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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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MENTAL HEALTH- NOT A PERSONAL FAILURE

By Aanya Agarwal and Visheshta Kalra
From Amity Law School, Noida

ABSTRACT

We live in a society in which an issue like mental health is a stereotype and people generally avoid accepting the fact that they are having mental illness also it is seen as a sign of weakness, not only the lower strata but also the well-educated class struggle to accept this fact. In countries like India, this issue is more serious and the mindset of people needs to be changed. We have to acknowledge this truth that mental health is as important as physical health and there is no shame in having a mental illness. Also, the laws and regulations are quite different for the people suffering from severe mental disorders and their rights are not the same as of a normal person, in this paper, these topics are discussed at length and an attempt has been made to provide a clear view to the readers.

INTRODUCTION

“Just because you don’t understand it doesn’t mean it isn’t so”

- Lemony Snicket

According to WHO ‘Mental health could be a state of well-being during which a person realises his or her own abilities, can address the conventional stresses of life, can work productively and is ready to create a contribution to his or her community.’

Individuals with mental disorders are powerless against misuse and infringement of their essential rights. Such maltreatment or infringement may happen from various components in the public eye including organisations, relatives, parental figures, experts, companions, random individuals from the network, and law implementing offices. This sets a basis for a defensive instrument to guarantee proper, sufficient, convenient, and altruistic social insurance administrations. Such defensive components incorporate authoritative arrangements and strategies to guarantee that the privileges of this helpless gathering are secured.

Mental health isn't only a concept that alludes to somebody's mental and enthusiastic prosperity, but is a condition of mental and enthusiastic prosperity where a person can utilize their intellectual and passionate capacities, fulfil the quality need and capacities within the general public.

Mental illnesses ought not to be thought of uniquely in contrast to physical ailments. Truth be told, the two are indivisible. Since the whole body is associated and intertwined, the two can’t be isolated. The mind is an organ, simply like everything else within the body and might be harmed like every other part. When the mind is sick, it's not disengaged in just the cerebrum, but influences the whole body. Substance misuse, self-damage, and self-destruction are extremely normal and threatening in those individuals with dysfunctional behaviours. The disgrace encompassing dysfunctional behaviour shields individuals from getting the help they need with one expecting to indicate signs of improvement and makes them shroud their agony.

Few types of mental health problems:
A person can be diagnosed with various kinds of mental health issues, some of which are briefly discussed below.¹

1. Panic Attacks and Anxiety: A panic attack is an abrupt scene of exceptional dread that triggers extreme physical responses when there is no genuine risk or clear reason. Fits of anxiety can be exceptionally startling. At the point when fits of anxiety happen, you may believe you're losing control, having a cardiovascular failure, or in any event, kicking the bucket.

2. Bipolar disorder: Bipolar confusion is a psychological instability set apart by extraordinary movements in a state of mind. Manifestations can incorporate an incredibly raised disposition, called craziness. They can likewise incorporate scenes of sadness. Bipolar confusion is otherwise called bipolar illness or hyper discouragement. Individuals with bipolar confusion may experience difficulty overseeing the regular day to day existence errands at school or work or looking after connections.

3. Depression: Depression is named a state of mind issue. It might be portrayed as sentiments of pity, misfortune, or outrage that meddle with an individual's regular exercises. Individuals experience wretchedness in various manners. It might meddle with your day by day work, bringing about lost time and lower efficiency. It can likewise impact connections and some constant wellbeing conditions.

4. Drugs - recreational drugs & alcohol: A drug can be characterised as any substance that is assimilated into the body of a living life form and causes a rotation in the typical body working. On numerous occasions, these substances are utilized to treat the manifestations of illness or to fix them. There are likewise tranquilizes that individuals take for reasons other than restorative. Recreational medications are psychoactive substances that adjust cerebrum working. Individuals like to take these substances since it briefly changes the manner in which they think, feels, and see. Liquor is the most mainstream of every recreational medication.

5. Phobias: A phobia is an unreasonable and nonsensical dread response. The effect of fear can extend from irritating to seriously impairing. Individuals with fears regularly understand their dread is silly, however they're not able to take care of business. Such feelings of trepidation can meddle with work, school, and individual connections.

6. Self-harm: Self-hurt, otherwise called self-injury, is characterised as the deliberate, direct harming of body tissue, managed without the goal to end it all. Different terms, for example, cutting and self-mutilation have been utilized for any self-hurting conduct paying little heed to a self-destructive goal.

Scale of problem in India:
Mental health in a nation where fundamental luxuries like clean water, power, food, instruction, and lodging are painfully missing isn't unexpected, yet profound disgrace additionally adds to the forsaking and disgrace around the subject, cutting across lines of religion, class, position and sexual orientation.

Mental health ought not to be dealt with flippantly under any conditions, however, less so in India, where around one out of

¹Bipolar Disorder, Mind (June 30, 2020, 10:25 AM), https://www.mind.org.uk/information-support/types-of-mental-health-problems/
three individuals looking for clinical assistance could be experiencing sorrow, implying that somewhere in the range of 23 million might be needing psychological wellness care at some random time. India likewise has probably the most noteworthy pace of self-destruction on the planet, losing more than 220,000 per year as indicated by World Health Organization information; an understudy ends it all consistently in India.

The treatment hole for emotional well-being in India is faltering, with scarcely 5,000 specialists and 2,000 clinical analysts in a nation of 1.3 billion. Mental consideration represents a minuscule 0.06% of India’s human services spending plan. In Bangladesh, the number is at 0.04%, not endlessly higher, yet it’s despite everything better.²

One of the biggest tragedies faced in the country in the field of mental health is the Erwadi Tragedy, 2001—Erwadi fire incident is an accident that occurred on 6 August 2001, when 28 inmates of a faith-based mental asylum died in the fire. All these inmates were bound by chains at Madheen Badusha Mental Home in Erwadi Village in Tamil Nadu.

**India’s outlook towards mental illness:**

The what-will-human say mindset is far-reaching to such an extent that some town programs have connected mental administrations to the nearby sanctuaries with the goal that individuals can look for help in the pretense of strict action to stay away from the disgrace of presentation.

This mindset is proliferated in no little measure by the harsh and musically challenged perspectives toward psychological well-being. For example, Indian government officials and open characters frequently scorn their rivals by weaponising terms like “imbecile,” “hard of hearing,” “intellectually not well,” “impeded,” “bipolar,” “incapacitated,” “dyslexic” and “schizophrenic.”³

Psychological wellness circumstance in India requests dynamic approach intercessions and asset assignment by the legislature. To decrease the disgrace around psychological wellness, we need measures to prepare and sharpen the network/society. This can happen just when we have steadiness across the country exertion to teach the general public about mental ailments. We additionally need steps to interface the patients with one another by framing an organization, so they could tune in and bolster one another. Besides, individuals encountering emotional well-being issues ought to get similar access to sheltered and successful consideration as those with physical medical issues. Furthermore, dysfunctional behaviour should compulsorily be put under the ambit of extra security. This will help individuals to see psychological instability with a similar focal point as they use for physical maladies.⁴

² Vikram Zutshi, India’s attitude towards mental health issues is depressing, Qrius (July 4, 2020, 6:45 AM), https://qrius.com/indias-attitude-towards-mental-health-issues-is-depressing/

³ Vikram Zutshi, India’s attitude towards mental health issues is depressing, Qrius (July 7, 2020, 10:45 PM), https://qrius.com/indias-attitude-towards-mental-health-issues-is-depressing/

India with a populace of more than a billion houses, is one of the most noteworthy numbers of - intellectually sick people, who require long haul care. With under 10% accessibility of the in-patient care required for exceptionally sick patients and short of what one therapist accessible for one lakh Indians, the gap between assets and prerequisites still remains excessively wide. Because of this wide gap, an enormous number of mental patients don't get sufficient treatment and experience the ill effects of long-standing sickness and coming about of incapacity. A huge number of the patients who do manage to reach the brighter side of this illness, arrive so late, that by then the disease gets incessant and impervious to treatment.

**Nexus between mental health and law:**

The laws influencing Mental Illness are often categorised in the following manner - 'Hard' and 'Soft' Laws.

A. "Hard" laws allude to laws that are official and enforceable globally or locally. In India, some of the hard laws about mental health include The Mental Health Act, 1987; The Protection of Human Rights Act, 1993; Persons with Disability Act, 1995; The National Trust Act, 1999; Protection of Women from Domestic Violence Act, 2005; Protection of Children from Sexual Offences Act, 2012, and related legislation. Prominent statutory legislation regulating narcotics is the Narcotic Drugs and Psychotropic Substances (NDPS) Act 1985.

B. "Soft" laws, in turn, are not official. Be that as it may, these laws if all around built and mirror an expansive agreement can turn into a model for future enactment. To explain this in simpler words, soft laws are not laws, they are simply rules or policies that are quasi-legal and not binding. It is argued that these policies could become permanent over the due course of time. Some examples include the National Mental Health Policy 2014 and the National Mental Health Programme.

There have been a few amendments over the course time, some of such revisions may happen to improve the law, right blunders, improve value, make the arrangements progressively severe, or to ensure that the law is consistent with international conventions.

**Indian laws regulating treatment of persons with mental disorders:**

The connection between psychiatry and law frequently becomes an integral factor at the hour of treatment of PMI (person with mental illness). Treatment of PMI frequently includes a decrease in individual freedom of mental patients. The vast majority of the nations in the World have laws managing the treatment of mental patients. Although there are intricate portrayals of different types of mental issues in different treatises in Ayurveda, the consideration of the intellectually sick in the refuges in India is a British development. After the takeover of the organization of India by the British crown in 1858, countless laws were ordered with hardly a pause in between for controlling the consideration and treatment of intellectually sick people in British India. Some of these laws are:

1. Mental Health Act, 1987: The MHA has had some positive features while the rest have been the target of critic ever since its

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5 Pratima Murthy, B. C. Malathesh, C. Naveen Kumar, and Suresh Bada Math, Mental health and the law, PMC (July 5, 2020, 8:25 AM), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5282613/
foundering. It is claimed to be concerned fundamentally with the lawful methodology of permitting, controlling confirmations, and guardianship matters of PMI. Human rights issues and psychological wellness care conveyance are not appropriately tended to in this Act.

2. Persons with Disability Act, 1995: PDA-95 was ordered in 1995 to expel separations in the sharing of formative advantages versus non-crippled people and to forestall misuse and abuses of people with incapacity (PWD). It accommodated obstruction-free condition and explained duties regarding the administration to design procedures for exhaustive improvement programs, to exceptional arrangement for the incorporation of PWD into the social standard. Under PDA-95, mental impediment and dysfunctional behaviour are arranged as states of incapacities. Along these lines, the PMI is qualified for benefits accessible to PWD as given under the Act.

3. United Nations Conventions for Rights of Persons with Disabilities, 2006: UNCRPD was adopted in December, 2006. It was ratified by the Parliament of India in May, 2008. It is an international treaty which identifies the rights of disabled people as well as the obligations on Parliament and the NI Assembly to promote, protect and ensure those rights. It aims to ensure that disabled people enjoy the same human rights as everyone else and that they can participate fully in society by receiving the same opportunities as others.6

4. Indian Contract Act, 1872: According to Indian Contract Act, 1872, any person of sound mind can make a contract. Section 12 of the Act stipulates that a person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interest. A person, who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person, who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind. It means a PMI who is currently free of the psychotic symptoms can make a contract, whereas a person who is currently intoxicated or delirious cannot make a contract.

5. Marriage and divorce: Under Hindu Marriage Act, 1955, conditions in respect of mental disorders, which must be fulfilled before the marriage, solemnised under the Act, are as follows.7

1. Neither party is incapable of giving a valid consent as a consequence of unsoundness of mind.
2. Even if capable of giving consent, must not suffer from mental disorders of such a kind or to such an extent as to be unfit for marriage and the procreation of children.
3. Must not suffer from recurrent attacks of insanity.

CONCLUSION

"It's okay to not be perfect. It's okay to make mistakes. It's okay to do something that you hadn't done, because if we don't do those things, we never grow."

-Dawn Stanyon

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In our nation, the disclosure of psychological sickness is frequently trailed by refusal and wavering to look for help. Despite its gigantic social weight, emotional wellness stays an untouchable subject that is vulnerable to age-old marks of disgrace, biases, and fears. Even though psychological issues can be restored or controlled, a great many people will in general hide their issues away from plain view and endure peacefully. In addition to the fact that we need to effectively cultivate mindfulness about psychological well-being, we additionally need to make mindfulness about the idiocy of the marks of disgrace appended to emotional wellness, to annihilate them.

The articulation "mental disorder" signifies psychological sickness, captured or deficient improvement of the brain, psychopathic confusion, or some other issue or inability of the brain and incorporates schizophrenia. The articulation "psychopathic disorder" signifies a tireless issue or incapacity of the brain (regardless of whether including sub-typicality of knowledge) which brings about strangely forceful or truly flighty direct concerning the next gathering, and whether it requires or is defenceless to clinical treatment.

In the irrefutable setting that each general public needs laws in different territories to keep up the prosperity of its kin, psychological well-being care is one such significant zone that requires fitting enactment.

Mental healthcare facilities can be improved in our country by continuous implementation of region psychological well-being program in a staged way with help of sufficient administrative and money related data sources is the need of the day. Prepared psychological well-being care work force, treatment, care and restoration offices ought to be made accessible and available to the majority. This must be made conceivable by the sharing of duty by government and non government associations devoted to the reason for mental health. All the clinical schools of our nation ought to have a different branch of psychiatry to guarantee satisfactory preparing of students and progressively number of postgraduate psychiatry learners.

Our country can fight mental heath issues unanimously when the community is well versed with the problems. For example, government and private players need arrangements for emotional wellness disease as they assume a huge job in helping the general public to battle against it. An unmistakable position on psychological well-being will assist everybody in acknowledging how genuine a danger it is. Schools and universities need to deal with psychological well-being mindfulness, sharpening and distributed help to guarantee that no individual feels so far harmed that he/she concludes that life does not merit living any longer.

Each division in our country needs psychological well-being strength preparing for individuals who are a piece of that industry to manage the negative impact of burnout just as harsh encounters to have on our emotional wellness.

General emotional wellness strategy ought to be presented and legitimised which ensures that help is accessible to anybody and every individual who is connecting with others about close to home and expert issues that weigh intensely at the forefront of their thoughts and soul.

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CYBERCRIME IS THE BANE OF THE INTERNET: IS INDIA READY?

By Aarushi Chopra
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Scope of the Article

Statement of problem:
This article highlights the issue of the increasing threat of cybercrime in India with main emphasis on whether India is still ready to deal and tackle with this growing menace and what steps have been taken place by the Indian government to deal with this situation proactively.

Limitations:
Over the span of approving and examining resources that the researcher has depended upon, it has been unequivocally felt that the ambit of this zone of law is still under development, particularly in India.

Introduction

Cybercrime is the bane of the internet and new technologies generate new opportunities of more innovative ways of doing crimes and this threat is growing multi fold in this new world of digitization and growing technology. As the world is becoming digital, crime is also moving towards virtual space from physical space. It is going through a massive change in its modus operandi and it is going to multiply whether we like it or not.

According to a study from the University of Maryland, there is a cyberattack once every 39 secs. This shows how the technical evolution have outpaced the defence as well as security tactics of private organisations and the governments all over the globe. We are in this digital age where our virtual identity has become an important aspect of our day to day lives. We are now just a bundle of numbers or codes in numerous computer databases owned by corporations and government. With the evolution of cyberspace which is taking place at an unprecedented pace, especially in the developing economies, the exploitation of it by utilising it in it’s true essence has made people generate millions and millions of dollars. Earlier, cyberthreats were hardly of any value but now when we see it, it is disruptive and has become rather destructive. So with the scale of cyberattacks increasing with each passing day, not only India but all countries across the globe cannot afford to ignore this threat.

What is Cybercrime?
Cybercrime refers to all the illegal activities carried out by using technology as an instrument. It is a criminal act which targets a computer, network device or a computer network. An important feature of cybercrime is its nonlocal character: acts can be done in jurisdictions which are separated by vast distances. This is also a severe problem for law enforcement since international cooperation is needed for previously local or even national crimes now. For example, if a person uses his computer to access child pornography in a country which does not ban child pornography, then is that particular individual committing a crime in a country where such data is illegal? Where will cybercrime exactly take place?

Types of cybercrime:
Cyber criminals are professionals who are very organised and use advanced techniques. Others are just some novice hackers. Hence, Cybercrime attacks can commence wherever digital data exists, along with an opportunity and motive. Cybercrimes do not really occur in a vacuum but are in fact distributed in nature. Therefore, cybercriminals mainly rely on
various other actors to finish the crime for them like a malware creator who uses the dark web to sell the code. They use numerous attack vectors for the cyberattack and are constantly developing to new techniques for achieving their goals without getting detected or arrested.

Most cybercrimes fall under the following two categories:

I. Crimes that targets computer networks or devices (example: to gain access to a computer)

II. Crimes using computers as an accessory to a criminal act (example: online identity theft used to steal funds from a bank account)

III. Crime using computer as a weapon for an attack (for example: DoS attack - denial of service)

Cybercrimes can be mainly bifurcated into the following 3 kinds:

A. Cybercrime against persons (cyber harassment, online libel or slander, child pornography, identity theft, spoofing, credit card fraud)

B. Cybercrime against property (DDOS attack, hacking, theft of IP, computer vandalism, computer squatting, virus transmission)

C. Cybercrime against nations (cyber warfare, cyber vandalism)

The following are some standout cybercrimes to watch out for:
1. Internet and email fraud
2. ATM fraud
3. Wire fraud
4. Software piracy
5. Botnets
6. PUPs
7. Exit scam
8. Cyberextortion (demand of money to prevent a threatened attack)
9. Ransomware attacks (is a type of cyberextortion)
10. Crypto jacking (mining of cryptocurrency using resources not owned by hackers)
11. Cyberespionage (access of company or govt data by hackers)

Taking the example of **Equifax**, an American credit monitoring company was hit by a massive data breach which impacted over 143 million customers. The attackers found a vulnerability in Equifax’s open source software which allowed them to access all the sensitive files of the company. The data stolen not only included full names, birth dates, social security numbers, addresses but also included around 200,000 credit card numbers and 200,000 additional documents that contained personal-identifying information. Even the way in which the breach was handled was widely criticized which shows how there is a real need for notification procedures for breaches. Another example is the **Uber breach** where hackers stole personal data of around 57 million riders and drivers. Uber paid the attackers $100,000 to keep the data safe and to keep quiet about the breach. The data stolen included names of the riders and drivers, their phone numbers and email addresses. Even the driver’s license of some drivers were stolen.

With the rapid increase in cybercrimes all over the world, it has become a major threat to all those who use the internet, with millions of user’s data stolen over the past few years. This has created a major dent in many economies.

**Is India Ready?**
As India embarks on its journey to Digital India, the challenge to address the issues of cybersecurity needs to take place on a war footing basis. Even companies are now opting for cyber insurance policies. In fact, according to the DSCI report, around 350 cybersecurity policies have been sold to Indian companies till 2018, which is an increase of 40% from those in 2017. But certainly isn’t not enough since these insurances can help cover losses only to some extent and at the end of it the impact of data breaches are not solely confined to monetary losses.

The government of India has attempted to form a cybersecure nation for all is citizens and businesses. They had decided to launch an updated version of the National Cybersecurity Policy this year (2020), which is all ready and will be announced to the public soon as said by the National Cybersecurity Coordinator Mr. Rajesh Pant at an Assocham event. There were also a few initiatives taken by the Indian government in 2019 towards drafting of the above mentioned policy:

1. **CERT-in: Indian Computer Emergency Response Team**
   It is the National Agency developed to handle the country’s cybersecurity. It became operational in 2004 and its basic aim is to respond to any computer security incident when they occur, report its vulnerabilities and to promote IT security practices.

2. **NCIIPC: National Critical Information Infrastructure Protection Centre**

   It was created by the central government under Sec 70A of the Information Technology Act, 2000 to protect information infrastructure for critical sectors of the nation from unauthorised access, use, modification, disruption, disclosure, etc. which include: power and energy, telecom, transport, BFSI, strategic and public enterprises.

3. **Cyber Surakshit Bharat**
   The Ministry of Electronic and Information Technology (MeitY) launched this initiative to spread awareness about cybercrime, build capacity and enable government departments on steps to be taken for creating a cyber resilient IT set up. It also aims at conducting workshops for citizens as well as businesses to educate them on the cybersecurity practices that can be taken place.

4. **Cyber Swacchta Kendra**
   The Ministry of Electronic and Information Technology (MeitY) launched this initiative. It is a cleaning bot used for analysing malware and detecting botnet infections. It also aims at notifying, enable cleaning and secure systems to prevent further infections.

5. **Personal Data Protection Bill, 2019**
   This is the most important initiative taken by the Indian government. As the name suggests, this bill aims to protect the personal data of individuals in India from being processed by government, companies incorporated in India, foreign companies. It also aims at establishing a Data Protection Authority for the same.

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India also has an Information Technology Act, 2000 (IT Act) which deals with cybersecurity and cybercrimes. This act provides protection for transactions taking place through electronic interchange and electronic communications. It also aims at safeguarding electronic data, information, records, and prevent any kind of unlawful or unauthorised use of a computer system. Cybercrimes like hacking, phishing, denial-of-service attacks, malware attacks, electronic theft and identity fraud are specifically punishable under this act.

**There are also some relevant rules which are framed under the IT Act like:**

i. The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules 2011 (the SPDI Rules). It recommends reasonable security practices and procedures which can be implemented for collecting as well as processing personal or sensitive personal data.

ii. The Information Technology Intermediaries Guidelines Rules, 2011, under which intermediaries are required to implement reasonable security practices and procedures for making their computer resources and information contained in them secure.

There are other laws too that contain provisions related to cybersecurity which includes the Indian Penal Code, 1860 (IPC) which punishes offences such as defamation, cheating, criminal intimation and obscenity even including the ones committed in cyberspace, and then we have the Companies (Management and Administration) Rules, 2014 (the CAM Rules) which are framed under the Companies Act, 2013 requiring companies to make sure that all security systems as well as the electronic records are safe and secure from any unauthorised access or tampering.

Furthermore, there are also some sector-specific regulations like the Reserve Bank of India (RBI), the Department of Telecommunication (DOT), the Securities Exchange Board of India (SEBI) and the Insurance Regulatory and Development Authority of India Act, 1999, who have mandated certain cyber security standards that are to be maintained by their regulatory entities like banks, telecom service providers, insurance companies and other listed companies.

Though India has taken a few steps and is still taking more towards strengthening its cybersecurity, it still needs to invest more around this area, as these aforementioned initiatives and laws can only help to an extent. Strong legal foundation and policies is the need of the hour. While we are working on Digital India, we also need to work more on cyber safety by making the government, private institutions and educational institutions work together. Policies made by the government should endure that both public and private entities are equipped enough to tackle any challenges of cybersecurity. Private entities invest huge amounts on finding solutions but it is needed to be understood with the help and support from the government which will make them well equipped to deal with such incidents.

Besides all this, what also needs to be looked into is the regulation of the role of software developers and software product companies. Such companies are pushing software with evident vulnerabilities which is easily exploited by cybercriminals. What is even more important is the speed and agility that is there while we counter these crime. So to stay one step ahead of the attacker, one needs to continuously adjust
and improve and the technology needs to constantly evolve.

**Conclusion:**
India is still way far behind and has to catch up if it wants to be at par with other developed countries on readiness parameters of cyber security infrastructure. More serious initiatives need to be taken with a more focused and well-defined approach along with a skilled cyber team. Since cybersecurity is of national importance, there is a need for more public awareness-raising campaigns and education so as to promote the training of needed specialists in cybersecurity. Finally, considering the global nature of cyber threats, it is important to note that cybersecurity cannot be addressed in isolation and an international approach also needs to be sought. The key elements to achieve an effective approach in cybersecurity is the coordination as well as collaboration between various governments and private sector entities from around the globe. India has entered into various cybersecurity related bilateral agreements with various countries and we hope more such agreements will be signed soon.

To make Digital India crime free, we need a two-pronged approach, where firstly, we establish a nationwide hygiene campaign to pre-empt attacks likely to occur due to human error and secondly, we need to strengthen existing laws and enforce them procedure on security agencies. Therefore, with sufficient amount of nationwide awareness on cybersecurity, strong policies and initiatives, India will definitely be able to fight major cyber threats more efficiently and effectively, avoiding heavy damages.

**References:**

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ANALOGOUS SCRUTINY OF REAL ESTATE LAWS IN INDIA AND BRITAIN

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ABSTRACT
Real estate law is the field of law that governs purchasing, using and selling of land precisely. This law is related to how people acquire property and how they make use of the property they own. Real estate law is also known as real property law. Different countries have different laws relating to real estate. In the following write up we are going to have a comparative analysis between the real estate laws between India and United Kingdom/Britain.

Introduction
It is called “Real” estate because it is related to real property. Real property is land in contrast with personal property or assets like jewellery, objects, vehicles, etc. Fixtures that lies above the land and are attached to it, such as buildings and other structures are a part of real estate.

Before the mid-nineteenth century, the standards governing the transfer of real and individual property on an intestacy were very unique. In spite of the fact that this division doesn't have a similar importance any longer, the difference is still significant due to the fundamental differences between the two categories. An example is the real fact that land is immovable, and in this manner the guidelines or the laws that governs it must differ by mode of its utilisation. A further purpose behind the differentiation is that rules of the legislation is often drafted employing the traditional terminology.

The division of land and assets has been condemned as being not acceptable as a reason for arranging the standards of property law since it focuses consideration not on the proprietary interests themselves yet on the objects of those interests.

Real property can be classified into:
1. corporeal hereditaments – tangible real property (land or other structures)
2. incorporeal hereditaments – intangible real property (an element of way, etc)

There are various aspects of this law like purchase, financing, zoning, title, deeds, taxes and estate planning, etc.

Real estate law is closely tied to various other areas of law. For example, the sale of real estate is governed by the contract law, and mandates that such contract be in writing. There are various specific types of torts and crimes that apply to real estate. For example, trespass refers to entering the land of another without authority to do so, and it can be a crime or the subject of a civil lawsuit. Real estate is also subject to special provisions in family law, such as the rights of a spouse in the marital home.

Real estate in India is administered and impacted by a unique combination of State-specific and Federal laws, whereas real estate in Wales and England are majorly governed by two main pieces of legislation, The law of property Act, 1925 and The land Registration Act, 2002.
There are several land related laws in India, the same is with many other countries. Every law has a different and separate function in protecting rights to land. Talking about India.

1) **Transfer of Property Act, 1882** - A Central Act that provides general and basic principles of movable as well as immovable property, for example lease, mortgage, sale, exchange, part performance and lis pendens.

   The states are required to adopt the provisions of this Act.

2) **Registration Act, 1908 and Indian Stamps Act, 1899** - These Acts govern laws relating to requirement for registration of various deeds, instruments as well as documents relating to transfer of interest in immovable property and payment of stamp duty.

3) **Indian Easement Act, 1882** - The laws relating to easementry rights to immovable property are governed under this Act.

4) **The Indian Contract Act, 1872** - The laws related to contracts in India are governed under this Act such as capacity to enter into contract, execution, implementation, breach and remedies available, etc.

5) **Land Revenue Codes** - There are many states in India who have formulated their own land revenue codes by which laws relating to agricultural land-holding, types of tenancy, land revenue etc are governed.

6) **The Real Estate (Regulation and Development) Act, 2016 (RERA)** - RERA governs development, marketing and sale of real estate developments and projects in order to protect interests of purchasers in the real estate sector.

   **Some of the features of RERA are as follows:**

   a) Under this Act, each state needs to establish a Real Estate Regulatory Authority. The authority can be approached by the purchaser in the event of any complaints against a developer.

   b) According to this Act, it is compulsory to enlist each under development property where land is over 500 sq. meter or incorporates eight apartments.\(^\text{11}\)

   c) Neglecting to enrol and register project under authority ambit may prompt punishment up to 10% of the project cost.

   d) As a purchaser, you have to pay just for carpet area and not for an overly built region.

   e) The manufacturer needs to put 70% of the cash got from the purchaser into an alternate record. This cash will be withdrawn when the project is completed. This will stop misbehavior of manufacturer of utilizing cash raised for one anticipate for another undertaking.

   f) The builder should give five-year guarantee to any auxiliary deformities in the structure.

   g) The developer needs to distribute all right data about the project, for example, venture plan, design, endorsement of the administration, land title and anticipated date of fulfillment. This data ought to be accessible with RERA.

7) **Foreign Exchange Management Act, 1999** - FEMA governs the sale and purchase of immovable property in India by various foreign entities.

**Real estate laws in England**
There are two main pieces of legislation that underpin Real estate in England and Wales:

The former one introduced some major reforms in the Real estate sector and also consolidated and modernised pre-existing real estate laws. The ownership of land, many of the rights and obligations which are related to it must be registered at the Land registry, which is a government agency. The regime of land registration is given under the Land Registration Act, 2002 and related regulations. However, it is to be noted that these two Acts are not at all all-inclusive. There are other legislation that governs various aspects of the real estate law for example, the execution formalities for contracts and deeds.

Relevancy of International laws to real estate
Indian perspective:
Several concepts or principles recognised under International law have been historically adopted in some or the other form in the various legislations which govern real estate in India for example, rights of agriculturalists to fair compensation in case of acquisition of lands by the Government of India. However, International laws do not have a direct applicability in India.12

UK perspective:
The real estate sector is governed by the laws of domestic jurisdictions. Due to which, legal formalities and requirements relating to real estate are left untouched by International Laws. However, transactions relating to real estate are not ring-fenced and various areas of real estate have an International element. For example, Environmental policies and laws in the UK often derive a web full of International agreements.

Ownership
Indian perspective:
There was a time when right to property was recognised as a fundamental right under the Constitution of India but now, it is a constitutional right and not a fundamental right. Article 300-A of the Constitution mandates that no person shall be deprived of his property save by authority of law, embodying the doctrine “eminent domain” which provides for the acquisition of private property by the government in the interest of public.

Also, States are given the power to legislate as well as impose legal restrictions on the ownership of lands by various classes of people such as- land owners with leasehold rights, cultivation rights, transferable or non-transferable rights, mortgagees, land owners belonging to SC/ST categories, etc. We may also find that in certain states, ownership of real estate has been limited such that non-agriculturalists are not allowed to buy agricultural lands in that state.

Further, under the current foreign exchange norms, no person living outside India can acquire any immovable property within India, except if permitted.

UK Perspective:
Any person who is above the age of 18, whatever his nationality may be is eligible to buy and sell freehold property without any restriction.13

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13 A Brief Legal Guide to Investing
Types of Rights over land
Indian Perspective:
Wide variety of rights over land are recognised in India and they vary diversely in their nature. They are:

a) Freehold Rights: These refer to absolute right, title and interest of land against the world.
b) Leasehold Rights: These rights refer to absolute rights and interest to hold and use a property by a tenant or lessee, as per the terms of the lease deed for a fixed tenure. These are rights in rem.
c) Licence Rights: These refer to right of a licensee to occupy or use a property on a non-exclusive basis. Here, no easement or interest is created in the property in favour of the licensee. These are rights in personam.
d) Easement Rights: These refer to the right which the owner or the occupier of the land possesses for the purpose of enjoyment of land. One such example can be right of passage.
e) Development Rights: These are unused rights which allow builders to make changes to their property within the limits imposed by the local authorities or the government.
f) Subsurface Rights: These are the rights to the earth below the land and any such substance which can be found under the surface.

UK PERSPECTIVE:
There are different categories of rights over immovable property which are recognised in England and Wales, some of which are as follows:

a) Ownership Rights: Under this there are three types of ownership interest: Freehold, Leasehold and Commonhold.
b) Legal Rights: They must be created by deed such as legal charges.
c) Equitable Rights: Many of these are created by contract such as agreement of sale.
d) Other Rights: These may contain rights that arise without any documentation. For example perspective rights.

System of Land Registration
Indian Perspective:
Indian law does not stress upon registration of the title or the land. Instead, it focuses on the registration of the documents under which the title is transferred in accordance with the Registration Act, 1908.

UK Perspective:
In England and Wales, every unregistered land must be registered on occasion such as grant of lease, grant of mortgage, and the grant of lease for more than seven years.

CONCLUSION
As striking as the outcomes of this analysis may be, the fact is that the organisation of assets across international borders is also equally risky. Appropriate means of protection are an exact, individual clarification, a tax ruling and, where appropriate, a tax contract. Legal, descriptive, analytical and comparative procedures have been deployed in order to govern the likely impact of technological change on the dissemination of legal risk with particular reference to India and UK. The impact is the extent to which a change in transactional process may inadvertently...
affect risk. Risk being the significance of change and the likelihood of that consequence having a adverse effect.

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ANALYSIS OF JAMMU AND KASHMIR DOMICILE LAW

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Abstract
On 5th August 2019, two Jammu and Kashmir specific provisions, Article 35-A and 370, were abrogated and diluted respectively and the Jammu and Kashmir Reorganisation Act, 2019 was passed. As per the provisions of this act, the State of Jammu and Kashmir was reorganised and re-constituted into the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh. The reorganisation prompted fears of demographic change in Jammu and Kashmir in absence of a state domicile law which would shield the local residents of J&K from outside competition in education and employment. Taking cognizance of the public opinion, the Central Government enacted the Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order in April 2020, which introduced new eligibility criteria for the grant of domicile status in the territory by inserting a new section dedicated to the same in the Jammu and Kashmir. This paper aims to analyse whether the new domicile law sufficiently protects the rights of locals in employment, education and acquisition of land. To this effect, the paper begins with a thorough explanation of the concept of domicile as it has evolved in English common law and Indian case law. The concept of ‘domicile’ in English Common Law

In India, the term ‘domicile’ usually denotes place of origin, birth and/or residence of the individual in a particular state or a union territory. The term is familiar to ordinary Indians in the context of seat reservation in educational institutions and employment in public services. However, in the legal parlance, the term ‘domicile’ has some specific legal connotations which are discussed forthwith. In doing so, it is imperative for us to understand the exact legal meaning behind terms such as ‘place of birth’, ‘place of origin’, ‘place of residence’, ‘domicile’ and ‘residency’, since these are often used interchangeably in common parlance. The concept of domicile is borrowed from English common law. Dicey defines "Domicile of origin of a person means "the domicile received by him at his birth". He further opines: "The domicile of origin, though received at birth, need not be either the country, in which the infant is born, or the country in which his parents are residing, or the country to which his father belongs by race or allegiance, or the country of the infant's nationality". Lord Cranworth observed in "Domicile meant permanent home, and if that was not understood by itself no illustration could help to make it intelligible". In Somerville v. Somerville, Arden, Master of the Rolls, observed: "I speak of the domicile of origin

16 Id. at 88
17 Whicker v. Hume, 10 HLC 124 (1858).
rather than of birth. I find no authority which gives for the purpose of succession any effect to the place of birth. If the son of an Englishman is born upon a journey, his domicile will follow that of his father\textsuperscript{18}.

80. Here, it is important to analyse different perspectives by which the aforementioned three jurists have arrived at the definition of ‘domicile statuses’. Out of the three distinguished jurists discussed above, none of them have agreed that domicile refers to the civil status which he/she has received at the place of birth. Dicey says that domicile status, though accorded legally at the time of birth, does not mean that the domicile status received at the time of birth is the same as the place of birth, or is the same as the nationality to which his/her parents belong. In Somerville v. Somerville, the Master of the Rolls clearly emphasises on the domicile of origin rather than of the place of birth. In this case, domicile is a hereditary civil status derived from the parents’ domicile at the ‘time of birth’, regardless of the ‘place of birth’. Lord Cranworth, however, categorically emphasises that domicile status is the place of residence of the individual where he/she is residing permanently, thereby rejecting the definition on the basis of origin or place of birth.

81. Another major principle of domicile law under English common law is that domicile is different from nationality, and every individual is invested with a domicile status legally. This principle was laid out in the famous Udny v. Udny case in this proposition:

82. “The law of England, and of almost all civilised countries, ascribes to each individual at his birth two distinct legal statuses or conditions: one by virtue of which he becomes the subject of some particular country binding him by the tie of national allegiance, and which may be called his political status, another by virtue of which he has ascribed to him the character of a citizen of some particular country and as such is possessed of certain municipal rights, and subject to certain obligations, which latter character is the civil status or condition of the individual, and may be quite different from his political status. The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely, that of domicil, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage, succession, testacy or intestacy, must depend”.\textsuperscript{19}

83. The concept of State Domicile, its legal status and constitutionality

84. In India, the definition of ‘domicile’ has been under ambiguity for quite some time. This is because, in the Indian context, ‘domicile’ is usually referred to as the domicile of the state. However, traditional legal position has differed varyingly on this issue. In Halsbury’s Laws of England, it is stated that “English law determines all questions in which it admits the operation of a personal law by the test of domicile. For this purpose it regards the organisation of the civilised world in civil societies, each of which consists of all those persons who live in any territorial area which is subject to one system of law, and not its organization in political societies or States, each of which may either be co-extensive with a single legal system or may unite several systems under its own

\textsuperscript{18} Somerville v. Somerville, 31 E.R. 839 (1801).

\textsuperscript{19} Udny v. Udny, 1 L.R. 441 (1869).
sovereignty”. In the Indian context, since the country has a single integrated legal system with no states having legal systems co-existing with the national one, it can be theoretically argued that the concept of ‘state domicile’ doesn’t exist in India. Therefore, the questions on domicile status may arise only in the case of deciding the application of law on individual(s) in a different territory with a different legal system as per traditional legal jurisprudence. However, in D.P Joshi vs. State of Madhya Bharat, in which the court was to decide whether charging capitation fee on non-domiciled residents of Madhya Bharat was constitutional or not, the court made an important observation by citing Dicey:

85. "The area contemplated throughout the Rules relating to domicile is a 'country' or territory subject to one system of law'. - The reason for this is that the object of this treatise, in so far as it is concerned with domicile, is to show how far a person's rights are affected by his having his legal home or domicile within a territory governed by one system of law, i.e. within a given country, rather than within another. If, indeed, it happened that one part of a country, governed generally by one system of law, was in many respects subject to special rules of law, then it would be essential to determine whether D was domiciled within such particular part, e.g. California in the United States; but in this case, such part would be pro tanto a separate country, in the sense in which that term is employed in these Rules".

86. The court explained that while within a single legal system of a territory, different set of laws for different parts of the country may exist. The court cited the example of marriage laws in India in this case since these laws are different for different classes of people, while existing within a single integrated legal system. Therefore, in a country where under the same legal system, different laws apply to different parts of the country on different subjects; the domicile status shall be considered that of the region to which these laws apply to, and not the entire territory. The court further explained that ‘state domicile’ is consistent with the Indian Constitution because the Constitution provides for the Union, State and Concurrent Lists which bifurcates the subjects for the Union Legislature and State legislature to legislate upon. Continuing with the example of marriage laws (which falls under the Constituent List) to explain the constitutional validity of ‘state domicile’, it held “until the Centre intervenes and enacts a uniform code for the whole of India, each State might have its own laws on those subjects, and thus there could be different domiciles for different States. We do not, therefore, see any force in the contention that there cannot be a domicile of Madhya Bharat under the Constitution”.

87. In Dr. Pradeep Jain v. Union of India, while deciding upon the issue of domiciliary reservation in undergraduate and postgraduate medical institutions, the court observed: “It is true and there we agree with the argument advanced on behalf of the State Governments, that the word ‘domicile’ in the Rules of some of the State Governments prescribing domiciliary requirement for admission to medical colleges situate within their territories, is used not in its technical legal sense but in a popular sense as meaning residence and is

22 DICEY, supra note 1 at 83
intended to convey the idea of intention to reside permanently or indefinitely\textsuperscript{24}. This is similar to the position adopted by the court in D.P. Joshi v. State of Madhya Bharat. Therefore, the court, in both these cases, has invariably confirmed that while using the term ‘domicile status’ within the Indian legal system, the court does not construe the meaning of the term in its traditional legal sense and instead construes in the sense of its meaning in common bureaucratic parlance. To lend further credence to the constitutionality of ‘state domicile’, the court cites Halsbury’s Laws of England which states "In federal states some branches of law are within the competence of the federal authorities and for these purposes the whole federation will be subject to a single system of law and an individual may be spoken of as domiciled in the federation as a whole; other branches of law are within the competence of the states or provinces of the federation and the individual will be domiciled in one state or province only." \textsuperscript{25}

88. **Eligibility criteria for domicile status in Indian states**

89. Many Indian states set domicile status requirements on the basis of a combination of both domicile of origin and the domicile on the basis of choice of residence. To certify domicile status of an Indian citizen in an individual state, the citizen is required to produce a domicile certificate. The domicile certificate is usually issued by the Tahsildar or equivalent officers. Some common requirements are as follows:

90. **Proof of duration of continuous stay for the minimum prescribed time in the state**: The minimum duration of continuous stay differs from state to state. While states such as Karnataka require mere 6 years of continuous stay in the state\textsuperscript{26}, states like Maharashtra\textsuperscript{27}, Jharkhand\textsuperscript{28} and Himachal Pradesh\textsuperscript{29} require much longer durations of continuous stay in the state (15, 30 and 20 respectively).

91. **Proof of having passed the Std. X and / or Std. XII qualifying examination**: The said exam should be passed from within the territory of the state and from any Government-run or government-recognised institutions. It is pertinent to note here that this requirement does not imply that the individual should have passed the qualifying examination from the respective State Board of the state only.

92. **Domicile of parents**: Domicile may also be passed down hereditarily, in consonance with the principle of domicile of origin – if either of the parents is domiciled in the state (i.e. they possess a domicile certificate), the ward may also be considered a domiciled resident of the state.

93. **Provisions for Central and State Government employees**: Central and State Government employees or employees working in a Union or State government undertaking or the wards of such employees are also eligible to apply for domicile status provided they have served in the state for a certain period of time.

94. **Some state-specific requirements**: In Jharkhand and Uttarakhand, domicile residents are considered those who have

\textsuperscript{24} Dr. Pradeep Jain Etc vs Union Of India And Ors. Etc, 1 SCR 942 (1984).

\textsuperscript{25} Volume 8 of Halsbury’s Laws of England, 422 (4 ed. 1974).

\textsuperscript{26} Karnataka Examinations Authority (KEA), Eligibility Clauses to claim for Government seats (2018).


\textsuperscript{28} Government of Jharkhand, झारखण्ड के स्थानीय निवासी की परिभाषा एवं पहचान (2016).

\textsuperscript{29} Government of Himachal Pradesh, Bonafide Domicile Policy (1972).
been resident in a state since or before a cut-off date (in this case, 1985). In Maharashtra and Karnataka provide domicile status on the basis of mother tongue to those who live in the border districts of the corresponding neighbouring states. Therefore, Maharashtra accords domicile status to those who have mother tongue as Marathi in the Marathi-speaking border districts of Karnataka and Karnataka does the vice-versa with Kannada-speaking border districts of Maharashtra. Furthermore, Jharkhand accords domicile status on the basis of culture – residents who have their names in local gram panchayat / khayatan records are accorded domicile status on the basis of the culture which the residents belong to in the respective region.


96. (Hereinafter referred to as the ‘act’)

The definition of ‘domicile’ is defined in Section 3A of the Jammu and Kashmir Civil Services (Decentralization and Recruitment) Act, 2010 which was notified in Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order, 2020. It states:

“(1) Any person who fulfils the following conditions shall be deemed to be a domicile of the Union territory of Jammu and Kashmir for the purposes of appointment to any post carrying a pay scale of not more than Level-4 (25500) under the Union territory of Jammu and Kashmir or under a local or other authority (other than cantonment board) within the Union territory of Jammu and Kashmir:-(a) who has resided for a period of fifteen years in the Union territory of Jammu and Kashmir or has studied for a period of seven years and appeared in Class 10th /12th examination in an educational institution located in the Union territory of Jammu and Kashmir; or (b) who is registered as a migrant by the Relief and Rehabilitation Commissioner (Migrants) in the Union territory of Jammu and Kashmir.
(2) Notwithstanding anything contained in sub-section (1), following persons shall be deemed to be domicile under sub-section (1) :- (a) children of those Central Government Officials, All India Services Officers, Officials of Public Sector Undertaking and Autonomous body of Central Government, Public Sector Banks, Officials of Statutory bodies, Officials of Central Universities and recognised Research institutes of Central Government who have served in Jammu and Kashmir for a total period of ten years; or (b) children of parents who fulfil any of the conditions in subsection (1); or (c) children of such residents of Union territory of Jammu and Kashmir as reside outside Union territory of Jammu and Kashmir in connection with their employment or business or other professional or vocational reasons but their parents fulfil any of the conditions provided in sub-section (1)”.

Salient Features of the Jammu and Kashmir Domicile Law

30 Ipsita Chakravarty, To which inhabitants should a state grant domicile status? Scroll.in (2016), https://scroll.in/article/808438/to-which-inhabitants-should-a-state-grant-domicile-status (last visited Jul 19, 2020)
31 see supra, note 13
32 see supra note 12
Erasure of distinction between permanent residents and non-permanent residents:
The law, while prescribing fifteen-year duration of continuous stay as a criterion for domicile status, essentially clubbed locals (who were defined as permanent residents of the state) and nonlocals in the same bracket. The Central Government entirely omitted the reference to ‘permanent residents’ in the new law.

For context, Article 35-A provided for the erstwhile state of Jammu and Kashmir the power to define what classes of people would be permanent residents and confer privileges in the fields of education, employment and acquisition of property.

Under the power vested in it by Article 35-A, the Jammu and Kashmir Constitution defined permanent residents as those who were state subjects since or before 14 May 1954 or those who had been continuously resident in the state for 10 years and had acquired immovable property before the mentioned date. Before 5th August 2019 (i.e. the day of abrogation), all jobs in state services were reserved for the permanent residents only. Under the new law, residents who do not wish to or haven't resided permanently in the state shall be eligible to receive domicile status, thereby bringing parity with those who have resided permanently. Therefore, a resident in Jammu and Kashmir who has met the minimum requirements as prescribed in Section 3A Sub-Section (1) could theoretically attain domicile status and receive associated privileges even if the resident in question was born and raised in a different state and had no historical / cultural links to the state. An example of this, which was reported in the media, was that of an IAS officer from Bihar who received domiciled status despite being a non-local officer.

Reservation for only Level 4 level jobs:
The law reserved only Level 4 jobs for domiciled residents while jobs for higher classes and with higher pay-grades were thrown open competition between domiciled and non-domiciled residents.

Possibility of obtaining domicile status without actually residing in the territory:
Sub-Section 2 clause (a) implicitly allows wards of employees employed in services / public sector undertakings / institutions defined in the said clause to attain domicile status of the territory of Jammu and Kashmir even if they had never resided in the territory itself. This is because the said clause under the said sub-section is exclusive of the domicile requirements set out in sub-section (1)’s clauses. This is subject to the requirement that the parents in this case have to serve in the territory for a period of ten years. Sub-Section clause (c) provides a similar implied exemption to the children of those who are residents of the state but are working outside the state for vocational / professional reasons. For example, if a resident who has passed the Std. X qualifying examination from an educational institution in the territory after

34 INDIA CONST. art. 35
35 J&K CONST. art. 6 (1)
39 see supra. note 23
40 Id.
41 Id.
a period of study of seven years leaves the state for employment purposes to a different state/territory, his child, even though he/she may have been born and raised in a different state / territory and has never resided in the territory shall be eligible for domicile status, equivalent to the status of those who have resided in the territory for ages.

Grant of domicile to excluded communities: The new domicile law grants domicile status to West Pakistan refugees, Valmikis and other communities in J&K (who were migrants to the erstwhile state)\(^42\). These communities were not considered permanent residents since they were not state subjects. When Jammu and Kashmir was a princely state, the Maharaja of Jammu and Kashmir issued two notifications in 1927\(^43\) and 1932\(^44\) respectively which defined who qualified as state subjects. Under the erstwhile Jammu and Kashmir Constitution, only those who were state subjects as defined by the notifications issued in 1927 and 1932 were considered permanent residents. In the case of West Pakistan refugees, they had migrated to Jammu during the partition years in 1947 and were not state subjects at the time of migration\(^45\). Therefore, despite residing in the state since and before the cut-off year of 1954, they were not considered permanent residents. The Valmikis were safai-karamchari (sanitary workers) brought over from Punjab in the 1950’s\(^46\), and were granted permanent residency only on the condition that they would not seek any other different form of employment than their current one. The new domicile law granted the disenfranchised communities the right to be domiciled in the territory under Sub-Section 1 (b) of Section 3A of the act.

Response to the newly enacted law
In accordance with the provisions of this Act, on May 18\(^{th}\) 2020, the Jammu and Kashmir Grant of Domicile Procedure Rules were issued by the government. The new domicile law received negative criticism from Jammu and Kashmir’s political class. An NC (National Conference) spokesman said the amended domicile law was made in exercise of power under the J&K Reorganization Act 2019, “which stands challenged in number of petitions before the Supreme Court”.\(^47\) The PDP stated that order was aimed at effecting a demographic change of J&K and rejected the amended domicile law and the recent order\(^48\). In response to the same, the Central Government amended the order by reserving jobs at all levels for the domiciled residents of Jammu and Kashmir.\(^49\)

Critical Assessment of the Jammu and Kashmir Domicile Law


\(^{45}\) see supra note 28

\(^{46}\) Id.


\(^{48}\) Id.

The domicile law of Jammu and Kashmir, on the face of it, does not appear to be quite different from domicile laws enacted in other parts of India. After reorganisation, the territory of J&K’s administrative structure was envisaged to be modelled after that of Puducherry, a similarly governed union territory with an elected government and legislature of its own, but with greater control from the Centre. Many of the provisions in Jammu and Kashmir’s domicile law and Pondicherry’s domicile law are similar, but comparing Puducherry’s territorial domicile laws with that of Jammu and Kashmir, an important difference stands out - children of employees working in government services / public sector undertakings / institutions of the Central Government as well as of the Puducherry Administration are eligible for domicile status (similar to J&K), but the children mentioned above should have studied for minimum two years in any secondary/higher secondary school in the territory and should have passed their qualifying examinations from the same school. In the case of Jammu and Kashmir, children of employees serving in institutions / public sector undertakings / banks / governments listed in clause (a) sub-section 2 of section 3A of the act need not study and pass the qualifying examinations from an educational institution located outside the territory of Karnataka is eligible to be considered as a domiciled candidate for government seats in education and employment if he/she speaks Kannada, Tulu or Kodava as his/her mother tongue. As a proof of mother tongue, the candidate is required to sit for a language test in the respective mother tongues listed above. A similar provision enacted in Jammu and Kashmir to protect non-residents taking advantage of local rights would further enhance local rights in Jammu and Kashmir without being an affront to national integrity, while protecting cultural identity of the territory at the same time.

With respect to land rights, the J&K domicile law has been alleged to not have provided sufficient protection to J&K residents in terms of ownership of land. There have been demands in Jammu to enact laws similar to that of Himachal Pradesh to protect local land from outsiders, especially after the protective cover provided by Article 35-A was removed.

The specific provision in focus for similar

51 see supra note 23
52 Id.
53 see supra note 12
application to J&K is Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 which prevents transfer of land owned by agriculturists to non-agriculturists in the state of Himachal Pradesh, whether they are Himachal Pradesh or non-Himachal Pradesh residents. However, land may be purchased by special approval from the Government of Himachal Pradesh. This is essentially a protective measure to protect the lands owned by Himachal Pradesh-domiciled residents. However, while the abrogation of Article 35A implies permission for non-local residents to purchase private property, land for industrial and commercial purposes may not be purchased by non-local residents.

Leasing of land for a certain period of time (maximum 90 years) is permitted for non-residents. This is because the Jammu and Kashmir Industrial Policy, 2016 (which lists these provisions), was put in effect before the abrogation of Article 35-A and was not amended after the dissolution of the state and it remains in force till 2026. This essentially means that the current system of reserving land for industrial purposes shall continue to remain in the hands of local residents. It is desirable that this policy be continued after its expiration also, since Jammu and Kashmir’s fragile ecology and scarcity of usable land may not support large-scale industrialisation. A more suitable provision in this regard to protect the land rights of domiciled residents is Article 371 and the state-specific provisions listed for Nagaland and Mizoram. Article 371A (1) (a) (iv) and Article 371G (1) (a) (iv) of the Constitution of India states that no Act of Parliament shall apply to the State of Nagaland and Mizoram respectively regarding ownership of land and transfer of land and its resources. This is a safeguard for local residents with respect to land rights since these states share similar economic and socio-political characteristics with Jammu and Kashmir, and therefore the insertion of a similar provision under Article 371 would go a long way in allaying fears over the new domicile law.

Conclusion

The new domicile law of Jammu and Kashmir can be summarized as a concerted attempt to bring parity with the domicile laws prevailing in other parts of the country. This is of course, justified since the special status of the state has been withdrawn. It is even advantageous because it does provide a limited level of protection to the rights of local residents, and importantly, previously disenfranchised communities excluded under the permanent residency laws of the erstwhile state also gained their rights. However, more safeguards would be appreciated in this regard considering the fears over demographic change and the tense political situation in the territory.

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56 Id.
57 Safwat Zargar, Special status for Jammu and Kashmir has gone, but outside investors cannot buy land there Scroll.in (2020), https://scroll.in/article/953922/special-status-for-
58 Id.
60 INDIA CONST. art. 371A (a) (iv)
61 INDIA CONST. art. 371G (a) (iv)
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INTRODUCTION
Obscenity is an offence under the Indian Penal Code, 1860 and the Information Technology (Amendment) Act, 2008. Obscenity is defined as certain material which is characterized as being offensive in relation to the public sense of decency. The definition of obscenity in terms of the legal and lingual aspects are vague and not universal, often varying according to the moral standards and notions of communities and countries, what may be termed obscene in India may not attract the same meaning in western countries. Obscenity can be found in movies, magazines, speeches and at times even in artistic expressions. It is important to find the thin line which demarcates the boundaries between what is deemed to be “obscene” and what is considered to be morally acceptable to the society. The subject of obscenity is of great importance in recent times due to the rise in technology which has a sway over the young vulnerable minds and which in turn has become the most important medium through which it is expressed. The Indian Parliament has enacted various Laws and Acts to curb the menace of obscenity.

OBSCENITY WITHIN THE AMBIT OF IPC

Sections 292, 293 and 294 of IPC have been enacted with the ulterior motive to protect and safeguard the public moral by making the sale, etc., of obscene literature and publications in general, and to young persons in particular, a cognizable offence. The word obscenity and obscene have not been defined in the IPC. Section 292 of the IPC in simple terms states that if any material is taken as a whole is lascivious or appeals to the prurient interest and also tends to deprave and corrupt the persons who read, see or hear the matter contained in it, then the matter will come under the purview of obscenity. Further clause (2) of section 292 goes on to state the extent of punishment for those indulging or aiding in the offence of obscenity in any manner, which includes the sale, hire, distribution, public exhibition, circulation, import, export and advertisement, such a person will be punished with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees on first conviction and in the event of second or subsequent conviction then with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

One important point to note is that the provisions of section 292 under IPC cannot be invoked to penalize works done in public interests such as in the cases of scientific, literary or scientific purposes. Section 292 also conflicts with Article 19(2) of the constitution which is about the freedom of speech and expression, however, the Constitution provides that the fundamental rights are subjected to reasonable restrictions to prevent indecency in public.


63 Sec 292 of Indian Penal Code.
Section 293 also bans the selling of obscene objects to young persons and prescribes punishments for the same. Obscene acts and songs are also made an offence under section 294 which states that whoever, to the annoyance of others-
(a) does any obscene act in any public place, or
(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

**PENAL OFFENCE OF OBSCENITY UNDER I.T. ACT, 2000**

Section 67 of the Information Technology Act, 2000 deals with the penal offence of publishing or transmitting obscene material in the electronic form. The section states that, Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

Section 67 of the Information Technology Act, 2000 is modelled on the basis of section 292 of IPC, the only material difference being that section 67 of the Information Technology Act, 2000 has made the offence offence of obscenity applicable to any material in the electronic form and in the electronic world. Hence each and every electronic content which is obscene would come under the ambit of section 67 of the Information Technology Act, 2000. It is pertinent to note that any offence relating to obscene content in electronic form can be only tried under the Information Technology Act of 2000 and not IPC because section 81 of the Information Technology Act states that provisions under the Act shall have an overriding effect.

**TEST OF OBSCENITY**

A test for defining what constituted the offence of obscenity was first laid down in the English case of Regina v. Hicklin, The court held that all material tending "to deprave and corrupt those whose minds are open to such immoral influences" was obscene, regardless of its artistic or literary merit. Obscenity is regularly used in the same sentence as vulgarity, and the two terms are often used to denote the same concept but in the legal aspect there is a sight difference between them. In a landmark case the apex court of the Indian Judiciary held that, a vulgar writing need not necessarily be obscene, the court further expounded that vulgarity instills a feeling of disgust, revulsion and also boredom but does not have the effect of depraving and corrupting the morals of any reader of the novels, whereas obscenity has the tendency to deprave and corrupt those whose minds are open to such immoral influences. The ruling of the court in the above mentioned case has elucidated on the difference between obscenity and vulgarity and has

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64 Sec 67 of the Information Technology Act, 2000.
65 L. R. 3 Q. B. 360, 371 (1868).
shown that obscenity has a larger context to it which includes depraving and corrupting the minds of those who are open to such immoral influences and not merely a feeling of revulsion or disgust.

Further in the case of Ranjit D. Udeshi v State of Maharashtra\(^{67}\), the Hicklin test was found to be valid for determining what constitutes obscenity, the court stated that, “Treating sex in a manner appealing [or tending to appeal] to the carnal side of human nature” is offensive to modesty and decency and is obscene. But the extent of such appeal must be examined in each case”. The Court examined the text of the book under question and concluded that it was obscene under Hicklin Test. In the case of Chandrakant Kalyandas Kakodar vs The State Of Maharashtra And Ors\(^{68}\), the court held that when considering the question of obscenity of a publication what the court has to check is for whether a class, and not an isolated case into whose hands the book, article or story falls, becomes depraved by reading it or might have lecherous or impure thoughts that aroused in their minds.

**SHORTCOMINGS OF HICKLIN TEST**

The supreme court had by and large followed the the Hicklin test until the year 2014, where in the case of Aveek Sarkar v. State of West Bengal\(^{69}\), the apex Court made a departure and held that contemporaneous community standards would be equally relevant in determining whether any particular information is obscene or not. The supreme court held that, “we have to therefore apply the community standard test rather than Hicklin test to determine what constitutes obscenity. A picture of a nude/semi-nude, woman as such, cannot per se be called obscene unless it has the tendency to arouse feeling or revealing an overt sexual desire\(^{70}\). The picture should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it. Only those sex-related materials which have a tendency of exciting lustful thoughts can be held to be obscene, but the obscenity has to be judged from the point of view of an average person, by applying contemporary community standards\(^{71}\).

The Hicklin test for obscenity was also followed in the U.S.A, where the American judiciary had followed the rule laid down in the case until when the U.S. Supreme Court laid down a 3 rule test for obscenity in the case of Miller v. California\(^{71}\), which held that a work is deemed to be obscene if:

a) The average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interests.

b) The work depicts or describes, in a patently offensive, way according to contemporary community standards, sexual conduct specifically defined by the applicable state law, and

c) The work taken as a whole, lacks serious literary, artistic, political or scientific value.

In another instance Commenting critically on Hicklin test more than than eighty years later in Commonwealth v. Gordon et al., Judge Curtis Bok of the Philadelphia County Common Pleas Court complained that if strictly applied the rule laid down will render any book unsafe, since a moron could pervert to some sexual fantasy to

\(^{67}\) A.I.R. 1965 SCR (1) 65.
\(^{68}\) (1969) 2 SCC 687; AIR 1970 SC 1390.
\(^{69}\) (2014) 4 S.C.C. 257.
\(^{70}\) Sarkar v West Bengal, Global Freedom of Expression Colombia University.
\(^{71}\) 413 U.S. 15 (1973).
which his mind is open to the listings in a seed catalogue and not even the Bible would be exempt\(^\text{72}\).

**DIFFERENCE BETWEEN OBSCENITY AND PORNOGRAPHY**

Pornography and obscenity are two terms that are often used interchangeably, but in reality the two terms have different meanings and are different penal offences under the Information Technology Act, 2000. Obscenity is generally defined as any material which is offensive to modesty or decency and is lewd, on the other hand pornography is intended to directly arouse sexual desire. Section 67A of The Information Technology Act, 2000 deals exclusively with the broad ambit and parameters of electronic or digital pornography. Thus section 67A focuses on any material in the electronic form which contains sexually explicit act or conduct. Section 67A does not give any explanation as to what the terms “sexually explicit act or conduct” mean. Hence it is to be taken that any content in the electronic form which contains explicit sexual intercourse and other sexually explicit acts including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; bestiality; sadistic or masochistic abuse; or lascivious exhibition of the genitals or pubic area of any person in this regard, would be covered under the term, “sexually explicit act or conduct”\(^\text{73}\).

Section 67A of the Information Technology Act, 2000 provides punishment for whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct and such a person shall be punished on first conviction with imprisonment of either description for 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 imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees\(^\text{74}\). Hence it can be encapsulated that both terms without doubt offend public decency and morals but pornography is a more aggravated form of obscenity which intends to arouse sexual desire.

**LANDMARK CASES AND JUDGEMENTS**

In the Maqbool Fida Husain v. Raj Kumar Pandey case, the Delhi High court held that, the “Bharat Mata” painting by M.F. Hussain Was not obscene under section 292 of the Indian Penal Code. In this case the acclaimed artist M.F. Hussain depicted the Bharat Mata in the form of a naked woman. The advertisement of the painting led to several protests on the ground that the painting was obscene. Justice Sanjay Kishan Kaul in his observation stated that,"we have been called as the land of Kama Sutra then why is that in this land we shy away from its very name? Beauty lies in the eyes of the beholder and so does obscenity". Further the court held that the allegations against the painter were baseless and that nudity was a part of contemporary art\(^\text{75}\).

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\(^\text{73}\) PAVAN DUGGAL, TEXT BOOK ON CYBERLAW 122-123 (2 ed. 2016).

\(^\text{74}\) Sec 67A of The Information Technology Act, 2000.

\(^\text{75}\) Delhi HC quashes obscenity case against MF Husain, The Times of India, May 9, 2008.
In Avnish Bajaj v. State\textsuperscript{76}, popularly known as the Baazee.com case an IIT Kharagpur student named Ravi Raj, uploaded an obscene MMS video clip on a website called baazee.com for sale. Upon investigation, a chargesheet was filed against Ravi Raj, Sharat Digumarti and the Avnish Bajaj who was the owner of the website. The state contended that there was an offence made under section 292 of the IPC and that the failure to have adequate filter in a system which is entirely automated entails serious consequences and a website cannot escape such legal consequences. The Delhi High Court observed that a prima facie can be made out against the website under section 292(a) and section 292 2(d) of IPC. The court further observed that, “by not having appropriate filters that could have detected the words in the listing or the pornographic content of what was being offered for sale, the website ran a risk of having imputed to it the knowledge that such an object was in fact obscene”, and thus it held that as per the strict liability imposed by Section 292 of IPC. Obscenity relating to the photograph of a woman exposing her thighs and cleavage in a magazine was scrutinized in the case of P.K. Somnath v. State of Kerala\textsuperscript{77}, the court was of the view that the picture in question cannot be called an obscene picture and went on to state that nudity per se was not obscene or indecent since the facial expressions were not at all provocative. The court further held that “something more has to be present” and until that criteria has not been satisfied, the nude body of a woman cannot be considered as obscene or indecent.

**CONCLUSION**

Obscenity in any form is unacceptable and should be rightly denounced at the very beginning. To ensure that the offence of obscenity does not turn into an unstoppable social menace, certain changes need to be implemented in the existing laws, for example Section 67 of the Information Technology Act, 2000 penalizes only those who publish or transmit any lascivious or prurient material in the electronic form and stays silent on those who access or view such pornographic or obscene electronic content. Punishment including to those who indulge in the viewing of obscene content in the electronic form will help in deterring the effect of such influences on young minds who are a click away from viewing obscene content on the internet. At the same moment there is a need to differentiate and demarcate the boundary that separates content which are obscene from those which are not, so that laws which curb obscenity are not used in a manner which is draconian and thereby penalizing every content that is against the so called “community standards”. Recent judgments of the Indian Courts indicate that the judiciary is of the opinion that the concept of obscenity is bound to change with the passage of time and due to progressive changes taking place in the modern society.

\textsuperscript{76} (2005) 3 CompLJ 364 Del. \quad \textsuperscript{77} (1990) CriLJ 542.
POLICE BRUTALITY AND FAKE ENCOUNTERS: AN INSIGHT ON COLD-BLOODED MURDERS

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POLICE COMPOSITION AND FUNCTIONING

INDIA

The advent of the modern policing system dates back to the time of British rule in India. In the year 1861, the British Government came up with the Indian Councils Act, 1861 (which overhauled the then India’s Executive council). The act laid the foundation stone for the modern and professionalized police bureaucracy in India. It introduced what was known as Superior Police Services, that later came to be known as Indian Imperial Service. The highest rank was that of Inspector General followed by Deputy Inspector General and so on. In the year 1902-03, Sir Andrew Fraser and Lord Curzon established a police commission for implementing police reforms. For the very first time, it recommended the appointment of Indians at officer level in the police services. They could rise only to the ranks of the Inspector of Police. However, they were not made the part of Indian Imperial Police. From the year 1920, Indian Imperial Police was open to Indians and the entrance examination for the services was conducted both in India and England. After the creation and enforcement of Constitution of India in the year 1947, the modern Indian Police Service was created under Article 312(2) in Part XIV.

A. The Police Act, 1861

The police forces in India are governed by The Police Act, 1861. The act lays down not only the hierarchy but various duties and function, that is to be performed by a police officer. The entire police establishment under any State Government, according to the Act, shall be considered as one police force. The appointment, vacancies, pay and all other condition of service of members of the police force shall be such as determined by the State Government. The duty of the police officers is defined under the act as “It shall be duty of every police officer promptly to obey and execute all orders and warrants lawfully issued by the competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice and to apprehend all persons whom he is legally authorized to apprehend.”

A closer look at the Administration of police will clearly show that most of the problems that have

78 Repealed by Government of India Act, 1935
79 Sir William Wilson Hunter 7 Ors., “The Imperial Gazetteer of India: The Indian Empire (Vol 1st Descriptive)”
80 Ibid
81 Supra Note 2
83 Act 5 of 1861
84 Under Constitution of Force in the Police Act, 1861
85 Ramesh v. State of UP (1978) Cr.LJ 626 (All)
86 State of UP v. Lal Bahadur, AIR 1978 All 55
originated are from the legacies of their ancestors which was stagnant, disjointed, outmoded and dysfunctional.

A. The Code of Criminal Procedure, 1973

The jurisdiction and power of investigation for the policing system in India is defined under The Code of Criminal Procedure, 1973. The powers and duties of police is defined from Section 154 to Section 173 of the said act. These sections also maintain check and balance to the police functionaries by enabling them to compulsorily provide information to Magistrate from time to time. The act itself divides the jurisdiction of the police system in respect to investigation by classifying the offences under two heads- Cognizable and Non-Cognizable. Not only this, the police officers have also been given power to search, medical examination of a rape victim (to be done by a woman police officer), custody and so on.

UNITED KINGDOM

The policing system during the 18th Century in United Kingdom, were organized by the local communities which generally comprised of Watchmen and Constables, with Central Government having no direct involvement in it. The City of Glasgow Police, was the first ever professional policing system, that was established following the Act of Parliament, 1800. The police system in UK is divided into three major heads-


The Territorial police services are the first limb of the police division which constitute the majority of policing system in the three states of UK- England and Wales, Scotland and Northern Ireland. As of the census of 2013, there are 45 different types of territorial police services that cover these particular regions and also have either independent police authority or local authority or joint police board. The above-mentioned acts, address number of issues ranging from appointment of a chief constable to jurisdiction, powers and functions in all the three states. There are certain territorial police service that are entrusted with performing national role, e.g. the Special Operations directorate of Metropolitan Police.

B. The Serious Organized Crime and Police Act, 2005

The National law Enforcement Agencies are the second most important division after the Territorial Police Services. It includes the National Crime Agency and the British Transport Police. The Serious Organized Crime and Police Act, 2005 cites them as “Special Police Forces”. The NCA operates all across United Kingdom but requires a written agreement of the domestic prosecuting authority to operate in Scotland and Northern Ireland.

88 §177 t/w §209, The Code of Criminal Procedure, 1973
89 §2(c), The Code of Criminal Procedure, 1973
94 Robin Bryant, “Blackstone’s Handbook for Policing Students”.
95 Cl. 16 of 1996
96 Asp 8 of 2012.
97 Cl. 32 of 2000
98 Cl. 15 of 2005.
99 https://www.nationalcrimeagency.gov.uk/
100 Transport Police (Jurisdiction) Act, 1994.
They come into action against organized crime.

C. Common Law of England

The last limb of the policing system in UK are the Miscellaneous Police Services, which trace back their roots of foundation in older legislation or the common law. They have the function of safeguarding local areas such as parks, ports etc.

UNITED STATES OF AMERICA

The policing system in United States is divided among “18000 federal, state, local and city departments, all with their own rules.” Every State has its own nomenclature regarding powers, responsibilities and funding.

The Code of Laws for the United States of America

At the federal level, both i.e. federal police which possess full federal authority as enshrined under United States Code (U.S.C.), and federal law enforcement agencies, which are authorized to enforce various laws at the federal level, exists. Both the police and law enforcement agencies work at the highest level, entrusted with policing roles and may imbibe component of one another e.g. FBI. These police forces have jurisdiction in all states, U.S territories, and U.S possessions for enforcement of federal law. Some of the police forces at Federal level include The Department of Justice, The Department of Homeland Security, United States Secret Service etc. At county level, county law enforcement is provided by sheriff’s department or offices and county police. The County police works only in metropolitan countries. There are even countries that comprises both- the county police and the county sheriff. In such situation’s responsibilities given to each are clearly demarcated. County police are entrusted with typical police duties such as patrolling, investigation etc. whereas on the other hand, the Sheriff’s department mainly works in court like serving papers etc. Municipal Police are found in cities e.g. New York City Police Department (NYPD).

DIFFERENT FORMS OF POLICE BRUTALITIES

The term “Police brutality” is legally defined as an excessive use of force by a legal enforcing entity in order to curb down a particular subject, thus leading to civil rights violation. The term was firstly used by the Chicago Tribune in the year 1872, when a civilian under arrest, was beaten at the Harrison Street Police Station. The brutality can range from rape to torture and even custodial deaths. A comparative study of the same is discussed below-

INDIA

The cases of police brutality in India before and after independence don’t show any major difference in their numbers. Some of the famous cases are-
1. In the year 1980, the incident of “Bhagalpur Blinding’s” in Bhagalpur, a state in Bihar became very famous

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wherein, police blinded 31 undertrial prisoners in the custody by pouring acid into their eyes. This was also the first case where Supreme Court ordered compensation for human rights violation.

2. In the case of “Videocon Land Acquisition” in Pune, the police opened fire on people protesting against the illegal land acquisition.

3. In the famous case of “Guru Grant Sahib Desecration”, the police killed 2 and gravely injured 50 others, who gathered for the protest. The police claimed that they acted in self-defense.

4. In the famous “Thoothukudi violence”, the police killed allegedly 13 protestors and gravely injured more than 100 who gathered to protest against the expansion of proposed copper smelter program.

5. The Jamia Milia Islamia attack yet remains one of the darkest days of 2019, wherein police attacked on students protesting and also on non-protestors for raising their voice against Citizenship Amendment Act, at the campus of Jamia Milia Islamia.

6. On 16th of March, 2020, a police constable attached with Laxmipura police station at Vadodara was arrested for allegedly raping 21-year old women, during his late-night patrolling duty.

7. A constable of Ghumarwin Police Station in Himachal Pradesh was arrested, after committing rape with a laborer at her quarter, in guise of giving food ration for whole week.

8. In the famous “Thoothukudi custodial death”, a father-son duo was allegedly beaten, brutally tortured, sexually assaulted by the police officers of Thoothukudi district, in the custody, for opening their mobile shop beyond the prescribed hours in COVID-19 Pandemic situation. The duo later died in the custody.

9. The cops of the “Tuticorin district” allegedly took a man without warrant from her widowed mother’s house, kept in custody, was tortured, beaten and later died due to Brain Damage. His fault was that he was the younger brother of a man, suspected in a murder case, and to get to him, they used him as a bait.

10. A 19-year old man, who came to give an SSLC exam died allegedly after being lathi-charged by the police, his only fault being that he did not wore helmet and thus violated traffic police rules.

OTHER COUNTRIES

1. The Royal Ulster Constabulary (RUC) in Northern Ireland killed 5 Catholic Civilians and also opened fire on crowds, protesting for Irish Nationalist. As a result of it more than 100 people were killed which included as boys as young as 9.

2. Edson Da Costa, a black Portuguese man was killed in police custody in the year 2017, the reason for which is unclear even till today. It sparked a fire among the general masses that led to several protests in the country. Even the slogan “Black Lives Matter” was put up.

3. Jordon Begley, died due to cardiac arrest due to the actions of Greater Manchester Police Officers who allegedly shot the man with taser, while he was restrained and handcuffed two hours before his death.

4. George Floyd, was killed in Minnesota by an officer, by having his neck choked by the officer’s knee. The fault of his was that, he paid a counterfeit $20 to a shop in exchange of packet of cigarettes.

5. Michael Brown Jr., an 18-year-old man was shot dead by a Ferguson police officer in the suburb of St. Louis. The officer shot Brown 6 times. He died on the spot.

6. Ian Tomlinson, a newspaper vendor
died in the City of London during the protest of G-20 Summit, after being struck by a police officer.

7. Camilo Marcelo Catrillanca Marin was killed by the Chilean police force in the year 2018, by being shot at the back because the force suspected that she was involved in a car theft, that later got disproved.

8. Breonna Taylor, an African-American was killed on March 13, 2020, when the Louisville Metro Police Department, while executing a no-knock-search warrant, entered her apartment and shot at her 8 times. Later it was revealed that she was not the suspect they were looking for.

ENCOUNTERS

The word encounter springs from a French equivalent “encontre” meaning “meeting; fight; opportunity”. The term is popular among the masses all over country especially India, because of very high number of killings done by police among major economical cities. In India, the encounter killing by police can be justified for mainly three reasons—

a. In self-defense or private defense of the police officer under section 96 of the Indian Penal Code, 1860.

b. Under exception 3 of the Section 300 of the Indian Penal Code or Section 46 of the Code of Criminal Procedure, 1973, wherein provisions have been laid down with regard to extra-judicial killings and cases of culpable homicide.

Although, there is no provision in the Indian law that straight away defines or authorizes the encounters of the criminals. In the landmark judgement of PUCL v. State of Maharashtra102, the hon’ble bench (comprising of Chief Justice RM Lodha and Justice RF Nariman) issued guidelines as to what should be done if an encounter of a certain person or criminal is done. The guidelines are:

1. **Record Tip-off:** Whenever the police receive any intelligence or tip-off regarding criminal activities pertaining to the commission of a grave criminal offence, it must be recorded either in writing or electronic form. Such recording need not reveal details of the suspect or the location to which the party is headed.

2. **Register FIR:** If in pursuance to a tip-off, the police use firearms and this results in the death of a person, then a FIR initiating proper criminal investigation must be registered and be forwarded to the Court without any delay.

3. **Independent Probe:** Investigation into such death must be done by an independent CID team or a police team of another police station under the supervision of a senior officer. It has to fulfil eight minimum investigation requirements like, identify the victim, recover and preserve evidentiary material, identify scene witnesses, etc.

4. **Magisterial Probe:** Mandatory magisterial inquiry into all cases of encounter deaths must be held and a report thereof must be sent to the Judicial Magistrate.

5. **Inform NHRC:** The NHRC or State Human Rights Commission (as the case may be) must be immediately informed of the encounter death.

6. **Medical Aid:** It must be provided to the injured victim/criminal and a Magistrate or Medical Officer must record his statement along with the Certificate of Fitness.

7. **No Delay:** Ensure forwarding FIR, panchnamas, sketch, and police diary

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entries to the concerned Court without any delay.

8. **Send Report to Court:** After full investigation into the incident, a report must be sent to the competent Court ensuring expeditious trial.

9. **Inform Kin:** In the case of death of accused criminal, their next of kin must be informed at the earliest.

10. **Submit Report:** Bi-annual statements of all encounter killings must be sent to the NHRC by the DGPs by a set date in set format.

11. **Prompt Action:** Amounting to an offence under the IPC, disciplinary action must be initiated against the police officer found guilty of wrongful encounter and for the time being that officer must be suspended.

12. **Compensation:** The compensation scheme as described under Section 357-A of the Cr.P.C must be applied for granting compensation to the dependents of the victim.

13. **Surrendering Weapons:** The concerned police officer(s) must surrender their weapons for forensic and ballistic analysis, subject to the rights mentioned under Article 20 of the Constitution.

14. **Legal Aid to Officer:** An intimation about the incident must be sent to the accused police officer’s family, offering services of lawyer/counsellor.

15. **Promotion:** No out-of-turn promotion or instant gallantry awards shall be bestowed on the officers involved in encounter killings soon after the occurrence of such events.

16. **Grievance Redressal:** If the family of the victim finds that the above procedure has not been followed, then it may make a complaint to the Sessions Judge having territorial jurisdiction over the place of incident. The concerned Sessions Judge must look into the merits of the complaint and address the grievances raised therein.

**MISUSE OF POWER BY THE POLICE**

The Indian Police Services\(^\text{103}\) system is authorized to maintain order, enforce law and prohibit events, which violate the sanctity of law. Saddening to which, the IPS within its jurisdiction are failing to act accordingly to their duties. Failing their duties, the extent to register complaints\(^\text{104}\), to false charge\(^\text{105}\), malicious prosecution\(^\text{106}\) and ill-treatments within the custody\(^\text{107}\), which sends a clear picture that injustice is not the problem but commitment to their duties is in police administration.

**POLICE FAILURES TO REGISTER COMPLAINTS AND INVESTIGATE CRIMES**

The Indian police tackles problems of terrorism, cognizable crime and non-cognizable crime of the country while general disposition to register and investigate crime, are conversely getting refused by the police force, most of the times. The police can refuse a FIR registration only if the case is of petty

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\(^{103}\) Hereinafter referred to as IPS


issue\textsuperscript{109}, non-cognizable crimes\textsuperscript{110} or if the case is outside their territorial jurisdiction\textsuperscript{111}. In 2015, in the case Shri Mohammed Rafi V. The Station House Officer, the respondent police filed a case against the petitioner in respect of the offense punishable under sec 166A of IPC. In Mohd Rafi case the charges against the petitioner, a police officer, was that he refuses to register a case of a rape incident victim. The decision was against the police inspector Mohammed Rafi, over his failure to act against those accused of rape cases, which got him arrested, and adding to it, became the first investigation officer ever to get arrested.

REMEDIES IN LAW

“We the people are the rightful masters of both congress and the courts, not to overthrow the Constitution but to overthrow the men who pervert the Constitution” - Abraham Lincoln.

Accordingly, if any police officers failed his duty to register offenses stated under section 154 of Cr.Pc. the informant under section 154(3) of Cr. Pc can approach any senior officer of police or the Superintendent of Police or the Commissioner of the police with a written complaint\textsuperscript{112}. If even after approaching to senior Police Officials, no FIR is registered, then the informant can file a complaint to the Judicial Magistrate/ Metropolitan Magistrate u/s 156(3) read with Section 190 of the criminal procedure thereby requesting the FIR to be registered by the police and commencing investigation into the matter. Under section 166A(c) of IPC if the Public servant concerned, fails to record any information given to him under sub-section (1) of section 154 of the Code of Criminal Procedure, 1973, he is punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine. This violation of life and liberty guaranteed under Article 21 of constitution of India because of the inaction of the police are decaying the role of police infrastructure in our country and its repairment is a big call.

FALSE CHARGES AND ILLEGAL DETENTION

The notion of Police dysfunction is far more than we can visualize. Arrest on false charges and illegal detention are another common abuse of police throughout India. But what are false charges?

False charges or accusation are allegations of offense which are not true and/or otherwise made without any supported grounds of facts whereas illegal detention is when a defendant or suspect is falsely imprisoned or unlawfully confined by a Police Officer.

Section 41 of Cr. Pc explains when any police may arrest without a warrant\textsuperscript{113} that also includes an order from a magistrate\textsuperscript{114}. Under section 151 of Cr.P.C\textsuperscript{115}, police may

\textsuperscript{111} Sugesan Transport Pvt. Ltd. V. Assistant Commissioner of Police, (2016) S.C.C. Online Mad. 9348
\textsuperscript{112} State v. N.S. Gnaneswaran, (2013) 3 S.C.C. 594.
\textsuperscript{114} Maledath Bharathan Malyali v. The Commissioner of Police, (1950) S.C.C. Online Bom. 11.
also arrest without a warrant, any individual they suspect is planning to commit any cognizable offense. A wrongful arrest by police officer can be resisted by the defendant by presenting evidence that proves that the arrest is wrongful and the officer no longer can lawfully arrest the person. If no evidence of proof is presented then the person being arrested must cooperate with the police entirely but claim can be made for presence of personal lawyer. Later, if the complaint filed against the person prove to be false, then is such case the person within his/her rights can sue the complainant or the police officer on account of various loss during the period of incarceration to which the person is legally entitled, that is malicious prosecution\textsuperscript{116}, defamation\textsuperscript{117}, false imprisonment\textsuperscript{118}, lost wages\textsuperscript{119}, wrongful conviction\textsuperscript{120} etc. Thus, law never fails to cognize that no one is above law and the law is applicable to all. The writ of Habeous Corpus\textsuperscript{121} is an effective legal recourse through which a person can report on account of unlawful detention or imprisonment to a court and request the court to order the custodian of the person or the police officer to bring the prisoner to the court and determine whether the detention is lawful\textsuperscript{122}.

**CUSTODIAL DEATH AND PUBLIC HARASSMENT**

On June 23, 2020 the death of a father and son due to alleged custodial torture in Sathankulam near Tuticorin in Tamil Nadu has led to nationwide outrage. This event had raised serious question not only about administration of criminal justice but also to the administration of the state and credibility of judiciary system of the country. Bennix and Jayaraj were taken into custody for keeping their mobile phone shop open beyond the allowed time as per the lockdown rules. Bennix and Jeeyaraj died on June 23\textsuperscript{rd} because of continuous bleeding and severe injury from alleged custodial torture. This incident of custodial death and public harassment is no new to this country. Dehumanizing torture is a common tactic for criminal investigation. Custodial death and public harassment are another widespread concept all along that need to be questioned. Ultimately to restrain this rampant criminal practice within administration of criminal jurisdiction needs to be put down by collective efforts on multiple fronts -the legal, institutional as well as social. International pressure is also equally important in adding to pressure for change.

**FAKE ENCOUNTER**

Fake encounter is second degree murder by the police or the militia when they encounter person accused or suspected criminals, done as an act of self-defense. “Encounter” by police in India means killing by police officers, with legal legitimation. Self-defence is recognised under section 96 to 106 of IPC states the

\textsuperscript{116} Supra Note 30.
\textsuperscript{117} Subramanian Swamy v. Union of India, (2016) 7 S.C.C. 221.

law relating to the right of private defence of person and property. This act of self-defence or encounter are of course not worrying but cold-blooded murder by the police as can be evident in many cases by far now. Fake shootouts is a concept that existed from British decree in our country when Jallianwala Bagh massacre 1919 materialized where police killed at least 400 innocent people and injured over 1,500, continuously evolves over time into cold blooded brutal murder by the police, with impunity and are accompanied with varied interpretations, posing a herculin challenge for judiciaries across the world to define and limit fake encounters.

CASES THAT BEGAN THE CONCERN ABOUT EXTRAJUDICIAL KILLING

Extrajudicial killing were widely practised in the past to cease insurgencies in the state of Bengal in 1960s and Punjab in 1980s. Fake shootouts are commonly practised in areas of active conflicts in our country mostly in the states of Jammu &Kashmir, states in north east including Manipur as well as in central India affected by maoist insurgency. Some rights group reported a higher figure of 100,000 deaths since 1989 in Kashmiri insurgency. Widespread plague of corruption in India’s police force can be sighted in the high profile Lakhan Bhaiya encounter case where 21 people - mostly police officers were convicted in the kidnapping, wrongful confinement and murder of a real-estate broker, Ramnarayan Gupta and were sentenced to life imprisonment. Senior Inspector Pradeep Sharma who was earlier alleged to be the mastermind behind the deadly operation, was found not guilty of the 2006 murder of broker Ramnarayan Gupta in what is known in India as a "fake encounter. Following in Prakash kadam v Ram Prasad Vishwanath Gupta123, case headed by bench of justices Markandey Katju & Gyan Sudha Mishra said, “fake encounter killings should be regarded as “rarest of rare”, an essential parameter to award the capital punishment in a case. Fake encounter killings by cops are nothing but cold-blooded brutal murder which should be treated as the rarest of rare offence and police personnel responsible for it should be awarded death sentence. They should be hanged”. The court says “If crimes are committed by ordinary people, ordinary punishment should be given but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.”. North east states have always been known for its militant activities since its formation, and for smooth functioning, the central government imposed the Armed Forces Special Powers Act (AFSPA) in 1958. Under the AFSPA, the security forces have the right to use deadly force with legal immunity. The army can also keep any person in detention without a warrant indefinitely. The AFSPA was implemented in Manipur to suppress extremist organisation, but there are frequent allegations of its misuse. Many protests have been done catching the eye of the nation by Irom Sharmila also earned the name of Iron Lady for her 16-year hunger strike against this law124. One of the most famous protests in 2004, where 30

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women from Manipur walked naked through the streets of Imphal to decry the gang rape and murder of a young woman and the case was never prosecuted because of the legal immunity granted under the AFSPA to the Indian paramilitary unit responsible. A high-profile case filed in 2012 before the Supreme Court of India related to allegations of 1,528 extrajudicial killings in the state of Manipur, which is conflict-affected. A landmark decision by the supreme court in 2016, adjuring setting up of a special investigation to check the illegality of such actions by a special body of Central Bureau of Investigation and also the operation of National Human Rights Commission, was a result of such cries. Despite of all the steps taken unfortunately the progress is slow and very less number of charge sheets have been filed till date. The CBI court is investigating these fake encounter cases since 2017 and thus Manipur case continues. These are all set cases of how power is getting misused by India’s police and armed forces ostensibly.

Fake encounters are ascending with each growing day. On 6 December 2019 the recent Hyderabad incident of allegedly killing of four men on encounter who were accused of rape and murder of a veterinarian women returning home from her clinic. This leave us with a question of validation of such encounters and how to define and limit them. Justice Markandey Katju, former Supreme Court Judge quoted judgement of justice A.N. Mulla of the Allahabad High Court. “I say this with all sense of responsibility: There is not a single lawless group in the country whose record of crime comes anywhere near that of the single organised unit called the Indian Police Force. Policemen in general, barring a few, seem to have come to the conclusion that crime cannot be investigated and security cannot be preserved by following the law, and it can only be achieved by breaking or circumventing the law”.

While the Indian judicial system is trying to empty the sea of corrupt police jurisdiction, on January 9, 2020 in Mohali a CBI court drop in a bucket of justice in a 27 year old case of Baba Charan Singh fake encounter case and held 6 police officers guilty of the encounter killing of Baba Charan Singh and five of his relatives. Overemphasizing on the subject matter of all the fake encounter cases the Sahibabad case is not to be left unnoticed. A FIR is registered against 12 cops posted at Vijay Nagar and Sahibabad police station in two separate encounter cases. The charges against the police officials in both the cases were that when the accused went to the police station to surrender for the crime registered under his name, the police officers did not take them into custody and later abducted them from a public place and allegedly hit them in their legs and then took them to jail. Thus, police with such serious allegations against them should be prosecuted rather than gaining popular support. Recent cases of Elijah McClain and George Floyd in US not only left the world in great grief but also make us realise how injustice have been prevailing among cop’s jurisdiction and no action or voice have been raised for so long.
FAKE ENCOUNTER AN INJUSTICE TO ARTICLE 21

Article 21 of the Constitution of India 1950 stipulates that no person shall be deprived of his life or personal liberty except in accordance with the procedure established by law. The act of intentionally killing accused as an encounter by police officials, is a matter of contentious debate across the world. The debate hinges on the backdrop of such encounters. The former view as opined in Article 3 of Universal Declaration of Human Rights stated: “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.” Similarly, Article 21 of the Constitution of India guarantees ‘right to live with human dignity’. Any violation of fundamental rights guaranteed under article 21 is a punishable offence. The criminal justice administrative system in India presumes that an accused is innocent until proven guilty. The burden of proof relies on the prosecution to prove that the accused is guilty of the offence convicted. Section 154 of the Criminal Procedure Code (Cr.P.C) have authorized police officials to register a FIR and commence investigation to person alleged to have committing a crime. While conducting investigation police can arrest the accused. Section 46 of the Cr.P.C define as to how an arrest has to be made under criminal justice administration. Sub-Section 3 of Section 46 contemplates that nothing in the Section gives a right to cause the death of a person, who is not accused of an offence punishable with death or imprisonment for life. It impliedly means that a right to cause death of a person is given to the police officer in case a person is accused of an offence punishable with death or with imprisonment for life when he is trying to evade the arrest. Any encounter killing not following the principle of rule of law is thus violation of an individual’s fundamental rights which is a punishable offence and thus to prevail justice there should be no impunity for such killings. UNHR raised concerned about increasing extrajudicial killing in India and recently have expressed alarm about allegations of at least 59 extra-judicial killings by police in Uttar Pradesh since March 2017 in Yogi Adityanath ruled UP.

OBSTACLES TO POLICE ACCOUNTABILITY

The spatial and relational basis of section 197 of Cr.P.C grants wider impunity to public servants specially police officers for any act done in discharge of their official duty. The emergence of police brutality in the country and the fact that the court has realized the violation of laws done under police jurisdiction with

129 https://criminallawstudiesnluj.wordpress.com/2020/04/23/deconstructing-section-463-of-the-crpc-a-tacit-approval-
130 Ibid
impunity grants to them under section 197 of Cr.P.C, is imperative that the court and the legislature recognize the despoilment and take action that extremely guarantees citizen their autonomy to fundamental rights, violation of which is a serious offence by whosoever it is done.

STEPS TO PREVENT POLICE ATROCITIES

The people are living in a world, where their voices against police and their related services, are easily clamped down. US and Britain are two such countries, where corruption in police officers, are felt by the people residing there for a long time. There were measures taken to prevent such corruptions. Some of which are:

A. Dismantling of police force

Recent killing of George Floyd by Minneapolis police officers outraged the citizens across US. Steps like “dismantle” and “abolish”, is an ongoing practice which is challenging to the whole police force. The dismantling of police forces is practiced by countries of Iraq, Guatemala and Bougainville (island) which has significantly re-oriented their decayed policing services, in rectification of their flaws and reconciliation towards serving better. It is followed by employing the three-year process which includes hiring a fresh, trained and most importantly, corrupt free police officers. The step which is substantially skipped in the process, is the registry of such dismissed officers, which is essential to ensure that those who are fired are not serving elsewhere.

B. Zero tolerance policy

The adaption of zero tolerance policy back in New Jersey in the year 1973 proposed a notable set back in police bribery as well as lower the rate of brutality by 42%.

IV. C. Broken window policy

The practice of broken window policy in New York Police department back in 1994 introduced by Bratton, a New York City police commissioner, showed that clamping down of minor crimes, if left unattended, would become a reason for a bigger problem in comparison to what they are already facing. However, on other hand, it led to use of excessive force by the police officials even in harmless situations. The nationwide arrest on violent crimes were allegedly less than the arrest made for low-level non-violent activities in US. These arrests were made on activities involving issues like drug addiction, homelessness, and mental illness which could have been treated by healthcare professionals and social workers, rather than the police.

D. Body-worn cameras

It was first tested in UK in the year 2005, as a measure to employ stringent checks and balance against police brutality. Misconduct of power is likely not to be committed if the, action of police is being recorded, was the idea back then. The cameras were supposed to be active when an incident of encounter took place. US also adapted this policy by the year 2012 to lesser crime in their police jurisdiction.

E. Anti-chokehold policy

An “Anti-Chokehold Act” was passed in New York, after the killing of Eric Garner, who was choked to death by the police officials. This made “chokehold”,
forbidden in much parts of USA. The introduction of bill was in high demand after the police killing of George Floyd. According to the act, the act of applying pressure to the throat or wind pipe causing serious physical injury or even choking to death, would be treated as Class C felony, punishable up to 15 years in prison.

F. Limit the use of force

Standardizing the use of force, or employing deadly force, only during exceptional situations can be sought as another alternative. Any excessive force used, should be questioned and investigated for protection of human rights and life. This is widely followed in the culture of police communities in England, Germany, Japan which proves to provide justice to unarmed civilians from police brutality.

INDIA

The policing system in India is not only regulated by the bylaws of the country but various organizations look after it, in order to ensure proper functioning and accountability of the administrative system. In addition to above solutions that can be inherited by the Indian police administration, some of the others are: National Police Commission

The National Police Commission (NPC) was constituted by the Government of India in the year 1977, with the sole aim of employing a check and balance strategy on the role, functioning, use of powers, political interference in their work etc. The commission produced a total of 8 reports between 1979 and 1981, suggesting a wide range of reforms that are important, in order to overhaul the police functioning in India. But, none of the recommendations it suggested was implemented by the government. Bureaucrats and politicians have a greater vested interest in regulating the functioning and administration of police in India, and thus the status quo has been maintained and continued. The need of the hour is to revive the administration of National Police Commission and to implement any recommendations, that is suggested by it.

Media

Media is another channel that acts as a spokesperson for policing system in India. Media has been ascribed the status of “fourth pillar of democracy”. It acts as one of a vigilant watchdogs to the functioning and administration of police in the country. It is due to media that all the incidents and fake encounters that takes place, is reported in the first place. Media also acts a channel, a platform to put forth the views of the general masses regarding a particular incident. But, recently reporting biased and lack of empathy for the sensitive topic over the mainstream has put a black spot on the sanctity of media. The only thing that can be done is to Non-Government Organizations

National Government Organizations relating to police brutalities can be classified under two heads

NGO’s concerned with the violations of human rights by the police officers

NGO’s concerned with the reforms in bringing about a change in the functioning of the police organizations. The former is more concerned with making the police and government responsible for the atrocities or the fake encounters, that are committed. However, one of the problems they face in doing their task is being
ignorant of law, court procedures and many times, even working of police. The task is quite daunting not only because they lack expertise but because of the nature of work, which is becoming complex with each passing day. Another major problem faced by the NGO’s, is the non-availability of information regarding government plans and programs concerning police reforms. The police do not share information with outside agencies easily (due to their own constraints), that particularly affects the NGO’s in long run.

CONCLUSION

The policing system all over the world are governed by the state by-laws that provide exclusive jurisdiction and powers to them. But, since the time of inception, this power is misused in ways, which is capable enough to shake the conscience of a right-thinking member of the society. The laws governed in UK and USA and the cases that pertain to such atrocities, are much larger in number as that of compared in India. The laws that are meant to protect the civilians often becomes the reason of taking away their lives. In India, the position of police officers is of many honors, but currently, they have reduced themselves as a puppet to bigshot politicians and bureaucrats around the country. The Code of Criminal Procedure, 1973, The Police Act, 1861, and several other judgements specifically lays down guidelines in cases of police mis happenings along with, what steps should be taken in order to prevent the future commission of the same. But improper implementation of laws and guidelines along with corruption to the root of administrative functionaries has degraded the working of police in India. Fake Encounters, custodial deaths are just an example of it, where police get away easily after such acts because they know that nothing will happen to them. The need of the hour is to revive National Police Commission, ensure independent investigation in all the cold-blooded murders and enact mechanism (as suggested) to ensure proper implementation of laws and guidelines along with stringent checks and balance.  

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CRUELTY: A VITAL GROUND FOR DIVORCE

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Abstract
As we know that a Hindu Marriage is a sacrament and the other Marriages are purely a Civil Contract. The Hindu Law never static: It was dynamic and was changing time to time so in order to bring reforms in Hindu Law, a Bill i.e. Marriage & Divorce was introduced in the Parliament in 1954-55. Divorce is a tool to dissolve a Marriage and the parties can seek the Divorce on the various grounds. However, Cruelty is a vital ground for Divorce in all Religions Marriage. It’s a kind of character as to cause danger to life, limb/health. It is specifically depend upon the fact & circumstances, character, way of life of the parties, their social and economic conditions, their status, customs and traditions. It’s tough to categories, although it is mainly classified into two heads: (a) Physical Cruelty & (b) Mental Cruelty. Though the concept of English Law and the Hindu Marriage Act in terms of Cruelty as a ground of Divorce or Judicial Separation is more or less the same, yet the Ld. Judge in India still hold that the marriage is a sacrament taking into consideration the social and cultural conditions of our Country.

INTRODUCTION
‘Divorce’ as defined in the Oxford English Dictionary – is ‘legal dissolution of marriage’ & the William Shakespeare thus refers to it as “The comedy of errors”.

D. Tolstoy in his celebrated book ‘The law and practice of divorce and matrimonial cases’. Defined Cruelty in these words: ‘Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger’. D. TOLSTOY, THE LAW OF PRACTICE OF DIVORCE AND MATRIMONIAL CASES 61(6TH ed.).

HISTORICAL POSITION OF DIVORCE IN HINDU
Hindus believe that the marriage is a Holy sacrament and it is also important for the complete life. As we know that our Legislation has adopted the concept of...
Divorce from the English Legislature as the Indian Divorce Act was passed in 1869 but it had remained in applicable to the Hindus and in 1954-55 the Hindu Marriage Act was passed and governs all the matter related to the Hindu Marriages, so the Indian Judiciary somewhere has to depend on the decision of English Law.

Hindu marriage is made in heavens, so there is no question of breaking them on earth. Separation, which originally was close to blasphemy is longer so. Slowly and steadily the concept gave away with the social reformers increasingly agitating for the emancipation of women saying that women must not be chained with a man devoid to all virtues of a reasonable husband.

The British Government frowned upon any effort to make radical changes in Hindu law, despite the Hindu reforms’ agitating for such changes. According to former Chief Justice of India Mr. P.B. Gajendragadkar, that was the reason why the growth of Hindu Law was arrested during the whole British period.

“When we became free and the Indian Parliament, which was sovereign, began to function, the age of commentators came to a close and that of legislators commenced. Naturally one of the first tasks to which Parliament addressed itself was to change Hindu Law with a view to modernizing its provisions and wherever necessary, to effecting changes on the basis of social justice.”

This is how the eight years of Indian independence, the Hindu Marriage Act 1955 came into existence in our Country. Section 13 of the Hindu Marriage Act deals with the grounds on which the parties can seek a decree of divorce from a competent Court having jurisdiction to entertain such petition. Sub-sections (1) & (1A) of section 13 of the Hindu Marriage Act, 1955 prescribes the grounds on which either of the parties can seek a decree of divorce from a court of law.

**GROUNDS FOR DIVORCE....**

Following are the grounds under which either of the parties are entitled to seek the decree of divorce under section 13 of the Hindu Marriage Act, 1955.

1. Adultery
2. Cruelty
3. Desertion
4. Conversion or Chang of religion
5. Insanity
6. Leprosy
7. Venereal disease
8. Renunciation of World
9. Presumption of death

{Under the Hindu Marriage Act on these above grounds men & women can claim for the decree of Divorce before the concern Court of Law}

**STATUS OF THE CRULTY IN THE HINDU MARRIGE ACT 1955 (as Amended in 1976)**

As per the Hindu Marriage Act 1955 Cruelty was not a ground of Divorce, it was only a ground of Judicial Separation U/s 10 of Hindu Marriage Act.

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135 JUSTICE GANJENDRAGADHKAR, 59TH REPORT OF LAW COMMISSION OF INDIA.
Under Section 13 of Hindu Marriage Act, 1955, Divorce-(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(ia) has, after the solemnization of their marriage, treated the petitioner with cruelty.\(^{136}\)

**LEGAL CONCEPT**

CRUELTY (one of a ground of divorce) 

Section 13(1)(i-a) of Hindu Marriage Act says that any marriage solemnized before or after the commencement of this Act, may, on a petition presented by either the husband or the wife. Be dissolved by a decree of divorce on the ground that the other party has after solemnization of the marriage, treated the petitioner with Cruelty.

On the filing of a Divorce petition, if the Court is satisfied that the ground of the petition is the ground of specified in clause (f) of the sub section (1) of section 13 of Hindu Marriage Act, where the ground of petition is Cruelty, then in such a case the Court shall decree such relief accordingly.

When we study a matrimonial matters, we found that every matrimonial matters are dedicate to the humanity and emotional bonding which demands love, affection, trust, respect, regards and dedication with each other.

In general every matrimonial conduct, which may cause annoyance to the other, may not be treated as cruelty to the other party. The conduct of a party should be grave & weighty; it must something more serious than an ordinary wear & tear of a normal married life. So at the time of the consideration of a matrimonial matter, Court observed the back ground, social status, education, physical, mental / status of education of a party and after the such observation if the Court found that the relation between the parties had deteriorated and it would not be a possibility to live together without any distress, mental agony and torture, pass a decree for divorce.

**CRUELTY IS DIVIDED INTO TWO PARTS:**

There are various grounds to claim on the basis of Cruelty and type of Cruelty but in various judgments it’s specifically divided into two parts i.e.

1. **MENTAL CRUELTY**
2. **PHYSICAL CRUELTY**

(A) Mental Cruelty, that creates an adverse effect on the mental status as well as the social & life style of the other party.

(B) Physical Cruelty

*Case Laws along with Judgments related with cruelty in matrimonial matters:

Mental Cruelty in Section 13(1)(ia) can broadly defined as that the conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other party, so we can say that the mental cruelty must be of such a nature that the parties can’t reasonably be expected to live together.

What is cruelty in one case may not amount to cruelty in other case having regard to the facts & circumstances of a case. What is cruelty in one case may not amount to cruelty in other case. In other words, Cruelty is not defined in the Act but it’s a

\(^{136}\) Section 13 of Hindu Marriage Act, 1955 (Bare Act).
relative term. It varies from person to person there can’t be laid down any straight jacket formula and each case has to be examined on its own facts. Cruelty depends upon various factors which includes the status of the spouses and the atmosphere in which they live. Cruelty implies and means harsh conduct and of such intensity and persistence, which would make it impossible for the spouse to operate the marriage. It is not necessary to prove that the mental cruelty is such as to cause injury to health of the party.

...... (A) MENTAL CRUELTY :
An act of mental cruelty is far more severe and dangerous than an act of physical violence. What constitutes mental cruelty has been outlined in following cases:
Mental Cruelty can be inflicted in many ways. A false criminal case to harass the husband/wife would be an act of mental cruelty

NON-CORDIAL BEHAVIOUR OF WIFE :
It is indeed true that marriage is a sacred relationship between husband and wife. In a traditional society like ours, when a boy marriage a girl, he not only bring a wife to his home, but also bring a daughter-in-law for the family. Thus, the behavior of a women has to be seen both as a wife and a daughter-in-law.

Rama Kanta V/s Mohinder Laxmidades Bhandula (Punjab & Haryana High Court 1995)\textsuperscript{137}
In this case the Hon’ble High Court has observed that the behavior of the wife in the matrimonial home not cordial, she was disrespectful towards her in-laws, threat to commit suicide & file a false complaints U/s 498A/34 of IPC against husband & his relatives (which ended in acquittal) . Her this conduct made it impossible for the respondent to live peacefully with her in the conjugal home (matrimonial home).

Anupama Panday V/s Asutosh Panday (High Court of Uttrakhand 2011)\textsuperscript{138}
In this case at the time of Appeal before the Hon’ble High Court (DB) observed that the wife insulted husband and his other family members in the presence of guest – foul language used by the wife against the husband and in-laws- Husband stated that when the wife refused to go back with him to Holland, and he tried to contact on phone with her and children, he was not allowed to talk to them, nor wife called back him- Husband has successfully proved a case for Divorce on the ground of cruelty-Appeal dismissed.

Rani Bai alias Sakuntla Verma V/s Chandershakher Verma (High Court of Chhatisgarh) (DB)
Husband got compassionate appointment after the death of his father and he is responsible to look after his mother along with two sisters-When husband refuse advise of his wife to live separately and avoid their responsibilities, wife had gone away to her matrimonial home with her father where she fermented troubles in marital relations of her brother and sister of husband and ultimately marriage between them has been dissolved-Wife has also filed an application U/s 125 of Cr.P.C. to harass her husband alleging certain false allegations-Mental Cruelty has been made out due to obstinate conduct of wife-Husband entitled to get decree of Divorce.

\textsuperscript{138} Ashutosh Pandey & Ors. V. Smt. Anupama Pandey & Ors., (2011) UK HC.
Harbhajan Singh V/s Amarjeet Kaur, AIR 1986 MP 41

The wife not only refused to do house hold work, but in presence of guest, also forced the husband to clean the dining table, utensils and crockery. She even slapped the husband. She used to keep her husband waiting outside the house for half an hour or more on his return from the office. She went to the extent of leveling false charges of embezzlement against her husband to the bank authorities, where he was employed.

(B) PHYSICAL CruELTY:

Dr. Lokeshwari V/s Dr. Srinivasa Rao (AIR 2000 AP 451: (3) ALT130 : II (2000))

Divorce on the ground of Cruelty (Physical & Mental) - Appeal – Wife attempt to throw the child on road and in a hotel threw a chappals/sleepers at the husband causing humiliation and embarrassment to him – Acts of the wife cruel towards husband and an element of cruelty is apparent in her act making life of husband miserable – Court below rightly granted a decree of divorce in favor of Husband – Appeal dismissed.

Fact of the case: The husband has filed OP No. 2 of 1988 U/s 13(1)(ia) of the Hindu Marriage Act, 1955 seeking divorce his marriage with the appellant – wife on the ground of cruelty. The husband has alleged that the wife was cruel towards him and narrated several incidents about her cruel and humiliating acts towards him. In his evidence, he deposed that the wife was cruel towards him and never treated him as her husband. He spoke about specific incidents of her cruelty and humiliating acts towards him. He deposed that when he took her along with the child to Dr. S. Venkateswara Rao house at Siddipat, she created ugly scenes there also, which have been corroborated by the testimony of other witness i.e. PW2. The husband further deposed that while returning from Siddipet, the wife stopped the car near the Sanjay Theatre near the outskirts of Hyderabad and attempted to throw the child on the road. In another incident, the husband deposed, in order to see that the wife changes her attitude towards him, he took her to Siddarth Hotel. Even at the Hotel, the wife became furious for no reason and threw the Chappals/sleepers at him humiliation and embarrassment to him. To corroborate the nature, attitude and behavior of the wife, the husband examined his friends Dr. S. Vankateswara Rao who also spoke about the adament behavior of the wife towards the husband. Even the evidence of another witness i.e. Pw3 who is the father of husband (PW1) is to the same effect that he wife humiliated the husband and treated him cruelty.


Wife asking the Police as to why he (husband) was not being handcuffed. When the family members of the wife in her presence have beaten up and threatened the family of the husband is an overt act of cruelty by itself.

IN ADDITION TO:

There is a specific provision U/s 23A of Hindu Marriage Act, that in a divorce proceeding on the ground of Cruelty, respondent may not oppose the relief sought on the ground of petitioner’s cruelty,

140 Dr. Lokeshwari v. Dr. Srinivasa Rao, A.I.R 2000 (3) ALD 350, 2000 (3) ALT 130, II (2000) DMC 351.
but also make a Counter – claim for any relief under this Act on that ground: and if the petitioner’s cruelty is proved, the court may give to the respondent any relief under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief on that ground.

It is pertinent to mention here that, to maintain the privacy of the parties there is specific provision of U/s 22 in this Act, every proceedings shall be conducted in camera and it shall not be lawful to any person to publish any matter in relation to any such proceeding except a Judgment of High Courts & Supreme Court printed or published with the previous permission of the Court. Even the party names are not given in the cause list & at the time of hearing the matters called by its case numbers only.

In my view, at the time of proceeding I feel that parties also face a mental cruelty, as per the provision, that the proceeding should be held in camera; the proceeding should be conducted on day to day basis as also every effort should be made to complete the proceeding with in a period of six months. Unfortunately, neither the proceedings are held in camera nor on day to day basis.

It is also pertinent to mention here that as per the Section 23(2) of this Act, that before proceeding to grant any relief under this Act. It shall be the duty of the court in the first instance, in every case where it is possible to do consistently with the nature and circumstances of the case, to make every endeavor to bring about a “reconciliation” between the parties.

CONCLUSION
Word of Cruelty has not been defined in the Hindu Marriage Act although it is a ground of divorce and judicial separation. It has to leave upon the judicial discretionary power of the Judges for which a judge considers the social/education status, life style, etc. of the parties and the cruelty in one case can’t be treated as such in other case because of the life style, social/economic/education status & customs of a section of society may be different with the other society.

_______after my observation & study of the matrimonial cases I have found that the cruelty can’t be described into the words even covered into a boundary, in fact it’s beyond that kind of explanations. In various cases I have seen in many matrimonial matters that the woman/wife is getting more of the benefits in the matrimonial laws and male/husband is helpless. Now days, general approach of Courts are so humble & humanitarian towards the parties. They called a meeting with the parties or send the matter for counseling and decide whether the formation of love and affection between the parties has been dried up or not, it’s difficult to know but the Courts are made all possible efforts to reconcile the matter between the parties.

SUGGESTIONS
After my Research I would like to suggest:
First after analyzing the Judgments, Books, Court proceedings and consulting to the seniors, I found that there is lack of awareness in the people regarding the law (cruelty) provisions and remedies. I think some legal institutions or the new comers in the field of law should provide with the legal aid and awareness to the people, especially who live in remote/rural areas. Although Delhi Law Service (DLSA) which work under the supervision of the High Courts are also working in the remote areas for the weaker section of the society for the legal awareness and rights of the people. But it would not be enough so, NGOs and legal Institutions should come up and aware the society. Second reason is that families don’t file suit for divorce
under cruelty because of the family’s reputation. On this issue I suggest that there must be a proper counseling by the help of professional counselors between the couple so that the main reason of the cruelty can come out and be resolved amicably and mutually because in my eyes the person who is doing cruelty is because of that person might be going under any psychological disorder in most of the cases and pre litigation mediation should be mandatory before filing a suit before the court of law. Thirdly I have observed that divorce cases not only in the matter of cruelty, but under all grounds take a long time which completely destroys the life of both individuals and their children if any, for this there should be a Summary Trial make fast-track courts in which there is already a provision to resolve the matrimonial case within the period of six months for the purpose of speedy disposal of cases. Somewhere in the middle what I found that women get the advantage in most of the cases and it is already presumed that the man / husband would have only done the cruelty against the woman. Courts should also consider and look into and every case of cruelty from both the sides. Fourthly the parties to the suit feels humiliated between the proceedings of the court because the proceedings are done in open court, for that matter there is also a provision in law that is the camera proceeding which means the case will be held only in the presence of the parties and their councils so that the privacy of the case can be maintained and parties to the suit should not go through any humiliation. But unfortunately I found that courts do not follow these provisions. So in my opinion these provisions should be followed in the matrimonial cases amicably and wisely. These are the special kind of matters which cannot be treated in a general manner like civil/criminal matters. That on the same cause of action, various cases are made out between the parties for the different reliefs like divorce, maintenance U/s 24 of Hindu Marriage Act 1955 and U/s 125 of Cr.P.C, U/s 498A of IPC, Domestic Violence Act, Guardianship/Custody of Wards etc. So at last one thing I would like to suggest that just to stop the multiplicity of suits and for the proper adjudication of a mater all the above matters should be decided in a special Court, which will reduce the harassment and time of the parties.

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JUST WAR THEORY AND THE RIGHT TO UNIVERSAL HEALTHCARE: ANALYSING THE INTERNATIONAL HUMANITARIAN LAW IN LIGHT OF GLOBAL PANDEMICS

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INTRODUCTION
The just war theory, majorly a Christian philosophy tries to reconcile 3 things:
• Taking human life is seriously wrong.
• States have an obligation to defend their citizens and defend justice.
• Protecting innocent human life and defending necessary ethical values generally needs the willingness to use force and violence.
The theory specifies conditions for deciding if it’s simply to travel to war, and conditions for the way ought to be fought. The aim of Just War Theory is to supply a guide to the proper means for states to act in potential conflict things.
The original just war philosophy is in fact solely a remote relative to the contemporary just war theory. As a philosophy it is a ragtag collection of views, prescriptions, and traditions, a venture of the theologians, philosophers, canonists, jurists, and practitioners. The previous philosophy had 3 major sources: Theology of the centre ages, humanitarian law, and trendy philosophy of law. The system supply is comprised of Augustine, Humanitarian Law – by the body of the jus in Bello norms. The philosophical supply is provided by the sequential line of thinkers from Suarez to Kant.

COVID-19 has proved to be more than a war against Humankind as the damages caused by the pandemic are way greater than damages caused by World War - II. This pandemic has wrecked and erased millions and billions of people from the planet. In India, suggestions have been coming up for setting up a war-room for every state, which would be storing the emergency medical kits and services.

Similarly, the world-known brand - Louis Vuitton has started the manufacturing of hand sanitizers with the alcohol that was earlier used by them in the manufacturing of perfumes, just like the big companies, during the World War - I and World War - II, had begun the manufacturing of arms, ammunition, ships and tankers, bombers and other war-related items to boost and support the wartime economy.

International Humanitarian Law has released guidelines in order to tackle the COVID-19 situation, which only releases safety measures when there's a war-like situation or ongoing war. IHL deals with wars and armed conflict issues and not medical or virus issues, this proves that at an extent this pandemic is no more an epidemic situation, but a war against enemy COVID-19. This epidemic demands safety precautions alike an ongoing war or

global emergency and the front line doctors are the warriors risking their lives and saving the world from the cruel virus.

This global emergency has caused everybody to stay locked inside their homes, also this has forced a temporary ban on travel and tourism which even the biggest wars haven't experienced. So, let's understand the gravity and cruelty of the virus and maintain social distancing!

DEVELOPMENT
The Christian tradition of simply war theory began within the fifth century with theologian Augustine's read of justice in warfare may be summed up by his statement that, "We don't obtain peace so as to be at war, however, we have a tendency to head to war that we have a tendency to could have peace. Be peaceful, therefore, in warring, so you will beat those whom you war against, and produce them to the prosperity of peace."

In the thirteenth century, Thomas Aquinas designed on and enlarged Augustine's thought on justice and warfare. Later Christian thinkers have additional significance and comment on the just war theory; however, the most principles have a tendency to still use these days those derived from Augustine and Aquinas.

Just war theory manages the legitimization of how and why wars are fought. It can either have theoretical or historical justification. The hypothetical viewpoint is concerned about morally justifying war and the structures that fighting might possibly take. The historical viewpoint, or the "just war custom," manages the verifiable assortment of decides or understandings that have been applied in different wars over the ages.

The theory proposes a series of principles that aim to hold a reasonable moral framework for war. The series include Jus ad Bellum, Jus in Bello, and Jus post-Bellum. Under international law, we look into all these aspects before, during, and after the war.

JUS AD BELLUM
The literal meaning is “right to war”. It is a set of criteria that are to be consulted or looked into before actually resorting to war to determine whether entering into war is the right decision and is permissible, that is, is it just a war

The six criteria that must be satisfied can be further be explained like:

1.) Having just cause: - there must be a just and reasonable cause for going to war, in the effect of like self-defence, protecting the innocent, defence of others, or punishment for grievous wrongdoing.

2.) Right intention: - the good caused by the war must be greater than the destruction and death and thus it should only be fought for the just cause.

3.) Proper Authority and public declaration: - A war cannot be done in secret and it can only be launched by the correct governing body of the country.

4.) Last resort: - Wagging a war should be the last reasonable and workable option left for addressing the problem.

5.) Probability of success: - An impact must be likely to avoid unnecessary bloodshed.

6.) Proportionality: - war should only be waged if the universal goods outweigh the universal evil.

Because these criteria are very open-ended and it is on the interpretation and justification it is often a matter of contention among countries waging war, so as to decide whether the grounds have been satisfied before the war has been declared or not.

JUS IN BELLO
Jus in Bello is a set of rules governs what happens once the war has begun. The main
function of this law is to govern how a war has to be fought without a prejudice considering the fact that how or why they had begun. In rules to be followed which are:

1.) Weapons prohibition: - No chemical or biological weapons are allowed.
2.) Non- Combatant Immunity: - Innocent civilians should not be harmed intentionally.
3.) Proportionality: - Excessive force, or force greater than needed is forbidden.
4.) Prisoners of war: - prisoners of war will not be subjected to any kind of cruel punishment, they should be treated as normal prisoners.
5.) No means that are evil in themselves are allowed. Examples include genocide, distinguishing soldiers as doctors, etc.
6.) No Reprisals: - If the other side breaks the rules it does not mean that you get to break it too.

The International Committee of the Red Cross (ICRC) and many intellectuals, wishing to stress the positive, call it International Humanitarian Law (IHL) to highlight their goal of mitigating the excesses of war and shielding civilians and other non-combatants.

**JUS POST BELLUM**

The just war theory majorly revolves around the two principles of war concerning the beginning and continuation of war, but what after the war has ended? This is a major question that always concerns the international authority for humanitarian laws. There are few criteria described which have to be met in order to be just. They are:

1.) Proportionality and Publicity: - Settlement should be public and should not be about revenge.
2.) Rights Vindication: - Most importantly the crimes that triggered the just war should be remedied.

Discrimination:- The civilians should not be punished for the acts of the government.

Punishment: - Fair punishment should be meted out for leaders that endorsed war crimes, soldiers that committed war crimes from both sides of the conflict.

Compensation: - Financial restitution is okay, but a tax on civilians is not allowed.

Rehabilitation: - Transformation of the aggressor regime, demilitarization, human rights education, etc. This is really important and the most controversial one.

The problem with all of these criteria is that “History is written by the victors” and whoever wins the war generally decides most of the things. It is very difficult for the other side to object unless one has a very nice and objective international community.

**MORAL CONFLICT**

A war is only just if it is fought for a reason that can be justified, and that carries sufficient Moral grounds. States who voluntarily starting military aggression by use of force must demonstrate that there is a "just cause" to do so.

However, both civil war and armed conflict between two countries are mostly escalated to prevent wrongs and ill-treatment, which may be considered as just war.

**Example**- When there is a massacre going on inside a state or when a government is massacring some minority or maybe even not a minority a majority of its citizens like the way the Combonian Khmer Rouge regime did that it is just to go in and stop it by force if necessary, so those are the just occasions of war.

There is also justice in war "Jus in Bello", (Justice in the conduct of war) and that hangs mostly on issues of non-combatant immunity of discrimination of attacking only other soldiers so it hangs on a very old idea that war is a combat between combatants from which non-combatants
should be shielded, non-combatants means women and children, old men, medical personnel, religious officials and the merchants who sell weapons to both sides were in some account treated as non-combatants whom nobody should attack, but basically it also means the civilian population should not be subject to attack in war.

PROBLEMS WITH THE THEORY
Some people give following justification against the theory of just war-

Stronger has monopoly- There is an argument that a strong country violates all rules and regulations in war, while give lectures to the weak countries to abide by international law. Thus, weak countries should do whatever they can, and wage war by realism and relative strength, and should not revolve around a legal document.

Useless in Modern day conflicts- It is being said that “just war theory”, has nothing to do with modern day warfare and there is no place for ethics in war, as countries today possesses mass killing weapons such as nuclear, biological and chemical weapon which ultimatel downgrade the morality of war.

Ruthless to terrorists -This theory does not suit the ideology for terrorists, as abiding by such theories handicaps the victim of terror attack.

GROWTH OF RIGHTS OF WAR PRISONERS UNDER JUST WAR THEORIES
Prisoner of war (POW), a person captured or interned by a belligerent power during war. Within the rigid sense it's applied only to members of regularly organized soldiers, but by broader definition it included guerrillas, civilians who take up arms against an enemy openly, or non-combatants related to a military unit . Within the first history of warfare there was no recognition of prisoner of war, for the defeated enemy was either killed or enslaved by the victor. The women, children, and elders of the conquered tribe or nation were frequently disposed of in indistinguishable fashion. The detainee, whether or not an agile belligerent, was completely at the mercy of his conqueror, and if the prisoner survived the battlefield, his existence was dependent upon such factors because the supply of food and his usefulness to his captor. If permitted to measure, the prisoner was considered by his captor to be merely slightly of movable property, a chattel. During religious wars, it had been generally considered a virtue to place nonbelievers to death, but within the time of the campaigns of Caesar a captive could, under certain circumstances, become a freedman within the Roman Empire. As warfare changed, so did the treatment afford captives and members of defeated nations or tribes. Enslavement of enemy soldiers in Europe declined during the centre Ages, but ransoming was widely practiced and continued whilst late because the 17th century. Civilians within the defeated community were only infrequently taken prisoner, for as captives they were sometimes a burden upon the victor. Further, as they weren't combatants it had been considered neither just nor necessary to wish them prisoner. the event of the utilization of the mercenary soldier also attended create a rather more tolerant climate for a prisoner, for the victor in one battle knew that he might be the vanquished within subsequent. As warfare changed, so did the treatment afford captives and members of defeated nations or tribes. Enslavement of enemy soldiers in Europe declined during the centre Ages, but ransoming was widely practiced and continued whilst late because the 17th century. Civilians within the defeated community were only infrequently taken
prisoner, for as captives they were sometimes a burden upon the victor. Further, as they weren't combatants it had been considered neither just nor necessary to wish them prisoner. The event of the utilization of the mercenary soldier also attended create a rather more tolerant climate for a prisoner, for the victor in one battle knew that he might be the vanquished within subsequent, within the 18th century a replacement attitude of morality within the law of countries, or law of nations, had a profound effect upon the matter of prisoners of war. The French political philosopher Montesquieu in his L’Esprit des lois (1748; The Spirit of Laws) wrote that the sole right in war that the captor had over a prisoner was to prevent him from doing harm. The captive wasn't to be treated as slightly of property to be disposed of at the whim of the victor but was merely to be away from the fight. Other writers, like Rousseau and Emerich de Vattel, expanded on an equivalent theme and developed what could be called the quarantine theory for the disposition of prisoners. From now on the treatment of prisoners generally improved.

**WAR PRISONERS: GOVERNANCE AND REALITY**

“It’s always the fear of the unknown”

K. Nanda Cariappa, Retired Air Marshal

In 1906, the government of Switzerland made arrangements for a conference between thirty-five states to look into the areas for improving the propositions of the First Geneva Convention. In the amendments so introduced, there were provisions regarding the protection of the ones wounded or captured in battles as well as volunteer agencies and other medical professionals involved in the process. Recommendations regarding making repatriation of belligerents were proposed instead of making it mandatory. However, after the First World War, the necessity for further amending the pre-existing provisions was felt. Therefore, in 1929, newer provisions were introduced so that all prisoners of war could be treated with compassion and be allowed to live in humane conditions. Rules regarding the daily lives of prisoners were also laid down, and the establishment of the International Red Cross as a neutral organisation meant to collect and transmit data about prisoners of war and those wounded or killed in the process.

In this regard, the ‘prisoners of war’ must be defined. It has been put down in words in Article 4 (A)(1) of the Third Geneva Convention which is related to the Treatment of Prisoners of War [GC (III)]. They are defined as a person or persons captured or interned by a belligerent power during a war. It is, mostly, applicable to members of the armed forces, but they may include civilians who take up arms during a combat openly against an enemy, or non-combatants who are associated with military forces.

In recent times, the Indian Air Force Wing Commander Abhinandan Varthaman was captured by Pakistan after the incident of air strikes between India and Pakistan. While some argue that Wing Commander Varthaman was entitled to receive treatment as a prisoner of war, in the legal sense of the term there was no declaration of war by either of the states involved. To answer that, reference may be made to Article 2 of the Geneva Conventions which clearly states that the provisions of this Convention “shall apply to all cases of declared war or to any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them”.

www.supremoamicus.org
Overall, the whole point behind laying special emphasis on the treatment of prisoners of war is that those detained in armed conflicts must be treated with humanity irrespective of their allegiance, which is laid out in GC (III). These humane standards are something which is worth fighting for.

RIGHTS, REPARTION AND RELEASE

According to the Geneva Convention POWs cannot be prosecuted for taking direct part in the hostilities as their detention cannot be treated as a form of punishment, they are detained only with an aim to prevent further participation in the conflicts. Also, there are some disciplinary sanctions that are provided to these prisoners of war. Firstly, according to Article 118 they shall be released and repatriated without delay after the cessation of active hostilities. On repatriation any article of value impounded from them under Article 18, and any foreign currency which has not been converted into the currency of detaining power shall be restored to them. Prisoners of war against whom criminal proceedings are pending, can be detained till the end of the proceedings or till the completion of their punishment. The same is applicable for those who were already convicted for an indictable offence and were sentenced to punishment depriving them of liberty. The Geneva Convention also lays down the rights of the Prisoners of War as it is considered that a crime cannot reduce a person into a non-person, so he is entitled to all those rights that are provided to a non-prisoner. First and the foremost right is Right to be Treated humanely in all types of circumstances. They shall be protected against any kind of violence, as well as intimidation, insults and public curiosity. Any unlawful act or omission by the detain power which can cause death or any serious injury endangering the health of the prisoner in custody is prohibited. The International Humanitarian Law also laid down some minimum conditions of detention that cover issues like accommodation, food, clothing, hygiene, medical care of the prisoners etc. They should be respected in all circumstances. No prisoner of war may be subject to physical mutilation or medical or scientific experiments of any kind that are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest. The women should be treated in the same manner as men are treated. There should not be inequality in treatment on the basis of gender, sex, etc. Every prisoner of war when questioned on any subject, is bound to provide only his surname, first name, rank, date of birth, personal or serial number etc. If he refuses to answer the questions, he cannot be threatened, insulted or exposed to any unpleasant treatment of any kind and also the detaining powers cannot coerce or torture him to secure the information.

INTERNATIONAL HUMANITARIAN LAW AND COVID-19: RIGHT TO UNIVERSAL HEALTHCARE

While all human activities have basically paused around the world due to Covid-19, places such as Yemen, Syria, Congo, and South Sudan, have not seen much of a slowdown in military activity. The number of people in armed conflicts, enfeebled by years of fighting in wars, devastations, erosion of basic services (like food, health, educations), and displacement, are especially vulnerable to the spread of Covid-19 in the current pandemic. Most of the people depend on the humanitarian relief for their own survival and those...
people are the populations under siege or cut off from basic services that are needed for them to live, detainees, and displaced persons. As nations take measures to avoid the spread of Covid-19 (such as restrictions on international travel, social distancing), freedom of movement of humanitarian workers, transport of medical equipment, medicines and other goods, and humanitarian operations are hindered, leaving some people without support and help. Finding an equal balance between the legitimate right or duty of States to protect and ensure the public health and well-being, and the requirement for humanitarian relief and access by impartial humanitarian organizations is much awaited and this is thing is done by International humanitarian law (IHL) or also called the law of armed conflict and under this, IHL provisions give parties to the conflict, third States and international humanitarian organizations significant ground rules to guide the dialogue on humanitarian access and the provision of humanitarian activities, including when a pandemic, like Covid-19, erupts in times of armed conflict. In rules governing humanitarian access, in conjunction with general international law, set a framework of laws for what each party may and may not do while striking an equitable balance between health necessities, military essentials, and humanitarian action.\(^{145}\)

PROTECTION OF RIGHT UNDER IHL:
Medical personnel, facilities, and transport
As shown by the outbreak of Covid-19, what is the necessity now? Sufficient staff


and well-equipped medical facilities are necessary for providing medical care on a large scale. Under International Humanitarian Law or for that matter under any circumstance, medical personnel, units, equipment and transports exclusively allocated to medical purposes must be duly respected and protected under all situations. There must be an assurance and maintenance of medical hospitals and establishments by the occupying power in the occupied region. Also, protecting services and ensuring good public health and hygiene is the sole motive of IHL in the current scenario. In addition to this, IHL has also given the possibility of setting up hospital zones for the diseased that may be purely dedicated to addressing the current pandemic. All these provisions are explicitly stated in Rules 25, 26, 28, 29, and 35 ICRC Customary IHL.

Water
Though the earth’s territory is covered with 70% of water, still there is a crisis for potable water in many parts of the world. Clean Water supply is one of the most important jobs at this time. In wars and armed conflicts, all the installations which were made for providing potable water to the people were destroyed by fighting over decades.\(^{146}\) Any interruption with water supply means that hundreds and thousands of people will be left with no water, which means no way to sanitize themselves and their place which is the basic requirement for stopping the spread of this disease. Rules 15 and 54 ICRC CIHL Study clearly states that IHL prohibits attacking or destroying any objects which are meant for human survival which includes installations

of drinking water also and constant care must be taken during military operations to spare these important objects.

**Humanitarian relief**

Humanitarian action in countries affected by armed conflicts and wars is crucial in saving lives throughout the current crisis. Under Rules 55, 56 ICRC CIHL of international humanitarian law, each party associated to armed conflict bears the first responsibility to satisfy the essential desires of the population under its control. Impartial humanitarian organizations like the ICRC have the proper right to supply their services. Once relief schemes are agreed by the parties involved, the parties to the armed conflict and third States shall permit and facilitate the fast and unimpeded passage of the humanitarian relief subject to their right of control (e.g. by adjusting any pandemic-related movement restrictions to allow victims to access humanitarian goods and services). Sanctions regimes and other restrictive measures. The COVID-19 outbreak requires the mobilization of significant humanitarian resources, at present, that often lack in War hit countries. Sanctions and other restrictive measures currently can impede impartial humanitarian action in these regions, to the detriment of the most vulnerable and endangered. Sanctions, regimes and other precautionary measures that hinder Unbiased humanitarian organizations, such as the ICRC, from carrying out their exclusively humanitarian activities in a significant manner are incompatible with the letter and the spirit of international humanitarian law. States and international organizations that enforce such measures should confirm that they are parallel to international humanitarian law and do not have a grievous impact on the principal humanitarian response to COVID-19. They must devise effective mitigation measures, such as humanitarian exemptions which benefit the impartial humanitarian organizations.

**Persons specifically at risk**

People with old age or disabilities or vulnerable to diseases or medical history have lower immune as compared to others. Transients, shelter searchers, and exiles are especially vulnerable to episodes of COVID-19 because they are open to harsh environments and are also restricted from accessing fundamental administrations like medical services. Rules 109, 110 and 138 ICRC CIHL Study states that IHL provides aid to wounded and sick people and evacuates them and proper medical care help and care is provided.

**Internally displaced persons, migrants, asylum seekers, and refugees**

People who are certainly at risk for severe illness if infected by COVID-19 are older persons, those who have a weak immune system, and those with pre-existing health conditions. Other people, especially people with disabilities, may have to deal with different barriers such as communication, physical discomfort, etc. in accessing required health-care services as well as difficulties in implementing the required hygienic measures to prevent infection. For example, social distancing could be not possible for those people who completely rely on the support of others for everyday security, (April 9, 2020), https://www.justsecurity.org/69570/covid-19-and-humanitarian-access-for-refugees-and-idps-part-2-syria-and-bangladesh/.
tasks. It is required by International Humanitarian Laws to respect and protect wounded and sick persons, in addition to taking all possible measures to search for them and evacuate them without discrimination as soon as humanly possible. It is required that they receive assistance with the least possible delay that is required by their condition without discrimination. In addition to this, International Humanitarian Law provisions afford specific protection to older persons and persons with disabilities who are affected by armed conflict.

Detainees

We all are aware of the living conditions of the detainees. Their place of living is overcrowded, has poor or no hygiene, and lacks ventilation which becomes a huge challenge for the people there because all these conditions are not favorable for diseases like Covid-19 as this condition will make them more vulnerable. Under Rules 118 and 121 ICRC CIHL Study, it is clearly given that IHL should provide help to detainees’ health and hygiene and it must be safeguarded, also sick detainees must receive the required medical aid and care at the specific time.

CHALLENGES AND REALITY

Mental Torture, physical agony and a never-ending hope to return are some of the aspects that a war prisoner faces after his captivity. But the possibility of complete hospitable environment can’t be ruled out altogether. But this brings us to a question that why are these people met with such fate despite the provisions of the Geneva Convention and if there exist any loopholes what can be the remedies to it.

Detailed observations led us to the following conclusions for violation ideology:

No declaration of war: Fearing the notoriety in the UN, every country in the world that is fighting a war with its neighbouring country without declaring it to be a war. Resultantly, the prisoners who get detained in tussle never get the status of POWs and hence no rights. They are entitled as spies and met their fate.

The drafts, simple yet incomplete: The convention defines POWs and their right but lacks a system of checks and balances. There is no authorised body to check into the effective implementation of these provisions specially during the time of war.

Internal loopholes: No authority in the world can ever be forgiven for misleading and wrong information in regard to its people. The situation gains highlight in Journalist Chander Suta Dogra’s book ‘Missing in Action: the prisoners who did not come back’ where he writes “It is likely that the CO realized that Maj. Suri had gone missing due to errors made at his end; if the truth ever came out, his own leadership and performance would be questioned”.

All these factors lead to the atrocities, some of which are as discussed:

Cannibalism: It was in 1946 that a Japanese Lieutenant Hisata Tomiyasu was sentenced to death for this heinous crime. Reportedly no such instance has gained highlight after that. Not because it never happened but because it becomes easier to hide a crime.

Mutilation: The horrifying instance of Captain Saurabh Kalia and five other soldiers - Sepoys Arjun Ram, Bhanwar Lal Bagaria, Bhika Ram, Moola Ram and Naresh Singh who were tortured while in Pakistan’s custody. Worth remembering

that their mutilated bodies were handed over to India after 15 days.\textsuperscript{151} Mental agony: The harrowing experience of 3,000 POW is a proof that how some of the wounds go unattended. All POW recounted that one of the worst aspects of their captivity in Tibet was the constant attempt at brainwashing by Chinese Communist propaganda.\textsuperscript{152} Proving how it is not only the physical torture that matters a living. Physical torture: “All that a prisoner is expected to reveal are his name and his service number and not any more than that” despite clear mentions the war enemies torture and starve the POW to spread dominance.

CONCLUSION
The objective of international humanitarian law is to limit the suffering caused by warfare and to alleviate its effects. Its rules are the results of a fragile balance between the exigencies of warfare (“military necessity”) on the one hand and therefore the laws of humanity on the opposite. Humanitarian law may be a sensitive matter and it suffers no tampering. It must be respected altogether circumstances, for the sake of the survival of human values and, very often, for the sheer necessity of protecting life. Each and each one among us can do something to market greater understanding of its main goals and fundamental principles, thereby paving the way for better respect for them. Better respect for humanitarian law by all States and every one parties to armed conflicts will do much to assist create a more humane world. Conclusively it can be stated that Geneva Convention although much ahead of its time fails to tackle the new forms of atrocities that are laid on the POW. These lackadaisical methods of punishment and lip services do not work anymore because with strengthening ties of the world peace, the roots of hidden and more heinous forms of crimes are mushrooming. Thus, there arises-

- A need of body for check and balances,
- A forced implementation of rules by signatories,
- A determined judiciary to check all violations,
- Rehabilitation policies and
- An upgraded set of rules to incorporate what is left behind and will follow in the years to come.

COVID-19 represents a dramatic new threat to life in war-torn countries. International humanitarian law (IHL) provides an important legal framework that gives crucial safeguards to people suffering from armed conflicts. This overview summarizes a number of the important provisions of IHL which will be particularly relevant during the COVID-19 pandemic. Highlighting rights from Adequately staffed and well-equipped medical facilities to Water supply facilities, rights of a group of people, including older persons, those who have weakened immune systems, or those with pre-existing health conditions, are at particular risk for severe illness if infected by COVID-19, rights of poor Detention facilities, Internally displaced persons, migrants, asylum seekers, and refugees are particularly exposed to outbreaks of COVID-19. IHL has acted as a Conveyor in leading the countries to take Humanitarian action which is essential in saving lives during the ongoing crisis.

\textsuperscript{151} Theja Ram explainer: what the Geneva Convention says about the treatment of Prisoners of war The news Minute on 16 July 2020 at 3pm at https://www.thenewsminute.com.

\textsuperscript{152} Claude Arpi Exclusive! How China released Indian Troops after the 1962 war rediff.com on 16 July 2020 at 1 pm at https://www.rediff.com.
IMPORTANCE OF EDUCATION IN POLITICS

By Aksha Tarannum
From GITAM (Deemed to be University), Vizag

India is a country where many people do not have access to facilities like education, hospital, hygiene food etc. Now there are a billion people in India. India is the largest democracy in the world. It has the biggest number of people with franchise rights and the largest number of political parties. Since independence, India has had many political problems. There were problems such as unemployment, poor educational standard, balance of payment deterioration, large budget deficit etc. Even after 72 years of independence India faces the same problem. The question arises who should be blamed for such a scenario. Are the policy makers to be blamed? Are the middle men to be criticized? Are the depressed class people should be blamed? Well the problem lies in the roots and in this case a significant portion of the blame needs to be apportioned to the leaders. Though there are problems in most sectors, we can change our country a lot better. We can do a lot better, it should start with the parliament, when elite educated people sit in the parliament and make policies, only then India will be the most influential country in the world!

The people we elect represent us in government. They not only have to carry our decisions, but also they should foresee that the decision should not have any harmful effect in future. No doubt there have been enough examples of amazing politicians like the great Kamaraj who are not very formally educated. But we cannot ignore the fact that there are more than 70% of politicians who are uneducated and are dependent on their superior. India is the only country where politicians see parliament as a battle ground, ruling vs opposition, but they don't discuss problems together. Parliament is a place to raise the problems and accept inputs from all! But that's not happening, rather they blame each other, what's the point in blaming? Instead why don't they suggest or correct the opponent? By doing so it will ultimately be useful for India and its citizens. India is less progressive because of the government who thinks about their party before the nation as a whole. The minimum age to contest as an MP/MLA is 25 years. But the youth mostly concentrate on jobs, relationships, etc rather than participating in law making bodies. From our childhood we are being taught that 'study hard, get good marks, get a degree, get a safe and secure job'. The young politicians have a distinct advantage of gauging the aspirations of their age group. The young blood stimulates them to be more sensitive to all sections of the society and their idealism makes them less corrupt. As they can easily develop functional relationships with people, it becomes much easier to work with people to bring necessary and popular changes in the society. But these are only the necessary qualities, not sufficient, that an ideal is expected to show in India. As we all know that in India there is more than 50 percent of young age, mostly in India there are lots of younger and innovative people who didn't get a chance to prove themselves due to some holes in our system because of some corrupt politicians. There should be such a politician who can understand the problems of people whether he is young or old.

For a growing nation like India human development or mechanical development is important but education comes after hunger. At present after 65 years of independence hunger is not a problem but
education is. Thus, not only the general people but also the politicians must be educated.

According to Election Commission Of India Article 84(b) of Constitution of India provides that the minimum age for becoming a candidate for Lok Sabha must not be less than 25 years of age, must be a citizen of India, must be a vote for any parliamentary constituency in India but nowhere it is mentioned about the basic or minimum qualification required. The same things are required for the membership of Rajya Sabha except in respect of minimum age and representation. Article 75 of the Constitution of India provides that a Prime Minister must be a citizen of India, must be a member of the Lok Sabha or the Rajya Sabha and if he or she is neither a member of the Lok Sabha nor the Rajya Sabha at the time of selection, he or she must become a member of either of the houses within six months, must not hold any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Government, must be the age of either of two houses whose member he or she is. But in India qualification doesn't matter if a person is eligible based on above mentioned criterion. For example Indira Gandhi, who was considered as our best Prime Minister, was also not a graduate. She was the Prime Minister from 1966-1984 which shows that the agricultural growth was the highest it has ever achieved on the other hand industry’s performance was the worst. If we see other Prime Ministers like I.K. Gujral or Rajiv Gandhi did not complete their graduation. The Prime Minister is the senior-most member of cabinet in the executive of government in a parliamentary system. The Prime Minister selects and can dismiss members of the cabinet, allocates posts to members within the government; and is the presiding member and chairperson of the cabinet. But what if the Prime Minister itself does not have enough knowledge to select or to reject. Even today most of the MPs and MLAs are under graduate or illiterate. The importance of education for someone who represents a large number of people in Parliament cannot be overemphasised. About 75 per cent of MPs in the Lok Sabha have at least a graduate degree, while 10 percent are only matriculated. Interestingly, the percentage of MPs elected in 2014 general election about 13 per cent were of matriculated degree in comparison to the 15th Lok Sabha where the percentage was only 3 per cent.

The current Lok Sabha has only one literate MP, a member of the Telugu Desam Party(TDP).

If we compare the education level of the two biggest parties in the Lok Sabha, the BJP and the CONGRESS. BJP has a few fifth and eight pass MPs, 2 percent each whereas Congress has none. About 10 percent of the BJP’s MPs are 10th pass whereas only 2 percent of the Congress. In comparison the Congress has more 12th pass MPs (16 percent) than the BJP’s (10 percent). When it comes to graduates, the BJP beats Congress. About 23 percent of the BJP MPs are graduates while the number for the congress is only 14 percent. On the other hand the Congress has more graduate professionals such as lawyers, chartered accountants, and doctors than the BJP. The Congress also has more postgraduate MPs (39 percent) than the BJP (25 percent).

In Maharashtra in 2009, highly qualified legislators are not very common. Only 87 out of 284 MLAs, who emerged winners, hold graduate degrees while a merge 29 are postgraduates, as per the analysis conducted by Association for Democratic Reforms (ADR), based on their affidavits filed with the Election Commission. This
means only 31% MLAs are graduates and just 11% are postgraduates. The Delhi-based election watchdog mentioned that about 55 MLAs are matriculates (Std X passed) while 51 have cleared their Std XII. 1 candidate is illiterate while 4 have not even studied Std 5. 7 have cleared Std V and 11 cleared Std VIII. only 4 hold doctorate degrees. According to a 2014 survey, views on 21 most educated members of the 15th Lok Sabha, those with a PhD, did not reflect any better performance in promotion of literacy. Only 10 out of these 21 MPs scored above the national average when it came to better schooling in their constituencies. In terms of employment opportunities, even less-- 9 out of the 21 scored above the national average. By the above data we can easily understand the future of politics in India. Almost every post in India, educational qualification of a person is required, then why should it not be applicable for the politicians, who ultimately take decisions about the economy of India. Politicians become powerful administrators after winning the election. Then is it not necessary for them to need basic knowledge and education to perform the works. If a minister has no capability to read and understand files then how can he take proper decisions. It is not good for our country, but these things are common in many developing countries. There should be some basic screening tests that must be conducted in order to examine the critical situation. They need to understand how the economy functions and runs. These knowledge can only be better acquired by education. They are the decision makers of the country and education helps to take diplomatic decisions in any critical situation. Politics is a field that demands efficacious administrative skills. For that one should have a minimum knowledge about the country’s different dimensions including its culture, geography, law and order and so on. This itself implies the importance of quality education. They need education so that they understand the needs of people. They need to know current affairs, past events and relevant knowledge about their locality. Some leaders make their ruling by inheritance even though they are not having the education qualification. It should be avoided. Education is the vital tool for improving the economic conditions of our Nation. It’s not about getting so many degrees. It’s just a common sense every educated individual poses that should matter.

There are many ways by which we can improve procedure of election such as :-
A descriptive written exam should be conducted by the Election Commission. Questions may be asked from India’s history/culture, Freedom Struggle and Constitution.
- By bringing Manifesto under Section 420 of cheating. Candidates should be prosecuted if he doesn’t fullfill the manifesto promises if he or she wins. There should be imprisonment of 2-5 years and debarred from next election.
- Papers should be published showing the assets value that the person owns and their family, debarring from contesting anymore if there is falsification of documents.
- The maximum age limit for MLA and MP should be 60. Every politician should support one another on the development issues.
- Ministers of any department should be chosen on the basis of knowledge and experience not on the basis of his party seats.
- Every minister needs a business advisor who must be capable of being CEO of a 500 fortunes company.

For avoiding these problems we need to solve it from the root level by increasing
local self-government by empowering the local institutions i.e. panchayat system and urban local bodies. The system exists but is severely hampered by lack of rights for these bodies to take financial decisions on behalf of the communities/regions that they represent. For doing so people should also think for whom they are voting and making them into power, should enhance some development in the lives of poor people. In my views Indian politics can be changed only when the politicians mind set changes. Frankly speaking, if they do corruption there is no problem but just do 1 percent of work for the people there will be more development in INDIA.

As Swami Vivekananda said, “Education is the manifestation of perfection already in man”. No matter whether we are a politician or civilians, education is a right and mandatory process that every human should inherit.
S.53A, TRANSFER OF PROPERTY ACT - A SWORD TO ITS OWN SHIELD?

By Aman Mehta
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ABSTRACT

This paper primarily focuses on the doctrine of part performance and the recent trends regarding protection under S.53A of The Transfer of Property Act, 1882 in India with the question being asked that “has the protection of S.53A lost its importance after the enactment of Registration and Other Related Laws (Amendment) Act, 2001 (w.e.f. 24-9-2001)?” After the enactment of Act No. 48 of 2001 (w.e.f. 24-9-2001) S. 53A of the Act was amended and the words “the contract, though required to be registered, has not been registered, or,” were omitted from the said Section making the registration of deed transfer of an immovable property compulsory. The registration of sale deed was made a must after the amendment. Hence, if there was any other grievance or defect except registration, the help of the doctrine of part-performance and the protection under S.53A of the Act could be taken. However, a document had to be registered if it was made compulsorily registrable under S. 17 of the Registration Act, 1908 or under the Transfer of Property Act, 1882. Some scholars have suggested that after this amendment, the protection of S.53A has lost the importance it had prior to the amendment. The legislative intent behind S.53A is that it is seeking to protect the transferee by allowing him to retain the possession of the property, against the right of the transferors, who after the execution or completion of an incomplete instrument of transfer has failed to complete it in the manner specified by Law, without any fault of the transferee. Prior to the amendment, the doctrine of part performance provided a safeguard for the transferee against the transferor in retaining the possession of the property in circumstances where there was no fault on his part even when the sale deed was not registered. After the amendment, if the contract of sale is not registered then the Section and with it the safeguard does not have any application whatsoever. This adds another obstacle in getting protection under S.53A as there are already many necessary conditions for the application of S.53A. This paper analyzes the applicability of S.53A of the Act pre-amendment and post-amendment. The paper tries to find out if the amendment has proved to be a hurdle in seeking protection of S.53A, making it lose its importance that it used to hold before the amendment was enacted.

THE DOCTRINE OF PART PERFORMANCE

The doctrine of part performance was inserted in the Transfer of Property Act, 1882 (from hereby referred to as the TPA, 1882) via Section 53A by the Transfer of Property (Amendment) Act, XX of 1929 and was retrospective in nature. It came into force with effect from April 1, 1930. Prior to this amendment, the application of the English equity of part-performance was not very uniform and certainly not certain. There was a difference in opinion with respect to the application of this Section. In some cases, the doctrine of part performance was applied while in other cases, this was not the case. For example, in

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Mahomed Musa v. Aghore Kumar, the privy council had applied part-performance as explained in Maddison v. Alderson and had held that it could be applied to Indian cases. However, in Ariff v. Jadunath, the privy council did not apply the doctrine of part performance. This Section is based mainly on the principle of equity and the legal maxim “qui aequitatem quaereret, aequitatem agendum est.” meaning “He who seeks equity must do equity”. This maxim’s definition with context to S.53A of the TPA, 1882 is that it requires the one who is seeking the cancellation of an instrument to restore to the defendant the position occupied by the latter before the transaction sought to be nullified.

According to S.53A where any person takes possession of the immovable property in part performance of a written contract, and he has already performed or is willing to perform his part of the contract would mean that the transferor or any person claiming under him would be debarred from enforcing against the transferee (or any person claiming under him) any right in respect of such transferred property other than that provided by the terms of the contract. The Act of part performance must be an act done in the performance of the contract as distinct from those acts which are introductory or ancillary to such performance or merely accommodating and as such referable to some other arrangement. The principle of equity and part performance is developed under English Law. However, G.M. Sen, in his journal article, points out that the scope of the provisions of section 53A is very much narrower than the corresponding principle of part performance of the English Law.

CONCEPT OF PART PERFORMANCE UNDER THE ENGLISH LAW VIS-A-VIS RULE GIVEN UNDER S.53A

The Juristic concept of ‘part performance’ came to us from English Law. It was developed by the Court of Equity under the equity jurisdiction. The two significant cases that helped develop the doctrine of part performance were Maddison v. Alderson (as mentioned above) and Walsh v. Lanceley. However, there are key differences between the English Law of part performance and S.53A of the TPA, 1882. The English Law follows a more liberal approach while applying the doctrine of part performance as compared to the rule contained in S.53A. For example, the first key difference between the English doctrine of part performance and S.53A is that the English doctrine of part performance is also applied to oral contracts. In contrast, S.53A only applies to contracts those which are in writing and signed by the transferor. The second key difference is that under the English Law both the transferor and the transferee can claim as a plaintiff that the contract be specifically performed, however, as per S.53A only the transferee can invoke this Section, and the transferor or any person

154 AIR 1914 PC 27 (30): 42 IA 1: ILR 42 Cal 801: 28 IC 930
155 8 App Cas 467.
156 AIR 1929 PC 101
160 (1882) 21 Ch D 9.
claiming under him is debarred from enforcing this Section against the transferee. The third key difference is that under English Law the part performance of a contract gives rise only to equity and not to a legal right, in contrast under S.53A, the part-performance gives rise to a statutory right of defence.\(^{161}\)

**ESSENTIAL CONDITIONS FOR THE APPLICABILITY OF S.53A**

In *Kamalabai Laxman Pathak v. Onkar Parsharam Patil*,\(^{162}\) The Hon’ble Bombay High Court emphasized on the key ingredients of S.53A placing reliance upon the case of *Damodaran v. Shekharan*\(^{163}\) which laid down the five requirements of S.53A in a layman’s language. The ingredients required for the applicability of this Section are:-

(i) There must be a contract to transfer for consideration any immovable property;
(ii) The contract must be in writing, signed by the transferor, or by someone on his behalf;
(iii) The transferee must, in part-performance of the contract, take possession of the property or if the transferee is already in possession of the said property then he must continue to be in possession in part-performance of the contract;
(iv) The transferee must have done some act in furtherance of the contract;
(v) The transferee must have performed, or be willing to perform, his part of the contract.

In order to get protection under S.53A of the TPA, 1882 after one has proved its applicability, one has to satisfy three aspects, these are:-

a) There was an agreement for the sale of immovable property in his/her favour,
b) He/she was put in possession in part-performance of the agreement for sale, and
c) He/she has performed or is ready and willing to perform his/her part of the contract under the agreement.\(^{164}\)

The most crucial aspect for claiming protection under S.53A is the third and the last aspect. The transferee has to satisfy and prove that he/she had performed or was ready and willing to perform his part of the contract under the agreement. If the transferee does not plead that he did this and is unable to satisfy the Hon’ble court the same, the provision of the doctrine of part performance under S.53A would not be attracted, as observed in *Sohan Singh v. Guzari*\(^{165}\). On the other hand, If *prima facie* all the ingredients required under S.53A are present, then the transferee would be entitled to enforce his rights under this provision.\(^{166}\)

**S.53A OF THE TPA, 1882 AS A PROTECTIVE SHIELD**

S.53A is generally used as a defence and as a protection shield by the transferee in order to protect their possession of the property. It can only be availed as a defence, the transferee cannot take the benefit of this Section and claim possession, nor it confers a right on the basis of which the transferee can claim rights against the transferor.\(^{167}\) The transferee cannot make an independent claim, i.e., he cannot ask for a title on the

\(^{161}\) Ram Lal v. Bibi Zohrai, AIR 1939 Pat 296 at 303: 182 IC 18
\(^{162}\) AIR 1995 Bom 113, (1994) 96 BOMLR 641
\(^{163}\) AIR 1993 Ker 242
\(^{164}\) Lakshmi v. Karuppathal, AIR 2011 Mad 192 (195).
\(^{165}\) AIR 1997 HP 12: (1996) 2 Sim LC 95
\(^{166}\) Balaraja v. Syed Masood Rowther, 1999 AIHC 112 (Mad)
basis that all the conditions laid down in the Section are fulfilled. The right, which S.53A confers, is available only as a defence to protect possession against the transferor, it imposes a bar on the transferor from enforcing any right other than that expressly provided under the contract (not the case under English Law). This right can only be relied upon as a shield and not a sword, but the protection is available to the transferee both as a plaintiff and as a defendant so long as he uses it as a shield.\textsuperscript{168} Thus, it is well settled that S.53A provides for only a ‘defence’.

**THE REGISTRATION AND OTHER RELATED LAWS (AMENDMENT) ACT, 2001 (ACT NO.48 OF 2001)**

The Registration and Other Related Laws (Amendment) Act, 2001 (Act No.48 of 2001) w.e.f 24-9-2001 amended S.53A of the TPA, 1882 along with other sections of complementary legislations like the Registration Act, 1908 and the Indian Stamp Act, 1899. After the enactment of this amendment, the words “the contract, though required to be registered, has not been registered, or,” were omitted from S.53A. This has had a significant legal effect with regard to the protection granted under S.53A. The question that needs to be dealt with and answered is that has the protection of S.53A lost the importance and value it held prior to the enactment of the above-mentioned amendment act (48 of 2001). In the quest of answering this question, it is necessary to delve into the other supplementary legislations to the Transfer of Property Act, 1882. Along with amending S.53A of the TPA, 1882, Act (48 of 2001) also amended S.49 and S.17 of the Registration Act. It also inserted Item 23A in the schedule I of the Stamp Act requiring 90% of the stamp duty as a conveyance on the contracts for the transfer of immovable property in the nature of part performance under S.53A of the TPA, 1882.

S.49 of the Registration Act talks about “Effect of non-registration of document required to be registered”, the old, unamended Section is given below:-

\textbf{S.49 effect of non-registration of document required to be registered. -} No document required by Section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall –

(a) affect any immovable property comprised therein, or
(b) confer any power to adopt, or
(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instrument.]

The Registration and Other Related Laws (Amendment) Act, 2001 amended S.49 of the Registration Act and the words “or as evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act, 1882” (underlined above) were omitted.

\textsuperscript{168} V. Krishnaiah v. Narsimhareddy, AIR 1976 AP 395 (398); (1976) 2 APLJ (HC) 16.
Perhaps, the most important amendment came in S.17 of the Registration Act, the amendment made was that it inserted subsection 1(A) which stated that “the documents containing contract to transfer for consideration, any immovable property for the purpose of Section 53A of Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement then, they shall have no effect for the purposes of the said section 53A.”

POSITION OF LAW AFTER THE AMENDMENT ACT NO. 48 OF 2001

The legal effect that the above-mentioned amendments had was that now a purchaser or a transferee could not protect the possession he had over the property against the transferor via using S.53A as a shield if the agreement to sell was not registered and duly stamped. The present nature of S.53A is a lot different from what it was prior to the amendment. Prior to the amendment, even an unregistered and not stamped agreement to sell would have been admissible by the courts as evidence. However, reading the amended S.53A of the TPA, 1882 with the amended S.17 and S.49 of the Registration Act and even Item 23A in the schedule I of the Stamp Act, the position of law changes. After the 2001 amendment, now the agreement to sell has to be compulsorily registered and duly stamped (90% of the stamp duty) in order to be admissible in court and for the transferee to be granted protection under S.53A. However, the 2001 amendment was not retrospective in nature, so the contracts or agreements to sell which had been made prior to the amendment were valid and admissible as far as S.53A was concerned.

JUDGEMENTS UPHOLDING THE STATUTORY EFFECT OF THE AMENDMENT ACT

Post the amendment there have been various judgements where the court has held the agreement to sell, or any contract which was unregistered or not stamped or both were held to be not admissible in the court of Law as evidence. For example in Para 70 of Sukdev Singh v. Income-tax Ward – 6(3), Mohali it was observed that:-

“…..Now originally Section 53A of T.P. Act provided that even if “the contract though required to be registered has not been registered”, which means the right of defending the possession was available even if the contract was not registered but by Amendment Act 48 of 2001, the expression “though required to be registered has not been registered” has been omitted which means for the purpose of possession under S.53A of T.P. Act, the agreement referred is required to be registered.”

Taking another example, The Hon’ble Delhi High Court in Deewan Arora v. Tara Devi Sen in Para 6 of its judgement upheld the statutory effect of S.17 of the Registration Act and item 23A in the schedule I of the stamp act via which unregistered documents and documents whose 90% of stamp value was not paid would have no effect for the purposes of the said section 53A. The court held that the agreement to sell in the particular case was unregistered and ‘not so stamped’ and that

169 IT Appeal No. 1118 (Chd.) of 2011

170 163 (2009) DLT 520
according to the above mentioned amended sections, the agreement to sell would be inadmissible. Praveen Kumar Jain in his Legal article ‘Judgement in Deewan Arora v. Tara Devi Sen – A Critical Study’[171] has very cleverly put that ‘Section 17(1A) and item 23 A are exclusive twin pulling horses of its chariot.’

CONCLUSION

In light of the above discussion, it has to be said that the enactment of The Registration and Other Related Laws (Amendment) Act, 2001 (Act No.48 of 2001) proves to be a hurdle in seeking protection of S.53A making it lose the importance it held as a protective shield for the transferee prior to the amendment. Prior to the amendment, the position of the Law was more liberal and lenient. Even unregistered documents and documents not so duly stamped could be admissible as evidence in the courts of Law. This made it easier for the transferee to prove and verify their agreement to sell in order to grant protection under S.53A and use it as a protective shield of defence against the transferor asking for possession. In India, majority of the poor and even middle-class people are unaware & handicapped when it comes to paperwork. The Amendment Act of 2001 made it compulsory for a contract to be registered and duly stamped. S.49 was amended in such a way that it withdrew the exemption of registration of a contract filed in evidence under S.53A that the transferee’s earlier enjoyed. This proved to be a hurdle for many transferee’s as not everyone is aware of the legislative changes that keep on happening, nor many poor people can go the extra mile and register and stamp their papers. This amendment act in question has diluted the defence of S.53A in which the transferee could protect his possession of the property. In my opinion, the Amendment Act no. 48 of 2001 has proven to be a sword to its own shield.

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INSURABILITY OF E-COMMERCE RISKS. WHAT INDIA CAN LEARN FROM USA?

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Abstract
The concept of Consumerism has witnessed a transitional shift from traditional commercial transaction of services to electronic mode of commercial transaction of services which has brought out a significant change in the dynamics of the business world. With the advent of technology, the commercial transaction of services conducted electronically on the internet has risen and has contributed abundantly in the growth of the E-Commerce Industry. The role played by the platforms who act as intermediaries in extending services to consumers often face many risks which in the long run may threaten their operation of business in the market. It is undeniable that there are a lot of insurance issues that crop up in the third party liability risks in association with e-commerce activities. It has been a subject of debate among insurance professionals that the coverage of e-commerce risks for corporate insured’s only includes a part of the coverages needed to answer affirmatively in relation to the liability risks associated with e-commerce activities. Moreover, there are gaps in traditional insurance policies with respect to e-commerce risks and this in turn poses a question for extension of insurance policies either in combination of standard commercial general liability and umbrella policy or a need for a separate policy for better outreach to the insured. Taking these things into consideration, there is a necessity to evaluate and analyse the suitability of insurance policy models adopted in the United States and in India. This paper analyses on these aspects and evaluates the need to come up with special e-commerce insurance policies for improvement of the efficiency of the Insurance Sector.

Keywords: Third Party Liability, Commercial General Liability, Umbrella Policy, Traditional Insurance Policies.

1. Introduction
2.
3. With the burgeoning of e-commerce space as a place for commercial transactions, there are multiple risks that e-commerce platforms face. Some of them are consumer related, product related, service related, intellectual property related and cyber theft related. A large part of these risks are being litigated in courts or arbitrated leaving these platforms looking for ways of risk mitigation. They turn to insurance companies to cover their risks. Insurance companies insure these risks either through a Traditional Commercial General Liability (CGL) policy and Umbrella Policy or through separate policies for each type of risk. Even then, there are gaps between their coverage and the platforms liabilities. The jurisprudence on this subject has evolved differently in USA and in India; the adequacy of law in India is also studied. Standard CGL policies and umbrella policies do not cover all the risks that e-commerce platforms face, there are many gaps in their coverage which force these platforms to adopt several insurance policies to cover their risks. The jurisprudence on the coverage of CGL in the USA has been quite contradictory as different cases state different interpretations. There is a need to adopt some of the liberal interpretations in India.
The adequacy of laws in India can be studied with reference to the IT act of 2000, and intermediary guidelines. Besides these, there are Intellectual property laws in India which lay down what constitute infringement. Contractual obligations are also part of the laws behind the risks in e-commerce contracts but they are not insurable. However, there is no recommendatory model insurance policy or law to govern CGL for e-commerce platforms, the need for such a guideline/law/recommendation is evaluated in India.

4. II. Gaps in Insurance Policies and Need For Special E-Commerce Insurance Policies

5. 2.1 Standard Commercial General Liability or Umbrella Policy Coverage Is Not Sufficient For E-Commerce Risks and third party liability risks?

Yes, there exists a gap in Traditional Insurance policies in relation to e-commerce risks in India as these policies are not sufficient enough to include all the coverage’s with regard to liability risks connected with e-commerce activities. In order to fill those gaps the integration of both Standard Commercial General Liability and Umbrella Policy is not enough for e-commerce risks as it only provides for the rights of privacy caused by the utterance of the publication of the information. There are various risks that are related with e-commerce platform that will prove problematic for coverage under the traditional Commercial General Liability and umbrella policy. Following are the risks which may be encountered by the e-commerce platform:

- Invasion of Privacy
  E-commerce platform creates a risk of liability with regard to invasion, infringement, interference in relation with rights of privacy which may be controversial for the traditional CGL as well as umbrella Insurance policy. The reason behind this is that the traditional policy provides coverage for invasion of rights of privacy. A CGL or umbrella insurer of such a claim will face problems which will result in denial of coverage on the issue that the insured’s liability has nothing to do with the disseminating information but rather to do with the gathering of information. There is a loophole in the fact that CGL policy language does not cover dissemination of information but e-commerce platform face such liability.

- Infringement of Intellectual property Rights
  E-commerce platforms face liability in infringement of intellectual property rights which are covered in some CGL policies and umbrella policy but some of these risks are excluded because of the following reasons. Firstly the coverage respond only to the injury which arises out of the insured’s advertising activities. The coverage under CGL policy excludes the injury or liabilities faced because of third party advertisement on its website are denied under the coverage’s.

- Damage to third person’s computer data, software, programs or computer network.
  There is a risk of liability related to data, software, programs. The term damage as

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172 Michael Rossi, “Cyber and Privacy Risk and Insurance” (2000)
https://www.irmi.com/articles/expert-commentary/third-party-liability-e-commerce
defined under CGL policy and umbrella policy whether the claimant is seeking damages because of the property damage. The interpretation of the term property damage is related to tangible property and will not apply to non-tangible property. So there exists a loophole in the interpretation of the definition and until it is resolved there exists a potential gap in traditional CGL and umbrella coverage for e-commerce risks.

**Gaps in Traditional Insurance Policies with respect to First Party e-commerce risks**

First party risks are the risks generally covered by commercial property policies which also provides liability coverage in relation to first party losses. When a third party imposes a liability on the insured for a loss that is recognised as a first party loss under the policy. There is a gap in traditional insurance policies in respect to the first party risk which all risks policies include that there must be a physical loss or damage to property to trigger both the property damage and time element. But in some cases nonphysical event e-commerce loss in which the computer server hosting the website has been attacked.

Another gap occurs is by the indemnity period provisions. Legal liability and first party risks produced by e-commerce activities can be managed in part by indemnity and insurance provisions in contract. But some of the risks faced by companies conducting e-commerce activities are unique to those activities, traditional indemnity and insurance provisions are not simply are not adequate for e-commerce activities. Indemnity period provisions of a commercial property policy which determine the time period from inception of a loss for which the insured gets to claim coverage. The indemnity provisions in standard commercial property policies are not well suited for all e-commerce risks even if the e-commerce event at issue triggers coverage in the first instance. Regardless of the indemnity provisions inserted into the contract the person reviewing the contract must understand how the indemnification of third party claims for intellectual property infringement, privacy, pure financial loss, and bodily injury and property damage including data. These provisions must be reviewed and negotiated in order to ensure that the risks which company wants to be defended and indemnified by the service provides are properly addressed. Another gap for e-commerce risks has to deal with valuation issues for stolen computer data, software or programs. Whereas standard commercial property policies that have been slightly amended contain detailed valuation provisions for lost or damaged data, software or programs. Such policies typically provide coverage for the lesser of the actual cash value of the stolen property or replacement cost but it is not clear how much if any coverage will be provided for stolen electronic data processing media (EDP).

In order to close the gaps the insured could amend one or more policies to cover the gap at issue the insured in express language to its commercial property policy describing all the different types of loss events it could

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3 ibid.
experience with respect to its computer system, data, software, programs etc and then stating all of such events shall be deemed physical loss or damage for the purpose of coverage under the policy. Also in case of indemnity period the insured can also amend the indemnity provisions to such special physical loss or damage so that the time element coverage matches up with the e-commerce risks. An insured can also amend the valuation provisions in its commercial property policy. In this way, whether the property is stolen by a third person or by an employee of the insured the coverage provided by the different policies in the insured program should be the same.

2.2. Closing Gaps for Liability Risks with New E-Commerce Insurance Policies

The insurance companies in order to fill or close the gaps has come up with the e-commerce insurance policies which is “Net Advantage Internet Professional Liability Policy”, “Safety Net Internet Liability Policy”, “E-Risk protection policy” with increase of e-commerce products in order to respond to liability risk. 177 The above mentioned e-commerce insurance policies are offered by United States to insure various types of liability risks faced by e-Commerce platforms. In case of companies having only Standard Commercial General Liability (CGL) policy can purchase one of the new e-commerce insurance policies is a suitable option. The companies while dealing with e-commerce liability risks need to consider following points. Firstly, the e-commerce platform need to understand that at the time of buying the e-commerce insurance policies they are not limited to the aforementioned coverage. Secondly the insurance policies related to e-commerce must be properly checked to make sure that the coverage mentioned covers all the professional liability which would otherwise be covered in professional liability. Thirdly, regardless of the policies the ecommerce platform must amend its Standard CGL and Umbrella policies in order to fill the existing gaps in insurance policies to cover those risks.

2.3. Closing the Gaps for Liability Risks with Traditional Insurance Policies

In order to fill the existing gaps with regard to traditional insurance policies and to prevent liability risks. In case the insured’s who already have professional liability and multimedia coverage shall analyse their programs and come to an outcome that there is any gap and in case a gap is identified close it by further amending the policies. Regardless of the coverage’s built the insured shall also consider that is there any adjustments that should be made to the CGL policy and Umbrella Policy in order to insure e-commerce risks which is covered by that coverage. Finally in order to minimise the overlapping of coverage’s it should be properly reviewed and if there is a further gap then amend the policies.

2.4. Need for New E-commerce Insurance Policies for closing the gaps.

There is a gap in the insurance policies to cover the e-commerce risks. In order to close the gaps the insurance policies is not sufficient alone to cover all the issues. To fill those gaps following new e-commerce insurance policies have been introduced to protect the e-commerce risks. Some of the policy includes marsh’s Net Secure Program, underwritten by a consortium of insurers, E-Risk policy from Fidelity and Deposit companies; secure system policy and network policy. These programs provide for the first party coverage and liability coverage where the insurer can

177 ibid.
pick and choose the coverage’s. These policy forms are in a state of flux, with the insurers apparently reviewing each other’s forms to try the addressal of the same issues as much as possible. The policies above mentioned provide some form of coverages for each of the issues raised above. One way for the insured to close the gaps in coverage is simply buy one of these policies at least on a difference in conditions or difference in limits basis. If there is any falls in the e-commerce loss of the insured’s program as constituted by traditional policies, the stand-alone e-commerce policy should respond to loss. As there exists gaps in the traditional insurance policies and umbrella as discussed above. Following policies have been mentioned in order to fill those gaps. The liability risks are discussed in relation to first party liability and third party liability risks in this paper. For covering the e-commerce which is not covered under both the policies there is a need for establishment market for stand-alone e-commerce policies which will focus only on the e-commerce risks in order to fill those gaps which are not covered under the traditional insurance policies and umbrella policy. In contradiction some corporate insured’s do have all the three of these coverage’s either in stand-alone policies or liability policy at a primary or umbrella layer. In their opinion there is no need for any of the new stand-alone e-commerce insurance policies.

III. Implementing USA’s Jurisprudence on CGL Policies in India to cover E-commerce Risks

3.1. Where it all began in the USA

Commercial General Liability (CGL) Insurance has been in place in the insurance sector for a long time and is generally preferred by businesses to cover risks or losses arising out of bodily injury or damage to property. E-commerce businesses are a rather recent development which came much after the issuing of CGL policies. E-commerce companies, by the nature of their risk taking behaviour, realized the need to insure themselves. The problem of interpretation of the traditional insurances came up before the judiciary regarding risks that were never contemplated before the advent of the internet.

3.2. Issues

Most CGL Policies in the US contain two part of coverage. Coverage A deals with Bodily Injury and Property damage, whereas Coverage B deals with Personal and Advertising Injury Liability. Their positions for coverage of each risk are different for first-party (e-commerce platform) and third-party coverage (final consumer or person suing e-commerce platform). “Questions started to arise about:-

- Whether property damage included ‘intangible property’ or not?
- Whether business interruption is ‘Personal Injury’?
- Whether Privacy is a “Personal and Advertising Injury”?

6.

3.3 Landmark Cases with evolving jurisprudence

Two landmark cases on the subject of Intellectual Property coverage are American Guaranty and Liability Insurance Co v Ingram Micro Inc179 and State Auto

178 Douglas R Richmond, 'A Practical Look at E-Commerce and Liability Insurance' (2001) 8

Property and Casualty Insurance Co v Midwest Computers and More\textsuperscript{180} that reflect contradictory views on the same subject in the same country by different courts.\textsuperscript{181} While in the former the US District Court for the District of Arizona ruled that property includes ‘intangible property’ in first party all risk coverage policy, in the latter the US District Court for the District of Oklahoma ruled that loss of property cannot be covered under a third party liability policy. Although CGL Policies today have explicit wording to exclude Intellectual Property infringements, a large part of the liability depends on the interpretation of the Courts. To avoid this uncertainty, insurance companies have started offering other specific policies which cover risks that standard CGL policies do not such as Cyber Insurance Policy, Product Liability Insurance Policy etc.

Business interruption has been interpreted in certain cases to be included within ‘injury’ only when it relates to third party injury. Invasion of privacy on the other hand requires proof of ‘publication’ of personal information to be covered under CGL.\textsuperscript{\textit{182}} In some cases even utterances to a third person is considered publication.\textsuperscript{183} In other cases, this requirement meant publication to a large number of persons.\textsuperscript{184} Similarly, advertising injury has had divergent views as to whether “true advertiser’s” advertising should be covered or whether even limited advertising on websites are covered.\textsuperscript{185}

\textbf{3.4. An argument for implementation in India}

In India, the development of e-commerce sector is probably because the internet was introduced only later on in India than in the US and e-commerce business models operating in India are mostly Indian branches of foreign e-commerce companies. Even the ones established in India have borrowed the idea from the West. Learning lessons from the West and since the top general insurance companies in India are joint ventures between Indian and foreign insurance companies, they adopted the later models or templates of CGL insurance which explicitly excluded many of the risks that e-commerce companies face.

The reasoning used in Ingram’s case must be implemented in India to include intangible property in CGL coverage. Otherwise e-commerce platforms will have to buy several policies just to cover their unique risks. CGL policies must evolve over time; however it is going too far to expect that insurance companies will expand their scope of coverage especially toward businesses that are not risk-averse. In that case, the Indian judiciary must adopt liberal interpretation to accommodate these risks within the coverage.

Indian insurance companies have started to offer Cyber Risk Insurance, which is crucial for e-commerce platform considering the amount of data stored online; they still do not cover business related risks. The other alternative is for insurance companies to issue e-commerce risk insurance; this development has already started taking place in the USA, but does not

\textsuperscript{180}Civ. 99-185 (D. Ariz. April 19, 2000)
\textsuperscript{181}Richmond (n 7)
\textsuperscript{182}Ratts v. Board of County Commissioners, 141 E Supp. 2d 1289, 1324 (D. Kan. 2001)
\textsuperscript{183}Ratts v. Board of County Commissioners, 141 E Supp. 2d 1289, 1324 (D. Kan. 2001)
\textsuperscript{184}Marleau v. Truck Ins. Exch., 37 P.3d 148, 153-54 (Or. 2001)
not seem probable in India in the near future. With that being the case, the only solution is for CGL coverage to be expanded to encourage businesses in the e-commerce sector, in exchange for which the insurance company may charge a high premium.

IV. Inadequacy of Indian Laws to cover E-commerce Risks

E-Commerce has revolutionized the way businesses are functioning today across the globe. It has made the buying and selling of goods and services much easier than the traditional approach adopted by retailers to capture the market. Though at the periphery, it may seem uncomplicated and an easy way of doing business, there are a variety of legal issues and factors that crop up which e-commerce businesses need to take into consideration once it’s ready to takeoff and storm the market. In India, there is no specific or comprehensive legal framework that deals with e-commerce business however; relevance is placed on the Information Technology Act, 2000 and its amended act, The Trademarks Act of 1999, The Copyright Act of 1957, The Indian Contract Act of 1872 to regulate the e-commerce business. There are certain discrepancies and issues in these legal provisions which need to be plugged in and there’s a necessity to draft a separate comprehensive framework for the promotion and growth of ecommerce sector in India.

4.1 Legal issues in E-commerce

With the extension of online business space in India, new issues are developing. These issues are regular to all the legal provisions referenced over that regulate e-commerce businesses and present a hazard to the e-commerce platforms. The primary issue is that of privacy and security as tended to under section 3 of the Information Technology Act, 2000 and 3A of IT Amendment Act, 2008 and section 67&72 of IT Act, 2000 and sections 66E, 67,67A, 67B and 72A of IT Act, 2008 separately. The personal data of the customers goes through different degrees of interface which compromises the delicate private subtleties of customers. Another issue that endures in e-commerce business is consumer protection. It is not clear whether online trading and business amounts to providing service as defined under CPA and would it include service online and delivered offline. Thirdly, data protection is another issue which has developed to a significant extent because of access to technology where there is a constant threat to tentative users who divulge certain data on e-commerce platforms for consumption of services. Fourthly, Content Regulation is another issue that online businesses face as they are the sole host or distribute third party data/content. This is tended to under section 79 of IT Amendment Act of 2008 and is prevalently known as the "Safe Harbor Rules" where these platforms go about as "intermediaries" while dealing with third party information. Intellectual Property issues additionally crop up and present an extraordinary risk to e-commerce platforms. The IT Act, 2000 deals with certain parts of copyright violations on the internet except sections 43 and 65 of the Act which covers some aspects of copyright. Additionally, the Trademarks Act of 1999 doesn’t give enough protection to domain names and is

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along these lines not extra-territorial in nature. The IT Act 2008 does not address the jurisdictional issues.\textsuperscript{187}

### 4.2. Need for a comprehensive Legal Framework

A comprehensive legal framework is required for the development and better addressal of issues that e-commerce companies deal with. In India, the Information Technology Act deals with e-commerce activities and with the amended act of 2008, the government has come with a legislation that would reduce the punishment in most cases, reduces the power of police, providing compounding at executive level even for criminal offences without consent of the victim, makes it difficult to apply penal provisions, provides immunity from vicarious liabilities for intermediaries against any law in the country.\textsuperscript{188} The Act does not create rebuttal presumptions of confidentiality of trade secrets and information. In the absence of strong protection of data theft and privacy nothing is left for Indian outsourcing industry and the absence of an effective remedy for corporations is likely to further erode the confidence of the Indian industries in the new e-commerce legal regime.\textsuperscript{189} Thus, with the above issues and gaps in the IT Act, there is a dire need to come up with a sound and comprehensive legal framework that specifically deals with e-commerce activities which would plug in the reasons to barriers and promote growth of the e-commerce sector in India. There can also be a setup of a separate body or a coordination platform carved out by the Ministry of Electronics & Information Technology which specifically drafts and recommends policies, standards for insurance companies which address varied legal issues and coverage policies touching upon the e-commerce sector. Moreover, a proper establishment of a common information pooling platform is needed wherein all e-commerce transactions could be recorded and reported by law to better understand and fulfill the gaps in coverage policies.

### V. Conclusion

E-Commerce sector is the most booming sector in the country, and given the number of transactions it undertakes of million numbers of people, it is something which is growing at a tremendous rate in India. The amount of goods and services that the consumer buy or sell or get into contact with e-commerce platforms every day or each hour or minute of the day gives rise to contractual obligations which can be violated by the sellers or by third persons, here referred to e-commerce platforms/companies. Thus, it is imperative in such cases to understand in detail the insurance framework which covers e-commerce risks. The research undertaken in this paper points that there are certain gaps in the traditional insurance policies being offered and moreover, there is a need to adopt the way CGL policies are interpreted by the US Courts in India. Moreover, there is also a pressing need to introduce a separate and a comprehensive law for e-commerce activities in order to plug in the forthcomings in the Information Technology Act, 2000 and 2008 and other provisions loosely governing e-commerce activities in India.

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\textsuperscript{187} Dr. Sumanjeet, The State of E-Commerce Laws in India: A review of Information Technology Act (2010) 1, 273

\textsuperscript{188} ibid.

\textsuperscript{189} Sumanjeet (n 15).
INFODEMIC – ANOTHER PANDEMIC TO FIGHT

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Introduction
The Director General of the World Health Organization, Dr Tedros Adhanom Ghebreyesus, has stated: “We are not just fighting an epidemic; we are fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as dangerous.” This article attempts to delve into the phenomenon of fake news and see how it can be prevented with the help of legislations. While doing so, the conflict between the freedom of expression and the restrictions placed on it to curb the spread of fake news will be reconciled using John Stuart Mill’s Doctrine of Free Speech, and few important Supreme Court judgments.

The problem regarding the spread of misinformation is certainly not new; however, the threat is more imminent now, when COVID-19 has posed a serious challenge to mankind. The term “fake news”, being a neologism, does not find a place in leading dictionaries. We can gather its definition from various sources. Fake news refers to fabricated news, found in traditional news, social media, or fake news websites, has no basis in fact, but is presented as being factually accurate. It refers to misinformation, disinformation, or mal-information. Disinformation refers to false information that is deliberately created to harm some people; whereas, misinformation refers to false information that is created without intending to harm anyone. Mal-information is based on reality but, used to inflict harm on a person or a social group. The spread of fake news can happen via two modes. It can be spread by journalists through media, or by private citizens, via social media. Both of these should be considered while formulating the spread of fake news.

Fake news during COVID-19
The Government of India announced the lockdown on 24th March 2020, to prevent the spread of Covid-19. Many speculations regarding the nature of lockdown and the availability of essential commodities lead to wide unrest. Even the popular news channels were guilty of circulating fake news. On 15th April 2020, “Public TV”, a Kannada news channel, broadcasted an item “HELICOPTER MONEY”, which was false and mischievous. Ever since the virus outbreak, while scientists were Economic Perspectives 31(2) https://web.stanford.edu/~gentzkow/research/fakenews.pdf accessed on 27 April 2020.


still trying to figure out the origin and cure, many false theories were propagated regarding the virus. Social media was flooded with various fake news suggesting the reasons for the outbreak and different kinds of cures that had no scientific backing. Few individual’s medical records were made public, violating their privacy rights. There were also instances of fabricating and circulating false medical reports. All these led to the formation of a certain myth regarding the virus while, the actual precautionary measures that one needs to take, did not gain much prominence. This widespread misinformation created unnecessary panic amongst the civilians rather than re-sherthing them that we can fight this virus together.

The presentation of the news also matters when it comes to media reports. The kind of words used to describe an incident, or picture selection to showcase the incident has a huge role to play. The ‘Norms of Journalistic Conduct’ published by the Press Council of India in 2010 states: “In general, the caste identification of a person or a particular class should be avoided, particularly when in the context it conveys a sense or attributes a conduct or practice derogatory to that caste”. Similar rules apply in case of disclosing the religion of an accused or a victim. Not following these guidelines creates a stigma regarding a particular community and this has led to communal conflicts during the lockdown period.

Freedom of Expression and Fake News
We have established the definition and consequences of fake news. Before exploring the legislative tools that are available to combat the spread of fake news, we need to check whether the imposition of restrictions is justified. For this purpose, I’ll briefly put forth the Doctrine of Free Speech by John Stuart Mill, and the constitutional status of freedom of the press.

J.S.Mill’s Doctrine of Free Speech
Furthering the concept of inalienable natural rights by John Locke, the libertarian philosopher J.S. Mill, argued that truth drives out falsity, therefore the free expression of ideas, true or false, should not be feared. Truth is not stable or fixed but, evolves with time. Mill argues that whatever one expresses is his/her opinion and to put a restriction on that would amount to a deprivation of basic human rights. The core of his argument suggests that most of the assumed truths have turned out to be false, and hence falsity should not be a ground to restrict free speech. This argument, although might seem extreme, is not meritless. If we consider the present scenario, there is still a difference of opinion regarding the origin of the virus. What was initially held to be true has turned out to be false, and hence falsity should not be a ground to restrict free speech. This argument, although might seem extreme, is not meritless. If we consider the present scenario, there is still a difference of opinion regarding the origin of the virus. What was initially held to be true has turned out to be false, and hence falsity should not be a ground to restrict free speech. This argument, although might seem extreme, is not meritless. If we consider the present scenario, there is still a difference of opinion regarding the origin of the virus.

196 Press Council of India, Norms of Journalistic Conduct, 2010
197 Ibid.
power can be used to restrict freedom of speech if it’s affecting the rights of another person \(^{200}\). What he meant by affecting the rights of others is left to interpretation and whether the publication of fake news affects any rights of another individual is an open question.

The issue at stake here is the right of a person to know the accurate information. Especially when we are dealing with a pandemic about which there is virtually no correct information available, spreading fake news affects the rights of another person to access correct facts and figures of the current situation.

**Freedom of expression under the Indian Constitution.**

Fundamental right to guarantee ‘freedom of speech and expression’ is provided under Article 19(1)(a) of the Indian Constitution subject to the qualifiers under Article 19(2). It has a long history in the form of Amendment I in the year 1951. Being upset by the Supreme Court’s decision on the Crossroads case\(^ {201}\), upholding the right to freedom of speech and expression against the government’s restrictions, the then leaders sought to remove the qualifier ‘reasonable’ from the clause to prevent judicial review\(^ {202}\). As of now, the Government can make laws imposing reasonable restrictions on the right to freedom of speech and expression in the interest of the sovereignty and integrity of India, the security of the state, friendly relations with foreign countries, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense.

Various judgments also provide the extent of the freedom of expression and the power to restrict it. The recent one being *Shreya Singhal v. U.O.I.*\(^ {203}\), where the Supreme Court struck down Section 66A of the Information Technology Act,2000, as it goes beyond the restrictions provided under Article 19(2). The freedom of the press is regarded as a species of which freedom of expression is a genus\(^ {204}\). Since freedom of the press is derived from Article 19(1)(a), all the restrictions mentioned under Article 19(2) apply to it. The essentials of freedom of the press include:

1. Freedom to access all the sources of information either of one’s views or borrowed from someone else or printed under the direction of the person\(^ {205}\).
2. Freedom of publication.
3. Freedom of circulation\(^ {206}\).

The situation becomes complex when misinformation is spread in the name of one’s view or another individual’s view. The Supreme Court has held that it is covered under Article 19. That does not lead to the conclusion that the media can report any such views expressed by an individual. In the case of the *U.O.I v. Association for Democratic Reforms*\(^ {207}\), the Court has stated that “One-sided information, disinformation, misinformation, and non-information, all equally create an uninformed citizenry which makes democracy a farce.” Through this judgment, it becomes evident that journalists have a duty to check the authenticity of the claims made by persons in their capacity.

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\(^{200}\) Idib.


\(^{203}\) AIR 2015 Sc 1523

\(^{204}\) *Sakal Papers v. U.O.I* 1962 SCR (3) 842.

\(^{205}\) M.S.M. Sharma v. Sri Krishna Sinha, AIR 1959 SC 395

\(^{206}\) Supra note 13

\(^{207}\) (2002) 5 SCC 294
All the judgments highlight the freedom of the press, but how these decisions can be utilized and implemented in the realm of social media is something that should be pondered upon. Though the form might be different, the substance is still the same. The same rules apply to people sharing their opinion, or anyone’s opinion on the social media platform. Since the spread of the rumors creates panic and anxiety among people, any reasonable restrictions placed on the freedom of speech and expression to ensure public order will not amount to a violation of Article 19.

Controlling the spread of fake news
To control the spread of fake news, the cooperation between stakeholders like the Government, civil society, the media, law enforcement authorities, etc., is significant. Additionally, the public also has a huge responsibility in preventing the spread of fake news. The lockdown might have prevented the spread of the virus, but it has certainly not contained the spread of fake news; in fact, the spread of fake news has increased. People should use fact check apps like Boom208 to verify the messages they receive or the posts they come across on social media. Various social media applications have started working towards curbing fake news. Mark Zukerberg, the C.E.O of Facebook, posted on Facebook, “Through this crisis, one of my top priorities is making sure that you see accurate and authoritative information across all of our applications”. In their process of curbing fake news, they have identified economic incentives to be one of the major reasons for the spread of fake news. A majority of fake news that is published has a financial motive. It is generally done by spammers masquerading as legitimate news publishers and posting hoaxes that get people to visit their website, which is mostly ads, which in turn gets them money209. Hence, it is necessary to eliminate such monetary incentives.

The legal tools available to penalize disinformation and mal-information should be used efficiently. Section 505(b) of the Indian Penal Code, 1860, provides for imprisonment up to 3 years, or fine, or both, for causing or likely to cause fear or alarm to the public. This can be read with Section 54 of the Disaster Management Act, 2005, to combat the current crisis. When it comes to social media posts and forwarded messages, the Government can block the content under Section 69A and intercept, monitor, and decrypt communication using Section 69(1) of the Information Technology Act, 2000. However, in using these tools, the Government needs to increase accountability and responsibility, and infuse reasonable checks and balances in exercising surveillance powers, as it involves curbing the right to privacy of an individual. A balance needs to be struck between individual rights and societal interests.

Conclusion
The 17th century English poet, John Milton wrote: “Give me the liberty to know, utter, and to argue freely according to conscience, above all liberties” 210. Freedom of speech and expression is vital to any democracy. But does it mean that such freedom is absolute and unfettered? Milton however, seems to argue that the freedom of speech and expression is guaranteed to honour the truth, and not for the sake of the freedom

208 BOOM Live https://www.boomlive.in/about-us/
itself. If we allow the spread of fake news in the name of freedom of speech and expression, we will be doing contrary to what Milton argued.

The Government should also not exercise its power arbitrarily in censoring the media. Since the courts are not functioning in their usual capacity, the Government should provide for a redressal mechanism in case any individual’s right to freedom of speech and expression is violated. There are also suggestions to make use of artificial intelligence to combat the spread of fake news which reduces the possibility of arbitrary use of power. Further, the fight against any pandemic can only be fought efficiently with the true spirit of collectivism rather than to seek refuge in legislations; Afterall, necessity overrides all the laws.

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CRIME AGAINST WOMEN & MEDIA AS AN AIDE

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Abstract

In spite of the awareness regarding the violence against women and acceptance of the state to fight against all the vicious agents falling in the periphery of violence against women, according to National Crime Record Bureau it is increasing sprightly. Violence against women is a social, economic, developmental, legal, and educational and a health issue; hence it is a kind of hindrance to India’s developmental path. Violence against women dates back to the history of mankind, as mentioned in ‘Mahabharata’. And to overcome this problem it is essential to tackle various other concurrent issues that act as contributing factor and thus play an equally important role. Media acts as watchdog to protect public interest against malpractice and create public awareness so this paper deals with how media can be effectively utilized for eradicating problem, place of women in society, how violation against women is affecting the developmental efforts of India, forms of violence against women, do laws fall short in some aspects, role of UN’s Declaration for Elimination of Violence Against Women, 1993 and The Protection of Women from Domestic Violence Act, 2005 in overcoming this ever-growing problem. Also, this research analyses the importance of media, role of media and its effect on the society.

Keywords: Violence against women, media, development efforts.

Introduction

From household maltreatment to assault as a weapon of war, savagery against ladies is a gross infringement of their human rights. In addition to the fact that it threatens ladies' wellbeing and their social and monetary prosperity, brutality likewise upsets worldwide endeavors to decrease destitution. While then again the spread of social shades of malice like settlement passings, kid marriage, aggressive behavior at home, assault, inappropriate behavior, abuse of ladies laborers are wild in various pieces of India. Numerous elements are known to impact open observations about brutality against ladies, right now information paper we inspected the job of news and data media. We discovered that media portrayal contemplates rule investigate in the territory. All things considered, these investigations show that the media much of the time mirrors society's confusion and faltering about severity against women. Regardless of the way that the association between media specifying and direct isn't settled, examinations of group gathering show that media can play an occupation in scattering legends and reinforcing information about the authentic nature and level of the issue. Lamentably, writing about viciousness against ladies that challenges rather than strengthens social and social standards about sexual orientation is still the minority. There remain holes in our insight with more research required with regards to the effect of news inclusion on open understandings, mentalities and practices and how-to best specialty intervened messages to all the more viably advance positive social change.
Crime against women as a social issue

1. It is a social issue because many social causes are responsible for the crimes which are committed against women. These causes include Inferior status of women due to social obnoxious social conditions, unpleasant family atmosphere and also not to forget Patriarchal structure of the society.

2. In Indian scenario, man occupies loftier status and women solely become his accessory. A woman is never considered as solitary in her own right, she is, first the daughter, next the wife and last the mother of a man. Without a man, her existence is treated as a myth. To maintain their supremacy, Men are consciously taught to be belligerent and rigid while women are conditioned to be acquiescent and quiet. And that’s the reason why official statistics show a declining sex ratio, health status, literacy rate, work participation rate and political participation among women.

While on another side of the scenario the spread of social evils like dowry death, rape, sexual harassment, child marriage, domestic violence, exploitation of women workers, disparities in wages is widely spreading in different parts of India.

Crime against Women: An Economic Issue

5. The conversation encompassing the connection among ladies and financial advancement goes back to the mid-1970s after Esther Boserup's weighty work: 'Lady's job in Economic Development'. Wrongdoing against ladies is a significant mishap to sexual orientation equity. Sex equity is a sort of ‘smart economics’ for three main reasons -

1. If it is achieved it removes all the hindrances which are there to prevent women from having the same access as men to economic opportunities, education, and productive inputs.
2. It improves women’s absolute and relative status which contributes to other developmental outcomes.
3. If women and men have equal opportunities to become socially and politically active, shape policies, and make decisions, it will lead to more representative and more policy choices.

Violence against women can’t be taken as an economic issue unless and until we don’t take an account of the way the debate has been sprightly growing in the international arena. Last 20 years have been totally characterized for the globalization of both protection of women right and neoliberal ideas. Crime against women is an economic issue because it is a major setback to economic efficiency as mentioned by World Bank in its Developmental Report “… gender equality matters instrumentally, because greater gender equality contributes to economic efficiency and the
Crime against women as a health issue
Crime against women can be considered as a health issue because according to World Health Organization it has genuine effect on wellbeing. Ladies who are casualty of savagery can be truly harmed however they are additionally bound to create, in addition to other things, habit, mental infections and concepitive medical issues. Crime against women is a health issue for two obvious reasons:

1. It affects the wellbeing and physical health of victims, their families and society as whole.
2. It affects significant number of people: mainly girls, boys, and teenagers, young as well as grown women.

It is a health issue because wellbeing consists of both mental and physical health. The victims of this crime are injured physically but the impact of these kinds of acts disturbs mental health of the society. As these acts are of greater complexity, more it is difficult to cure the common physical wound.

Crime against women as a Legal Issue
Law is the instrument of the society and it is not static. To make it potent and beefy, it must keep pace with the society. Law is essentially enacted to maintain peace that means to fulfill the needs of the society, to prevent crime and punish criminals. But the attitude of courts in interpreting these laws is old-fashioned, rigid and in an anarchic way. The implementation of these laws is so poor that the offenders have lost all trepidation of authority, and it is sprightly increasing because they think that they can indulge themselves in the crime as if they have exemption from punishment. Legal machinery which includes police, advocates and the courts are responsible for the inefficient implementation of protective law.

Concurrent stage of Women in Society
In ancient Indian times, women held a high place of respect in the society as mentioned in Rigveda and other Scriptures. Volumes can be written about the status of women and their gusty deeds from the Vedic period to the modern times. On the other hand Manu states that a women is never self-dependent as in all three phases of her life she is looked after by firstly her father who looks after her in her childhood next husband who looks after her, in her formative age and then after her sons who hold and look after her in her old age. One of the main reasons behind current place of the society is the patriarchal structure of the society. Male domination is one of the main factors which are impacting the life of woman in all over the world.

It is not possible to study violence against women without understanding its past and the part the past plays in modern beliefs and behaviors. Historical, legal, literary and religious writings all confer to understand the unique status of women, status that consist of the basics of the explanation of why it is they have become the victims of this violence.

Impact of Media on Crime against Women
Ladies’ are the abundance of India and they have contributed in pretty much every field and caused nation to feel pleased at each event. They are in front, driving the nation, making achievements and wellspring of motivation for some however, another truth of Indian culture is that there is efficient segregation and neglecting of ladies’ in India, which could be as far as deficient nourishment, refusal or constrained access to training, wellbeing and property rights, kid work and aggressive behavior at home.
and so forth. The dread of sexual brutality has been an amazing element in limiting ladies’ conduct and feeling of opportunity. The battle against viciousness is really the battle against the inconsistent circulation of intensity both physical and financial between the genders. Media is the reflection of society and media reports are impression of happenings in the general public. Media has massive capacity to impact the majority and correspondence and IT upheaval has additionally expanded its significance. Tragically, these days media are faltering from its genuine job and giving one-sided data which makes advancement of the general public progressively troublesome. Depicting ladies as equivalents in the general public is a subject that has been given low need by the Indian media. The Indian media should be sharpened to sexual orientation issues and now should concentrate on ladies’ issues in a conclusive manner as their job is adverse for the ladies strengthening in India. In the light of these realities, the present paper canter’s around ladies’ issues in contemporary Indian culture and job of media in tending to the issues.

Role of Global Media Monitoring Project in Eradication of this Problem
In numerous nations, the same number of ladies as men are moving on from media, news coverage and correspondence degree projects and entering the business. In 1995, when the main considerable investigation of ladies’ media experts across 43 countries was created, ladies comprised around 40 percent of the media workforce. Ladies are urged not to go into ‘hard’ news beats and rather are directed into zones of news that are purportedly of more ‘enthusiasm’ to ladies and are additionally usually held as being less esteemed. A Monitoring Project (Global Media Monitoring Project (GMMP)) 2015 report found that 31 percent of stories on legislative issues and 39 percent of tales about the economy have female by-lines.

The advanced world is as liable to sustain a similar sexual orientation division that exists in the disconnected world as the inverse. There is little proof to recommend that computerized media are utilizing or advancing a greater number of ladies than different pieces of the media biology. The GMMP’s most recent discoveries propose that ladies’ deceivability as the two residents and media experts in online news destinations and Twitter channels was 26 percent, just two rate focuses higher than for TV, radio and print. The circumstance off-camera everywhere web organizations, which hold impact over which news content is displayed most obviously and are liable for balance of conversation and remarks, has been similarly desperate.

Notwithstanding the Global Media Monitoring Project, there are a few local activities which consistently screen gendered parts of the media, some of which additionally work with columnists to advance change inside newsrooms. The South Africa-based Gender Links, shaped in 2001 to advance ‘sex fairness in and through the media’ in Southern Africa, drives the media group of the Southern Africa Gender Protocol Alliance. Sexual orientation Links advances media promotion through worldwide activities, for example, the Global Alliance on Media and Gender (GAMAG), facilitating sex and media summits, creating strategy in a joint effort with controllers and working with media associations through preparing and approach improvement. Sex Links is presently creating Centre’s of Greatness for Gender in the Media in 108 Newsroom across Southern Africa.
In 2016, the World Association for Christian Communication (WACC), the Global Media Monitoring Project (GMMP) Network and various assistants pushed a campaign to end news media sexism by 2020. The ‘End News Media Sexism’ fight empowers and supports backing exercises that advance changes in media game plans and news inclusion practice. The campaign is embracing a multi-disciplinary system and usages a wide scope of instruments to advance mindfulness, including a sex scorecard against which media associations are estimated.

Role of Women in Media

Various associations, generally sex centered, have propelled committed prizes to perceive accomplishments of ladies in media. The International Women’s Media Foundation keeps on perceiving the bold work of ladies’ columnists. In 2007, the Alliance of Women Film Journalists’ started giving out the EDA Awards every year to perceive ladies’ producers and photojournalists. All the more as of late, in 2015 the African Development Bank started supporting a classification for Women’s privileges in Africa, intended to advance sexual orientation uniformity through the media, as one of the prizes granted yearly by One World Media.

Ladies’ achievements in the media part have since a long time ago stayed under-perceived by conventional expert and news associations, a pattern that remaining parts unaltered. Ladies have won just a fourth of Pulitzer Prizes for remote announcing and just 17 percent of grants of the Martha Gellhorn Prize for Journalism.

In considering the manner by which ladies’ commitment to the news condition is made unmistakable, the UNESCO/Guillermo Cano World Press Freedom Prize is a yearly honor that respects an individual, association or foundation that has made an outstanding commitment to the resistance and additionally advancement of press opportunity anyplace on the planet. Nine out of 20 champs have been ladies.

The Poynter Institute since 2014 has been running a Leadership Academy for Women in Digital Media, explicitly centered around the aptitudes and information expected to make progress in the computerized media condition. Comparable activities have started to show up in different locales. UNESCO has additionally driven workshops media experts and network media in Gabon and Burundi, as a feature of its worldwide endeavours to improve sexual orientation balance in the media.

At no other time in history have media assumed such a significant job in the socialization of individuals and become such a necessary and steady piece of individuals’ regular daily existences. The media have the ability to transmit messages and pictures of the world. They are not just reflections of the world; they are dynamic shapers of observations and thoughts. In the course of recent years, the media have become ground-breaking and focal entertainers in developing and understanding nearby and worldwide get-togethers. As foundations, they shape social and social perspectives, sway on legislative issues and open arrangement, and even impact news coverage.

Conclusion

Sex based viciousness, particularly fierce wrongdoings like assault, is a multifaceted issue. Despite the fact that the fuse of stringent laws and stricter disciplines are essential to discourage individuals from perpetrating such wrongdoings, the answer for this is significantly more than just proclamation. In spite of the fact that the change to criminal law tends to the couple
of this issues, it despite everything misses the mark in numerous viewpoints. In a nation like India where sexual orientation separation is being worked at such a large number of levels and from multiple points of view, achieving the required change requires committed and joined endeavors of numerous organizations. Despite the fact that the status of ladies in India, both truly and socially, has been one of the regard and respect, however the hard truth is that indeed, even today, they are battling for their own character, yelling for dissemination of their voices and battling for their own regard. Consistently, they cross among the apprehensions and full for distinction. Notwithstanding the sacred assurance of balance of genders, wild segregation and misuse of ladies in India proceeds. The occurrence of lady of the hour-consum ing, lady battering, attack and sick treatment of ladies are on increment. Ample opportunity has already passed since ladies ought to get a good and stately situation in the Indian culture. Mindfulness in the ladies just as society ought to be made what’s more, their equivalent rights ought to be viably executed. Violations against ladies ought to be made culpable and an exploration ought to be finished on each wrongdoing which goes to the light. In the time of globalization and with unrest in methods for correspondence and data innovation, the media job has gotten more urgent for ladies strengthening in India. The Indian media presently should concentrate on ladies issues in a conclusive route as their job is impeding for the ladies strengthening in India. It is basic that the media ought to commit a decent level of their projects to make mindfulness among ladies furthermore, the general public everywhere, give data about ladies’ privileges and hardware to approach for their overall advancement. Projects to fortify ladies advancement ought to be authorized and news antagonistically influencing their improvement ought to be blue-penciled or prohibited.

Along these lines, the far-off dream of ladies strengthening in India can be acknowledged with the help of media, government and NGOs. As Swami Vivekananda properly said that “The country which doesn’t regard ladies will never turn into an amazing extraordinary country, media should move in the direction of giving ladies their much-merited status”.

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CULPABLE HOMICIDE AND MURDER

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Abstract

Law is an important mechanism for regulating a society. It also brings about a social change. India is a country of various diversities. The legislature after keeping in mind the various factors like languages, caste, demographic factors, etc., time and time again introduce various tools for the effective regularization of society. Penal laws are one of them which provide for the punishment to the culprits who have done something wrong. Indian Penal Code, 1872, is the most important of them. The sections in the code are exhaustive and are interlinked with others as well. The most technique Among most them all is the difference between Section 299 & 300. Law students are often confused while trying to find out the difference between these two sections in respect of their clauses. There is very thin line of distinction which separates the two. The supreme court had many occasions visited the provision of the code and marked the basic different between the two. In this report I have tried to highlight some of the legal precedent which will help you to understand the difference between the two.

The major difference lies in the fact that in murder the act is done with an intention of causing any bodily injury which itself is sufficient to cause death of a person whereas in a case of a Culpable Homicide, the act is performed with intention to cause bodily injury which is likely to cause death of a person.

Introduction

Section 299 of Indian Penal Code and Section 300 of Indian Penal Code deals with the concepts of Culpable homicide that doesn’t amount to Murder. Both mean, to harm a person but there are certain things that makes Murder differ from Culpable homicide. Hence, the problem arises here in the fact that both Murder as well as Culpable homicide are concepts that relate to harming a person, but the difference shall be decided based on final outcome of a certain act.

Section 302 of Indian Penal Code deals with punishment for Murder where the convict of a Murder is punished with death or imprisonment of life and shall also be liable to fine. Murder is a cognizable offence and it is non-bailable. And Section 304 of Indian Penal Code says about punishment for Culpable homicide not amounting to Murder. Where punishment for Culpable homicide is imprisonment for life or imprisonment for a period of 10 years and shall also be liable to fine. Culpable homicide is also a cognizable offence and it is a non-bailable offence as well.

Murder and Culpable homicide can be differentiated with certain points. Also, there are certain ingredients to say that the act of a person or a suspect is said to constitute a Murder as well as a Culpable homicide that does not amount to Murder. The common ingredients are “actus reus” and “mens rea” where the person would have caused harm to a person by certain act. As above discussed, the difference lies in the knowledge of outcome of the act he or she does. This paper aims to analyze the differences between Murder and Culpable homicide in detail which in addition will study the ingredients of Murder and the ingredients of Culpable homicide too.
Culpable Homicide (Section 299):

Homicide means killing a human being either by lawful means or by unlawful means. Whereby the lawful homicide comes under the ambit of general exceptions in Indian Penal Code under Section 76-106. And the next one is the unlawful homicide which comes under the category of offences against human body in which Section 299 of IPC specifically deals with Culpable homicide which does not amount to Murder, then Section 300 of IPC talks about Murder and lastly Section 304A which deals with the concept of Death by negligence in which death would be caused by any rash or negligent act.

When dealing with concept of Culpable homicide, Section 299 of Indian Penal Code comes into play. This section says that whoever causes death to a person by doing certain act with any intention of causing death or with the knowledge of doing such act to cause death to a person is said to be an offence of Culpable homicide. There are certain exceptions to this concept and they are to be broadly discussed below: Culpable homicide when not amounts to murder – A Culpable homicide does not amount to murder is the offender acts without a self-control by a sudden provocation and that act amounts to death of a person by mistake or by an accident. Here the provocation is not voluntary and such provocation should not be against anything in law or against a public serving who is in lawful exercise or his powers and also one should not be provoked against anything done in lawful exercise of any right of private defense.

A Culpable homicide does not amount to Murder when an act is done with an intention of good faith with effect of any probate defiance of person or private defense of property, where it exceeds the power which is given to him by the provisions of law and thus causing death of a person against whom he is exercising such right of private defense without any intention of causing more harm than necessary at that point of time for the purpose of private defense.

Culpable homicide will not amount to Murder when the offender, in case of being a public servant or a person serving and acting for the advancement of public justice or aid for public does any act that exceeds the powers which are given to him by law and by that act any death is caused which he is believed to be in good faith and to be lawful or necessary for the discharge of his duty without ill-will towards the person.

Culpable homicide does not amount to Murder when it is said to be committed without any premeditation or as a sudden fight in any heat of passion which is a result of a sudden quarrel and where the offenders taken any undue advantage or having acted upon in a cruel or unusual manner.

Murder (Section 300):

Murder, this term traces its origin form the Germanic word mouth where it means secret killing. Murder means when one person is killed with an intent of another person with any malice or a forethought. It can also be said as a serious offence when compared to Culpable homicide. Moreover, an offence will not amount to Murder unless it includes an offence which falls under the definition of culpable homicide. To broadly explain, we can say that Murder is a species where Culpable homicide is a genus.

The Culpable homicide amounts to murder except in some cases, wherein the act which caused murder should be done with an
intention to cause death or Such intention of causing death should cause a bodily injury to that person or If such intention of causing death causes a bodily injury and that bodily injury must have caused the death of that person or He must have the knowledge that the act he has done is immediately dangerous in all probable sense to cause death or a bodily injury that is likely to cause death of a person. And it is a crime to commit an act, even after knowing that the act he does is a risk of causing death or such injury.

**Essentials**

**Ingredients or essentials of Culpable Homicide:**

The following are the essentials of culpable homicide:-

1) Causing of death of a human being;
2) Such death must have been caused by doing a act;
3) The act must have done:
   a) With the intention of causing death; or
   b) With the intention of causing such a bodily injury as is likely to cause death; or
   c) With the knowledge that the doer is likely, by such act, to cause death.

I.

**Ingredients or essentials of Murder:**

The following are the essentials of the Murder:-

1) Prosecution must establish, quite objectively, that a bodily injury is present.
2) The nature of the injury must be proved. These are purely objective investigation.
3) It must be proved that there was an intention to inflict that bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended.

**Cases**

**Culpable Homicide:**

- In *Kusa Majhi v. State of Orissa*\(^\text{211}\), the deceased admonished her own son for not going for fishing with the co-villagers. Infuriated on this the accused, the son, brought an axe and dealt blows on her shoulder and she died. There was no preplans or premeditation. The blows was not her on neck or head region. The accused dealt blows to cause bodily injury which was likely to cause death and he dealt blows on the spur of moment and in anger. Therefore, it was held to be a case of culpable homicide falling under this section.

- In *Munnilal’s*\(^\text{212}\) case, the accused on the chest of the D and began strangle him and did not desist despite intervention by his relations. D died owing to internal bleeding due to rupture of the spleen which was enlarged. It was shown that the other injuries were not sufficient to cause death had the spleen not been ruptured. The fact of the spleen being enlarged was not known to the accused. Here the accused was held a guilty of culpable homicide under the second part of Section 304. D, as a bulger breaks into a house carrying an unloaded pistol which he intends to use frighten the inmates of the house should be detected. The owner of the house confronts the bulger who thereupon points the empty gun on him. The owner dies for fright. In this case D would be a liable for culpable homicide not amounting to murder second part of section 304.

**Murder:**

\(^{211}\) 1985 Cri. L.J. 1460.

\(^{212}\) Munnilal, A.I.R. 1943 All. 853.
In Namdeo v. State of Maharashtra\(^{213}\) the appellant Namdeo and the deceased Nianji were residing in one and the same village and relation between them were stained. The reason was that the accused suspected that some of his animals died due to witchcraft played by the deceased. On October 25, 2000, the deceased, Nianji was sleeping in the backyard of his house. At about 2.00 to 3.00 am, Sopan, PW-6 son of deceased Nianji heard shouts of his father calling “Bapare, Bapare”. On hearing the cry Sopan and his wife rushed towards the back of his house where his father was sleeping. PW-6, Sopan show that the accused was giving the blows on the head of his father nianji. On seeing Sopan accused fled away from the pace taking axe in his hands. Sopan chased him but could not catch him. The medical opinion was that the injury was sufficient in the ordinary course on nature to cause death of the victim. The Supreme Court held that considering the nature of weapon used by the accused and the vital part of the body of the deceased chosen by him for inflicting injury, it was clear that the intention of the accused was to cause death of the deceased. Therefore, in the circumstances of the case it was covered by Section 300 of the Indian Penal Code.

In Veku alias Velumurgan v. State through Inspector of Police\(^{214}\), it was alleged that accused person armed with knives and sticks assaulted deceased and informant. Injured was sole eye witness to occurrence and he has given in the detail role played by the each of accused person. His presence at a time of occurrence cannot be ruled out in a view of injuries sustained by him. In this case occurrence take place in the evening whereas FIR was logged after six hours in night. Deceased and informant sustained multiple injuries. Normal conduct of human being is to save their lives and rush then to hospital. When Sub-Inspector of police come to know about the incident he went to hospital and it is in hospital that informant had given report to police. Delay in lodging first information in no way affects credibility of the case prosecution. It was held that testimony of eye witness is reliable and corroborated by medical evidence. Further, evidence of doctor who recorded dying declaration of deceased also lends support to the case of prosecution. Therefore, convicting of accused person was held proper. If a person stabs another in the abdomen with sufficient force to penetrate the abdominal wall and the internal viscera he must be held to have intended to cause injury sufficient in the ordinary cause of nature to cause death.

### Distinction between Culpable Homicide and Murder

<table>
<thead>
<tr>
<th>Culpable Homicide</th>
<th>Murder</th>
</tr>
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<tbody>
<tr>
<td>A person commits culpable homicide, if the act by which the death is caused is done</td>
<td>Except in the cases hereinafter expected culpable homicide is murder, if the act by which death is caused is done</td>
</tr>
<tr>
<td>a) with the intention of causing death;</td>
<td>1) with the intention of causing death;</td>
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b) with the intention of causing such a bodily injury as it likely to cause death;

2) with the intention of causing such bodily injury as the offender known to be likely to cause the death of the person to whom the harm is caused;

3) with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;

4) with the knowledge that the act is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death.

c) the knowledge that he is likely by such act to cause death.

Conclusion

There is a thin line difference between culpable homicide and murder. Culpable homicide is a gene while murder is the species. Murder includes culpable homicide but, culpable homicide does not include murder in all cases. Culpable homicide is a wider term than murder. To decide whether a particular act falls under the domain of murder or culpable homicide first of all the facts have to be ascertained and then intention and knowledge of the person who caused the death or bodily injury have been ascertained. If the intention or knowledge is higher, then, the case would fall under the ‘murder’ or otherwise, it would fall under the ‘culpable homicide.'
SECONDARY MARKET: ISSUES AND REGULATORY FRAMEWORK

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ABSTRACT
Outstanding securities are traded in the secondary market, which is commonly known as stock market predominantly deals in the equity shares. Securities market in India has grown exponentially as measured in terms of amount raised from the market, number of stock exchanges and other intermediaries, the number of listed stocks, market capitalisation, trading volumes and turnover on stock exchanges, investor population and price indices. Along with this, the profiles of the investors, issuers and intermediaries have changed significantly. The market has witnessed fundamental institutional changes resulting in drastic reduction in transaction costs and significant improvements in efficiency, transparency and safety. The author will discuss the issues and challenges that the secondary market is facing and analyse each problem.

1.1 INTRODUCTORY
Capital market is imperative for the development and advancement of an economy. Presently individual investors, annuity finance, shared reserve, insurance fund; mutual funds place their cash in different instruments of the capital market. Thusly feasible and even minded advancement of capital market has gotten fundamental.

A market which bargains in securities that have been as of now gave by organizations is called secondary market. It is otherwise called stock exchange. It is the base whereon primary market is depending. The secondary market is otherwise called aftermarket and is money related market which at first issues monetary instruments such a stock securities alternatives and future offers purchased and sold. The term secondary market is additionally used to allude to the market for any pre-owned merchandise or resources or elective Use of a current item or resources where the client base is second market.215

All through the different stages, capital market in India has encountered development and simultaneously, a few bottlenecks were additionally experienced. over two decades have slipped by after India acknowledged the globalization strategy as a weapon for money related segment changes. From confined system, gradually the economy moved towards open economy. Rather than control and limitation, the words the executives and advancement were utilized much of the time. Indeed, even legitimate phrasings were additionally loose to some degree. The market capitalization, every day exchange volumes expanded significantly during the most recent two decades. As the private just as remote venture was permitted in different areas, it gave a tremendous lift to the capital markets in India. On the off chance that we take a gander at the list numbers or offer costs of organizations, there has been immense rise after 1991, after commencement of budgetary part changes. Be that as it may, when this was occurring, there were a few issues and limitations being created in the money

215 https://shodhganga.inflibnet.ac.in/bitstream/10603/23733/12/12
related market all in all and capital market specifically.216

1.2 CAPITAL MARKET
Financial markets are said to be markets where monetary exchanges are directed. Financial exchanges by and large allude to creation or move of monetary resources, or assets otherwise called financial instruments or securities. Monetary exchanges channel assets from financial specialists who have an overabundance of accessible assets to guarantors or borrowers who must obtain assets to fund their spending. Financial markets comprise five essentials: the debt market (Debt instruments are exchanged), the equity market (Equity instruments), the foreign exchange market (where monetary standards are changed over with the goal that assets can be moved starting with one nation then onto the next. Exercises in the foreign-exchange market decides the foreign-exchange rate, the cost of one money as far as another), the mortgage market, and the derivative market.217 There are specifically two types of financial markets in an economy – capital market and money market.

Money market is a market in which only short-term debt instruments whose maturity is of less than one year are exchanged. Money-market securities are all the more generally exchanged and will in general be more liquid.

Capital markets are scenes where reserve funds and speculations are diverted between the suppliers who have capital and the individuals who are in need of capital. The elements that have capital incorporates; retail and institutional financial specialists while the individuals who look for capital are organizations, governments, and individuals. Capital markets try to improve value-based efficiencies. These business sectors bring the individuals who hold capital and those looking for capital together and give a spot where elements can trade securities. Capital markets are made out of primary and secondary markets. The most widely recognized capital markets are the securities exchange or stock market and the bond market. The primary market alludes to the market where securities are made, while the aftermarket is one in which they are exchanged among financial specialists. Different kinds of issues made by the enterprise are a Public issue, Offer available to be purchased, Right Issue, Bonus Issue, Issue of IDR, and so forth. The organization that brings the IPO is known as the issuer, and the procedure is viewed as a public issue. The procedure incorporates numerous venture banks and guarantors through which the offers, debentures, and securities can straightforwardly be offered to the speculators. It offers market for new shares or securities therefore is also known as New Issue Market. There is fixed price of share and can be sold only once. It assists with providing assets to maturing endeavours and furthermore to existing organizations for development and expansion. Here transaction takes place between companies and investors. It has no geographical boundary, there is no physical existence. The principle capacity of the

216 Available at, https://shodhganga.inflibnet.ac.in/bitstream/10603/23733/12/12_chapter_06.pdf, last accessed on 04-04-2020.


primary market is capital development for any semblance of organizations, governments, establishments and so forth. It assists investors with putting their investment funds and additional assets in organizations beginning new tasks or endeavours hoping to grow their organizations. Different methods of raising funds are there in primary market like offer through prospectus, private placement, rights issue, Electronic Initial Public Offer i.e. e-IPO.

Secondary market: A market which deals in securities that have been starting at now gave by associations is called secondary market. It is in any case called stock trade. It is the base whereupon new issue market is depending. The secondary market is in any case called secondary selling and is a cash related market which from the outset issues fiscal instruments such a stock securities choices and future offers bought and sold. The term secondary market is furthermore used to insinuate the market for any used product or assets or elective Use of a present thing or assets where the customer base is second market.

The securities are exchanged a profoundly regularized and legitimized within severe guidelines and regulations. This guarantees the investors can exchange without the dread of being cheated. In the most recent decade or so because of the headway of innovation, the auxiliary capital market in India has seen an incredible blast.

Market participants; following are the prominent participants of secondary market:

(a) Buyers and Sellers Intermediaries: An intermediary is commonly an organization that encourages the directing of assets among loan specialists and borrowers by implication. That is, savers (loan specialists) offer assets to a middle person foundation, (for example, a bank), and that organization gives those assets to spenders (borrowers). This might be as advances or mortgages. Alternatively, they may loan the cash legitimately by means of the money related markets, and dispose of the financial intermediary, which is known as monetary disintermediation.

(b) Depository: are organizations which hold your securities(Shares, securities, debentures, Mutual Fund Units) in electronic structure which is otherwise called dematerialization of shares or DEMAT account. Along these lines, Depositories are for the most part capable and responsible for safety's sake of your securities and track every one of your exchanges.

(c) Merchant bankers: As per SEBI rules, a merchant banker refers to, “any person who is engaged in the business of issue management either by making arrangement regarding buying, selling or subscribing to securities or acting as manager, consultant or rendering corporate advisory services in relation to such issue management”.

(d) Clearing houses: The clearing house enters the image after a purchaser and venders have executed an exchange. Its job is to unite the means that lead to settlement of the exchange. In going about as the broker, a clearing house gives the security and proficiency that is indispensable for monetary market dependability. Clearing houses take the contrary situation of each side of an exchange which incredibly diminishes the expense and danger of settling various exchanges among different gatherings. While their order is to diminish chance, the way that they must be both purchaser and merchant at exchange initiation implies that they are liable to default hazard from the two gatherings. To
alleviate this, clearing houses force edge necessities219.

1.3 SECONDARY MARKET AND FEATURES
The secondary market is commonly known as the stock market, otherwise called aftermarket, is the follow on of open contribution in the market. It is where stocks, bonds, options and prospects, issued beforehand, are purchased and sold. Basically, it is a commercial centre where securities issued before, are sold and bought. The Secondary Market gives the chance to financial specialists to purchase or sell shares recorded on the Exchange, after the underlying initial offering, securities are exchanged starting with one speculator then onto the next.

There are 19 perceived stock trades in India. Mangalore Stock Exchange, Saurashtra Kutch Stock Exchange, Magadh Stock Exchange and Hyderabad Stock Exchange have been derecognised by SEBI. As far as lawful structure, the stock trades in India could be isolated into two general gatherings – 16 stock trades which were set up as organizations, either restricted by ensures or by offers, and 3 stock trades which were set up as relationship of people and later changed over into organizations, viz. BSE, ASE, and Madhya Pradesh Stock Exchange. Aside from NSE, every stock trade whether built up as corporate bodies or Association of Persons, were prior non-benefit making associations. According to the demutualisation plot ordered by SEBI, every stock trade other than Coimbatore stock trade have finished their corporatisation and demutualisation process. As needs be, out of 19 stock trades 18 are corporatized and demutualised and are working with respect to benefit organizations, restricted by shares220.

Products of secondary market: following are the financial instruments that deal in the secondary capital market:
(a) Equity shares: The holders of these shares are the real owners of the organization. They have a democratic right in the gatherings of holders of the organization. They have a command over the working of the organization. Value investors are delivered profit in the wake of paying it to the preference shareholders.

(b) Bonds: A negotiable authentication confirming obligation. It is regularly unbound. An obligation security is for the most part given by an organization, region or government office. A security financial specialist loans cash to the guarantor and in return, the backer vows to reimburse the credit sum on a predefined development date. The backer as a rule pays the investor intermittent premium instalments over the life of the advance. The different sorts of Bonds are as per the following:
Zero Coupon Bond: Bond gave at a rebate and reimbursed at an assumed worth. No occasional intrigue is paid. The distinction between the issue cost and recovery cost speaks to the arrival to the holder. The purchaser of these bonds gets just a single installment, at the maturity of the bond.

CONVERTIBLE BOND: A bond giving the speculator the alternative to change over

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220 Available at, https://www.sebi.gov.in/sebi_data/faqfiles/jan-
221 Ibid.
the bond into value at a fixed transformation cost.

(a) Debenture: debenture is a medium-to long haul obligation instrument utilized by enormous organizations to obtain cash, at a fixed pace of premium. Debentures are uninhibitedly transferable by the debenture holder. Debenture holders reserve no privileges to cast a vote in the company's regular meetings of shareholders, yet they may have separate meetings or votes for example on changes to the rights connected to the debentures. The intrigue paid to them is a charge against benefit in the organization's fiscal reports.

(b) Mutual funds: A mutual fund is a kind of financial vehicle made up of a pool of cash gathered from numerous financial specialists to put resources into protections like stocks, securities, and currency advertise instruments, and different resources. Mutual funds pool cash from the contributing open and utilize that cash to purchase different protections, generally stocks and securities. The estimation of the mutual fund organization relies upon the exhibition of the protections it chooses to purchase.

(c) Preference shares/stock: Proprietors of these sorts of shares are qualified for a fixed profit or profit determined at a fix rate to be delivered consistently before profit can be offered in appreciation of value share. They additionally appreciate need over the value investors in installment of excess. In any case, in case of liquidation, their cases rank beneath the cases of the organization's lenders, bondholders/debenture holders.

Further of following types:

Cumulative Preference Shares, Cumulative Convertible Preference Shares.

(i) Government securities (G-Secs)\(^2\): These are sovereign (credit risk-free) coupon bearing instruments which are issued by the Reserve Bank of India on behalf of Government of India, in lieu of the Central Government's market borrowing programme. These securities have a fixed coupon that is paid on specific dates on half yearly basis. These securities are available in wide range of maturity dates, from short dated (less than one year) to long dated (up to twenty years).

(ii) Security receipts: are defined under section 2 (1) (zg) of SARFAESI Act as under: "security receipt means a receipt or other security, issued by an asset reconstruction company to any qualified buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitization."

(iii) Right issues: The issue of new securities to existing investors at a proportion to those as of now held. A rights issue is a challenge to existing investors to buy extra new offers in the organization. This sort of issue gives existing investors securities called rights. With the rights, the investor can buy new offers at a rebate to the market cost on an expressed future date. The organization is allowing investors to expand their presentation to the stock at a markdown cost\(^3\).

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1.4 SECONDARY MARKET ISSUES FACED

There are multiple issues that act as a barrier in the proper functioning of the stock market or secondary market. While the secondary market in different phases witnessed growth and development meanwhile also faced some political, administrative and so forth issues. Some of the problems are enumerated below:

(i) Insider trading: Insider trading is a typical event in many stock trades. Insider trading is the purchasing or selling of a traded on an open market organization's stock by somebody who has non-open, material data about that stock. Insider trading can be illicit or legitimate contingent upon when the insider makes the exchange. It is illicit when the material data is still non-public. Insiders who come to realize special data use it either to purchase or sell offers and make a fast benefit to the detriment of regular investors. Despite the fact that numerous principles and rules and regulations have been planned to check insider trading, it is a proceeding with wonder. Unlawful insider trading incorporates tipping others when you have any kind of non public data.

Example: Amazon case; In September 2017, previous Amazon.com Inc. (AMZN) money related examiner Brett Kennedy was accused of insider trading. Specialists said Kennedy gave individual University of Washington graduated class Maziar Rezakhani data on Amazon's 2015 first quarter income before the discharge. Rezakhani paid Kennedy $10,000 for the data. In a related case, the SEC said Rezakhani made $115,997 exchanging Amazon shares dependent on the tip from Kennedy.224

(ii) Lack of protection to investors: Investors are the foundation of the securities advertise. They not just decide the degree of movement in the securities advertise yet in addition the degree of action in the economy. The development in the quantities of Investors or financial specialists in India is empowering. The investor has no task to carry out in the everyday administration of the business or its control aside from as allowed by the law. Investor carries on business when they purchase and sell resources, organizes other to purchase and sell resources, oversees resources having a place with others, or works aggregate speculation plans. An investor draws in these exercises, yet they are not having any authority throughout the everyday exercises of any corporate. Ordinarily, an investor is a visually impaired individual; they don't have the foggiest idea about any exercises made by the organization. He/she can't manage the destiny or predetermination of the cash contributed. A speculator to that degree is very delicate and is presented to specific dangers in light of the fact that the utiliser of his cash can submit botes.

(iii) Open objection225: When the capital markets began working, barely any representatives used to meet up at a specific place and perform exchanging exercises. As the quantity of recorded organizations expanded and number of intermediaries additionally expanded, it was troublesome to perform exchanging. Normally, a few motions and yelling were important to locate the coordinating exchange. For instance, in the event that one would need


to buy portions of X. Ltd. in a specific amount at a particular rate, he needed to yell and discover someone else ready to sell the portions of a similar organization and afterward, he could arrange the costs. This framework had a restriction that because of open clamour. Not many members indicated their enthusiasm for exchanging with this procedure. Further, this sort of market isn't appropriate for certified investors as they avoid open outcry.

(iv) Secluded stock exchange: The stock trades in India have nearness just at specific areas. At the particular areas, typically exchange happens which is likewise portrayed by territorial highlights. However, it should likewise be noticed that stock intermediaries of one stock trade were not permitted to work in some other stock trade. The stock trades were not permitted to have branches at various areas. Because of this issue, just not many stock trades like BSE ruled the exchange capital markets. In any case, this had made other stock trades isolated. These stock trades were situated in distant places all through the nation. Be that as it may, the local stock trades were very little supported by volume of exchanging. Aside from this now NSE has assumed control over BSE, yet on the whole these two stock trades represent over 90% of exchanges stock trades. Enrolment of these trades is additionally limited. The dealers/intermediaries additionally estimate in shares without preparing them. This hampers the general conviction that capital market is a flawlessly serious market.

(v) Immature debt markets: The offers gave in the primary market are later on exchanged the secondary capital markets for example stock trades. Be that as it may, a piece of primary market likewise includes debenture financing. The debentures are given in the primary market. In any case, in stock trades there is no space for exchanging debentures. The aftermarket in industrial debentures stayed immature throughout the years. Despite the fact that value showcase has grown quickly all through the most recent two decades, the debentures advertise has stayed underdeveloped. This outcomes into less energy of long haul investors in the market.

(vi) Price Rigging: This disadvantage is regularly seen when organizations think of capital issue in the essential market. The costs of offers are falsely pulled up before issue of securities by organizations. This counterfeit increment in cost is finished by certain purchasers and vendors among themselves or among bunch which draws in itself in such kind of exercises. This push-up results into bull development in the market.

(vii) Risk Of Rumours: More often than not showcase is driven by bits of gossip about a specific organization or by and large showcase. Bits of gossip may get skimmed in the market by sites, news offices, and money related papers or even by overhearing people's conversations. It might happen that administration of the organization, with the assistance of the merchants spread the gossipy tidbits in the market. This impacts the investor’s observation about valuation of securities. The representatives or even advertisers of an organization may get undue bit of leeway out of such gossipy tidbits. It is normal that the investors should get themselves far from the rumours, they should stop from following up on bits of gossip.

(viii) Counterfeit shares: Frauds including fashioned shares testaments are very normal. Speculators who purchase shares lamentably may get such phony declarations. They would not have the option to follow the vender and their whole interest in such phony offers would be a misfortune. Wrong information also creates
issue, Assets are raised from speculators promising interest in ventures yielding exceptional yields. Yet, a few advertisers occupy the cash to theoretical exercises and other individual purposes. Financial specialists who put their cash in such companies at last lose their cash. There are different issues winning in the Indian markets like blowing up venture costs what's more, fixing absurd premium in the primary market, particular and saved apportioning of considerable piece of capital, benami dealers, rackets and messing with open issue application structures, badla fund and so on. A portion of these issues have been sifted through, however when all is said in done, this outcomes into loss of certainty among little and retail financial specialists. Absence of insurance to the little and authentic financial specialists is additionally one of the disadvantages of the Indian markets. Huge numbers of the exchanges are completed by examiners who intend to get benefits from momentary vacillations in costs of securities. This is obvious from the way that greater part of the exchanges are of the convey forward sort.

1.5 REGULATORY BODIES
At present, the Acts governing the securities markets are:
(a) The SEBI Act, 1992
(b) The Companies Act, 1956, which sets the code of conduct for the corporate sector in relation to issuance, allotment, and transfer of securities, and disclosures to be made in public issues.
(c) The Depositories Act, 1996 which provides for electronic maintenance and transfers of ownership of demat (dematerialized) shares.

In India the secondary market for shares is governed by an organization known as Securities and Exchange Board of India or SEBI. The Indian Stock market was to a great extent unregulated preceding the production of the SEBI. In 1990, a broker named Harshad Mehta began to abuse provisos in the financial framework too in the conveyance component of stocks purchased and sold on the Bombay Stock Exchange. The outcome was one the quickest bull runs throughout the entire existence of the Indian securities exchange. Nearly INR 40 billion was guided from the banking system to control stock costs to uncommonly elevated levels. In 1992, when the trick was at long last found, millions had lost their lives' fortunes and the episode had unfavourably influenced the notoriety of the Indian securities exchanges.

To bring investors over into the securities exchange and pull in outside reserve houses, the financial exchanges must be made protected and all around directed. The Securities and Exchange Board of India Act, 1992 was passed and under its arrangements SEBI was set up. The regulatory body intently screens all exchanges that go on in the financial exchanges and any instances of value apparatus or control are quickly managed. The SEBI is the administrative position set up under Section 3 of SEBI Act 1992 to ensure the premiums of the investors in securities and to advance the improvement of, and to direct, the securities advertise and for issues associated therewith and incidental thereto.

The objective of SEBI is :
“To direct stock trade and securities markets and to advance their precise working;
To control, teach and secure the rights and enthusiasm of retail speculators;
To forestall exchanging acts of neglect and accomplish a harmony between self guideline by the securities businesses and its statutory guideline;
To control and to create set of accepted rules and reasonable practices by representatives, trader agents, so as to make them serious and proficient.”

The mandate of the Act comes from its preamble and the powers conferred are mention in Chapter VIA. The preamble of the Act provides for:
- the establishment of a Board to protect the interests of investors in securities; and
- to promote the development of, and
- to regulate, the securities market and for matters connected therewith or incidental thereto.

Chapter VIA enumerates certain punishments on the violation of the concerned provisions. The chapter broadly discusses about the penalty and adjudication provisions. There is penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such act continues subject to a maximum of one crore rupees in following cases:
- failure to furnish or file or maintain information like returns, records, accounts;
- failure on part of intermediary to enter into agreement with clients;
- failure to redress investors’ grievances (including SCORES);
- defaults in case of mutual funds, failure to comply with the terms and conditions of certificate of registration, to invest money, to refund the application monies paid by the investors, to despatch unit certificates, to make an application for listing;
- failure to observe rules and regulations by an asset management company;
- default in case of alternative investment funds, infrastructure investment trusts and real estate investment trusts;
- investment adviser or a research analyst fails to comply with the regulations;
- where a stock broker fails to issue contract notes in the form and manner specified, to deliver any security or fails to make payment of the amount due to the investor, charges an amount of brokerage which is in excess of the brokerage.

Where transactions are involved penalty provided which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such act, whichever is higher in case where:
- insider deals in securities of a body corporate listed on any stock exchange on the basis of any unpublished price-sensitive information or communicates the same or counsels, or procures for any other person to deal with it;
- any person fails to disclose the aggregate of his shareholding in the body, or make a public announcement to acquire shares at a minimum price, or make a public offer by sending letter of offer.

There are also the provision which provides Penalty for fraudulent and unfair trade practices, for alteration, destruction, etc., of records and failure to protect the electronic database of Board.

On overall view SEBI has efficiently tried to manage the market functioning properly and smoothly, by protecting the interest of investors.
investors and also providing the provision for controlling the fraudulent practices that may prevail.

The Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 provides rules and regulations for registration of depositories and also provides provision for its certification, its governing body, rights and obligations of depositories and participants.

1.6 CONCLUSION

A few changes have been presented starting with those in stock trade organization, securities exchanging, settlement, conveyance versus instalment, securities move, exchanging subordinate, chance diminishing measures, screen based exchanging, speculator insurance support and some more. A significant formative activity was an across the nation on-line completely robotized screen based exchanging framework (SBTS) where a part can punch into the PC amounts of securities and the costs at which he gets a kick out of the chance to execute and the exchange is executed when it finds a coordinating deal or purchase request from a counter gathering. Screen put together exchanging makes with respect to line, electronic, mysterious and request driven exchanges conceivable. It is a straightforward framework which gives equivalent access to all financial specialists, independent of their topographical areas. SBTS electronically coordinates arranges on a severe cost/time need and consequently cut down on schedule, cost and danger of mistake, just as on misrepresentation bringing about improved operational effectiveness. It permitted quicker consolidation of cost touchy data into winning costs, in this manner expanding the instructive proficiency of business sectors. It empowered market members to see the full market on continuous, making the market straightforward.

All the stock trades are required to set up a reserve called Investor Protection Fund (IPF). The reason for the store is to give pay to financial specialists. The commitment to IPF is from individuals as a small amount of exchange charges, some portion of posting expenses, enthusiasm on security stores to be made by organizations at the hour of open issues and so on. The measure of remuneration accessible against a solitary case of a financial specialist emerging out of default by a part merchant of a stock trade is Rs. one lakh if there should be an occurrence of significant stock trades.

Dematerialization of Shares; Traditional settlement framework on Indian stock trades offered ascend to settlement hazard because of the time that slipped by before exchanges settled by physical development of declarations. There were two viewpoints - the main perspective was identifying with settlement of exchange stock trades by conveyance of offers by the dealer and instalment by the purchaser. The subsequent viewpoint was identifying with move of offers for the buyer by the backer. This arrangement of move of possession was horribly wasteful as each move included the physical development of paper securities to the backer for enrolment, with the difference in proprietorship being prove by a support on the security endorsement. Additionally, burglary, mutilation of endorsements and different anomalies were wild and what’s more, the backer reserved the privilege to decline the exchange of a security. All these additional to the expenses and deferrals in settlement, limited liquidity and made the complaint redressal of financial specialists’ tedious and on occasion immovable. Every one of these issues has been comprehended by
setting up of safes and presentation of scrip less exchanging.

The structure and procedures of the SEBI have been created throughout the year. The SEBI is an administrative body which is presently a quarter century old and the capital market framework is all the more then 100 years of age. There ought to be cross fringe collaboration among numerous kinds’ controllers and among controllers and calling. Security Exchange Board of India has appreciated accomplishment as a controller by pushing orderly changes forcefully and separately. Security Exchange Board of India has likewise been instrumental in making quick and valuable strides considering the general emergency and the Satyam disaster. This assignment of guideline is being carried by SEBI, as it were, alongside different controllers like RBI, Department of Company Affairs and so forth. Following the execution of changes in the auxiliary capital market in India in the previous barely any years, Indian stock exchanges have hung out on the planet positioning.

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FILIAL RESPONSIBILITY LAW IN INDIA: A CRITICAL ANALYSIS OF THE EXISTING LAW AND ITS PROPOSED AMENDMENT

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ABSTRACT
Respecting elders and tendering to their needs are some of the core values knitted deep into the fabric of the Indian culture. The elder generation spent a lifetime nurturing and tendering to the needs of their children and it is therefore very important that the children reciprocate this love and affection by taking care of the elders in their hour of need. The significance of the need to protect and provide for the welfare of the senior citizens is also enshrined in the Constitution of India, under the Directive Principles of State Policy. Towards this end, the Government of India has enacted the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. For more than a decade this Act has been serving the needs of parents and elderly citizens who were in distress. However, this piece of legislation has faced a fair bit of criticism. Towards making the existing legislation more effective, the Government has proposed an amendment to the existing Act. The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019 was introduced in Lok Sabha on December 11, 2019. The objective of this paper is to critically analyze the provisions of the principal Act as well as the proposed amendment to the said Act.

Keywords: Analysis; Act; Elderly Law; Maintenance; Legislative drawbacks; Parents; Senior Citizen; Welfare; Amendment; Filial responsibility.

I. Introduction

As per the population Census of India, carried out in the year 2011, there were nearly 104 million people who were sixty years old or above. According to a report of the United Nations, this number is expected to reach the 173 million mark by the year 2026. This valuable section of our population has and at some levels continues to contribute their best to the society and nation. In their old age when they are vulnerable and even infirmed, it is our duty to ensure their protection, both financially and otherwise. Providing for the well-being of the elders has been an integral part of the moral code of conduct of all the civilizations that reached an advanced stage of social and cultural development. Caring for the elders is not only seen as a moral and ethical duty, but also a religious one. As is ordained in almost all the Holy Scriptures, a devoutly religious person must be benevolent and compassionate towards their elders and take care of their needs. Traditional Indian culture celebrated the ageing process and emphasized on the need to venerate the elders. Age did and culturally still does command respect in India. However, the growing consumer culture and the deteriorating joint family system has dented and corroded that value-system. Growing old has a marked negative connotation in the modern popular culture. There is an ever growing market of products being peddled with the central Government of India, (Internet) available at http://mospi.nic.in/sites/default/files/publication_reports/ElderlyinIndia_2016.pdf
idea of ageing almost as an ailment which these products can help alleviate. With the eroding of the old value system, the elderly are being increasingly isolated from the community and are often left to fend for themselves. There has been a staggering increase in the cases of elderly abuse in the recent past. A study conducted in this regard showed that a shocking 71 percent of the elderly population in our country faces harassment from their own family members\(^2\). Taking into account the increasing offenses against senior citizens, our Government has over the years made assiduous efforts to bring in legislations to provide for the welfare of these senior citizens. Bills such as the Destitute and Needy Senior Citizens (care, protection and welfare) Bill, 2005, Needy and Neglected Senior Citizens and Orphans and Runaway Children (care and rehabilitation and welfare) Bill, 2005 are all demonstrative of the Government’s endeavors in this regard. However, due to manifold reasons, these bills did not materialize into an enacted legislation. The efforts of the Government came to fruition in the year 2007, when the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 was successfully enacted as a law.

II. Maintenance and Welfare of Parents and Senior Citizens Act, 2007 - An Analysis

The Act consists of seven chapters and thirty two sections. The provisions contained under the Act may, for the purpose of anatomization, be divided into two parts. The first part of the Act deals with provisions for senior citizens to seek maintenance from children as well as matters connected therewith or incidental thereto. The second part of the Act deals with provisions aimed at achieving the welfare of parents and senior citizens.

Provisions regarding Maintenance:
The Act contains provisions for a senior citizen, including a parent (biological, adoptive or step parent\(^3\)), to make an application against his children (son, daughter, grandson and grand-daughter excluding a minor\(^4\)), seeking maintenance, provided that the said senior citizen is unable to maintain himself from his own earnings or out of the property owned by him. A childless senior citizen may seek maintenance from a relative, who the Act defines as any legal heir of the said childless senior citizen, who is not a minor and is in possession of or would inherit the property of the said senior citizen after his death\(^5\). Large parts of the elderly population in India has worked in the unorganized sectors and as a result do not receive benefits like a pension. The provision of maintenance under the Act proffers the senior citizens a sense of financial security and ensures that they can live their life with dignity.

The Act provides for the constitution of Tribunals for dealing with matters pertaining to the Act. The Tribunal shall be presided over by an officer of the State, not below the rank of Sub-Divisional

\(^3\) Maintenance and Welfare of Parents and Senior Citizens Act, 2007, §2(d)
\(^4\) Id; Section 2(a)
\(^5\) Id; Section 2(g)
Office. For the purpose of disposing of an application under the Act, the tribunal may seek the guidance and assistance of one or more persons who possess expert knowledge in any area relevant to the matter at hand. The Tribunals are to dispose each such application within a period of ninety days. The Tribunal may refer a matter to Conciliation, if it so deems fit, before arriving at a pronouncement. The Act expressly bars the legal practitioners from making representations before the Tribunal. The State Governments have been empowered to designate Maintenance Officers and such officers of the state shall have the power to represent the senior citizen if he so desires. The Act contains provisions for interim maintenance and accordingly empowers the Tribunal to instruct the Children or Relative to pay interim maintenance during the pendency of the application. The Tribunal may also proceed to issue a warrant against the Children or Relative to levy fines and may order for their imprisonment for a term not exceeding one month in the event that the said Children or Relative fail to comply with the orders of the Tribunal. The Tribunal is empowered to issue summons for directing the appearance of Children or Relative and in the event that the Tribunal is satisfied that such a person against whom an application for maintenance is filed, is willfully avoiding attending the Tribunal, the Tribunal may proceed to hear the application ex-parte. The provisions of the Act mandate that the maximum maintenance allowance shall not exceed an amount of rupees ten thousand per month. The Tribunal is also empowered to order an amount in addition to the maintenance by way of simple interest capped at a minimum of five percent and maximum of eighteen percent from a date which shall not precede the date of filing of application. For the purpose of hearing any appeals from the order of the Tribunal, the Act provides for the setting up of an Appellate Tribunal by the States, which shall be presided over by an officer not less than the rank of a District Magistrate. An Appeal against the order of the Tribunal shall be filed within a period of sixty days from the date of the order of the Tribunal. There is an onus on the Appellate Tribunal to pronounce the orders in writing within one month of the receipt of the appeal.

Provisions Regarding Welfare: Chapters Three to Five of the Act constitute provisions aimed at ensuring the welfare of Senior Citizens. The Act provides for establishment of old age homes throughout the country for housing indigent Senior Citizens and casts an obligation on state governments to establish and maintain such old age homes in their respective states. The Act requires that each district in a state shall have at least one such institution and each such institution shall have a minimum capacity to accommodate one hundred and fifty senior citizens. The Act also contains provisions for the medical care of Senior Citizens and states that in hospitals which are fully or partly funded by

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240 Id; Section 7(1) and (2)
241 Id; Section 8(3)
242 Id; Section 6(6)
243 Id; Section 17
244 Id; Section 18(2)
245 Id; Section 5(2)
246 Id; Section 5(8)
247 Id; Section 6 Proviso to (4)
248 Id; Section 9(2)
249 Id; Section 14
250 Id; Section 15(1) and (2)
251 Id; Section 16(1)
252 Id; Section 16(5)(1)
253 Id; Section 19(1)
Government, special provisions should be made for them. This includes reserving beds in such hospitals for senior citizens, separate queues for them, conducting research activities for chronic geriatric diseases etc.\textsuperscript{254} In order to ensure that the provision of the Act are carried out smoothly the State Government may confer powers as well as impose certain duties on the District Magistrates\textsuperscript{255}. Further, the Central Government is empowered under the Act to conduct a period review and monitor the progress of the implementation of the provisions of the Act by the concerned State Governments\textsuperscript{256}.

The Act lays down that if after the commencement of this Act, any senior citizen by way of a gift or otherwise transferred any of his property, subject to a rider that the person who has received the property shall provide the basic amenities and basic physical needs to the transferor, and if such a transferee refuses or fails to comply with the said condition, the said transfer of property shall be deemed to have been made by fraud or coercion or under undue influence and shall at the option of the transferor be declared void by the Tribunal\textsuperscript{257}. Far too often in the past, parents have been victims of cruelty by children who found it all too convenient to abandon the parents once they gifted their property to them. The Act provided strong armour in safeguarding the interests of these senior citizens. From a reading of Section 23, it is clear that the provisions thereof are contingent on the existence of a specific recital in the transfer deed, to the effect that in lieu of such a transfer, the transferee shall be liable to provide the senior citizen with basic amenities and basic physical needs. Thus, the question that arose before courts later was whether the Tribunal under the Act has the power to render a transfer void in pursuance of the provision of Act, if there were no specific recitals as stated above?

Addressing the very same issue in one of the cases\textsuperscript{258} before it, the Hon’ble High Court of Kerala opined that the condition referred in Section 23 has to be understood based on the conduct of the transferee and not with reference to the specific stipulation in the deed of transfer and accordingly it is not necessary that there should be a specific recital or stipulation as a condition in the transfer deed itself.

The Act also states that any person who commits the offence of abandonment against a Senior Citizen shall be punishable with imprisonment for a term which may extend to three months or fine which may extend to five thousand rupees or with both\textsuperscript{259}. The Act expressly states that no Civil Court shall have jurisdiction to entertain any matter pertaining to the Act and further that no Civil Court shall grant any injunction in respect of anything relating to this Act\textsuperscript{260}.

### Legislative Drawbacks

It is nearly impossible for law makers to foresee all impediments and pitfalls in the implementation of legislation. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 is no exception to

\textsuperscript{254} Id; Section 20(1) to (5)  
\textsuperscript{255} Id; Section 22(1)  
\textsuperscript{256} Id; Section 31  
\textsuperscript{257} Id; Section 23(1)  
\textsuperscript{258} Radhamani and others v. State of Kerala (2016 (1) KHC 9)  
\textsuperscript{259} Section 24; The Maintenance and Welfare of Parents and Senior Citizens Act, 2007  
\textsuperscript{260} Id; Section 27
this. Some of the major drawbacks of this legislation are as follows:

1. The Directive Principles of State Policy espouses the cause of all senior citizens irrespective of their financial standing. However, the Act in its present form is silent about those senior citizens who are childless and who also do not possess any property of their own.

2. A childless senior citizen may seek maintenance from a relative who stands to inherit the property of the said senior citizen. This provision is premised on the assumption that the after the life time of the senior citizen the property will be inherited by the relative. The inherent flaw in such an assumption is the fact that it does not consider a scenario where the senior citizen may sell or otherwise transfer the property to someone else. If that is indeed the case, it would be an unjust burden on the said relative as he/she may end up not inheriting the property despite having to provide maintenance to the senior citizen.

3. The definition of children under the act does not cover a son-in-law or a daughter-in-law. Considering how in most cases of abuse of the elderly a son-in-law or a daughter-in-law is involved, their exclusion from the provision of the Act is a major drawback.

4. The Tribunals constituted under the Act are expected to perform many functions which are judicial in nature such as issuing summons, recording evidence etc. The Act merely states that the person presiding over such a Tribunal shall be an officer of the state not below the rank of Divisional Officer. More often than not these officers are not trained in legal matters. As such, it is highly likely that the procedures conducted by these Tribunals may have some irregularities, which in turn will result in increasing interference from High Courts on the grounds of such irregularities.

5. The total bar on legal professionals from representing parties before the Tribunal is also not reasonable. Without the help of legal professionals it may be difficult for these Senior Citizens to make representations on matters involving complex questions of law.

6. The Act has put a cap on the maximum maintenance that a tribunal can order. At present, the maximum amount that a tribunal can order as maintenance is rupees ten thousand per month. The Act does not take into account the socio-economic background of the family, the earning capacity of the children and other such factors. Further, with the increasing cost of living, the said amount of ten thousand per month may prove to be insufficient.

7. Currently, only parents who are aggrieved by the order of a tribunal may prefer for an appeal. Taking away the right of appeal from the other party viz., the children or relative, who may be genuinely aggrieved by an order of the Tribunal, is against the principle of natural justice.

IV. Analytical Outline of the Proposed Amendment

Taking into account the drastic surge in the offences of exploitation and abandonment of parents and the increasing call for reforms to the existing enactment, the Government of India has proposed an amendment to the existing Act. The Maintenance and Welfare of Parents and Senior Citizens (Amendment) Bill, 2019 was introduced in Lok Sabha on December 262


262 Section 7(1) and Section (2); The Maintenance and Welfare of Parents and Senior Citizens Act, 2007.
11, 2019. Some of the key features of the proposed amendment Bill are as follows:

1. The bill seeks to modify the definition of the term ‘Children’ to make it more comprehensive by bringing into its ambit a son or a daughter be it biological, adoptive or a step child as well as a son-in-law, daughter-in-law, grandson, grand-daughter, even if minor, through a legal guardian. It proposes to modify the definition of the term ‘Maintenance’ to make it more inclusive by providing for provision for food, clothing, housing, safety and security, medical attendance, healthcare and treatment necessary to lead a life of dignity. It proposes to amend the definition of the term ‘Parent’ to bring into its ambit a father-in-law, mother-in-law and grandparents. The definition of the term ‘Relative’ is also sought to be modified so as to include a minor relative duly represented by a legal guardian. It also proposes to modify the definition of the term ‘Welfare’ to expressively include needs in the nature of food, clothing, housing, safety and security, medical attendance, recreation and other such facilities needed for the physical and mental well-being of the senior citizen.

2. The Bill proffers to provide flexibility in filing methods by including filing of the application online or by sending it through a registered post or by any such other means besides filing it in person.

3. While the obligation of the Tribunal to dispose the application within a period of ninety days has been retained, the Bill seeks to add a provision whereby the Tribunal will be required to dispose the application within a period of sixty days wherein the applicant is a senior citizen aged eighty years or above.

4. The Act currently obligates a Conciliation officer, to whom the matter has been referred to by the Tribunal, to submit his findings within a period of thirty days. The Bill seeks to reduce the said time period of thirty days to fifteen days.

5. The Bill proposes an amendment to the provisions of Section 9 (1) of the principal Act by empowering the Tribunals to not only order for a monthly allowance but also other resources and care, for the maintenance of the parent or senior citizen, which is necessary to lead a life of dignity.

6. The Bill seeks to remove the upper cap of Ten Thousand rupees as the maximum monthly allowance which the Tribunal can order. Instead, it empowers the Tribunal to look into various factors such as the standard of living of the applicants, the earnings of the applicant and children/relative etc., and then determine a monthly amount of maintenance.

7. The Bill seeks to amend Section 13 of the principal Act, by reducing the number of days given to the children/relative to deposit the amount ordered to be paid by the Tribunal from thirty days to fifteen days.

8. The Act in its present form only allows for senior citizens or parents to file an appeal, should they be aggrieved by the order of the Tribunal. The Bill seeks to extend to the children and relatives the right to appeal, if
they are aggrieved by the order of the Tribunal.  

9. The proposed amendment to the Act seeks to bestow a duty upon the Maintenance Officers under the Act to ensure that the orders of the Tribunal are complied with and in the event of non-compliance and empowers such officers to take necessary steps to ensure compliance.

10. The Bill seeks to completely overhaul the Welfare provisions under the Act. It proposes the setting up of Senior Citizens’ Care Homes and Multi-Service Day Care Centre for Senior Citizens. Such institutions shall be required to be registered with a Registration Authority to be designated by State Governments. The minimum standards to be adhered to for setting up and maintenance of such institutions shall be prescribed by the Central Government. The State Government shall be empowered to withhold or cancel the licenses of these institutions if they fail to adhere to the said standards. Further, the State Government is required to designate an authority which shall be the Regulating Authority for such institutions. The Regulatory Authority will monitor the functioning of the institutions by conducting regular inspections or social audit.

11. The Bill seeks to make additions in the principal Act whereby the State Government will be empowered to provide health care services to those senior citizens who are unable to perform day to day activities due to any physical or mental impairment. Such services shall be provided by trained and certified attendants or caregivers. Institutions which provide such training and certification for the above purposes will be required to be registered with the Registration Authority constituted under the Act. There is also a provision in the Bill for accreditation of these institutions based on the quality of their service.

12. The Bill requires that in each Police Station in the State, one officer possessing training and orientation and not below the rank of a Sub-Inspector be appointed as the Nodal Officer for the purpose of this Act. Further, it also obligates the State Government to form a Special Police Unit in every district. The primary purpose of forming such a unit will be to co-ordinate the functions of police in matters dealing with distressed parents and senior citizens. An officer not below the rank of Deputy Superintendent of Police shall head the unit and the unit shall also consist of Nodal Officers and two social workers having relevant experience. The Bill further mandates that one of the two social workers shall preferably be a woman.

13. The Bill also provides for provisions for the general welfare and well-being of senior citizens including taking steps for age-friendly environment, transportation, and other public facilities. It also proposes to establish a state level helpline dedicated for the safety and security of the senior citizens.

14. The Bill seeks to modify the penal provisions under the Act and enhance the punishment for offences such as intentional abuse (including physical abuse, verbal and emotional abuse, economic abuse, neglect and abandonment causing assault, injury, physical or mental suffering) or abandonment. The punishment proposed under the Bill is imprisonment for a term
which shall not be less than three months, but which may extend to six months or with fine up to ten thousand rupees or both 279.

15. The Bill further seeks to modify the provision of Section 29 of the principal Act with regard to the power of the Government to issue Orders in the official Gazette in order to provide for the resolution of any practical difficulties in the implementation of the Act. While the principal Act confers such a power on the State Government, the amendment seeks to transfer the power to the Central Government 280.

16. While the principal Act conferred upon the State Government the power to make Rules for the purpose of carrying out the provisions of the Act, the Bill empowers the Central Government to frame model Rules with respect to which the State Government shall be required to make Rules. Where the Central Government has made any such model Rules regarding a specific matter, the said Rules shall apply to all states till the respective State Government frames its own Rules in conformity with such model Rules 281.

V. Assessment of the Proposed Amendment

From all the new provisions and alterations being sought for in the proposed amendment Bill it can be surmised that the Government did pay heed to the calls for a review of the Act made from various factions including the High Courts of some states. The proposal to redefine and expand the key terms like ‘Children’, ‘Parent’, ‘Relative’, ‘Maintenance’ and ‘Relative’ removes ambiguities and will plug-in the loopholes in the existing Act.

Since the Act is essentially a welfare legislation for the elderly, procedural rigidity may defeat the very purpose of it. The Bill recognizes this by expanding the methods for filing an application. In addition to the existing procedure, where an application has to be filed in person, the amendment allows for a senior citizen or parent to make an application through other convenient methods including online applications and applications through registered post. This is a thoughtful and considerate allowance as the elderly who do need tackle these procedures may often not be in a state to make themselves present in the Tribunal.

The Bill also endeavors to reduce unnecessary delays in proceedings with an aim to help the senior citizens get the maintenance at the earliest. From directing the Tribunals to dispose applications of senior citizens of eighty years and above within sixty days to obligating the Conciliation officers to submit their findings within fifteen days, as well as reducing the number of days within which the children/relative has to deposit the amount ordered by the Tribunal, are all steps taken to achieve this objective. The proposed amendment also seeks to take a sterner view of violations of the provisions of the act by providing for enhanced punishments to the defaulters ensuring better execution of the provisions of the Act.

The proposal to remove the upper limit of maintenance is also a welcome change as it will make possible for the Tribunal to order for an optimal maintenance amount after taking into account the socio-economic background of the concerned parties. Another pragmatic addition that the Bill aims to make is for the Tribunal to not just order for a pecuniary relief by way of

279Id; Clause 26
280Id; Clause 28
281Id; Clause 29
maintenance but also allow for other forms of relief like shelter, clothing, medical care etc. With these changes the Tribunals will become better empowered to ensure a good quality of life of the elderly.

While the Bill is aimed to make the system more efficient and effective in providing relief to the distressed elderly, a just system has to ensure all concerned parties have equal opportunity to present and defend their perspective. Therefore, to seek for the Tribunal to permit the children and relatives to file for an appeal is a much needed change to the Act. It does away with the arbitrary and unjust presupposition that the children or relatives can never be the aggrieved party.

Under the Act in the present form, although the State Government is required to set up old age homes, yet there are neither provisions to regulate these institutions nor a prescribed minimum standard which these institutions are required to adhere to. The Bill seeks to bring radical changes in this regard by providing for the setting up of Senior Citizens’ Care Homes and Multi-Service Day Care Centre for Senior Citizens thereby ensuring standard of care provided to the elderly.

Further, the proposal for setting up a dedicated helpline number, constitution of Special Police Units, and appointment of a Nodal Officer in each Police Station are all measures that ensures the reach of the system is extensive and the elderly have more access to avail themselves of this system, set up for the dedicated purpose of helping them in their time of need.

VI. Filial Responsibility Laws in Different Countries

- The importance of protecting the elderly citizens and parents are recognized by almost all the countries around the world. Accordingly, most of the countries have their own legislative provisions for this purpose. Summarized below are few of these legislations of different countries in the world.
  - **Singapore**: In Singapore, the Maintenance of Parents Act was enacted in the 1995. It requires children to pay their parents of the age sixty and above a monthly amount or a lump sum amount as allowance.
  - **China**: China enacted the Law for the Protection of the Rights and Interests of the Elderly in the year 2013. The law imposes an obligation on the family members to care for the needs of the elders and to ensure that they are not ignored or neglected. The law further requires that children staying away from their parents should frequently visit them or should send their greetings. When the rights of the parent is infringed; he or she can refer the matter to concerned department in this regard or bring a law suit in the jurisdictional people’s court in accordance with the law prescribed in this regard.
  - **Bangladesh**: The Parents Maintenance Act was enacted in the year 2013 in Bangladesh. As per the law an adult child is obligated to provide a logical amount as maintenance to his parents from his earnings in the event that the parents are not staying with the children. If they do not provide such maintenance, the parents may make a compliant. There are provisions under the Act to impose fines as well as imprisonment to violators of the Act.
  - **United States of America**: The provisions of the USA filial support laws vary from state to state. However, these laws too are aimed at ensuring the elderly get needed support. These laws require adult children to support their indigent parents.
  - **Europe**: The European Union (EU) recognizes the right of an elderly person to live a life of dignity and independence as
well as their right to participate in social and cultural life. This is a fundamental right enshrined under Article 25 of the Charter of the Fundamental Rights. In Germany, an obligation in cast on relatives in a straight line of lineage to support each other. In France, a responsibility is cast on close relatives to support each other in case of need.

VII. Conclusion

There is no doubt that the Maintenance and Welfare of Parents and Senior Citizens Act, 2007 has been successful in ameliorating the situation of many distressed senior citizens. The proposed amendment, if enacted into a law will help towards making the existing law even better equipped to provide for the welfare and well-being of our elder generation. Having said that, there are still a number of impediments which might continue attenuating the efficacy of the Act. One such obstacle is the lack of awareness about this law. A study conducted by Help Age India found that even in a highly literate state like Kerala, only thirty percent of the elderly population was aware of this law and even they were unaware about the procedure to file an application with the Tribunal. The study also revealed that though the Act was formulated to provide swift reprieve and justice to the elderly, the ground reality is far from it. The sample case studies revealed that there is a considerable amount of pending petitions and that in some cases even after an order for maintenance was passed, the children had failed to make any payment. In this regard the respective petitioners of the case studies also revealed that despite filing complaint with the police authorities there were no positive action for ensuring the compliance of the order. The proposed amendment seeks to address some of the aforesaid issues. It is also pertinent to note that this betterment of the legislation needs to be supported strongly by auxiliary measures like spreading awareness about the law, sensitizing the officials involved in the implementation of the Act to the needs of the Elderly, imparting good values to children at school levels by making them understand the importance of respecting and taking care of the elders etc. Legislation alone cannot bring about that radical a change. As a society we are collectively responsible to ensure that our elders get to live with comfort, dignity and a sense of financial security.

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GEOGRAPHICAL INDICATIONS FOR FOOD PRODUCTS WITH SPECIAL REFERENCE TO INDIA

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ABSTRACT
Any product that links its origin to a specific geographical region and owns properties and reputation pertaining to that origin has a sign associated with them known as Geographical Indications. The Geographical Indication depends on a specific geographic location therefore there should be a direct linkage between the product and its origin. Geographical Indication regulates the food industry, wine sector, spirits drink, handicrafts, etc. Intellectual Property Rights protect Geographical Indication in accordance with Trade-Related Aspects of Intellectual Property Rights (TRIPs) by the World Trade Organisation and Geneva Convention. The food industry consists of small players and forms a major share as a contributor to the economy of a developing country. They prove to play a significant role in enhancing the profitability of the domestic and international food industry by facilitating the protection and promotion of their local resources and by increasing consumer access for quality food items connected to their origin.

The research paper throws light on the functioning of Geographical Indication in the Food industry in India. It evaluates various products that can get the protection of the Geographical Indication and the difference between trademarks and geographical indications. It also provides an understanding of the effective use of Geographical Indications by examining the famous case of Basmati Rice. Also, the paper analyses the Tirupati laddu case in light of Geographical Indications. Finally, the paper provides a few recommendations that would help advance the working of Geographical Indications in the food industry.

Keywords: Trademark, Registered Proprietor, Basmati Rice, Divine Intervention

INTRODUCTION
Intellectual properties are the labor of human intellect and which is why is called Intellectual property. As it the creation of a human mind it is an intangible right. It is a legally protected right of the owner of intellectual property and prior consent is necessary for its use by others. It is the original concept of an idea given shape to actual work. Intellectual property consists of patents, trademark, copyright, geographical indication, designs, trade secrets, etc. As said by renowned jurists with every property comes the right of its protection and security. Intellectual property possesses various dangers as it is a valuable property. Intellectual property is always prone to get pirated just like tangible property is very likely to get robbed. The Supreme Court in Gramophone Company of India Ltd. v. Birendra Bahadur has observed that intellectual properties are the brainchild of the authors, the fruits of labor, and therefore considered to be their property. The rights of intellectual property are created and protected by statutes. 286 The World Intellectual Property Organisation (WIPO) and Trade-Related Aspect of Intellectual

286 Dr. BL Wadehra, Law relating to intellectual property (5th edn, Universal Lexis Nexis 2018) xvi
Property Rights (TRIPS) have recognized some properties as intellectual property. In India various enactments protecting Intellectual property are:

- The Copyright Act, 1957.
- The Trade Marks Act, 1999.

Geographical indications as described under Article 22 of TRIPS Agreement states “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin.”

WIPO defines geographical indication as “a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin.”

Geographical Indications are prescribed minimum level of security under the TRIPS. It requires member of the World Trade Organization to stop the use of a geographical indication that deceive the public to the geographical origin of the goods or form an act of unfair competition.

GEOGRAPHICAL INDICATIONS IN INDIA

GEOGRAPHICAL INDICATIONS:
Geographical Indications is an instrument to protect the quality reputation and characteristic of a product originating in a particular area, region, or country. The product must essentially attribute geographical origin. Geographical indication helps the producers and manufacturers of a product to build a reputation and goodwill which will bring the premium to the product and create a difference between the products of competing producers. Examples of Geographical indications in India are Darjeeling tea, Kanjeevaram silk, Chanderi sarees, Champagne wine, etc. The producers who sell reputed goods are dragged in unfair competition as the manufacturers who sell fake products gain an advantage by selling those products in the name of reputed products at the same price.

INDIA AND GEOGRAPHICAL INDICATIONS ACT, 1999: Goods once registered are protected under the Geographical Indication act. The Geographical Indication status to a product acts as an indicator in the market restricting competitors to use that product and fetching premium to the producers of the differentiated product. Geographical Indication had become important for a country like India having rich natural and agricultural resources. In the year 1999, the Geographical Indications (Registration and Protection) Act, 1999 was enacted. The Geographical Indications of Goods (Registration and Protection) Act defines ‘geographical indication’ as ‘an indication which identifies such goods as originating

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289 ibid
or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in the case where such goods are manufactured goods, one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region, or locality, as the case may be.  

**WHAT CAN BE PROTECTED UNDER GEOGRAPHICAL INDICATIONS ACT, 1999?**

Section 2(1)(f)\(^{291}\) defines the term “goods”. The section states goods include foodstuffs, handicraft products, or any natural, agricultural, or manufactured goods\(^{292}\). Section 2(1)(g)\(^{293}\) defines indication as ‘any name, geographical or figurative representation or any combination of them conveying or suggesting the geographical origin of goods to which it applies.’ The Indian legislation also extends the protection to manufactured goods, although ‘most Geographical Indications’ are granted for agricultural products for characteristics owed to the place of origin, having an impact of soil and climate.\(^{294}\)

**DISTINCTION BETWEEN TRADEMARK AND GEOGRAPHICAL INDICATION:** The functions of Geographical Indication are different from that of Trademark. A trademark is an intellectual property owned by enterprises to distinguish their goods from their competitors producing relatable products and services. On the other hand, a geographical indication is not owned by an enterprise, it is a common heritage of a group or association of people in a geographical area where products comprise of exclusive characteristics and reputation and which may be utilized by manufacturers engaged in their production.

**GEOGRAPHICAL INDICATION FOR FOOD PRODUCTS**

The Darjeeling tea has often faced violation of passing off from tea produced in Kenya and Sri Lanka, the Darjeeling tea has in past been circulated in the name of Kenyan tea or Sri Lankan tea unless it got a Geographical Indication because of its fine aromatic flavor which is only cultivated in the hilly areas of North-Bengal. Even developed countries like the United States and France for decades have been producing rice in their native countries and getting it registered as a trademark based on ‘Basmati’ to fetch premium from its famous geographical name. The most well-known exploitation of Basmati rice which is a renowned Geographical Indication in India can be traced by when the United States patented ‘Basmati Rice Lines and Grains’ which was given to Rice Tec Inc, this event has made a lot of controversies.\(^{295}\)

**GEOGRAPHICAL INDICATION FOR BASMATI RICE:** For long in India, the absence of any legislation for the protection of any Geographical Indication with unawareness of its protection in other countries led to the grant of a patent of Basmati like rice Texmati and Kasmati to

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\(^{290}\) The Geographical Indications of Goods (Registration and Protection) Act, 1999 No.48 of 1999, § 2(1)(e)  
\(^{291}\) Supra note 5 at § 2(1)(f)  
\(^{292}\) Ibid  
\(^{293}\) Supra note 5 at § 2(1)(g)  

294 Dr BL Wadehra, Law relating to Intellectual Property, 5\(^{th}\) edn, Universal Lexis Nexis 2018 459  
295 Dr (Smt) Mangala Hirwade, Dr Anil W. Hirwade, ‘Geographical indications: Indian scenario’ [2006] 1, 4
American Company Ricetec in the year 1997. The distinct quality of Basmati rice is its long grain aroma which is grown in northern plains of Pakistan and India. Basmati rice qualifies the definition of geographical indication defined in the TRIPS Agreement and the same is entitled to protection under the TRIPS Agreement. The outcome of granting a patent to an American company for Texmati and Kasmati would lead to unfair competition to Indian exporters of Basmati. India’s focus was centered on violations made by Americans for illegally using the geographical rights of Indian and Pakistani producers of Basmati rights. The important issue is not testing the validity of patent but the exploitation made by them. Rice Tec in its reply contended that Basmati is a generic name and not a special name like Scotch Whisky, is a pointless argument. It is not a generic name and shall be protected. In 2000, an application for the re-examination of patents granted to American company was filed by India after which, American company withdrew four key claims from the original twenty that it had made to get the patent. Rice Tec was also ordered to change the title of its patent from “Basmati Rice Lines and Grains” to Rice Lines Bas 867, RT 117, and RT 121. India filed an objection against Rice Tec for using the name basmati and getting it patented though Basmati back then was not acclaimed as a ‘geographical indicator’ then. Till Basmati was not granted geographical indication Rice Tec was selling its rice cultivated in the United States under the name Basmati. But after the enactment of Geographical Indication of Goods Act, 1999, Basmati was given the Geographical Indication certificate on February 16, 2016. After successfully obtaining the Geographical Indication Certification the producers and exporters of 77 districts of 7 states comprising Punjab, Haryana, Uttar Pradesh, Delhi, Himachal Pradesh, and Jammu and Kashmir will now be enjoying absolute rights to utilize the Geographical Indication and prevent all unauthorized persons from using the same. The products with Geographical Indication tag get the benefit of premium pricing as well as legal protection to boost exports which in turn will promote the economic prosperity of the producers. The biggest importers of Basmati Rice from India are Saudi Arabia and the United Kingdom.

GEOPGRAPHICAL INDICATION TO TIRUPATI LADDU

The Tirumala Tirupati Devasthanam is a temple of Lord Venkateshwara in Andhra Pradesh. It acquired the Geographical Indication protection for its prasadam (sacred food) given to the devotees to protect it from other producers making the same laddus under the same name. It is the first time where Geographical Indication protection has been granted to a religious place. In March 2008 the managing Trust filed an application for Geographical Indication certificate for protection of Tirupati Laddus. They contended that there has been a lot of demand for these laddus which has also given birth to black marketing of these laddus around the temple. The Temple officials had to seek Geographical Indication protection of these laddus to control the situation of producing fake laddus and selling them in the name of Tirupati laddus. The flavor of

297 Rana & Co. Advocates, ‘IP Connect e-newsletter’ [2006].
the laddu defines its distinctive characteristics which are attributable to that region. Also, the laddus are made of high-quality raw materials in proper amounts and the skill involved of the cooks in its preparation makes it valid for Geographical Indication protection. A panel of experts examined the application and declared Tirupati Laddus deserve a Geographical Indication tag. On 15th September 2009, the Tirupati laddus were registered for geographical indication and any unauthorized use or infringement would attract civil and criminal penalties. The grant of Geographical Indication to Tirupati laddus raised many controversies and arose following questions:

1. **Whether granting of a geographical indication for Tirupati Laddu is as per the law?** The answer to the question came out to be that the Geographical indication granted to Tirupati laddu is well within the Geographical Indication Act of 1999 and the laddus fall within the meaning of goods under section 2(1)(f). It also satisfies all the conditions of a Geographical Indication.

2. **Whether the grant of Geographical Indication is permissible to a single producer, i.e Tirumala Tirupati Devasthanam (TTD)?** Section 2(n) provides that a ‘registered proprietor is any association of persons or producers or organization representing the interest of the producers of the community’. The section only concerns with producers and not a single producer. Whereas, TTD is a single producer who employed cooks on a contractual basis to make laddus. Therefore, the condition prerequisite for giving Geographical Indication to an association of persons or body is not fulfilled as the collective interest of a community is not being benefited. The motive behind registering a good as a Geographical Indication is to make sure that there is uniformity in economic benefits between all the producers of a geographic area possessing identical quality and characteristics of a product. The intention is not to protect a single producer’s business interest in a particular region. Therefore, according to me granting Geographical Indication to a Single wealthy spiritual institution having a monopoly is violative per se of the provisions of the Act.301

3. **Whether Tirupati Laddus lack distinctiveness?** Tirupati laddus inherently do not possess any distinctive features besides its size. The ingredients such as flour, ghee, sugar, and dry fruits are not different from any other normal laddus. Nor is the process of manufacturing them in any way different. The temple authorities claim that the laddus prepared in the temple have a series of quality checks and are made of the best raw material. All these qualities do not suffice to grant a Geographical Indication status. The TTD claims that the laddu deserves a Geographical Indication tag because there is a divine intervention of the lord in the unique taste of laddus.

4. **Whether Tirupati Laddus is a generic name?** The term Tirupati laddus were commonly used by all producers of laddus in the temple town. The Tirupati Laddus can only be distinguished from its size. And if the name Tirupati Laddus has become a generic name, the grant of Geographical Indication is fallacious.

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298 Supra note 5
299 Supra note 5 at § 2(n)
300 Ibid
The case of Tirupati laddu portrays how big religious institutions can create a monopoly. In granting Geographical Indication status to Tirupati Laddu, the Registry did ignore many provisions of the law and commercialized sacred prasadam which hurts the religious sentiments of the community.

CONCLUSION AND RECOMMENDATIONS

India is home to a rich cultural heritage and natural resources. Each state produces some special and distinct products which have with time gained a good reputation and goodwill. Geographical Indication is one such instrument that protects all such goods having special features originating from a region or area. The Geographical Indication (Registrations and Protection) Act was enacted in 2003 and has been granting Geographical Indication certification to many goods and products. The Central Government has the discretion to decide from a large number of products who should be given a Geographical Indication tag. The food products are divided into two parts, agricultural products, and foodstuff. The registry is successful in granting many Geographical Indications concerning food products. Although the Geographical Indication act has framed stringent laws on granting Geographical Indication tags to foods, the registry has failed to adhere to the sections of the act. The Registry lacked in vigilance to grant geographical indication like in the case of Tirupati laddu. A similar application was also filed by Reliance to give Jamnagar a geographical indication for petrol, diesel, and LPG. But subsequently, the application was abandoned. There is a requirement by the registry to make yardsticks for granting Geographical Indication protection.

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‘FORCE MAJEURE’ AND THE ‘PANDEMIC’: A COMPREHENSIVE ANALYSIS UNDER THE INDIAN CONTRACT LAW

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ABSTRACT:
Coronavirus Disease, commonly known as COVID-19, has vehemently emerged into a global malady. Starting from the streets of Wuhan in China in the late months of 2019, it consistently transformed itself from an ordinary virus to a global pandemic. With a plethora of deaths crossed worldwide within a period of over 7-8 months, the pandemic has created indomitable havoc in the commercial world.

The ubiquitous virus has left a fatal effect on the lives of the people and has shattered the greatest of nations with its draconian traces in terms of death tolls and economic damages. It has affected several purchasing and supply units, manufacturers, distributors, real-estate projects and various commercial and financial businesses. But, what is common among them?

Inter alia, every business activity starts from an agreement or covenant between two different parties. These agreements play a major part in harmonious trade and commerce. But, businesses are facing contractual legal problems because of the devastating crisis created by the pandemic. Non-performance of the contractual obligations has led to various kinds of damages to the parties.

The paper aims to delve into the intricacies of the concept of Force Majeure in the Pandemic with pertinent Legislation, Case laws and ad hoc Illustrations. The paper has been divided into three different parts-

- Part-1 introduces the meaning/definition of Force Majeure to understand the difference between a Force Majeure and an Act of God event, and to feasibly analyse the Pandemic as a Force Majeure event. The following part also aims to analyse how the meaning of ‘Law’ in the contract plays a pivotal role and also renders a brief explanation of a Wagering agreement to avoid any kind of ambiguity in terms of analysing contingency.
- Part-2 analyses the intricacies under the Doctrine of Frustration and the Doctrine of Impossibility (Initial as well as Subsequent). A clear-cut differentiation is conducted between Force Majeure and the Doctrine of Frustration to viably understand the importance of a Force Majeure clause.
- Part-3 deals with the types of remedies available to the parties keeping in mind the essence of ‘Time’ in the contract.

KEYWORDS: Force Majeure, Act of God, Doctrine of Frustration, Doctrine of Impossibility, Essence of Time.

INTRODUCTION:
The Constitution of India under Article 19(1)(g)302 provides the right "to practise any profession, or to carry on any occupation, trade or business". The article gives the citizens of India the freedom to carry on any business which is legal under the laws of the State. But, the nationwide lockdown has created a contradictory belief. Therefore, to continue business activities is the right of a citizen and one which isn’t barred by law.

But, can these rights be suspended during the Covid-19 Pandemic?

302 The Constitution of India.
The answer to the very question lies *per se*, under Article 19(6). The said clause allows the State to impose or even suspend the provisions of sub-clause (g) of clause (1). Article 352(1) of the Constitution of India also lays down the suspension of provisions of article 19 during a National Emergency. Such an emergency, however, can only be declared in case of war, external aggression and armed rebellion. Nevertheless, a pandemic constitutes an emergency of national importance but does not identify health emergencies under its ambit. But, entry 29 of the Concurrent list in the Seventh schedule allows the centre as well as the states to take necessary steps to curb the transmission of any infectious disease.

303 Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, [nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,— (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise].

304 If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or [armed rebellion], he may, by Proclamation, make a declaration to that effect [in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation].

[Explanation. A Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or by external aggression or by armed rebellion may be made before the actual occurrence of war or of any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.]


306 Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.

307 The Constitution of India.


310 (1920) 2 K.B 714.
earliest been adopted by the Madras High Court in 1925\textsuperscript{311}. However, Force Majeure has been implicitly explained under the provisions of section 32 and section 56 in the Indian Contract Act, 1872.

\textit{Section 31}\textsuperscript{312} - “Contingent contract” defined.

It states that- “a ‘contingent contract’ is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen”.

\textit{Section 32}\textsuperscript{313} - Enforcement of contracts contingent on an event happening.

It states- “Contingent contract to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contract becomes void”.

In the Cambridge Dictionary\textsuperscript{314}, Force Majeure refers to: “an unexpected event such as war, crime, or an earthquake which prevents someone from doing something that is written in a legal agreement”.

Black’s Law Dictionary\textsuperscript{315} defines Force Majeure as:

A “superior force- an event or effect that can be neither anticipated nor controlled”.

In simple legal terms, a contingent contract deals with force majeure or in the words of a layman, any unforeseen circumstance arising in the future. A force majeure event is commonly referred to in the English Law. It states that whenever an event which is external, unforeseen and unavoidable by both the parties to a contract, the same may become void or voidable at the choice or willingness of the parties to the contract. The parties to the contract are free from any liability arising from the collateral, non-anticipatory event and no suit can be filed for non-performance or non-compliance of their contractual obligations.

A force majeure event can also be examined under the broad category of an ‘Inevitable Accident’\textsuperscript{316} but, it should not be confused with the concept of ‘Act of God’.

\textbf{Difference between ‘Force Majeure’ and ‘Act of God’}:

An ‘Act of God’ event is only restricted to the occurrence of natural forces which are extraordinary, non-anticipatory and beyond reasonable control\textsuperscript{317}. An act of god clause only comprises an exhaustive list of events. Whereas, a ‘Force Majeure’ event is one which is external, non-predictable and unavoidable but can also comprise events resulting from human agency.

The force majeure events are all those external forces which are unforeseen, beyond the control of the parties and which cannot be anticipated by the parties to the contract. Act of God (vis major), fire, earthquakes, plagues, hurricanes, war, acts of government as well as epidemics are some of the force majeure events\textsuperscript{318}.

\begin{itemize}
  \item \textsuperscript{311}Edmund Bendit And Anr. vs Edgar Raphael Prudhomme on 2 November, 1924. https://indiankanoon.org/doc/1178720/
  \item \textsuperscript{312}Indian Contract Act, (1872).
  \item \textsuperscript{313}ibid.
  \item \textsuperscript{314}Cambridge Dictionary.
  \item \textsuperscript{315}Black’s Law Dictionary, 2nd edition.
  \item \textsuperscript{316}Dr. R.K. Bangia, LAW OF TORTS 42 (24th ed. Allahabad Law Agency 2017).
  \item \textsuperscript{317}Dr. R.K. Bangia, LAW OF TORTS 45 (24th ed. Allahabad Law Agency 2017).
\end{itemize}
It is not necessary that an exhaustive list of events could only comprise force majeure events in the contract. The parties to the contract are also entitled to have a non-exhaustive list of events to constitute a force majeure clause in the contract on the option of the parties.

Illustration:
‘A’ the landlord of a house, contracts with ‘B’ the tenant to pay a sum of ₹10000 if any of his family members die due to ‘fire’ in the house. Thus, in such a case, if ‘fire’ could be considered as a force majeure event in the contract, ‘B’ will be entitled to receive damages for the death of any family member.

Note: Facts and circumstances vary in each case.

For instance, if the same fire is constituted as an act which was under ‘B’ s control or the facts of the case reveal that ‘B’ was well aware of the fact that there was likely a chance of fire; thus, in such a case, ‘B’ will be liable for damages suffered until the provisions of the force majeure clause shall consider ‘fire’ to be a part of the non-exhaustive list of events.

‘Pandemic’ - a force majeure event?
The Ministry of Finance in its memorandum dated 19.02.2020 stated that a pandemic such as the novel coronavirus shall also stand as a force majeure event.

Therefore, if ‘A’ a manufacturer in Kerala under a contract with ‘B’ a distributor in Chandigarh fails to deliver the products to ‘B’ due to the lockdown (act of government), or, due to any other government order is prohibited to deliver the goods as so demanded by ‘B’, the parties will not be held liable to any damages so caused to any of the parties.

The Delhi High Court has recently delivered its judgement in this regard.

Change in ‘Law’:
It must also be noted that the current act of government (lockdown) also attracts a ‘change in law’. The orders of the government to invoke country wide lockdown falls under the acts that amount to a ‘change in law’. The parties to the contract must be aware of the ‘definition of law’ and what amounts to change in ‘law’ while invoking a force majeure clause of the contract.

In simple terms, before relying on the force majeure clause, the contract must also be thoroughly examined to understand:
1. The ‘laws’ governing the contract, and,
2. The ‘acts’ which fall under the ambit of the acts of the government, to constitute the ‘change in law’.

When a party to the contract tries to invoke a force majeure clause, the same party must be aware of the ‘definition of law’ under the contract to which they are bound to perform.
their obligations. The clause has to be examined to see if the law which has impacted the contractual obligations is covered under the definition of 'law' in the change of law clause.

For instance, ‘A’ the exporter of goods from India has a contract with ‘B’ the importer of the goods in Australia. Under their contract they consider the definition of law as the law of both the countries i.e., the law of India as well as the law of Australia, to continue their trade. Later, due to the lockdown both the parties are under a position of impossibility. Thus, here the parties can discharge themselves from any liability because the definition of law considers the laws of both the states.

Suppose, the same agreement considers only the laws of Australia under the definition of law governing the contract, the other party i.e., ‘A’ cannot discharge himself from the contract.

It must also be noted that when there is a change in the law as to an instance creating such a change, the same act of the government must be covered under the contract. The contract must consider such an order of the government under the ambit of 'change in law'.

Thus, the obligations of a party could only be excused when:

1. The uncertain event is a cause of superior forces or a part of the non-exhaustive list of events,
2. The uncertain event is beyond human control,
3. The event is unforeseen,  
4. The event cannot be avoided or overcome, and,
5. The event cannot be assumed.

Wagering Agreement:
A wagering agreement is also a kind of contingent contract. Such agreements are also based on the happening or non-happening of a future contingent event.

Section 30 – Agreements by way of wager, void:
It states- “Agreements by way of wager are void: and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made”.

A wagering agreement is also considered a contingent contract but stands void ab initio. Agreements based on way of wager are often confused and are even sometimes considered to be within the ambit of contingent contracts. The nature of such a contract was differentiated in Carlill v. Carbolic Smoke Ball Co.

For instance, if ‘A’ (a gambler) makes a wagering agreement with ‘B’ (another gambler) that if a pandemic occurs in the future within a reasonable time, ‘A’ will be entitled to a sum of ₹5000. Later, the pandemic occurs, but, ‘A’ will not be

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awarded any claim by the Court if ‘B’ fails or refuses to pay the sum.

Thus, a wagering agreement is also a contingent contract, but such an agreement has been specifically declared to be void.

**(PART:2)**

**Doctrine of Frustration:**

When a party to a contract does not have a force majeure or act of god clause in its contract, they are bound to be liable for compensation towards another party for non-performance or non-compliance of contractual obligations. But, such a party to the contract is also entitled to frustration if such non-compliance is a cause of ‘impossibility’ or ‘unlawfulness’.

Such a frustration to escape from liability could be availed and falls under the ambit of the doctrine of frustration. Frustration here refers to ‘automatic termination’.

The doctrine of frustration is generally availed in cases which do not have a force majeure clause in the contract.

*Section 56*²⁹: Agreement to do an impossible act.

It states- “an agreement to do an act impossible in itself is void”.

Compensation for loss through non-performance of an act known to be impossible or unlawful.

It states- "Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise”.

If an act which is impossible or which cannot be performed due to certain uncertain circumstances, such an agreement becomes void *per se* if and only when both the parties are unaware of the contingency.

**Illustration:**

‘A’ unveils a liquor shop with the prior permission of the government, such an agreement is of legitimate business because of lawful nature. If in proximity the government puts a ban on liquor consumption and sale, ‘A’ will *ipso facto* fall under an unlawful business because liquor falls under an illicit consumption, trade or occupation. Thus, the contract gets frustrated.

Similarly, if ‘A’ was well aware of the fact that liquor had become a good of unlawful nature and despite knowing the fact, if ‘A’ continues to carry on his business activities, ‘A’ cannot defend himself from the liability under the ambit of the doctrine of frustration.

**Note:** In the above-mentioned situation, ‘A’ cannot defend himself from liability by the pleading of ‘mistake as to a matter of fact’. He would still be liable under ‘mistake as to a matter of law’³³⁰

Apropos current situation, if ‘A’ (a goods manufacturer) from Delhi contracts with ‘B’ (a goods dealer) in Kolkata to deliver the goods in the month of April, the same will become an impossible act because both the parties are prohibited from performing their contractual obligation amid lockdown.

**Note:** The party would not be under impossibility if the same manufacturer deals with essential goods.

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The foremost steps of the doctrine of frustration were laid down in Taylor v. Caldwell. It was held that:

“When the contract is not positive and absolute, but subject to an express or implied condition, e.g., a particular thing shall continue to exist, then in such a case, if the thing ceases to exist, the performance of the contract is deemed to be impossible and the parties are excused from performing the contract.”

Under the Indian Contract law, the doctrine of frustration is elucidated in Satyabrata Ghose v. Mugneeram Bangur & Co. & Anr. It should be noted that ‘impossibility’ does not merely refer to physical or legal impossibility but also comprises impracticability. This concept has been ascertained by the Supreme Court of India in the landmark case of Energy Watchdog v. Central Electricity Regulatory Commission. The court held that:

“If there is an express or an implied clause in the contract which deals with the event leading to frustration of the contract, it should be dealt under Section 32 of the Act whereas if the event that happens is outside the scope of the contract it should be dealt under Section 56 of the Act.”

Doctrine of Impossibility:
Frustration could be the result of:
1. Initial Impossibility, or,
2. Subsequent Impossibility.

1. Initial Impossibility:
When there is a situation as to a matter of initial impossibility, the case is usually void ab initio. The obligations of the parties to the contract are beyond possibility since the beginning. The concept of initial impossibility could be understood in Shyam Biri Works Pvt. Ltd. v. U.P. Forest Corporation.

For instance, ‘A’ enters into a contract with ‘B’ to discover treasure by magic. Thus, in such a case, the act is void prima facie. Similarly, with reference to government restrictions, if a person enters into a contract with another person to perform their obligations during the current lockdown situation, the same will result in initial impossibility.

2. Subsequent Impossibility:
The Covid-19 conundrum attracts the concept of ‘subsequent impossibility’. Under the concept of ‘subsequent impossibility’, the impossibility so arisen is not void since the beginning. Such an impossibility is a sole cause of an uncertain act or event during the subsequent performance of the obligations.

Apropos the current situation, for instance, ‘A’ enters into a contract with ‘B’ to deliver him 50 bales of cotton. But, unfortunately,
because of government orders (lockdown), ‘A’ is prohibited to perform his obligation. In such a situation, the impossibility is a cause of subsequent impossibility and not one of initial impossibility.

The legal maxim- “les non cogit ad impossibilia” states that “law does not compel a man to do what he cannot possibly perform”.

Thus, with reference to the current scenario, most businesses, not having a force majeure clause, are availing the blanket of section 56 to protect themselves from any liability. Suppose, if ‘A’ - a manufacturer and distributor of wooden logs- entered into a contract with ‘B’ the buyer of the wooden logs in the early months of January and asked ‘A’ to deliver the product by April. ‘B’ agreed to ‘A’s request to deliver the product by April and assuming ‘A’ to be a good and trusted party, paid a minimal sum to him in advance in the month of January. ‘B’ assumed no risk in the delivery of the wood, and, therefore did not add a force majeure clause in his contract. Later, due to the vulnerable pandemic, the government restricts the trade and imposes lockdown. Now, ‘B’ due to some urgent need of the wood, could not terminate the contract and requests ‘A’ to return the advance payment made by him earlier. But, ‘A’ refuses saying that he would suffer damages because he had already cut the wood. Thus, in this case, ‘B’ could render the concept of subsequent impossibility. Thus, the contract stands frustrated.

Note: ‘B’ could also avail to either suspend or terminate the contract. ‘A’ has suffered the damage and could be either compensated keeping in mind the nature of the contract and the nature of the event or would not be compensated for any damages stating that consent of ‘A’ was obtained in good faith or, there was no mens rea on the part of ‘B’.

Section 65: Obligation of a person who has received advantage under void agreement, or contract that becomes void. It states- “When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make Compensation for it to the person from whom he received it”.

Under the abovementioned provision, the words “when a contract becomes void” are of relevant emphasis. The words state that when a contract is discovered to have become impossible or unlawful subsequently, the same becomes void. Thus, if any of the party is in the position of an advantage over the other, the same needs to be compensated to the aggrieved party.

It should also be noted that the parties to the contract could frustrate the contract only and only if both the parties are unaware of any possible threat or future contingency. If a party to the contract is aware of a possible uncertain event, the same could not constitute to be taken due care of. The same has been mentioned in section 56.

Difference between ‘Force Majeure’ and ‘Doctrine of Frustration’:

Often, people consider force majeure to be similar to frustration. This similarity is condonable up to certain features but, it must be noted that ‘similarity’ does not refer to ‘same’. This thin line of...
differentiation is of the utmost importance when it comes to comparing force majeure with the doctrine of frustration. Force majeure as we have already discussed is a series of events considered to be uncertain. Whereas, the doctrine of frustration is also concerned with these uncertain events but, it does not completely reflect the events covered under the ambit of force majeure.

1. A force majeure event consists of all those events which are uncertain, beyond human control and unavoidable. Such a clause could comprise a specific list of events (exhaustive) or general list of events (non-exhaustive) or even both.

For instance, ‘A’ before entering into a contract with ‘B’, ad idem, agrees to add ‘gas leakage’ as a part of a non-exhaustive list of events in addition to an exhaustive list of events.

Whereas, under the ambit of the doctrine of frustration, only those events which cannot be predicted, controlled and avoided stand under the list of events i.e., specific list of events.

Suppose, ‘A’ enters into a contract with ‘B’ to perform their obligations in a water project. Later, due to uncertain water leakage, both ‘A’ and ‘B’ are unable to perform their obligations. Thus, here the parties cannot fall under the ambit of the doctrine of frustration unless they have a ‘force majeure clause’ in the contract covering water leakage as a part of the force majeure event.

2. Under force majeure, the list of events to be covered under the ambit of force majeure are identified prior to the execution of the contract.

For instance, ‘A’ before entering into a contract with ‘B’, with mutual consent agrees to add ‘gas leakage’ as a part of a non-exhaustive list of events. Here, the force majeure event is identified prior to execution.

Whereas, under the doctrine of frustration, the uncertain event arises subsequent to the execution of the contract. Such an event is not identified prior to execution.

For instance, apropos current situation, the parties under a contract, not comprising ‘pandemic’ as a force majeure event can protect themselves under the blanket of the doctrine of frustration. Such an event has been arising subsequent to execution.

Note: The doctrine of frustration could only be invoked in ‘executory’ contracts. A contract which has already been ‘executed’ does not fall under the ambit of the doctrine of frustration. The Delhi High Court has recently delivered a judgement stating that ‘frustration’ could not be invoked in an executed lease agreement.

3. Under force majeure, the contract does not become void per se. Such an event could make the contract either void or voidable only on the choice of the parties. The uncertain event does not adhere to compulsory impossibility. It is only restricted to pro tempore impossibility.

https://indiankanoon.org/doc/130579261/
343 Livell’s News Network, Doctrine Of Frustration Under Section 56 Of Contract Act Not Applicable To Lease Agreements: Delhi HC [Read Judgement], LiveLaw (May 22, 2020, 02: 32 P.M.)
For instance, during the current coronavirus situation, those businesses consisting of a force majeure clause in their contract are not necessarily under immediate termination. The contracts could stand suspended for a reasonable time.

Note: The suspension is also objective whether ‘time is an element of essence’.

Whereas, under the doctrine of frustration, the parties are intended to termination and the contract becomes void. The impossibility comprises ultimate termination and, thus it is of permanence. When the impossibility is a result of initial impossibility, it is void ab initio. On the other hand, if the impossibility is subsequent, the contract is usually under immediate and compulsory termination.

For instance, with reference to the current conundrum, ‘A’ had entered into a contract with ‘B’ in January to fulfil their obligations in May. Thus, here the impossibility is a part of subsequent impossibility. Thus, if the parties to protect themselves from any loss, approach the court to avail remedy, they will be ordered to immediate termination.

Note: It is not always mandatory to terminate the contract under such an event. If the parties do not agree mutually to suspend their obligations, they are bound to termination.

When a force majeure event cannot be covered, ‘frustration’ of the contract could be claimed. Whereas, when a force majeure event can be covered, ‘frustration’ cannot be ‘automatically’ claimed. Both are simultaneously similar, but contradictory at the same time.

Thus, if a party to a contract has a force majeure clause in the contract, the party cannot claim for the frustration of the contract automatically. On the other hand, if the party does not have a force majeure clause in the contract, the same could claim for the frustration of the contract.

Here, if the party covers a force majeure event, the same cannot be automatically frustrated. The parties need to solemnly formalize the termination of the contract. Whereas, in a contract, where parties do not have a force majeure clause to cover any such uncertain event, the same could be automatically terminated without prior notice.

(PART:3)

Consequences:

Now that we are well aware of the concepts of force majeure, the doctrine of frustration and the doctrine of impossibility, the important question that still remains is – What are the consequences of such a pandemic on the contracts?

The legal maxim – “ubi jus ibi remedium” is of utmost importance. The maxim states- ‘where there is a wrong, there is a remedy’. The current scenario, because of due protection against the draconian virus, has created a lot of confusion when it comes to contractual obligation.

Under such an event, the ‘wrong’ affiliated to the deadly coronavirus cannot be adequately ascertained. Such an event, in spite of creating severe health and monetary damages, cannot be considered to be a ‘wrong’. But, the result of human activities is always present under the ambit of ‘wrong’.

The global pandemic was prima facie unknown to become a draconian menace. Such an event was de facto unfamiliar during the initial days of its outbreak. But,
subsequently has led the law perusal in regards to contracts.

Several consequences arise out of such contractual obligations.

**The Essence of ‘Time’ in contract:**
Before understanding the various consequences of force majeure, it is important to understand the role of ‘time’ in a contract.

A contract may be continued for a reasonable time or, for a specific time period. Where contracts do not have a specific period of continuance, the same is considered to have been made for a ‘reasonable time’\(^{344}\). The reasonability is based on the nature of the contract, type of contract, etc. Reasonability differs in each case.

There are two situations arising in a contract:

1. **When time plays an essence in the contract:**
   Sometimes, certain contracts are continued for a specific time period. The obligations of the parties are based keeping in view the essence of time in the contract. In such a contract, non-performance of the obligations leads to automatic termination of the contract. It should also be noted that it’s not always necessary that such a contract will ultimately lead to termination. Sometimes, the same could lead to being void or voidable by the parties.

   **Section 55\(^{345}\): Effect of failure to perform at a fixed time, in contrast to which time is essential.**

   **Shivani Singh, Adarsh Subramaniam & Varsha Manoj, Effect of COVID-19 on performance of contracts where time is of the essence and passing of risk in sale of goods contracts, Barandbench (May 13, 2020, 6:12 P.M.)**

   It states- “When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of essence of the contract”.

   For instance, ‘A’ had booked a train ticket in Indian railways to travel to Rajasthan in the month of April. Therefore, the same would be automatically terminated due to impossibility. Here, time plays an essence in the contract, but, the same automatically becomes void.

   Similarly, if ‘A’ had entered into a contract with ‘B’ for construction of his house by the end of May, the same has time as the essence of the contract. Here, the contract could automatically become void or voidable at the choice of the party.

2. **When time does not play an essence in the contract:**
   When there is a failure to perform the obligations where there is no stipulated period of existence, the same becomes void under the provision of section 55. Here ‘failure’ to perform the obligation is of relevance.

   Under the said provision, ‘failure’ refers to non-performance due to human agency and not one that arises from impossibility. When such a failure is due to an uncertain event, the same has been held to be void or voidable at the choice of the parties. The current corona situation has led to an

\(^{344}\) Shivani Singh, Adarsh Subramaniam & Varsha Manoj, Effect of COVID-19 on performance of contracts where time is of the essence and passing of risk in sale of goods contracts, Barandbench (May 13, 2020, 6:12 P.M.)

\(^{345}\) Indian Contract Act, (1872).
impossibility. But, such an impossibility is not an act of the parties to the contract. Therefore, during the pandemic, if a contract does not consider time of utmost importance, the same does not lead to being void.

Therefore, the essence of time is of complete relevancy and emphasis to further understand the consequences of non-performance of contractual obligations. The following are the most common consequences of non-performance amidst the coronavirus conundrum:

1. **Termination:**
   The parties to the contract are entitled to temporary termination (suspension) or even permanent termination or discharge of the contract. When parties to the contract have a force majeure clause to deal with any uncertain future circumstance, the same could be terminated on the choice of the parties.
   
   Keeping in view the current situation, suppose, ‘A’ entered into a contract with ‘X’ to deliver him some non-essential product. The same contract was made without a force majeure clause. Here, ‘X’ due to non-performance of his obligation can claim for automatic termination under the doctrine of frustration.
   
   Similarly, if ‘B’ enters into a contract with ‘Y’ to deliver steel amid the lockdown. The same could not be terminated on the grounds of either force majeure or the doctrine of frustration. The same has been explained by the Bombay High Court in this regard because steel is an essential commodity and is, therefore, allowed for trading amid the lockdown.

2. **Suspension:**
   The word ‘suspension’ refers to temporary prohibition or prevention for ad interim period. When parties to the contract are not at a position to terminate the contract, the parties to the contract can, by mutual acceptance, suspend the contract for a specific time period. Such a suspension is most acceptable where time does not play an essence in the contract.
   
   For instance, if a retailer owns a shop selling non-essential commodities, the retailer could by mutual agreement, suspend the contract with the distributor until the further performance of his contractual responsibility.
   
   **Note:** Such termination must be duly conveyed by notice to the parties.

3. **Novation:**
   Novation refers to the substitution of an existing contract into a new one. The parties to the contract can, with mutual acceptance and ad idem, substitute the original contract into a new contract. Here, the parties to the contract are no further liable for any obligation present under the original contract. Novation of a contract mostly involves the transfer of the obligations of one party to another party with mutual consent of the second party. During the pandemic, many small businesses may agree to novation or substitute for a new and fresh contract.

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For instance, ‘D’ a retailer in Maharashtra, entered into a contract with ‘G’ a pharmaceutics manufacturer and distributor in Goa. Later, due to the pandemic, ‘G’ with mutual consent of ‘A’, substitutes the supply to ‘K’ another pharmaceutics distributor in Maharashtra. ‘A’ therefore, substitutes his original contract from ‘G’ to a new contract with ‘K’ for expeditious supply. Thus, the contract remains alive.

4. Alteration:
Alteration\(^{349}\) of a contract refers to the process of reducing or changing the terms of the contract without substituting it into a new contract. Alteration of the contract does not change the parties to the contract but changes the obligations under the contract.

For instance, ‘P’ enters into a contract with ‘Q’ for the supply of 100 bags of wheat. Later, due to less income in hand with ‘P’, both mutually agree to alter the contract and reduce the supply to 50 bags of wheat. Here, the parties to the contract remain the same but the obligation of supplying 100 bags of wheat reduces (alters) to 50 bags of wheat.

5. Arbitration:
It is not always mandatory to approach the court for any dispute settlement at the first place, until and unless, the parties to the contract are *ad idem* willing to assign the dispute to an arbitrator. Arbitration has played a massive role in harmonious and satisfactory dispute settlement amidst the coronavirus pandemic. Such a right has been assigned to the parties to the contract under section 28\(^{350}\).

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\(^{349}\) *ibid.*

\(^{350}\) Indian Contract Act, (1872).

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Exception 1. - Saving of contract to refer to arbitration dispute that may arise:
It states- “This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred”.

Exception 2. - Saving of contract to refer questions that have already arisen:
It states- “Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration”.

Arbitration has stood as a boon to contractual disputes. It is not necessary that parties to the contract need to have an arbitration clause to refer any dispute for arbitration. Section 7 of the Act\(^{351}\), *inter alia*, provides the right to have a separate agreement to resolve disputes under arbitration. The parties are also entitled to submit notice to the other party to refer the dispute to an arbitrator with mutual consent and, without an arbitration agreement. Arbitration is considered as an excellent dispute resolution as it prevents the parties from court expenses.

Thus, if any of the parties to the contract are with or without an arbitration clause or agreement, willing to resolve their disputes outside the court, the same could amount satisfactory to both the parties.

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If the parties are not satisfied with arbitrary dispute resolution, the parties are not restricted to approach the court. Mediation has also played a significant role in this regard.

**CONCLUSION:**
The Covid-19 pandemic despite creating a deploring situation around the world, has led to severe contractual disputes. The obligations of the parties are on a standstill due to the draconian effects on contracts. Some covenants might have a force majeure clause while some may not.

The pandemic has given us the opportunity to delve into the depth of contingency. Such an uncertain situation mostly evolves once in a century, but, in order to scrupulously tackle these situations, it is important to prepare ourselves. The law has led us to practically understand the concept of force majeure and the importance of the doctrine of frustration in this regard.

The law is very wide, and so are the concepts of force majeure. A force majeure deals with contingency and such a contingency could either make the agreement void or voidable based on the objectivity of the case. Several things need to be kept in mind while drafting a force majeure clause and its enforceability. Similarly, the doctrine of frustration is perusal in this regard.

The parties to the contract are under an event of impossibility amidst the pandemic. Thus, the obligations of the parties to the contract have *ipso facto* become void under the provision of the doctrine of frustration. But, such a contract could also be voidable at the choice of the parties.

While some contracts are mutually resolved, some still revolve around court procedures. The global malady has solemnly affected the economy at large. But, in order to absolve the disputes so arisen, the courts have enunciated the enforceability and effects of such a pandemic on the covenants.

It is rightly said that the law is very flexible and transforms itself with time. Similarly, the practicability of such force majeure concepts and doctrines are also transformed amidst the pandemic.

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https://www.thehindu.com/opinion/lead/mediation-in-the-age-of-covid-19/article31863358.ece
INTRODUCTION
The particular research paper is presented on the case State Delhi Administration Vs Sanjay Gandhi 1978 Cr. L 952 (SC) which is a Criminal Appellate Jurisdiction popularly known as ‘Kissa Kursi Ka Case’ and talks about cancellation of bail under section 439 of the CrPC 1973, that has been previously granted by the High court of Delhi.

FACTS AND ISSUES

FACTS: This particular case is mainly based on the film ‘Kissa Kursi Ka’ produced by Shri Amrit Nahata which, depicted the story of the political doings especially during the time of emergency of the famous mother son duo, Sanjay Gandhi who was the respondent in the particular case and Mrs. Indira Gandhi former prime minister of India. Certificate for exhibition of the film was supposed to be granted by the censor board which was declined, upon which the producer filled a writ petition on the writ of Mandamus in the court. According to the court’s directions, the screening of the film for the grant of the certificate of exhibition by the judges was scheduled on 17th November, which could not take place owing to the destruction of all the 150 reels of the film and the petition filled by the producer came to an unexpected and abrupt end.

After the period of emergency ended, and on arrival of the Janata Government to power, a raid was conducted in the Gurgaon premises of the Maruti Limited, on the basis of which certain impeaching materials i.e. 13 steel trunks containing the reels of the film, all burnt and damaged were founded in the factory premises. The security officer and the assistant of the company were arrested on the same day and on the day after a confession was made by the assistant officer regarding how the reels of the film were destroyed and the purpose behind the destruction caused. Several other statements made by the different employees of the company were recorded and after the completion of the process of investigation the CBI filled a charge sheet citing a total of 138 witnesses for the charges to be proved. However, in order to protect
himself from arrest the respondent obtained an anticipatory bail from the sessions court and tried to tamper with the witnesses in order to safeguard his private interest. Owing to the fact, that the respondent was granted an anticipatory bail who was accused for offences under sections 120B, 409, 435, and 201 of the Indian Penal Code by the CBI, the state filled an appeal before the supreme court for the cancellation of the bail on the ground of thwart to the court of justice and after the previous plea before the Delhi high court was dismissed.

ISSUES: Special leave appeal against an order rejecting the application for cancellation of bail raised the following issues:

1) Firstly, whether the prosecution succeeded in proving the fact that the respondent meddled with its witnesses in the particular case.

2) And secondly, if there was presence of reasonable apprehension, that there will be a continuation in the course of conduct if the respondent was allowed to remain at large and whether the respondent abused his liberty.

- RELEVANT LAWS AND PRECEDENT CASES

RELEVANT LAWS: In the particular case, the relevant sections that are being used are Section 439(2) of the CrPC which talks about the special powers of the high court or sessional court regarding bail and section 437(5) of the CrPC which talks about the times when bail can take place in case on non-bailable offence along with article 136 of the Indian Constitution which gives the supreme court of India the special power to grant special leave to plea against any judgement or order passed by any tribunal or court of India. The other sections that comes into the picture in the concerned case are sections 83, 100, 161, 164, 306, and 306(5), of CrPC, section 27 of the Indian Evidence Act 1872, and sections 120(B), 201, 409, and 439 of the IPC.

PRECEDENT CASES: The two main cases cited as precedents for delivering the particular judgement were the cases of Gurucharan Singh and others Vs. State of Delhi Administration and Madhukar Purshottam Mankar Vs. Talab Haji Hussain.

JUDGEMENT

Supreme court founded that the respondent had misused the facility offered to him by the high court. It was clear from the facts that the accused had meddled with the witnesses. The court held that not just a reasonable apprehension of the benefit for the accused was present in tampering the witnesses but also there was satisfactory proof that the respondent did abuse his liberty by attempting to suborn the witnesses and therefore forfeited his right to remain free. Hence in a unanimous judgement the supreme court declared the bail to be cancelled.

CRITICAL ANALYSIS

JUDGE’S REASONING:

Owing to the facts of the case where the respondent anticipated the possibility of an arrest due to the raid conducted obtained an anticipatory bail for himself. But owing to the meddling of the witnesses which led to the filing of an appeal by the State Delhi Administration first before the high court
and then before the supreme court for the cancellation of the bail.

The supreme court raised two concerns, as has been pointed out by CJI Chandrachud while delivering the judgement that, “Rejection of bail when bail is applied for is one thing and cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial.”

Also the power to take back into possession of an accused who has been freed upon on bail has to be implemented with great care and circumspection. These two concerns made the case quite challenging giving the respondent an opportunity to safeguard himself. But as the facts of the case portray, anticipatory bail was initially obtained in respect of offences of conspiracy and theft of the film from the government’s custody which later after investigation turned out to be more serious offences under section 120(B) and section 409 of IPC. The fact that the respondent was found to be misusing his liberty granted by the court by tampering with the witnesses which is a crime under section 409 of the IPC and is punishable with life imprisonment makes the offence a non-bailable one. The hostile attitude of the witnesses in the court of justice even after confessing and giving a written statement about the same can itself be treated as a proof against the respondent.

The supreme court stated that the attitude of the state towards the accused by not taking him into the possession was seen as a biased decision on its part and also the fact that the respondent was charged with an offence under section 409 of IPC made the high court duty bound to enforce the provisions of section 437 of CrPC and not act on the basis of vigilance and promptitude.

Ganpat Singh, Digambar Das, and Satpal Singh all being the employees working at various positions in Yadav’s company giving affidavits to support the fact that Yadav was contacted by the respondent for changing his statement in the court prior to the date of hearing also acts as a reasonable proof against the accused.

Also, according to the court in cases where the statute raises a presupposition of guilt the accused is eligible to contradict that presumption by proving his defense by a balance of probabilities. He is not required to establish his case beyond a reasonable doubt and hence is eligible to establish its case in an application for cancellation of bail by showing a preponderance of probabilities.

CRITIQUE:
The case owing to its proceedings and the over ruling by the supreme court can be termed as a landmark judgement. Few of the arguments put forward by the respondents were very interesting and had the capability of turning the tables. For example, one of Shri A.N. Mulla’s argument where he contradicted the allegation made by appellant regarding the tampering of the witnesses as this according

360 State (Delhi Administration) vs. Sanjay Gandhi (05.05.1978 - SC) : MANU/SC/0171/1978
361 A postal peon
362 An employee of the Maruti Limited
363 Constable of Haryana armed police
to him resorted to the expedient of asking for cancellation of the bail of the accused in order to give prop to a failing case based on undermined charges. This was impermissible in an appeal filed under article 136 of the Indian Constitution as in these cases the only issue that is to be considered by the supreme court is whether with the help of the evidences provided earlier, the high court gave an appropriate judgement or not. He also argued, that any observations made by the supreme court in the above scenario will inadvertently influence the course of trial as the case was pending in the sessions court. Also the argument of the respondent regarding the prosecution witnesses turning hostile was impressive, where he by citing examples of relationships like that of siblings or parents where the former may resile in the court from a statement recorded at the time of investigation stating love and affection as the reason and not persuasion as the one. He connected the same with the employer and employee relationship trying prove the charge of 409 on his client as false. But at the same time reasoning provided by the Coram was also equally justified and are crystal clear from the series of events that took place. Thus, taking into consideration all the facts and the situations of the concerned case the supreme court’s rendered full justice by over ruling the high court’s decision and cancelling the bail appeal. The supreme court also tried to justify its decision by not interfering and letting the liberty of the session judge in fixing the amount and conditions of the bail remain intact.

The judgement hence paves the way for the public at large to view the positives and the negatives of politics with the help of entertainment means like movies. The best part about the judgement is the unanimous view of the Coram and the interesting arguments put forward by both the parties.

CJI Y.V Chandrachud exquisitely clusters all the views and the arguments and passes the following judgement while keeping in mind the valid arguments of the respondents and keeping the liberty of the session judge intact.

CONCLUSION
The particular decision of the supreme court has proved yet again that law is blind and equal for all whether the accused is a powerful politician or a poor man, justice is served at last. Finally, the film was released on 16th February 1978 and both Sanjay Gandhi and his assistant were sentenced to imprisonment for a period of a month and two years respectively. Sanjay Gandhi was denied bail and the accused was found guilty of breach of trust, criminal conspiracy, mischief by fire, dishonestly receiving and destroying property under government’s custody, and meddling with the witnesses. The judgement given by the Coram was unanimous without any dissenting views. The movie ‘Kissa Kursi Ka’ was a political satire and portrayed the corrupt practices that are being carried out by the politicians for gaining power. The legal case went on for a period of eleven months and several appeals had to be made after which justice was finally rendered and the appeal for cancellation of bail of the accused was approved.

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CHILD RIGHTS AND PROTECTION: AN INTERDISCIPLINARY FIELD OF LAW

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ABSTRACT
“A child is a beam of sunlight from the Infinite and Eternal, with possibilities of virtue and vice, but as yet unstained.” — Lyman Abbott, American Congregationalist minister.

Asia is a large and populous continent where 60% of the world's population resides. In terms of only the child population, India has the highest child population in the world followed by China. As children are the most vulnerable citizens of the society. The phase of childhood is considered as the age of innocence, freedom, joy and play. At this point of life, a person hardly shoulders any kind of obligation or responsibility and they feel no liability towards anyone. This article discusses about the challenges faced by a child either in terms of crime or, due to the thinking of society and also highlights the legislation framed to overcome these challenges. The article also attempt to focus on the shortcomings of the enactments or their poor implementation.

PROLOGUE
As it is evident, that children portray a most significant proportion of our society and are the most vulnerable segment of society. Thus, they needed to be protected from the harshness of the world outside. Through the eyes of Nelson Mandela, Former President of South Africa – “Safety and security don't just happen they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear.” And not only they need to be protected but also they need their distant voices to be heard.

In former times, children were recognized as mini people thus possessed mini rights. According to many researchers, in the back century study of childhood has never catered the attention of society because this never occurred to them that there is a need of reasonable classification between individuals thus they never knew that they were doing something wrong; But as the time varies, there was a sense of feeling about childhood and this field of study gained consideration, people started considering children as specific being with specific needs, requiring specific care as well as specific measures of protection.

According to some historian the concept of children’s rights took its roots well before the 20th century, as soon as the adults came to consider children as specific beings with specific needs and profile. In this whole period of time many legislations, charters, committees, schemes etc. were formed in order to prioritize safeguard and protection for children as well as to cater the needs of children. International conventions or committees as well as Indian legislation played an important role in relinquishing the crimes against children.

In furtherance of these initiatives many more issues were resolved by the legislations i.e. issue of child labour, issue of child education, issue of child marriage, issue of child trafficking, issue of child adoption, issue in difficulty of taking stock of children voice, issue of malnutrition, issue of child sexual abuse etc.

What does it mean to be a child?
As study of childhood had always been a interdisciplinary field of study therefore, there has been many ways for defining the term ‘child’. Although, at last International
law gives the status of child to the persons who are below eighteen years of age it says—‘child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’ While, Indian law remains ambiguous, the law in our country makes provisions for child in multi-sectoral aspect; different definition for different aspect of law for instance, Child Labour (Protection And Regulation) Act, 1986 and The Beedi and Cigar Workers (Conditions of Employment) Act, 1966 states that, child means a person who has not completed his fourteenth year of age. Whereas, The Plantations Labour Act, 1951 and The Motor Transport Workers Act, 1961 provides that, child means a person who has not completed his fifteenth year. On the other hand, The Prohibitions of Child Marriage Act, 2006 asserts, child means a person who, if a male, has not completed twenty-one years of age, and if a female, has not completed eighteen years of age. However, there are few Acts that concurs with the opinion of UN convention regarding the child age, The Juvenile Justice (Care and Protection of Children) Act, 2015 and The Protection of Children from sexual offences Act, 2012 both considers that, “child means any person below the age of eighteen years” and not only this, to determine the criminal liability of a child the age is seen in a more different way the Indian Penal Code, 1860 asserts criminal liability on a child at the age of twelve years, below seven years no liability arises and between seven to twelve years the liability conferred upon maturity of child. As every act is brought with a different objective therefore, in order to solve their purpose of establishment the term ‘child’ has been defined differently. In Indian law age of child is determined through two expressions minor and major. However, these expressions has created an ambiguity and confusion so, in anticipation of relinquishing this obscurity Indian Majority Act, 1875 was adopted, which clearly states that, “Every person domiciled in India shall attain the age of majority on his completing the age of eighteen years and not before.” But the act also states that nothing in the act shall affect the capacity of any persons to marry, dower, divorce and adoption as well as the religion or religious rites therefore, the incongruence is still there.

**EMERGENCE OF CHILD RIGHTS**

History of child rights has been a longer journey through time and space therefore this has always been difficult to determine the date when history of child rights begins. Indeed, this specific field of restorical interest was born in 1960 with the publication of famous book “Centuries of Childhood, A Social History of Family Life” of A French historian Phillippe Aries in which he mentioned that the concept of children’s rights takes its roots well before the 20th century, as soon as the adults came to consider children as specific beings with specific needs and profile. In back 17th century, the mortality rate of infants increased leading to limited size of the families thus the adults tends to track down all the family archives in order to determine the reason behind the infant mortality and this expression was translated as a sense of feeling for childhood, for the first time, child were considered as specific beings requiring specific measures for protection. After this, there was a time of Industrial Revolution and child labour in the factories.

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365 Indian Majority Act, 1872 [section 3]
has been denounced as one of the most shameful events in the industrial revolution, there was a huge demand of child labour as well as supply of child labour. But by the time of second industrial revolution state intervened with “Swiss Factories Act, 1877.” In the same way, as the time was revolving new problem came into shape with their emerging solutions, but there was no permanent solution until the World War 1; in the history of child rights, period after the World War 1 was of particular importance during 1919, the newly formed “League of Nation” established a committee on child welfare known as “Child Welfare Committee” was the first committee for the welfare of child with an intention to circulate the best practice made for the protection of children, and in the year 1924, league of nation adopted the declaration of the rights of the child which came to be known as “Declaration Of Geneva” and an expanded version of this was adopted by United Nation in 1959 the declaration recognizes that, ‘Mankind owes to the child the best that it has to give’, but was hardly implemented. In 1979, the UN held the International year of the child and there a conference was held on children’s rights and there a proposal was made on adopting a convention on the rights of child and finally, the convention was unanimously adopted on 20th November, 1989, popularly known as United Nation Convention On The Child Rights [UNCRC] according to which, all children should grow up in the spirit of peace, dignity, tolerance, freedom equality and solidarity and created an obligation for all Nation to provide these rights to children by law. Then in the year 1992, the Government Of India ratified the convention. Before this ratification India, has already adopted a number of laws and formulated a range of policies to ensure the best interest of children; for instance, The Guardian and Wards Act, 1890.

VULNERABILITY OF CHILD AND THE LAW IN INDIA
It is clear that children are the most vulnerable citizens among all individuals, therefore they are too much prone to all the risks and perils and this is compounded by the social inequalities they are facing because according to Thomas Jefferson; “There is nothing more unequal than the equal treatment of unequal people”, and Article 14 of the Constitution of India also accords the same thing that in pursuance of justice reasonable classification can be done to ensure equality among people. Hence, it is justified that this specific strata of society needs specific protection as their lives are struggling for a better future revolving around various issue of exploitation and abuse, actually, abuse can be of physical, sexual and mental as well; and it can be mounted by any other person whether any adolescent, or a teacher or a family member and it has been found that there is a large number of cases in which children are sexually exploited by their own family members.

- Child Sexual Abuse or exploitation and law reforms
Child Sexual Abuse - According to report of NCRB [2018]: as many as 109 children were sexually abused everyday in India, sexual abuse is found as the most prevalent crime against child, sexual abuse basically occurs when a child is used for a sexual gratification by any other person; an adolescent or an adult. The sexual exploitation can be committed through many crimes, for instance; offence of rape and sodomy, offence of outraging modesty,

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366 National Crime Branch Bureau
unnatural offences or child Marriage, pornography or child prostitution and so on. Although there are various legislative enactments dealing with these crimes but these enactments do not specifically address child sexual abuse or strictly speaking there is no comprehensive law dealing with child sexual abuse. THE INDIAN PENAL CODE, 1860 states about the offence of Rape and Sodomy. Rape has always been a too tactful to be discussed and in IPC; the term ‘Rape’ is too specific: it does not even include boys thus considering child specifically is too far to be reached. Now anything less than rape is defined under IPC is ‘outraging the modesty’ and this is also restricted for girls thus there is another offence asserted in IPC viz. ‘Unnatural Offences’ this area somehow considers the offence against male child. In the leading case of Sakshi v. Union of India367, the court gave the following directions:

In holding a trial in the case of child sex abuse or rape:

1. A screen or such arrangements may be made wherein the victim or witnesses (who may be as equally vulnerable as the victim) do not see the body or face of the accused;
2. The questions put in cross-examination on behalf of the accused, in so far as they relate directly to the incident, should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
3. The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

As above mentioned that the laws dealing with sexual offences does not recognise child sexual abuse, they treat the child victim in the same manner as they treat an adult victim, they do not consider the vulnerability of a child and the trauma faced by them during the proceeding, for a child, Justice not only implies seeing the accused in custody but they also needs a trauma free life.

Child Trafficking: leading to prostitution and pornography - Child Trafficking is also considered as predominant crime in India. Actually trafficking is a process of recruiting, contracting, procuring or hiring a person for CSE, i.e. commercial and sexual exploitation. It is often seen as girl children are trafficked into prostitution and boys are trafficked into forced labour and sodomy, and these children are then seen as the victims of pornography or outraged modesty. Sexual trafficking actually involves business in brothels, massage parlours, bars, leading to prostitution and pornography. Whereas, commercial trafficking includes domestic labour, begging, camel racing and organ transplants.

In order to prevent trafficking, a new legislation came into place, THE IMMORAL TRAFFIC PREVENTION ACT, 1986 the act basically recognizes the commercial sexual exploitation which means a person gaining through the sexual exploitation of a child or a woman. The act outlets some provisions related to rescue of victims, a search without warrants, considering offences as cognizable and many more.

In spite of the prevalence of act still there are many cases of child trafficking and there are certain reasons for the failure of

367 Sakshi v. Union of India Case No. 33 of 1997
the act. The foremost gap is that the act is restricted to the context of CSE unless there is a gain from the exploitation; the act will not be rendered as an offence thus ITPA is required to deal with the restrictions imposed and Secondly, it does not recognise the age of victim when abducted but looks at the age of victim when got rescued, thus the traffickers took the advantage of it; they make sure that the age of victim rescued should be 18 years or above and in this way, the victim got turned into offenders and the vague reports of doctors are also the reason of these crimes thus, there are some changes required to be amended in the act.

**Child Marriage** - As child marriage is also a form of sexual abuse, child marriage is one of the offences committed in the name of traditional practice since many years this offence is prevailed in India and mostly found in rural areas or areas having lack of education and this area of crime has gained too much concern leading to an important legislative enactment i.e. PROHIBITION OF CHILD MARRIAGE ACT, 2006 supplanted ‘The Child Marriage Restraint Act, 1929.’ The Prohibition of Child Marriage act deals with the prevention of child marriages as well as the consequences of child marriage, the act provides the age of marriage: ‘18 years for girls and 21 years for boys’ it considers a child marriage as voidable that means considered valid unless declared void and onus of declaring marriage as void lies on child and guardian filing for legal proceedings.

In case of Seema V. Ashwini kumar,\(^{368}\) The Supreme Court of India on 14th February, 2006 made it mandatory for all marriages to be registered and asked the authorities to implement the amended rule in three months. The judgment could have significant impact on child marriages. Although the act has few shortcomings that is why the child marriages still prevails in our country and the foremost is that it considers child marriage as voidable not void and Secondly, the onus of declaring such marriage void lies on child and legal guardian filing for legal proceedings and it is obvious that parents who themselves carried out such marriages may never take such steps.

**PROTECTION OF CHILD FROM SEXUAL OFFENCES ACT, 2012 (POCSO)**

The Act has come into force with effect from 14th November, 2012. This a comprehensive law enacted to provide protection for sexual assault, sexual harassment and pornography, while safeguarding the best interest of child at every stage of the judicial proceedings by incorporating ‘child-friendly mechanism for reporting, recording of evidence, investigation and speedy trial of offences through designated special courts’\(^{369}\). The act also defines the age of the child as any person below the age of eighteen years and also defines all types of sexual assaults, including penetrative and non-penetrative assaults and also mentions the circumstances when the accused is one of the family member or in a dominant position like a teacher or a doctor. The Act provides the stringent punishment for the traffickers. Basically, the act deals with both ‘the measures to prevent the crime’ as well as ‘the aftermath of crime.’ There are certain provisions made which almost covers the loopholes in the former acts, discussed above like the POCSO Act

\(^{368}\) Seema V. Ashwini kumar Case No. 291 of 2005

\(^{369}\) model guidelines under section 39 of pocso act, 2012
recommends a child welfare committee for the safety and security of the child, Act also provides special courts for the judicial proceedings that conduct trial in-camera and without revealing the identity of the child in child-friendly manner and it ensures that a parent or any trusted person must be present at the time of testifying, while interviewing of child it is make sure that a trained police officer or an expert lead the interview. In order to secure better future of the child or to make his rest of the life trauma-free the court must disposed off the case within a year and ensure a proper compensation must be paid to the child. The section 39 of the said act, states that state government is required to make guidelines for the use of persons including NGOs, professionals and experts trained in knowledge of psychology or social work, etc. to assist the child at the trial and pre-trial stage.

In this way the POCSO Act provide a means to justice for the children and also proves to be an effective deterrent in curbing the occurrence of such offences.

- Child Labour: Economic Exploitation of Child

Child labour is an act of exploitation, which basically, deprives the children from their childhood; it is another group of vulnerable children subjected to abuse or exploitation. The term ‘child labour’ often includes activities such as helping their parents around the home, assisting in family business, earning own pocket money or earning to fulfill the house needs and so on but these activities are not the worst forms of child labour; worst forms of child labour involves the activities where children being enslaved, exposed to serious hazards or separated from their family at a very early age, where children work under abusive and exploitative conditions that are clearly dangerous to them. According to a report of International Labour Organisation (ILO), in 2017 there are around 12.9 million Indian Children engaged in work, although there is a large number of children that are unreported. Child labour not only affect physically but also the mental status (Tender mind) of children.

In 1986, a new act was framed CHILD LABOUR PROHIBITION AND REGULATION ACT, 1986 (CLPRA) with a motive to curb the child labour and ensure unflinching punishments to offender which was later on amended in 2016 because of few loopholes. The CLPR Act provides the distinction between the age of a ‘child’ that is any person below the age of 14 years, and of “adolescent” that is children lies in the age between 14 to 18. The act prohibits the employment of a child in any employment including as a domestic help because there are various cases found in which child are used or suffered by their own guardians in the name of domestic help whereas, an adolescent is allowed to be employed except in few enlisted hazardous occupations\(^{370}\). The act ensures that the offender (employer) pay a compensation of Rs. 20,000 for employing any child in contravention of the act and such compensation shall be deposited in the child labour rehabilitation-cum-welfare fund.

In our legal framework, there are few other acts that also enshrines the same objective that is to prevent child labour and these are: The first one is FACTORIES ACT, 1948 – This act actually prohibits the employment of children below the age of 14 years in any factory and the act also laid down the rules regarding the age of the child, pre-adults or adolescents. The second one is THE MINES ACT, 1952 – this act prohibits the

\(^{370}\) CLPR(Amendment) Act, 2016
employment of children below 18 years of age in a mine. The CONSTITUTION OF INDIA, 1950 does, however Article 24 provides that, “No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment” and in Article 39(e) accords that “the health and strength of workers, men and women, and the tender age of children are not abuse and that citizens are not forced by economic necessity to enter avocations unsuited to their age.”

In a landmark Judgement ‘M. C. Mehta v. State of Tamil Nadu (and others)’ it was held that: child should not work and an adolescent also not work at least in hazardous industries like match factories as in the case, other than this the court gave certain directions to improve the quality of children employed in the factories by relying on Article 39(f) and Article 45 of the Constitution of India, 1950 and to ensure that the directions are properly looked out court also made a committee for that and insisted on compulsory education for children.

JUVENILE JUSTICE ACT
This legislative enactment first took place into 2000 as ‘Juvenile Justice (Care and Protection) Act, 2000’ for the protection of children and this was later on amended in 2015 as ‘Juvenile Justice (Care and Protection of Children) Act, 2015 and came into effect from January 15, 2016. The act deals with two categories of children i.e. “child in conflict with law” and “the child in need of care and protection” this means both the juvenile as offenders as well as the victims. The act deals with all area of study: For instance, the child victimised by abuse and exploitation; whether it is physical, mental, sexual or economical and it also deals with the children who are the offenders. The 2015 amendment act was proven as a boon for the children in conflict with law as it not only deals with crime and punishment but it also entails the process of rehabilitation of children the objective of the act is to prevent the crime not the criminal. A proper Juvenile Justice Board has been organized under the act for the best interest of the child.

The act also provide provision related to the adoption of child; it ensures that a child should be adopted to a family through a legal process so that it remains in the eye of government and the child become lawful child having all the rights, it accords a proper process for the domestic and inter-country adoption of orphans or abandoned children. It states that adoption of a child is final on the issuance of an adoption order by the court and this has been seen as a shortcoming because this procedure renders a delay in adoption due to heavy load on the courts due to which a little amount of adoption cases has been dealt by the courts. Therefore to overcome this issue Maneka Gandhi introduced a new Juvenile Justice Amendment Bill, 2018. The bill seeks to amend the juvenile justice act to empower the district magistrates to issue orders for the purpose of adoption in order to expedite the proceeding so, that all the pending matters are transferred to the district magistrates and can be heard timely.

- Infringement Of Child’s Right To Life and Allied Laws
Right to Life i.e. Article 21 of Constitution of India, 1950 reads as, “No person shall be deprived of his life or personal liberty except according to a procedure established by law.” This right has been held as the Heart of the Constitution and the

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372 women and child development minister
interpretation of this article has changed over the years and the various rights fall under it. This right of the constitution is not merely the physical act of breathing it has a much wider meaning which includes right to live with human dignity, right to livelihood, happiness, health etc. In The Case Of ‘Budhadev Karmaskar V. State Of West Bengal,’ it was stated that the word life in article 21 means a life of dignity and not just an animal life; which means that right to life.

In the words of Charley Resse: “if you believe in the right to life, then you must believe in the right to have the means to defend that life.”

Infanticide or Female Foeticide – As above mentioned right to life includes many other rights and people are not getting those rights but when it comes to children then considering other rights is a distant thing children are not even get to live a life. In Indian context male child are preferred over girl child, thus female children are especially vulnerable to foeticide or infanticide. This is the most prevalent offence in India since 1980s when the first abortion related law came into place i.e. MEDICAL TERMINATION OF PREGNANCY ACT, 1971 – the act provided legal abortion in most states, but specified the legally accepted reasons for such abortion like; to save the life of mother or to avoid grave permanent injury to either physical or mental health of the mother, but with the time and advancement in technology people started misusing it and then Government Of India passed the PRE-NATAL DIAGNOSTIC TECHNIQUES (Regulation and Prevention of Misuse) ACT, 2004 [PCPNDT]; which provided that no person shall conduct or cause to be conducted any prenatal diagnostic techniques to determine the sex of the foetus to avoid the foeticide.

In a landmark judgement, ‘Centre for Enquiry into Health and Allied Themes (CEHAT); and Ors v. Union of India and All India Reporter 2003.’ Supreme Court issued a number of guidelines for the central government, the central supervisory board and the state government in order to implement the provisions of the act more rigorously. However, still the intended goal of the act is yet to be achieved because of poor implementation of the Act therefore, there is a need of proper implementation and awareness of such laws because “we believe every child is created equal with the right to life.”

Adoption of Child – Adoption of a Child is also included in the Right to life, every child has a right to be adopted by a willing parent and to have a name, nationality as well as a family. Matters related to it are governed by personal laws in India. For instance; Adoption of Hindu child is governed by HINDU ADOPTION AND MAINTENANCE ACT, 1956 whereas Adoption of children belongs to other religion is governed by GUARDIANS AND WARDS ACT, 1890. And this shows that religion plays an important role in such matters which renders a strain in the attainment of the object of the Act. Thus, there is a précised need of a uniform law on adoption and it also arises as a part of fundamental rights: Right to life.

373 Budhadev Karmaskar V. State Of West Bengal, (2011) 11 SCC 538

374 Centre for Enquiry into Health and Allied Themes (CEHAT); and Ors v. Union of India and All India Reporter 2003 [2001] 3SCR 534

375 Article 21 of Constitution of India, 1950
Right to equality and also according to some international instruments to which India is obliged i.e. the CRC and the Hague Convention.

**Child’s Right to Education** – Education is a key to many locked problems. In the words of Nelson Mandela; “Education is the most powerful weapon which you can use to change the world.” Therefore, this right is the most salient right in a child’s life. Earlier this right was accorded in Constitution as a directive principle [Article 41] and after getting concerned with the issue, Right to Education enshrined as Fundamental Right of the Constitution of India [Article 21-A] which states that, “the state shall provide free and compulsory education to all children to the age of six to fourteen years in such manner as the state may, by law, determine.”

After a while, the government came up with an idea to enact a legislation i.e. RIGHT TO EDUCATION ACT, 2009 which came into effect on 1st April, 2010. The act represented consequential legislation envisaged under Article 21-A of Constitution of India, as the objective of the act is to highlight the importance of education and ensure every child has the same.

Although, even after the establishment of the act and insertion of fundamental right, the objective has not been accomplished yet, and this because of poor implementation of the act; as the title of the act incorporates the words, “Free and Compulsory” that means every child has a right to education and the all the expenses incurred in that are paid by government; no child is liable to pay such amount, either the government or the legal guardian is liable for that but there is one loophole, that it is obvious now school fees [Tuition fees] would be the liability of government but what about the other expenses like the travelling ones, stationery, sanitary facilities etc. without these a child cannot study properly and this travelling problem is the biggest contributing factor to girls dropping out and none of these are properly looked after by the government. Other than this, the act provides elementary education just for the children of age six to fourteen, but this is not sufficient; the age need to be extended to eighteen years according to the Indian Majority Act, 1875. So, that a child become major or adult and can complete further studies on own. The next biggest shortcoming of the act that it does not include the children with disabilities and does not make any special provision for awareness of girls education thus infringing the Fundamental Right [Article 14] of the constitution i.e. Right To Equality according to which, “equal treatment of unequals is as bad as unequal treatment of equals”; hence, there is a need of reasonable classification for the children with disabilities as well as girls. Not only this, the other shortcoming is that the act considers Government School, most of which do not focus on quality of learning thus there is a need to look that matter or strictly deal with private schools in this matter.

**Child participation or Child’s Right to be heard** – The convention on the rights of child [CRC] deals with right of participation of child which states that participation applies to all children and even babies can express a view and the responsibility lies in the hands of adults. This right basically, means the right of child

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376 Article 14 of Constitution of India, 1950
377 Inserted by the Constitution 86th amendment Act, 2002
378 under article 12 to 17 plus article 31 of CRC
to express his or her opinion and to influence the decision to be taken. For instance, The Right to be heard in the Judiciary: Child participation must be authentic and meaningful and this requires a radical shift in adult thinking and in our country’s tradition there is a need of change that made a misconception regarding the point of view that a child is dependent on father figure thus this need to be changed. In our Constitutional Framework, the constitution of India encompasses most of the rights that are enshrined in UN convention on the rights of the child. It accords rights to children as citizen of country and there are few rights that are specifically subjected to children and their well being including fundamental rights as well as the directive principles. For instance, Article 19 (1) (a), provided for the freedom of speech and expression as a fundamental right to every person in India, and nowhere is it mentioned that children are to be excluded, yet the exclusion does take place because of the patriarchal norms governing the attitude of the society and this can be overcome by taking stock of children’s voice. Although in the past few decade there are some developments regarding this by constituting bal panchayats or youth clubs or by hearing the child voice in the court, but still has a lot to accomplish.

INSTITUTIONAL STRUCTURES FOR THE CHILDREN

In these few years, it has been seen that various steps were taken by the government to ensure the protection of the children. For instance, new acts came into place, various institution formed, many NGOs created awareness for the child development and so on. Under the Juvenile Justice Act, 2015: observation homes, Special Juvenile Police Units, Child Protection Units, and After Care organizations were formed to ensure that the after-life of both the victims as well as the offenders is safe and sound and especially that offender are given a proper chance to rehabilitate and secure their future. Under the Family Courts Act, 1984 family courts were framed to ensure that proceeding held in these cases are proper and child-friendly.

Under the National Commission for Protection of Children Act, 2005; The National Commission For Protection of Child Rights (NCPCR) is established. This statutory body of Government of India, set up in March 2007 to protect, promote and defend child rights. As the government of India ratified the UN Convention on the right of the child in 1992, the establishment of this commission is the historic milestone to translate the commitments into action. It was comprised of seven member out of which two are women to develop a safe, secure and child-friendly environment for the children. It empowers the state government to designate the courts as Children Court and every court has a public prosecutor with an experience of seven years, these courts are framed to ensure speedy trial in the child related cases. The commission took significant step for the development and protection of children. Although there are few shortcomings; in a case, “National Commission for Protection Of A Child Rights V. Dr. Rajesh Kumar" 379 there was a dispute between the NCPCR and state commission of west Bengal over the jurisdiction. The court concluded that both the commissions have to work for the best interest of the children in a spirit of cooperation and that there were no jurisdictional issues involved. This is really

379 SLP (Civil) Number 34251 OF 2017
lament situation that the institution set up for the protection of children have virtually forsaken them in a fight over jurisdiction, and in these types of fight the children have been forgotten. But the court concluded it very immaculately.

Other than the commission there are various schemes for the protection of child articulated by Integrated Child Protection Scheme (ICPS) of the Government of India which bring multiple schemes under one comprehensive scheme.

**CONCLUSION**

It is an eternal thought that children are the future of our country. The former president Mr. Jawaharlal Nehru also said that “The children of today will make the India of tomorrow. The way we bring them up will determine the future of our country.”

But the delinquency arises here that how many people of our country implies with this thought, the attitude of our society towards this problem is not satisfactory.

Over the past few decades, to protect this vulnerable strata of the society many legislation like, POCSO, CLPRA, etc., or many new NGOs, Orphanages, Schemes and commission like NCPCR are formulated. Other than this our Constitution of India guarantees too many rights to children as a citizen as also as a child right through fundamental rights and directive principle, yet the situation still exist even there is an upsurge in the crimes related to children and it is fact that in spite of these schemes, legislation, the Right to Life of children is fully transgressed: ‘Every second child under five-years old is malnourished; 1 in 4 adolescent girls between 15–19 years old is married; 30 of 100 girls who enter school do not complete primary-level education.’

And this is the worst situation of our country. Violence against child is a multifaceted problem, never occurred because of single cause but the most important cause is the patriarchal norms and societal attitude towards these problems, even after having fundamental rights why children are still precluded from it because of the thinking and the poor implementation of these legislations, thus there is a need of proper interpretation of these legislation and creating awareness regarding it. So, that society consider child as a specific citizen having all the rights, because changes do not just happens they are the result of efforts and initiatives and it is necessary to revert back to each and every situation. For instance, the steps government took during the COVID-19 regarding children studies; they set up virtual classes so, that the studies of children are not hampered and their health is also not compromised. In the words of David Vitter, “I continue to believe that if children are given the necessary tools to succeed, they will succeed beyond their wildest dreams.”

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380 Accessed online at azadindia.org/social-issues/status-of-children.html
A CRITICAL ANALYSIS ON PREVENTIVE DETENTION IN INDIA

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Introduction

Indian courts, during the past few decades, has come forward as a champion in protection of the fundamental rights of the individuals, especially that of right to life and personal liberty ensured under article 21. This has ensured several basic and important rights to the individuals and has especially helped the poor and the down trodden to ensure that they get the proper dignity that they deserve. In spite of such activism put forth by the courts, they have failed to ensure and protect the personal liberties of the detainees when it comes to preventive detention (PD) laws. The last judgement dealing with the constitutionality of the PD laws was that of AK Roy v. Union of India381 where in the courts had upheld the validity of such laws. This judgement was passed after the “due process” clause was incorporated into the Constitution382. This has placed the Constitution in a very peculiar position as two adjacent articles of the Constitution are contradictory in nature.

This therefore makes it very important to have a greater understanding of the detention laws from the time of colonial rule in India. It is important to understand the need for incorporation of such laws into the Constitution and to look at judiciary’s role in defending these laws by keeping the scope of judicial review to a minimum. It is imperative to look into all the arguments that have been put forth against the PD laws and ponder upon the importance of such derogatory laws seventy years after the completion of the Constitution.

What is Preventive Detention?

It has been explicitly provided in the Constitution that the Parliament is empowered to sanction laws to provide for preventive detention383. The term “preventive detention”, when referred by our Constitution, typically means detaining a person without criminal trial384. This means that there is no charge formulated and no criminal offence is proven385. Such detention can be done for “the security of the state, maintenance of public order, or maintenance of supplies and services essential to the community”386 among others. The Constitution also clearly states that the preventive detention laws need not comply with “fundamental procedural rights guarantees”387. Such laws are in stark contrast to the law in the regular criminal justice system wherein it tries to minimize the custody and arrest. Under the ordinary criminal law, proper and valid arrest by the police requires securing credible evidence. Pre-trial detention is not extended beyond 24 hours without any constitutional criminal procedure are inapplicable to the preventive detention process because preventive detention does not involve the adjudication of criminal charges. See, e.g., State of Bombay v. Atma Ram (1951) S.C.J 208, 212; Ashok v. Delhi Admn. (1982) 2 SCC 403, Para. 14.

381 AIR 1982 SC 710
382 Maneka Gandhi v. Union of India, 1978 AIR 597, 1978 SCR (2) 621
383 There are several preventive detention laws enacted by the central government. See infra Part III.
384 See, Constitution of India, Article 22(5)
385 Courts in India emphasise the importance of the distinction between punitive and preventive detention regimes. On this view, rights recognised in constitutional criminal procedure are inapplicable to the preventive detention process because preventive detention does not involve the adjudication of criminal charges. See, e.g., State of Bombay v. Atma Ram (1951) S.C.J 208, 212; Ashok v. Delhi Admn. (1982) 2 SCC 403, Para. 14.
386 See, National Security Act (NSA), 1980
387 See, India Const., Article 22(3)
“investigative purpose” and the same is subjected to “periodic review”. There are also certain safeguards that are given under the ordinary criminal law to the arrested person. The PD laws however allow for an arrest to be made upon the subjective satisfaction of the executive officer that a person may pose a threat to the society. No grounds are required to be mentioned for up to 5 days and in some rare occasions even 15 days after the arrest has been made. There is no production of the detainee before the judge and there is no “periodic review”. The detainees are also not given the right to an attorney. Intervention by advisory boards only exists upon detaining an individual for more than 3 months and even in such situations there is no legal assistance, no periodic review and no trial.

The main objective of any PD law is to prevent an individual from doing a prejudicial act against “the defense, security of any state in India, security and foreign affairs of the nation, supplies and services essential to the community or maintenance of public order” among others. In Mariappan v. The District Collector and Others, the court held that the main objective of any PD law is not punitive but preventive. In Aljan Mia v. District Magistrate, Dhanbad, the court held it to be a purely anticipatory measure without any relation to a crime. The court also opined that subjective satisfaction of the administrative authority warrants such a detention. The act of preventive detention is purely administrative. The Constitution provides an exhaustive list of grounds upon which a person can be detained under such laws. They are:

- Security of India
- Foreign Affairs
- Defence
- Maintenance of supplies and essential services
- Maintenance of public order
- Security of the State

The detainee under such laws is not entitled to the rights provided under article 19 or 21. There are also certain safeguards that have been provided to the detainee upon being arrested under such laws. They are:

- A maximum period of three months is permitted for detention. If the detention period is to be transgress beyond 3 months, approval of the advisory board is required.
- The detainee needs to be communicated the ground for his detention which may only be refused by the state in public interest.
- Earliest opportunity must be given to the detainee to make his representation before the detaining authorities.

These aforementioned safeguards aren’t available to an enemy alien.

The detailing is also allowed to challenge such a detention order in a writ proceeding. Interference by the writ court in such matters is only warranted under limited grounds.

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388 The safeguards include “the right to be informed of the grounds of arrest as soon as possible, to be presented before a judge within 24 hours and to be defended by a lawyer of one’s choice” among others.

389 Supra Note 1

390 2014 SCC OnLine Mad 5741

391 AIR 1983 SC 1130

392 Ankul Chandra Pradhan v. Union of India: AIR 1997 SC 2814

393 India Const., Schedule VII, List I, Entry 9 (Central Government Powers); List III, Entry 3 (Concurrent Powers). The Supreme Court states that the language of these entries must be given the widest possible scope because they set up of machinery of government and not mere acts of a legislature subordinate to the Constitution. See Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta, AIR 1955 SC 367.

394 See, Constitution of India, Article 22(4)- 22(7)

395 See, id. Article 22(3)(a)
History and development of Laws Surrounding Preventive Detention.

I. Preventive Detention Laws before Independence

Preventive detention laws have been prevalent in India since colonial rule by the British. In the 19th century itself there were a framework of regulations in force to enable the Britishers to arrest and detain individuals without trial in certain cases. The writ of Habeas Corpus was also denied to the detainees. Preventive Detention laws were sanctioned through emergency legislations during both World War I and II in British India. During World War I, the Defence of the Realm Act and the Defence of India Act had been enacted to preventively detain individuals to secure the nation’s security and safety. These laws had expired at the close of the war but was soon replaced by peacetime PD laws such as the Rowlatt Act and Bengal Criminal Law Amendment Ordinance. The Defence of India Act and Defence of India Rules were enacted shortly after World War II. These laws enabled the government to arrest and detain any individual who was considered as a threat to “maintenance of essential supplies and services, national security or public order.”

II. Article 22

The provisions relating to PD are clearly mentioned in Article 22. Article 22 was initially called Draft Article 15-A during the drafting phase. This Draft Article was introduced by the constituent assembly into our constitution due to the dilemma over whether “due process of law” or “procedure established by law” should be a part of Article 21 and the latter taking the final step. The “due process of law” provision was initially a part of the draft article which ultimately formed article 21. Sir BN Rau, being the “Official Constitutional Advisor”, after having a discussion with Justice Frankfurter over the said matter was convinced that the said provision should be eliminated from draft Article 15. His formal report on this matter was accepted by the constituent assembly and the phrase “due process of law” was replaced by “procedure established by law”.

See Anarchial and Revolutionary Crimes Act, 1919 (Act No. 11) & 34(b) (Ind.), found in 8 ‘The Unrepealed Acts of the Governor-General in Council 330 (1919)’


396 See, e.g., 1 Burma Code 209, Bengal Regulation III (Apr. 7, 1818) (Gov’t of Burma 1943). The history of this regulation is quite complex, and its extension and amendment is outlined in 2 Frederic G. Wigley, Chronological Tables and Index of the India Statutes 775- 77 (Calcutta 1897). It was extended to most of British India by the State Prisoners Act (No. 34) of 1850.


398 See Defence of the Realm Act, 1914, 4 & 5 Geo. 5. c. 29 (Eng.)

399 See Defence of India (Criminal Law Amendment) Act, 1915 (Act No. 4) (Ind.), found in 8 THE UNREPEALED ACTS OF THE GOVERNOR-GENERAL IN COUNCIL 102-08 (1919).
law”. This replacement was also done to support Preventive Detention legislations. This change did not sit well with Dr BR Ambedkar, which ultimately led him to introduce article 15-A in the assembly. This article was mainly introduced by the drafting committee as a means of compensation for what had been missing in article 15. Dr BR Ambedkar foresaw the tyranny that would be prevalent with the unfettered power of the executive to detain and arrest individuals and that of the legislature to pass oppressive detention laws without the blanket protection provided by due process. Therefore, draft article 15-A was introduced to provide safeguards to individual’s personal liberty. However, to enable the Parliament to pass preventive detention laws, there was a proviso attached to Article 15-A indicating that the rights recognized therein did not extend to preventive detention cases but included certain procedural rights for preventive detention cases. Article 22 was therefore enacted to be complimentary to article 21 and not to suppress it. Historian Granville Austin stated that, “the story of due process and liberty in the constituent assembly was the story of preventive detention.”

The Parliament is empowered to prescribe the “class or classes of cases” in which the advisory boards approval is not required for detention beyond three months. The Parliament can also prescribe the requisite procedure for the advisory board in the detention process.

One of the very first cases to have been dealt by the Supreme Court is that of A.K Gopalan v. State of Madras, where in a Communist leader named AK Gopalan had challenged the provisions of the Preventive Detention Act, 1950 stating that the same were violative of Article 14, 19, 21 and 22. This led the court decide on the fact whether Article 22 was a ‘Complete Code’ or not. The majority had rejected the ‘Complete Code’ argument and had agreed that article 22 existed alongside article 21. There was however an error committed by the court in the latter cases where they had erroneously construed the minority opinion given by Mahajan, J. as the decision in AK Gopalan’s case wherein Article 22 is a ‘Complete Code’ and that validity of any detention order must be determined ONLY according to the provisions of Article 22.

The same point was reiterated in Haradhan Saha case. The court in RC Cooper held that ‘Complete Code’ argument in AK Gopalan’s case is untenable and held that preventive detention laws are also to comply with provisions of article 19 along with article 21 and 22. The Maneka Gandhi case helped in transplanting “procedure established by law” with “due process of law” without changing the verbatim in Article 21. The Francis Coralie Mullin case helped in the introduction of the “just, fair and reasonable” logic into the fabric of Article 21.

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404 India Const., art 22(3)
405 Id. at art 22(4)- 22(7)
406 See GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1966), at 102
407 India Const., Art. 22(7)(a)
408 India Const., Art. 22(7)(c)
409 (1950) SCR 88, AIR 1950 SC 27
410 RC Cooper case: 1970 SCR (3) 530
411 (1975) 3 SCC 198
412 (1970) 2 SCC 298
413 1978 AIR 597, 1978 SCR (2) 621
414 1981 AIR 746, 1981 SCR (2) 516
III. Preventive detention Laws following the commencement of the Constitution

The VII schedule to the Indian constitution enumerates the subjects upon which the Parliament and the state legislature can enact laws. Entry 9 on the union list (List I) and Entry 3 on the concurrent list (List III) empowers the Parliament and state legislature respectively to enact laws on preventive detention. The Supreme Court observed the lack of need to mention in a statute dealing with preventive detention what issue of foreign affairs or defence it deals with.

Preventive detention act, 1950 was the very first PD law to be enacted by the Indian government. In the name of security and public safety, this act enabled the government to arrest and detain individuals without trial. AK Gopalan v. State of Madras, AIR 1950 SC 27 dealt with the constitutionality of the above Act and the court held that Preventive Detention Act (PDA) was constitutional except for those provisions of Section 14 which were held to be unconstitutional due to the digression from the exhaustive list of circumstances that has been mentioned in article 22.

The Maintenance of Internal Security Act (MISA) was enacted two years after the lapse of the PDA, 1950 in the year 1969. This act, which had provisions similar to the PDA, was grossly violated and used as a political weapon during the time of emergency in the mid 1970s. MISA had expired in the year 1978 and was quickly followed by the National Security Act (NSA) which, until now, is still in force. NSA allowed for preventively detaining persons acting “prejudicial to the defence of India, the relations of India with foreign powers, the security of India, security of state, the maintenance of public order, or the maintenance of supplies and services essential to the community”. In AK Roy v. Union of India, the constitutionality of the NSA was challenged and was upheld by the Supreme Court, mainly due to having objectives in verbatim as mentioned in the seventh schedule. Even the provision in the Act which denied the right to counsel was upheld by relying upon Article 22(3)(b), in spite of the Court expanding the meaning of Article 21 in Maneka Gandhi’s case and including the right to counsel within its framework.

Except for two brief periods, India has always had a preventive detention law after independence.
The Supreme Court, in several instances, has held that the preventive detention laws must be strictly construed due to the extraordinary power that is granted by the same. The national security act had authorized both the state and the central government to preventively detain individuals in certain situations. The central government, state government, district magistrates and police commissioners are empowered to detain individuals “with a view to preventing him from acting in any manner prejudicial to” various state objectives including public order and national security. This act has garnered a rich and complex body of case laws covering almost every aspect of the said act.

There is also the Defence of India Act and the Defence of India Rules that were enacted during the Sino-Indian war of 1962, which empowers the central government and the state government to detain a person if it is satisfied that the act of that person is in any manner prejudicial to the defence of India, civil defence, public safety, public order, relation with foreign powers, peaceful conditions in any part of India, military operations or supplies and services of essential commodities. There is also rule 152 which deals with preventive detention, which has never been resorted to till date. The Supreme Court has held that PD provisions under these rules need strict compliance and that an order detaining an individual can only be issued by a competent authority which cannot be lower than a district magistrate, hence doesn’t include an additional district magistrate acting as a district magistrate. The court also observed the obligation of conveyance of grounds for detention by the detaining authority to the detenu in order to help make an effective defence and representation, failure of which violates “the principles of natural justice” and makes the detention illegal.

The central government had also enacted the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) which authorizes any officer of the central or state government, not below the rank of joint secretary or secretary respectively, to detain any individual, including a foreigner, to prevent him from acting in a manner “prejudicial to the augmentation or conservation of foreign exchange or to prevent him from – (1) smuggling or abetting the smuggling of goods, (2) engaging in transporting or concealing or keeping smuggle goods or dealing with them otherwise, or (3) harboring persons engaged in smuggling goods or in the abetment of the same”. The constitutionality of COFEPOSA was also challenged and upheld by the Supreme court in Attorney General for India v. Amratlal Prajivandas mainly due to the

428 See NSA, sec 3
429 The executive may delegate the authority to issue detention orders to local district magistrates or commissioners of police for specified periods of up to 3 months at a time. See NSA, sec 3(3). Approval of the state government is required for such detention orders within 12 days. See NSA, sec 3(4)
430 See R.K Agarwal, THE NATIONAL SECURITY ACT
431 Defence of India Rules, rule 30(1)(b)
432 The rule authorizes a police officer to arrest a person without a warrant if the person is reasonably suspected of having committed or about to commit a contravention of the rules directly connected with the defence operations and civil defence.
433 Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 434
434 Ajaib Singh v. Gurubachan Singh, AIR 1965 SC 1619
435 Lakhan Pal v. union of India, AIR 1967 SC 1507
436 Act No. 52, 1974
437 AIR 1994 SC 2179
fact that it was placed in the Ninth Schedule. Even after the ruling in IR Coelho’s case, the Supreme Court upheld the validity of COFEPOSA on the ground that it safeguards the security of India from economic harm.

The Prevention of Black-marketing and Maintenance of Supplies of Essential Commodities Act was enacted by the parliament in the year 1980, which permits detention for the prevention of “Black-marketing and maintenance of supplies of commodities essential to the community”.

The central government has also enacted The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act (SAFEMA) which provided for administrative detention for a period of up to 6 months and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act which allowed for the preventive detention of an individual to prevent him from engaging in illicit traffic in psychotropic substances and narcotic drugs.

Many state governments have also enacted their respective preventive detention legislations:


ii. “The Assam Preventive Detention Act”, 1980 wherein a 6 months period of administrative detention is provided.

iii. “The Bihar Control of Crimes Act”, 1981 wherein a 12 months period of administrative detention is provided.


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438 Initially, any legislation placed in the IX Schedule was barred from judicial scrutiny. IR Coelho v. State of Tamil Nadu (AIR 2007 SC 861) however laid down that fundamental rights violations cannot be overlooked by the judiciary even if it is placed in the IX schedule.

439 AIR 2007 SC 861, id.

440 Dropti Devi v. union of India, (2012) 7 SCC 499

441 Act No. 07, 1980

442 Id, sec 3

443 Act No. 13, 1976

444 Act No. 46, 1988

445 Act No. 1, 1986; enacted in the interest of public order, see sec 3

446 Act No. 38, 1980; see sec 3

447 Bihar Act 7 of 1981; enacted in the interest of public order, see sec 12

448 Gujarat Act No. 16 of 1985; enacted in the interest of public order, see sec 3

449 Act No. 6 of 1978; enacted in the interest of security of the state or public order, see sec 8

450 Act No. 12 of 1985; enacted in the interest of public order, see sec 3

451 Act No. 7 of 1981; enacted in the interest of public order, see sec 3

452 Tamil Nadu Act No. 14 of 1982; enacted in the interest of public order, see sec 3
Amendments have also been brought upon most of the state legislatures to include video piracy and digital offenders on the list of individuals who can be preventively detained. In *J.Ameergani vs State Of Tamilnadu*, the Tamil Nadu High Court upheld State Legislature’s power to enact laws on preventive detention relating to video piracy and digital offenders based on the doctrine of *Pith and Substance*. The validity of these amendments in light of article 21, 19 and 22 is still in the grey. The writ of *Habeas corpus* is considered instrumental in providing protection to the individuals from unlawful and erroneous detention. It has been described as “a great Constitutional privilege of the citizen” or “first security of civil liberty”. The court held that the said Writ could be used if there is a *Mala fide* exercise of the Detention power or if the same is done for ulterior or collateral purposes. The provision of *Double Jeopardy* has also been used for the protection of the detenu.

**Justification of Preventive Detention Laws in India**

Preventive detention is drenched in controversy and is a highly disputed part of the constitution. The power of the Parliament and the state legislature to enact laws emulating provisions of preventive detention stems from Article 22(3) of the Constitution. In fact, the members of the constituent assembly had always wanted to include a provision relating to preventive detention. Even though article 22 serves the purpose of providing safeguards from the abuse of preventive detention, it is often given constitutional recognition for the purpose of restraining the Right to Personal Liberty for “the good of the people”. The courts in India on numerous occasions have upheld the legality of PD laws. The power of PD can be used in the event of any reasonable doubt, apprehension or suspicion that there will be commission of a crime prejudicial to the state’s interest. In *Ahmed Noor Mohamad Bhatti v. State of Gujrat*, the court upheld the provisions of section 151 of Criminal Procedure Code, 1973, which granted power to the police to arrest and detain individuals without warrant to avoid the commission of a cognizable offence. The court staunchly opposed holding a provision unconstitutional merely due to the unreasonable aspect which results from arbitrary exercise of the power. To fully understand the justification of PD laws in India, four issues need to be deliberated upon: –

1. **Grounds for Detention Order:** Preventive detention laws are mostly sanctioned on the ground of “public order” and “national security” among others. There is however no attempt made by these legislations nor the constitution to demarcate the limits of these terms and the acts which they include. Having a legislation defining these terms may prove to be inefficacious as it gives opportunity to an individual to alter his behavior but

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453 Article 32 and 226 empowers the Supreme Court and High Court respectively to issue the writ of *Habeas Corpus*, which means “you may have the body”.

454 Deepak Baja v. State of Maharashatra: AIR 2009 SC 628


456 Art 22(3) denies protection against arrest and detention to an individual, as provided under art. 22(1) [right to be told the grounds for detention and counsel of choice] and 22(2) [right not to be detained beyond 24 hours without the authority of the magistrate], if the same is arrested under preventive detention laws.

457 (2005) 3 SCC 647
absence of the same has conferred a wide discretionary power to the legislature to include different acts. The courts have also failed to establish a consistent jurisprudence to provide substantive content to these concepts. The court however did try to differentiate the terms “law and order” and “public order” and “security of the state”. The court stated that if law and order is considered to be a concentric circle, then Public order is a smaller circle within it and security of state is a much smaller circle within public order, thereby stating that only the most severe acts can justify preventive detention. Therefore, the court tried to state that any act affecting law and order cannot warrant preventive detention. However, the court did not establish clearly defined boundaries and much of the scrutiny was left to the courts to examine the executive’s assessment of threats to public security. The courts usually refrain from questioning the executive’s determination of including any act as “security of state”. The courts have however tried to distinguish between public order and law and order as was done in Arun Ghosh v. State of West Bengal where the court tried to define “public order” by describing the acts which contravene the same. This however proved to be a vague definition and the courts in subsequent judgements have laid down that “public order” determinations are extremely case sensitive and need to be decided on case to case basis. Due to this muddled jurisprudence, the courts have endorsed a very broad interpretation of “acts prejudicial to the maintenance of public order.” “Subjective Satisfaction” of detaining authority:

The PD laws enable issuance of detention orders by detaining authorities on their satisfaction that there is a threat to “public order” or “national security.” The courts have also laid down that a detaining authority’s “subjective satisfaction” is a statutory prerequisite for the exercise of this power and that the court cannot question this satisfaction to appreciate its objective sufficiency. The courts however have the power to decide whether satisfaction is “honest and real, and not fanciful and imaginary” thereby allowing the courts to use the “non-application of mind” standard to allow for judicial review. This enabled the court to revoke the detention order on the ground of improperly considered irrelevant factors, failure to

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458 Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740
459 Id. at 757
460 The scope of judicial review in these matters is quite limited
461 See, e.g., Masood Alam v. Union of India, A.I.R. 1973 S.C. 897, 905 (sustaining detention order issued to preserve national security based on executive's determination that detainee had and would continue to "stimulate anti-Indian feelings"). In fact, the courts have ratified subtle but important extensions of the concept of "national security." For instance, the Supreme Court has held that "national security" threats include internal disturbances and need not involve a threat to the entire country or even a whole state. See, Union of India v. Tulsiram Patel, A.I.R. 1985 S.C. 1416, 1482.
462 AIR 1970 SC 1228-1230
463 State of UP v. hari Shankar Tewari, AIR 1987 SC 998
465 See, e.g., NSA, sec 3
466 Anil Dey v. State of WB, AIR 1974 SC 832
467 Id, at 834
468 Id
469 Piyush Kantilal Mehta v. Commissioner of Police, AIR 1989 SC 491, 496.
understand the detainee’s circumstances and failure to consider relevant material. However, an amendment to the NSA limited the scope of the “non-application of mind” by directing the courts to consider the identified grounds of detention as severable. This greatly reduce the scope of judicial review as one valid ground was held to be enough to sustain a detention order if the detention order was not given on the cumulative basis of all the grounds.

iii. Quasi-Judicial review and Advisory Boards:
The power of preventive detention, despite being an administrative action, does provide for quasi-judicial review of detention orders by the advisory board, rules for issuance and confirmation of detention orders. This helps in preventing the arbitrary exercise of the preventive detention power and also provides an opportunity to the detenu for the fair and objective appraisal of his case. There is however no hearing or trial involved in the same. Under NSA, the government authority issuing detention orders is obligated to refer all cases relating to PD before the advisory board within three weeks period from issuance of the detention order. All proceedings are however confidential and cannot be disclosed publically.

This elaborate executive review process helps in giving structure and procedure for the issuance and confirmation of preventive detention orders and eliminates any sense of arbitrariness. These enquiries and procedures however digress from the traditional judicial proceedings and is not based on any factual findings in any formal sense. There is also no right to confrontation, compulsory process or Counsel.

iv. Procedural Safeguards: There are also certain procedural safeguards provided to an individual detained under preventive detention laws such as right to be communicated the detention grounds and to oppose the order at the earliest by making a representation. The Supreme Court has also elaborated on the procedural safeguards mentioned in article 22(5) by stating that the detainee has a right to be informed of his or her rights under the article and to make an effective representation of the detainee must also be forwarded. The advisory board, after appreciating the detaining authority’s and detainee’s report, must, within 7 weeks period from issuance of the detention order, report as to whether there is a sufficient cause to detain. All proceedings are however confidential and cannot be disclosed publically.

Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on the facts proved either by applying the test of preponderance of the probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects.”
representation with prompt supply of essential documents and copies for realization of the same.\textsuperscript{480} The denial of a right to counsel was however upheld by the court,\textsuperscript{481} permitting the right to a counsel only in the event where the government is represented by legal counsel.\textsuperscript{482} Hence safeguards have been provided for such procedure, albeit minimal and famished in nature.

India has also asserted its stand on PD in the international human rights forum. This was done by India ratifying “the International Covenant on Civil and Political Rights (ICCPR)” with a reservation to Article 9 of the same.\textsuperscript{483} India has also taken a firm stance before the UN human rights committee on the issue of PD laws by stating that such laws have sufficient safeguards to protect the fundamental human rights and that liberty of the individual cannot be suppressed even at the time of emergency and that there is no inconsistency with ICCPR.\textsuperscript{484}

Can Such Laws Be Justified in Our Present Times?

Provisions relating to preventive tension have been ingrained in our constitution from its very inception. It has been more than 70 years since India has drafted its constitution and has come a long way in realizing the basic fundamental rights of the individuals, especially the right to personal liberty which has been given a very wide scope by the courts. This therefore begs to answer the question as to whether preventive detention laws are still necessary in our democratic country where the role of the government is quickly shifting from a police state to that of a welfare state. It also begs us to ponder as to whether such restrictions on personal liberty, which is a core and basic fundamental right, can be warranted when the same cannot be done by the state even during a time of emergency.\textsuperscript{485}

Supporters of the PD regime might state that these pre-emptive measures help in tackling extreme situations and provides safety to the society. This argument can be agreed upon in matters relating to national security but it fails to answer the question as to how this regime can be justified against acts of video piracy\textsuperscript{486} where there is no threat to national security and it can barely considered as a threat to public order. The term “public order” has been given such a wide scope by the government that it has empowered them to include various acts under the PD regime which barely counts as public order, let alone national security. The arrest of journalists under NSA for their dissent against public figures is one such example. Therefore, the very objective of the PD laws, which is to prevent the commission of a crime, is lost as these laws are now being used to secure arrest and detention of individuals for a longer time and with less evidence.

\textsuperscript{480} Wasi Uddin Ahmed v. District Magistrate, Aligarh, AIR 1981 SC 2173
\textsuperscript{481} AK Roy v. Union of India, AIR 1982 SC 745
\textsuperscript{482} To comply with art. 14
\textsuperscript{483} India has stated that provisions of article 9 (right to personal liberty) will be applied in such a manner that it is in consonance with provisions of article 22(3) to (7) of the Constitution
\textsuperscript{484} U.N. Human Rights Committee, Third Periodic Reports of States’ Parties due in 1992: India

\textsuperscript{485} India Const., art 359(1) states that art 21 & 22 are non-derogable rights even during emergency period (introduced by the forty-fourth amendment act, 1978)

\textsuperscript{486} See, e.g., amendment to “The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-Offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1985” introduced by Act 61 of 2013, which included the term video and audio pirate.
It is pertinent to note that even Britain, the country which introduced PD laws in India, has disposed off such laws after the World Wars. Even during the time of war, many civilized nations including US and several other European nations, had never implemented any PD laws. The framers of our Constitution had incorporated the PD regime into Article 22 to mainly secure the detention of those individuals who posed a danger to the security and existence of the newly formed nation. The framers believed that the sacrifices of so many individuals would be fruitless if the liberties for which they have fought and died for are not protected from individuals using ruthless and merciless tactics and whose methods, cultures and inspirations are all associated with foreign organisations. 70 years later, however, there is no such grave danger to the security and existence of the nation which warrants such a regime. Even if the government wants to continue such laws, they should make sure that they are used in the most extreme circumstances and with utmost restraint. These laws are being abused and used against political opponents and dissenters. One recent example is that of Mian Abdool Qayoom v. Union Territory of J&K the court had rejected a temporary release application made by Qayoom due to the Covid-19 outbreak. He was detained solely on the grounds of his ideology and the same had also been upheld by the court, even after affirming that the detention order was “clumsy”. This sets a dangerous precedent where people can be preventively detained on ideological basis, even upon the lack of evidence of any actual threat to public order due to the harboring of such ideology. This is a gross violation of the Human rights and personal liberties that are enshrined and enumerated in our constitution. It goes against the very nature of our preamble and the ideals that our democratic country shares. When courts refuse to question the detaining authority’s subjective satisfaction, stating that it is outside their objective assessment, it opens a Pandora’s box of absolute impunity to the government. The courts also stray from their duty of safeguarding personal liberties by subjecting themselves to the supremacy of executive, as was done in ADM Jabalpur case. These laws are also increasingly being used to detain individuals without any high standard of burden required for the same, thereby normalizing the use of this power as a means for the betterment of the people rather than being used as in extreme and rare circumstances as a last resort. It is increasingly being used for the “incarceration of unwanted persons” with barely any procedural safeguards.

The scope of judicial review in such matters is very limited. The court has however tried to expand the fabric of judicial review in these situations to ensure that certain personal liberties can be provided to the detenu. This was done by the court by stating that stale allegations do not warrant such detention orders and that there should be a live danger to the public order. The court also observed that the order shouldn’t be vague and arbitrary so as to make the challenge to the detention order impossible. The court has however failed in expanding its judicial review to the detaining authority’s subjective satisfaction.

487 These individuals mostly consisted of communists.
490 1976 AIR 1207, 1976 SCR 172
492 Bhawarlal Ganeshmalji v. State of Tamil Nadu, (1979) 1 SCC 465
493 Prabhu Dayal Deorah v. DM Kamrup (1974) 1SCC 103
and has even refused to do so when the possibility of release of detune and commit a prejudicial act was used as a ground for passing the detention order. One might argue that the provisions under article 22 dealing with PD regime cannot be altered as it forms a part of the original text of the Constitution. They might state that it is only upon amendment that the same can be altered and the courts do not have the power to undermine the same. This was the main reason for the court in AK Roy’s case 494 to uphold the validity of NSA. This argument is however inherently flawed as there is nothing in the constitutional text which states that a separate treatment must be given to the original text and the amendments if the same is not in line with the values enshrined in our Constitution. It can also be stated that the constituent assembly, which drafted the original text, was barely representative of the people and was devoid of a ratification process. This argument is also flawed due to the simple fact that in Maneka Gandhi’s case 496, the Supreme Court had transplanted “due process” clause into Article 21, which was essentially an original text. This judgment had greatly changed the dynamic of the provisions relating to PD 497, as the only reason for introducing Article 22 was to supplement for the absence of the “due process” clause. As Maneka Gandhi’s 498 case has changed the nature of Article 21, there is no justification for Article 22 to exist to ensure harmony in the constitutional text. Existence of Article 22 also cannot be justified due to the fact that the scope of article 21, which ensures a right to free legal aid, counsel and appeal 499, extends to article 22 500. The fact that emergency declared at the time of national crisis cannot derogate the rights guaranteed under article 20 and 21 501 is enough justification to revoke the PD regime under Article 22, which is violative of provisions mentioned under article 21, as the same has been authorized for acts against public order, which is less severe compared to national security and also due to the fact that PD regime is an illegitimate and undeclared state of emergency as stated by the international rules pertaining to “states of emergency”. These laws also run afoul of the international standards such as “the International Covenant on Civil and Political Rights (ICCPR)” which India has ratified but failed to adhere to 502.

Conclusion

Preventive detention laws have long been a part of the Indian legal system, even before India had gained independence. Having an association with such a law for such a long period of time, coupled with the legitimization of the same done by both the government and the courts in numerous circumstances, these laws have permeated into the society as something which is normal and something which is necessary for the societal benefit. This is something which is not good for any democratic nation and it needs to be addressed quickly.

495 AIR 1982 SC 710
496 1978 AIR 597, 1978 SCR (2) 621
497 India Const, art 22(3)- 22(7)
498 1978 AIR 597, 1978 SCR (2) 621
499 Madhav Hoskot v. state of Maharashtra, (1978) 3 SCC 544m
500 RC Cooper v. Union of India, (1970) 2 SCC 298
501 India Const., art 359(1) states that art 21 & 22 are non-derogable rights even during emergency period (introduced by the forty-fourth amendment act, 1978)
502 Article 4 of ICCPR provides for derogation from personal liberties during a state of emergency and the standards set forth do not satisfy India’s current situation.
because these laws have allowed for the
government to bypass the ordinary criminal
legal system and has allowed for the
violation of numerous fundamental rights,
especially personal liberty, which is
sacrosanct to the constitution. The scope of
these laws has also been extended under the
guise of protection of public order, by
including cow slaughter, video piracy and
copyright violations into the list of acts
which warrant preventive detention. Even
the minimal constitutional safeguards
provided under article 22 have become
redundant after the incorporation of due
process in the Constitution.

In light of the above stated points, it would
be best if these detention laws are scrapped
altogether from the Constitution. If these
laws are however to remain a part of the
Constitution, there are certain fundamental
changes that have to be made to ensure that
the personal liberty of the individual is
secured. Some changes which are necessary
include:-

• Protection of detainees from discriminatory
treatment and torture.
• Safeguards to prevent the use of the
detention laws to suppress any dissent from
majority practice or government.
• Safeguards to prevent the use of these laws
to bypass ordinary criminal legal system.
• Deletion of “maintenance of public order or
maintenance of supplies and services
essential to the community” grounds for
passing PD laws.
• Limited circumstances to be mentioned for
the use of this power and scope of judicial
review to be expanded.
• To reduce the three-month detention period
without any form of review.
• To include judicial involvement in
detention review process.

• Periodic review of terms of detention and
conditions to ensure that the detention is
“strictly required”.
• Grounds of detention must be
communicated promptly.
• Right to counsel.
• In case of unlawful detention,
compensation to be provided, except during
public emergencies.

It would be much more beneficial to do
away with these rights altogether but if
these rights are to stay, it can only be
justified in the interest of security of the
nation and also the procedural safeguards
have to be drastically improved to prevent
any violation of the fundamental personal
liberties.
THE FEMALE SOLDIER: NEED TO INDUCT WOMEN INTO COMBAT ROLES IN THE INDIAN ARMY

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“The question isn’t who’s going to let me; it’s who’s going to stop me.” - Ayn Rand

Women have been a fundamental part of many armies across the globe since the early 1700s and have been involved ever since. Females participated in wars and battles providing medical or technical support and the focus shifted when large numbers of men were called away for the multiple wars that were being waged everywhere. Women were then put in the position where they had to take up combat support roles to assist in the warfare. They may not have been recognized as official members of the army but they have been valuable nonetheless.

HISTORY OF WOMEN IN THE INDIAN ARMY

Women have been a part of the Indian Army since 1888 when the ‘Indian Military Nursing Service’ was formed under the British Raj. British Indian Army nurses participated in WWI and WWII. It was only in 1942 that the Women’s Auxillary Corps (India) was formed and women participated as telephone, teleprinter and cipher operators. For decades, women were restricted to serve only in the medical fields.

In 1992, pursuant to the power conferred by Section 12 of the Army Act, 1950, the Government started its Special Entry Scheme (SES) for women and they were inducted into the Army Service Corps (ASC), Army Postal Services and Army Ordnance Corps (AOC) followed by the Army Education Corps (AEC) and the Judge Advocate General (JAG) Branch. The scheme was initially approved for a period of five years only.

Women started receiving formal education in technical fields and eventually in 1996, they were allowed to apply for the technical arms i.e. Corps of Engineers (Engrs.), Army Air Defence (AAD), Corps of Electronic and Mechanical Engineers (EME), the Regiment of Artillery and the Intelligence Corps (Int.). Women were not allowed entry into the combat arms such as the Armoured Corps, Infantry and Mechanised Infantry.

Females serving in the non-medical cadre served as Short Service Commissioned (SSC) officers where they were allowed to serve for a period of five years, extendable by five years with a final extension of four years.

In February 2003, Babita Puniya filed a Writ Petition in the Delhi HC seeking the grant of Permanent Commission (PC) to serving women SSC officers. In 2006, the grant was issued to those women officers and they were given the option of moving under the new SSC scheme of service for ten years, extendable by four years or of continuing under the previous scheme. The pre-commission training period for women was subsequently increased from 24 weeks to 49 weeks so as to make them undergo the same training as their male counterparts.

In 2008, the Ministry of Defence (MoD) granted PCs to prospectively SSC women officers in the AEC and JAG departments.

503Section 12- Ineligibility of females for enrolment or employment.- No female shall be eligible for enrolment or employment in the regular Army, except in such corps, department, branch or other body forming part of, or attached to any portion of, the regular Army as the Central Government may, by notification in the Official Gazette, specify in this behalf.

504 WP (C) 1597 of 2003
This was challenged by Major Sandhya Yadav on the grounds that it only granted PCs prospectively and only to certain cadres. The HC replied that the matters of induction and operations were outside the purview of the court and that it was a policy matter so the benefits would be given only to those women officers in service who had come before the court or retired during the pendency of the proceedings.  

**RECENT DEVELOPMENTS**

The MoD rolled out a new policy in 2019 that allowed women to be eligible for PCs in eight other streams in addition to the AEC and JAG branch. However, they were eligible only for Staff Appointments and not for commanding roles. There were a lot of other restrictions in the same policy, the opportunities were limited and women were not on an equal footing with their male counterparts. It was a requirement to serve for a minimum of 20 years to be liable to receive pension benefits but women officers were excluded from receiving pension and retirements benefits even after serving for their full stipulated tenure of 14 years.

The policy was starkly sexist for it did not provide the same benefits to women as it did to their male counterparts with illogical gender based biases limiting the scope of opportunities for women and the Hon'ble SC pointed out these discriminatory terms of the policy. In a landmark judgement in February 2020, the SC reaffirmed the Right to Equal Opportunity guaranteed to all female officers by lifting all restrictions on appointments. The court paved way for female officers to serve in command appointments and not just staff appointments in eight streams of the Army barring the combat role. This decision opened doors for women to serve in the Army until retirement and in the combat-support arms and Services division of the army while getting the same benefits, pensions and ranks as their male counterparts.

In March 2020, the physical standard for women officers was revised by the MoD. The new guidelines required them to complete new Physical Proficiency Tests (PPT) and a mandatory Junior Command (JC) course at War College in Mhow to be eligible to apply for PC. The Army’s Directorate of Military Training also envisaged a new Basic Physical Efficiency Test (BPET) which includes a 5-km run, a 60m sprint, climbing vertical rope, traversing horizontal rope and a 6ft trench. BPET is a series of physical tests that is conducted regularly to keep the physical fitness of officers and jawans in check. It is a continuous routine that is in place to ensure physical efficiency. The Army has now made BPET mandatory for all female officers, something they were excluded from initially. In 2011, women officers commissioned before 2009 and above the age of 35 were exempted from performing BPET and PPT but that has been reversed now as well.

As of July, 2020, women officers have planned to approach the SC questioning these new physical standards and tests saying that it was unfair and unjust to introduce these tests for women who have already completed 14 years of service and are above 35 years of age. The view is that the new standards have been laid down without conducting any study and is an attempt to prevent serving women SSC officers from receiving PC. These women

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506 MANU/ SC/ 0194/ 2020
507 Art. 16, Constitution of India, 1950
are being asked to complete course that one takes as a Major while already being a Lt. Col. It is a welcomed move to apply these revised rules prospectively but to raise physical standards equal to that of men without actually permitting them to apply for all roles as their male counterparts does seem out of place. The debate was never male vs. female, it was about securing equal rights and the SC upheld rights give under Article 14 and Article 15 by granting parity to women officers with their male counterparts. The challenges that come with this right are something that women need to brace and prepare for. Equal rights also means no concessions or pardons and that they will be put at the same level as men in every way. But equality also means freedom to apply for combat roles as well. This move by the Apex Court was a win, not just for women aspiring to join the Armed Forces but also for society as a whole. It was a step towards gender equality and integration. However, the question of including women in combat roles was still left unanswered.

HESITATION TO INCLUDE WOMEN IN COMBAT ROLES

Very few countries have broken the gender barrier and have allowed women to take up combat roles in the army. The road to gender integration in the military has been tough but many countries have succeeded. India has one of the largest armies in the world and it resisted the introduction by citing concern over women’s vulnerability. The view is that a woman might not have the mental and physical ability to cope with the stress of being on the front lines. Other reasons include the societal burdens and obligations, spousal postings, hygiene and housing factors and general outlook of men.  

Mr. Pranab Mukherjee rightly said, “In our country ‘Shakti’, which means power, is a manifestation of female energy. This Shakti defines our strength.” Fierce females have always been a part of history; they have brandished swords and guns to fight off the enemy. India remembers its great warriors like Ashoka, Harshavardhan and Prithviraj Chauhan but somewhere we forgot our female revolutionaries. They were daughters, wives, mothers and sisters who valiantly fought off royalty and men to keep the integrity of their land. The truth is that there are numerous accounts throughout history establishing the fact that women have been instrumental and intrinsically involved in war.

HISTORY OF FEMALE WARRIORS IN INDIA

The first record of a female warrior dates back to half a century before Rani Laxmi Bai when Kittur Rani Chenamma ruled the land. The Doctrine of Lapse was introduced and when the Britishers vehemently tried to annex Kittur, she gallantly fought them and eventually killed John Thackery. Keladi Chenamma defeated Aurangzeb’s army on the battlefield which resulted in her kingdom being recognised as an independent kingdom. Onakka Obavva was not of royal descent but was the wife of a guard at the Chitradurga Fort. She took matters into her own hands and killed almost 100 of Hyder Ali’s men who were trying to sneak into the fort. Rani Abakka resisted and fought fiercely against the Portuguese, gaining the name Rani Abhaya. Rani Velu Nachiyar was a woman of Tamil origin who held her kingdom for almost 10


509https://in.reuters.com/article/india-women-military/indian-armed-forces-to-recruit-women-for-all-combat-roles-president-idINKCN0VX1PQ
years with her army of women despite constant attacks by the British. Rani Rudramma Devi took over the reins of the Kakatiya Dynasty when there were no men and fiercely battled the Pandyas, Cholas and the Yadavas. Belawadi Mallamma is credited with being the first queen in the history of the Indian subcontinent to have trained and raised an all women army back in the 17th century. She battled heroically against the Maratha army to save her kingdom and was later released by Chatrapati Shivaji for her bravery. During the revolt of 1857, our history textbooks fail to mention Rani Draupadi, the queen of Dhar who attacked the Sardarpur cantonment and returned with the loot causing the British army to get nervous. Rani Avantibai was the wife of King Vikramjeet Singh and the queen of Ramgarh. She took over the position of head when the king fell sick and valiantly fought off the British army with her troop at Kheri. Jhalkaribai was a part of Rani Laxmi Bai’s army and was also the advisor to the queen. Since they looked similar, she took position at the centre of the battlefield, giving Rani Laxmi Bai the opportunity to escape. Uda Devi was a woman belonging to the Dalit community who, under the able leadership of Begam Hazrat Mahal, formed an army of women to fight in the battle of Sikander Bagh. Her courage resulted in the death of 40 British soldiers before she was captured.

These were just a few of the female warriors among the many who came onto the male dominated battlefield to bleed for their motherland. Our history has been crafted by women who have fought and died in war. Women have been accepted as commanders and leaders back in the 1800s if we were to disregard gender roles and norms, patriotism is intrinsic. Somewhere down the line, during and after colonization, the Indian society forgot the value of women in every field and she became an object to be hidden away behind doors. Her spirit, intelligence, abilities and strength was reduced to a mere nothingness. It was a long journey from there to much later in the future where women began to stand up and fight for their social, economic, political and civil rights. Confidence was regained and women were reminded of everything they were capable of achieving, if given the opportunity. Women have repeatedly proven themselves to be valuable assets in every field they have ventured into, be it sports, science, arts, politics or academics. They have been in positions of power and have shown excellent results while donning familial roles simultaneously.

Women need only a chance to show what they are capable of. Lt. Col. Mitali Madhumita was the first woman officer to be awarded the Sena Medal in 2011 for her bravery shown during the attack on the Indian Embassy in Kabul. Captain Divya Ajith Kumar was the first female officer to receive the prestigious Sword of Honour and also lead the all women contingent of 154 women officers and cadets during the 2015 Republic Day Parade. Dr. Seema Rao, also known as ‘India’s Wonder Woman’ was the first female commando trainer who has trained over 15,000 Special Forces. Women demonstrated their competence in all professional fields and it was only a matter of time before the society was made aware of benefits they would incur if they lifted all barriers against women.

Until recently, there were no female fighter pilots in the Indian Air Force. In 2016, the IAF took in 3 female fighter pilots on an experimental basis. After evaluation, Flt. Lt. Avani Chaturvedi, Flt. Lt. Bhawana Kanth and Flt. Lt. Mohana Singh were made an official part of IAF’s fighter squadron for their exemplary performance.
and as of 2019, 8 more female fighter pilots were inducted. In 2019, a 24 year old female naval officer, Sub. Lt. Shivangi was inducted as the first maritime reconnaissance pilot. Consequently, women also gained clearance to join the Military Police. This only goes to highlight the Army’s strong resistance to include women in combat roles and the concept of patriarchy that is deeply ingrained as compared to the other forces.

**Objections to Having Women in Combat Roles**

Although there has been considerable talk to include women in combat roles, there are fundamental objections raised for the same. It still continues to be an idea stuck in the pipeline because of the following concerns:

- **Physical capabilities:** the general notion is that the physical prowess of a woman is not adequate for combat. War is synonymous with physical strength and women are considered to have very little of it. It is to be noted that men who get enlisted into the army are not born with that heroic strength; they undergo hours of training and extensive conditioning to reach that level of fitness and dexterity. Where does it say that females cannot be subjected to the same? Women recruits can be trained the same way as men right from academy induction. All the female wrestlers, the country has seen are outcomes of appropriate conditioning, rigorous training, fitting dietary regimes and dedication. They have shown results which are proof of the fact that it can be done, that it is very much possible for women to build muscle and strength. Women have tremendous scope to build endurance and tolerate pain. We see female labourers toil through the day under scorching sun and all sorts of weather conditions just as much as male labourers, sometimes with a baby tied to their back. It would be wrong to limit an entire section of the population based on gender generalizations and physical strength of a person should in no way be restricted to their gender.

- **Organisational difficulties:** in peace stations, there are adequate facilities and suitable arrangements for women officers. However, in difficult terrains it is not the same. For example, in Siachen, there are some posts with bunkers that are just big enough for five men to huddle up. In extreme places, basic amenities like bathrooms are not available. War often requires close proximity with soldiers and this is not something that falls under the recognized norms for a woman in today’s society. Firstly, this kind of primitive thinking has always prevented organisations from exploring their full potential. Societal notions cannot be the guidelines for setting standards when it comes to matters of employment. Secondly, something as trivial as organisational technicalities cannot be the reason for not allowing women on the front lines. Dynamic and proactive policies, adequate funding and sufficient time is all that is required to mandate and finance the construction of suitable facilities for female personnel. Multiple armies across the world have formulated appropriate policies to deal with all difficulties that came with this gender inclusion.

- **Capture and torture:** even in the 21st century, society is unprepared to deal with a woman being captured by the enemy. Capture during war is a natural phenomenon and women who champion the right to undertake combat roles are

510 Ibid.

511 Sakshi Malik, Geeta Phogat, Nirmala Devi, Navjot Kaur, Babita Kumari, Alka Tomar
aware of the same. The sanctity of a woman’s body seems to be dictated by society’s philosophies, without any regard to her opinions about the topic. Women’s groups have desperately fought for equality and liberation from the cultural obligation of being forced to stay in ‘safe and secure’ environments in their professions merely because of their gender. The society is still back tracked by old fashioned gender roles to actually allow women to make their own decisions. The disparity between male and female personnel will continue to exist until the disparity for their safety does. The safety of a male soldier is just as important as that of a female one and the real cause for discomfort and outrage should be the capture of any soldier, irrespective of the gender.

- Domestic obligations: women have the domestic obligation of rearing a child or of taking care of a family. A woman officer need not be forced to choose between having domestic life and progressing in her military career. Women should still have the option for opting for combat roles simply because it is their choice to have a family or not. It is simple to handle such an issue with the right policies in place. For e.g. The Washington Army National Guard came up with the progressive idea of setting up a policy where women do not have to forsake their military career entirely to have a child. Promotions and rankings were delayed and appropriate post-partum physical training was provided to ensure that the personnel are ready to go back to the front lines again. Almost all professional fields have appropriate policies in place catering to the needs of women of child bearing age.

- General outlook: the men in the troops are primarily from rural parts of the country and the Army is of the opinion that they would not be accustomed to having female counterpart alongside them on the front lines. The chauvinism in the male soldiers will not permit them to endanger the lives of a female and this will bring down the cohesion of the unit in general. It is to be noted that the question raised during the debate of allowing women into command roles was, “will the men obey a female commanding officer?” this thought process was discarded as archaic and the ban was lifted as a step towards gender equality. It is not easy to bring about a cultural shift of this magnitude but the first step towards achieving it has to be taken nevertheless. The change will not occur until there is facilitation for the same.

The only question to be asked now is how far the Government and Defence Ministry is willing to go to get these policies in place and do the needful in exchange for the dedicated services of these brave and empowered women.

**HISTORY OF WOMEN IN COMBAT ROLES ACROSS THE GLOBE**

Women across the globe have been a part of the military and have undertaken combat roles since the time war was conceptualised. They would disguise themselves as men to get enlisted in the army during the World Wars just to be able to fight in the war. Militaries had a problem initially, logistically and mentally, to get accustomed to a female soldier but with the right training both genders began to work together and showed results that most thought would be impossible.
Australia
Women have been a part of the Australian Army Nursing Service since 1899. In 1941, the Royal Australian Navy, Australian Army and the Royal Australian Air Force established a female branch allowing women to take up combat support roles. In 2013, the government decided to open all streams for women and they were allowed to take up combat roles as well. By 2014, the physical standards were determined and all policies were in place and by 2016, women had taken up positions in all frontline combat roles. Australia had its first female fighter pilot in 1988. It was their common misconception that women might not be able to perform the same way as men, physically and mentally. This was proven incorrect by the 2016-2017 ADF report which states that completion rates for women and men in initial training have been at par since 2011.515

USA
As millions of men were called away for the war, women’s roles were drastically altered. Close to 30,000 women served in the military during WWI and 3,50,000 served in WWII. There was no policy in place that recognized them as soldiers but they participated nonetheless. After the war ended, the Women’s Armed Services Integration Act was enacted and women were fully recognized as member of the U.S military. Female participation grew over the decades and they were authorized to fly fighter planes and serve on combat ships during the Gulf war. In 1994, a ban was imposed disallowing women to step into any combat roles. However this was reversed in 2013 by the Secretary of Defence. It was recognized that women were a part of war without any recognition or benefits and it was time to face that reality. Since then, women have successfully undergone and completed training for the Army and Marine Corps and women are now entering training courses for the Navy SEALS as well.516

Canada
Women were always considered to be an important part of the Canadian army. The Government opened all its military roles to women in 1989, seven years after the Charter of Rights and Freedom which was enacted in 1982. That same year the Canadian Human Rights commission gave the Forces 10 years to meet a specific quota for women employed in combat roles as a significant step towards achieving a gender equal proportion in the profession. The introduction of women into combat arms has increased the recruitment pool in the country by 100%. 517 CAF men and women are treated equally in every way. They are selected for promotions, postings, and training based only on rank, qualifications and merit.

UK
In 2016, UK lifted the ban on allowing women to serve in combat roles. The government was of the belief that the army should reflect the society they live in and that combat roles should be determined based on abilities rather than gender. The opening of the roles was done in a phased and systematic manner, initially with positions in the cavalry and armoured units and finally in the infantry units. They conducted basic fitness tests for infantry recruits like completing an eight mile march in less than two hours while carrying a 25 kgs backpack with gear and equipment. Different standards of tests were set for different arms and women were

516 https://www.ourmilitary.com/women-in-combat/
517 https://forces.ca/en/women-in-the-caf/
tested accordingly. The Defence Ministry conducted an 18 month review to set up a proper system of assessment, training and deployment.

Israel

The Israeli Defence Forces is an organisation that sets standards for all militaries across the world. Most men and women perform compulsory defence duties for reasons beyond the scope of war. In 2004, the ‘Caracal’ was formed with the sole objective of giving women a chance to serve in a true combat role. It was a co-ed combat battalion named after a desert cat whose gender is difficult to detect. An entry into the army did not automatically mean equal treatment but Israel holds the Caracal as proof that all women can be a part of the army. As of today, nearly 50% of Israel's lieutenants and captains are women.

Germany

It took a case before the European Court of Justice in 2000 for the German army, Bundeswehr, to open its doors to women taking up combat roles. A woman, Tanja Kreil felt that she was discriminated against when her application to join the forces was rejected, not because of her capabilities, but because of her gender. The Courts agreed with her and paved the way for women to take up combat positions. Since 2001, the number of women in the German Armed Forces has tripled. Logistical adjustments were made to facilitate the women soldiers along with behavioural adjustments in the way male officers acted around female counterparts.

Finland

Finland took a more progressive approach to the situation where they made it a voluntary option for women to opt for combat roles. It was compulsory for men but if a woman chose the role then she was trained accordingly for combat roles, at the same level as men. There are absolutely no restrictions placed on women in the Finnish Army.

Denmark

Denmark conceptualised a policy of ‘total inclusion’ where they proposed ‘combat trials’ to explore how a woman would fight and perform on the front lines. A study conducted in 2010 by the British Ministry of Defence reviewed the decision to exclude women from combat roles and the outcome of the report was that women performed the same as men. Since then all positions in the military have been open to women with equal benefits and perks.

Benefits of Women in Combat Roles

Women have constantly demonstrated their ability to be mentally, physically and emotionally capable to handle and execute combat roles and leadership positions. The debate is so focused on physical prowess that the question of whether or not women benefit the army is left ignored. The benefit of an action is sometimes seen over the course of a few years simply because it requires a cultural shift in the mentality as well. Only when an idea is fully accepted can it truly flourish. Some of the benefits of having women in combat roles are as follows-

- Ability vs. Gender: there are various instances where the applicant is capable for the post irrespective of the gender. There are lots of women who are physically and mentally more capable than the men who get recruited into the army. This assessment of calibre will provide a basis to standardize

the recruitment and training requirements for women. This would also help in assessing the extra training women are required to undergo to build muscle and strength, the same way as men are trained for it.

- Mental quickness: it is a fact that women are more capable of multi-tasking as compared to men. They have the mental ability to quickly analyse situations and provide multiple, efficient solutions. Women can actively make judgment calls while engaging in other activities. This kind of mental skill is quite valuable on the front lines and in leadership roles when quick and important decisions have to be made.

- Career progressions: Widening the job opportunities for women automatically increases the number of recruits. This increases recruitment rates and allows women to reach higher positions in the forces which will further obliterate sexism. A woman will be treated with respect if she reaches a position of power based on her own skill, competence and capability.

- Military proficiencies: a mixed gender pool of talent in any work force acts as a breeding ground for ideas, innovations and success. If women are inducted into combat roles, they will be trained to hone the right talents, abilities and dexterities that are required to be showcased on the front lines. Women will be treated equally if they are exposed to the same risks as men.

- Interpersonal skills: women are of such nature that forming relationships based on honest and mutual trust comes easily to them. This is highly resourceful when it comes to the matter of gaining intelligence. There have been reports in the Middle East that women soldiers were able to gain information which men could not merely because they were able to get the civilians to trust them and that in most countries a woman cannot talk to a man who is not her husband.

- Sensitivity: even when decked in gear and vests, women showcase sensitivity that does not come easily to men. This is very important to have on the front lines to maintain a sense of peace and calmness in the midst of destruction and chaos. Women are more easily trusted which makes it easier to sneak into enemy lines to gain information.

- Pride: every country prides itself on being a harbinger of equality and equal rights. The concept of equality remains superficial and unattained unless it is achieved in the true sense. Women have always made the nation proud in every endeavour they have undertaken and it is only a matter of pride to have women serving on the front lines. The inclusion of women in all streams of the army will actually justify this pride and give it the true meaning.

- Cultural integration: the main benefit of inducting women into combat roles would be the cultural shift that it would bring about in the mentality of not just the men in troops but also in the mind of the general society. The change has to start somewhere and culture changes only over time. Almost all professional fields have been primarily male dominated until a shift was gradually brought about by including and accepting women.

CONCLUSION

There are multiple benefits that women bring to any field they work in and that includes the Armed Forces. The Supreme Court’s recent decision ensures equality but more has to be done to achieve complete

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integration. The military builds a force and a sense of brotherhood amongst soldiers based on hyper masculinity and blood. Male supremacy is worshipped to an extent that others are considered inadequate, after all that is the mindset of any soldier when going into war as well, to come out as supreme. This sort of conditioning is the root cause for the gender gap and is a symptom of obsolete patriarchal notions that has run our society for so many years. Women will continue to be considered as a minority until others are made to recognise them as first class soldiers, equal counterparts and not a delicate object of society. They have been a part of war since ancient times and the need for their integration has only become stronger. In this day of political advancements and progressive thinking, it is very easy to bring about changes in a system. Every monumental revolution has been brought about by generating debate and raising questions. Women have to be included and also accepted in combat roles. The first step would be to identify the hurdles. The problems of all stakeholders must be assessed and adequate research has to be conducted before a comprehensive strategy can be formed. For any policy to be a success there has to be a free channel of communication to ensure transparency and efficiency. The easy part of this process is the policy making, the difficult part is the massive cultural shift that has to be brought about in the mindset of men and society. It is a far-fetched hope to change society’s views overnight so the first step would be to condition the men. Training programs with the objective of educating and sensitizing troops have to be initiated and continued until the troops get accustomed to the concept of a female soldier. Once the integration is truly complete in the grassroots level, it is only a matter of time before society follows.
EVALUATION OF APPLICABILITY OF JUDICIAL INTERVENTION IN ARBITRATION PROCEEDINGS: ARBITRATION AND CONCILIATION ACT, 1996

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Abstract
In the wake of explosion of litigation in courts, a new trend has emerged to resolve civil and commercial matters. Arbitration is a new instrument practiced globally. In India, with the objectives of expedition and minimum judicial interference, the legislature adopted The Arbitration and Conciliation Act 1996 to determine the procedure of arbitration proceedings. The sources emerge from early medieval era to UNCITRAL Model Law on International Commercial Arbitration. However, in order to adhere to the objectives, a conflict of competency of jurisdiction of the arbitral tribunals and the national courts often arises. The paper, in light of kompetenz-kompetenz principle, analyses how the provisions of the said act curtail or minimise the judicial interference with the arbitration proceedings, not only on a quantitative basis but also as a qualitative relief.

Introduction
“An independent and efficient judicial system is one of the basic structures of our constitution... It is our constitutional obligation to ensure that the backlog of cases is decreased, and efforts are made to increase the disposal of cases”524. The idea behind this judgement is the theoretical underpin of the instrument of Arbitration we use in our country. In order to maintain good governance in an age of explosion of litigation, arbitration is an urgency to manage the growing crisis of judicial delay.

The Arbitration and Conciliation Act, 1996 is based on UNCITRAL Model Law on International Commercial Arbitration, makes provision for arbitration procedures for both domestic and international matters, in a fair and efficient way. The objectives of the act, as presented by the legislature, is to provide for speedy disposal of cases relating to arbitration with least court intervention525.

Party Autonomy and the independence and authority of arbitrators are the hallmarks of this Act. The prevalence of party autonomy over court intervention with the object of achieving the two-fold objective of speed and economy in resolution of disputes by ‘domestic’ and ‘international commercial arbitration’ is the core of this legislation526.

524 Brij Mohan Lal V. Union of India & Others 2002 4 Scale 433

526 Gouri R, Judicial intervention in arbitration proceedings and speedy justice an analytical study, Chapter I, 2014.
527 AIR 1989 SC 1263 (1266)
Section 5 of the 1996 Act, unlike the 1940 Act, supports the objectives and clearly highlights the intention of the legislature to settle cases with arbitration agreement expeditiously with minimum judicial interference. Centralising the concept of “speedy justice” along with “minimum judicial intervention”, the legislature conveys that justice is not to be determined in quantitative basis by speedy disposal, but also qualitative relief provided to both the parties.

In other words, the main object to drastically curtail supervisory role of the courts, demolish various stages and proceedings through which an award was required to pass through in the mechanism of old enactments so that the object of speedy resolution of dispute is achieved.

An interesting theory that the author came across while researching on the jurisdiction of the arbitral tribunal is the kompetenz-kompetenz principle. In an uncomplicated manner, the principle relates itself to the competence and the circumstances that influence the jurisdiction of the arbitral tribunals and national courts. While this theory was first recognised in India with the passage of the Act in 1996, the concept in English law has been well known since the decision of Mr. Justice Devlin in Brown v. Genossenschaft Osterreichischer Waldbesitzer. It was laid down that “[Arbitrators] are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties - because they cannot do so - but for the purpose of satisfying themselves as a preliminary matter about whether they ought to go on with the arbitration or not.”

This paper aims to analyse the competence of jurisdiction of arbitral tribunals over national courts with respect to the provisions of the Arbitration and Conciliation Act, 1996 overseeing intervention of judicial proceedings before, during and after an arbitration proceeding.

Judicial Intervention Before Arbitration Proceedings

Section 5 of the Arbitration and Conciliation Act 1996 lays the principle of judicial intervention during the proceedings. It enumerates that no judicial authority shall intervene except where so provided by the act. The section is found to

Usage of term “judicial authority” by legislature in all three sections, is firstly a clear recognition that judicial control of commercial disputes is no longer in the exclusive jurisdiction of courts. There are many statutory bodies and tribunals which would have adjudicatory jurisdiction in commercial matters. Hence, secondly it implies that policy of least intervention articulated in Section 5 is equally applicable to all “judicial authorities” that may have such adjudicatory jurisdiction over arbitrations. Clarified, that common use of term “judicial authority” in Sections 5, 8 and 45 does not in any way imply that Part I of 1996 Act is applicable to arbitrations which have their juridical seat outside India.”


528 Extent of judicial intervention—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.
529 Western Shipbreaking Corps. V. Clare Haven Ltd., 1998 (Supp) Arb LR 53.: 1998 (1) RAJ 367 (Guj)
533 Supra 5
be analogues to Article 5 of the UNCITRAL Model Law.

To minimize the supervision of courts, the section begins with a non-obstante clause *Notwithstanding anything contained in any other law*. Along with the intention of the legislature, the clause also defines the extent of judicial intervention allowed by the act. The permissible levels of intervention can be inferred from the ending clause of the section *except where so provided in this Part*. However, since arbitration is still a developing instrument in the country, without adequate court support, the procedure might get mislead or off-track. Lord Mustill, in *Coppee-Lavalin SA/NV V. Ken-Ren Chemicals and Fertilisers Ltd (In Liquidation)* said, "Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the Court may be not only permissible but highly beneficial."

Therefore, the competence of jurisdiction of arbitral tribunals over national courts is yet to be decided. This is to happen over unique up-coming cases, where the judiciary will weigh the majority and dissenting opinions based on facts and find new interpretations.

Section 8 of the Arbitration and Conciliation Act 1996 requires the judicial authority to intervene by directing the parties to arbitration where an arbitration clause exists. This has been ruled out as a mandatory requirement to be fulfilled by the judicial authority.

This section is *similar* but not analogues to the Article 8(1) of the UNCITRAL Model Law. The legislature intentionally has not adopted the clause *unless satisfied that the agreement is null and void, inoperative or incapable of being performed*. The implied meaning of this omission is that no judicial authority has the jurisdiction to determine the validity or even existence of an arbitration agreement and it is the sole jurisdiction of the tribunal to rule on the above.

On literal interpretation of the section, the reader can clearly conclude two details. One being that the non-obstante clause...
over-rides over every provision or clause contrary to it. Secondly, it makes a mandatory obligation on the courts instead of an optional or debatable obligation of referring the parties to arbitration.\textsuperscript{540} The latter is supported by the judgement of H.P. Corpn. Ltd. V. M/s. Pinkcity Midway Petroleums\textsuperscript{541} where the Supreme Court held “This Court in the case of P. Anand Gajapathi Raju and others V. P.V.G. Raju (Dead) and others\textsuperscript{542} had held that the language of Section 8 is peremptory in nature. Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. Therefore, it is clear that if as contended by a party in an agreement between the parties before the Civil Court, there is a clause for arbitration, it is mandatory for the Civil Court to refer the dispute to an arbitrator.”

Judicial Intervention During Arbitration Proceedings

Section 9\textsuperscript{543} of the Arbitration and Conciliation Act 1996 provides the courts with a gateway to intervene during the arbitration proceedings by empowering the courts to make interim measures on selected occasions. The court has the jurisdiction to entertain an application under this Section before or during arbitral proceedings and after the making of the award but before it is enforced in accordance with Section 36 of the Arbitration and Conciliation Act 1996.\textsuperscript{544} This section does not provide any substantial relief.\textsuperscript{545} Section 9 is not subjected to party autonomy. The power of the court bestowed herein is mandatory. This means the parties cannot agree to avoid the provision, or otherwise. However, party autonomy and


\textsuperscript{541} AIR 2003 SC 2881.

\textsuperscript{542} 2000 (4) SCC 539.

\textsuperscript{543} Section 9 Interim measures, etc., by Court — [(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court— (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely:— (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried,

\textsuperscript{544} Globe Cogeneration Power Ltd., V. Sri Hiranyakeshi Sahakari Sakkere Karthare Niymat Sankeshwar, 2004 (4) RAJ 263 (Kar).

\textsuperscript{545} Liverpool and London Steamship Protection and indemnity Association Ltd., V Arabian Tankers Company.
arbitral award are two foundational structures which when distorted by intervention of the judicial authorities, takes away the meaning of arbitration proceedings. Therefore, with the aim to protect rights under adjudication before the arbitral tribunal from being frustrated\textsuperscript{546}, the interim measures are to be strictly adhered to the listed scenarios in the provision.

An interesting question arises when we focus on Section 13\textsuperscript{547} and Section 14\textsuperscript{548} of the act, which provide the court with another opportunity to intervene in the proceedings in the process while the parties challenge the proceedings or when the court has to terminate the mandate. When read the provisions together, one may fall in doubt on whether the remedy provided under Section 13(2) does not exclude the remedy under Section 14(2)? Or in simpler terms, whether the provisions are not mutually exclusive?

The answer has been highly debated, first appearing in the case of Guwahati HC State

\textsuperscript{546} Firm Ashoka Traders V. Gurumukh Il & Saluja 2004 (3) SCC 155

\textsuperscript{547} Section 13 Challenge procedure.—(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator. (2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal. (3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. (4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award. (5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34. (6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

\textsuperscript{548} Section 14 Failure or impossibility to act.—(1) 3 [The mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if]—(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and (b) he withdraws from his office or the parties agree to the termination of his mandate. (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. (3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

\textsuperscript{549} 2007 (1) Arb. LR 564 (Gauhati) (DB)

\textsuperscript{550} 2008 (3) R.A.J. 227 (Del.)

\textsuperscript{551} 2008 (3) Arb.LR 456 (Delhi)
exercised in respect of a long-dead dispute iii. or a dispute that was not arbitrable, without the approval of the Court. The Delhi High Court held these situations to come under the purview of the de jure incapability to perform.

Interestingly, in Chennai Metro Rail Limited V. M/s. Lanco Infratech Limited it was held that all of the above contentions were not in consonance with the spirit and intention of the act. On analysing the statute, the court held that the legislature did not intend to either provide the parties with multiple remedies or mutually exclusive concurrent remedies. Both the sections happen to be a complete code within itself. It was also observed by the court that the above judgements took no note of the UNCITRAL Model Law, which provided two different tracks for the sections in question, one relating to the very appointment and another relating to the continuation. The sections are mutually exclusive and the judiciary in the case of injustice to a party may be approached pursuant to section 34(2)(a)(v).

Judicial Intervention After Arbitration Proceedings
Section 34 of the Arbitration and Conciliation Act 1996 defines the procedure to set aside the arbitration award by the courts. The section is another instrument to keep the judicial intervention in check. It provides a list of very limited scenarios where the court has the power to set aside the arbitral award, which are as follows:

i. A party to the arbitration agreement was under some incapacity.

ii. The arbitration agreement is not valid under the law.

The applicant that is the party making the application was not given proper notice of appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case.

The arbitral award deals with matters outside the scope of submission or reference to arbitration.

The constitution of the arbitral tribunal or the procedure of arbitration was not as per agreement of the parties.

The subject matter of dispute is not capable of settlement by arbitration.

The arbitral award is in conflict with the public policy of India.

The award is founded on matters relating to conciliation proceedings between the parties, which are confidential in law or is based on admissions, suggestions or proposal made in conciliation for an attempted settlement of dispute.

A party can challenge an arbitrator on the selected grounds under Section 13 of the act in front of the tribunal itself. However, if the party is unsuccessful, they can challenge the arbitrator again but this time in the court on the same grounds under section 34. A feature of section 34 is that issues will not be included in applications pursuant to Article 34 of the Act.

Hearings under section 34 of the Act are summary proceedings with the respondent’s scope for objections, followed by the applicant’s opportunity to show the validity of any ground under section 34(2) of the Act. Proceedings pursuant to Section 34 are different from regular civil suits. In standard civil action, it would be permissible for the court to pass judgment on the basis of the facts found in the complaint on failure to file defence. Even if there is no contest in the case pursuant to Section 34, court can

552 Judgement dated 10-01-2014 passed by Hon’ble Mr. Justice V.Ramasubramanian in O.P.No.845 of 2013

553 Ibid
not set aside award on the basis of the averments found in complaint. Even if applicant does not rely upon grounds under Clause (b), Court, on its own initiative, may examine award to find out whether it is liable to be set aside.554

A very interesting question arises that, whether under section 34 of the act, the court in addition to having jurisdiction in setting aside the award, also has the jurisdiction to modify the award?

It was first answered in the case of McDermott International Inc. v. Burn Standards Co. Ltd. (sc)555 where it was held that

“52. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct the errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court’s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

The Arbitration Act of 1940 contained a provision of modification of awards by the court. However, absence of such clause in the newly adopted act of 1996 makes the intention of legislature clear to not to vest such a power in the hands of the court.556 However, the Delhi High Court in Union of India v. Modern Laminators Ltd557 took a view that section 34 of the Act envisages the power to modify an award and that McDermott propounded the limited scope of section 34 of the Act without discussing whether the power to modify formed part of the confines of the said scope.

The recent judgement by Gujarat High Court in Gujarat Mineral Development Corporation Ltd. v. Simplex Infrastructure Limited558 stands by the ruling in McDermott and discourages reappreciation of awards by the courts—

"11.7.1. ...The quintessence for exercising the power under this provision is that the Arbitral Award has not been set aside. The challenge to the said award has been set up under Section 34 of the Arbitration Act about the deficiencies in the Arbitral Award which may be curable by allowing the Arbitral Tribunal to take such measures which can eliminate the grounds for setting aside the Arbitral Award. No power has been invested by the Parliament in the Court to remand the matter to the Arbitral Tribunal except to adjourn the proceedings for the limited purpose mentioned in subsection (4) of section 34. The view which we are expressing is supported by the decision of the Hon’ble Supreme Court in the case of McDermott International Inc. vs. Burn Standard Ltd..”

“13. ...The scope and exercise of jurisdiction by this Court in exercise of powers under Section 37 of the Arbitration Act by this Court will be coterminous with the scope of Section 34 of the Act and therefore, unless and until the case is made out for interference as per law laid down by the

554 Fiza Developers & Inter- Trade P. Ltd., V. AMCI (I) Pvt. Ltd. and another 2009 (5) CTC 65
555 (2006) 11 SCC 181
556 Pushpa P. Mulchandani & Ors. v. Admiral Radhakrishan Tahiliani, 2003 (6) BomCR 24
557 2008(3)ArbLR489(Delhi)
558 MANU/GJ/1067/2017
Hon’ble Supreme Court in the case of Associate Builders (supra), this Court would not be justified in interfering with the findings recorded by the learned Arbitrator, confirmed by the learned Commercial Court”

Conclusion
Indian law on arbitration has evolved from indiscriminate judicial intervention, established in the Colonial Act and the successive 1961 legislation, to a more mature Act based on the Model Law. Throughout the evolution of principles, it has moved towards the objectives of expedition and minimum judicial interference. The Arbitration and Conciliation Act 1996 is holistic in nature. The next level of growth is to properly interpret these provisions by keeping party autonomy and minimum judicial interference as centric principles. Section 5 of the act defines the extent of interference by any judicial authority. These authorities are further occasionally defined by the courts. Section 8 makes certain that the parties to arbitration are directed to the proceedings without any chance of judicial interference even before the commencement of the proceedings. The act empowers the courts to grant interim reliefs, but only for specific instances. This is done to guard the instrument of arbitration from losing purpose and has the support of the courts to come-up with interpretations to maintain the relevance of the objectives.

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THE EXISTING LEGAL FRAMEWORK OF INTELLECTUAL PROPERTY AND 3D PRINTING

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ABSTRACT
3D printing technology has advanced as the next revolutionary technology of the current epoch with ample momentum to rebuild almost every aspect of society. The limits of additive manufacturing technology are increasingly growing, from lithium-ion batteries to human organs. Predominantly confined for industrial applications, additive manufacturing is widely recognized in commercial and consumer usage. A major rise in the conflicts over intellectual property among those trying to profit from this transformative technology comes with larger-scale adoption. In order to survive these inevitable disputes over valuable intellectual property assets, holders of rights need to be aware of the applicable, dynamic, and rapidly changing legal framework, with its many incentives and ambiguities. This article recognizes the relationship between Intellectual Property and 3D printing. Primarily, the article helps to understand the existing legal framework of Intellectual Property in India with reference to 3D printing, followed by other countries such as the United States of America, the United Kingdom, and the People’s Republic of China. In addition, having to understand the threat that 3D printing is causing to the existing legislations, the challenges faced by the Intellectual Property law with special emphasis on India is explained in detail.

INTRODUCTION
The capacity to generate and duplicate three-dimensional (hereinafter, ‘3D’) objects from a single device is an exceptional technology that has been aspired by many science-fiction writers. The existence of such aspiration is currently known as additive manufacturing, popularly referred to as 3D printing.\(^{559}\) Technically, it is a process of constructing three-dimensional objects from a digital 3D model or Computer-Aided Design (hereinafter, ‘CAD’) model by the use of 3D modeling software.\(^{560}\) It is important to note that there have been consistent advancements in the additive manufacturing technology in the past few decades.\(^{561}\) Although the machines in the present are not essentially the replicators of Star Trek, the ability of modern technology with regard to the size, components, and resolution of the concluded product have transitioned 3D printing from imagination to a critical source of development.

The influence of 3D printing on modern civilization has both its advantages and disadvantages. The capability to build prototypes almost instantaneously and to produce custom designs cost-effectively can transfigure the modern world. However, the accessibility of the technology at the consumer level has provided a series of possible disruptive

\(^{559}\) David Santos González & Almudena González Álvarez, Additive Manufacturing Feasibility Study & Technology Demonstration, EDA, 10 (2018).


\(^{561}\) Dachamir Hotza et al., Advances in Additive Manufacturing Processes and Materials, AME (2014).
effects. In the current scenario, 3D printing has emerged to an aspect where the consumers, either through printing services or with thrifty 3D printers for home, have instant access to it. This created a major advantage to the DIY (do-it-yourself) community which embraced 3D printing rather than engaging with paid professionals.

In addition, the DIY community can compose a configuration and can make that accessible to the entire world through a digital portal. 3D printing enables the DIY group to manufacture public goods in the form of usable prototypes that are freely accessible to anyone with access to a 3D printer. Further, it is important to note that if the designs printed is a duplicate of a subsisting patent, additive manufacturing explicitly permits pervasive patent infringement. The existence of Intellectual Property (hereinafter, ‘IP’) Legislations shall protect the rights of the patent holders. However, 3D printing affects the IP rights of the holders in various manners that the infringement subsequently falls outside the purview of the present legislations.

EXISTING INTELLECTUAL PROPERTY LEGISLATIONS IN INDIA WITH REGARD TO 3D PRINTING

The IP legislations in India can be dealt in a four-fold manner: firstly, Patents to protect the inventions; secondly, Trademarks to differentiate the holder’s services and products from others; thirdly, Copyright to protect the artistic, literary or musical works; and lastly, design registration to protect the shape and layouts of the products.

PATENTS

In India, The Patents Act, 1970 is the statute regulating patents. According to Section 2(1)(j) of the Patents Act, a new product or process which comprehends an innovation may be granted a patent. Consequently, the patent proprietor has the exclusive right to preclude the third parties from making, using, selling, importing, or offering for sale the patented invention. 3D printers can promote patent infringement in three different manners: firstly, using the blueprint of the patented product which directly infringes the rights of patent proprietor (direct infringement); secondly, intentionally inducing a third party to directly infringe (induced infringement); and lastly, deliberately contributing to infringement by selling or importing a component of a patented invention (contributory infringement). CAD files can be easily circulated electronically and the corresponding objects can be reproduced at several locations with minimal patent proprietor visibility. Interestingly, the stance on whether the dispersion of CAD files would constitute an infringement of a patent is uncertain and relies heavily on whether the making or selling of electronic incarnations of the patented product

566 Id.,
567 Ajay Thakur, All you need to know about the IPR Laws in India, iPLEADERS (July 13, 2020, 10:17 PM), https://blog.ipleaders.in/need-know-ipr-laws-india/.
comprises a direct infringement of the rights of the patent proprietor.

TRADEMARKS
The Trade Marks Act, 1999 along with the common law protects the Trademarks in India. A trademark is registered with reference to a particular component of the products or services. Further, the inherent function of the trademark is to indicate the prospective buyers about the quality of the products or services. According to the Trade Marks Act, a trademark is infringed if a mark is identical or relatively similar to the registered trademark. 3D printing will constitute a greater loss to the trademark proprietor of a particular product or service as they are dependent on their brand. To be precise, there are possibilities for the registered trademarks to be infringed with respect to the CAD files as they may comprise digital versions of the respective trademark.

COPYRIGHTS
The 1957 Copyright Act in combination with the 1958 Copyright Rules forms the legal structure regulating the protection of copyrights in India. Regardless of the registration of Copyright, the originality of the dramatic, literary, artistic or musicals works, cinematograph films, and sound recordings are protected under the Copyright Act. According to the copyright law, software code is usually regarded as “literary work,” and CAD files are classified as “artistic works” with respect to the product being a drawing and involves artistic craftsmanship. Legal copyright infringement appears to occur when a third party utilizes the exclusive rights of the holder without permission. Consequently, the existing copyright law is inclined to adequately secure the right of the proprietor of the copyright from the unauthorized transfer of CAD files inclusive of their artistic outputs. Individually, the Copyright Act also describes a series of actions that do not entail infringement, including reasonable processing of work for private or personal benefit, including research. The Copyright Act will regulate the right of copyright holders to transmit CAD files to producers and suppliers, to the degree set out above. This exclusive right requires the copyright proprietor of the work to issue licenses in relation to the CAD file with limitations on its usage. CAD file licensees may also be prohibited from modifying the copyrighted work in any manner.

DESIGN
The Designs Act, 2000 deals with all kinds of designs with creative work and anything that is in the essence of a mechanical tool or any construction mode falls under its exception. Accordingly, the Designs Act would exempt certain 3D printed items that are “merely mechanical devices” under the Designs Act or “artistic works” under the Copyright Act. In order to protect the design from unnecessary infringement, it has to be registered. A design is registered in reference to a category of products where the design is protected only in regards to the goods for which registration was granted. Upon registration of a design, the proprietor shall have the exclusive right to utilize the design in any article with respect to any class in which the respective design is registered. It is pertinent to note that the occurrence of piracy of a design can be elucidated in a two-folder manner under the

571 The Trade Marks Act, § 29 (1999).
572 The Copyright Act, § 13 (1957).
573 The Copyright Act, § 2 (1957).
574 The Copyright Act, § 52 (1957).
Designs Act: firstly, when the design is placed to a registered relevant product with an intention to sell without the approval of the holder; and secondly, when a product has been registered in relation to design with an intention to sell without the approval of the holder.\textsuperscript{576}

EXISTING INTELLECTUAL PROPERTY LEGISLATIONS IN OTHER COUNTRIES WITH REGARD TO 3D PRINTING

UNITED STATES OF AMERICA

The 2D and 3D works fall under the ambit of “Pictorial, graphical and sculptural works” mentioned under Section 102(a)(5) of the Copyright law of United States (hereinafter, “U.S”) until their mechanical and functional aspects are considered. The respective section protects the original works of the authors immediately after fixing the tangible medium of expression.\textsuperscript{577} Section 106 of the U.S. Copyright law grants the copyright owner an exclusive privilege in regard to the works established therein.\textsuperscript{578} This includes works such as sculptural and artistic works which could be printed using a 3D printer. In addition, CAD files through which the products are printed may also be protected by the copyright.\textsuperscript{579} Further, if the court believes that the portions of the file are protected by copyright, then replicating that file would amount to infringement of copyright. However, if no components of the file are copyrighted, subsequently it makes it available for everyone to copy the file without need for permission. Applying for industrial design registration is one of the possible ways to protect the usage of 3D printing from infringement as it protects the artistic character of utilitarian objects. Although the protective spectrum excludes functional elements, visual aspects such as form, configuration, and embellishment will be secured. The infringement of industrial design is only stimulated when the replica made is almost identical in both appearance and feel. Consumers can prevent infringement by even minor customization. Correspondingly, rights holders must either expect possible modification points and apply for security over a multitude of variants, or only secure elements that are relatively difficult to change.

Considering the trademark, the consumers in order to avoid infringement remove the trademarked name or logo from the product before printing. A more complex issue arises when a product’s trade dress or distinctive guise which is free of any trademark, has acquired a secondary meaning that clearly indicates its source. Conversely, the Trademarks Act essentially needs the “use” of the logo in the commercial context to be considered as an infringement.\textsuperscript{581} Hence it is entirely plausible that the usage of a 3D printer to build a replica of a trademarked product for personal purpose may not fall under the ambit of infringement according to the law. The U.S. patent law system acknowledges a repair and restoration doctrine.\textsuperscript{582} A user may freely use the patented product after the sale of that respective product by the

\textsuperscript{576} The Designs Act, § 22 (2000).
\textsuperscript{577} Copyright Act, 17 U.S.C. § 102 (1976).
\textsuperscript{578} Copyright Act, 17 U.S.C. § 106 (1976).
\textsuperscript{582} Wilson v. Simpson, 50 U.S. 109 (1850).
patent proprietor, or when the patent expires. If any part of the proprietary product breaks or fails, the customer may need to fix or remove the part that is broken or failed. The repair or replacement of such a product is legal until they generate a completely new product. In addition, if the patent holder ascertains that the ‘repair’ was actually a ‘reconstruction’, it may lead to patent infringement. However, the difference between legal repair and illegal reconstruction is still uncertain. Further, the current scenario of the repair and reconstruction doctrine gives direction as to what would deem to be a valid infringement of standards of repair and is in need of guidance from the higher courts. Additionally, Article 1, section 8 of the U.S. Constitution grants Congress the authority to enact laws regarding patents and Congress has utilized that power accordingly. Keeping the patent law in mind, when a product causes damage that requires redressal beyond the home, then it is necessary for the individual to buy a new product for further use. Actions that are contradictory to this are considered either as an unwarranted reconstruction of the object or an extensive repair to entirely build a new article. This requirement is effective even if a user is ignorant of the existence of that particular patent. However, it is possible for the consumer to replace the minor elements of the object using a home 3D printer. Existing legal precedence explains the extreme ends of the discussion regarding repair and restoration doctrine, but leaves considerable gray ground where 3D printing technology is likely to escalate.

UNITED KINGDOM

The United Kingdom Patents Act, 1977 is the United Kingdom’s (hereinafter, ‘UK’) prime aspect of patent law legislation. As with many other national Patent Acts in Europe, much of its substantive provisions emanate from European and international patent law initiatives. The statutory provisions relating to patentability originate from the 1973 European Patent Convention (hereinafter, ‘EPC’). Further, considering the fact that the EPC did not regulate the post-grant process of patents, federal legislators introduced models of the 1975 Luxembourg Convention, popularly known as the 1975 Collective Patent Convention (CPC) with respect to the patent infringement and exceptions.

British patent law, by virtue of section 130(7) of the UK Patents Act 1977, recognizes the international history of many of its substantive provisions. This section demands that all laws relating to patentability, infringement, and exceptions have to be framed as having, as generally as possible, the same consequences in the UK as the relevant laws of the European Patent Convention, Community Patent Convention and Patent Cooperation Treaty in the territories to which those Conventions relate. Additionally, section 60(1) & (2) of the UK Patents Act 1977 governs direct and indirect patent infringement.

Further, the UK has expressed its desire to engage in the Unitary Patent Program. This approach was initiated by most EU Member States and contemplated the creation of a unitary patent right, together

587 Id.,
588 Patents Act, § 60 (1949).
with a system of common adjudication, within the participating states. Hence it is conceivable that after review by the European Patent Office, protection by ostensible patents with the unitary effect would be accessible for applicants. Such patents would then be mandated by a new court system, namely the Unified Patent Court (UPC) along with the current bundle of patents. The introduction of this program is currently delayed due to a constitutional challenge before the German Federal Constitutional Court and the political repercussions of the referendum on leaving the European Union on 23 June 2016, while the UK Government recently ratified the Unified Patent Court Agreement to participate as a non-EU member.

PEOPLE’S REPUBLIC OF CHINA

The advent of consumer-level 3D printing has given rise to issues at a variety of rates especially, surrounding the intellectual property to protect industrial designs. Admittedly, with China having a reputation for producing and selling counterfeit 3D products, their issue towards the 3D printing and the threats caused to the owners of well-known designs are extreme. If a 3D printer creates a design for a company and then the trademark registered by a third party in the Chinese Trademark Office for that specific or similar product is applied to that product, then infringement of the trademark may occur under Article 52 of Trademark Law of People’s Republic of China (hereinafter, ‘PRC’). Moreover, if the label is not registered but is well recognized in China, the act will also be considered a violation of Article 5 of the PRC Law Against Unfair Competition. Given the fact that there is no general “fair use” or “private use” protection under the PRC Trademark Act or the PRC Act Against Unfair Competition, the production of one product in this context should, in principle, suffice to establish infringement.

It should also be mentioned that for many years it has been possible to register 3D shapes in relation to trademarks in China. A brief analysis of that respective list shows the registration of a large number of 3D marks. Any unapproved printing of these licensed 3D labels would also constitute an infringement of trademarks within brands?, The Drum (July 18, 2020, 11:58 PM), https://www.thedrum.com/news/2017/04/06/chinas-counterfeit-goods-market-tarnishing-the-reputation-its-homegrown-brands.


Patricia Marquez, Trademark: A Comparative Look at China and the United States, 14 TILR 334, 352 (2011) [hereinafter Patriciа].

Id. at 345.

Id. at 350.


594 Danielle Long, Is China’s counterfeit goods market tarnishing the reputation of its homegrown
the current Chinese law and policy. Comparably, if the design is well known in China, such as the design of a Coco-Cola bottle, it may still be protected under the PRC Law Against Unfair Competition even though it has not been licensed in China. The 3D designs are protected essentially under Article 2 of the PRC Patent Law. According to the respective article, the word ‘design’ is referred to as any new design of the shape, structure, or mixture thereof of a product, along with the hybrid of color and shape or pattern of a product which generates an architectural feeling and is suitable for industrial use. Certainly, any 3D printing of a design which is registered in the Chinese Patent Office as a design patent can encompass a patent infringement. Nevertheless, there are defenses that can be established under the PRC Patent Law. Taking this into account, the failure to review design patents before granting them is an advantage to the defendant to question the validity of that respective patent itself by stating that it is not a novel. Further, the patents last only 10 years in PRC and they cannot be renewed, hence the expiration of the patent can be recognized as a defense. Furthermore, experimental use can be used as a defense as it is possible in the case of design patents. Although there is no distinction between private and commercial use in PRC, it can still be recognized as a defense and left to the interpretation of the courts.

Under the PRC copyright law, creative works and their 3D depictions are protected. That being said, notwithstanding several well-known cases, such as the Lego case, it is widely believed that if an artistic work is imposed on an industrial level it will lose copyright protection and have to be protected as a design patent by the PRC Patent Law. The PRC Copyright Law contains a broad range of protections (under Article 22) that may be applicable to a customer using a 3D printer to make a 3D version of an artistic work inclusive of fair use and protections for private research and analysis. Such protections will need to be overhauled when 3D printers reach family homes.

CHALLENGES FACED BY THE IP LAW

Despite the fact that India has enacted numerous legislations for the protection of the IP, there are few aspects through which a 3D printer helps the infringer to elude. Further, duplicated copies of an invention using a 3D printer is essentially constituted

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601 HG, supra note 41.
603 HG, supra note 41.
604 Patents, China IPR SME Helpdesk (July 18, 2020, 3:42 AM), https://www.china-iprhelpdesk.eu/content/patentsfaqs.
605 Dr. Li Feng et al., China: Experimental Use Exemption Of Patent Infringement - A Brief Comparison Of China And The United States, PIF 6.242, www.supremoamicus.org 193
as a lost sale to the patent proprietor. However, in order to sue for infringement, it is necessary for the patent holder to know that a 3D printer is used by someone to construct a patented invention. Moreover, being aware of such usage is a daunting task as these printers are used widely across the world in different sectors. IP laws are age-old laws that are trying to develop by persuading the judiciary to broader the interpretation with regard to modern technologies. Considering the U.S Patent law, the buyer of the patented invention is entitled to the right to use and repair. 609 Their repair and reconstruction doctrine which allows the consumer to repair a failed or broken component of the invention, aborted to disclose that buyers can replace the needed components easily using a 3D printer. This doctrine is not followed in India, as the third party cannot make or use the invention without the permission of the patentee. 610

Further, fixing liability on an infringer is another critical problem. The Indian Copyright has endured amendments to incorporate Internet Service Provider (ISP) Liability for the purpose of infringements through the internet. However, the introduction of such a notion with technology like additive manufacturing is still uncertain. It is perceivable that the people responsible for the 3D print models will expect no liability for the occurrence of infringements through their database. The Indian Copyright Act has provided Internet Service Provider liability 611 under Section 51(a)(ii) and Technology Protection Measures under Section 65A and 65B in order to determine the liability for infringing IP works through the internet. The main concern with 3D printing is the permissibility of “making” under the Patent law. To understand this concern, the process of additive manufacturing has to be clear. 3D printing technology commences with a digital 3D template or blueprint of a design known as CAD. The CAD files can be created either through scanning of the objects with the help of a 3D scanner or by direct manual drawing on the CAD program. Subsequently, the file transfers its contents to the 3D printer in “layers,” which makes the primed to print. 3D printer discharges material substances starting from the foundation, layer by layer, to create an object upwards. Once the layers are placed accordingly, they are fused together which eventually transforms the object into a solid form. 613

Future 3D printers seem to have the ability to reproduce themselves or to print an identical printer. 3D printing has the ability to be both impressive and simplifying; from making items as complicated as effective aircraft parts, advanced prosthetics, 615

611 The Copyright Act, § 51 (1957).
612 The Copyright Act, § 65 (1957).
615 3D Printed Prosthetics | Where We Are Today, Amputee Coalition (July 18, 2020, 1:45 PM), https://www.amputee-coalition.org/3d-printed-prosthetics/.
guns$^{616}$ and lab-developed organs$^{617}$ to things as plain and useful as a plastic replacement character for baby coaches.$^{618}$ The price of replicating items has been reduced, and the method of production has become easier to complete. Business owners and individuals may not need to buy complex machines and appliances or possess exceptional skills for producing goods. The products can be printed based on the 3D models and templates through the 3D printers. The raw materials are the only essential components for printing. As much as 3D printing being an exceptional technological development, it is infringing the rights and privileges of the people exceedingly. The problem of copyright is indeed similar to that of Napster$^{619}$ and the battle between the music industry and peer to peer sharing websites. Nevertheless, the 3D printer adds more to this. It not only makes the files readily accessible for download but additionally, it takes a step forward by printing the potentially copyrighted design. Therefore, if people and organizations are not diligent, there may be several levels of copyright infringement. Throughout the long run, 3D printing has the potential to absolutely shudder intellectual property to its heart, as it diffuses the factors of production and flouts many of the principles that underpin present IP laws.$^{620}$ It causes a substantial financial loss on IP assets.

CONCLUSION

3D printing is an innovative means of production that will make it easier to copy a patented product and thereby facilitate the infringement of a patent. Considering that the future application of the Patent Act to 3D printing is uncertain and there is a necessity for new regulatory structure.$^{621}$ The current repair and reconstruction doctrine in the U.S needs modification. It is recommended that the Supreme Court can follow a reinterpreted standard or set of standards to make the research more accurate, consistent, and predictable for the patent proprietors and the consumers of a 3D printer. When 3D printing technology advances, the traditional patent law between repair and reconstruction needs improvement as well. Keeping in mind the copyright regime, the holder should know the identity of the end-user. Therefore, it is pertinent for the courts to clarify the extent of copyright protection provided to the CAD file. However, the court is also expected to make sure that the copyright is not granted to technological progress and solutions. 3D printing is an extraordinary invention. Nevertheless, its threat to the IP laws is extremely high that the infringers of the patents slip away from the legal consequences easily with no regrets.

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CRITICAL ANALYSIS OF JUDICIAL DECISIONS ON RESERVATION IN PROMOTION

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ABSTRACT
India, after more than seventy years of independence, has moved ahead and is being recognized as a future superpower. It is now true that the social background of the nation has changed and even the Scheduled Castes and Scheduled Tribes are moving forward and members belonging to SCs and STs enjoy higher positions in the services under the state. In this backdrop, it is necessary to revisit the existing reservation policies and the principles laid down by the Judiciary which govern the reservation system in the country. The present article aims to understand the existing scenario of reservation in promotion in the country and offers suggestions for the future course of action.

1.1 Introduction
Article 16 of the Constitution guarantees equality of opportunity in matters of public employment. This equality of opportunity is guaranteed to all citizens in matters relating to employment or appointment to any office under the state. Article 16(1) is a facet of Article 14. While Article 14 is cast in negative terms and bars the state from denying any person equality before the law or equal protection of laws, Article 16 imposes a duty upon the state to take positive steps for ensuring such equality. Also, since Article 16(1) is a facet of Article 14, reasonable classification is permitted even under Article 16 and therefore, Article 16(4) which provides for reservation of appointments or posts in favour of any backward classes of citizens, which, in the opinion of the State, is not adequately represented in the services under the State, is not an exception to Article 16(1) but must be read harmoniously with Article 16(1).

1.2 Concept of Reservation in Promotion
The term “matters relating to employment” in clause (1) has been interpreted by the courts time and again and for the first time, in The General Manager, Southern Railway v. Rangachari, it was interpreted as to include promotions within its ambit as well. In Rangachari, the question before the court was the scope and effect of Article 16(4). It was argued by the respondents that reservation as provided under Article 16(4) applied only to reservation of posts at the initial stage of appointment and not for reservation of posts for promotion.

The Court held that Article 16(1) must be liberally construed and the “matters relating to employment” cannot be confined only to initial stage of employment. Therefore, it concluded that promotion to a selection post is also included in the matters relating to employment. The Court thus concluded:

It would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a...
portionately higher percentage of appointments at the initial stage. In a given case the state may well take the view that a certain percentage of selection posts should also be reserved, for reservation of such posts may make the representation of backward classes in the services adequate, the adequacy of such representation being considered qualitatively.

Therefore, for the first time, power of the State under Article 16(4) was held to include the power of providing for reservation of posts in matters of promotion as well. A year later, in 1963, in M.R. Balaji and Ors. v. State of Mysore⁶²⁸, the Supreme Court also laid down the ceiling limit for reservation and capped it a maximum of 50% reservation. Even though such a limit was laid down by the court in respect of Article 15(4), but the court remarked that what is true in regard to Article 15(4) is equally true in regard to Article 16(4).

To further advance the interests of the backward classes and to provide more opportunities to them in public employment, various constitutional amendments were brought out by the government pertaining to reservation in promotion were eventually challenged in M. Nagaraj and Ors. v. Union of India and Ors.⁶²⁷ The Constitution (Seventy-seventh Amendment), 1995, (Eighty-first Amendment), 2000, (Eighty-second Amendment), 2000 and (Eighty-fifth Amendment), 2001 Acts were challenged as violative of Articles 14 and 16 and 335 of the Constitution. It was contended that these amendments were brought out to overrule the judicial decisions in the cases of Indra Sawhney and Ors. v. Union of India and Ors.⁶²⁸, R.K. Sabharwal and Ors. v. State of Punjab and Ors.⁶²⁹ and Ajit Singh and Ors. v. The State of Punjab and Ors.⁶³⁰ (hereinafter referred to as Ajit Singh II).

The Constitutional validity of the impugned Amendment Acts was upheld. It was ruled by the Court that these amendments retain the controlling factors, viz., backwardness, inadequacy of representation and the efficiency of administration keeping in mind the constitutional mandate under Article 335. Further, these amendments are confined only to the SCs and STs and do not apply to the OBCs. The other constitutional requirements, namely, ceiling-limit of 50%, the concept of creamy layer, the sub-classification between OBCs on one hand and SCs and STs on the other hand as held in Indra Sawhney and the concept of post-

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⁶²⁶ AIR 1963 SC 649.
⁶²⁸ AIR 1993 SC 477.
⁶²⁹ AIR 1995 SC 1371.
⁶³⁰ AIR 1999 SC 3471.
based Roster with in-built concept of replacement as held in \textit{R. K. Sabharwal} are also not obliterated\textsuperscript{631}.

Prior to the judgment in \textit{Indra Sawhney}, SCs and STs enjoyed reservation in promotion. However, the Supreme Court in \textit{Indra Sawhney} restricted reservation at the entry-level only and disallowed reservation in promotion. To protect the interests of the SCs and STs, the government brought in the 77\textsuperscript{th} Amendment in 1995 which added Article 16(4A) to the Constitution. Article 16(4A) emphasised upon the opinion of the State to decide upon the ‘backwardness’ and ‘inadequacy of representation’ for providing reservation in promotion. However, such an opinion has to be formed on the basis of quantifiable data and if the above two reasons do not exist, then reservation in promotion is not permissible since Article 16(4A) is only an enabling provision and will come into operation only on the fulfilment of certain prior prerequisites.

The Court observed that ‘catch-up rule’ and ‘consequential seniority’ are not implicit in clauses (1) to (4) of Article 16. These are judicially evolved concepts whose basis lie in service jurisprudence. These are not axiomatic concepts such as secularism and judicial review and deletion of ‘catch-up rule’ and insertion of ‘consequential seniority’ are therefore not violative of Articles 14 and 16 of the Constitution.

The Court in \textit{Indra Sawhney} also ruled that the number of vacancies to be filled up on the basis of reservation in a year must not exceed 50\% and these include the carried forward vacancies. This made it difficult for the Government to fill the backlog vacancies. To overcome this problem, Government introduced the 81\textsuperscript{st} Amendment, adding Article 16(4B) to the Constitution which excluded the carried forward vacancies from the ceiling limit of 50\%. The Court while upholding the constitutional validity of the impugned act observed that\textsuperscript{632}:

\textit{“The Constitution (Eighty-First Amendment) Act, 2000 gives, in substance, legislative assent to the judgment of this Court in R.K. Sabharwal. Once it is held that each point in the roster indicates a post which on falling vacant has to be filled by the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate alone then the question of clubbing the unfilled vacancies with current vacancies do not arise.”}

To maintain the efficiency of administration as mandated by Article 335, a time-scale was also ordered to be imposed by the Supreme Court with regard to the carried forward reserved vacancies.

The \textit{Constitution (Eighty-fifth Amendment) Act, 2001} was added to overcome the basis of the decision of the court in \textit{Indra Sawhney} and \textit{S. Vinod Kumar and Ors. v. Union of India and Ors.}\textsuperscript{633}

Reading Article 335 with Article 46 of the Constitution, the Amendment was upheld by the Court because the proviso to Article 335 only relaxed the constitutional limitation and did not obliterate it altogether. However, such relaxation depends on case on case basis. Thus, the above constitutional amendments were upheld as valid provided, in each and every case the state has to collect quantifiable data on the backwardness and

\textsuperscript{631} \textit{Supra} Note at 6.

\textsuperscript{632} \textit{Supra} Note at 6, ¶ 63.

\textsuperscript{633} (1996) 6 SCC 580.
inadequacy of representation of SCs and STs before introducing any provision for reservation in promotion and consequential seniority and the impact of such reservation in promotion on the administrative efficiency. If these compelling reasons are not adhered to by the Government, it is very well within the power of the Court to strike down such a provision as violative of the Constitution.

1.4 Recent Developments on the issue of Reservation of Promotion

After Nagaraj, the law on reservation in promotion remained quite settled with no major issues cropping up. The Constitutional Amendments which were declared as valid became the basis for development of reservation policies throughout the states in the country. However, recently, the Supreme Court has demanded strict application of the constitutional provisions and has come down heavily on any legislation/provision which is in violation of the constitutional mandate.

1.4.1 B.K. Pavitra and Ors. v. Union of India and Ors. 634

In B.K. Pavitra and Ors. v. Union of India and Ors. (hereinafter referred to as B.K. Pavitra I), the Court considered the validity of the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002. The Act provided for grant of consequential seniority to the Government Servants belonging to the SC and ST category with retrospective effect. The validity of the Act was under challenge in Nagaraj as well but after deciding the constitutional validity of the Amendments, the Apex Court remitted the individual matters back to the Appropriate benches to be decided in accordance with the decision of the Court in Nagaraj.

Section 3 of the Act provided for an inbuilt mechanism for providing reservation in promotion to the extent of 15% and 3% respectively for the SCs and STs. The High Court held that the argument cannot be accepted that if all the posts in higher echelons may be filled by SCs and STs, the promotional prospects of general merit candidates will get choked or blocked because reservation in promotion was provided only up to the cadre of Assistant Executive Engineers. The High Court thus held the Act to be valid and in appeal, the matter reached back to the Supreme Court. The decision of the High Court was reversed in appeal by the Supreme Court. It was held by the Court that the collection of quantifiable data pertaining to backwardness, inadequacy of representation and impact upon the overall efficiency is a necessary prerequisite without which the enabling provisions under Article 16(4A) and (4B) cannot be given effect to. If the State wishes to exercise its discretion under Article 16(4A), then it has to first collect quantifiable data pertaining to the above-mentioned factors and even if it comes to the conclusion on the basis of such data that compelling reasons exist for providing reservation in promotion with consequential seniority, the ceiling of 50% cannot be breached and creamy layer has to be necessarily excluded.

“Mere fact that there is no proportionate representation in promotional posts for the population of SCs and STs is not by itself enough to grant consequential seniority to promotees who are otherwise junior and thereby denying seniority to those who are given promotion later on account of

634 AIR 2017 SC 820.
The Court observed that the mandatory exercise was not carried out by the Government of Karnataka and in the absence of such an exercise, the ‘catch-up rule’ enunciated by *Union of India and Ors. v. Virpal Singh Chauhan and Ors.* still holds the field.

It was thus declared that the provisions of the impugned Act to the extent of doing away with the ‘catch up’ Rule and providing for consequential seniority under Sections 3 and 4 to persons belonging to SCs and STs on promotion against roster points are ultra vires Articles 14 and 16 of the Constitution.

1.4.2 Collection of Quantifiable Data regarding “Backwardness” of SCs and STs not Necessary: *Jarnail Singh and Ors. v. Lachhmi Narain Gupta and Ors.*

As noticed above, the Supreme Court in *Nagaraj* laid down a categorical imperative of collection of quantifiable data relating to “backwardness”, “inadequacy of representation” and “impact on the overall efficiency” before the State can exercise its power of providing reservation in promotion for SCs and STs in view of the enabling provision under Article 16(4A).

The law laid down by the Apex Court in *Nagaraj* was challenged on two grounds:

1) It was contended that *Nagaraj* should be declared as invalid to the extent it demanded collection of quantifiable data pertaining to the “backwardness” of SCs and STs. It was contended that such an exercise is contrary to the decision of the Court in *Indra Sawhney* wherein it was held that “the Scheduled Castes and the Scheduled Tribes are the most backward among backward classes and it is, therefore, presumed that once they are contained in the Presidential List Under Articles 341 and 342 of the Constitution of India, there is no question of showing backwardness of the Scheduled Castes and the Scheduled Tribes all over again.”

2) Challenge was also made to the application of creamy layer to the SCs and STs on the ground that *Indra Sawhney* did not apply the test of creamy layer to SCs and STs and it was made applicable only to the OBCs. It was contended that any exercise of amending the Presidential List by the Executive would be violative of the doctrine of Separation of Powers since the list can be amended only by the Parliament and none else.

3) It was also argued that *Nagaraj* did not lay down any test for determining the adequacy of representation in service and the Court should lay down such a test which could be made applicable to all stages of promotion.

The Court agreed with the contention that insofar as *Nagaraj* mandates collection of quantifiable data pertaining to “backwardness” of SCs and STs, it is impermissible. This portion of the judgment in *Nagaraj* is clearly contrary to the nine-judge bench decision of the Supreme Court in *Indra Sawhney*. Thus, the law in *Nagaraj* mandating collection of quantifiable data pertaining to “backwardness” of SCs and STs was declared to be bad.

With respect to the application of creamy layer to SCs and STs, the Court held that application of creamy layer to SCs and STs does not in any manner tinker with the Presidential Lists under Articles 341 and 342 of the Constitution. When the creamy

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635 *Supra* Note at 13.
636 AIR 1996 SC 448.
637 AIR 2018 SC 4729.
638 *Supra* Note at 7.
layer is excluded, the caste or group or sub-group mentioned in the List remains the same and it is only the advanced sections of the caste or group or sub-group which are excluded. This is, in effect, the true objective of providing reservations. Only when the well-to-do and advanced sections are weeded out from being the beneficiary of reservations that the actual backward classes are identified who should enjoy the fruits and benefits of reservation so that they can be uplifted. Thus, *Nagaraj* was upheld as valid in its application of the creamy layer to SCs and STs and it did not, in any manner, interfere with the power of Parliament under Articles 341 and 342.

As far as laying down a test for determining the adequacy of representation was concerned, the Court felt it better to leave it to the appropriate government only for the simple reason that as one goes higher in the level of posts, efficiency in administration assumes even greater importance and “it may be necessary, even if a proportionality test to the population as a whole is taken into account, to reduce the number of Scheduled Castes and Scheduled Tribes in promotional posts, as one goes upwards.”

The Court placed reliance on *Indra Sawhney* wherein the nine-judge ruled that in some cases, reservations are not desirable and should not be allowed. For example,

1. Defence Services including all technical posts therein but excluding civil posts;
2. All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment;
3. Teaching posts of Professors - and above, if any;
4. Posts in super-specialties in Medicine, engineering and other scientific and technical subjects;
5. Posts of pilots (and copilots) in Indian Airlines and Air India.

The Court made it clear that is not an exhaustive list and can include various other top-level posts. Thus, the two important conclusions which can be drawn from *Jarnail Singh* are-

1. The law in *Nagaraj* mandating collection of quantifiable data pertaining to “backwardness” of SCs and STs is bad and to that extent *Nagaraj* stands overruled.
2. The concept of creamy layer is applicable even to SCs and STs as was held in *Nagaraj* and the principle is re-affirmed.

### Limited Power of Judicial Review on the Opinion formed by the State after collection of Quantifiable Data: B.K Pavitra and Ors. v. The Union of India and Ors.

In *B.K. Pavitra I*, the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (To the Posts in the Civil Services of the State) Act, 2002 which provided for grant of consequential seniority to the Government Servants belonging to the SC and ST category with retrospective effect was held as invalid to the extent of doing away with the ‘catch up’ Rule and providing for consequential seniority under Sections 3 and 4 to persons belonging to SCs and STs on promotion against roster points because the State had failed to collect quantifiable data on the “backwardness”, “inadequacy of representation” and “impact on overall
efficiency”. In 2018, the Government again brought out the Karnataka Extension of Consequential Seniority to Government Servants Promoted on Basis of Reservation (to Posts in Civil Services of the State) Act, 2018 providing, among other things, for consequential seniority to persons belonging to the Scheduled Castes and Scheduled Tribes promoted under the reservation policy of the State of Karnataka with retrospective effect from 24 April 1978.

The Act was challenged in B.K. Pavitra and Ors. v. The Union of India and Ors. (hereinafter referred to as B.K. Pavitra II) on the basis that the 2018 Act has failed to cure the infirmity pointed out by the Court in the Karnataka Determination of Seniority of the Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Act, 2002 in the case of B.K. Pavitra I. It was contended by the petitioners that the provisions of the Reservation Act 2018 are virtually the same as those of the Reservation Act 2002 and the Reservation Act 2018 is based on a report which furnishes factual data which could have been furnished in the earlier round. Therefore, all that the legislature had done was take recourse to exercise of judicial power which is constitutionally impermissible.

The State contended that it had in fact carried out the exercise as mandated by Nagaraj before enacting the 2018 Act. After the decision rendered in B.K. Pavitra I on 9th February, 2017, the Government of Karnataka constituted the Ratna Prabha Committee on 22nd March, 2017 to submit a report on the backwardness and inadequacy of representation of SCs and STs in the State Civil Services and the impact of reservation on overall administrative efficiency in the State of Karnataka. The Committee submitted its Report on 5th May, 2017 titled as “Report on Backwardness, Inadequacy of Representation and Administrative Efficiency in Karnataka” which was submitted further to the Law Commission of Karnataka on 8th June, 2017. It was on the basis of the Ratna Prabha Committee Report that the Government of Karnataka introduced the Karnataka Extension of Consequential Seniority to Government Servants Promoted on the Basis of Reservation (to the Posts in the Civil Services of the State) Bill 2017. The Bill was passed by the Legislative Assembly on 17th November, 2017 and by the Legislative Council on 23rd November, 2017. On 16th December, 2017, the Governor of the Karnataka reserved the Bill for the consideration of the President of India under Article 200 of the Constitution. The Bill received the assent of the President on 14th June, 2018 and was published in the official Gazette on 23rd June, 2018. It is pertinent to note here that even though the law after Jarnail did not require collection of quantifiable data on the point of “backwardness” of SCs and STs, the Ratna Prabha Committee still contained data on the “backwardness” aspect.

The Court held that by constituting the Ratna Prabha Committee after the decision in B.K. Pavitra I, the State fulfilled the constitutional mandate as laid down in Nagaraj and successfully overruled the basis of the decision of the Court in B.K. Pavitra I. The Apex Court further observed:

We are of the view that once an opinion has been formed by the State government on the basis of the report submitted by an

642 Supra Note at 20, ¶ 101.
expert committee which collected, collated and analysed relevant data, it is impossible for the Court to hold that the compelling reasons which Nagaraj requires the State to demonstrate have not been established. Even if there were to be some errors in data collection, that will not justify the invalidation of a law which the competent legislature was within its power to enact.

It was further pointed out that once the categorical imperative as laid down in Nagaraj has been carried out by the Government, the Court must be circumspect in exercising the power of judicial review to re-evaluate the factual material on record.

1.4.4 Reservation in Promotion is not a Fundamental Right: Mukesh Kumar and Ors. v. The State of Uttarakhand and Ors. 643

While dealing with the issue of consequential seniority in matters of promotion, the Apex Court in Ajit Singh II observed that every individual has a fundamental right to be “considered for promotion” by virtue of Article 16(1). However, Articles 16(4) and (4A) do not confer any fundamental right to reservation. The same principle was laid down by a Constitution bench of the Court in C.A. Rajendran v. Union of India644 wherein the Court observed:

Our conclusion therefore is that Article 16(4) does not confer any right on the petitioner and there is no constitutional duty imposed on the government to make reservation for Scheduled Castes and Scheduled Tribes, either at the initial stage or at the stage of promotion. In other words, Article 16(4) is an enabling provision and confers discretionary power on the State to make a reservation of appointment in favour of backward class of citizens which, in its opinion, is not adequately represented in the services of the State.

Yet again in 2020, the Supreme Court has reiterated that the Government is not bound to make reservations in public posts and there is no fundamental right inherent in an individual to claim reservation in promotion. Articles 16(4) and 16(4A) are merely enabling provisions which vest the discretion in the state whether to provide or not to provide for reservations. Further, where the State decides not to provide for reservation, the exercise of collection of quantifiable data as mandated by Nagaraj and modified by Jarnail is not necessary and no mandamus can be issued by the Court directing the State Government to provide reservations.

In Mukesh Kumar and Ors. v. The State of Uttarakhand and Ors., Section 3(7) of Uttar Pradesh Public Services Act, 1994 (which was modified and made applicable to the newly created State of Uttarakhand in 2001), which provided reservation for appointment to public posts filled up by promotion was declared as unconstitutional by the High Court. By way of implementation of the judgement of the High Court, the State Government constituted a committee for collection of quantifiable data relating to backwardness and inadequacy of representation of SCs and STs in public posts and even though the committee report suggested inadequate representation, the Government decided that there will be no reservations to the SCs and STs in posts in public services. Writ petition was filed against this proceeding of the State Government and it was struck

643 (2020) 1 SLJ 350 (SC).

down by the High Court as being contrary to law. The High Court clarified in review that in light of the decision of the Supreme Court in *Jarnail Singh*, it was not necessary to collect data on backwardness of SCs and STs but the State Government had an obligation to collect quantifiable data regarding inadequacy of representation in state services before providing reservation in promotion. The High Court further directed that the decision whether to provide reservation in promotion or not is to be made by the Government only after considering such data.

In appeal, the decision of the High Court was reversed by the Supreme Court. It was ruled by the Supreme Court that since Article 16(4A), which provides for reservation in promotion for SCs and STs in the services under the State, is an enabling provision, therefore, the Government is not bound to provide reservations and as such, such a proceeding undertaken by the Government cannot be declared as illegal. The collection of quantifiable data is mandatory before reservation in promotion can be provided. However, when the government decides not to provide reservation, it is not required to justify its decision on the basis of quantifiable data, showing that there is adequate representation of the members belonging to SC and ST in the services under the state.

Reservation in promotion is not a fundamental right. Even if there is inadequate representation of the members belonging to SC and ST in the services under the state, no mandamus can be issued by the Court directing the state to provide for reservation. Collection of quantifiable data pertaining to backwardness and the impact of reservation on the overall efficiency is a *sine qua non* before providing for reservation in promotion. However, the *vice versa* does not stand true and the decision for not providing reservation need not be based on quantifiable data showing that there is adequate representation of the members of Scheduled Castes and Scheduled Tribes in the services under the State.

### 1.5 Critical Analysis of the Judicial Decisions

The timeline for the concept of reservation in promotion and the issue of seniority which runs along with it can be divided into three parts-

1. Pre *Indra Sawhney* Period
2. Post *Indra Sawhney* Period
3. Post *Nagaraj* Period

Prior to *Indra Sawhney*, reservation in promotion was enjoyed by the members belonging to Scheduled Castes and Scheduled Tribes. At the time, it had not been long that the country had gained independence and the evils of caste system were still prevalent. Therefore, it was necessary to provide special opportunities to the backward classes not only at entry level but also in higher posts so that they could be uplifted in the social strata. However, to maintain equality of opportunity under Article 16(1) and avoid over-representation of the backward classes, reserved posts were not allowed to be carried forward to the next year, although relaxation of time period was granted to them to prove themselves worthy of higher posts. In the initial period after independence, it was necessary to provide such opportunities to the SCs and STs to allow them to be uplifted in the social strata and get over and above the evils of the caste system. However, at the same time, the constitutional mandate of efficiency of administration had to be kept in mind while considering the claims of the SCs and STs in the services under the State.
In 1992 came the nine-judge bench decision of the Supreme Court in *Indra Sawhney* whose purpose was to finally settle the issues pertaining to reservation. This decision came after four and a half decades of country’s independence. At this point of time, the onus of development of the country was largely on the public sector. Therefore, efficiency of administration became an important factor while considering the claims of SCs and STs in the services of the State. Reservation in promotion was rightly disallowed by the court fearing that excessive reservation even in higher posts would largely undermine the efficiency in the working of public sector. Reservation in higher posts would breed discontent among the general category members who might lose their will to work as a result. Also, it would make the members belonging to SC and ST inefficient because of a virtual guarantee of promotion.

Further, realizing that there are classes other than the SCs and STs which are backward and which constitute a major chunk of the country’s population which need reservation for their upliftment, 27% reservation was granted to such OBCs, while excluding the advanced sections, called the creamy layer, which was restricted only at the entry level. Also, keeping in view that the equality of opportunity under Article 16(1) does not become a mere illusion, the reservation was capped at a ceiling limit of 50% including the carried forward reserved vacancies. Therefore, the Court through its decision in *Indra Sawhney* reconciled the equality of opportunity with the directive principles of development of Scheduled Tribes, Scheduled Castes and other weaker sections of the society.

However, the limitations set up by the Court were overcome by the Government by adding Articles 16(4A) and (4B) to the Constitution. But the Court was conscious enough to notice the fact that such untrammeled power in the hands of government without any limitations would wreak havoc among the members of the general category. Therefore, certain constitutional limitations were set out by the Court through its decision in *M. Nagaraj* before any reservation under Article 16(4A) could be brought into force. This was the collection of quantifiable data relating to “backwardness”, “inadequacy of representation” and the impact of the reservation policy on the overall efficiency. This was laid down as a categorical imperative and without such exercise, the reservation can be struck down as violative of Articles 14, 16 and 335 of the Constitution.

However, the decision in *Jarnail Singh* which negated the need for collection of quantifiable data pertaining to “backwardness” of SCs and STs can have serious consequences. Such a decision was based on the observation of the nine-judge bench *Indra Sawhney* that the SCs and STs are permanently backward. While this certainly might have been the case in 90s, it is clearly not in 2020. The submission that a member of SC or ST who reaches a higher post no longer has a taint of untouchability or backwardness was rejected in *Jarnail Singh* which is blatantly wrong. For example- If a reserved category candidate becomes an IAS Officer, he has obviously risen in his status and clearly does not have a taint of untouchability or backwardness anymore. Even the SCs and STs have risen in the social strata and cannot be deemed to be permanently backward. Attaching permanent backwardness to them would mean attaching the historical social stigma
of backwardness on the basis of caste. The purpose of reservation is not to perpetuate the caste system but to transcend it. Therefore, collection of data pertaining to backwardness should still remain a constitutional mandate even for the SCs and STs while providing for reservation in promotion. This argument gains even more importance because reservation in promotion is not a fundamental right. It is an enabling provision which must come into action only after fulfilling all the necessary conditions lest adverse consequences occur.

It is an obvious fact that a person belonging to general category and a person belonging to reserved category working on the same post can do only equal things for their well-being. It is not the case that the general category is in anyway treated specially in comparison to the reserved category candidate. Rather, it is the opposite since the reserved category candidates have the special provision of reservation at their disposal. Therefore, once they enter the services under the state, further promotion should purely be based on merit since both the candidates have equal resources at their disposal. It is a fact that reserved category candidates can and they do perform better than the general category candidates and occupy posts against the general seats and not the reserved ones. Therefore, there is no reason why such candidates should be allowed to be promoted to higher posts only on the basis of merit.

Also, even at the entry level, like the OBCs, the creamy layer among the SCs and STs should be excluded from the benefit of reservation so that the actually backward SCs and STs can take advantage of the beneficial provision.

Recently, in *Chebrolu Leela Prasad Rao and Ors. v. State of A.P. and Ors.*[^645] a judgement delivered by the Apex Court on 22nd April, 2020, the Supreme Court while observing that the ‘creamy layer’ among the SCs and STs are taking all the benefits of reservation, called for a revision of the Presidential Lists under Articles 341 and 342 of the Constitution. This observation was made by a 5-judge bench of the Supreme Court while holding 100% ST reservation provided by the erstwhile State of Andhra Pradesh in Scheduled Areas is unconstitutional. It was observed that:

> By now, there are affluents and socially and economically advanced classes within Scheduled Castes and Scheduled Tribes. There is voice by deprived persons of social upliftment of some of the Scheduled Castes/Tribes, but they still do not permit benefits to trickle down to the needy. Thus, there is a struggle within, as to worthiness for entitlement within reserved classes of scheduled castes and scheduled tribes and other backward classes.

The times have changed and so has the condition of SCs and STs. They are educationally, economically and socially stronger. When creamy layer has emerged among the SCs and STs, it is evident that the reservation policies need to be revisited, especially with regard to reservation in promotion. Collection of numerical data on their backwardness which helps the state in forming an opinion is a necessity without which undue benefits would be awarded to the SCs and STs and other weaker sections of the society. Also, it is time to give more regard to efficiency so that the Public Sector grows and develops and does not lag behind in contributing to the economic development of the nation.

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MARRIAGE (CONSENT TO RAPE)

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INTRODUCTION
As we are on the edge of completing our 74 years of Independence, the woman in The Republic India are still not free and independent and continues to live in fear and darkness in the society. One side were the judiciary of our country making cornerstones by making glorious decisions on matters like ‘Adhaar Card Case’, ‘Sabrimala Case’ and ‘Triple Talaq’ and governments talk about protecting rights of woman, making various schemes and spending corers on them on the other hand they are silent on criminalizing the concept of marital rape. Rape is rape. Be it stranger rape, date rape or marital rape. The law does not treat marital rape as a crime. Even if it does, the issue of penalty remains lost in a cloud of legal uncertainty. Despite in rise of marital rape cases in India the law does not defines it and considers it to be a private matter of husband and wife and therefore such matters are dismissed by the courts. But rape on the other hand is being recognized and are dealt in courts. Marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage.

RAPE A HINIOUS CRIME
Rape is a word originated from Latin word ‘to seize’, which is understood as sexual intercourse between two people where one person is against or is not willing to do it or not ready for it. Rape in simple terms is forcefully having sexual intercourse with another person against will. Many jurist have defined Rape as situation were intercourse was without conscious and voluntary consent, i.e. when the woman was unable to give consent, or when resistance was prevented by stupor, intoxication, narcotics, etc. Rape is also considered as unlawful carnal knowledge, without the women’s consent either by force, fear or fraud. Patriarchal system that governs Indian families has always considered women as mere property of her husband or guardian. So rape was considered as theft of women and wrong against husband or guardian. This ideology has influenced our legislatures in ignoring offence of spouse rape by giving it shield of matrimonial right of the husband and by this they are silently accepting that women are merely an object of sexual gratification of her husband with no will of her own over her sexuality. This perception has subsided women’s right to equality and justice.

Rape in India is defined under section 375 of the IPC as intentional and unlawful sexual intercourse with a woman without consent. And here it entitles to social and cultural perspectives.

The IPC (Indian Penal Code) defines rape vide sections 375 as :

"... Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—
(First) — Against her will.
(Secondly) — Without her consent.
(Thirdly) — 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.

646 B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 12 (1954) [hereinafter cited as KARPMAN].

647 Id.
648 Articles on legal issues [ISSN: 2349-9796]
(Fourthly) — 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.

(Fifthly) — 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 sixteen years of age.

Explanation 1—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception I — A medical procedure or intervention shall not constitute rape.

Exception 2 — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.  

In Bodhisattwa Gautam v. Subhra Chakraborty, court held that rape is a crime against the basic human right and violation of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines for awarding compensation to the rape victim.

The judgement in the landmark case of Chairman, Railway Board v. Chandrima Das, the Court held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Rape is a crime not only against a woman; rather it is a crime against the society in large. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life, which includes right to live with human dignity contained in Article 21.

That a reading of the previously mentioned cases it is clear that such an exception as "marital rape:" is violative of the basic fundamental concepts on which our entire legal system is bases and such an except damages the entitlement of women to live with dignity and encourages the society to commit crime against the women, which in itself is unacceptable and against the principle and corner stones of the Constitution of India...

MARITAL RAPE

Marital rape otherwise called as spousal rape is an immoral act where a man engages in undesired sexual intercourse with his wife. It is considered as a graven offence which obliterate the main covenant of marriage that is, consensus. Even in consonance with religious authorities, it is reckoned as a heinous crime any sexual intercourse between a husband and wife without wife’s consent amounts to the offence of Marital Rape.

Exception 2 decriminalizes the offence of Marital Rape by stating “sexual intercourse or sexual acts by a man with his own wife where wife not being under fifteen years of age, is not Rape”. But there is
one specific form of marital rape that has been criminalized by the Indian Penal Code vide Section 376B, which says that “Sexual intercourse by husband upon his wife during separation: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation - In this section,"sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Understanding the concept of Marital rape in context of Indian Law can be held to be cruel to wife’s as in any case of Rape it is only the offender or the rapist who has violated the law and not the rape victim, i.e. victim has no role in the crime and the full liability lies on the offender/rapist. However, in case of wives when their husband does this crime on them they are not liable in India.

In India when we talk about rape the first question that’s hits mind is who has done it. If he turns out to be husband, we say it is not rape as, marriage understood as an agreement giving consent for sexual acts between spouses. However, marriage does not mean consent to sex or any sexual acts as the dignity of the wife is harmed i.e. the fundamental right of her is put on stake which is guaranteed by the Indian Constitution.

Marital rape is considered as rape only if the wife is less than 15 years of age. There is no legal protection accorded to the wife after the age of 15, which is against human rights regulations. The same law that provide for the legal age of consent for marriage to be 18, protects from sexual abuse only those up to the age of 15. As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

- When the wife is between 12 – 15 years of age, offence punishable with imprisonment upto 2 years or fine, or both.
- When the wife is below 12 years of age, offence punishable with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine;
- Rape of a judicially separated wife, offence punishable with imprisonment upto 2 years and fine;
- Rape of wife of above 15 years in age is not punishable.

Violative of basic fundamentals guaranteed in part III of the Indian constitution

The Indian Constitution guarantees all citizen EQUALITY DIGNITY LIBERTY etc. where sexual privacy is an important element that needs attention or recognition and protection in India as such recognition would acknowledge the subordinating impact of sexual privacy. As the term, Sexual Privacy serves as a corner stone for consent of the woman. As marital rape is a crime that occurs in the private sphere between the spouses but the responsibility lies on the state to penetrate into private sphere otherwise the woman will have to suffer the offence of rape done by her husband.

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654 The Indian Penal Code, 1860, section 376B
655 East’s Treatise of the Pleas of the Crown 1803.
656 Indian Penal Code (45 of 1860), Section 376(1)
657 Ibid

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658 Indian Penal Code (45 of 1860), Section 376A.
659 Indian Penal Code (45 of 1860), Exception to Section 375.
660 Yale Law Journal.
Exception 2 of section 375 IPC is violative of Article 21 of the Indian Constitution, which states, “no person shall be denied of his life and personal liberty except according to procedure established by law.” In addition, the apex court finds article 21 to be vaguer than just life and liberty and concept of rights to health, privacy, dignity, safe living conditions, and safe environment etc. are enriched within it. Article 14 of the Constitution guarantees the fundamental right that "the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Article 14 therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860, discriminates with a wife when it comes to protection from rape. Thus, it is submitted that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860, is not a reasonable classification, and thus, violates the protection guaranteed under Article 14 of the Constitution.

In Justice K.S. Puttuswamy (Retd.) v. Union of India, the Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that the right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations.” Forced sexual cohabitation is a violation of that fundamental right. The distinction between whether a woman is married or unmarried was not dealt in this case, and The Supreme Court of India also found the right to abstain from sexual activity for all women, irrespective of the marital status.

Supreme Court in The State of Karnataka v. Krishnappa, said sexual violence apart from being a heinous act is an unlawful and infringes the right to privacy and sanctity of a woman, and recognized that non-consensual sexual intercourse amounts to physical and sexual violence. Exception 2 also harms the dignity of a married woman and the apex court had ruled that the ray of right to life extends to right to live with dignity. However, the very existence of Exception 2, which fails to deter husbands from engaging in acts of forced sexual contact with their wives, adversely affects the physical and mental health of women and undermines their ability to live with dignity.

The concept of right to privacy is not mentioned in our constitution, but Supreme Court when dealing with the issue of right to privacy observed: Kharak Singh V. State of U.P.; Govind V. State of M.P.; Neera Mathur V. LIC etc., the SC has perceived that a right to privacy is intrinsically ensured under extent of art. 21. The right to privacy under Art. 21 incorporates a right to be allowed to sit unbothered and not aggravated. Any type of intense sex damages the right to protection, sexual security. It is presented that the teaching of marital exclusion to rape damages a wedded woman’s entitlement to protection by diving her to go into a sexual relationship without wanting to.

661 The Indian Constitution Article 21
662 India Const. art. 14.
666 (1992) 1 SCC 441 (India).
667 1963 AIR 1295, 1964 SCR (1) 33
668 1975 AIR 1378
669 1992 AIR 392
In the landmark case of *Vishakha V. State of Rajasthan* the SC has extended the right of privacy in working environment also. Further, along a similar line we can translate that there exists a right of privacy to go into a sexual relationship even inside a marriage. Subsequently by decriminalizing rape inside a marriage, the marital exception is teaching damages to right of privacy of a wedded lady and is consequently illegal.

In the case of *State of Maharashtra V. Madhkar Narayan* the SC has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violate her privacy as and whenever he wished.

**Hidden crime**

Marital rape causes mental trauma to women, it indicates that the marital rape often has serve and is long lasting consequences for woman. To harm a person mentally and physically, knowingly comes under crime. It takes place inside the four corners and most importantly between legally married man and woman. So, it is generally underestimated by society and hence it become a hidden crime. The main reason men do not want to forbid marital rape is that they do not want to give them the power to say no. When we look towards the legal perspective, unwilling sexual relationship between husband and wife is recognized as criminal offence in many countries but in India, entering into a marital relation is presumed to deliver consent.

Marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. The Hon’ble Supreme Court of India, being the last hope for reforms in outdated approach towards marital rape after Parliament, said that country is not ready to accept marital rape as a crime. It can be seen that the lawmakers have a different view and believe marital rape cannot be applied in the Indian context because of factors like "level of education and illiteracy, poverty, social customs and religious beliefs".

Article 14 of the Indian constitution guaranties every person equality (i.e. both man woman) but the Penal Code discriminates against woman (wives) who were raped by their own spouse. The law identifies both man and woman as separate and independent legal identities and the jurisprudence over the world in the modern era is concerned with woman protection. Exception 2 of the Section 375 is violative of Article 14 of the Indian Constitution insofar it discriminates woman on basis of marriage by denying the equal protection from the offence of rape and sexual harassment. Exception 2 also creates two different class of woman based on marital status and immunizes action perpetrated by men against their wives, and making it possible for married woman to victimized just for the reason that they are married.

Supreme Court of India, when dealing the issue in case of *Budhan Chaudhary v. State of Bihar* and *State of West Bengal v. Anar Ali Sarkar*, stated that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test, that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve. However, exception 2 disturbs the whole purpose of the section 375; protecting woman form inhuman activity of rape and sexual harassment.

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670 (1997) 6 SCC 241
671 AIR 1991 SC 207
672 ICRW(International Centre for Research on Woman)
punishing those who are engaged/involved is such heinous crime as husbands are exempted from the punishment that the Penal Code charges on such activity (i.e. Rape) and is contradictory to that objective. But the consequences is same in both the cases (i.e. in married woman and unmarried woman).

Moreover, scenario of married woman is worse than unmarried woman as they are certain to their husband and family emotionally and financially. Additionally, exception 2 to the section 375 has developed a mind-set in society that encourages husbands to forcefully have sexual intercourse with their wives, against their consent, as they apprehend that their acts are not discouraged or penalised by law, as no rational nexus may be deciphered between the exception and act’s objectives. The jurist in country have tried equating virginity with rape of a woman i.e. once woman gets married to her husband it is supposed that she gives her virginity to her spouse, and having sexual intercourse with him against the consent will not be rape. Therefore marital is more horrendous for a woman as she has to stay with her rapist/aggressor ordinary.

The Supreme Court in Joseph Sine vs. Union of India676 said, “Wife is not a chattel”. Therefore, from the above-mentioned verdict it can inferred that the husbands should not treat their counterparts/wife’s as sexual object in order to satisfy their sexual pleasure against their consent. The victims of such crime have become helpless and subjugated to various kinds of immoral acts.

Moreover, such acts of husband are as considered wrongdoing against the woman and covered under the ground of cruelty, as marital rape is not criminalized in republic of India that wants government attention.

Kerala high court in Sree Kumar v. Pearly Karun677:
The court bserved that the offence under Section 376A, IPC will not be attracted as the wife is not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent. In this case, the wife was subjected to sexual intercourse without her will by her husband when she went to live together with her husband for 2 days as outcome of settlement of divorce proceedings which was going on between the two parties. Hence the husband was held not guilty of raping his wife though he had done so.

The judiciary seems to have completely relegated to its convenience the idea that rape within marriage is not possible or that the stigma of rape of a woman can be salvaged by getting her married to the rapist.

CONCLUSION
Any crime when is done either in public or private is crime and the person doing it should be held liable by the law of the land and when crime like marital rape is not criminalized completely then it is a wrong doing and against the constitution principles and it reflect that Exception 2 to Section 375 of the IPC is an infringement of Articles 14 and 21 of the Constitution. There are loopholes in protecting women from Domestic Violence Act, as the Act no were talks about the crime of marital rape. The country is heading towards the era of revolution and legal reforms. As in country like India, such reforms are difficult and far to be achieved, as the judiciary, the lawmakers (parliament) are not prepared for such big reform to

676 2018 SCC Online SC 1676

677 1999 (2) ALT Cri 77
criminalizing marital rape but it is high time that Indian jurisprudence to understands the inhumane nature of this provision of law and strikes it down, and fill the gap between Rape and Marital Rape as both are the most heinous crimes making woman vulnerable and her life miserable and make India a country were there is no discrimination and people enjoy their rights in real sense.

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Introduction: -
The world as of today is under lockdown due to the outbreak of Novel Coronavirus. While the safety and health of the public are of primary importance, the havoc created by Covid-19 to other economical and legal machinery cannot be set aside. In times of this crisis, only essential activities are allowed to function. In crucial government departments, the only limited and selective staff is allowed to come to work. The Judiciary has also dealt with the crisis at hand by taking only urgent and critical matters on board. Understanding the hazardous nature of the Pandemic all other administrative activities remain suspended by the Judiciary. To adhere to the strict need for social distancing, courts have expanded their horizon by allowing appearances through video conferencing and e-filing documents. No doubt these measures renovate the antiquated court proceedings, but it is a sad reality that the reason behind the implication of such modern measures is to avoid a pandemic not to adapt to the changing nature of justice. Its high time that the modernization of the judiciary is taken as a priority and to improve the quality of the justice delivery system.
The crisis presented by the Covid-19 also affects the functioning of Article 21; the right to life, personal liberty, livelihood, and dignity. The constitutional path that needs to be chosen in such times should be the one that harmoniously construes the state’s interest with that of the citizens’. Because the crisis is not only restricted to public health anymore. The prisons in India if left unattended may become the epicentre for the spread of the virus. Understanding the gravity of this issue, The Supreme Court took suo moto cognizance of the problem of over-occupancy in Indian prisons, during the times of Covid-19 spread across the...
country. While isolation wards have cropped up in prisons all across the country, major steps for decongesting of prisons in the form of granting emergency paroles and interim bails to undertrials have started in many states of India, such as U.P., M.P., Maharashtra, etc. only to name a few. Also, some of the state governments have put a ban on prison visits from relatives, etc. for some time.678

Kerala has been the first state to understand the need of the moment. On 25 March 2020 Kerala Government issued an order, GO No. 710/2020, which talks in detail about a set of guidelines; on food support, empowering local self-governments, the provision on uninterrupted essential medical services to persons suffering from cancer, diabetes and heart disease, specific support for transgender persons, etc. The order in its entirety talks about public well-being without any other deviations. In times like this, every state needs to follow the lead provided by the Kerala State Government and stand apart from the political agenda movements.

Accessibility to Justice: -
As per India’s democratic framework, access to justice is a fundamental right granted to every citizen and thus, it must not be ignored. In times of Covid-19 where social distancing has become a need, to make sure that justice is still accessible to people should be of top priority. Technology by coming to the rescue; opens up several doors to combat this situation. By granting access to most litigants, even while they are in self-isolation, quarantined, or following social distancing, technology can be of utmost help. Accessibility is embedded in the core of the justice delivery system. Since the quality of adjudication in a courtroom is directly proportional to its reach to the litigants. In India, it is still a constraint for a lot many people to get access to justice. Some don’t have the financial means to reach the court and seek justice while the other cannot afford the time required for the process of litigation. Not only this, the inaccessibility to courtrooms for the physically challenged people is also another roadblock. All these obstacles add up to the need for videoconferencing at such times. With the boom in technology and its wide usage, it is available for access in the hands of every ordinary citizen, and there is no reason as to why the apex institution such as Judiciary must not make use of it. The Supreme Court in the case of Swapnil Tripathi v. Supreme Court of India679 held that the entire judiciary must move towards the streaming of proceedings starting with the Supreme Court itself. This may be the right time to bring in videoconferencing for good. Just like many employees will be able to prove the viability of working remotely in a post-Corona world, many litigants who have experienced videoconferencing and e-filing will question why these cannot continue after the pandemic abates.680

The Supreme Court initially recommended litigants to use a US-based video conferencing app ‘Vidyo’. But the application raised severe security and sovereignty issues, which were later added

679 Writ Petition (Civil) 1232/2017.
680 Madhav Chandavarkar, the coronavirus pandemic is an unfortunate opportunity for India’s judicial system to modernise, Coronavirus Crisis, (June 30, 2020, 08:30 AM), https://scroll.in/article/958271/the-coronavirus-pandemic-is-an-unfortunate-opportunity-for-indias-judicial-system-to-modernise.
to by the linkage issues caused due to too much traffic. Hence, other means such as WhatsApp, Facetime, Skype were instructed to use as a mean to last resort.

Legal Developments:
On April 6, 2020, A Bench led by Chief Justice of India (CJI) Sharad A. Bobde laid down certain restrictions that deemed all restrictions laid down on people from entering, attending, or taking part in any court proceedings as lawful considering the situation in the wake of Covid-19. The court invoked its extraordinary Constitutional powers under Article 142 to step away from the convention of open court hearings. Since open court hearings would lead to the gathering of a large number of people in very close proximity, thus making the people present in the courtroom more prone to the virus.

Videoconferencing Guidelines:
The Apex court also laid down certain guidelines for the courts and litigants to streamline videoconferencing. While giving a series of directions, the Supreme Court allowed the High Courts to decide the usage and necessary proceedings regarding the temporary transition to video conferencing in their respective states. District Courts would follow the mode of videoconferencing as instructed by their respective High Courts. The courts would also make the requirements of the videoconferencing facilities for those litigants who do not have it. Since this feature requires technical knowhow, helplines would also be established to solve technical related issues.

“In no case shall evidence be recorded without the mutual consent of both the parties by videoconferencing. If it is necessary to record evidence in a courtroom, the presiding officer shall ensure that appropriate distance is maintained between any two individuals in the court,” the apex court order said.

Right to Health: -
During the times of a pandemic, the consequences of neglect in the health sector can cause severe harm. The strata of society that gets affected the most in such times are the poor and marginalised. Due to the fear of the spread of infection an unplanned lockdown was enforced, thus, leading to negligence in the distribution of resources and violation of health rights. Poor healthcare mechanisms and lack of proper equipment threatened the safety of a lot of doctors and medical staff working at the front line. Covid-19 brought into light the readiness of the system to fight the pandemic and the right to health as a fundamental right in India.

Even though the constitution of India doesn’t expressly recognize the right to Health it is still an inherent part of life with Dignity and is undoubtedly a core component of Article 21. During such times an important area that attracts concern is the testing of people to contain the pandemic. As the systematic dismantling of public healthcare has rendered us more vulnerable in terms of inadequate facilities, shortfall of trained personnel, and inadequate biotechnological support.
A major part of the population being from the lower economic group needs the government’s support the most in the times of such pandemic. Whereas, on the contrary, the horrifying reports from all over the country show that hunger and starvation are a much bigger threat than the pandemic itself to these people. There are also people who require immediate access to the free healthcare services for essentials and Covid-19 both.

At the time of enforcing the lockdown, the Government’s presumption that every person has access to food, water, housing, etc. was flawed. As a result, so many people who didn’t have any access to even the basic amenities found their survival from hunger, and thirst to be more threatening than Covid-19 itself.

It is widely accepted that socio-economic factors and poverty heighten vulnerability to disease and death, and curtail access to quality health care. Abysmal public health expenditure, inadequate personnel, low investment in training and education, inadequate public health infrastructure, and lack of state commitment to build robust public health systems have been problems at the centre of public health research and policy. The health sector peoples who are fighting on the front line in this time, making them more vulnerable to the virus, have a right to full protection under Article 21 and Article 14 of the Constitution.

Human Rights concern in times of a Public Health Emergency: -

The coronavirus epidemic has now enveloped the globe and generated new forms of governmentality and biopolitical practices in its wake. But only new forms of human compassion and solidarity can help overcome this lethal and formidably grim challenge.

An important reasoning to check the lockdown would be the ‘Proportionality Test’ which has been mentioned in the case of Puttaswamy. The test emphasises on two parameters, being

(a) was the measure necessary and,
(b) was it the least restrictive force needed by the state to achieve its goal.

The Indian lockdown could be said to be one of the harshest lockdowns in the world as it barely gave a 4-hour notice before its enforcement. But, the means by which this lockdown was enacted are arbitrary, lack transparency, and empathy towards the poor and don’t respect their need for survival. These reasons make it a failure from the view of the ‘Proportionality Test’.
The positive measures taken with the intent of doing good of the majority of the public should have been spelt out in every minute detail for the action to pass the ‘Proportionality Test’. The harm caused could have been controlled by the government by meeting the requirements of the test, which could have been done by communication of the measures in detail and its entirety by the media. It’s a given that the state controls the media and resources and thus if tried the damage could have been controlled.

If take a look at the standards laid down by the International Human Rights during the times of health emergencies, when restrictions on one’s liberty were enforced in the form of quarantine, self-isolation, lockdowns and the compulsory distancing norms, it tells us that there need to be an attentiveness on the part of the state. The authorities must ensure that the measures are not stifling orders, but are well processed and calibrated to the need of the situation. Liberty being a fundamental right under the Constitution of India is curtailed under such times, there must be no restrictions on the flow of information and free speech must be guaranteed.

**Prisoner’s Rights during Pandemic: -**

Prisons in India are at a high risk of becoming the breeding grounds for Covid-19 due to the paucity of space and inadequate healthcare facilities. Due to the lack of cells and overcrowding in prisons, the idea of social distancing seems like an impossible task to achieve. Thus, making prisons a threat to not only the inmates but also to the authorities working there.

A two-judge bench of Chief Justice SA Bobde and LN Rao issued a notice to the director-general, Prison, and chief secretaries of all states and Union territories on March 16, asking them about the precautionary measures taken to prevent the spread of the virus in the jails. 689

According to the last count published by the National Crimes Record Bureau in 2018, the country has about 450,000 prisoners against a mandated capacity of 396,000 inmates in its over 1339 central, district and sub jails. 690 Before lockdown jails were running at 50% higher than their occupancies. Thus, creating an environment of panic among the prisoners as well as the working staff. Hence, prisons are releasing 14 categories of prisoners including severely sick inmates and women prisoners as well.

The courts have ordered the states and union territories to formulate a High Powered Committee (HPC) to decide the categories of prisoners that are to be released on parole/Interim Bail to avoid the issue of overcrowding in prisons. The Court suggested the following categories for consideration of release:

7. Prisoners who are convicted/undertrial for one offence for which the sentence is upto seven years.

8. Any categories identified by the HPC based on the nature of

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offence, duration of the sentence, and severity of the offence.⁶⁹¹

According to the data gathered by the Commonwealth Human Rights Initiative (CHRI), which is an international NGO, most of the states have started the release process for the prisoners with the exception of those charged with the offences of Murder, Rape, Terror and held guilty or under trial for the offences under The Narcotic Drugs and Psychotropic Substances, Act, 1985 and The Prevention of Children from Sexual Offence Act, 2012.

**Constitutional Remedies-**

Even though the Right to health isn’t expressly mentioned in the Constitution of India, it still remains a core part of the Right to life i.e. Article 21 of the constitution. According to the judgement of the Supreme Court in the case of Paschim Bangal Khet Mazdoor Samity & Others v. State of West Bengal & Others⁶⁹², the right to life included an obligation to provide timely medical treatment necessary to preserve human life.

The question that still arises is whether the fundamental right to health is available to the prisoners just like any ordinary citizen or not. To that, The Supreme Court of India in its decision in Charles Sobhraj v. The Superintendent, Central Jail, Tehar, New Delhi⁶⁹³, held that imprisonment does not “spell farewell to the fundamental rights.” Though the implication of these rights to prisoners may be slightly different from that of other citizens due to the restrictions imposed because of the imprisonment. Though, this to not be treated as an excuse to deny the health remedies to prisoners; as any violation may lead to court’s interference to provide the remedy.

Apart from the Indian Constitution, Section 4 of the Prisons Act, 1894, provides for the provision of sanitary accommodation facilities to prisoners. At the same time, Section 7 of the same legislation contemplates the provision of shelter and safe custody facilities to such prisoners who may be found to be in excess of the prison capacity of a prison.⁶⁹⁴ The Act also makes it mandatory for the prisoners to go through a medical examination before their admission into the prison.

The Model Prison Manual, 2016 lays down some guidelines for prisoners in the wake of an epidemic. In such cases of spread of a pandemic, the manual directs segregation of infected prisoners into separate cells and sanitization of the infected inmates’ clothes, belongings, and cells. The manual also rules against overcrowding of prisoners in cells or wards during the times of an epidemic.

**Legislative Framework:**

Without effective human intervention, a pandemic can only end when the virus kills every host it has infected. Thus, the authorities need to step into the picture and bring the machinery of the legislative framework into motion to reduce the damage as much as possible. Under the Indian Constitution, public health and

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sanitation are the responsibilities of the state and local governments while the union government manages port quarantine, inter-state migration, and quarantine.695

- In January, using the power enshrined under The Disaster Management Act, 2005 the government tried to enhance the preparedness at the hospitals to contain the Covid-19 virus. By declaring the Covid-19 spread as a pandemic thus, a disaster gave the states the authority to use the funds from the State Disaster Response Fund for the relief work.

- In March, the Ministry of Health notified the states to invoke Section 2 of the Epidemic Disease Act, 1897, which deals with providing special powers to centre and state government to deal with the prevention of transmission of the epidemic.

- India being a signatory to the International health regulations, 2005 (IHR), needs to establish a firm and considerate health response to the spread of the Covid-19 virus on an international scale. This is done by the Integrated Disease Surveillance Program (IDSP).

The Disaster Management Act, 2005:

As per the directions of the Union Ministry of Home Affairs under the Disaster Management Act, 2005, the state governments and district authorities initiated the lockdown. The act’s intent is “to provide for the effective management of disasters and matters connected therewith or incidental thereto”.

Under the Act, the National Disaster Management Authority (NDMA) was established, headed by the Prime Minister. In pursuance of the Act, a committee was formulated by the ministry i.e. National Executive Committee (NEA) which is chaired by the Home Secretary. As per this act, the Ministry of Health and Family Welfare regulated the sale of surgical masks, hand sanitizers, and gloves and have added them as Essential goods under the Essential Commodity Act, 1955 to prevent hoarding and black marketing.696

On March 24, 2020, the NDMA and NEA issued orders directing the Union Ministries, State governments and authorities to take effective measures to prevent the spread of COVID-19, and laid out guidelines illustrating which establishments would be closed and which services suspended during the lockdown period.697

The Epidemic Disease Act, 1897:

Time and again the need to update the age-old law has been raised, but the legislative has felt against it. David Arnold describes the law as “one of the most draconian

pieces of sanitary legislation ever adopted in colonial India.” 698

The Epidemic Act, 1897 was designed to bring the government machinery into motion in times of the threat of an epidemic and not to deal with the general public health system. The law consists of four sections which bestow wide powers to the government. The state governments are entitled to regulate ‘dangerous epidemic disease’. The union government governs the movement of ships and vessels into the territory of India. Disobedience to the law attracts penal actions. The act allows state governments to ban public meetings, gatherings and also close schools and colleges till the threat is passed.

The intent of the drafters of the act was to establish a nexus with international laws regarding the epidemics. The primary concern of the government was to build harmonious relations with the International Sanitary Convention, to protect trade and commerce in the times of the spread and to eliminate any fears in the international countries about the spread of plague or cholera outside India.

Other Legislature-
1. Aircraft (Public Health) Rules, 1954- Government has also taken recourse to the Aircraft (Public Health) Rules, 1954. Since travel in such times is of very inflammatory nature as it may lead to a rise in the spread of the virus, special extraordinary measures need to be taken. The Act warrants a health officer to check the citizens arriving from international countries at the airports. 699

2. The administration can also take recourse to Sections 269, 270, 271 of the Indian Penal Code to ensure effective enforcement of the public healthcare rules. For successive enforcement and effective regulation, we require the amalgamation of public safety laws to efficiently track the execution of reaction to an outbreak. 700

Conclusion

The spread of Covid-19 across the globe is unprecedented and drastic times call for desperate measures, hence the lockdown. The Novel Coronavirus has spread so rapidly that it has changed the rhythm of the globe. India being a country with such a vast population faced the threat of the spread of Covid-19 the most. Due to the poor healthcare facilities in most rural parts of the country, the chances of the virus to spread like wildfire were very high. Thus, all necessary steps were taken by both the central and state governments to curb the damage to its minimum.

In times like this, the danger is not only limited to people’s health. The constitution also faces a risk, as people’s fundamental rights may be overlooked by the government to safeguard their health. With the shift in priority the necessity to guard the basic rights arise. Supreme Court of India played a very firm role as a custodian to make sure that no violations either of the constitution or of human rights go unchecked.

With the ocean of landmark judgements as a shield to the fundamental rights the constitutionality remained secure, as while

the governments made sure the health of people are improved and the virus is eliminated, the courts worked to draft the guidelines to ensure the protection of justice. The courts were of the view that under no circumstances access to justice should be compromised, hence the need to upheld the functioning of the judiciary, the courts adopted the videoconferencing and e-filling of cases.

The prisons were very prone to the virus due to the lack of health care facilities and the shortage of space in jails. Following the practices of social distancing and quarantine were of utmost difficulty in the jails due to the problem of overoccupancy. To solve that issue and to safeguard the health and rights of the prisoners, decided to grant interim bail/parole to a certain category of prisoners.

Life of a human being is not just animal existence; it is far more important than that. Hence, it must be protected from any form of inhumane treatment. To make sure that doesn’t happen, the justice delivery system should not be put to halt under any circumstances.

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MARITAL RAPE: THE ACT OF TRAUMA ON BODY AND MIND

By Hely Kikani
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Abstract
Marriage could be a state of being united to someone of the other sex as husband or a mate in a very accordant and written agreement relationship recognized by law. It’s thought-about as a sacred thread that binds two people in a very time period of intimacy.

Rape associated of itself) is an offence against woman, violating her dignity and pride and once it happens inside the four walls of a married home, it reduces the woman to the standing of an object used just for sexual gratification. There's a direct need for a definite law on marital/spousal rape in India, that ought to be at par with the accepted international norms on this issue.

Marital rape is serious and social issue that we must always got to concede as shortly as attainable so no more such offence came about any sexual activity between husband and adult female while not wife’s consent is termed marital status rape. The act of inhabitation against the desire of married person could be a grievous offence, and can't be condoned simply because the husband has been brought up in a very in a society with a mind-set that it's right of the husband to populate where and whenever he needs so. Wives don't seem to be the assets of their husbands however in our society, marriage in a way, provides men a ‘licence to rape’ with their wives. Marriage mustn't be seen as a allow for unconsented sexual activity everybody incorporates a right their body quite anyone else. Sex ought to solely be through with the mutual consent, love, caring and clear communication.

However, despite the increasing range of cases of marital rapes in our country, marital rape isn't outlined in any statute/laws. It's to be noted that whereas "Rape" is outlined below section 375 of the Indian penal code, there's no definition of 'Marital Rape' until currently and there's no reorganization of marital rape below the orbit of Indian Law. In India, marital rape exists de facto however not de jure. Whereas in different countries either the assembly has criminalized marital rape, or the judiciary has compete an energetic role in recognizing it as associate degree offence, in Republic of India but, the judiciary appears to be operational at cross-purposes. Though marital rape is that the commonest and obscene kind of sexual pleasure in Indian society, it's hidden behind the ideological barrier of wedding. The Hon'ble Supreme Court of Republic of India, the last hope for reforms in superannuated approach towards marital rape once Parliament had adorned up its boots, aforementioned that country is not able to settle for marital rape as against the law. It are often seen that the law manufacturers have a distinct read and believe marital rape can not be applied within the Indian context as a result of factors like "level of education and literacy, inadequacy, social customs and non secular beliefs".

Marital Rape: A Non Criminalized Crime In India

“Marital rape is defined as any unwanted sexual relation by a partner or ex-partner, committed without consent and/or against a person’s will, prevail by force, or threat of force, fearfulness, or when someone is unable...
to consent.”

Rape in itself is such a traumatic experience and if faced by a spouse in a very marriage, it can leave an everlasting scar on the spouse’s mind and might humiliate the spouse to such a core that the connection can’t be fixed with the partner ever at the moment humiliating sexual experience. Marital rape is more traumatizing experience than rape by a stranger as in a very marital rape because the trust bond between the partners are broken conspicuous which is beyond repair. It perpetuates feeling of mental torture, humiliation and hate and contempt against the partner.

Present legal position

The definition of rape codified in Section 375 of the Indian penal code includes all types of statutory offence involving non-consensual intercourse with a lady. However, Exception 2 to Section 375 exempts unwilling sexual activity between a husband and a wife over fifteen years old from Section 375’s definition of “rape” and thus immunizes such acts from prosecution. As per current law, a wife is presumed to deliver perpetual consent to own sex along with her husband after getting in marital relations. While unwilling sexual contact between a husband and a wife is recognized as a criminal offense in almost every country of the globe, India is one among the thirty-six countries that also haven’t criminalized marital rape. Prior to the amendment in IPC in 2013, when the wife was between 12 – 15 years, the drastically reduced quantum of punishment was provided, which can have extended to two years or fine. It amounted to rape only the wife was below 12 years old. The amendment in 2013 has done away with this clause but at the identical time has not recognized the concept of marital rape and has chosen to continue with the earlier legal approach. it might be pertinent to suggests that Justice Verma Committee Report has recommended that marital rape exemption within the IPC should be withdrawn.

The Honorable Supreme court and various high courts are recently flooded with writ petitions challenging the constitutionality of exception 2 of section 375 Indian penal code 1860. And during a recent landmark judgment, the Supreme Court criminalized unwilling sexual intercourse with a wife between 15&18 years old. This judgment has successively led to a rise in other writs challenging the constitutionality of Exception 2 as a full.

PIL that the exemption is unconstitutional and violates the rights of married women under articles 14, 15, and 21 of the Indian Constitution. one amongst the petitioners has challenged the provisions of Criminal Procedure Code, which are to be read with section 376 Indian Penal Code on the bottom that differential procedure additionally as differential punishment is prescribed, which is bigoted and unconstitutional.

701 Shruti , why we need to talk about marital rape?, ( july 2, 2020, 1:30pm) https://sayfty.com/why-we-need-to-talk-about-marital-rape/
702 Rea Savla, Trapped in Tradition’s Prison: Why India is Not Ready to Criminalize Marital Rape, ( jun 30, 2020, 4:00pm) https://bpr.berkeley.edu/2015/10/29/trapped-in-traditions-prison/
703 Indian Penal Code § 375, No. 45 of 1860, India Code
704 Marital Rape in India: 36 countries where marital rape is not a crime, India Today, Mar. 12, 2016.
708 Delhi court to listen to NGO’s Plea Opposing Marital Rape”, Indian Express 28, 2017
Violation of Article 14 of the Indian Constitution:

Article 14 of the Indian Constitution ensures that “the State shall not deny to anyone equality before the law or the equal protection of the laws within the territory of India.” Although the Constitution guarantees equality to any or all, Indian legal code discriminates against female victims who are raped by their own husbands. The Exception to Section 375 creates two categories of ladies supported their legal status and prioritizes one woman in protecting them from rape than married ones — that’s an immediate contradiction of each Indian citizen being guaranteed equal protection of laws.

In Budhan Choudhary v. State of Bihar and State of West Bengal v. Anwar Ali Sarkar, the Supreme Court held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that may be passed given that the classification has some rational nexus to the target that the act seeks to attain. But Exception 2 frustrates the aim of Section 375: to safeguard women and punish those that engage within the inhumane activity of rape. Exempting husbands from punishment is entirely contradictory to it objective. Put simply, the implications of rape are the identical whether a lady is married or unmarried. Moreover, married women may very well find it more difficult to flee abusive conditions reception because they're legally and financially tied to their husbands.

Violation of art. 21 of Indian constitution:

Exception 2 is additionally violate article 21 of the Indian constitution, Article 21 states that no one shall be denied of life and person shall be denied of life and private liberty except consistent with the procedure established by law. That Article 21 of the Indian Constitution, incorporates the correct to measure with human dignity and may be a standout amongst the foremost fundamental components of the proper to life which perceives the independence of an individual. The Supreme Court has held that the offense of rape abuses the right to life and also the right to measure with human dignity of the victim of the crime of rape. The Supreme Court has interpreted this clause in various judgments to increase beyond the purely literal guarantee to life and liberty. It's held that the rights enshrined in Article 21 include the rights to health, privacy, safe living conditions, and safe environment, dignity, among others. In recent years, courts have begun to acknowledge a right to abstain from sexual activity and to be free from unwanted sexual issues enshrined in these broader rights to life and private liberty.

In The State of Karnataka v. Krishnappa, the Supreme Court held that “sexual violence but being a dehumanizing act is an unlawful intrusion of the proper to privacy and sanctity of a female.” In the identical judgment, it held that sexua intercourse without will issues amounts to physical and sexual violence.

Later, in Suchita Srivastava v. Chandigarh Administration, the Supreme Court equated the correct to form choices associated with sexual issues with rights to non-public liberty, privacy,

709 India Const. art. 14.
713 Suchita Srivastava v. Chandigarh Administration, (2008) 14 SCR 989 (India)
dignity, and bodily integrity under Article 21 of the Constitution.
In the landmark case of The Chairman, Railway Board v. Chandrima Das, the Hon'ble Court held that rape isn't a mere matter of violation of a normal right of someone but the violation of Fundamental Rights which is involved. Rape may be a crime not only against the person of a girl, it's against the law against the whole society. It's a criminal offense against basic human rights and is violate of the victims most cherished right, namely, right to life which has right to measure with human dignity contained in Article 21.
Additionally, Exception 2 violates Article 21’s right to measure a healthy and dignified life. As mentioned above, it's well settled that the “right to life” envisaged in Article 21 isn't merely a right to exist. For instance, there is no dispute that each citizen of India has the correct to receive health care or that the state is required to produce for the health of its constituents. 715

Conclusion:
Marital bonds are considered inviolable in India and marriages in India don't thrive on sex. These are some hard hitting realities of this modern times during which marital bond isn't as sacred because it is taken into account to be. There's a pressing must criminalize marital rape as crime and amend divorce laws of the country by making marital rape as a legal ground to require divorce from an abusive marriage. The criminalization of marital rapes also will have a consequence on divorce laws within the country because the “marital rape” could also become a ground for the couples to file for divorce like other grounds like cruelty, adultery etc. The changes in divorce laws by making marital rape as ground for divorce will certainly be a good relief to all or any the victims of marital rape who now will legally be ready to take an action against their respective spouse. The relief which victims of marital rape is change in divorce laws is that they will seek compensation from the competent court for the physical and mental torture they need skillful thanks to the marital rape is finished by their spouse.
Also we seen that exception 2 of the section 375 of Indian legal code is violate art. 14, 15 & 16 of Indian constitution and it's unconstitutional. It is pertinent to state that within the absence of a law, there's no data on the amount of cases of marital rapes being reported. It's pertinent to notice that the penal code is within the Concurrent List and is implemented by the States. There's an enormous diversity within the cultures of the states. And hence, seeable of the identical it's necessary for the regime to require stringent steps during this regard. That within the era of legal reforms and revolutions, it's of utmost importance to require steps towards criminalizing marital rape in order that we are able to move a breakthrough towards the road of progress in real sense. In an exceedingly country like India, such a reform is way from the truth as neither the lawmakers of this country nor the Indian judicial systems are prepared to bridge the gap between marital rape and rape as they're both heinous crimes which could scar the victim for keeps.

714 MANU/SC/0046/2000
TREATY OF LISBON AND ITS IMPACTS ON COMPETITION LAW

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ABSTRACT
The paper has chosen an International Aspect rather then a domestic one. It refers to how a treaty has impacted Economy and Law, here specifically Competition Law. Paper focuses on the treaty’s journey and reasons for passing it along with, major objectives it announces in Introductory Part. Thereafter, the paper speaks of how the treaty has impacted Economy and Competition Law taking European Parliament and competence capacities of High Representative of Foreign Affairs and modifications and analysis by EC Legal Services. Paper focuses on analysis rather then bare text reading to make readers understand of various aspects in own viewpoints. Judicial Review focuses on how treaty has modified Art230(4) of EC into Art263(4) of TFEU impacting the bridges faces in regards to Locus Standi for private suers. Landmark Competition rulings have been classified like Microsoft for anti competitive agreements and its significance in Competition Law. Competition Rulings have also focussed on how judgments have been passed in violation of already established doctrines(mentioned in Verizon Communication case)and also charging higher prices is not violation of Competition Law(ruled in Pacific Bell Case). Critical gaps have been analysed in regards to concept of undertakings & social considerations and exemptions, but how those impacts Insurance Companies having both features but not debarring solidarity,hence no exemptions in regards to social security which should have been there in Competition Law.

INTRODUCTION
2 Treaties which drafted the fundamental essentials of EU are has been modified by Treaty of Lisbon. Treaty was executed in Jeronimos Monastery of Lisbon, Portugal and that’s where it derives its name from. Treaty reviews Treaty on European Union (Maastricht Treaty) and Treaty on the functioning of European Union (Treaty of Rome) along with few tagged armistices of treaty establishing European Atomic Energy Community (EURATOM). The treaty did modifications to European law which got passed which lowered down the state’s wide powers of Veto capacity but it did not scrapped out the same. History of Lisbon treaty traces to non fruitful results of above 2 mentioned constitutional treaties. Hence, European Council (EC) of 21-23 June, 2007 adopted a comprehensive ratification for a consequent inter jurisdictional colloquium under Portuguese Presidency and same has been endorsed by all member states. Treaty does not enunciates any Union symbols, for eg, National Anthem, flag or any National song. Charter of FR entrusts all citizens with civil, political, economical and social rights. Treaty has considerable 7 articles with tagged along conventions and communiqués, out of which Article 1&2 are utmost crucial. Article 1 of Treaty contains substantial statutes ruling European Unions as well as modified presentations regarding CFSP& enhanced cooperation . Article 2 revises the EC Treaty, which is nominated on the functioning of EU, as EU is legal inheritor of EC. There are 27 member states, out of which UK, Denmark, Ireland

716 www.lexology.com
and Poland has exercised the option of opting out.

The specific objective of treaty is to consummate the benchmarks of Treaty of Amsterdam & Treaty of Nice with an aim to amplify the proficiency & parliamentary aura of the Union to enhance the intelligibility of the same. It brings more strong standards in EU with more vigorous potential competency for the European Parliament. New text converse the considerable attainments, but is no longer is a serving Constitutional Treaty.

It disentangles in which the EU works by ameliorating the fine institutional structure of Union and the manner in which resolutions are achieved. Under Art 3TEU it has following objectives-

- Encouragement of tranquillity and wellness of Union’s Nationals.
- Freedom, security, justice without internal constraints.
- Imperishable evolution based on economic occurrence and communal fairness.
- Free single market.
- Gregarious traded economy extremely liberal and aiming at exhaustive employment and overall progress.

Treaty conveys 3 essential keys of democratic equality, representative democracy, and participation democracy, whereas participation democracy rules that even Union’s citizens can also participate. The revised TEU does to be certainly operating to some extent as the warehouse of constitutional key elements of EU which is generally a fact in regards to Title 1(Common Pro), Title 2(Democratic principles), Title 3 (Provision on Institution). The articles within these titles unquestionably redress matters of constitutional nature. For eg, emplacement of law making capacity within EU and formation of new enlarged title role of President of EUC.

**CHANGES TO COMPETITION LAW & ECONOMIC SECTOR**

Under changes to Competition Law, safeguarding trade, Competition has become a major aim for administrations in Western Europe and Competition Law has emerged as a integral and central wedge of economic and legal side. The C.L of European Union has frollicked a key in success of European Integration during last half a century. In yester years, National Competition Laws have also become increasingly crucial, often creating rigidity between new law and European Law directives. Yet, despite its cruciality, images of European experiences with C.L often remains fuzzy and falsified. The forerunner of Lisbon had listed Competition Policy as EU’s main goal. Under compulsion from French President Mr Sarkozy, this goal had to be repealed and instead be placed in Protocol No 27 on the Internal Market and Competition which speaks that “internal market set out in Article 3(1)(g) has a technique assuring that competition isn’t pervert and misrepresented”. Yet, a brand new constitutionally indissoluble entity speaks that internal market in Art2 of Treaty on EU incorporates a structure to assure that competition isn’t pervert. However impact of this modification may be limited as EC Legal Services has ensured repeal of Art3(1)(g) would not avert a legislator to assume that competition isn’t pervert. Under present EC treaty, Competition is also not one of the community goals and therefore amendments should have no real

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717 https://competitionpolicyinternational.com
crashes on application of competition policy. Author doesn’t agree with this and has a query as to whether EC Courts will contemplate the associatory connections between protocols and competition law provision in the same manner as they associate the connections between those and the widespread EC treaty provision on goals and strategies.

Under changes to Economic Sector, treaty introduces some significant amendments for Common Commercial Policies (CCP’s) and the determination related procedures. CCP is newly added in an expanse with all the external manoeuvres of EU, with foreign and security blueprints, international strategies, profitable expansion aid, economic, financial and technical collaboration with third countries. The essential arenas of CCP have been enlarged to also take foreign direct investments, services and trade concerned aspects of IPR into its own ambit. The amendments impact the role of European Parliament and also operations of EC and competency potential of High Representative of foreign affairs & security strategies and also the European External Action Service. Together with these amending modifications, there shall also be revisions within plans of action within EU. Changes brought by Lisbon Treaty will impact not only the scope of power of EU Member States on the common mercantile policies, but also impact place of EU in context of International Trading. Article 107(3)(a) of TFEU formerly under Article 87(3)(a) of EC which assists in encouraging the economic maturing and growth of regions where benchmarks of livelihood are lunatically low has been expanded. The article now includes expansion in economic & social views. Under Art 349 includes territories of Guadeloupe, French Guiana, Martinique, Reunion, Saint Barthelemy, Saint Martin, Azores Madeira & Canary Islands. Article 108(4) of TFEU permits EC to adopt directives in order to encourage State Assistance for beneficiary to sub standard places that may have been exempted from Council.

JUDICIAL REVIEW OF EU ACTS AND POSITION OF COMPETITION LAW AFTER TREATY OF LISBON

Treaty on Functioning of European Union (TFEU) speaks for 2 different modes judicial power drafted to ensure legal management of power by EU Institutions, Offices and bodies. The important provisions are Art 263 in regards to direct measures for repeal and Art 267 in regards to indirect review along the preliminary recommendation procedures from national courts. The court of Justice had stringently transliterated Locus Standi pre requisites set out in former treaties for private suers to provoke the legality of EU Measures in front of EU Courts notwithstanding the denunciation in legal literature over last half a century. Under Article 230(4) EC as they were individually impacted by unlawful EU measures, they could directly plead in front of General Court for repeal of proceedings. Art230(4) reads as,

“Any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which although in form of a regulation/decision addressed to another person, is of direct and individual concerns to former”.

Despite, the condemnation, Court of Justice rubbed to amend its established case law and shifted the thrust on member states for treaty amendment. Hence, Treaty of Lisbon
modified Art230(4) of EC to now Art 263(4) TFEU as,

“Not entailing any executing measures, any natural/legal persons set in motion the proceedings against an act impacting directly to such person, and also against regulatory act”

The first branch of Art263(4) TFEU is same to Art 230(4) of EC, hence no words for same. Second branch of Art263(4) TFEU is distinguished from second branch of Art230(4) EC, as it has used the word “act” instead of “decision” and deleted “although in the form of a regulation or decision addressed to another person”. But these amendments simply do consider of the case law of Court of Justice. Now the most crucial modification introduced by Treaty of Lisbon is in the third branch which says probability for natural or legal persons to acquire standing to plead an action without meeting stipulations of “individual concern” provided that, firstly they still meet the requisites of direct concern and there dare is secondly set on account against a regulatory act which therefore does not requires. This treaty has a capacity to alleviate the gap in regards to locus standi for private suers, depending on agreeable exposition by Judiciary. Therefore main attention of this analysis is on the recent order (Inuit Tapirut Kanatami) and judgement of (Microban) of general court which ruled for the first time on exposition of Art263(4) TFEU, since such acts cannot be taken as regulatory acts, the requisition of individual concern, as traditionally elucidated, continues in full application to such cases. On the other hand, Microban Judgment affirms that the modifications to “locus stand rules” do make it a cakewalk for private suers to provoke non legislature acts directly in some cases.

719 https://openaccess.city.ac.uk

COMPETITION CASE RULINGS

The Court of Justice is empowered Judicial body to make universal elucidations & applications of Competition Law across EU. European Competition Law within EU members by encouraging regulation of anti competitive assertions by companies to assure prevention of Cartels & Monopolies which would manufacture dominance and abuse of same. Competition Law also known as Anti-Trust Law can be executed by public authorities along with individuals. Public authorities directs proceedings against a party which it has a suspicion has violated Competition Law. Abuse will lead to anti competitive agreements and fines alongwith. Nonetheless, execution of competition remains are but execution of EU&Member States. C.L has been largely been left up with a great wind to competition authorities. In specific, there have been not yet a single case where Member State courts has awarded for abuse of EU Competition laws. The main excuse for non enforcement of C.L in Europe is regulated by Member States creating legal uncertainties.

Microsoft Corp Vs Commission

A case bought by EU against Microsoft for violation of its dominant position under C.L. Novell argued that Microsoft was pushing out its competitors through Anti Competitive agreements because of non disclosure of some interfaces to Windows NT. Judgment- EU concluded its decision in 2003 and directed the company to offer version of Windows without Media Player and requisites necessary for competing networking software to link fully with Windows Desktops& Servers. EU

720 T-201/04
penalized the Microsoft with Pounds381 Million, (highest ever in its operational conduct) having 120 days to impart the server requisites & 90 days to impart a version of Windows w/o Windows Media Player. In 2004, Neelie Kroes was designated the European Commissioner for Competition who stated benchmarks and open origin are better to anything proprietary in context of fines brought to Microsoft has they had abused their dominant position.

Significance- The case shacked brightness on the distinction between US Anti Trust Laws & EU Competition Law, when Commission erroneously decided that the behaviour by firm is abusive, but the fact is its not the commerce of firm, and the consumer drops out by missing out in the products & service. In this scenario law is all inclusive known as “False Positive” concerning US Anti Trust laws. But on the other hand, Commission also edges that conduct by firm is not violative, but as a matter of fact, firm is left to its own devices & its anti competitive application which causes losses.

Verizon Communications Inc Law Offices of Curtis Vs Trinko, LLP721

Decided by US Supreme Court ruling Telecommunications Act, 1996 had not amended the framework of Sherman Act maintaining assertions that content of Anti trust Benchmarks without drafting latest declarations that goes beyond those benchmarks, hence ruling in contradiction of doctrine established in Aspen Skiing Co Vs Aspen Highlands Skiing Corp.

Pacific Bell Telephone Co. Vs Linkline Communications722

US Court ruled that there is no duty to deal at retail price level along with no predatory pricing, firm is not bound to mark both of these services in a mode that safeguards rival’s profit margin and hence SC did not held Bell’s abuse of Sherman Act when it charged other interests prices tagged for higher price.

Re Indep Service Organisation Anti Trust Litigation723

Applying essence of Kodak’s Case without Aspen Co Case, Court could not conclude any Anti Trust Liability for denial of license. IP preserved by patents & copyrights because IP Right Holders enjoying immunity to exclusion in interest of risk anti competitive harm.

CRITICAL GAPS IN REGARDS TO COMPETITION LAW

Lisbon Treaty gets a major hit with all the existing members losing their Veto Power in order to accept majority. LT has reduced the scope of Veto along with State’s potentiality. Secondly it browbeats all states to adapt European Euro as official currency, getting values of other currencies down which this nowhere sustains the objectives of the treaty. Also, UK is compelled to adapt EU laws, but many times House of Common and House of Lords have enacted laws, which will now create a ruckus for adaption and implementation of same. Under rules of EU Custom, UK will not be able to set its own economic limits.

In regards to Competition Law, the concept of undertakings and social considerations, CL only bids to activities of undertakings and not to the conduct of entities. Therefore, entirely communal based activities are not in the web of C.L. A supreme impact is assumed if public sectors hold crucial part of undertakings subscribed block. Hence, for C.L to be bid in this case

722 555 US.438 (2009)
723 203F.3d, 1322 (Fed.Cir. 2000)
the nature of economic activity is not relevant. Under Art 106(1) of TFEU, the activities done by state undertakings has no point, but the presence of economical activity has legal potentialities of acting organisation is not relevant. Hence, accounting of social sector can also account up to for same. The decisive query is if rule making capacity connects to economic activities as a matter of fact, any kind of undertaking may be exercised by private sector on the defence to deny the exercise of official authority and to proclaim the applicability of Competition Law. An exemption from C.L is social security, health insurance and old age pensions.

Social Securities do not perform an economic activity, for eg under Insurance Benefaction of money also depend upon salaries of insured person and it must be disciplined to the control of state. If so is the matter, then Art 101&102 of TFEU are not applicable and economic scheme as conflicted to a solidarity based scheme, might be distinguished by optional membership, the principle of subsidization, its profit making characteristic or by its supplemental character accounting to a basic scheme. If insurance exhibits elements of both kinds, then the liberty to do competition with other social securities does not debar solidarity based feature. Therefore, there is no general immunity from Competition Law for social security sector which should have been there.

**CONCLUSION-AUTHOR’S VIEW**
The main goal of treaty was to avert it from becoming too clumsy by including the EU Charter within the lap of treaty, this is contradicted by the point that it is designated the same legal worth as treaties and any political or legal consultee will compulsory have it to the hand in the light of legality of EU Laws/National Laws that falls within the ambit of EU laws, and hence treaty distinguishes in certain ways from EU Constitution. If treaty is sanctioned the Charter will have a major effect on Judicial Review for the EU legal orders. Even newly constituted TEU&TFEU are said not to have constitutional temperament for reasons like, ‘Constitution’ word not applied, EU Minister of Foreign Affairs would be termed as “Higher Representative of Union” and words like “law or legal framework” be repealed. Treaty nowhere speaks of dominion of EU Law pertaining to EU Constitution, except a small mention in Declaration 17. Treaty is less clearer in ascertained aspects and the foundation is less perceptible then the Constitutional Treaty, however ratified, will give out elemental base for EU to move forward in coming years.
WILDLIFE CONSERVATION INTENTIONS IN INDIA

By I.Nisha Padmavathy
From SRM, School of law

INTRODUCTION
Wildlife conversation is an action in which human beings make responsible efforts in order to protect animals, plants and their environment. The importance of wildlife conversation is extremely essentials as the wildlife and wilderness plays a significant role in preserving the ecological balance and maintains the element of human life. The wildlife conservation mission is to secure the species and to enlighten the humankind on living viably with other species. The International Union Conservation of Nature evaluated that around 27,000 species are in the possibility of extinction. India is native for extensive range of animals. India is amongst the most bio diverse domain of the world and consists of 3 of the world’s 36 bio diversity hotspots. Due to decline in the number of wild animals, human poaching activity and intrusion, the national parks and protected areas were formed by the government of India in 1935. Nilgiri langur and the brown and carmine Beddome’s toad of the Western Ghats are some of the evident endemics. India nurtures around 172, or 2.9% of IUCN (International Union for Conservation of Nature). India is situated at the junction of the three territories Afrotropical, Indomalayan and Paleoarctic which attributes components from each of them and which also stimulates migration of avifauna from these places.

ADVANCEMENT OF WILDLIFE PROTECTION:

EVOLUTION OF LEGISLATION WILDLIFE CONVERSATION:
• 1887- Wild Birds Protection Act by British Indian Government, according to this act possession and sale of wild birds which are either killed or seized is illegal.
• 1912-Wild Birds and Animal Protection Act, but this act was amended in the year 1935 and then Wild Birds and Animal Protection (Amendment) Act 1935 was passed.
• 1927-Indian Forest Act, was widely based the preceding act called Indian Forest Act which was enforced by British in 1878. Both the act 1878 and 1927 were developed to preserve the region of the lands of forest and wildlife, especially to preserve timber.
• 1972-The Wildlife (Protection) Act, the act provides shelter for wild animals, plants and birds, in order to assure environmental and ecological security.

OBLIGATION FOR PROTECTION WILDLIFE:
Before the Wildlife Protection Act was implemented “Forests” were a part of wildlife was a state subject. After the Wildlife Protection Act was enacted it was a nationwide law in the region of environment especially wildlife and reasons for the implementation of the law includes:
• India as a rich variety of flora and fauna. There was a rapid fall in number of species that exists in India, for example, during the

724 Article report- Wildlife conservation laws in India by Samir sharma-
725 Article report- Wildlife protection act upsc by Ayush Verma-
20th century, India was a place to around 40000 tigers but by 1970’s the number had exceedingly reduced to 1820.

- The radical shrinkage in flora and fauna can result in ecological imbalance, which may alter the aspects of climate and ecosystem.
- Previous to the enactment of this act there were only around five national parks.726

Every organism that is present on the earth has an exclusive space in the food chain and aids the ecosystem in its individual way. But, in the recent times, abundant number of animals and birds are at risk. If we do not take early rigorous action, it wouldn’t be long until the species which are at risk turns extinct, which does not end there. Cause of extinction of animals and birds will have a tremendous effect on human race. It is our obligation to converse our wildlife.

WHAT ARE THE OTHER PERILS TO WILDLIFE IN INDIA?
The Humans are now the biggest hazard to earth, are wrecking the planet and has killed around 80% of animals, birds, marine life. Eradication of habitat is a direct fall in Indian wildlife by eliminating trees, contaminating rivers, which results changes in human life with various environmental issues. Assam flood 2019, which caused danger to the life of wild animals in Kaziranga National Park.

DEFORESTATION
Deforestation means permanent clearing the forest for metropolitan use, to make room for something other than forest. In 2009, India had made to the tenth place globally in the amount of loss of forest.

LOSS OF HABITAT
Activity which is done by human such as mining for natural resources causes habitat extirpation, which in turn causes extinction of wild species in India and disruption in ecosystem.

POACHING
Poaching is one of the methods for illicit hunting of wild animals for trophies and ivory, fur of many animals including claws. Elephant, Tigers, Rhino which are considered to be India’s top endangered species are important target for poaching which amounts for wildlife trade.

ROAD KILL
Over ten years, the current enemy of India’s wildlife is Road kill. Indian wild animal due to the lack of prey which tends pushes the animals towards the highway passing through the jungle, motorcycles on highway has killed numerous.

RAILWAY TRACK
Rail track in India intersects along with number of national reserve and jungle. For instance, in 2013 railway track Chapramari located in West Bengal killed 17 elephants such many accidents have occurred by trains in India.727

Environmental obstacles are of a challenge in India. Even though there has been steps taken for the protection for wildlife728, according to report by NGO Wildlife Protection Society of India (WPSI) in January 2020, India as lost 110 tigers in 2019 in which third of them were lost to poaching, along with that in same year (2019) the country has lost 491 leopards,729 more rigorous steps has to be taken in order to conserve wildlife.

726 Article report- Why we need to save wildlife by Pawan kotiyal published on May 2013
727 Article report- Biggest threats of India by walkthroughindia
728 Article report-Wildlife threat published on March 3rd 2003 by indiaenvironmentalportal
729 Newspaper article- Times of India published on January 1st 2020
LAWS GOVERNING WILDLIFE PROTECTION IN INDIA:

WHAT DOES THE WILDLIFE PROTECTION ACT, 1972 DO?
The object of the act is to safeguard the formation of network of ecologically-valuable protected areas in the country and also to protect the catalogued species of animals, birds and plants.730

- The country’s all inclusive list of endangered species was developed. The act also restricted hunting of endangered species.

- CITES is a multilateral treaty, the wildlife protection act aided India to join the party of Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES). The main purpose of CITES is to protect endangered animals and plants. It is also called as Washington Convention and was taken up as an outcome of the meeting held by IUCN (International Union for Convention of Nature) members.731

- The Act established the wildlife advisory boards, wildlife warrens, determines their powers and duties. The animals which come under the Schedule according to Act’s provision are forbidden from trading.732

- Under the provisions of the act The National Board of Wildlife was authorized as a statutory organisation. The principal body to inspect and authorize all matters related to wildlife, projects of national park, sanctuaries. The prime responsibility of the board is to promote the preservation and expansion of wildlife and forest.733

CONSTITUTIONAL PROVISIONS:

Article 48A: “Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”733 In 1976, this article was included in Constitution by 42nd Amendment.

Article 51A: The article lays down certain fundamental duties in which it includes fundamental duty to develop and protect natural environment which combines forests, lakes, rivers, and wildlife. Every citizen must have empathy towards for living creatures.734

SCHEDULE OF WILDLIFE PROTECTION ACT:

Schedule 1: This schedule is for endangered species which demands severe protection. The wild animals which specified under this schedule they can be hunted only if they cause any danger to human life or if they are disabled or diseased and trading of animals under this schedule is prohibited. Rigorous punishment will be provided in violation of these rules. Examples: Tiger, Clouded Leopard, Blackbuck, Himalayan Brown Bear, Brow-Antlered Deer, Blue whale, Common Dolphin, Cheetah, Hornbills, Indian Gazelle, etc.

Schedule 2: Under this schedule wild animals can be hunted only if they are a threat to human beings and also if they are disabled or diseased and even trade is forbidden. Examples: Kohinoor (insect), Assamese Macaque, , Large Indian Civet, Indian Fox, Larger Kashmir Flying

730 Article report-Objectives and features of wildlife protection act,1972 by Hemant more published on June 4,2019
731 Article report-Wildlife protection act 1972 by byjus
732 Article report-Wildlife protection act by snmiasacademy
733 India kanoon
734 Article report-Constitutional imperatives in protection of wildlife by Praveen Bargav published on May 1st,2011
Squirrel, Bengal Hanuman langur, Kashmir Fox, etc.

Schedule 3 and 4: This schedule is for wild animals which aren’t in the category of endangered species that is in they are not in the risk of extinction. Hunting of these animals leads to penalty. The punishment for violation the rules is rigours but less in comparison with the schedule 1 and schedule 2. Examples: Hyena, porcupine, flying fox, Malabar tree toad, Himalayan rat etc.  

Schedule 5: The animals which can be hunted are included in this schedule. The animals which are announced as vermin such as common crow, mice, rats, fruit bat, can be hunted.

Schedule 6: This schedule comprises of the protection which provided for agricultural and medicinal plants.

Examples: Red vanda, blue vanda, pitcher plant, kuth, etc.

THE PRIMARY PROJECTS IN INDIA ON WILDLIFE CONSERVATION:

PROJECT TIGER
Project Tiger has enriched the conservation of tigers and also has provided with exceptional changes in the ecosystem. it was first established in 1972. National Tiger Conservation Authority administers Project tiger; it is sponsored by Ministry of Environment Forest and Climate Change. The aim is to protect the tigers from extinction by providing possible community in their natural habitat. Tiger task force provides guidance for the determination of number of tigers, their habitat, hunting habits, in which Corbett National Park and Ranthambore National Park are element of the project. The number of tiger as escalated in reserved area, in 1972, there was 268 tigers in 9 reserve areas which have risen to 1000 in 28 reserve areas in 2006 to 2000+ in 2016.

PROJECT ELEPHANT
In 1992, The Government of India proposed “Project Elephant”; the main intention of the project is to preserve elephants and their environment and also by establishing scientific and management measures they conserve the migratory routes. Domestic elephants are also included in this project, and conflicts are reduced between humans-elephants. The project aspires to take preventive steps for protection of elephant against poaching and unnatural death.

CROCODILE CONSERVATION PROJECT
The Government of India successfully accomplished a project to conserve the Indian crocodiles, which was also in the risk of extinction. The purpose of the project is to converse the crocodiles, the government too steps such as:

- They created sanctuaries to protect their natural habitat.
- The government also developed captive breeding.
- They also made the local people to participate in the project.
- To advance the management.

The crocodile conservation project is a major success and it has increased the number is crocodiles, 4000 alligator, 1800 crocodile, 1500 saltwater crocodiles are re-established.

UNDP SEA TURTLE
Wildlife institute originated the UNSP Sea Turtle in order to save Olive Ridley turtles. Odisha is a place where it has contributed

735 Article report-Objectives and features of wildlife protection act,1972 by Hemant more published on June 4,2019

736 Article report-Wildlife protection act 1972 by byjus
towards the composition of a map of breeding of sea turtle. Around 10 coastal states in India the project has been set up. The project has also aided in the improvement of guidelines to protect the mortality rate of sea turtle. The project also uses Satellite Telemetry to track the migratory route of the sea turtle in the sea.\(^{737}\)

**CONCLUSION:**
The activity of poaching, hunting, trading of wild animals is still flourishing in India which needs to be restrained. If extensive use of these methods is to be continued there’ll be more consequences in the ecosystem. In 2018 report, the total number of endangered animals in India was 635 animal species but was less compared to report submitted to IUCN in 2013 which was 646, although in 2014, the total number endangered species in India was only 413. As these reports suggests, extreme measures must be taken in order to safeguard the wildlife. Loss of habitat and poaching are legitimate danger to India.

Eminent Environment and Biodiversity Act Enacted by Indian Government:
- Indian Forest Act, 1927
- Biological Diversity Act, 2002
- Fisheries Act, 1897
- Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Rights) Act, 2006
- Mining And Mineral Development Regulation Act, 1957
- Environment Protection Act, 1986
- Prevention of Cruelty To Animals, 1960
- Air (Prevention and Control of Pollution) Act, 1981
- Water (Prevention and Control of Pollution) Act, 1974
- Forest Conservation Act, 1980

These are some of the measures which are taken by the Indian Government along with; they also signed a drafted conversation which included the bordering countries such as Nepal, Bangladesh which is linked with illicit wildlife species trade and preservation of tigers and leopards.

After all these efforts taken by the government in order to protect the wildlife there is still a significant amount of decrease in numbers of wildlife species which might be due to simple punishment which is provided in violation of the rules. According to Section 51 in The Wild Life (Protection) Act, 1972, the highest punishment for violating the rules is 3 years imprisonment which may extend up to 7 years with fine which shall not be less than twenty five thousand rupees, but in case of breach of rules relating to conversation of tiger sanctuaries the punishment is imprisonment up to 3 years which may extend up to 7 years with fine for rupees ten thousand to two lakh rupees, and if they rules are broke the rules for the second time, the imprisonment is for not less than seven years with fine not less than five lakh rupees which may extend up to fifty lakh rupees, though these punishments are followed still the activity of poaching are increasing, therefore there must be severe measures and punishments are to be taken in order to protect wildlife species and to obtain ecological balance and more awareness of wildlife conversation must be spread throughout the world.

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\(^{737}\) Article report-Wildlife conservation initiatives by India Government by ranthamborenationalpark published on May 25th, 2017
CONTRIBUTION OF INDIAN MEDIA: YESTERDAY AND TODAY

By Janhavi and Ujjwal Lohat
From Galgotias University

“It is the press, above all, which wages a positively fanatical and slanderous struggle, tearing down everything which can be regarded as a support of national independence, cultural elevation, and the economic independence of the nation.”
— Adolf Hitler, Mein Kampf

‘Freedom of Press’ or ‘Freedom of media’ is the expression of free thoughts by way of various mediums, and is the greatest bridge of communication between ‘the one who gets the power’ and ‘the other who gives the power’ but, without any external interference which could damage the quality of thoughts imbibing interest of the general public. In a democracy, ‘Press and Media,’ act as a watchdog to what activities the government has been doing, whether there is parity in what the authorities are supposed to do and in what they have been carrying out and also, giving a fairer picture to its citizens that let them decide that whether their chosen representatives are worth the power vested in them or not? But, lately, there has been a different meaning that the Media and the Freedom of Press have been portraying. Now, the interest of the media has shifted from the interest of the general public to economical and political interest. And if not that, it has now certainly become the game of power, fear, and benefits. Unimpressively, fear is slowly and steadily silencing the words, and it has become low-spirited to finally question whether the Media, under the constitutional check, is any more free or fair? Whether there can be no more discrepancy presumed between Freedom of Press and Freedom of Trade? Whether the free expression of thoughts in the name of democracy might mean a threat to the loss of a job or maybe life? Whether Contemporary India has lost the sense of free and fair media? The answers to all the above questions are in the paper which seeks to define what went wrong with Freedom of speech and expression and can we still expect the media to be the fourth independent pillar of democratic India?

1. Insight to ‘Freedom of Media’

Media is the collective communication channel used to gather and distribute data or information, the term communication is derived from the Latin word "communicare". It is related to communication, media propagating data or information, to multitudes in society by the specialized medium such as print media, photography advertising, and broadcasting published in the perspective of commercial consideration. 

Authentic and time-honored media is the oxygen of democracy because the survival of both without the significant other is nearly impossible. Basically, the testament for democracy is the extent of ‘Freedom of Press’. Today, in the Indian democracy, Press or Media, stands at the pedestal where, if media is free and fair, is a momentous question, as this draws a clearer picture as to, What kind of democracy we live in? Whether the Government that we chose for ruling the nation, is the right kind

of government? and Where is the nation actually standing in this fast-moving world? Thus, In order to protect the democratic system of government that the Constitution of India provides, It becomes essential to protect the freedom of speech and expression envisaged under the same. And, for the benefit of the people at large, it becomes important that information of any kind reaches the mass from various sources that are reliable. Thus, a ‘free press’ or ‘free media’ for disseminating any and every kind of information to the mass become very crucial and hence, stands to be the fourth pillar of democracy.

Press including individual journalists and media organizations demand freedom because of the functions discharged for the benefits of society. Media acts between the government and its citizens as a barometer for the public’s opinion and as a middleman to disseminate fair and impartial information to the public at large of government's activities to ensure fair, free from arbitrariness and just delivery of information. The First Press Commission however, expressed the view that freedom of the press means, “freedom to hold an opinion, to receive and impart information through the printed words without any interference from any public authority.”

The Apex Court in one of its landmark cases of Express Newspapers V. Union of India, justly describing the importance of the Freedom of Press, held that “Freedom of the press is the heart of social and political intercourse. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to constitutional mandate” Hence, explaining that Freedom of Press has a vital role to play in the democracy of the nation.

2. Transformation of ‘Press’ or ‘Media’

The power that the Media possesses today, or the freedom it has attained is not an overnight evolution rather, the Press or the Media has taken years, for freedom of speech and expression to be an integral part of the fundamental rights of an individual by delivering authentic information to the mass. This evolution embarks its presence in history, particularly in India, since the moments where writing on stones, public announcements, etc was being used as various techniques of disseminating information to the public. And, today when the news, from almost any part of the world, is just notifications away, it is apt to say that the journey has been revolutionary, noteworthy, and frequent.

- Imprints of the existence of ‘Media’ before its birth

The media in India have a long history, which is even longer than the history of modern representative democracy. Rock edicts of Emperor Ashoka (C 273-236 BC) engraved on rocks contain in abundance measures adopted and regulations issued by him. He used this for communication in his vast Empire, but there were no restrictions on communication imposed by law. Further, Arthashashtra originally written in the reign of Chandragupta Maurya embarked on the presence of punishment for spreading false rumors, Arthashashtra originally written by Kautilya mentioned these punishments during 324 C to 300 BC. The Rock edicts also speak for spies and

739 Report of 1st Press Commission 1954 at p. 358
740 Indian Express Newspapers V. Union of India AIR 1986 S.C. 515
reporters during the reign of Emperor Ashoka and the reign of Chandragupta Maurya. In ancient times there have been many examples that state that even when the print media was not established the emperor's and the Kings used various modes to disseminate and communicate the information to its civilians such as writing on the stones and sending information via some specific informants that they had in their courts, etc. Specifically in the reign of Babur, he used to officially announce for the purpose of tax waving off, on all Muslims if he used to win the battles and for the communication of the same information, he used to use various communicative measures. The earliest mentions of pre typographic newspapers are to be found in the Contemporary historical work of later Mughal times. The message of communication from the cave paintings indicate that the incidences occurred in nature give knowledge human activities such as hunting the symbols indicate ideas sound and syllables books being the oldest form of Media communication are as old as the existence of written language during the medieval time books of sacred writing and religious texts were relatively regarded as a repository of wisdom unseen to the common world.

- ‘Media’ before Independence

Christians who came to India with an avowed purpose of converting Hindus into

743 https://www.bl.uk/collection-items/the-bengal-gazette-an-anglo-indian-
744 https://andrewotis.com/download-hbg/
745 http://www.educationjournal.org/download/818/3-4-41-250.pdf

A campaign against the first Governor-General of India came out to be the first censorship in India when the ‘Bengal Gazette’ was banned from circulation through official channels.745 It was the incident that reportedly sharpened Hicky’s
perception about how free press should be to be able to serve its purpose. After a period of fighting back, he kept on publishing by delivering his newspapers in his neighborhood despite him being arrested. The first newspaper was finally crushed down by the previously targeted Governor-General and the Supreme Court in 1782. Although it’s reach and its time of existence were limited people, it would be just to say that he inspired others to launch newspapers too, many newspapers like ‘Bombay Herald’ and ‘Bombay Courier’ in 1789 and 1790 came alongside ‘Bengal Gazette’. But soon the government struck down the freedom of the press, obviously rattled by the excessive criticism of the latter. For more than 2 decades after that, the gagging of the press continued as successive Governors-General in India refused to cede freedom to the press.

In the 18th century, several acts were passed by the British government as stringent curbs over the Indian press. Before the revolution which took place in 1857, the press was fiercely involved in rallying the masses, the Britishers inevitably started becoming more apprehensive in regards to press freedom. In view of this, a gagging act was passed by Lord Lytton, which was driven towards controlling and curtailing the content published by Indian media. The act compelled all Indian publishers to get licensed by the British government while also ensuring that nothing was written against the government and also not criticizing it nor questioning it for any measure.

The British government’s such step to bring this act miserably failed because the press was impervious to the ‘Gagging Act’ and started working its way around disseminating news. Eventually, it pushed the government to design far more stringent measures. For instance, in the 1870s, it shifted its focus onto vernacular publications that were inspiring masses to take part in the fight against the British empire, by spreading awareness about the dire situation of the Indian people. One such publication was the Bengali weekly “Amrita Bazar Patrika” (established in 1868 in Jessore district, now in Bangladesh). Amrita Bazar Patrika caught the spotlight when it reported on the exploited indigo farmers. In the light of this Vernacular Act was passed on 14 March 1878 where the British government claimed itself with stronger control over vernacular newspapers in order to curb “seditious writing” in “publication in oriental languages”. This act was not imposed on English-language newspapers, Amrita Bazar Patrika, a bilingual, accepted the new act and became an English weekly, and played an important role in the development of Indian investigative journalism. The weekly once described the Viceroy of India, Lord Curzon, as “Young and little foppish, and without any previous training but invested with unlimited powers.”

In the 1880s the nationalist movement became very active and gave a strong push to the Indian press. Inevitably, the government once again passed several laws to control and suppress the press and its political agitation. Reba Chaudhuri in her book “The story of Indian Press” wrote that “A number of press laws and restrictions were imposed, and placed on the statute

746 http://www.educationjournal.org/download/818/3-4-41-250.pdf
747 https://www.loc.gov/item/sn88063470/
748 https://www.britannica.com/topic/Vernacular-Press-Act
749 britannica.com/biography/Lord-Curzon
book from time to time. After the establishment of the Indian National Congress, there were sections 124A and 153A of the penal code enacted in 1898. Four new measures were enacted between 1908-1911: namely, the Newspaper (Incitement to Offences) Act of 1908, the Press Act of 1910, the Prevention of Seditious Meetings Act of 1911 and the Criminal Law Amendment Act of 1908. There was also the Officials Secrets Act as amended in 1903.750

- **Role of ‘Media’ in the War of Independence**

To curb the “Non-English, Indian language press,” the British government brought a Vernacular Press Act in 1878. The act was aimed at stopping the spread of unrest against British rule, although it was later repealed by Lord Rippon in 1881. Throughout time several newspapers played an important role in marching towards independence. Indians owned the platform ‘Tribune’ but it was shut down after covering the ‘Amritsar Massacre’ in 1919 and its owner Kali Nath Ray was sent to jail. With the aid of the Government of India Act, Britishers restricted the media from publishing anything against the Emperors and British rulers, and if they did their right to press would be confiscated. But Indian media retaliated towards it, and rather served as an important tool in the movement of independence. Many leaders started coming up with their own newspapers to spread awareness like ‘Young India’ and ‘Harijan’ by Mahatma Gandhi, ‘Kesari’ and ‘Mahratta’ by Bal Gangadhar Tilak, ‘Naujawan’ by Bhagat Singh, etc. defining how media was playing a strong role in the movement of Independence defining the rightly said: “Pen is mightier than the sword”.

In 1923 and 1924 radio took an interesting origin in India, 3 radio clubs were established in Bombay, Calcutta, and Madras (now Chennai).751 They started their services by mostly airing music and talks for a couple of hours a day but got shut down in 1927 due to financial crises.

- **Media, Post Independence**

Before the impact of globalization, mass media was entirely controlled by the Government, which basically let the media project only what the government wanted the people to see but with the onset of globalization and privatization, the situation has undergone some humongous change.

3. **Constitutional Validity of ‘Freedom of Press’ or ‘Media’**

The Parliamentary debates are proof that the founding fathers did not want separate provisions for the freedom of media in the Constitution of India, but later the Supreme Court of India and various other conditions led to its involvement in the ambit of the fundamental rights prescribed to every citizen. Under the wide phraseology of freedom of speech and expression, i.e., Article 19 (1) (a) of the Constitution of India, Freedom of Media finds its space. Article 19 is very important and vital as freedom of speech and expression lies at the very root of liberty. Article 19 helps an individual express his views, his dissent, and his opinions regarding the government governing the entire nation. The media basically derives its rights from the right to

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751 http://www.ddejust.ac.in/studymaterial/mmc-1/mmc-104.pdf
freedom of speech and expressions available to the citizens. Thus the media has the same rights no more and no less than any individual to write, publish, circulate, or broadcast. The right to freedom of speech and expression carries with it the right to propagate and circulate one's views freely, and the freedom of the press means principally the right to publish without any previous license or censorship. Article 19 (1) (a) is not only crippled, cabined, and confined to newspapers and periodicals but also includes pamphlets, leaflets, handbills, circular and every sort of publication which affords a vehicle of information and opinion.

Article 19 (1) (a) reads, (1) All citizens shall have the right (a) to the freedom of speech and expression. The exception to the right guaranteed under Article 19 (1) (a) is contained in Article (2) which reads: “Nothing in sub-clause a of clause 1 shall affect the operation of any existing law or prevent the state from making any law on the exercise of the right under sub-clause in the interests of the Sovereignty and the Integrity of India, Public order, decency, morality or in relation to the contempt of court, the security of the state, friendly relations with the foreign States, defamation or incitement to an offense in so far as such law imposes reasonable restrictions.”

Freedom of the press is the extension of the citizen's right to freedom of speech and expression. Since freedom of media is the extension of the citizen's right to freedom of speech and expression, the laws imposing restriction on this right of the citizen applies to the press too. Media basically acts as the watchdog and a neutral observer and hence stands in a very advantageous position to monitor and disseminate information related to the government and its activities. Under the Constitution of India, Preamble also ensures that it would resolve to secure for all the citizens of India, liberty of thought, expression, and belief.

4. Legislative sanctions to ‘Indian Press’ or ‘Indian Media’

In India, the regulatory regime governing the media sector is contained under the Prasar Bharti Act, 1920 and the Cables Network Act, 1995, and the rules framed thereunder. The media sector is regulated by institutional structures and governmental bodies which include the Ministry of Information and Broadcasting (MIB) and Prasar Bharti. These governmental bodies have been entrusted with the activities of governance through the issue of guidelines, policies, and uses and the granting of a license for the broadcasting and electronic media sector. Censorship in media plays a pivotal role in Indian media and we are bound to follow rules set up by the government. Nowadays, it is up to the government to decide what has to be aired on the network or not, which has led to questioning the very essence of the law.

Cybercrimes can involve criminal activities that are traditional in nature such as theft, fraud, forgery, defamation, and mischief, all of which are subject to the Indian Penal Code. The abuse of the Computer has also given birth to a gamut of new age crimes that are addressed by the Information and Technology Act, 2000. According to Information Technology Rules 2011, objectionable content includes anything that “threatens the unity, integrity, defense,
security or sovereignty of India, friendly relations with states or public order.”

5. ‘Impediments’ or ‘Threats’ to Freedom of Media in the 21st century

Press Freedom basically means freedom unless specifically prohibited by law to gather, print, and publish information and to set up technology in pursuit of such objectives to claim and gain access to information. Such information has to be free from government, militants, language chauvinists, regional pressure groups, and a lot of other external factors. Press freedom is obtained on the ground that it is a prerequisite to democracy, denial of such freedom of the press would lead to the strangling of democracy.

- Freedom of Press becoming Freedom of Trade

The visual media (especially the television channel) which is one of the most widely used sources of information, is misusing its power. The news channels only focus on gaining their TRP and maximizing profits. The only motive that news channels have today is to sustain in the cut-throat competition and make more and more money.

For attracting a large number of audience, news channels began telecasting irrelevant pieces of information. An example of such an instance would be news channels telecasting crime and anti-social activities in a spiced up way which has led to the rise of criminal activities in the society. News media does not stop here, they even try to interfere in the lives of celebrities invading their privacy and violating their right to privacy. All such instances indicate and put a question: is the media actually working for people by doing its duty or just working for gaining TRP and making more and more money?

Freedom of media was meant for benefiting society and helping it move forward in society. Article 19(1)a of the Indian Constitution grants freedom to the media, but this article has to be read along with Article 51A(h) which states that it is the duty of all citizens to develop the scientific temper, civilization and spirit of inspection and change. In India, the recent tendencies show that media is playing such a revolutionary role, instead of promoting scientific thinking, which itself can solve many social problems like poverty, unemployment, lack of healthcare, etc. the Indian media often focuses on telecasting superstitions, celebrity life, backward ideas, etc. drifting the attention of the public from major social issues to non-issues. The owners of the media often look at it as a source of making money.

- External threat to life, of power and money

The Indian media has some worrisome threats, that if not removed will continue to have a coarsening effect on the state of the media in the world’s largest democracy. The basic challenge being the dark depths of the internet itself. The fast consumption of sensational fake news is proof of how bad money drives out the good one. The worst of which is the involvement of political parties with big pockets in funding and employment of fake news sites to dupe and divide voters, tarnish rivals, and professional players. Arthashashtra to Information and Technology Act has varied space for punishment for spreading fake information and rumors, still, this remains to be a vital challenge in the existence of free and fair media. Delivery of Paid news is one of the deadliest pollutants for the
mass media. With market advances at play and public investment in private companies, journalists found it sometimes cost-effective to write only partially true stories of companies waiting to list on the stock exchanges. The enormous power vested with the media leads to blatant blackmailing by the media too, for delivery of information in favor of the party supposedly in the picture.

The lenient role of the regulatory body specifically the Press Council of India by mere issuance of guidelines on the address of paid news, fake news, and other unethical concerns makes media houses lesser careful as to what kind of practices are being undergone for information delivery. Ownership of media houses by the handful of people, specifically, big businessmen associated with leaders of political parties, political party members themselves, largely affects the credibility of the information. India is considered to be one of the deadliest democracies for journalists. There have been varied cases such as the murder of journalists Gauri Lankesh etc., that reinstate fear in the minds of journalists for news delivery, and hence, proves to be the biggest threat to free and fair media.

6. **Delineation of Indian Media today and hereafter.**

Today the Indian media is being suppressed by the politicians but not only there, but the Indian media has also forgotten its mission which has always been to spread information and awareness. Earlier during the time of independence, Indian media focused on revealing the dirty work of the British government, making people aware of their rights and giving them a sense of independence. Media was one of the most important tools during the time of independence many freedom fighters have used media to express their thoughts and opinions and fire up some integrity in the people towards the nation. But today, all media cares about is its TRP, and also many politicians now own media channels and use it to criticize the opposite party contesting against them. Indian media has now just become a platform of TRP and political rivalries, forgetting its real mission in the process of making money. Also, India ranks at 142 out of 180 countries in the World Press Freedom Index, indicating how free the media is and how much it is controlled by the Indian politics.

> How do you ensure fairness in media reports?

The answer, blunt as it may be, is that you don’t.

> What does free speech mean?

*Freedom of speech does not mean that people can say things that you like. It does not mean that they can say things that you agree with. It does not mean that they can say things that you think are fair. Freedom of speech means people can say whatever they want to say whether you think it is fair or not. You cannot have a free press and a guaranteed fair press.*

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753 [https://rsf.org/en/ranking](https://rsf.org/en/ranking)

754 [http://collections.mnhs.org/MNHistoryMagazine/articles/43/v43i08p308-310.pdf](http://collections.mnhs.org/MNHistoryMagazine/articles/43/v43i08p308-310.pdf)
INDIA: A FORM OF ASYMMETRICAL FEDERATION

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ABSTRACT

Federalism, a form of political system, refers to the complementary arrangement of government where a central government shares the power with regional or state governments. The federal structure of government is noticed all around the world with some notable characteristic differences. The federal structure could be symmetric or asymmetric.

India has a federal structure. Part XI of the Indian Constitution classifies the division of powers between the union and the state governments of India. Through the paper, we shall answer the question if India, a Union of States, is an asymmetric federalism. We shall classify political asymmetry and constitutional asymmetry.

For a critical assessment and to answer the question, we shall focus on the following objectives:

- Analyzing Tillin’s contentions vis-à-vis asymmetrical nature of the Indian federation.
- Analyzing differential rights given to North-eastern states in India, especially Nagaland and Mizoram, and Jammu and Kashmir vis-à-vis other states in the Indian federation.
- Classifying the difference between Nagaland and Mizoram.

After evaluation, there is a clear conclusion that federal structure of India is asymmetrical in nature.

INTRODUCTION

Political asymmetry (de-facto asymmetry), a feature of every federation, exists because of the geographical and demographic sizes of the units or states. It is often known as universal asymmetry. Representation in Rajya Sabha, for instance, is on the basis of its population. Each state has its seat in the Rajya Sabha or Council of States based on its population and not any other ground. Uttar Pradesh, hence, has 31 seats in the Rajya Sabha, whereas Goa, Puducherry, and some northeastern states have only one seat each. Similarly, every other state has its number of seats on the basis of its population. Thus, there exists

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760 The Constitution of India. (1949), arts. 4(1) & 80(2), sch. 4.
political asymmetry in Indian federation. However, there is a difference between constitutional asymmetry and political asymmetry.\(^{762}\)

- Constitutional asymmetry (de-jure asymmetry) means asymmetric federalism.\(^{763}\) Asymmetric federalism connotes the existence of nation granting differential rights\(^{764}\) or special status\(^{765}\) or separate deals with regards to policy making to some of its states or federal units or sub-units in order to ensure that recognition is given to certain distinct, territorially concentrated ethnic or national groups.\(^{766}\) In simpler terms, it means an unequal division of powers between states.\(^{767}\) These asymmetrical devices work, within a federal setup, to accommodate diverse population\(^{768}\) and help citizens achieve a degree of self-determination.\(^{769}\)

- India has a federal constitution,\(^{770}\) along with asymmetric provisions.\(^{771}\) It is evident from the provisions implying granting of autonomy to resolve ethnic conflict to north-eastern Indian states and Jammu and Kashmir (hereinafter referred to as Kashmir).\(^{772}\) Following part of the paper elaborates on the subject. Firstly, paper will introduce the existence of asymmetric provisions in the north-eastern states and Kashmir. Secondly, we shall analyze Tillin’s contentions on the asymmetry of Indian federation.

### DECONSTRUCTING NORTH-EASTERN STATES’ ASYMMETRY VIS-À-VIS PART XXI OF THE CONSTITUTION

North-eastern states (Assam, Manipur, Nagaland, Mizoram Sikkim and Arunachal Pradesh), which cover more than half of the provisions mentioned under Article 371A-371H,\(^{773}\) have wide division of ethnic communities, highest proportion of scheduled tribes and very scarce resources.\(^{774}\) In fact, the majority of

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\(^{763}\) Hausing, K. K. (2014). Asymmetric federalism and the question of democratic justice in northeast India. *India Review*, 13(2), 87-111.


\(^{773}\) The Constitution of India. (1949), pt. XXI.

population of these states come under the category of scheduled tribes (for instance, 86.1%, 86.5% and 94.4% of population in Meghalaya, Nagaland And Mizoram respectively is scheduled tribes). These provisions came as a resolution to ethnic conflicts in the northeastern region and as a means to give some autonomy, special rights, and thus, recognition to their distinct culture and tribal communities which forms majority of the population. These special rights are not given to all the states but the states with some conditions such as hilly terrain, existence of different ethnic groups, tribal population, low population density, economic problems. These rights and provisions granting special status to certain states are discriminatory, though positive in nature, as they don’t cover the states without these above-mentioned conditions or which are not there in Article 371-371H of the Constitution. For instance, Article 371A has a provision that says the no act or statute made by parliament would be applicable to the state of Nagaland prior to the consent of their legislature if it is related to Naga customary law and procedure or religious or social practices, administration of civil and criminal justice involving decisions related to Naga customary law; whereas there are no such provisions in the constitution for any other state except Mizoram. Similarly, the legislative assemblies of both the states (Nagaland and Mizoram) can prevent any legislation and their application if they are related to the ownership and transfer of land. Other states in Indian federation do not have such right to prevent any application of law with respect to the ownership of land. However, the provision given under Article 371A for Nagaland gives an additional power, in comparison with Mizoram, to the former state.

It extends the right, to prevent the application of any law concerned with ‘land and its resources’, to Nagaland’s Legislative Assemblies. ‘Land and its resources’ provision is not extended to Mizoram; Article 371G provides the legislative assemblies of Mizoram to prevent the application of legislation concerned with ‘Land’ only. Thus, a provision giving differential status and more autonomy to these states than other states in the nation implies de-jure asymmetry or constitutional asymmetry.

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778 The Constitution of India. (1949).
779 The Constitution of India. (1949).
780 The Constitution of India. (1949). art. 371G.
781 The Constitution of India. (1949).
782 The Constitution of India. (1949).
784 The Constitution of India. (1949).
785 Article 370 granted special status to Kashmir. Under the protection of special status, Kashmir was allowed to have...
its own constitution, define the status of ‘permanent residents’ according to its own convenience and had the right to prevent outsiders from holding the ownership of any property within its circumference. Also, the article provided immunity to the state (currently Union Territory, since 31st October 2019) from following any law applicable to the rest of India and allowed to have its own penal and criminal procedure code. On 5th August 2019, the government modified Article 370 and scrapped the special status granted to the state. The Constitution (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954. It means that Kashmir no longer has the special status; and the rights, immunity and privileges enjoyed due to the special status ceased to exist in effect.

Tillin objects that differential rights granted to North-eastern states and Kashmir violates basic principles of Asymmetric federalism and are transient in nature. Following part of the paper evaluates and analyses various contentions raised by Tillin on the asymmetry of Indian federation.

Tillin argues and contradicts that the constitutional rights given to all the states with respect to the language were same and there were no prerogatives given to some states which is the basic principle of asymmetric federalism. I would like to contend his point on the basis of special status given to Nagaland and Assam. Firstly, there were same rights given to all the states, but there were certain special provisions which were specific to some states as mentioned above. Granting differential rights to Nagaland and Mizoram from other states to protect their customs and regulate the ownership of their land amounts to asymmetry. Secondly, Nagaland and Mizoram are granted different status, with respect to land provision, from each other even when there is similar situation with minute difference implying that our Parliament has intended to follow asymmetry with precision. Though there was a beginning of conflict by Mizo National Front led by Laldenga even after introducing an asymmetrical status for the state for Mizoram in the state, it was overcome by the peace accord which is insight/story/how-kashmir-changed-on-august-5-1577706-2019-08-06.


often seen as innovating offer of extreme asymmetric federalism as it granted special and more cultural autonomy to the Mizoram.\textsuperscript{793} The peace treaty due to the granting of differential status and more autonomy implies that India could be seen as asymmetric federalism even according to the normative justification.\textsuperscript{794}

Next comes the status of Kashmir. Though Kashmir has ceased to operate under special status,\textsuperscript{795} it is an example of asymmetric provision which was granted special rights. Tillin argues that provision is not asymmetrical because of its transient nature, and it was due to the UN intervention and unresolved armed dispute with Pakistan.\textsuperscript{796} Article 370 granting differential status was transient and it was revoked recently, I agree. However, Tillin didn’t make any contention relating to northeastern states even though they are temporary.\textsuperscript{797} It doesn’t change the fact that they failed to deliver the purpose for which they were made. He mentioned that the asymmetrical status did not stem from recognition that its ethnic or religious distinctiveness constituted a basis for a higher degree of self-government than other Indian states, even though its majority Muslim population was a major reason for the dispute in and over the state.\textsuperscript{798} Firstly, intention doesn’t matter as it was accorded with differential status and autonomy nonetheless.\textsuperscript{799} Granting special status to Kashmir was not done directly to accommodate the diverse population. It was given special status due to the UN intervention and unresolved armed dispute with Pakistan, but it does not change the fact that special status was given to the state. Secondly, I would like to put the point that provisions came in force because of the dispute. The dispute was because of majority Muslim population. To prevent any future dispute, create peace and wait for the integration it into the dispute, it was introduced into the constitution as mentioned clearly by N. Gopalswami Ayyangar.\textsuperscript{800} Hence, ethnic and religious distinctiveness was considered, and the distinct majority was benefitted as they had separate constitution and property rights just for the people of Kashmir.

“Normative justification says that asymmetric federalism in a democracy should consider differences and make conditions which helps in maintaining multiple identities with peace, multiple identities should be seen as complimentary and there should be equality provided to all citizens even if is through positive discrimination. The object of the normative justification is to allow asymmetric provisions for promoting equality among the citizens and regions.
\textsuperscript{797}The Constitution of India. (1949). pt. XXI.
“Part XXI reads temporary, transitional and special provisions. There is a use of word ‘and’ that implies that all the provisions are temporary, transitional and special and not just temporary or special, transitional or temporary.”
CONCLUSION

Hence, India, a Union of States, is an asymmetric federalism. Several provisions made in the constitution with regard to granting of additional powers to north-eastern regions and special status to Jammu and Kashmir proves the point. Further, different provision with respect to land and its resources are made differently for Nagaland and Mizoram, under the Indian Constitution, proves that India tried to keep asymmetry with respect to provisions under the precision application wherever required.

Louise Tillin contended that no prerogative was given to some states and formation of every state was on the linguistic ground, which does not imply any differential right granted to state. However, granting of differential status to north-eastern states and special status accord to Kashmir proves the contrary. Louise further contended that granting of differential rights to the states for a temporary period reflects that constitution makers did not intend to keep Indian federation asymmetrical in nature. In my opinion, intention does not matter in this dispute and mere granting of differential rights to different states amount to asymmetry. Moreover, settlement of dispute in Kashmir due to Muslim population and according peace in Mizoram to prevent the conflict was done by providing asymmetrical provision, and thus, India is an asymmetrical federalism in true sense as it satisfies normative justification too. Tillin objected that there were disputes in Kashmir though, special status was extended due to the UN intervention. According to the facts, the UN intervened to settle down the dispute which arose because of Muslim population.

Asymmetric provisions were used as a tool to attain peace.

I believe that intention to extend asymmetric tools to settle down disputes and attain peace by providing differential rights and special status to some states is enough intention, mere possession of this status with some states, and successful results of this tool is enough to conclude that India is an asymmetric federalism.

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RIGHT TO ABORTION: A LIBERTY OF RIGHT AND CHOICE

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ABSTRACT
The medical termination of pregnancy used to terminate the pregnancy by safety and efficacy in clinical practices in India. The word ‘aborting’ is not used as such in the law; instead, use the term medical termination of pregnancy. The curious choice of words which used in the colonial period for the technical jargon in laws, but the use of MTP which aimed at ensuring the abortion laws in the country has not implemented as to grant women a choice or a right to undergo safe abortions. It is a procedure that would protect the doctor’s against prosecution. The choice of a woman or her right to terminate the pregnancy is a dream in India.

Many of the countries that restrict the laws as a right of women because of the health aspects. Some of the law which says about the women’s request is universally acceptable and fit for purpose. But the road to the law reform is long and complicated. It will be the right to give a woman a choice for her abortions, but it is the biggest challenge that if at all with all these technologies, abortion can affect the health of the women. The termination of pregnancy can be achieved as a right by the collective efforts of many people and women themselves-so that everyone with the unwanted pregnancy who seeks an abortion can have it, as early as possible and as late as necessary.

Keywords: MTP ACT, Right of termination, Weeks of Pregnancy, Amendment Act, Judicial activism, Article 21

INTRODUCTION
“No woman can call herself free until she can choose consciously whether she will or will not be a mother.” — Margaret Sanger

In India, the majority of women are still unable to obtain access to safe abortions, following 50 years of legislation which have passed, it is still many women’s in many districts have problems with the abortion. The Medical termination of pregnancy amendments has already made in 2002, 203, 2014, 2020. The district abortion control, punitive steps are taken, physical criteria for pre-natal abortion facilities and medical care, where all intended to expand safe services. The medical termination of pregnancy is the method of separation of unwanted pregnancy. Abortion becomes legal in India in the year 1971. It is keeping in mind the advanced technologies that might make safe abortions in the field of medical science. The framers of the bill wanted the women/girl to have such abortion thinking that if not performed, it will make serious consequences’ in the life of the pregnant women. To avoid such problems, that might affect the women’s body the parliament has constructed the law which makes safe abortions so that it will not affect those mentioned above. So for terminating the pregnancy lawfully, the Shantilal Shah Committee was appointed to look after the case.

The committee studied the legal, health and socio-cultural implications of the abortions and proposed legally-termination. The recommendations of the committee led to the act that has passed by the parliament came to know as “Medical Termination Of
Pregnancy Act, 1971.” However, the punitive provisions were not invalidated, even though the MTP Act was adopted.

Abortion discussed in many ways or multi-subjects in the world. Like that of theology because most of the religions are having something to say about the abortions and their issues. The ethics are one of the important things as we know that human conduct and the moral side of it having the problems that involve in it. The law is a regulation which is made by the humans as sanctions which are enforced by the state. The abortion is classified into many categories depending upon the circumstances it occurs, i.e. include artificial or induced, natural, spontaneous, or accidental. All those except the induced abortion makes it punishable by the law because it is an abortion that makes delivery voluntarily procured (any time before natural birth) with intent to destroy the foetus. That’s why it has made punishable so that people with intent would not kill the fetus inside the body. Abortion is the destruction of life after conception and before the delivery. Before these two times, life has already begun. However, many peoples in our society have a different point in this, some people say that life will start at the moment of conception. But this is a religious tenet that makes no scientific truth at all. Others say they don’t believe in fertilised ovum instead they think that human life begins at birth. Or we can say that when the foetus is sufficiently developed and starts moving and removed from the mother’s womb.

Some may argue that if there were no life before a child was born, that would be no need for any legal prohibition or penalty for infusion, with the exception that small degree that such intervention avoided or the purpose of the wellbeing of the mothers. Each of the views mentioned above is at different and are at a high level. This first view based on the fact that life begins at birth with contact with fetus unless we take it because of the moral law doesn’t accept the right to life which are considered immoral in every part of his fetal development.

‘only the child has the right from the moment it is born to be protected by the law.’ this is technically right, but pragmatically it is not workable. It is having less severe when any ethical or legal relevance given to the peoples who are in the category of the individual therapeutic question whether a mother should be free to abort or not.

No country will give an independent opinion to the mother at the time of pregnancy. But almost countries will forbid the contact with the fetus except on medical grounds in the second or trimester period. They consider this contact of the legal condemnation of the foetus because only on the basis that some kind of life deserving needs protection.

GROUND FOR TERMINATION OF PREGNANCY
Before knowing the grounds for the termination of pregnancy, we should remember that abortion is legal throughout much of the world. But each countries law varies. Around 61 countries, including much of the European countries, allow abortion without any restrictions. Twenty-six countries ban abortions altogether, with no exceptions. The remaining countries to save mothers life and protect the mother’s

801 Section 312 of I.P.C.
health allow abortions with restrictions. The abortion is of two types, i.e. Medical and Surgical.

Medical abortion is also known as medication abortion, which uses pills to abort. The medicine that you take should be done at home if one is pregnant for less than ten weeks. If one is above ten weeks, it should be taken at the hospital.

Surgical Abortion is the aborting by operating to remove the pregnancy from the womb. The lifting is done with the local anaesthetic (to the numb cervix), Conscious Sedation (you are relaxed but awake) and Deep Sedation or General Anesthetic (sleep). There are two methods of surgical abortion, i.e. Vacuum and Suction abortions. If at all, there are many types of abortions everyone can terminate the pregnancy. The termination of pregnancy can be done as per Section 312 of the Indian Penal Code. The framers of the code do not use the word ‘abortion’, as it speaks about miscarriage only. However, Miscarriage is having synonymous with abortion, i.e. miscarriage refers to spontaneous abortion and Voluntarily causing miscarriage means it’s a criminal abortion. In the advance stage, to protect the life of mother, Section 312 of the penal code allows termination of pregnancy of therapeutic (Medical) grounds. The unborn child must not be killed in the womb, except to protect the mother’s precious life because that the fetus has the right to life and if the pregnancy caused without the women’s consent is punishable by law.

Under Section 3 of the Medical Termination of pregnancy act 1971, Act says, when the Medical Practitioner may terminate the pregnancy.

Notwithstanding anything contained in the Indian Penal Code (45 of 1860) a registered medical practitioner shall not be guilty of any offence under that Code or any other law for the time being in force if any pregnancy is terminated by him in accordance with the provisions of this Act. It is clear that the provisions of the MTP Act so far as abortion is concerned suppresses the provisions of the Indian Penal Code.

Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner, where the length is of twelve weeks, and in case, the duration of the pregnancy twelve to twenty weeks by two or more registered medical practitioners are, of opinion, formed in good faith that:

1. The physical and mental health of Pregnant women will affect if the pregnancy takes place, so much risk is there to do that.
2. A grave injury in pregnant women to physical or mental health
3. If the pregnancy caused by rape
4. The substantial risk that is involved that, If the child born would suffer physical and mental abnormalities.
5. For limiting the number of children, failure of any devices which was used by the married women and her husband, caused by unwanted pregnancy constitute grave injury on her.
6. Such a pregnancy would involve, such risk of harm to the health of a pregnant woman's actual or reasonable foreseeable environment.

The termination of pregnancy is not allowed after the twenty weeks, and a medicinal opinion is given in good faith, as mentioned in Section 52 of the Penal Code. It is to be noted that the risk involved in the

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802 https://en.wikipedia.org/wiki/Medical_abortion

803 https://indiankanooon.org/doc/1836566/
abortion which affect the mother’s mental health, where the term ‘grave injury’ or ‘substantive risk’ has unidentified and has left to the interpretation of the clause by the medical practitioner.

**CONSENT OF ABORTION**
The Medical termination of pregnancy act, 1971 clearly defines in Section 3(4) as to whose consent would be necessary for such termination of pregnancy.  
It clearly says, no pregnancy can terminate who:
(i) has not attained eighteen years of age - minor
(ii) is a lunatic
Except, parent or guardian should give consent in writing.
It also mentions to save the Clause discussed above; no pregnancy can be terminated except with the consent of the Pregnant women.
So, it is clear that if termination of pregnancy has to be done, the essential factor is that there should be the consent of the pregnant women. The husband or relatives of husband/pregnant women consent is irrelevant as per this section. So, if the husband wants to terminate and women don’t, it cannot be terminated. And if the women wish to and Husband doesn’t want to terminate, it can be terminated, as because it is the consent of women necessary and valid.

**WHERE CAN PREGNANCY TERMINATE?**
Other than the procedure mentioned in Section 5(1) of the Medical Termination of Pregnancy Act, 1971, all the pregnancies can only be terminated either:
(i) A hospital established by the Government or
(ii) A place approved by the government for the Act.
Section 5 (1) says, the termination of pregnancy as done by the opinion and venue with two medical practitioner does not apply, because, it is done immediately and also necessary to save the life of the pregnant women. The real problem lies where there is contrary between the Indian penal code and the MTP Act, i.e. the Section 312 of the Penal code says that anyone for saving the life of the pregnant women is permitted for abortion. In the MTP Act, only a Medical Practitioner (Doctor) can terminate the pregnancy.
Section 4 (b) of the Act says about the Approval of a Place, i.e. No place shall be approved under Clause unless:
(i) the Government is Satisfied, termination of pregnancy done under safe and hygienic Conditions
(ii) the following places:
(a) an operation table and instruments for performing abdominal gynaecology surgery
(b) Anaesthetic, resuscitation and sterilisation equipment.
(c) Drugs and parental fluids for an emergency.

**PERMISSIVE ABORTIONS**
Therapeutics: It is the type of abortion in the old Indian law to save the mother’s life. It allows abortion when the mother’s life not threatened, but when continued pregnancy causes many problems to the mental, physical health of the mother (reformed law).
Eugenics: The basic theory of eugenic abortion is that abortion can be justified if it suspected that an infant would be born psychologically or physically deformed before conception.
The life of suffering needs to alleviate the unborn child.

**Pregnancy caused by Rape:**
The mental health of the mother will affect a pregnancy problem caused by rape. It victim (mother) doesn’t want the child to bear from the criminal activity in which she was not guilty.

**Social and Economic Consideration:**
The women’s absolute right to regulate the use and control of her body is a common claim in support of abortion. She has the right to abortion on request, and if she determines that she does not want to end the pregnancy. The power to regulate the use and control of the body is founded on ideals of equality, and limits on it can be a violation of the privacy.

Abortion is a very safe operation with highly trained medical practitioners and well-equipped infrastructure, medical facilities, types of equipment. In the countries where abortion is legal, the death rates are usually below 1 per 1,00,000 procedures. In the developing countries like India where the infrastructure described above, equipment and other facilities are limited to availability the abortion procedure possesses a heavy burden on the health care system. About one-third/ one – quarter of the deaths in abortion is due to the complication, i.e. illegal/ induced abortions. In developing countries, about 2.5 crores of unsafe abortions are taking place every year. In these around 80 lakhs carried out in the least or hazardous or dangerous conditions.

Between 2010-2014 an average of 5.6 crore induced abortions occurred worldwide. When we see that 35 induced abortion per 1000 women aged between 15 years to 44 years is a surprising value. The annual cost of treating significant complications from unsafe abortions is US$553 million. Women's and adolescents lead to unsafe abortions because they are not getting access to the safe abortion which include (i) restrictive laws (ii) poor availability of services (iii) High Cost (iv) Social stigma (v) the objection of the health care providers (vi) unnecessary requirements( third-party authorisation, waiting, mandatory counselling etc.)

**JUDICIAL BEHAVIOUR**
Through numerous judgments the courts in India have played an essential role in the development of rights of women, it has profoundly contributed to the position whereby those who infringe the rights of women/ wife to terminate to pregnancies through their various judgments. It has also said that, until women assert and demand the control of her body and reproductive process, there shall be no freedom, equality, full dignity and personhood possible for women. The right to abortion is an individual conscience and conscious choice of a woman.

Article 21 of the constitution says about the Right to life. The right to personal liberty is the most precious, inalienable and fundamental rights to citizen. It enshrined in the Indian Constitution.

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806 https://www.who.int/news-room/factsheets/detail/preventing-unsafe-abortion
The Article 12 of UDHR\textsuperscript{809}, Article 17 of ICCPR\textsuperscript{810}, Article 11 of the American Convention, and Article 8(1) of the European Convention says that it is protected under the freedom from inference in one’s own privacy and family.

The J
dgments which were delivered by the European Commission of Human Rights in Bruggemann and Scheuten v. the Federal Republic of German\textsuperscript{811} and Paton v. the United Kingdom.\textsuperscript{812} It has said that the decision of one makes about one’s body, particularly one’s reproductive capacity, lie squarely in the domain of private decision making.

\textit{In Kharak Singh v. State of U.P. and others,}\textsuperscript{813} the Supreme Court has undoubtedly interpreted article 21 and recognised that a person has complete rights of control over his body organs and his ‘person’. Thus Right to procreation and to have control over one’s reproductive organs gives birth to another right, i.e. the right to abortion.

\textit{In Satya v. Sir Ram}\textsuperscript{814} Supreme Court held that termination of pregnancy twice at the instance of wife despite the insistence of the part of the husband and his parents to have a child in family amounts to cruelty.

\textit{S.k Verma v. Usha}\textsuperscript{815} it was held that aborting foetus in the very first pregnancy by a deliberate act without the consent of husband could amount to cruelty. The court in S.k case ignores the MTP Act, where the concern is not material.

In \textit{Mrs X v. Union of India}\textsuperscript{816} the supreme court allowed the termination of pregnancy to a 22-week old mother. It was done after the seven-member board opined that allowing pregnancy to continue women’s physical and mental health.

Similar cases in \textit{Tapasya Umesha Pisol v. Union of India}\textsuperscript{817}( 24 weeks), \textit{Meera Santhosh Pal and ors. v. Union of India}\textsuperscript{818}( 23 weeks), \textit{Mamta Verma v. Union of India}\textsuperscript{819} in all these the Hon’ble supreme courts referred the matter to Medical board to know the opinion of the board.

In \textit{Murugan Nayakkar v. Union of India}\textsuperscript{820} the apex court allowed termination of 32-week pregnancy of a 13-year-old rape victim considering age, trauma during sexual abuse, mental agony at present and report of the medical board constitute the termination allowed.

In \textit{Suchita Srivastava v. Chandigarh Administration},\textsuperscript{821} the court said that, that a women’s right to make reproductive choices is also personal liberty as meant in Article 21 of the constitution of India.

In \textit{Sharda v Dharmpal}\textsuperscript{822} the judgment clearly shows that till the year 2003, the women’s right to privacy was not explicitly recognised and thus further her say in medical examinations or in terminating the pregnancy was denied.

In \textit{Anil Kumar Malhotra vs Ajay Pasricha},\textsuperscript{823} Supreme Court Upheld Punjab and Haryana HC’s Ruling and said That A

\textsuperscript{809} Universal Declaration of Human Rights
\textsuperscript{810} The International Covenant on Civil and Political Rights
\textsuperscript{811} 3 EHRR 244 1977
\textsuperscript{812} 3 EHRR 408 1980
\textsuperscript{813} 1963 AIR 1295, 1964 SCR (1) 332
\textsuperscript{814} AIR 1983 P&H 252
\textsuperscript{815} AIR 1987 Del 86
\textsuperscript{816} WRIT PETITION (CIVIL) NO. 81 OF 2017
\textsuperscript{817} WRIT PETITION (CIVIL) NO.635 OF 2017
\textsuperscript{818} WRIT PETITION (CIVIL) NO.17 OF 2017
\textsuperscript{819} WRIT PETITION (CIVIL) NO.627 OF 2017
\textsuperscript{820} Writ Petition(s)(Civil)No(s).749/2017
\textsuperscript{821} (2009) 9 SCC 1, 22
\textsuperscript{822} (2003) 4 SCC 493
\textsuperscript{823} CIVIL APPEAL No.4704 OF 2013
Woman Does Not Need Her Husband’s Consent To Abort. It is a progressive step in recognising and implementing the reproductive rights of women because it recognises their autonomy.

In *Rakesh Kumar v. Prem Lal*, the Himachal Pradesh HC said that the fetus is a part of the body of the deceased and no separate compensation is applicable on the ground of loss of the fetus.

Under section 165 and 166 of the Motor Vehicles Act, the Bombay HC held that the unborn child in the womb is not a person within the meaning of the sections.

In *State of Rajasthan v. S. (Name Withheld)*, the Rajasthan HC held that the Reproductive Choice of a woman is a fundamental right flowing from Article 21 of the constitution.

In *Alakh Alok Srivastava v. Union of India* at that stage continuation of pregnancy was less hazardous than the medical board opined termination. Accordingly, the apex court did not allow the termination of a ten-year-old 32-week pregnant rape victim.

In *Savita Sachin Patil v. Union of India* the court rejected termination of 27-week pregnancy by giving medical opinion that there is no physical risk to mother, but the fetus had severe physical anomalies.

In *Ms Z v State of Bihar*, the apex court declined the order of termination of pregnancy since a substantial amount of time (32 weeks) was passed due to negligence of authorities and ordered a compensation of Rs. 10,00,000 (Ten Lakhs).

**ABORTION LAWS OF OTHER COUNTRIES**

*United States of America:*

In *Jan Roe v. Henry Wade*, in which the court held that Right of a married woman to terminate her pregnancy as a part of the Right of personal privacy. Following the judgment and subsequent related ruling, the current law on abortion in the U.S. is that abortion is legal but can be limited to varying degrees by the states.

The states have adopted regulations on the prohibition of abortion at late-term, which allowed the notification to the parents of minors and allowed the parents to be informed of abortion risk in detail before the procedure.

*European Nations*

In most of the European countries, abortion is legal, given a wide range of restrictions under which it is permitted. The exceptions are the mini-state of Malta and the micro-statutes of the Vatican citadel, San Marino, Lichtenstein and Andorra where the abortion is illegal or severely restrained.

Most of the EU require abortion in the first quarter on demand, with more extended timescales for Sweden and the Netherlands.

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824 1996 A.C.J 980, 23.
825 Motor Vehicles Act of Indiana, Pari Materia to Motor Vehicles Act of India (Herein after referred as MVA)
826 D.B. Spl. Appl. Writ No. 1344/2019
827 WRIT PETITION (C) No.76 OF 2018
828 Writ Petition (Civil) No.121/2017
829 Civil Appeal No. 10463 of 2017
830 410 US 113 (1973)
831 Interactive maps comparing US abortion restrictions by state, LawServer

832 In Malta abortions are de facto allowed to save the mother’s life through observance of the principle of double effect.
834 “Malta now only EU country without life-saving abortion law”. The Malta Independent. July 14, 2013.
Common-Law Countries:
The UK abortion act says it allowed termination of a pregnancy at any time if there is a significant risk of the baby being born severely disabled and is purely in the hands of doctors in good faith.835

In Australia,836 abortion law is a state subject, and there is no need for the spousal or counselling for the termination of pregnancy.
In Canada837, France838, and South Africa839 in these countries there is absolutely no legal restrictions and abortion is a sole concern of a woman.

In Denmark840 on a case danger, after 12th week of pregnancy has elapsed granted authorisation. On account hereditary condition or of an injury or disease during early or fetus life, the child will be affected by a severe physician or mental disorder.

**IS FOETUS IS A PERSON? DOES RIGHT TO LIFE IS EXTENDED TO AN UNBORN?**

In Case William L. Webster v. Reproductive Health Services841 the Missouri statute in which The Supreme Court upheld and declared that ‘the life of each human being begins at conception’, and that ‘Unborn children have life interest, health and well being which is protectable.’

Without any doubt, we can say that the fetus of an infant in the womb of the mother is not a natural person. But equally, there should not be any doubt that it is ‘Juristic’ or ‘Juridical’ person. A child in a mother’s womb recognized as a legal person who can inherit or acquire and hold property and other legal rights in all jurisdictions. And there should be no question that only that person has the rights, whether natural or legitimate.

In India and England, the law of the will recognises that the child that is present in the mother’s womb and Section 99(1) of Indian Succession Act 1925, states explicitly that “all the words expressive of relationship apply to a child the womb who is afterwards born alive.”

In Queen Empress v. Ademma,842 in which the Madras High Court Pointed Out that Lexically and logically, an unborn child is a person having a life.

**MEDICAL TERMINATION OF PREGNANCY- A VIOLATION OF ARTICLE 14?**

Article 14 of the constitution says about Equality before law.

The state shall not deny any person equality before the law or equal protection of laws within the territory of India. The State shall also Prohibit the discrimination on the grounds of religion, race, caste, sex or place of birth.

The failure of any device or procedure that a married woman or her husband use to limit the children may be considered to be a significant injury to the pregnant women’s mental and physical health. The MTP act would allow abortion if the child conceived

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835 Section 1(1)(d), United Kingdom’s Abortion Act, 1967.
838 The Act that decriminalised abortion is the Veil Law of 1975
839 The Act that authorises termination of pregnancy on demand is Choice on Termination of Pregnancy Act, 1996
840 Ch. 25, Denmark Health Act, 2005.
841 492 U.S. 490 (1989)
842 (1886) I LR 9 MAD 369
of as a result of an inadequate instrument used for restricting the number of children because of the anguish and concern caused by such a pregnancy is significant harm to mental health and well being of the pregnant women. The legislature has not comprehended that the agony or anguish should term as severe injury to the prospective women’s mental and physical health. Therefore there is discrimination between the fetus situated in a similar position. The act, as mentioned above, violates Article 14 of the constitution of India.

In *Air India Etc. Etc. v. Nergesh Meerza & Ors.* 843 It has said that the destruction of the female fetus does not uphold the equality principle enshrined in the constitution of India.

In *Health & Allie Themes (Cehat) and ors. v. Union of India*844 It is a landmark Judgment which at the paternal stage itself criminalises sex- determinations to eradicate the infanticide between women. The judgment reflects on how it focused on the law and not remedy, and it emphasises the importance of regulation and execution.

In *Vijay Sharma and Mrs Kirti Sharma v. Union of India*845 the court said that foeticide of a girl child is a sin. Such tendency offends the dignity of women. It violates the right of the women’s right to life; also, it infringes Article 39(e) of the constitution of India. It also noted that ‘life’ exists in the fetus while in the womb of the mother and context of article 21 of the constitution of India applies to an unborn person as well. Thus it can be considered as the most significant argument for validating the MTP act as unconstitutional.

In *State of Tamil Nadu and ors. v. Ananthi Ammal and ors.*846 When the law challenged against the Guarantee enshrined in Article 14, the first duty of the court is to examine the purpose and policy and then to know what legislature seeks to obtain by discovering whether the classification made by law has a reasonable relation to the object which.

**THE MTP (AMENDMENT) BILL, 2020**

The MTP (Amendment ) Bill, 2020 was introduced in Lok sabha in March, 2020. The bill amends some of the sections of the MTP Act, 1971. The amendments in certain pregnancies by registered medical practitioners and also the time limits and the termination of a pregnancy by using medical or surgical methods.

Actually, under the act, the pregnancy can be terminated within 12 weeks by one registered medical practitioner:

(i) if the pregnancy may risk the life of the mother, cause grave injury to her health.
(ii) there would be a substantial risk that the child would suffer physical or mental abnormalities ( if it was born)

When the pregnancy terminated between 12 to 20 weeks, two medical practitioners are required to give their opinion.

Now, in the amendment bill, it has been said that due to advanced technologies the provisions of the said pregnancy may be terminated within 20 weeks for one medical practitioner and with two medical practitioner at 24 weeks.

The abnormalities in the foetal will not apply to the upper limit of termination of pregnancy. The medical board will diagnose these abnormalities. The medical board consist of (i) A Gynecologist (ii) A Radiologist or Sonologist (iii) A

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843 1981 AIR 1829, 1982 SCR(1) 438
844 Writ Petition (Civil) No. 301 of 2000
845 AIR 2009 Bom 29
846 1995 AIR 2114, 1995 SCC(1) 519
Pediatrician (iv) any other member as notified by the state government.

In the light of the judgment of Privacy⁸⁴⁷, to ensure that no women use unsafe means approaches to end the pregnancy because she cannot access reliable abortion. As the woman’s reproductive choice, privacy and dignity and to provide services free of bias and judgment. What will the amendment allow if women to receive abortion on request? Would it increase access to safe abortion or unsafe abortion? Even if the right to privacy is not absolute and reasonable, it is nevertheless a basic or fundamental right rather than a statutory right or a common-law right.

To ensure that right of women to reproductive decisions incorporated into the public health plan, the state will take its actions. The laws which affect the sexual and reproductive health and rights in India, particularly the MTP Act, should urgently be amended.

CONCLUSION
The importance to legalise abortion because it will encourage illegal means or practices. It is unfair that a person who receives legal help from the courts have not achieved justice. ‘every mother has an obligation to better give her offspring the best as she can. Yet it is in bad condition that when she indulges in the illegal activities, which injures the foetus by the carelessness or ignorance of the mother. If the women had given the right to terminate at any point in time, it would affect the mother and the foetus in one way or other. So the abortion is performed solely at the discretion of the medical practitioner to have a safe abortion. Otherwise, it would amount to the substantial risk to the pregnant women and her mental and physical life.

The increase week or time for the termination of pregnancy is at the opinion of the medical board. After considering the pregnant women’s health, the medical board can give guidelines on whether to terminate the pregnancy or not. There is no doubt that the women’s right to make the reproductive choice by herself. As it is enshrined in the Constitution under Article 21 “ Personal Liberty.” So it is up to the pregnant women whether she should bear the child or abort the child is her privacy. But the point is, If she chooses to, she should be able to access abortion on request at any point of time within the legal gestation limit.

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⁸⁴⁷ Justice K. S. Puttaswamy v. Union of India WP (C) 494/2012
RIGHTS OF ARRESTED PERSON - A CONSTITUTIONAL AND LEGAL ANALYSIS

By Kunal Garg
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Abstract
The Indian legal system is based on the principle of "innocent till proven guilty." The Criminal Code of Procedure 1973 and the Indian Constitution grant certain protections to individuals arrested to protect their interest. Police powers to enforce arrests are subject to certain restrictions. The imposition of these limitations can be regarded as acknowledgment of the rights of the person arrested. The constitution of India also recognizes the rights of those arrested as fundamental rights. The researcher attempts to elucidate these basic rights in this article.

CHAPTER I
Introduction
The apex court in the case State of Haryana v Dinesh kumar ²⁴⁸ cited the meaning of arrest given in Halsbury's laws of England "The word arrest when used in its ordinary and natural sense means the apprehension or restraint or the deprivation of one's personal liberty. When used in legal sense in the procedure connected with criminal offense an arrest consists in the taking into custody of another person under authority empowered by law for the purpose of holding or detaining him to answer a criminal charge or of preventing the commission of a criminal offense the essential element to constitute an arrest in the above sense are that there must be an intent to arrest under the authority accompanied by a seizure or detention of the person in the manner known to law which is so understood by the person arrested” The basic principle behind these protections is that the government has massive resources at its disposal for the prosecution of individuals, and so individuals are entitled to some protection from the government's abuse of those powers. During any investigation, an accused has certain rights; examination or prosecution of an offense for which he is charged, and should be shielded from unreasonable or unlawful detention. Police have broad powers to detain any individual under Cognizable Crime without going before a judge, and Court will be careful and see that such powers are not misused by being used lightly by personal benefit. There can be no arrest on the merely suspicion or facts. Even a private citizen cannot obey and detain another citizen on someone else's argument, however unjustifiable it may be. Arrest so made comes with many rights enshrined by the constitution and the criminal procedure court which began at the time of arrest till the person is detained by the police. These rights are basic in nature and are provided to safeguard the individual arrested against the atrocities and misuse of power by the police inflicted on the accused.

²⁴⁸ State of Haryana v Dinesh kumar 2008 3 S.C.C. 222
custody of the police, an under-trial or a convicted individual does not lose his human and fundamental rights by virtue of incarceration. The intention of the legislature in laying down these principles has been that hundreds of guilty persons may get out free but even one innocent should not be punished. Indian Constitution itself provides some basic rights and safeguards to the accused persons which are to be followed by the authorities during the process of criminal administration of justice. Aim of this study is to provide careful consideration on the rights and privileges of the person captured under the criminal code of procedure and the constitution.

CHAPTER II
Right to silence
The 'right to silence' arose from the principles of common law. It means that normally courts or tribunals should not conclude that the person is guilty of any behavior merely because he has not answered questions that the police or the court have asked. The Justice Manimath Committee in its report was of the opinion that in societies where anyone can be arbitrarily held guilty of any charge the right to silence is very much needed. Any statement or confession made to a police officer in a court of law is not admissible, as provided by the law of evidence. Court in the case of Nandini Sathpathy v. P.L. Dani[849] Where it was held that no one could physically obtain answers from the accused and that the accused was entitled to remain silent during the investigation.

CHAPTER III
Right to be informed of the grounds of arrest and right to bail
The primary requirement of lawful arrest is the notification of reasons of arrest along with the charges issued against the Arrestee. Section 50 (Criminal Procedure Code 1973) provides that a person arrested without a warrant should be informed of the full details of the offense and of the grounds for his arrest by a police officer or other person making the arrest, and where the offence is bailable of his right to be released on bail [right to bail sec.50(2)], when a person is arrested with a warrant the police officer executing the warrant of arrest will notify the substance to the arrestee [sec 75] further [under sec 55] when a subordinate officer is deputed by a senior officer to arrest a person he will notify the person to be arrested the content of the written order given by the senior officer stating the offense or cause for which the arrest is made. Section 50 being mandatory, confers a valuable right and non-compliance with it amounts to disregard of procedure established by law. The timely information helps the accused person in many ways, as it offers an opportunity to explain any mistake or confusion in the executing authority's mind and to move the competent court for bail in suitable circumstances and for a writ of habeas corpus to plan his defense[850]. It is not necessary to furnish full details of an offence but adequate particulars put be given to the arrestee to enable him to understand the grounds of his arrest. The detention becomes unlawful when the grounds given are not proper and sufficient[851]. Article 22 (1) of the Constitution provides that a person arrested for an offence under

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849 Nandini Satpathy v P.L. Dani and Anr. A.I.R. 1978 SC 1025,
850 Govind Prasad v state 1975 C.R.L.J 1249 CAL
851 Madhu Limaye vs The State Of Maharashtra1969 A.I.R. 1014 1969 SCR (3) 154
ordinary law be informed as soon as may be the grounds of arrest. The grounds of arrest should be communicated to the arrested person in the language understood by him; otherwise it would not amount to sufficient compliance with constitutional requirements. (Johari 2004) 852

CHAPTER IV
Right to be produced before a magistrate

The arrested person should be promptly produced before a judge or magistrate this right has been created to prevent the arrest from becoming means of compelling the arrestee to give information and to enable the judicial authority independent of the police to determine the question of bail or discharge. Section 56 of The Criminal Procedure Code stipulates that in the case of an arrest without warrant a police officer is expected without unnecessary delay to produce the arrested person before a before a magistrate having jurisdiction. section 57 states that no police officer can detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period will not (in the absence of a special order of magistrate under section 167) exceed 24 hours . Thus the person arrested should be produced before the magistrate within 24 hours of this arrest .The period of 24 hours does not include the time necessary for the journey from the place of arrest to the magistrates court. This right is not only a formality but it is substantial protection given to the accused so that if there is no case against him he can be released on bail or released immediately. It is important that the magistrate should try to enforce this condition and where it is found defied with come down heavily upon the police 853

Article 22(2) of the Indian constitution states that In addition to the furnishing of the grounds of arrest the arrested person must be produced before the magistrate within 24 hours of his arrest. The period can be extended beyond 24 hours only under in the case of judicial custody Article 22 of the constitution is to give a shield against the acts of non judicial authorities or of the acts of Executive .Thus under these provisions of the constitution the accused has the right to be produced before a magistrate within the time of 24 hours thus securing a speedy trial. In the case of C.B.I v. Anupam J. Kulkarni 854 the Supreme Court laid down the extensive guidelines that should be followed while making arrest of an accused person when under some circumstances investigation cannot be done within 14 hours. The court also held that production before magistrate within 24 hours is mandatory and from these the magistrate has the sole authority of extending the period of detention which will in not be more than 15 days. After this period ends the next step is judicial custody.

CHAPTER V
Right to consult with a lawyer or legal aid

According to section 303 of the code the right of every arrested person to consult a legal practitioner of his choice. The right begins from the moment of arrest 855 which is the pre-trial phase. The arrestee also has the right to consult with his/her friends and relatives if they wish so 856. The consultation with the lawyer meant to protect him is to be the presence a police officer on duty but not within the range of hearing of the police 853

853 Khatri v state of Bihar 1981 C.R.L.J. 470
855 Moti Bai v state A.I.R. 1954 Raj 241
856 Francis Coralie Mullin v Administrator Union Territory of Delhi 1981 A.I.R. 746
officer. According to Article 22 (1) of the Constitution any person arrested cannot be denied the basic right to consult or to be defended in the court of law by a legal practitioner this is mandatory for a fair and just trial to happen. The reason behind recognition of this right is simple that the accused may not have the competency and skills to fight his case.

In Hussainara Khatoon v. Home Secretary, Bihar, the Supreme Court has held that it is the constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty or indigence to have free legal services provided to him by the State and the state is under constitutional duty to provide a lawyer to such person if the needs of justice is so require. If free legal services are not provided the trial may be vitiates as contravening Article 21. It was also held (per Bhagwati J) that the state cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to improving speedy trial.

CHAPTER VI
Special protection to women
Women shall not be arrested without the presence of a lady constable and further no female be arrested under sunset and Sheela Barse versus state of Maharashtra the apex code took note of the custodial violence in women lodge in police lockup and directed that there should be lockups in good localities exclusively for female suspects further the interrogation of females aspects should be carried only in presence of female police officers. Section 53(2) of the criminal code established the statutory principle that a female medical practitioner should embody medical review. Supreme court in State of Maharashtra v Christian community, welfare council held that when arresting a female accused all efforts should be made to keep a lady constable present but in the situations where the arresting officers are reasonably satisfied that any lady constable is not available or it’s not possible at the moment to secure her presence at the arrest sight and a delay can take place in investigation then the arresting officer should record these reasons and carry on with the arrest as usually made in case of arresting a man.

CHAPTER VII
Rights available to person under preventive detention
Right or safeguards available to person detained under preventive detention law [clauses 4 to 7 article 22 of the constitution] the expression preventive detention means to retain a person without trial. The purpose of preventive detention is to detain a person as a precautionary measure to prevent him or her from doing something on the apprehension that he or she is likely to do something wrong unless detained Laws governing preventive detention are follows

- a) No detention beyond three months unless such detention is approved by the advisory board.
- b) The detaining authority must communicate as soon as maybe to the detenue, the grounds for his detention.

857 Joginder Kumar v State Of U.P 1994 A.I.R. 1349,
858 Hussainara Khatoon v Home Secretary, State of Bihar 1980 S.C.C. 98
859 Sheela Barse & Ors v Union Of India & Ors J.T.1986 136
860 State of Maharashtra Vs Christian Community Welfare Council of India 2003 8 SCC 546
c) the detenue must be given the earliest opportunity of making a representation against the order of detention

d) No detention beyond maximum period prescribed under the law made by parliament under clause 7(b)

CHAPTER IX
Consequences of non-compliance with arrest provisions

A trial will not be void because the arrest provisions have not been fully followed. If the court has jurisdiction over an offense and illegality will not overthrow the courts jurisdiction to try that offence\(^\text{861}\) it will also not affect that the accused person is guilty or not guilty of the offence which he is charged however illegality or irregularity of arrest would be quite material if such person is prosecuted on a charge of resistance to or to escape lawful custody. If a public servant who has authority to make an arrest knowing the exercise that authority in contravention of law by making an illegal arrest he can be prosecuted under section 220 of IPC further if any person illegally arrest another person is punishable under section 342 IPC for wrongful confinement as illegal arrest is similar to false imprisonment and the one who makes such arrest exposes himself to a suit for damages in civil court. The provisions regarding arrest cannot be by passed by alleging that there was no arrest but only informal retention by police\(^\text{862}\)

CHAPTER X
Safeguard against custodial torture

Torture is the systematic deliberate infliction of acute pain in any form by one person to another. Experts in Supreme Court observed custodial violence (torture, rape or death) in police custody or lock up is a matter of deep concern it infringes article 21 of the constitution as well as the basic human rights. In 2008 (c.r.p.c amendment) a new section been inserted to take care of custodial torture to some extent. Section 55A (health and safety of arrested person) stipulates that it is the duty of person having the custody of an to take reasonable care of health and safety of the accused thus making it obligatory on the part of police having custody of the accused to take care of the health and safety of those arrested.

CHAPTER XI
Conclusion

The constitution states that the rights of accused are fundamental rights. Fundamental rights are considered to be basic and should be provided to all despite of them being incarcerated. These rights are well stipulates and elucidated on the paper but when it comes to the ground the reality seems to be extremely altered than what is written in the constitution. The police deployed to protect the society is often the one that destroys our faith in the system. Even those accused do not cease to be the citizens of our country and are still a part of the society that the police is deployed to protect. It is also clear that the police also use their power to undermine the people caught and use their fear to coerce cash. There are constant accounts of custodial abuse that Convience the deprivation of the captured individuals fundamental rights has turned out to be common these days. It is police responsibility to protect the rights of society. It is still the duty of the police to secure the privileges of the captured person. There is an urgent need to make reforms in the Criminal Justice System such that the

\(^{861}\) Prabhu v emperor A.I.R. 1944 Mad 369

\(^{862}\) Queen-Empress vs Gobardhan (1887) I.L.R. 9 All 528
state can understand that its primary responsibility is not to prosecute but to socialize and improve the wrongdoer and, above all, it should be clearly recognized that socialization is not synonymous with incarceration, as it requires prevention, education, treatment and rehabilitation in the sense of social security. Furthermore, in the light of the regulations mentioned, a police officer must ensure that handcuffs are not inappropriately used, that the accused is not inappropriately threatened, that the detained person is made aware of the reasons for his detention, that he is notified of his right to bail and, of course, that he is brought before a Magistrate within 24 hours of his detention.

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ANTI-TORTURE LAW- A COMPELLING NEED FOR STANDALONE LEGISLATION IN INDIA

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ABSTRACT:
Torture has been practiced as a potent means of criminal investigation in India. Though there are honourable exceptions, the police and the paramilitary forces resort to this barbaric practice, thwarting the criminal justice system and undermining the rule of law. The authors have provided a brief history of custodial torture and its existence in India. The authors have analysed the significant attempt that the Supreme Court of India has made to curb this barbaric practice. A brief study of the International conventions relating to torture has been made. The recommendations made by the Law Commission and the Parliament’s attempt to enact an Anti-Torture law have been discussed. The authors have concluded that the enacting of Anti-torture law can make a worthwhile difference in tackling one of the major issues of policing in India.

INTRODUCTION:
The paradigm of Criminal Justice Administration is dynamically altering its facets which ultimately resulted in the evolution of three essential principles that forms the pillars of the modern criminal justice administration. The foremost principle is the essence of legality wherein the criminals are treated equally irrespective of their wealth or repute. The next principle is that the stakeholders involved in the process must be treated with due respect, be it the accused or the victim or the witness at both procedural and substantive levels. The third principle is the quintessence of quality in the criminal justice which mandates the presence of certain minimum standards that should be followed in various criminal processes such as independence and impartiality of judiciary, an open court trial, unconstrained access to legal counsel, right to be released on bail and speedy trial.\(^{863}\) In spite of incorporating such core principles, the criminal justice administration yet delivers injustice, the reason for which is identified to be the cruel act of torture inflicted by one of its agencies upon the persons who are detained in prisons. Out of the all human rights violations, custodial torture forms a serious form of human rights violation and the same is performed by the State machinery, which is constituted for the purpose of guarding the human rights. The present day irony is that, the custodial torture is being seen as a common practice by police during investigation rather than a human rights violation which it actually is. This paper focuses upon the immoral illegality of custodial torture and discusses about the pressing demand for an Anti-Torture Law in India.

CUSTODIAL TORTURE-AN AGE-OLD PHENOMENON:
India is boasting as an effective upholder of the fundamental rights of its citizens, but the evil of custodial torture has been in practice for decades now, to which there is no effective legislation to curb. The malevolence of custodial torture intensified

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\(^{863}\) Pandey BB. India-Pre-trial Detention Law and Practice, in Frieder Dunkel and Jon Vagg (eds.), Waiting for Trial, 1994, 303-333
and was noted widely during the period of emergency in India. The country witnessed various violations in the custody, yet remained silent as its hands were tied down by the strings of emergency. The death of P.Rajan a student of Engineering, who was arrested by the police alleging naxal association and was later, killed due to torture inflicted by the police upon him hinted the atrocities of the State machinery. What instigated more shock waves was when the police denied arresting him. But after years of struggle, the victim’s father brought out the truth that Rajan was brutally murdered in the custody and his body was disposed off by the police which couldn’t be found till date. While the nation perceived that the police tortured only men in custody, the Mathura rape case wherein a young tribal girl was raped in custody by two police men proved the perception otherwise and revealed that the police are not having any moralities within themselves as they voluntarily plunder the human rights of the victims. The factum that the police are acting without any conscience was proved when Bhagalpur Blinding Case was reported, in which the police had poured acid into the eyes of the hardened criminals with an intention to discipline them. Even after four decades of such cruelty, when the justice system is bragging that every victim is delivered justice, the custodial torture has proven itself to be a never ending saga. The statistics that 1,727 persons died in police custody between 2001 and 2018, out of which only 26 policemen were convicted imbibes shock waves in the minds of the citizens. More recently in the times of this pandemic, the southern part of the country witnessed a ravishing incident where a father and son were beaten to death in the police custody for a sole of reason of them opening their shop beyond the curfew hours. The arrest was made on June 19, and the next day the father and son duo were admitted in the hospital with severe wounds wherein it was found out that the father’s dhoti and the son’s pant were fully soaked with blood. After two days of agony the son passed away, and his father passed away the very next day. The chronology of these events articulates the change in attitude of the state machinery wherein in the initial phase atrocities were committed upon individuals who were criminals, but in the subsequent phase the victims were tortured due to political pressure and the recent phase is that torture is inflicted upon the victim irrespective of the fact that whether the person committed the crime or not.

APEX COURT ON TORTURE:
The Hon’ble Supreme Court has condemned the brutality of the police in custody in various circumstances and has laid down that the police is not a judicial body to decide whether an accused is guilty or not and it has absolutely no right to inflict pain upon the persons in custody under the guise of delivering justice. The Apex Court in the case of Kishore Singh v. State of Rajasthan has held that the use of third degree methods is violative of Article 21 of the Constitution and that the State must Re-educate the police force out of their sadistic arts and inculcate respect for humans. While expressing the fervour for the betterment for the persons suffering from police brutality the Apex court in the case of State of Uttar Pradesh v. Ram Sagar Yadav recommended for an amendment to the Law of Evidence to place the burden

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864 Tukaram and Others v State of Maharashtra, AIR 1979 SC 185
865 Khatri (IV) v State of Bihar, AIR 1981 SC 1068.
866 Kishore Singh v. State of Rajasthan AIR 1981 SC 625
867 State of Uttar Pradesh v. Ram Sagar Yadav 1985 SCR (2) 621
of proof on police in cases of police brutality and custodial violence. In the historic case of *Shri D.K. Basu vs State Of West Bengal*868, the Apex Court observed that custodial violence, including torture and death in the lock ups, stroke a blow at the Rule of Law, which demanded that the powers of the executive should not only be derived from law but also that the same should be limited by law. The Bench further expressed its astonishment that the cruelty is committed by persons who are supposed to be the protectors of the citizen under the shield of uniform and authority in the four walls of a police station or lock-up and the victim being totally helpless in that situation. In addition to which the Apex Court also issued guidelines which have to be followed while arresting a person. The guidelines mandated medical examination of the arrestee ever 48 hours during detention by an approved doctor and the presence of a very minute injury was to be recorded. Though the guidelines were ordered to be displayed in every police station and were required to be followed by the State machinery, yet the custodial atrocities have not been destroyed, perhaps practiced more intensely than before. This cast light upon the fact that, this ruthless practice cannot be destroyed by mere guidelines as the same has fallen in deaf years; all it needs is an enactment to terminate the same.

**UN CONVENTION AGAINST TORTURE:**

Article 2 of The United Nations Convention against Torture, 1984 (UNCAT) imposes a duty on the states to take effective administrative, legislative, judicial and other necessary measures to prevent acts of torture in any territory under its Jurisdiction.869 The Article also emphasizes the fact that an order from a superior officer or public authority cannot be invoked as a justification of torture.870 The Convention also calls upon the State to ensure that all acts of tortures are offences under its criminal law. Article 5 of the UDHR871 and Article 7 of the ICCPR872 states that no one shall be subjected to torture, cruel inhuman or degrading treatment or punishment. India is a part of unique list of 9 countries which has the inglorious distinction for not having ratified the UN Convention against torture. The murderous police assault and brutal torture which caused the death of two innocent traders in the city of Tuticorin in Tamil Nadu underlines the urgent need to ratify the UN Convention against Torture (UNCAT) in fulfilment of its legal obligations both National and International. The

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868 D.K Basu v. State of West Bengal 1997 (1) SCC 416
Executive Committee of the Common Wealth Human rights initiative (CHRI) chaired by former Chief Information Commissioner Wajahat Habibullah issued a statement on the recent torture and deaths of 2 innocent traders in Tamil Nadu wherein he urged the Government of India to announce its commitment to UN Convention against Torture (UNCAT). The report published by the UN High Commissioner for Human Rights (OHCHR) stated that no security forces accused of torture were prosecuted in a civilian court despite such allegations emerging since early 1990’s. The report also reiterated its recommendation on Human Rights Situation in Kashmir calling upon India to ratify the UN Convention against Torture, and other cruel, inhuman or Degrading Treatment or Punishment (UNCAT) and its Operational Protocol and despite repeated calls India has not yet ratified UNCAT.

THE LAW COMMISSION’S REPORT ON TORTURE:
The 273rd Law Commission report on Torture recommended the implementation of United Nations Convention against Torture through a legislation. The report stated that the most significant reminders in the report are twofold: recognition above all the jus cogens nature of torture, that it is prohibited without any exceptions as a part of customary law; the constitutional protection under Article 21 and Article 20 (3) of the Indian Constitution. The report also acknowledges the Court’s inability to ensure prohibition of torture in everyday policing despite the attention given by it in number of cases. The report further recommended strong punitive punishments for those who indulge in torturing. A draft Prevention of Torture Bill, 2017 was also annexed to the report which provides for punishment extending up to life imprisonment and fine. The Commission also suggested a definition of Torture wide enough to include inflicting injury either intentionally or involuntarily, or even an attempt to cause such injury which will include which will include physical, psychological or mental injury. The Commission also was of the opinion that the state should own responsibility and the principle of sovereign immunity cannot override the rights assured by the Constitution. The Commission also recommended amendments to Criminal Procedure Code, 1973 and Indian Evidence Act, 1872 to accommodate provisions regarding compensation and burden of proof respectively. The 113rd Law Commission report, on injuries in police

custody also stressed on the necessity to shift the burden of proof upon the police in case of custodial deaths. The Law commission also had recommended special measures in its 135th report on custody of women in custody. Time and again the Law Commission has urged the Government of India to consider the enactment of an Anti-torture legislation in the lights of increasing custodial torture, deaths and abuse of power.

THE INADEQUACY OF THE EXISTING LEGISLATIVE PROVISIONS:
Section 26 of the Indian Evidence Act, 1872 is categorised as the mainstay principle which is said to prevent the menace of custodial violence, as there was a common perception that police used third degree methods or inflicted pain upon the body of the detained persons for recording their confession as to the commission of the crime. But this perception does not hold any good in the present day scenario wherein the state machinery is practicing custodial torture not only for the purpose of obtaining confession from the accused but also for an array of reasons including psychological factors, political pressure, work pressure, punitive violence and other such related factors. The only penal provisions castigating custodial violence that are in existence are Sections 330 and 331 of the Indian Penal Code, 1860 which again is directed towards the path of confession. Section 49 of the Code of Criminal Procedure, 1973 is the only provision which is not concerned about confession as it restrains the policemen from using more power than required to detain the accused in custody. The existing legal proscription of the use of violence in custody is proving itself derisory as it does not efficiently meet up the complex facets of the injustice imposed in the hands of the victims in the form of custodial violence, thereby compelling a separate legislation to inhibit the evil practice.

DESPERATE STIPULATION FOR ANTI-TORTURE LAW IN INDIA:
The cruel and barbaric attitude of the Indian police is not something that has suddenly come out of the blue but has been in existence since the Vedic period of Indian History. Sexually harassing women to the extent of rape has become a common and prevalent form of torture. In most of the cases crushing the testicles of the prisoners has been the approach of police towards the prisoners. The dreadful Mathura rape case, Bhagalpur blinding case, Maya Tyagi case in Baghpat and the recent murder of Jeyraj and Phenix in Tamil Nadu are shameful incidents of police atrocities which have caused a nation-wide outcry. This lingering barbaric exercise of power, despite being controlled is showing an alarming increase every year. As per the report by the National Campaign Against Torture (NCAT) the number of custodial deaths during the year 2019 remained 5 persons per day. The National Human

878Tuka Ram And Anr vs State Of Maharashtra 1979 SCR (1) 810
879Khatri And Others vs State Of Bihar &Ors,1981 SCC (1) 627
Rights Commission recorded\textsuperscript{881} a total of 1,723 deaths out of which 1,606 were in judicial custody and 117 deaths were in police custody. Apart from torturing for the purpose of extracting confession, torture is routinely done to obtain bribe from the detainees or their relatives. The NCAT report also highlighted the methods of torture practiced by the police which included hammering nails in the body, electric shock, pouring petrol in private parts, applying chilli powder in private parts, urinating in mouth, pricking needle into body, branding with hot iron rod. Moreover, the police officials in a gruesome act of barbarism kicked a pregnant woman in her belly.\textsuperscript{882} If there isn’t a proper law and if the police officers aren’t charged or convicted for police brutality they would continue to act in a demonic fashion. Policemen must know that they will go to jail and pay the ultimate price if they continue to operate in an inhumane way. When a policeman indulges in such heinous acts, he also degrades himself to the level of a criminal. He cannot furnish an argument in favour of such heinous action that it was done for the protection of society or the necessity to bring the wrongdoer to justice.

The report also stated that the Central Armed forces deployed in insurgency affected areas also involve in torture. The report further blamed the armed opposition group for brutal killings including torture and Maoists also have tortured and killed villagers suspecting them to be police informers.\textsuperscript{883} The duty of law enforcement officers is to serve mankind, safeguard lives and property, and to respect constitutional rights of all men to liberty, equality and justice however the statistics above stated clearly shows there has been a clear violation of the constitutional rights guaranteed and under Article 21 and with such violations showing an alarming increase every year it becomes absolutely necessary to enact a Legislation to combat such gross violation of human rights and abuse of power by the officials in power. Irrespective of existing laws governing the police accountability, the increase in police brutality highlights the need for the enactment of a specific law serving to the prevention of the custodial violence.

PARLIAMENT’S FAILED ATTEMPT: The absence of an anti-torture law doesn’t mean that the practice is approved by the law-making body. The malice of custodial torture has been identified as a practice which demands immediate termination by the Parliament, owing to which the Bill of prevention of torture was passed in the Parliament for the first time in 2008. However, the same got stuck in the upper House since 2010. It was then in 2016, the Bill was again called for enactment in the Apex Court. The 273\textsuperscript{rd} Law Commission in the course of the proceedings proposed the “Prevention of Torture Bill, 2017” which again felt prey to the political games. The Bill missed out certain recommendations of


the Commission such as the prescription of life imprisonment for public servants who caused the death of persons in the custody, the burden of proof on the public servants and the compensation for the victims which rather formed the core principles of the Bill. The act of making the Bill as a mere political agenda rather than enacting the same is posing a greater threat to the prevention of human rights rather the actual act itself.

THE PLAUSIBLE INCLUSIONS IN THE ANTI-TORTURE LAW:
The alarming rise in the number of custodial violations necessitates the immediate enactment of the Anti Torture law, which is merely a step away from the Prevention of Torture Bill, 2017. The Anti Torture Law whilst consisting of punitive provisions to punish the wrong-doers and containing remedial measures as to providing compensation to the victims, it should also contemplate eclectic measures to prevent the commission of the offence. The verity that most of the cases involving custodial torture and even custodial death are not reported and even if reported in certain circumstances the policemen are never convicted compels the need for preventive measures in the legislation more extensively than the penal provisions. The enactment must mandate the presence of a person appointed by the National Human Rights Commission or other incidental body during the course of arrest and investigation. In line with the Convention against Torture Initiative, the Anti Torture law must encompass the victim with the right to complain against the use of force or any form of torture in custody. The allegation must be investigated by an independent and impartial body, as the present scenario of the police investigating the complaint against police is further deteriorating the ravished self of the victims. As recommended in the Law Committee report, the statute must incorporate the provisions of imprisonment which may extend up to life imprisonment depending upon the crime and nature of the injury inflicted upon the victim. The legislation must also address the extradition provisions as extraditing criminals from foreign countries still remains a greater problem to the nation.

RECCOMENDATIONS:
- To repeal all laws promoting impunity to the police force including Section 45 and Section 197 of the Criminal Procedure Code and to amend the Human rights Protection Act, 1993 in order to bring the Armed Forces under the purview of NHRC.
- Enact a legislation which does not provide any kind of defence to those indulging in such inhumane act.
- Recognise torture as a crime distinct from custodial death and provide a separate punishment for torture under the Law that is to be enacted.
- Surprise visits to police stations and similar units by senior officers which would help in early detection of persons who are held in unauthorised custody and subjected to ill-treatment.
- The police officials should be trained in such a way that they implant the spirit of service in accordance with the rule of law.
- The behaviour and the personality traits of the candidates have to be assessed during the process of recruitment.

CONCLUSION:
The upswing in the incidents of custodial torture and subsequent deaths emphasizes the need for the enactment of Anti-Torture Law in India. Constitutionality should not be replaced with muscleularity in a democratic country like India. The existing legal provisions are certainly not enough to meet the tests of UN Convention and that is
why we have failed to live up to the expectations of the international community which emphasizes on the safeguarding of fundamental human freedom. Security concerns are often being cited to defeat humanitarian morality which is impermissible in a country that is committed to the advancement of fundamental human freedoms. Human dignity being the core constitutional value, the increase in torture and custodial deaths stresses on the compelling need for a standalone anti-torture legislation in India.

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DEMOCRACY SANS FREEDOM OF SPEECH AND EXPRESSION VIS Á VIS FREE PRESS: A STUDY OF INDIAN SCENARIO

By Mayank Singh
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ABSTRACT-
Since the time immemorial the concept of democracy is not an alien concept to Indian soil, from the ancient scriptures like Rigveda and Atharvaveda itself we have found the mention of elected Kings, council of elders, assembly of people etc. so in that way we can say that the concept of democracy was in India much prior to Greece but it further developed during the nineteenth century when we got exposure to the western culture. The freedom of press has always been the most cherished right of all the democratic countries of the world. Press brings forth the action, misdeed, lapses, failings of the government or other governing body exercising power. Thus, it has been rightly described as the Fourth Estate. Indian judiciary too has not left any stone unturned in order to maintain the freedom of press in India. But a recent trend which we can observe that now days the persons who are critical of the government is now being harassed either by Government themselves by putting charges of sedition against them or the supporter of the government calling them antinationalist and giving threats over phone call or in social media outrage and character assassination. On World Press Freedom Index 2020, the position of India is 142nd among 180 countries, North Korea Being on 180th position. This article tries to evaluate the present state and problem faced by press in disseminating the information and will also suggest the measure to ensure the freedom of press.

• INTRODUCTION-
Democracy is a kind of political arrangement where the “rule is of the people, by the people and for the people” said by Abraham Lincoln. The word “Democracy” has been derived from the Greek term “Demos” and “Kratos” in which Demos means “People” and Kratos means “Power”, so it is the “power of the people”. In democracy, it is the people with whom the ultimate power resides they either exercise it by themselves by forming a group among themselves and rule themselves by making laws, policies and by-laws. This kind of democracy is called direct democracy and this can be only practically exercisable in small fraction of people or in small countries. On the other hand, when the people do not rule themselves directly but they choose representative among themselves and then those chosen representative rules the people by making laws, by-laws, policies etc. In India, we have this kind of democracy and this is called the Indirect Democracy. The development and welfare of all its people is the focal point of the democratic type of government unlike the authoritarian or autocratic government. Every action, policies, laws etc. are to be judged on the scale of welfare the people. India is the largest democracy in the world with the lengthiest written Constitution in the world which itself declares it to be a democratic nation. Sovereignty involves an important factor in determining the democratic form of government, which means that it have total control over itself and does not get affected by external forces.

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Press on the other hand is the fourth supporting external pillar of any democratic institution. Freedom of press ensures the functioning of the democracy smoothly. Through medium of press people of democratic state remains informative of the various policies, by-laws, laws etc. of the government.

The freedom of press as defined by Lord Mansfield, “consists in printing without any license subject to the consequences of law.” Thus, it means the freedom of publishing without previous permission anything which one pleases and it not only confined to the printing of newspapers of periodicals but also circulation of pamphlets or any sort of publication contain information or opinion.

- **FREEDOM OF PRESS IN INDIA**

As discussed above the press is the fourth pillar of any democracy which ensures the smooth functioning of the government and also ensures peoples participation in the government.

In India, there is no separate provision which ensure the freedom of press in India but this freedom of press implied flows from the Article 19(1)(a) of the Constitution of India which ensures Freedom of Speech and Expression as a fundamental right. Article 19(1)(a) states as “All citizen shall have right to freedom of speech and expression”. As freedom of press emanates from the article 19(1)(a), this right is only available to citizens of India so any non-citizen cannot claim the guarantee of this constitutional provision. The freedom of press is regarded as a “species of which freedom of expression is a genus.”

Freedom of press originates from the freedom of speech and expression thus, freedom of press stands on no higher footing than that of the freedom of speech and expression of a citizen, press has got not any other privilege distinct from the freedom of speech and expression of the citizen. The Indian Press Commission has expressed that “Democracy can thrive not only under the vigilant eye of its legislature, but also under care and guidance of public opinion and the press is par excellence, the vehicle through which opinion can become articulate.”

In relation to the separate special provision regarding freedom of press the opinion has been expressed that “press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager is merely exercising the right of the expression, and therefore, no special mention is necessary of the freedom of the press.”

Again, as pointed above this freedom of press has emanated from freedom of speech and expression, thus this freedom of press is also subject to the restrictions which governs the freedom of speech and expression which are given under Article 19(2) of the Constitution. The ground on which the restriction on freedom of speech and expression or on freedom of press can be imposed are-

a. Security of the State.
b. Friendly Relation with Foreign States.
c. Public Order.
d. Decency or Morality.
e. Contempt of Court.
f. Defamation.
g. Incitement of an Offence.

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885 Lowell v Griffin, (1938) 303 US 444.
886 *Sakal Papers v Union of India*, AIR 1962 SC 305.
888 Dr. Ambedkar’s Speech in Constituent Assembly Debates, VII. 980.
h. Sovereignty and integrity of India.

- **JUDICIAL APPROACH IN MAINTAINING FREEDOM OF PRESS**

  In *Sakal Papers v Union of India*[^889], the Supreme Court held that “article 19(1)(a) guarantees not only what a person circulates but also the volume of circulation, the freedom of newspaper to publish any number of pages or to circulates it to any number of person is each an integral part of the freedom of speech and expression. A restraint placed upon either of them would be a direct infringement of the right of freedom of speech and expression. Being a restriction on Article 19(1)(a) and it was not related to any of the restriction mentioned in 19(2) thus it was invalid.”

  In *Indian Express Newspapers v Union of India*[^890], observing the utility of freedom of press the Supreme Court has held that, “the expression freedom of press has not been used in Article 19 but it has been comprehended within Article 19(1)(a). The expression means freedom from interference from authority which would have the effect of interference with the content and circulation of newspapers. There cannot be any interference with that freedom in the name of public interest. The purpose of press if to advance the public interest by publishing facts and opinion without which a democratic electorate cannot make responsible judgments. Freedom of press is the heart of social and political inter-course. It is the primary duty of the courts to uphold the freedom of the press and invalidate all laws or administrative actions which interfere with it contrary to the constitutional mandate.”[^891]

  Supreme Court in the case of *Express Newspapers v Union of India*[^892] held that a law which imposes a restriction of its circulation or imposes a pre-censorship or require the Government aid in order to survive or prevent the newspaper from being started is categorically violates Article 19(1)(a).

  In *Romesh Thapar v State of Madras*[^893], Supreme Court held that a law which imposes a ban on entry and circulation of a journal in a state is violative of freedom of press. Court further observed that the freedom of expression includes freedom of propagation which essentially includes freedom of circulation. Without circulation, freedom of publication is of no value. Thus, restrictions can only be imposed under Article 19(2).

  In *Bennet Coleman and Co. v Union of India*[^894], the validity of order which fixes the maximum number of papers to be printed in a newspaper was challenged. Supreme Court held that it is violative of the freedom of expression as the fixation of page limit will not only deprive the petitioners of their economic viability but also restrict the freedom of expression by compulsive reduction of page level entailing reduction of circulation and the area of coverage for news and views. If as a result of reduction in pages the newspaper will have to depend on advertisement as their main source of income they will be denied dissemination of news and views.

  In *M.P. Lohia v State of West Bengal*[^895], it was observed by the Supreme Court that putting a restriction on the freedom of press in case of interference in the administration of justice is neither an unreasonable

[^889]: AIR 1962 SC 305.
[^890]: (1985) 1 SCC 641.
[^891]: In *Re Harijai Singh*, AIR 1997 SC 73.
[^892]: AIR 1958 SC 578.
[^893]: AIR 1950 SC 124.
[^894]: AIR 1973 SC 106.
restriction nor it is a permissible freedom under Article 19(1)(a) of the Constitution. Again, addressing the issue of media trial the Supreme Court in Rajendra Sail v MP High Court Bar Association\(^{896}\), observed that “right of freedom of media has to be exercised responsibly and internal mechanism should be devised to prevent publications that would bring judiciary into disrepute and interfere with the administration of justice, especially since judiciary has no way of replying thereto by the very nature of its office. Proclivity to sensationalism is to be curbed in every case. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be therefore, protected.”

The question of freedom of press and right to fair trial arose in the case of Sahara India Real Estate Corp. Ltd. v Securities and Exchange Boards of India\(^ {897}\), and the Supreme Court held that in the interest of justice all the courts i.e. Supreme Court, High Courts and Civil Courts can issue prior prohibitory order restraining the publication of court proceedings in the exceptional circumstances temporarily and such powers of the courts do not violate the Freedom of press under Article 19(1)(a).

Supreme Court in an obiter of a case in Mohammad Ajmal Mohammad Amir Kasab alias ABU Mujahid v State of Maharashtra\(^ {898}\), on the act of Indian news channel reporting each and every minute detail of the operation of armed forces against the terrorist on the national television, while terrorists were hidden from security forces and having no means to know the exact plan of action of Indian armed forces and their arms and ammunition but channel showing them on minute to minute basis which in a way was helping their collaborators sitting across the border communicating the terrorist every details of action, came out to be very serious threat to the security of the nation. This act does not only make armed forces task difficult but extremely risky and dangerous. On this act of media court observed that freedom of media can be put to restriction on the violation of another person’s right to life and personal liberty given under Article 21 or putting the national security into peril can never be justified by taking the plea of freedom of speech and expression. Further observed by the court that these shots or visuals can be shown to the public after all the terrorists were neutralized or armed forces operation were over.

**CURRENT STATE OF FREEDOM OF PRESS**

The press acts as a mode of communication between the people and its Government. Press acts an additional pillar of democracy which acts outside the Government independently of any external pressure. Freedom of press is so necessary that there has been many attempt to control it from the British regime itself but even though it worked vigorously without any fear. To curb the freedom of press Britishers brought Indian Press Act 1910 and Indian Press (Emergency) Act (1931-1932). Even during the emergency period which often called as the black spot on the Indian democracy, the freedom of press was drastically curtailed. There was significant reduction in the number of information which could be disseminated, Doordarshan and All India Radio was already under the direct control of the then Government.

The importance of press can be seen on the point that it is the easiest medium through


\(^{897}\) AIR 2012 SC 3829.

\(^{898}\) AIR 2012 SC 3565.
which the common people of the country can be informed about the government and through this medium only they can share their opinion, facts, problem or views on any matter.

Today after 70 years of independence and around after 45 years of emergency proclamation we cannot say that our press is free from any external or any Governmental interference. India though being the world’s largest democracy, we have seen ample examples where we can say that holding the Government responsible is not the duty of the press. Indian media seen flattering many a times the government for every action they took whether it is for the people of against the public policy. Recent time has seen many of the journalist who have been the critical of the government being attacked by the government or the government patronized groups. Often, journalists were arrested under Sedition laws for putting any question about the capabilities of the government even though the Supreme Court has given the detailed guidelines about the use of sedition law but again it is of no use. Those journalists who have courage to speak against the government often being complained of getting threat calls, trolling on the social media and the character assassination by the media itself and in the worst scenario they were being killed.

In a recent report titled “Getting Away with Murder” on the recent attacks on reporters have got some findings which could worry an individual. In the last 2014 to 2019, in the span of five years at least 198 serious attacks on the journalist have been reported out of which 36 happened alone in 2019 and among them six were happened in the recent protest against Anti Citizenship Amendment Act.

In the famous case of killing of Gauri Lankesh in 2017 a staunch critique of right wing who was killed outside her house by a gang apparently after being inspired by a book brought forth by a right-wing institution called ‘Sanatan Sanstha’ in which the Gauri Lankesh was identified as a ‘Durjan’ (evil person). A charge sheet of 9325 pages have been submitted in 2018 naming 18 accused but even after 2-year time gap trial has not started yet.

- CONCLUSION-
Since the last seventy years of Indian independence, Indian democracy has seen many ups and downs but the role of media has been remarkable even much prior to the independence i.e. during the British regime. It can be very well said that Democracy and Freedom of press go hand in hand, if freedom of press dies then the democracy will automatically die. Freedom of press and democracy have direct nexus and it can be seen that the country with higher freedom of press have greater participation of people in its government and less corruption. Since 2003 there has been alarming reduction in ranking of India in World Press Freedom Index. People need to keep in mind that in order to have a stronger democracy there has to be a free press to great extent otherwise it will soon become an autocratic nation. The suggestive measure which can be taken into consideration for ensuring freedom of press are as follows-

1. A separate statute should be made for addressing the problem of journalist regarding threat, attack or otherwise and

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stringent laws with speedy trial should there for offences under it.
2. A separate quasi-judiciary body should be established consisting of senior journalists, bureaucrats and retired judges who keeps check on the freedom of press.
3. A journalism promotion fund should be made to encourage new journalist.
4. The Government should adhere to a self-imposed restriction upon themselves on affecting the working of free press.
5. Government should encourage the free and fair reporting.

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I. IMPACT OF COVID-19 ON ARBITRATION PROCEEDINGS; ONLINE DISPUTE RESOLUTION A WAY FORWARD

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INTRODUCTION
Coronavirus has been asserted as a global pandemic by the World Health Organization. It has impacted the lives of people all over the globe. In a way, it has put a haul in people’s life. The world is staggering under the impact of Covid-19, a global pandemic that has caused lockdowns in many countries. With the outbreak showing absolutely no signs of improving, the worldwide commotion in all aspects of life seems set to continue. The legal system of India is no different including the Alternate Dispute Resolution Mechanism for resolving disputes, which has also been adversely affected. Even post-pandemic the Indian judiciary was overburdened with a mammoth of cases, which let people reevaluate their decision of resolving their disputes via alternate dispute resolution. The process and the idea of resolving disputes were still in the development stage. The process was in the initial stages of gaining the trust of people. Then the pandemic took place. The whole country was in complete lockdown, mandating the social distancing norms, less gathering of people. Even if we keep in mind the current situation of India, it’s in the unlocking stage people have to maintain social distance. The Indian courts have started conducting the proceedings through video conferencing in order to avoid people to people contact and taking up only urgent matters. Whereas the arbitral proceeding which is usually known for their cost-effective and speedy resolutions the ongoing proceedings were abruptly stopped and so was the enforcement of arbitral awards. The basic aim of writing this paper is to express our viewpoints on how this coronavirus pandemic has impacted the arbitral proceeding and evaluating the process of online dispute resolution. A comparative study of arbitration institutions across the globe.

BACKGROUND
As, discussed previously the number of cases of COVID-19, disease which is caused by the virus named SARS-CoV-2 has been increasing globally. The Indian judiciary as well the alternate dispute resolution methods are no less impacted. The Supreme Court of India, taking suo moto cognizance of the hardships faced by litigants throughout the country, on account of the coronavirus with respect to the period of limitation under diverse laws passed an order dated March 23, 2020. It was held by the apex court that the period of limitation in all proceedings before any Court or any Tribunal would stand extended as per the order of March 15, 2020, until any further orders are passed by the court. This ensured that the ongoing proceedings are not impacted anyhow by the limitation period. The Indian Judiciary started taking up important matters via video conferencing. They even started with e-filing methods.

On the other hand, when we talk about ADR proceedings; The Indian Council of Arbitration (ICA) is an eminent arbitral institution in India directing the conduct of arbitration proceedings including international commercial arbitration. The Indian Council of Arbitration has been set up through the initiatives of the Government of India in
order to handle a variety of arbitration cases. The ICA has framed and embraced the International Commercial Arbitration Rules which administers international commercial arbitration carried out by the ICA and it serves as a model to other arbitral institutions as well.

The pending arbitration proceedings where the strict timeline period is expiring within the lockdown period as mandated by the Government of India may take a resolution to Section 29A for extension of time as and when the courts of law reopen. Further, as per the direction of the Hon'ble Supreme Court order dated March 23, 2020, which stated that the statutory timelines for filing pleadings as well as the conduct of all other proceedings would be extended and may be raised in the application for an extension being filed. This order is applicable to all Courts and Tribunals which includes also Arbitral Tribunal. Taking in mind the increasing restrictions day by day and complete lockdown in the country, some arbitral proceedings, which are of urgent nature, may be conducted virtually. Section 19 of the Arbitration & Conciliation Act, 1996 states that the Arbitral Tribunal shall not be bound by the Code of Civil Procedure, 1908 nor the Indian Evidence Act, 1872. We are aware that the parties to the arbitration proceeding or the Arbitral Tribunal may decide on the procedure to be followed in the conduct of such arbitration proceedings it is one of the advantages of the processes of ADR.

While the Arbitration & Conciliation Act, 1996 has no mention for the conduct of arbitration proceedings through video conferencing, Section 19 certainly gives power to the Arbitral Tribunal to allow the same. The Arbitral Tribunal has the power to direct the parties to the arbitration proceedings to file pleadings through electronic mail and conduct proceedings through the means of video conferences keeping in mind social distancing norms with minimal loss of productivity and conducting the proceedings with efficiency and effectiveness.

Arbitral Tribunals in order to keep up with the changing and dynamic technology and the strict statutory timelines enumerated in the Arbitration & Conciliation Act, 1996 may even resort to video conferencing in general circumstances for convenience as well as cost-effectiveness of the proceedings. This method would be a lot more successful in the long run.

THE CONCEPT OF ODR (ONLINE DISPUTE RESOLUTION)

In late 1990, when people started to use emails and started communicating through the Internet, it is that era when accessing the Internet was becoming easily available. The dispute resolution began through online mode. Online dispute resolution resolves online communication disputes and offline disputes also. ODR has a mechanism for dispute resolution which involves following steps- firstly, one party approaches an ODR firm then next step, the firm reaches out to the other party then if both parties agree to the arbitration rules, an arbiter is appointed. Further, a timestamped information is sent via Email & WhatsApp then the interaction takes place online or through telephonic conversation. Later, a verdict is given within a month.

For assisted online dispute resolution, the parties in dispute are brought together by a mediator to resolve the matter. The mediator communicates mostly through emails and the disputed parties can access each other's statements. The mediator endeavours to reach the acceptable terms
for parties by resolving their issue. Communication through videoconferencing has become a lot more convenient these days due to advanced technology.

Online Dispute Resolution, or ODR, is basically a branch of dispute resolution which performs resolution of disputes using Information and Communication Technology. It is the modern complement of Alternative Dispute Resolution (ADR) mechanisms like mediation, arbitration, negotiation, or a hybrid procedure. This evolving modern approach gives the power to disputing parties to decide how they want their disputes to be resolved, and the use of technology aids the entire process, thus making it convenient, cost-effective, speedy, effective and efficient.

ODR has wide application and can be used as a mechanism to resolve a wide variety of disputes varying from simple civil disputes to even certain compoundable criminal matters. The use of ODR in India is at an initial stage and is starting to gain reputation day by day. A collaborated reading and interpretation of the Arbitration and Conciliation Act, 1996, Information Technology Act, 2000, and Indian Evidence Act, 1872 does not only make ODR legally and technically practicable, but also helps overpower jurisdictional issues, eradicate geographical barriers, mechanize executive tasks, enrich the efficiency of professionals, promote eco-friendly processes, and finally, pass a speedy, economical and cost-effective solution to disputes.

Recently, the Supreme Court of India in a suo moto writ petition named ‘Expeditious trial of cases under Section 138 of N. I. Act, 1881’, took into consideration the observations in Meters and Instruments Private Limited and anr. v. Kanchan Mehta that

“Use of modern technology needs to be considered not only for paperless courts but also to reduce the overcrowding of courts. There appears to need to consider categories of cases that can be partly or entirely concluded "online" without the physical presence of the parties by simplifying procedures where seriously disputed questions are not required to be adjudicated.”

DISPUTE RESOLUTION METHODS

Online Dispute Resolution can be seen as an online ADR as it majorly involves the use of negotiation, mediation, or arbitration for dispute resolution.

- **Synchronous ODR** is a method of dispute resolution where the parties exchange dialogues with each other in real-time by using various video-conferencing applications, some of which would be discussed below.

- **Asynchronous form** is where communication is not conducted in real-time but via email or other such communication applications in the form of written communications.

- **Online Mediation** is coming out to be the most used form of dispute resolution. Usually, online mediation commences with an exchange of emails between parties that contain basic information about the proceedings followed by virtual meetings which would be conducted in the chat rooms.

- **Electronic Arbitration** is an underutilized method of online dispute resolution but it usually cover-up the process up to a certain extent.

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900 (2018) 1 SCC 560.
Every operable method of ODR is unique and efficient in its own way and the beauty is that it can be customized as per the needs of the parties.

In the case, *Shakti Bhog Food Ltd. v. Kola Shipping Ltd.*[^901^], it was held that communication and acceptance by telex, telegram and other modes of communication have been accepted as valid for communication.

**ODR PLATFORMS**

There has been a shift in the pattern of resolving disputes which can be established as more and more ODR platforms have become possible in the country facilitating different kinds of dispute resolution for various national and international companies. These ODR platforms accustomed to an easy process of dispute resolution by conjoining the already existing process of ADR with dynamic technology, making the process altogether feasible and time convenient.

- **Centre for Alternate Dispute Resolution Excellence** is a website based platform formed in order to conduct online dispute resolution. The basic process is First, one party approaches the platform which then in return contacts the opposite party. If both the parties acquiesce then an arbitrator is appointed and time-stamped indications are sent via e-mails or WhatsApp. Usually, in this process, the parties do not meet face to face keeping in mind the social distancing norms but they make contact electronically via video calls. The decisions/awards that are issued are legally binding given within 20-25 days of time.

- **SAMA** is another ODR platform that provides easy access to high-quality ADR service providers and gives assistance to people in order to resolve their disputes online.
- **Centre for Online Dispute Resolution** stands itself as an institution that would administer cases online end to end.
- **AGAMI** is a non-profit ODR conducting platform that seeks to form an improved system of law and justice by providing time-efficient and feasible dispute resolution methods.

**KEY CONSIDERATIONS FOR VIRTUAL HEARINGS**

1. **Developing best methods for a virtual hearing:** If managed and implemented properly and inappropriate disputes, virtual hearings can save a great amount of time and cost. As a matter of practicality and proper planning, stakeholders might think to consider the following factors while opting for virtual hearings:
   a. Achievability to organize a virtual hearing – evaluating the number of participants, the participants’ access to technology, time-zone differences, and the parties’ ability and likeliness to present their case virtually;
   b. Whether any directives or procedures (including security measures) are to be embraced;
   c. Whether there are any concerns relating to data privacy;
   d. Whether any specific communication procedure has to be followed;
   e. The procedure for the choosing of an online platform;
   f. Revisiting the appropriate timeline of the oral hearing;
   g. The order of presentation and time management between the parties;
   h. The speaking decorum (for example, identifying oneself before speaking and exploring means to ensure that participants

[^901^](2009) 2 SCC 134.
do not talk over one another for the successful conduct of the proceedings); i. The proper format for e-bundles (Submissions); j. Whether a third-party is needed to host documents; k. Predetermining the mode for taking of evidence and how objections may be made; l. Planning for session breaks; m. Whether any sort of additional services such as transcription and translation is required; n. Whether the hearing would be recorded or not; o. Planning for substitute hearing and communication arrangements in order to avoid any sort of technical issues;

In the case, *State of Maharashtra v. Dr Praful Desai*, the Supreme Court held that evidence of witness can be recorded by video conferencing and said that physical presence is not necessary.

2. The practice round: Various service providers allow arbitral participants to organize and participate in “dry runs” before the hearing day so that the users can accustom themselves with the relevant technology. A well-organized dry run will work to ensure that participants have an experience without any interruptions on the hearing day. Parties for undertaking ODR should take particular note of the following features:
   a. The audio and video quality and the tribunal’s clarity (in various hearings where factual witnesses are present the arbitrators may require an unhindered view of the witness’ location and any documents that they might be referring to);
   b. Understanding and implementation of the “break-out rooms”, common and private chat features, and understanding how and when these will be used appropriately;
   c. How parties and the tribunal will review the e-documents;
   d. Communication procedure with the moderators or third-party vendors.; e. Parties and the tribunal should consider the capability of their IT infrastructure.; f. Directing of communication to ensure that participants do not speak over each other; and
g. Lastly, the tribunal and the parties may take into consideration where situations of one or more participants (including witnesses) get disconnected from the virtual platform. If such situations arise, the tribunal may have to consider alternate resolutions such as a short break until the participant re-connects in the virtual proceedings.

3. Usage of reliable technology: Usually, most of the service providers offer a technical guide on the planning of a virtual hearing. The following checklist gives out factors that participants may consider in case they opt to hold a hearing without a service provider’s assistance:
   a. assortment of a quiet location with enough lighting; (b) good internet connectivity; (c) usage of earphones with microphones for the purpose of audio clarity; (d) muting microphones when a participant is not speaking and minimizing competing sounds such as typing as they may create issues with transcriptions and avoiding any sort of disturbance; (e) analysis all the devices; and (f) moulding for troubleshooting processes.

**ANALYSIS**

ODR is a relaxed, mouldable, and an extremely creative tool for dispute resolution which is not bound by strict rules and procedures. So it allows parties to
formulate the process of participation as per their comfort. All civil and commercial online disputes are resolved through ODR these days. There are paperless digitized proceedings. Online mediation is in its primitive stage of development, gradually due to advanced technology it will become a constructive mechanism for resolving disputes. It has become very important to introduce an efficient method for resolving online disputes as traditional methods i.e. litigation is expensive, time-consuming, and has jurisdiction problems. This form is cost-efficient as it requires a minimal cost to be paid by both parties as compared to litigation. ODR allows participation of such parties who could not attend meetings held in person due to some disability. Also, it is convenient for parties who stay in different time zones, as the online mediator allocates time to one party as per their needs without wasting the time of the other party. It is time-saving as the time spent on travel for any arbitration, mediation, or conciliation proceeding is not wasted. The technological revolution has become a part of life in the 21st century.

There are also few drawbacks to this technologically advanced mechanism. The ODR mechanism is impersonal and requires high-speed Internet connectivity for videoconferencing. It is potentially inaccessible to some individuals as some individuals are not highly computer literate. ODR is not appropriate for someone who is not comfortable with technology. The face to face interactions is better than online interactions as it eases a bond which is not facilitated online. ODR also poses a problem because it does not have any method for correction or make changes after the dispute has been resolved.

RELATIONSHIP WITH E-COMMERCE

E-commerce has given a variety of choices to Indian customers and consumers. However, E-commerce in India has given rise to disputes by consumers purchasing from e-commerce websites. E-commerce disputes arise due to misappropriate product information, defective products, and unsecured website. These problems can be avoided by spreading more digital awareness. Moreover, every customer has constitutional rights to approach the courts to resolve disputes and enforce their rights. Thus, due to the number of pending cases in the traditional court system, the customers are being deprived of their access to justice. Therefore, to satisfy the needs of consumers in the e-commerce market, ODR as a new approach to resolving online disputes has been introduced. ODR makes the law more accessible to consumers in e-commerce disputes which results in building the trust of consumers in e-commerce transactions.

RECOMMENDATIONS

- With the constantly evolving law, and its procedures there should be specific guidelines and protocol for conducting online dispute resolution
- Awareness should an integral part of conducting such methods
- It is a more substantial and cost effective tool which might have a good run in future if promoted and used appropriately

CONCLUSION

Presently, the country is facing the COVID-19 crisis due to which states are under lockdown. This situation has impacted the lifestyle and the working approach of individuals. People have started working online due to which comes online disputes, as more and more people are connected with the advanced technology. Therefore, with the new growth of e-commerce and
global transactions of consumers through the Internet, many disputes occur which involves parties from different jurisdictions. To resolve such disputes mechanisms like ODR uses techniques like arbitration, mediation, and other such methods that can be useful. The legislation related to online dispute resolution can be amended further to provide a successful ODR system, encouraging e-commerce and providing timely dispute resolution for an online consumer. Online Dispute Resolution in India is at its early stages and is gaining acceptance day-by-day.
CHILD ABUSE

By Mehak Aneja
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ABSTRACT
The aim of writing this paper is to discuss and encompasses a variety of experience that are harmful to the child and also threatening. Child abuse and neglect means physical maltreatment or sexual molestation of a child. There are different signs and symptoms of abusing a child. For example: Burns, Fear, Depression, Assault, Weight loss, Multiple bruising, Emotional abuse and Psychological abuse. Due to this child become uncooperative and have aggressive behaviour. There is change in appetite and loss of weight. Child abuse is a neglect or a harm and it happens in all ethics, income groups and cultural areas. These abuses may cause serious injury and also result in death. In India problems are coming up in the society like rape, sexual abuse, sexual harassment but the issue of child abuse is becoming vaster in society. So, in this research we will discuss or focus on child abuse concept, classification of child abuse, laws, amendments and also about the story of 12-years-old orphaned boy who was abused physically by his close relatives.

INTRODUCTION
Child abuse is defined as trauma inflicted on minor by parents or any other caregiver/caretaker, sexual abuse, non-accidental injury, emotional abuse, physical abuse. Child neglect means when parents or caretaker fails to provide basic needs to the child which are necessary and also safety neglect, educational neglect, physical neglect, intentional neglect, poisoning all these are included in child neglect. The offenders of these neglect are stepparents, foster parents, caretaker, relatives. Factors responsible for child abuse and neglect are most common factors which included alcohol abuse, drugs, poverty, economic problem, stress, unemployment, lack of family support. It is very difficult to detect a child being abused but a medical and social history may help in revealing a child being abused. It is the duty and responsibility of whole society to understand the concept of child abuse. There are different NGO’s that help in child protection and safety of children, care of children is under their care.

CASE REPORT
A boy name peter who was 12 years old was living with her maternal aunt in kenya. He went to dental hospital in october 2012 with a painful left facial swelling related to the left upper incisors. He was referred to that
Hospital for treatment from local hospital. Enquiry conducted the family history that out of three siblings he was the first born and their mother has been deceased due to HIV. The patient had no medical history and even never went to hospital. All medical examination was done and result of investigation was diagnosis of child abuse and neglect. The boy suffering from traumatic injuries. The objective of treating the boy was to eliminate the pain, infection and swelling and also to report the relevant authorities for child abuse and neglect. This story was about Kenya but there are many other countries where child abuse take place. The violence against children are very high. The research tells that there are 50% people who report for sexual violence, 31% people report for physical violence, 19% people report for educational neglect.

**CHILD ABUSE- THE CONCEPT**

- In India child abuse is extremely prevalent as well as where it is rooted in economic, social and cultural practices. All its forms and manifestation has become a global issue.
- Actual harm to a child dignity, survival, development is arising out of sexual, physical, emotional or psychological maltreatment.
- It is defined as an act, negligence and failure on the part of child, that threatens the life and development of child.
- The problem had been gone through by various government and non government organizations but they are not able to understand properly.
- Child abuse can happen anywhere in homes, school, playground, work places etc.

It is therefore become necessary to study the child abuse and its impact on the lives of children. Legal provisions are made for the protection and many polices and programmes are implemented by the government to make the better future for the new generation.

**CLASSIFICATION OF CHILD ABUSE**

There are different classification under child abuse. Child abuse remain same but the difference occurs is physical or emotional harm.

- Physical child abuse
- Emotional abuse
- Sexual abuse
- Neglect

**Physical child abuse:** physical abuse result in physical harm to body like beating, hitting, bulling, forcing child and leaving a child in an undignified posture. The intent of action can cause hurt as may also result in injuries.

**Signs of physical child abuse**

- Fearful behaviour
- Child does not interact and feel shy.
- Unexplained Bruises.

**Emotional abuse:** occurs when caregiver not responding to a child’s emotional needs and blackmailing a child. Failure to provide a supportive environment is also comprised as child emotional abuse.

**Signs of child emotional abuse**

- Excessive fear and shyness
- Behavioral changes
- Inappropriate age behaviour

**Sexual abuse:** the child is not aware about the sexual activity and an involvement of child in sexual activity does not understand what he/she is doing. Secual abuse include rape, incept, forcing, virtual sex, obscene marks, exposed to pornography.

**Signs of sexual abuse**

- Behavioral signs
- Physical signs
Neglect: child abuse and neglect can be defined as the trauma on minor which is intentional, non accidental injury by parents, caretaker. Rejection and abandonment, not providing adequate medical care, not providing adequate food or clothing to the child, failure to provide schooling and lack of emotional support and love by the family or caregiver leads to neglecting a child. Doctors and health care professionals often contract which children are abused and neglected. They play an important role in detecting child abuse and neglect. Child maltreatment has become a global issue all over the world.

Signs of neglect
- Child may appear to have bad hygiene
- It seems to be unsupervised
- There behaviour changes and behave troublesome and disruptive behaviour.

RIGHTS OF CHILDREN UNDER LAW
In India there is large number of population and large number of child population which are being abused, exploit and neglected. This information is obtained from the NCRB which maintain crime data. Thus data maintain by NCRB shows us that the record of crime which is maintained is registered only under Indian Penal Code or other criminal Act. Other punishment like child pornography, exposure etc. are not maintained in NCRB because they are not offences under India Penal Code. Provision for rights of children under law is given under constitution, DPSP (Directive principles of state policy, Indian Penal Code, POSCO Act, Juvenile justice (care and protection children Act, 2000).

The constitution of India provide right to protection to children. It guarantees in Article 15 about special attention to children and special laws/rules/policies made for safeguard their rights. India has committed to protect, secure safe and well being of all the citizens including childrens. Article 14, 15, 15(3), 19(1)(a), 21, 21(a), 23 tells us about the right to equality, protection of life, personal liberty, discrimination, special provision for women and children and so on.903

Directive principle of state policy (DPSP): DPSP include Article 39(e), 39(f), 45 which directs the state to ensure that children are provided with opportunities and facilities. It also ensures about the care and education of children.904

903 Article 14 of the Constitution of India reads as under: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

Article 15 secures the citizens from every sort of discrimination by the State, on the grounds of religion, race, caste, sex or place of birth or any of them. However, this Article does not prevent the State from making any special provisions for women or children.

Article 19(1)(a) to freedom of speech and expression.

Article 21 Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 21(a) The State shall provide free and compulsory education to all children of 6 to 14 years in such manner as the State, may by law determine.”

Article 23 Prohibition of traffic in human beings and forced labour

904 Article 39(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.
Indian penal code:
IPC also include some offences like:
   a) Foeticide
   b) Infanticide
   c) Abetment of suicide
   d) Exposure and abandonment
   e) Kidnapping and abduction
   f) Selling of girls for prostitution
   g) Rape
   h) Unnatural sex

POSCO Act:
POSCO Act 2012 was enacted to provide protection of children from offences like sexual assault, sexual harassment and pornography. Safeguarding the interest of child at every stage of the judicial process. 

The Juvenile Justice (care and protection of children) Act, 2000:
This provide proper care, protection and treatment of children by accommodating to their development needs in conflict with law child , means a person who has not attain the age of 18 years and is not too mature to understand what is happening/ what is right or wrong. Child is defined under sec 2(e) of children Act, 1960 as well as under United Nation Convention on the Rights of child, 1989. The children Act 1960 was repealed earlier from Juvenile Justice 1986 which aimed at providing care, protection, treatment, development and rehabilitation to the children who are neglected. It protects the right and interest of children. In case there is any heinous crime the proper and fair administration of criminal justice is done by juvenile offenders.

IMPACT OF CHILD ABUSE
The impact of child abuse is life long. It harms their past, present and future. The victims have emotional, psychological, physical and mental impact on their lives. It does not impact only on abused child but also on the country. Sexual, physical emotional abuse and neglect are the main reasons behind the depression of children. Parents have high expectation from their children but the childrens are not able to build trust relationship with their parents from their experiences. Fear, anxiety, eating, sleeping disorders are the main impact of child abuse. Physical harm to a child result in abusing. This harm is in form of wounds, burns, marks, scratches, swelling. Child labour is also being one of the major component. Child abuse reduces the work performance and productivity. It also effects education and development.

CONCLUSION
This research paper clearly analysis that there is increase in against children. So, it is important to remind people about the child abuse and neglect because these are serious threats to a child’s healthy development. The effect of child abuse occurs on the whole nation. The growth, development, education is effected and due to this there past, present and future is destroyed. The impact of child abuse and neglect is discussed as physical, psychological, behavioral but all these terms are difficult to separate. This analyses that the India is facing a huge problem and is is necessary 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.

Section 2(e) "child" means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.
bring more knowledge about child abuse among the society. To make the institutions of child welfare more effective judicial system has to protect the interest of victim’s and society. Also, government should lay down some strict rules for the wrongdoer to provide justice to the victims.

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THE PLIGHT OF THE INDIAN JUDICIARY

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ABSTRACT

From being plundered under the Raj to being able to breathe as a Democracy and drafting a ‘magnum opus’ of a constitution, India, that is Bharat, has surely trailed a long way. However, there’s one organ of the establishment that has persisted even when atrocities lurked around the nation. That one machinery, irrespective of its correctness, has deemed to be perpetual to this country. Certainly, The Judiciary, well known as the Interpreter of the Law of the land. This justice-delivery machine not only has aspired to shield the sanctity of the legal system, but also has gained a reputation in the eyes and mind of the people it solemnly affirms to guard. The hopes and aspirations of the people are best addressed by the quality of justice that its established judiciary is capable of delivering. In order to maintain this plausibility, Its independence comes out as a prerequisite. This paper shall lay emphasis on this particular notion of ‘Independence’ that remains inseparable whenever Judiciary is to be talked about. The journey of Judiciary as an organ of our beloved democracy, the quagmire it has dwelled in, the coveting acts of its fellow organs to encroach its realm.

INTRODUCTION TO THE INDIAN JUDICIARY

India has a quasi-federal\(^{906}\) structure with 29 States further sub-divided into about 445 administrative Districts. However, The Judicial system has a unified structure, a single-integrated Judiciary; The Supreme Court, the High Courts and the lower Courts constitute this structure. This unified-pyramidal character\(^{907}\) outshines as a prominent feature of the Indian Constitution, being in contradiction to the American and Australian models. The firm stance India’s courts have taken in upholding the values enshrined in its detailed and eloquent Constitution is universally recognised. Operating in one of the world’s most populous nations, it made serious efforts to turn access to justice into a reality and provide individuals with the tools to exercise their rights more effectively.

India comprises of a pluralistic society. Such a country, being large and diverse must have a system where the local initiative and a strong centre are blended. India has thus created a federal structure with a strong central government. The existence of The Indian Constitution is rooted in its freedom struggle which aimed for not only political independence, but also for social justice and sought to bring about a socio-economic revolution with rule of law. In the constitutional scheme, the judiciary occupies a pivotal position. The judiciary is the guardian angel of the Constitution and the vehicle which would help bring about the social revolution which the Constitution strives for.

“\(\text{The judiciary was seen as an extension of the Rights, for it was the Courts that would give the Rights force, the Judiciary was to}\)"

\(^{906}\) Federal Government by K.C. Wheare, 1951

\(^{907}\) Commentary on the Constitution of India” by P.K. Majumdar, R.P. Kataria. P.1633
be an arm of the social revolution upholding the equality that Indians had longed for during colonial days, but had not gained.”  

The Constitution incorporates several provisions regarding the judiciary, which provide for:

1. The establishment of the Supreme Court of India, its constitution, organisation, constitutional jurisdiction and powers, qualifications for the appointment of judges, method of appointment, their conditions of service and security of tenure.

2. The establishment of a High Court for each state or for two or more states, its constitution, organisation, constitutional jurisdiction and powers, qualifications for appointment of judges, method of appointment, their conditions of service and security of tenure.

3. The vesting of effective administrative control in the High Court, over the subordinate judiciary, and in the matter of recruitment of personnel to the judicial services.

The Supreme Court as the highest court of the country came into existence on the 26th January 1950, i.e. the date of commencement of the Constitution. Under the Constitution, the SC is the highest court of civil and criminal appeal and is also vested with original and advisory jurisdiction. The Court occupies a most vital and exalted position under the constitutional set-up, entrusted with the power to interpret and finally decide on all matters and disputes pertaining to the state, its various organs and the people of India. Further, its decision is binding on all courts throughout India. The High Court established for each state or groups of states, in relation to that territory, constitutes the highest Court of Civil and Criminal Appeal, review and revision. The Court is also invested with original jurisdiction to issue prerogative writs for enforcement of rights given to individuals under the Constitution and the laws.

India practices constitutional governance by rule of law. Be it legislature, executive or judiciary; all are the brainchild of the Constitution of India, 1950. In this democratic arena, the judiciary happens to be an impartial umpire that resolves conflicts within the boundaries demarcated by a Written Constitution.

“Judiciary is the one of the three wings of the State that certainly has succeeded to inherit a privileged position from the words of the Constitution and spirit of the people that is beyond the reach of the other two wings namely the executive and the legislature.”

INDEPENDENCE OF JUDICIARY

908 The Indian Constitution: Cornerstone of A Nation by Granville Austin (1999)
910 Article 214-231.
911 Article 233-237.
912 Introduction to the Law of Constitution by A.V. Dicey (1885) ; ‘The Rule of Law Doctrine’
914 ‘Judiciary still the most trusted wing”, the Hindu, May 09, 2000
915 M.C. Setalvad Memorial Lecture delivered by Hon’ble Shri R.C. Lahoti, ChiefJustice of India at The Gulmohar Hall, India Habitat Centre, Lodhi Road New Delhi On Tuesday, 22nd February, 2005
principle of the rule of law under the Constitution; it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law thereby making the rule of law meaningful and effective”.

An independent judiciary is necessary for a free society and a constitutional democracy. It ensures the rule of law and realisation of human rights and also the prosperity and stability of a society. 919 The objective of justice is deeply imbeded in the Preamble of the Constitution of India. In fact, the judiciary does not only dispense justice between one individual and the other or between one group of people and the other, it also makes justice in the controversies arising between individuals and States, also two or more States. All the above responsibilities can be discharged only when the country has an authoritative, independent and impartial judiciary. 920

Then again, making its intention more concrete about the independence of judiciary, the Court held that:

“The constitutional scheme aims at securing an independent Judiciary which is bulwark of democracy.” 921

This aspect of ‘Independence’ is not limited to the segregation of powers amidst the different organs of the life of democracy but it also plainly asserts that judges must be independent and free of their colleagues.

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917 Emphasising on the importance of judiciary in a democracy and good governance, Senior advocate of the High Court of Karnataka - S.P. Shankar.
918 1982(2) SCC 831
919 see also K. T. Shah, CONSTITUENT ASSEMBLY DEBATES, vol. VIII 218-19
and superiors in discharge of their judicial functions. The independence of the judiciary is a part and parcel of the discipline of law and of the eco-system of a constitutional state.

Independence of judiciary majorly depends on some several conditions like:

- Mode of appointment of the judges
- Security of their tenure in the office
- Adequate remuneration and privileges
- Jurisdiction of courts over all issues of judicial nature
- Principles of non-interference by other branches of government in judicial functions
- Entitlement of judges to certain fundamental freedoms
- Posting
- Promotion
- Transfer
- Immunities
- Disqualification
- Discipline and removal and court administration.

Satisfactory implementation of these conditions enables the judiciary to perform its due role in the society thus inviting public confidence in it.

And in its ultimate analysis the concept and content of independence means, jurisdiction of courts over all issues of judicial nature, principles of non-interference by other branches of government in judicial functions, entitlement of judges to certain fundamental freedoms, qualifications, selection and training of judges, their tenure, posting, promotion, transfer, immunities, privileges, disqualifications, discipline and removal and court administration.

SAFEGUARDING THE TENURE

If a judge's tenure is at the mercy of political masters, then it will have an adverse effect on the administration of justice. The things may appear good in theory, but in actual practice, it affects independence of judiciary. Judges will be hesitant to quash any illegal orders of a minister, who has exerted a prime influence in his appointment and is important for his further stay in the courts. This would mean the administration of independence of judiciary. Thus security of tenure is a sine-qua-non of judicial independence.

The judges should be removed only for gross judicial misconduct, i.e., for the most serious offence, and that to through an especially cautious procedure. We should remember that fixity of tenure which is given to judges is not for the benefit of judges but in real sense it is for the benefit of the judged.

The independence of the judiciary depends to a great extent on the security of tenure of judges. If judges tenure is uncertain or precarious it would be difficult for him to

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perform his onerous duties of his august office without fear or favour.\textsuperscript{927}

For that reason the independence is to be protected at any cost. The only way to protect judicial independence is to provide judges security of tenure. Thus, the draftsmen of the constitution allowed removal only for the most serious causes and by the strictest Procedures.

**APPOINTMENT & TRANSFER OF JUDGES**

The Judges of the Supreme Court are appointed by the President under Article 124 (2), while the Judges of the High Courts are appointed by the President under Article 217 (1) of the Constitution.

**Art 124 (2)** provides that the President shall hold consultation with such of the Judges of the Supreme Court and of the High Courts in the State as he/she may deem necessary for the purpose. **Art 217 (1)** provides that the President shall hold consultation with the Chief Justice of India, the Governor of the State, and in case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

The **transfer of Judges** from one High Court to another High Court is made by the President after consultations with the Chief Justice of India under **Article 222 (1)** of the Constitution.

The powers of the President are purely formal because in this matter he acts on the advice of the Council of Ministers. There was an apprehension that Executive may bring politics in the appointment of Judges.

The Indian Constitution, therefore, does not leave the appointment of Judges on the discretion of the Executive. The Executive under this Article is required to consult persons who are ex-hypothesis well qualified to give proper advice in matters of appointment of Judges.\textsuperscript{928}

The **appointment of judges** is the prime and foremost link in the chain of judicial reform. As The father of Public Interest Litigation of India, Justice P.N. Bhagwati would say:

“*We would rather suggest that there must be a collegium to make recommendation to the President in regard to appointment of a Supreme Court or High Court Judge. The recommending authority should be more broad based and there should be consultation with wider interests. If the collegium is composed of persons who are expected to have knowledge of the persons who may be fit for appointment on the Bench and of qualities required for appointment and this last requirement is absolutely essential — it would go a long way towards securing the right kind of Judges, who would be truly independent in the sense we have indicated above and who would invest the judicial process with significance and meaning for the deprived and exploited sections of humanity.*”

**CONSULTATION V. CONCURRENCE**: THE CONSTITUTIONAL TUG OF WAR

As per standard dictionaries, there is hardly any difference between “consultation” and “seeking opinion.”\textsuperscript{929} In fact, they are synonyms. Initially, the Court held that “the

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\textsuperscript{929} According to Black’s Law Dictionary consultation means the act of asking the advice or opinion of
word ‘consult’ implies a conference of two or more persons or, an impact, of two or more minds in respect of a topic in order to enable them to evolve a correct or at least a satisfactory solution. But the Court has ‘decided’ that they shall mean different things in law and made “consultation” equaling to “concurrence”. It does not, however imply or expressly mean that consultation has a binding effect. Justice Krishna Iyer said:

"Consultation is different from consentaneity. They may discuss but may disagree; they may confer but may not concur."

Asserting his cautious views, Ambedkar's Disclaimer on using the word “concurrence”:

"With regard to the question of the concurrence of the Chief Justice, it seems to me that those who advocate that proposition seem to rely implicitly both on the impartiality of the Chief Justice and the soundness of his judgment. I personally feel no doubt that the Chief Justice is a very eminent person. But after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and I think, to allow the Chief Justice practically a veto upon the appointment of judges is really to transfer the authority to the Chief Justice which we are not prepared to vest in the President or the Government of the day. I therefore, think that that is also a dangerous proposition."

The opinion of each of the three constitutional functionaries is entitled to equal weightage and it is not possible to say that the opinion of the Chief Justice of India must have primacy over the opinions of the other two constitutional functionaries. If primacy were to be given to the opinion of the Chief Justice of India, it would, in effect and substance, amount to concurrence, because giving primacy would mean that his opinion must prevail over that of the Chief Justice of the High Court and the Governor of the State, which means that the Central Government must accept his opinion. But as we pointed out earlier, it is only consultation and not concurrence of the Chief Justice of India that is provided in Clause (1) of Article 217.

Till 1973, the practice existed to appoint the senior most Judge of the Supreme Court as the Chief Justice of India. This practice had somehow virtually been transformed into a convention and was followed by the Executive without any exception. In 1956, the Law Commission headed by the then Attorney-General M.C. Setalvad had criticized this practice and recommended that in appointing the Chief Justice of India the experience of a person as a Judge, his administrative competence and merit should be judged and seniority should not only be the main consideration. Mr. A.N. Ray was appointed as Chief Justice of India superseding three of the senior colleagues, Justices Shelat, Hegde and Grover and eight hours after the swearing in ceremony of Mr. A.N. Ray, as the Chief Justice of India, the

someone where as concurrence means agreement or assent, Brayman A.Gamer, West Group, 7th edn.p.311,286.

930 R Pushpam v. State of Madras, (1953) 1 MLJ 88
931 Union of India v. Sankalchand Himathlal Sheth & Anr AIR 1977 SC 2328
932 Constituent Assembly Debates, 24th May, 1949; Vol. VIII
933 S.P. Gupta v. Union of India 1982(2) SCC 831 para 29
three Judges resigned from the Supreme Court. The appointment of a judge as the Chief Justice of India superseding senior Judges has been criticized as being against the judicial independence.  

Prior to 1990, there was a consensus that ‘consultation’ under Article 124(2) and Article 217 (1), did not necessarily mean ‘concurrence’. In the S.P. Gupta Vs. Union of India [1981 (Supp) SCC 87], majority took the view that the opinion of Chief Justice of India does not have primacy in the matter of appointment of Judges of the Supreme Court and the High Courts, and that the primacy lay with the Central Government.

Justice P.N. Bhagwati cautioned us by asserting:

“We can always find some reason for bending the language of the Constitution to our will, if we want, but that would be rewriting the Constitution in the guise of interpretation.”

Unmindful of his advice, this is precisely what the court went on to do a decade later in Supreme Court Advocates-on-Record Association v. Union of India  

(Second Judges case) where a majority in the 9-judge bench came to the conclusion that ‘consultation’ would mean ‘concurrence’ or ‘consent’. It was held that the appointment is ultimately an executive act, the constitutional doctrine of judicial review did not justify the primacy of the executive and that primacy of the opinion of the Chief Justice of India was essential, in view of the constitutional obligation of consultation with the Chief Justice of India.

The judgment held that such a view safeguarded the independence of the judiciary even in the appointment of Judges.

It is often mistakenly argued that such an insulated process of judicial appointment is provoked and justified by the concerns raised by the inter-institutional tussles of the Emergency period and hence by virtue of separation of powers and rule of law, the appointments model is justified. The Supreme Court by then had already widened its jurisdiction, giving substantive remedies which were legislative in nature as evident from Laxmikant Pandey v. Union of India  

or Vishaka v. State of Rajasthan. It substantively relaxed locus standi procedures, with strides of judicial activism and populist tendencies as evident in the evolution of public interest litigation through the 1980’s. Therefore, the shift from SP Gupta case to the Second Judges Case must not be misinterpreted as redemptory post-Emergency shift towards judicial independence and insulation from authoritative political influence. It was rather evidence of an active and opportunistic judiciary while weak coalition governments were in power at the Union Government.

The Supreme Court gave its Advisory Opinion on October 28, 1998 in Third (III) Judges Case [(1998) 7 SCC 739], clarifying the scope and extent of the size of the Collegium as well as the manner in which the Chief Justice of India will hold consultations with other Judges. It clarified that the Chief Justice of India will form a Collegium’ of senior most Judges for consultation regarding the appointment of

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934 (See kuldeep Nayyar, suppression of Judges; Palkhiwala, Our Constitution Defaced and Defiled; Kummarangalam Judicial appointments.)

935 (1993) 4 SCC 441

936 1984 AIR 469, 1984 SCR (2) 795

937 AIR 1997 SC 3011
Judges or transfer of Chief Justice or Judge of High Court. It also held that the opinion of the Chief Justice of India would have primacy. This judgment resulted in a Memorandum of Procedure laying down the detailed process and procedure of appointment of Judges to High Courts and the Supreme Court, which is being presently followed.

After commencement of the Constitution of India, a fresh Memorandum of Procedure (MoP) for appointment of Judges to the Supreme Court and High Courts were framed. The MoP was revised in 1971 and 1983. This was further revised in 1994 and 1998 after the Judgments in the Second and Third Judges cases respectively, with approval of Chief Justice of India and Prime Minister. Currently, all appointments to the Supreme Court and the High Courts are made as per the MoP framed pursuant to the Supreme Court Judgment of 6.10.1993 read with the advisory opinion of 28.10.1998.

In December 2015, the Supreme Court ordered the government to revamp the 1999 MoP and finalise a new one after consultations with the Chief Justice of India (CJI). The order came after the Centre, through its then-Attorney General Mukul Rohatgi, sought to draft the MoP stating that it was an administrative responsibility, which fell within the executive domain. The MoP was first drafted in June 1999 and laid down the procedure to be followed under the collegium system for appointing judges to the higher judiciary. The Centre has minimal say in such appointments.

In October 2017, a bench of justices AK Goel and U U Lalit said that though the Supreme Court fixed no time limit for the finalisation of the new MoP, the issue cannot linger on for an indefinite period. It issued a notice to the Attorney General to respond to the issue while hearing a petition of advocate RP Luthra. A Supreme Court bench of justices Sanjay Kishan Kaul and KM Joseph took cognisance of the burgeoning vacancies in high courts on December 6 last year. The bench said that as on December 1, 2019, there were only 669 judges in 25 high courts against a sanctioned strength of 1,079.938

**NJAC: A SHORT-LIVED COMMISSION**

“Wise judges never forget that the best way to sustain the dignity and status of their office is to deserve respect from the public at large by the quality of their judgments, the fearless, fairness and objectivity of their approach and by the restraint, dignity and decorum which they observe in their judicial conduct.”939

The Indian Judiciary is an anomaly. In no other country of the world is the judiciary, so insulated from the will of the executive and legislative branches, and , as an extension of this, from the will of the people. In time, this has turned the judiciary’s position as the champion of the people into something of a contradiction, as the least accountable branch of government has styled itself the most responsive to the people.

There is need for a National Judicial Commission (which is independent of the executive and the judiciary) with an

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939 Words of Justice P.B.Gajendragadkar in regards to the NJAC
investigative machinery under its control, which can investigate complaints against judges and take disciplinary action and initiate action against them. The Campaign for Judicial Accountability and Reforms calls upon all sections of society to put pressure on Parliament and the government to bring a suitable Constitutional Amendment Bill for this purpose.

There is now an imperative demand from the public that matters dealing with appointments and other misdemeanours by Higher Judiciary needs to be carried out by an Independent Body using transparent criteria, instead of the present unsatisfactory mechanism shrouded in secrecy and controlled by a small cabal. It is for this reason that National Commission to Review the Constitution headed by former Chief Justice of India Mr. Justice Venkatachaliah has also advised the constitution of a National Judicial Commission. A mechanism like a National Judicial Commission will be able to impress upon the concerned judge either to desist from such activities or rectify that office in disgrace.

In 1987, the setting up of a National Judicial Services Commission (NJSC) was recommended by the Law Commission in its 121st Report. It prescribed that the Commission must be a body of experts drawn from various interest groups in close touch with the administration of justice such as judges, lawyers, law academics and litigants and include the Chief Justice of India, the three senior most judges of the Supreme Court, three Chief Justices of High Courts according to their seniority, Minister for Law & Justice, and an outstanding legal academic.

Following this, The Constitution (67th Amendment Bill), 1990, was introduced to provide an institutional framework for a national judicial commission. The recent National Commission to Review the Working of the Constitution had suggested the establishment of a National Judicial Commission under the Constitution with the Chief Justice of India as Chairman and two senior-most judges of the Supreme Court, the Union Minister for Law and Justice, and one eminent person nominated by the President after consulting the CJI as members.

Finally, The centre proposed a body responsible for the appointments and transfers of the judges in the country that came to be known by the name of The National Judicial Appointments Commission (NJAC). The according to the NJAC, the commission would replace the old collegium system for the appointments of judges. In the proposed NJAC act, the commission would have six members — Chief Justice of India (Chairperson), two other senior judges of the Supreme Court next to the Chief Justice of India, Union Law Minister and two eminent persons chosen by the a committee formed of CJI, Prime Minister and the leader of Opposition. A five-judge bench of the Supreme Court declined to accept the National Judicial Appointments Commission (NJAC) act and the 99th Constitution Amendment act, saying its as “unconstitutional and void”.

This commission, consisting of the judicial and the executive branch, was charged with the responsibility of making recommendations or appointments of judges based on a procedure that ensures transparency and judicial independence. India follows the Judiciary-executive model of appointment. Unfortunately the
discussion on judicial independence in India has come to be understood largely in terms of non-politicization of the appointment process. To rethink the doctrine of judicial independence or separation of powers in the context of the JAC is to think of these doctrines in terms of collaborative and inter-institutional processes which are transparent and accountable. The proposed JAC Bill in India was therefore not a move back to the older executive-judiciary model but a step towards a new institutional niche, an institutionalisation of the executive-judiciary model through the JAC.

THE CONTROVERSIAL TRANSFERS: PUBLIC INTEREST OR PUNISHMENT?

The issue of transfer of High Court judges have raised numerous controversies from time to time. The framers of the constitution wanted that the transfer from one High Court to another should not be by way of punishment. They intended that this weapon should not be used to punish a judge but for public purpose and public interest. The transfers were challenged several many times on the ground of malafide intentions. Elaborating on the above mentioned contention, a few case studies make it clear as to why a transfer of a judge should unveil a reason so as to evidently showcase the public interest.

JUSTICE TAHILRAMANI

Justice Vijaya Kamlesh Tahilramani was the senior-most High Court judge in the country who decided to quit after the Supreme Court Collegium transferred her from the chartered High Court to a relatively small High Court of Meghalaya. In 1982, V. K. Tahilramani joined the Bar. She has served as a Government Pledger and Public Prosecutor for Maharashtra. She became Acting Chief Justice of Bombay High Court on 5 December 2017 and then the Chief Justice of MHC.

The collegium, headed by Chief Justice Gogoi, had recommended transfer of Justice Tahilramani, who was elevated as the Madras High Court’s Chief Justice on 8 August, to the Meghalaya High Court. Though she was due to retire from service on October 2nd, 2020, the sudden transfer to a much smaller High Court has upset her, she said at a dinner meeting. Refusing to accede her request for reconsideration of the transfer, the Supreme Court said "the Collegium has carefully gone through the representation and taken into consideration all relevant factors."

The Campaign for Judicial Accountability and Reforms condemned the decision of the Supreme Court collegium to not disclose why it recommended the transfer of Madras High Court Chief Justice Tahilramani to the Meghalaya High Court. The group urged the top court to restore the faith in the judiciary by immediately disclosing the reasons for transfer of High Court judges and resolving to disclose detailed reasons for all transfers in the future.

“It is incumbent upon the collegium to make clear the reasons for such transfer and dispel any doubts about its independence and fairness. Refusing to do so serves no institutional purpose and instead weakens the institution of the judiciary by making it less transparent.”

The transfer has provoked a barrage of criticism against the collegium and its opaque process of appointments and transfers. Tahilramani is the senior-most among the High Court judges currently
holding office. The Madras High Court is considered a prestigious court, with a long history. In terms of size, it has a sanctioned strength of 75 judges compared to just three in the Meghalaya High Court.

Over the decades, the Supreme Court has recognised the importance of judicial transfers in the High Courts and the effect that such transfers have on the administration of justice. Given the experience of the Emergency era, when transfers were used as a form of punishment by the executive, the Supreme Court, through what is now known as the “Three Judges cases”, has monopolised transfer powers in its collegium.

By law, a judicial appointment or transfer is made through orders of the President. But Article 222 of the Constitution as interpreted by the Supreme Court has put in place an implicit restriction on the President by making the concurrence of the chief justice of India a condition for the transfer. No transfer order can be issued by the President without the advice of the chief justice of India.

However, the consultative process that had been put into place to guard the judiciary against arbitrary transfers has been criticised over the years for itself becoming arbitrary.

The case of Justice Tahir Ramani fits into this framework where the public is left with no information on why the transfer was made. As a result, it is unclear why her transfer to a smaller High Court was necessary. The Supreme Court held in the 1994 case that a transfer could only be made in public interest for the better administration of justice. What was the public interest in transferring Justice Tahir Ramani to Meghalaya? The collegium resolution gives no answer. The resolution merely states that it is being done for better administration of justice.

Legal luminaries like former Madras High Court judge K Chandru have criticised Justice Tahir Ramani for resisting the transfer, arguing that no High Court is lesser than another. While this is true given that they all have similar powers under the Constitution, a transfer without delineating proper reasons has an inherent danger to be seen as a punishment.

Justice Tahir Ramani has just over a year of service left as a High Court judge. The question hangs in the air: Was it imperative to transfer her at this point?

JUSTICE JAYANT M PATEL

Justice Jayant M Patel of the Karnataka high court had resigned after the Supreme Court collegium transferred him to the Allahabad High Court. He declined his consent to be transferred and instead put in his papers. Since he holds a constitutional post, there was no question of anybody accepting or not accepting his resignation, Justice Patel said. The decision to transfer Justice Patel within 20 months of being appointed to Karnataka HC has prompted protests from lawyers at the Gujarat High Court, where he practised law and was elevated to the Bench as an additional judge in 2001.

Justice Patel would have been a relatively junior judge in the Allahabad HC. Justice Patel was the second senior-most judge in the Karnataka HC and tipped to become the chief justice after incumbent SN Mukherjee’s retirement. People familiar with the development said the SC collegium decided to transfer Justice Patel. On the Contrary, It was expected that Justice Patel will be elevated to SC in case he was not made chief justice of Karnataka.
as SC has no representation from Gujarat since Justice AR Dave demitted office.⁹⁴₀

Justice Patel was not obliged to give any reason for his resignation. He resigned, only saying that he wanted to be “relieved from the institution.” Maybe his transfer was reason enough, but was there any reason for his transfer? A judge is not a plaything nor is the process of his transfer a non-productive activity undertaken independently of rules simply for the thrill of meddling with the institution. In not citing any reason, Justice Patel pointed to the pointlessness of reasons in an area outside the boundaries of judicial freedom where private opinion, not law, humour not sense or wisdom and arbitrariness not regularity of procedure governs.

In this case, we must presume, as the Collegium of judges has decided, that for reasons unknown, the transfer was for good cause and the principle of independence of judiciary mandates we keep silent and hold our peace.

THE CYCLICAL SYNDROME OF DELAY, ARREARS & PENDENCY

The challenges and impediments suffered by the Indian Judiciary can very well be blanket-labelled as a syndrome wherein a looping-effect of delay in administration of justice, the piling arrears hindering with the procedure of courts and the pendency of cases that has left a blot of backlogs. Experiencing a docket explosion and pendency of cases doesn’t add much to the surprise as the machinery of justice is being squeezed from every side. To provide a person with a rough count, there are 60,444 cases pending in the Supreme Court, and 44.42 lakh cases in various high courts. At the district and subordinate court levels, the number of pending cases stand at a shocking 3.32 crore, as per the latest stats of 2020.⁹⁴¹

Clearing India’s huge backlog of legal cases isn’t quite tough - 6000 new judges could do it.⁹⁴² Pointing out the very issue faced in the appointment of judges and Macanulty’s calls a void which might take a year to fill up, considering the fact that it takes that much amount of time to appoint a civil judge. Ignoring the aforementioned count of appointment, it shall be apt to suffice that the number of sanctioned judges is adequate and if all the sanctioned judges were appointed, mounting pendency and huge delays would be history. There can be no excuse for keeping judicial positions vacant while the nation suffers because of this neglect. As underwhelming as it sounds, the apex court holds merely three women judges under its ambit, even in such modern times where gender diversity still prevails as a hurdle. The efficacy of Courts remain under a dark cloud of doubt when not even a single High Court or Subordinate Court in the country

⁹⁴¹ https://njdg.ecourts.gov.in/hcnjdgnew/ (Data from High Courts of Bombay, Delhi and Madhya Pradesh is not available on NJDG as these High Courts are not shifted to Case Information System NC 1.0 developed by eCommittee, Supreme Court of India.)
⁹⁴² See 245th Report, Law Commission of India - Arrears and Backlog : Creating Additional Judicial (Wo)manpower
is working at full capacity. No significant improvement in this key parameter has often been a blame aimed at the Collegium that appoints the Guardians of the judiciary. At the current “Case Clearance rate’, an assumption that has been forebode in the mind of Justice V.V. Rao is that it might take a whooping 320 years to clear the pendency of suits in India. While further stating that:

“If one considers the total pendency of cases in the Indian judicial system, every judge in the country will have an average load of about 2,147 cases.” 944

The National Judicial Data Grid (NJDG), which makes latest consolidated figures of district-wise pending cases merely a click away for litigants to keep up with this shown dramatic numbers. To blur the bifurcation between civil suits and criminal proceedings, 23,12,099 on-going cases for over 10-20 years of a bracket represent only the 6.95 per cent of the total pendency that is lurking in the subordinate courts of our country. Eventually it becomes rather easier to absorb the other statistics when one start off with the gravest of the all. Now just to put the fellow slices together to the pie, 1,12,43,801 is the count of cases that remain stagnant for about a year, 93,81,382 for over 1-3 year span and lastly, over a crore proceedings that have existed without a judgement for about 3-10 years.945 If just the numbers are being talked about for a moment, 80 per cent of the citizens of this nation would be hesitant to approach the courts, naturally. The Judicial system seems to have become irrelevant for the common citizens, and this is responsible for many ills plaguing our nation, like disrespect for law and corruption.

With the High Courts capable of housing a strength of 1079 judges, the judicial machinery settles for just 680 judges, constantly working with that inevitable burden that has accumulated over the years. The researcher would be leaning on one side if the reformatory actions aren’t highlighted that come out as a brainchild of the Law Commissions and various National Reports. From the release of ‘The Arrears Committee Report of 1949’ to the Report of Supreme Court on ‘Access to Justice’ of 2016, a lot of efforts and ideas can be witnessed but the condensing comparisons of the reports with reality surely tell us that these Judicial reforms till now have largely been piecemeal in nature. Being humbled by the notion of Justice being grated on the slate of the Preamble does not ensure its application, it is when the Cornerstones of the legal system - Independence, Fairness and Competence - blend in together, the notion can be vested with its actual meaning.

In order to catalogue every reform that has been put forward for the sole idea of covering the entire bandwidth of the Judiciary, we need to take a cursory glance at the reports that have been formulated over the years. As far as one can jog their memory, The Civil Justice Committee headed by Justice Rankin in the year 1924-25 remains at the starting line of the inception of such reforms. The reflection of what comprised this report can very well be seen in the Fourteenth Report of the Law Commission presented in 1958.


945 https://njdg.ecourts.gov.in/njdgnew/?p=main (Fresh data as of July 11th, 2020)
Eliciting its views in collaboration with the public opinion, The Commission arrived the conclusion as under:

“It was generally agreed that the Code of Civil Procedure is an exhaustive and carefully devised enactment, the provisions of which if properly and rigidly followed are designed to expedite rather than delay the disposal of cases. Delay results not from the procedure laid down by it but reasons of the non-observance of many of its important provisions, particularly those intended to expedite the disposals of proceedings.”

The report stands as the harbinger of the legal maxim Justice delayed is justice denied back in the time when our judiciary was at infancy. Bringing to limelight issues like the congestion of work at the High Court level, delays and arrears leading to miscarriage of justice and increment in the cost of litigation, etc. The major finding of the report still remains that the delay in decision of these cases is as old as the law itself. It succinctly examined the root cause of the problems that existed within the judicial realms while advertising several reforms that hold relevancy even today. Reallocation of the flux of cases from the High Courts to the lower courts seemed necessary in order to spread the workload more homogeneously. It seeks to upscale the powers at Magisterial level in order to target the congestion faced at the levels of courts above it. To deal with the arrears, which was provided with a meaning as to cases not disposed within the time limit, a certain time period was allocated to each level of Court which was to ensure the speedy disposal of cases. These aforementioned arrears were to be dealt with the aid of temporary additional courts that could serve as the handmaid of the functioning of the Judiciary. This idea was to be fuelled by a team of reserved judges driven to revamp the way things worked in the Court-house at the said time. In a nutshell, The fourteenth report can very well be summed up as the instrument of enlargement when it came to ‘Access to Justice’.

CONCLUSION

Absence of even an atom of justice is a worrying omen for the idea of a welfare state that exists in a healthy democracy. The present condition of the Judiciary in the country somehow appears to be in a sort of aestivation, a dormancy. The psychological equivalent of what lungfish do to get themselves through the dry season. A faint resentment can be witnessed in the indigent masses when it comes to acquiring their rights and claiming what’s fair, through the routes of Judiciary.

In order to ensure a robust judiciary, several facets need to be covered, hasty and imperfect legislations to be avoided, ample distribution of workload, . The crux of the idea of Rule of law lies deep within the soothing folds of Justice, which can be both seen and administered, simultaneously. Erosion of this idea has a consequential effect which dilutes the rights that are grafted with utter guarantee in the pages of our Constitution.

The need of independent judiciary is deeply rooted in the conception of written constitution. Because the written constitution is considered basic law of the Land and requires some authority to interpret it, in absence of such authority the constitution would create disorder than order in the society. Hence, independent judiciary is not only necessary but indispensable.
Prior to the Collegium era, the Supreme Court had the opportunity to address the issue of arbitrary transfers in the Sankalchand case, where the transfer of a judge from Gujarat to Andhra Pradesh was challenged. The court held there was no power to transfer out of whim, caprice or fancy of the executive. Transfer of a Judge was not to be used as a tool to “bend a judge” to the executive's way of thinking. Nor was it a punitive measure for a judge who “does not toe the line of the executive” or has fallen from its grace. Transfer was meant only to subserve public interest. And, executive intrusion in the process was taken care of through effective consultation with the Chief Justice of India, proving to be an institutional protection, straight-jacketing the exercise of the power of transfer. This consultation, to satisfy normative function, required the Chief Justice not only to collect vital information from responsible channels and directly familiarise himself with requisite data to take an action for the furtherance of public interest, especially for the cause of an efficient judicial system, but also informally ascertain from the judge concerned if he has any personal difficulty or there are any humanitarian grounds on which transfer may not be sanctioned.  

Furthermore, The collegium system prefers practising lawyers rather than appointing and promoting judges of the subordinate judiciary, which often comprises a rather diverse pool of candidates. As a result, the composition of the high courts becomes, literally, an “old boys’ club” featuring largely male, upper-caste, former practising lawyers. This culture fuses its way further into the system as this is the pool from which Supreme Court judges are drawn. Needless to say, the same judges will also find themselves within the topmost ranks of seniority in the Supreme Court, who then decide future appointments to the high courts, creating a self-perpetuating cycle of privilege. The Researcher recommends that there needs to be a shift from the seniority-based appointment practice towards a merit-based appointment. Meritorious quality of appointment is central to the aims and objectives of such legislation and this cannot be left to be stipulated by delegated legislations. Provisions asserting this may be clearly stated in the bill similar to Constitutional Reforms Act of 2005 in the United Kingdom where Section 63(2) states that the “Selection must be solely on merit.” and Section 63(3), “A person must not be selected unless the selecting body is satisfied that he is of good character.” Hence, The creation of a Judicial Appointments Commission is not a step back to the original constitutional position in the Constitution of India, 1950 but rather, a concrete opportunity to create a new participatory and transparent method of appointment to the judicial positions in line with contemporary constitutional

946 https://www.bloombergquint.com/opinion/the-collegium-should-reveal-its-reasons-for-justice-jayant-patels-transfer
design. This reform would restore parity between executive and judiciary in appointment of judges, which is constitutional and in conformity with rule of law and separation of powers.

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WOMAN DIRECTOR- A PROVISION ON PAPER OR IN PRACTICE?

By Nikita Ninad Bokil and Shiva Sah
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ABSTRACT:
Right from being the speaker of the Lok Sabha, to being the President of the country or being the managing director or CEO of multinational companies and being in head to head competition with the world leaders, women are everywhere and have shown their skills and dominance in whatever they intend to do. Right from being the first citizen of country with the most populous democracy in the world or being the Speaker of the House of People of the world’s second largest populated country or being the Chairman & CEO of the world’s leading food and beverage Company or being the Managing Director & CEO of India’s second largest bank and so on, in whichever field you can think of the Indian women have shown their skills, power and dominace. Women are no longer are inferior in any which way as compared to men and made their place in the world at par with that of men. India is no exception, and hence various new opportunities and chances are created for women to showcase their skills and talents. A recent development in the corporate world was the Companies Act, 2013 where it imposes a mandate for the companies to include at least one woman director in its Board of Directors. Intricate research on the working and implementation of such provision in the Companies Act has been made, along with the need and importance of a woman director in a company and the reasons for not finding such woman directors on board has been made in this paper. Also provisions related to role of such woman directors in a company along with their necessary qualifications and other mandates are discussed.

KEYWORDS:
WOMEN, DIRECTOR, COMPANIES ACT, SECTION 149, BOARD OF DIRECTORS, ROLE, EXAMPLES.

OBJECTIVE OF THE PAPER:
The objective of this research paper is to analyze the provisions related to women directors in the Companies Act, 2013 and research about the role, duties of such women directors and also the applicability of such provisions in the real corporate world.

METHODOLOGY:
This research paper is based on secondary data. The style of the paper is descriptive and exploratory.

INTRODUCTION:
In this progressing world, women are no longer lagging behind and neither are they dependent on men for their finances as well as basic needs. The law itself is creating many opportunities for women for them to showcase their skills, abilities and come up in the forefront. A recent example is the Companies Act, 2013, Section 149(1) which makes it mandatory for every company to have at least one-woman director on their Board of Directors. The Ministry of Corporate realizing

947 Section 149 (1) proviso 2, Companies Act, 2013
the importance of Indian women, with their environment friendly management and managerial competencies has reserved a mandatory function of female in the Board of Directors of groups in the these days notified Companies Act, 2013, which is being applicable from 01st April, 2014. With this obligatory provision for representation of ladies on the Boards, India is possibly to have greater gifted ladies on the Boards of their companies. Women empowerment is now not something where a girl can merely play a simple position in a company but have to be a phase the greater stage of selection making process. As per the accessible data, European countries lead in appointing Women as Director on a Company’s Board948. Among them, Norway stands top with 45% the place India holds only 4.7%. However, the percentage of women Directors appointed in Indian groups is predicted to increase.

STATUTORY PROVISIONS RELATED TO WOMEN DIRECTOR:

The 2nd proviso to Sub part 1 of Section 149949 of Act prescribes that such category or lessons of groups as can also be prescribed, shall have at least one woman director. This requirement is not applicable for all companies. According to Rule three of The Companies (Appointment and Qualification of Directors) Rules, 2014 the following classification of organizations shall all appoint at least one female director:

(i) each listed company;
(ii) every other public enterprise having -
(a) paid–up share capital of a hundred crore rupees or more; or (b) turnover of 300 crore rupees or more: Explanation: The paid up share capital or turnover, as the case may additionally be, appearing in the final date of cutting-edge audited monetary statements shall be taken into account. (Explanation to Rule 3 of The Companies (Appointment and Qualification of Directors) Rules, 2014. According to 1st proviso to Rule three of The Companies (Appointment and Qualification of Directors) Rules, 2014, the new corporations which will be integrated underneath Companies Act, 2013 and are blanketed in class of organizations as furnished in Rule three shall comply with such provisions inside a period of six months from the date of incorporation950. As per the Companies Act, 2013, it is mandatory to appoint at least one-woman director as a board member in sure sorts of companies. The penalty for non-compliance of provision extends to a first rate of Rs10,000 with a further nice of Rs.1000 per day if the contravention continues.

NEED OF WOMEN DIRECTORS IN A COMPANY:

More girls on board does not solely mean the mode to draw in sales and production however additionally creates some public image. It will increase monetary come

948 Siri Terjesen, Ruth Sealy &amp; Val Singh,
Women Directors on Corporate Boards: A Review and Research Agenda, 320, 320-332
949 Companies Act, 2013 Section 149(1) proviso 2

950 G.K. KOPOOR &amp; SANJAY DHAMILJIA, TAXMANN’S COMPANY LAW AND PRACTICE 435 (23 ed. Taxmann Publications (P.) Ltd.)
back likewise, rather than mere media attention. In terms monetary returns means the come back on equity (ROE) will increase. The study reveals that the board of a non-public sector company, go by an expert CEO with a combination of men and ladies, helped ROE rise by four.4% in 2014 over the last year. In distinction, an identical company with a men-only board saw its ROE rise by a mere.1.8% within the same amount. Sure alternative example s would be Chanda Kochhar, WHO heads ICICI bank and Kiran Mazumdar Shaw, director of Biocon restricted has shown a positive distinction on come back on equity. All the on top of analysis shows that there has been a rise in girls participation on the boards and additionally the highlight of the complete legislation is that gender diversity has been addressed through initiating a move towards girls on board. Failure to handle such gender diversity would cause serious economic consequences in future. What is more there ar such a big amount of countries that leave girls unrepresented, modification gets accelerated only if there's dynamism within the frame of mind of individuals. It sounds as a heat welcome by stating that “such category or categories of firms as could also be prescribed, shall have a minimum of one girls director”. These words mean to mention no restriction being obligatory in having range of girls administrators on the board. in a very country like Asian country wherever the scope for judicial proceeding is probably going to be booming within the field of company and science judicial proceeding wherever the longer term would rest, such legislation would usher in a lot of clarity in specifying the rights of various genders and thereby avoiding unamicable problems. This improves company transparency. But sure firms like RPG Enterprises Ltd, Essar cluster, Mahindra and Mahindra Ltd ar among the big conglomerates WHO ar observing tran sferral in girls from government agencies, educational and analysis establishments, non-profit organizations, and audit corporations, as most of the eligible girls within the company world ar already a part of several boards. All listed firms should have a minimum of one lady director on their board, per new company governance norms finalized by capital market regulator Securities and Exchange Board of Asian country (SEBI).

Having lady director will facilitate in some ways such as:  
- Better monetary results  
- Better diligence in deciding and risk management  
- Gender diversity act as a technique  
- Good governance  
- The maximization of company performance

After the Satyam and alternative scams like it, firms ought to rummage around for a proficient lady WHO will add worth to the corporate and are available up with new, innovative ideas and views for the businesses. firms like Mahindra and Mahindra Ltd and therefore the Essar cluster have

951 Sakshi Mittal, The Role of Women Directors in Corporate Governance, 4 NUJS L. Rev. 285 (2011), at 289
introduced lady administrators from educational & analysis establishments so they’ll add worth to their firms and work diligently. A comprehensive study was conducted by the catalyst within the year 2007 and it absolutely was terminated that prime ranking firms that had a lot of lady administrators on the board were having higher monetary performance and it may improve the gross domestic product of the country. Per the reports of Harvard Business Review in 2011 girls leaders were judged on completely different parameters and it absolutely was found that girls administrators are higher [far better] as compared to male administrators as a result of they need the standard to require initiative and perform well likewise as build better relationships.

SUCCESSFUL WOMEN DIRECTORS IN INDIA:

(1) CHANDA KOCHHAR:
Chanda Kochhar is one of the most successful woman in India and is the Managing Director and the Chief Executive Officer of the ICICI Bank. She is proved to be the brains behind removing ICICI bank during their period of crisis by suggesting and formulating strategies. Under her guidance and leadership, ICICI bank has managed to become one of the top banks in the country with the profit margins touching the sky.

(2) SHIKHA SHARMA:
The MD and the CEO of India’s third largest bank in the private sector, Shikha Sharma proves to be an inspiration and role model for all the women out there who have ambition and dream to make it big on their own. Ever since she is appointed to the post, the bank’s stock has seen to be appreciated by a phenomenal 90%. However, this not being all, Shikha Sharma is also the Chairperson of Axis Asset Management Company Limited, Chairperson of Axis Bank UK limited, Axis Capital Limited along with Axis Private Equity Limited.

(3) MALLIKA SRINIVASAN
Women are usually considered not suitable with farm equipment in India, but Mallika Srinivasan, the chairperson of Tractor and Farm Equipment (TAFE) has defied this notion. Under her effective leadership the company’s revenues went straight up from Rs. 85 crore back then; to over Rs 8,000 crore today. In an interview with Forbes India she revealed that she plans to make TAFE a $5 billion company in the next three to five years with her planning and effective management and business skills.

(4) ARUNA JAYANTHI
Aruna Jayanthi is the CEO of Capgemini India since January 2011, prior to which she worked out of Europe and North America. She is also the current Chairperson of Board of Governors of National Institute of Technology Calicut. Jayanthi is considered to be one of the most successful Indian women in the tech sector and is also an executive council member of the industry body NASSCOM.

NON COMPLIANCE TO SEC.149(1) OF COMPANIES ACT:
Even though the Companies Act clearly mentions in its section 149(1) that it is mandatory for every company to should have atleast one-woman director in its Board of Directors, but the compliance of this provision is not very much followed in
the actual corporate world. Even though the law states the compulsion to have a woman director on the board, there still are many corporate companies who have not complied with the same. According to data compiled by the market tracker known as the Prime Database from corporate governance reports filed by companies as of December 31, as many as 120 of the top 500 NSE-listed companies did not have any independent female member on their boards. The list includes at least 18 companies that are in the top 100. Last year, the Securities and Exchange Board of India asked the top 500 companies to appoint at least one woman independent Director.

Having a woman director on board tends to bring a lot of varied opinions and a different outlook and views as related to business decisions. Also it ensures gender equality and safe guards the interests of the women employees in the company by taking into considerations no ill happenings or ill treatments against them. Keeping all this into mind it is at most necessity for any corporate house to have a woman director on their board, and the laws should be made more rigid in cases where such corporate houses or companies fail to comply with such provisions which are itself mentioned in the law.

CONCLUSION AND SUGGESTIONS:

Through this article, we discussed about the provision of a woman director in the company’s Act. Be that as it may, as of April a year ago, 10 percent of the best 500 NSE-recorded organizations were not in consistence with SEBI's sex assorted variety activity. Upwards of 51 organizations were yet to select at any rate one free lady chief on their sheets, and of these, five organizations were a piece of the main 100 recorded organizations on the NSE. The idea of Women Independent Director is genuinely in the soul of accomplishing women strengthening and furthermore to acquire the truly necessary genuine autonomy and basic dynamic into the board room of the organizations. Nonetheless, the arrangement, albeit good natured, will require a significant stretch of time to be executed genuinely and in soul as examined before, it isn't just matter of enactment, yet in addition an adjustment in mentality is likewise required. This has been seen to consistently be a typical attribute in Indian industry and this is just gradually decreasing.

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DECODING THE INTERPLAY OF
STANDARD ESSENTIAL PATENTS
AND COMPETITION LAW: AN
INDIAN PERSPECTIVE

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ABSTRACT
In this article titled, ‘Decoding the Interplay of Standard Essential Patents and Competition Law: An Indian perspective’, the researcher has focused on the interesting yet complicated relationship between SEPs and Competition Law with respect to the Indian scenario. The researcher has confined the discussion to telecommunication industry owing to the fact that India’s telecom industry is second largest in the world. With the ever-increasing advancement in technological inventions coupled with the ongoing globalisation, the market has gone global. Consequently, it has become quintessential to bring a certain level of uniformity and standardisation in the technological innovations pertaining to telecommunication industry so as to ensure the interoperability and compatibility of products. The need to bring the uniformity and standardisation across a common industry, (herein Telecom industry) has led to the emergence of Standard Essential patents (SEPs). The meaning as construed from the terminology ‘Standard Essential Patents’ is a ‘patent’ i.e. an innovation which is so ‘essential’, that it is accepted as a standard to be adhered to by all the parties who are involved in the concerned sector. Thus, SEP Holder becomes the owner of this standardised patented technology and assumes market power as a reward to his R&D investment and so on. Enjoyment of monopolistic right is bestowed on the SEP Holder by virtue of Patent Law. However, there are situations wherein such dominant position in the market can be misused thereby conflicting the fundamentals of Competition Law. For this reason, the researcher has attempted to analyse whether this relationship between the two fields is in conjunction or conflict with each other.

1. INTRODUCTION
Today’s world is one which is driven by technology, innovation and thriving competition in the markets. Innovative technology is developing and evolving at an ever-increasing pace irrespective of the nature of industry. Patent Law regime sufficiently acknowledges and protects inventions pertaining to technology as well as rewards the inventor’s labour, investment, R&D by granting him monopolistic rights for a certain time period. One of the recent significant developments encompassing the field of technology and patents is Standard Essential Patents (hereinafter referred to as SEPs). In simple words, SEPs refers to patented technologies which are so essential as to serve as a standard, which need to be complied with by the various counterparts involved in the particular industry concerned. Though the SEPs are instrumental in bringing in interoperability, co-operation, consumer benefit and at times even pre-competitiveness, there is a general notion that the concept of SEPs frustrates the objectives of Competition Law.

SEPs are patent that claim technologies required to establish the standards, wherein these technologies are core technologies without any alternatives, therefore such standards have to be adhered by every product failing which such product shall be
a commercial failure. SEPs are instrumental in encouraging compatibility and interoperability across competing devices in marketplaces as well as lowering the costs of products for consumers. At the same time, SEP gives monopoly to the SEP Holder as a reward for the R&D put in by the SEP Holder to create and develop the standardised technology. On the other side of the spectrum, there exists competition law which aims to ensure a competitive environment wherein innovative technologies, products, and services are purchased, sold, traded and licensed thereof. Consequently, it is of paramount significance to understand this complex yet intricate interrelationship between SEPs and Competition Law.

2. AN ERA OF STANDARDISATION – TUSSEL WITH COMPETITION LAW?

With the advent of Standard Essential Patents (SEPs), the era of standardisation has come into picture. Through the concept of standardisation, there are certain patented technologies accepted as a standard which must be followed by similarly placed industries across a given sector. The International Organisation for Standardisation (ISO) defines a formal standard as ‘a document, established by a consensus of subject matter and approved by a recognised body that provides guidance on the design, use or performance of materials, products, processes, services, systems or persons.’ In simpler words, a standard comprises technical specifications which intends to put forth a common or standard design for any process or product. The practice of standardisation, which has rapidly grown due to industrialisation, ensures compatibility and interoperability amongst the competitive products in the global market. On account of exponential growth in inventions, it becomes quintessential to standardise certain patented technology in order to harmonise the consistency and quality of products from different manufacturers of a common industry. The standardisation is instrumental in establishing universal protocol and ensures development while enabling compatibility and interoperability. Despite the perks of standardisation, it can’t be denied that SEPs raise several concerns with respect to Competition and IP law especially in situations pertaining to FRAND Licensing, patent pools and cross-licensing. In other words, the anti-competitive connotation of SEPs is quite evident and cannot be simply ignored.

In this respect, it is essential to note that monopoly bestowed on a patent is not prima facie anti-competitive since incentivisation of invention can’t be denied as the market prices do not necessarily suffice prices incurred on R&D. However, monopoly with respect to SEPs, on account of wide acceptability and non-substitutability, confers enormous market

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955 Banerjee and Kapila(n1)
956 Tyagi and Chopra(n2)
958 Banerjee and Kapila(n1)
959 Viswanath(n5)
power which might result into abuse of power thereby exhibiting anti-competitive behaviour.\textsuperscript{960} Although the primary objective of standardisation is to establish widely-acceptable standardized technology, it might raise anti-competitive concerns since there is no alternative available to such standard.\textsuperscript{961} In the given scenario, the SEP Holder assumes a higher pedestal and a superior bargaining power to the extent that he might either refuse to license standard patented technology or claim unreasonable royalty rates. The situation takes an anti-competitive colour at this stage as the prospective licensees have an obligation to implement the standardised technology in absence of any plausible or alternative substitute for the same.

It is to be noted that while on the one hand, standardization is a significant process intended to enhance innovation among competitors and benefit all stakeholders involved while on the other hand the process has a tendency to hamper the competitive market resulting in less innovation and dwindling the economic growth.\textsuperscript{962}

3. ROLE OF STANDARD SETTING ORGANISATIONS (SSOs):

The role of SSOs is of paramount importance in the standardisation process. SSO is basically an organisation or an established group which aims to develop, coordinate, promulgating, revise, amend and other such incidental purposes in order to produce technical standards meant to meet the requirements of a wide base of affected adopters or implementors.\textsuperscript{963} There is absolutely no doubt that the SSOs play a major role in developing a standard by acknowledging SEP Holders’ patented technology, however the responsibility of choosing one standard amongst different competing technologies is a mammoth one. It is a herculean task to opt one technology as a uniform standard out of so many potential competing technologies which are equally capable of bringing similar results. Once a patented technology has been accepted as a standard, the SEP Holder gains a superior bargaining power and dominant position eventually. However, the competition concerns arise when the SEP Holder charges exorbitant royalties or doesn’t want to license the SEP in appropriate terms. Consequently, the situation amounts to abuse of dominant position which might adversely affect the healthy competition in the market forces across the industry. The potential implementors or adopters of the standard would now be under an obligation to adhere to that particular technology as it’s a minimum standard which is to be followed across the respective industry in order to sustain in the market.\textsuperscript{964}

Thus, it is to be noted, standardisation procedure of SSOs puts a SEP Holder in a dominant market position in comparison to its competitor as the patented technology has been accepted as a standard which is to

\textsuperscript{960} ibid
\textsuperscript{961} Banerjee and Kapila(n1)
\textsuperscript{963} Tyagi and Chopra(n2)
\textsuperscript{964} Arpan Banerjee, ‘Background Note: Standard Essential Patents, Innovation and Competition: Challenges in India’ (2017)7(1) IP Theory Article 1. <http://www.repository.law.indiana.edu/ipt/vol7/iss1/1> accessed 9 May 2020
be adhered by all implementors. This situation might lead to market dominance and has the tendency to be abused thereby hampering competition. However, SSOs ensure that the dominant position so attained by the SEP Holder is not abused to the detriment of the adopters or implementors. It is at this juncture that the FRAND (Fair, Reasonable and Non-Discriminatory) commitment comes in to ensure that SEP Holder’s monopolistic rights or dominant position is not exploited to the extent that competition in the market is hampered and the implementors of the standardised technology have to undergo hardships as no other alternative to the standardised technology is available.

The role of SSO’s in the standard-setting process is so significant with respect to its effect on IPR regime and competition that even WIPO in one of its report acknowledged the significance of formulation of international standards in the globalising world wherein the market is becoming more global. The report also suggested that certain regulatory mechanisms of SSOs must be chalked out so that there is enhanced accountability and accessibility of SEPs.

It is, therefore, significant to acknowledge that the SSOs can play a constructive role in balancing the competition law issues pertaining to the standardisation process as well as licensing of the standardised technology to the prospective adopters of the same. However, SSOs must have IP Policies which have the potential to bring

4. ROLE OF COMPETITION COMMISSION OF INDIA AND COURTS IN SEP RELATED DISPUTES:

The recent litigation dealing with SEP and FRAND has brought the opposing relationship between the Competition Law and Standard Essential Patents to forefront. More specifically, disputes have arisen as to what constitutes a FRAND obligation and how is it to be enforced. In India, the development and evolution of the SEP and FRAND is at a nascent stage yet and it is akin to a piece of slate ready to be chalked out in a particular way. As far as the Indian SEP-FRAND litigation is concerned, the issues pertaining to competition came to the limelight when Ericsson, which is one of the key players in global telecommunication market, brought a suit against three local Indian smartphone suppliers namely Micromax, Intex and Iball.

A common thread linking the cases is that on one hand SEP Holder (Ericsson) filed infringement suits against the implementors of concerned standardised technology while on other hand latter lodged complaints with CCI on the ground that former’s behaviour is abuse of dominant position and levelled allegations of exorbitant royalties and NDA Agreements as these raised competition concerns. The litigation brought the Competition law and Patent law at loggerheads. For instance, in the present

965 Randakevičiūtė (n10)
966 Banerjee and Kapila (n1)
967 ‘Standard Essential Patents’ (maip) <accessed 12 May 2020
968 Telefonaktiebolaget LM Ericsson v. Mercury Electronis. & Another, CS(OS)442/2013
969 Telefonaktiebolaget LM Ericsson v. Intex Technologies. (India), CS(OS) No. 1045/2014
970 Telefonaktiebolaget LM Ericsson v. M/S Best IT World (India) Private Ltd., CS(OS)2501/2015
case, Ericsson (SEP Holder) for filing an infringement suit, approached the Court under The Patents Act, 1970 while local implementors invoked the jurisdiction of CCI under The Competition Act, 2002 to bring an action against abuse of dominant position by Ericsson.

One of the most significant debate which arose in the litigation was pivoted on whether the Competition Commission has jurisdiction in relation to dealing with SEP disputes. In this regard, it is essential to note that Section 3(5) of the Competition Act provides exemption to IPR holders from the provisions of the Act, thereby granting them monopoly over its exercise. While at the same time, Section 62 of the statute provides that all the provisions contained therein are only in addition to any other law and not derogating such other law. Eventually, the Commission asserted on its jurisdiction by emphasising on its welfare legislation capacity on the basis that the aim and objective of the Commission as provided in the Preamble, concerns with protection of consumers any sort of anti-competitive behaviour and dominant position being abused.  

Consequently, while hearing the complaints of local manufacturers i.e. Micromax, Intex and Iball, CCI held that Ericsson charged exorbitant royalties from the local manufacturers and thereby violated competition laws. It also held that Ericsson’s behaviour triggered competition concerns in relation to patent holdup and royalty stacking. In a ground-breaking approach, the CCI even took upon itself the responsibility to determine the royalty rates and while doing so it became the first Competition Commission in the world to go to the extent of determining royalty rates.

However, simultaneously, Ericsson filed a writ petition in the Delhi High Court challenging the jurisdiction of CCI to initiate any proceedings with respect to the royalty claims by the SEP Holder as issues pertaining to the same would fall within the ambit of The Patents Act, 1970. Consequently, in March 2016, Delhi High Court in its judgement provided some jurisprudence on this matter. While hearing the writ petition challenging CCI’s jurisdiction, Justice Bakhru after a careful perusal gave an important finding on the issue of jurisdiction conflict of Court and CCI in relation to SEP related disputes. Emphasis was laid by the Court on the fact that both the Acts are specific statutes in their own respective fields. It also stated that nature of remedies under S 27 of Competition Act and S 84 of Patent act are sufficiently distinct in their own spheres. Consequently, Court came to the conclusion that it is not for the civil courts to look into abuse of dominance as it falls under the jurisdiction of CCI under Section 4 of Competition Act whereas it also stated that the ambit of powers of CCI is confined

971 Viswanath(n5)  
972 Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson, CaseNo. 50/2013.  
973 Intex Techs. (India) Ltd. v. Telefonaktiebolaget LM Ericsson, Case No. 76 of 2013,  6  
974 Best IT World (India) Private Ltd. v. Telefonaktiebolaget LM Ericsson, Case No. 4 of 2015  
975 Rashmi Singh and Pabitra Dutta, ‘Standard Essential Patents and FRAND Litigation’(2015) 2(7) Law Mantra < accessed on 10 May 2020  
only in relation to assessing the Anti-competitive Conduct and does not extend to determining the royalty rates.\textsuperscript{978}

Therefore, at present the CCI has the jurisdiction in so far, the investigation of the conduct and the abuse of dominance is concerned, however CCI lacks jurisdiction with respect to the royalty rates determination as it is something which falls within the domain of Court’s jurisdiction. It is safe to conclude that with more SEP- FRAND litigation coming up, there is certainly going to be greater clarity on the issue of CCI’s power with respect to SEP issues.\textsuperscript{979}

5. COMPETITION LAW CONCERNS WITH RESPECT TO SEPs:

In order to analyse the competition concerns pertaining to SEPs, the researcher has categorised competition concerns in two aspects i.e. standardisation process and Licensing.

5.1 Competition Law Concerns in the Process of Standardisation (i.e. standard setting)

5.1.1 Non-Disclosure of IP by SSOs members

As it is known, SSOs have their own IP Policies to regulate the process of standardisation. In this context, there are certain SSOs whose IP Policies mandate IP Disclosure while there are IP policies of some SSOs which doesn’t include disclosure.\textsuperscript{980} It is essential to note here that one of the primary objectives of disclosure of IP is to facilitate the SSO members to make an ideal and informed choice pertaining to the technical merit, implementation costs and availability of the prospective adopters for the given technology.\textsuperscript{981} Thus, it is possible that non-disclosure of IP might defeat the purpose of standard setting as it might exhibit anti-competitive behaviour.\textsuperscript{982}

Therefore, absence of disclosure of IP has the tendency to hamper competitiveness.

5.1.2 Selection of Technology in an anti-competitive manner

Given the enormous benefits and superior bargaining power bestowed on the owner of a standardised technology, there is a possibility that the competing dominant players might abuse the process to ensure that their technology is chosen as a standard. It is therefore, preferable that the technology must be chosen on basis of some expert opinion as an unfair selection of technology threatens healthy competition.\textsuperscript{983}

5.1.3 Refusal by SEP Holder to license on FRAND terms

Once a patent Holder’s technology is accepted as a standard, there is a probability such owner of technology might abuse his dominant position. Thus, for this reason, SSOs require the SEP Holders to license the standardised technology on FRAND terms.\textsuperscript{984} In a given

\textsuperscript{978} Anil Kumar Bhardwaj ‘IPR – SEPs and Competition: Conflicting or Complementary, (Presentation 2016, Competition Commission of India <https://www.cci.gov.in/node/2800 > accessed 12 May 2020

\textsuperscript{979} Gupta(n21)

\textsuperscript{980} ‘4 SEP Disclosure and Information Transparency,’ (National Research Council, Patent Challenges for Standard-Setting in the Global Economy: Lessons from Information and


\textsuperscript{981} ibid


\textsuperscript{983} Bhardwaj(n25)

\textsuperscript{984} Gupta(n21)
scenario, wherein SEP Holders refuses to license the standardised technology or the licensing mandate of the SSO itself is unfair, then this situation also raises concerns pertaining to competition law.985

5.2 Competition Law concerns in SEP Licensing

5.2.1 Patent Hold Up
The phenomenon is called ‘hold-up’ because in absence of any alternative to SEP, the implementors are bound to adhere to the standard of SEP Holder thereby the latter might abuse the situation by ‘holding up the implementors’. 986 As per this theory, ‘the owner of a patent on just one part of a larger product might demand a disproportionate royalty by leveraging the threat of an injunction against the manufacturer that would block the sale of the entire product.’987

Once SEP gains commercial acceptance, then it is said to be ‘locked in’. Consequently, bargaining power of SEP Holder surges so much so that the locked in SEP can be misused to claim unreasonably exorbitant royalty rates. In this respect, while dealing with the complaints lodged by Micromax and Intex, the CCI noted, ‘hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities.’988

5.2.2 Royalty Stacking
The concept of royalty stacking refers to the practice wherein each licensor claims exorbitant royalty for its component to be used in the product eventually resulting into price urge of the entire product as the royalties metaphorically gets accumulated.989 As per this concept, various SEP holders impose similar kind of royalties on their own specific components which forms part of a multi-component product thereby the royalties aggregate so much so as to exceed the total price of the resultant product itself. Consequently, royalties are stacked up together in such a way which results into unreasonable aggregate royalty.990

5.2.3 Discriminatory Practices
Discriminatory practices, in the context of SEP licensing, means unequal treatment given different licensees despite equivalent transactions. In a given scenario, if CCI is able to establish that SEP Holder has unequally treated two similarly placed implementors whether in respect of royalty rates or terms of license, then it is a case of abuse of dominance.991

Since discriminatory practices might lead to abuse of dominance, the competitive concerns arising out of such unequal treatment is quite evident.

6. CONCLUSION
A flourishing market, irrespective of the industry, is one which promotes competition amongst the various players in the market. In this respect, SEPs have assumed vital importance in the global market. SEPs are basically meant to foster

985 Bhardwaj(n25)
986 Gupta(n21)
988 Singh and Dutta(n20)
989 Hartline & Barblan(n31)
990 Singh and Dutta(n20)
compatibility and interoperability amongst the market players across a common industry thereby promoting healthy competition and innovation. As a matter of fact, standards are looked upon by the market as a springboard for building a competitive environment.\textsuperscript{992} It is, therefore, essential to understand that SEPs do not have any inherent conflict with the competition law rather it is in conjunction with it. SEP, being a patent apparently might seem to be at loggerheads with competition law but factually SEPs and Competition Law serve to work in furtherance of each other. In the view of researcher, Competition law is not meant to derogate the domain of SEPs instead it ensures that the true purpose of SEPs doesn’t get subjugated by the superior market position of the SEP Holder. Thus, Competition law essentially acts as a system of ‘check and balance’ so that SEP Holder doesn’t abuse his superior market position to the detriment of its competitors and eventually even the consumers. It is to be understood that the competition law is not per se against the monopolistic right or dominant position rather it is concerned with abuse of dominant position. The abuse of dominant position is not just going to raise concerns pertaining to competition law but it is going to adversely affect the motivation and purpose of the standardisation as well. Last but not the least, the researcher is of the opinion that competition law is quintessential to regulate the implementation of the process of standardisation and licensing of SEPs however it must be resorted in such a way that the competition and innovation exist harmoniously. As it is said, excess of everything can have detrimental effects therefore the relationship between SEPs and Competition Law must be harmoniously construed as such wherein both can cater to each other’s fundamental ideology without adversely impacting on each other’s development and evolution.

\textsuperscript{992} Telecommunication Standardization Bureau, \textit{Understanding patents, competition & standardization in an interconnected world} (2014)
LEGAL AND PRACTICAL ASPECTS OF AIRCRAFT LEASING IN INDIA

By Piyush Singh Phogat
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II. Introduction
A single wide body passenger jetliner such as Boeing 777-9, can cost up to USD 409 million. Any airline in the ever-competitive aviation industry needs a fleet of aircrafts flying to multiple destinations, however it is neither feasible nor practicable for the operator to purchase all of its aircrafts. Since the 1980s, when aircraft operating leases represented less than 5% of the overall aircraft operating market, the number of aircraft operating leases has grown significantly. Airlines have realized the advantage of aircraft leasing, adding aircraft to the current fleet for a convenient period of time, without the economic risk of aircraft ownership. Prior to the actual lease, a complicated process is enacted to make sure a lease contract satisfies both the Lessor and the airline. Over time this process has become more cumbersome and time-consuming due to the associated delivery and redelivery processes. The complexity and timespan of this process often catches airlines off-guard.

Section 3 of the Civil Aviation Requirement – Air Transport Series ‘C’ Part I defines ‘Aircraft’ Lease as defined as an agreement by a person (the lessor) to furnish an aircraft to another person (the lessee) to be used for compensation or hire purposes for a specified period or a defined number of flights. The DGCA requirements also define the ‘lessor’ as the party furnishing the aircraft under a lease.

There are different types of leases depending on the terms and conditions of the agreement. In India, like across the world, aircraft leasing is quite prevalent. There is an entire gamut of legislations, viz. Directorate General of Civil Aviation (“DGCA”), the Reserve Bank of India, Income Tax regulations, which lessors and lessees have to consider in an aircraft leasing transaction in India. Leasing agents have become a core part of the aviation industry. Leasing reduces the initial capital outlay for airlines, provides access to the latest technologies and models, and allows airlines to flex the size of their fleet to mirror demand.

III. Aircraft Leasing Scenario in India
In 2015, Boeing projected India's demand for aircraft to touch 1,740, valued at $240 billion, over the next 20 years in India. This would account for 4.3 per cent of global volumes. According to Airbus, India will be one of the top three aviation markets globally in the next 20 years. Airbus is expecting an annual growth rate of over 11 per cent for the domestic market in India over the next ten years, while the combined growth rate for domestic and international

routes would also be more than 10 per cent.\(^\text{996}\)

The aviation industry in India, as per the European aircraft manufacturer Airbus, would need around 1750 aircrafts in the next 20 years. As per another study done by Centre for Asia Pacific Aviation (CAPA, 2018a), “the number of aircrafts operating in India would exceed 5000 mark by 2050. The Indian carriers are known to have ordered a total of around 1000 aircraft which are to be delivered over the next decade”. Large numbers of these aircrafts are leased through leasing companies located offshore. The aircrafts leased through offshore lessors are valued worth more than $45 billion and is estimated to generate an annual lease revenue of $5 billion and annual tax revenue of $200 million from leasing.\(^\text{997}\)

As per Annual Report of Indigo, total lease rental payment by Indigo in FY18 was around INR 36 billion and is expected to rise to almost INR 75 billion in 2020-21. This shows that aircraft leasing industry is a huge industry and Indian carriers are incurring large dollar-denominated expenses. As a result, Indian rupee sliding against dollar will amount to large cut in net profits for the Indian Carriers.\(^\text{998}\)

### IV. Types of Leases

Aircraft leases can be effectively categorized into three categories (i) wet lease; (ii) dry lease; and (iii) damp lease on the basis on their functions, operation, duration and utility.

#### i. Wet Lease:

Also known as the ACMI (Aircraft, Crew, Maintenance, and Insurance) lease, is when essential ACMI services are also leased along with the aircraft. The salaries of the crew are to be paid by the lessor and not the lessee i.e. the company operating the aircraft. Whereas, aircraft operating charges such as cost of fuel, parking, overfly charges etc. are payable by operating airline.

A wet lease generally lasts 1–24 months. A wet lease is typically utilized during peak traffic seasons or annual heavy maintenance checks, or to initiate new routes.\(^\text{999}\)

#### ii. Dry Lease:

Unlike wet leases, a dry lease does not include crew, maintenance or insurance. A dry lease can be further classified into two (i) Operating Lease if the aircraft is leased for a short period of time and the lessee does not have the option to purchase the aircraft at the period of expiry of the lease it is termed as a finance lease. Whereas, if the aircraft is leased for a long period of time compared to its total lifetime, and the lessee has the option to purchase the aircraft it is termed as an operating lease.

#### iii. Damp Lease:

Damp lease is a form of wet lease, wherein the aircraft is leased along with its maintenance and insurance, but aircraft crew is not leased. However, an initial crew member may be provided for training the lessee’s crew. Paragraph 2.5 of DGCA Aircraft Leasing Manual defines damp lease as a ‘lease arrangement whereby a lessor provides an aircraft with partial crew to the lessee’.

### V. Civil Aviation Requirements

Paragraph 1.1 of DGCA Aircraft Leasing Manual provides that no Indian operator

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\(^\text{996}\) https://www.business-standard.com/article/companies/india-emerging-biggest-aircraft-market-115111000052_1.html

\(^\text{997}\) Pawan Kumar Chugan, ‘Aircraft Financing and Leasing in India Challenges & Opportunities’ (2019).

\(^\text{998}\) Pawan Kumar Chugan, ‘Aircraft Financing and Leasing in India Challenges & Opportunities’ (2019).

\(^\text{999}\) http://www.globalplaneseARCH.com/aircraft_leasing/definition.htm
shall take any aircraft on lease or give any aircraft on lease to a foreign operator without permission from the Director General of Civil Aviation. The guidelines under the Civil Aviation Requirements are applicable to parties involved in operational leasing agreements, including Indian Air Operator Permit/ Certificate Holders and foreign air operators.

IV.I Article 83 BIS to the Chicago Convention

Article 83 bis to the Chicago Convention imposes essential safety oversight responsibilities. Any aircraft transfer made under the said provision is to be recognised by all states which have ratified Article 83 bis. The transfer of responsibility involves functions and duties under various provisions of the Chicago Convention pertaining to the rules of the air, radio licensing, certificates of airworthiness, and personnel licences, respectively.

i. Article 12: Obligation upon every contracting state to ensure that every aircraft bearing their nationality mark, shall comply with rules and regulations with respect to the flight and manoeuvre of aircraft.

ii. Article 30: Mandatory licensing of aircraft radios by the state of registry if they are to be carried over the territory of other contracting states.

iii. Article 31: Every aircraft engaged in International navigation must be provided with a Certificate of Airworthiness issued or rendered valid by the State of Registry.

iv. Article 32: The pilot and crew of every aircraft engaged in international air navigation shall be provided with licenses and certificates of competency by the state in which the aircraft is registered. However, each contracting state reserves the right to refuse to recognize the certificates of competence given to any of its nationals by another contracting state.

IV.II Aircraft License Agreement: Article 83 BIS

Paragraph 4.2 of DGCA Aircraft Leasing Manual states that; Once it has been established that an Article 83 bis agreement is the best solution for maintaining effective airworthiness control and regulatory oversight of a particular aircraft that is subject to an international leasing arrangement, there are four mandatory components that must be addressed before an Article 83 bis agreement can come into force. These are (i) a formal agreement (ii) an exchange of letters (iii) a delegations agreement (iv) an agreement regarding airworthiness responsibilities.

VI. Leasing Procedure as per DGCA Requirements

Under Chapter 7 of the DGCA Aircraft Leasing Manual the parties to the lease agreement are mandated to make an application for approval in writing together with detailed descriptions of the party(s) responsible for the operational control and continuing airworthiness for the aircraft in the lease arrangement. DGCA may further require supplementary documents to determine the airworthiness and operations under the lease agreement.

Paragraph 9.1 of the DGCA Aircraft Leasing Manual provides that once an application is made to the Air Transport Directorate of DGCA, it may convene a meeting with the Indian operator with a view to finalising the arrangements and modalities for operation of the leased aircraft during the period of lease.
The representatives of foreign operator as well as the foreign regulatory authority may also be allowed to participate in the meeting. The Directorate General of Civil Aviation shall take a decision regarding desirability of conclusion of an agreement under Article 83 bis. Subject to the provisions and the requirements contained in chapter 7.

VII. Indian Registered Aircraft Leased to Foreign Operator

Paragraph 7.3.1 of the Civil Aviation Requirement Section 3- Air Transport Series ‘C’ Part I provides that the Indian registered owner, shall submit the following to the Directorate General of Civil Aviation; (i) a completed three sets of Aircraft Leasing, (ii) a copy of the lease agreement, and (iii) Consent of Foreign Civil Aviation Authority, at least 45 days prior to the proposed date of commencement of operations. It should be noted that the consent of the applicable foreign civil aviation authority is required before a leasing permission can be issued. Such consent should be in writing.

Paragraph 7.3.3 provides for Airworthiness Eligibility Requirements necessary to ensure the safe operation of an Indian registered aircraft by a foreign air operator: (i) Where the aircraft is to be maintained by or under the authority of the foreign air operator, the organization that will perform and certify the work must have a valid maintenance approval or equivalent document, for the aircraft type that is the subject of the leasing operation, issued by the airworthiness authority of the country of the lessee. (ii) The above approval will ensure that an evaluation of the maintenance organization has been carried out by the foreign civil aviation regulatory authority.1001

VIII. Leasing Aircraft from One Indian Operator to Another Indian Operator

The applicant shall submit to DGCA (Air Transport Directorate) the following: (i) a completed three sets of Aircraft Leasing Form, and (ii) a copy of the lease agreement, at least 45 days prior to the proposed date of commencement of operations.

The aforementioned notice period of 45 days can be waived or reduced by the authority in the following cases:

i. The aircraft which was originally intended to operate the scheduled flight is grounded for technical reasons such as maintenance, inspection, mandatory checks or for any other reason beyond the control of the operator;

ii. or operation with leased aircraft is necessitated by the fact that the existing financial lease agreement has expired, and a new financial lease agreement is yet to be concluded;

iii. or the aircraft has been leased or chartered to meet an emergency such as natural calamity, industrial unrest or any other similar situation.

Conclusion

The Indian aviation sector has undergone a rapid transformation, passenger numbers have skyrocketed over the past couple of years. In order to meet the growing market, the airliners have turned towards leasing as a mode of acquisition of aircrafts. Although, India does not have any legislation dedicated to aircraft financing, but the DGCA has come up with various

1001 Civil Aviation Requirement Section 3- Air Transport Series ‘C’ Part I
guidelines in form of Civil Aviation Requirements to ensure oversight of aircraft leasing agreements. To ensure that airworthiness and compliance the requirements provide that no Indian operator shall take any aircraft on lease or give any aircraft on lease to a foreign operator without permission from the Director General of Civil Aviation. The regulations also provide detailed requirements and authorizations in order to enable that the lease agreements are effective and beneficial for the aviation business environment.

The cost of purchasing an aircraft can be restrictive to an airline which wants to embark on or expand its fleet. Leasing enables the cost to be spread across many years and allows the operator to fly at a relatively economical price. Like in other jurisdictions, the process of aircraft leasing is fairly complex in India involving numerous paperwork.\textsuperscript{1002} The regulations also provide detailed requirements and authorizations in order to enable that the lease agreements are effective and beneficial for the aviation business environment.

Fundamental Rights are the basic bundle of natural rights that are available to each and every individual and the State is bound to provide and maintain such rights so that individuals get the freedom to enjoy their own interests. In many countries, such as the United States of America, South Africa, Canada etc. these rights are known as the ‘Bill of Rights’. The Constitution of USA was the first contemporary Constitution to incorporate and guarantee fundamental rights, and thereby made them justiciable and enforceable through the intervention of courts. Thereafter, few other countries with a written Constitution also guaranteed such rights to the individuals to keep it out of the hold of repressive governments. Various countries follow and applies the famous legal maxim ‘ubi jus ibi remedium’, which means that there can be no right without a remedy and hence, these countries provide certain remedies for enforcement of fundamental rights under their Constitution and preserve and protect the fundamental rights of individuals. This paper shall deal with a comparative study between USA, South Africa and India with respect to:

i. Which among these countries follows parliamentary sovereignty and which gives supremacy to judiciary in order to check which organ, legislative or judiciary, have been given the power to deal with the enforcement of fundamental rights of the people?

ii. What is the mechanism followed for enforcing the fundamental rights of a person and the remedies available, in case of, violation of any fundamental rights?

iii. Who has the right to approach the court, in case of, violation of any fundamental rights?

iv. Whether the enforcement of fundamental rights is suspended in case of emergency?

1. Parliamentary Sovereignty vs. Judicial Supremacy

The controversy between Parliamentary Sovereignty and Judicial Supremacy has been the concern of scholars for many years and it seems to be never ending. In USA, there have been several conflicts between the three organs of the Government but the judicial branch has risen superior in the conflict and the supremacy of the superior court is only due to the character, the purity and the industry of its judges. In one of the most significant case decided by the US Supreme Court, an Act of Congress was declared invalid by the Court and it was ruled by the Court that as the Constitution of US clearly states that it is the supreme law of the land and because it is within the scope of the judiciary to uphold the law, the courts must declare state laws and even Acts of Congress invalid when they are inconsistent with a provision of the Constitution and the same is applicable to the executive actions also.

Professor Dicey, in his book ‘The Law of The Constitution’ has observed in reference to the USA that ‘the powers of the executive are again limited by the
the Constitution are the judges\textsuperscript{1006}, therefore, 'the Bench can and must determine the limits of the authority both of the government and of the legislature.'\textsuperscript{1007} Article III Section II of the US Constitution, 1787 establishes jurisdiction of the US Supreme Court and the Court possess original jurisdiction over certain cases, such as, suits between two or more states and/or cases involving ambassadors and other public ministers, and has appellate jurisdiction on cases that involves a point of constitutional and/or federal law.\textsuperscript{1008} The decision of the Supreme Court on questions of constitutionality are final and binding for all other courts and governmental authorities, whether state or federal. Whereas, in South Africa, before 1994, Parliamentary Sovereignty was placed on a higher pedestal than the judicial supremacy because at that time, apartheid was prevalent in the country, judiciary was open to abuse by a governmental force on the said racist ideology as seen in the constitutional history of the country which reveals how a corrupt government manipulated the judiciary for achieving its ill motives and also, criticised it when it made efforts to suppress the menace of apartheid.\textsuperscript{1009} Also, in one of South Africa’s most famous constitutional cases, Chief Justice Centlivres, stated that, ‘if the provisions of a law are clear, we, as a court, are not concerned with the propriety of the legislation or policy of the legislature, our duty is to minister and interpret it as we find it.’\textsuperscript{1010} But the whole situation of parliamentary supremacy in South Africa changed after Sections 4 and 7 of 1993 Constitution came into operation and now these sections are incorporated in the current 1996 Constitution under Sections 2, 7(2) and 8(1) which denotes that the Constitution is supreme and the Bill of Rights binds all the organs of the government/state.\textsuperscript{1011} Therefore, the Constitutional Court under the South African Constitution has been given the power to deal with any constitutional matter, which includes, any issue involving the interpretation, protection or enforcement of the Constitution\textsuperscript{1012} and can also declare a law invalid, if proved to be inconsistent with any provision of the Constitution including Bill of Rights.\textsuperscript{1013}

Section 39(2) of the Constitution of South Africa, 1996, which falls under the Bill of Rights, provides for duty of the judiciary that for interpreting and developing the law, it has to promote the spirit, purport and objects of the Bill of Rights. In fact, the Constitutional Court in the case of Carmichele v Minister of Safety and Security and another (Centre for Applied

\textsuperscript{1006} ibid.
\textsuperscript{1007} ibid.
\textsuperscript{1008} United State Courts
\textsuperscript{1010} Collins v Minister of the Interior 1957 1 SA 552 (A).
\textsuperscript{1011} Prof. Francois Venter, ‘South Africa Introductory Notes’ (North-West University, Potchefstroom Campus, South Africa)
\textsuperscript{1012} Constitution of South Africa 1996, s 167(7).
\textsuperscript{1013} Constitution of South Africa 1996, s 172(1)(a).
Legal Studies Intervening\textsuperscript{1014}, held that the courts are ‘under a general duty to develop the common law when it deviates from the objectives of the country’s Bill of Rights’. The High Court of South Africa also has the power to deal with any constitutional matters, except when, (i) the Constitutional Court has agreed to hear directly; or (ii) by an Act of Parliament assigned the case to another court of a status similar to the High Court of South Africa.\textsuperscript{1015} The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless confirmed by the Constitutional Court.\textsuperscript{1016}

The Indian Constitution is a mixture of Judicial Supremacy and Parliamentary Sovereignty, wherein, the former is adapted from the American Constitution and latter from the British Constitution. The Supreme Court and High Courts has been given the power to declare any law, enactment or executive order as unconstitutional, if it infringes any provision or basic structure of the Constitution. Also, the court is bound under Article 32(2) and 226 (1) of the Constitution of India, 1950 to issue directions or orders or writs for enforcement of fundamental rights provided expressly in Part III of the Indian Constitution and the Supreme Court has also been given the power to decide what should be the appropriate remedy for enforcement of fundamental right of the petitioner.\textsuperscript{1017} On the other hand, Article 368(1) of the Constitution of India, 1950 provides the Parliament the power to amend, modify or repeal the Constitution but this power is subject to certain restrictions provided in the Constitution, such as, Article 13\textsuperscript{1018} provides that the Government of India or State Governments may not enact any legislation inconsistent with Part III of the Constitution, therefore, Parliament does not enjoy an unrestricted power of amending the Constitution. Hence, in all the three countries, USA, South Africa and India, judiciary has been given the power for enforcement of fundamental rights of its’ people and the highest court of the country has the power to enforce fundamental rights and deal with infringement matters related to the constitution. In India and South Africa, not just the highest court of the country but certain other courts of the country also have been given the power to deal with constitutional matters, including enforcement of fundamental rights but in South Africa, the powers of the other courts are restricted to the confirmation by the Constitutional Court. With respect to enforcement of fundamental rights, US Supreme Court has only Appellate jurisdiction whereas in South Africa, the Constitutional Court has both Original and Appellate jurisdiction and the Indian Constitution grants Original jurisdiction to the Supreme Court and also, the High Court in India is granted with Original jurisdiction to exercise the power to issue writs for the restoration of fundamental rights.\textsuperscript{1019}

2. Mechanism for enforcing Fundamental Rights

Any person whose fundamental rights have been violated has certain remedies available to protect them from such infringement. In USA, the person whose fundamental right is violated can approach the lower court and

\textsuperscript{1014} 2001 (4) SA 938 (CC).
\textsuperscript{1015} Constitution of South Africa 1996, s 169(1)(a)(i).
\textsuperscript{1016} Constitution of South Africa 1996, s 172(2)(a).
\textsuperscript{1017} Kanu Sanyal v District Magistrate Darjeeling (1973) 2 SCC 674,687: AIR 1973 SC 2684.
\textsuperscript{1018} Constitution of India 1950.
\textsuperscript{1019} Constitution of India 1950, Art 226.
if he is not satisfied with lower courts judgment, the aggrieved person can approach the highest court of the country, i.e., Supreme Court, for enforcement of his fundamental rights. The doctrine of incorporation is a constitutional doctrine which makes the Bill of Rights applicable to the states via Due Process clause of the Fourteenth amendment, prior to which bill of rights were only applicable to federal government. The Supreme Court has followed ‘selective incorporation’ for extending to the States almost all of the protections in the Bill of Rights, as well as other, unenumerated rights. With respect to enforcement, if a party is not satisfied by the decision of the lower court, can file a petition to the US Supreme Court asking it for grant of writ of certiorari. The court only accepts for hearing the case if it deals with any constitutional issue. With respect to writs, since the American colonists were well verse with the English common law and the use of prerogative writs by their courts, they decided to incorporate the remedy of writs in its Constitution as well. Earlier, the power of issuing writs was granted by the Congress under the Judiciary Act, 1789 to the Supreme Court and not by the Constitution, and since the Constitution is the supreme law of the land, the Court held in Marbury v. Madison\(^{1020}\), that any contradictory congressional act is without force and the power to issue writ of mandamus in the exercise of its original jurisdiction was held to be unconstitutional. Now, there is no specific provision that allows for issuance of writs; however, Article 1 Section 9(2) of the US Constitution, 1787 provides for a specific prohibition on the suspension of habeas corpus and it constitutes a civil proceeding in USA notwithstanding that the object is by means of it to obtain release from custody under a criminal prosecution.\(^{1021}\) The writs are issued both by the Supreme Court and District Courts, but the Supreme Court uses these powers only in its appellate character.\(^{1022}\) The power of the US Supreme Court to issue other types of writs is conferred and regulated by ordinary law, such as, All Writs Act , codified at US Code Title 28, Part V, §1651, which deals with issuance of writs by the Supreme Court and all the courts established by Act of Congress and this Act was a part of Judiciary Act of 1789 and the current form of the Act was passed in 1911 and has been amended several times since then. The remedy of issuing writ of habeas corpus will no be if there is another adequate remedy by appeal available but if the remedy available is not speedy and efficacious and the constitutional rights also cannot be adequately preserved, the remedy of habeas corpus can be adopted.\(^{1023}\) In South Africa, Section 167 of the Constitution, deals with the establishment of the Constitutional Court and its powers. It is the highest court in the country which deals with enforcement of fundamental rights. Ways in which a case can reach the Constitutional Court are, as the result of an appeal from a judgment of the High Court or the Supreme Court of Appeal or as an application to the Court, asking it to sit as a court of first and last instance because of the urgency of the matter or as the result of the court below declaring a piece of legislation invalid, which requires confirmation by the Constitutional Court or as a Bill of parliament asks the court to review. The court in Dudley v. City of Cape Town and Anr.,\(^{1024}\) held that the Constitutional Court

\(^{1020}\) Marbury (n 2).

\(^{1021}\) Ex parte Tom Tong 108 US 556.

\(^{1022}\) Ex parte Clarke (1879) 100 US 552.

\(^{1023}\) Re Barber 75 Fed 980.

deals with the matter of direct access to the court and the Constitution allows a person for direct access, ‘when it is in the interest of justice and with leave of the Constitutional Court.’\(^{1025}\) The cases initiates in the High court which has the power to grant various remedies and can declare legislation invalid, and then it reaches the Constitutional Court passing through the Supreme Court of Appeal. The judges of Constitutional Court judge decide if an important principle relating to the interpretation of the Constitution has been raised and examines whether there is a reasonable prospect that the appeal may succeed and, thereafter, if satisfied, will grant leave to appeal.\(^{1026}\) The writ of habeas corpus is not used in South Africa but ‘interdictum de homine libero exhibendo’ is a remedy which is equivalent to the said writ, under which a person who is arrested or detained can challenge the legality of his or her detention, and be released if it is found to be unlawful.

In India, under Article 32 and 226 of the Constitution of India, 1950, a person whose fundamental rights are violated has been given the right to approach Supreme Court or High Court for enforcement of his rights. These courts have been given the power to issue directions, orders or writs, such as, habeas corpus, mandamus, prohibition, certiorari and quo warranto for enforcement of fundamental rights against any authority in the State, when a right of an individual is infringed.\(^{1027}\) The petitioner may enforce his fundamental rights by other proceedings, such as, a declaratory suit under the ordinary law or an application under Article 226 or by way of defense to legal proceedings brought against an individual\(^{1028}\) but he also has a fundamental right to approach the Supreme Court for enforcement of his fundamental right under Article 32 as it falls under Part III of the Constitution which makes it itself a fundamental right and hence, this right of the petitioner cannot be abrogated, abridged or taken away by an Act of the legislature. An application under Article 32 of the Constitution of India, 1950 cannot be refused merely on the ground that the petitioner has another adequate legal remedy open to him, where a fundamental right appears to be infringed.\(^{1029}\) Also, the Supreme Court is given under Article 32(2) the power to decide among issuance of directions or orders or writs for enforcement of such fundamental right, what should be the appropriate remedy for enforcement of fundamental right of the petitioner.\(^{1030}\) The High Courts have been vested with the power to issue writs under Article 226 of the Constitution but this power of the High Courts is wider than the power provided to the Supreme Court because writs can be issued by the Supreme Court in case of infringement of the fundamental rights only, but High Courts have been provided with the jurisdiction to issue writs not only in such cases but also where an ordinary legal right has been infringed provided a writ is a proper remedy in such cases according to well established principles.

Therefore, the mechanism followed for enforcing the fundamental rights, is evidently quite different in the three countries. The peculiarity of Article 32(2) of Indian Constitution is that the power to issue writs is conferred by the Constitution, but the same is left with the legislature in

\(^{1025}\) Constitution of South Africa 1996, s 167.

\(^{1026}\) ibid.


\(^{1029}\) ibid.

\(^{1030}\) Kanu Sanyal (n 14).

\(^{1031}\) Constitution of India 1950.
US. The remedy of issuing writ of habeas corpus in US lies only when there is no other adequate remedy available but the same is not with India. And in all the three jurisdictions, the availability of writ of habeas corpus or interdictum de homine libero exhibendo (in case of South Africa) is entrenched in the fundamental rights or bill of rights.

3. **Locus Standi**

Since fundamental rights are basic rights available to a person, they would be meaningless if not enforced. In USA, the Fifth, Ninth and Fourteenth amendments to the Constitution grants all fundamental rights to every person and the right to enforce fundamental rights is itself a fundamental right. Therefore, whose fundamental rights have been violated have a Constitutional right to have their complaint properly considered in a reasonable and unbiased court in a timely manner and it must include the right to public trial, the right to present relevant evidence, and the right of consensual assistance of counsel of one's choice.\(^{1032}\) Any person whose fundamental rights have been infringed can only bring action before the court against such infringement.\(^{1033}\) Although, there are few circumstances under which a person other than whose fundamental rights have been directly infringed can move before the court on the latter’s behalf, such as, when as direct consequence of the infringement of another’s rights substantial economic injury is faced by the petitioner and the other person are so intertwined that unless the petitioner advocates the rights of such other person, these rights cannot be effectively vindicated \(^{1036}\) and when the one injured cannot properly bring such complaint, in case, he is denied freedom of speech or the he is a child or mentally disabled or dead or tortured.\(^{1037}\) Therefore, when someone provides legal representation to groups or individuals that have been unrepresented or under-represented in the legal process, this noble process is known as Public Interest Litigation. These include not only the poor and the disadvantaged sections, but also ordinary citizens who have lacked access to courts, administrative agencies, and other legal forums, by reason of their inability to afford lawyers to represent them.\(^{1038}\) The South African Constitution, expressly includes the persons who have a right to approach a competent court, in case, a right in the Bill of Rights has been infringed or threatened, and they are: (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.\(^{1039}\) In a case where the court rejected a public interest case seeking to enforce the right to water, Justice O’Regan recognised the important role of public interest organisations in bringing socio-economic rights litigation, ‘South Africa is fortunate to have a range of non-governmental organisations working in the legal arena seeking


\(^{1033}\) *U.S v Raines* (1960) 362 US 17 (22).


\(^{1035}\) *Grisworld v Connecticut* (1965) 381 US 479 (481).

\(^{1036}\) *NAACP v Alabama* (1958) 357 US 449.

\(^{1037}\) Fundamental Rights (n 30).

\(^{1038}\) Report By Council of Public Interest Law, USA (1976).

\(^{1039}\) Constitution of South Africa 1996, s 38.
improvement in the lives of poor South Africans. Long may that be so. These organisations have developed an expertise in litigating in the interests of the poor to the great benefit of our society. The approach to courts in constitutional matters means that litigation launched in a serious attempt to further constitutional rights, even if unsuccessful, will not result in an adverse costs order. The challenges posed by social and economic rights litigation are significant, but given the benefits that it can offer, it should be pursued.\textsuperscript{1040} In another case, Justice Sachs observed, ‘Interventions by public interest groups have led to important decisions concerning the rights of the homeless, refugees, prisoners on death row, prisoners generally, prisoners imprisoned for civil debt and the landless.’\textsuperscript{1041}

In India, any person whose fundamental rights have been infringed can move to the Supreme Court or High Court for the enforcement and protection of his fundamental rights\textsuperscript{1042} but any third person on behalf of a person whose fundamental rights have been violated can move to the court, only if the issue involved is in the public interest, therefore, in India also Supreme Court and High Courts accepts the remedy of Public Interest Litigation or also known as Social Action Litigation, where it is not necessary for the affected person to himself approach the court, a petition or a letter espousing the cause of poor which can be accepted as writ petition can be filed by a public spirited person or body or the court can even take cognizance of the matter suo moto. Justice P.N. Bhagwati, who is referred to as the Father of Public Interest Litigation in India, has stated, ‘A new dimension has been given to the doctrine of locus standi which has revolutionized the whole concept of access to justice’\textsuperscript{1043} and has also accentuated that public interest litigation is ‘a strategic arm of the legal aid movement’ which is intended to bring justice within the reach of the poor masses who constitute the low visibility area of humanity.’\textsuperscript{1044}

Therefore, in all the three countries, the person whose rights have been infringed has the locus standi to approach the court but under few circumstances a third person can approach the court on his behalf, normally by using the remedy of Public Interest Litigation. In all three democratic countries, citizens have access to justice to vindicate legal rights and the legal duties should be judicially enforced so that people feel a sense of participation.\textsuperscript{1045}

4. Suspension of enforcement of fundamental rights in case of Emergency:

State of Emergency is a situation which hinders and affects the normal functioning of a State and during such situation government performs actions differently. Government can declare such state during a disaster, civil unrest or armed conflict. The term ‘Emergency’ is not expressly mentioned in the Constitution of USA but the framers considered the question of how to deal with emergencies, or ‘exigencies’, and trusted that they had formulated a

\begin{footnotesize}
\textsuperscript{1040} Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28; 2010 (4) SA 1 (CC).
\textsuperscript{1041} [2009] ZACC 14; 2009 (6) SA 232 (CC) para 19.
\textsuperscript{1042} Constitution of India 1950, Art 32, 226.
\textsuperscript{1044} Jain (n 44).
\textsuperscript{1045} Sunita Chhabra ‘ Public Interest Litigation in India and USA a comparative study ‘ <https://shodhganga.inflibnet.ac.in/bitstream/10603/49011/9/09_chapter%204.pdf> accessed 1 October 2019.
\end{footnotesize}
document which would permit the government to do so effectively.\textsuperscript{1046} The Constitution of USA incorporates specifically English common law procedure of a suspension clause under Article 1 Section 9 clause 2, which states that, ‘the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it’, whereas there is no provision for suspension of other writs. Power of the suspension of the habeas corpus can be exercised by both, the President and Congress, but the President cannot exercise this power without express authorization of Congress.\textsuperscript{1047}

In South Africa, Section 37 of the Constitution of South Africa, 1996 deals with ‘State of Emergency’. During the state of emergency, any legislation enacted may derogate from the Bill of Rights only to the extent that- (A) the derogation is strictly required by the emergency; and (B) the legislation- (i) is consistent with the Republic’s obligations under international law applicable to states of emergency; (ii) conforms to subsection (5), and (iii) is published in the national Government Gazette as soon as reasonably possible after being enacted.\textsuperscript{1048} There are certain fundamental rights which are inviolable including amongst others the right to life and to human dignity; the prohibition of discrimination on the grounds of race, sex or religion; the prohibition of torture or inhuman punishment; and the right of accused people to a fair trial.

In India, the right to move Supreme Court for enforcement shall not suspended except as provided by the Constitution of India\textsuperscript{1049} and this exception is included in Article 359 of the Constitution of India, 1950 which deals with the suspension of the enforcement of the fundamental rights during emergencies, where the President have been given powers to declare that the right to move to the court for the enforcement of fundamental rights (except Article 20 and 21 of the Constitution) shall remain suspended for the period during which the proclamation of emergency is in force and as soon as the order cease to be operative, the infringement of any fundamental right made either by legislative enactment or by executive action can perhaps be challenged by the citizen in a court of law.\textsuperscript{1050}

Therefore, in all the three countries, fundamental rights are suspended during the emergency period but the organs of government who has the power to suspend fundamental rights are different. Under India and South Africa, there are certain rights which are inviolable in case of emergency.

CONCLUSION

In all the three jurisdictions, USA, South Africa and India, judiciary has the power to enforce the fundamental rights of a person in case of their breach or infringement and the legislature does not have any power to make a law which abrogates or violates any of these rights. The right to enforce fundamental right is itself a fundamental right in all the three countries. In India and South Africa, the procedure and mechanism to be followed for enforcing the


\textsuperscript{1047} Fisher v Baker (1906) 203 US 174.

\textsuperscript{1048} Constitution of South Africa 1996, s 37(4).

\textsuperscript{1049} Constitution of India 1950, Art 32(4).

fundamental rights of any person is expressly mentioned in their Constitutions whereas in USA the mechanism is not completely expressed in the Constitution but it has become clear only after judicial intervention. The mechanism followed in all the three countries are quite different; and the jurisdiction and procedure of the authority, i.e., the courts, enforcing the rights are also different. But in these countries the person aggrieved as well as a public-spirited person on behalf of the victim is allowed to approach the court in case of infringement of fundamental rights. During the state of emergency, fundamental rights are suspended in all the three jurisdictions, the difference being, in USA and South Africa it is not expressly mentioned in the Constitution whereas in India it is. In South Africa, the executive has the power to suspend fundamental rights during emergency whereas in USA and India, executive has the power to suspend but only after the approval of the legislature, the rights get suspended.
A SOCIO LEGAL STUDY OF MARRIED MUSLIM WOMEN IN CONTEMPORARY INDIA

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ABSTRACT
A annexure after which a man and woman officially became each other’s life partner in the eyes of law and community people and support each other within the restrictions of what has been laid down for duet in the terms of rights and obligation. The contract of Islamic marriage which has a veritable meaning of the work Nikah is the physical kinship amid man and woman, which makes the relationship legitimate. Nikah is an Arabic term used for marriage, meant discrete forms of sex relationship between a man and a women instituted on certain affair. This paper decodes that how women were demeaned as chattels, and were not given any privilege of inheritance and were thoroughly dependent. First, I exhort you about how consuetude of marriage executed from pristine period and how the mechanisms transform for execution of marriage in Muslim community. This paper assist you to understand the detailed iteration and struggle faced by the married Muslim women in the contemporary India, radix of Muslim marriage and grounds of dissolution of marriage. The prime purpose of me to do research and compose on this subject is that now regime has aroused on this significant and sedate matter and made umpteenth law to seek grievances of women and to bestow them justice from erroneous behavior of laity. After wrote this paper I got to cognize that it’s a wakeup call now that we need to change our vision for women and moratorium to treat women as an object, it was prophet mohammad who brought an absolute change in the position of women but now we all need to stand by women and raise our voice for their concern.

INTRODUCTION
Marriage formed by the wedding customs and rituals prevailing in the Muslim word, though Islamic marriage depends upon the regulations of government and the origin of country. Quran specified both Muslim men and women as the set of cloth, guiding the concept that a married Muslim couple are like garments, who complete and protect each other, “show and conceal” the body of human being. Creation of marriage in United Arab Emirates begins to happen since a week before, which includes the wedding date and preparation. Wedding events start to happen with groom and bride and nights dazzling with singing and dancing. Whereas in the United States of America, Muslims come from many background, which involve the Muslim communities from South Asia, Arab countries and recently the largest segment from East Africa.

The rituals and customs are heavily influence for commemoration of Muslim wedding; Nikah will be the central events in all American-Muslim wedding. The wedding is superintended and oversees by Muslim cleric, an Imam. Albeit, the Muslim wedding can be done anywhere in mosque, either in bride’s home or reception hall. As stated by the survey of North American Muslim that the merger of two or more countries, for instance, the two most popular colors of wedding dress is specified as red and white. Muslim wedding ceremony in China followed norms and customs practices in the 20th century, for instance wearing western clothing such as white wedding dress, however china
religion rituals are used by Chinese Muslim marriage. Sultan and Mughal were the gospeller of the Islamic religion, who handed Islamic tradition to the medieval Indians. The compage is the similar to the Middle- Eastern Nikah; Muslims who belongs to Indian country generally obey those customs which are practiced by Muslims of the Middle East, based on Islamic convention. The rituals followed by Indian Islamic wedding ceremony is by proceeded by sending groom’s baraat to the decided place of execution of marriage and share a sherbet drink with the brother of his bride. The wedding ceremony known as Nikah, which is performed by the Maulvi and a priest called Qazi, this contract of marriage is known as Nikaahnama, which is signed by couple and by the walises and maulvi. The bride brought to the premises of her husband, where she is greeting by her mother-in-law by holding Quran over her head. The wedding reception organizes by the groom’s family, which is known as the Valimah or Dawat-e-walima.

Muslim marriage in India, all the Muslim people live in India are governed by the Muslim Personal law (shariat) Application Act, 19371. Muslim Personal Law basically deals in the context of marriage, inheritance and charities among Muslims.

1 Rooychowdhary, Arijia (4 may 2016), retrieved 1December 2017

Muslim marriage in India is a civil contract between a woman and a man to live as husband and wife and follow all the essentials of marriage contract. Marriage in Islam, or Nikah, is not a sacrament (as in Hinduism), Muslim marriage act in Indian constitution is also a devotional act i.e. ibadat. The Prophet is reported to have said that marriage is obligatory (wajib) for every physical fit Muslim, that marriage is equal to jihad (holy war) and that he who marries completes half his religion, while the other half is completed by leading a virtuous life. Other schools of thought prescribe that the man must also have the means to earn a lawful livelihood, to pay Mahr and to support wife and children.

2 Mahr means the money and the property which the wife is entitled to receive from the husband in consideration of the marriage but this consideration is not the same as that of the civil contract.


4 By Prophet Mohammad.
Dominance of the orthodox sunni school but in the period of Jehangir’s regime, cutting of nose and ears and death penalty could not be impose without the Emperor’s permission. The accomplishment of code of law was orders by Aurangzeb. During the period of East India Company, Muslim law was enforced except when Muslims left the disputes to be determined according to Hindu saastras. The regulation 11 of 1772 by sec. 27 enacted that

“IN ALL SUITS REGARDING INHERITANCE, SUCCESSION, MARRIAGE AND CASTE AND OTHER RELIGIOUS USAGES OR INSTITUTION, THE LAWS OF THE QURAN WITH RESPECT OF MOHAMEDAN AND THOSE OF THE SHASTRAS WITH RESPECT TO GENTOOS (HINDUS) SHALL BE INVARIABLY ADHERED TO”

The Privy Council recognized the right of shia Muslims to their own law.

In 1937, the shariat act was passed by British Raj which was followed in India in matters marriage, divorce and succession among Muslims.

5 All the Muslims in India are governed by the Muslim Law (Shariat Application Act, 1937). This law deals with the marriage, succession, inheritance, charities among Muslims.

6 Personal law and citizenship in India’s transition to independence.

AFTER SARIAT SENERIO

The achievement of India’s independence from the British was meant to bring about significant change in the regular life of Indians.

Earlier under British rule, Indian society was known by the social collectives, caste and religious identity, with a lack of focus on citizenship and the individual. The political and law relationship India was indeed determined by these social measures; the fundamental Rights Constitution was passed and intended to reverse the concept that an individual could be limited based upon caste, religion, economic status etc. Although the new standards laid out in the constitution have not religious are still determinants of political influence and access to resources.

In 1937 the shariat application Act was enacted by the British government in India and after India became independence from British, the shariat Act (Muslim personal Law) was maintained in Indian society. The law was originally introduced as a matter of policy by the British government, but upon independence Muslim personal Law became significant to Muslim identify and religion. The primary aspect of religion has created controversy across both Muslim communities and Hindu political organization.

SOURCES OF MUSLIM LAW

Muslim law lie on the prohibitory order of Qur'an, of the conventions introduce by the usage of prophet(sunna), of the generic consideration of the jurists(Ijma). Later, it has been satiate by the juristic preference(Istihsan), independent interpretation(Iltihad) and precedent(Taqlid). Sources of Muslim law align into two categories that is primary and secondary sources. Primary source re those on which Muslim law relied upon, which comprise; Quran, Sunnat, Ijma, Qiyas. However the traditional source of Muslim law are Sunnat and Ahadis. On the other hand there is also a secondary source of Muslim law, which is not the main modality of Muslim law but is a supplementary source, which includes; Urf or Custom, Legislation, Judicial decision, Equity, justice and good conscience.
MUSLIM MARRIAGE IN INDIA
MUSLIM PERSONAL LAW

In India Muslim Personal Law applies for marriage in Muslim. Muslim Personal Law (Shariat) Application Act, 1937 governed in India for all the Muslims. This personal law deals with marriage, succession, inheritance and charities among Muslims.

The Muslim personal Law does not applicable to Muslim who married under the Special Marriage Act, 1954. These laws are not applicable in Goa state, where the Goa civil code is applicable for all the persons irrespective of religion7,8.

7 Registered marriage under special marriage Act, 1954 arrived from the original on 24 september 2010
8 The special marriage Act, 1954 archived from the original on 24 September 2010.

WIVES ALLOWED IN INDIA FOR MUSLIM MARRIAGE

The current organization of Muslim Personal Law in place discrimination against women in the three different ways:
1. A Muslim man is allowed to marry up to four wives at a time.
2. He can give divorce to his wife without entering into any legal processes.
3. A Muslim man does not need to provide any financial support to his ex-wife after three months of Divorce.

DISSOLUTION OF MUSLIM MARRIAGE ACT, 1939.

The Shariat Act, 1937 concerns Muslim women seeking divorce in Section 5. This section was subsequently deleted and replaced by dissolution of Muslim Marriage Act, 1939. A Muslim woman can go in court to seek divorce9,10. This Act came to protect the rights of Muslim women who have been divorced by their husband, and also deal with the circumstances in which a married Muslim woman can divorce from their husband and to provide for related matters.

9 The concept of divorce under Muslim law retrieved 10july 2018.
10 Muslim women’s right for dissolution of marriage retrieved 10july 2018.

The following are the circumstances where a Muslim woman can ask for divorce.

SECTION-2 of Act, 1939

- When the husband has not been known for four years.
- When the husband has not provided for the maintenance for two years.
- When the husband has been sentence for imprisonment for seven years or more.
- When the husband failed to fulfill or perform his marital obligations for three years.
- When the husband was impotent at the time of marriage and remains impotent.
- When the husband treats his wife with cruelty, even if absent physical violence.
- When the husband has been insane for two years or is suffering from leprosy or virulent venereal disease.
- In that case also when the wife has given by her father or guardian before she attain the age of 15years.
- When the husband associates with his wife of evil repute or leads an infamous life or attempts to force her to live an immoral life.
- When the husband disposes of her property or prevents her to exercise legal rights over it.
CODIFICATION OF MUSLIM PERSONAL LAW

Before independence, every state has accepted and practiced different sets of religious laws so in this according every communities has their personal and family matters and the court have always adjudicated family matters on this basis. The personal law which is made for Muslim in India has never been codified systematically and proper in comparison with the others Personal Law. The Dissolution of Muslim Marriage act, 1939 consistently taken as the most explicit and the Indian government also started intervention into Muslim personal law, the nine grounds was only codified on which a Muslim women can file a Divorce against her husband but those are eventually neither beneficial for women nor they change the mentality in male to initiate divorce. The codification of Muslim Personal Law went for codification in the last few years. Article 246 of the constitution of India and entry 5 of the concurrent list gives power to the legislatures to pass law regulating personal law.

In the case of Mohd. Ahmed Khan v Shah Bano Begum11 and John Vallamattom v Union of India12, have come out from the requirement to bring in regard of gender just legal framework and not through the desire to preference to impose or force anything on different communities. There already exists a judicial and legislative framework the reform of Muslim Personal Law.

11 1985 SCR (3) 844
12 AIR 2003 SC 2902

MUSLIM WOMEN (Protection of Rights on Marriage) Act, 2019

In August 2019 the supreme court of India enables Muslim men to give divorce their wives by triple talaq, to be unconstitutional. The Parliament of India criminalizing triple talaq. The citation of this Bill is Bill no. 247 of 2019, which was introduced by Ravi Shankar Prasad (Ministry of law and Justice). Lok Sabha and Rajya Sabha reintroduced this Bill, which was passed in July 2019. As a result Bill gained assent from President of India. The Act has retrospectively effective from 19 September 201813.

13 It replaces an ordinance promulgated on February 21, 2019.

PROVISIONS

This act provides:

• If Muslim husband made any proclamation upon his wife from his words, either spoken or written, by any electronic means or any other form whatsoever, shall be VOID AND ILLEGAL.
• When Muslim husband announces talaq upon his wife shall be punishable with three years imprisonment and shall also be liable for fine. The punishment of this offence under this shall be cognizable. But when the talaq is pronounced upon women with Magistrate’s permission, to determine such condition or situation an offence shall be punishable under this Act as compoundable.
• The Married Muslim women upon whom talaq is pronounced shall be liable or entitle to get maintenance allowance for livelihood for her and dependent child and
shall also be entitled to custody of her minor child, which may be determined by the Magistrate.

- An accused person can get a bail of this offence under this Act by the Magistrate, when the married woman upon whom talaq is announced, is satisfied with the grounds of talaq and that person need to file an application before Magistrate for ground of talaq which should be valid and reasonable to get bail.

“TRIPLE TALAQ IN INDIA IS LEGALLY PROHIBITED”

CASE LAWS

➢ MOHD. AHMED KHAN vs SHAH BANO BEGUN AND ors 1985 SCR (3) 844

FACTS OF THE CASE

A Muslim woman Shah Bano begun upon whom Triple Talaq is announced by her Mohd. Ahmed Khan on the ground of maintenance, Ms Bano claimed for maintenance under the Code of Criminal Procedure, in place of Personal Law. According to the personal law of Islam state, it is stated that a woman may be personal law of Islam state, it is stated that a woman may get maintenance during ‘iddat’ period. Iddat period is of three menstrual cycles along with the ‘mehr’, where the woman i.e. the bride will get the money which was promised to give at time of marriage. This was the only to get the maintenance which is legally enforceable by law to the married Muslim woman from her husband. In Indian law, it provides maintenance for life, barring some exception14.

14 Issue was raised that whether the personal laws the code of criminal procedure shall apply.

HELD IN THE CASE

All the three levels of court in India i.e. district court, high court and the supreme court passed their judgments, which was in favor of Ms shah Bano. Although the case should came in Muslim Personal Law because the both plaintiff and the defendant being Muslim, the judgment opposed by the AIMPLB, as they claimed that adjudication of personal law was beyond the jurisdiction of the courts. This case has received many varied public posture. The government of India passed a legislation or an Act known as “The Muslim Women( Protection of Rights on Divorce)1986”, where a married Muslim wife will get the maintenance by her husband under this Act. Also under this Act the Muslim women is entitled to a ‘ Fair and Just’ amount of money during the period of ‘iddat’, beyond which the husband was to have no liability.

➢ AHMEDABAD WOMEN ACTION GROUP(AWAG) v. UNION OF INDIA(AIR (1997)3SCC573

FACTS OF THE CASE

According to Muslim Law, Muslim men is allow to have four wives or to do four marriage with the right of Divorce under the concept of Talaq, in which the husband has the authority to give to her wife without her consent and without using any judicial method. The PIL filled regarding this case which is considering the following five major issues, they are-

- To state Muslim Personal Law which allows polygamy as void as violating Articles 14and 15 of the constitution.
- To state Muslim Personal Law this prohibits a Muslim Men to give Talaq to her wife, without her assent and without resort judicial process of court. As void and violating Article 13, 14 and 15 of the constitution.
- To state that a Muslim husband takes more than one wife is an Act of cruelty within the statement of Clause VIII.
• State Section 2 Dissolution of Muslim marriage Act, 1939.
• To state that Muslim women (protection of Right on Divorce Act), 1986 is void as it violating Article 14 and Article 15.
• Further proclaim that the provisions of Sunni and Shia Laws of inheritance which states discrimination of share in the same status between the males and females void as discriminating against females only on the ground of sex.

HELD IN THE CASE
On the basis of the above arguments the court was of opinion all the citizens of India or Indians have been governed by respective Personal Law, regardless of the time period. There was an argument or opinion that the effect of interference by the court would be come in several undesirable outcomes because the adjudication of personal laws was beyond the jurisdiction of the court. Therefore, the petition was dismissed

➢ DANIAL LATIFI AND ANOTHER v. UNION OF INDIA(2001) 7 SCC 7

FACTS OF THE CASE
The landmark judgment passed in Shah Bano’s case has created confusion in the Muslim Personal Law, where it is said that a divorced woman is entitle to reasonable and fair provisions and maintenance within the period of ‘iddat’, in accordance with the Section 3(1) of Muslim women (Protection of Rights on Divorce) Act 1986. But this Act was challenged by the council i.e. Danial Latifi and claiming that it was unconstitutional and is violating Article 14 and 2115.

15 Issue was raised provisions enacted which was section 3 of the Act as unconstitutional and violates Section 14 and 21 of the constitution.

16 Issued was raised was whether this practice of triple Talaq is unconstitutional because it violates Article 14, 19, 21 of the constitutional.

HELD IN THE CASE
The Petitioner in this case, said in his arguments that the Act i.e. Muslim women Act, 1986, is unconstitutional and undermine the secular character, which is the basic feature of constitution because there is no reason of bereave the Muslim women on the applicability of Section 125 of the code of criminal procedure and present act is in violation of Article 14 and 21.

The Respondent said in his contention that Personal Law is a legitimate basis for discrimination and is not violating Article 14 of the constitution. Thereby the court held that this Act neither violating Article 14 and 21 of the Indian constitution, nor make any discrimination.

➢ SHAYARA BANO v. UNION OF INDIA AND OTHERS (Based on triple Talaq case).

This case was heard by the supreme court of India with a constitutional Bench of 5-judge. This case was challenged the very ‘immediate triple Talaq’ although this case hasn’t receive any judgment16.

The PIL was filled by the Ms Shayara Bano which was based on the immoral and unfair practice and enlightens a hope for millions of women who were a victim of commercial riots. This PIL determined the need of change for struggling women and enhance the scope of subject matter related to support and provide opportunities for women.

Shayara Bano, petitioner of this case, was repeatedly abused by her husband and eventually divorced through Triple Talaq. As India is secular country, the supreme court of India has chosen to acknowledge
the needs and rights of those who truly deserve it. India is second largest country who consists more number of Muslims. Verdict is yet to come.

➢ SHAMIM ARA v. STATE OF U.P

FACTS OF THE CASE
The appellant was filled for maintenance against husband, the appellant involving maintenance from her husband for herself and two of her four children on ground that her husband abandoned her and treated her cruelly. For it the respondent claimed that dower has already been paid and the husband agreed to pay Rs. 150 per month for the maintenance of minor child. Therefore, the application for maintenance was dismissed and an appeal was filed before the Supreme Court, which deals with the concept of maintenance where the wife was divorced by her husband and was also paid the dower.

Issues Rose: regardless if the dower was paid then can the court order the husband to pay maintenance to wife.

HELD IN THE CASE
It was stated by the apex court that the husband shall be liable to pay the maintenance for the two sons, were born from the marriage, hence order the husband to pay maintenance so that the wife who is in custody of the children can maintain the children.

SOCIAL CHALLENGES ON MARRIED MUSLIM WOMAN
DURING MUGAL ERA the culture and civilized of the Muslim was known or considered by the practice of purdah combined with women. Education of Mughal for Muslim women was limited to religious knowledge and based on the discrimination between boys and girls, therefore the education is not relevant or adequate for girls because prior the education of their began from Makatab/ primary school and then Madrasas for more education. Reason for discrimination was because of being son’s preference in Indian male dominated society not of following the Islamic ritual. All the rituals or religion and education were take place in according with Quran. Early marriage gives right to unilater divorce and encourages retaining it. Marriage in Muslim law can be done by oral or written but early oral marriage was so common than written without having witness or regard of witness. The term ‘Polygamy’ was also very common and known in Muslim marriage early, women in polygamous marriage had to live with the co-wives.

In 1211CE the sultan of Delhi, instead of his son, he appoint his daughter Raziya Sultan of Delhi, she was the only single woman who appointed for royal seat of Delhi by highest and popular consent of most of the people. This reason was sufficient to make changes in society and create a big and dynamic image in their mind to change their perspective with rigid caste and culture and gender difference. After it several women in the royal Mughal family took private education. From this many things were starting to change: after Raziya, Baber’s daughter Gulbadan Begum, Author of Humayun Namah was the first women to archive the culture and social realities of Mughal women, an elder
daughter of Aurangzeb became a poet. Accordingly women of royal Mughal family played a versatile role and were trained in both horsemanship and social behavior and protocol, later on, they started taking part in every field which was defined for males only, such as politician and artists.

With the passage of time, the thinking of people and new opportunities for women was also available. With this in the 19th century, it became an idea to think how women be modernizes, grow and educated. But the rules and thinking for women in Muslim religion remained the same. Teaching and advancing women was meaningless for those people within Islamic law. Daughters and wives of Royal Muslim family took step forward, which helped other woman also go ahead and they started getting freedom. All the many women started compare ourselves with males and started talking about their rights also. Hail argued for female education Mumtaz Ali and his wife Muhamamdi Begum founded a newspaper, which were known as Tazib-un-niswan for took up the issue of female education, and also took up the issue related with women as female education, the age of marriage, polygamy, a women’s role in marriage and purdah. By 1937, the average rate of Muslim girl’s education through India had surpassed the nation average.

Changes of All kinds started coming in the society, both legally and socially.

JUDICIAL OR LEGISLATIVE CHANGES: Now it’s high time of a call for legal changes in society and in state for women status. 20th century has turned it into thinking of change and awareness for women. Rights of women started getting legal recognition, which were not in accordance of Quran but by the Sharia Act. In 1937, center legislation passed a Sharia Act and many Acts came into existence for welfare of women in every sector, such as Education, Marriage and Professional, whose purpose was to get the women the facilities and protect them from their rights, special provisions for their rights and special property of female, adoption, marriage, divorce and maintenance after marriage and to secure their interest. Every legislation has an aim and objective is to recognize to needs of women rights and to give them freedom and to keep them as equal as men so that no one can exploit them and to give them equal status in society.

GENDER DISPARITY

The society in which we live is male dominated from the beginning and restrictions have been imposed on women since God himself lived on the earth. Discrimination from women has happened in every way such as bias between woman and man which has a live example Sati custom and Dowry. It is not only that only Indian woman had to suffer all these but Muslim women had to go through from this phase, even these women had to kill their desires. They didn’t know their rights and only played a role of puppets for the society. Later, ever since the daughter of the royal families did not consider themselves separate from men, they began to advance in everything, they believed that there isn’t any work which a women cannot do, this has become a matter of rust which was being fought in the society and women were demanding equal rights for them without assuming any discrimination such as caste, religion, race and gender. First this movement started in India and then every woman understands it and raised their voice against it. After a lot of struggle, the society started to understand this matter. To change this custom, not only some people but all people need corporation. In this recent
century, in which we are living where everything has been upgraded, the society should also change for women. We should all continuously put our efforts so that the society can change their thinking for women and treat them equal in everything.

SOCIAL REVOLUTION ON MARRIAGE MUSLIM WOMEN
This is a historic demand of change not because Muslim women have suddenly woken up but also it’s a high time to not let them to compromise with any subject. More than 30 years ago, in 1985, Mohd. Ahmed Khan vs. Shah Bano Begum, which emphasize on the protection of the rights of the divorced Muslim Women and or to those who have got divorced from their husband. The enactment of this case was done by the government of Rajiv Gandhi, to invalidate the decision passed by the Supreme Court in this case. In year later, in 1997, Ahmadabad women action group (AWAG) v Union of India, void as discriminating against female only on the ground of sex, predominantly void Sections 10 and 34 of the Indian Divorce Act and also declare void Sections 43 to 48 of Indian Succession Act, simultaneously.

With the passage of time, government made laws, In 1972, Muslim Personal Law board established, to deal with the marriage, succession, inheritance, and charities among Muslim community, then later, in the year 1939, the Dissolution of marriage Act came to provide the legal right to married Muslim women to obtain divorce from their husband and to provide for related matters, which helped women to fight for themselves and to raise their voice against injustice going with them, with the change in the society and in the buildup needs of women to accomplish, another Act came into existence in the year 2019. An act which prohibit male to pronouncing the Talaq to their wives until they are not satisfy with reason the Talaq and is also protect the rights of women after divorce, men is entitled to provide maintenance to the women after divorce, apart from Mahr. This act declared the practice of triple Talaq as void and impose punishment on people who indulge in such practice would be liable for imprisonment for up to 3 years20.

EFFECTS OF THE STEP TAKEN NO LONGER SOLITARY
Presently, the range of Muslim women who have approached to the Supreme Court is the evidence that no Muslim women will be left alone to challenge Muslim Personal Law. This is a reason of the ongoing historic fight. It is a bitter truth that Muslim women have always been a victim of triple Talaq and polygamy, every one of the poor divorcees wafted to the court consistently with the reason that they are contending for maintenance under Section 125 of the criminal procedure code21, and seeking from the court to be abolished triple Talaq and polygamy.

21 the purpose of the Section 125 of Crpc is to maintenance to the dependent wife, children and parents from destitution.
22 Ahl- e Hadees, the people of hadith, the sole souces of religious authority and oppose everything introducing in Islam in regard of the Quran, sunnah, and hadith, after the earlist times.

The records the courts revealing that women applied for divorce initially after the second marriage of husband and the discovery disclose that he has already married. In the year 1993, Ahle- Hadees sect issued a Fatwa stated that triple Talaq is a invalid form of divorce and must be recognize as the single pronouncement of Talaq, hereby
revocable. Since then women have contrary triple Talaq and polygamy whenever a fatwa or a judgment has brought the issue to the in front.

In 2001, the constitution legality of the Muslim women Act, 1986 was upheld by the Supreme Court, which had been defiance as soon as it was passed, for depriving Muslim divorcees of rights available to other divorcees. The apex court interpret the meaning of the word ‘fair and reasonable provision and maintenance’ to be conferred to a Muslim divorcee within the three months of iddat period after divorce, meant an amount of money that would maintain her through life.

A REFORM GENERATION
A lot of changes came with the passage of time, a new generation Muslim women has come up, by emphasizing on the subjects of education and self-confidence, asserting Muslim identity by altering their religious practice and norms or challenge their religious leaders. Earlier, they were not even allowed to pick up a Burqa from their face and talk to each other. At present, Muslim women came ahead to interact with media and share their consideration through media to the male leaders and the state, forming organization to protest against the injustice done against them. At the moment, Muslim women participate in every revolution to reform the procedure and the customs, for which they were struggling since so long.

MATTERS OF FOCAL POINTS
- Essentially we now required to reshape our customs and thinking related to women.
- Now it’s the time to insert old laws which should be updated by inserting them to the needs of today’s woman.
- It is written in Quran that husband and wife are the supporter of each other, but it seems like men have misunderstood that woman is just a thing should be thrown away after use.
- Equal and fair chance should be given to every women in every without any partiality or doing unfair bias in related to any disparities.
- Now it has become a great need that we should introduce women with their rights.
- The Muslim women had made great efforts to identify themselves in their society, and their struggle also contributed in the development of country.
- We should inform everyone about the rights of women in the society and also make them aware about their marriage and after divorce rights.

CONCLUSION
The problem with people is they afraid to bring some changes in society. When it comes to bringing change for women, both society and law strike a silence, whether a women belongs to Hindu Caste or Muslim Caste, both of them had to struggle a lot in their life and also had to face many disparities. Let me tell you about the custom that was started long ago and still continues i.e. the Pardah practice, in which a female require to conceal their body from others, it’s a religious and social practice of female seclusion prevalent among some Hindu and Muslim communities. Women were face challenges everywhere in related to every subject since beginning, they were facing triple pitfall simultaneously, first as a minority, then as a woman, and became a
helpless woman who find herself a grain which is constantly being grinded between people who wanted them to obey their customs and perform their religious identity and with their desire of freedom. When it came to justice for women, the law had a black band on its eyes. Earlier, didn’t want to see the truth and not ready to accept the revolution for women because prior law ran and performed their functions in accordance of society. Later, at a very slow pace, the Law started modify their laws in gratifying the struggling women, and made some most effective Act, such as Muslim Personal law in 1972 and then Muslim women (Protection of Rights on Marriage) Act, 2019.

The struggle of women shouldn’t go in vain, the revolution that women had raised, we should light that with victory. Women were a victim of a great manifestation of commercial riots. This is a wakeup call for all of us that we all should now raise our voice in issues related to minority rights, identity based violence and Muslim women rights and do research on this to make this an important and serious subject.

BIBLIOGRAPHY


INSTITUTIONAL ARBITRATION IN INDIA: THE WAY TO THE FUTURE

By Pranav Raina (Assistant Professor) and Devansh Agarwal
From School of Law, Galgotias University

INTRODUCTION

“Conflict is inevitable, but combat is optional.” — Max Lucade

The diversity of human needs, interests, and goals have led to conflicts becoming an inevitable part of our lives. While some of these conflicts are resolved through communication and cooperation, some require the assistance of a third party for their resolution.1051

‘Resolving a conflict is rarely about who is right and who is wrong, it is about the acknowledgment and appreciation of the differences’1052 between two sides. In India, settlement of disputes without court intervention dates back to ancient times. Our ancient texts and scriptures have reflected similar processes like Arbitration and Mediation that were practiced to resolve various kinds of disputes in the community. It has been seen that in the last few decades, these processes have been increasingly resorted to, as methods of Alternative Dispute Resolution in India.

‘If necessity is the mother of invention, conflict is its father.’1053 And these conflicts have led to the innovation of alternate forms of dispute resolution. Due to the impact of Globalization1054, effectiveness of Private International Law1055 and rapidly changing landscape of business1056 and commerce all around the world, including India, there is a demand for efficient time bound methods of dispute resolution. The aim of these methods is to resolve disputes outside court of law and are comparable to international standards1057, for which we need proper rules and regulations1058 to run that structure.1059

As far as India is concerned the goal of the Constitution1060 is to render justice1061 categorised into social, economic and political sections1062. Access to fast, inexpensive, expeditious justice is a basic human right to people of all segments of society and the delays in the judicial proceedings in India, due to multiple reasons, are often unacceptable to the people involved in modern legal transactions and they prefer the simpler and faster method of dispute resolution, which

1051 Shashank Garg; The Indian Perspective Alternative Dispute Resolution, Oxford University Press, 2018
1052 Thomas Crum; Magic of Conflict: Turning a Life of Work into a Work of Art, Touchstone; 2nd edition (February 1, 1998)
1054 Manfred B. Steger; Globalization- A very short Introduction; Oxford University Press, 2009
1055 George A. Bermann; International Arbitration and Private International Law; Pocketbooks of the Hague Academy of International Law; Publisher Brill/Nijhoff, 2017
1058 https://www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx; accessed on 05/06/2020 at 13:19
1059 Supra 1
1060 http://legislative.gov.in/sites/default/files/COI-updated.pdf; accessed on 05/06/2020 at 13:22
1061 https://www.constitutionofindia.net/constitution_of_india/preamble; accessed on 05/06/2020 at 13:24
1062 Supra 9
Taking about arbitration we have seen that there are various techniques used like Ad-hoc Arbitration, Institutional Arbitration, Emergency Arbitration, Plea Bargaining etc. to resolve disputes according to the needs and requirements of the parties present in a particular kind of culture. The techniques and the regulations of arbitration have varied forms in different cultures and they have evolved over a span of times in all the countries. We would be focusing on the rise of arbitration in India and analysing the modern approach with its pros and cons. At the moment India is going through a phenomenal change in the field of international dispute resolution and our research will show this gradual evolution.

**MODERN INDIAN APPROACH: INSTITUTIONAL ARBITRATION**

The recent trends in arbitration in India today mainly follow the Doctrine of *Kompetenz- Kompetence* along with the allied Principle of Separability, which simply implies that the arbitral tribunals have the power to comprehensively rule on its own jurisdiction. Ruling over one’s own jurisdiction is much easier in an Institutionalised Arbitration where the set of laws are already well defined as compared to Ad-hoc Arbitrations. Institutional and Ad-hoc are two main categories of Arbitration and the practitioners of arbitration need to have a very differently grinded mind set than normal lawyers who do one or two arbitration just incidentally. There are various other differences between the two ways of Arbitration which can be seen below in the table that has been drafted by a first-of-its-kind arbitral institution in India named the Mumbai Centre for International Arbitration (MCIA).

<table>
<thead>
<tr>
<th>Aspect of procedure</th>
<th>MCIA (Institution of Arbitration)</th>
<th>Ad-hoc Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment of arbitrator</td>
<td>The MCIA Rules provide precise timelines for the appointment of the tribunal in various scenarios (sole arbitrator, three arbitrators, multiparty proceeding etc.).</td>
<td>Parties have to approach the courts to secure arbitrator appointments.</td>
</tr>
</tbody>
</table>

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1063 Shashank Garg; The Indian Perspective Alternative Dispute Resolution, Oxford University Press, 2018

1064 Suresh C. Gupte; The Doctrine of *Kompetenz-Kompetence*: An Indian Perspective; the doctrine says that an arbitral tribunal has the authority to decide whether it has jurisdiction to deal with the matter brought forth it and whether the dispute is covered under the arbitration clause of the contract.; Richard Kreindler, Competence-in the Face of Illegality in Contracts and Arbitration Agreements, 2013

1065 The doctrine of separability is the principle that an arbitration agreement is a separate contract, not necessarily affected by the invalidity, ineffectiveness or non-existence of the main contract.

1066 https://mcia.org.in/about/why-mcia/mcia-vs-ad-hoc/ accessed on 25.05.2020 at 20:20
<table>
<thead>
<tr>
<th><strong>Arbitrator challenges</strong></th>
<th>The MCIA Rules have provisions dealing with the challenge of arbitrator(s), and if necessary, the replacement of the arbitrator(s).</th>
<th>Parties will have to approach the courts to challenge arbitrator(s) and seek a replacement. This can lead to delays and costs.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fees</strong></td>
<td>The MCIA Rules provide an upfront fee schedule, which define an upper limit for arbitrators' fees as well the MCIA administrative fee.</td>
<td>Parties may have to negotiate the fees with the arbitrator(s).</td>
</tr>
<tr>
<td><strong>Supervision of arbitration proceedings</strong></td>
<td>The MCIA Secretariat and the Council supervise the conduct of arbitration proceedings under the MCIA Rules.</td>
<td>There is no institutional supervision of proceedings.</td>
</tr>
<tr>
<td><strong>Consolidation of proceedings</strong></td>
<td>The MCIA Rules have specific provisions dealing</td>
<td>No such procedure is available, which may lead to</td>
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<td></td>
<td>with the consolidation of proceedings.</td>
<td>conflicting awards and/or increased costs.</td>
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<td></td>
<td>The MCIA Rules provide a mechanism for the appointment of an emergency arbitrator to grant interim relief in appropriate circumstances.</td>
<td>Appoinment of emergency arbitrator for urgent interim relief</td>
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<td></td>
<td>The MCIA Rules provide for scrutiny of draft awards, so that the MCIA Registrar can suggest modifications to the form of the draft award (without affecting the Tribunal’s liberty of decision).</td>
<td>Scrutiny of awards</td>
</tr>
<tr>
<td></td>
<td>There is no scrutiny of awards process in an Ad-hoc Arbitration.</td>
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</table>
| The above table gives us an insight into the functioning of two most prominent ways of arbitration. This could initiate, rather it has already initiated, debates and discussions by administration, corporates, lawyers,
arbitrators and counsels etc. at various platforms to find out which of them is more beneficial or impactful, and the discussion continues till date as there are pros and cons at both sides. It has been observed over the past few years that Singapore, United Kingdom, United States of America and a few other countries have developed Institutional Arbitration as one of their main part of their countries dispute resolution regime and have established themselves as a hub of International Commercial Arbitration. India’s journey towards becoming a center of International Institutional Arbitration is also on a rise but it gets hampered by the ineffective arbitration law and the age old legal regime.

Institutional arbitration is a procedure where arbitral proceeding is undertaken according to a set of rules and is administered by a particular arbitration institution which we have already seen above in the table.

Having said that, Institutional Arbitration is still in its nascent stage in India, a pioneering economic power in the contemporary world with the largest population that has consumers of indefinite products arising from International trade and commerce. India has developed in its Business and Trade patterns over the years and has risen to almost the levels which many developed countries of the West achieved in hundreds of years. These transactions based on bilateral and multilateral agreements do face conflicts many a times that become difficult to resolve without any proper framework. The current legal framework in the country comprises of the Court Structures which are incompatible and create roadblocks instead of providing a smooth functioning of dispute resolution mechanisms. The present day judiciary in India and the Parliament till very recently had not undertaken much effort, to promote any other alternate dispute resolution system, that now has been introduced in the 2019 amendment viz-a-viz Arbitration Council of India. This council has been made with an attempt to make India a hub of institutional arbitration and its real life implementation would be a dream come true for International Investors and Multinational Firms to start their setups in India as envisioned by our Hon’ble Prime Minister.

a. There are over 35 arbitral institutions in India. These include, domestic and international arbitral institutions where arbitration facilities are provided by various public-sector undertakings, trade and merchant associations, and city-specific chambers of commerce and industry.

b. Despite the existence of these arbitral institutions in India, parties opt for Ad-hoc arbitration and regularly approach courts to appoint arbitral tribunals under the relevant provisions of the Arbitration Act. The preference for Ad-hoc Arbitrations by Indian parties is not limited to arbitrations where the amounts of the disputes are small but even where crores of rupees are spent for instance construction and infrastructure arbitration, and there are various reasons behind parties choosing Ad-Hoc India, National Summit of the Legal Fraternity, Mumbai, 4th and 5th March, 2006.

1067 Burkhard Hess, The Private -Public Divide in International Dispute Resolution Brill/Nijhoff Publishers, 2018
Arbitration, some of which are listed below:\(^{1070}\):

c. Lack of credible arbitral institutions
• Misconceptions relating to institutional arbitration
• Lack of governmental support for institutional arbitration
• Lack of legislative support for institutional arbitration
• Judicial attitudes towards arbitration in general.

Though many of the above given points are major roadblock still we see that the new India is adapting to Institutional Arbitration slowly and gradually.

To identify the roadblocks to the development of institutional arbitration we need to examine specific issues affecting the Indian arbitration landscape. We also need to prepare a road map for making India a robust centre for institutional arbitration, both domestic and international, and for this the Central Government of India had constituted a High Level Committee\(^{1071}\) under the Chairmanship of Justice B. N. Srikrishna, Former Judge of the Supreme Court of India. This Committee submitted its report on July 30, 2017 and with a view to strengthen institutional arbitration in the country, the Committee identified six points to improve the performance of Indian arbitral institutions\(^{1072}\):

d. Accreditation of arbitral institutions
e. Accreditation of arbitrators
f. Creation of a specialist arbitration bar and bench
g. Amendments suggested to the Arbitration and Conciliation Act and other laws
h. Role of the government in promoting institutional arbitration
i. Changes in arbitration culture

It was also decided to amend the Arbitration and Conciliation Act, 1996, wherein new sections were inserted from 43A to 43M in the Act\(^{1073}\), which established Arbitration Council of India (ACI).
j. Sub-section (1) of section 43-D provides that it is the duty of the Council to take all measures necessary to promote and encourage arbitration, mediation, conciliation or other alternate dispute resolution mechanisms, and for that purpose to frame policy and guidelines for the establishment, operation and maintenance of uniform professional standard in respect of all matters relating to arbitration.
k. Section 43-I provides that the Council shall make grading of arbitral institution on the basis of criteria relating to infrastructure, quality and calibre of arbitrators, performance and compliance of time limit for disposal of domestic and international commercial arbitration.

\(^{1070}\) Nigel Blackaby & Constantine Partasides QC; Redfern and Hunter on International Arbitration, Student Version; sixth edition; Oxford University Press, United Kingdom; Pg 42-43

\(^{1071}\) The Committee was set up by the Ministry of Law and Justice, Government of India to review the Institutionalisation of arbitration mechanisms in India and submit a report on suggested reforms.


\(^{1073}\) THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019 received the assent of the President on the 9th August, 2019, and was published for general information in the Official Gazette of India on August 9, 2019.
The keys areas which will play a significant role in developing International Arbitration today and in the coming years are as follows:

1. Total Transparency of the Arbitration System
2. Clarity in the Selection Process of a Sole Arbitrator or Multiple Arbitrator Tribunal
3. More Specific Investment Arbitration Rules
4. Guidelines and Rules regarding Third Party Funding, which is not yet very common in India.
5. Rise in Financial Institution Arbitration
6. Potential Appeal Mechanism (By Consent)
7. Sanitising Arbitral Awards
8. A shift to the Oriental Hemisphere
9. Diversity in International Arbitration
11. An Accelerated Timeline for low-value or simple disputes
12. Mechanisms which cater to Multi-party / Multi-contract scenarios
13. Availability of an Emergency Arbitrator to determine urgent applications for interim relief before the main arbitral tribunal is appointed
14. A Time-limit for the arbitral tribunal to render its Final Award
15. A Clear Costs Schedule providing guidance on Tribunal and Administrative Fees

In India many of these key points are being implemented but not in the whole country and wherever it is implemented it is not very robust. It is a fact that the Indian sub-continent has no strong arbitral institution which could operate within the complicated as well as complex Indian system, though the insights of the 20th Law Commission Report have reflected an updated development but not very stable or uniform. India is already consumed with the phenomenon of globalization and the need of the hour is indicative of a robust dispute settlement infrastructure.

The establishment of Commercial Courts, Divisions, Commercial Appellate Division of High Courts Act, 2015: in which a specific limit is set, in case of its outreach, it shall be heard by specially qualified commercial courts. The jurisdiction that wishes to promote arbitration must adopt a pro-arbitration policy which is required to have in connectivity and consensus between the Administrators, Lawmakers and Courts.

Since the procedures and rules are already framed for specific mechanisms, the only part to be reckoned and practically implemented is that of implementation and procedural execution. Institutional Arbitration is transparent and credible, the cost of litigation in the Courts is unpredictable but when it comes to Institutional Arbitration the cost is specific and the fee structure is transparent which makes it easier. The fee structures and costs involved can be seen on the website of various institutions like the MCIA. This shows the transparency and the clear cost schedules with reference to Interim Reliefs, Administrative Costs, Filling Fees etc. There are many ‘soft’ factors which makes the mentioned form more adaptable and acceptable including monitoring and supervision, administrative and infrastructural assistance from the Institution, the code of conduct and quality of arbitrators.

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1074 HOWARD, M. 2018. Impacts of cultural differences on international arbitration based on the example of Iran. Robert Gordon University, PhD thesis.
CONCLUSION:
It is evident that the Parliament and the Government of India recognises that if India intends to grow as a commercial super power, it needs to develop a robust institutional dispute settlement infrastructure and inculcate confidence in its legal system. Given the lack of the success of the Indian arbitral regime, the Government has chosen a top down approach to initiate reform and increase the effectiveness of arbitration. In this context the changes made by the 2019 amendment would be helpful in establishing accredited arbitral institutions as undeniable part of the arbitration regime. India can be a Strong Seat of International Arbitration for the whole world as it would be economically very cost effective and geographically in the Centre of the Far East and Far West. Institutional Arbitration should also be promoted in India so that:

- Instead of the High Courts & Supreme Court the right for the selection of an Arbitrator/s should be held with the Institution which has access to a whole pool of International Arbitrators and Counsels who are Experts in this field.
- Arbitration is carried out on a daily basis from morning till evening in normal working hours so that there is no backlog of cases or delay in concluding the arbitration proceedings.
- Exorbitant amount of fee charged by the counsels and arbitrators can also be taken care of by having a fixed fee schedule which will negate space for ambiguity.
- Steps can be taken regarding the Finality of an Award which is open to appeal or review only by a President or Registrar of the Institution so as to negate the parties taking a court route.
- The decision of the President of the Arbitral Institution can be made final and binding on the parties and any right of the parties to appeal can also be waived off.
- Foreign parties and investors are attracted to use the Arbitral Institutions in India as a seat of arbitration as it is backed by the Judiciary of the country and the judiciary has a pro-enforcement approach.

These institutions get a chance to attend international conferences and host international conferences where they represent the nation and enhance the international image of Institutional Arbitration in India and this is possible only if they are provided with ample resources and opportunities.

- There are good bilateral relations between the Arbitral Institutions in India and the ones in other countries to ensure constant updates of rules governing International arbitrations in various fields of law internationally.

In addition, institutional arbitration in India would not only be a monetizing opportunity for the nation but also for our large legally

1075 Shashank Garg -The Indian Perspective Alternative Dispute Resolution ,Oxford University Press,2018
1077 Nigel Blackbay and Constantine Partasides QC with Alan Redfern and Martin Hunter, International Arbitration, 6th Edn. 2015, Oxford University Press
skilled and highly intellectual workforce. A strong seat of arbitration in India would prevent our Senior Lawyers and experts in the field of arbitration from going out and doing arbitration which leads to a massive brain drain like all the other professions. This would also generate a great space for employment for the young budding lawyers in this field. Every institution could provide legal team support which would be one of the basis for successful institutionalized arbitrations which is lacking in other arbitration institutions of the world.

Institutionalisation of arbitration can go a long way in securing ideals like informality, simplicity, quickness, cost effectiveness. The more robust the arbitral institutions are in India it is more likely that India will become a preferred arbitral destination.

‘Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser-in fees, expenses and waste of time.’

-Abraham Lincoln

1079 Deoto Roy & Madhukeshwar Desai; Institutional Arbitration In India- The Way Forward; Shashank Garg (Ed.), Alternative Dispute Resolution- The Indian Perspective; Oxford University Press, 2018; Pg 104
MYTH AND REALITY OF CAA

By Priyamvada Singh
From Mody University

Prior to 2014 Lok Sabha election Bhartiya Janata Party (BJP) promised all the Hindus settled in other countries which are neighbors of India to give place in India and welcome all the refugees, for this purpose the citizenship amendment bill after being discussed in Lok Sabha was referred before a parliament committee in 2016. It was discussed with version organization in different states by the members of this committee, The Bill was passed in Lok Sabha on 8th January 2019 but could not be tabled before Rajya Sabha as the tenure of Lok Sabha ended and the bill lapsed on 3rd June 2019. The citizenship amendment bill faced a great criticism after it was passed in Rajya Sabha on 11 December 2019 by 125 MPs present and voting in favor of it and President Ram Nath Kovind signed it on 12 December, after this it is regarded as CITIZENSHIP AMENDMENT ACT 2019 (CAA) which the opposition party want to term as unconstitutional.

What exactly the citizenship amendment bill talks about?
The CAA will change the definition of illegal migrants as all the Hindus which includes Jains, Sikhs, Buddhists, Christians, Parses are considered as minority in countries like Afghanistan, Pakistan, and Bangladesh and does not include any Muslim settled in these countries, it is said that such migrants and people who come to India can reside in any state of India and the burden will be shared by whole country. The main concern of government for such amendment is the ill-treatment or persecution of Hindu as minority in theses countries, the reason why only Hindus have been given consideration under this act is because Muslim can get shelter in other Islamic countries but Hindus will not. Before know more about CAA it’s important understand what Illegal migrate means basically they are those people who have come to India with any documents or with fake documents and is staying in India for time more than the visa permit.

History of CAA?
Whether a person is citizen or not is governed by article 5 to 11 of the constitution and legislature of this matter is been amended many a time since it came to force 64 year ago in the year 1955.
The 1986 citizenship amendment bill state that no person will be given citizenship merely because they are born in India it is very important for them to prove that they at the time when born have their parents any one of the parents as citizen of India.
In 1992 the amendment was made in the act which stated that for a person to be a citizen of India if he/she is born after 1950 but before the commencement of this act his father should be citizen of India when he was born and once this act is enforcement one of the parents should be the citizen.

In 2003 the act was again amended and passed by the Parliament but was signed by the parliament in 2004 after which it came to Be known as Act 6 of 2004 after which the concept of illegal migrants was introduced.
The laws were made in 2015 and 2016 in the act which said that no Illegal migrate who belong to the ground of Hindu, Sikhs, Buddhist, Christians Parses will not be charged under foreigner act and will not be deported from India if they are found without valid documents and are not the legal citizens of India this amendment further introduced in the Lok Sabha and
present CAA act is based on this amendment made in 2016.
This is how with many amendments made time to time in the citizenship Act 1955 today the final CAA is been amended it may happen that in future other changes can be made in the act with time.

**What amendment are made under the citizenship act?**
The amendment under this act makes it clear that this act apply only to Hindus which include Sikhs, Jains, Christians, Parse and Buddhist belonging to three particular countries which are Afghanistan, Pakistan, and Bangladesh as mentioned under section 2 of the act further this act in the same section give a particular date that is 31st of December 2014 which means all those who have entered India before this date and under any law or by the Central Government if they are exempted they will no more be treated as illegal migrants. After section 6A some new section have been inserted which vocalize that a certificate of registration should be given to every person who is referred under sub clause (b) of sub clause (1) of clause 2 of this act and after the certificate has been given the person should deemed to be the citizen of India, under sub clause (3) of clause 6B of the act if there is any proceedings pending against such person will be held abated, it also makes it clear that any person can fill an application for citizenship irrespective of the proceedings present against him and he will not be deprived of any rights to which he is entitled. Sub clause (4) of clause 6B state that the provisions mentioned in this act will not apply to tribal area of Assam, Meghalaya, Mizoram or Tripura as included in the Constitution sixth schedule the area covered under "The Inner Line" notified under the Bengal Eastern Frontier Regulation, 1873. The amendment is made under section 7D which says that if any law violated by the overseas citizens or provision for time being they should be given a opportunity of being heard, under the third schedule of the principal act it is stated that normally a citizen have to reside in India for a period of eleven years before acquiring the citizenship but for the Hindu citizen including Sikh, Jain, Christian, Parse and Buddhist of Afghanistan, Pakistani, and Bangladesh this period is reduced to five years which means if they are residing in India for a period of five years they can apply for citizenship, the main reason behind such amendment is that a fast and easy provision will help them get citizenship not only today but in future also to others who wish to get the citizenship. There is an amendment for the overseas citizens of India which states that if any OIC is of India origin or any of its spouse it they have the right to travel India or to work and study in India.

**What is NRC and how it’s connected to CAA?**
In 1951, a register was prepared which keep the official record of the legal citizens of India and such census has not been done after that thus, NRC is the similar record of all legal citizens of India it keep all the demographic information about the people who qualify under the citizenship act 1955. This NRC will be implemented across India after which the illegal migrants will be detected and deported back from where they came, but who is considered as the citizen of India is a big question again for this purpose citizenship act 1955 says that person born in India:

(a) on or once the twenty sixth day of January 1950, however before the first day of July 1987;

(b) on or once the first day of July 1987, however before the commencement of the
Citizenship (Amendment) Act, 2003 and either of whose oldsters could be a subject of India at the time of his birth;

(c) on or once the commencement of the Citizenship (Amendment) Act, 2003, where-

(i) each of his oldsters are voters of India; or

(ii) one in every of whose oldsters could be a subject of India and also the alternative isn't associate amerceable migrant at the time of his birth, shall be a subject of India by birth

A writ petition in supreme court was filled in 2013 by Assam public works and Assam sanmilita mahasangh & ors. User this they asked supreme court to delete all the illegal migrants name from voters list, the supreme court ordered in 2014 the update of NRC in accordance with citizenship act 1955 and citizenship rules in 2003, after starting of the process in 2015 on August 31 NRC was released And 1.9 million failed to register in list of NRC. The government has not given any clear Information about the update of NRC in Assam but the people of Assam where asked to submit their proof and in citizenship act 2003 a special exception was mandated to Assam. Basically the connection between NRC and CAA will affect the illegal migrants as those who will not be able to prove under NRC will be regarded and non citizens thus if the Muslim come under such they will be treated as illegal migrants because they do not come under CAA and this may be a problem for those migrants who came from countries other than Afghanistan, Pakistan, and Bangladesh but those who have came from these three countries will not be a issue for them. If we look at the views of the government they made it clear that there is no plan to conduct NRC across the nation, similarly Home Minister Amit Shah said that those who have proof about the citizenship need not to worried and no one will be sent outside the country inact arrangements will be made for them here only. There has been a lot of protest against the act and many questions have confusing answers here is the answer to all such doubts, the biggest doubt about the NRC is whether it will be implemented throughout the country? well the government in its official gazette has on 31 July 2019 announced that according to sub section (4) of rule 3 in the citizenship Act that the population register will be prepared throughout the country except Assam of all the people within the local jurisdiction from 4 April 2020 to 30 September 2020. Basically the supreme court named it as NRIC (National Registration of India citizen) to separate it from NRC (National Register of citizens) which is in Assam, after this it is made clear that under rule 3 of 2003 rules the nation wide NRC has been announced. The other issues which people face is whether population register and NRIC is linked or not well under the 2003 rule the sub rule 5 of rule 3 says that the details in local Register shall be made after they are verified but the population register. Now what exactly the population register and NRIC is? The population register basically contains the details of people living in and village or rural area or town where as the NRIC contain the details of all the India citizen whether they are living inside or outside the country. People are not able to understand by which process the doubtful citizens will be identified well under the 2003 rule sub rule 4 of rule 4 makes it very clear that all those whose are doubtful citizens will be marked in the population register and entered in the local Register and after the verification their families will be informed. After this the most important question which was
asked is when and how did the Citizenship Act 1955 got connected with PR and NRIC thus in 2003 and amendment was made in the citizenship act 1955 called as CAA of 2003 to introduce Illegal migrants and NRIC in it hence section 2 describe the definition of illegal migrants and after addition of section 14A the concept of NRIC came by CAA of 2003 the population register was not mentioned in the main law but through 2003 rules it was bought.

Is CAA against the Muslim community? There are lot of protests going on in the country and with that it is very important to understand whether these protests are right or not as the Muslim will face any problem in future or in present regarding CAA. It is very clearly stated by the Ministry of Home Affairs that no India citizen need to worry about the amendment in the citizenship act as it does not affect any Indian citizens including Muslim, no Indian foreigner will be deported only the illegal migrants will be according to the foreign deportation laws. People are really worried that whether the Muslim will get citizenship of India in future well it is very clear that any foreigner no matter of which category including Muslim will get citizenship of India according to the naturalization that is section 6 of the citizenship act and through registration that is section 5 of the same act, it is very much clear that in past fees years also Muslim have been given citizenship from Afghanistan, Pakistan and Bangladesh and will be given in future, thus all the India citizen will enjoy their rights under constitution and will not be deprived. It is for all the Muslim citizens of India to understand that even in past when Bangladesh boundary issues were solved in 2014 around 14,896 people were given citizenship out of which more than thousand were Muslim, the CAA has nothing to do with the deportation.

Though it is very much true that the CAA has no were mentioned anything regarding the Muslim community but it does not mean that the government has made the law against the community. If people try to pay attention to the Act and the amendment made under it a very clear and understanding picture comes out that those who are the legal citizens of India including the Muslim community has nothing to do with the bill which means they are very much safe and need not to worry for this reason the bill only talks about the six community mentioned in the act if they are illegal migrants and try to make it easy for them to get the citizenship of India but still if any Muslim from country like Afghanistan, Pakistan and Bangladesh wish to get India citizenship they are very much welcomed according to the laws provided, hence the citizen should not panic and try to understand the working of government and should peace in the country.

India situation before CAA? The basic issue in India before CAA which led to the amendment includes the refugees chakma and hajong in Arunachal Pradesh they are originally Bangladesh inhabitants of Chittagong hill and when Bangladesh was still called east Pakistan they fled the country. Chakma are Buddhist and hajong are Hindus, in northeast they caused a great stir to local groups and they were oppose to the settling of these people in India. It was because of these reasons the central government to avoid conflict rehabilitate chakma and hajong to North East Frontier Agency in tirap division and later Arunachal Pradesh was created from NEFA area so that citizenship of India can be given to these people, the supreme court order to give citizenship was enforced in 2017. The other reasons which were creating problem
in India before CAA that there was an over stay concession to be paid by the minorities including Muslims from three countries Afghanistan, Pakistan, and Bangladesh if they overstay 90 days the fine was 100 rupees and if they stay from 91 days to two years the fine was 200/- and for this reason the concession was made by external affairs minister to minorities of these countries, if we look into such situations the minorities of these countries were facing a big problem for this the government made a big decision which may give relief.

**CAA is unconstitutional?**

The citizenship amendment act has been attacked by many that it is unconstitutional but the reality is totally different no article of the constitution including article 14 has been violated as the doctrine of reasonable classification has been resolved and the minorities in the countries have been reasonably classified, the legislature is well established and it always keep in mind the need of people, it also consider any danger or harm which may result from any decision. With time the society is becoming more divert, problematic and complicated for the legislature to form any law and for this reason classification can be done on reasonable grounds to come out of certain difficulties as laws are policy to attain specific ends which in return does not mean to break the law "Bare equality of treatment regardless of the inequality of realities, is neither justice nor homage to the constitutional principle." People feel that CAA law is against constitution and secularism but it is only possible when there is lack of legislative competence, there is no provision present in the amendment which infringe the constitution ifact there is a better way to portray the law that it does not include few in the amendment but also that it does not exclude anyone, it is good for people to discuss the law and describe as we are a democratic country but at the same we will not tolerate violence as it break our democracy.

People are challenging the citizenship amendment act on the grounds that it violate the fundamental rights of the constitution and discriminate on the basis of religion but before making any such statement the citizen of our country should understand that the government intention can not be questioned in enacting legislation it has to be presumed by the court of constitution, we can’t declare a law unconstitutional only on the ground that it is abused. The “intelligible differentia” with “rational nexus” in case where non citizens that is citizens are considered should not be adopted, it is very clear that article 14 include non citizens also in the word “Person” but what we need to under is only those non citizens who entered legally so that every provision of the laws will apply equally to them as well. Moving future to understand the constitutionality of the CAA we must consider the liqueate pact of Nehru in 1950 according to which the minority rights will be protected by India and Pakistan, many petition have been filed in the supreme court that CAA should include Muslim minorities but this decision can not render the CAA as unconstitutional it’s is choice of India government to exclude a particular section and those Muslim minorities who want to be added in the CAA should remember the amendment made by the Pakistani in Nehru liqueate pact in 1974 where Shias were not declared as minority.

**CAA against secularism?**

It is for us to understand that secularism has nothing to do with CAA. The definition of secularism States that religious beliefs is a private matter and the state should not Interfere in the same and thus the state itself will not have any particular religion as
national religion so that the rights of individual and minorities can be protected. But there have been certain incidents where state need to take some action like in Kartarpur Pakistan a Hindu girl was forced to convert her religion and if we know till 2017 the Pakistani Did not legitimate Hindu marriages not just this but after partition in 1947 India adopted a secular form of nation but it is also true that at time when constitution was framed the word secularism was not the part because both Nehru and Ambedkar wanted that people themselves should decide according to the situation and time so secularism has nothing to do with CAA rather CAA is a step taken by the government so that people who face problem in three countries mentioned above can get speedy citizenship of India, people have questions in mind that why on religion basics this act is been based the clear is that during the time of partition few families could not travel back to India and they are still stuck in Pakistan and so this historical mistake will be corrected now.

Why do we need CAA?
It is very important for people to understand the need of CAA in our country it’s not just an act or amendment but a whole new way how India will work now.

- For the better working of a country it is very important for government to have a data which states how many citizens are there in the country out of which how many are in minorities and if there are any illegal migrants or who have came to do business in our country or to stay without permission because many a times the citizen of country suffer due to illegal migrants so to solve this the NRC has been issued in the country which will keep a clear check list of all registered citizens.
- People should understand that CAA is not to harm any of the legal citizens of our country which if you were born in the country and our citizen of country According to the laws mentioned you need not to worry about the CAA this includes even Muslim community if they are legal citizens but this act will provide citizenship to those who are being prosecuted in the neighborhood countries so that they can live with dignity and respect.
- Those who are in majority no matter which community they belong to or which country they can also have India Citizenship and can apply for the same by the legal laws provided in the country.
- Earlier Bangladesh was not in support of the law and did not agree to take those illegal migrants which came form Bangladesh back but now the country has given a helping hand and confirmed that any person who is illegal migrants in India from Bangladesh will be take back to the country which is a good act for India as well it make help both the countries to form a friendly relations which will help in future in terms of any difficulties.
- The cut off date which is 2014 as fixed by the government is fixed while in keeping in mind that in future no immigration should face any difficulties and rather it will encourage more of it.
- Persecution of minorities in countries have always been a big issue and we see that people immigrants from these countries come to India so CAA is a big step taken which will provide citizenship to all such people at the same time it does not deal with forced deportation of people from India’ which will help all because in other countries Islam is main religion and those with other religions they face a big problem so India being a secular country is help people of all religions to come back.

Cases related to CAA?
Around 143 petition against CAA has been filed and will be heard by a bench headed
by chief justice S.A Bobde and separate petition relating to CAA in Assam and Tripura will be taken. The petition mostly state that the CAA law should not be implemented as it is against the Muslim community and based on religion criteria, most of the opposition parties want that this law should be declared unconstitutional as it violet the provisions of the constitution but I response to these petition the supreme court on 9 January said that they cannot declare any law as unconstitutional they can only answer on the validity of the law further the court made it clear that they will not hold the CAA and even the high court will not hear the CAA pleas with this around five judges constitution bench will hear 140 petition.

The response to all the petition filled in the court the center submitted a 129 pages affidavit where they make it very clear that the legislation is not invalid or against the constitution this affidavit was filled by B.C Joshi Director of Ministers of Home Affairs. In a petition from the Indian Union Muslim league it was said that CAA is against the Muslim community and infringe the fundamental right to quality for which the bench asked the center to make all the terms and conditions and aims of CAA clear to the people and make them aware about the law. Not just this but there are many questions which came forward like there substantial questioning of law and whether the classification on the basis of religion and geography can be made or not? In response to all these questions the center in it affidavit made it clear that CAA is very much needed to reinstall secularism, fraternity and equality in fact there is a great need in the country to have NRC with this the government answer almost all the issues filed in the petition, the government also provided many historical data why only six community have but included in the act and the government stated that they have taken some other decision and made law in favor of these six communities infact foreigners act will be applied to them, the password enter rules 1950 is also amended.

The government also gave justification as to why only Pakistan, Afghanistan and Bangladesh were selected from were the illegal migrants will be given citizenship in India the main reason given was that these countries have their national religion and are not secular country due to which a large exploitation of citizens with other religions in fact in last few decades these countries have seen a great violence. The government also said when one of the petition asked that why not Muslim are included they said that Hindu from other Nations are also not included because persecution take place in these countries more as compared to other countries no just this at the end it was made clear in the petition that the CAA is not against constitution as article 15 an 19 are provided oy to citizens of the country not to illegal migrants and with this even article like 5,6,7,8,9,10 which talk about citizenship to people are also not violated as parliament has a overriding power under which it can make laws for any new class of communities.

Conclusion
India being a country with vast diversity of religious and cultural it is very difficult to maintain the balance between all but every time India prove it self to value the belief of all the citizen in the country which lead to the development of the nation in terms of economic, social and spiritual, the most important aspect of India culture is equality in terms of religion, race, cast, sex and creed this spread large amount of love and unity among the citizens, to make this heritage of our country more prominent the Citizenship amendment act has been introduced which not only value the
fundamental rights and other provisions of the constitution but also protect the interests of those people who have faith in Bharat Mata. This act of citizenship is inspired by the great philosophy of vasudhaiv Kutumbakam which means that whole world is our family and that is the reason why India help all those who are in great need and weak economically, socially and culturally in past also India made efforts to provide shelter to refugees of different communities similarly in the citizenship act the government made it clear that not just people of Hindu community but those of Parses and Christians have also been included, through this act we can also see India follow the words said by father of the nation Mahatma Gandhi who once said that no matter even if Pakistan is divided but citizens of Pakistan who are forced to leave the country are Indian citizens and were born to serve.

We all know that no discrimination take place in India and all the minorities including the Muslim community can live with full dignity and respect but it because of the political influence and environment in the country that the act is facing great criticism and big confusion are being created, the opposition parties are making it difficult for the government implement the act in fact many of the people protesting against the act don’t even have the clear information and knowledge that why such act is been introduced and it is for this reason that people should understand why such decisions has been taken by the government and how it will benefit the country and its citizens. Those people who think that the is act against the constitution and certain article should give a deep study to the act and learn that no provision of the constitution is being violated, it is also very clear that the parliament can make laws in special circumstances like haj pilgrimage were given subsidies the government is trying it best to fulfill all the promises made to the people and providing all the facilities.

It’s a request to all the citizens who do not want the citizenship amendment act to pass and apply on the country that study the reason why government took such step, how India will benefit from the act and how in future the country will get profit from the same once you get the answer to all such questions you will have a different Outlook today’s the CAA and it’s implementation as it will help all the minorities to get a Citizenship and they no need to face any discrimination or persecution in any of the countries mentioned in the act. It is for the people of India to have faith in the government and its decision which will help the whole country in future and promise made by the government that no citizen will be deported from the country even if found as illegal migrants, India has always believed in secularism and socialist form and it also follow the path shown by our great leader, it will never go against any of the law which will break the democracy of our country and even if the government will choose a wrong path the judiciary of our country is so strong that it won’t led the government to break the rule hence as a citizen it is our duty that we respect the government and its work so that a better future of our country can be shaped.

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FREEDOM OF SPEECH ART 19 VS SECTION 499 & 500 OF IPC, 1860

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Abstract:
Reputation is considered as one of the most important assets of any person. The said person be any political leader, business tycoon, famous celebrity or even middle-class person. Everyone loves their reputation. Our Constitution gives us Right to freedom of speech via Article 19(1)(a) but it comes with the reasonable restrictions defined under Article 19(2). Defaming any person as defined under section 499 and shall be punished under Section 500 of Indian Penal Code, 1860.

This Article deals whether Section 499 and 500 of IPC, 1860 is unconstitutional as per Article 19 Right to Freedom of Speech which itself a Fundamental Rights protected and guaranteed under The Constitution of India. This Article puts forwards various interpretations done by Hon’ble High court and Hon’ble Supreme Court, and with deep analysis and research and concluding on the same.

Introduction
A good name is worth more than good riches. (Shakespeare’s Othello, Act-II, Scene III, pp.167):
Good name in man and woman, dear my Lord Is the immediate jewel of their souls; Who steals my purse, steals trash; Its something nothing: T’was mine, t’is, and has been slave to thousands; But he that filches from me my good name, Robs me of that which not enriches him And makes me poor indeed.

Freedom of Speech is the bulwark of democratic government. This freedom is essential for the proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties.

In Maneka Gandhi v UOI, Bhagwati J, has emphasised on the significance of the freedom of Speech and expression in these words:

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.

In 1927, in Whitney v California, Louis Brandeis J, made a classic statement on the freedom of Speech in the context of the US Constitution:

Those who won our Independence believed that the final end of the state was to make men free to develop their faculties... They believed liberty to be the secret of

1080 Para 105 of Delhi High Court-Ram Jethmalani vs Subramaniam Swamy on 3 January, 2006
1082 Maneka Gandhi v UOI, AIR 1978 SC 597: (1978) 1 SCC 248
1083 Whitney v California, 247 US 214.
happiness and courage to be the secret of liberty. They believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile... that public discussion is a political-duty; and that this should be a fundamental principle of the American Government.

Talking about the First Amendment to the US Constitution which guarantees freedom of speech in the USA. The US Supreme Court has observed 1084:

It is the purpose of the First Amendment to preserve an uninhibited market place of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee.

Fundamental Right- Article 19 of The Constitution of India.

Article 19(1)(a)-“ to freedom of speech and expression;
Article 19(2) - “Nothing, in sub-clause (a) of clause (1) shall effect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the (the sovereignty and integrity of India, ) the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

Section 499 & 500 of Indian Penal Code, 1860.

Whether or not it is for the public good is a question of fact.  

Second Exception.—Public conduct of public servants.—It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.  

Third Exception.—Conduct of any person touching any public question.—It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.  

Fourth Exception.—Publication of reports of proceedings of courts.—It is not defamation to publish substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.  

Fifth Exception.—Merits of case decided in Court or conduct of witnesses and others concerned.—It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.  

Sixth Exception.—Merits of public performance.—It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.  

Explanation.—A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.  

Seventh Exception.—Censure passed in good faith by person having lawful authority over another.  

—It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.  

Eighth Exception.—Accusation preferred in good faith to authorised person.  

—It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.  

Ninth Exception.—Imputation made in good faith by person for protection of his or other's interests.  

—It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.  

Tenth Exception.—Caution intended for good of person to whom conveyed or for public good.  

— It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.  

Section 500. Punishment for defamation.—Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.
Fundamental Right of Freedom of Speech, i.e. Article 19 Vs Section 499 & 500 of IPC, 1860 can be cleared through various High court and Honble Supreme Court Judgements which are as follows as:

1. **Abk Prasad vs Union Of India (Uoi) And Ors**

   Writ petition was filed by the petitioner seeking a declaration that section 499 and 500 of Indian Penal Code are arbitrary, illegal and ultra vires of constitutional limitations and violative of Articles 14, 19(1)(a) and 21 of the Constitution of India.

   The Senior counsel- Mr. S. Ramachandra Rao, appearing for the petitioner submits that,

   *In view of the fact that the law of defamation was enacted about one and half century back by colonial rulers and after freedom India having become republic governed by a Constitution this law cannot remain a part of statute. He contended that section 499 of I.P.C is directly opposed to the freedom of expression which includes freedom of press and as such it cannot have any place in a democracy like ours. He further contended that, if it was not possible to strike down section 499 as a whole then the first exception to section 499 needs to be struck down partially.*

   The learned Advocate General who appeared for respondents submitted that,

   *Right of freedom of speech is guaranteed by the Constitution and it includes freedom of press but freedom of speech by no means can include right to defame. The learned Advocate General was of the view that section 499 of the Constitution reasonable restrictions can be imposed on freedom of speech by competent legislations. The learned Advocate General was further of the view that freedom of press though sacred could not be higher than freedom of a citizen.*

   The court observed that

   *Now, coming to Article 19, true it guarantees to all the citizens of India freedom of speech and expression but clause (2) to Article 19 gives power to the State to have restrictions on rights to freedom. Laws with respect to libel and slander existing at the time of coming into force the Constitution of India were saved. Later on, by First amendment clause (2) was amended and certain new grounds of restrictions were introduced. Libel and Slander were substituted by word Defamation. So, from 1951 there is a constitutional protection to section 499 I.P.C. Therefore, it is not open at all to the petitioners to contend that section 499 is ultra vires to Article 19 of the Constitution of India. Section 499 was in existence at the time of commencement of the Constitution and section 499 of I.P.C is in chapter XXI which deals with 'OF DEFAMATION'. The title under section 499 has been incorporated in I.P.C as 'Defamation'. Therefore, in the absence of any challenge to the First Constitutional amendment of 1951 substituting the words Libel and Slander by Defamation it may not be possible by any stretch of imagination to hold that section 499 I.P.C was ultra vires to Article 19. It appears that, Libel and Slander were substituted by Defamation because Libel and Slander were not defined in section 499 or any other provisions of Indian Penal Code whereas Defamation had been defined very elaborately.*

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1085 Andhra High Court- Abk Prasad vs Union Of India (Uoi) And Ors on 25 January, 2002.

Equivalent citations: 2002 (3) ALT 332, 2002 CriLJ 2464
Further observed that-

“Now, applying these principles and acknowledging that defamation is one of the exceptions created under Article 19(2) of the Constitution, we do not think that Section 499 or 500 suffers from any Constitutional infirmity. The excerpts from the judgment expressing doubts by Supreme Court with respect to vires of Section 499 or 500 I.P.C have been expressed because it appears that such an argument had been made but it had not been tested by the Supreme Court. This appears to be a just passing reference and in the case in which this reference was made the facts would suggest that there was a likelihood of damage to the reputation of the persons concerned who had moved the Court, but even then the Supreme Court did not go into the question of vires of section 499 and 500 I.P.C.

We are of the considered view that right of freedom of press is not higher than the right of freedom of speech of an individual and this right, as is said, is not an absolute right. This is a right guaranteed under Article 19 of the Constitution of India and this right is subject to restrictions mentioned in Article 19 of the Constitution. Even without that, it is well settled principle of equity that, one’s freedom to move his arm ends where somebody’s nose starts.

Freedom of expression or freedom of press would not certainly include freedom to defame. It would be, however, a different story if such publication is made which is factually correct and which is in public interest.

Let us assume that a person is involved in anti-national activities and a publication is made bringing it to the notice of the general public that such person is involved in anti-national activities and if it is factually correct it would be in the interest of the public to know such accusation, but if such accusation is factually incorrect then damage would be done to the person about whom such a story is published. Therefore, we do not find that the law of defamation is in any way unreasonable or section 499 of I.P.C violates any principles on which our democratic set up rests. Truth is an exception to the law of defamation.”

Coming to conclusion it stated that Truth should be a defence without further conditions, there are two conditions under section 499 I.P.C for truth to become an effective defence in a complaint of defamation. One is that it should be factually correct and the other is that it should be in public interest. We do not find how it is unreasonable. It is not always necessary to bring truth to the notice of general public.

Let us assume that there is a victim of rape. In Indian society, if it is known that a particular woman has been subjected to rape there is guarantee for a miserable life to her. In such a social order the poor victim may try to hide this truth from the public. Would it be right for the press to publish such a story. After all, it is not going to serve any public purpose. In such a situation that poor lady shall be entitled to have a right to privacy although factually it would be correct that such a lady was raped. Therefore, it would not be always sufficient defence that the story published was factually correct. If the contention pleaded before us is accepted that truth should be a defence without further qualifications, then the pressmen shall enter anybody’s bedroom.

As has been held in R. Rajagopal’s case that the right to privacy and right of freedom of press have to be balanced, therefore, a laxman rekha has to be drawn somewhere and in our view the laxman rekha is the public interest. If publication of truth is in public interest it would not be a defamation, but if it has nothing to do with public
interest and relates to privacy of an individual then it would certainly be defamatory. Therefore, in our view it would be dangerous if truth without further qualifications is made a defence in an action against defamation.

2. In the case of Ram Jethmalani vs Subramaniam Swamy\textsuperscript{1086}

It was held by Justice Pradeep Nandrajog that statement made by defendant was prima facie defamatory. It was a case of exceeding the privilege and that by itself was held to be evidence of malice. The statement was quite on connected with and irrelevant to the situation, actual malice on part of defendant was well established. This harmed the image of plaintiff at large and such allegation destroy the personal and political reputation as LTTE is banned organization and connecting the name with it leads to loss of reputation. However such loss is not recoverable, said by justice, but still compensation of Rs 5 lacs awarded in favour of plaintiff and against the defendant, considering his professional status and his social status.\textsuperscript{1087}

3. In the Case of Subramaniam Swamy v. Union of India\textsuperscript{1088}

In the year 2014, Dr. Subramaniam Swamy alleged corruption charges on Ms. Jayalalitha. After which Ms. Jayalalitha framed defamation charges on Dr. Subramaniam Swamy. He in return challenged the constitutional validity of Section 499 and Section 500 of the India Penal Code. The court, in this case, upheld the constitutional validity of the offense of criminal defamation. And ruled out that Section 499 and Section 500 of the India Penal Code, impose reasonable restrictions on the right to freedom of speech and expression.\textsuperscript{1089}

4. In the case of Vijaykant & Anr. v City Public Prosecutor & Ors.\textsuperscript{1090}

The Order was passed by a Bench comprising of Justice Dipak Misra and Justice R.F. Nariman. Justice Misra is the author of the decision in Subramanian Swamy v Union of India & Ors [W.P. (Crl.) No. 184 of 2014 and other petitions], upholding the constitutional validity of the criminal defamation provisions in the Indian Penal Code, 1860.

Justice Misra observed that a political rival in a democracy, like any other common man, has the right to criticize the government of the day. He further stated that democracy is predicated fundamentally on the ideas of criticism, dissent, and tolerance, noting that the will, desire, aspirations and sometimes the desperation of the people are expressed through such criticism. Defamation proceedings should not be instituted in response to political criticism, including allegations of corruption in the government or that a politician is unfit to run the government. The Court reportedly stated that, “you can’t use defamation cases to throttle democracy. This is not done. You are a public figure and you have to face criticism … A government cannot be seen to use state machinery to file criminal defamation cases against political opponents. Cases for criticizing the government or bureaucrats create a chilling effect … Even though we upheld the

\textsuperscript{1086} Delhi High Court- Ram Jethmalani vs Subramaniam Swamy on 3 January, 2006, Equivalent citations: AIR 2006 Delhi 300, 126 (2006) DLT 535
\textsuperscript{1087} http://www.legalserviceindia.com/legal/article-399-ram-jethmalani-v-s-subramaniam-swamy-a-case-analysis.html
\textsuperscript{1088} Writ petition (Criminal) No. 184 of 2014
\textsuperscript{1089} https://blog.ipleaders.in/defamation-section-499-to-502-of-ipc/
\textsuperscript{1090} Writ Petition (Criminal) No. 43/ 2016; Writ Petition (Criminal) No. 193/ 2015.
Defamation law, if we find there is a continuous effort and deliberate design to engage government law officers to file cases, it is the duty of the court to protect them”.

5. In the case of Arvind Kejriwal v. Union of India.

There has to be a debate with regard to the conceptual meaning of the term defamation’ used in article 19(2) of the Constitution and ‘defamation’ in section 499 of the IPC. It was also pointed out that the freedom of speech and expression has to be a controlled one and does not include the concept of defamation as defined under section 499.

6. In the case of In N. Ravi v. Union of India

wherein it had been observed as follows: Strictly speaking on withdrawal of the complaints, the prayer about the validity of Section 499 has also become academic, but having regard to the importance of the question, we are of the view, in agreement with the learned counsel for the petitioners, that the validity aspect deserves to be examined.

7. In the case of Chintaman Rao vs. The State of Madhya Pradesh

The Supreme Court explained the meaning of “reasonable restrictions” imposed in Article 19 (2). It implies intelligent care and deliberation and that is required in the interests of the public.

**Information Technology Act, 2000 and Violation of Article 19 and attracts Section 499 & 500 of Indian Penal Code, 1860.**

In the Case of Shreya Singhal vs U.O.I.

Shreya Singhal’s case is a landmark judgement in the field of freedom of speech and expression. This epic case brings forth various dimensions which are important facets of article 19(a). Section 66A which was widely criticised for its over breadth, vagueness and its chilling effect on speech was struck down by the apex court as it was unconstitutional. However, in Swamy’s case Mishra J takes a different route and points out that there is a difference in the canvas on which the Shreya Singhal’s case has been made. In that case there was a narrow interpretation of the provision. However, in Swamy’s case ‘reputation’ (which is implicit in article 21) was also involved and narrow interpretation was not the case.

**Conclusion:**

From the above analysis and research, we can conclude that Article 19(1) (a) provides Right to freedom of Speech & Expressions which comes along with reasonable restrictions defined under Article 19(2), but if defamation is done then it should be dealt with Section 499 & 500 of Indian Penal Code, 1860.

1091 https://globalfreedomofexpression.columbia.edu/cases/vijaykant-anr-v-city-public-prosecutor-ors/
1092 Arvind Kejriwal v. Union of India [W.P. (Crl) No. 56 (2015)].
1093 http://ili.ac.in/pdf/paper10.pdf
1095 http://ili.ac.in/pdf/paper10.pdf
1096 1951 AIR 118, 1950 SCR 759
1097 https://lexlife.in/2020/05/03/defamation-law-in-india/
1098 IN THE SUPREME COURT OF INDIA-WRIT PETITION (CRIMINAL) NO.167 OF 2012
1099 Page-12 http://ili.ac.in/pdf/paper10.pdf
Famous cases of defamation was on Tarun Gogoi\textsuperscript{1100} for Rs. 100/- Crore defamation case, and alleged arrest of comedian Kiku Sharda for defamation.\textsuperscript{1101} And Recent Defamation Case of Anchor Arnab Goswami\textsuperscript{1102}. Moreover there is one case which is making big chaos here is on stand-up comedian Agrima Joshua\textsuperscript{1103} who had gave defamatory statements.

From the above discussion we can state that fundamental Rights guaranteed by The Constitution of India is supreme over all other laws since it is Law of Land. But defamation shall be dealt with punishments so that no other person in future does such acts.

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A DETAILED STUDY ON CITIZENSHIP AMENDMENT ACT 2019

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ABSTRACT
India recognizes an individual as a citizen by virtue of birth, descent, registration and naturalization pursuant to the Citizenship Act 1955. Under the previous regime, the citizenship Act was amended 5 times that is in the years of 1986, 1992, 2003, 2005 and 2015. Citizenship Amendment Act 2019 have argued vigorously in favour of its constitutionality as well as its importance. Yet, it was passed by Indian Parliament on 11 December 2019. This Article deals with the meaning of citizenship, what the amendment to the Citizenship Act says, the aim of the Citizenship Amendment Act 2019, features of Citizenship Amendment Act 2019, details of the CAA protests, controversies regarding the same issues raised against the Citizenship Amendment Act 2019 and rallies in favour of the Act. In this article, the researcher has tried to discuss in detail about the CAA 2019.

KEY WORDS: Citizenship Act, CAA, NRC, Assam Accord, illegal immigrant, CAA protests.

INTRODUCTION:
The Citizenship (Amendment) Act, 2019 seeks to amend the Citizenship Act, 1955. It was passed by the Parliament of India on 11 December 2019. It seeks to grant Indian Citizenship to persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities on ground of religious persecution in Pakistan, Afghanistan and Bangladesh. The Act aims at granting citizenship rather than taking away someone’s citizenship. This Act is not against any Minority in India. It is only concentrating on ending the sufferings of lakhs of persecuted refugees fleeing from these three countries. All the minority communities being persecuted on religious lines in these countries have been included. The Citizenship Amendment Act (CAA), 2019, aims to give Indian nationality to non-Muslim “illegal migrants” from Afghanistan, Bangladesh and Pakistan, who came to India before December 31, 2014, due to religious persecution, and who enjoy the benefit of waiver of Foreigners Act and Passports Act.

WHAT IS CITIZENSHIP?
Citizenship defines the relationship between the nation and the people who constitute the nation. Citizenship carries with it certain advantages conferred by the Constitution. It gives an individual certain rights such as, protection by the state, right to vote, and right to hold certain public offices, in return for the fulfillment of certain obligations owed by the individual to the state.

CITIZENSHIP IN INDIA:
Though the Constitution of India is federal and provides for dual polity, but it provides for a single Citizenship for the whole of India. Every Indian is the Citizen of India and enjoys the same rights of citizenship no matter in what state he resides. Article 11 of the Indian Constitution expressly confers power on Parliament to make laws to provide for such matters. In exercise of its power the Parliament had enacted the Indian Citizenship Act 1955 which provides for the acquisition and termination of citizenship subsequent to the commencement of the Constitution. Entry 17, List 1 under the Seventh Schedule talks
about Citizenship, naturalization and aliens. Therefore, Parliament has exclusive power to legislate with respect to citizenship.

WHO IS AN ILLEGAL IMMIGRANT IN INDIA?
Under the Citizenship Amendment Act 2019, Illegal immigrants are citizens of other countries who entered India without valid travel documents like a passport and visa or who entered with valid travel documents but remained in the country beyond the permitted time period. They can be deported and jailed under the Foreigners Act 1946 and the Passport (Entry into India) Act, 1920.

THE SCENARIO BEFORE PASSING OF THE ACT:
The Citizenship Act, 1955 describes 5 conditions for obtaining citizenship of India, such as Citizenship by Birth, Citizenship by Descent, Citizenship by Registration, Citizenship by Naturalization, Citizenship by incorporation of territory. Under Section 5(a) of Citizenship Act 1955, a person of Indian origin must be ordinarily resident in India for seven years and they should have lived in India continuously for 12 months before submitting an application for citizenship. Under this Act, one of the essentials for citizenship by naturalization is that the applicant must have resided in India during the last 12 months, as well as for 11 of the previous 14 years.

WHAT THE ACT INTENDS TO DO?
The main aim of this Citizenship Amendment Act 2019 is to make changes in the Citizenship Act, the Passport Act and the Foreigners Act.

AMENDMENTS:

The Citizenship Amendment Act of 2019 has inserted the following provisos in section 2, sub-section (1), after clause (b):

Provided that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who entered into India on or before the 31st day of December, 2014 and who has been exempted by the Central Government by or under clause (c) of sub-section (2) of section 3 of the Passport (Entry into India) Act, 1920 or from the application of the provisions of the Foreigners Act, 1946 or any rule or order made thereunder, shall not be treated as illegal migrant for the purposes of this Act;

A new section 6B was inserted (in the section concerning naturalization), with four clauses, the first of which stated:

(1) The Central Government or an authority specified by it in this behalf may, subject to such conditions, restrictions and manner as may be prescribed, on an application made in this behalf, grant a certificate of registration or certificate of naturalization to a person referred to in the proviso to clause (b) of sub-section (1) of section 2.

WHAT IS THE CUT-OFF DATE FOR INDIAN CITIZENSHIP?
The cut-off date for Indian Citizenship is 31 December 2014. Only those who entered India before this date have a right to seek citizenship in India under the CAA. Those who entered India thereafter have no such right, even though they may have faced religious persecution in the subject countries before or after that date.

FEATURES OF CITIZENSHIP AMENDMENT ACT 2019:
1. Under the Citizenship Act 1955, a person may be given an OCI card, if he is of Indian
origin or the spouse of a person of Indian origin. The Citizenship Amendment Act 2019 gives the facility to OCI cardholder to travel in India, work, and study in the country.

2. The Citizenship Amendment Bill 2016 says that the citizenship of OCI cardholders can be cancelled on 5 grounds: showing disaffection to the Constitution of India, registration through fraud, engaging with the enemy during war, damaging the sovereignty of India, sentenced to imprisonment for two years or more within five years of registration as OCI. But the Citizenship (Amendment) Bill, 2019 added one more ground of the cancellation i.e. if the OCI has violated any law that is in force in the country.

3. The Act says that on acquiring Citizenship such person shall be deemed to be citizens of India from the date of their entry into India and all legal proceedings against illegal migrants related to their illegal migration or citizenship will be closed.

4. The Citizenship Amendment Act, 2016 provided that these illegal migrants of Hindus, Sikhs, Buddhists, Jains, Parsis and Christians communities of Afghanistan, Bangladesh, and Pakistan must stay at least 6 years in India before applying for Indian citizenship through naturalization. But the Citizenship (Amendment) Act 2019 would reduce this period to 5 years from 6 years.

EXCEPTION:
The provisions on citizenship for illegal migrants does not apply to the tribal areas of Assam, Meghalaya, Mizoram, and Tripura, as included in the Sixth Schedule of the Constitution. These tribal areas include Karbi Anglong in Assam, Garo Hills in Meghalaya, Chakma District in Mizoram, and Tripura Tribal Areas District. It also does not apply to the areas under the Inner Line Permit under the Bengal Eastern Frontier Regulation, 1873. The Inner Line Permit regulates the visit of Indians to Arunachal Pradesh, Mizoram, and Nagaland. The Act does not include migrants from non-muslim countries fleeing persecution to India, Rohingya Muslim refugees from Myanmar, Hindu refugees from Sri Lanka and Buddhist refugees from Tibet, China.

WHAT IS ASSAM ACCORD?
The Assam Accord was a Memorandum of Settlement signed by the Government of India and Assam and the All Assam Students’ Union (AASU) and the All Assam Gana Sangram Parishad (AAGSP) in New Delhi on August 15, 1985. The signing of the Accord led to the conclusion of a six-year agitation that was launched by AASU in 1979, demanding the identification and deportation of illegal immigrants. In the ate of 1970s, an extraordinary student movement had taken root in Assamese soil. Very high concentration of immigrants from East-Bengal, drew national attention due to a sudden rise in the number of voters compared to the previous election two years earlier.

What was agreed upon in the Assam Accord?

i. Foreigner’s issue.

ii. It was agreed that “for purposes of detection and deletion of foreigners, 1. 1. 1966 shall be the base data and year”, and that “all persons who came to Assam prior to 1. 1. 1966, including those amongst them whose names appeared on the electoral rolls used in 1967 elections shall be regularized.”

iii. Foreigners who “came to Assam after 1. 1. 1966 and upto 24th March 1971 shall be detected in accordance with the provisions of the Foreigners Act, 1946 and the Foreigners (Tribunal) Order, 1964” and their names “will be deleted from the electoral rolls in force”.

What was agreed upon in the Assam Accord?
iv. “Such persons” it was agreed, “will be required to register themselves before the Registration Officers of the perspective districts in accordance with the provisions of the Registration of Foreigner’s Act 1939 and the Registration of Foreigner’s Rule 1939.

v. Under clause 5, “Foreigners who came to Assam on or after March 25, 1971 shall continue to be detected, deleted and practical steps shall be taken to expel such foreigners”.

vi. NRC will be prepared.

NATIONAL REGISTER OF CITIZENS:
The NRC in Assam is basically a list of Indian Citizens living in the State. The Citizens Register sets out to identify foreign nationals in the state that borders Bangladesh. The process to update the register began following a Supreme Court order in 2013, with the states nearly 33 million people having to prove that they were Indian Nationals prior to March 24, 1971. The updated final NRC was released on August 31, with over 1.9 million applicants falling to make it to the list.

What happens with the excluded individuals?
‘Non-inclusion of a person’s name in the NRC does not by itself amount to him/her being declared a foreigner’, Govt. has said. Such individuals will have the option of to present their case before foreigners’ tribunal. If one loses the case in the tribunal, the person can move the court and then the Supreme Court. In the case of Assam, the state government has clarified it will not detain any individual until he/she is declared a foreigner by the Foreigners’ tribunal.

DEPORTATION:
The CAA has absolutely nothing to do with the deportation of any foreigner from India. The deportation process of any foreigner irrespective of his religion or country is implemented as per the mandate of the Foreigners Act, 1946 and/or The Passport (Entry into India) Act 1920. These two laws govern entry, stay movement within India and exit from India to all foreigners irrespective of their religion or country therefore the usual deportation process which would apply to any illegal foreigner staying in India. It is a well considered judicial process that is based on a proper inquiry by the local police or administrative authorities to detect an illegal foreigner. It is ensured that such an illegal foreigner has been issued a proper travel document by the embassy of his country so that he can be duly received by officials of his country when he is deported. In Assam, the process of deportation happens only after the determination of such a person as a ‘foreigner’ under the Foreigners Act 1946. Then, he becomes liable for deportation. Therefore, there is nothing automatic, mechanical or discriminatory in this exercise. The State Governments and their district level authorities enjoy the power of the Central Govt. under Section 3 of the Foreigners Act and Section 5 of the Passport (Entry into India) Act, 1920 to detect, detain & deport any illegal foreigner.

CAA PROTESTS:
The passage of the legislation resulted in large-scale protests in India. Violent demonstrations were organized against the bill. The people of North Eastern states were in fear that granting Indian citizenship to refugee and immigrants will cause a loss of their rights. The protesters in other parts of the country said that the bill is against Muslims and demanded that muslim
refugees and immigrants must be granted Indian Citizenship. Major protests against the Act were held at universities in India. Students of Aligarh Muslim University and Jamia Milia Islamia alleged brutal suppression by Police. The protests have led to death of protesters, damage to the public and private property, detention of hundreds of people and internet ban.

The protests held from Delhi to Kochi, from young students on their respective university campus to the women striking and protesting at Shaheen Baugh, are collectively upholding their constitutional right to dissent and striving to uphold India’s rich legacy of peaceful protest protected under the Article 19(a) and 19(b) of the Constitution of India.

Jamia Milia Islamia is a very prominent institution and has students from all faiths. This institution also became the main protest site against CAA. Even the non-muslim students were compelled to join in the protest as they felt that it was their duty to stop the government from dividing people in religious lines. A thousand of people had gathered on the main road outside the university of JMI many of them were women accompanied by their young children - sat on carpets on the road all day, while men stood on the sides. Protesters listened to speakers talk about secularism and the constitution, and how the government was threatening to undermine both.

The protesters held posters condemning the act of the Government and there Anti- muslim steps, speeches against the Anti- secular steps was being given. Nobody was armed or disrupted any public order instead there was an atmosphere of healthy resilience and resent on the roads. The protestors had arranged a "Sarva Dharma Sambhava" to highlight unity among religions and communities. The interfaith ceremony, witnessed traditional Hindu-style 'havan' and Sikh 'kirtan'. Many political leaders from Fourteen political parties protested outside Mahatma Gandhi's statue and sat on dharna there since morning wearing black bands on their arms as a symbol of protest against the NPR, NRC and CAA. Adding that the opposition leaders also left their designated seats in the front row and sat at the back in separate blocks.

From enforcing the Section 144 of the Criminal Procedure Code, the Unlawful Activities (Prevention) Act, sedition laws, internet shutdowns to National Security Act – the heavy-handed approach of the Government demonstrates the betrayal of what India stands for: upholding the dignity and liberty of its people. The authorities have not only been curbing freedom of expression and the right to peaceful assembly and association, but are also using excessive force to deter future peaceful protests – which has resulted in the arrests of over 1000 people, detaining over 5000 persons and at least 30 deaths. With this, India stands in complete violation of international human rights laws and standards.

There have been harsh police actions against anti-CAA protesters very particularly BJP-ruled states has been an alarming incident for the right activists. The Delhi police arrested students Meeran Haider and Safoora Zargar from JMI university for their alleged role in organisation of protests against the Citizenship Amendment Act (CAA), which is considered discriminatory towards Muslims. Even the members of civil society condemned the Delhi Police, which fell under the jurisdiction of Home Minister Amit Shah, for falsely implicating "student activists in Delhi violence cases. In February, 53 people were killed in the worst religious violence that the Indian capital could have ever seen in decades. The violence erupted after a mob led by the
governing party leader targeted sit-ins in New Delhi against the Citizenship Act. The Muslims residing in the North-east Delhi were attacked by a group of Hindu people and the capital burned while the Prime Minister Narendra Modi was engrossed in a diplomatic meeting with the US president barely 20 km away from the site of communal violence. Where a huge number of people lost their lives, the then Home Minister Amit Shah by rejecting the complicity of the Delhi Police chose to praise them for controlling it.

The shootings at Shaheen Baugh and JMI was the result of the hateful speeches delivered by governing party leaders, who went on to the extent of naming Shaheen Baugh as a “centre of anti-national activity.” The Minister of Finance and Corporate affairs Anurag Thakur while condemning the Shaheen Baugh protests by leading chants of “Shoot the Traitors” at BJP election rally. Parvesh Varma, a BJP parliament member from the constituency of West Delhi said that the people at Rahim Bagh are “Muslims who want to take over India” and that they would rape and kill New Delhi resident. These politicians were liable under Sec 153A for persons who indulge in wanton vilification or attacks upon the religion, race, place of birth, residence, language etc. of any particular group or class or upon the founders and prophets of a religion. and 295A to punish deliberate and malicious acts intended to outrage the religious feelings of any class by insulting its religion or the religious beliefs but nothing was done instead the protesters which included women and children were lathi charged upon and treated with utmost brutality by the use of tear gas.

On January 30th, a gunman attacked the protesters at the JMI, injuring a student. The attackers social networking site showed that he was a CAA supporter and had shared posts praising Mahatma Gandhi’s assassin on his 72nd death anniversary. A couple of days later a man opened fire at the protesters ate the Shaheen Baugh hurling out antisecular comments. There was an atmosphere of fear spread outside the JMI university after two men conducted air firing.

RALLIES IN SUPPORT OF THE ACT:
Akhil Bharatiya Vidyarthish Parshad, a student wing of the Hindu Nationalist Rashtriya Swayam Suvak Sangh, held Rallies in support of the Citizenship Amendment Act. Rallies in support of the Act were led by BJP leaders in West Bengal. Similarly, in Rajasthan, New Delhi, Pune also rallies were held by the BJp. In Kerala, ABVP organized rallies in support of CAA and NRC.

CHALLENGES PUT FORTH AGAINST THE VALIDITY OF CITIZENSHIP AMENDMENT ACT 2019:
1. It violates the basic structure of the Constitution.

Basic Structure are systematic principles underlying and connecting provisions of the constitution. They give coherence and durability to constitution. Theory of basic structure is based on the concept of constitution identity. In Keshavananda Bharati’s case, it has been held that Judicial review is the basic features of the Indian Constitution and, therefore it cannot be damaged and destroyed by amending the constitution under Article 368 of the Constitution.

The amendment is violative of the basic structure and the fundamental values articulated in the preamble i.e. equality, justice, rule of law,
secularism as enshrined in the constitution. The power of amendment under Article 368 is a 'constituent' power and not a 'constituted power'; that, there are no implied limitations on the constituent power under Article 368; that, the power under Article 368 has to keep the Constitution in repair as and when it becomes necessary and thereby protect and preserve the basic structure. In such process of amendment, if it destroys the basic feature of the Constitution, the amendment will be unconstitutional.

The theory of basic structure states that the constitution contains certain characteristics that cannot be taken away by any legislation. These form the cornerstone of the governance of the country. Therefore, any legislation that fails the test of "basic structure" is unconstitutional. In the case of S.R. Bommai v. Union of India, it was held that Secularism is a part of the "basic structure". Therefore, any Act passed by the Parliament must not be against secularism. However, the recent amendment has only provided for non-Muslims to get citizenship if they have come before 31st December 2014, which is inimical to the idea of Secularism.

Secularism means "Sarva Dharma Sambhava". This means that all religions are equal in the eyes of law and that the state shall not propagate or endorse one particular religion. This philosophy is also enshrined in the Preamble and in Articles 26-29 of the Constitution. The critics said that this amendment violates the basic structure of the constitution of India. By violating the basic structure of the Constitution, it doesn’t fulfil the width and identity test. And the law which fails the width and identity test is to be null and void as it is unconstitutional.

2. It is against Muslim.

The fundamental criticism of the Act has been that it specifically targets Muslims. Thus, the religious basis of citizenship not only violates the principles of secularism but also of liberalism, equality and justice. It fails to allow Shia, Balochi and Ahmadiyya Muslims in Pakistan and Hazaras in Afghanistan who also face persecution, to apply for citizenship. A key argument against the CAA is that it will not extend to those persecuted in Myanmar and Sri Lanka, from where Rohingya Muslims and Tamils are staying in the country as refugees. Neither is religious persecution the monopoly of three countries nor is such persecution confined to non-Muslims. This Act states that religious minorities from Afghanistan, Pakistan and Bangladesh will no longer be treated as illegal immigrants. It specifically names 6 religions, that is Hindus, Sikhs, Buddhists, Jains, Parsis and Christians. Muslims and Jews have been deliberately kept out of the ambit of this Act. Even though some of these religions are also religious minorities in India, it is notable that 4 out of 6 religions fall under the ambit of Hindu Personal Law. The critics are of the view that the Citizenship Amendment Act is unconstitutional as the Act specifically targets Muslims and the religious basis of citizenship not only violates the principles of secularism but also of liberalism, equality and justice.

3. It violates Article 14.

Critics argue that CAA is violative of Article 14 of the Constitution, which guarantees the right to equality. It is violative of Article 14 as it has failed to pass the twin test of reasonableness which led to unequal treatment among the equals and the act is arbitrary. Whether a classification is a permissible classification under Article 14 or not, two conditions must be satisfied,
namely, (1) that the classification must be rounded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) that the differentia must have a rational nexus to the object sought to be achieved by the statute in question.\textsuperscript{1106} Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violation of basic structure of the Constitution of India. The principle of equality of law means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means “that equals should not be treated unlike and unlike should not be treated alike. Like should be treated alike”. The CAA is in the teeth of Article 14, which not only demands reasonable classification and a rational and just object to be achieved for any classification to be valid but additionally requires every such classification to be non-arbitrary. The Act is an instance of class legislation, as classification on the ground of religion is not permissible. It violates the equality clause of Art.14. The question of discrimination arises only when there is discriminatory treatment among equals and offending Art.14 of the constitution. The Rule of Law embodied in Article 14 is the “basic feature” of Indian Constitution and hence it can not be destroyed even by an amendment of the Constitution under Article 368 of the Constitution. The Act treats equals as unequals, i.e. all persons facing religious persecution in their native country are not being treated alike.

In \textit{E. P. Royappa v. State of Tamilnadu}\textsuperscript{1107}, Bhagawati, J., delivering the judgment on behalf of himself, Chandrachud and Krishna Iyer, JJ. Propounded the new concept of equality in the following words- “Equality is a dynamic concept with many aspects and dimensions and it cannot be ‘cribbed, cabined and confined’ within traditional and doctrinaire limits. From a positivistic point of view, equality is antithesis to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the Rule of Law in a republic while the other, to the whim and caprice of an absolute monarch. Where an Act is arbitrary, it is implicit in that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.” The Act has failed to pass the twin test of reasonableness as the Act has resulted in unreasonable classification. Moreover the differentia adopted is unreasonable and there is no reasonable nexus. The implied exclusion of Muslims makes the classification legally and Constitutionally impermissible because it is against the fundamental constitutional policy of Secularism. all the sufferers of religious prosecution were differentiated on the basis of religion. In fact, there are sects within Muslim which face religious prosecution in some of these Countries. Since, the classification attempted is against the Constitutional policy of Secularism, it is invalid and therefore there is no reasonable classification in the eye of law. So far as the rational nexus is concerned, since there is no valid classification, the doctrine of rational nexus has no relevance. Even then it can be said that the object of the law, namely to legalize the illegal migration of certain religious communities to the exclusion of one religious community and to grant

\textsuperscript{1106} Deepak Sibal & Ors. V. Punjab University & Another, 1989 AIR 903, 1989 SCR (1) 689.

\textsuperscript{1107} Maneka Gandhi v. Union of India, AIR 1978 SC 597.
citizenship to them is against the secular policy enshrined in the Constitution. This being so, one doesn’t have to examine the rationality of the nexus between the difference and the object of the law. Thus, the Citizenship Amendment Act 2019, doesn’t satisfy the twin test. The critics say that as there is exclusion of one particular religious community from its purview and as it groups only three countries and expressly excludes specific religions and regions it violates Article 14. Thus, it is arbitrary and discriminatory.

4. It is violative of Article 15 of the Constitution.

Article 15 of the Constitution provides that no citizen shall be subjected to discrimination in matters of rights, privileges and immunities pertaining to him. Article 15(1) specifically bars the State from discriminating against any Citizen of India on grounds only of religion, race, caste, sex, place of birth or any of them. Any law discriminating on one or more on these grounds would be void. The Citizenship Amendment Act has added a provision under section 2 that any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian Community from Afghanistan, Bangladesh, Pakistan who entered India on or before the 31st December, 2014, and who has been exempted by the Central Govt. under any relevant law shall not be treated as ‘illegal immigrant’. The definition of ‘illegal immigrant’ which following the Amendment, is alleged to have become discriminatory to a particular religion and hence, directly violates Article 15 of the Indian Constitution.

5. It is violative of Article 19 of the Constitution.

The right to protest, to publicly question and force the government to answer, is a fundamental political right of the people that flows directly from a democratic reading of Article 19. Using of internet is something like freedom to connect. The Supreme Court has declared access to internet as a fundamental right under Article 19 of the Constitution. Government cannot deprive the citizens of fundamental rights except under certain conditions explicitly mentioned in the constitution. Access to Internet is a fundamental right under Article 19 of the Constitution, subject to some restrictions and said freedom of press is a valuable and sacred right. Access to Internet is merged with manifold fundamental rights like Education, information, communication, free speech and expression, health among others. In the Anuradha Bhasin Case, challenging the J&K restrictions that free speech and expression on the internet was a fundamental right and constitutionally protected under Art.19.

Internet shutdown is a violation of fundamental rights. Internet access is a basic right that must not be restricted. A blanket shutdown can be dangerous because it fails to distinguish between the legal and illegal aspects of the action. During a shutdown, one can’t do card transactions or rely on e-governance. The poor and the vulnerable can’t rely on biometrics for rations and cooking fuels. On the face of it, internet shutdown also restricts legal forms of speech. Blanket shutdowns are disproportionate and unconstitutional. In India, there has been no consensus on whether such internet restrictions constitute a violation of basic human rights. However, according to the Universal Declaration of Human Rights (UDHR), the UN has


1109 Universal Declaration of Human Rights, adopted on 10 December 1948.
stated that internet access is a human right. It is clear that internet shutdowns violate individual rights guaranteed under the Constitution. They aren’t productive and lead to deep social and economic losses. These shutdowns also lead to economic losses.

6. It is violative of Article 21 of the Constitution.

Article 21 guaranteed the Right to life and personal liberty to citizens only against the arbitrary action of the executive, and not from legislative action. The right guaranteed in Article 21 is available to ‘citizens’ as well as ‘non-citizens’. Life or personal liberty includes right to live with human dignity. The expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights. The Constitution of India guarantees equal protection to all and forbids the state from depriving anybody’s life and personal liberty without procedure established by law.

The right to life and liberty mentioned in Article 21, which has been interpreted by the Supreme Court to mean the right to live with dignity are available to all persons. A non-citizen is certainly a person, and hence is also entitled to those rights. In National Human Rights Commission vs State of Arunachal Pradesh76, the question was about the Chakma refugees, who were illegal immigrants from Bangladesh. The Supreme Court observed that the fundamental right of life and liberty guaranteed by Article 21 of the Indian Constitution is also available to Chakmas, though they were not Indian citizens. Therefore, the critics are of the view that the Citizenship Amendment Act is unconstitutional as it violates Article 21 of the Indian Constitution. The Act violates Article 21 by creating a separate class of individuals who would be rendered stateless. The government may justify it to say that Article 21 is available to even those belonging to foreign lands but as a legislative policy it is an act of discrimination. It violates the right to belong to India as a citizen with dignity protected by Article 21.

ARGUMENTS AGAINST CAA BY OHCHR:

Office of the United Nations High Commissioner for Human Rights (OHCHR) said that India's new Citizenship (Amendment) Act 2019 is fundamentally discriminatory in nature. The amended legislation seeks to expedite citizenship for religious minorities namely, Hindus, Sikhs, Buddhists, Jains, Parsis and Christians, fleeing persecution in Afghanistan, Bangladesh and Pakistan, who have been resident before 2014. But Muslims are excluded from the same protection.

International Covenant on Civil and Political Rights and the Convention for the Elimination of Racial Discrimination prohibit discrimination based on racial, ethnic or religious grounds. The amended law appeared to undermine the commitment to equality before the law enshrined in the Constitution of India.

The UN High Commissioner for Human Rights filed an intervention at the Supreme Court of India, linked to petitions challenging the Citizenship Amendment Act of 2019 (CAA). This legislation – along with a population and citizenship register – has been the focus of nationwide protests across India. The arguments of the petition are limited to those excluded from the purview of the legislation from the specified countries – Afghanistan, Pakistan and Bangladesh. Therefore, this does not address the exclusion of Sri Lanka, Nepal, Bhutan or those fleeing from any other country. The
main focus of the legal argumentation is to address the principle of equality between citizens and non-citizens and non-discrimination in enacting legislation. The intervention application seeks to protect migrants that fall outside the specific categories of the CAA. The CAA allows Buddhist, Christian, Hindu, Jain, Parsi and Sikh migrants from Afghanistan, Bangladesh and Pakistan, a path to legal citizenship in India who entered India on or before December 31, 2014.

ARGUMENTS BY SUPPORTERS OF THE ACT:

1. It does not violate the basic structure of the Constitution of India.

The supporters of the Act said that, the Citizenship Amendment Act 2019 is not violative of the basic structure of the Constitution of India. Theory of basic structure is based on the concept of constitution identity. The Constitution of Indica envisaged a secular and democratic republic taking into account the diverse cultural heritage and religious groups that reside in the sub-continent. The Act primarily allows certain illegal migrants to apply for citizenship provided they meet four criteria: a) they came to India before 31 December 2014; b) they got exemptions from the Passports Act and Foreigners Act from the Union government; c) they’re from Afghanistan, Bangladesh or Pakistan and; d) they’re Hindus, Sikhs, Christians, Parsis, Jains or Buddhists. Secularism is a part of the basic structure of constitution of India. As per one of the landmark Case of India decided by the largest bench of 13 judges, it was made a principle that the ‘basic structure of the constitution of India’, cannot be amended to remove any word whatsoever. However, additions can be made to them if the situation demands. Constitution of India treats all religions equally.

The Act aims at granting citizenship rather than taking away someone’s citizenship. This Act is not against any Minority in India and the rights of each Indian Citizen will be equally protected. It is only concentrating on ending the sufferings of lakhs of persecuted refugees fleeing these three countries. All the minority communities being persecuted on religious lines in these countries have been included. Muslims are not included as they do not face religious persecution in these Islamic countries. It does not affect the Indian Citizens of Islamic community. Under the existing provisions of the Act, migrants from Hindu, Sikh, Buddhist, Jain, Parsi or Christian communities from Afghanistan, Pakistan or Bangladesh who entered into India without valid travel documents or if the validity of their documents has expired are regarded as illegal migrants and ineligible to apply for Indian citizenship under section 5 or section 6 of the Act.

2. It is not violative of Article 14.

The Amendment makes differentiation between two groups: one consisting of Hindu, Sikh, Buddhist, Jain, Parsi and Christian Community and the other Muslim. The language of the proviso makes reasonable distinction between the two groups in a particular context which is discernable from the phrase ‘from Afghanistan, Bangladesh or Pakistan’. The Amendment is restricted in terms of only three countries where Muslim is the official state religion and the said communities form minority groups in those countries. The differentiation in the proviso is thus based on the fact that it separates the minorities from the majority of these three countries. The minority communities in these countries have fear of persecution on the basis of religion and the differentiation becomes reasonable on humanitarian grounds. It is humbly argued that the religious groups who
will be given citizenship are the ones who faced religious prosecution in those three Muslim countries and the Muslims have not faced this problem there. Therefore, the classification of sufferers of religious prosecution who belong to the Hindu, Sikh, Buddhist, Jain, Parsi or Christian Communities is valid under Article 14. However, it has nothing to do with any Indian Citizen in any way. The Indian citizens enjoy fundamental rights conferred on them by the Constitution. No statute including CAA, can abridge or take them away. The CAA does not affect any Indian Citizens, including Muslim Citizens. The Amendment does not prohibit persons belonging to Muslim Community from applying for Citizenship of Indica. It does not freshly declare Foreign Muslims as Illegal migrants. The position of Foreign Muslims remains unchanged by the Amended Act and only a relaxation to foreign persons belonging to minority communities of specific three countries has been provided based on a reasonable Objective. Therefore, the Citizenship Amendment Act is not violative of Article 21 of the Constitution. The present legal process of acquiring Indian Citizenship by any foreigner of any category through Naturalization or through registration of the Act stays operational. The CAA does not amend or alter it in any manner. Hundreds of Muslim migrating from these three countries have been granted Indian Citizenship during the last few years. If found eligible, all such future migrants shall also get Indian Citizenship, irrespective of their numbers of religion. In 2014, after the settlement of Indo-Bangladesh border issues, 14, 864 Bangladeshi Citizens were given Indian Citizenship when their enclaves were incorporated into the territory of India. Thousands of these foreigners were Muslims. Government has cited that the partition of India on religious lines and subsequent failure of the Nehru-Liaqat pact of 1950 in protecting the rights and dignity of the minorities in Pakistan and Bangladesh as the reasons for bringing this Bill. After Independence, India conceded that the minorities in its neighbourhood are its responsibility. First, immediately after Partition and again during the Indira-Mujib Pact in 1972 when India had agreed to absorb over 1.2 million refugees. It is a historical fact that on both occasions, it was only the Hindus, Sikhs, Buddhists and Christians who had come over to Indian side.

3. **It is not violative of Article 21.**

The Constitution of India guarantees equal protection to all and forbids the state from depriving anybody’s life and personal liberty without procedure established by law. “Everyone has the right to life, liberty and security of person.” The expression “life or personal liberty” under Article 21 is interpreted by the Court to mean and include life with human dignity. Every society has different norms to protect the human life and dignity of individual. The right to life denotes the significance of human existence for this reason. It is widely called the highest fundamental rights. The Amendment does not prohibit persons belonging to Muslim Community from applying for Citizenship of Indica. It does not freshly declare Foreign Muslims as Illegal migrants. The position of Foreign Muslims remains unchanged by the Amended Act and only a relaxation to foreign persons belonging to minority communities of specific three countries has been provided based on a reasonable Objective. Therefore, the Citizenship Amendment Act is not violative of Article 21 of the Constitution.
The Citizenship Amendment Act (CAA) is "perfectly legal and constitutional", the government told the Supreme Court, asserting that the citizenship law was a matter concerning the sovereign power of parliament and "could not be questioned" before the court. "Only parliament has got sovereign powers to legislate on citizenship," said the government in a preliminary affidavit to the Supreme Court. The government said, the CAA did not relate to any Indian. "Neither does it create any citizenship to them nor takes it away,"

CONCLUSION:
Union of India has a duty to protect those who are prosecuted in its neighbourhood. But the procedure must be in accordance with the spirit of the Constitution. In India, all citizens including Muslims enjoy the same rights. The CAA facilitates the claiming of citizenship by illegal non-Muslim immigrants or other persons who are unable to provide the proof of residence. To understand the CAA, one has to consider the political situation in other South Asian countries. There has been persecution of religious minorities for decades in Pakistan, Bangladesh and Afghanistan. CAA does not affect India’s external relations and India doesn’t have any repatriation agreement with Afghanistan, Bangladesh or Pakistan. The Act aims at granting citizenship rather than taking away someone’s citizenship. This Act is not against any Minority in India and the rights of each Indian Citizen will be equally protected. It is only concentrating on ending the sufferings of lakhs of persecuted refugees fleeing from these three countries. All the minority communities being persecuted on religious lines in these countries have been included. Muslims are not included as they do not face religious persecution in these Islamic countries. It does not affect the Indian Citizens of Muslim community.

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ABORTION LAWS IN INDIA: THE PARAMOUNT NEED FOR CHANGE

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ABSTRACT
Abortions are an important aspect of reproductive health of women but it has for long remained a contentious issue. Abortion laws are influenced by social, moral and religious views as all laws are wont to. However, these often conflict with the medical and legal need of abortions in a society. The Medical Termination of Pregnancy Act governs all of the abortion law in India. The Act, however, was enacted nearly half a century ago and as such is not the most suitable set of provisions defining abortions in the country. This article analyzes the aforementioned Act and its lacunae from a legal and social standpoint, in an attempt to determine whether the existing legal provisions are adequate to govern abortions in the country. This article analyzes the aforementioned Act and its lacunae from a legal and social standpoint, in an attempt to determine whether the existing legal provisions are adequate to govern abortions in the country. The Act, which defines who can terminate their pregnancy and, when and by whom, does not limit or curb abortions it deems not required. This results in unsafe alleyway abortions resulting in a great number of maternal deaths. The need for amendments to the existing laws is crucial and this article examines this taking into consideration the prevailing social conditions and mindset in the country.

Keywords: Abortion, lacunae, amendments, social standpoint, unsafe abortions

INTRODUCTION
The United Nations hosted the International Conference on Population and Development (ICPD), a 1994 meeting in Cairo where 179 governments adopted a revolutionary Programme of Action and called for women's reproductive health and rights to take centre stage in national and global development efforts. The Conference established that every woman has the recognized human right to decide freely and responsibly without coercion and violence the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. Access to legal and safe abortion is essential for the realization of these rights. One in four pregnancies ends in abortion. Abortions include various clinical conditions such as spontaneous and induced abortion (both viable and non-viable pregnancies), incomplete abortion and intrauterine foetal demise, reports the World Health Organization (WHO).

Abortions in India were illegal under Section 312 of the Indian Penal Code until it was repealed in 1971. In 1964, the Shah Committee, headed by Shantilal Shah, was constituted to form a report and give suggestions for the draft of an abortion law in India. The Committee carried out a review of the legal, medical and socio-cultural elements of abortion and recommended the legalization of abortion. It recommended to the government liberalisation of the outdated and outlived


1111 World Health Organization, Abortion, https://www.who.int/health-topics/abortion#tab=tab_1.
law of miscarriage contained in Section 312 of the Code. It observed that whatever may be the moral and ethical feelings that are proposed by society as a whole on the question of induced abortion, it is an incontrovertible fact that a number of mothers are prepared to risk their lives by undergoing an illegal abortion rather than carrying that particular child to term.\footnote{1112 K.D. Gaur, Abortion and the Law in India, 15 CULR 132 (1991).}

Thus, in 1971, the Medical Termination of Pregnancy Act\footnote{1113 Medical Termination of Pregnancy Act, Act 34 of 1971 (hereinafter MTP Act).} was passed amending the laws governing abortions in the country. Section 3 of the MTP Act reads:

1) Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force if any pregnancy is terminated by him in accordance with the provisions of this Act.  

2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—
   (a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or
   (b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that—
      (i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or
      (ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I.—Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II.—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.  
   (b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

Gestational Period

Section 3(2) of the Act, insofar as it restricts the length of pregnancy for termination to twelve and twenty weeks has no nexus with the object of the MTP Act.

In the case of N\text{ikhil} D\text{attar} v Union of India and Anr\footnote{1115 N\text{ikhil} D\text{attar} v Union of India and Anr, Civil Appeal No. 7702 of 2014; Grounds of Challenge.}, the petitioner argued that in view of the stride in technology, the 20th week cut off should not still be applicable considering the fact that the 20th

\footnote{1114 The Medical Termination of Pregnancy Act, § 3, 1971.}
week cut off was determined on the basis of an assessment made by the Shantilal Committee to the effect that the state of the technology available for the performance of abortions in the late 1960s and at the time of the drafting of this Act, that any abortion done after the 20th week could possibly impact on the life of the mother. During the last five decades, however, the technology has changed dramatically and it is now undisputed that abortions can be safely carried out even at the 40th week.

Various High Courts and the Supreme Court have permitted termination beyond 20 weeks on the ground of physical/mental injury to the woman and/or substantial risk of foetal abnormalities. However, as a result of the current legal framework, women in such cases are forced to approach the Courts for an immensely personal decision about their own bodies. This causes financial and social hardships, and women from rural areas and socio-economically disadvantaged backgrounds do not have the wherewithal to approach Courts.\textsuperscript{1116}

There have been a number of cases wherein the petitioner approaches the Court for permission to terminate her pregnancy after the gestational period limit but in the long drawn process of a suit and Court proceedings, gives birth to the child before the Court ever comes to a decision.

In the case of Ms. X v. Union of India & Others,\textsuperscript{1117} the Supreme Court of India deliberated on whether a woman terminate her pregnancy post-20 weeks where the foetus has severe abnormalities. The Court held that based on the medical board’s determination that continuing the pregnancy would pose a grave threat to the woman’s mental and physical health, the woman may undergo termination under Section 5 of the MTP Act.

In many cases, women do not learn of their pregnancy well into their 16th - 18th week. Any medical risks to the woman or foetal abnormalities that might arise are thus inconsequential since the law stipulates that the pregnancy cannot be terminated.

There also arises often the question of foetal abnormalities that can only be detected after certain development of the foetus which occurs after the gestational limit has expired. There is no way for women to then terminate such a pregnancy with serious foetal abnormalities that might even go on to affect their lives since the law dictates otherwise.

### Medical Opinion of Woman’s Health

Section 5 of the Act\textsuperscript{1118} permits termination only in cases where it is necessary to save the life of the woman is arbitrary, unreasonable, disproportionate and violates Article 14 and 21. The Section fails to accommodate cases where medical opinion establishes that there is grave risk of injury to the physical or mental health of the pregnant woman, or where there is a substantial risk of foetal abnormalities\textsuperscript{1119}. The abovementioned Section includes the phrase “is immediately necessary to save the life of the pregnant woman” which further begs the question whether the term ‘life’ means only the beating of the heart or


\textsuperscript{1117} Ms. X v. Union of India & Others, (WP(C) 593/2016).

\textsuperscript{1118} MTP Supra note 4.

\textsuperscript{1119} Swati Agarwal and Ors v Union of India, Writ Petition (Civil) No. 825 of 2019.
it also includes life undermined by a level of anguish and mental trauma caused by a compulsion of carrying a pregnancy to full term. The Right to Life as guaranteed under Article 21 of the Constitution provides for a healthy, dignified life. A pregnancy which does not result in the woman’s death but leaves her in a painful or anguished medical condition violates her right to health and her life cannot be said to come under the purview of Article 21.

**Autonomy and abortion as a matter of right**

Abortion in India is not available as a matter of right, a woman does not have the right to terminate her pregnancy simply by virtue of her desire. The legality of abortion is subject to the opinion of a medical professional determining the risk to the woman’s health. Section 3(2)(a) of the Act, insofar as it requires opinions of medical practitioners certifying that continuation of pregnancy would involve risk to the life or grave injury to the physical or mental health of the pregnant woman or if there is a substantial risk of fetal abnormality, violates the fundamental right to privacy and the right to reproductive choice as have been guaranteed by the Supreme Court in the cases of *Justice (Retd.) K.S Puttaswamy v Union of India* and *Suchita Srivastava v Chandigarh Administration* respectively. The termination of pregnancy should not be subject to the opinion of a medical practitioner for, it snatches a woman’s autonomy away from her and places it in the hand of a medical professional or Medical Board.

The Supreme Court and the High Court of Madras have respectively affirmed women’s rights to choose in the context of continuing a pregnancy. In *Suchita Srivastava* the Supreme Court clearly held that the state has an obligation to ensure a woman’s reproductive rights as a component of her Article 21 rights to personal liberty, dignity, and privacy.

In the landmark judgement of *Joseph Shine v Union of India*, the Hon’ble Supreme Court while decriminalizing adultery under Section 497 of the Indian Penal Code has upheld the absolute sexual autonomy of a woman. Denial of the right to decide on the number of children and the termination of pregnancy on the basis of the not uncommon argument that ‘prevention is better than cure’ and it is the woman’s fault for conceiving an unwanted pregnancy, inevitably stains the sexual autonomy of the woman.

**Social Stigma**

Abortion related stigma, which cuts across all contexts, continues to negatively affect women’s health and well-being. Stigma is also an important reason why data on induced abortion are so scarce and unreliable: For fear of being shamed or judged, women worldwide underreport their abortions in data collection efforts.

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1120 *Id.*
1121 *INDIAN CONST. art 21.*
1124 *Id.*
A 2004 U.S. study, for example, found that 72% of women reported at least three reasons for why they had had an abortion. Socioeconomic concerns is the most frequently cited type of reason, followed by wanting to stop childbearing and wanting to postpone or space a birth. Other main reasons include partner- and health-related issues, which vary widely in prevalence by country.

The established statistical reasons include financial, maturity, age, health, violence and relationship concerns.

Not all pregnant women can afford childcare and all the costs that come with raising a child. Unintended pregnancies cause great financial strain and it is one of the leading reasons behind abortions. Teenage pregnancies are especially difficult because the women are dependent on their parents for financial reasons and lack the maturity and emotional stability required to give birth and raise a child.

In India, specifically, the social stigma and disgrace attached to being an unmarried-pregnant women is a huge factor in abortion numbers. Unmarried mothers face great difficulties in every sphere due to a preconceived notion about their so perceived state of disgrace.

According to a study in Nigeria, lack of partner support for the abortion decision has been linked to both relatively late (second-trimester) abortions and the use of untrained providers. To this end, designing intervention to reduce the stigma has become a priority, as has developing the research tools to measure stigma – from both providers and women’s perspectives.

**Rape**

The MTP Act provides that in pregnancies caused by rape, the woman will be presumed to be under great mental anguish and injury. While this provision allows women who are rape victims to get their pregnancy terminated within the stipulated gestational limits, it does not cater to women further along in their pregnancy. In such cases, women have to approach Courts for a discretionary decision about the termination of their pregnancy. They are also subject to the opinion of medical practitioners, often having to carry their pregnancy to full term, suffering great mental anguish all the while.

In the case of V. Krishnan v. Rajan Alias Madipu Rajan & Another, the Madras High Court held that a minor rape survivor has the right to decide whether to continue a pregnancy or not. The Court said, “We cannot force a victim of violent rape/forced sex to give birth to a child of a rapist.”

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1132 MTP, Supra note 4.
However, in D. Rajeswari v. State of Tamil Nadu & Others\textsuperscript{1134}, the Madras High Court upheld that a minor rape survivor who satisfies the requirements of Section 3 of the MTP Act can obtain a termination of pregnancy.

In the case of Chandrakant Jayantilal Suthar & Another v. State of Gujarat\textsuperscript{1135}, the Supreme Court of India while deciding whether a minor rape survivor who is 24 weeks’ pregnant access medical termination of pregnancy, reviewed the medical opinion and allowed for termination if the girl consented. However, the Court noted that this was a particularly difficult decision because “Whatever be the circumstances in which the child was conceived, whatever the trauma of the young mother, the fact remains that the child is also not to blame for being conceived.”

“A rape victim shall not be further traumatized by putting through a needless process of approaching courts for taking permission.’’

In the Bhavikaben v. The State of Gujarat\textsuperscript{1136} case, the High Court of Gujarat debated if an adult rape survivor undergo medical termination of pregnancy when she is more than 20 weeks pregnant. The Court applied the survivor’s best interests test in Chandrakant, and found that where medical experts agree that the woman’s mental or physical health will be severely impacted by the pregnancy, she has a right to terminate.

In the case of Registrar (Judicial), Madurai Bench of Madras High Court v Union of India\textsuperscript{1137}, a Division Bench of the Court presided by Justice N. Kirunakaran, on the basis of a news report, took suo moto cognizance of the high rate of maternal mortality and the barriers to access abortion after the 20 week gestational limit. Pursuant to his research, Justice Kirunakaran directed the registration of a writ petition calling upon the Central Government to remove gestational limits in the case of rape, among other directions.

His order noted: “in India, thousands of women and children are raped every year and the number of rapes are shockingly increasing. In 2016, about 38, 947 women were raped whereas the number was only 18, 233in 2004. In case of rape victims, there is a chance for getting conceived and those unwanted foetus can be terminated if abortion window period is extended for 24 weeks, so that, the birth of unwanted children with stigma which are result of the rapes and forced relationships, against the wishes of the victims, can be avoided. In the interest of women, children and future generation, the amendment is necessary.”

**Personal Law and State Interference**

There ought not to be any legal impediments at all to a woman’s right to an abortion and the State’s interference with such a fundamental personal decision by way of legislation is disputable. The question that arises is whether the State is capable of understanding the complex situation that arises in the context of pregnancies when bound by legislation and, whether the State may at all legislate in a domain which is essentially personal.

This debate, however, not unlike many other issues and legislations enters into the age long debate of State pervasive personal laws. What really constitutes the personal

\textsuperscript{1134} D. Rajeswari v. State of Tamil Nadu & Others, (Crl.O.P. No. 1862/1996).

\textsuperscript{1135} Chandrakant Jayantilal Suthar & Another v. State of Gujarat, Special Leave Crm. 6013/2015.

\textsuperscript{1136} Bhavikaben v. The State of Gujarat, Special Crim App 1155/2016.

\textsuperscript{1137} Registrar (Judicial), Madurai Bench of Madras High Court v Union of India, Suo Moto WP (MD) No. 9910 of 2019.
sphere when the State frames legislations to govern all aspects. The recently decriminalized law of adultery\(^\text{1138}\), for example, allowed the State to peer into one’s bedroom. The law pertaining to conjugal rights (under the Hindu Marriage Act, 1955)\(^\text{1139}\) give the State the power to, in a sense, dictate the marital physical relationship between a husband and wife.

**Discrimination against unmarried women**

Explanation 2 to Section 3(2) of the Act\(^\text{1140}\), insofar as it is limited to contraceptive failure only for married women, discriminates against unmarried and single women and is thus violative of Article 14. The classification based on marital status is not tenable as it has no nexus with the object of terminating an unwanted pregnancy. An unwanted pregnancy in the case of single women also causes anguish and has far greater mental and socio-economic consequences. The provision also adversely affects the sexual autonomy of unmarried and single women.

In *Amit Sahni v Union of India and Ors*\(^\text{1141}\), a Public Interest Litigation filed before the Delhi High Court, the petitioner raises the crucial issue that there exist a myriad of situations in which women find themselves unable to carry through with a pregnancy. There are financial, emotional, social and many other situations, such as death of spouse or partner and marital discord, where a woman is in no position at all to carry on and seeks an abortion.

**MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) BILL, 2014**

The Medical Termination of Pregnancy (Amendment) Bill, 2014 was introduced in October 2014 and hoped to bring about great changes in the existing abortion law in the country and to finally shift the discourse from medical professionals to women. Such a shift decreases the vulnerability of women within the clinical setting and frees them from subjective interpretations of abortion law.

The 1971 MTP Act does not recognise the ability of women to act as autonomous agents within the clinical setting. It primarily offers protection to all doctors carrying out abortions in good faith and within the limits stipulated by the law, empowering them to make the final decision on abortion. This focus on the medical profession rather than women is partly the result of the fact that the Indian abortion law stemmed from national concern about the growing population and about the high maternal mortality from unsafe abortion. In India, therefore, abortion is located within discourses on family planning and public health, which justifies the 1971 MTP Act’s emphasis on the providers of the service.\(^\text{1142}\)

The Bill suggested several major changes:

1. The term ‘medical practitioners’ was replaced by ‘health care providers’. This was done to include other fields of medicine into the purview. The term health care providers included medical qualifications of Ayurveda, Unani, Siddha, Homeopathy and nurses or auxiliary nurse midwives.

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\(^{1138}\) Penal Code, *Supra* note 17.

\(^{1139}\) Hindu Marriage Act, § 9 (1955).

\(^{1140}\) MTP, *Supra* note 4.

\(^{1141}\) Amit Sahni v Union of India and Ors, Writ Petition (Criminal) No. 1612 of 2019.

2. The Bill aimed to extend the gestational period during which a pregnancy could be terminated, from twenty weeks to twenty-four weeks.

3. It also granted women autonomy for terminations under twelve weeks of pregnancy. This meant that women pregnant for twelve weeks or under no longer needed the opinion of a medical professional to get an abortion and could do so on request.

4. The Bill included a provision under which the length of the pregnancy would not apply where the termination was necessitated by diagnosis of any of the substantial foetal abnormalities as may be prescribed.

5. It included a provision for the protection of the privacy of women whose pregnancy has been terminated under the Act.

6. The Explanation to Section 3(2) was amended to include all women and their partners and not just married women under the protection of failure of contraceptive or device.

The inclusion of other fields of medicine was hotly debated and argued over. It was said to dilute the safety of medical procedures and would result in unsafe and careless abortions. On the other hand, it would be more inclusive not just in the medical field but would also cater to women to whom hospitals are not easily accessible, especially in rural areas. Reports from the World Health Organization also show that nurses and midwives successfully and smoothly perform a large percentage of abortions over the world.

The Bill was a huge step forward towards achieving legal recognizance of women’s autonomy over their bodies and, safe and healthy abortions.

The Bill, however, was not passed in the past six years and neither was it deliberated upon. A draft Bill was introduced and suggestions from the public and all stakeholders were invited, however, no changes were ever deliberated or introduced to the Bill. Several petitions were filed in Courts, asking for the passage and implementation of the 2014 Bill and the Ministry of Health and Family Welfare was asked to prepare reports and deliberations multiple times.\(^\text{1143}\)

MEDICAL TERMINATION OF PREGNANCY (AMENDMENT) BILL, 2020

The Amendment Bill was introduced on February 13\(^{th}\), 2020 and was passed by the Lok Sabha (Lower House) on March 17\(^{th}\), 2020. The Bill was built on the base provided by the MTP Amendment Bill, 2014 and apart from recognizing a need for better, more technologically advanced provisions, also acknowledges in its Statement of Objects and Reasons, that several Writ Petitions have been filed before the Supreme Court and various High Courts seeking permission for aborting pregnancies at gestational age beyond the present permissible limit on the grounds of foetal abnormalities or pregnancies due to sexual violence faced by women.

Among the changes introduced by this Bill were some that were suggested in the 2014 Amendment Bill and a handful of new ones: The Bill included the provisions for the termination as when necessitated by diagnosis of any of the substantial foetal abnormalities, privacy of the woman and contraceptive failure extending to unmarried women. However, the contested provision for medical practitioners to be

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\(^{1143}\) See Amit Sahni v Union of India and Ors, Writ Petition (Criminal) No. 1612 of, 2019.
amended to health care providers was left out. It also established constitution and establishment of Medical Boards for the purposes of safe and regulated pregnancy terminations.

The gestational period for the termination of a pregnancy was extended from twelve and twenty weeks to twenty and twenty four weeks. However, the autonomy that would’ve been given to women under the 2014 Bill was not included. The gestation period was increased subject to the conditions and evaluations of medical practitioners as under the MTP Act, 1971.

This Bill, is one step forwards in the right direction. An extended period will allow more risks to both the pregnant women and the foetus to be detected and prevented. The bill does not, however, make abortion a matter of choice or right, the medical practitioner’s opinion is still the focal point. There are several reasons beyond medical, as discussed above, that govern a woman’s decision to terminate her pregnancy and the Bill does not cater to such needs.

The need for such a provision is imminent but given the current situation, passage of the Bill in its present state might also be considered a positive thing.

INTERNATIONAL CONVENTIONS AND LAWS

Right to life and personal liberty is the heart and soul of the wider field of law called the ‘human rights.’ Reproductive rights were not explicitly enumerated but were provided protection under the umbrella of the ‘right to life and liberty’ until the coming into existence of various international and legal instruments (regardless of their justiciability) like the Proclamation of Tehran (1968), Cairo Program of Action (1994), Beijing Platform (1995), Yogyakarta Principles (2006), Article 12 of European Convention on the Protection of Human Rights and Fundamental Freedoms, African Commission on Human and Peoples’ Rights and Inter-American Commission.1144

The International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on Elimination of all forms of Discrimination Against Women (CEDAW), specifically General Recommendation 24, all support that the right to reproductive healthcare and the right to reproductive autonomy are basic rights and that the State has a positive obligation to fulfill these rights. Article 1 of the American Declaration of Rights and Duties of Man and the Inter American Commission of Human Rights say that abortion is legalized until the end of First trimester1145. Article 16(e) of the Convention on Elimination of all forms of Discrimination Against Women reads: “The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;”1146.

In the landmark judgement of Roe v Wade1147, the U.S. Supreme Court on January 22, 1973, ruled (7–2) that unduly restrictive state regulation of abortion is unconstitutional. Justice Harry A. Blackmun, the court held that a set of

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1146 Convention on Elimination of all forms of Discrimination Against Women, art 16(e), Dec. 18, 1979.

1147 Roe v Wade, 410 U.S. 113.
statutes criminalizing abortion in most instances violated a woman’s constitutional right of privacy, which it found to be implicit in the liberty guarantee of the due process clause of the Fourteenth Amendment (‘...nor shall any state deprive any person of life, liberty, or property, without due process of law’). In his opinion, Blackmun noted that only a “compelling state interest” justifies regulations limiting “fundamental rights” such as privacy and that legislators must therefore draw statutes narrowly “to express only the legitimate state interests at stake.” The court then attempted to balance the state’s distinct compelling interests in the health of pregnant women and in the potential life of foetuses. It placed the point after which a state’s compelling interest in the pregnant woman’s health would allow it to regulate abortion “at approximately the end of the first trimester” of pregnancy. With regard to the foetus, the court located that point at “capability of meaningful life outside the mother’s womb,” or viability.

In the judgement of Ayotte v Planned Parenthood of Northern New England1148, the U.S. Supreme Court issued its opinion, upholding the plaintiffs’ ability to challenge the law's constitutionality pre-enforcement, and affirming that the states may not enact abortion restrictions that fail to protect women's health and safety.

In Planned Parenthood of Southeastern Pennsylvania v Casey1149, the fundamental right of a pregnant woman to obtain a lawful abortion without government imposition of an undue burden on that right was argued. The decision restated that the source of the privacy right that undergirds women’s right to choose abortion derives from the due process clause of the Fourteenth Amendment to the U.S. Constitution, placing individual decisions about abortion, family planning, marriage, and education within “a realm of personal liberty which the government may not enter.” The judgment also revised the test that courts use to scrutinize laws relating to abortion, moving to an “undue burden” standard: a law is invalid if its “purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the foetus attains viability.”

In the cases of Singleton v Wulff1150 and Northwestern Memorial Hospital v Asheroft1151, a U.S Court upheld that a physician had standing to assert rights of patients seeking abortions and, patient “may be chilled from such assertion by the desire to protect the very privacy of her decision from the publicity of a court suit.”

In K.L. v Peru1152, it was held by the United Nations Human Rights Committee (UNHRC) that a forced continuation of pregnancy and denial of access to legal abortion constitutes cruel, inhumane and degrading treatment (Article 7, ICCPR) and violation of privacy (Article 17, ICCPR) among other things.

In the face of recent threats of Roe v Wade1153 being overruled in the U.S., both by state and people action, pro-reproductive health care law and policy makers have stepped up and ensured safe and legal access to abortions in their states, in cases even expanding access.

1149 Planned Parenthood of Southeastern Pennsylvania v Casey, 505 U.S. 833.
1150 Singleton v Wulff , 428 U.S. 106.
1151 Northwestern Memorial Hospital v Asheroft, 362 F. 3d 923 (7th Cir. 2004).
1153 Roe, Supra note 38.
One such law is New York’s Reproductive Health Act. When passed in January 2019, it was hailed as one of the strongest protections for abortion access in any state in any country. The Act ensures that if Roe v Wade were ever overturned, abortion would remain a legal health procedure in New York—and patients and doctors would not go to jail. It also expands access to abortion later in pregnancy if the pregnancy cannot survive. The Reproductive Health Act is about making sure that at every point in a pregnancy, a patient’s health (not a politician’s ideology) drives medical decisions.

Illinois, New Mexico and Rhode Island have introduced similar Reproductive Health Acts, which would codify in law what we already know: abortion is not a crime. These bills would safeguard residents’ right to access abortion safely and legally, no matter what might happen at the U.S. Supreme Court.\footnote{Id.}

**STATISTICS**

According to the first national study of the incidence of abortion and unintended pregnancy in India, an estimated 15.6 million abortions were performed in the country in 2015 which translates to an abortion rate of 47 per 1,000 women aged 15–49. The study was conducted jointly by researchers at the International Institute for Population Sciences (IIPS), Mumbai; the Population Council, New Delhi; and the New York–based Guttmacher Institute.\footnote{Id.}

The study also estimated the incidence of unintended pregnancy in India and found that out of the total 48.1 million pregnancies in 2015, about half were unintended—meaning they were wanted later or not at all. The estimated unintended pregnancy rate was 70 per 1,000 women aged 15–49 in 2015.\footnote{Id.}

Currently, slightly fewer than one in four abortions are provided in health facilities. The public sector—which is the main source of health care for rural and poor women—accounts for only one-quarter of facility-based abortion provision, in part because many public facilities do not offer abortion services.\footnote{Id.}

Laws fall along a continuum from outright prohibition to allowing abortion without restriction as to reason. As of 2017, 42% of women of reproductive age live in the 125 countries where abortion is highly restricted (prohibited altogether, or allowed only to save a woman’s life or protect her health). The vast majority (93%) of countries with such highly restrictive laws are in developing regions. In contrast, broadly liberal laws are found in nearly all countries in Europe and Northern America, as well as in several countries in Asia.\footnote{Id.}

An Order in Registrar (Judicial), Madurai Bench of Madras High Court v Union of India, noted the prevalence of unsafe abortions and high rate of foetal abnormalities, “About 1.6 crore abortions are done in India and 81% of the abortions are done at homes and 13 women die every day due to unsafe abortions. Moreover, it has been reported by WHO – MOD (March of Dimes) about 2,70,00,000 children are born every year in India and the children born with birth defects are 1.7 million viz., 17 lakh children and foetal abnormalities are found out in the foetal itself. The
doctors are finding it very difficult to diagnose the abnormalities in the foetus within 20 weeks as the cases are reported very late, especially, in the rural areas. The birth of children with defects to the tune of 17 lakh every year could be avoided.”

**Unsafe Abortions**
The World Health Organization defines that an unsafe abortion occurs when a pregnancy is terminated either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards or both. Unsafe abortion procedures may involve the insertion of an object or substance (root, twig, or catheter or traditional concoction) into the uterus; dilatation and curettage performed incorrectly by an unskilled provider; ingestion of harmful substances; and application of external force. In some settings, traditional practitioners vigorously pummel the woman's lower abdomen to disrupt the pregnancy, which can cause the uterus to rupture, killing the woman. Women, including adolescents, with unwanted pregnancies, often resort to unsafe abortion when they cannot access safe abortion.1160

The Guttmacher Institute report1161 mentions the challenges faced by women in India trying to obtain abortion care, including the limited availability of abortion services in public health facilities. “Our findings suggest that a shortage of trained staff and inadequate supplies and equipment are the primary reasons many public facilities don’t provide abortion care.”

The steps that can be taken to improve availability and quality of abortion services extend to training and certifying a greater number of doctors and permitting nurses, auxiliary nurse midwives and practitioners of indigenous medicine to provide medication induced abortions and MMA.

Ensuring that public health facilities have the equipment and drug supplies necessary to provide surgical abortion care and MMA is imminent.

The study also recommends improving the quality of contraceptive services, including by offering a wide range of contraceptive methods and providing counselling to help individuals prevent the pregnancies they do not want and achieve their reproductive goals.1162

Inadequate abortion laws will not curb the number of abortions, rather increase the number of abortions done illegally and unsafely.

**Conclusion**
Induced abortion is common across the globe. The vast majority of abortions occur in response to unintended pregnancies, which typically result from ineffective use or non-usage of contraceptives. Other factors are also important drivers of unintended pregnancy and the decision to have an abortion. Some unintended pregnancies result from rape and incest. Other pregnancies become unwanted after changes in life circumstances or because taking a pregnancy to term would have negative consequences on the woman's health and well-being. As a result, abortion continues to be part of how women and men manage their fertility.

1161 Guttmacher, *Supra* note 49.
couples in all contexts manage their fertility and their lives, regardless of the laws in their country.\textsuperscript{1163} This calls for laws that can successfully and effectively help women access abortions, establishing their autonomy and rights under reproductive health care.

Law reform can be achieved in many ways, and usually a combination of strategies is used. For example, advocacy often integrates efforts from legal, medical, research and women’s associations and organizations to collectively present the benefits gained from reforming the law. In addition, global and regional treaties, agreements and conventions can provide the basis for urging signatory countries to change their abortion law to be in compliance with the provisions of such agreements.\textsuperscript{1164}

But abortions do not automatically become safe with legalization.

As the preference for small families and the desire to control the timing of births continue to increase, so will the motivation to postpone motherhood, achieve healthy spacing between births and limit family size to the number of children desired. National governments and donors need to continue to invest in providing high-quality, comprehensive contraceptive services that women and couples need to achieve their desired family size and preferred timing of their births. Ensuring personal choice is essential to a woman’s ability to use whichever method best suits her specific needs. Yet, because of human error or method failure, some pregnancies will be unintended despite contraceptive use.\textsuperscript{1165}

\textsuperscript{1164} Id.  
\textsuperscript{1165} Id.  
\textsuperscript{1166} Id.
A FALLACIOUS RESCUE TO REVERSE DISCRIMINATION: EWS

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ABSTRACT
The long-standing goals of the Indian Constitution which serve as a driving force towards building a society that finds its roots in justice, liberty, equality and fraternity. We have seen under the Citizenship Amendment Act, 2019, where these objectives were trampled upon by the Parliament. In this article, the Citizenship Amendment Act would not be the impugned topic for discussion, lieu, it will be the Constitution (103rd Amendment) Act, 2019 being the subject-matter for consideration. This act empowers the “Economically Weaker Citizens” by providing them 10 per cent reservation, in addition to the already-existing reservationists and explicitly excludes such reservationists from the purview of this act. The act has faced a juggernaut of criticisms on various grounds which I will be discussing in this article. Indeed, reverse discrimination is happening at this time as the forward classes are not subjected to the special provisions made in this behalf for their counterparts, i.e. the backward classes of citizens. They are availing such benefits by virtue of the fact that they have sustained a long-standing disadvantageous position in the society due to various compelling forces and now, it’s the time for them to stand beside the forward groups. This is the essence of substantive equality and thus, the Constitution (103rd Amendment) Act is an attempt of sowing seeds for reviving the historical discrimination in response to the reservation provisions for the backward groups. This act finds its inception in a premise which is backed by a misunderstood necessity.

I will be discussing in detail about the Constitution (103rd Amendment) Act and the reasons of its enactment. Then, the focus will be shifted on the “Proportionality Test”; for the purpose of screening the impugned Act through each rung of the test and analyzing the extent of its correctness.

A NEW BORN RESERVATION
When our constitution was being framed, the framers had it in their mind that the backward classes of citizens shall get an equal opportunity in order to emancipate themselves from their historically-disadvantageous position and get adequate representation in every facet of development. Before the constitution came into being, the Scheduled Castes and Scheduled Tribes were the crystal clear groups who were known to be strangulated and stranded in a vicious circle of social exploitation. Thus, these groups were on the forefront of the policies of the constitution makers and this later led to the inclusion of special provisions for them in the form of Article 15(4) & 15(5)\textsuperscript{1167}, along

\textsuperscript{1167}Article 15(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.
with Article 16(4). But a dilemma arose later with regard to the recognition of ‘Other backward Classes’ to be subjected to the same special provisions meant for the SC’s and ST’s. The OBC’s claimed that they also ought to be the beneficiaries of such provisions on account of their backwardness, whether in terms of social, educational or economic backwardness. The court construed them to be socially and educationally backward in Article 15(4) & 15(5) and a much broader perspective was seen in Article 16(4), by referring them to be backward classes. This was a step towards their amelioration and thereby bringing in ‘social democracy’.

After taking into consideration social and educational backwardness as a determining principle for reservation, it is also imperative to consider economic backwardness which is an analogous principle and has much to do with reservation. Seemingly, it is also the only criterion for me to ponder upon, as another ground for reservation. Over the years, there has been a drastic change in the status and conditions of the SC/ST/BC’s, whether in education or employment. These opportunities were catered to them by way of special provisions enshrined in the Fundamental Rights.

Had not been poverty alleviation and access to basic necessities of life one of the key concerns of any democratic government? If I am not wrong, the Fundamental Rights Chapter was embedded in our constitution to instill dignity, autonomy, liberty and equality amongst the persons or citizens.

For instance, there are two boys Ronaldo and Dybala, where Ronaldo belongs to a well-to-do family and has access to more than the required necessities of life, whereas, Dybala on the other hand, lives in a slum area with her mother, who works as a maid in different places. Do you think that both of them share the same lifestyle and are getting equal opportunities in any race of life? No. In fact, Dybala might be perceived as a less dignified person because of his filthy clothes and thus, may be seen as a thief. He may not have autonomy to make choice in his decisions and does not possess the same amount of liberty to access certain amenities, unlike Ronaldo.

Seeking to the aforesaid case, the compelling reason of such inequality in opportunities is economic backwardness. In such a situation, unless the person being economically incapacitated will not be uplifted, there will be nothing worse than that for him. Thus, till the time, Dybala will not become educated and employed in any occupation, very less time will be left for him and his family to crumble down. This could only become possible through an ‘Affirmative Action Program’ like reservation.

Therefore, instead of acting as a lackadaisical person and seeking to the exigency of time, the Parliament brought the Constitution (103rd Amendment) Act, 2019 which seeks to provide 10 per cent reservation to the ‘Economically Weaker Sections’ of citizens by amending Articles 15 and 16 and adding Clause (6) to both

1168 Article 16(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

1169 Article 15(6): Nothing in this article or sub-clause (g) of clause (1) of Article 19 or clause (2) of Article 29 shall prevent State from making:
(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and
the Articles. Though, no citizen could benefit from this law unless he has fulfilled certain conditions, as prescribed in that behalf.

But the law restricts its application to certain categories of citizens, which are Scheduled Castes, Scheduled Tribes and the Non-Creamy Layer of Other Backward Classes. This part of the law is like an elephant in the room and has to be discussed in great detail. This leads us to screening the impugned law through each stratum of the ‘Proportionality Test’ and reviewing its credibility.

II. A ‘Proportionate’ Review of a Law
It is paramount for a law to be unequivocally proportionate in its application. By and large, it may not be possible for the maker of a law to foresee its far-reaching ramifications but it should not become implausible on the face of it. What and how a law brings a disproportionate impact is the subject-matter of the ‘Proportionality Test’. It uncovers all the latent and patent effects of a law, after the law goes through its Four-Layer Passage. Hereupon, I will be discussing the four elements of the proportionality test by placing them against the new reservation law.

A. Legitimate Goal: First Stage
This element talks about the interest(s) that must exist in a law in order to justify the interference with another interest or right. The new reservation policy aims to provide those means by which the economically weaker sections (EWS) of citizens could achieve certain level of prosperity, other than the already existing reservationists. The purpose at this stage is to weigh the interest(s) that must hold such good in order to outweigh the competing interest. To put it conversely, what is that competing interest here and will it be legit to forgo such interest? The interest with which the present law is interfering with has multiple facets of it.

(b) any special provision for the advancement of any economically weaker sections of citizens other than the clauses mentioned in clauses (4) and (5) and as far as such special provisions relate to their admissions to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.

Explanation— For the purpose of this article and Article 16, “economically weaker sections” shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantages.

Article 16(6): Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any economically weaker sections of citizens other than the classes mentioned in clause (4), in addition to the existing reservation and subject to a maximum of ten per cent of the posts in each category.


Id., In its Office Memorandum no. 20013/01/2018-BC-II dated January 17, 2019, the Ministry of Social Justice and Empowerment, Government of India has stipulated that only persons whose families have a gross annual income less than Rs.8 lakhs, or agricultural land less than 5 acres, or residential flat less than 1,000 sq. ft., or residential plots less than 100 sq. yards in notified Municipalities, or residential plots less than 200 sq. yards in areas other than notified Municipalities, are to be identified as EWS for the benefit of reservation.

Id.

Talking about the case of M. Nagaraj v. Union of India\textsuperscript{1174}, where the court laid down two tests, the ‘width test’ which takes within its ambit all the constitutional principles alleged to have been infringed by the impugned amendment and the other was the ‘identity test’ which further identifies any abridgement of the basic structure of the constitution by the same amendment.\textsuperscript{1175}

When we talk about the impediments of the amendment, we have to certainly refer to Articles 15 and 16. This amendment came into being to uplift those who are economically backward but does it conform to the previous amendment made in both the Articles. It actually doesn’t, as first of all, Article 15(4) and 15(5) clearly lay down that the citizen invoking reservation must be ‘socially and educationally backward’ and in furtherance, Article 16(4) also lays down that the citizen shall ‘not be adequately represented in the services under the state’. But when the amendment here, so made, explicitly excludes the SC, ST, OBC-NCL, it comes in clear conflict with the provisions of Articles 15 and 16. It is only those excluded groups who fulfil the requisite conditions for reservation and when groups other than those had been placed on the same parlance, it is a clear violation of Article 14 of the Indian Constitution. In our further discussion, we will come across certain facts which will show that the economically weaker sections of citizens under Articles 15(6) and 16(6) are not so economically backward.\textsuperscript{1176}

In Minerva Mills v. Union of India\textsuperscript{1177}, it was held that Articles 14, 19 and 21 of the Constitution form the ‘Golden Triangle’ and in no case can be violated, as they form part of the Basic Structure of the Constitution. This amendment thus, alters the basic character of the constitution by violating Article 14.

Also, since the case of M.R. Balaji v. State of Mysore\textsuperscript{1178}, the court had been consistent about the ’50 Per Cent Rule of Total Reservation’. Under any circumstances, the 50 per cent cap shall not be breached and the same has been done by the 103\textsuperscript{rd} Amendment, by exceeding the limit to 59.50 per cent.\textsuperscript{1179} Over the years, the Courts have been stringent about the 50 per cent rule whether in matters of education or employment and the Parliament has simply overlooked the precedent, without there being any compelling exceptional circumstances\textsuperscript{1180} and thereby, failing the width test. Thus, interference with the basic tenets of the constitution under the pretense of alleviating ‘economic backwardness’; does not justify the amendment to have a ‘legitimate goal’.

B. Rational Connection: Second Stage

Indeed, when the purpose of an amendment is not legitimate, there is no point of discussing the other elements of the test.\textsuperscript{1181} But, irrespective of this fact, the scope of my essay is to place the amendment against each of such elements. There must be a rational nexus between the interference and the goal sought to be achieved. The

\textsuperscript{1174} AIR 2007 SC 71
\textsuperscript{1175} Supra Note 4
\textsuperscript{1176} Supra Note 4
\textsuperscript{1177} AIR 1980 SC 1789
\textsuperscript{1178} AIR 1963 SC 649
\textsuperscript{1179} Supra Note 4
\textsuperscript{1180} See Devika, Reservation to the Economically Backward Class — Indian Constitutional

beneficiaries of this amendment are ‘General’ or ‘Other Categories’ of citizens, other than SC, ST and OBC-NCL. Where, such classes of citizens are holding the maximum number of posts or jobs, whether in private sector or government jobs. In fact, in a report given by the Union Minister of State Personnel, Jitendra Singh has shown that till January 2016, 52.47% posts have been held by the General Category of Citizens.  

Here in this case, the Parliament has prescribed 10 per cent reservation for the EWS category of citizens without any rationale or adequate determining principle like any authentic data to make it reasonable for such per cent of reservation and thereby brings this case into the fold of ‘Manifest Arbitrariness’, one of the levels of Graded Equality. In Shayara Bano v. Union of India, Nariman J said that when the Parliament has made any legislation that is excessive and disproportionate, it would be considered as manifestly arbitrary. Comparatively, the 50 per cent rule of total reservation was carved out as a mid-way for the general and backward classes of citizens, unlike the 10 per cent rule.  

Also, the amendment does not seek to provide reservation freely to the EWS category; it imposes certain conditions like that of Rs. 8 Lakhs and other limitations on assets. However, these restrictions are not suitable enough to justify the interference with the Basic Structure of the Constitution. In one of the sessions of Lok Sabha in August 2018, a report submitted by the Union Minister of State for Statistics, Vijay Goel, mentioned that India’s per capita income was Rs. 82,229 in 2016-2017 and currently tax becomes payable for an income above Rs. 2.50 Lakhs and around 97 per cent of the country’s population fall below this limit. Thus, the income limit of Rs. 8 Lakhs would include almost the whole of population and needy people would again be deprived of the benefits, as was happening in the case of Creamy-Layer amongst the OBC’s. This makes the means of achieving the so-called legitimate goal as irrational and thus, our goal of minimizing economic backwardness by way of reservation will not be served by such policy measures and will remain as a mere interference only.  

C. Necessity: Third Stage  
Now, if I reiterate the goal of the reservation policy, it was to uplift the economically backward classes of citizens. For me, economic backwardness is apparently the sole criterion left for reservation but this does not make the policy adopted by the Parliament necessarily to be the least restrictive one. The conditions discussed above in the last element for entry into the EWS category are not correct and there may have been any other alternative measure which could have served the purpose well. Although, the amendment is facing the foremost critique for the inclusion of false classes within its purview and is stretching the wrong further, by laying down inappropriate conditions of the their inclusion which will ultimately go against the purpose of amendment.  

Recapitulating the income criteria of Rs. 8 Lakhs which provides a disproportionate
benefit to the subjects of the amendment could have been superseded by an alternative measure. I have mentioned about the India’s per capita income of Rs. 82,229 in the last element, the income limit must be even less than this amount in order to facilitate proper apportionment of reservation benefits to the poorest of the poor class. Thus, the amendment fails to clear the necessity stage of the test.

D. Balance: Last Stage

In the last stage of the Proportionality Test, we have to determine that amongst the Right of the Economically Weaker Sections of Citizens and the Basic Structure of the Constitution, which has to be given an upper hand. A balancing is done when two rights or interests are on the same parlance and one has to be chosen out of them. In Aruna Ramchandra Shanbaug v. Union of India, the court allowed ‘Passive Euthanasia’ and for the first time, a person was allowed to die at the instance of the other person. In the context of balancing, this case is the best example of two interests competing with each other on the same footing (Life). Thus, between both the conflicting interests, the court recognized Right to Die.

It may not be necessary every time that both the interests have a common standard of assessment, this would lead to ‘incommensurability’. Incommensurability in its literal sense means, when two things cannot be measured on a common scale. In Internet and Mobile Association of India v. RBI, the court quashed the circular of RBI as it was infringing Article 19(1) (g) by disallowing the banks from providing services to persons who deal in ‘cryptocurrencies’ and the court rejected RBI’s plea of Article 19(6), which talks about reasonable restrictions in the interest of the general public. Though, the court didn’t go into each prong of the test but did examine on the basis of the Necessity prong. Ultimately, both the conflicting interests belonged to the general public only (Trade) as one was giving them the right to trade and the other was restricting the same in their interest. Unlike in Aruna Shanbaug case, where both the competing interests shared the same scale and were flowing in the same direction, to save the victim from further suffering. On the other hand, in the Cryptocurrency Judgment, trade of cryptocurrencies should be allowed as it is a fundamental right to trade and at the same time, it should also be barred as it poses undue risk upon the general public. Thus, there exist a ‘Strong

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise

Incommensurability”\textsuperscript{1193} and one has to be chosen.

Although, it is not a straight-jacketed rule that incommensurability has to be judged on the face of it, instead, \textit{it is also possible to integrate two interests by building a relation between them} and this brings the concept of ‘Weak Incommensurability’.\textsuperscript{1194} In the case in hand, on one side, a fundamental right is enabling the upliftment of the EWS category of citizens [Articles 15(6) and 16(6)]\textsuperscript{1195} and on the other side, another fundamental right is getting abridged due to the former one (Article 14)\textsuperscript{1196}, for the reasons noted under the previous headings. Irrespective of the fact that whichever incommensurability exist, weak or strong as both the interests are in the furtherance of certain classes of citizens and thus, one has to be upheld seeking to the relevant reasoning.\textsuperscript{1197}

The relevant considerations in regard of the present case can be one which we have discussed above in the text and the same could also include a ‘Cost Benefit Analysis’.\textsuperscript{1198} When it comes to assessing the cost for introducing a particular scheme, it has to be weighed in terms of the benefit it will provide. Here, it will become imperative for the states to appoint a competitive body for scrutinizing the applications for \textit{EWS Quota} and for that, costs need to be incurred. But when the law does not find legitimacy in its inception, then there is no point of selecting its beneficiaries.

\textsuperscript{1193} \textit{Supra} Note 7 at 719  
\textsuperscript{1194} \textit{Id.}  
\textsuperscript{1195} \textit{Id.}  
\textsuperscript{1196} The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.  
\textsuperscript{1197} \textit{Supra} Note 7 at 722  
\textsuperscript{1198} \textit{Id.}  
\textsuperscript{1199} V.D. Mahajan (ed.), \textit{Jurisprudence and Legal Theory} 94 (EBC Publishing (P) Ltd., Lucknow, 5th edn.)
POLICE BRUTALITY- A LEGAL, CONSTITUTIONAL AND INTERNATIONAL PERSPECTIVE

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Abstract-

The unwarranted use of force by the police personnel is what police brutality is and it is not healthy for any democratic country and should be dealt with utmost attention. Police being the safeguard of the democracy and sector of providing security to the citizens, when are subjected to these accusations it condemns the working of the institutions. When any citizen animadverts about police brutality the only meaning to their agony is that they were not treated with all the rights and provisions that they were incepted for them. Incidents of police brutality and custodial deaths are not only reported in the modern period but they were reported in the ancient time also when there was no such system of policing sector. In ancient times issues within the territory were dealt by soldiers and the supreme person was the king who decided. Soldiers were brutal with their behavior towards the citizens and so the modern police. Unnecessary force should not be allowed be practiced by any policing sector for any citizen unless it is the last option for them. The paper consists of four major topics: 1) Legal provisions protecting from police brutality; 2) Legislative Provisions protecting from police brutality; 3) International laws and provision for curtailing custodial death and Police Brutality; 4) List of cases of Police Brutality. There are somehow provisions and rules mentioned to protect the accused from this dreadful act starting from the legal statutes like Criminal Procedure Code, Indian Evidence Act, Indian Penal Code, and now coming to the constitution there are articles like 14, 19, 21 which are protecting the accused person. International perspective there are many treaties which are partially or totally talking about the protection from the issue. This article attempts to provide the basic rights that accused person has after he is arrest and the various provisions which help the accused to be treated humanely. Stringent laws and portions for people who commit this crime is the only way for reducing the rate of this crime. Most affected state of India is Maharashtra and Andhra Pradesh with almost 500 cases combined in last in last 10 years. This became a serious issue due to which many new law were made so that this increasing number of cases shall decline. But in 2017 alone 900 cases of custodial deaths were reported. So, this is a grave issue in India’s democracy and efficient steps shall be taken to remove it. The bizarre with this issue is that people who are victims of custodial deaths are still innocent, they have a suit pending on them but because of this they have to die. There are thousands of cases which are filed and are ongoing, but to my imagination there may be so many cases which are not filed because the police is somehow able to suppress the family, victim of the crime. This is some serious issue and should be dealt as soon as possible.

Introduction-

The body of police in a country can be called as a law enforcement body. The term police have been derived from the Latin word politeia which means the condition of Polis or state. India is a diverse state and the second most populous country in the world and maintaining peace and order in the society is a strenuous act. Police personnel have a vital role in
safeguarding the peace and surveillance within the territory. For its easy functioning and to maneuver these responsibilities there are some exceptional power and rights which are only limited to the police personnel. These include the responsibilities to maintain public order, protect VIP’s and play a crucial role in the security of the state. Under the Police Act, 1861, the duty of the police personnel is quoted and codified. Specifically, section 23 of the act defines the various duties of the police personnel. Their appointment, dismissal, and etc., of inferior police is defined under section 7 of the Police Act, 1861. Also, in section 57 and 58 of the Model Police Act, 2006 various roles, functioning and responsibilities are prescribed. Further, numerous factors help in explaining the diversity of the police activities and systems. The types of criminal activities committed in a society and the various means used by the criminals play a vital role in ascertain the police force’s activities. Like to handle cybercrime there was no such law implemented in India but after in 2000 a new law for cybercrime was implemented.

Based on the definition first proposed by American sociologist Egon Bittner, “the

common feature among all the different agencies engaged in policing is the legal competence to enforce coercive and nonnegotiable measures to resolve problematic situation.”

But somehow these powers and responsibilities do turn into police brutality and hamper the society.

**LEGAL PROVISIONS PROTECTING FROM POLICE BRUTALITY-**

In the inquisitorial system of criminal justice system, the person is never guilty but is innocent prior to the verdict of the court and should be treated like an Innocent. There is a particular procedure through which the decision whereby the suspect is guilty or not is to be decided. Here is the process briefed-

After a crime is perpetrated which is defined as illegal and punishable by the Indian law then the first step for initiating any criminal procedure against the person is by filing a F.I.R (First Information Report). If the offence is cognizable under CrPC, then the F.I.R is filed under section 154 of CrPC. If the crime is punishable for more than 10 years of imprisonment then the police have a time of 90 days for filing the charge sheet and if the crime is

1200 An act for the regulation of Police in India.
1201 Section 23 (Police Act, 1861) I) to obey and execute all orders and warrants lawfully issued by the competent authority, ii) to collect and communicate intelligence affecting the public peace, iii) to prevent the commission of the offence and public nuisances, iv) to detect and bring the offenders to justice and to apprehend all person whom he is legally authorized to apprehend, and where there is sufficient evidence then the police personnel may enter any drinking house or gaming shop to investigate without warrant.
1202 Section 7 (Police Act, 1861) I) [Subject to the provision of Article 311 of the constitution] may from time to time under this act, thee Inspector-General, Deputy Inspector General Inspector-
punishable for less than 10 years then the police have a time period of 60 days to file the charge sheet. Under section 173 of the CrPC the charge sheet is filed against the person. The charge sheet contains the name of the parties, the different sections which define his crime, if released on bail then the sureties, nature of crime, witness to the case and etc. If the charge sheet is not filed within the given time then the accused shall be granted bail under section 436, 437 and 479. After the charge sheet is filed the case is produced before the magistrate. After the charge sheet is filed before the magistrate the magistrate analyses and if he thinks there is no such offence committed then he shall acquit the accused. If the charges framed are sufficiently backed with the evidences then the magistrate asks the accused if he wants to plead guilty which is written under section 241 or he wants a trial. If the accused pleads guilty then he shall be punished and the case is decided and over and a verdict is pronounced. If the accused asks for a trial then the prosecutor calls the government witness and they are produced. Once they are produced the defense is given the chance to cross-examine the statement of witness. Once the cross-examination is completed from the prosecutor side the accused is asked to answer each and every questionable issue. Once the questions are asked the defense is asked to back with evidence and witnesses for the said answers by the accused which is written under section 313 of the CrPC. When they are cross-examined and analyzed from both the side. Finally, both the parties present their prayers and what they want from the court.

After analyzing the different evidences and facts the magistrate pronounces the judgement. If the death punishment is awarded to the convict then the same shall be approved by the High court and the right to appeal also lies there. If the Magistrate pronounces sentences which are for life imprisonment or less than life imprisonment then there is no need for getting it approved from High court. After the appeal is made to the High court and if the High court rejects it then the convict has the power to appeal in Supreme court. If the Supreme court also rejects the appeal, then a mercy petition can be filed before the President seeking relief from the death sentence. Then according to the Article 66 of the Indian Constitution the President may pardon, reject, suspend, remit or commute the sentence. If the mercy petition is also rejected then the death warrant is issued where the day, date and time is written and accordingly the death sentence is completed in the jail premises by hanging the convict.

Until the court pronounces the verdict and the final judgement for the case the person is just an accused and shall not be treated as guilty. “Innocent until proven guilty” the abovementioned sentences are not self-quoted but they are written and specified under Article 11(1) of United Declaration of Human Rights. But illiterate people who don’t known about the procedure are prone to these brutalities because they get threatened easily and police using its power make them confess and destroy their lives.

Further there are some rights of accused which are for the protection of the accused person so that he faces no such brutality or inequality after getting arrested, there are

1206 Sir William Garrow during 1791 Old Bailley
special laws codified for helping the accused-

1) Right to know the ground of arrest- every person while he is getting arrested has the right to know the grounds and the reason why he is getting arrested. The particular right is pointed in section 50 of CrPC. Also, according to Section 75 of CrPC if the police is enforcing any warrant then he shall produce the warrant when asked or if needs to be proved.

2) Inform about the arrest to anyone- after the person is arrested, he has the right to inform about the arrest to any relative or any other person of his interest of his choice.

3) Right to be produced before the Magistrate within 24 hours of arrest- once the person is arrested then the accused shall be presented before the court so that further actions can be taken. Section 76 of the CrPC order the police officer to present the accused within 24 hours of the arrest.

4) Right to consult a lawyer- after the person is arrested the accused has the power to hire a lawyer for his case. This right is defined under section 41D of CrPC. The person also has the right to choose his own legal practitioner for defending him. Moti Bai vs. State.

5) Right to be released on bail- the person may be released on bail according to the section 436, 437 and 439 of CrPC. If the person is arrested for non-cognizable offence and that also without the warrant then the arrested person shall be informed about the provisions of bail. Chandra Swami vs. Central Bureau of Investigation.

6) Right to obtain free legal aid- if the person is not able to hire a lawyer due scarcity of resources then the person has the right to access free legal aid and also the court has the right to appoint a lawyer to the accused which is directed under section 39A. The right has been unequivocally given in the case Khatri (II) Vs. State of Bihar. Even if the accused is not able to apply for accessing the right then also, he shall be provided and this does not revoke his right, Sukh Das Vs. Union Territory of Arunachal Pradesh.

7) Right to keep silence- though this particular right is not enumerated in any of the legal statute but the right can be derived from the various different laws. No arrested person shall be forced to speak anything. Nandini Satpathy Vs. P.L Dani where the court stated “no person can force any person to give any statement or to answer any questions and the accused person has the right to keep silence during the process of interrogation”.

8) Right to be analyzed by a medical practitioner- whenever a person is arrested then the medical test and all other medical related test and survey shall be conducted with the accused permission and in a register medical institution. This particular right is given under section 54 of CrPC. In Selvi and Ors vs State of Karnataka which held that involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) for the purpose of improving investigation efforts in criminal cases.

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1207 1954 Cr L.T.(Raj) 1591
1208 AIR 1997 SC 2575.
1209 1986 SCR (1) 590
1210 1978 SCR (3) 608
1211 AIR 1997 (1) SCC 416
1212 Criminal Appeal no. 1267 of 2004
1213 During the test, subjects are exposed to auditory or visual stimuli (pictures, videos and sounds) that are relevant to the facts being investigated alongside other irrelevant words and pictures.
In D. K Basu Vs. Province of West Bengal, this case is the milestone judgment since it concentrates absolutely "on the privileges of denounced individual and it additionally commits the cop to do certain exercises". The court additionally expressed that on the off chance that the cop neglects to play out his obligation, at that point he will be at risk for hatred of court. Such issue can be initiated in any High Court having the purview over the issue. However, different endeavors have been made in the law to shield the blamed individual from the custodial torment and different encroachment of rights the incomparable court at long last made some extra alterations in the Indian courtroom.

According to the Indian Evidence Act, 1872 there are some rules concerning submitting the evidence that has been obtained from various sources. Law knows that the police officer have the power to extract most of the information from the accused using physical and mental torture and also by threatening him and his family for putting in grave danger, so to avoid these type of situation and problems we do have some clauses in the Indian Evidence Act, 1872 which shall protect the accused person from getting tortured as written in the various section-

1) **Section 24 of Indian Evidence Act, 1872** a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the court have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient in the opinion of the court.

2) **Section 25 Indian Evidence Act, 1872** no confession made to a Police officer shall not be proved as against a person accused of any offence

3) **Section 26 Indian Evidence Act, 1872** no confession made by any person whilst he is in the custody of a Police officer unless it is made in the immediate presence of a magistrate

4) **Section 27 Indian Evidence Act, 1872** states that when any related information is gathered from the confession made by the accused while in custody then the provided evidence is confession or not, the information can be proved in court.

In Indian legal executive framework torment or debasing treatment is absolutely awful. Article 21 of the Indian constitution. In Kishore Singh Vs. Raj, extreme compels were passed by the court against the police for its shocking demonstration of torment, stigmatizing the strategy of police, Krishna Iyer, J has watched:

"Nothing is more cowardly and unconsciously than person in police custody being beaten up and nothing inflicts a deeper wound on our constitutional culture than a state official running berserk regardless of human rights."

In, Gauri Shankar Sharma Vs. State of Uttar Pradesh which is a typical case where a police officer tried to rescue his colleague by giving evidence favorable to the accused police man. Restoring the conviction of 7 years by the trial court and rejecting the plea for substituting the imprisonment by fine.

1216 The High Court persuaded itself to believe that the police officer did not give false evidence since
The offence is a serious nature aggravated by the fact that it was committed by a person who is supposed to protect the citizen and not misuse his uniform and authority to brutally assault them while in his custody. Death in police custody must be seriously viewed for otherwise we will help take a stride in the direction of police raj. The punishment should be of such as would deter others from indulging in such behavior\textsuperscript{1217}.

**LEGISLATIVE PROVISIONS PROTECTING FROM POLICE BRUTALITY**

Indian law provides stringent laws and regulation which help in protecting the rights of accused while in custody of police but the constitution has no such provisions as for protecting the accused but certain Fundaments Rights are enumerated in the constitution which indirectly help in protection from the custodial torture. Fundamental rights are enumerated in the part III of the Indian constitution and comprises of various articles like 19, 20, 21, 22, 32 and 226 which are somehow protecting from custodial death. Protection under Indian constitution-

There are some rights given to the accused which are as follows-

1) **Right to life**- one of the basic rights which is available to every person and without his right existence of rest of the rights are meaningless and of no point. Before 44\textsuperscript{th} amendment right to life was a revocable right and only after the ADM Jablapur\textsuperscript{1218} case the Supreme Court took the view that if the President had declared a state of emergency in the country and has also suspended the right to move the court for the enforcement of any right, the right to life under Article 21 could also be suspended. But finally, after the 44\textsuperscript{th} amendment article 20 it was made an irrevocable right. In Kharak Singh case\textsuperscript{1219}, the Supreme Court held that the term “life” in Article 21 meant not merely continuance of one’s animal existence but a right to the profession of each organ of the body. Thus, it includes be inhibition against the deprivation of any of the limbs and faculties of life. The provision further prohibits the mutilation of the body by amputation of an arm or leg or the pulling out of a eye or destruction of any other organ of the body.

2) **Right to against self-incrimination**-

From the verdict of Supreme Court in Nandini Satpathy\textsuperscript{1220} the following were stated-

1) Suspects who are not yet formally charged are having the right to remain silent during custodial interrogation

2) “To be a witness against himself in Article 2(3) extended beyond the court process to convey any giving of incriminating evidence of information even during police investigation”.

It provides that Clause (3) of Article 20 provides that “no person accused of any offence shall compelled to be witness against himself.” In other words, this clause prohibits all kinds of compulsions to

\textsuperscript{1217} 

\textsuperscript{1219} 
Kharak Singh v. State of Uttar Pradesh, AIR 1963 SC 1295

\textsuperscript{1220} 
Nandni Sathapathy v. PL Dani, AIR 1978 SC 1025
make a person accused of an offence a witness against himself. In this context, the Supreme Court in the case of M.P. Sharma v. Satish Chandra\(^{1221}\) had observed that this right embodies three essentials, viz. (a) It is a right concerning to a person who is accused of an offence; (b) It is a protection against coercion to be witness and (c) It is a protection against such compulsion relating to give evidence against himself. This right can also be said to be the ‘Right to Silence’.

3) **Right against Ex-post facto operation of Criminal Laws**- the element feature of “Rule of Law” is that a person should not be punished or arrested if at the time of commencement of the crime, the committed crime was not defined illegal or there were no such provision for declaring that act illegal in law, then for the same the person cannot be arrested or face any legal action. E.g.- cybercrime before 2000 wasn’t a crime.

4) **Right of equality and equal protection law**- the Article 14 of Indian constitution helps maintaining equality in society and protects the citizens from different discrimination which prevail during the ancient India. Article 14 prohibits discrimination on basis of religion, caste, sex, race, birth place, creed, faith. The role of doctrine of equality becomes more significant in the context of the rights of the accused because he has committed a crime\(^{1222}\). The doctrine helps in prohibiting unjust, undeserved and unjustified inequalities in the administration of providing justice to people.

5) **Right against double jeopardy**- it stated that no person shall be punished or prosecuted for the same offence more than once, the construction bars the double punishment for the same offence. The legal maxim for this term is nemo debet bis vexari. This can be generally termed as if the person is acquitted or has been punished for any offence then the person cannot be booked for the same offence again and again. For availing this right, the accused has to prove-
   1) previous prosecution has already taken place
   2) punishment has followed or acquittal as well
   3) the punishment or acquittal has been already deciding and completed if given.

6) **Right to speedy trial**- the remedy for right to speedy trial is embalmed in Article 14, 19(1)(A) and 21 in the constitution and Criminal Procedure. Firstly, it was entailed in the case Sheela Barse Vs. Union of India\(^{1223}\), the supreme court announced the time schedule for deciding the cases which are related to juvenile but no such conclusion was made as Supreme Court was unwilling. Later on, in a significant judgement of Abdul Rehman Antuley Vs. R.S Nayak\(^{1224}\) the court was able to fix the guidelines for speedy trial but failed to fix the time limit for it.

**INTERNATIONAL LAWS AND PROVISION FOR CURTAILING CUSTODIAL DEATH AND POLICE BRUTALITY**-

Prohibition of human torture and ill treatment is mentioned in mostly all the conventions and treaties because they are somehow very inhuman in nature and shall

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\(^{1221}\) M.P. Sharma v. Satish Chandra, 1954 SCR 1077

\(^{1222}\) A.N Chaturvedi., Right of accused in Indian Constitution.

\(^{1223}\) 1986 AIR 1773, 1986 SCR (3) 443

\(^{1224}\) AIR 1992 SC 1630.
be curtailed. Internationally also there have been many steps and moves taken to ensure no person shall suffer any type of torture. Therefore, in UN charter in its preamble affirms and declares its “faith in fundamental rights, in dignity and worth of the human person in equal rights of men and women in the dignity and the worth of the human person, in equal rights, of men and women”

Torture is prohibited under-
1) The International Committee of the Red Cross (IRC), 1863-
   Founded in 1863 in Geneva as an impartial humanitarian body. It is active in many forms of protection and assistance to victims of allied war and armed conflict. In matters of international armed conflicts and various other international conflicts the ICR has the authority to visit the countries who are State Party to the Geneva Convention and have the right to visit the prison where all the victims are kept.
   They also have the power to roam freely within the prison and talk to the prisoners without any witness to the detainees ask them anything they want and for their work, there is no such restriction or limit for the duration for talking to the prisoners. Finally, they have to maintain a diary and mention every problem that they are facing. Most importantly their work is to ensure that they are given basic mental and physical necessity. All the reports made are totally confidential.

2) European Convention on Human Rights, 1950-
   The prevention of torture has been resolutely stated in the European Convention of Human Rights law since 1950 when the council of Europe adopted the European Convention. In Article 3 of the convention it has stated that.
   
   No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
   
   This provision somehow protects the people from torture. It is legally binding in the country adopting the convention and has been condemned for also ignoring the word ‘cruel’ from the provision because of which it has been violated a many a time.

3) International Covenant on Civil and Political Rights
   After the Universal declaration of rights adopted by the United Nations they started working on the covenant because they needed a legal binding nature which can help in enforcing the rights and provisions.
   Article 7 states that no one should be subjected to torture, cruel, inhuman or degrading treatment to anyone. Also, article 7 cannot be exempted or relaxed and is totally binding. No one can be forced to give any confession or forced to do any medical examination. Even during public emergency also, the article 7 can never be revoked or exempted. Also, in Article 9 it gives the rights to the arrested person from arbitrary arrest, person getting arrested shall know the reason for which he is being arrested and etc.

CASES OF POLICE BRUTALITY

1225 Manoj Kumar Sinha, Implantation of Basic Human Rights, 1990
1226 J. Bhushan, Custodial Violence - Indian Bar Review
1227 Balwinder Kaur, Torture and Deaths in Police Custody- A violation of Right to Life.
1228 Article 7 of the International Covenant on Civil and Political Rights, Part- 1
1) Saheli A Women’s Resources Centre Vs Commissioner of Police 1229

The case where a 9 year old boy got killed due to the ill treatment of the accused and how inhuman police personnel’s can be while on their duty. The 9 year old boy was protecting her mother when two of the police men tore her clothes and were assaulting her. The boy was simply holding her mother. But then the police men threw the boy away which resulted to the grave injury of the boy. When the mother returned after her bail she found the boy admitted in hospital but died due to grave injuries in abdomen. Further in the case it is also written that the S.H.O also threatened to take the case back because the case was against the police officials.

2) Death of Somabhai Thakor because of Police ruthlessness, Gujarat

The perished, Shri Punjabhai Thakor matured 55, was suspect for a situation of robbery from the place of an occupant of Napa. The expired and two other deliberately acknowledged for examination and were being explored. The PSO trained that he be conceded in the emergency clinic. The specialist was not accessible. The Head Constable checked his pulse and discovered him dead. He left the body there and came back to the police headquarters to report the passing. The examination of Panchanama was hung on 14 November 1995. Meanwhile, rodents had stricken the body. The Panchanama report expressed that there were dim spots of beating on the back. The SDM, based on the report, had suggested that the objection ought to be given over to the Vigilance Department. Further the division enlisted a case u/s 302, 114 of IPC against the police authorities who were suspects to the wrongdoing. The after-death report found the reason for death due to cardio-respiratory disappointment. After further examination by the officials the passing was pronounced because of the police severity and in light of the fact that the police didn’t act separately.

3) Case of Mohd Amir Khan, Modh. Amir Khan vs. State

The case can be totally be referred to police brutality where almost every right of the accused was violated starting from informing the grounds for arrest to keeping the accused in remand of police for 7 days without any notice. The person was accused for planting bombs during the series of bomb blasts from 1996-1997. The accused was arrested at late night from the highway and was taken to a secret location, where he was brutally tortured for it. His nails were removed from his fingers by pliers, he was beaten to an extreme level, he was forced to drink water mixed with detergent and was regularly given electric shocks. He was forcefully made to sigh a bunch of blank papers. He was kept in special jail can also be called as solitary confinement where he lost his memory and started to have eye sight problem. because he was accused under TADA and POTA act. After 14 years of imprisonment he was finally acquitted and proved that he was never a part of the incident in anyway. He spent 14 years of life inside jail. He was arrested at 18 years of age and acquitted in 32. He also wrote a book during imprisonment which explained the brutality that he faced and what all problems and his journey of 14 years.

Conclusion-

After reading and going through the various rules, regulations and provisions. There are enough regulations

1229 1990 1 SCC 422
and enactments for the protection of the accused and protecting the accused from various ill treatment present in the world being it in the Criminal Procedure Code, 1973, Indian Evidence Act 1872, Indian Penal Code 1860 and the great Indian Constitution itself has numerous provisions and enactments. In Indian Constitution Article 21 has been defined vastly and has provided immune to the various atrocities caused by the police by giving many rights under it (Sunil Batra Vs. Delhi Administration AIR 1978). Internationally there are hundreds of treaties specially mentioning the problem of custodial death due to police brutality like The European Convention on Human Rights, 1950, The United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955, The International Covenant on Civil and Political Rights, 1966, The Human Rights Committee, The American Convention on Human Rights 1978, The council of Europe Declaration on the Police 1979, The African Charter on Human and Peoples Rights 1981 etc. these treaties are somehow based totally for protection of various problems faced by the accused while in custody and helps in minimizing the problem to an extent. Under International Law states are responsible for making laws regarding the issue and pose stringent punishment The provisions are not only meant for the people of a particular country or people from who belong to a certain country but are there for each and every human being in this word irrespective of any possible discrimination available.

But somehow due to illiteracy, poverty, belonging to backward region, religion and caste chances of these rules getting violated increases and produces a different scenario. There are various organizations which are continuously working for their upliftment so that the cases of police brutality decrease but due to these factors and the number of offenders it somehow becomes impossible to get justice to each and every person who becomes a victim to this situation. Many a times due to the power of the police official many of the cases are not filed in fear of them. Police officials are somehow able to scare them by threatening their family or the accused person himself. Somehow in every possible way be it in legal, constitutionally or internationally there are provisions enshrined in each and every perspective. This shows how big this issue got in the past and recent times that law was introduced in every circumstance so that they don’t get offended or are Harassed.

To protect women and children from the atrocities of police officials there are special provisions for them. Women cannot be arrested after sunset and till before sunrise; lady constable or police personnel shall be present for arresting the women there should be special healthcare provided to women whenever they need. According to section 18(2) of Juveniles Justice Act 2000 children cannot be put in jail or lockup brought to police stations for inquiry, to inquire a child the parents have the right to whether their child should be examined or questioned.

From the victim’s perspective they do suffer a lot both physically and mentally because tortures are of harmful nature. But there are cases where there is a positive outcome from the torture that police practices like on habitual offenders and on some offenders, who have done some gruesome crime like rape, terrorism or any rare case. So, these people do have that level of mentality that police personnel have to torture them but there is always a limit to every act.

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ARTIFICIAL WOMB - CRÈME DE LA CRÈME TO EXTRICATE PREMATURE BABIES?

By S. Aparna and G. Srividhya Iyer
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ABSTRACT

A fetus grown in an extracorporeal environment – a thought that cannot be comprehended by a layman, whereas the 21st-century technology repeatedly proves to be ahead of perceived reality. It is depressing to acknowledge the fact that India, a developing country, has the highest number of premature deaths and such deaths in the NICUs-Neonatal Intensive Care Units are predominantly due to infections affecting the underdeveloped immune system of the premature babies. Thus, AWT- Artificial Womb Technology can be a robust pinch hitter for NICUs a few decades from now. Hitherto, India has not been vocal about research on AWT. For serving this purpose, this paper contributes a Model Act to regulate research on AWT with the cardinal aim of saving the lives of premature babies. To further research, the paper suggests aborted fetuses as the research subjects. The researchers of this paper have provided categorical reasons as to why aborted fetuses are preferred as the research subjects. AWT research is indeed a double-edged sword but the fact that India has to mitigate the death rate of premature babies cannot be ignored. Medico-legal experts have critically opined that partial ectogenesis has potentiality in the artificial womb. In light of this statement, the Model Act provided in this paper envelops partial ectogenesis.

Keywords: AWT, NICU, premature deaths, aborted fetuses, partial ectogenesis.

1. INTRODUCTION

The “Artificial Womb” is a replica of the female uterus in an extracorporeal environment and is designed for “Ectogenesis”- the growth of the fetus outside the mother’s body. It is an invention in progress that does not construe a founder and acknowledges the cumulative efforts of many minds that have led to the present developmental stage. It is a concept that Emanuel M. Greenberg had solidified into research and futuristic writing in the 1920s. The artificial womb is still a concept that is foreign to a common man and will still be reciprocated the same, ten years from now. Hope always floats among the researchers indulging in AWT research, an invention that is positively looked forwarded to be used as a savior for struggling human fetuses that are on the brink of death due to lack of peak technology like the artificial womb. Research that has taken so many decades and is yet in the development stage might prove to be a costly affair but belief exists that it may become affordable— a few years down the lane.
The existence of artificial wombs in the Hindu mythological times like the *Mahabharata*, where the flesh from the womb of the female was divided into sections to result in hundred fetuses and was successfully grown into well-developed babies, is a well-known incident among the Hindu religious community. The idea of artificial womb design has been portrayed in many works of fiction.

**Figure 2: Blueprint of the 1955 EUFI.**

Emmanuel M. Greenberg had acquired a patent in 1955 for the design of an artificial womb. The design portrays an amniotic fluid-filled tank to host the fetus connected via the umbilical cord to a machine that facilitates the circulation of blood, a heater to regulate the tank, and an artificial kidney for waste regulation.

Yoshinori Kuwabara led a project in 1996, Juntendo University, Tokyo, for the development of premature goat fetuses. Fourteen goat fetuses were nurtured in an artificial amniotic fluid sac called the EUFI – Extra Uterine Fetal Incubation, similar to the mother goat’s uterus. The project succeeded to sustain the fetuses for three weeks but it sadly was not compatible to test human fetuses, though it later proved to be a spark model for the present research.

The EUFI was further developed in 2017 by the researchers in Children’s Hospital, Philadelphia. The improved EUFI additionally incorporated an interface that acts as the placenta, supplying nutrients, oxygen, removing waste, and the design resonates with the simulated sound of the mother’s heartbeat.

Though the lamb fetuses were successfully sustained for a month, noticeable progress from the 1996 EUFI, testing on premature human fetuses is a reality yet to be realized. Researchers in that project hint the non-viability of the development of the artificial womb to sustain a full pregnancy – complete ectogenesis. “Complete ectogenesis” starts from IVF-In Vitro Fertilization to the delivery of the fetus in...
an extracorporeal environment. IVF is the external procedure where sperm and unfertilized eggs are induced to fertilize in an external medium\textsuperscript{1235}. Complete ectogenesis is predominantly not been supported yet by researchers and bioethics experts.

On the progressive side, “Partial Ectogenesis” is the growth of an immature fetus, the age ranging from 8 weeks (considering the viability of AWT development hitherto) to 40 weeks outside the mother’s womb. This paper will only focus on partial ectogenesis, the latter being a reality-come-true in a few decades and also holding the support of experts in the field.

2. DESIGN OF ARTIFICIAL WOMB TECHNOLOGY (AWT)

2.1. THE 1996 EXTRA UTERINE FETAL INCUBATION (EUF1)\textsuperscript{1236}

EUF1 for 14 goat fetuses was developed in 1996 by Yoshinori Kuwabara and his team. The goat fetuses were surrounded by artificial amniotic fluid in a sustainable equipment that was connected to Extracorporeal Membrane Oxygenation (ECMO) – which is a pump system that circulates blood in the bloodstream of the pre-term baby, via an artificial lung. ECMO is an extracorporeal life support system that supports a person whose heart and lung are unable to function at the optimum level required to sustain life. The circulated blood is drained at systematic intervals from the umbilical arteries and is streamed into the umbilical veins. This blood is in turn recirculated and ventilation of a mixture of optimum amounts of oxygen, nitrogen, and carbon-dioxide is infused into the blood to produce the required natural chemical compounds in the blood.

The heart rate, blood pressure, and movements of the fetus were continuously being recorded by the polygraph systems. This ensures that the fetus is always kept in a stable favorable environment at its best physiological conditions to sustain the fetus. But the 1996 EUFI could ensure this stability only for a limited period. The team succeeded in sustaining the ill newborns in the EUFI for three weeks. So the 1996 EUFI could be used only for sustaining the goat fetuses that were ill newborns requiring critical intensive care. The research on human fetuses was not undertaken owing to the necessity of a more sustainable equipment.

2.2. THE 2017 IMPROVED EUFI\textsuperscript{1237}

Figure 3: The 2017 improved EUFI.\textsuperscript{1238}

The fetus of a lamb was sustained in a device for 4 weeks, an appreciable improvement from the 1996 project. A closed tank of amniotic fluid, where the umbilical cord of the fetus was connected to a pumpless oxygenation system was designed. A new technique of umbilical vascular access was incorporated. Also, the mother’s heartbeat was echoed in the artificial womb to ensure that the fetus is


\textsuperscript{1237} supra note 5.

How the artificial womb works
This device, currently tested on lambs which have similar prenatal lung development to humans, could transform care for extremely premature babies.

The premature lamb is placed into a temperature-controlled biobag.

The lamb’s heart pumps blood through an artificial placenta which oxygenates the blood and adds heparin (blood thinner).

3. CURRENT DESIGN OF ARTIFICIAL WOMB AND DEVELOPMENTAL CONSIDERATIONS

The artificial womb is amniotic fluid-filled equipment with optimum temperature and humidity regulators, an artificial placenta – a simulation of the human female placenta, in the amniotic sac, and an umbilical cord interface for the artificial supply of blood, nutrients, and disposal of waste.

Artificial supply and disposal confirm that AWT is highly immune to infections. The similar possibility of cases wherein the mother experiences gestational immune intolerance - the unfortunate situation wherein the immune system of the mother rejects any foreign matter in her body, including the fetus in the placenta, is ruled out in AWT, proving that it shows complete inclination towards the protection of the fetus in the artificial womb under any circumstance.

There is an ongoing discussion on the possibility of connecting the birth mother to the fetus in the artificial womb to provide Immunoglobulins - an indispensable antibody for the immune system to be working at the optimum level for the growth and development of the fetus.

Concerning expulsion of the fetus – otherwise named ‘delivery’ - at the end of pregnancy, the artificial womb is suggested to be provided with an external circulation mechanism wherein the expelled fetus will be directed, just like how natural delivery works. Also, the artificial womb will be developed to an extent that is a replica of the female uterus and will accommodate the periodical growths of the cell linings in the

completely supported physiologically. Any medical access involving physical contact, that is required to be done for fulfilling the duty of a caregiver, need not be performed because AWT owes to no-external contact. The AWT system design promises constant monitoring by ultrasound machines. And the external interface can be used for all the vascular needs like drawing blood, providing nutrition support, etc., without disturbing the internal fetal environment.

Hitherto, the artificial womb research is carried out by the scientists with the prime aim that AWT should be used for saving babies that are born preterm – somewhere around 24 weeks of pregnancy. The 2017 EUFI could successfully prove that the fetal lambs that were extremely premature could be developed normally for 4 weeks. Again, the EUFI developed till then was not viable for research on human fetuses.
placenta to provide the most optimum environment for the fetus.

4. PRETERM BIRTH (PTB)

Any birth that occurs before the gestation period of 40 weeks is said to be preterm birth. Such babies are underdeveloped and are called as ‘premature babies’. Preterm birth is the dominant cause of death among children below five years of age. Preterm birth has three significant periods;

a. Extremely preterm – less than 28 weeks,
b. Very preterm – ranging from 28 to 32 weeks and
c. Moderate to late preterm – 32 to 37 weeks.\textsuperscript{1239}

It is a grave concern that India has the greatest number of preterm births and also the highest number of preterm deaths across the world.\textsuperscript{1240}

Figure 4: Preterm births and neonatal deaths- A comparison between India and the world. It can be inferred that AWT may be hope for 75% of premature babies.\textsuperscript{1241}

Because India still is an LMI (Low and Middle Income) developing country and all the hospitals in India are not endowed with NICUs- Advanced Neonatal Intensive Care Units that hosts the premature babies to sustain their lives, numerous deaths of premature babies very,and%20visual%20and%20hearing%20problems.

\textsuperscript{1239} World Health Organization, Preterm birth,WHO(Feb.19,2018), https://www.who.int/news-room/fact-sheets/detail/preterm-birth#:~:text=An%20estimated%2015%20million%20babies%20are%20born%20earl%20early%20re

\textsuperscript{1240} Id. at note 10.

can be attributed to this fact of lack of accessibility of NICUs.

Adding to this predicament, ‘golden hour’ – the time of transition when the PTB baby is transferred from the mother’s womb to the NICU care, there is an undeniably high susceptibility of such babies to suffer from IVH (Intra Ventricular Hemorrhage) during this period of ‘golden hour’. The lesser the birth weight of the PTB baby and the earlier the PTB baby is born, the longer will be its stay in the NICU and the higher will be the possibilities of complications. So, utmost care is to be given, to ensure that such PTB babies survive. Also, the care taken in the golden hour day is directly influential to the baby’s health in the future and whether the baby will survive the optimum gestation period in this extracorporeal NICU.

5. AWT - A HEALTHY SUBSTITUTE FOR NICU(s)

PTB babies are always at the risk of respiratory issues due to their underdeveloped respiratory system, hypothermia (inability to stay warm), hypoglycemia (low blood sugar), jaundice, etc.

Most importantly, the immune systems of such premature babies are not fully developed, so there is a very high risk of such babies being prone to even the least harmful of infections.

Figure 5: Data supporting AWT to save the lives of premature babies.\footnote{1242}

Extreme prematurity is the leading cause of death in the NICU due to the increased risk of serious complications that the PTB baby can succumb to. Such complications mainly arise due to organ immaturity and iatrogenic injuries. “Iatrogenesis” is the phenomenon where complications arise due to medical activities like physical diagnosis, intervention, error in practice, and negligence, and such complications transform into causes for diseases or disabilities.\footnote{1243} The deaths in NICU are predominantly due to infections that affect the underdeveloped immune system of the PTB babies.

The incubation methods that are currently in use in the NICUs are bound to involve physical human interactions with the preterm baby inside the incubator. The preterm baby is prone to all the infections in the NICU and the current NICU facilities still prove to be inadequate to control the humidity in the NICU. Most importantly, any medical procedure or immediate care requires the preterm baby to be accessed physically by the responsible hospital staff, since the baby is placed under a closed hood incubator that needs to be tech/health/hope-for-preemies-as-artificial-womb-helps-tiny-lambs-grow/article18247212.ece.

opened by physical interference.

![Figure 6: Causes of neonatal deaths.](image)

AWT hosts the fetus in a completely closed artificially simulated environment that eliminates any kind of human interaction and shuts off even the least possibility of infection. It is completely supported by ultrasound machines making it superior to any physical examination that may be required. It incorporates an anticoagulation interface, without ventilators and pressors, thereby eliminating the likelihood of IVH. Thus, the high risk of IVH during the golden hour, as discussed earlier, is nullified in AWT. The fact that the primary aim of AWT is to save the lives of preterm babies that are on the brink of a life-death situation, is always to be reflected upon.

Babies in the NICUs are likely to suffer retinal damage and NICUs have to be lighted to monitor the baby. The use of fluorescent tube lights has not served the purpose to the extent as expected, so they were replaced in multiple incubators by UV lights, but this also poses a great danger of UV exposure to the premature baby. Though partly effective measures have been taken to protect them against such complications, eliminating the scope for such complications is always better than risking the same.

Parents of the PTB baby visit the NICU, though there is hope that the cleaning procedures are thoroughly followed, there is always the risk of spreading infection to the PTB baby in the NICU. Adding to this, a single NICU hosts multiple incubators.

Never can any legal instrument not allow the parents to visit the NICU, but this risk can be mitigated and nullified if AWT is adopted. Because the artificial womb is completely monitored and is a high-end technology-assisted equipment, so parents of the PTB baby can view the fetus through visual instruments that are being essentially incorporated into the artificial womb system design.

Though there can be an argument that the baby in the NICUs can be open to the mother’s physical touch and care, with medical approval, and in the artificial womb it is not possible; such an argument can be defied by being attentive to the fact that artificial womb incorporates a simulation environment of the mother’s womb resonated with the constant sound of the heartbeat of the mother. In partial ectogenesis the fetus remains in the mother’s womb for the first few weeks and then it is immediately transferred to the artificial womb which is an exact


simulation of the mother’s womb. So, the fetus will feel that it is in the mother’s womb for the full gestation period. In the artificial womb, the golden hour is minimized to the least possible, to avoid all the complications that arise in the NICU incubators during the golden hour.

It is easy to notice that artificial womb provides a highly protective environment to the fetus as the monitoring of the health of the fetus and supply and extraction of nutrients and waste respectively is being done in a machine-medium that has no contact with the external environment. If proving a high success rate in the future, artificial womb, can be substituted for NICUs because of the primitive indispensable fact that it provides an extracorporeal environment that is highly immune to infections and thus protects the fetus sustaining inside the artificial womb.

Though NICU is almost similar to AWT techniques, it cannot provide the fully immune, strictly no-external contact environment that AWT can offer.

6. SHORTCOMINGS OF AWT

Though AWT poses a lot of benefits in addition to the main cause – saving the lives of premature babies, there are detriments to every invention in this world. Otherwise, it would be named as God’s creation. The artificial womb is a far-fetched reality that will spring decades down the lane. The research is still in the infant stage and requires lots more to consider. Though AWT has reached a stage of belief more than hope, with assured viability in the initial stages of commercial release, AWT will not be affordable by the needy. The natural milk production of the birth mother is a problem that will be unsolved even if AWT becomes a reality because the presence of the growing fetus in the mother’s womb is a necessary pre-requisite for the mother to produce milk naturally, which sadly would not be the case in the artificial womb.

7. INDIAN BACKDROP

7.1. AWT IN INDIA

Hitherto, separate legislation for research on AWT has not been passed. Though there may have been private research works conducted towards AWT, it has not come to public notice. Nevertheless, most of the researchers are inclined towards the adoption of AWT for partial ectogenesis to save the lives of premature babies.
only will this make India more public health-oriented, but it will also be on par with the countries across the world that will realize the beneficial effects of such technology in the future.

7.2. ABORTION

7.2.1. ABORTED FETUSES AS RESEARCH SUBJECTS FOR AWT?

The 2015 study on “The Incidence of Abortion and Unintended Pregnancy in India” - quoted in figures “We estimated 48.1 million pregnancies, a rate of 144.7 pregnancies per 1000 women aged 15-49 years, and a rate of 70.1 unintended pregnancies per 1000 women aged 15-49 years”\(^\text{1245}\). Abortions accounted for one-third of all pregnancies, and nearly half of the pregnancies were unintended.\(^\text{1246}\) Such aborted fetuses are cast off as biomedical waste. This can be productively used for furthering the research on AWT.

Figure 7: Data depicting - out of 48% unintended pregnancies, 33% end in abortion.\(^\text{1247}\)

7.2.2. SCOPE IN INDIA FOR LIVE ABORTED FETUSES

Environmental

(1) Even though the usage of a live fetus for research is non-licet as per the ICMR (Indian Council of Medical Research) guidelines, there arises a grave need to use the same due to lack of other alternatives.

7.2.3. REGULATIONS THAT REQUIRE ADOPTION IN INDIA

In the “Protection of Human Subjects of Biomedical and Behavioral Research” report published by the National Commission, the commission concludes “some information which is in the public interest and which provides significant advances in health care can be attained only through the use of the human fetus as a research subject.”\(^\text{1248}\). The objective of AWT is to save the lives of premature babies, for which research on the human fetus is indispensable.

Under Section 46.204 of the United States “Code of Federal Regulations”, if there is no direct benefit to the fetus from the research, the occurrence of any risk undertaken should be minimized to the highest extent possible, to accomplish the research’s objective. In such cases, the purpose of the research should be towards realizing crucial areas of biomedical knowledge that cannot be achieved by any other means.\(^\text{1249}\) As previously stated,
owing to the lack of alternatives, research on fetuses is imperative.

Section 46.207 of the Code, states that the secretary shall fund the research if it is satisfied that “The research presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of pregnant women, fetuses or neonate; the research will be conducted in accord with sound ethical principles; and that, informed consent will be obtained.” Research on AWT satisfies all the above pre-requisites to obtain funding. Hence, research on fetuses should be allowed in India for the sake of public welfare.

8. RESEARCH ON AWT

As stated already that AWT can be a healthy substitute for NICUs, there is an imperative necessity to further research on AWT so that it is a near reality that can be used to save the lives of premature babies. Since India is still in its infant stage concerning AWT there is a need for regulating the current research on AWT. Since R&D on AWT is ongoing across the world, the researchers of this paper would like to contribute a Model Act for regulating research on AWT.

8.1. EMBRYO AND FETUS

‘Embryo’ refers to that stage of growth from fertilization, resulting in a zygote, to the end of 4 weeks whereas ‘Fetus’ refers to the growth of the unborn child from 8 weeks until birth. This paper emphasizes that Partial ectogenesis involves the growth of a fetus and not an embryo, thus partial ectogenesis is implied to start from 8 weeks of growth.

8.2. ABORTED FETUSES

This paper proposes to research on aborted fetuses since there is no alternative for such research. Researching on aborted fetuses is more favorable ethically than research on PTB babies that are expelled naturally during delivery.

8.3. ABORTED FETUSES FROM THREE TO FOUR MONTHS - SUITABLE FOR RESEARCH

Before 3-4 months, the aborted fetuses are very underdeveloped and post 3-4 months the mother undergoing such abortion would have a higher emotional attachment with the fetus and the researchers of this paper do not prefer to add to the mental agony of such mothers, hence research on the period of 12 weeks to 16 weeks (3 – 4 months) is suitable.

8.4. NEED FOR SETTING ASIDE THE 14 DAY RULE

As per the ICMR Guidelines, any research on embryo shall not be carried out beyond a period of 14 days -the period when primitive streak appears. Primitive streak refers to the phase in which an embryo can no longer split into two, or where two embryos can no
longer fuse into one. Thus it marks the origin of one’s individuality. Research on embryo beyond 14 days is a human right issue but the viability of AWT cannot be gauged if the 14-day limit is not relaxed. Since Partial ectogenesis in AWT requires research on fetuses that are 3 to 4 months old, thus the 14-day rule should be set aside.

9. MODEL ACT

This paper contributes a rough draft of regulations to research on AWT. The Transplantation of Human Organs and Tissues Act, 1994, and the ICMR Guidelines are the base materials for the construction of this draft.

A. The following Model Act concerns only aborted fetuses that are 12 weeks to 16 weeks for the reasons stated under the title - 8.3. Aborted fetuses from three to four months - suitable for research.

B. Since the researchers of this paper do not possess the requisite knowledge and expertise in the scientific field, details about the following aspects are not provided in the draft -

1. The expertise that the AWT researchers should possess for carrying out the research.
2. Scientific details.
3. Criteria for selection of research sites.
4. Other miscellaneous matters.

B. A rough idea is provided with respect to the following, and such proposals are not exhaustive -

1. Technical details on the composition of committees, Appropriate Authorities, etc.

2. Infrastructural and other requirements of the research site.
3. Documents to be filed by the AWT center etc.
4. Details on quorum and inspection are only illustrative.

C. Penalties and Miscellaneous are not elaborated in this draft.

ARTIFICIAL WOMB [TECHNIQUES AND REGULATIONS] MODEL ACT, 2020

An Act to provide for regulating the research on Artificial Wombs with the aim to save the lives of premature babies and for matters connected therewith or incidental thereto.

“Be it enacted by Parliament in the Seventy-third Year of the Republic of India as follows:”

CHAPTER I

PRELIMINARY

1. Short title, application, and commencement-

This Act may be called the Artificial Womb [Techniques and Regulations] Model Act, 2020.

It extends to the whole of India.

It shall come into force on such date as the Central Government may by notification in the Official Gazette, appoint.

2. Definitions- In this Act, unless the context otherwise requires-

a) “Appropriate Authorities” means the Appropriate Authorities appointed under Sec 14;

1254 supra note 12.
1256 Ethical Guidelines For Biomedical Research On Human Participants, October 2006.
b) “Artificial Womb” is an equipment where the natural processes of pregnancy are sustained in an extracorporeal environment;

c) “Artificial Womb Technology Center” means a center registered under the Act that undertakes AWT research;

d) “Authorization Committee” means the committee formed under Sec 8.

e) donor means any person as specified under Sec 4;

f) “fetus” is the unborn child from the end of the eighth week of pregnancy until birth.\(^{1257}\)

Provided that, for the purpose of this Act ‘fetus’ will refer to fetuses that are twelve weeks to sixteen weeks old;

g) “hospital” means any approved center for abortion under the MTP (The Medical Termination of Pregnancy) Act, 1971.\(^{1258}\)

h) “registered medical practitioner” means a medical practitioner as defined under Sec 2(h) of the Indian Medical Council Act, 1956.\(^{1259}\)

Such person should be enrolled under the State Medical Register as required under Sec 2(k) of the Indian Medical Councils Act, 1956.\(^{1260}\)

i) “Sexually Transmitted Diseases” means disease spread by sexual contact.

CHAPTER II

DONATION OF FETUS FOR AWT RESEARCH

3. Donation of a fetus for AWT research-

(2) A pregnant woman who has decided to undergo abortion under the MTP Act, 1971, may consent for donating her fetus for the purpose of research on AWT.

i. It shall be the duty of the registered medical practitioner to obtain the consent of the pregnant woman for donating her fetus for research;

Provided that, For the purpose of subsection

a) Such consent should be an informed consent, as lawful under The Indian Contract Act, 1872;\(^{1261}\)

b) Such consent has to be taken before the fetus is expelled out of her womb.

(2) A donor giving consent under subsection (1) is required to produce the same in writing in the presence of two or more witnesses (at least one should be the near relative of such person).

(3) Such consent shall not be taken from a pregnant woman who is carrying a child such that,

If the child were born, it would suffer from physical or mental abnormalities or
Such pregnancy is alleged(by the pregnant woman) to have been caused by rape,
The pregnant woman is a minor.

Note: Provisions under subsection (3) have been included to reflect the intention that consent from such pregnant woman would only subject them to further agony.

4. Donations can be accepted only in the following circumstances:-

(1) Cases in which abortion is intended to restore the deteriorating physical or mental health of the pregnant woman;

(2) Cases in which the life of the pregnant woman is in danger and thus abortion is intended;

(3) Cases in which abortion is intended due to failure of contraceptive thus resulting in an unwanted pregnancy.

In all the above cases;


\(^{1258}\) Section 4, The Medical Termination of Pregnancy Act, 1971.

\(^{1259}\) Section 2(h), The Indian Medical Councils Act, 1956.

\(^{1260}\) Section 2(k), The Indian Medical Councils Act, 1956.

\(^{1261}\) Section 14, The Indian Contract Act, 1872.
a) The woman should not suffer from Sexually Transmitted Diseases.
b) The woman should have decided to undergo abortion of fetus that is twelve weeks to sixteen weeks old as stated in section 2(f) of this Act.

5. A donor who consents has to be medically examined by –
The registered medical practitioner in charge of the hospital in which the abortion is to be effected;
(1) Two independent registered medical practitioners authorized by the Appropriate Authorities.

6. Preservation of the fetus-
(1) After the removal of the fetus from the pregnant mother’s womb, the registered medical practitioner shall take all necessary steps for the safe preservation of the fetus.
(2) The hospital shall inform in writing to the Artificial Womb Technology Center for removal and storage of the fetus of the donor, as may be prescribed.

7. Restriction on donations- No donations shall be taken for commercial purposes. Donations shall be purely altruistic.

8. Authorization Committee-
(1) An Authorization Committee shall be constituted by the Central Government by notification in the Official Gazette. An application has to be made before the committee by the registered hospital where abortion is to be effected. On application, the committee, if satisfied that the consent for donation is not furthered by coercion and that the conditions of this Act are satisfied, then the committee shall allow for such donation.
(2) The committee should notify the order of acceptance, as may be prescribed, within a week from the date of such application.

9. Regulation of hospitals which donate fetuses to AWT centers-
On and from the commencement of this Act,
(1) Any hospital under the MTP Act, which is not registered under this Act, shall not conduct, or associate, or assist in the donation of the fetus for AWT purposes. A medical practitioner / any other person shall not conduct or aid directly or indirectly, either through themselves or through any other person, any activity relating to the donation of the fetus at a place other than a place registered under this Act.

10. Explaining effects, etc. of donation-
A registered medical practitioner shall explain the purpose of such donation to the pregnant woman. Such person shall explain all possible effects, complications, and hazards associated with AWT research, as may be prescribed.

11. No Objection Certificate-
A Certificate of No Objection has to be acquired from the pregnant woman and her spouse if alive, close relatives if the spouse is not alive.
Provided that; Such No Objection Certificate shall state that-
They shall not question if the AWT research results in failure;
Once the fetus is implanted all their parental rights stands extinguished.
However, such certificate can be revoked before the implantation of the fetus in AWT.
The pregnant woman must give written consent on behalf of the fetus as well.

12. Letter of Confidentiality- A Letter of Confidentiality has to be given to the pregnant woman by the registered
hospital concerned, and the AWT Center, since abortion, is a question of her privacy.

13. Contact details of the donor-
The registered hospital where such abortion cases have come up, has to maintain a record of the contact details of the donor, to contact him in case of necessity. Such records are to be kept confidential.

CHAPTER IV
APPROPRIATE AUTHORITIES


14 A. Functions of Appropriate Authorities- The Appropriate Authorities shall deal with registration and its related affairs, holding meetings, inspection of registered hospitals and AWT Centers, setting standards for registered hospitals and AWT Centers, and such other functions as may be prescribed.

14 B. Advisory Committee- An Advisory Committee shall be set up for aiding Appropriate Authorities. It shall have such powers and functions as may be prescribed.

14 C. Powers of Appropriate Authorities - The Appropriate Authorities shall have all the powers of the civil court.

14 D. National Registry- A national registry shall be maintained to record the list of donors, AWT Centers, registered hospitals, etc.

CHAPTER V
REGISTRATION OF HOSPITALS, ARTIFICIAL WOMB TECHNOLOGY RESEARCH CENTERS

15. Registration of hospitals engaged in the donation of fetuses to AWT Centers-

No other hospital other than those hospitals under the MTP Act, 1971 that are proximate to the registered AWT centers can register under this Act for donation. Application for registration shall be made by the hospital to the Appropriate Authorities in such form and manner, as may be prescribed. Hospitals that are not in a position to provide specialized skills, services, and medical instruments shall not be eligible for registration.

16. Registration of Artificial Womb Technology Centers-

No center that is not registered under the Act for undertaking research on AWT shall deal with any matter concerning the research. Those centers which have the necessary expertise, skilled manpower, latest technology, etc., required for the research may apply to the Appropriate Authorities for the certificate of registration. The application shall be made in such form and manner, along with the fees as may be prescribed. Such application shall contain the following:

i. Full Name and Full address of the research site;
ii. Site-related documents (land acquisition approval, location, infrastructure, safety, etc.);
iii. Complete Details and a signed declaration of each of the members of the research team;
iv. The methodology of research, duration of the study, sample size, study design, etc.;
v. Details of risk involved, if any;
vi. Alternatives available, if any;
vii. Statement of ethical issues involved and the measures to tackle the same;
viii. Checklist of the equipments and devices;
ix. Checklist of drugs and chemical substances used;
x. Details with respect to quality assurance;  iv. Biomedical laws experts;
xi. Details of sponsors and a declaration signed v. A social activist;
by them;  vi. Educated Commoner from the general
xii. Certificates of Compliance as necessary; public who can comprehend AWT
xiii. Letter of approval from various concerned research;
v.  Other members as may be prescribed.
departments;  vii. A special resolution is to be passed for
xiv. All other documents related to the research. approving the registration. Any conflict of

(1) The Appropriate Authorities shall inspect interest shall also be recorded. In case of tie
the site with his team consisting of - votes, the chairman holds the deciding vote.
i. Qualified scientists specialized in AWT research;
ii. Bioethics lawyers and experts;
iii. A social activist etc.

The site should mandatorily consist of the following-
i. Favorable infrastructure for research;
ii. The site should be spacious enough to conduct the research;
iii. The center must have well-trained researchers with expertise in AWT research;
iv. High safety and surveillance measures must be installed;
v. Provision for favorable transportation of fetus;
vi. Proper storage inventories for fetuses before implantation in AWT;
vii. Provision for disposal of biological waste in accordance with Good Dispensing Practices;
viii. Necessary apparatuses for carrying out the research;
ix. Provision for record maintenance for each research subject daily;
x. Provision for training staff periodically in Good Clinical Practices;
xii. Other required infrastructure.

After such inspection, a meeting shall be conducted for passing a resolution to grant registration. The quorum shall consist of-
i. A Chairman;
ii. Medical experts;
iii. Clinical experts;

17. Certificate of registration-
(1) The Appropriate Authorities shall after inquiring into the application for registration, if satisfied that the applicant has met out with all the requisites of this Act, and a resolution of approval has been passed, shall grant the certificate of registration in such form and manner for such period, subject to such conditions as may be prescribed.

(2) Otherwise, the Appropriate Authorities shall give an opportunity to be heard to the applicant. Further, if he is satisfied that the conditions of the Act are still not met with, he shall reject the application for registration.

(3) Such certificate of registration must be renewed once every six months, failure of which results in cancellation of registration.

18. Restrictions on research-
(1) Minutes and records of the research must be kept confidential;

(2) The AWT Center shall not publish any report regarding the research without the approval of the committee.

19. Suspension or cancellation of registration-
(1) The Appropriate Authorities may suo moto or on the receipt of any complaint may investigate into issues relating to compliance of the provisions of the Act.
After offering an opportunity of being heard to the registered center (Hospital or AWT), if it is satisfied that there has been a breach of provisions of this Act, it may suspend its registration for such period till the same is rectified or may cancel the registration depending on the degree of deviation from the Act.

(2) Such cancellation or suspension shall not affect criminal liability, if any.

20. Appeals- Any person aggrieved by the suspension or cancellation of registration may prefer an appeal within thirty days from the date of the order of suspension or cancellation, to the Appropriate Authorities.

CHAPTER VI

ALLIED MATTERS

21. Information on further matters to be given by AWT Center-
   (1) The AWT Center shall immediately inform the committee,
      i. If the research plan has been altered;
      ii. If the research has been dropped, the reasons for the same should be recorded. Details of the research conducted hitherto are to be filed;
      iii. The details of accident(s), if any;
      iv. The emergence of factors that might impact the research.

22. Submission of progress report- The progress report of the research shall be submitted once in a month to the Appropriate Authorities.

23. Meeting of the Quorum - There shall be a periodic review of the research once every two months in a meeting by the quorum as mentioned in Section 16(5).

24. Inspection of research site- The site shall be inspected periodically by the team consisting of inspectors as mentioned in Section 16(3).

CHAPTER VII

OFFENCES AND PENALTIES

25. Offenses and penalties- Any contravention of this Act shall be duly punished with imprisonment or fine or both.

CHAPTER VIII

MISCELLANEOUS

26. Power to make rules- The Central Government shall have powers to make rules under this Act.

10. CONCLUSION

Concluding with the words of Plato that “Necessity is the mother of invention”, this paper proposes a Model Act that is envisioned to be implemented in India to support AWT research so that AWT can become a reality in a few decades.

Incorporating AWT as a healthy substitute for NICUs is indispensable for two reasons:

a) The rate of survival of premature babies will increase, due to reasons stated in this paper.
b) India has the highest number of premature deaths in the world and AWT will aid India to be relieved from this nightmarish ranking.
INFORMATION ANALYSIS ON CHILD SEXUAL ABUSE: POCSO ACT 2012

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1. INTRODUCTION

Indian children encompasses of more than 40% of India’s population and 19% of the world’s population. India also has the highest number of developing teenagers in the world. However the numbers falling victim to sexual abuse is staggering and dreadful. Child sexual abuse is one of the most brutal types of crimes known to humanity and yet the legislature and law enforcement has evidently failed to control it. Protection of child is guaranteed to all citizen through Article 21 and India is also a part of United Nation Convention on the Rights of Children. Generally child sexual abuse or CSA means when a child below the age of 18 years has sexually victimized and molested for sexual stimulation by an adult or older adolescents. The lack of connivance of the Union legislature and nonchalant behavior of the state has resulted in over 1.5 lakh pending cases according to the Supreme Court registrar. The subject of child sexual abuse is intricate and extremely disturbing matter to deal with, probably why it has so much societal stigma attached to it.

According to Wikipedia and WHO, child sexual abuse means an adult engaging in sexual activities with a child by asking, forcing, pressurizing, or by other means, indecent exposure of genitals or female nipples etc., child grooming or using a child to produce pornography. Such sexual abuses are increasing at alarming rate in India as well as other countries, while there are various provisions meant to deal with such guilty acts yet not many culprits have been punished and nothing can heal the trauma that child has gone through. Some studies suggest that large number of victims are girls but boys are also fall prey to these inhuman abusers and pedophiles. In 55 studies in over 24 countries, the number of girl victims range from 8 – 31% while the number of boy victims range from 3 – 17%. A survey and interview conducted of 12,447 children by Ministry of Women and Child Development showed that around 38% among them have been sexually abuses or are undergoing such kind of abuses.

Most sexual abuse offenders are acquainted with their victims as 30% of them are their fathers, brothers, uncles or cousins and 60% are other acquaintances, such as friends, babysitters or neighbors. Only 10% of offenders are strangers. Thus it is true that almost 60% of sexual abuses are committed by the person known. It becomes difficult to expose these kinds of matter to public or even take an action towards it as it is associated with societal stigma. Due to which less and less cases are registered in courts and these children face life long post-traumatic stress and depression, it impacts their adult life and create psychological problems. The Indian penal code has inscribed all offences and punishments and has even made various amendments. Approaching the problem of

1262 www.wikipedia.com
1263 United Nations Convention On Rights of Children
1264 Ncbi.nlm.nih.gov/pmc/articles
1265 Hindustan Times, extract from October, 2019

Wikipedia.com
Ncbi.nlm.nih.gov/pmc/articles
Ministry of Women and Child Development
Vikaspedia.com
child sexual abuse is difficult task all around the world but in India the shortcoming of the society and the government append to the problem. It is shrouded upon and the child victims fall prey to the lackadaisical attitude of the government and the passivity of the society first as they have to tackle them before reporting the cases. Many cases of child sexual abuse are swept under the carpet and are even unheard by the victim’s parents. The cases goes unregistered thus increasing the number of cases. Studies shows that more than 7,200 children are raped every year and 109 children were sexually abused every day in 2018\textsuperscript{1270}. On the global level, World Health Organization in 2002 said that about 150 million girls and 73 million boys under the age of 18 years have undergone some kind of sexual abuse\textsuperscript{1271}.

The flow of gestalt behavior was shattered when the news of the Nithari case came out in 2007. It was the most gruesome act that occurred between 2005 and 2006 when a group of 38 children and women reported missing were allegedly raped and murdered\textsuperscript{1272}. It was this news that led the Ministry Of Women and Children Development to sought out a bill to view the offence pertaining to child sexual abuse, the bill which now is an act known as Protection of Children from Sexual Offences Act, 2012.

While there is a great awareness of sexual offences against women in India especially after the Delhi gang rape case of 2012 and accordingly various amendments have been made yet less light has been manifested on the sexual offences against children. A United Nations International Children Fund (UNICEF)\textsuperscript{1273} survey shows that more than 42% of Indian girls have undergone sexual abuse during their teenage years. ‘Boys get raped too’ though unconventional can be proven accurate by a survey by experts in 2007 which shows that 53% of boys were sexually abused in that year\textsuperscript{1274}.

2. Reasons for increased number of sexual abuse of children

The concept of child abuse is not new to the world. In fact in 1790s and 1876s, children were more of the sexual playthings for the royalty rather than innocent beings. In 1820s more than 76% of the children under the age of 19 years had been molested. From 1970s onwards, molestation and sexual abuse had started to be noticed by the public and became more damaging for the children\textsuperscript{1275}. Earlier the concept which was rejected by the public now evoked a large outcry. The Indian society has always taught the children to obey and respect the elders without ever questioning their decisions and actions. It is deep rooted in the society’s social essence. The children fall easy prey to the predators who wish to satisfy their sexual lust and desire. Moreover the harmful traditional practices like child marriage, discrimination against girl child, child trafficking, child labor, sex tourism and devadasi system has badly impacted the children giving a raise to their vulnerability. Lack of adequate nutrition, poor access to medical and educational facilities has resulted in more children being on streets and becoming beggars. These circumstances has increased the possibilities of exploitation and violation of these children. UNICEF has also suggested

\textsuperscript{1270} India Today, January 20, 2020
\textsuperscript{1271} Human Rights Watch
\textsuperscript{1273} UNICEF
\textsuperscript{1274} www.lawjournals.org
\textsuperscript{1275} DROITPENALE: INDIAN LAW JOURNAL ON CRIME AND CRIMINOLOGY by Pooja Bali & Suresh Kumar
that child marriage and girl child discrimination can form a base for sexual abuse. The fact which cannot be denied is that sexual abuse not occurs only on the streets but also inside their homes and are committed by their own acquaintances. An incest transpired in the safety of their homes leaves encumbered scars and long term psychological trauma.

3. **Ineffectual responses in the cases**

There is no doubt in the fact that various implementations have been done to ensure the protection of children against sexual abuse, however these commitments by the Indian government have failed to properly ensure that stringent and meticulous punishments are given to the perpetrator. The effective responses have been failed to achieve due to another hurdle which is the societal stigma and lack of faith in the institutions. A survey conducted in 2007 shows that only 25% of the cases were told by the victims and only 3% of the cases had been reported to the police\textsuperscript{1277}. In this Renuka Chowdhury, the minister of women and child development said that ‘the topic of child sexual abuse has been shrouded in secrecy and there is a conspiracy of silence around the subject’\textsuperscript{1277}. Talking about sex to elders or even parents is disparaged on and discussing such pivotal issues is intimidating for the victims. A case of Apna Ghar, a residential facility in Rothak, Haryana is a clear example of how sexual abuse also occurs in the safety of institutions. In 2012, three teenagers snuck out of the facility, stealing 500 rupees from the director to go to Delhi where they wanted complain about the horrible conditions they were living in, that they had been sexually abused and allegedly raped\textsuperscript{1278}. When the National Commission for the Protection of Children Rights came to investigate the case, they described the situation there as insane and unbelievable. Girls were forced to have sex with strangers, they were stripped naked and beaten to their vaginas and had even been suspended from the ceiling as a form of punishment. The son-in-law of the director had molested them repeatedly. The children are sexually abused at their homes, on the streets, in educational facilities, at schools, in neighborhoods and any other place where their vulnerability is exposed. The torments faced by them is aggravated by the criminal justice system that does not want to hear and take actions of such cases.

In Uttar Pradesh, mother of a two year old child walked in on her child being abused by 17 year old male cousin. When the family went to the police station the next day to report the case, they were hushed up by the police and even their extended family and were persuaded to go back home\textsuperscript{1279}. In another case of Neha, a 16 year old girl from a low caste family was raped by her neighbor, the next day when she wore her best clothes to look respectable and went to report the case but the police remarked on her that the sex must have been consensual\textsuperscript{1280}. She was then forced to go back home and they did not register the complaint. A 32 year old women named Jyoti recently came out with her story of sexual abuse when she was 11 years old, she had always been scared and skeptical to share her story as the trauma she went through lasted for 6 years until her tutor (abuser) got a job somewhere else\textsuperscript{1281}.

\textsuperscript{1276} National Crime Bureau
\textsuperscript{1277} Indiatoday.com
\textsuperscript{1278} www.tribuneindia.com
\textsuperscript{1279} Human Right Watch : Breaking the Silence
\textsuperscript{1280} www.hrw.org, Human Right Watch survey
\textsuperscript{1281} Breaking the Silence, February 2013
While talking about the issue she pointed out that the society often tells us to respect the elder and listen to them, even years later she was scared to go the police as she knew the ostracism her family would have to face. The criminal justice system and even the police fails to take these issues sensitively. However many NGOs have taken a vow to break the silence and deal the issues open rather than in secrecy.

Meenakshi Ganguly, the director of Human Rights Watch South Asia said in a statement that the children who bravely complain are often dismissed and ignored by the police, medical staff and other authorities. In over a 100 interviews conducted by Human Rights Watch, the children often fear the process. The police, medical staff and other authorities are unprepared to deal with these cases often leaving child’s accounts in cynicism and to subject them to humiliating medical processes. Rather than facing such humiliation, the children often think the case is better of unreported. Rapes and sexual abuse even occur in well run orphanages and residential facilities and these cases too goes unreported. The government here is also at fault as it does not have a record of all orphanages and other facilities running in the country with the names of children they are housing.

4. Legal Framework
States of India like Andhra Pradesh, Bihar and Delhi have the highest percentage of incidents of sexual exploitation. Highest number of incidents were reported in children working and living on the streets, at work and in institutional care. 50% of the abusers were known to the victims while 73% of the victims age from 11 to 18 years. Most cases which goes unreported are those of children ranging from the age of 5 to 12 years.

Engaging with the United Nations Convention on the rights of Children, India is determined to protect the children from sexual abuse and violence. As a part of this Convention, the Indian government is legally bind to ensure and incorporate full range of basic human rights to children. According to Article 34 of the Convention, the government is obliged to protect the children from all types of sexual abuse and exploitation. Yet, despite the enigmatic number of sexual abuse to children in India, there was no specific law inscribed until the POCSO act of 2012. The children were made to suffer in silence and secrecy.

RAHI, a NGO foundation conducted a study ‘Voices from the silent zone’ which shows that out of 76% of women sexually abused a child 40% of them are cases of incest. Incest cases are one of the most heinous crimes as they are a shameful memory which are rarely discussed with someone. According to the federal police, 1.2 million children are involved in prostitution.

4.1 Lacuna laws

Where the IPC after various amendment gives a full detailed and interpreted sections related to rape and sexual assault against a woman, there are almost no laws in IPC related to child sexual abuse. The Indian Penal Code does not spell out child abuse.

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1282 Timesofindia.com, 2018  
1283 J Indian Acad Forensic Med. April-June 2012, Vol. 34, No. 2  
1284 Wikiprogress.org  
1285 Article 34, UNCRC  
1286 J Indian Acad Forensic Med. April-June 2012, Vol. 34, No. 2  
1287 Vikaspedia.com  
1288 Indian Penal Code
The picture tended to get vague when talking about any assault other than that against a woman as the law does not define the sexual offence committed against a child and even a man. The law did not distinguish rape from child sexual abuse and the laws applicable are already have several shortcomings. These laws were too specific and did not inscribe the punishments for fondling, kissing and filming children for pornographic purposes. Sexual assault is defined by the usual definition as sexual acts or advances without the consent of the other party, but the legal interpretation tends to be very different. Section 375 and section 376 of IPC refer only to rape. It only described rape as an act of penile vaginal penetration. Unfortunately this law excluded sexual offences that require penetration of physical, oral or objects as well as abuse against men. Confirmed sodomy was the only sexual crime against a boy and the image tended to get hazier when a child commits a crime against another child.

In that case the Juvenile Justice Act fell into force yet again failed to tackle directly with the issue of child sexual exploitation.

4.2 Legal loopholes

Before the POCSO act 2012, several years and several cases had passed with impeded justice. The multiple forms of violence were inadequately protected by the legislation not meant to fix them. If a girl was subjected to non-penetrative sexual violence, the perpetrator could be charged with ‘attack intended to outrage the modesty of a woman and if a boy was raped, the perpetrator could be charged with anti-homosexuality law of the colonial era which criminalized carnal intercourse against the order of nature. Nonetheless it took nine years for the Union legislature to pass the bill as before this act the only prevalent legislation was the Goa Children Act 2003. How was the judiciary able to define modesty and extend section 354 of IPC to outrage the modesty of women against children? The severity of the offence of obscene gestures under section 509 of IPC was lower even if the damage done to the child was at a much larger as severe as rape. Even today, the Indian legal system fails to define ‘child’. ‘Child’ is classified differently in different laws pertaining to children and an individual’s age is not considered universally to be determined as the child. Because of this, there is ambiguity in the legal proceedings. Article 1 of the UN Convention on the Rights of the Children defines ‘a child as every human being below the age of 18 years unless under the law applicable the majority is attained earlier.’ A presence of lacuna can be spotted here as the Indian Penal Code defines a child under the age of 12 year whereas Immoral Traffic Prevention Act, 1956 defines child as a minor under the age of 16 year who has not attained majority. Section 376 of IPC specifies the age of consent to 16 years of age while sections 82 and 83 indicate that nothing is a crime committed by a child under the age of 7 years and subsequently 12 years of age before he has reached an adequate maturity to recognize the essence of the Act and the consequences of his actions. There is also a binary interpretation for ‘boys’ and ‘girls’ as seen in the Juvenile Justice Act which defines a

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1289 Section 375 & 376, IPC
1290 Section 377, IPC
1291 Juvenile Justice Act, 2015
1292 Section 377, IPC (decriminalized in October 2018)
1293 Section 509, IPC
1294 www.ohchr.org
1295 Section 2 sub clause (aa), Immoral Traffic Prevention Act, 1956
1296 Indian Penal Code
minor male as below the age of 16 years and
a minor female as below the age of 18 years.
Not only the law but the law enforcing
agencies is also at fault\textsuperscript{1297}.

5. Judiciary on Child Sexual
Abuse

- **Sakshi v/s Union of India (2004)**
  - The Supreme Court developed
guidelines for the conduct of child sexual
abuse trials\textsuperscript{1298}.
  - (a) The screen or arrangement
where the victim is or is to be made
witnesses do not see the accused's body or
features.
  - (b) The questions put to a cross-
examination on the behalf of the accused in
so far as they are specifically relevant to the
incident should be answered, in writing, to
the president of the Court, who can refer
them, in plain and not misleading language,
to the victim or to witnesses.
  - (c) Ample breaks, as required,
should be permitted for the victims of child
abuse or rape while giving testimony in
court.

- **Tara Dutt v/s the State (2009)**\textsuperscript{1299}
  - The criminal law of our country did not
recognize digital rape as a detestable
offence\textsuperscript{1300}. As a result, the petitio-
ner has been convicted of the fact that a woman's
modesty was insulted by criminal law in
compliance with Section 354 of the Indian
Penal Code.

- **Vishal Jeet v/s Union of India**\textsuperscript{1301}
  - In this case, the SC has briefed the
State Governments and Union Territories in
the following directions:
  - (a) Statutory legislation requiring
implementing authorities to take effective
and decisive action in the eradication of
child trafficking under the existing laws.
  - (b) Take action to provide
appropriate and refurbishing housing.
  - (c) Create a special Advisory
Committee consisting of politicians,
sociologists, criminologists, women / child
welfare and voluntary social organizations,
which will be responsible for making
recommendations on the eradication of
children's prostitution.

6. Protection of Children
Against Sexual Offences Act,
2012

The study on child sexual abuse in 2007,
statistical figures and various cases like
Sakshi v/s Union of India & ORS (SC
2004)\textsuperscript{1302} convinced the Union government
to pass the POCSO bill of 2011 on 22 May
2012. It is a matter of record that POCSO
act is a product of the directions provided
by the judiciary. This gender neutral
legislation is one of its kind and the most
awaited steps taken by the government. It
enables the children to seek justice and even
psychological and rehabilitation support. In
Madan Gopal Kakad v/s Nawal Dubey\textsuperscript{1303}
(SC 1992), the milestone judgement whose
empirical framework transpired an account
of debauched and hideous event in which a
medical practitioner sexually assaulted and
molested young children. This was not only
in blatant disregard of the universal moral
code, its professional principles and values
but also a deliberate violation of the law.
These types of cases needed more stringent
punishments which eventually led to the
making of POCSO act. In State v/s Pankaj
Choudhary, Delhi High Court (2011)
prosecuted the accused only for outraging

\textsuperscript{1297} Section 2 sub-section 12, Juvenile Justice Act
2015

\textsuperscript{1298} AIR 2004 SC 3566

\textsuperscript{1299} http://lawcommissionofindia.nic.in/rapelaws.htm

\textsuperscript{1300} Indiakanoon.com

\textsuperscript{1301} AIR 1990 S.C. 1412

\textsuperscript{1302} AIR 2004 SC 3566

\textsuperscript{1303} Judicialcompetitiontimes.in
the modesty of a woman but not included the digital penetration of anus and vagina of a 5 year old child as this crime was not recognized in IPC. The POCSO act has therefore added penetrative assault and increases the cover for protection of the children.

Most child right activists have welcomed the POCSO act as a major breakthrough, although they were concerned about certain problems. Many believed that the government should be prepared to enact changes to strengthen the law within the law after the Ministry of Women and Child Development has evaluated its application. Recently an amendment bill was presented in Rajya Sabha by the Minister of Women and Child Development, Smriti Zubin Irani on 18 July, 2019 and was passed on 29 July, 2019. This act was designed to systematically address the despicable crimes of sexual abuse and exploitation of children in India.

The penalty for such offences prescribed under Section 4 of the Act, penetrative sexual assault is imprisonment between 7 to life time and also fine. The amendment however changed the minimum 7 years to 10 years. It further says that if an individual commits penetrative sexual assault on a child below the age of 16 years, they will be punished with life imprisonment with fine or a term of 20 years. Section 5 & 6 of the Act provides the grounds of aggravated penetrative sexual assault and its penalty which was from 10 years to life imprisonment with fine but now it is 20 years up to death penalty. Under aggravated sexual assault, Section 9, the bill added 2 new offences: assault committed during a natural calamity and administering or help in administering any hormone or chemical substance to the child for purpose of attaining early sexual maturity. Section 14 of the act talks about pornography of a child which includes any visual depiction of sexually explicit conduct involving photographs, video, digital or computer generated images. The act penalizes the storage of pornographic material under section 15 for commercial purposes with a punishment of up to three years or fine or both. The bill amended 3 years punishment and changed it to 5 years. The bill also added 2 new other offences: failing to destroy, delete or report pornographic material involving a child and transmitting, displaying, distributing such material except for the purpose of reporting it. The main reason behind increasing the years of punishment is to stop the trend of child sexual abuse and incorporated powerful deterrent provisions. The amendment bill propounded death penalty for raping a child below the age of 12 years. The Act obliges the Central and State governments to spread the knowledge through media, including television, radio and print media at regular intervals in order to make the general public, children and their parents and guardian aware of the act. The National Commission for Protection of Child Rights and State Commission for Protection of Child Rights have been made the designated authority to observe the implementation of the act and its provisions.

6.1 Procedure of reporting cases
Under **Section 19**, the procedure for reporting as case is inscribed. The media is forbidden from revealing the identity of the infant without the authorization of the Special Court. The punishment for breaching this clause by media could be from six months to one year\textsuperscript{1313}. In the case of a rapid trial, the POSCO Act specifies that the child’s testimony must be recorded within a period of 30 days. Also, the Special Court has to conclude the trial within a period of one year, as far as possible. To provide for relief and rehabilitation of the child, as soon as the complaint is made to the Special Juvenile Police Unit (SJPU) or local police, these will make immediate arrangements to give the child, care and protection such as admitting the child into shelter home or to the nearest hospital within twenty-four hours of the report\textsuperscript{1314}. The SJPU or the local police are also required to report the matter to the Child Welfare Committee within 24 hours of recording the complaint, for long term recovery of the child\textsuperscript{1315}. The POSCO Act acknowledges the intention to commit an offense must be penalized even if it is ineffective for any reason. Attempting to commit an offense was made responsible for prosecution for up to half the penalty imposed by the crime court. It also provides punishment for the offense, which is the same as the offense commission. That will include trafficking for sexual purposes. Simultaneously, deterrence has been given for making false accusations or claiming false facts with malicious intent to avoid abuse of the law. Such punishment was kept relatively light to encourage reporting. If a child is misrepresented, punishment is higher (one year). **Section 28** defines and discourses about Special courts. The introduction of Special Court plays a key role in how law and evidence can be perceived. The POSCO Act provides for special courts where trial proceedings can be conducted in a more sensitive manner with the victim’s testimony given either ‘in camera’ (i.e. privately), via video link, or behind curtains or screens, intended not only to reduce trauma but also to protect the child’s identity\textsuperscript{1316}. This includes child-friendly coverage, collecting facts, investigating and prosecuting offenses.

### 6.2 Child Friendly Process under **Section 24**

The Act provides for a child-friendly procedure in the following manner\textsuperscript{1317}:

- **Recording of the child’s statement will be done at the child’s residence or place of choice by a female police officer not below the rank of sub-inspector.**
- **No child will be held in police station at night for any reason.**
- **The police will not be in uniform when recording the child’s argument.**
- **The child’s statement will be registered as spoken.**
- **Assistance of an interpreter or translator or expert will be given if the child needs.**
- **Medical examination of the child will be done in the presence of the child’s parents or any other person in whom the child has trust or confidence.**
- **If the victim is a girl child, a female doctor will administer the medical examination.**
- **Regular breaks will be given to the child during the trial.**
- **Child will not be asked to testify repeatedly.**
- **No offensive questions or character assassination of the child will be done.**

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\textsuperscript{1313} Section 23 (2) POCSO Act  
\textsuperscript{1314} Section 19(5) POCSO Act  
\textsuperscript{1315} Section 19(6) POCSO Act  
\textsuperscript{1316} Section 26 POCSO Act  
\textsuperscript{1317} Section 24 POCSO Act
7. **Major encumbrances in the implementation of POCSO Act**

In its full application, the Act encountered unexpected difficulties. Its delivery in the economy is weak and the compliance rate is very low. The conviction rate is only 4%, acquittal rate is 6% and pendency rate is nearly 90%, as described by the National Crimes Records Bureau, while cases registered under the POSCO Act increase consistently including brutal gang rape. In 2017, 32,608 instances were registered, according to the latest figures released by the NCRB and 39,827 in 2018 under the Act, for the safety of children. According to data from the National Crime Record Bureau, there was a 22 percent rise in these cases compared with the previous year, per day 109 children were sexually abused in India by 2018. Recently released NCRB study indicate that in 2017 there were three hundred and thirty-eight hundred and thirty seven cases registered under the POCSO.

In 2018, there were 21,605 child rapes, including 21,401 cases of girls and 204 cases of boys. Uttar Pradesh had 2023 cases, Tamil Nadu had 1457 cases and the highest number of child abuses was in Maharashtra at 2832. All crimes against children has increased steeply more than 6 times from 22,500 in 2008 to 141764 in 2018 (according to the 2008 and 2018 NCRB statistics). In 2017, there were 129032 cases of child abuse.

1. The State Governments should nominate a Court of Sessions, in consultation with the Chief Justice of the High Court, to proceed with offenses to facilitate rapid proceedings. However, the POSCO Act specifies further that the Court may also be called a Special Court, if it had already been notified as child court under the Commissions for the Protection of Childs Rights or if a Special Courts had been established for similar purposes under some other statute.

2. Given the constitutional requirement to have an exclusive POCSO court for each district, the guidelines have been consistently ignored.

3. The major obstacle is the non-establishment of special courts in all districts in the country for child sexual exploitation. The creation of such courts was a crucial task of the Act and the failure to settle and pending cases reported under it has been a significant delay.

4. The lackadaisical attitude of the bureaucracy of the State Government is seen in that they neither devise a legal manual, nor fulfill other formalities for enforcing it until, and unless, the Supreme Court interferes.

5. Judges assigned to deal with such matters are not competent. Neither the state government offers additional training nor the cases is seriously studied. As a result, they perceive cases to be an extra burden and thus, the cases are not adequately and efficiently handled as provided for in the Act.

8. **Constitution of India and Protection of Children**

The Constitution recognizes the children as the most vulnerable human beings and thus had made provisions correspondingly. They are the most affected than any other age group by the actions of the state and any other individual. The children are not seen as people who have a mind and vision of their own and are often guided by the adults. Since they have no political and

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1318 Legallyindia.com
1319 Indiatoday.com
1320 Timesofindia.com
1321 Bbcnews.com
economic power, their voices are often suppressed.
1. The Constitution obliges the State to provide free and compulsory education to all children from age of 6 to 14 years.\textsuperscript{1322}
2. The Constitution prohibits the employment of any child below the age of 14 years to work in a factory, mine or any hazardous employment\textsuperscript{1323}.
3. Right to equal opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and guaranteed protection of childhood and youth against exploitation and against moral and material abandonment\textsuperscript{1324}.
4. Apart from these rights, they also have the right to be protected from being trafficked and forced into bonded labor, right to equality, right against discrimination and right to personal liberty.\textsuperscript{1325}
5. The state must make special provisions for women and children, protect the interest of minorities, promote educational interest of weaker sections and also raise their standard of living\textsuperscript{1326}.

9. Additional efforts taken by the government

1. National and State Commission for Protection of Child Rights\textsuperscript{1327}: In addition to their counterparts in other Indian states, it plays a key role in improving children’s status in India. It could do a lot more with more resources, more support from the central government and better trained workers. More significant than ever is their position as independent monitors of government action. Recently, they have taken a massive job to track the implementation of India’s landmark right to education Act, which mandates state governments to provide all 6-14 year olds with free education in neighborhood schools and includes crucial provisions on the safety of children\textsuperscript{1328}.
2. ICPS: In 2009, the Ministry of Women and Child Development established the Integrated Child Protection Scheme in India which was the largest ever effort to strengthen child protection initiatives\textsuperscript{1329}. The purpose was to promote and introduce innovative institutions and programs. The most ambitious of these was the appointment of social workers and the creation of committees to deal directly with children’s rights in every district of the country.

Child welfare committees: They are among the most significant child welfare systems in India at the moment. They are powerful quasi-judicial bodies of experts who coordinate the welfare authorities and the police and audit residential child care facilities. Increased number of committees were anticipated in the Integrated Child Protection System (ICPS). Founded in 2000 under the Juvenile Justice Act, at least one child protection committee should be set up in each district, financed by the State Government.
4. Juvenile Justice Act: The key law overseeing child protection in India is the Juvenile Justice Act of 2015\textsuperscript{1330}. A series of “model laws” have been formulated up by the central government for the application of the law, which have since been enforced by individual states and in some cases changed. The act protects two groups of children: those who are in conflict with the law and those who need protection and care.

\textsuperscript{1322} Article 21A, Constitution of India, Ins. By the 86\textsuperscript{th} Amendment act 2002
\textsuperscript{1323} Article 24, Constitution of India
\textsuperscript{1324} Article 39e, Constitution of India
\textsuperscript{1325} Article 14, 15, 21, 23, 46 of the Constitution
\textsuperscript{1326} Article 15(3), 29, 47 of the Constitution
\textsuperscript{1327} Ncpcr.gov.in
\textsuperscript{1328} Human Rights Watch: Breaking the Silence
\textsuperscript{1329} Integrated Child Protection Scheme, 2009
\textsuperscript{1330} Juvenile Justice Act, 2015
10. Conclusion
Child abuse is considered as a social taboo, therefore many families decided to cover the case up. The increasing crime rate of child sexual abuse needs to controlled and the silence needs to be broken. Though the Government has taken various steps to eradicate the problem from the root but the implementation of these steps have been besmirched by the outdated judicial proceedings and in malpractices. It takes time even to register FIRs and after they are filed, they are halted by political agents such as in Unnao and Kathua cases (2018). The POCSO Act needs to be taken seriously, though the act states that the trial should be completed within one year however it is a very rare because of the slow paced justice delivery system. The Government should focus on strengthening the existing laws and making it certain that they are well executed instead of amending the laws. The amended law declares that the punishment for raping a child below 12 years is death penalty. Sadly in over 17,500 child rape cases in 2019 none of the perpetrator were awarded death penalty. The last death penalty given and executed for child rape was on 14 August, 2004 of Dhananjay Chatterjee, long before POCSO Act was enacted. Survivors have to wait for years to obtain justice and even in cases of death penalty, convicts can have a possibility to appeal their sentence. The POCSO Act is formidable, but implementation is inefficient because corruption exists on all levels of the system. An initiative must also be made to enhance the compliance and implementation of current laws, only then law will be able to keep its promise to protect children from sexual offenses.

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PRATISPARDHA KANOON: THE COMPETITION WATCHDOG

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Introduction
“Competition in market-based economies refers to a situation in which firms or sellers independently strive for buyers' patronage in order to achieve a particular business objective, for example, profits, sales, or market share. Competition in this context is often equated with rivalry. Competitive rivalry may take place in terms of price, quantity, service, or combinations of these and other factors that customers may value.”¹³³⁴

No better combination of words nor any quote can describe the state and definition of competition in the economy. Competition Law has legacy of many years. “Relevant Market” and “Power over the Market” are noticeable features of competition. Competition law has been adopted by a lot of countries and most of them include provisions regarding relevant market and power over the market. The question which this paper seeks to answer is, whether relevant market is the only determining factor in the matters involving Competition Law?

“Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish framework within which the competition policy is applied by the commission. The main purpose of market definition is to identify a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behavior and of preventing them from behaving independently of effective competitive pressure. Therefore, the purpose of defining the “relevant market” is to assess with identifying in a systematic way the competitive constraints the undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and the presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specific use of such product is concerned. In essence, it is the notion of “power over the market” which is key to analyze many competitive issues.”¹³³⁵

The severity and magnitude of the relevant market in Competition Law serves to be more salient when such words happen to be a part of the judgment delivered by the Hon’ble Supreme Court of India. The global development of relevant markets is one of the evident feature of this era. Relevant market has impact on firms and is increasingly recognized in International Combinations as well. Therefore if dealt properly and skillfully relevant market could be a factor which could change the course of any competition related issue.


¹³³⁵ CCI v. Bharti Airtel Ltd. and Ors, 2019 2 SCC 521, decided on December 5, 2018.
Relevant Market: When is Market Power Determined?
The market wherein one or more goods compete is known as the relevant market under competition law. Consequently, whether two or more products can be construed as substitute goods and whether a particular and separate market for analysis of competition is constituted by those goods, is defined under Relevant Market. Relevant Market constitutes both the product market as well as the geographic market. In order to determine the relevant product market, all those products and services which are considered as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use, need to be analyzed. Furthermore, proper care is needed to see if the area in which the firms concerned are involved in the supply of products or services and whether the conditions of competition are sufficiently homogeneous or not. Relevant Market is an important component of most of the systems of competition law.

Law or Social Change: What Dash Ahead?
Law has been both dependent as well as independent variable i.e. a cause as well as an effect in society and has inter-reliance with other social systems. The advantages of law as an instrument of social change are attributed to the fact that law in society is seen as legitimate, more or less rational, authoritative, institutionalized, generally not disruptive, and backed by mechanisms of enforcement. While the term is usually applied to changes that are beneficial to society, it may result in negative side-effects or consequences that undermine or eliminate existing ways of life that are considered positive.\textsuperscript{1336}

The old MRTP Act metamorphosed into the Competition Act with the emerging regulations of competition in India. Growth of state-owned enterprises between 1960 and 1990 along with Economic Liberalization in India in 1991 addressed the issue of competitiveness among enterprises in the markets of India. In 1995 when India decided to sign the World Trade Organization (WTO) global treaty this issue became grave. It was during these years from Economic Liberalization to signing of the WTO global treaty, when the debate as to whether or not the MRTP Act, 1969 and the MRTP Commission should continue to regulate the monopolies and restrictive trade practices in India. This resulted in the constitution of a high-powered committee (Raghavan Committee), headed by Mr S V S Raghavan, in the year 1999 in order to gauge some of the necessary changes which may be required to combat the trade related anti-competitive practices of Indian enterprises after economic liberalization. Coupled with the recommendations of the Raghavan Committee and the Constitutional Mandate, the Parliament enacted the Competition Act, 2002 in December 2002 which obtained the Presidential assent on 13 January 2003. The Competition Act is, thus, a legislation that imposes reasonable restrictions upon citizens and enterprises to the freedom of trade and commerce while operating in India.\textsuperscript{1337}

Competition Law, indisputably, has led to a positive social change preventing practices having adverse effect on competition, in

\textsuperscript{1336} Social change, NEW WORLD ENCYCLOPAEDIA available at: http://www.newworldencyclopedia.org/entry/Social_change

\textsuperscript{1337} Manas Kumar Chaudhuri, Competition Law in India: Perspectives available at: https://www.researchgate.net/publication/304184152_Competition_Law_in_India_Perspectives
order to promote and sustain competition in markets; protect the interests of consumers and ensure freedom of trade. In Monopoly form of market, the total profit is greater than that of the combined profit of all firms in a market of competitive nature. Furthermore, consumer welfare also suffers under monopoly as compared to a competitive scenario. Competition Law covers this part in almost every aspect of itself, and ensures the well-being of competition in the market as well as consumer welfare. The Competition Act, 2002 aims to curb any activity which is or which may harm the freedom of an individual to freely compete in the market or which may go against consumer welfare. It is hence, pretty lucid that, the law has played a positive role in fabricating the social status of Competition Law from removal of monopoly to growth of competition. The latest competition legislation of India is a civil legislation and mandates the Commission to abide by the principles of natural justice.  

BHARTI AIRTEL Verdict- Concept of Relevant Market and the Competition Act.

The recommendations of the Raghavan Committee and the Constitutional Mandate led to the legal recognition of Competition Act, 2002 in India. The concept of “relevant market” was well explained by the Competition Commission of India through its verdict in Competition Commission of India v. Bharti Airtel Ltd. And Ors.  

The case in Bharti Airtel Ltd. was about the grievances of the telecom operators who alleged collusion, anti-competitive agreements between the telecom operators and denial of point of interconnection (POIs) [i.e. points that allow voice call originating from the work of one operator to terminate on the network by other operator]. RJIL, a new entrant into the telecom market had filed an information before the Competition Commission of India alleging anti-competitive agreement having being formed by three major telecom operators. Further allegations against the respondents, that is, Incumbent Dominant Operators were that they had, through an anti-competitive agreement/cartel, limited the provision of services by delaying or denying POIs to RJIL, with a view to block its entry into the market. The Competition Commission of India, while inquiring into the alleged contravention and determining whether any agreement has an appreciable adverse effect on competition or not, mentioned that it is relevant to take into consideration the provisions stated in sub-section (3) of Section 19. These constitute creation of barriers to new entrants in the market, driving existing competitors out of the market foreclosure of competition by hindering entry into the market. All these activities have connections with the ‘market’.

A. Relevant Market

The word “market” has reference to “relevant market”. As per sub-section (5) of Section 19, such relevant market can be relevant geographic market or relevant product market. In the present case, we are concerned with the relevant product market viz. telecommunication market. Sub-section (7) of Section 19 enumerates the factors which are to be kept in mind while determining the relevant product market. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which the competition

1338 Sections 36(1) and 36(2) of the Competition Act, 2002.
1339 Bharti Airtel Ltd. and Ors., Supra Note 2.
policy is applied by the commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic and productive dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings’ behavior and of preventing them from behaving independently of effective competitive pressure. Therefore, the purpose of defining the “relevant market” is to assess with identifying in a systematic way the competitive constraints that undertakings face when operating in a market. This is the case in particular for determining if undertakings are competitors or potential competitors and when assessing the anti-competitive effects of conduct in a market. The concept of relevant market implies that there could be an effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market insofar as specified use of such product is concerned. In essence, it is the notion of “power over the market” which is key to analyse many competitive issues.  

B. The Objective Behind the Competition Act

The Act prohibits anti-competitive agreements and has a laudable purpose behind it. The main purpose of this act is to ensure healthy competition in the market, as it brings about various benefits for the public at large as well as economy of the nation. Enhancement of consumer well-being is the ultimate goal of the Competition policy/ Consumer policy. These policies ensure that the market functions effectively. Ensuring “Level playing field” for all market players is another purpose in curbing anti-competitive agreements, as a result of which market remains competitive. It sets “rules of the game” that protect the competition process itself, instead of competitors in the market. Consequently, economic growth, development and economic efficiency improve.

In Excel Corp Care Ltd. v. CCI1341, the objective behind the act as well as the rationale in curbing anti-competitive practices was taken note of. Effectual use and allocation of the resources of the economy is included in efficiency of the Economy. Competition inclines to bring about enhanced efficiency in not only static but also dynamic sense. The same is done by disciplining firms to produce at lowest possible cost and pass these cost savings on to consumers, and also motivating firms to undertake research and development to meet consumer needs. Economic Growth and economic development are interrelated. An increase in the value of goods and services produced by an economy is a key indicator of economic development. Economy’s well-being constituting, employment growth, literacy, mortality rates and other measures of quality of life, is a part of the broader definition of economic development. Through improvements in economic efficiency and reduction of waste in the production of goods and services, competition may bring about greater economic growth and development. The market is therefore able to more rapidly reallocate resources, improve productivity and attain a higher level of economic growth. Over-time sustained economic growth tends to lead an enhanced quality of life and greater economic development. Economic growth

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1340 Bharti Airtel Ltd and Ors., Supra Note 2

1341 Excel Corp Care Ltd. v. CCI, (2017) 8 SCC 47
to the ultimate benefit to the consumers through Competition policy is reflected in terms of better choice (new products), better quality and lower prices. For the purpose of redressing a perceived imbalance between the market power of consumers and producers a consumer welfare protection may be required. The imbalance between consumers and producers may stem from market failures such as information asymmetries, the lack of bargaining position towards producers and high transaction cost. Competition policy may serve as a complement to consumer protection policies to address such market failures. Due to worldwide deregulation, privatization and liberalization of markets, developing countries need a competition policy, in order to control the growing role of the private sector in the economy so as to ensure that public monopolies are not simply replaced by private monopolies.

International Relations
A. Anti-Trust Law of U.S.
U.S. Law was the first jurisdiction to introduce a coherent competition system to influence entire global competition regime. The core of anti-trust regulation is formed by Sherman Act and Clayton Act. Prohibition of concentration of wealth and economic power in the hands of a few was aimed by the Sherman Act. The courts made the enactment more meaningful by interpreting the vague terms. Clayton Act was an attempt to strengthen anti-trust enforcement. Another law, Federal Trade Commission Act was enacted in the year 1914. It declared the unfair methods of competition and unfair and deceptive acts, practices affecting trade and commerce to be illegal. In relation to the new law, the test of “Market” evolved as relevant for application of Anti-Trust law. It was based on geographical nexus and included range of close substitutes. Consequently a finer test of “Relevant Geographical Market” and “Relevant Product Market” evolved for analyzing mergers and acquisitions and affirmed the relevance of consumer views and available substitutes in the market place in the analysis of monopoly.

B. International Competition Network
Economic growth and productivity
With the help of Competition productivity increases through various means which include, pressure on firms to control costs, ease of market entry and exit, encouraging innovation, pressure to improve infrastructure and benchmarking. In an environment of competition, it is important for firms to constantly strive in order to lower their production costs so that they can charge competitive prices. Furthermore, in order to correspond to consumer demands, they must also improve their goods and services. Resources are reallocated from less to more efficient firms through entry and exit of firms. When an entrant is more efficient than the average incumbent then the overall productivity increases and when an existing firm is less efficient than the average incumbent. Entry as well as threat of entry servers as an incentive for firms to continuously improve in order not to lose market share to be forced out of the market by the new entrant. Innovation acts as a strong driver of economic growth with the help of introduction of new or substantially improved products or services and development of new and improved

processes that lower the cost of production and in turn increase the efficiency. Incentives to innovate depend upon the degree and type of competition in the market. By means of competition, communities are pressurized to keep local procedures competitive by improving roads, bridges, docks, airports and communications, as well as improving educational opportunities.

Competition also can contribute to increased productivity by creating the possibility of benchmarking. The productivity of a monopolist cannot be measured against rivals in the same geographic market, but a dose of competition quickly will expose inferior performance. A monopolist may be content with mediocre productivity but a firm battling in a competitive market cannot afford to fall behind, especially if the investment community is benchmarking it against its rivals. With the help of applying pressure on firms through competition, productivity of the firms is increased. The reason for the same being the efforts of the producers to charge competitive prices and at the same time they strive to lower down their production costs. For the purpose of corresponding to the demands of the consumers’ the same leads to improvement in the quality of their goods and services. The enforcement of Competition Law deals with anti-competitive practices arising out of acquisition or from the exercise of undue market power by firms that result in harming the consumer in the form of higher prices, lower quality, limited choices and lack of innovation. Through the remedies provided by the enforcement of Competition Law, situations that will lead to decreased competition in the markets are avoided. Furthermore, not only anti-competitive conduct is sanctioned with the help of Competition law but any future anti-competitive practice is also deterred. Competition has a number of benefits and at the same time it can be seen that cartels or anti-competitive agreements cause harm to consumers by fixing prices, limiting outputs or allocating markets. An active and effective enforcement against such cartels or anti-competitive agreements has a direct and visual effect in terms of reduced prices in the market and the same is also supported by various empirical studies.

Keeping in view the aforesaid objectives that needs to be achieved, Indian Parliament enacted the Competition Act, 2002. Need to have such a law became all the more important in the wake of liberalization and privatization as it was found that the law prevailing at that time, namely, Monopolies and Restrictive Trade Practices Act, 1969 was not equipped adequately enough to tackle the Competition aspects of the Indian Economy. The law enforcement agencies, which include CCI and COMPAT, have to ensure that these objectives are fulfilled by curbing anti-competitive agreements.

Elimination of Evils affecting the economic landscape of the country
Section 18 of the Competition Act, 2002 casts an obligation on the Competition Commission of India for the ‘elimination’ of the anti-competitive practices and for the promotion of competition, interests of the consumers and free trade. Mr Neeraj Kishan Kaul, the learned Additional Solicitor General rightly pointed out that the act clearly aims to address the evils affecting the economic landscape of the country in which the interest of the society and consumers at large is directly involved.

1344 Bharti Airtel Ltd. and Ors., Supra Note 2.

1345 Bharti Airtel Ltd. and Ors., Supra Note 2.
The court clearly laid emphasis on the same in CCI v. SAIL.1346.

“As far as the objectives of competition laws are concerned, they vary from country to country and even within a country they seem to change and evolve over the time. However, it will be useful to refer to some of the common objectives of competition law. The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are threefold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices. These factors by and large have been accepted all over the world as the guiding principles for effective implementation of competition law.

The Bill sought to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in market within India and for this purpose establishment of a quasi-judicial body was considered essential. The other object was to curb the negative aspects of competition through such a body, namely, “the Competition Commission of India” (for short “the commission”) which has the power to perform different kinds of functions, including passing of interim orders and even awarding compensation and imposing penalty. The Director General appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission. In short, the establishment of the Commission and enactment of the Act was aimed at preventing practices having adverse effect on competition, to protect the interest of the consumer and to ensure fair trade carried out by other participants in the market in India and for matters connected therewith or incidental thereto.

The various provisions of the Act deal with the establishment, powers and functions as well as discharge of adjudicatory functions by the Commission. Under the scheme of the Act, this Commission is vested with inquisitorial, investigation, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. Vast powers have been given to the Commission to deal with the complaints or information leading to invocation of the provisions of Section 3 and 4 read with Section 19 of the Act. In exercise of the powers vested in it under Section 19, the Commission has framed regulations called the Competition Commission of India (General) Regulations, 2009 (for short “the Regulations”).

The Act and the Regulations framed thereunder clearly indicate the legislative intent of dealing with the matters related to contravention of the Act, expeditiously and even in a time-bound programme. Keeping in view the nature of the controversies arising under the provisions of the Act and larger public interest, the matters should be dealt with and taken to the logical end of pronouncement of final orders without any undue delay. In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country’s economy cannot be ruled out.”1347

Concluding from the above, the Competition Commission of India is entrusted with the duties, powers and functions to deal with the anti-competitive practices and activities mentioned above.

1346 CCI v. SAIL, (2010) 10 SCC 744

1347 CCI v. SAIL, Supra Note 13.
The main purpose is the elimination of practices having adverse effect on the competition for the purpose of promoting and sustaining competition. In addition to this, protection of the interests of the consumers and ensuring freedom of trade, carried on by the other participants, in India is a vital constituent. The Competition Commission of India is empowered to call any person for rendering assistance or production of the records in order to arrive at even the prima facie opinion, to conduct an enquiry. As a result of the provisions the Competition Commission of India is also empowered to hold conferences with the parties concerned including the advocates of the parties and other authorized persons.

Need for Regulatory Mechanism
Regulatory Mechanism is the order of the day and is also known as regulatory economics. Starting from laissez faire to mixed economy to the present era of liberal economy with regulatory regime, the journey of the economic policy of this country has served to be a long one in the last 60-70 years. With the materialization of the mixed economy some of the key industries like aviation, insurance, railways, electricity/power, telecommunication, etc. were monopolized by the State, along with the mushrooming of various public sector enterprises.

Conclusion
The Competition Act, 2002 has proved to be a landmark legislation. The act aims at promoting competition and curbing all the ant-competitive agreements. Through this act various restrictions are imposed on the dominant enterprises to curb them from misusing their position. Furthermore, any kind of combination beyond a particular size is also regulated by the act. Therefore, this act does not curb monopolies rather it curbs the abuse of the monopolies.

The Competition act is, in the present as well as in the future, expected to play a responsible role in the process of changing the control mechanism related to monopoly and restrictive trade practices. Furthermore, apart from giving the consumers more powers to redress their grievances, the interest of the small and medium industries in the country are also expected to be protected.

There can be no better way, than with the quote from two English barristers, Flynn and Stratford, apt to conclude this article which is as follows-

“It is also helpful to bear in mind the distinction between a restriction on competition (an economic concept) and a restriction on conduct (a concept which lawyers find easier to understand), especially since such restrictions can be discerned from contractual terms without deeper consideration of the underlying circumstances.”

To sum up, the concept of relevant market is like man power in the handloom industry and if the above stated factors are kept as a base and then the relevant market is decided skillfully, the same would drive the course of any competition law related issue. Therefore this concept proves to be the cardiovascular system of the watchdog.

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1349 Extracted from Mr Sudhir Mulji’s dissent note in the Raghavan Committee Report

Extracted from Mr Sudhir Mulji’s dissent note in the Raghavan Committee Report
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ABSTRACT

In international trade and commerce, resolving disputes by the procedure of arbitration has become exceptionally strong and widely accepted means. As pointed out by some commentators that around 90% of all international contracts are governed by an arbitration clause.

Rapid globalisation has provided a corresponding growth in the volume of international contracts with clauses providing resolution of dispute by means of international arbitration. In turn, the availability and effectiveness of international arbitration has been noticed by many as an urge to cross border commerce and investment.

As the pivot of the world economy has pointed towards the higher growth economies in emerging markets, the disputes to be resolved by international arbitration are increasingly drawn from trade with and between emerging economies. Although the traditional centres of international arbitration is situated in Western Europe and North America which are even more busier than ever, they are facing strengthening competition from elsewhere as well.

In particular, an increasing number of nations have developed their arbitration laws and supporting judicial practices, and an ever-widening choice of arbitral institutions worldwide now provide services to their potential customers. In other cases, in some jurisdictions the courts themselves are dealing and making attempts to attract international disputes away from arbitration.

The increasing complicated legal landscape provides an array of choice to international parties as to how they manage and resolve their disputes. Business needs will keep changing depending on the context provided, but some general guidance which can be drawn from an analysis of the aspects of international arbitration which can be noticed as most advantageous for international parties while minimising perceived disadvantages of international arbitration on the other hand.

Introduction

Indian law has provided provision for dispute resolution by the way of International Commercial Arbitration. This mechanism is aimed at resolving commercial disputes between an Indian party and a foreign party within the framework of Indian Arbitration Laws. The arbitration proceedings could be governed by the rules of the arbitration institutions or the courts have the power to appoint arbitrators under the provisions of section 11 of the Arbitration and Conciliation Act 1996. The business disputes between parties are settled through mutually agreed-upon terms by the way of arbitration. The parties basically submit the dispute to one or more arbitrators who settle the dispute by making a binding decision on the dispute. Thus, arbitration is a procedure of settling the dispute outside the courts in an efficient and timely manner.

International Commercial Arbitration

The section 2(1)(f) of the Arbitration Act defines ICA (International Commercial Arbitration) as a legal and commercial relationship and either of the parties in dispute is a foreign national/resident or a foreign body corporate, company,
association or body of individuals whose central management is in foreign land. Thus, as per Indian laws, arbitration with having a seat in India involving a foreign party is regarded as ICA, subject to Part I of the Act.

- Objectives of International Commercial Arbitration

Arbitration is an advanced alternative to the legal system and aims to fill up gaps that persevere in the conventional court proceedings. Various legal characteristics of commercial arbitration in India include, the provided provision of a Neutral Dispute Resolution Forum against the local courts, providing parties with commercial expertise to adjudicate the tribunal, not similar to courts that merely exercise general jurisdiction. The law in India provides parties with an enforceable award as opposed to jurisdictional uncertainties in litigation and the arbitration proceedings is speedy trial avoiding the delays and appeals that always occurs in the court system. In addition, the parties are not subject to public trials, thereby sustaining the confidentiality of the parties.

- International Arbitration Legislation

The UNICITRAL Model Law was unanimously adopted in the year 1985 and was further subsequently amended in year 2006. Basically, there are more than 60 countries that have adopted this model law that permits comprehensive legislative treatment of the international arbitral process. The Model sustains the validity and enforceability of arbitration agreements under (Article 7 - Article 9) by providing a guideline for competent arbitrators under (Article 16) and the absolute judicial non-interference under (Article 5). The parties are always provided with the choice of arbitral seat under (Article 1(2), Article 20), and for appointing of the arbitrators under (Article 10 - Article 15) and the provisional measures under (Article 17) to be taken. The Model only lays down an objective procedure for arbitration under (Article 18 - Article 26), and evidence taking under (Article 27) as per the applicable substantive law under (Article 28) to come to a concluding arbitral award (Article 29 - Article 33). Most importantly, the model provides provisions for the recognition and enforcement of foreign arbitral awards including bases of non-recognition (Article 35 - Article 36).

Advantages of International Commercial Arbitration

- Decision-Maker Selection and Expertise

One specific area where international arbitration will always have an advantage over any court proceeding is in the extent of party control, and the same is being reflected strongly in the ability in many cases for parties to select arbitrators through a mechanism of their choice. As there are many experienced and competent judges, and on the other hand many judges specialize in these field of large-scale commercial disputes, sometimes it is the case that judges sitting in a national court have to deal with a very wide range of cases, and then frequently need to balance the limited resources of the court system between their caseload.

However dedicated and skilful judges sitting in a national court, may not be best equipped to deal with a dispute occurring in the context of international trade and commerce, which in case may involve both a high degree of factual complexity and particular issues of fact or law arising from the international dimension as well. Moreover, there could be the case that an individual who has excelled to the extent of reaching the rank of judge in a national court system will be very strongly influenced by their own national law and the various assumptions and principles which are provided under the law, rather than focus on the provisions of different systems of national law with one another and other issues of international law. However, the situation concerning the appointment of arbitrators is evidently very distinct, the approach is not uniform. Indeed, there are divergent views in the international arbitration community as the right of party for nomination of arbitrators is fundamental in nature. Instead, if the parties in dispute require such a right for nomination of arbitrators, they must specifically mention that under the clause in the arbitration agreement. In international arbitration specifically, there is wide range of guidelines provided for selection of sole arbitrators or panels of arbitrators, with variation to the extent of party involvement. However, in international arbitration there is a spectrum which at one end allows a high degree of control by the parties in dispute over the choice of arbitrator, and on the other side if the parties find themselves at the other end of the spectrum with limited party control over nomination, it is basically due to the parties' own choice. In most of the cases it is possible to find well qualified and experienced arbitrators who will combine their gained commercial knowledge with their legal skills and proceed forward to adopt a more international and pro-business outlook. As international arbitration has continued to grow worldwide, there has been a expanding growth in the number of potential arbitrators, nowadays there is a wealth of choice available with the parties in dispute.

- **Co-ordinated Dispute Resolution**

In addition to the expanding internationalisation of business, the past few decades have noticed an escalation in the complexity of economic activities. The growth of numerous regional trade blocks, such as the EU, is, in part, a recognition of the reality that modern business is conducted on a global scale, with national boundaries having lost much of their former significance in that regard. As national courts and systems of national law are limited within the national boundaries, the risk associated is that a dispute relating to modern global business will be subject to the courts of different nation’s involved in parallel proceedings, or having difficult and lengthy proceedings concerned with the question arising of that which will exercise their jurisdiction. Such a confusion, with appropriate forethought, could be avoided with well-drafted arbitration clauses providing an international arbitral tribunal a wide jurisdiction as possible. In such a procedure, there is scope for exercising the enormous advantage of carrying all relevant aspects related to dispute considered in one arbitral forum, and for the arbitral tribunal exercising jurisdiction to have appropriate powers over the entire issue in dispute.

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As told, it is not ordinary situation for there to be disputes over the arbitral tribunal's jurisdiction and the same serves to emphasise the need to take care in drafting the arbitration clause with due precision\textsuperscript{1352}. Even the well-drafted clause, however, may not be able to expect everything that may eventuate, and the most common issue is that the arbitration agreement may not cover all the potential disputes which may arise, specifically if there are multiple contracts merged or multiple parties involved. However, none of these difficulties at the margin detract from international arbitration's advantage over national and state courts in providing a co-ordinated procedure for resolution of all the disputes among the international parties, notwithstanding the geographical distribution of the subject matter providing situations for the disputes.

- **Finality of Decision**
To a greater extent as compared to the litigation in the courts, international arbitration provides finality in the decision-making process. One of the disadvantages of the court proceedings is that judgments can sometimes be subject to one or more appeals, and they could take many years to be resolved. The basic feature of most of appeals through the court proceeding is that, by their nature, they can rely on the principles of law which the appeal court may often want to consider in a way that is generally applicable, or at least consistent with all other decisions. The court, in paying attention to the wider legal landscape, inevitably doesn’t decide the case solely by reference to the particular situation and facts of that case, and may be persuaded to backed away from the recent decision awarded on the facts of the particular case, in the favour of a decision that more appropriately fits to the interpretation of the law itself.

Such a delay and potential diversion towards scrutiny of legal principle can be avoided in the arbitral process, where the arbitral tribunal's decision is final other than usually limited available grounds of challenge in the courts. However, in the most of the arbitration-friendly jurisdictions, the courts are determined to emphasise their enthusiasm of not to interfere in the arbitral process, they could not properly surrender their entire rights, and even in these jurisdictions there lies a range of limited grounds on which the award can be challenged. The inability to appeal awards is observed as a strength in general, but parties in dispute sometimes express concern about the lack of any corrective mechanism which could provide remedy to the obvious errors. To some extent, concerns in that regard are reduced by the ability of the parties in dispute to choose their arbitrators and the lack of any probable remedy beyond the decision of the arbitrators is a strong encouragement to exercise due care when choosing the appointment procedure for arbitrators and in nominating arbitrators as well.

- **Costs and Speed**
The arbitrations could acquire benefits in terms of costs and speed, and absolutely the procedure can be tailored to save time and money. In spite of this, there are numerous examples of arbitrations being costly and

the procedure enduring quite a while. In some cases, this is in part because parties may prefer a more thorough process and will opt for a detailed examination of the issues, in the knowledge that this is more likely to produce a fair result.

In any case, it is fair to say that there are few techniques within court processes which can sometimes curtail expense and, for example, in the English courts it is possible to apply for a summary determination of the case without a trial. Under most arbitral rules, there is no similar procedure for synopsis determination. However, while in a clear case the summary procedure will shorten the length of the court process, in a more complicated case it may result in time being wasted on an unsuccessful application, with the effect of extending the length of the court process even further.

Most of the arbitral rules provide the option of an expedited process for dispute resolution or fix a time limit for the award to be granted. However, it is open for the parties in dispute to mutually agree on a timetable which suits their choice of expedite resolution. Furthermore, there is also a scope for the parties in dispute to agree, either at the time of drafting the arbitration clause or subsequently, to limit within reasonable bounds the extent of procedure which would otherwise be time-consuming or expensive or both, such as the extent of document disclosure and/or the extent to which particular facts must be proved.

Moreover, it is difficult to derive a comparison at a very basic level between the costs and speed of arbitrations, as opposed to the costs and speed of litigation in the national court. In some cases, there are chances in which litigation can be an attractive option, but in numerous cases of international disputes, international arbitration provides a more flexible model with the capacity to adjust itself more closely to the parties’ expectations and requirements considering costs and speed.

Conclusion
The rapid and continual state of change in international trade provides that the choice for business parties of whether to arbitrate international disputes in relation to litigation in the courts, and exactly the manner of arbitration, will often be complex decisions of requiring careful consideration and wise counsel. There are many instances in which the right decisions can lead to an international arbitral process which is optimal in meeting the needs of the parties, offering as it does a system of dispute resolution tailored to the parties’ needs and recognising the need for a business-like resolution, so as to allow trade to continue.

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REACTION TO THE PANDEMIC: A NEW ECONOMIC SYSTEM

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Abstract:

The pandemic of Covid-19 has been heralded as one the greatest pandemics that mankind has witnessed so far. Having shaken all the social and political structures of the society across countries, the pandemic has successfully demolished all the old systems and have provided the potential to give birth to a new order. Whether economic or legal, the pandemic now paves way for a new system and new rules that, that hold the power to alter the course of mankind into a new direction. This paper seeks to focus upon the possible changes that maybe bought about in the economic and trade discourse between countries, within the helm of international law and order.

Keywords: International, economic law, covid-19, Coronavirus

Introduction:

The world has observed scattered cases of pandemics across centuries. The spread of several diseases, majorly due to excessive human activities or the lack of strong immunity, have claimed the lives of several. The various pandemics and epidemics that the world has seen till date are1354:

- Prehistoric Epidemic Circa 3000 B.C
- The Plague of Athens, 430 B.C
- Antonine Plague, A.D. 165-180
- Plague of Cyprian, A.D. 250-271
- Plague of Justinian, A.D.541-542
- The Black Death, 1346-1353
- Cocoliztli Epidemic, 1545-1548
- American Plagues, 16th Century
- The Great Plague of London, 1665-1666
- Great Plague of Marseille, 1720-1723
- Russian Plague, 1770-1772
- Philadelphia Yellow Fever Epidemic, 1793
- Flu Pandemic, 1889-1890
- American Polio Epidemic, 1916
- Spanish Flu, 1918-1920
- Asian Flu, 1957-1958
- AIDS pandemic and epidemic. 1981-present
- H1N1 Swine Flu Pandemic, 2009-2010
- Zika virus Epidemic, 2015-present day
- The Corona Virus, 2020

The various pandemics and epidemics have not only altered the course of history for humans, but have had a significant impact on the relations and interactions of countries with each other. But, none had been so drastic so as to compel a change in the economic policies and the trade relations between states. Even the global economic system underwent a change only post the Second World War, alongwith the onset of the Bretton Woods systems, which gave way to the New International Economic Order or the NIEO. This was not the case until the year 2020.

The year 2020 proved to be tumultuous year. Right from January, there have been several international events that have threatened to disturb the international tranquillity, both in terms of war and trade. The tipping point for the spiralling events

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was the spread of the Covid-19, also known as the Corona virus, from the country of China to countries all over the world. This virus, imitating as a common cold and flu in its initial symptoms, seems to have bought the whole world to a standstill. However, the Corona virus is responsible for a lot more than deaths: it has compelled the world and its economies to rethink their policies.

This pandemic has also revealed instinctive nature of survival of economies. The main purpose of now countries all over the world is to thrive, even in the face of a downfall, recession or mounting number of deaths. It has revealed the fragility of the once touted powerful nations and how despite possessing the best health care systems, their lack of management and the lack of priority given to such events has consequently led to the downfall of their own population. The pandemic has revealed that now the purpose cannot just be to mint money and gain power or clout but the aim is to now focus on the welfare of the population and to reinitiate the idea of a ‘Welfare State’, which is often regarded an important part of the formation of a state.

The Covid-19 has majorly impacted several countries in terms of lives and equilibrium of economies. Among the several countries to have been severely affected by the virus, the worst hit is the United States of America, bearing the loss of almost 3,414,105 lives\textsuperscript{1355} till 13\textsuperscript{th} July, 2020. The economic consequences of the pandemic are worst. Several business have had to arbitrarily shut down, people are warned against crowding and are advised to maintain social distancing, travelling for leisure is banned, new standards of hygiene have been imposed to avoid a community spread of the virus. It has also led to mass unemployment, which is as high as 32 per cent, much more than the Great Depression of 1920 and or the Great Recession in 2008, which was clocked at only 10 per cent.\textsuperscript{1356}

To top it all, the effect of the US-China trade wars, where United States of America had imposed tariffs on the Chinese products as they deemed that earlier tariffs were unfair trade practices.\textsuperscript{1357} and China imposed tariffs in retaliation, on the American products, had already began sowing the seeds of the disruption of the cross-border operation of industries.

The pandemics and epidemics, in the past, have not been able to spread easily across countries and continents. This time the situation is different. However, there are several inter-connected reasons why this virus reached the levels of a pandemic.

One important reason can be attributed to the easy accessibility of people across borders. The virus has been majorly spread from people at airports. Another reason is the lack of adequate check-ups and the inability to detect the persons infected with this deadly virus in time. There are several persons who blame the economy of China as well, who allegedly did not inform the world forum regarding the seriousness of this disease. No matter the reason, it has

\textsuperscript{1355} United States of America, WorldOMeter, available at https://www.worldometers.info/coronavirus/country/us/, last seen on 13/05/2020
\textsuperscript{1356} Richard Heinberg, Pandemic Response Requires Post-Growth Economic Thinking, Common Dreams, available at https://www.commondreams.org/views/2020/04/09
\textsuperscript{1357} Anna Swanson, Trump’s Trade War with China is Officially Underway, The New York Times (2018) available at https://www.nytimes.com/2018/07/05/business/china-us-trade-war-trump-tariffs.html, last seen on 13/05/2020
resulted in such a downfall of the entire global economic system as a whole.

In this age of globalisation, several countries tend to disaggregate and spread out their several units of production and distribution across several countries. One country may have the production unit, another may have assembly unit while another may have the research and development of a company and its products. The country with the cheapest labour, almost no environmental norms and which has largest amount of production facilities of companies all over the world is none other than China. It would be a natural consequence that if China was to impose a lockdown on all its activities, it would not only impact the production unit of the said company, but would also cast a ripple effect on the rest of the economies. For instance, the city of Wuhan, where the outbreak began, is a hub for a significant production of global share of optical fibre cable and related devices. The effect of the shut down reverberated on the global level much before the declaration of the virus as a pandemic.\textsuperscript{1358} The pandemic also forced the development of the attitude of focussing upon the basics. It is shifting the spotlight from materialistic habits to the habits of survival. This clear demarcation of priorities has resulted in a consistent fall for what was initially considered as basic, but turned out to be just luxury. Another outcome of the pandemic is the rehabilitation of nature. The excessive human activities, in the form of factories and exploration had depleted the nature significantly of its resources. The nature, it seems, is healing itself.


\textbf{The need for change:}

The pandemic has compelled economists to divert attention from the capitalistic and materialistic policies to a more humane and community-based approach. The virus is affecting all, rich and poor alike and thus, this has now blurred the distinction between classes that is said to exist in a society. There is more focus upon the medical services and the development of the same in every economy with even a single case.

This brings us to a question: what should be the ideal response in the form of an economic system, to this pandemic? This outbreak has clearly forced everyone to rethink what was deemed as normal and has created a situation that demands change.

For starters, the governments now need to focus on dissociating in global value chains and diversifying their production units into different countries and should try to nationalise as much as they can. They heavy reliance on China by major countries for substantial amount of production is also responsible for this global crisis. However, there is still an on-going debate against the concentration of companies in a particular state, as it would also affect cross border labour, investment and livelihood of states that are not self-sufficient in nature.

Another option would be now to focus more upon building a greener and environment friendly economic and trade policies. Nature has long suffered due to the activities of men and the growing viruses are also responsible for accelerating the process of global warming and could ultimately result into successive mutations that would infect animals as well.\textsuperscript{1359} The afoot/articleshow/75374832.cms?from=mdr, last seen on 13/05/2020

\textsuperscript{1359} Sandrine Dixson-Decleve, Hans Joachim Schnellnhuber, Kate Raworth, Project Syndicate, \textit{Could Covid-19 give rise to a greener global future?}
spread of the virus has proven to be a wake-up call of some sorts, warning against the impending doom of deforestation, greenhouse effect and the spread of rampant and more frequent pandemics.

There has to be an increase in accountability and instead of a blame game, the countries should try to emerge from the ashes in a pragmatic way. Countries should come together to actually formulate policies that are environment-friendly in practice, and not just on a report that can be renewed periodically. The governments and the administration should now cohesively take the Earth and its preservation more seriously. Another important step would be to focus upon the overall hygiene and waste management of the world that hampers the right to clean environment.

Governments and authorities should now invest more in medical research and drug testing and make it one of the top priorities, so as to eliminate any new diseases that may infect the denizens of the Earth. A progressive increase in testing for this and other viruses can not only help trace its contact, but can also be helpful in curbing the further spread of the same. The world leaders should be on the same page regarding any medical advancement and it should within the common knowledge of all the world leaders so that there can be no further arm-twisting for the import or export of drugs.

Policymakers should be to support citizens’ livelihoods by actively investing in renewable energy instead of fossil fuels. Countries should also start gradually phasing out the use of fossil fuels and employing renewable energy technologies, most of which are now globally available and already cheaper than fossil fuels in many cases. With the recent fall in the price of oil globally, damaging fossil-fuel subsidies can and should be eliminated.1361

Shifting from industrial to regenerative agriculture is also feasible and would allow us to conceal carbon in the soil at a rate that is sufficient to reverse the prevailing climate crisis. Moreover, doing so would also result in profits, would effectively enhance economic and environmental resilience and improve wellbeing in both rural and urban communities simultaneously.

Regenerative agriculture is a feasible option that has emerged in many of the new economic models that are being considered by states all over the world. The ideas are primarily based on the principle of living within our planetary boundaries. The goal should be to create a safe and fair operating space for all. We must work within the planet’s natural boundaries while also ensuring that marginalized and vulnerable communities are not at a disadvantage.

Another option that is being explored is the use of the Corporate Social Responsibility or CSR funds, collected from various companies, as either a penalty for the violation of environmental norms or as a security to restore the nature if any harm is done. However, debates continue as the companies themselves are struggling with profits and productivity issues and in the light of the recent events, it would be slightly unfair to tax the haves excessively, when it is their fight to survival as well. The corporate rely on the society and

1360 Ibid.
1361 Ibid.
communities for their operation and if the society is hit, so is the company.

Almost 10 million employees in the USA have applied for unemployment benefits, labelling it as one of the worst crisis, which was not even the case of Recession of 2009.1362 Coupled with a debt based economy, where everything runs on mortgage, there have been huge protests against the lockdown of various states and various industries in America. People need to go back to work, because almost everyone has loans to pay. The government authorities are advised to also pay people in this crisis of unemployment. According to the US economic relief package, Washington will send to most households, one-time payments of $1,200 per adult—plus $500 per child—and expand unemployment benefits, increasing the weekly payments for eligible workers, including independent contractors and the self-employed, by $600 for the next few months. The new law also delays tax filing, suspends wage garnishing among those who have defaulted on their student loans, and establishes a four-month eviction moratorium among landlords with mortgages from federal entities.1363 Despite these massive steps, it may not be enough as these are temporary measures and do not account for a long-term relief.

Denmark and other northern-European countries, on the other hand, are taking a slightly different approach. Their governments are directly paying businesses to maintain their payrolls to avoid the sort of mass layoffs and furloughs that are already happening across the United States. The main advantage of this approach is that restaurants, factories, and so on don’t have to go through the bureaucratic rigmarole of firing thousands of workers and then rehiring them all when the economy bounces back and also those workers don’t have to waste time applying for jobs, either. It is as if they are putting their entire economy in the freezer for three months.1364

Another suggestion is to now expand the parameters which evaluate the index of development and not just measure the economic progress of the country only through the gross domestic product or gross National product. In 1972, Bhutan’s King Jigme Singye Wangchuck invested the phrase “Gross Happiness Product” which sought to recognise new parameters for a comprehensive study of the development of an economy. These parameters include time use, living standards, good governance, psychological well being, community vitality, culture, health, education and ecology.1365 These parameters were evolved to study the overall development of an economy that goes beyond numbers and statistics. The same can be adopted by countries all over the world.

Conclusion:

To conclude, the pandemic has definitely coerced the nations to go beyond the normal and usual economic practices and policies and have necessitated the evolution of policies and attitudes that maybe more

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1364 Ibid.
1365 Supra at 3
useful in combating such outrageous situations in the near future.

REFERENCES:

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IMPACT ON NON-PAYMENT OF PART OR ENTIRE OF THE SALE CONSIDERATION

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Abstract
Sale Consideration means the total aggregate sum of the Consideration and the Deferred Consideration which is paid by the Purchaser to the Seller in regard to the Transfer of his right during an execution of a sale deed. The price paid or promised or part paid and part promised indicates the actual payment of the whole of the price at the execution of the sale deed and is not sine qua non for completion of the sale deed thus price constitutes an essential ingredient which specifies the interest of the seller to the transaction of the sale.

Key words: Sale, Consideration, Purchaser, Seller, Transfer, Sale Deed

I. INTRODUCTION
A sale is a transaction which constitutes between two or more parties in which the buyer agrees to sell the moveable or immovable assets to the seller for a specified amount. A sale process is said to be completed only when both the parties are competent to make a transaction for the specified amount. To constitute a sale, a transaction must involve or undergo the exchange of goods and services or specified payments between the parties. Where if one party transfers a moveable or immovable asset to the other party without any consideration where it is said to be considered as a donation or as a gift. A sale of immovable property just states as a transfer of ownership in exchange of price paid or promised or part paid and part promised indicates the actual sale in accordance to Transfer of Property Act, 1882.

II. SALE OF IMMOVABLE PROPERTY UNDER TRANSFER OF PROPERTY ACT, 1882
A sale of immovable property undergoes different modes of in which it can be transferred. A transfer of immovable property may attract by way of Sale, exchange, lease, gift, mortgage etc. Where each mode of transfer undergoes its own recognition and its significance in its own process. Section 3 of the Transfer of Property Act specifies the meaning in regard to the key terminologies. “Transfer of Property” means an act by which a living person conveys property, in present or future, to one or more living persons, or to himself and one or more other living persons, and “to transfer property” is to perform such act.

Sale is a transfer of ownership for a money consideration. It implies an absolute transfer of all rights in the property sold. No rights in the property sold are left in the transferor.

Section 54 of the Transfer of Property Act defines “sale” and where the provisions also specify how a sale of an immovable property should be executed. The Section reads as follows – “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised.

1366 Section 5 of the Transfer of Property Act, 1882.
1367 Dr. Avatar Singh, Prof. (Dr.) Harpreet Kaur, Textbook on the Transfer of Property Act, 6th Edn. Lexis Nexis, pg. 183.
1368 Section 54 of the Transfer of Property Act, 1882.
2.1 SALE HOW MADE
Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immovable property of a value less than hundred rupees, such transfer may be either by a registered instrument or by delivery of the property. Delivery of tangible immovable property take place when the seller places the buyer, or such person as he directs, in possession of the property.\(^\text{1369}\)

2.2 CONTRACT FOR SALE
A contract for the sale of immovable property is a contract that a sale of such party shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.\(^\text{1370}\)

III. ELEMENTS OF SALE
1. Transfer of Ownership – Ownership is the aggregation of all the rights and liabilities in a property. When there is the transfer of ownership, the aggregation or total of all rights and liabilities in a property are transferred from transferor to the transferee.
2. Money Consideration – The “price” that is referred to in the provision connotes to money consideration. Where the ownership of property is transferred in consideration for money it amounts to sale but if it is transferred for anything else which clearly amounts to exchange.

Section 54 of the Act provides that contract for sale of itself does not create any interest or in charge on such property.\(^\text{1371}\)

IV. ESSENTIALS OF VALID SALE
The essential elements of a sale are:
1) Parties
2) Subject – Matter
3) Money – Consideration
4) Conveyance

1) Parties – When we deal with chapter of sale the basic consideration where it should be accomplished is the parties. Where there must be at least two parties to a sale are the transferor who is called as a seller / vendor, and the transferee is known as the purchaser / buyer.\(^\text{1372}\) In regard to a valid sale, both the seller and the purchaser must be competent at the time of execution of sale. The seller must be competent to contract, i.e., he must be of sound mind and must have attained the age of majority.\(^\text{1373}\) A contract of sale must be based on a mutual agreement between the parties.\(^\text{1374}\) Besides that, he must be the owner of the property or should have an authority to which the said property he is going to sell.\(^\text{1375}\) The seller must have a legal title to it only then he has the authority to sell the property.\(^\text{1376}\) Similarly, an agent having a power of attorney to sell the property can also sell it without being the owner of the property but in regard to the authority given to him. Once the sale is executed in regard to the authority given by general power of attorney, without obtaining the requisite permission of the court, the sale deed would be considered as an invalid and would not confer any title on

\(^\text{1369}\) Ibid.
\(^\text{1370}\) Ibid.
\(^\text{1371}\) Bhabani Sarma v. Narayan Sarma, AIR 2003 Gau 171
\(^\text{1372}\) Shakeela Bano v. Mohd Bismil Saraj, AIR 2006 MP 192
\(^\text{1373}\) Misabul Enterprises v. Vijaya Srivastava, AIR 2003 Del. 15
\(^\text{1374}\) Gangotri Bal v. Jeevarkhan Lal, AIR 2006 Chh 88
\(^\text{1375}\) Arjuna Subramanya Reedy v. Arjuna China Thangaavelu, AIR 2006 AP 362
the transferee. But in regard to the Power of Attorney executed in favour of the holder expressly authorizes him to transfer the property he would be a competent seller. A transferee must be competent to receive the transfer and he shall not be disqualified by law in regard to the acceptances of the property transferred.

2) **Subject-Matter** – Section 54 of the TP Act only deals with the transfer/ sale of immovable property. Immovable property includes tangible and intangible and it includes land, the benefits arising out of land and the things attached to the earth except standing timber, growing crops, and grass. When a property is transferred where it should establish an intention to sell the property to the purchaser for a consideration, the transfer includes the delivery of the property along with the ownership of that property.

3) **Money-Consideration** – The “Price” is an essential element of sale. In regard to the property on which the contract to sale is made the price must be ascertained for the property to be transferred. The price must be paid effectively at the time of execution of sale, before it in advance or after the sale. The price paid and price promised to stand on equal footing in regard to the process and transaction of a sale. There is no question of illegality, or contrary to public policy if both parties agree that the payment of the considered shall be postponed in certain events, or that it shall not be paid at all if the property is lost.

Non-payment of sale consideration does not vitiate a sale if it is promised to be paid. But if a declaration is made in regard to the consideration has already been paid and it is found to be incorrect, the transaction does not amount to a sale. Where in this case there was a concurrent finding that no sale consideration was paid and it was based on cogent reasons. The sale was not taken into consideration and it was set aside. A transfer of a property would not amount to sale if there is no price is paid or promised or partly paid or promised. The transaction under sale without the consideration will not amount to gift provided evidence is adduced for it nor it falls into the category of exchange if the transferor does not transfer ownership of the property.

Therefore, a stipulation in a sale deed that the price will be paid in one year, provided that the possession is obtained within that time, and that if possession is not so obtained then the payment of the price will be postponed, or that in the occasion of the vendee not getting the property, the price will not be paid at all. In all of the above-mentioned situation, the deed is a sale deed within the meaning of the provision.

If from the recitals in the sale deed it appears that title would only pass once after the payment of full consideration is received, the inference would be in accordance to consideration is paid, there is no transfer.

4) **Conveyance** – Section 54 of the Act has provided two modes in regard to the transfer of an immovable property.

i. Delivery of Possession

ii. Registration of sale deed

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1376 Lakwinder Singh v. Paramjit Kaur, AIR 2004 P&H 6
1377 A Bhagyamma v. Bangalore Development Authority, Bangalore, AIR 2010 Kar. 63
1378 Section 3 of the Transfer of Property Act, 1882
1379 Bhartu v. Naval, AIR 2012 All 91
1380 Umakanta Das v. Pradip Kumar Ray, AIR 1983 Ori 196
i. Delivery of Possession – Where if the property falls under the ambit of tangible immovable property and of the value of rupees one hundred and upwards transfers can only be made through a registered instrument. In regard to the transfer of immovable property which uphold the value below one hundred rupees can be transferred through a registered instrument or by delivery of the property and where this stands as optional.\textsuperscript{1381} A delivery of the tangible immovable property takes place only when seller puts the buyer or any such person where as he directs in possession of the property. In a sale, these requirements of law must take place with the help of registration, attestation and a document written called as the sale deed is executed the transfer of immovable property in form sale is completed and will be binding on both of the parties.\textsuperscript{1382}

ii. Registration of sale deed – Where the value of the tangible immovable property is rupees one hundred or upwards, the transfer of sale of such property requires registration of the deed. Where if the property falls under the ambit of intangible immovable property of any valuation, it shall require registration for completion of sale.

A transfer of an immovable property can only be effectively executed through a registered document, mere making an agreement of sale or executing of power of attorney would not transfer right, title or interest of an immovable property.\textsuperscript{1383}

Where in the case of Bishundeo Narain Rai v. Anmol Devi\textsuperscript{1384} the Supreme Court has clearly stated that where a combined reading of Section 8 and 54 of TP Act suggests that through an execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be only on terms and conditions which has been laid down in the sale deed indicating the intention of both parties for the sale. The intention of the parties can clearly be gathered from the averments which has clearly been laid down in the deed itself or by other attending circumstances. The registration act as a prime facie proof or as the intention of the seller that he intends or agrees to transfer the ownership on the date of execution of the deed. The completion of the sale process only takes place when it has been taken place through a registered instrument and where the sale deed transferring the immovable property of the value of rupees one hundred and upwards requires registration under Section 71 of the Indian Registration Act, 1908.

V. OBJECT OF A SALE DEED

A sale deed acts as an evident instrument which establishes the title, interest and ownership over the property. This instrument also acts as an essential document in further sale by transferee as it establishes his proof of ownership of the property. A transfer of sale deed is executed only in accordance to the sale agreement which has been executed prior to the execution of the sale deed, and after compliance of various terms and conditions which has been mentioned in the “agreement to sale” as agreed by both parties i.e., transferor and transferee. The buyer should clearly ensure the title of the property before the execution of sale deed and it should be the absolute

\textsuperscript{1381} Arjuna Reddy v. Arjuna C Thanga, (2006) 7 SCC 756
\textsuperscript{1382} Inder Chand v. Sethi, AIR 2006 Raj 251
\textsuperscript{1383} G. Ram v. Delhi Development Authority, AIR 2003 Del 120
\textsuperscript{1384} AIR 1998 SC 3006
responsibility of the purchaser to ensure whether any charge or any encumbrance on the particular property and in case of purchaser is purchasing the said property subject to such encumbrance. Further, subject to the agreement between both the parties, all the statutory considerations or payments should be paid such as property tax, cess, water charges and maintenance charges etc. should be obtained before the execution of the sale deed and the transferor should obtain requisite clearances, permissions and approvals in regard to the transfer or sale of the said property prior to execution of the sale deed.

**VII. DIFFERENCE BETWEEN AGREEMENT TO SALE AND SALE DEED**

**Agreement to sale** - An agreement which establish that the sale of the property is to take place in future on the terms and condition which will be has been laid down in the agreement. 

In agreement to sale the no interest, right or ownership of the property does not amount to transfer to the buyer. 

Section 54 of the TP Act define that contract for sale or an agreement to sale of immovable property shall take place only in accordance with the terms and conditions are settled between the parties and does not require any registration. It does not create any interest in, or charge on such property.

**Sale-deed** - A sale deed establishes a transfer of interest, right and ownership of the immovable property. Sale deed establishes legal title of the purchaser in regard to the absolute interest of the transferor passes to the transferee.  
A sale mandates registration of an immovable property is of the value of rupees one hundred and upwards. Agreement to sale – Delivery of possession, not confer any right, title or interest in the property, however, it certainly enables the agreement holder to protect his possession, in terms of Section 53-A of the TP Act, subject to completion of the necessary requirements of law. An agreement holder, who has been ready and willing to perform his part of the contract and has taken step in furtherance thereto, can protect his possession.

To constitute a valid sale, ownership has to be transferred for the price paid or promised to be paid or partly paid and partly promised. Therefore, future payments of price does not arrest the passing of title by a registered instrument. If the parties so contract it may be postponed, unless the payment of full consideration is made. In the absence of contract, the title gets conveyed, as soon as the document, with the stipulation of consideration, is registered. The mode of transfer of ownership in view of tangible immovable property, above rupees one hundred can be made only by a registered instrument.

"Agreement to sale" is not same as “Sale”- It is no doubt true than an “agreement to sale” is not the same as “sale” and the titled to the property, agreed to be sold, stills vests with the seller (only in accordance with agreement to sale ) but in case of sale title to the said property vests with purchaser. An “agreement to sale” is an

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1386 Raheja Universal Ltd v. NAC Ltd., (2012) 4 SCC 148
1387 Devinder Singh v. Fateh Jung Singh and Others, AIR 2018 P&H 70
1388 G. Hampamma v. Kartigi Sajivalda Kalingappa and Anr, 1990 AIR (Karnataka) 128
executory contract, whereas sale” is an executed contract.  

VII. MODE OF EXECUTION TO SALE

Once a sale deed is executed the process of sale of an immovable property will require to undergo the process of registration for completion of the sale. As stated, writing, attestation and registration are the major principles to constitute a valid sale of a property, whose value is more than one hundred rupees. Transfer of ownership cannot take place without the process of registration. When the value of the property is of a lower value the sale can be accomplished through delivery of the property. In regard to the minimal value, the formality of attestation and registration does not stand as a main criterion and where this stands as a discretionary part of parties. As stated, once the major principles are fulfilled the transfer of immovable property in form of sale is completed and where both parties are binding to the sale executed. Therefore, in regard to a suit for presumption can only be filed once the process of registration will be considered as premature. Once registration takes place, the ownership transfers effectively from the date of execution of the sale deed, unless we find a there is an intention of the parties to contrary. As the courts have been stating that in many cases regarding the general rule of passing of ownership is only through the process of registration and where the registration process clearly establishes the intention of the both the parties i.e., transferor and transferee as expressed in the contract. Where there are few circumstances in which intention cannot be gathered through the registered documents or appears ambiguous, in those situations where an extraneous evidence is admissible for the courts to draw a conclusion. Where Section 17 of the Act clearly states that the documents which is to be registered.

VIII. NON – PAYMENT OF SALE CONSIDERATION

IN REGARD TO A CONDITIONAL SALE DEED OF SALE

Where the payment of price does not attract as the main price to a validity of the sale, i.e., it is not sine qua non for the process of completion of a sale. In the case of Hara Bewa v. Banchandital the court has clearly stated that the whole interpretation in regard to the Non-payment of a sale consideration can be clarified through the recitals in the sale deed which are indecisive, surrounding circumstances or conduct of parties are the relevant factors to decide the validity of sale.

When a sale deed was registered with the “condition” that the right, title and interest will only pass once the payment of balance consideration is paid. As the sale condition was never fulfilled, hence no legal right, title and interest will be passed and where this never amounts to valid sale.

1389 B.R Koteshwara Rao v. G. Rameswari Bai @ G. Rameswari Devi and Anr, 2004 AIR AP 34
1392 Ram Sran Lali v. Domini Kuer, AIR 1961 SC 1747
1393 Kameshwar Choudhary v. State of Bihar, AIR 1998 Pat 141
1394 Kaliaperumal v. Rajgopal, AIR 2009 SC 2122
1395 Prem Singh v. Distt Board of Rawalpindi, AIR 1934 Lah 917
1396 Bishudeo Narain Rai v. Anmol Devi, AIR 1998 SC 3006
1397 The Registration Act, 1908
1398 Shiva Narain Sab v. Baidya Nath Tewari, AIR 1973 Pat 386
1399 AIR 1957 Ori 243
This can be sustained by way of illustration –
Where A and B registered a sale deed on a condition that once the balance amount is paid by B to A as per the terms and condition that the right, interest and title will pass to B. As the said amount was never paid in accordance to the sale condition, hence no legal right, interest and title will be passed, which cannot be declared in their favour when the second part of the registration sale deed regarding payment of balance amount was not fulfilled within a stipulated period, as the time is the essence of the contract. When the right, interest and title did not pass, then possession of the suit land cannot be delivered.\textsuperscript{1400}
So, in regard to a "conditional sale deed" it is a major factor that to take a note of it through the recitals of the sale deed it appears that the title would pass after payment of the full consideration, the interreference to this would be until the condition is fulfilled the transfer would not take place. Even though the sale transaction is not valid, transfer is not affected on the view of non-payment of sale consideration but that itself will not get the registered sale deed cancelled automatically before the registering authorities namely sub-register unless and until the affected person invokes the provision of Section 31 of the Specific Relief Act for cancellation of the registered sale deed on the ground that sale is not valid for the non-payment of sale consideration as per the terms and condition in accordance the sale deed. In good faith if the vendor has delivered possession to the purchaser on the date of sale deed, if the purchaser fails to fulfil the condition, the vendor is at his liberty to seek for cancellation of the sale as well as for re-
delivery of the possession from the purchaser.

IN REGARD TO A NON-CONDITIONAL SALE DEED OF SALE CONSIDERATION
Where in non-conditional sale deed specifically in regard to the "payment or sale consideration", where the registration has been taken place and legal right, interest and title has been transferred in accordance to the sale deed. Price paid or part paid and part promised clearly states that the actual payment of whole of the price at the execution of the sale deed and is not \textit{sine qua non} for completion of the sale deed. Thus, price constitutes an essential ingredient in process of transaction of a sale. Although, the whole consideration amount is not paid and but if the document states that the price has been received in accordance to "understanding of the parties" or in "good faith" if executed and thereafter duly registered, then the sale would be considered as a valid sale and also transfers the legal right, interest and title of the property to the purchaser.

Where in the case of \textit{Vidyadhar v. Manikrao},\textsuperscript{1401} the Supreme Court held that "price paid or promised or part paid and part promised" indicates that payment of the whole of the price at the execution of the sale deed and is not \textit{sine qua non} for completion of the sale. Even if the whole of the price is not paid, but the document is executed, and thereafter, registered, the sale would be complete, and the title would pass on to the transferee under the transaction.

Transaction having been executed through a registered instrument, was in the public domain, and in the knowledge of the vendor right from the beginning. The non-payment of part of the sale price would not

\textsuperscript{1400} \textit{Ramesh v. Kasi Rao @ Kasi Prasad and Anr, 2003 51 BLJR 549}

\textsuperscript{1401} (1999) 3 SCC 573
affect the validity of the sale. Once the title of the property has already passed, even if the balance sale consideration is not paid, the sale could not be invalidated on this ground. In order to constitute a “sale”, the parties must intend to transfer the ownership of the property, on the agreement to pay the price either in present or in future.

The intention is to be gathered from the recitals of the sale deed, the conduct of the parties, and the evidence on record. In regard to this we just need to observe that the vendor has already agreed to the transfer and where the appearance of the parties clearly states the interest of the vendor to sell the property to the purchaser and anyhow this not brought into to the dispute.

The only dispute now sought to be raised is that the vendor has not received the entire sale consideration or part of sale consideration is not paid and where this does not provide a ground for cancellation of the sale deed.

The remedies lie with regard to the non-payment of sale consideration in a conditional sale deed, the vendor is at his liberty for cancellation of sale deed and in case of good faith if the vendor has delivered the possession on date of sale deed he has the authority for re-delivery of the possession from the purchaser. In regard to non-conditional sale deed of sale consideration the remedies lie with vendor is to only seek for recovery of the balance amounts and cannot seek for cancellation of the registered sale deed.

CONCLUSION
A sale deed plays a vital role in process of transfer of an immovable property and where the deed acts as an evidencing instrument in regard to transfer of right, interest and title of the property. The intention of the parties can be clearly gathered in regard to the averments in the sale deed itself or by other occurrences. It is the responsibility of the buyer to ensure the title of the property and also to check whether any encumbrance on the property and check the status of the property at the sub-registrar’s office before the execution of the sale deed. The remedies lie with regard to the non-payment of sale consideration in a conditional sale deed, the vendor is at his liberty for cancellation of sale deed and in case of good faith if the vendor has delivered the possession on date of sale deed he has the authority for re-delivery of the possession from the purchaser. In regard to non-conditional sale deed of sale consideration the remedies lie with vendor is to only seek for recovery of the balance amounts and cannot seek for cancellation of the registered sale deed.

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ENVIRONMENT PROTECTION: INDIAN ENVIRONMENTAL LAWS AND THE NEW CHALLENGE OF COVID-19 PANDEMIC

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Abstract
Since time known, man has utilized the nature and its resources in a highly exploitative form. This fact often arises in our consciousness and since decades, in every era and every continent globally, scholars, politicians, government and to that matter science have time and again published various reports, agendas, bilateral-multilateral meetings to tackle the environmental crisis and make the world a better place for the future. Today, the Covid-19 global pandemic that has shattered the world’s economy, general living and has made everything come to a halt, has again forced us to re-think, realize and decide our actions and steps that we urgently need to start working on, in order to avoid such global crisis situations in the future.

Post-pandemic, this is possible only through the collaborated efforts of the nations of the world, and with a dedicated intention to change our policies, legal framework and efforts towards securing and protecting our environment. Even though challenges are many, but as it has been said “The Ultimate Measure of Man is not where he stands in moments of comfort and convenience, But where he stands at Times of Challenge”.

Keywords: Environment Degradation, Human Exploitation, Rethink-Restore, Collaborated Efforts, Sustainable Development, Change in Policy and Framework.

1. INTRODUCTION:
We know the answer to the Question: “What is Environment Protection?” since a long time now. There has been formulation of domestic and international policies, frameworks, guidelines, treaties, summits, agreements, judgments by the Apex Courts as well as special tribunals pertaining to environmental aspects, not just in India but in every other nation of the world. Also, it is quite astonishing that, it is not only us, due to the so-called ‘Indian-easy attitude’, but the same problem persists in every other and ‘more developed and well equipped technological economies of the world. The two questions that need to be analyzed are:

1. What have been our historical scenario and the current framework?
2. How Covid-19 pandemic has brought a new challenge and the need to shift our efforts globally?

Environment Protection is not a new challenge and need in front of us. There has been formulation of several specified acts, guidelines through legislature, institutions have been set up to guide and formulate environment protection policies and act as a watch dog for its implementation. The Courts from time and again, have guided and ordered the lethargic government officials and institutions to realize the need of securing environment and working on the same dedicatedly and has taken cognizance of any failure by any institution or body for the same. However, it is still not achieved truly and the problem still persists due to non-seriousness and unawareness among the general public, corruption and

1402 Martin Luther King Jr., Strength to Love (1963)
back-door entry routes in institutions and ways of exploitation of loopholes in laid down codes of law.

Often it is felt that, there are institutional drawbacks, lack of cognizance and building up of proper-effective principles to deal with the problem of protection and improvement of environment and natural habitat, especially when we take India’s outlook. However, it is to note that even the Father’s of the Indian Constitution, realized the fact that, India is a nation of cultures and traditions, which has insights of protecting and worshipping, mother nature since ancient periods, and which still today, can be felt and seen more closely in the tribal areas and by analyzing the life of tribal community in India.

Also, the Indian Courts from time to time, have given land mark judgments that have built the framework on which the environmental protection policies and guidelines have been formulated, institutions have been setup to ensure their compliance and general principles have been incorporated in order to ensure liability to the offenders. It is important to get a note of the developments and cognizance that the judicial courts, especially the guardian of the constitution of India has taken from time to time, in order to come up with the drawbacks and loopholes in our current scenario, which needs to be improved for the future.

2. Historical Developments in Indian Environmental Protection:
There have been several instances when the guardian of the constitution, The Supreme Court of India has come with amendments, incorporation of principles and taking cognizance of the need of protecting and sustaining the environment for the future, and in times of non-compliance with the provisions, have imposed penalties and directions for the same to both Individual and the State. In Sachidanand Pandey V. State of West Bengal & Ors, the apex court made a settled law that, whenever a problem / issue pertaining to ecology will be brought before the court of law, then the court shall bear in mind, Art. 48-A and Art. 51 A (g) of the Constitution of India, which specifically provide that “The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country” which has been incorporated within the Directive Principle of State Policy and “to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures” which has been incorporated in Fundamental Duty of the citizen of India, respectively.

In T. Damodar Rao & Ors V. Special Officer, Municipal Corporation, Hyderabad, the Apex Court held that the use of land by Income Tax Department and LIC was illegal and contrary to law and issued mandamus restricting respondents from raising any structure on the questionable land, incorporating that environment pollution and its spoliation is slowly poisoning and polluting the atmosphere, should also be regarded as a violation of Art.21 of the Constitution of India.

In M.C Mehta & Anr. Etc V. Union of India & Ors. Etc, popularly known as

1403 AIR 1987 SC 1109, 1987 SCR (2) 223
1404 Ins. By the Constitution (Forty-second Amendment) Act 1976, sec. 10 (w.e.f. 3-1-1977)
1405 Ins. By the Constitution (Forty-second Amendment) Act 1976, sec. 11 (w.e.f. 3-1-1977)
1406 AIR 1987 AP. 171
1407 1987 AIR 965, 1986 SCR (1) 312
Delhi Gas Leak case/ Oleum Gas Leak Case, a historical judgment that brought in picture the basics of environment protection standards and doctrines which are:

a. **Public Liability**- The Apex Court, arrived on the notion of granting remedial relief, in case of a proved infringement of a fundamental right U/Art.21, and widened its ambit by including power to award compensation as well as considering environmental aspect under it. Also, added a liability in Tort Law, for harms caused by pollution.

b. **Principle of Absolute Liability**- This doctrine made, the industries engaged in hazardous activities, absolutely liable for the harm caused and this made several changes in the liability aspects and compensation to be provided to the affected person.

c. **Deep pocket Principle**- It is an idea, that the risk and liability of a hazardous activity should be borne by the person who is economically in a good position.

Also, it is quite worthy to note that, after the Oleum Gas Leak case and later, The Tragic Bhopal Gas Leak Case, amendments were made in The Factory Act of 1948, which incorporated a new chapter- ‘Hazardous Industries’ and later, The Public Liability Insurance Act of 1991, was passed with the motive – “An act to provide for public liability insurance for the purpose of providing immediate relief to the persons affected by accident occurring while handling any hazardous substance and for matters connected therewith or incidental thereto”

In Municipal Council, Ratlam V. Shri Vardhichand & Ors, the apex court held that in case of Public Nuisance, the presence of Sec.133, Criminal Procedure Code of 1973 must be felt and any contrary opinion is contrary to the Law, and also provided that the plea of lack of funds by a public body shall not be entertained by the courts and the government, in order to present a mockery of statutes and provisions in front of the public.

In Rural Litigation and Entitlement Kendra, Dehradun V. State of Uttar Pradesh & Ors, wherein the petitioners filed a writ petition against the Limestone mining operations in the Doon Valley, which lead to heavy deforestation, landslide calamities and water shortage. The Apex Court ordered closing down of these mining operations in the valley and highlighted the concepts like- “Right To Breath” and “Sustainable development”. Following the order, A forestation program was also conducted with the help of local villages and civil society groups in the valley.

Many a times, a common problem arises as to when and how shall the industries and their operators shall know that the industry or work engaged is causing or has started causing environmental degradation and harming the environment. Also, it is necessary that before one can come up with solutions to tackle the problem, one needs to get to know the cause and reason behind the aforesaid problem. Thus for the same, “Environment Impact Assessment” came into picture. This was evolved in, Indian Council for Enviro-Legal Action Etc V. Union Carbide Corporation Etc. V. Union of India Etc., 1980 AIR 1622, 1981 SCR (1) 97

1409 The Factory Act, 1948 Act No. 63 of 1948 1* [23rd September 1948]
Union of India & Ors. Etc. where the Court identified that “Precautionary Principle” and “Polluter’s Pay Principle”, are the two important pillars and concepts to be recognized in order to achieve sustainable development, take measures in advance by taking precautions and cognizance of the damage that is likely to cause to the environment and in case of such damage, harm to the environment, not only compensation is to be awarded, but also the Cost of Restoration, is borne by the polluting industry or person. Also, in one of the cases, pertaining to the same principles, the court demarked a specific time limit to formulate coastal management plans by the coastal states and banned industrial and construction activity within 500 meters of high tide lines.

In M.C Mehta V. Union of India, which popularly came to be known as “Ganga Pollution Case”, E.S. Venkataramiah J. while taking cognizance from the issues highlighted by the petitioner over the pollution of the river Ganga, due to the trade effluents of large industries on the bank as well as the sewage of towns and cities nearby have lead to a potential degradation of the water body, for which the court directed, the industries to develop appropriate treatment plants before discharging them and secondly, ordered of closing various tanneries in Jajmau, Kanpur and mandated the consent to be taken from state pollution control board before such establishment and the others could be allowed only after they kept the plants in sound condition. Also, through another writ petition filed in, M.C Mehta V. Union of India & Ors., popularly known as “Taj Trapezium Case”, concerns were highlighted over the toxic emissions from industries like Mathura refinery, iron foundries, glass and chemical industries, hampered and were damaging the marble by coating it with a yellowish appearance. The court, after taking cognizance of the seriousness of the matter, due to the reputation of the Taj, as a UNESCO world heritage site, it ordered reallocation of several industries outside the trapezium, banning of coal and coke based industries, ordered industries to switch over to CNG, directed the U.P pollution control board to take note of the polluting industries and also directed the government, to allocate funds for maintaining the greenery around Taj.

Order For Environmental awareness and Education- In M.C Mehta V. Union of India & Ors., in which the following directions were given by the Honorable Court:

a. Cinema Theaters shall advertise at least two slides containing information and messages on environment, free of cost and failing to do so, shall result in cancellation of their license.

b. The Television Industry and All India Radio shall broadcast information to spread awareness for environment in national and regional languages with a view to educate people of their social obligation towards the environment.

c. Environment was made a compulsory subject to be taught till senior secondary level from the academic session of 1992 and University Grants Commission (UGC), also introduced the subject in higher education too.

‘Public Trust’ is a concept which provides that, the state or the government shall protect the resources and property of the

1414 1996 AIR 1446, 1996 SCC (3) 212
1415 1988 AIR 1115, 1988 SCR (2)530
1416 1987 AIR 1086, 1987 SCR (1) 819
1417 Writ Petition (Civil) No. 860 of 1991 (22nd Nov. 1991)
public or for common utilization of all, and shall not use the same of any commercial or beneficial purpose of its own. In context of the same, the apex court in, M.C Mehta V. Kamal Nath & Ors\(^{1418}\), evolved the concept of public trust in environmental aspect and provided expressly, the State’s duty to protect and act in furtherance of public trust doctrine in India also, thus quashed the lease granted to the motel on the banks of river Beas and the approval of Ministry of Environment and Forest was cancelled. Also, the court ordered that the Himachal Pradesh Government shall restore the area in its natural condition, and ordered the motel to pay compensation through costs of restoration of the environment.

\(^{3}\) A Brief Overview of Indian Environmental Law:

In broad terms, the Indian environment laws and framework of policies and institutions seek to:

- Protection of the environment.
- Reverse Climatic Changes.
- Achieve Zero Carbon Economy.

A. General Protection

The infamous, Bhopal Gas Tragedy\(^ {1419}\), was the turning point in India’s environment outlook wherein the need was felt of a comprehensive and generalized legal code and legislation that acted as an umbrella consisting in harmony, the connectors for various previous specific pollution control legislations like the Air Act and the Water Act. For the aforesaid purpose, The Environment Protection Act\(^ {1420}\) was enacted with the objective – “An Act to provide for the protection and improvement of environment and for the matters connected there with”. Under the act, Pollution Control Boards (PCBs) were established at the central and state level in order to prevent, control and foresee environment pollution in India.

Also, The National Green Tribunal (NGT) was established under the National Green Tribunal Act\(^ {1421}\) with the objective – “An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto”.

B. Specific Protection and Attention

While considering specific attention to be given to the different kinds of pollution, that tend to happen on a daily routine and that to the matter of fact, at a very increasing level, various acts, legislations and regulations have been formulated from time to time with their own objectives and aims to be accomplished. For instance, in order to tackle the Problem of ‘Air Pollution’, the apex court has regarded – The Fundamental Right to breathe in a clean and safe environment under the purview of Art.21 of the Constitution of India. For the same, The Air (Prevention and Control of Pollution) Act\(^ {1422}\) with the objective- “An act to provide for the prevention, control and abatement of air pollution, for the establishment, with a view to carrying out the aforesaid purposes, of Boards, for conferring on and assigning to such Boards powers and functions relating

\(^{1418}\) (1997) 1 SCC 388


\(^{1420}\) Act No.29 of 1986 [23\(^{rd}\) May 1986]

\(^{1421}\) Act No. 19 of 2010 [2\(^{nd}\) June 2010]

\(^{1422}\) ACT No. 14 of 1981 [29\(^{th}\) March 1981]
thereto and for matters connected therewith”.

Also, for another drastic and significant problem of tackling and preventing water pollution, especially in a country like India, which such multi-utilization of the water bodies in rural-urban-industrial-domestic and every other sector, the following steps were taken:

1. **The Water (Prevention and Control of Pollution) Act**
   - The act was brought with the objective: “An Act to provide for the prevention and control of water pollution and maintaining or restoring of wholesomeness of water, for the establishment, with a view to carrying out the purposes aforesaid, of Boards for the prevention and control of water pollution, for conferring on and assigning to such Boards powers and functions relating thereto and for matters connected therewith”.

2. **Ganga Plan of 1986** – The said plan was launched, with the main objective to improve the water quality by Interception, Diversion and treatment of domestic sewage and prevent toxic and industrial chemical wastes from identified grossly polluting units entering into the river.

3. **National water policy** – The first policy was adopted in September, 1987 which was reviewed and updated in the year 2002 and later again in the year 2012. The policy seeks to establish a standardized national information system with a network of data banks, resource planning and recycling for providing maximum availability, impacts of projects on human settlements and environment, regulate exploitation of ground water, settling water allocation priorities.

4. **Other Significant measures** – Coastal Regulation Zones under the Environment Protection Act, in order to manage and prohibit industrial and other activities in the coastal zones and nearby coastal areas. Secondly, establishment of Godavari Water Disputes Tribunal and Krishna Water Disputes Tribunal, in order to tackle interstate water allocation and distribution controversy.

In respect of Forest and Wildlife management, conservation and enhancement in different parts of India, various enactments were formulated for the same, from British-Raj period to Post-independence. A significant view was also taken that India has been a country of religious culture and heritage, which has derived many of its ancient norms, traditions, festivals, procurement of daily essentials and various other things from the natural habitat as well as many wildlife entities have been part of the religious traditions since decades. The foremost was the enactment of **Indian Forest Act** which was incorporated during the British regime with the objective – “An Act to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest produce”. Post independence, two significant legislations were passed, firstly, **Wild Life Protection Act** with the objective – “An Act to provide for the protection of wild animals, birds and plants and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental securities of the country”. It has provided schedules which give varying degrees of protection. The aforesaid Act was amended in the year 2002 and which

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1423 ACT No. 06 of 1974 [23rd March 1974]
1424 Act No. 16 Of 1927 [21st Sept. 1927]
1425 Act No. 53 of 1972 [9th Sept. 1972]
came into force in 2003, made punishments and penalty of offences under the Act more stringent. Second, *Forest (Conservation) Act*\(^{1426}\) which came into force with the objective – “An Act to provide for the conservation of forests and for matters connected therewith or ancillary or incidental thereto”. Later amendments were made in the Act by way of the Amendment Act of 1988 and later in the year 1992, which made provisions for allowing some non-forests activities in forests, without cutting or by limited cutting with prior approval from the central government.

C. Tackling Modern Environmental Problem. 

The Word **WASTE** has been the most common as well as at the same times the most difficult problem to tackle with in today’s world. Surely this can also be regarded as one of the very significant reasons behind degradation of environment. Although various enactments and legal rules, protocols have been formulated over the years, yet this problem not only persists but at the same time continues to rise at a very higher rate. In India, in order to ensure safe and effective disposal and handling of various wastes emerged from different industries, many enactments were formulated like, Batteries (Management and Handling) Rules 2001, Hazardous Waste (Management and Handling) Rules 2003, Construction waste Rules 2016.

Also, in the context of wastes, it is important to highlight a new form of wastes that is rapidly expanding in this modern-technological oriented world, especially from last 3 decades or so, is the problem of “**E-waste**”. It is the waste generated from disposal of used Electrical & Electronic Equipments (EEE’s) in all forms like Temperature exchange equipments-Refrigerators, AC’s etc.; Screens and monitors; Large and Small electronic equipments and other small IT and Telecommunication equipments. Also according to an UN Report\(^{1427}\) the projected amount of E-waste to be generated by the year 2025 and 2030 stands 65.3 Mt and 74.7 Mt respectively, if it tends to go at the current rate. Another important fact that is to note, is that this E-waste is not only the sole outcome of the modernized developed societies of America and Europe only. The same report provides that in the year 2019, Asia produced the highest amount of E-waste of 24.9 Mt, followed by America – 13.1 Mt and Europe – 12 Mt.

Today about only 15 to 20% of this E-waste is taken up and documented for proper recycling and disposal. The larger portion of 80 to 85% ends up to be dumped, traded or recycled through non-environmental ways and many of the portion left is even left over as it is without any disposal. This E-waste not only occupies a larger portion to be treated with, but also releases about 95 Mt of CO2 equivalents in the atmosphere, about 50 tons of mercury and 70 to 75 kilotons of plastics every year. However, such waste is highly valuable as it contains several precious metals that can be recycled and reused. The Raw materials that is generated through E-waste stands to be valued around 55 to 60 Billion $ USD, however with the current lack of framework, only about 15% of this can be recovered with the sound and planned disposal networks. This is one of the Key Areas that needs to be worked upon, as the consumption and production of electronics is likely to only go up in the future.

\(^{1426}\) Act No. 69 of 1980 [25\(^{th}\) Oct. 1980]

4. The New Challenge of Covid-19 Pandemic on Environment:
Since the emergence of the pandemic and its disastrous effects throughout the world, we often find that, more emphasis is being laid to the economical and political aspect, rather than sociological and environmental face of it. Be it the formal statements of various nations of the world, financial infuses by government and industries, or discussions being undertaken by people in daily routines, one finds very less emphasis on the fact that, “The Pandemic has reminded us that how vulnerable our modern advance society are”.

From environmental point of view, it is to realize that it is more than illness of human beings and citizens of various nations, rather than it depicts the symptoms of the ailing health of our planet. Also, this pandemic has once again stressed us to realize the fact that, human dysfunction relationship with the nature has caused such a wider disease. It is to note that many studies and accounts of the past experiences provide scientifically that 75% of diseases that are transmitted to human beings are from animals, that is the branch of ‘Zoonotics’.

The Pandemic has made us realize a very ironical fact that, “the disease carrying pathogens have no adherence to Man-made boarders”, and thus just addressing Local-Domestic problems and finding solution to them will work no more. It is time that collaborated efforts needs to develop where not only the nations of the world via their official governments should only take the efforts, but also civil societies, industries and people at their personal level must realize the need for an overall global change in protection, improvement and sustainment of environment for the future.

The problem continuous to lie because of “Non-Acceptance” and “Lack of Self Realization” by the citizens, institutions and other machineries of the states until and unless, a formal-directive order in terms of judgments is delivered by judicial institutions highlighting their concerns over the increasing cases of pollution, deterioration of ecology, and acts that have lead to degradation of the natural face of nature. Secondly, the problem which persists and everyone can feel and see around them, yet they ignore it at all and adapt it in their normal routine of life is not raised or highlighted by Non-governmental organizations or self-research groups, and that too only those issues which get highlighted through media agencies or popular public figures, get a little bit of attention. In India, one can truly relate the aforesaid, by realizing that the government of the states as well as the central government does not intend to work on their own unless the NGT or The Supreme Court of India, interfere in the matter and direct them to work upon the same subjects.

However, the Pandemic has come up with certain specific things that need new introduction and focus must be laid on its achievement for the purpose of attaining sustainable development and a better greener economy and ecology for the future. Some of them, which need to be developed in environmental aspects, are:

1. The Need to conduct a new study for the inter-relationship between Pollution & Health.
2. Develop an Easy Accessible platform for every citizen, to provide data and information regarding environment and pollution, their duties and effects of the work done, like the one developed during the Pandemic.
3. The need to deliver promptly on International Agreements, agendas, summits and form a new blueprint for a new economic-ecological-societal green future.

4. Signify the role of inducting financial stimulus of investments into the environment sector by the government as well as the business institutions, as well as at the personal level as was introduced and done during Covid-19.

5. Collaborated Efforts of the nations is must with the dedication as shown by the nations of the world during the Pandemic.

6. Shift from Traditional methods in every field of daily routine to more innovative, creative methods by using technology as a medium.

5. The Need for Global Collaboration:

A. Role of United Nations Environment Program (UNEP)

In these changing and vulnerable situations, the role of UNEP has increased by two-fold. It shall stand firm in solidarity with the billions of people who are suffering by the impact of the pandemic and at the same time develop a notion for the future that the Virus requires strong environment response in the present as well as in the future times. The foremost and new problem in terms of environment stands with the “Personal Protection Equipment and Medical Waste Disposal”. Medical wastes, equipments and other new challenges have emerged in front of us which not only is worsening the current scenario by spreading the infection, but at the same time there is requirement to ensure the proper disposal of the wastes in the future by evolving effective methods of disposal of such wastes. Another issue is to develop alternative channels of “Global Conferences”, in order to continue and carry on global environment plans and initiatives during such tough times too. We often find the collaboration of nations and their active participation in trade and other economic matters; however when it comes to develop new ways and innovations for environment assessment and goals, the lack of such dedication and commitment still fumbles.

Also, “Future Proofing Sustainable Recovery” and sustainable development is the only possible way and this shall only be possible when environmental response plans and policies are given the importance they deserve.

B. Shift from Sustainable Development to Sustainable Development Plus (+):

Since a very long time now, UNEP has highlighted its Goals that the nations of the world shall work upon and tend to achieve in the near future. In a short glance, these are: National Planning, Monitoring of Plans, Systematic tackling of Issues, Prohibiting Trade of Plants and Animals, Greener Technological Development, Policy planning, Infusion of Finances, Building up collaboration and partnership, Capacity Building, Improve Soil and Water cover, Safeguard the oceans, Reduce pollution and waste, Boost renewable energy, Increase resource efficiency, Combat climatic change and maintain a Healthy Ecosystem, the Ultimate Deadline which is of year 2030. Among these, in the current scenario more emphasis is needed on the following:

1. Climatic Action- It is no doubt that Climatic Alteration and change is directly related to the spread of such global pandemic, and that too it results in long term effects. The same which has not been able to implement effectively is the lack of true and dedicated commitments. The future lies upon our commitment of “Decarbonization of Planet” which shall be
enforced seriously and ways must be developed to achieve the same. Also, climatic change is not only linked with increased pandemics and diseases but also other global threats of devastating natural calamity, famine and other economic security. Today, this can be checked by proper planning, shifting to greener renewable energy sources from traditional fuels, developing effective and greener waste of waste disposal rather than Land dumping and Ocean dumping methods. Also, Trade shall play an important aspect, by making it more climates resilient and implement the policies of “Global Green New Deal”\(^{1428}\) effectively in the future.

The Green New Deal was commissioned by the UNEP in 2008 which aimed to address climatic change and economic inequality that includes many reforms and public work projects. It called for governments to allocate financial stimulus and funding to green sectors and provided the following objectives- a. Economic Recovery, b. Poverty eradication, c. Reducing carbon emissions and ecosystem degradation.

A significant role shall be played in “Climate Change Conference COP26 of 2021”, which is scheduled to be held in Glasgow, Scotland. The conference will set to incorporate the 26th Conference of Parties to the United Nations Framework Convention on Climate Change (UNFCCC), which was postponed by the Covid-19 Pandemic this year but the same shall play a vital role in “2030 Agenda for Sustainable Development”.

2. Securing Life on Land- Unprecedented destruction of natural forest cover and biological habitat of flora and fauna on land is a significant and very crucial matter to be dealt with. Matters like such have not been given dedicated commitments in the past as well as in the current scenario too, which has eventually lead increased human-animal interaction due to which such pathogens are likely to spread easily in both livestock and human beings. Also, since the areas of protection are very vast, the singular efforts of just the formal institutions won’t work. Rather collaborated and harmonious efforts of civil societies, industries and government shall put their best to ensure the same.

Such wastes and garbage is not only produced by the industries in the form of trade effluents and sewages, but the equal contribution of garbage is drawn out from every household too that ultimately leads to the destruction of the Biodiversity of the ecology of the land. Also, in order to ensure that the land we live-in does not get converted into a dumping site, various policies, channels and guidelines need to be implemented and post implementation, serious working needs to be done. In the same context, UNEP is dedicated and committed to support countries to ensure outcome at “UN Biodiversity Conference of Parties (COP15)” to the Convention of Biodiversity (CBD) which has been postponed to 2021 due to the Covid-19 Pandemic. CBD COP 15 will review the achievements and delivery of the CBD’s Strategic Plan for Biodiversity 2011-2020.

3. Securing Life below Oceans – The decline and degradation of natural marine, coastal and freshwater ecosystem has resulted in Increased Ocean Warming, Rise in Water Level, Ocean Acidification and Widespread Harm to the Aquatic Biodiversity. The general idea that ‘World War 3 shall happen due to the crisis of water’ is today taken

lightly in many parts of the world, however we have accounts of many countries that have already ran out of their water resources. Instances of increased number of Dead-zones in the marine areas are the result of these major 3 reasons- a) Ocean Dumping, b) Toxic-industrial waste discharge, c) Human exploitative functioning.

There is a need to shift towards “Sustainable Blue Economies” that has been defined\textsuperscript{1429} by the World Bank (WB) as “The sustainable use of ocean resources for economic growth, improved livelihoods, and jobs while preserving the health of ocean ecosystem”. Later, for which in the year 2018, Sustainable Blue Economy Finance Principles were provided in order to provide a guiding framework for infusing finances towards a sustainable blue economy achievement in the future. The same was developed by the European Commission, WWF, the World Resource Institute and the European Investment Bank. A major initiative came amid this critical time, where the “UN Ocean Conference 2020” was co-hosted by the governments of Kenya and Portugal, with the major objective to stress upon science-based innovative solutions that shall result in a new approach towards global ocean protection and restoration.

C. Prioritizations and Add-ups in Indian Context – In Indian approach towards environment protection and achieving sustainable development for the future, first few steps can be taken initially by developing our current plans and goals which shall be fruitful in the near future as well as can give long term benefits if implemented positively. Some of these can be summed up as:

1. India’s land geographical area consists of at least 1/3\textsuperscript{rd} of High Quality Forest Cover, which signifies highly valuable and variety of resources that can be derived out of them. Attention needs to be laid upon the sustainment and plantation of trees and herbs with various qualities like Bael, Nageshwar, Neem, Amla, others that have medicinal as well as consumption qualities.

2. Frequent scientific studies are required that analysis regional balance between Humans-wild animals-nature, in order to assess the damage, proneness likely to damage as well as ways to conserve and sustain resources of the nature.

3. Changing patterns and methods of framing system, by laying more emphasis on organic farming, technologically driven innovations of micro-irrigation and disposal of the left over after crop harvesting. This is the most common problem faced in North-India especially during the winters and harvesting periods

when the various grain states, engage in burning of parali (straw) that eventually chokes the air.

4. Development of Infrastructure patterns and change in township planning, shifting towards smart cities as well as development of Rural-India. Also, such a development shall be adhering to the carrying capacity in a safe and sustainable way that should be estimated before the commencing of the project.

5. A need also arises; to spread and adopt the traditional Indian cultures that seek to worship the Mother Nature for its benefits and at the same realize its true significance as a way of protecting the environment. India has always been the land of culture and traditions since ages and the connection between humans and nature is well established, this needs to be promoted in our modern society.

**CONCLUSION.**

Once again, we all have been reminded that our efforts have lacked to a significant extent towards protection of the environment and restoration of the damages caused. Today they need to be multilateral in terms of not only restoring what we have damaged, but also changing our commitments from Domestic based solutions to Global-collaborated dedications. Post-Covid-19 Pandemic has made us realize that despite looking only towards the economic and political effects on it on the nations of the world, equal stress must be drawn upon its environmental face and to accept the fact that the pandemic is has shown us the true sign that how vulnerable is our modern societies are and how this is not just a concern of human health, but at a larger scale it depicts the symptoms of our ailing planet. It has also made us realize that, pathogens or such global crises don’t adhere to the man-made borders. Deterioration of environment and giving non-importance to any one part or nation of the world, will not only effect that only nation, but will ultimately lead to contamination and crisis throughout the globe.

The future depends upon our actions and dedicated commitments of not only one or two machineries of state now; rather the efforts of civil societies, industries, and personal level dedication from inner conscious is much needed apart from formulation of new policies and framework to achieve the goal of sustainable development, greener economy, zero carbonized planet, restoration of ecology and tackling of pollution and wastes globally. Post-pandemic, the role of global platforms, agreements and international conferences shall surely play a vital role in developing and strictly following the deadline goals set by them. Mahatma Gandhi has rightly said “The world has enough for everyone’s needs, but not enough for everyone’s greed”, hence protection and sustainment of environment can be truly achieved in future, it only demands our global efforts that require actions to be undertaken from today itself.

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VELLORE CITIZEN WELFARE FORUM V UNION OF INDIA, AIR 1996 SCC 2715

By Shefali Soni
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Introduction
Environment plays a very important role for all the creatures in this world and we have are blessed with the mind abilities to think about that environment and we can protect that environment. The case through which we are about to deal is dealing with same issue where because of development, some industries operated by humans only discharging harmful effluents from their factories to the river, Agricultural land which is not only causing harm to ecology but the people like us living around those industries life would be also in stake. In the case of Vellore Citizen Welfare Forum vs. Union of India1430, the bench of 3 judges analyzed the case and Justice Kuldip Singh delivered the judgement.

Statement of Facts
In this case the petitioner filed a petition under Article 321431 of Constitution of India which was filled in Public Interest which directed against the pollution which is being caused by enormous discharge of untreated effluents by the tanneries (57 tanneries) of industries from state of Tamil Nadu. According to Petitioner these tanneries are discharging their harmful effluents to agricultural lands, road side water ways and open land because of which those untreated effluents are mixing into river water and which is polluting the drinking water for public at large and survey was conducted by Tamil Nadu Agricultural University research Centre Vellore says that, the 35000 hectare of land is becoming unfit for cultivation. The court after listening the argument and contentions from both the parties found the industries guilty for their ignorance which caused damage to environment and ordered some industries to be closed until they do not install pollution control devices in their industry and levied the compensation of 10000 rupees from each industries of State of Tamil Nadu.

Background
The petitioner filed the case under Article 31432 of the constitution which gives the right to approach towards Supreme Court of India. As we all know every person has a right to live in clean environment which comes under Article 211433 of the constitution. Rural litigation and entitlement Kendra v. State of U. P1434, Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

1430 VELLORE CITIZEN WELFARE FORUM. VERSUS. UNION OF INDIA AIR 1996 SC 2715
1431 Remedies for enforcement of rights conferred by this Part. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2),

RURAL LITIGATION AND ENTITLEMENTKENDRA & ORS versus STATE OF UTTAR 1987 AIR 359
Limestone mining which denuded mussoorie hills of trees and forests cover and accentuated soil erosion resulting in blockage of underground water channels were banned. Because it was infringing the right of Citizen enshrined U/A 21 of Constitution. The petitioner in this case argued for the same and filed the petition in the interest of public. The constitution also enshrined U/A 47, 48A and 51A(g) that The state has duty to raise the level of nutrition and standard of living and to improve public heath, Protection and improvement of environment and safeguarding of forest and wild life and the state, to protect and improve the natural environment including forest, lakes, rivers and wildlife, and to have compassion for living creatures, respectively. Apart from constitution, many other Acts were passed by the government for protection of Environment for e.g. The water prevention Act, The Air Prevention Act, and The Environment Protection Act. And if we see in detail then the water prevention Act constitutes Central pollution Control Board and State pollution Control board which can prohibit the use of stream and wells for disposal of pollution matters and it is noted that this Act restricted on outlet and Discharge of Effluents without obtaining Consent from Boards. In this case the Respondents i.e. the State of Tamil Nadu was unable to perform their duty properly so that they could prevent the discharge from the Tanneries which could prevent the harmful effects to the environment. Now if we see in international perspective then the most famous conference in which India participated held on Stockholm In June 1973, in this conference several measures were taken for environmental protection and after this conference only India passed the law to protected environment In the year 1986. After this conference Rio conference was held in the year 1992 in Rio which gathered all the leaders from different countries to talk about the Sustainable development because of which some important doctrines were came into picture i.e. Precautionary principle and Polluter pays principle. The polluter pays principle held to be sound principle by Indian Council for Enviro-legal Action v Union of India, the court observed in this case that once the activity carried on which leads to harmful effect to the environment by any person, they will be held liable to recover the environment back as it would be, if that activity was not caused harm to the environment. So in this case also the industries held liable to recover the environment as their tanneries caused so much harm to the environment. This principle simply says that the absolute liability for harm to the environment extends not only to pay compensation to the victim but also the recover the environment or restore the environment degradation. And at same point precautionary principle enables decision makers to adopt precautionary measures when scientific evidence about an environment or human health hazard is uncertain. Narmada

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1435 supranote-4
1436 Duty of the State to raise the level of nutrition and the standard of living and to improve public health
1437 Protection and improvement of environment and safeguarding of forests and wild life.
1438 Article 51A(g) in The Constitution Of India 1949,(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
1439 Water (Prevention and Control of Pollution) Act, 1974
1440 The Air (Prevention and Control of Air Pollution) Act, 1981.
1441 The Environment (Protection) Act, 1986
1442 Indian council for enviro-legal action v union of India 1996 (5) scc 281
Bachao Andolan vs. UOI\textsuperscript{1443} is fine example of this principle. Now in this particular case the central government has complete power under Environment Act\textsuperscript{1444} of 1986 to take measures to protect and improve environment (U/S 3 of Environment Act)\textsuperscript{1445}, the respondent must have taken steps properly against industries which would not at all taken by them because of which the central government has power to take steps against them under this Section of the Act. And section 7\textsuperscript{1446} of the same Act says that person carrying on industry, operation etc. not allow to emission or discharge any harmful pollutant to environment. And u/s 5 (1), the central government has also power to prohibit and restrict on the location of industries and carrying on the process and operation in different areas for a good reason in the interest of public. In this present case also Exactly the same judgement was passed by the Supreme Court i.e. to transfer some of the industries from the settlement of public, and also directed that to not to construct the industries within 1 kilometer from the embankments of water sources.

Analysis
As the per the affidavits filed on behalf of state of Tamil Nadu and Board clearly indicated that the tanneries and other polluting industries in the state are being persuaded for the last about 10 years to control the pollution generated by them. They were given option either to have common effluent treatment plants or to set up pollution control devices but that till date most of the industries were not taken any steps. And as per the order by court to National environmental Engineering Research Instituting, Nagpur to send a team of experts to examine the feasibility of setting up of CEPT’s\textsuperscript{1447} has not started and also to inspect the existing CEPT’s where the construction work is in process, that report by NEERI\textsuperscript{1448} says that as far CEPT’s are Concerned, there is improvement in the performance of industries but they are still not operating optimal level and are not meeting the standards as laid down by ministry of Environment NEERI has given their recommendations in this matter too which was followed by the court.\textsuperscript{1449} After taking into consideration of all the reports and contentions of State government, the SC gave its judgement which was definitely correct. And the judgement so delivered by the court, it clearly indicated that they had applied the principle of precautionary principle and polluter pays principle that gave message to judicial system of India to take strict actions against the person or institution who is polluting the environment. The respondents were ignorant in this case as, according to NEERI it was also found that, court was monitoring in this particular case for the last 4 years but no proper instructions were

\textsuperscript{1444} Supranote-12
\textsuperscript{1445} Power of Central Government to take measures to protect and improve environment - Subject to the provisions of this Act, the Central Government, shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution
\textsuperscript{1446} Persons carrying on industry operation, etc., not to allow emission or discharge of environmental pollutants in excess of the standards - No person carrying on any industry, operation or process shall discharge or emit or permit to be discharged or emitted any environmental pollutants in excess of such standards as may be prescribed.
\textsuperscript{1447} Centre for Environmental Planning and Technology
\textsuperscript{1448} National Environmental Engineering Research Institute
followed by the industries in the State of Tamil Nadu give after so cause Notice given by the Court and in their report it was also found out that the physio-chemical characteristics of ground water for dug well water tannery clusters. According to report also shows that well waters around the tanneries is unfit for drinking. The court also considered the argument valid that the precautionary principle are important to be applied in this case as it is accepted as part of customary international law. Court also considered the point that for the development of Humans, these industries are required to get leathers, as India is the biggest Exporter of finished Leathers and Tamil Nadu is the great producers of leathers but it is noted that in order to generate the revenues, we cannot put the environment into stake and there are approximately 900 tanneries in the 5 districts of Tamil Nadu from which some are operating according to the rules prescribed by the government but many of them are not installed the pollution control plants. As because of effluents from tanneries, the general people living around the industries, their life was in danger and they were not getting the proper water to drink and not even the proper air to breath. And as according to Public Trust doctrine which was not taken into consideration by courts that, this citizen has trust on the sovereign of the country that they will protect the resources of environment which was in this case getting polluted i.e. Water. So in this case according to me the State is also liable, as they did not properly do the investigation after even getting the order from the court. The court would have also lived the compensation on State government of Tamil Nadu.

Conclusion
So according to my perspective the judgement delivered by the Supreme Court was correct but they should have also held the State Government of Tamil Nadu to be responsible for being ignorant, to properly have an eye over the industries so that they would have followed by the instruction given by the State Boards. Because of Industries the lives of many individuals were put in the stake and it created inconvenience to them to drink the proper water. So the judgment given by Supreme court to compensate the all the victim is very much relevant and the learned MC Mehta has also played a great role in this case, that saved many lives for future also and sustainable development was considered properly by the Court in this Case and in the interest of Public the court has given appropriate judgement.

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GREEN CONSUMERISM AND SUSTAINABLE CONSUMPTION

By Shivi Chhaberiya
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Introduction
The term “green consumerism” has been in vogue since a very long time. When the people or rather consumers started to look for things like “value for life” or “impact on environment” not only “value for money” while buying things, the companies also started marketing their products as environment friendly or planet safe to attract the new section of consumers known as “green consumers” and thus the whole concept of “green consumerism” came into being. The term green “describes people, products, or activities that are environmentally responsible”, such responsibility means that consumers try to mitigate the effects of the “production, use, and disposal of the products they buy”.

The practice of green consuming is trending because it is a means of addressing “environmental concerns without compromising the market driven economy”. Sustainable consumption means that the consumers buy products which have a less adverse impact on the environment so that the future generations can also benefit from the resources we have now. The concept of “green consumerism” and “sustainable consumption” are interlinked as both emphasize on the judicial use of resources and awareness among consumers to buy products that will not contribute to the deterioration of the environment. Only by following the practice of green consumerism can, the goals of “sustainable consumption” be achieved.

The Consumer Protection Act 1986 which was introduced as a means to protect the rights and interests of consumers and for the same purpose several consumer councils were, established at the central and state levels. Section 6 cl. (a) of the same act states that “the consumer has the right to be protected against the marketing of goods [and services] which are hazardous to life and property”, which means that any such product that is harmful to the life of the consumer will not be sold or marketed, but this is exactly what is happening in the current market practice. To fulfill the demand of the general public, mass production is followed due to which the industrialization is increasing rapidly, more and more land is being used for factories, forest land is being roped in production purposes be to build factories or for sourcing raw materials, therefore the need for green consumerism is even more in today’s date as there are some grave environmental threats which can be significantly curbed by the practice of “sustainable consumption”. This paper shall in detail discuss about the concepts of “green consumerism” and “sustainable consumption”. This paper shall also discuss about the movement in India and the contribution of the consumer forums and councils to it.

Scope of the study
The scope of this paper shall be narrow, while discussing the meaning and the concept of green consumerism and sustainable development; it shall also look into the concept of sustainable development as defined by the United Nations.

1450 Pettit, Dean& Jerry Paul Sheppard, “IT’S NOT EASY BEING GREEN: THE LIMITS OF GREEN CONSUMERISM IN LIGHT OF THE LOGIC OF

1451 THE CONSUMER PROTECTION ACT, NO. 68 OF 1986, § 6 (a).
Environmental pollution and climate change are affecting the world as a whole today and “green consumerism” together with “sustainable consumption” can prove significantly effective in reducing the environmental deterioration. With the same objective this paper shall also study extent of awareness about “Green consumerism” and the legislations that promote “sustainable consumption”.

Research methodology
To understand the meanings and concepts of the terms “green consumerism” and “sustainable consumption” various books, articles, journals, and research papers have been referred. Further various reports and indexes have also been looked into, to examine the position and situation of India in following the sustainable development goals. Therefore this paper follows Doctrinal method of research to understand the concepts and analyze the situation of “green consumerism” in India.

Research Objectives
- To understand the concept of “Green Consumerism” and “sustainable consumption” their origin, meaning and concept.
- To analyze the relation of “Green Consumerism” with “Sustainable Consumption”.
- To examine the importance of “Green Economy”, this includes green and sustainable consumption and production respectively, as tangents of “sustainable development”.
- To examine the Indian laws and policies regarding the same matter of “green consumerism” and “sustainable consumption”.

Literature review
“It's Not Easy Being Green: The Limits of Green Consumerism in Light of the Logic of Collective Action”, Dean Pettit & Jerry Paul Sheppard\(^ {1452}\). In this paper the authors have closely examined the collective logic patterns of humans and have proposed reasons as to why one would incline towards green consumerism and why one would not. They have also analysed the limits of green consumerism in respect of the same, to examine its relevance as a solution to the environmental problems. Thus, this paper focuses on the problems green consuming can face due to “voluntary” behaviour of individuals.

“Sustainable Consumption and Production: An Effort to Reconcile the Determinants of Environmental Impact, Stefano Pogutz and Valerio Micale\(^ {1453}\)”, this paper aims at providing a critical review of the sustainable consumption and production policy and how the concept evolved. Initially it analyses the policies for sustainable production and then the role of technology played in sustainable production. Then through the result obtained from the first analysis it further examines the consumption pattern in different business and societies. Lastly it provides a theoretical framework to modify the consumption pattern of the societal model. It provides an in-depth analysis of the IPAT equation while focusing on two factors related to consumption and production i.e. affluence and technology. It states that many attempts are being towards


having a green economy by governments across the world, as the consumers are becoming more aware about the effects of their consumption pattern on the environment and thus they are shifting to a more green approach towards their shopping.

“Making Sense Of The Green Economy, Federico Caprotti and Ian Bailey\textsuperscript{1454},” this paper aims at providing a clear definition of green economy while stating some critical issues about it that are pertinent and suited to geographical analysis. Firstly it tries to criticise the growth focused, neo-liberal and techno-centric definition of green economy. Secondly it attempts at appraising the strategies that are created to make "green economy" the centre of social and environmental change. It further discusses about the spatial complexities that could arise in the transition to "green consumerism". Therefore it tries to give "green economy" new dimension by approaching it geographically and trying to define it as a political and socio-economic phenomenon. It further contends that "green economy" is a concept that offers a strong content driven set of ideas for socio-economic progress in the wake of environmental crises, not excluding the development factor, thus these qualities make for the ideas of "green economy" potent to applied in the future and for redefining the pattern of consumption and production.

“Green Consumerism in India: The Challenges Ahead, Gurjeet Singh\textsuperscript{1455},” this research paper deals with the concept of green consumerism in the wake of the introduction of the consumer protection act 1986. It tries to highlight some of the issues connected with it and the challenges that the Indian consumer movement and its proponents might face in the future. It describes the meaning and concept of "green consumerism" though to produce a much large effect the contribution of individuals have to be combined with the efforts of social and political institutions. It states around six main challenges that could be faced by the movement in India while simultaneously giving solutions for them. The paper concludes by stating some more questions upon whose answer, the success of the green movement lies.

\textbf{Green Consumerism & Sustainable Consumption: Meaning and Concept}

Broadly speaking green consumerism is the pattern of consumer behavior which involves awareness about the consequences of such a pattern on the environment\textsuperscript{1456}. “Green consumerism is the use of individual consumer power to promote less environmentally damaging consumption, without compromising on the wants and needs of the consumers”\textsuperscript{1457}. The followers of such a pattern are known as green consumers, these consumers have accustomed themselves to such a lifestyle which involves the least degrading effect on the environment. The consumers who can be termed as green consumers are those who “rationally” choose their products which have less or no packaging or have a recycled symbol on the packaging etc.


\textsuperscript{1457} Suresh Mishra & Sapna Chadah ed., \textit{CONSUMER PROTECTION IN INDIA ISSUES AND CONCERNS}, Indian Institute of public administration, New Delhi, 2012.
These consumers are of common belief that such a purchasing pattern can significantly contribute to the environment change policies. Due to the changing consumer pattern many brands have started advertising their products as “Green Products” so as to attract the new pool of customers who are known as “Green Consumers”.

The main driving force behind the changed behaviors of consumer while buying things is mainly because of the awareness among the consumers about the implications of their “over-consumption on the environment”\footnote{Dean Pettit & Jerry Paul Sheppard, IT’S NOT EASY BEING GREEN: THE LIMITS OF GREEN CONSUMERISM IN LIGHT OF THE LOGIC OF COLLECTIVE ACTION, 328-350, The Queen’s Quarterly, 99 (3), (1992).}. Green consuming has become a means through which “people can address their environmental concerns without compromising on the market driven economy”\footnote{Supra note 3.}. But as all good things come with a hefty price tag, the habit of practicing “green consumerism” requires many sacrifices form the consumer which can eventually lead to reducing the utility of the consumers\footnote{Id.}. Firstly all such “green products” can cost the consumers more than they may pay for the same type of the product. Such relatively high cost can be due to the more cost of production or manufacturing of the product which is environment friendly. Therefore to further this concept of green consumerism it is assumed that a person who is environment friendly is willing to pay some extra price for the “green” products. Secondly the consumers have to put in a little more effort while practicing “green consumerism”, i.e the goods purchased have to be disposed of in the same “eco-friendly” manner to practice “green consumerism” in complete manner.

Thirdly consumers have to sometimes accept an imperfect good in substitute for a perfect good\footnote{GreenDex 2009: Consumer Choice and the Environment- A world wide Tracking Survey https://www.nationalgeographic.com/greendex/assets/GS_NGS_Full_Report_May09.pdf.}, it may not always be the case that a producer that is producing the goods in an eco-friendly manner is producing the goods that are best suited to the utility of the consumers. Fourthly the consumers to may have to reduce their consumption in order to fully conserve the natural resources, some of the authors have contend that such a consequence may be as a sacrifice to the consumer but in today’s world there modern alternatives being made of almost all kinds of goods that can be substitute for normal goods and which don’t have such implications on the environment as the previous goods.

“Sustainable consumption is defined as consumption that demands less of the ecosystem services that the Earth provides, and is less likely to impair the ability of future generations to meet their own needs as a result”\footnote{Norwegian Ministry of the Environment, Sustainable Consumption Symposium Report, Oslo}. This concept was first defined in the Oslo symposium on Sustainable Consumption, as the consumption of those goods that are essential for maintaining the quality of life, while at the same time “minimizing the use of natural resources, toxic materials and emissions of waste and pollutants over the life cycle, so as not to jeopardize the needs of future generations”\footnote{Id.}. This consumption requires that the consumption
of the current as well as the future generations improve, while “maintaining the services and quality of resources throughout”\(^{1464}\). It focuses on those strategies of consumption through which those products that “foster highest quality of life, the efficient use of natural resources”\(^{1465}\), while not deteriorating the environment, and promoting “social development”.

The goals of “green consumerism” such as clean air, clean water, and ethical treatment of all natural goods is a collective good that is to be shared by all\(^{1466}\) i.e. these goals can only be achieved by the collective contribution of all, all being governments, institutions, individuals etc and by cutting down on the consumption by sustainably consuming.

**United Nations Program of “Sustainable Development”**

After the Second World War the rise of industrialization led to new economic development throughout the world. The consumer behavior changed significantly due to the industrialization process. People started to consume more, with the advent of mass production, more new advertising schemes and increased income people started to spend more on products which eventually lead to massive surge in consumption. This led to widespread environmental disruption and degradation. In 1980s there was a sudden rise in the “environment conscious” consumers in England, due to this degradation\(^{1467}\), various brands started to advertise their products as “eco-friendly” or “recycled” to attract the new class of consumers that had emerged. There was new movement started in England regarding the degrading effects of such products on the environment\(^{1468}\), this new class of consumers was environment conscious and thus the whole movement of green consumerism was started.

The concept of sustainable development was introduced for the first time in the Brundtland Commission of the United Nations as the development that meets the needs of the present without compromising the ability of future generations to meet their own needs\(^{1469}\). Moreover initially the focus was put on “sustainable production” as the tangent of “sustainable development”, the contention as put forward by the OECD was to modify the “transformation processes or substitution of materials input in order to moderate the environmental impact per unit of output produced”\(^{1470}\). However there was a change in this policy which was noticed in the “Rio de Janerio” and the “World summit on Sustainable Development” of 2002, wherein the concept of sustainable development was linked to sustainable consumption, it was determined here that “the processes of consumption and

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1466 Supra note 10, at 332.
1468 Id, at 232.
production were equally detrimental to the environment. United Nations in its 2012 conference on Sustainable development had “Green Economy” as of its central themes, wherein it was held as the catalyst that would promote the national policy development and international co-operation among countries to fulfill the seventeen goals of sustainable development. As a matter of concern it was highlighted that “unsustainable patterns of production and consumption where they occur remains fundamental in addressing environmental sustainability” and also the need for sustainable use of all natural resources. To recognize the same the sustainable development goals were developed wherein every member country was exhorted to make legislations while keeping in mind those goals. Accordingly recognizing the importance of “green consumerism” and “sustainable consumption” goal 11 and 12 were added in the SDG’s which talk about sustainable cities and communities and reasonable consumption and production respectively. These goals further highlight the importance of “green consumerism” in today’s world where climate change has started to affect our surroundings.

The “Going Green” movement in India
India is home to the second largest population in the world and is an emerging market in the world economy. Indian consumers unlike their other counterparts are more environmentally conscious, therefore the wave of green consumerism in India is not undermined. Indians are more likely to think about factors like “value for environment” before they buy any product. A survey which analyzed the number of green consumers in India showed that around ninety percent of Indian consumers prefer making green choices and ninety five percent who do so claim to do it for the environment. Due to this new trend within the Indian consumers the companies have also started to market their products with the objectives of “eco-friendliness” besides concern for a cleaner environment is an important dimension of corporate social responsibility which all the companies have to fulfill under sec. 135 of the Companies Act. Furthermore “right to

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1473 These 17 goals are as follows 1) no poverty, 2) zero hunger, 3) good health and well-being, 4) Quality Education, 5) gender equality, 6) clean water and sanitation, 7) Affordable and clean energy, 8) decent work and economic growth, 9) industry, innovation and infrastructure, 10) reduced inequalities, 11) sustainable cities and communities, 12) responsible consumption and production, 13) Climate change, 14) life below water, 15) life on sustainable consumption is the only way we can mitigate the effects of climate change. As if the consumption rate is abated so will be the production and thus the little we consume, the more it will be in resonance with the “eco-friendly” norms.
live in a pollution environment” is also an implied right under Art 21. The rise in the public interest litigation regarding “environment related issues” began in the 1970’s. After the case of *M.C. Mehta v. Union of India*, there was a sudden rise in the number of PIL’s being filed for environmental issues. A number of legislations were passed after this case e.g. “the Environment (Protection) Act of 1986” and “the Public Liability Insurance Act” after the case of *Union Carbide Corporation v. Union of India*, the public liability insurance act. The Supreme Court however has developed a “detailed doctrinal framework for the resolution of environmental questions, while laying emphasis on sustainable development”. The principle like “polluter pays” and the absolute liability of “rogue industries” in cases of environmental pollution by hazardous substances was developed by the Supreme Court in view of safeguarding the environment in *M.C. Mehta v. Union Of India and Indian Council for Enviro-Legal Action v. Union Of India* respectively. According to a report released by the United Nations sustainable development program India ranks 115th in terms of sustainable development goals out of 162 listed for it. This shows that in the recent years India has been giving emphasis on the sustainable development goals stated by the United Nations. Governments are becoming more environment conscious than they were before, various schemes have been evolved by the government in respect of the same. Yet India has a long way paved before it to become completely “green” conscious. One of the major problems that can arise in the implementation of “green consumerism” in India is that India being a developing country may not have the techno-legal framework that is required of the implementation of the same. Another problem that may arise is the packaging of the products, as a large amount of waste is produced from the packaging itself , a new system for packaging shall be evolved maybe something on the lines of the “Green Dot” system that would help people to analyze which product is more eco-friendly.

Given all of the above problems, one of the major problems that would occur is that to completely follow green consumerism one has cut down on the consumption as every kind of consumption has its take on the industries, operations discharge pollutants. The Environment (Protection) Act, 1986, no. 29, § 3 cl(1).

1479 Article 21 of the Indian constitution states that no person shall be deprived of his life and liberty except by a due process established by law. INDIA CONSTI., art 21, 1950.

1480 AIR 1987 SC 1086 (India).


1482 Under this Act, the central government has the power to make all necessary measures for protecting, preventing, controlling and mitigating environmental pollution. These measures include increasing the standards or quality of the environment and marking off those areas in which industries, operations discharge pollutants. The Environment (Protection) Act, 1986, no. 29, § 3 cl(1).

1483 This act aims at providing insurance as a immediate relief to the victims of the accident caused by any hazardous substance. The Public Liability Insurance Act, 1991, no. 6, 1991.

1484 AIR 1990 SC 273.


1486 AIR 1996 SC 1446.


1488 Supra note 7.
environment\textsuperscript{1489}, according to a report by the United Nations, India is one of those countries which don’t have relevant legislation on “sustainable consumption”\textsuperscript{1490} therefore given the population in India, to motivate everybody to significantly reduce their consumption will be a huge task.

\textbf{Conclusion}

Going green is the need of the hour, with climate change and increasing global warming it is important for everybody to consume wisely while keeping the environment in mind. Green consumerism can also lead to the depletion of green sources therefore to reduce the effects of human consumption on the environment it is essential to sustain one’s consumption i.e. to make sure we consume wisely and use the policy of 3r’s in our daily lives. In countries like United States of America, Australia, France etc. there is a growing trend of tiny houses among the people. These houses are fully self-sustaining form producing their own energy to water treatment plants to even producing their own manure from decompost. These tiny houses come within five to six hundred of square footage are completely environment friendly. Such a system not only reduces the carbon footprint on earth but also is an excellent example of how one can practice sustainable consumption. Many other brands like Levis, The Body Shop and Vilvah etc. are using the method of sustainable consumption within their manufacturing processes. Levis makes their denim fabric from the used plastic bottles, whereas Body Shop uses recycled bottles for packing their products, Vilvah which is an Indian skincare recently changed their packaging bottles from plastic to reusable metal bottles. A school in Guhawati has successfully made bricks out the used plastic bottles which can be used for construction purposes also. The consumer needs to be made aware of the growing need of green consumerism, almost all the brands which manufacture shampoo and other such hair care products use sulphate in such products whereas such use of sulphate over the period of time increase the risk of having cancer in a person and it is also harmful for the environment. Most of the companies owing to the recent surge in the green consumers have started marketing their products as “environment friendly”, but little do these companies actually are providing such products. One such example is H&M which has a separate line of clothing under the name of CONSCIOUS which has clothes made from recycled fabric, but upon closer inspection most of these clothes are made from “viscose”, this fabric is made by using wood from ancient or threatened forests and to top it off 70\% of the wood pulp is wasted or incinerated while only 30\% is used to make clothes\textsuperscript{1491}, thus clothes that are marketed or brought by the people thinking that they are environment friendly actually to do more harm than good. In the view of the same there needs to be better dialogue between the consumer organizations and the environment groups to provide the consumer with the correct information about the various products available in the market. The increasing population means an increase in the consumption which means more depletion of resources. Therefore there is a need for a new

\textsuperscript{1489} Supra note 8, at 236.


legislation which shall define the consumption pattern each family shall follow and the installation of such sustainable measure in each house, office and institutions shall be made compulsory such as solar panels or reusing water by treating it, or generating their own fuel by “Gobar gas plants” where food has to be prepared in mass. Furthermore every company has corporate social liability under which they have to fulfill some duties towards the society also. Thus all companies should strive to follow the policy of reusing their own bottles again for their packaging, denim fabrics should essentially be produced by used plastic bottles, instead of using sanitary pads people should be encouraged to use menstrual cups which can be used for a period of five years and are more easily decomposable than pads. E-commerce giants like Amazon, Flipkart, Myntra, etc. use excessive plastic while delivering their respective shipments such excessive use shall be monitored closely and they should be fined on exceeding a stipulated amount of plastic. Furthermore the manufacture of single use plastics shall be banned completely. Stricter measures are required for the implementing the policy of sustainable consumption. Consumers now days have become more environment conscious but still there is a large untapped space to cover from being green consumers to becoming sustainable green consumers.

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JUDICIAL INTERVENTION: IS SECTION 34 CREATING AN ENDLESS LOOP?

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ABSTRACT

Judicial interference in Arbitration: Is section 34 of the Arbitration and conciliation act creating an endless loop?

The topic “Judicial interference in Arbitration: Is section 34 of the Arbitration and Conciliation act creating an endless loop?” is a topic of great significance for the reason being that parties specifically oust jurisdiction of the courts when they opt for arbitration and by providing the power to set aside a binding award passed by an arbitrator, the legislature has paved the way for losing parties to set aside an arbitral award by filing a section 34 application and moving to fresh arbitration thereby creating an endless loop.

The author agrees that judicial intervention is required for the smooth functioning of the arbitration system but excessive interference leads to delay in enforcing arbitral awards and defeats the main objective of the Act.

The generally accepted justification provided for this excessive intervention was the incompetence of the arbitrators but the 2019 amendments brought to the Act has aptly tackled with this loophole and the author has attempted to co-relate the amendment with the theoretical loop created to put things into perspective.

The author has dealt with the several cases that limit the scope of intervention along with procedure set in place for appointing an arbitrator and the establishment of arbitral institutions set up for the grading and accreditation of the said arbitrators to ensure greater reliability regarding arbitral award. Specific provisions having an effect on narrowing down the scope of judicial intervention has been elaborated in detail.

“The courts of this country should not be the places where the resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried.” — Sandra Day O’Connor

INTRODUCTION

One of the strongest modes of settling disputes from time immemorial that remains efficacious is the procedure of arbitration. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary courts and enabling the parties to substitute a domestic tribunal thus it becomes clear that the powers of the court of law are specifically ousted for the sake of economic and expeditious disposal of a case. It could be defined as the reference of dispute or difference between not less than two parties for determination after hearing both sides in a judicial manner by a person or persons other than a Court of competent jurisdiction. The parties must intend to submit to arbitration i.e, there must be animus arbitrandi. In simpler terms when parties consent to lay before or submit their dispute before one or more arbitrators

1492 Fazalally Jivaji Raja v. Khimji Poonji & Co.
AIR 1934 Bom 476.
and authorise them to make a binding decision, the process of arbitration is said to have taken place. An award is a decision given in an arbitration proceeding by an Arbitration Tribunal and is said to be analogous to the judgement given by a court of law. The award is necessarily binding on both of the parties as it would not be a reference to arbitration if it only bound one of the parties.\textsuperscript{1495}

It is to be noted that it doesn’t come as a shock that arbitration doesn’t take place completely on its own like other adjudications of administrative bodies but at some point, does come under the purview of judicial control. With the object being speedy dispute redressal, it is important that arbitration cases must be decided based on affidavits and other relevant documents and without oral evidence. There may be few exceptional cases where it may become necessary to grant an opportunity to the parties to lead oral evidence. In both circumstances, the judicial authority is required to decide the issue expeditiously within a time frame and not to treat such matter like regular civil suits.\textsuperscript{1496}

\textbf{JUDICIAL INTERFERENCE JUSTIFIED}

Off late arbitration has become an off-set of litigation in the sense that it has involved itself in the spiral of pleadings and proceedings, the reason for the same being the lack of institutions that can give the required codification, infrastructure and the convenience of arbitral facilities to conduct arbitration of disputes by the book. Most of the arbitral tribunals are not institutionalised rather ad hoc the lack of a streamlined process or qualified arbitrators due to the Act’s insistence on party autonomy has failed in its objective of expeditious and economical disposal of disputes in its aim to reduce the line of numerous people waging their docket in a litigated case. As most arbitrators appointed are retired judges under Section 11 of the Act, the reliance of long-standing procedures and submissions are placed as per their experience behind the bench leading to a long and arduous process much similar to a court proceeding. Hence arbitration ends up involving issues, oral and documentary evidence, chief and cross-examination etc wherein problems arise as to the disputes involving the power of the arbitrator to mark evidence, his power to record objections and order of such recording to name a few.

Further, party-appointed arbitrators may not be competent adding to which advocates who try to procure unnecessary adjournments add up to the unethical working of the arbitration process and if the scope of judicial interference is curtailed, it may lead to disastrous consequences for the parties and the system as a whole.

\textbf{SCOPE OF JUDICIAL INTERVENTION}

The major reason behind Arbitration becoming the most sought after grievance redressal system could be attributed to the litigation process being extremely time consuming and expensive. Majority of the people approach the courts in one of the two scenarios, either to get justice served due to their genuine belief in the Indian judicial system or the implied assurance that a case filed before a civil court would take years to come to a close thereby giving ample

\textsuperscript{1495} State of U.P. v. Padam Singh Rana, AIR 1971 All 270.

\textsuperscript{1496} Shin Etsu Chemical Co.Ltd. v.Aksh Optifibre Ltd., (2005) 7 SCC 234.
time for a wrongdoer to exploit this means. Arbitration, on the other hand, assured that its main objective was to minimize if not oust the supervisory role of the courts as well as to dispose of cases in a timely and cost-efficient manner.\textsuperscript{1497}

Though the umbrella belief is that arbitration will completely oust the jurisdiction of the court, it is far from reality. Due to the incompetence inherent in the arbitration process because of the party autonomy provided within the law, it necessitates a certain amount of judicial interference to maintain the rule of law.

It would be surprising to know the number of provisions that are allotted for the purpose of facilitating judicial interference into the arbitral sphere. Section 5 which is of the Arbitration and Conciliation Act 1996 defines the extent of judicial intervention in arbitration proceedings. It paves the way for judicial intervention in following among other cases which can be drawn under three groups i.e. before, during and after arbitration.

Section 8 – Power to refer the parties to arbitration.
Section 9 – Power to make interim orders.
Section 11 – Appointment of the arbitrator in certain events.
Section 13 (5) - Procedure for challenging an arbitrator.
Section 14(2) - Power to decide on the termination of the mandate of the arbitrator in the event of his inability to perform his functions.

Section 16 (6) - Competence of an arbitral tribunal.
Section 27 – Assistance in taking evidence.
Section 34 – Power to set aside an award.
Section 34(4) – Power to remit the award to the arbitration tribunal.

The Supreme Court has held that “an arbitrator is a judge appointed by the parties and as such an award passed by him is not lightly interfered with.”\textsuperscript{1499} However, seeing that the main aim of the Award is to render an award in the interest of justice, the Court is vested with the power to keep a close eye on the Arbitrator’s actions. Keeping this aim in mind the law provides certain remedies against the Arbitral Awards.

Section 34 of the Arbitration and conciliation act gives the court the power to interfere within the ambit of the Arbitration and set aside an award passed by the Arbitrator. The section not only lays out under what circumstances an arbitral award may be set aside but also defines the limitation period within which an application to set aside an arbitral award must be made before the court. An arbitral award can be set aside only if any of the grounds as laid out in S.34(2)(a) or S.34(2)(b) can be established thereby sealing the fact that if the application cannot stand within the boundaries set by the sections then the petition doesn’t have a standing.\textsuperscript{1501} The scope of section 34 has been reduced significantly so as to minimise the interference of court in arbitral matters and the recourse to court

\textsuperscript{1498} Shodganga “judicial interference”
https://shodhganga.inflibnet.ac.in/bitstream/10603/201577/10/10_chapter%204.pdf

can opt only in the following circumstances,

1. If the party challenging the award furnishes proof that he was under some incapacity;
2. That the agreement was not valid under the law;
3. That the party was not given proper notice of the appointment of an arbitrator or the arbitral proceeding or was otherwise unable to present this case;
4. That the award deals with a dispute not referred to or not falling within the terms of the agreement;
5. If the award contains decisions on matters beyond the scope of the submission to arbitration only when of the decisions on matters submitted to arbitration can be separated from those not to be submitted and in that case, only the severable part is liable to be set aside;
6. If the composition of the arbitral tribunal or the procedure was not in accordance with the agreement of the parties;
7. If the subject matter of the dispute is found, in the opinion of the court, not capable of settlement under the law
8. If the award is in conflict with the public policy of India.

The courts pertaining to such grounds still don not have the power to sit in the capacity of an appellate court and decide upon the merits of the case. The court must restrict itself to setting aside an arbitral award only upon the following possible events:

If the composition of the arbitral tribunal is not in accordance with the law
The arbitral proceedings transgressed from the procedure and other specifics laid out in the agreement between the parties.

And in absence of such an agreement, the procedure adopted by the arbitrator wasn’t in accordance with part I of the act. This means that the award must necessarily be in accordance with part I of the act and transgression from the same may lead to the award getting set aside.

SCOPE OF THE PUBLIC POLICY & PATENT ILLEGALITY GROUND

The term public policy which implied public good or the interest of the general public found no definition in the act and the resulting ambiguity led to the courts interpreting that ground how they wanted to. This ambiguity was sought to be tackled with by the The Law Commission in its 446th Report which made setting aside an arbitral award restricted on grounds of public policy to apply only when the award was affected by fraud or corruption, or was against the fundamental policy of Indian law or in contravention with the most basic notions of justice or morality, was added as an explanation appended to sub-clause 2 of S.34(2)(b) of the act by way of an amendment. It has also added an explanation to sub-clause (ii) which establishes that if anyone moves an application to set aside an arbitral award on the grounds of public policy, the courts are barred from going into the merits of the case. It was held that the court should not set aside an award just because it does not agree with the interpretation of the agreement given by the arbitrator rather it should base its decision on whether or not the award was based on no evidence or irrelevant evidence or was perverse.

Though what constitutes a violation of public policy in the sense that what is in the

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best interest of the people and what is not is still debatable but what is erroneous on the face of the law or what is in clear violation of a statutory provision and can be inferred on the face of the award cannot be said to be in the interest of the common people. What constitutes as patent illegality has been elaborated in Associate Builder’s v. Delhi Development Authority\(^{1505}\)

1. fraud or corruption
2. contravention of substantive law
3. error of law by the arbitrator
4. contravention of the arbitration and Conciliation Act, 1996 itself
5. the arbitrator fails to consider the terms of the contract and usages of trade under section 28(3) of the Act
6. arbitrator fails to give a reason for his decision

**JUDICIAL INTERVENTION POST-2015 AMENDMENT OF THE ACT**

After taking into account the vagueness inherent in the ground of public policy and its misuse by parties to snake in the judiciary’s interference upon the award passed through the system of arbitration, the Arbitration and conciliation (Amendment) Act, 2015 sought to limit and curb the judiciary’s interference by narrowing down the scope of public policy to the extent of an award being considered inconsistent with the public policy of India,

1. If the award was affected or influenced by fraud or corruption
2. It is against the fundamental policy of Indian law
3. It is against the basic notions of morality or justice.

The court also opined that it can only set aside the award leading to fresh arbitration between the parties only upon finding that the arbitrator was biased or influenced fraudulently or if there has been a gross miscarriage of justice of any sorts etc. the court must merely perform the role a supervisory role for the parties have explicitly chosen to oust the jurisdiction of the court when they opted for arbitration and this objective of the system of arbitration must be respected and safeguarded\(^{1506}\). Most of the times the arbitral award is sought to be set aside on the plea of misinterpretation of the contract by the arbitrator. The parties use this as a back door to set aside an award by an arbitrator thereby misusing S.34 as an appeal mechanism in courts, which the Supreme Court has time and again clarified that it doesn’t. It is made clear that interpretation of contract falls solely within the ambit of the powers of the arbitrator, with that being established emphasis is laid upon the fact that misinterpretation of the contract is not a ground that has been established under s.34.

The most recent judgement on this matter being the Ssangyong Engineering\(^{1507}\) and Construction v. National Highways Authority of India the Supreme court held that the arbitrator’s view cannot be substituted with the courts own view and if a contract could be interpreted in two ways it should not be set aside if the view does not coincide with the view of the court. The court held that the view held by the majority of applying the circular over the contract amounted to rewriting of the contract itself which was in gross violation of natural justice.

In a very recent judgement, the Supreme Court has also clarified that the award

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\(^{1505}\) Associate Builders v. Delhi Development Authority, (2014) 4 ARBLR 307 SC.


passed by the Arbitral Tribunal can be interfered with in the proceedings under Section 34 and Section 37 of the Arbitration Act ONLY in a case where the finding is perverse and/or contrary to the evidence and/or the same is against public policy.\footnote{1508}{State of Jharkhand v M/s HSS Integrated SDN.}

**THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019 & JUDICIAL INTERFERENCE**

The Arbitration and Conciliation (Amendment) Bill, 2019 arose from the recommendation of a high-level committee under the chairmanship of Justice BN Srikrishna. August 2019 brought with it the amendments to the act and has included some prominent changes to the Arbitration and Conciliation Act 1996 while modifying its recent amendments from 2015. The act formally received the presidential assent on 9th August 2019 and has been published in the Official Gazette.

The author would neither be elaborating on every individual amendment introduced nor critique it. However, emphasis will be laid on specific provisions relating to the setting aside of an award and its implication on whether or not judicial interference into arbitral matters has been narrowed down. The Act mainly aims to set up an independent body that will provide grading of arbitral institutions that will be set up for the purpose of appointment of arbitrators as designated by the courts, frame policies for speedy and cost-effective disposal of cases, maintain a record of all arbitral awards made in India and also most importantly recognize institutions that provide professional accreditation to arbitrators.

**ARBITRAL INSTITUTIONS**

The function of appointment of arbitrators under S.11 has been considered exclusively under the domain of the judiciary.\footnote{1509}{SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618.} The function was carried out by the Supreme Court for international commercial arbitration or by the High Court for domestic arbitration when the parties aren’t able to come to consensus upon the arbitrator chosen or when the parties or two appointed arbitrator do not seem to come to an agreement or when the person or institution designated to carry out the appointment process fails to carry out their duties.

This function has been expressly delegated to an individual institution for this specific purpose of appointing arbitrators among other duties that have been so delegated by the Judiciary.

The 2019 amendment was the implementation of the subtle push that was being hinted upon by the 2015 amendment through S.11(6)(B) where the delegation of the power to appoint arbitrators does not amount to delegation of judicial power. The provision involves setting up and enabling specific arbitral institutions in India to take over the functions of appointing arbitrators as accredited or graded by the Arbitral Council of India. Thus, all application that was to be filed before the Supreme Court or High Court is to be filed before the arbitral institutions so designated for this purpose by the court that has the jurisdiction to so do.

If there is no arbitral institution set up within the jurisdiction of a certain High Court, the Hon’ble court may maintain a panel of arbitrators to fulfil the said purpose. The application for appointment needs to be disposed of within 30 days from
the date of service of notice to the opposite party, though the mandatory nature of this provision is still in doubt.

This amendment has drawn significant inspiration from the practices followed in Singapore\textsuperscript{1510} and Hongkong\textsuperscript{1511} wherein appointment of arbitrators is handled by the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre (HKIAC).

The fee payable to the arbitrator will be determined as per the fourth schedule unless the parties have decided on fees as per the rules of the arbitral institutions, and will apply only to domestic arbitrations and not international commercial arbitrations. Moreover, the amendment has provided for the deletion of Section 11(6)(A) while keeping Section 11(6)(B). The B.N.Srikrishna Committee recommended the deletion with an aim to reduce judicial interference in the hopes of accepting and implementing systems similar to that in Singapore and Hong Kong would help in reducing the unwanted delays caused as well as to aid the growth of arbitration in India through the process of doing away with the provision of examining the existence of a valid arbitration agreement by the courts.

The scope of the court’s powers to decide its own jurisdiction to accept arbitration petition\textsuperscript{1512} as well as different categories of issues\textsuperscript{1513} which are within the jurisdiction and competence of the court while exercising powers under Section 11 was decided by the Supreme Court with regard to the issues that could be decided by the chief justice or whomsoever he designates on the matters of jurisdiction and existence of arbitration agreement and issues that should be left to the arbitral tribunals should decide.

The 2015 amendment codified the above mentioned by bringing in Section 11(6)(A) wherein the power of the courts was curtailed ONLY to the examining the existence of a valid agreement\textsuperscript{1514}.

The 2019 amendments take away this residual power of the courts too when it comes to scrutinising the existence of a valid arbitration agreement by deleting Section 11(6)(A). This was done so to reduce the delay caused by the examination of the existence of a valid agreement as the same would require producing evidence and arguments. What is to be considered here is the fact that courts were carrying out a very vital duty of examining the existence of an arbitration agreement so as to not prejudice any party and the deletion of the same may lead to the automatic appointment of tribunals for issues that are prima facie not arbitrable like issues that have to do with rights in rem.

Thus without any initial test to determine whether or not there exists a valid arbitration agreement may ironically lead to more wastage of the tribunals time for, at the end of it, the tribunal may find that there exists no valid arbitration agreement in the first place!

QUALIFICATION OF ARBITRATORS

The 1996 act or the 2015 amendment had not prescribed any minimum qualifications

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\textsuperscript{1510} Sections 9A(2), 2(1) and 8(2), International Arbitration Act (Chapter 143a) (Singapore).

\textsuperscript{1511} Section 13(2) and 24, Arbitration Ordinance, [1 June 2011] L.N. 38 of 2011 (Hong Kong).

\textsuperscript{1512} SBP vs. Patel Engineering, (2005) 8 SCC 618.


for a person to be appointed as arbitrator in addition to the general conditions of a person capable of being unbiased and impartial. The 2019 amendment, however, has brought in the eighth schedule that prescribes certain specific qualification standards that a person has to fulfill to be accredited as an arbitrator.

Any lawyer, company secretary, chartered accountant, cost accountant, Indian legal service officer, legal officer or an officer with an engineering degree both in private and public sector or any degree with a ten years’ experience bracket within the scientific stream of Information technology, IPR, telecom services etc along with having reasonable legal competence to give a reasonable arbitral award.

However any person that has been convicted of an offence involving, moral turpitude would automatically lose accreditation but with that being said, there is no punishment, action or fine imposed on arbitrators not falling within the qualification standards prescribed.

SECTION 17 POWERS OF THE TRIBUNAL
Another area where the tribunals powers have been narrowed down allowing for greater discretion of the courts is the amendment of section 17 whereby the powers of the tribunal to grant interim relief to a party during the pendency of an arbitration proceeding or after the award has been rendered but before its enforcement has been reduced to merely granting interim relief during the pendency of the proceeding under section 17 and not after the award has been given by the arbitrator.

Any post-award interim relief has to be taken up in court through a section 9 application and not through section 17.

“FURNISH PROOF” UNDER SECTION 34
One of the most significant yet subtle amendments was the limitation of the scope of Section 34. Prior to the amendment section 34(2) of the Act 1996 involved furnishing of proof which allowed courts to frame issues and asked to lead evidence beyond the record of the arbitral tribunal which thereby seemed like conducting an arbitration proceeding like a civil suit.

The amended section thereby restricts the scope of Section 34 by making it clear that an application to set aside an arbitral award would only require perusing evidence on record of the tribunal and nothing beyond that. It substitutes the words “furnishes proof” with “establishes on the basis of the record of the arbitral tribunal”.

2019 AMENDMENT’S EFFECT ON JUDICIAL INTERFERENCE
Judicial interference was justified earlier by the author for the sole reason that arbitrators both appointed by the parties or by the court could turn out to be incompetent, biased or may lack a general calibre in law or the best practices involved in conducting an arbitral proceeding and go on to render a legal arbitral award that will be binding on the parties.

That is to say that an appeal against a judgement is within the rights of the person because he had no say in which judge he wanted or their expertise in a particular field of law thus entailing the provision of looking into the merits of the case again to pass a reasonable judgement. This isn’t the case when it comes to arbitration where the parties are at full liberty to choose their arbitrator and with the 2019 amendment in place, a specific qualification requirement for the arbitrator to get accreditation has been established. This clarifies the further limitation on judicial interference for a
qualified arbitrator is presumed to provide an independent unbiased and well reasoned arbitral award compared to arbitrators that haven’t been accredited by the arbitral council of India. The motive behind this is to reduce the time taken to go over the process of setting aside an award for the reasons pertaining to the incompetence of the arbitrator chosen or appointed.

Further, the arbitral institutions that will be set up will take care of the appointment of arbitrators entirely thereby reducing the interference of courts through a section 11 application.

As clarified in the case of TPI Ltd vs Union of India, it is reiterated that the arbitral award should not be appealed on the basis of merits for the reason that there was no pressure on the parties to opt for arbitration. Arbitration has always been an alternate dispute redressal system where the parties have consented to abide by the award given by the arbitrator chosen by them. Now that qualified arbitrators have become mandatory the question of perusing the award based on merits does not arise thereby ousting the jurisdiction of courts even further.

**CONCLUSION**

The whole point of resorting to arbitration is to specifically oust the jurisdiction of the courts. it is a time-saving mechanism set in place to tackle disputes that arise between parties in a quick cost-efficient manner. Section 34 in theory could lead to an endless loop between the parties by way of the court entertaining the petition to set aside the award by the losing party say on the grounds of public policy which is still rather vague thereby delaying the enforcement of the award and also undermining the arbitrator who rendered the award in a way following which if the award does get set aside, there is nothing to say that the losing party to the “appeal” wouldn’t apply for another S.34 petition for the same creating the said loop. This could lead to increased wastage of the courts time which was exactly what arbitration sought to tackle.

The author does concede to the point that arbitration does cause the parties a lot of money and that in reality, the parties would arrive at a settlement sooner or later, the possibility of it still undermines the whole objective of arbitration in toto.

Where the parties have agreed to oust the jurisdiction of the courts to come together and determine the dispute through arbitration, the courts must not interfere. With the provision to provide for skilled qualified and unbiased arbitrators has been set in place, the question of mandatory judicial interference has reduced significantly.
INTERNATIONAL LABOUR STANDARDS AND ITS APPLICATION IN INDIA: THE ANALYSIS

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ABSTRACT
This paper is to discuss the origin of an International Labour Organization, which has been acting behind the scenes of Indian labour law formulation since 1919. The main objective of this organization is the protection of the rights and basic necessities of the labour-worker community. Not only it has strived towards it but also has provided exceptional services for all the three main elements of the industrial sector - government, employer and employee (worker/labour). The article also talks about the various methods and regulations which has helped us benefit and uplift the industrial sector. The International Labour Law standards have influenced the legislation, labour welfare, trade union systems and industrial relations between employer and employee. There are eight core conventions, which influences or basic legislation and they are also called fundamental/human rights convention of the International Labour Standard. In spirit, it is a similar feel to the International Labour Organization Philadelphia Charter of 1944. Even without the International Labour Organization, the Indian constitution has a resemblance to its standards due to the presences of the Fundamental Rights and Directive Principles of State Policy. The paper further discusses the various acts which have been influenced by International Labour Organization Standards. The Factories Act, 1881 was the first act which was amended by the International Labour Organization Standards. It brought provisions health, safety and hygiene along with measures to prevent child labour. The Mines Act, 1923 dealt with workers of Indian mines. This act took correctional measures regarding the working hours and total working days in a week of the employees but did not talk about any provisions regarding the overtime, and its pay. The Trade Union Act and Payment of Wages Act, 1936 was made to prevent disorders relating to wages by ensuring fixed wages for a fixed amount of time. After the influence of the International Labour Standards, they ensured low priced and quick therapeutic release for over-worked employees. The Weekly Holidays Act, 1937 recommends one paid holiday per week and later, provide additional paid half-day holiday in a week. The Industrial Employment Act, 1946 gives conditions for the employment of workers in the form of standing orders. The Industrial Disputes Act, 1947 introduced industrial tribunals for adjudicating matters of disputes in the industrial sectors.

Thus, to achieve these safety and protection goals, the International Labour Organizations Standards have been implemented on the above-mentioned acts and legislations. This will lead us to talk also about the impacts of these acts and legislations, keeping in mind the International Labour Organization Standards.

INTRODUCTION
Due to the steady fast growth in the past century of the industrial as well as the technological sector has to lead to an increase in the employment of human labour forces. The labour forces are made to do unconventional jobs which put strain at their physical and mental status. The jobs may last over ungodly periods of time
without them consuming the basic necessities to sustain their bodies. The spread of the industries across borders has to lead to the employment of these labour forces in rather atypical manners which are mostly unethical and in some cases illegal. This has enlightened the struggles faced by the labour forces due to exploitation by employers. This lead to United Nations intervention in matters as mentioned above. Thus, under United Nations organizations took place the birth of the International Labour Organization in 1919.

**International Labour Organization (I.L.O.):**

3. International Labour Organization is one of the most crucial organization operating at world level for the benefit of the workers. This specialised organization promotes the right to work, decent employment opportunities, social protection, minimum wages, compensation as well as a trade union. Not only 186 countries are members of this organization which has been following a tripartite governing structure, but it also consists of government representatives as well as employee and employer heads. This governing structures provided the chance for equal representation of the parties, and their views are closely induced in the policies of the principle laid down by this organization. These principles are called International Labour Standards.

One of the predominant functions of I.L.O. is the setting up the international labour standards, which include - Conventions, recommendations and protocols. These Conventions are internationally as well as nationally legally binding to the member nations who have ratified it. The Recommendations provided in international labour standards need not require ratification as there are guidelines and Protocols are weapons which help in the modification of the mentioned conventions.

The I.L.O. consists of three main organs, i.e. (1) The **general assembly** which holds a yearly meeting on June called the International labour conference (I.L.C.). (2) The **executive council** which meets thrice in a year on March, November and conducts a half-day session in June at the end of I.L.C. (3) The I.L.C. provides as a policy-making body and a world forum for contemplating on social and labour issues. It was in this forum the International labour standards were set and adopted. The implementation of these standards was set by a budget contributed by member states. “The I.L.O. has four basic and strategic objectives:-

1. To promote rights at work.
2. To create and encourage decent employment and income opportunities for women and men.
3. To enhance social protection for all.”

Thus following these objectives I.L.O. developed I.L.S.

**International Labour Standards (I.L.S.):**

I.L.O. has developed a systematic process of building the international labour standards which have aimed for promoting opportunities for all genders and also obtained decent as well as productive work along with the general conditions of freedom, equality, security and dignity. These global standards provided to maintain a smooth as well as non conflicted working of the industrial sector. This ideology has been depicted in Guy Ryder.

1515 www.ilo.org
Director-General of I.L.O.’s speech of 2016:

“The ILO’s job mission demands that they identify and predict the transition engines of progress currently in operation and be ready to respond quickly to unexpected incidents and challenges. This would be inconceivable that if the organization did not go on targeting the neediest, the ILO’s mission for social justice could be successfully carried out. The ILO will be judged by how we do for those in poverty, homelessness, no job, the future, or hope for those suffering from the deprivation of fundamental rights and freedoms is rightly judged”

This speech is also taken as a vision statement which provided as a base of international labour standards.

There are 8 conventions which are called the fundamental or core conventions of I.L.S. which were laid down by I.L.O.:

1. Forced Labour Convention, 1930 (Convention No. 29)
2. Freedom of Association and Protection of the Right to Organize, 1948 (Convention No. 87)
3. Right to Organize and Collective Bargaining, 1949 (Convention No. 98)
4. Equal Remuneration Convention, 1951 (Convention No. 100)
5. Abolition of Forced Labour Convention, 1957 (Convention No. 105)
6. Discrimination (Employment and Occupation) Convention, 1958 (Convention No. 111)
7. Minimum Age Convention, 1973 (Convention No. 138)
8. Worst Forms of Child Labour, 1999 (Convention No. 182)

International Labour Organization and India:-

The process of the implementation standards is in context to India. India is one of the founding member of the I.L.O. As the ratification of I.L.O. conventions is a voluntary process; India only ratifies such conventions when the national laws and practices confirm such conventions. As needs to be the incorporation of the Convention in accordance with the Indian constitution, India has been cautious with ratifying particular convention but always has adopted a positive outlook for the concerns of the International Labour Standards. India has ratified 43 conventions to date. India is a party to the I.L.O. Convention No. 144 “Tripartite Consultation (International Labour Standards)”.

Ratification Procedures and Implementation of International Labour Organisations Conventions:

This process of ratification is lengthy as well as a tedious process. There shall not be any conflict between the national laws and the convention proposed by the I.L.O. After the convention is accepted in accordance with that, India has to notify the Governor-General of the International Labour Office. Once the concurrence is issued, the document called Cabinet Note is prepared by the Ministry of Labour and Employment (MOLE). Such a document needs to be approved and then be presented to the parliament. The progress of the


1517 Article 19 of ILO Constitution.
process needs to be informed to the I.L.O. Once the proposal is passed by the parliament, India is required to provide at reoccurring intervals a report regarding the application of the conventions.\textsuperscript{1518} Once ratification is done, it becomes legally binding. Thus, making India liable to the international supervisory procedures regarding the matter.

Thus India has ratified six core conventions; they are as follows:-
1. The Forced Labour Convention, 1930 (Convention No. 29)
2. Equal Remuneration Convention, 1951 (Convention No. 100)
3. Abolition of Forced Labour Convention, 1957 (Convention No. 111)
4. Discrimination (Employment and Occupation) Convention, 1958 (Convention No. 111)
5. Minimum Age Convention, 1973 (Convention No. 138)

INDIAN CONSTITUTION AND INTERNATIONAL LABOUR STANDARDS
India being the Independent Sovereign Republic, has enacted and enforced its own set of legislation which are followed by its people. The legislation adopted is a compilation of various laws who found its root in legislations around the world. A compilation is called The Constitution of India. The constitution has not only established the present democratic governmental system but also has provided welfare as an aim for the nation-state and its citizen. They even ensure the granting and protection of the fundamental rights which provide for giving the people equality, dignity, personal liberty, religious freedoms and even the power to move to the court when such Fundamental Rights have been infringed by an individual or even the state. The Labour Force of India constitutes of 49.8\%\textsuperscript{1519} of India’s population, thus, making them an integral part of the society which has based its growth on the labour forces who indulge in the industrial and trade sector. The Constitution of India has found ways to provide adequate safeguards to the minorities, women, children, economically backwards and the tribal people and other weaker sections. The protection of interests of the Working Class was one of the main aims that was kept in mind while making the Constitution. It is necessary for a Welfare State to deliver help in cases of illness, old age, physical as well as mental incapacity, lack of employment or underemployment and lack of economic power, etc. The State provided assistance not as charity but as basic rights of the people which can be informed if violated.

The Fundamental Rights present in the Constitution provides for political democracy while the Directive Principles of State Policies deal with the socio-economic-cultural attributes of this democracy. When these principles are implemented, a welfare state is born. The Directive Principles of State Policy are:

\begin{itemize}
  \item Article 38\textsuperscript{1520} of the constitution declares that the main state goal is to protect and promote the welfare of the people while in parallel, maintaining the social order.
  \item Article 41\textsuperscript{1521} states that the State keeping in mind it’s economic capacity and development, is to make provisions which may help people who are underprivileged to
\end{itemize}

\textsuperscript{1518} Article 22 of ILO Constitution.
\textsuperscript{1519} https://tradingeconomics.com/india/labor-force-participation-rate
\textsuperscript{1520} http://legislative.gov.in/sites/default/files/doi-4March2016.pdf
\textsuperscript{1521} http://legislative.gov.in/sites/default/files/doi-4March2016.pdf
secure the right to work, to education and public assistance such as unemployment, old age, sickness and disablement.

• Article 42\footnote{\url{http://legislative.gov.in/sites/default/files/coi-4March2016.pdf}} lays down that securing safe and humane conditions of work and granting for maternity relief is one of the main goals which shall help us achieve the concept of the welfare state. No child who is below 14 years in age shall be employed to work in a factory, mine or engaged in any such workplace or in hazardous employment.

• Article 43\footnote{\url{http://legislative.gov.in/sites/default/files/coi-4March2016.pdf}} creates upon the state a responsibility to secure to all workers even if they are agricultural, industrial, or otherwise, to provide for conditions at work which ensure a proper maintaining of life and full enjoyment of leisure along with opportunities in social and cultural aspects and in particular the State take measures to promote cottage industries on an individual and cooperative basis in rural areas. The above-mentioned legislation were enacted to provide safeguard and promote the interest as well as to benefit the of labour community by covering the major aspects of their employment like the concept of fair wages and regular payments, working conditions, holidays and leave, safety and health, conditions of works, labour welfare, social security industrial relations, protection of interest of women and child labour, labour indebtedness, housing, recruitment and training.\footnote{www.shodhaganga.org} The legislations includes all forms of workers, even the ones engaged in factories, mines, plantations, railways, motor-transport, shops, etc. of the industrial sector. The Constitution of India provided the Centre and State Government clear set of goals under the concept of “welfare nation” to ensure all-round development even of labour community and even has provided the government with a subtle hint that they should ensure that the labour community should not lag behind either in social or in political life. The labour legislation was formed after the introduction of constitution aims at achieving this end.\footnote{www.shodhaganga.org}

The Fundamental Rights has also acted as the enforcer and protector of the labour law legislation in India. The concept of Equality which is introduced under the head Fundamental Rights, does not just mean absolute equality before the law. It means that equals shall be treated equally as absolute equality cannot be achieved by humans due to varying physical and mental strength. In simpler terms, it means the absence of special privileges due to birth, caste, class or any other favour towards a particular individual. This rule can be proved in Randhir Singh vs Union of India\footnote{AIR 1982 SCR 298} the Supreme Court held that there might not be an explicit mention of the principle of “equal pay for equal work”. But it is one of the main goal enshrined under Article 14, Article 16 and Article 39(c) of the Constitution of India. Under sub-clause (c) of clause 1 in Article 19 states that it is the fundamental right of the citizen to form association and unions. However, the state does have the power to impose necessary restrictions. This right includes right to form companies, partnerships, societies and even trade unions. In Balakotiah vs Union of India\footnote{1958 AIR 232, 1958 SCR 1052}, it was held that right to form trade union fell under Article 19(1)(c) but had no guaranteed right to effective bargain, strike or lockout but only includes right to life, right to means of livelihood which makes it possible for a person to survive.
The Right to Life and Personal Liberty mentioned in Article 21 has wide and far-reaching meaning. Life is not a mere animal existence. It not only means life cannot be extinguished but also include the concept of the right to livelihood. If the right to livelihood is to treated as a part of the right to life, then the easiest way of depriving a man of his right to life would be just depriving him of his means to earn the basic necessity for the proper functioning of his life. In Olga Tellis vs Bombay Municipal Corporation 1928 popularly known as “pavement dwellers case”, the five bench judge of the Supreme Court ruled that right to livelihood is enshrined under Right to Life in Article 21.

INDIAN LEGISLATION AND INTERNATIONAL LABOUR STANDARDS

1. FACTORIES ACT, 1948:- The Factories act was introduced to provide adequate safety measures so to promote health and welfare of the workers and also to reduce the reckless overuse of the employee’s skill in hazardous situations. This act covers the basic working conditions in factories, provide for the minimum requirement to maintain measures so as to maintain safety and welfare. The Factories Act is applicable to all the factories using power and employing ten workers or more or 20 workers or more without the employment of power for 12 months. This act has been influenced by hours of work (industry convention), 1919, which limits working hours to 48 hours per week and 8 hours per day. The convention also provides the conditions wherein events of the accident, emergency, urgent work and continuous process, etc. one may exceed the working limit. Further, Weekly Rest (Industrial) Convention, 1949 laid down 24 consecutive periods of hours of rest after working according to the working hours laid down in the above-mentioned conventions. The Labour Inspection Convention, 1947 provides regulation regarding timely inspection and regulations to ensure the proper placement of safety measures in the industry.

2. INDUSTRIAL DISPUTE ACT, 1947:- For the peaceful resolution of disputes and to promote cordial relations amongst workers and employers, this act was enforced. This act is applicable to all the units of the industrial and commercial sector. It covers all workers and employees who are paid a maximum Rs.1600 per month except for a person who is employed for managerial and administrative capacities. The main machinery of the act provides ways to investigate and settle disputes through committees, consolidation officers, the board of conciliation, courts of enquiries, labour courts and tribunal and voluntary arbitrations. This act also provides protection of workmen during the pendency of the proceedings and also provides the right to appeal. Procedures and compensation for strikes, layouts, layoff, retrenchment, transfer of undertaking, closure and reopening of a close undertaking are also mentioned in the act. It also provides penalties for the regulations breached either by the employer or employee. This act contains some provisions which have been inspired by the unratified conventions and recommendations of I.L.S. Those conventions are Collective Bargaining Convention, Collective agreement recommendations, Voluntary

1928 1986 AIR 180, 1985 SCR Supl (2) 51
conciliation and arbitration recommendation.

3. TRADE UNIONS ACT, 1926:- The Act aims to regularize labour-management relations in order to allow the lawful organization of labour. The Act mentions the protection and privileges that shall be provided to the registered trade unions. The registration of the trade unions is a voluntary process, but there are some conditions that are to be followed in order to get a trade union registered. There are various regulations which deal with the dissolution of trade unions and amalgamation of trade unions which is rather a tedious procedure. The inspiration of this act came from the Tripartite Consultation Convention, 1976, which has been ratified and came into effect giving powers to tripartite bodies under the Act. The Trade Unions Act took from two conventions of I.L.S., i.e. Freedom of Association and Protection of the Rights to Organize Convention, 1948; and Right to Organize and Collective Bargaining Convention, 1949. These conventions gave rights to autonomy in union organizations for furthering and defending workers interest by collective bargaining and collective action. It also provided protection against discrimination for joining the trade union and taking collective actions. Rural Workers Organization Convention, 1975 was also inspired in creation and reformation of the act.

4. BIDI AND CIGAR WORKERS(CONDITIONS OF EMPLOYMENT) ACT, 1966:- The main provision was to reduce child labour by only allowing children of 14 years and more to work in such factories. This act prohibited children from handling dangerous work like cinder picking, cleaning of ash pits, manufacturing match sticks, explosives, fireworks, spinning wool cleansing, etc. Children were only permitted to work for 6 hours between 8 A.M. to 7 P.M. for the compulsory day of rest in a week. The employer shall also provide legal notice to the local inspector and also maintain a day to day basis register regarding the employment of children.

5. THE SHOPS AND ESTABLISHMENT ACT, 1953:- To create right for the workers and legal obligation for the employers, the act was introduced. The special feature of this act was that each state had to frame their own rules and regulations, the number of people employed, amount of wages, working period as well as hours according to the labour force operating in their state. The provision laid under the act made it compulsory to register a shop and establishment within 30 days of commencement of work. Prior notice shall be provided in case of closure if the situation may permit. But communication of the closure is to be compulsorily made within 15 days of closing. This act also lays down guidelines for the hours of work per day, per week, rest intervals, opening and closing hours, closed days, the national holiday, regional holidays and religious holidays. Employment of children, young adults, women are regulated by the provisions mentioned under this act, rules for annual leave, maternity leave, sick leave, casual leave are also mentioned. Keeping in mind the profit and predictability of these shops and establishments. There are also a fixed set of rules as well as conditions which are required to be fulfilled for the termination of service.

6. THE MINES ACT, 1952:- The act exclusively deals with the health, welfare and the safety of the workers employed to do mining activities. The act also puts a
limit on maximum hours on work that shall be permitted to the workers by keeping in mind the nature and intensity of their physical labour. The act incorporated various sections to ensure that the working conditions of miners are met with proper safety and medical guidelines. The Mines Act is administered by the ministry of labour and employment through the directorate-general of mine safety (DGMS).

7. THE MOTOR TRANSPORT WORKERS ACT, 1961:- Taking care of motor transport workers and regulating the conditions of the work is the main purpose of the Act. It applies to every motor transport, undertaking who have employed for five or more workers in all the states/trade unions in the country. The act gives power to the state authorities to apply any provisions of the act to any motor transport undertaking employing less than five workers. The provisions of the act prohibit any adult worker for more than 8 hours per day and 48 hours per week. In the various occasion, the time limit may exceed up to 10 hours per day and 54 hours per week.

8. WORKMEN'S COMPENSATION ACT, 1923:- There are various provisions in this act to provide compensation in situations of industrial accidents/occupational diseases which may happen to the employee in the course of employment resulting in their death or disablement. The act covers minimum compensation of Rs.20,000 and maximum of Rs.1,14,000 in cases of death, for permanent disablement minimum compensation is Rs.20,000 and maximum up to Rs.70,000, and for temporary disablement, the compensation is 50% of the said wage for a maximum period of 5 years.

9. MATERNITY BENEFIT ACT, 1961:- The maternity benefits under this act is provided to female workers after completion of 80 days of employment. Their work should not be gruesome, tedious or lengthy as it may interfere with pregnancy or the development of the foetus, even in some cases lead to miscarriage or death of the mother. They are thus providing a period of 1 month to 6 weeks rest prior to the delivery. The bonus of Rs.250 is provided along with the maternity benefit for post-natal care, and prenatal care may also be of free of charge. The women workers receive maternity benefits only on the submission and affirmation of a medical certificate.

10. EQUAL REMUNERATION ACT, 1976:- This act was introduced to prevent discrimination between men and women workers for similar nature of work. This act was also prevented inequality in recruitment and service conditions for the employment of women and men except where the working of women was prohibited or restricted by the law. Right to Equal Pay without any discrimination on the grounds of gender was adopted by India from Equal Remuneration Convention, 1951.

11. PAYMENT OF GRATUITY ACT, 1972:- This act provided payment when one ceased to hold office. The coverage of the act is factories, mines, oil fields, plantations, ports, railway companies, shops and commercial establishments. Only employees whose wages did not exceed more than Rs.3500 per month were eligible to be provided with such payment.

12. EMPLOYEES STATE INSURANCE ACT, 1948:- This was one of the main acts which provided health coverage as well as medical coverage for an employee who has
fallen prey to employment injury. The amount of pension depends on whether the incident leads to death or a severe injury. Employees eligible under this act are not to have wages exceeding Rs.3000 per month. The act covers minimum compensation of Rs.20000 and maximum of Rs.114000 in cases of death, for permanent disablement minimum compensation is Rs.20,000 and maximum up to Rs.70,000, and for the temporary disablement, the compensation is 50% of the said wage for a maximum period of 5 years.

13. THE PAYMENT OF BONUS ACT, 1965:- The act created a statutory obligation for the employers to pay a bonus to employees after certain establishments such as profits or productivity. This act is applicable to all the factories come under factories acts as well as any establishment exceeding more than 19 employees on any day during a day. The government may extend the coverage by reducing the employee numbers to 10. It includes all forms of workers whose salary or wage do not exceed Rs.2500.

14. MINIMUM WAGES ACT, 1948:- The act was introduced to determine a standard minimum wage for industrial as well as trade sectors as such legislations did not exist prior. This act was applicable to all the employees skilled or unskilled, manual or clerical, including indoor workers as well as outdoor workers, thus minimum wage becoming an obligation for employers and rights for the workers.

15. PAYMENT OF WAGES ACT, 1936:- Not only the act regulated wages but also provided prompt payment and a method of prevention from exploitation by the employers. The Act also included a method of remuneration, bonuses or sums payable at the termination of the service. The main provision of this act was equal remuneration for men and women. Minimum Wage Fixing Convention, 1970 (I.L.O. conventions) was introduced and laid down various concepts, i.e. deduction from wages, periodic payment of wages, notification to workers on the condition on which they are being employed, maintaining wage statements and payroll records and also maintaining any deduction made by the employer on the payments made to the worker. This convention also helped in the prevention of unnecessary deduction of wages, and the concerned worker is to be given reasonable opportunities to show why the loss incurred was not in their hands which lead to the deduction.

16. THE PLANTATIONS LABOUR ACT, 1951:- The plantation workforce has been the most exploited group of workers in the organized sector of industries and trade. Hence, act came to existence which ought to provide for the welfare of labour and to manage, the conditions of workers in plantations. Under in legislation, the state government has powers which allow them to take all the feasible measures to improve the conditions. The maximum hours of work are 9 hours a day and 54 hours a week. No worker is allowed to work for more than 5 hours before they had an interval for rest of minimum 30 minutes. The act further mentioned penalties imposed for the violation of the provisions with the fine of minimum Rs.500 and/or three months of imprisonment, which may extend up to Rs.1,00,000 and/or imprisonment of 12 months.

17. THE CONTRACT LABOUR ACT, 1970:- This act required contract labours to work for maximum 9 hours between 6 A.M. to 7 P.M. with the exception of midwives and nurses in infirmaries or hospitals.
18. THE CHILD LABOUR ACT, 1986:-
This act was enacted to prohibit the engagement of children in particular emoluments and to regulate the conditions of work of children in other employments. This act intended to remove act lays down a procedure to decide various reforms regarding the banned occupations. Further, the act lays down various penalties for the employment of children in violation of the provision of the act. The act obtained uniformity in context with the definition of “child”. No child shall work between 7 P.M. and 8 A.M. and the period of work shall not exceed 3 hours per day before he or she has had an interval for rest of at least an hour, and in total, a child is not permitted to work more than 6 hours. Every child employed shall be given a holiday each week and such holiday shall be specified by the employer in the establishment. The act provided provisions for the punishment with imprisonment for a term not less than three months but May extent to one year with fine, not less than Rs.10000 which may extend up to Rs.20000 to the employers who permits any child to work in contravention to the provision of the act.

In Weekly Rest (Industrial) Convention, 1921 laid down in article 2 that workers shall be provided with atlas 24hours of consecutive rest in a period of 7days and such rest shall concede with already established customs, national holidays, traditions of the state. This rest shall be provided after each major undertaking, the period of rest shall also be considered keeping in mind the humanitarian and economic conditions of the society.

The Labour Administration convention, 1978 lead to the creation of the concept “Autonomy of Employers and workers organisations.” It forced the competent bodies to form a set of rules and regulations which needed to be revised at fixed intervals keeping in mind the dynamic conditions in the labour community. The competent bodies were made to review international employment policies, chart out the employed, unemployed and underemployed persons and draw out attention to the defects and exploitations faced by the workers and provide policies to diminish such situations.

Protection of Wages Convention, 1949 laid down a few guidelines for payment of consideration to employees or workers by employers. The wages payable shall only be paid in the form of legal tender as promissory notes, vouchers, coupons, normal form of currency otherwise prohibited by state laws. The consideration shall be paid directly to the worker otherwise mentioned against the law. It also mentioned the workers are not to be coerced to make use of stores or services operated in connection with the undertaking they are employed. The deduction of wages shall only be permitted if it complies with the national laws fixed by the government and also the workers should be informed prior to the deduction of wages along with a reasonable reason.

UNRATIFIED CONVENTIONS ANFD RECOMMENDATION OF I.L.S.
In order to follow or apply such I.L.O. conventions or any part of conventions introduced by I.L.S. does not necessarily mean to ratify such conventions. Paragraph 2 of the ILO declaration on fundamental principles and Rights at Work and its Follow-up declares that all members declare that:-

“All members have a duty to support, uphold and understand, in good faith and in conformity with the Constitution, values respecting the fundamental rights applicable to these conventions, even though they have not ratified the conventions in question, arising from the
very fact that they are members of the Organization, namely:
(a) The right to collective bargaining;
(b) Eliminate forced or compulsory labour;
(c) Abolition of child labour;
(d) Eliminate discrimination in employment and occupation.”

India has not ratified conventions on Freedom of association and protection of the right to organize of 1948, and collective bargaining of 1949 as they are not consistent with the municipal laws of the country. As communicated by the department of personnel and training (DOPT), these ratifications would lead to providing government employees certain rights which are prohibited under statutes like to strike work, criticise government policies openly, to freely accept financial contribution and to join any foreign organisation, etc.

CONCLUSION
After analysing the various conventions of the International Labor standards, it can be taken into consideration that India is concerned about the improvement of labour standards and trying to make improvements in the labour sector. India has implemented the conventions ratified by it and also took various provisions from unratted conventions of International labour Standards to make improvements by making amends to current existing laws. The main reasons behind the non-ratification of those conventions are that those conventions are not consistent with the current laws of India. The international standards have been prepared to keep in mind some particular countries, but unfortunately, India’s situation is not such that would fall in one such country as they are trying to enforce universal standards by completely ignoring subjective circumstances and it is not just and the correct way of jurisprudence.

One can derive from the above give research that perceptions and safeguards have been provided by the law to reduce exploitation of workers, but such laws have not been implemented due to various reasons. They are:
1. Illiteracy of the workers makes them unaware of their rights.
2. Unequal treatment: Giving benefits to people with power, money and influence. In-Humane treatment towards people who work at risky jobs like Bidi and Cigar factories.
3. The method of implementation of the legislations are weak, i.e. the penalties are low and do not act as an economic burden to the person committing the offence and imprisonment are of short period and mostly bailable.

Indian laws only have kept in mind the scenarios which existed a century ago and have not updated the laws in accordance with the present living conditions. The money provided to a permanently disabled person or dead person is only around Rs.20,000 to Rs.1,50,000 (approx.) which is not sufficient to provide to the dependent members. The Maternity Benefits provided by the act is also not equivalent to the pay the women losses in her un-paid leaves du.

RECOMMENDATIONS
The researcher makes the following recommendations for Indian labour law and International Labour Organization:-
1. India should ratify all those conventions which are needed for the current scenario of

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labour industry and make amends to the current labour and industrial laws of India.

2. International Labour Standards while making the provisions for the improvement of the labour sector by only keeping in mind a few countries and totally ignored the situation of India. They should also focus on making laws which are suitable for countries like India as it is the second most populated country in the world and its 48% of the population falls under labour category.

3. The privileges provided by the acts mention in this paper are not financially enough to support the people who come under this act.

4. The act itself is laid down in legal terms which a person with a limited vocabulary is unable to understand.

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ETHNIC CLEANSING OF ROHINGYA MUSLIMS: VICTIMS OF RACIAL KILLING AND HUMAN RIGHTS INFRINGEMENTS

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ABSTRACT
There has been an ongoing issue of the ill-treatment of Rohingya in Burma since 1982. This has impacted the global and domestic forum of Myanmar. This paper unfolds the kinds of atrocities that have been caused by the Authoritarian Government of Myanmar. It emphasises on genocide, refugee status and the abuse and torture of the Rohingya residing in Burma. It looks at the violation of provisions given under UDHR like Citizenship, Statelessness, lethal use of weapons against civilians, limitations on freedom of speech, to practise any religion and movement, forced displacement which is given under the UN Guiding Principles on Displacement. It will discuss Contemporary developments like the Truth Commission body and a national body called The Annan Commission Report and interference of Organisations like UN, UNHCR along with regional mechanisms like ASEAN for dealing with the tyrannical rule of the Burmese and between the local Rohingya Muslims. Data report depicting mass expulsion and killing of local Muslims is also given here. The paper also studies the impact of the Rohingya Crisis on neighbouring countries like Bangladesh, Thailand, India, Malaysia and Indonesia. The final section prescribes various causes and recommendations for a peaceful state.

INTRODUCTION
The city of Rakhine (Arakan) is the oldest area found in Burma. The Rakhine State extends up to 14,300 square miles (Islam 1999) with 3.8 Million individuals incorporating 59.7% Buddhist, 35.6% Rohingya Muslims and other remaining people are the local groups in the area (Alam 2013). The Muslim belongs to the Sunni Muslim minority that resides in the Arakan area of Myanmar and is one of the most abused and ill-treated minorities worldwide. There is an existence of a historical connection with the Rakhine state and carry a distinct identity with themselves. Myanmar continued battling with the issue of the political shakiness and armed conflict after getting freedom from the United Kingdom in 1948. In 1962, a rigid authoritarian dictator state was shaped with due accentuation on communist thoughts. Which went on for more than 60 years.

After 1962 the Burmese armed force perpetrated different wrongdoings like killing, tormenting, raping the Muslim population. The state later exposed the mass removal of Rohingya which prompted the incessant displaced person emergency in 1977 in Bangladesh also in 1992. Later many Muslims were constrained by the Bangladeshi Forces telling them to return to their homeland. The Rohingya who returned were either murdered by the Burmese or had restricted rights in relation to the employment and movement in the country. Every year many Rohingya Muslims were uprooted who were surviving on humanitarian aid while dealing with maltreatment like exploitation of labor, arbitrary arrest and detention, and beatings caused by the State Border Guards. In March 1997, there was a significant viciousness broke out against Muslims because of the allegations of rape by a Buddhist woman leading to a demotion Muslim houses in Mandalay. Later Muslims are also blamed for stealing...
jewellery from the pilgrimage site of Buddhists (Schober 2007, 58). Rape allegations by Buddhist women led to a lot of conflict in June 2012 2013 2014, leading to hundreds of death in Sittwe Rakhine state. The state proposed the establishment of camps where the Rohingya weren't permitted to take part in any social, economic, and any other activity outside their village and were cut off from different networks. In 2016, about 400 villages in Rakhine state were torched down due to the military prorations that were against a minority group (Human Rights Watch 2017) leading to a displacement of ten thousand people (Barry 2017).

**GENOCIDE**

If a Government performs a mass homicide it will constitute a genocide. We've likewise observed abominations causing atrocities over Rohingya Muslims who have been a constant victim of this slaughtering by the oppressive standard of the dictator. These demonstrations have constituted a genocide against the local Muslims intending to decimate the out of Burma. They were categorised as non-citizen and unlawful settlers who have been isolated from other ethnic groups (Szurlej 2015). They were known as Muslim “Kalar” which means black (Fortify Rights 2015).

Rohingya became stateless and lost their nationality as they weren’t included in the Citizenship Law 1982. They were not allowed to get employment, medical services, education (Human Rights Watch 2013). They were called by different names like snakes, mad dogs, wolves, jackals, and have been recognised as jihadis, thieves, murderers, terrorists and criminals. The 969 movement, radical requests of priests, the Tatmadaw and police who have caused disappearances and murders, gang rape of women, arrests, mass rapes, torments, and pyromania of the Rohingya local villages. The Myanmar Government was also preparing armed forces and procured heavy weapons against the local Muslims (Szurlej 2015). The Rohingya were forced to live in detention camps located in Rakhine State where there is a lack of basic facilities (Fortify Rights 2015). In 2017 about 10,000 Rohingya including children died because of sickness and starvation in IDP camps. The Burmese security forces intentionally focused on the obliteration of the civilian population in Arakan district (AI 2017). They have additionally lost rights related to study, practice and profess religion, marriage, work and medical facilities (Wright Westcott 2017). In numerous positions we've also seen that the genocidal perpetrators have deflected their blame to the victims by destroying shreds of evidences, intimidating witnesses and opposing investigations. In this, the destructive culprits redirected their faults to the victims by contracting examinations and devastating confrontations. Maung Zarni and Alice Cowley characterised this sort of annihilation as “slow-burning” (Zarni and Cowley 2014).

**HUMAN RIGHTS OF ROHINGYA**

Human Rights secured in a vote based country as opposed to a nation outside control or the military system, or tyrant fascisms or one-party rule (Mohajan 2013). Rohingya Muslims are not given nationality rights and are vulnerable to citizenship rights, extra judicial killing, rape, destruction of livelihood, human trafficking, sexual violence, discrimination and persecution, systematic use of child soldiers, forced labour and child labor, confiscations of land, unsatisfactory conditions detention, renewed instances of political arrests, detention, forced displacement, continuing use of torture.
CITIZENSHIP AND NATIONALITY
Citizenship help in exercising full scope of harmonious rights which originate from a recognised and legitimate authority (Kymlicka 2011: 22, Raz 1994). It provides a legitimate identity for the protection of various rights of a particular minority group. Without it, individuals are placed in a dis-balanced position with the government creating an inferior position with other national groups. Discrimination and dominant separation at an official gathering leads to violent behaviour and negative stereotyping. In a democracy, it provides a mechanism to determine who isn’t a part of the nation as it is extremely hard for the global community to integrate based on nationality laws. The Constitution of Myanmar defines citizenship as “national races” (CRUM,2008: Article 15) and has given its delegation to the legislation (CRUM,2008: Article 346). The Legislation has mentioned eight categories for citizenship criteria- “Karen, Shan, Mon, Burma-Rakhine, Kayah, Kachin, Chin” (BCL, 1982: Article 3). It also prescribed a central body that consists of three ministers who determine the question of citizenship of an individual based according to the citizenship applications with the help of the Council of State decision (BCL, 1982: Article 4). The Chair of New National Democracy Party proposed the purpose of Citizenship Law 1982 as “the citizenship law is intended to protect our race by not allowing those with mixed blood from making political decisions [for the country], so the law is very important for the preservation of our country” (Green 2013: 96). Rohingya have always been vulnerable whose rights have been violated by majority populations who enjoy the security of the government powers using citizenship though they don’t have practical roads for practicing resistance nor protection from the state. After considering the situation of Rohingya were placed under the —. Zawacki argued that the convention only applies to those residing in the territory and is vague in nature (Zawacki 2013: 20, UNHCR 1954: Article 1). The act classified a legitimate exclusion of One million Rohingya, by denying the nationality rights. The disavowal of Burmese citizenship has resulted in inequalities. Rohingya is given the position of “statelessness” or stateless persons. UDHR subjects the right to life (Article 3) and the concept of statelessness as a matter of human rights law. Article 15 stated that no person should be prohibited from changing his nationality and no person should be deprived of his identity or citizenship. The predicament of the Rohingya won’t improve until the law is deprived of its biased arrangement. The inward auxiliary situation concerning the absence of citizenship of Rohingya focuses on the unsafe idea of the reality and defencelessness opposite the state and other adversarial ethnic groups. Bangladesh or Myanmar has not acknowledged the reason for statelessness as an appropriate possibility for citizenship. The Citizenship law 1982 eradicates the basic rights to reside with harmony in their tribal terrains due to non-acknowledgment of their reality before 1823 and places them into disproportionality powerless situations with other groups in Rakhine state.

ROHINGYA EXODUS
In 1978, the military carried out their activity called Naga Min or Dragon King to uproot the Rohingya citizens out of the state. About 200,000 Rohingya fled to Bangladesh because of a lack of documents. Bangladesh was an underdeveloped country which didn’t have legitimate resources to satisfy the requirements of the
citizens. In 1979, Myanmar and Bangladesh consented to an agreement. This agreement focussed on the returning back of Rohingyan to Myanmar. However, when Rohingya returned back to Myanmar they were jobless and with no confirmation of citizenship. Therefore they were declared as illegal foreigners of the state.

THE 969 MOVEMENT
A renowned enemy of Muslim pioneer of Myanmar Ashin Wirathu began a 969 movement to blacklist the Muslim community. The Buddhist composed 969 on a chakra wheel. These digits represented the gems of Buddhism which were Buddha, Sangha and Dhamma. It delineated the rule of Emperor Ashoka and his regime. The first 9 represented the qualities of the emperor, the second depicted the Dhamma and the other 9 represented the Sanghas.

The Buddhist leaders used to stick stickers everywhere throughout the state on vehicles, shops, houses, and cabs which categorised them from other communities. These stickers portrayed from which places should Buddhist individuals shop and eat. The fundamental goal of this movement was to prevent Muslims from developing and eradicating them in every way from Myanmar (Aggestam, 2002).

GOVERNMENT’S POLICIES
Theravada Buddhists had a majority in the region from 1057. During World War II, the Buddhist Burmese began battling for their expansionism and autonomy from the British. Later Buddhists became a significant figure in Burma. They had the ability to make their own enactment. Buddhism was chosen as an official religion for the nation. However, many Muslims didn’t consent to Muslim beliefs were different from the Buddhism beliefs. Leaders from both the community wanted supreme power, which lead to a number of protests in the country (Juergensmeyer, 2010).

The Buddhist community was in majority so they democratically elected their leader however the leaders were biased and pro-Buddhist. The intention of the leader was to suppress Islam by countering the Rohingyas. Mr U Nu began a methodology as “Burmese Buddhist Approach to Socialism”. The concept concentrated on the development of the infrastructure and providing financial support in Buddhist majority area. The states which were having the religious minority didn’t see any infrastructure or financial support by the government or any organisation (Akins, 2014).

Mr. Ne Win, who was a president from 1958 to 1981 envisaged hatred towards Rohingyas Muslims in the country. During his term, he proposed the “Nationalistic Xenophobia” amongst the general public. The general society started mistreating the Rohingyas and were considered as outsiders and a strain of Myanmar’s economy and security. Later he passed a Citizenship Law 1982 preventing Rohingyas to be a citizen in Burma and declaring them as illicit vagrants and foreigners of the state. An operation called Naga Min and Thaya was also initiated against the local Muslims (Akins, 2014). President Mr. Thein Nyan who was the head of New National Democracy made the 1982 law legitimate. He was a defender of the Buddhist Burmese group and was against the blending of the Buddhist race with any other community. Meanwhile, the hate speeches addressed by Wirathu and the 969 movement and Safeguarding National Identity was also bringing utmost disparity and clashes between communities. In 2012, the President announced before the United States High Commission that Rohingyas...
are not a part of Myanmar and should be residing in some different state. The communities became brutal towards them and this led to the Rohingya becoming a minority in the world (Zarni 2013).

**FREEDOM OF RELIGION**

Freedom to profess and practise any religion is considered an important component. This right has been mostly violated in anti-democratic countries. These are contemplations regarding the hatred towards religious freedom of the Rohingya population. The minority is not allowed to enjoy the anti-discrimination laws made by the state since they are non-citizens. Muslims in Myanmar needed permission from higher authorities to flee away from their home towns. The request was mostly denied by the authorities however sometimes because of bribery they were allowed to travel in the surrounding area. Rohingya living in Rangoon also required approval from authorities to travel within and out of the Rakhine State. According to Article 34 of the Burmese 2008 Constitution states, “Every citizen is equally entitled to freedom of conscience and the right to freely profess and practice religion subject to public order, morality or health and to the other provisions of this Constitution”.

ICCPR protects this right. It provided provisions concerning the freedom to practise and profess any religion or belief. According to Article 18, it lays down restrictions on the professing religion and focuses on wellbeing, health, order, or fundamental rights. The Burmese authorities violate these fundamentals rights. The security powers of Myanmar captured Rohingya Muslims for teaching Muslim teachings and praying without emphasising on the above conditions. Religious spots of worship were only built with the approval of the official authority of Burma. These requests were mostly denied. Therefore, we see how Muslims faced difficulty with repairing or building a mosque or religious schools in Rakhine State. Old mosques in Mon State and Rakhine State were detonating because of the denial of a request by authorities for the maintenance of mosques. The repairing of a roof of a Rangoon mosque became a reason for conflict when the Rangoon Mayor and USDP candidate Aung Thein Linn agreed for the construction project. Later the Yangon City Development Committee forced the mosque to stop the repairing of the roof. The authorities disapproved of this construction. In 2015, President Thein Sen proposed a law called “Four Race and Religion Protection Laws” which was partially bias towards Burmese and discriminatory towards Rohingya Muslims. The first law under it was the Monogamy Law, focusing on one marriage for both men and women. This was seen as a discriminatory practise against Muslims as their religion allows for polygamous marriage (Radio Free Asia 2017). In the 1990s Myanmar implemented a law under which all people residing in Rakhine were required to get permission from Myanmar Border Guard Force authority before getting married and often had to wait for years for processing of fee (Human Rights Watch 2013, The Arakan Project 2011). The Government made rules like to obtain a license for marriage a man was required to save their beards and women were prohibited to wear the headscarf while clicking a picture. Women were also told to take a pregnancy test before getting marriage permits (Fortify Rights 2005). There was also the existence of firstly, Religious Conversion Law which prohibited forced conversion and approval of religious conversion by Registration Board and Interfaith Marriage Law which
was governed by the Myanmar Buddhist Women’s Special Marriage Law which allowed for denial of marriage between Buddhist women and non-Buddhist men. Another important law was the Population Control Law which focused on providing a limitation by the Government at division and state level on the reproductive rate if there was an increase in birth rate, infant rate, or maternal mortality rates which acts as a hindrance in the development of a country. In some instances, the state authorities have denied the issuance of birth certificates for children. In 2005 law was implemented restricting the birth of not more than two children in every Rohingya family. These laws clearly targeted the Rohingya of Buthidaung and Maungdaw townships in Rakhine state.

FORCED DISPLACEMENT
Rohingya who travelled within the state and outside were often a victim of exploitation. After the Citizenship Law 1982, many individuals were held to be illegal migrants (UNESC 1995). Burmese officials violated Article 13 of UDHR which stated that “everyone has the right to freedom of movement and residence within the borders of each state” (UDHR Article 13.1). The Burmese blocked humanitarian aid which was being provided to Rohingya, violating the United Nations Guiding Principles on Displacement. The principles laid down the responsibility of protection and humanitarian aid to the internally displaced persons (IDP) without any discrimination on basis of religion, national or ethnic origin, or legal status. The government was supposed to protect the displaced from any attacks and to refrain from keeping the displaced forcefully in camps. In 2005, wife and three children of U Kyaw Min, a Rohingya MP of the National Democratic Party for Human Rights (NDPHR) were imprisoned for 17 years for living and travelling in Yangon (Rangoon) without a permit” (MRGI 2008). President Thein Sein’s suggested the mass expulsion of the Rohingya to third countries.

USE OF FORCE
The Burmese security powers abused the Rohingya during arrest and attacks on villages which resulted in deaths. It violated United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. While using the power the authorities are required to practice restriction and providing a limit to harm and injury.

CONTEMPORARY DEVELOPMENT
UNITED NATIONS: Tomas Ojea Quintana focussed on responsibility and accountability of government. In March 2010, Quintana visited Myanmar and established a foundation called UN Commission of Inquiry to investigate Myanmar’s infringements of laws. In June 2012, partisan savagery erupted. The Rohingya weren’t protected by the security forces, which resulted in several deaths and 100,000 displaced. They also participated in the persecution—killing, beating and capturing the Rohingya and hindered humanitarian aid. During the contention, media ignited the concept of discrimination by publishing incorrect information. After the outbreak in society, the mass expulsion of Rohingya in UNHCR camps was recommended by President Thein Sein. UN Special Rapporteur Yanghee Lee was denied access to Muslim villages in Rakhine state during her investigatory visit. (Al-Jazeera 2017). A proper reporting by the UN Special Rapporteur is done to keep a check on the human rights violations and lack of government response. (Bangkok Post 2017, UNGA 2016, UN 2017a, 2017b).
TRUTH COMMISSION: In August 2012, abuses in Myanmar were examined by the Truth Commission which was developed by Quintana. This body represents provincial mediations between the abusers and their victims. Quintana additionally encouraged to remove the limitations on the movement of the displaced Rohingya in the camps. In September 2011 President Thein Sein designated a National Human Rights Commission instead of a Truth Commission. The Rohingya representative entrusted with researching the June episode of savagery. Later he found no administrative mishandles and presumed that every single philanthropic need was met while overlooking situations encompassing persecution and citizenship of Rohingya. The commission also violated the Paris Principles. It violated these principles because of the absence of autonomy from legislative abuses. In October 2012, brutality again erupted by state security forces and local officials. The Rohingya towns were pulverised leading to an obscure killing of people and displacement of 35,000 people. Burmese officials hindered Rohingya access to the business sector, food, and work. United Nations provided aid to Rohingya who was captured, jeopardised, and intimidated. In March 2013 again violence erupted leading to 13,000 individuals homeless indicated by the United Nations. According to reports, about 120,000 internally displaced persons (IDPs) are residing in brief sanctuaries with inadequate facilities where the medical team has recorded instances of malnourished children, skin contaminations, worms, chronic coughing in the camps.

ASEAN: Rohingya uprooting because of composed and far-reaching brutality has prompted overflow of a local circumstance into the Malaysian and Thai waters and domain looking for asylum from oppression (Bangkok Post 2014, Reuters 2014). The Rohingya issue would hence warrant a clarification of regional mechanisms, to be specific ASEAN’s inability to manage manhandles executed upon these individuals. The member states of ASEAN have been badly affected by this situation. It is an intergovernmental association that indicates its operational systems and standards that illuminate part states concerning intergovernmental relations in ASEAN’s systems (Acharya 1997, 2001, 2005, Ba 2009). Its standards are made out of norms preventing the outside obstruction and the autonomy of the state (TAC Article 10), tranquill depression of debates and non-impedance inside undertakings and (TAC Article 2, 11,13) and procedural standards of counsel and majority in the process of decision making (Narine 1997: 365, 1999: 360, Sebastian and Lanti 2010: 155). Every ASEAN country discusses the issues to manage the Rohingya issue collectively which means that, Myanmar would have to rebuff itself and take into consideration regionalisation and internationalisation of the Rohingya issue. The ASEAN Charter specifies the guidelines for the protection of human rights. Since AICHR is arranged inside this network, fundamentally this prompts state power over official conclusion-making authority (ASEAN 2009a: supra 15, Petcharamesree 2013). Malaysia’s PM Najib Razak also accused Myanmar of engaging in genocide against Rohingya and called up a meeting for members of Myanmar in ASEAN (Channel News Asia 2016, Jozuka and Maung 2016, The Nation 2016).

THE ANNAN COMMISSION REPORT: In 2016, The Office of State
Counselor (Aung San Suu Kyi) and the Kofi Annan Foundation together established a committee to recognise the variables that brought underdevelopment and viciousness in the nation. It focused on providing nationality to all individuals and giving equal rights concerning movement, education, facilities like clean water, shelter, sanitation, food, ensuring and providing humanitarian aid for all communities in Rakhine State.

DATA REPORT
An operation called Nagamine (Dragon King) was to clear out the illegal migrants from Burma by the demolition of mosques, historical schools of Islamic monuments and brutality, starvation, rape, torture, and death by the government leading to the displacement of 200,000 Rohingya and death of 50 Rohingya from Northern Arakan to Bangladesh. (Grundy-Warr & Wong, 1997; Smith, 2006). In 1991, and showed up in Bangladesh received 260,000 Rohingya who fled from Myanmar. From 1993 to 1997, 250,000 Rohingya transients came back to the Rakhine State (Grundy-Warr and Wong, 1997; Coutts, 2005).

In 2008, Rohingya were forced to work at a construction site, agricultural field or as guards, and the Tatmadaw and NaSaKa was killed if any Rohingya denied working (Fortify Rights, 2015). In 2012, a 27-year-old Buddhist lady Thida Htwe was assaulted and killed by three Muslim men in Ramri Township which resulted in conflict and led to the death of 100 Rohingya and displacement of 120,000 people. A number of dead bodies were disappeared or burned during persecution. (HRW, 2012; Mohajan, 2018). In Yan Thei town, 70 Rohingya are slaughtered (HRW, 2013). In 2012, 140,000 were displaced and kept into IDP camps in heartless conditions. There was no clean water and restrooms and a prohibition of humanitarian aid and health aid in camps. (HRW, 2012; Motlagh, 2014).

The UN Office for the Coordination of Humanitarian Affairs reports that in August 2015, 143,500 Rohingya remained internally displaced in Rakhine (UNOCHA, 2015). On November 12 2016, 60 Rohingya militants killed lieutenant colonel was killed and injured other cops. After this, the forces demolished 1,500 Rohingya structures and helicopters terminated aimlessly into the Rohingya towns. This led to the death of 100 Rohingya and more than 90,000 had fled from Myanmar (International Crisis Group, 2016).

On 27 August 2017, Gu Dar Pyin Massacre killing 90 Rohingya in Gu Dar Pyin district of Rakhine State (Blumberg, 2018) and later the Burmese army burnt the corpse with acid (Klug 2017). On 30 August 2017 Tula Toli slaughter took place where 500 ladies and youngsters were slaughtered (Dhaka Tribune, 2017). On 2 September 2017, Ina Din slaughter took place killing 10 Rohingya in Rakhine State (Lone et al., 2017; Taylor, 2018).

In certain cases, 354 Rohingya towns in Rakhine State were burnt down, numerous Rohingya houses were plundered, and there was a rise in gang-rapes (Wright and Westcott, 2017). The report suggested that 1.1 million local Muslims were relocated in Bangladesh, 40,000 in India, 102,553 in Thailand, 133,263 in Malaysia, 1,000 in Indonesia and 55,000 in Pakistan before the finish of March 2018 (International Development Committee, 2018).

ROHINGYA AND IT’S IMPACT ON THE NEIGHBOURING COUNTRIES
Rohingya have always been treated brutally by the Burmese police and army. This prompted the Rohingya Crisis in Myanmar resulting in major displacement and illegal
migration of refugees in various nations like Bangladesh, Thailand, Indonesia, India and Malaysia.

**BANGLADESH**
Bangladesh is situated in South Asia and is neighbouring country of Myanmar. Bangladesh consistently provided shelter to the Rohingya Muslims. But as it belonged to the underdeveloped nations, it became difficult for the country to deal with the migrants as there was a lack of resources. So later, both countries consented a peaceful agreement for the returning back of the Rohingya to the Rakhine State. Numerous Rohingya went back to Myanmar but after seeing the brutal conditions there, they migrated back to Bangladesh. About 1.1 million refugees are still residing in Bangladesh. Jonathan, BBC head of South East Correspondent said “Rohingyan Muslims can’t return back to their country and villages as the Myanmar government pulverised many homes and villages. They made landmines with the border of Bangladesh so that no one can quietly cross the border.” He further expressed that “After the agreement of resettlement of refugees, Myanmar government assembled 25000 refugee camps with the help of India and Japan. The condition of the refugee camp is very poor, the houses are already broken and individuals cannot live there. The refugee camp is not their homeland” (Jonathan, 2019).

World Health Organization said there were 60,000 births in the refugee camps in 2018. The camps became overcrowded and a hub of diseases. There were also issues like human trafficking, smuggling and prostitution which started coming up within the camps.

**THAILAND**
Myanmar and Thailand are Southeast Asian countries and share the same coastline. There were numerous reports of the Rohingya fleeing away to Thailand. On 25 July 2019 Thailand Prime Minister Mr. General Prayuth Chan-Ocha gave a very biased proclamation about Rohingyan exiles who look for shelter while introducing his new government strategies “I am thoughtful with Rohingyan however they don’t belong to Thailand, they are changing from the Thai Nation in their looks and appearances”. He was a chairperson of International Security Operation Command (ISOC) and gave a three-path action to block the entry of Rohingya in Thailand.

He said that the Thai Navy should prevent the entry of any Rohingya boat in the Thai region and should give direction for the boat to change it’s route to Malaysia or Indonesia. If any boat enters Thai seas with sick or starved Rohingya the Thai government will provide them food and assistance to look after them however they will not be allowed to land on the lands of Thailand. If any Rohingya enters the territory furtively then they will be declared as illegal migrants (Phasuk, 2019). The government was obliged to permit shelter to the asylum seekers and therefore it was considered a violation of International Law.

**INDIA**
India is a neighbouring country of Myanmar. Some of the refugees also moved to India in the wake of experiencing the significant abominations done by the Burmese police and armed force. Myanmar and India share a small border that is far away from the Rakhine state hence India didn’t confront significant concerns identifying with the Rohingya. It assumed a significant role in the
rehabilitation of the Rohingya Muslims. Japan and India commonly settled on constructing 25,000 refugee camps in Myanmar. India also commended Bangladesh and guaranteed them for giving financial assistance for supporting the camps of refugees. It claimed that this issue arose because of Citizenship Law and ought to be tackled by the inclusion of the United National Organization and the ASEAN.

India transparently said that the Rohingya belongs to the Rakhine State and should return back to their country. (Sakib, 2019).

INDONESIA
Indonesia is situated in Southeast Asia and is part of ASEAN. It also received Thailand’s push back refugee theory. It permitted the refugees to enter the region; however, it led to a lot of burden on the economy. It plays an active role in resolving the issue. The President of Indonesia guaranteed to provide support for refugee camps in Bangladesh and medical assistance and food to the refugees in boats. Indonesia is a Muslim state therefore had a strong opinion towards the Myanmar government and the Buddhist community. The Indonesian authorities were worried about the radical circumstances which could prompt an annihilation among Muslims and Buddhists.

MALAYSIA
Malaysia is located in Southeast Asia and has a Muslim majority. After 1970, many Refugees crossed the Bay of Bengal and migrated to Malaysia. A report given by UNO recommended that Malaysia had 80,000 enlisted Rohingya refugees and thousands of unregistered Rohingya refugees. The Malaysian government constructed a department called Instant Comprehensive Registration System (ICRS). The department dealt with refugees from all over the world. ICRC registered all the refugees through the biometric verification system. The government supervised all the exercises of the refugees through this technology. UNCHR also developed such kind of tracking system. However, this system was only restricted to Rakhine refugees. These tracking systems were very useful for providing them employment, health services and training to the registered refugees (Nadarajan, 2018).

CONCLUSION
The conflict started in 1993 when Burmese started making laws restricting movement, education, procreation, marriage, health services and citizenship of the Rohingya Muslims. When the authorities deliberately discriminated against a group of people it mostly becomes the reason for violence in society. Later in 2012, rape of a Buddhist woman by three Rohingya led to a major breakout with thousands of burnt houses and 70 casualties. The idea of this immediate brutality is informational in that an ambush on one individual prompted an enormous overflowing of despise and viciousness against a whole group of individuals. This shows the hidden viciousness which was a huge level of repressed resentment and detests towards Rohingya which demonstrates an enormous level of social brutality previously existing. Cultural discrimination and human rights abuses have created deeper animosities and marginalisation. The Myanmar government has made about 2,000,000 individuals stateless and has placed them into a void of the worldwide network as there is no nation with the capacity or readiness to take these individuals which leaves them to the authoritarian rule of the government. A lack of human rights and violation of the human rights of Rohingya by Burmese are leading to conflict. The Government of Myanmar
should now focus on protecting the human rights of all communities and establishing a structure for equality which will help in the development of the country. In the end, if the Rohingya crisis is not resolved it will worsen the situation in international domain and will give other countries the power to start genocide towards their minorities.

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ABORTION: A TABOO IN INDIA

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ABSTRACT:
In the era of internet and technology where everything is on a rise the number of pregnancies in females are also increasing. But many times woman doesn’t want to give birth to their unborn child due to many reasons, some of them are: a mother is not mentally prepared for pregnancy, may be she has physical issues or may be she got pregnant due to forceful intimacy like, rape or incest. So in these cases where a women doesn’t want to continue, she has right to abortion because it is her body and her consent. But for abortion consent is required, if the woman is major (above 18 years) then her own consent is required and if the woman is minor (below 18 years) then her guardian consent is required. In India, abortion is legal after enacting of various laws and as a result some people consider abortion as a boon for female while some says that ‘Abortion is not less than a murder’. This article solely focuses on various ways of abortion a women can go through, various consequences a woman faces post abortion and legal scenario of abortion in India.

Keywords of the Article : Abortion, termination of pregnancy, therapeutic, justifiable, rape, incest, causing miscarriage, criminalised abortion, reproductive laws, MTP Act, pregnancy period, safe abortion.

INTRODUCTION:
India has pledged itself to safeguarding human and reproductive rights and ‘Abortion’ is one of them. Abortion refers to the process of ending of a pregnancy by removal or expulsion of an embryo or fetus. The term ‘Abortion’ is also known as termination of pregnancy. When an abortion takes place naturally, in that case it is called as miscarriage and sometimes it may be brought deliberately, in which case it is often called as induced abortion. Induced abortion has been legally allowed in India on broad-ranging grounds since 1971. This abortion may takes place due to following reasons such as: to protect the life of the mother, to avert the completion of a pregnancy that has resulted from heinous crimes like rape or incest, to put an end to birth of a child having mental deficiency, serious deformity, genetic abnormality or may be because of other reasons like social or economic reasons. By some definitions, abortion is therapeutic and justifiable in case to protect the female’s health or in case of rape or incest. Here in India, cost of abortion may from Rs 5000 to Rs 30,000 depending on the kind of procedure that is undergone. Herbal abortion is an alternative way of abortion which includes the use of herbs to trigger a miscarriage. Although this procedure is not completely an alternative to an abortion, having the baby and giving it up for adoption may also be considered.

TYPES OF ABORTION:
There are various types of abortion(termination of pregnancy) and they are discussed below:-

Early non-surgical abortion (medical): This abortion is carried out between 2 to 10 weeks of pregnancy. Under this procedure, to stop the process of pregnancy the drug is prescribed. After the consumption of drug, there may be cramping, clotting, bleeding or pelvic pain and within a few hours women pass the unborn child.

Vacuum aspiration: This abortion is performed between 2 to 12 weeks of pregnancy. Under this process, near or in the cervix local anesthetic is injected and then the unborn child and the placenta is suctioned out through the tube.

Dilation and evacuation: This procedure is performed in the 13-21/22 weeks of pregnancy. Under this process, a sponge-like material is placed in the cervix of the women that helps to open the cervix slowly and medication is given to mother to cure the pain and avert infection. General anesthesia is given to the mother and the child. After that with the help of suction curettage and forceps the unborn child and placenta are removed from the womb.

Induction abortion: This process is performed in 13-21/22 weeks of pregnancy. In this process of abortion, the placenta cannot be removed completely during the labor and the cervix is kept open for the doctor convenience to perform suction curettage.

Labor Induction: This process is performed in 22-29 weeks of pregnancy. In this process, the placenta cannot be removed completely during the labor and cervix is kept open to perform suction curettage. But in this procedure, it is possible that the child is delivered alive and if this happens then the baby will be taken care by the doctors of the hospital.

Hysterotomy (similar to C-section): This procedure is performed in the 22-38 weeks of pregnancy. When there are no possibilities left for termination of pregnancy then this procedure is done. In this procedure, the unborn child is removed by cutting the abdomen and uterus and after the removal, the unborn child is killed.

**PROS AND CONS OF ABORTION (TERMINATION OF PREGNANCY):**

Procedure of abortion may sound like a easy way to terminate the pregnancy. The decision of ending pregnancy is a difficult one but it may have to be done keeping the best interest of the mother and the child. Every procedure has its pros and cons and same applies with the procedure of abortion. This procedure surely has its pros and cons that are discussed below:

~ Pros of abortion are as follows:-

- Abortion is seen as a safe medical procedure and there is minimal risk of serious complications if abortion is done in the first trimester of pregnancy. Furthermore, it does not affect the health of the women and future ability to bear a child in her womb.
- Abortion can be done if the foetus is diagnosed with genetic disorder like Down’s syndrome.
- Sometimes even after using contraceptives, pregnancy occurs and in that case Abortion is the best option to be done for the birth control of unwanted pregnancy.
- Teenage girls who become mother can have harsh consequences in future and in that case, abortion early in the pregnancy is the best way rather than becoming a mother.

~ Cons of abortion are as follows:-

- If an abortion is done after the first trimester of pregnancy, a women could face various complications like heavy blood loss, moderate to severe pain and infection. If abortion done in later stages, then it could result in more critical situation and can cause medical conditions like sepsis or even death.
- If an abortion get delayed then it’s long-term complications may include cervical
complications and abnormal placenta development.

- Abortion also have physical side-effects and it can leave a women infertile. Past studies have suggested that women who have had abortion, were more likely to have miscarriage, premature birth and pregnancy/birthing complications in later pregnancies.

- A study at the Bowling Green State University in Ohio suggested that abortion can cause psychological problems. After abortion, a woman may suffer from serious mental illness like mental distress, depression or guilt due to the feeling of regret and shame about the decision.

INDIA’S LEGAL SCENEOFD ABORTION:

To protect the human being in both aspects i.e., mental and physical, should be the top and first priority of every country. In the same way, to protect a women’s life, health and mental state liberalisation of abortion law was very important and urgent as well in India. As a result various reforms and laws have been made to legalize the abortion in India.

Some of them are discussed below:

- In October 6, 1860, section 312 of India penal code 1860, criminalised abortion dubbing it as “causing miscarriage”.

- During 1960s, after the legalization of abortion in 15 countries, the Shantilal committee report came out which suggested that abortion and reproductive laws need to be regulated in India.

- In August 10, 1971, the Medical termination of pregnancy (MTP) was passed and this played a very prominent role in legalisation of abortion in India.

- In December 18, 2002, the MTP Act was amended. Under this amendment, law of abortion was decentralized and penal sanction were adopted for unapproved abortions that led to the formation of MTP rules in 2003 and these rules increase access for ladies, especially within the private health sector.

- In October, 29, 2014, to amend the prevailing MTP bill the Union Ministry Health and Family Welfare proposed a draft bill. Major amendments proposed included:
  ~ Increase the biological time for terminating the abortion to 24 weeks.
  ~ Raising the provider base of abortion services by including registered health practitioners to conduct abortions after specified training.
  ~ It also abolished the precondition of the opinion required of a registered health professionals, whether to abort or not, just in case of pregnancies not exceeding 12 weeks.
  ~ Just in case of pregnancies exceeding 12 weeks but not 24 weeks, it reduced the quantity of opinions required by a medical man from two to at least one, extending more rights to women over their pregnancies.
  ~ Under the contraceptive failure clause “married women” replaced with “all women” which would help unmarried women to get safe abortion in case of failure of contraceptive.

- In November 6, 2014, the India Medical Association (IMA) aversed the bill, questioning the amendment which raised the provider base of abortion services.

- In August 4, 2017, MTP amendment bill, 2017, was introduced within the Rajya

Sabha which planned to uplift the pregnancy period of abortion to 24 weeks. In January 2018, the identical bill, 2018, was introduced within the Lok Sabha with the identical demand to interchange the 20 weeks duration with 24 weeks and also added that in case of rape survivor it should be uplift 27 weeks.

- In December 28, 2018, the women’s sexual, reproductive and menstrual rights bill was introduced by Shashi Tharoor, which also sought to do away with the pre-condition of a medical practitioner’s opinion just in case of pregnancies not exceeding 12 weeks. But the bill didn’t interfere with the biological time limit 20 weeks.

- In May 29, 2019 petition filed by Swati Agarwal, Garima Sekseria and Prachi Vats in Supreme Court challenged the 20 weeks gestation limit saying that even medical science and technology has made it possible to terminate pregnancies at later stages. It also asked for amendments in section 3(2)(a) of the MTP Act on the basis that they violate Article 14 and 21 of the constitution.

- In May 26, 2019 Amit Sahni filed a PIL in Delhi High Court demand to substitute the 20 weeks with 24 weeks.

- In May 28, 2019 Delhi High Court issues a notice in plea to the Centre demanding to extend the duration of termination of pregnancy by 4 to 6 weeks more in case of mother’s health risk or foetus.

- In April 24, 2019, notices issued by Madras High Court to the Centre and state government seeks to extend the period for termination of pregnancy as a matter of urgency.

- I’m August 2, 2019, Union Health Ministry submitted Affidavit in response to the PIL filed by Amit Sahni. This affidavit stated that draft Medical termination pregnancy MTP amendment bill, 2019 has been sent for inter-ministerial discussion.

- In Transfiguration day, 2019, Supreme Court issued a notice to the Centre seeks its response to the PIL filed by Swati Agarwal, Garima Sekseria and Prachi Vats.

**LANDMARK CASES OF ABORTION:**

The law that plays a very important role in legalisation of abortion in India is the Medical termination of pregnancy Act 1971. This Act states that if there is any risk to woman’s health or her child then her pregnancy can be terminated by a registered medical practitioner up to the 20th week of pregnancy and with the help of section 5, termination of pregnancy is possible beyond 20 weeks if it is immediately necessary to save the woman’s life. There are various landmark cases that have come before the Court and whose decision was taken on the basis of report produced by Medical Board. In some of the cases termination of pregnancy are allowed even after 20 weeks of pregnancy and in some cases termination got rejected. Few cases are discussed below:

- **Mrs. X v. Union of India:**
  In this case, 7 member Medical Board suggested that continuation of pregnancy could gravely endanger the woman’s physical and mental health. The court held that “a woman’s right to make reproductive choices is also a dimension of her ‘personal liberty’ under Article 21 of the Constitution” and that the every woman has right to bodily integrity which allows her termination of pregnancy.

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1534 Mrs. X And Ors. Vs Union Of India, Writ Petition(Civil) No. 81 Of 2017.
Hence, in this case, Supreme Court gave the permission for termination of pregnancy of a 22-week old pregnancy.

- **Murugan Nayakkar v. Union of India & Ors. W.P.(C) No. 749/2017**
  In this case, Supreme Court allowed the termination of 32-week old pregnancy of a 13-year old rape victim on the basis of report of the Medical Board which constituted that a rape victim has suffered a trauma because of the Sexual abuse.

- **Savita Sachin Patil v. Union of India**
  In this case, report of Medical Board opined that there was no physical risk to the mother but the fetus had severe physical anomalies. Hence, on the basis of the report Court rejected the termination of a 27-week old pregnancy.

- **Alakh Alok Srivastava v. Union of India**
  Court did not allow the termination of pregnancy to the 10-year-old rape victim who was 32-week-old pregnant. Because the report of Medical Board opined that termination of pregnancy was more hazardous than the continuation of pregnancy.

**AWARENESS AMONG WOMEN:**
The Medical Termination of Pregnancy Act (MTP Act) was created in 1971 and focused on the mother’s safety in line with the technology available at that point of time. In line with this Act, abortion may be permitted to women facing the birth of a potentially disabled or malformed child within a 20-week pregnancy period. Section 3 of the Medical Termination of Pregnancy Act (MTP) Act, 1971, stated that abortion is allowed if continuance of the pregnancy could include a risk to the life of the pregnant woman or cause serious injury to her physical or mental health, or there is also a risk to the unborn child, may be suffer from physical or mental health abnormalities and Section 3(2)(b) of the same Act forbids the abortion of a foetus after 20 weeks of pregnancy unless a direction to that effect is given by a high court after taking into consideration a report from an expert medical team of any state-run hospital.

Discussing on this topic, Delhi health department in a recent RTI reply stated that only one in ten abortions in the city are appeared, while over 50,000 termination of pregnancies(abortion) have taken place in the last five years. There are so many women in India who are unaware about the fact that Abortion is legal in India under the Medical Termination of Pregnancy Act. Therefore, several women go through the unsafe abortion and later face several negative results and if the medical abortion process goes even slightly wrong, it can give outcome in life menacing complications such as ruptured ectopic, hemorrhage, etc. and can also have serious morbidities like PID, infertility etc. This is the reason I repeat that only lawfully allowed trained personnel who are postgraduates and qualified must be permitted to perform the procedure. Individual who doesn’t have MBBS degree must be given the permission even if there is a scarcity of trained doctors, because then it will be injustice to the patient.

So every woman should know about the Medical Termination of Pregnancy Act and should aware that A woman can safely

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1536Savita Sachin Patil And Another v. Union Of India And Others, Writ Petition (C) No. 121 of 2017.

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terminate her pregnancy within 20 weeks of pregnancy under the observation and guidance of one or two health practitioners and for those who want to terminate it beyond 20 weeks, must seek approval from the courts.

**CONCLUSION:**
Abortion is the procedure of putting an end to the pregnancy. Laws in India like Medical termination of pregnancy (MTP Act) and various other made the Abortion legal in India. Abortion is one of the effective way of controlling population because many a times pregnancy occurs due to failure of contraceptives and sometimes parents of an unborn child is not ready to bear a child. Abortion plays an important role in case of rape or incest. But the procedure of Abortion has negative impacts as well such as a mother suffers from mental trauma or may not able to get pregnant in future. Abortion is such a big decision that every women who is going to have abortion (induced abortion) must keep in mind positive impacts as well negative impacts. Every citizen should comprehend that procedure of Abortion got legalized in India for a good cause and not for a evil practice. Therefore, everyone should make an oath that Abortion or termination of pregnancy must take place for the welfare of either mother or a child and Abortion must not occur for the illegal work or evil practice.

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EMERGING DYNAMICS AND DIMENSIONS OF ARBITRATION

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ABSTRACT
“I can imagine no society which does not embody some method of arbitration”

- Herbert Read

The industrial revolution has led to a rapid escalation in global trade and commerce. To agree with the economic growth, the parties of an agreement prefer arbitration over litigation as a dispute resolution mechanism. Not only in India, even the economies of various other developing countries have realized that arbitration happens to be a favorable way out of all. Arbitration has always been a means of securing an arbitral award on a conflict issue by reference to the third party also known as Arbitrator and as a contractual arrangement, arbitration is, at least in theory, governed by the principle of party autonomy. About 120 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as “New York Convention”. The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help in enforcing Arbitral Award.

The Arbitration and Conciliation Act, 1996 facilitates the provisions regarding the finality of Arbitral Award and setting aside of Arbitral Award. The Supreme Court has described the beneficial features of this act as, (i) party autonomy; (ii) fair resolution of a dispute by a tribunal; (iii) the Arbitral Tribunal has a duty to act fairly and impartially. This research paper consists of a detailed analysis regarding the finality of Arbitral Award and Grounds to set aside Arbitral Award. This paper also attempts to give more suggestion as to an agreement which indicates that “no reason to be given while delivering an Arbitral Award.”

Keywords: arbitration, finality, award, set aside, dispute resolution mechanism, enforcement.

Finality and Grounds for setting aside Arbitral Awards
Introduction
The industrial revolution has led to a rapid escalation in global trade and commerce. To agree with the economic growth, the parties of an agreement prefer arbitration over litigation as a dispute resolution mechanism. Not only in India, even the economies of various other developing countries have realized that arbitration happens to be a favorable way out of all. Arbitration has always been a means of securing an arbitral award on a conflict issue by reference to the third party also known as Arbitrator and as a contractual arrangement, arbitration is, at least in theory, governed by the principle of party autonomy. About 120 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as “New York Convention”. The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help in enforcing Arbitral Award.

The Arbitration and Conciliation Act, 1996 facilitates the provisions regarding the finality of Arbitral Award and setting aside of Arbitral Award. The Supreme Court has described the beneficial features of this act as, (i) party autonomy; (ii) fair resolution of
a dispute by a tribunal; (iii) the Arbitral Tribunal has a duty to act fairly and impartially.

Arbitration, a form of alternative dispute resolution (ADR), is a process where two parties make their arguments to an arbitrator, who is a neutral third party, instead of litigating the matter in court. The arbitrator, typically a lawyer or retired judge, makes a decision following the arbitration hearing. The decision is legally binding and enforceable by the court, unless all parties stipulate that the arbitration process and decision are non-binding. An arbitration award is the award granted by the arbitrator in their decision. This award can be the money which one party has to pay the other party. It can also be a non-financial award, such as stopping a certain business practice or adding an employment incentive. An award which merely embodies a compromise of the parties themselves before the arbitrator, is a valid award.

The parties cannot appeal against an arbitral award as to its merits and the court cannot interfere on its merits. The Supreme Court has observed that “an arbitrator is a judge appointed by the parties and as such an award passed by him is not to be lightly interfere with.” But this does not mean that there is no check on the arbitrator’s conduct. In order to assure proper conduct of the proceeding, the law allows certain remedies against an award. Let’s further look into the provisions which are been provided by Arbitration and Conciliation Act, 1996 regarding the finality of Arbitral Award and setting aside of Arbitral Award.

**FINALITY OF THE AWARD**

A final award is an award which determines all the outstanding issues in the arbitration. An arbitralional tribunal can make only one final award in the absence of some specific authority to make more than one final award. Every arbitration agreement contains a provision that the award is to be final and binding on the parties and any other persons claiming under them. In *Premji Kumbabhai V. Union of India*[^1539], it was discussed that after the award becomes final, an end is put to all controversies between the parties on the points which were taken, either in attack or in defense. Once an award is delivered it cannot be reopened or reagitated. It is in the interest of the public at large that finality should attach to the binding decision pronounced by courts and the interest of the individual should not be vexed twice over the same kind of litigation.

If an award has been pronounced between the parties it shall be presumed that the award has dealt with all the disputes between them which existed at the time of the reference[^1540]. Similarly, a final decision would mean a decision, which would operate as res judicata between the parties. Though the provisions of CPC are not applicable to the proceedings under the Arbitration and Conciliation Act, 1996, the principles incorporated in section 11 and order 2 rule 2 of the CPC can be applied to the arbitration proceedings. The major issue regarding the finality of an award is that, there is no general test has been laid down for finality of an award. The reason is that a judgement or an order maybe final for one purpose and interlocutory for another.

An award made under the act besides being final is of binding in nature on the parties and persons claiming under them. Except for seeking the setting aside of the award or its modification, no party can challenge the award by any legal mode of litigation. 

[^1539]: AIR 1965 A&N 81 (DB)
[^1540]: Satish Kumar V. Surinder Kumar, (1969) 2 SCR 244; AIR 1970 SC 833
legal representatives, successors in interest and assignees of the parties are also bound by the arbitral award.
The award shall be final and binding on the parties and persons claiming under it subject to the time limit prescribed under section 33 and 34 of the Act\textsuperscript{1541}. The time limits are as follows:

1. Correction and interpretation of the award – 30 days from the receipt of the award;
2. Tribunal making a correction or giving an interpretation on a receipt of application for correction/interpretations – 30 days of the receipt of the request (this time period cannot be extended by the tribunal);
3. Tribunal making a correction on its own – 30 days from the date of award (this time period cannot be extended by the tribunal);
4. Party applying for an additional award against the claim omitted in the award – 30 days from the date of receipt of the award;
5. Tribunal making the additional award – 60 days of the receipt of request (this time period may be extended by the tribunal). The additional award should have the aspects of the award mentioned above;
6. Application for setting aside the award – 3 months from the date of receipt of award or the date of disposal of the application in the above categories (the court can extend to a maximum of 30 days)\textsuperscript{1542}.

In the cases of points from 1 to 5, the award becomes final and binding only after the expiry of the above time limits for the application or the disposal of the application. In the case of point no. 6, the award becomes final and binding if no application is made within the specified period of making the application and the grace period of 30 days. If the application for setting aside the award has been made in time and admitted by the court, the award shall not become final and binding till the court rejects the application.

**SETTING ASIDE ARBITRAL AWARD**

There is no provision for appeal against an arbitral award and it is final and binding between the parties. However, an aggrieved party may take recourse to law court for setting aside the arbitration on certain grounds specified in section 34 of the Arbitration and Conciliation Act, 1996.

Under the repealed 1940 Act three remedies were available against an award, which are:
- Modification
- Remission
- Setting Aside

These remedies have been put under the 1996 Act into two groups. To the extent to which the remedy was for rectification of errors, it has been handed over to the parties and the Tribunal. The remedy for setting aside has been older with returning back the award to the Tribunal for removal defects. Section 34 provides that an arbitral award may be set aside by a court on certain specific grounds, which are:

1. The party is under some incapacity;
2. Arbitration agreement between the parties is not valid;
3. Lack of notice of appointment of arbitrator or of holding of arbitral proceeding;
4. Arbitral award deals with the dispute not contemplated by or not falling within the terms of the submission to the arbitration or it contains decisions on matter beyond the scope of submission of arbitration;
5. Composition of Arbitral Tribunal or Arbitral procedure was not in accordance with the agreement of the parties;

\textsuperscript{1541}Arbitration and Conciliation Act, 1996

\textsuperscript{1542}Justice R.P. Sethi Commentary on Law of Arbitration and Conciliation [Act No.26 of 1996]
6. The court finds that the subject matter of the dispute is not capable of settlement by arbitration under the law;
7. The award is in conflict with the public policy.

UNCITRAL MODEL LAW

Section 34 of Arbitration and Conciliation Act is based on Article 34 of the UNCITRAL Model Law and the scope of the provisions for setting aside the award is far less than it was under the sections 30 or 33 of the 1940 Act. In Municipal Corporation of Greater Mumbai V. Prestress Products, the court held that the new act was brought into being with the express parliamentary objective of curtailing judicial intervention. Section 34 significantly reduces the extent of possible challenge to an award.

It is necessary for the aggrieved party to make an application under section 34 stating the grounds of challenge. An application for setting aside the award has to be made by a party to the arbitration agreement. But a legal representative can apply for it because he is a person claiming under them. There is no specific prescribed for making an application under section 34 of the act except it has to be a written statement filed within the period of limitation.

In Sanshin Chemical Industry V. Oriental Carbons & Chemical Ltd, there arose a dispute between the parties regarding the decision of the joint arbitration committee relating to venue of arbitration. The Apex court held that a decision on the question of venue will not be either an award or an interim award so as to be appealable under section 34 of the act.

In Brijendra Nath V. Mayank, the court held that where the parties have acted upon the Arbitral Award during the pendency of the application challenging its validity, it would amount to estoppel against attacking the award.

An award which is set aside is no longer remains enforceable by law. The parties are restored to their former position as to their claims in the dispute. Setting aside an award means that it is rejected as invalid. The award is avoided and the matter becomes open for decision again. The parties become free to go back to arbitration or to have the matter decided through litigation in court.

GROUNDS FOR SETTING ASIDE ARBITRAL AWARD

I. Capacity of parties

If a party to the arbitration is not capable of looking after his own interests, and he is not represented by a person who can protect his interests, the award will not be binding on him and may be set aside on his application.

If a minor or a person of unsound mind is a party, he must be properly represented by a proper guardian. Otherwise the award will not be liable to be set aside. Such a person is not capable of binding himself by a contract and therefore, an award under a contract does not bind him.

Section 9 of 1996 Act enables him to apply to the court for appointment of a guardian for a minor or a person of unsound mind for the purpose of arbitral proceedings. The ground of incapacity would cease to be available when the incompetent person is represented by a guardian.

II. Invalidity of agreement

The validity of an agreement can be challenged on any of the

1543 (2003) 4 RAJ 363 (Bom)
1544 AIR 2001 SC 1219
1545 AIR 1994 SC 2562
grounds on which the validity of the contract may be challenged. In cases where the arbitration clause is contained in a contract, the arbitration clause will be invalid if the contract is invalid.

In *State of U.P. v. Allied Constructions*[^1546^], the court held that the validity of an agreement has to be tested on the basis of law to which the parties have subjected it. Where there is no such indication, the validity would be examined according to the law which is in force.

### III. Notice not given to the parties

Section 34(2)(a)(iii) permits challenge to an award if the party was not given proper notice of the appointment of an arbitrator, or the party was not given proper notice of the arbitral proceedings, or the parties was for some reasons unable to present his case.

Under section 23(1) the Arbitral Tribunal has to determine the time within which the statements must be filed. This determination must be communicated to the parties by a proper notice. Section 24(2) mandates that the parties shall be given sufficient advance notice of any hearing or meeting of the tribunal for the purpose of inspection of documents, goods or other property.

If for any good reason a party is prevented from appearing and presenting his case before the Tribunal, the award will be liable to set aside as the party will be deemed to have been deprived of an opportunity of being heard i.e., the principle of natural justice.

In *Dulal Podda V. Executive Engineer, Dona Canal Division*[^1547^], the court held that appointment of an arbitrator at the behest of an appellant without sending notice to the respondent, Ex Parte award given by the arbitrator was illegal and liable to be set aside.

In *Vijay Kumar V. Bathinta Central Co-operative Bank & ors*[^1548^], the court observed that “it is a typical case where the arbitrator misconducted himself. Arbitrator held the first and only hearing on May 17, 2010. No points for settlement or issues were framed. The bank filed affidavits of four employees. Appellant was not given the opportunity to cross-examine them. He was denied the opportunity to produce evidence. A complete go bye was given to the provisions of law, procedure and rules of justice. It would thus be seen that appellant was unable to present his case.

### IV. Award beyond scope of reference

The limits of the authority and jurisdiction when mentioned in the arbitration agreement, the arbitrator should not exercise his powers beyond the limits prescribed under such agreement.

Section 34(2)(a)(iv) of the act provides that an arbitral award could be set aside if it deals with a dispute not contemplated or contains a decision beyond the reference.

In *Gautam Construction & Fisherie Ltd V. National Bank of Agriculture and Rural Development*[^1549^], the Supreme Court modified the award to the extent that the rate of construction meant for ground floor could not be applied to the construction of the basement area.

[^1546^]: (2003) 7 SCC 396  
[^1547^]: (2004) 1 SCC 73  
[^1548^]: FAO No.2161 of 2012  
[^1549^]: AIR 2000 SC 3018
Section 16 of the 1996 Act states that the initial decision with respect to the jurisdiction lies with the tribunal. In case of excess of jurisdiction the aggrieved party may apply under sec.34(2)(a)(iv) for setting aside the award. The appointed Arbitrator has no right to violate the terms and conditions of the contract. Even if it is not clear and unambiguous, he has the right to interpret the contract, but not go against it. Even in the case, State of Rajasthan V. Nav Barat Construction c1550, the majority of the claims allowed were against the terms and conditions of the contract.

V. Illegality in arbitral procedure

An award can be challenged in case of irregularity in composition of the tribunal with respect to the arbitration agreement or if the procedure that was agreed by the parties were not followed by the tribunal, then the aggrieved party can challenge the award under sec.34(2)(a)(v). Such irregularity in composition of the tribunal amounts to procedural misconduct. If it is found that the arbitrator had deliberately deviated from the terms and conditions of the agreement, such act amounts to misconduct of the arbitrator.

Section 13 provides that, if the challenge against the arbitrator is not successful for his procedural misconduct, then the aggrieved party may apply for setting aside of the award under section 34 before the court. In State Trading Corp. V. Molasses Co., the Bengal Chamber of Commerce1551, the arbitral tribunal denied a company to be represented by its law officer who happened to be an employee of the company. It was not only a misconduct of the arbitrator, it was also a misconduct of the arbitration proceedings, the court held.

VI. Dispute not Arbitrable

A dispute must be arbitral in nature for the exercise of power by an arbitrator. Only matters of indifference between the parties to litigation which affect their private rights can be referred to arbitration. Therefore, matters involving public rights, insolvency proceedings and criminal proceedings cannot be referred to arbitration.

In the case PNB Finance Ltd. V. Shital Prasad Jain1552, the Delhi High Court held that specific performance of an act does not fall within the scope of arbitration proceedings. However, the Supreme Court did not approve the view of Delhi High Court. The Supreme Court held that the right to specific performance deals with the contractual obligation and it is certainly open to the parties to refer the issue relating to specific performance to arbitration.

VII. Award against public policy

Section34(2)(b)(ii) states that, an arbitral award can be set aside if it is in conflict with the public policy of India. An award obtained fraudulently or through corruption i.e., by suppressing facts, misleading or deceiving, by bribing, by exerting pressure on the arbitrator will also be considered as an award against the public policy. If the arbitral award is contrary to the provisions of the act or against the terms of the arbitral agreement, it would be regarded as patently illegal. Under such circumstances the award could be set aside. In the case

1550 AIR 2005 SC 4430
1551 AIR 1981 Cal. 440
1552 AIR 1991 Del.13
Venture Global Engineering V. Satyam Computer Service ltd.\textsuperscript{1553}, the court held that the award could be set aside if it is contrary to fundamental policy of Indian law or justice or morality or if it is patently illegal.

**LIMITATION FOR FILING APPLICATION FOR SETTING ASIDE**

An application for setting aside an arbitral award must be filed within 3 months from the date of receiving the award from the arbitral tribunal. This limitation period can further be extended for another 30 days exceeding the time limit of 3 months.\textsuperscript{1554} At the expiry of the said time period, the award shall become enforceable\textsuperscript{1555}. In the case Union of India V. Shring Construction Co.(p) ltd\textsuperscript{1556}, the Hon’ble Supreme Court held that the district court should have decided whether the application was filed within the limitation period after excluding the time period that was lost in a wrong court.

**ADDITIONAL RESEARCH : IS IT FAIR IF THE REASON FOR DELIVERING AN AWARD IS NOT GIVEN BY THE ARBITRATOR, SINCE IT IS MENTIONED BY THE PARTIES, IN THE AGREEMENT?**

Section 31(3) of the act speaks about two types of awards, (i) Reasoned awards and, (ii) Non-Reasoned awards. This section states that, the reason for an arbitral award shall be mentioned unless the terms and conditions of the agreement states no reasons shall be given for the award. A reasoned award is one in which the adjudicating authority sets out the reason for its decision and these reasons form part of the award itself. An award must contain the reasons unless either it is an agreed award or the parties have agreed to dispense with reasons\textsuperscript{1557}. The parties to an arbitration, and especially the losing party, are entitled to know the reasons for the tribunals decision by which they are bound, unless they have mutually agreed in writing to dispense with reasons. In Siemens Engineering’s V. Union of India\textsuperscript{1558}, the court observed that, if courts of law are to be replaced by administrative authority and tribunals, as indeed, should accord fair and proper hearing and give sufficiently clear and explicit reasons in support of the orders made by them.

The Supreme Court settled the legal position that a speaking order or reasoned award is one which discusses or elaborates the reasons which let the arbitrator to make the award. In a reasoned award it is very important to discuss about the factors that led to such a conclusion and setting out the conclusions upon the questions of issues that arise in the arbitration proceedings without discussing the reasons for coming to these conclusions, does not make an award reasoned or speaking award\textsuperscript{1559}. there is no elaborate discussion does not mean that the reasons have not been articulated. The rational basis of the award is revealed in the narration. In our opinion it is a speaking award, and not a silent award, though it speaks in few words. We must therefore proceed on this basis\textsuperscript{1560}.

\textsuperscript{1553}2008(4) SCC 190
\textsuperscript{1554}The Arbitration and Conciliation act, 1996 Section 34(3)
\textsuperscript{1555}The Arbitration and Conciliation act, 1996 Section 36
\textsuperscript{1556}(2006) 8 SCC 18
\textsuperscript{1557}The Arbitration and Conciliation act, 1996 Section 53(4)
\textsuperscript{1558}AIR 1976 SC 1785
\textsuperscript{1559}Jajodea (overseas) Pvt.ltd. V. IDC of Orissa ltd. 1993 SCR (1) 229, 1993 SCC (2) 106
\textsuperscript{1560}Union of India V. Hindustan Motors ltd.1980 CENCUS 156 D, 1980 (6) ELT 423 DEL
In *Union of India V. Om Prakash Baldev Krishna*\(^{1561}\), the court held that a non-reasoned award is liable to be set aside by the court as contemplated by section 31(3) which requires that arbitral award shall state reasons upon which it is based unless the parties have mutually agreed that no reasons are to be given.

**CONCLUSION**

The main objectives of arbitration is speedy trial and to maintain confidentiality. As there is no place for appeal in arbitration in India, the moment an award has been set aside, either the award becomes unenforceable or either of the parties go for an appeal before the court against the award. In this case, the concept of speedy trial gets affected. Hence, an Appellant Authority for appeals against arbitral award must be introduced. An authority in the designation of providing justice, must always state the reason for delivering such a decree. The duty to record reasons is a responsibility of an arbitrator and it cannot be dispensed with by a clause. The validity of the order passed by the statutory authority must be judged by the reasons recorded therein and cannot be construed in the light of subsequent explanation given by the arbitrator concerned or by filing an affidavit.

“Orders are not like old wine becoming better as they grow older”.

-Krishna Iyer

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\(^{1561}\)AIR 2000 J&K 79
THE US-IRAN CONFLICT AND THE BREACH OF INTERNATIONAL LAW

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Abstract

The prohibition on use of force is one of the most paramount principles of international law and has been discussed widely in detail by scholars and eminent jurists. US’s recent strike on Iran to kill General Soleimani and Iran’s missile strikes on US military bases as a retaliation are the most recent use of force between two civilized nations and this paper attempts to undertake an extensive analysis of the conflict with respect to the breach of international law. Wars, belligerence, armed conflicts between nations have disrupted world peace and stability innumerable times since the dawn of civilisation and hence sanctioning any unwarranted use of force has always been the first prerogative of global bodies. There are various treaties and conventions which bind the States from refraining to use force against one another. However, in the first week of the new decade only, US carried out a strike on an Iranian convoy near Baghdad killing General Qassim Soleimani. Such a strike violates the principle of non-use of force as laid down by the UN Charter. The paper highlights the illegality of the killing under international law by presenting theorisations of jurists and scholars and analysing US’s claims of the strike being done in anticipatory self-defence. Iran as a response to the killing of Soleimani attacked US military bases in Iraq using missiles. Along with discussing the legality of armed reprisals in international law, the paper also examines Iran’s armed retaliation under the purview of right to self-defence and international law.

Historical Background:

The US and Iran have shared a turbulent history as the countries have found each other at loggerheads for a long period of time now. The seed of discord was sown between the country when the CIA pulled off a coup against Iran's elected Prime Minister Mohammad Mossadegh in 1953 putting Mohammad Reza Pahlavi, the last Shah of Iran, in power. This coup resulted in discord and protests in Iran which ultimately culminated in the revolution of 1975 in which the monarchy was toppled and Khomeini came to power. The revolution involved Iranian students taking American nationals as hostage in the embassy at Tehran for over a year. Ever since, there have been numerous skirmishes between the US and Iran. However, in January 2020 the tensions escalated to an unprecedented level when US killed Iranian General Qassem Soleimani in a drone strike near the Baghdad Airport. In response, Iran launched ballistic missile attacks on US military bases in Iraq. In this essay, these two recent escalations will be examined from the perspectives of International Law and the possible breaches involved thereof.

Part I

Killing of General Soleimani by US

General Qassim Soleimani was an Iranian major general and was considered as the second most powerful man in Iran after Ayotallah Khameini. He was behind many clandestine military operations by Iran. He was the leader of the Quds Force and was quite famous for his role in fighting in Syria and Iraq. However in 2011, he was named by the US to have plotted to assassinate the Saudi Arabian ambassador to the US and for which he was designated as a terrorist by the then Obama Government.1563 Certain escalations and intelligence about the General actively developing plans to carry out attacks against the US led the Trump government to conduct an airstrike in Baghdad targeting an Iranian convoy and killing General Soleimani. 

The US invoked pre-emptive self-defence to justify the strike and claimed that the strike was intended to deter future attack plans from Iran. Such a defence falls under the category of anticipatory self-defence in International Law and Hugo Grotius has written that for anticipatory self-defence to apply, the danger must be imminent.1564 However it was the Caroline incident which brought anticipatory self-defence in prominence. Canadian forces burnt down the Caroline steamer of USA on December 29, 1837 which was justified by the Great Britain as a necessary act carried out by Canada to deal with a security threat. After a lot of negotiations, the US and Great Britain although differing on the facts, decided on a test for self-defence. In 1841 the US Secretary of State, Daniel Webster stated that a state must show “a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”1565 The metric set for self-defence to apply in the Caroline incident got recognised by a lot of scholars of that time.

However, after the drafting and signing of UN Charter, it became a point of debate among scholars whether the right to self-defence provided under the Charter included anticipatory self-defence or not. If one is to follow a textual interpretation of Article 51, the right to self-defence only applies if ‘an armed attack occurs’. Scholars like Ian Brownlie, Louis Henkin and Philip Jessup adhere to such a textual approach. Doyle reasoned that if a rule allowed a state to use force in advance of an armed attack, it may lead states to pre-empt each other’s pre-emptive acts of self-defence.1566 This can lead to a vicious cycle of destruction among States internationally.

On the other hand, many scholars believe that international law allows states to use force in anticipatory self-defence.1567 Under this school of thought, the international military tribunals at Nuremberg and Tokyo invoked the test laid in the Caroline incident.1568 In several

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1564 HUGO GROTIIUS, ON THE LAW OF WAR AND PEACE, DE JURE BELLi AC PACIS (trans A. C. Campbell, London: 1814), Book II, ch I, V
1565 Letter from Mr. Webster to Lord Ashburton, Department of State, Washington, 6 Aug 1842.
instance, states have justified the use of force as an anticipatory self-defence. Although, such an anticipatory self-defence can be invoked only in situations where the threatened armed attack is imminent and the use of force is the only means available to deflect the threat.\(^{1569}\) Thus, anticipatory self-defence limits the right of a State to use force ‘only to situations in which the forthcoming armed attack is both very close at hand and virtually certain.’\(^{1570}\)

In the present incident, the US cannot justify the killing of General Soleimani under the classic anticipatory self-defence as the situation fails to meet the Caroline test of imminence. The US has neither provided any evidence to prove an imminent attack being planned by General Soleimani nor has it shown that all other alternatives to counter these alleged threats were employed. Thus, although the use of force is permissible under customary international law of anticipatory self-defence, it cannot be used in the given instance and US’s acts would violate international law.

However, with the increasing complexities in international relations, the states in practice sought to expand the requirement of imminence. This led to the inception of the concept of pre-emptive self-defence. Pre-emptive self-defence can be defined as a lawful use of force by a state against an entity that has the both the capacity and intent to carry out an armed attack. Thus, this school deems to include threats posed by the accumulation of WMDs (Weapons of Mass Destructions) for the intention of being transferred to terrorist groups.\(^{1571}\) However, the relaxation of the criteria of imminence does not automatically write off the high level of certainty of the incoming attack required for pre-emptive self-defence to apply. Thus, the line distinguishing lawful and unlawful pre-emptive self-defence is very thin which why the school has been subjected to scholarly criticism. In the end it becomes a question of the nature and accuracy of intelligence gathered by a state which it relies upon to launch a pre-emptive attack.

As of today, heavy state practice and opinio juris shows that States recognise the right to self-defence to prevent grave dangers from materialising.\(^{1572}\)

If one is to justify US’s strike under the school of pre-emptive self-defence, the presence of concrete evidence showing that Iran was planning an attack on the US or its allies becomes imperative. According to the statement released by US Department of Defence, General Soleimani was “actively developing” plans to kill US diplomats and service members when he was killed in Baghdad.\(^{1573}\) The President of US Donald Trump also stated, “‘Soleimani was plotting imminent and sinister attacks on cases where there is a threat of an attack by WMDs); Japan Threatens Force Against North Korea, BBC News, Feb 14, 2003 (Japan warned North Korea that it would launch a pre-emptive attack if it had evidence that North Korea was planning a missile attack)\(^{1573}\) Ryan Pickrell, Pentagon says it killed top Iranian general Qasem Soleimani on Trump’s order, Business Inside (Jan. 3, 2020, 08:38 IST), https://www.businessinsider.in/politics/news/pentagon-says-it-killed-top-iranian-general-qasem-soleimani-on-trumps-order/articleshow/73078205.cms
American diplomats and military personnel but we caught him in the act and terminated him.\textsuperscript{1574} The UN special rapporteur on extra-judicial executions Agnes Callamard however said that the US had not provided any information about an imminent attack from Iran.

Thus, considering the absence of any detailed evidence or information presented by the US about any forthcoming and imminent attacks being planned by the killed General, the US strike is a flagrant violation of international law and cannot be justified as an exercise of right to self-defence by the US.

It is imperative to also discuss the incident under the purview of the much controversial concept of preventive self-defence. Preventive-self defence falls outside the scope of the UN Charter as it permits the States to use force in cases of threats that are remote in time but are probable ‘under the circumstances prevailing at the time.’\textsuperscript{1575} The US has previously expressed a right to use force in situations where the perceived threats were uncertain with respect to the time and place of the attacks.\textsuperscript{1576} UK’s Attorney General also recognised the right to preventive self-defence and stated that States can act in self-defence where there is evidence of further imminent attacks, even if there is no specific evidence of where such an attack will take place of what will be the nature of such an attack.\textsuperscript{1577} The reasoning provided to support this view is that a restrictive form of self-defence cripples the States’ ability to nip threats in the bud and rather provide more time and opportunity for terrorist groups to build momentum to carry out grave attacks. Preventive self-defence has been acknowledged to be legal by several scholars.\textsuperscript{1578} However one must note that these scholars have went on to regard the UN Charter as anachronistic and defunct.

Thus, preventive self-defence relaxes the strict criteria of imminence under the concept of anticipatory self-defence. If one is to accept the existence of the doctrine of preventive self-defence, US’s strike that killed General Soleimani would be justified under International Law. However, it must be noted at the same time that although there is some state practice to reflect existence of such a preventive concept, there are not enough instances to make such a rule a customary international law. As the International Court of Justice stated in the Continental Shelf case: “It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States.”\textsuperscript{1579}

In conclusion, the US’s strike to kill Iranian General Qassim Soleimani in Baghdad violates the existing international law as it violates Article 2(4) of the UN Charter which reads as, “All Members shall

\textsuperscript{1576} 2002 US National Security Strategy, 15
\textsuperscript{1577} UK Attorney General’s speech in the House of Lords, HL Deb, Apr. 21, 2004, vol 660 cols 369-72.
\textsuperscript{1579} ICJ, Continental Shelf case (Libyan Arab Jamahiriya v. Malta), Judgment, 3 June 1985, ICJ Reports 1985, pp. 29-30, § 27.
refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

Part II

Iran’s missile attack on US bases in Iraq

On 8th January, 2020 Iran launched more than a dozen ballistic missiles attacking the two US air bases in Irbil and Al Asad in Iraq. The attack happened just a few hours after the burial of the Iranian general Qassim Soleimani who was killed by the US in a targeted strike. Iran claimed that 80 US soldiers were killed in the attack. However, both Iraq and the US denied any casualties in their military. It was later reported and also confirmed from Pentagon that more than 100 soldiers suffered traumatic brain injury in the Iranian missile attack.

Days before the attack, Iranian Foreign Minister Mohammad Javad Zarif, said in a news interview that Iran would retaliate for the killing of General Soleimani in a proportional way and attack on legitimate target sites. After the attack, he again reiterated his stance by saying Iran ‘took and concluded proportionate measures in self-defence.’ He also said that Iran did not seek any ‘escalation or war’ and their airstrike was allowed under article 51 of UN Charter.

To discuss this incident in light of international law, one ought to begin with the concepts of retaliation and reprisal. Reprisals are measures of self-help employed that consist of a violation of international law ‘in response to a prior violation of international law and undertaken for the purpose of enforcing compliance.’ Antonio Cassese has defined reprisals as, ‘unlawful acts that become lawful in that they constitute a reaction to a delinquency by another State.’ In 1934, Institut de Droit International passed a resolution stating, ‘Reprisals are measures of coercion, derogating from the ordinary rules of international law, decided and taken by a State, in response to wrongful acts committed against it, by another State, and intended to impose on it, by pressure exerted through injury, the return to legality.’ Armed reprisals are acts involving use of force in a peace time against a State which has committed an internationally wrongful act. The legitimacy of the concept of armed reprisals

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1586 Institut de Droit International, Session de Paris 1934, Régime de répresailles en temps de paix, Article 1 (author’s translation).
has been questioned several times even in the earlier stages of its evolution.

The earliest and most prominent instance of the judicial applicability of armed reprisals can be found in the Naulilaa Arbitration between Germany and Portugal. The Tribunal set certain standards to govern the resort to reprisals that involved use of force which were, “Reprisals are illegal if they are not preceded by a request to remedy the alleged wrong. There is no justification for using force except in cases of necessity...Reprisals which are altogether out of proportion with the act that prompted them are excessive and therefore illegal. This is so even if it is not admitted that international law requires that reprisals should be approximately of the same degree as the injury to which they are meant to answer.” This was the only time when the legality of proportionate armed reprisal was supposedly upheld by an international judicial body in necessary circumstances.

However, the international position on the legality of armed reprisals became more and more restrictive in post-second world war era. The most key international treaty that deemed armed reprisals to be prohibited was the UN Charter which has enshrined the prohibition of use of force in Article 2(4) which reads as, ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’ The only exceptions to such a prohibition as stated in the Charter itself are Article 43, providing for Security Council authorised force, and Article 51 providing for member States’ right to self-defence. Further, the 1946 Commentary on the UN Charter on Article 2(3) states that ‘It is obvious that this rules out recourse to certain measures short of war which involve the use of force, such as armed reprisals.’ From a scholarly point of view, one can easily conclude that all eminent jurists are of the opinion that armed reprisals are prohibited under the UN Charter. Ian Brownlie opined that the ‘Unambiguous prohibition of forcible reprisals was finally accomplished by the Charter of the United Nations.’ Other academicians that have held armed reprisals to be violative of UN Charter include Brierly, Antonio Cassese, and Georg Schwarzenberger. Practice of international organisations also seems to conform with a similar interpretation of the UN Charter. The UN Security Council adopted a resolution in 1964 condemning reprisals as ‘incompatible with the purposes and principles of the United Nations.’ The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States

1587 Portugal v. Germany (The Naulilaa Case), Special Arbitral Tribunal, 31 July 1928 (1927–8) Annual Digest of Public International Law Cases 527
1588 UN Charter, art 2(4)
1589 LELAND M. GOODRICH AND EDVARD HAM BRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS (Boston, MA: World Peace Foundation, 1946), 67
1590 BROWNLE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 223; IAN BROWNLE, PRINCIPLES OF PUBLIC
clearly stated that, ‘States have a duty to refrain from acts of reprisals involving the use of force.’

The International Court of Justice in the Nuclear Weapons advisory opinion observed that, ‘Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful.’ It must be noted that India among many other states asserted reprisals to be lawful. India in its submission to the Court stated, ‘when a State commits such a wrongful act or delict, the use of force by way of reprisal would have to be proportionate.’ However such limited opinio juris does not mandate the legality of armed reprisals as the presence of contrary practice as demonstrated above shows that armed reprisals are prohibited under the UN Charter. The International Law Commission while deliberating on non-armed reprisals or countermeasures and self-defence observed, ‘The contrary trend, aimed at justifying the noted practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence, does not find any plausible legal justification and is considered unacceptable by the Commission. Indeed, armed reprisals do not present those requirements of immediacy and necessity which would only justify a plea of self-defence.’ Further, it was presented to the Commission that the prohibition of armed reprisals had ‘acquired the status of a customary rule of international law.’

However, some scholars have attempted to make a case for the revival of armed reprisals claiming that the UN Charter does not ‘absolutely prohibit’ armed reprisals. Armed reprisals have been termed as a ‘necessary evil’ because UN is considered to be incapable of protecting its members against the illegal use of force. As has been observed by the ILC, a few scholars have argued that armed reprisals fall under the lawful umbrella of self-defence. Yoram Dinstein introduced the concept of defensive armed reprisals which are undertaken as a response to armed attacks and satisfy the requirements of necessity, proportionality and immediacy which are

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1596 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, General List No 95, para 46.
1602 Partsch, ‘Reprisals’, 201.
1603 Coll, ‘Legal and Moral Adequacy of Military Responses to Terrorism’ 302-3
also the requisites of valid self-defense. He contended that defensive armed reprisals are justified under Article 51 of UN Charter and customary international law.

To justify his stance, Dinstein invoked the Naulia Arbitration case in which armed reprisals were considered to be lawful if they met the requirements of necessity and proportionality. But such a position has not been accepted by States or international organisations.

To sum it up, armed reprisals are unlawful and prohibited under International Law and Iran’s strike is violative of Article 2(4) of the UN if it is to be characterised as an armed reprisal.

Having addressed the first issue of armed reprisals, it is imperative to analyse Iran’s attacks as a measure of self-defence under Article 51 of the UN Charter as Iran’s foreign minister himself described the attacks as so. Article 51 of the Charter states, ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.’ On a simple reading of the provision, it is clear that the right to self-defence only gets operational if an armed attack occurs against the State. It was held by the International Court of Justice in the Case Concerning Oil Platforms case that the State justifying the use of force as an exercise of self-defence has a burden of proving the existence of an armed attack being carried against it.

Iran cannot claim or invoke the right to self-defence under Article 51 of the UN Charter for primarily two reasons:

A. US’s strike does not amount to an armed attack for the right to self-defence to apply

B. Even if the US’s strike is to be considered as an armed attack, the right to self-defence is only available till the attack is underway

Armed attacks have not been defined by the UN Charter or any other treaties but they have been deliberated a lot upon by the International Court of Justice. In the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), the Court confirmed in the latter part of its judgment that there appeared to be a consensus on the nature of acts that can be treated as constituting an armed attack. The Court further held in the same case that armed attacks were grave acts of violence and should necessarily be distinguished from isolated incidents. In the Oil Platforms Case, the Court did not consider a series of minor attacks to qualify as an armed attack against which the right

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1605 Dinstein, War, Agression and Self-Defence, 245, 247.
1606 Dinstein, War, Agression and Self-Defence, 245, 250.
1607 Case Concerning Oil Platforms (Iran v. U.S.) (―Oil Platforms‖), 2003 I.C.J. (Nov. 6), 42 I.L.M. 1334, 1356.
1608 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14, para 195
to self-defence can be employed.\textsuperscript{1609} In the same case, the Court also held that an attack of a smaller scale even if mounted by a State did not warrant the use of force as an exercise of self-defence.\textsuperscript{1610} Constantinou has aptly summarised these points in concise definition for armed attacks as, ‘armed attack implies an act or the beginning of a series of acts of armed force of considerable magnitude and intensity (i.e. scale) which have as their consequence (i.e. effects) the infliction of substantial destruction upon important elements of the target State namely, upon its people, economic and security infrastructure, destruction of aspects of its governmental authority, i.e. its political independence, as well as damage to or deprivation of its physical element namely, its territory.’ Further, she adds the ‘use of force which is aimed at a State’s main industrial and economic resource and which results in the substantial impairment of its economy…’\textsuperscript{1611}

It can be inferred from this definition that for an attack to qualify as an armed attack under Article 51 of the UN Charter, the intensity, magnitude and destruction caused should be high. Thus, as per customary international law and opinion of scholars the killing of Suleimani is an isolated incident of violence and is not intense enough to be termed as an armed attack. In conclusion, US did not carry out an armed attack against Iran and hence Iran does not have a right to self-defence against the US under Article 51 of the UN Charter. The missile strike by Iran on the US military bases in Iran was an armed reprisal which is unlawful and prohibited under Article 2(4) of the UN Charter.

Moving on, it is also important to discuss the scenario if US’s strike to kill Soleimani is considered as an armed attack. It is a logical to infer that the armed attack by US ended after the strike in Baghdad. The International Court of Justice has made it clear in various judgments\textsuperscript{1612} that the once an armed attack is concluded, the attacked State cannot indulge in a retaliatory use of force and justify it as an exercise of self-defence. This can be reasoned to be situated in the Caroline paradigm which holds necessity and immediacy to be the key elements for the invocation of self-defence.\textsuperscript{1613} However, it is important to consider the fact that contrary state practice has been prevalent where force has been by used State actors in response to perceived past attacks.\textsuperscript{1614} Such acts increased after US’s operation enduring freedom against the Taliban which it conducted in retaliation for the September 11, 2001 attacks. Ironically, the States although supporting the idea of retaliatory self-defence by the US, has otherwise unanimously condemned other unlawful).\textsuperscript{1615}

\textsuperscript{1609} Oil Platforms (Islamic Republic of Iran v United States of America) [2003] ICJ Rep 161, para 64
\textsuperscript{1610} Oil Platforms (Islamic Republic of Iran v United States of America) [2003] ICJ Rep 161, para 51
\textsuperscript{1611} The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter by Constantinou, Avra (2000)
\textsuperscript{1612} See Military and Paramilitary Activities (Nicar. v. U.S.) (—Nicaragua), 1986 I.C.J. 14, 82 (June 27); see also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (—Nuclear Weapons), 1996 I.C.J. 226, 246 (July 8) (—[a]rmed reprisals in time of peace . . . are considered to be

\textsuperscript{1614} U.S. attacks for past attacks and to deter future attacks on Tripoli in 1986; U.S. attacks on Afghanistan and Sudan in response to the attacks on U.S. embassies in Kenya and Ethiopia in 1999.
instances of armed reprisals. The acceptance given to US’s retaliation to the 2001 attacks by the international community should not be mistaken as an evidence of the presence of a customary norm upholding the legality of reprisals as the nature of attacks carried out in US were of the gravest and most intense nature resulting in an excessive loss of life and resources. It was an isolated act which got a ‘non-legal acquiescence’ by the international community and not a recognition of legality under international law.

The law still remains strong and intact in prohibiting armed reprisals and the use of force once an armed attack has ended. Thus, in conclusion, the missile strikes by Iran on the military bases of Iran which caused substantial injury to US soldiers and a significant loss of lives as per the Iranian narrative is a flagrant violation of international law and should be strongly condemned by the international community of civilized nations.

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REALIZATION OF THE RIGHTS OF LGBTQ+ COMMUNITY

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INTRODUCTION
“History owes an apology to these people and their families. Homosexuality is part of human sexuality. They have the right of dignity and free of discrimination. Consensual sexual acts of adults are allowed for the LGBT Community” said Justice Indu Malhotra while passing the verdict of Navtej Singh Johar v. Union of India. This marks how the Indian society is slowing changing their attitude towards the members of the LGBT community. The author wants to embed the thought that sexual identity is not a ground for bullying, discrimination and ill treatment. The ideology of “Love is Love” is what the author believes in. Homosexual relationships are formed purely on the basis of love, a love for themselves as well as for their partners. No person belonging to this community chose to follow this path rather they were born this way and to lead this life. Though history has mocked these people, the community will never stop fighting for their rights and their equal status in society. This essay aims at bringing out that impressive emotion and uplifting the LGBT Community by recognizing them as equals in the society.

INTERNATIONAL VIEWS ON THE LGBT COMMUNITY
The LGBT community has been predominantly fighting for their basic Right of Equality and Right to Life along with Personal Liberty, which are not just the Fundamental Rights of many countries but also the basic structure of any Written Constitution, standing as the cornerstone of the Constitutions of many countries including India. “All human beings are born free and equal in dignity and rights” are the words that are found in the opening statement of the Universal Declaration of Human Rights.1618 The largest psychiatric organization, the American Psychiatric Association passed a resolution that Homosexuality is no longer a mental illness or sickness in the year 1973. In June 2011, the United Nations Human Rights Council adopted a wide range resolution on Human Rights, Sexual Orientation and Gender Identity. They focused their attention towards containing and restricting violence against the LGBT Community just on the grounds of sexual identity. The United Nations General Assembly has urged the States to protect and promote the right to life of all persons under their territory and to prevent the citizens from resorting to violence over each other motivated by sexual orientation and gender identity. All of these resolutions, recognitions, laws and rules primarily aim at a single purpose i.e. protection of human life and recognition of the Homosexuals, Transgender, Asexual, Queer and the others of the LGBTQ+ Community. Many countries of the world supported the LGBT Rights Declaration in the General

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1617 Navtej Singh Johar v. Union of India, WP (C) 572/2016
1619 Elliot Kozuch, The APA removed homosexuality from list of mental illness, available at https://www.hrc.org, accessed on 08/04/2020
Assembly of the UNO and the Human Rights Council in 2008 and 2011. A few countries strongly supported this declaration while the other sect of countries including India did not support the declaration. With the rapid augmentation, countries have started to realize there is nothing wrong in homosexual unions and the same has to be protected from discrimination and exploitation.

INDIAN VIEWS ON THE LGBT COMMUNITY

The readers of this essay need to understand a fact that any person you know be it your neighbor or your friend or anyone for that matter might be living in fear behind the closets because discrimination along with torture from their families. The Indian society considers the acts of homosexuality as shameful and sinful. At present with no law penalizing homosexuality, still the same-sex couples cannot get legally married in our country. The Indian Judiciary and Legislature have been considerate towards the homosexuals and the Transgender. In 2016, the transgender community was given the constitutional right to register themselves as the Third Gender. They are called as hijras commonly and bear different names in different states of India. The Government protects them through different welfare schemes, right to employment, medical schemes like free surgeries in government hospitals etc. There are approximately 4.8 million transgender people throughout India.

RELIGIOUS VIEWS ON THE LGBT COMMUNITY

Marked by various instances, homosexuality and the others were recorded in Hindu Mythology. In Mahabharata, Shikhandi, born as female, in 2009, the High Court of Delhi in Naz Foundation v. Govt. of India decided that Section 377 IPC was a direct violation of fundamental rights guaranteed by the Indian Constitution. In 2012, the Ministry of Home Affairs conveyed its strong opposition towards the decriminalization of homosexuality. Later the Central Government reversed its stand and stated the decriminalization of homosexuality was no legal error. In 2013, The Supreme Court set aside the 2009 Delhi High Court decision of decriminalizing consensual homosexual activity. On 18 December 2015, member of the Indian National Congress, Sashi Tharoor introduced a bill of repeal of Section 377 IPC. The Bill was rejected in the Lower House in a 71-24 vote. Finally, on 6 September 2018, in the case of Navtej Singh Johar v. Union of India the Supreme Court issued a verdict stating Section 377 IPC as unconstitutional as it was a sheer violation of fundamental rights and thereby legalizing acts of homosexuality. Many activists and experts have suggested the Government of India, to legislate laws for the recognition, marriages, settlement, adoption and civil rights of the same-sex couples.

1621 The LGBT Rights Declaration, available at https://www.ohchr.org, accessed on 08/04/2020
1622 The Transgender Persons (Protection of Rights) Bill, 2016
1623 Abraham Rohan, “All you need to know about the Transgender Persons Bill, 2016”, The Hindu. 30/11/2017
1624 WP (C) No. 7455/2001
1625 M Dhananjay. “Centre opposes decriminalization of homosexuality in SC”, Economic Times, 23/02/12
1626 M Dhananjay. “Supreme Court makes homosexuality a crime again”, The Times of India, 12/12/13
1627 Rappler, “India parliament blocks MP’s bill to decriminalize gay sex”.
1628 WP (Cr) No. 76/2016
identifies herself as a male and subsequently gets married to a woman. It also mentions about, Arjuna transforming himself into a woman named Brihandala, while he is in exile and later becoming the dance teacher for a princess. The Rig Veda states “Vikruti evam Prakriti”, which means diversity is what nature is all about or what seems unnatural is also natural. The Kama Sutra, a text on human sexual conduct, describes homosexual men as tritiya-prakriti and gives a detailed description about their anatomy along with their practices. It also talks about lesbians and calls them svairini. The transgender people worship the deity Ardhanarishvara, which is the androgynous incarnation of Lord Shiva and his wife Parvati. Aravan, a hero whom Lord Krishna married after transforming himself as a woman, Lord Ayyappa, who was born from the union of Lord Shiva and Lord Vishnu’s female incarnation Mohini, mark the existence of homosexuality and transgender in the Indian society. Marriages between heterosexuals and transgender Hindu women happen every year in South India and it is known as the Koovagam festival. In the village of Angaar in Gujarat, the Kutchi community has a ritualistic transgender marriage being performed during the time of Holi festival for the past century. Ishaak, the bridegroom and Ishakali the bride are both men, which is unusual. Thus, these residues show that Hinduism has always recognized homosexual unions.

When we look into the preaching of Christianity, there is clear restriction imposed on homosexual relationships. “You shall not lie with a male as with a woman; it is an abomination”. (Leviticus 18:22) and “If a man lies with a male as with a woman, both of them have committed an abomination; they shall surely be put to death; their blood is upon them”. (Leviticus 20:13) are the two verses from the Bible, which evidently opposes homosexuality. Various verses of the book of Genesis, Romans 1, I Corinthians, I Timothy have expressed its discontent and contempt against homosexual unions. But the Clergy, at present, has been open to the individuals who identify themselves as a member of LGBT and has allowed priests, preachers who have identified themselves as homosexuals. The churches have now constantly solemnized the marriages of same-sex couples in the countries where homosexual marriages are legalized. This marks the acceptance of the homosexuals in the Christian world.

In Islam, the Quran is the paramount source of law. The Quran mentions about the destruction of the people of Lot by the wrath of God, as they entered into lustful carnal relations between two men. According to Muslim Jurisprudence, the acts of homosexuality are punished with death. But there are many incidents of homoeroticism in the Mughal Empire marking the acceptance homosexuality in the Mughal Era.

The author again cites these historical instances, the present situations of the world and the changing attitudes of the religion, to make the readers aware that being a member of the LGBT community is morally and religiously justifiable. The author again asks the readers this question, “Why shouldn’t the LGBTQ+ Community receive their equal status and equal rights, just like other citizens and be protected from any kinds of discrimination and torture?”

THE INDIAN CONSTITUTION AND THE RIGHTS OF THE LGBT COMMUNITY
Looking at this concept from the perspective of Article 14 of Indian Constitution which encompasses the Rule of Equality before law and Equal protection of the Law, we can evidently see that all this torture, non recognition, withhold of rights, unequal treatment against the LGBT Community on the poor grounds of Sexual Orientation and Gender Identity, is sheer injustice to the people of those community.

Considering the concept from the viewpoint of Article 15 of the Indian Constitution, which speaks about non-tolerance of discrimination without any reasonable classification, we can again witness, the violation of this right and the injustice done to the members by not recognizing their rights and discrimination.

When we look upon this matter from the view of Article 21 of the Indian Constitution dealing with Right to life with Dignity, we can see sheer violation of this Article, as the present situation in the country is making the lives of these people much harder, by not recognizing any of their rights.

The readers may ask the author a question “What rights are not recognised and what is the discrimination or ill treatment was exerted on these people?” The answer lies when we look the list of recognized rights of the LGBT community in India.

2. With the passing of the verdict by the Supreme Court in Navtej Singh Johar v. Union of India, there is no longer any criminal punishment, for adult consensual homosexual practices.

3. With the passing of The Transgender Persons (Protection of Rights) Bill, 2016, the transgender people are recognised by the government as ‘Third Gender’.

4. A Transgender is considered as a person of the Other Backward Class (OBC) and be provided with reservations in Government run institutions and establishments.

5. As per the recent judgment of the Madras High Court in the case of Arun Kumar & Anr. v. The Inspector General of Registration and Ors., a transwoman shall also be considered as ‘bride’ under Section 5 of the Hindu Marriage Act, 1955.

6. A single gay or lesbian parent, who’s below the age of 30, can adopt a child.

The list ends here. These are the only expressed and recognised rights of the people of the LGBT Community. There are various personal and social rights that are barred by the Indian Laws even today. Such as Anti discriminatory laws in favour of the LGBT Community, Legalization of Same-Sex marriages, Child Adoption Rights of the Same Sex partners, the issuing of Family Cards under the Indian Law, Laws for the protection of homosexuals from rapists, Anti Defamatory laws in favour of Homosexuals and the list does not stop here. It is sad to know, that a person can’t even marry a person whom he loves just because the marriage is not legally solemnized. All these and whatever our minds can comprehend, are the injustice or discrimination or ill treatment exerted on the LGBT Community. In essence, every aspect of Right to Life and Personal Liberty along with Right to Equality is being violated and is being curtailed making these people starve day in and day out for these rights.

Despite International Laws, Conventions and Resolutions are being made in relation to the protection of the rights of this community; the Indian Government is still a tad slow in catching up with the changing trends of the society.
CONCLUSION
The author is not here to criticize the Indian Government and Administration, but rather as a voice for the poor souls undergoing all the trauma and torture. The author does not want to compare India with any country, stating that this country has legalized same-sex marriages, gave the LGBT community their rights et., but rather praise the country that is unique in all its features such has having diversified cultures and varied norms made with precise knowledge and intelligence. The author wants the Indian Government to preserve and promote the rights as mentioned in the Indian Constitution and never let any form of violation of the same to happen, just like how it is happening in the matter of the LGBT Community. The author has put forth the International views over this topic, so that we catch up with the pace of global development and not be left behind. The author brings in religion into this aspect as all of our Laws and Rules are made in accordance with our holy customs and values which we have been following for centuries. The author indeed wants to destroy the gender stereotypes in our country and make a country that is moving forward along with its entire people without any discontent but only pride. The author also wants the readers to know that this topic carries huge personal connection for the author is also gay and proud.

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ADULTERY IN INDIA

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INTRODUCTION
India is a land of culture and religion. Marriage is considered as the union of two souls and is a sacramental union. In that family, where the husband is pleased with his wife and the wife with her husband, happiness will assuredly be lasting. However, the concept of adultery is not an alien concept in Hinduism and has been recognized, but frowned upon, since ancient times. To commit to adultery is a sin as it destroys the holy union. Anybody who commits such an act, whether the husband or wife, would jeopardize their relationship. Therefore, adultery has been made a ground for divorce.

In India, the law of adultery has gone through substantial changes. The Indian Penal Code was drafted in 1860, a time when women were considered subordinate to men and men controlled their rights. The society considered woman to be the property of man. The crime of adultery was instituted under the Act of 1860 under section 497, consisting of various loopholes. Hence, the laws were vague and inadequate to meet the demand for justice. To meet the present-day scenario and to be at par with the society, it was necessary to restructure the adultery law in India. However, it continues to be a topic of controversy and debate.

WHAT IS ADULTERY?

In ordinary terms, when a man has sexual intercourse with the wife of another man, and the act does not amount to rape, it is called adultery. In legal sense, the term adultery has been defined under the Indian Penal Code, 1860. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery. The man could be married or unmarried. The section further provides for imprisonment of maximum 5 years, with or without fine. Therefore, to prove the offence of adultery, the following needs to be proved:

- There must be an act of sexual intercourse,
- The sexual intercourse must have been committed by a man with a woman who is the wife of another man,
- The man having sexual intercourse must have knowledge or must have such reasons to believe that the woman is the wife of another man,
- The act of sexual intercourse must not amount to rape,
- The sexual intercourse must be without the consent or connivance of the woman’s husband.

However, the section does not hold the wife guilty of any offence. It explicitly mentions that the wife shall not be punishable as an abettor. Even though the wife has consented for the act as much as the man, she will be held innocent. Adultery is an offence against the sanctity of the matrimonial home and an act which is committed by a man. The husband can

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1630 Manu Smriti, III, 60.
1631 The Indian Penal Code, 1860 (Act 45 of 1860), s. 497.
1632 Ibid.
only prosecute the man who had sexual intercourse with her wife. Therefore, adultery is an offence against the husband of the wife.

ADULTERY AS A GROUND FOR SEPARATION

Adultery, being an offence under the Indian penal code, is also a ground for divorce. Under Hindu Law, the Hindu Marriage Act, 1955 recognizes adultery as a ground for divorce. Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse. To avail divorce on this ground, it is, however, essential that a valid marriage subsisted at the time of the offence of adultery. Under Christian law, the parties do not obtain a decree for divorce, however the marriage can be dissolved on ground of adultery under the Indian Divorce (Amendment) Act, 2001, where either the husband or the wife may present a petition to dissolve the marriage on the ground that the respondent has committed adultery. Under the Muslim law, where men get substantial right under Muslim Personal Laws, The Dissolution of Muslim Marriages Act, 1939 recognizes a woman’s right to obtain a decree for the dissolution of her marriage on the ground that her husband associates with women of evil repute or leads an infamous life. This amounts to cruelty towards the wife.

The Special Marriage Act, 1954 recognizes adultery as a ground for divorce where a petition may be presented by either the husband or the wife on the ground that the respondent has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse. Adultery as a ground for matrimonial relief is gender neutral as it recognizes both the wife and the husband’s right to present a petition to claim relief. It does not assume one gender as the victim.

IS THE LAW OF ADULTERY DISCRIMINATORY UNDER THE IPC?

Whether the law of adultery is discriminatory has been a topic of debate. The wife is held innocent and is not punishable for the offence of adultery, even though she consents for the sexual intercourse. The offence of adultery is committed by two persons. To constitute this offence, one of the essential requirements is that the sexual intercourse must not amount to rape. Hence, it is a consensual act. However, the law has always presumed the wife to be innocent. The leading case for this is Yusuf Abdul Aziz v The State of Bombay, where the Supreme Court upheld the validity of Section 497, IPC. The question raised was whether section 497 contravenes articles 14 (right to equality) and 15 (Prohibition of discrimination) of the Constitution of India. The wife should be punishable as much as the husband. The court held that section 497 did not contravene articles 14 and 15 as article 15(3) itself allows the state to make special provisions for women. Therefore,

1634 The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 13(1)(i).
1635 The Indian Divorce (Amendment) Act, 2001 (Act 51 of 2001), s. 10(1)(i).
1636 The Dissolution of Muslim Marriages Act, 1939 (Act 8 of 1939), s. 2(viii)(b).
1637 The Special Marriage Act, 1954 (Act 43 of 1954), s. 27(1)(a).
1638 AIR 1954 SC 321.
the wife can be excused within the purview of article 15(3) and section 497 cannot be said to be ultra vires.

The reason for exempting the woman to be guilty and punishable despite being a consenting party stems from the abusive culture towards women prevalent in India from the beginning. Some cultures in India still do not believe in equality between men and woman, and the guilty woman would be treated with the most inappropriate manner.

If the wife is not punishable even as an abettor of the crime, then the wife of the adulterer does not have the right to bring a legal action against the adulteress. This explicitly poses discrimination against the aggrieved woman, since the husband of the adulteress can prosecute the adulterer. This is because of the assumption of the legislature that no person other than the husband of the woman shall be deemed to be aggrieved by any such offence. 1639

The Indian judiciary has upheld the constitutionality of section 497 with respect to this issue in the case of Sowmithri Vishnu v. Union of India. 1640 Referring to Yusuf Abdul Aziz v The State of Bombay 1641, it was held that Section 497 does not offend article 14 of the Constitution and the woman cannot be prosecuted by the aggrieved woman as “it is commonly accepted that it is the man who is the seducer and not the woman.” Section 497 excludes women from the purview of the offence. The Court held the legislature responsible for such provisions and cleared that it is for the legislature to meet the need for any changes. Therefore, the wife of the adulterer cannot prosecute the other woman.

1640 AIR 1985 SC 1618.

NO CRIMINAL ACTION AGAINST THE GUILTY SPOUSE

The offence of adultery is an offence against the husband of the wife and the man is the criminal. The husband can prosecute only the adulterer and not his own wife. Similarly, the wife of the adulterer cannot take a criminal action against her guilty husband. To assume that only the husband of the adulteress is the aggrieved person is simply turning a blind eye towards the wife of the adulterer. The wife is ignored as a victim.

However, this was reiterated in the case of V. Revathi v. Union of India. 1642 The Supreme Court, upholding the constitutionality of Section 479, IPC with section 198(2) CrPC, held that the law is not discriminatory in nature. It does not allow the two spouses to bring any legal action against each other. The intent of the legislature behind this is to allow the spouses to reconcile. It is an opportunity for the two to mend things between them. The court stated that “adultery law should be seen as a shield rather than a sword.”

EFFORTS TO AMEND THE LAW

RECOMMENDATIONS OF 42ND LAW COMMISSION REPORT

It recommended amendment in section 497 as- “If a man has sexual intercourse with a woman who is, and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, the man and the woman are guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to two years, or

1641 Supra note 9.
1642 AIR 1988 SC 835.
with fine, or with both.” The amendment to the section was recommended to fulfil two objectives-

1. To make the law gender neutral. The man and wife together should be held guilty of the offence as there is no reason why the woman should be kept out of the purview of this section, being a consenting party.
2. To reduce the punishment from five years to two years, in order to make it a less heinous crime.

**THE MALIMATH COMMITTEE REPORT, 2003**

The committee recommended the law on adultery to be gender neutral. It proposed the following amendment in section 497- “Whoever has sexual intercourse with the spouse of any other person is guilty of adultery.” Thus, not only the man but the adulteress is also made guilty under the said provision.

**THE UNITED NATIONS WORKING GROUP ON LAWS THAT DISCRIMINATE AGAINST WOMEN**

The United Nations Working Group on Laws That Discriminate Against Women in 2012 recommended to decriminalize adultery law. To treat adultery as a crime will eventually lead to discrimination and violence against women. However, all attempts to replace the existing provision remained fruitless.

**A LANDMARK DECISION**

The intention of the legislature, through section 497, was to prevent the act of adultery and to provide the appropriate punishment to persons committing such offence. When the IPC was drafted, the position of women in the society was worse than it is today. Keeping this in mind the law, till 2018, was biased towards women. The assumption that “the man is always the seducer” has been carried on since beginning and has been reiterated by the Supreme Court in various judgements. However, does this law ensures justice in this present time?

One of the significant yet necessary rulings of the Supreme Court has been in the case of Joseph Shine v. Union of India. In this landmark judgement, the Apex Court struck down section 497, IPC and decriminalized adultery, also stating that it is still a valid ground for divorce. The reasons for striking down this section have been raised in the previous cases.

The section was held to be archaic and constitutionally invalid. Adultery becomes an offence if the wife has sexual intercourse outside her marriage without the consent or connivance of her husband. However, it does not fall into the category of a criminal offence if she does it with his consent. This simply shows that women are subordinate to men. It will encourage the mindset of treating women as property of men. Section 497 does not match the present status of the society and is violative of articles 14 and 21 of the constitution. Article 21 guarantees protection of life and personal liberty and women being treated as chattel violates their fundamental right to personal liberty.

The law is discriminatory in nature. The woman is held innocent, whereas the man is solely responsible for the offence. On the other hand, it does not allow the wife of the adulterer to prosecute the adulterer and the adulteress. This way, there is gender bias as well as gender discrimination towards women. The law punishes only the...
adulterer, violating the right to equality. The Apex Court also held section 198(2) of crpc arbitrary and unconstitutional. The major ruling of the Court was to decriminalize adultery, and striking down of section 497, IPC. The Supreme Court overruled its previous judgements and further held, “adultery does not fit into the concept of a crime. There would be immense intrusion into the extreme privacy of the matrimonial sphere. It is better to be left as a ground for divorce.” To intrude in the privacy of the married couple violates their right to privacy under article 21. The offence of adultery does not affect the society and is a private matter, hence it does not require state’s intervention into the private realm of the couple.

CONCLUSION
The act of adultery does not only destroy the marriage, but also affects the life of the spouse in significantly. It is considered immoral in all religions. Even though it is immoral, the Apex Court has finally held that a marriage between two people demands privacy. The bold step of revising the law of adultery under the IPC was much awaited till the Joseph Shine Case, as it was vague and arbitrary in many forms. However, whether decriminalizing it is the solution is still not very clear and understandable. Adultery is not a criminal offence anymore but still a ground for divorce. Many societies of India do not consider divorced women to be women of repute. In fear of being humiliated and cornered by the people, many women will not prefer divorce from their husband, and the husband will continue his affair without being called a criminal. This will promote extra marital affairs. To experience this torture will eventually lead to mental disorders or maybe, suicide. Men too can be a victim of this.

However, declaring section 497 as unconstitutional has eliminated the discrimination and biasness, but there is still the need to review the law in order to protect the sanctity of marriage in India.

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NO LOCKDOWN OF DOMESTIC VIOLENCE DURING COVID-19

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ABSTRACT
Domestic violence is very well known and is most frequent towards women across the globe. Domestic violence against women is understood as a situation supported and reinforced by gender norms and values that place women in a subordinate position in relation to men. It is a blatant expression of patriarchy. In a matter of months, the world has been transformed. Thousands of people have already died, and hundreds of thousands more have fallen ill from a coronavirus. A situation like COVID-19 has been a shadow for the growing crimes against women; domestic violence is not only a public health issue but also a human rights crisis. Through the course of this paper, I have dealt with domestic violence amidst outbreak of COVID-19. I have started off by putting out how domestic violence have increased in this pandemic situation, and then analysed whether the steps taken by the government are in balance with the Protection of Women from Domestic Violence Act, 2005 and determines challenges that lie specific to our country. I have also stated how NGO and other international countries are providing redressal mechanism for the intimate partner violence. I have also highlighted the problem how drinking of alcohol has increased the number of domestic violence cases. I have towards the end concluded with some of the effective measure that should be taken by our country and if implemented with care it shall help us to solve this crisis.

Keywords: Domestic violence, Patriarchy, COVID-19, Domestic Violence Act, 2005, Intimate partner violence

INTRODUCTION
The viral disease is one of the world's leading causes of morbidity and mortality. The sudden outbreak of COVID-19 in 2019 in Wuhan, China has now spread globally. Our nation is facing a nationwide lockdown and mandated strict observance of social distancing. One of the huge impacts of staying at home is the surge in Violence against Women and Girls (VAWG) especially the cases of domestic violence. However, India is not the only country that is facing domestic violence but other nations are facing the rise in the number of domestic violence in this pandemic situation. VAWG is a universal issue and has a great impact on the victims/survivors, their families, and the communities they belong to. In the time of crisis, domestic violence cases have been increasing across the globe. Such an increase is not a new trend, instead, women tend to be at greater risks during such a health disaster and pandemics like the Great Depression, Ebola outbreak. The main reason for such kind of behaviour is due to the economic hardships that the people are facing along with poor living conditions. Domestic violence is not only a public health issue but

also a human rights crisis. As per the UN Women Report, Lebanon, Malaysia, and China have witnessed a twofold and a threefold increase respectively. Along with the increase in the report, greater complexity of violence has also been observed. Australia had an increase of 40% rise with a 70% increase in severity. Argentina, France, Cyprus, and Singapore have also registered a significant rise in complaints in their helpline requests. However, it was only one side of a coin where the upsurge is visible. There exists yet another side that pertains to poverty-ridden countries. In these places, the request has seen a sharp dip. For instance, Italy has reported 55% fewer calls; North France has a similar decline. India has overlooked the problem of domestic violence for a very long time as it was believed to be a 'private' matter.

According to a report, from 2001-2012, 45-50% of all crimes are against women and the cruelty is done by the husband or his family members. As per the Crime in India Report, 2018, women face violence in every 4.4 minutes. The intimate terrorism is another name of domestic violence is one of the forms of patriarchy. Women are often seen in the 'sticky floor and the glass ceiling.' The primary reason is the prevalence of cultural and religious orthodoxy and social norms which has been rooted for 'keeping the women in their place' which led to the division of gender roles and power dynamics.

Through the course of the article, I have dealt with the domestic violence amidst the outbreak of COVID-19.

DOMESTIC VIOLENCE IN RELATION TO COVID-19

The term 'domestic violence', which is refers to intimate partner violence; it also encompasses child and elder abuse by any member of the household. The rates of violence and abuse directed towards women are high particularly from the perpetrators known to them. As per a survey conducted by World Health Organization, one in every three women across the globe experience physical or sexual violence in their lifetime and at least 36% of all the women in a relationship have faced physical or sexual violence by their partners.

1651 Global and regional estimates of violence against women: prevalence and health effects of intimate partner
(A) DOMESTIC VIOLENCE IN INDIA
The Crimes in India Report, 2018, published by the National Crime Research Bureau (NCRB), a crime against women is recorded every 1.7 minutes, and every 4.4 minutes a woman is subjected to domestic violence. A total of 89,097 cases related to crimes against women has been registered across India in 2018 which higher than 86,001 cases as per 2017. The National Family Health Survey (NFHS-4), 2015-16 highlighted the 30% of women in India between the age group of 15-49 have experienced physical violence. The reports also highlighted that 83% of married women faces physical, sexual or emotional abuse from their husbands followed by abuse from their husband’s mother (56%), husband’s father and their own father (33%) and siblings (27%). The main reason for such violence is due to the prevalence of orthodox social norms and the stigma that is placed on the survivors of sexual or domestic violence which results in the unreported cases. Women sometimes feels unsafe while approaching the police as they worry the partner may be arrested and face double the amount of abuse once they are released and in the interim they also may face harassment from their in-laws.

(B) DOMESTIC VIOLENCE IN CONTEXT TO COVID-19
With the mandatory stay-at-home rules, social distancing, economic uncertainty and anxieties caused by this pandemic situation, domestic violence has increased globally. Across the globe counties like China, United States, United Kingdom, Brazil, Tunisia, France, Australia, and others have reported increased domestic violence cases. India stands in the fourth worst country for gender-based violence.

During the emergencies it has been seen that women faces greater risks including health disaster such as this pandemic and during the economic hardship there is an increase in violent, abusive, impulsive and controlling behaviour towards the cohabiting partners and romantic partners. It has been studied that since the Great Depression and seminal studies of the Unemployed Man and His Family states the evidence of destructive effect of unemployment, loss of income, and economic hardship on marital conflict, parenting quality and child well-being. The National Commission of Women (NCW) has seen the rise in the number of domestic violence complaints received via mail. The Chairperson of NCW believes

1655 Komarovsky M, The unemployed man and his family: the effect of unemployment upon the status of the man in fifty-nine families, APA PsycNet, https://psycnet.apa.org/record/1941-02696-000
1656 Domestic Violence Cases Have Risen Since COVID-19 Lockdown: Women’s Panel, NDTV News, April 3,
that the real figure is higher as the bulk of complaints they receive are send by the post. Between the month of March and April, NCW has received 310 complaints about domestic violence and 885 complaints for other forms of violence against women such as bigamy, polygamy, dowry deaths and harassments for dowry 1657.

People are unable to file complaints through messages, posts or calls, essential service such as hospital, grocery stores, and medical stores must be urged to help people get necessary support and send their messages to authorities if needed help. In France and Spain pharmacies are trained to identify people facing abuse through codeword which is by asking for ‘mask19’ for those people who cannot speak openly to indicate that they are victims of domestic violence.

**STEPS TAKEN BY GOVERNMENT TO CURB DOMESTIC VIOLENCE**

As the coronavirus pandemic is testing relationships across the society, the citizens are having a hard time deciding whether they are liberal or not as the true test is in the living.

Women are facing a hard time at work and home as they expected to become perfect from their husbands and in-laws with the things they are doing or else they are shouted upon or sometimes beaten by their husbands and in-laws. The age-old stereotypes are constantly running in the back of their minds of people which make them feel that women’s job is to cook, clean; wash and man’s job is to earn. The main test comes when one has to live with it and being ‘liberal’ is looked upon them and this confinement is showing the real mindsets of a person. The government is trying to install free counselling and helplines to report domestic violence crimes.

The Tamil Nadu government held a meeting with the Madras High Court to take effective measures to curb domestic violence against women during lockdown when they received a writ petition from advocates. The Health Department asserted that there should be a system to rescue women who all are facing domestic abuse. As per this system, the Anganwadi workers are now placed to co-ordinate and receive calls of domestic abuse and immediately inform the superior official about it. They have been working from the grass-root level and have been provided with smart phones for the same 1658. There were 111 counsellors temporarily designated as the protection officers to only address domestic abuse cases. The mobile numbers of all such officers are publicly available at every district. There have been arrangements for the fast transportation of the officers to respond to complaints of domestic abuse and rescue them to the shelter with immediate effect.

As per the counter affidavit, 65 cases of women in distress have been handled by one-stop centers across the Nation. The protection has now rendered services of 92 cases till April 21, 2020, and mainly the cases were of women wanted the officers to warn the abuser of legal consequences of

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1658 Numbers available at ICDS website, www.icds.in.nic.in
their actions but none of the women went to court out of fear of infection and mobility issues. During this whole pandemic, the police departments have now set up a tele-counselling center with the help of 10 psycho-social counsellors to look after all types of counselling required to the victims of domestic violence\textsuperscript{1659}. All the emergency numbers have now also been linked to ‘Kavalan SOS App’ and call centers with police helpline numbers which are functioning effectively in the State Police Master Control Room and the complaints are now attended by the nodal officer-in-charge directly. The governments have now issues district rescue teams to address violence against women.

The Delhi High Court also directed the Central Government to direct a WhatsApp number for the victims of domestic violence 24*7 and will have to respond to all the calls and messages that are receiving. The National Commission for Women (NCW) introduced a complaint portal for registering complaints and has also launched a WhatsApp number for the victims of domestic abuse\textsuperscript{1660}. It will be further looked at by the Ministry of Information and Broadcasting to all private satellite TV channels and FM Radio channels to give publicity on women safety and persons in distress.

A PIL was filed for the protection of women and the guidelines provided were:

- Increasing the number of Protection Officers.
- By introducing wide publication through electronic and print media mode
- Helpline number should be published in several newspapers and any other methodology that can be adopted.
- Emergency passes provided to all protection officer
- All team will have at least 2 women officers.

The Protection Officers are in temporary nature as per the Protection of Women from Domestic Violence Act, 2005 which can be looked into the regular appointment of Protection Officers are made. The guidelines given in the PIL should have the provisions contained in the Protection of Women from Domestic Violence Act, 2005, and shall be effected immediately. It has also been decided if there is no response to the helpline numbers then the call will be directed to the DSLSA and will be looked by them with immediate effect.

A PIL was filed in which it mentioned the incidents of domestic abuse have not only gripped India but also Australia, the UK, and the USA. They also claimed that the helpline number across the nation has received 92,000 calls in the first 11 days of the lockdown alone and the victims were taken to the shelter homes provided by the government.

(A) ANALYSIS OF GOVERNMENT MEASURES IN CONTEXT TO DOMESTIC VIOLENCE ACT, 2005

The Protection of Women from Domestic Violence Act, 2005 lays down that the government should adhere to the strategies that have not been adhered to. Firstly, the inability of the state to look out for women even in this pandemic situation is not only the violation of Fundamental Rights to Life guaranteed under Article 12 of the Indian Constitution but also Human Right Violation guaranteed in Article 21 of the...

\textsuperscript{1659} Greater Chennai Police Range https://chennaecorporation.gov.in/others/police.htm
\textsuperscript{1660} Complaints Registration and Monitoring System, National Commission for Women.

http://ncwapps.nic.in/onlinecomplaintsv2/frminstructions.aspx
Indian Constitution. In Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan’s case, it was guaranteed right against sexual and emotional abuse. Further, in the Francis Coralie Mullin v Union Territory Administration, the apex court recognized that an individual has a right to be freed from physical violence.

Section 11 of the Domestic Violence Act, 2005 highlights the part of the government for regular publicity of issues of domestic violence through the media or print to raise awareness in the society but clearly, the government left this circumstance when they issued lockdown.

Section 6 of the Domestic Violence Act, 2005 talks about the establishment of shelter homes in each district by the state government in which the government has failed or the work has been carried out incognito to which no one is aware. The government has recently appointed Protection Officer as per Section 8 and 9 of the Domestic Violence Act, 2005. Section 7 of the Act clearly states providing medical facility to women but the government has been negligent in providing essential goods that even lack sanitary napkins or tampons—regular essential for all women. Howsoever, Section 17 of the Domestic Violence Act, 2005 talks about the shared household which is concerning the Chameli Singh case. In S.R. Batra & Another v Smt. Taruna Batra, the apex court clearly defined the meaning of shared household under Section 2(s) of the Act. The government is trying to flatten the COVID-19 curve but overlooked the women’s physical mental health and violated the Sustainable Development Goal (SDG) and Article 51(A) of the Indian Constitution.

The Chairman of NCW has tried its best to acknowledge women of the helpline numbers but as per the record, it has always been seen that women feel uncomfortable reporting to the police and even if they do so the reports are ignored or delayed investigation takes place. For instance, a case in UP was reported wherein a woman approached the police regarding the domestic violence done by his husband but the police refused to rescue the victim and she was left with the accused. The numbers of cases are not proportionate to the incidents that are happening this is due to the lack of access to technology in remote and rural areas.

According to a survey, 57% of women in India still do not have access to phones so how are they supposed to use the helpline services?

In the absence of a thorough plan by the government, several NGOs have come forward. But they are even facing problems as they are not able to go beyond web-counselling or telephonic conversation. It has been difficult to rescue victims due to lack of transport facility or protective gears and some of the shelter homes have refused to intake women.

WAY FORWARD: INITIATIVES TAKEN BY NGOS & FOREIGN COUNTRIES

The coronavirus crisis led to the lockdown situation for the whole world but we cannot domest-viole-nngostruggle-government-catch-up
see any lockdown for domestic violence. It increasing every day and many NGOs are trying their best to cure this problem. With the lockdown and sliding into income with no job, tensions are rising especially in the lower-middle-class family. The Delhi High Court has directed the center and the government to hold meetings to take deliberated measure to curb the domestic violence and protect the victims during the coronavirus lockdown and to protect them the decision on the domestic violence will be taken in three days and the judgment will be passed via video-conferencing.

There were a total of 282 cases received by the community and hospital-based counselling centers of women-help organization SNEHA between a gap of one month. The NGO has also received 49 crisis mails where the survivors asked for help but prevented them from making any phone calls to them. The numbers of helpline calls were now reduced to 69 at the Lockdown 4.0.

Women from marginalized sections of society prefer to call or meet the local Counsel or volunteers by now during this lockdown it was seen that the middle or upper-middle class and educated survivors are now reaching out more against the fresh outbreak of violence or old abuse that has been exacerbated.

The NGO, All India Council of Human Rights, Liberties, and Social Justice (AICHLS) claimed that they have received an increasing number of complaints of domestic violence incidents during the lockdown in comparison to the last three years. The Delhi government with the help of the Delhi Commission for Women (DCW) has introduced sufficient measures to safeguard victims of domestic violence and child abuse by activating a 24*7 helpline number and the complaint is received and the victims will be rescued immediately.

The shocking news comes when not just wives, daughters too are at the receiving end of abuse being that physical, mental, or emotional, especially those who want to pursue education. The main problems lie as the court is at standstill. The Former chairperson of Maharashtra Women’s Commission requested the government to establish counseling centers in every district and the state and should be remotely active during the lockdown. United Nations Secretary-General requested all the countries to put their best efforts to keep the women of the country safe from domestic violence as men have now become a domestic predator and have alarmed the nations about the horrifying global surge in domestic violence against women and girls.

In Mumbai, many advocated came together and wrote to the Union Law Minister for Women and Child Development and offer their services toward the legal aid for victims for domestic violence that is rising during the lockdown. It was also seen the advocates are suggesting different methods used by the United Kingdom which is a ‘silent solution system’ which can help children who won’t have to speak up but just has to dial a dedicated number and keep the phone on so that the domestic abuser would get recorded. NGO Women’s Entrepreneurs for Transformation launched the Red Dot initiatives which require drawing of a red dot on their palms to alert

people. NGO Breakthrough has come up with many initiatives like ‘StreeLink’ along with the reviving its ‘Bell Bajao’ campaign. CORO India has also started sharing information regarding help for domestic violence by sticking the information in the food packets. Countries across the globe have brought several initiatives to prevent domestic violence in the pandemic situation. The Canadian government has announced an aid package of $50 million along with providing shelters and essential services to domestic violence victims.

Australia, France and the UK have also allocated funds separately. Countries including France, Spain, and other Caribbean countries started providing alternative accommodation to those who cannot be adjusted in the shelter homes. South Africa has given medical facilities to women who have faced domestic violence, on the other hand, China has launched its first online awareness campaign, namely “#antidomesticViolenceDuringEpidemic”. Spain designated a code word “Mask-19” to signal to the police to indicate that they are facing domestic violence whereas, the UK government launched an app called “bright sky” to provide support and information to survivors along with postal workers to look for suspected cases of domestic violence.

While looking at the increasing number of cases across the globe there was a need for a countrywide lockdown. But there is adequate need for implementation of judiciously integrated crisis for an increase in the number of cases of domestic violence in the pandemic:

- Firstly, as the government should widen the ambit of essential services, they should increase the allocation of funds for setting up shelter homes.
- Secondly, the emergency warning system must be set up ensuring that the women could reach out easily without alerting the abuser.
- Thirdly, the government should take strict action regarding the protection of the sexual and reproductive health of women.
- Fourthly, try to reach out to the women who have no access to phone or internet living in the panchayats and SHGs jointly to ensure full safety.
- Lastly, as the United Nations Secretary-General claimed that all the government should appeal for a ‘ceasefire’ for the victims of domestic violence by determining a long-term effect.

(A) GENDER LENS
Many NGOs highlighted that due to a shortage of food and not much of commercial activity in the crisis situation,


[1669] StreeLink, Breakthrough, https://inbreakthrough.org/campaign/streelink/


the immediate victim of domestic violence is mostly daughters and mothers of the house. WHO conducted a survey which clearly states that women who are in an abusive relationship their children will be exposed to the violence as the family cope with additional stress and potential economic or job losses. It was also highlighted by the WHO that the health impact caused by violence, particularly intimate partner violence on women and their children are quite significant. Violence against them results in injuries and serious, physical, mental, sexual, and reproductive health problems such as HIV, unplanned pregnancies, etc. During this pandemic situation, women are losing jobs have made them more vulnerable and are not financially stable. The National Federation of Indian Women asserted that during the decision of conducting the lockdown the government has clearly have not considered the impact on families and the families are generally run in a feudal and patriarchal way. The work done by women inside the houses is never discussed in terms of monetary value and led it to subjugation. Men generally do not spend their whole day at home but due to this lockdown they are confined to their homes and this led to irritation and frustration which later leads to intimate partner violence or even marital rape. The Karnataka State Commission for Protection of Child Rights highlighted that due to the lockdown the young girl’s families are attempting to marry off their minors and those who all are protesting against them are now facing physical violence in their houses and are unable to reach the police or the helplines.

DRINKING AND DOMESTIC VIOLENCE
After 41 days of the rigorous lockdown, the government has now imposed the opening of the shutters of liquor shops and the citizens have broken all the social distancing norms. Even though the Ministry of Home Affairs has released a detailed list of rules of liquor shops to follow to function smoothly but no one followed it which later resulted in an increasing number of coronavirus cases in India. It is a secondary thing for the time being like the opening of liquor shops has now resulted in much more fear in the minds of people and that is intimate partner violence. Alcohol consumption is a major contributor to the occurrence of intimate partner violence and links between the two are manifold. This fact sheet details what is known about the role of alcohol in shaping the extent and impact of intimate partner violence, factors that increase the risk of becoming a victim or perpetrator, and the role of public health in prevention 1672.

The government should have decided a more permanent solution to get its economy back on the track and not on the verge of the human cost that all women have to pay. Many women, especially the marginalized section of the society have constantly requested the government to stop the sale of liquor as it has added more burdens on their shoulders due to the increase of violence they are facing their homes. Several women came together and also requested the state to keep their wine shop closed during the lockdown to prevent alcoholics from shattering their families into pieces and wasting the money. Furthermore, the violation of human rights, the victims of domestic violence are facing mental as well

1672 World Health Organization, http://www.who.int/substance_abuse/terminology/
as health issues such as depression, sexual disorder, PTSD (post-traumatic stress disorder) and substance abuse, etc. The main reason for domestic violence is due to no communication from the outside world. Earlier, the victims could easily flee from a violent situation by staying elsewhere but now the option is not available with them.

The World Health Organization (WHO) says that alcohol consumption reduces self-control and leaves people less capable of negotiating tensions within relationships whereas, excessive drinking by one partner can also lead to financial difficulties, childcare problems and other family issues which will further lead to aggression and violent behaviour after drinking and which can be used as an excuse for violence. The condition of domestic violence and drinking are the same throughout the world. In South Africa, it was seen domestic abuse crimes are down by 70% as compared to last year as many women are trapped at home and are unable to call for help. In the 1980s, Greenland limited their alcohol production and was credited with a 58% fall in police call-outs for domestic incidents. In 2019, in Bihar, India women joined hands and campaigned for bans on liquor which resulted in a lesser number of domestic abuse, and such bans pushed alcohol consumption underground.

It has been estimated that a 1% increase in the price of alcohol will decrease the probability of domestic violence towards women by 5%.

(A) HAVE PREVIOUS ALCOHOL BANS REDUCED DOMESTIC VIOLENCE?

The WHO sites two historical experiments that made a great impact on society. In the 1990s, an Australian town has reduced its hour of sale of alcohol which resulted in reduced in the number of victims admitted to the hospital for domestic abuse.

In the 1980s, Greenland limited their alcohol production and was credited with 58% fall in police call-outs for domestic incidents. In 2019, in Bihar, India women joined hands and campaigned for bans on liquor which resulted in a lesser number of domestic abuse, and such bans pushed alcohol consumption underground.

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CONCLUSION

When the government was planning for lockdown due to the COVID-19 situation, they should have prioritized the domestic violence consequences. In India, the government has overlooked the need to integrate domestic violence and the mental health repercussions into the public health preparedness and emergency response plans against the pandemic.

We need a nationwide campaign to promote awareness regarding domestic violence and highlight the various modes through which the complaints can be filed. National news channels, radio channels, and social media platforms must be strategically used, similar to the way in which the government

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1675 Chaloupka FJ, Grossman, M, Saffer H. The effects of price on alcohol consumption and alcohol-related problems. Alcohol Research and Health, 26:22- 34  
has deployed campaigns advocating for physical distancing and hand-washing against the COVID-19 situation. Citizens must be sensitive towards intimate partner violence and the neighbours and bystanders should not ignore it but rather intervene in the situation. When people are unable to contact for help, the government should initiate an alternative just like France and Spain by introducing a codeword. The government should also allow civil society organizations, counsellors, mental health organizations, and other service providers to help people who are facing domestic violence. The government should classify reaching out to people facing domestic violence as an ‘essential service’.
INTO THE SHADOWS:
INTERWOVEN VOICES OF
SILENCES AND VIOLENCE'S
AGAINST WOMEN IN PRISONS
By Trisha Mukherjee
From Army Institute of Law, Mohali

INTRODUCTION

“No amount of me trying to elucidate myself was doing any good. I didn't even know what was happening inside me, so how could I even have explained it to them?”

~Sierra D. Waters

The #MeToo movement reached nationwide attention in October of 2017. Activist Tarana Burke created the phrase in 2006 to support women of colour who experience sexual intercourse violence. However, the phrase did not become popular until after the revelation of Harvey Weinstein’s abuses, when he acted with actress Alyssa Milano who tweeted “If all women who have been sexually abused or assaulted write '#MeToo' as a condition on their status, we can give people a sense of greatness the problem.”

In 1972, a young tribal girl was allegedly raped by two policemen on the compound of Desaiganj police Station in Gadchiroli, district of Maharashtra and her landmark case awakened India decades ago. But the question is: Do all the voices of sexually abused vulnerable women manage to reach their destination? I open with this example to connect the following paper about sexual harassment in prisons and rule in national dialogue and activists surrounding social sex harassment and beatings, and to think about why prisoners could not say #MeToo.

India has the world's largest democracy beyond the name. It has free elections, which includes many parties, the Parliamentary system, a unique and free-flowing judicial machine, and a country which abounds with non-governmental organizations that are proud of their independence and who help make community, a living one.

A prison is a rehabilitation centre designed to convert prisoners. Apart from this, prison systems often hide violence and immorality behind closed doors. Problems related to incarceration are becoming more pronounced even under the context of female prisoners. According to the latest data available since the end of 2015, Indian prisons numbered 17,834 women. Only 17% of these women live in women's prisons, and most end up in women's cells.

There is a national and international agreement that the state of prisons and the women living in them need urgent improvement.

About the paper
Prisons are more violent places as compared to society. The rates of physical abuse of female inmates are 27 times higher than the rates of females in the general population, according to prison ministry figures. Violence in prisons should be a priority issue for prison management for a

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1679 As per Prison Statistics India 2015, NCRB, from the end of 2015, there are 4, 19,623 persons in jail in India. Women constitute 4.3% of this figure, numbering a total of 17,834 women. Of these, 66.8% (11,916) are under trial prisoners.
number of reasons. **First,** violence kindle violence, that is, exposure to violence among youth increases the risk of later violent and non-violent crime, drug use and intimate violence against a partner.\(^{1680}\) **Second,** under international law, prisoners have a right to protect themselves from violence such as beatings, rape and abuse. According to **Principle 5 of the United Nations Basic Principles for the Treatment of Prisoners:** “Except for those limitations that are demonstrably necessitated by the very fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms began within the Universal Declaration of Human Rights …”\(^{1681}\) **Third,** it is difficult and very costly to maintain a safe and secure facility with a good quality environment, including a well-functioning environment with a violent organization. Violence is very difficult to address and accurately assess, because it is surrounded by silence and is therefore rarely reported. For this reason, reporting violence committed by inmates or staff can lead to retaliation. While this might ever be the case within the world outside the prison, the deprivation of liberty means a victim who reports the violence has no possibility of shake the retaliation by the perpetrator. A study found that 25% of respondents who had not reported their most up-to-date experiences of assault said that they didn't believe that reporting victimization would make a difference. A further 20% didn't report an assault because they feared retaliation.\(^{1682}\) Hence, the paper’s intentions are to become the voices of oppressed women under the weight of victims ’blame.

**CHAPTER 2**

**REPORTING A “CUSTODIAL RAPE” OR LABELLING AS “SEXUAL ASSAULT VICTIMIZATION”**

“I just want to sleep. A coma would be nice or amnesia. Anything, just to urge obviate this, these thoughts, whispers in my mind. Did he rape my head, too?”  
~ Laurie Halse Anderson

WHO has defined violence as “The intentional use of physical force or power, threatened or actual, against oneself, another person, or against a group or community, that either leads to or features a high likelihood of leading to injury, death, psychological harm, mal-development or deprivation.” It's noteworthy that the definition includes threats just like the potential use of force, which the defining outcome isn't only injury or death but also psychological harm, mal-development and deprivation.\(^{1683}\) Violence may further be categorized as self-directed, interpersonal or collective when directed towards: (i) oneself (ii) one’s family, intimate partner or unrelated person; and (iii) specifically defined groups for reasons of a social,

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political or economic agenda. Organized groups or states may perpetrate collective violence. The character of the violence could also be physical, psychological, sexual or deprivation/neglect. Sexual violence is particularly difficult to review and assess the stigma associated with being raped or abused and also thanks to the danger of reprisals from the perpetrator. Sexual violence could even be defined as behaviour that leads a private to feel that he/she is that the target of aggressive intentions. This may additionally include sexual pressure. During a recent study, sexual victimization was viewed exclusively as non-consensual sexual acts with oral, vaginal or anal penetration also as abusive sexual contacts (touching or grabbing during a sexually threatening manner or touching genitals). Sexual victimization during imprisonment is experienced by between 1% and 40% of the inmates, while physical victimization is experienced by between 10% and 25% of the inmates.

After the rape and murder of a veterinarian in Hyderabad on November 28 and therefore the burning of a rape survivor in Unnao, Uttar Pradesh, on December 5, there has been an outcry for justice for the victims. Within and out of doors Parliament there has been a clamour to form the criminal justice system tougher on an offender committing sexual crimes against women and youngsters.

‘Rape’ as a clearly defined offence was first introduced within the Indian legal code in 1860. Section 375 of the IPC made punishable the act of sex by a person with a lady if it had been done against her will or without her consent. The definition of rape also includes sex, when her consent has been obtained by putting her or an individual in whom she is interested, in fear of death or of hurt. After the Mathura Rape Case of 1972, while the session’s court acquitted both the policemen, the Supreme Court reversed the order of acquittal. The apex court, in its September 15, 1978 verdict, said no marks of injury were found on the girl’s private part or body after the incident and “their absence goes to an extend which indicates that the alleged intercourse was a peaceful affair”. The controversial verdict sparked wide scale protests across the country seeking a change in existing rape laws. Consequently, the Law was drastically amended and a replacement law entitled legal code Amendment Act, 1998 came into existence during which the very concept of ‘custodial rape’ as being more heinous than ordinary rapes was accepted. This Act caused some important changes within the existing provisions on rape within the Indian legal code. It amended Section 376 of the IPC and has enhanced the punishment of rape by providing that it shall not be but seven years. It’s also provided enhanced punishment of 10 years of imprisonment for cops or staff of jails, remand homes or other places of custody established by Law. The Act has further inserted a replacement section within the Indian Evidence Act Section 114A which lays down that where sexual activity by the accused has been proved and therefore the victim states before the court that she didn’t consent, the court will presume that there was absence of consent and therefore the onus are going to be on the accused to prove that the ladies had consented to the act. The Act has


amended the Code of Criminal Procedure and also provides for trial privately. Custodial rape is an aggravated sort of rape. It's an assault by those that are alleged to be guardians of the women concerned that are specially entrusted for his or her welfare and safekeeping. Just in case of custodial rape, the physical power that men have over women gets intensified with the legally sanctioned authority and power. Single women, widows with young children and ladies belonging to the lower strata of society who need to eke out a living against all odds, become easy prey to custodial rape because they're already bereft of the supportive mechanisms. Fortunately, reporting of custodial rape isn't very frequent during this country. Three rape cases in police custody were reported in 2002 and one such case was registered in 2003 which happened in Tamil Nadu. But albeit one such incident takes place that denigrates the image of the whole criminal justice system.

The Judiciary has taken a really a significant view regarding the commission of custodial rape. Whatever amendments, brought in rape laws to form the punishment more stringent, is especially due to those judgments. Within the State of Maharashtra vs. Chandra Prakash Keval Chand Jain1686 case, the court remarked ‘decency and morality publicly life are often protected and promoted’ if courts deal strictly with those that violate the societal norms. When crimes are committed by an individual in authority, i.e. a policeman, superintendents of jails, or managers of remands homes or doctors the courts approach shouldn't be an equivalent as within the case of a personal citizen. When a policeman commits a rape on a woman, there's no room for sympathy or pity. The punishment in such cases should be exemplary.

Abusing positions of trust and authority aren't however limited to public officials or cops. Further examination of the last decade of official statistics reveals that while enforcement activity concerning violence against women across all categories has increased,1687 custodial rape continues as a rarity: 2002 statistics reveal that only 3 of the 16,370 rape offences (under section 376 IPC) were custodial rapes, and a decade later, 2012 statistics reveal that custodial rape constituted just one of the 24,206 rape offences.1688

Reforms to legal code and procedure seem to possess done little to stem the tide of gender violence in India. Does this mean that these legal reforms are a failure? It’s documented in criminological circles that ‘official’ crime reports aren’t an accurate estimation of the size or sort of crime in society for a variety of reasons. A ‘dark’ figure of crime exists, which remains unreported in police official crime statistics. International victimisation studies suggest that much crime against women and youngsters isn't reported. This suggests that the steady increase within the number of rapes and crimes against women that are reported within the official statistics may be viewed because the ‘tip of the iceberg’. Furthermore, increased reporting

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1686 1990 AIR 658.
1687 According to the National Crime Records Bureau (NCRB), Crime in India - 2012 Statistics, 24270 cases of crime were reported against women in 2012. This constituted an annual rise of 6.4 %, with a steady increase in reported offences since 2008.

1688 National Crime Records Bureau, Crime in India 2012, Ministry of Home Affairs, Government of India, http://ncrb.nic.in/. See Table 13.5 – ‘Reported custodial rape cases and their disposal by police and courts during 2012’, p. 555. The IPC provisions indicating an 8.9% increase since 2008. During 2012, 4.8% cases were reported under the special and laws (SLL) provisions.
CHAPTER 3

SEXUAL VIOLENCE IN THE GARB OF “TORTURE”: MUTIFARIOUS FORMS OF VIOLENCE’S AGAINST WOMEN IN INDIA

“Beauty provokes harassment, the law says, but it’s through men’s eyes when deciding what provokes it.”

~Naomi Wolf

Violence against women, including sexual violence, has been a persistent and chronic social problem within India. This has been the case notwithstanding the emergence of local reform movements within the 19th and 20th centuries that campaigned to enhance the status of girls and eradicate social practices that have entrenched gender inequality, including the repeal of discriminatory laws and practices concerning dowry, the status of widows, child marriage, also as demanding better education and equal political rights for ladies.1689

By the top of the century, British authorities were finding it increasingly difficult to ignore these involves reform in light of the broader demands for political emancipation from colonial rule, and increasingly vocal demands from the suffragette movement on the domestic home-front. Demands for emancipation (both from Empire and Patriarchy) led women to assume leading roles within the reform movements of India, culminating within the foundation of the All India Women’s Conference (AIWC) within the 1920s.1690

India’s independence from British rule out 1947 witnessed an extra growth of women’s organisations demanding reform.6 the principles concerning dowry were an early success: the Dowry Prohibition Act 1961, which was amended in 1984, strengthened the legal measures against perpetrators of dowry-related crimes. It might be fair to mention that these early social movements in post-independence India were focused on eliminating the gravest social harms like dowry-related offences of torture, murder and rape.

The key argument of this essay is that a lot of the laws and practices in India that denied women equivalent rights accorded to men were a part of a colonial inheritance, instead of a product of local indigenous customs, traditions and religious practices. That said, custom, tradition and religion in India has played, and continues to play, a big part in sustaining the subordination of girls. Of course, this is often not unique to India, and may be a feature of the many cultures. Because the United Nations made clear in its 1993 Declaration on the Elimination of Violence against Women (DEVAW): "States should condemn violence against women and will not invoke any custom, tradition or religious consideration to avoid their obligations with reference to its elimination."1692 as calling for tougher laws to avert industrial disasters and promote work-place safety.

1691 These groups also tackled environmental issues (from pollution to de-forestation), socio-economic issues (from price regulation of rice and the socio-economic rights of the tribal communities), as well 1692 Declaration on the elimination of violence against women, UN General Assembly, A/RES/48/104, 85th plenary meeting, 20 December 1993 (DEVAW), http://www.un.org/documents/ga/res/48/a48r104.htm. DEVAW is a form of ‘soft law’ rather than binding legal treaty. Significantly DEVAW confirms that “gender-based violence” is a form of
That religion plays a prominent role in subordinating women is especially in India perplexing since Hinduism is replete with female goddesses, like Kali and Durga, who were created from the synergies of the Gods to eliminate demons (evil) and were worshipped as a logo of Shakti (feminine power) in Hindu mythology. However these mythological images of feminine power have done little to displace the entrenched and commonplace attitudes that devalue women in modern Indian society. As this essay concludes, it's this paradox that has been at the core of India's social organization and gender relations for hundreds of years, and continues to the present day.

Torture may be a subgroup of collective violence, defined specifically by the severity of the pain, the intentionality, the aim and therefore the perpetrator. Within the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, torture is defined as: (i) severe pain or suffering, physical or mental; (ii) inflicted intentionally; (iii) with a selected purpose like to get a confession or to punish; and (iv) by an individual acting during a public capacity. In contrast, cruel, inhuman or degrading treatment (also called ill-treatment) may involve less but still substantial pain or suffering and not necessarily be committed for a selected purpose.

Torture is prohibited consistent with law of nations, and there are not any circumstances that justify an exception to the present prohibition. Nevertheless, consistent with human rights reports, torture is practised in about 130 countries and is widespread and systematically utilized in 80–100 countries. Hostilities facilitate torture, for instance, between the fighters in an armed conflict or between religious, sexual or political majorities and minorities. Such hostility may become de-individualization and dehumanization. Torture could also be interpreted as socialized obedience in an environment where the perpetrators see themselves as performing an excellent service by punishing a gaggle that they perceive deserves ill-treatment. For this reason, minorities (of a sexual, political or religious nature) are at increased risk of being victims of torture and should be in need of stronger protection measures.


people have the opinion that, when an individual becomes deviant and commits a criminal offense, he should be bereft of all his rights. However, others are of the opinion that some rights remain vested during a person even after commission of a criminal offense by that person. There are certain basic rights which the prisoners are entitled to which safeguard them from some abhorrent practices. One such detestable practice is ‘Torture’ which is employed against the prisoners and under-trials to urge confessions from them a few particular event.

Unfortunately, torture has increased alarmingly throughout the planet. Consistent with famous NGO ‘Amnesty international’, quite 100 countries have sanctioned the utilization of torture on their people. The word torture is defined as “intensive suffering, physical, mental or psychological, which is employed to force someone to mention or confess about something against his or her own will”. This paper aims to determine that the people undergoing incarceration referred to as ‘Prisoners’ also are entitled to a number of the essential rights even when a number of their rights are curtailed.

Human rights are best defined because the rights which each person inherits by birth. They’re absolute as they are available from eternity and goes to eternity. They will be understood as inalienable rights “to which an individual is entitled to easily due to him being a part of the human family”. Every person enjoys these rights despite of their nation, location, language, religion, Ethnic or the other status. ‘Article 1’ of “Universal Declaration of Human Rights” states that “All individual are born free and with equal dignity and rights”. By reading this text in UDHR, it is often construed that every person is equal in their rights before law and no exclusions are made even when an individual has committed a criminal offense. Human rights are considered as legal rights and because of their legal nature it has a corresponding duty to protect these rights of every individual living in their territory.

It is established through different texts and judicial interpretations that committing a criminal offense doesn’t reduce the status of a person’s being into a non-human being. The provisions for the treatment of prisoners has been recognized on international levels and are discussed under various International Instruments like “Universal Declaration of Human Rights” (UDHR), “International covenant on Civil and Political Rights” (ICCPR), the “United Nations Standard Minimum Rules for treatment of Prisoners”, the “European convention for prevention of torture and inhuman or degrading treatment for treatment of prisoners”, “United Nations basic principles for treatment of prisoners” and “United nations convention against torture and other cruel, inhuman and degrading treatment” (UNCAT).

The attention of the Indian Supreme court was first drawn to the Rights of prisoners in 1983 while deciding the case of T.V. Vatheswaran v State of Tamil Nadu. The court held that the essential fundamental rights that are provided under ‘Articles 14,19 and 21’ under Part III of the Indian Constitution are available to prisoners in the least times as are given to the freemen. The court further stated that the walls of prisons cannot keep fundamental rights out.

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The Indian Constitution doesn't state any provisions concerning torture, however, the Indian Supreme Court, while deciding the scope of the elemental rights granted to each individual under Part III of the Indian constitution asserted that “each and each individual has the proper to life and he should live it with human dignity” which incorporates that torture shouldn't be used on an individual which affects his right to measure with dignity. Therefore, the Indian judiciary while deciding different cases has played a serious role in granting the prisoners their rights.

Under the National legislations, “Indian legal code 1890”, under “Sections 330 & 348”, makes the act considered as torture as penal, with 7 and three years of imprisonment, but when this offence is committed by a policeman on duty, it’s not applied. Therefore, these provisions falls in need of covering all the prospects of torture as defined within the Convention against torture.

Custodial torture in India is so common that the overall public has accepted it as a traditional routine interrogation conducted by police on account of a criminal offense committed by a private. Only the foremost grievous cases of custodial torture are reported, there's nothing quite a momentary shock within the society which eventually leads to a public outcry. Only after this public outcry and appeals, the govt takes the notice of things of prisoners and undertrials in prisons because they're left with no other option. Even when the govt is to require action against the guilty officers, the very best punishment the officer gets may be a suspension. After the incident fades far away from the general public memory, the guilty officer resumes their services.\(^\text{1699}\)

Even the Indian Supreme Court, within the recent case of \textit{Munshi Singh Gautam vs. State of Madhya Pradesh}\(^\text{1700}\) summarizes their grief concern about this problem of torture in Indian prisons by police. The Supreme Court stated that:

“The dehumanising torture, assault and death in custody which have assumed alarming proportions raise serious questions on the credibility of the rule of law and administration of the criminal justice system... the priority which was shown in Raghbir Singh case quite 20 years back seems to possess fallen on deaf ears and thus things doesn't seem to be showing any noticeable change. The anguish expressed within the cases of Bhagwan Singh v State of Punjab, Pratul Kumar Sinha v State of Bihar, Kewal Pati v State of UP, Inder Singh v. State of Punjab, State of MP v Shyamsunder Trivedi and thus the by now celebrated decision within the landmark case of D K Basu vs. State of West Bengal seems ‘not even to possess caused any softening of attitude within the inhuman approach in handling persons in custody’.”

Therefore, I will conclude by saying that human rights are available to every individual, even when he's a civilian or a criminal. The prison bars cannot exclude the essential rights of a private. It’s also been established that the prisoner while in custody of police in India is entitled to ‘Right against custodial torture’ under ‘Article 21’ of the constitution. However, watching the present scenario in India and reports of the National right commission and other NGO’s like amnesty international etc. it's clear that this right of prisoners are still violated in Indian prisons on a day to day even when the politicians deny it.


\(^{1700}\) Appeal (Crl.) 919 of 1999.
The Indian government being a signatory to the “United Nations convention against Torture” has did not perform their obligation to guard this right of people including prisoners. Monthly a replacement case is being reported in India concerning death in police custody because police torture. The Indian government till now has not ratified the “United nations convention against torture” and even after the introduction of ‘Prevention of Torture Bill, 2017’ in Indian parliament, no such legislation was passed. This shows the voluntarily delay of the Indian government to ratify the convention, the most explanation for which is to stop themselves to be answerable to the United Nations for the torture cases.

CHAPTER 4

“COUNTING OF RISK” OR “PREVENTION OF ASSAULT”: WHICH ONE WILL YOU CHOOSE?

“We mute the belief of malevolence—which is just too threatening in touch - by turning offenders into victims themselves and by describing their behaviour because the results of forces beyond their control.”

~Anna Salter

Indian Constitution grants equal rights to women, prisoners rights and arrested persons rights under Articles 14, 15 (3), 21, 22. Various legislations also are enacted to protect the women prisoners from violence like Prisoners Act, 1984, Indian code, Criminal Procedure Code, 1973, Indian Evidence Act 1872. The govt. is additionally providing various recreational programs inside the prison for rehabilitation of prisoners like Education, Yoga, Mediation, Library, Prison Labour and Visiting their relations. Once they are released from the prison, the govt. also provides for "Aftercare services for released prisoners" to protect them from social stigma. The matter arises only when the poor and illiterate female enters into the prison and in repeatedly they are physically and mentally harassed by the prison staffs. The worst kind of custodial violence is custodial rape of women prisoners by prison staffs. In difference, it is a significant issue which they're facing. There are horror stories about the torture in custody to the women prisoners. Asian Centre of Human Rights (ACHR) stated that “custodial rape remains one of the worst kinds of torture perpetrated on women by enforcement personnel and sort of custodial rapes of women happen at regular intervals”. Women prisoners who are within the custody, police complained particularly of harsh treatment by the police including sexual indignity or abuse, physical torture, beating and rough handling. An entire disregard by the police of procedures applicable to arrest, search, custody, and other rights creates immense hardship for the women. Variety of the incidents of custodial rape and thus the relevant decisions of upper courts are as follows. Padmini, wife of a suspect during a theft case, was gang-raped in 1992. Her husband was taken to the Annamalai Nagar police station in Chidambaram for interrogation on May 30, 1992 and kept in custody till June 2, 1992. Her husband was beaten to death. When Padmini visited the police station to meet her husband, she was gang-raped. Out of the 11 policemen involved during this case, 7 were acquitted and 4 convicted to undergo imprisonment for 10 years. The convicts went in appeal to the Supreme Court, which upheld the conviction of the trial court and Madras High Court. Before the intervention of the High Court of Madras, the Tamil Nadu government offered to pay Rs. 1 lakh as interim compensation and also agreed to
provide Government employment and accommodation in government homes. Soni Sori, a 35-year-old adivasi school teacher, warden and mother, subjected to sexual violence while in custody within the Dantewada police station in Chhattisgarh under directions of the Superintendent of Police (SP) says in her letter to the Supreme Court advocate that “After repeatedly giving me electric shocks, my clothes were taken off. I was made to stand naked in front of SP who was watching me, sitting on his chair. While watching my body, he abused me in filthy language and humiliated me.

The Supreme Court released her on bail in 2013.

Women prisoners aren’t safe in lock ups. Ms. Saradha was delivered to Special Prison for girls, Vellore, Tamil Nadu, as a remand prisoner having been remanded by the Judicial Magistrate. She was undressed totally and dragged nude for quite awhile till they reached the doorway of her cell and was put in solitary confinement and was never given back her clothes and no official within the prison bothered about her. She was only offered compensation by the court.

The Supreme Court has rightly observed in State of Punjab v. Gurmit Singh, that a rapist not only violates the victim's privacy and private integrity, but inevitably causes serious psychological also as physical harm. Rape isn't merely a physical assault; it’s often destructive of the entire personality of the victim. A murderer destroys the human body of his victim; a rapist degrades the very soul of the helpless female.

So, women face a lot of hurdles altogether stages of criminal justice process, especially while in police custody. At the time of her arrest, the women suffer from lack of knowledge about her basic rights. This custodial violence is daintily a menace or cancer to our Indian Society.

To address the prevention of violence, the beginning line is within the reason of models of violence. To understand prison violence, there are two main models, which are as followed:

The importation model emphasizes that prisoners bring their violence-prone behaviour to the institutions through their histories, personal attributes and links to criminal groups, as an example. This model would show efforts of prevention towards addressing the individual prisoners' susceptibility to violence through social programmes like anger management programmes.

The deprivation model holds that prison and deprivation from liberty can cause psychological trauma so as that, for self-preservation, prisoners create an oppositional prison subculture promoting violence. This model would direct prevention efforts towards the environmental factors and general prison climate, which require to be addressed by prison management. Recent literature has predominantly focused on the tiny print of prison organization, interactions between people and situational factors of considerable significance for prison violence.

Risk factors associated with prisoners
Individual risk factors ranges from potential violence to assaults with serious injuries. Youth and short sentences are associated with higher levels of violent misconduct, while older age, drug convictions and a better educational attainment indicate

reduced violent misconduct. Using registration of injury, Sung\textsuperscript{1705} found that a history of violent offences, violent victimization and psychiatric treatment were associated with increased risk of injuries. Work assignments reduced violence-related risks but increased the likelihood of accident-related risks.

Wolff, Blitz & Shi\textsuperscript{1706} studied sexual victimization in prison for inmates with and without mental disorders, and located that the rates were approximately 2.5 times higher for inmates with a mental disturbance and 3 times higher among female inmates compared to males.

Other special needs groups are likely to be in danger of victimization, like inmates affected by chronic diseases, minorities (ethnic, sexual, religious) and inmates with drug abuse. Also the rising population of older prisoners is victimized to an outsized degree. Considering the health problems and functional deficits prevailing among older prisoners, it’s likely that such victimization features a considerable impact on their quality of life and feelings of safety and security.

**Situation risk factors**

Studies have found a greater risk of violent incidents in higher-security facilities. This could be expected because high-security facilities host more violence prone prisoners. However, it’d even be expected that security measures serve to manage the danger of violence and thereby prevent it. There is also evidence that mixing the ages of prisoners could also be related to lower levels of violence than those found among groups of younger prisoners. Violence between inmates and violence against staff are correlated because staffs are often injured during attempts to interrupt up fights between inmates.\textsuperscript{1707}

Crowding is assumed to be a risk factor for violence, but the evidence for this is often not convincing. Last, risk factors for violence in prison settings involve factors associated with the extent of security, mixture of prisoners, staff experience, days of the week and management approaches and relationships between different staff groups.\textsuperscript{1708}

**The role of the prison health services**

While the prison management, including security measures and prison climate, has been identified above because the key think about preventing violence, the health services have the potential to form a crucial contribution to the prevention of violence. Access to health care is related to the prison climate: a positive prison climate facilitates interactions between correctional and health care staff and prisoners, while in negative climates correctional staff act as a filter or barrier between inmates and therefore the health services.

When violence results in injuries or to psychological consequences, the prison health service is usually involved in getting to the victims. In delicate cases (cases of sexual violence, torture, or staff-on-prisoner violence), the health services could also be involved under a false pretext, like accidents, fights between prisoners or “falls”. They’ll even be pressured to form a false report on the causes of the injury.


\textsuperscript{1707} Kratcoski PC. The implications of research explaining prison violence and disruption. Federal Probation, 1988, 52(1):27–32.

However, it's important to develop a particular health information registry of the causes and circumstances of the injury, that is, violence between prisoners or between staff and prisoner. With an injury registry in place, the injury data can provide indispensable information on the way to prevent violence through the examination of such factors because the place, time and day, circumstances, persons involved and therefore the nature of the violence.

Of particular importance for the prevention of violence is that the initial checkups administered on arrival within the institution. This examination should specialise in, inter alia, identification of indications (report, signs, and symptoms) of violence or maybe torture experienced before arrival at the institution. A careful record should be made from such signs and symptoms and made available to the prisoner for potential subsequent complaint or legal remedy.

In addition to the health information registry of episodes of violence for internal consumption and quality development, the health services got to have a reporting mechanism to independent authorities, like the ministry of health or an independent human rights body, to make sure that the fragile and punishable cases of violence, torture or sexual assault could also be evaluated neutrally.

The integrity of the health services, that is, the power to work professionally independent of the prison management, is at stake here, as is that the technical capacity to document sensitive cases of violence, torture and sexual assault for future documentation and legal remedy.

CHAPTER 5

RECOMMENDATIONS AND SUGGESTIONS

"Until justice rolls down like water and righteousness like a mighty stream."
~ Martin Luther King Jr.

As Kiran Bedi, Retd. Joint Commissioner, Special Branch has observed: "The law of rape isn't just a couple of sentences. It's an entire book, which has clearly demarcated chapters and can't be read selectively. We cannot read the preamble and suddenly reach the last chapter and claim to possess understood and applied it."

Custodial rape is an epidemic problem in detention institutions. An individual is in custody when he/she is under the care, supervision and control of another person or institution, called custodian. Normally, the custodian has an absolute or a high degree of control over the individual, including his/her mobility, liberty, food and water, contact with the surface world, and such. This relationship of control and dependence casts a robust duty of care and protection on the custodian. Rape, under such circumstances, may be a much more serious violation, since the aggressor takes advantage of his position of control over the lady, violating not only her bodily integrity but also the duty to worry and protect.

The most common example of custody is detention by the State, through the police, army and other security forces, which can be at police stations, lockups, prisons and interrogation centres. As an example, in February 2005, a soldier with the Tripura State Rifles raped a minor girl in West Tripura district. In January, a report prepared by retired judge Chanambam (http://www.cpt.coe.int/en/documents/eng-standards.pdf, accessed 12th July, 2020).

Updendra Singh found 2 members of the 12th grenadier’s military unit guilty of raping 15-year-old Sanjita Devi in Manipur in 2003. In February, an Assam Rifles constable allegedly raped a 12-year-old girl within the Karbi Anglong district of Assam, sparking widespread protests from various women’s organizations. In September authorities charged two members of the Bihar police with the custodial rape of a 35-year-old widow who was detained on a murder indictment.

The rape of persons in custody was a part of a broader pattern of custodial abuse. Most of the NGOs asserted that rape by police, including custodial rape, was more common than NHRC figures indicated. A better incidence of abuse appeared credible, given other evidence of abusive behaviour by police, and therefore the likelihood that a lot of rapes went unreported thanks to the victims' shame and fear of retribution. Consistent with 2002 records from the National Crime Records Bureau (NCRB), the newest available, courts tried 132 policemen for custodial rape, but only 4 were convicted. The Ministry of Defence reported that it filed 17 rape cases and 10 murder cases against army personnel from 2003-2004. To date, one rape case and five murder cases led to guilty verdicts. Within the remaining cases, the investigations remained ongoing or the fees were proved false. It had been during this climate that three cases of custodial rape occurred in quick succession, Mathura Rape Case, Rameeza Bee and Maya Tyagi. The three incidents were targeted sorts of violence against women, which also involved an abuse of power by public servants who are duty-bound to guard the people of India.

So how can we then add up of those selective, extreme responses? Why selective outrage for "brutal" rapes? Isn't all rape brutal? Why selective outrage for "rape accompanied by torture"? Isn't all rape torture? When women are alive, we don’t believe their testimonies. Can we need women to die to storm the streets? During this paper, I hope to convey that knee- jerk reactions demanding harsher punishments for particular sorts of rape are patriarchal in principal and harmful in practice.

While it's difficult to prosecute and punish a rape accused, the challenge is even greater when it involves custodial rape. In legal code, the state is taken into account to be the protector of the people, which is why it's the state that prosecutes rape cases, and not the victim. However, this logic doesn't hold true in cases of custodial rape. Since incidents of custodial rape typically happen in police stations, jails and other places travel by under the control of the govt, the evidence is within the control of the general public servants. It’s possible for them to destroy the evidence from the place of crime. To counter this, the women are asked for a shift in onus of proof from prosecution to accused in custodial rape cases. However, it's difficult to even register an FIR against the police. Problems encountered by women with registering FIRs are:

1. Police or other forces refusing to simply accept the complaint of the victim. this might be under the authority of either Police Standing Orders, or the impunity for offences granted under unjust laws like the soldiers Special Powers for the Police, Central (Armed) Reserve Police Forces or the Army.

2. Police practice of recording informal complaints within the sort of Community Social Register (CSR) instead of FIR – this has the effect of removing the recording of the offence outside the purview of CrPC and therefore the safeguards it provides victims;
3. The political compulsion to suppress crime statistics, including statistics about custodial rape. Even if FIR is registered, S. 197 CrPC prescribes that a employee can't be prosecuted for any offence for any act done while discharging the official duty, without the prior sanction of the state or central government, whichever was the authority that appointed the general public servant. In principle, the demand for harsh retributive justice for rape is summarized upon a patriarchal understanding of rape. It views rape as more horrific than other sorts of violence. Since we feel something more is lost when a woman is raped- her value and honour and identity- we feel compelled to require more justice for rape than other sorts of violence, albeit all violence is non-consensual. This is often why we get moved to calling for lynching, castration and hanging of rapists. To understand the impact of harassment on women one must hear the account of its victims as nobody conveys the meaning and truth of harassment better than the ladies who have endured it. Women often internalise male perceptions of harassment and blame themselves for having brought on the harassment. Sexual harassment is nothing but the showcasing of male dominance. Every hour, two women are raped during this country. What's more horrendous is that 133 elderly women were sexually assaulted last year, consistent with the newest report prepared by the National Crime Records Bureau (NCRB). a complete of 20,737 cases of rape were reported last year registering a 7.2 per cent increase over the previous year, with Madhya Pradesh becoming the “rape capital” of the country by topping the list of such incidents. Law remains but the amount of victims (including minor) continues to extend destroying the very soul of the helpless women. The concept of marital rape doesn't exist in India. Contrary to the favoured belief rape is nearly never perpetrated for sexual gratification. It's an 'acts of violence that happens to be expressed through sexual means'. Severe and certain punishment during a time bound manner, of the rapists has some deterrent value. Arrest alone might not constitute a robust societal response. Lengthy prison sentences have some behaviour-altering deterrent values. Many well-known jurists and public men have advocated execution for the criminals who commit rape because it is an offence worse than murder thus far as its impact cares. The courts need to comprehend the very fact that these conscienceless criminals-who sometimes even beat and torture their victims-who even include young children, aren't getting to be deterred or ennobled by such a little time of imprisonment. Therefore, within the best interest of justice and therefore the society, these criminals should be sentenced to captivity execution. Therefore, we need to address custodial rapes as a social evil existing in our society.
QUINTESSENTIAL QUESTIONS TO LYNNING

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Lynching has been in and around the news since quite a long time. It is a phenomenon that is known to many theoretically. Recollecting the common understanding to Lynching, it is an act wherein a public spectacle is made by allegedly ‘punishing’ another or ‘teaching a lesson to that other’. To make another group streamlined as per the standard set by one group, the other is oppressed in the society. Generally, the former is the minority group, and the latter is the majority group. With this knowledge, the writer aims to discuss some critical questions that do not come in ordinary discourse.

WHY MINORITY GROUPS ARE MOSTLY SUSCEPTIBLE TO LYNNING?

This question is something which apart from researchers, every minority group seeks an answer to. Why is it that most of the time, the lyncher is from a majority community and the lynched is from minority community? Does the factor of dominance of number play a part? Is it that simple? One can be the reason that since there is dominance of number, which makes them the majority, their idea of justice or correctness or belief would be infectious1710. They would want that a particular way should be followed since they are the deciding factor of what becomes the common societal norm on account of their number, since that would be followed by the majority1711. But again, it is too shallow an explanation for such a heinous crime that drive people to the extent of barbarianism. Apart from this, a reasonable society with varying beliefs and disagreements, needs to dig into the roots of the issue.

Proposed Reason 1: Othering
Caste is the major hierarchical division that exists in the society since the longest period of time1712. It is one such aspect that is so deeply entrenched in the hearts and minds of the people – both upper caste and lower caste, that it is still rampant across India. It is not just that they are incapable of getting rid of this prejudice, they refuse to let go of the hierarchical mindset. But this is not the reason for their Lynching. The reason lies in the notion of inequality1713. They are still not considered equal to the rest of the people. It is expected that the so called lower caste people would rise up to the level and standard of the so called upper caste for them to be respected alike1714. Why can’t they be of the caste or position they are of and still get respected with equal status in the society? That generally does not happen. This is because they are the ‘other’ caste1715.

1712 Discussed in chapter 3.
1714 DILIP M. MENON, BLINDNESS OF INSIGHT, 4, (2006)
1715 Emily Wilson, We the People, We the Mob: Linking Death, Race and Belonging, AUSTRALASIAN JOURNAL OF AMERICAN STUDIES, 75

www.supremoamicus.org
The same was the dilemma of American Blacks when they wanted to be accepted as equal citizens as the White Americans. They were considered to be of the ‘other’ race\textsuperscript{1716}. They were the ‘other’ race because the Whites created such a distinction between them – the distinction that was conveyed loudly and brutally that Whites were the superior race and Blacks were Inferior ones. This is the same context with which Indian Caste System works. According to the hierarchical notions formed over the years, the so called upper caste people believe that they have a certain superiority from the ‘other’ caste\textsuperscript{1717}. And so, these self-acclaimed superior beings consider their responsibility to so called “cleanse” or to “correct” the society. Apart from this, racial Lynching is not uncommon in India as well. With diversified population, inflow of African Students has risen over time. A video surfaced in 2014 where 3 African Students were lynched by a mob at Rajiv Chowk Metro Station in New Delhi\textsuperscript{1718}.

Religious minority in India has come under the most vulnerable radar since a year or two. Lynching in the name of cow protection by vigilante groups has become a common practice in many states. Whenever a suspicion arises of a Muslim dealing with cow or beef, or even without a suspicion when a Muslim is seen with a cow, it is assumed by the Hindus that such man must be guilty of dealing with cow slaughter\textsuperscript{1719}. No need is felt by the perpetrators of such acts to strive for truth behind such allegation – since the Muslims are of the ‘other’ religion, it is assumed that such an act must’ve been committed by them\textsuperscript{1720}. When such a suspicion spreads about a Hindu, innocence is assumed, which should be the case in every scenario\textsuperscript{1721}. The seeds of distinction that were sown during partition is still very much prevalent that Muslim is the ‘other’ religion and that they are not equal to the Hindus\textsuperscript{1722}.

This is the concept of Othering – where it is believed that another is different from myself – he/she is the ‘other’. That one would not have done an act which another did and for that he/she needs to be taught a lesson\textsuperscript{1723}. It is not just about communities or affiliations, it comes into practice in common parlance as well. For instance, in a case of road accident, when the person causing the road accident is beaten to death by the angry mob of general public\textsuperscript{1724}, it is also included in ‘othering’. The people attacking the person takes the victim as the ‘other’. Similarly, when a man gets

\textsuperscript{1716} Mohammareza Ghanbarinajjar, \textit{Race as a Cause for Discrimination and “Othering”, Bernard Malamud’s The Tenants a Case Study}, 2 CCSE, 3, 1, 2013


\textsuperscript{1718} Tarique Anwar, \textit{Delhi’s everyday racism: African student recalls lynch mob attack in metro}, FIRSTPOST, October 02, 2014.


\textsuperscript{1720} Supra note 42

\textsuperscript{1721} An accused is innocent unless proven guilty.

\textsuperscript{1722} Discussed in 2.3.2 of chapter 2.


\textsuperscript{1724} In 2016, a dentist Dr. Narang was beaten to death in Delhi after a minor scuffle on road. Karn Pratap Singh, \textit{Dentist beaten to death with iron rods in Delhi after minor scuffle}, HINDUSTAN TIMES, April 14, 2016 https://www.hindustantimes.com/delhi-news/40-year-old-delhi-dentist-beaten-to-death-over-dispute/story-6B3iRSclCAoyojEXaFx1AP.html Last Visited on June 06, 2018
castrated by the angry mob for alleged attempt to rape, he is that ‘other’ person who gets punished for not being among the people who do not indulge in such acts\textsuperscript{1725}. This also takes place with LGBT community when they are outcasted and tortured. Since they are the ‘other’ gender according to people, the LGBT community has to suffer from violence for being different.

\textit{Proposed Reason 2: Power Assertion}

In America, blacks demanded equal status after emancipation from slavery\textsuperscript{1726}. Whites were the sole race in power before this period and owned blacks as their slaves\textsuperscript{1727}. The fact that the so called inferior race – whites, demanded freedom and wanted to free away from the clutches of the white dominion – this made Whites uncomfortable\textsuperscript{1728}. The blacks as equal citizens rose to power and participated in direct competition for political power and positions in the American society, insecurity among the whites increased and they devised ways to maintain supremacy of power in the society. The rape myth was one such way in which blacks were forced to live in fear and under the supremacy of the White. This is how power was asserted by the Whites. It was not because that was the correct way of attaining power, it was obviously wrong, however apart from that, it was their fear of losing supremacy that motivated them to resort to Lynching in taking back the African Americans to the position which they were in before emancipation.

In India as well, Hindus assert their power as a majority community on the Muslims and even on other lower caste communities depicted by a number of crimes. For instance, the notion of ‘love jihad’ that has risen to significant importance in the Hindu community is astonishingly sad. It has worsened to the extent that the case of Hadiya reached the Supreme Court by her own father for her marriage to be declared void on account of ‘love jihad’ being committed by the Muslim husband\textsuperscript{1729}. Apart from this, honour killings are done on account of adults marrying outside their religion or community by self-acclaimed Khap Panchayats which claim to be saving the community and family. Women have been the age-old victim of power assertion by the patriarchal society we live in. All the Lynch crimes that are committed against women especially is mostly targeted on her dignity and respect\textsuperscript{1730}. Such sexual violence is just another way for the men to show their power over women, punishing them for not following the right social order according to men\textsuperscript{1731}. When a family is to be punished by Lynch mobs, the women of that family is

\begin{itemize}
\item[\textsuperscript{1725}] Emily Wilson, \textit{We the People, We the Mob: Linking Death, Race and Belonging}, \textit{AUSTRALASIAN JOURNAL OF AMERICAN STUDIES}, 75
\item[\textsuperscript{1726}] NAACP, \textit{History of lynchings}, \url{http://www.naacp.org/history-of-lynchings/} Last Visited on June 08, 2018
\item[\textsuperscript{1727}] \textit{Ibid.}
\item[\textsuperscript{1728}] GLOBALIZING LYNCHING HISTORY: VIGILANTISM AND EXTRA-LEGAL PUNISHMENT FROM AN INTERNATIONAL PERSPECTIVE, 18 (Manfred Berg and Simon Wendt ed. Palgrave macmillan, 2011)
\item[\textsuperscript{1729}] TIMES OF INDIA, ‘Love Jihad’ case: SC set aside Kerala High Court order that annulled Hadiya’s marriage, March 08, 2018, \url{https://timesofindia.indiatimes.com/india/kerala-love-jihad-case-sc-sets-aside-kerala-hc-order-that-annulled-hadiyas-marriage/articleshow/63215330.cms} Last Visited on June 06, 2020
\item[\textsuperscript{1730}] \textit{Ibid.}
\item[\textsuperscript{1731}] On the contrary, also see: A mob of angry women lynched a man accused of rape in Mumbai, when he was being escorted into the courthouse in Nagpur. These women were victims of the accused rapist. \textit{ASIA NEWS, Rape victims Lynch rapist,}
made a common target which is because in violating their dignity, men assert power. This can be witnessed from the recent Kathua Rape case wherein a minor girl was repeatedly raped and killed. It was a pre-planned act committed with the object of terrorizing and evicting a particular community from a particular region. This inhumanity is the gravest example wherein a group of people, in order to bring right order by evicting them committed such a barbaric action with the aim of setting an example for future generations to come. Though it fulfilled the purpose of leaving a gruesome mark on the society, but it also reached the nadir of humanity.

Some of the ways which can be deduced from the aforementioned discussion as to how power is asserted is as follows:

- **Stereotypes** affect behaviour of the people in a society. In economies where people are rigid in following patriarchal traditions, violence is inevitable at the sight of any such deviance. These are motivated by generally accepted notions of morality and manhood.

III.

- In societies, there is a need for maintaining Social Control and Hierarchy among different sections of people. Women and Homosexuals constitute the minority part of the society and for men to maintain and strengthen their position in the patriarchal system that they have constructed for themselves, they showcase their superiority as a group of people by instilling a sense of fear among the minority groups.

IV.

- The notion of ‘women of the family’ is highly Overrated in countries like India where honour of the family is directly linked with its women. So, if any person wants to attack a family or its honour, women become the obvious targets.

V.

Violence on sexuality is recognized as an Individual Wrong like rape, sexual assault, stalking etc. So, a mob crime like Lynching does not fall under any kind of crime particularly. There are always complications in implementation of laws addressing these individual crimes. Crime like Lynching stand less to no chance when not even been recognized in India.

*Proposed Reason 3: Loss of Faith*

This power surge in a few people can also exist because of loss of faith in the government law enforcement machinery. This is also the devolutionist theory as mentioned in the beginning of the article. This is when people think that the government is incapable of providing justice against an act or practice taking place in a society and because of this dissatisfaction, people take upon themselves as a responsibility to act against it. However, this does not seem to be a
very stable reasoning since nothing or no amount of incapability of the state can justify the barbaric acts of violence that are committed in the name of bringing just or correct or right order in the society.

DOES LYNCHING ONLY COVER PHYSICAL VIOLENCE?
Hurt, Grievous Hurt, Murder, Assault, Rape or Destruction of Property are all instances of the physical violence or the consequences of the crime of Lynching. But it becomes a debatable issue when we bring in the mental element into picture. Here, the ‘mental element’ can be taken in two ways: one where we analyse the mental trauma which the victim/s has to go through and second where psychological Lynching is involved.

The mental trauma which the survivor or the family of the victim goes through is horrifying to the extent that it will always be embedded in their mind their entire life. One can never get over such a terrorizing incident, the terrifying frenzy which flashes in their minds and the grief of what they have lost affect their mental health deeply. For that very purpose, the remedy of compensation is one of the rehabilitative options that are available to the victim. In case of Lynching, no victim is given any compensation uptil now since Lynching is not recognized as a crime in our legal system. However, there is always the debatable question that exists and i.e. whether one-time monetary payment suffice for the trauma lynch victims went through. According to the principle of parens patriae it is the duty of the State to take responsibility of the subsistence of lynched victims and to protect them from total displacement from their livelihood. This can be done by preventing Lynching from taking place, checking dereliction by any officer, and also covering the rehabilitation and the employment aspects of the lynched victims.

Now, when it is mentioned psychological Lynching, it is the literal meaning that is taken by this study to analyse it i.e. attack on the mind as a means of so called just or right or correct order of the society. Let a true instance help to assert this point properly. In December 2017 it was reported that a girl committed suicide in Maharajpur village of the Tikampur district in Bhopal. This incident was a result of her family being ostracised by the village people on account of her relationship with a Dalit boy and she being from an OBC community. The group of people in the community of that village punished the family by breaking social ties because of the girl’s choice to have a relationship with a boy of another community. This led to a psychological breakdown of the girl which drove her to commit suicide. This is one of the incidents reported of the many other incidents that must be taking place all over the country. However, problem with these kinds of instances is that it does not completely fall under any specific type of


1738 EJI, History of racial injustice: trauma of lynching, Last Visited on June 06, 2018
1739 parens patriae doctrine applies to the state’s power to substitute its authority for that of natural parents over their children.

Lawrence B. Custer, The origins of the doctrine of parens patriae, 27 Emory L. J. 195, 1 (1978)
1741 Ibid.
1742 Ibid.
crime as yet, unless Lynching is criminalized covering mental trauma as well. Taking into account the point that this article explains in the definition of Lynching – to take consequences suffered by the victim into account and establish the victim’s side of the case in order to locate culpability for the crime of Lynching – will atleast get closer in imparting justice to the victim’s family and even recognizing this act under the crime of Lynching. Otherwise, the nexus will be too remote to be established if the crime would be taken from perpetrator’s point of view in all cases.

1.3 What makes Mob a Mob of Lynching?
Mob is when a gathering of two or more people i.e. a crowd, audience or even a queue becomes emotionally charged towards an event\(^{1743}\). Substantial amount of people become collectively charged and evokes some kind of action. This reaction can be triggered by anything and varies from mob to mob. That is how it is defined in common parlance. But what differentiates or makes its stand apart when it comes to Lynch Mobs? There can be a variety of reasons which may bring some uniqueness to the Mob indulging in the crime of Lynching. Lynch Mob is unique primarily because of its objective. It takes into account several factors like attackers, spectators and outnumbered victims\(^{1744}\). As will be discussed in the defining of Lynching that the objective may include notions of justice, enforcing social or cultural norm or belief, or acts which leads to some consequences indicating towards a close nexus between the act and the affiliation of the person. In other words, a mob which is formed mirroring the ingredients of lynching is a lynch mob. However, let’s put it differently – what makes a Mob? Who are these people? The so called lynchers – do they all carry exactly the same objective while participating in such a crime or just different versions of that objective? Gustave Le Bon published in his work that a crowd when becomes a mob become a unified entity which acts as if guided by a single collective mind\(^{1745}\). However, Forsyth states that mobs may not have a common objective every time and may be a result of the dispersed collective behaviour like rumours, trends and social movements\(^{1746}\). Agreeing with Forsyth, lynch mobs may not always have a collective objective in mind, but these lynch mobs have collective consequence i.e. lynching similar to the concept of group liability. The mob consisting a substantial amount of people are always more prone to committing violent crimes like Lynching since, according to Philip Zimbardo’s (1969, 2007) theory of deindividualization wherein under the right circumstances, the mob becomes so powerful that the individuals in a mob escape their individual identity, normative regulations and restraints\(^{1747}\). So, is the version of rightness or justness during the crime of Lynching may not exactly same but converge at similar points to lead to a common consequence. Even now, one question still remains and i.e. what motivated them to be a part of that group? What is that charged emotion that made this mob? Answers to these questions are dependent and vary according to the society and the social movements taking place in that society at that particular time – this brings us closer to the proposed reasons as discussed above.

\(^{1743}\) DONELSON R. FORSYTH, GROUP DYNAMICS, 507
\(^{1744}\) Ibid.
\(^{1745}\) GUSTAVE LE BON, THE CROWD, 27 (1895)
\(^{1746}\) DONELSON R. FORSYTH, GROUP DYNAMICS, 509
\(^{1747}\) Ibid.
The explanation to these inherent questions in this segment come with such an understanding of Lynching that clarifies the root of its ingredients, and also these issues form a close nexus with each other on microscopic level. The purpose of taking this question for analysis was to highlight some key aspects of the most important ingredient of Lynching i.e. a mob. Since, without studying both the lynched and the lyncher, the mob and the trauma, understanding of Lynching would be incomplete. Crimes cannot be taken as a series of standard ingredients put together to make up punishable offences. Perpetrators of this crime cannot be made to fit in the already established standards of other crimes because of the uniqueness it carries, separating it and making it a rather an aggravated crime than other crimes like murder, assault, rape etc. This kind of discourse would deepen the understanding of Lynching and would enable to conclude probable solutions against this crime, not just imparting hollow punishments, but devising ways and remedies which would adequately address Lynching and rehabilitate the lynched victims.

1.4 WHY THE ELEMENT OF ‘PUNISHMENT’ IN LYNCHING?

The question that should be asked rather than just assumed as a part of Lynching is – Why Punishment? Why is there need for giving punishment to people either because of othering or asserting power or any other? Why people have this notion of wanting more severe outcome to teach a so-called lesson? According to Nietzsche, punishment is not first of all a juridical apparatus; it is a movement of life, a writing of life so as to remember, to inscribe, to imprint the past in its body. A primitive humanity still exists in us where punishment is motivated by the way one punishes their children – which is only limited when it reaches equivalent to the injury caused for which the punishment is given. And he questions that very aspect also that does such equivalence or balance may ever exist between Crime and Punishment? How can both of these different phenomena be linked to attain a balance in the society? The genesis of which is dated back to Christ when for the payment of sins by the people to God – the son of God took the punishment of death – and that was called love. This punishment gives a voluptuous pleasure of causing the other to suffer and that is nothing more than the pleasure of seeing another suffering harm for the acts he/she committed – this drives the feeling of Punishment – and this is cruelty. People enjoy the moment where they get to exercise such kind of power while making someone suffer – while giving punishments. It is like a payment for the act a person did by way of punishment which is equivalent to the harm he/she committed – like a transaction for redemption. What is the right amount of suffering that would suffice for redemption is a matter of debate. There is no clear answer to the phenomenon as to why lynchers consider that punishment should be given to the victim. Why to bring about right or just or correct order, punishment is seen as the first option? From theenalizt of lynchings studied in chapter 2, we can however come to a basic conclusion that such punishments are to deter – to instil such fear of punishment in people – that would result in the desired result. Why violence is seen as the best way for effective punishments is

1748 Jacques Derrida, The Death Penalty, University of Chicago Press, Volume 1
1749 Ibid.
1750 Ibid.
the question that will remain a mystery to us. But, nevertheless, it is indeed true that one sub-consciously connects an alleged wrong act with a necessary penance/punishment—which is also the general understanding of the Hindu concept of Karma. But people take a kind of responsibility upon themselves to act in retaliation according to their subjective reasoning of what is just and right during the crime of Lynching, which reflects imposing one’s perspective on another. But even if we prohibit Lynching, make it punishable, and even stop or cure this evil from our society, do we actually prohibit the desire to punish, which lead to the idea of committing the crime of Lynching in the first place? There are cases where we can see that desire to punish remain even when the people are arrested by the appropriate authorities, for instance, when a rape accused in Nagpur was dragged out of jail and lynched\textsuperscript{1752}. This desire to punish for an act done by suspected accused can be linked to the retributive theory of punishment, where eye for an eye is the rule of punishment\textsuperscript{1753}. But, that is the tool of the state to gain monopoly over violence along with ensuring deterrence in order to set an example\textsuperscript{1754}. From these deductions we can safely derive one explanation that because of the emergence a devolutionist mindset\textsuperscript{1755} and people losing faith on the government, the people want to assert power\textsuperscript{1756} over situations by which they can take matters into their hands and command some supremacy in the society. This is when people indulge in the crime of Lynching.

1.5 IS THE STATE RESPONSIBLE FOR PROMOTING LYNCHING?
As we discussed above, people get this feeling of power when indulging in the act of giving punishment for the right or correct order that they want should prevail in the society. The right question is what motivates them to have this kind of notion-taking control by violence – asserting power – punishments? It does seem familiar with the attributes of how state work in a lawful society. So, can we conclude that lynchers are imitating state? This is surely an incomplete picture. State represents people of the society. It is not that before State, there wasn’t a mechanism for punishing people for their crimes. The people surrendered their power of violence and the practices of giving out punishments as a requisite for democratic governance to the state\textsuperscript{1757}. That is the promise of people to the state. State is primarily structured on people’s desire and opinions, for instance, it was the people as well who wanted death penalty, and people losing faith on the government, the people want to assert power over situations by which they can take matters into their hands and command some supremacy in the society. This is when people indulge in the crime of Lynching.

\textsuperscript{1753} Jacques Derrida, The Death Penalty, University of Chicago Press, Volume 11
\textsuperscript{1754} Rasul Khan Mahsud, Monopoly over Violence, August 17, 2016, http://spearheadresearch.org/index.php/researchopinions/monopoly-over-violence Last Visited on June 5, 2020
\textsuperscript{1755} GLOBALIZING LYNCHING HISTORY: VIGILANTISM AND EXTRA-LEGAL PUNISHMENT FROM AN INTERNATIONAL PERSPECTIVE, 18 (Manfred Berg and Simon Wendt ed. Palgrave macmillan, 2011)
\textsuperscript{1756} Nandini Sundar, Hostages to Democracy, VESRO BOOKS, May 30, 2018, https://www.versobooks.com/blogs/3856-hostages-to-democracy Last Visited on June 06, 2018
for the terrorist Kasab, so much so that people celebrated and welcomed the death penalty verdict given to him\textsuperscript{1758}. And so, we cannot blindly say that people imitate State when it comes to Lynching. However, people are acting on behalf of state which is discussed below.

Lynchers do not have any right to act upon what they believe to be correct or just or right in the society without due regard to due process of law. Monopoly over force and violence is power of the State. This does not mean that people do not take up responsibility on behalf of the state\textsuperscript{1759} which can be seen in a number of instances – in Turkey, Lynching is considered to be legitimate force as a national reflex, in which the state can temporarily give up its monopoly over legitimate force and delegate it to the ‘nation’ to tackle\textsuperscript{1760}; in India it was reported that the BJP-led government in Haryana, provided ID cards to ‘genuine’ Gau Rakshaks motivating cow vigilantism\textsuperscript{1761}; there were training camps organized by Rashtriya Swayam Sevak Sangh, which is BJP’s parent organization, for the cow-vigilantes\textsuperscript{1762}. These are some of the ways in which we can see that people take responsibility because the state encourages them or motivates them to take action on their behalf. This can be one of the reasons why people have started to take law into their own hands when there is presence of full-functioning law machinery in our society. But all cannot be attributed on the State. State does encash from these violent uproars due to political reasons, but this is cannot drive people forcefully to behave inhumanly and act in a barbaric way. As we have seen above, state provide support but state does not compel the people to participate in these violent acts. There cannot be black-and-white answers to concretely decide what happens in that environment when people lynch, but with deliberations and studies in this article we have come closer to understanding that Lynching in India is surviving because of political support to the majority community. It is either by directly aiding Lynchers in some way or omitting to act against preventing the crime or punishing the crime that is fuelling Lynching.

1.6 WHY RECOGNITION OF THE CRIME OF LYNCHING IS IMPORTANT?
In the history of Lynching in America, one thing that remained constant was the massive journalistic involvement and extensive intellectual discourse that emerged over this issue\textsuperscript{1763}. The vast literature that emerged in this time is the reason that Lynching came to be primarily associated with America. For instance, the


\textsuperscript{1759} Abhimanyu Kumar, The lynching that changed India, FIRSTPOST, October 05, 2017, https://www.aljazeera.com/indepth/features/2017/09/lynching-changed-india-170927084018325.html Last Visited on June 06, 2020

\textsuperscript{1760} Ebru Aykut, Globalizing Lynching History: Vigilantism and Extra-legal Punishment from an International Perspective, (ed. Manfred Berg and Simon Wendt, published by palgrave macmillan), pg. 120


\textsuperscript{1763} EVELYN M. SIMIEN, GENDER AND LYNCHING: THE POLITICS OF MEMORY, 61 (2011)
In order to recover and cure the society from the crime of Lynching, there are two ways of doing that – first comes remembering and recognizing the crime by an intellectual discourse that would mobilize masses against it, and second comes the healing part where Lynching is enacted in the Indian criminal laws in order to punish and prevent the offence of Lynching by recognizing as a crime.\textsuperscript{1768}

1.7 IS THE CURRENT LEGAL SYSTEM ADEQUATE FOR CURBING LYNCHING?

Considering all the laws that are already in place, especially for the protection of minority groups, there is not much deliverance on stopping or preventing the crime or nipping the bud of these crimes once and for all. Arrests have been made in some of the cases\textsuperscript{1769} and the law machinery gives special provisions of strict punishments for crimes against Schedule Caste and Schedule Tribe. However, has it really stopped or prevented crime of Lynching from happening? Even if the crime of Lynching is 604enalized, it entails no guarantee that people will be transformed or as soon as conviction is decided or even when an arrest has been made, the perspective of the perpetrator of the crime of Lynching will change. If reformation was attained by punishing for crimes with violence, there wouldn’t have been a place for repeated offenders in the Indian Penal Code.\textsuperscript{1770} Why this kind of

\textsuperscript{1764} The Poem Strange Fruit\textsuperscript{1764} – became so popular that it gathered the much-needed attention that this crime deserved at that point in time in America. This poem sung by Billie Holiday was crowned as the best song of the 20\textsuperscript{th} century in Time’s Magazine’s last issue before the new millennium\textsuperscript{1765}. Although, this song was highly 604enalized604 among the white Americans because a 1986 film – Nine and a Half Weeks – used this song in the background to portray love affair between the characters of the film. Nevertheless, this development lead Strange Fruit to catch althemore attention among the masses\textsuperscript{1766}. Apart from this, people like Angelina Grimke, Ida B. Wells, Rebecca Felton, James Allen and John Ballefield took forward the discourse of Lynching. This is how masses were made aware and alert of the crime of Lynching. There was unification in the voices of America at that time because of the mobilization\textsuperscript{1767} created by the extensive literature that it changed the culture of Lynching in the long run. This is why recognition of the crime of Lynching is important.

Similarly, when this article asserts that Lynching as a crime should be recognized, it involves a two-fold explanation: one by extensive intellectual discourse over the subject that would gather recognition and mobilization, and two by making it a crime i.e. enacting a provision in the Indian criminal laws for the offence of Lynching that will recognize Lynching as a crime.

\textsuperscript{1768} EVELYN M. SIMIEN, GENDER AND LYNCHING: THE POLITICS OF MEMORY, 19 (2011)
\textsuperscript{1769} HUFFPOST, Accused arrested for Delhi-Mathura Train lynching says he was drunk, was egged by friends to attack victim, June 24, 2017, https://www.huffingtonpost.in/2017/06/24/accused-arrested-for-delhi-mathura-train-lynching-says-he-was-dr_a_22960848/ Last Visited on June 07, 2020
\textsuperscript{1770} For instance, section 75 or section 376E of the IPC.
system do not result in efficient result of transformation among people – getting rid of the prejudice they carry in their mindset, is the right question to ask. It has to be noted that Lynching is not just a singular crime with only notions of justice as its ingredient, it is far more complex, including aspects of Hate Crime as well. So, it is rather difficult to cure Lynching from the Indian society with the present legal machinery. We cannot deny the fact that State machinery is punishing people for committing violence because state has that monopoly over violence i.e. to regain that power and monopoly a lesson is taught to the person indulging in the same. The motive of the law machinery seems rather far from reforming or rehabilitating people in the society. With the aim devoid of reformative considerations, you cannot yield results of reformed men. Another thing is with the presence of adversarial form of legal judicial system, people are posing as adversaries to each other. In a dispute between majority and minority community for instance, there is no reconciliation that is attempted to be made, they already were adversaries all their life. Social order, change in attitude and instillation of the feeling of sameness between people, humanity is not established. What our society needs is a social change, a mental change and transformation in the attitude towards people, which could enable people to get over this feeling of ‘other’ that they have against people.

Further, as we can see from a number of instances, this ‘otherness’ is used in the politics of the country like a tool or ladder to step on and move forward. It is clearly not transforming or reforming people. So, we can conclude with this dilemma that there exist some reasons as discussed above which leads to doubting whether Lynching as a phenomenon can be cured from this society by the present legal system at all. The foremost reason for stopping anyone to commit violence is to instil this feeling that people are equal and that everyone deserves equal protection and position in the society. It is highly doubtful that punishment alone can change the attitude of the people towards Lynching. And, in the bargain of debating whether the punishment for a crime is adequate or not, the most important aspect – prevention is ignored. And other than that, even after years of attaining Independence, it seems we still haven’t been able to break free from the shackles of torture seen as the key to control – be it of State or of people. Lynching is not the usual crime of simple criminal acts with simple air-tight ingredients, there is no criminal standard that is set as yet in dealing with the crime of Lynching, more than the crime, the Lynchers and the lynched should be considered. The notions Lynchers carry is reflective of the acts that are committed during Lynching, but with no solution in sight uptil now. And most of the times, violence suffered by lynched victims because of the crime of Lynching is

1771 Rustam Singh Thakur, An eye for an eye will turn the whole world blind, MANUPATRA ARTICLES, http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=4648720-96bb-4fab-8eca-32b16ce2dae1&txtsearch=Subject:%20Criminal Last Visited on June 07, 2020
reflective of the age-old history of violence and oppression against them. Although, the current legal system does not have an efficient cure for Lynching as a Phenomenon, but it can devise a method for curbing Lynching as a Crime. Lynching is something which has gripped the society so tightly in its clutches that only law enforcement mechanism can be useful in freeing the people from it. Preventive measure can be ensured only when Lynching is brought within the purview and scope of criminal laws of our country. However, it is asserted by the government that the current legal provisions that already exist are sufficient for curbing this crime and that there is no need for any further development on this issue.¹⁷⁷⁴

**Conclusion**

In order to formulate a framework for the crime of lynching, it is important to perform an in-depth analytical study of the ingredients of lynching. Lynching ingredients involve a lynch mob composed of a group of people, perpetrating violence as a form of punishment in order to promote their version and notions of justice or right or correct order in the society, on minority groups which are generally outnumbered in such a scenario. This article has engaged in analytical study in understanding these ingredients by psycho-analysing the lynchers and the lynched. This has led to a clearer reasoning with respect to the root cause of the crime of lynching. It has also dealt with the important aspect of recognition of crime that form one of the research questions of this study. There has been a lot many efforts in defining lynching and all may be successful in covering its own domain of study. In the Indian context, it is very important to take into consideration the social conditions that lead to the formation of the mindset of the people of India. The factors like prejudice, caste hierarchy, patriarchy, communal mindset etc are some of the many facets of the social conditions of the Indian Subcontinent. It is very important that these factors are taken into account while dealing with a crime like lynching which is largely dependent and varies on the people that a particular society is composed of.

It was simply to start a discourse in this direction regarding the crime of lynching. It is by such intellectual exchange that awareness regarding this subject will come to surface, which has been rather less except by some news report platforms. This article has indicated that lynching should be elevated from the position of merely a practice to the position where it is punishable as a crime. It has achieved its goal in asserting with reasons that the existing legal systems and provisions are unable to tackle this crime and that there is an urgent need for steps to be taken in furtherance of legalizing lynching as a crime.

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RULE OF LAW

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ABSTRACT

Rule of Law exemplifies the law of matchless satisfactory of law. It is essential and principal want for a restricted and sorted out society. On the off hazard that an administration demonstrates as indicated by using the rule of rule of law then character freedom and proper may be ensured in better manner. The rule verifiable inside the decide of law that authentic need to act under the law, and not by using its personal statement or fiat, is as yet a cardinal guideline of the custom-based law framework. The respectable is regarded as not having any characteristic forces of its personal but the entirety of its forces movement and radiate from the regulation, a general which assumes such an imperative task in every unmarried honest nation of to-day.

Keywords: Rule of Law, Principle, Liberty, Justice, Political, Social, Economical, Educational and Cultural.

INTRODUCTION

The idea of Rule of Law is that the state is administered, now not by the ruler or the named agents of the individuals yet by way of the law. A country that cherishes the usual of law would be one where within the Grundnorm1 of the country, or the critical and center law from which all other law infers its power is the preeminent authority of the state. The ruler or the agents of the republic are administered by the legal guidelines decided out of the Grundnorm and their powers are restricted by the law. The King isn't the law yet the law is in particular else. The time period rule of regulation is not any place characterized inside the Indian Constitution. We can find that the term is however utilized as frequently as possible via the Indian courts in their selections. There isn't any uncertainty that the usual of law plagues the Constitution as a hidden rule. Truth be told, the Supreme Court has proclaimed the same old of regulation to be one of the basic features of the Constitution, so this rule can not be removed even by a sacred correction. As this Country Report will diagram, the Indian origination of the rule of regulation is both formal and meaningful. It is moreover discovered as an essential piece of right management. Questions are however raised with appreciate to the degree to which the sacred guarantee of the same old of law suits with authentic situation in India. The wellknown of regulation necessitates that people ought to be represented with the aid of acknowledged guidelines, instead of by means of the self-assertive picks of rulers. These guidelines should be preferred and unique, known and certain, and apply in addition to all people. Sacred governments depend upon a past obligation to opportunity beneath the usual of law. The primary feature of constitutionalism is a valid confinement on authorities. Under constitutionalism, rulers are not exempt from the laws that observe to every person else, authorities energy is isolated with legal guidelines set up by one frame and directed by another, and a free felony government exists to guarantee laws are regulated impartially.

RESEARCH METHODOLOGY

The Research Methodology adopted for the observe is the Doctrinal Method of studies. The Doctrinal Method of research involves evaluation of the statutes, present secondary data from different assets like books, internet, articles after which creating
a comparative take a look at with the United States of America. This Country is referred for the comparative observe as because this country stocks many common capabilities with that of India like each is Democratic Countries, both have a written Constitution, etc. And also due to the fact that is a Country that presents very huge discretionary rights.

CONCEPT OF RULE OF LAW

It became examined via antiquated Greek scholars, for example, Plato and Aristotle around 350 BC. Plato expressed: "Where the regulation is situation to some different energy and has none of its own, the breakdown of the nation, in my view, is no longer far-eliminated; yet within the event that law is the ace of the administration and the legislature is its slave, at that point the circumstance is loaded with assure and men appreciate all of the endowments that the divine beings shower on a kingdom". Similarly, Aristotle likewise embraced the concept of Rule of Law by composing. The expression Rule of Law is gotten from the French expression, “A. prinipe de legalite” (the preferred of lawfulness) which alludes to an administration dependent on requirements of regulation and not of men. Rule of law is certainly one of the critical requirements of the English Constitution and the principle is stated inside the Constitution of U.S.A and India also. The term ‘Rule of Law’ is taken from England. It method that no man is above the regulation and that all and sundry is subject to the jurisdiction of normal courts of law, irrespective of his rank and position. Rule of Law calls for that no man or woman have to be subjected to harsh, uncivilized or arbitrary treatment. Rule of law is associated with the word ‘law’ this means that that guy or a society must not govern by way of a person or ruler however instead of they need to be govern via Law. In different words we are able to say that law approach law of land that’s defined below Article 13 of Indian Constitution. Rules mean regulation policies. Since, there is no bodily life of law so regulation manner government based totally on principle. The expression “rule of regulation” explains a state of affairs in which everything should be achieved consistent with regulation. It is a situation in which there are criminal obstacles to governmental arbitrariness and there are available legal safeguards for the safety of the individuals. In easy words, it’s miles the opposite of tyranny, the antithesis of the guideline of anarchy and fear. According to Oxford Advance Learner”s Dictionary, rule of regulation manner the situation wherein all the citizens as well as the kingdom are ruled by the regulation. According to Black”s Law Dictionary “rule of law” way legal ideas of day to day application, approved through the governing bodies or government and expressed within the shape of logical proposition.

Sir Edward Coke, the Chief Justice in James Reign became the originator of this concept. In a battle towards the King, he maintained correctly that the King should

1776 https://advocatespedia.com/Rule_of_Law
1777 https://www.lawctopus.com/rule-of-law-explained/
be below God and the Law, and he mounted the supremacy of the law.

Prof. A.V Dicey evolved this principle of Coke. In 1885 he gave following 3 postulates of the rule of thumb of law in his classic book Law and the Constitution. According to Prof. Dicey, rule of law has three manner or we will say 3 ideas which are ought to be observed so that there may be supremacy of rule of regulation. The 3 ideas are:

1. Supremacy of regulation;
2. Equality earlier than Law; and
3. Predominance of Legal Spirit.

1. Supremacy of Law

According to the first precept, A. V. Dicey states that rule of regulation means there should be lacking of arbitrariness or huge discretionary power. In other words, each act could be controlled through regulation. According to Dicey, the English guys were ruled by means of the law and regulation alone. In the words of Dicey, “Wherever there may be discretion, there is room for arbitrariness and that in a republic no less than under a monarchy discretionary authority at the a part of the Government should mean insecurity for prison freedom at the a part of its subjects.” As Dicey postulated, the rule of thumb of law presupposes the absence of huge discretionary authority within the rulers, in order that they can’t make their own legal guidelines however must govern consistent with the set up legal guidelines. Those laws ought no longer to be too easily changeable. Stable laws are a prerequisite of the certainty and self belief which shape an essential part of man or woman freedom and security. Therefore, legal guidelines ought to be rooted in moral ideas, which cannot be carried out if they're framed in too exact a manner.

2. Equality before Law

The attribute of “Rule of Law” Dicey said turned into “equality earlier than the regulation and same subjection of all classes to the normal regulation of the land administered by means of the normal law courts.” The second principle emphasizes everyone, along with the government, no matter rank, shall be problem to the same law and courts. This detail is interpreted to be erroneous and facing package deal of criticisms. In fact, through cause of maintaining the regulation and order inside the society, there are simply exceptions inclusive of the Crown, police, Members of Parliament. The Crown may exercising prerogative powers which might also defeat the rights of individuals. The police have powers over and above the citizen. Members of Parliament have immunity from the law of defamation. Prof. Dicey states that, there need to be equality before the regulation or...
identical subjection of all lessons to the regular regulation of the land. He criticised the French prison device of droit Administrative in which there have been separate administrative tribunals for identifying the instances of State Officials and residents separately.

3. Predominance of Legal Spirit

The Third meaning of the rule of law is that the overall ideas of the charter are the result of juridical selections figuring out document rights of private men and women mainly instances introduced before the Court. Dicey states that many constitutions of the states (countries) assure their citizens certain rights (fundamental or human or basic rights) together with right to non public liberty, freedom from arrest etc. According to him documentary assure of such rights isn't always enough. Such rights can be made available to the citizens simplest when they're properly enforceable within the Courts of law. For Instance, in England there's no written constitution and such rights are the result judicial decision.

Application of the Doctrine in England: Though, there may be no written constitution, the rule of thumb of regulation is applied in concrete instances. In England, the Courts are the guarantors of the character rights. Rule of law establishes an effective control over the govt and administrative power. The view of Dicey as to the which means of the Rule of Law has been issue of much grievance. The whole grievance can be summed up as follows. Dicey has antagonistic the system of supplying the discretionary energy to the management. In his opinion presenting the discretionary power way developing the room for arbitrariness, which may additionally create as serious threat to individual freedom. Now days it has been clear that presenting the discretion to the management is inevitable. The opinion of the Dicey, thus, seems to be outdated as it restricts the Government action and fails to be aware of the changed idea of the Government of the State. Dicey has failed to distinguish discretionary powers from the arbitrary powers. Arbitrary strength may be taken as in opposition to the idea of Rule of Law. In contemporary times in all the countries inclusive of England, America and India, the discretionary powers are conferred on the Government. The present trend is that discretionary electricity is given to the Government or administrative authorities, but the statute which offers it to the Government or the administrative officers lays down a few guidelines or standards in line with which the discretionary power is to be exercised. The administrative law is much concerned with the control of the discretionary power of the administration. It is engaged in finding out the brand new ways and approach of the manage of the administrative discretion. According to Dicey the rule of thumb of law calls for that absolutely everyone have to be problem to the ordinary courts of the country. Dicey has claimed that there's no separate law and separate court docket for the trial of the Government servants in England. He criticised the system of droit administrative that's winning in France. In France there are two forms of courts Administrative Court and Ordinary Civil Courts. The disputes between the citizens and the Administration are decided via the Administrative courts even as the other cases, (i.e. The disputes between the residents) are determined via

the Civil Court. Dicey changed into very crucial to the separation for finding out the disputes between the management and the residents. According to Dicey the Rule of Law calls for equal subjection of all people to the regular law of the country and lack of special privileges for person including the executive authority. This share of Dicey does now not seem like correct even in England. Several humans experience some privileges and immunities. For example, Judges experience immunities from healthy in recognize in their acts accomplished in discharge in their professional function. Thus, the meaning of rule of law taken by way of Dicey can not be taken to be absolutely satisfactory. Third meaning given to the rule of regulation by using Dicey that the charter is the end result of judicial decisions figuring out the rights of personal men and women in particular instances introduced before the Courts is based on the peculiar individual of the Constitution of Great Britain. In spite of the above shortcomings inside the definition of rule of regulation through Dicey, he have to be praised for drawing the eye of the scholars and government towards the want of controlling the discretionary powers of the administration.

MODERN CONCEPT OF RULE OF LAW

The modern concept of the Rule of Law within reason extensive and, therefore, sets up an concept for authorities to achieve. This concept was advanced with the aid of the International Commission of Jurists, known as Delhi Declaration, 1959, which changed into in a while showed at Lagos in 1961. According to this idea, Rule of Law means that the functions of presidency in a loose society need to be so exercised as to create situations wherein the dignity of man as an individual is upheld. For it no longer only reputation of positive civil or political, social, economical, educational and cultural situations which are important to the full improvement of his personality but the modern idea of rule of law is to create those circumstances wherein the dignity of man can be protected. The modern concept of rule of regulation is to make authorities so effective that it could protect person liberty. As the object of rule of regulation is to protect person liberty then to fulfill this object it may be taken many meanings. K.C Davis gives seven ideas or meanings of the term rule of regulation.

1. Law and order
2. Fixed rule
3. Due technique of law or fairness
4. Observance of principle of herbal justice
5. Elimination of discretionary energy
6. Preference for Judges and Ordinary courts

RULE OF LAW UNDERNEATH INDIAN CONSTITUTION:

Rule of law has performed a wonderful role to increase the power Indian democracy. When Indian charter changed into frame into two alternatives USA & England. They followed a few provisions from USA and some from England. Our constitutional founder fathers adopted the Rule of Law from England and contain such a lot of provisions in Indian charter. Indian Constitution is excellent no person is above Indian constitution. All the three organs follow constitution if any organ does something in the manner of violation in the constitution all such acts can be regarded as ultra vires.
The preamble of The Constitution is likewise tells approximately Rule of Law. Part-III and all essential Rights come below the Rule of Law, which are enforceable with the aid of Law. If these are violated we can visit the Supreme Court and High court below Article 32 & 226. The time period Law consists of all orders, policies, regulations, bylaws, observe and customs. It expects that each one these can be according to Constitutional provisions if they are towards, below article-13 they'll be declare unconstitutional and void. In the Constitution of India guaranteed certain rights which may be enforced via the courts. At this Juncture, we may bear in mind the position prevailing in India as regards the third precept of Dicey’s doctrine of Rule of Law, i.e., foremost of felony spirit. Until this principle was being considered inside the context of interpreting the provisions of the Constitutions. In our Constitutional machine, the important and most characteristic characteristic is the idea of the rule of thumb of regulation which means, in the present context, the authority of regulation courts to check all administrative movement through the usual of legality. The ideas of Rule of Law denotes Justice, equality and liberty which are enriched in the Constitution of India.

The Constitution of India is above all the laws implemented in Indian Territory and any regulation made by means of the critical government or by way of the nation government have to be in affirmation with the Constitution of India. If any regulation made by using the legislation under the jurisdiction of India that is towards the mandates of the constitution, the regulation might be void. The charter of India guarantees equality earlier than the law, as an aspect of the guideline of regulation, below Article-14. Under Article 32, the Supreme Court has energy to problem writes inside the nature of Habeas Corpus, mandamus, prohibition, quo warrantor and certiorari. It is also given power of judicial overview to save you any extremely vires law, to preserve ‘Rule of Law’ Article 15 and 16 of Right to equality and Article 19, 20 and 21 in form of right to life and liberty are provisions of our charter to this affect. In India, nobody has very arbitrary strength, besides the powers given by way of the regulation. The constitution is the Supreme Court regulation of the land or even the authorities derives its authority from it. This effectuates the supremacy of regulation. Everyone, in India are situation to same legal guidelines, without any discrimination, court takes into account no rank or condition. However, the president and the governors (beneath Article 361) are given special exemptions. Armed forces personnels are handled by using armed legal guidelines, officers are given same immunities etc. But those provisions do not negate the effectiveness of the guideline of law in India, because their provisions also are made by laws, under various provisions of the charter. From a poor individual to the president, be it a police constable or a collector, are treated by means of regulation. Thus, the Indian constitution correctly applies the rule of thumb of regulation.

The Supreme Court inside the case of India Nehru, Gandhiji vs. Raj Narain - 1975 held that the guideline of law embodied in Article 14 is the 'fundamental structure' of the Indian constitution and as a result it cannot be destroyed even by way of an amendment of the charter below Article 368 of the constitution. Rule of Law and Indian Judiciary Fundamental rights enshrined in part III of the constitution is a limit on the law making electricity of the Indian Parliament. It consists of freedom of speech, expression, association, movement, residence, property, profession and private liberty. In its broader sense the Constitution itself prescribes the fundamental prison
machine of the U.S.A. To assure and promote fundamental rights and freedoms of the citizens and the honour for the standards of the democratic State based totally on rule of regulation. The popular habeas corpus case, ADM Jabalpur v. Shivakant Shukla is certainly one of the most critical instances on the subject of rule of law.

The Supreme Court found in Som Raj v. State of Haryana that the absence of arbitrary strength is the primary postulate of Rule of Law upon which the complete constitutional edifice is dependant. Discretion being exercised with none rule is a idea that is antithesis of the concept.

The third that means of rule of law highlights the independence of the judiciary and the supremacy of courts. It is rightly reiterated by using the Supreme Court inside the case Union of India v. Raghubir Singh that it isn't a rely of doubt that a widespread diploma that governs the lives of the humans and regulates the State functions flows from the decision of the advanced courts. Although, entire absence of discretionary powers, or absence of inequality are not possible in this administrative age, but the concept of rule of regulation has been developed and is prevalent in common regulation international locations together with India. The rule of law has furnished a form of touchstone to judge and check the administrative law prevailing within the us of a at a given time. Rule of regulation traditionally denotes the absence of arbitrary powers, and for this reason you possibly can denounce the increase of arbitrary or discretionary powers of the management and advise controlling it through techniques and different means.

Rule of regulation for that remember is likewise related to supremacy of Courts. Therefore, in the last analysis, courts need to have the electricity to govern the administrative movement and any overt diminution of that strength is to be criticized. The precept implicit in the rule of thumb of law that the govt have to act under the regulation and now not via its very own fiat is still a cardinal principle of the common regulation system, that is being followed by means of India. In the not unusual regulation device the govt is seemed as no longer having any inherent powers of its very own, however all its powers float and emanate from the law. It is one among the vital concepts gambling an essential position in democratic international locations like India. There is a skinny line between judicial evaluation and judicial activism. Rule of law serves as the premise of judicial evaluate of administrative action. The judiciary sees to it that the executive continues itself inside the limits of regulation and does no longer overstep the equal. Thus, judicial activism is stored into check. However there are times in India where judiciary has tried to infringe upon the territory of the govt and the legislature. A recent instance of this would be the prevailing reservation situation for the other backward classes.

In Keshvanada Bharti Vs. Union of India, the Supreme Court enunciated the guideline of regulation as one of the most vital components of the doctrine of simple

1787 https://www.slideshare.net/subramanyambommaka/latest-71063688

PIF 6.242 www.supremoamicus.org
structure. In Menaka Gandhi vs. Union of India, the Supreme Court declared that Article 14 strikes against arbitrariness. In Indira Nehru Gandhi Vs. Raj Narayan, Article 329-A become inserted in the Constitution under 39th amendment, which provided certain immunities to the election of workplace of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid because it abridges the primary structure of the Constitution Conclusion & Suggestions On a quick assessment of the above discussion we are able to say that Supremacy of Law Is the Aim, Rule of Law Is the Best Tool to Achieve This Aim. The Court is likewise making efforts to hyperlink Rule of Law with Human Rights of the people. The court is evolving strategy by which it is able to force the government not best put up to regulation but also create situations where human beings can develop capacities to revel in their rights in proper and significant way. Every authorities servant holding public strength is as a trustee of the society and answerable for due impact country wide goals. Although all the deserves are unhurt within the idea of the Rule of Law, the only Negative factors of the idea is that admire for law degenerates into rigidity of legalism that's injurious to the nation. The Hon’ble Supreme Court in quantity of cases thru its choice established Judicial Authority and evolved the Principle of Judicial Review which can not be amended, curtailed or removed. Our Constitution followed the three precept of Rule of Law i.e. Equality earlier than Law, Exclusion of Arbitrariness & Supremacy of judiciary. In the current generation the discretionary powers is furnished to the authorities for strolling the society however some time those power are misused by the government which results and destroys the primary principles of the society. If some reasonable restriction, rules and norms are created in exercising of such powers, those powers will efficiently and efficaciously regulates the society. The Dicey idea “Rule of Law” is adopted through our constitution, and this idea resulted into the achievement of our judicial system. In the cutting-edge technology the usage of Discretionary energy by the government is a need. The discretionary strength is against the Doctrine of Rule of Law. The balance between the two is to be made and this may be finished when the judiciary controls the misuse of discretionary strength by the Administration. The rule of harmonious Construction to remove the imbalance between “Rule of regulation” & “Discretionary Power” should be applied.

CONCLUSION
The rule of law inside the Indian society has now not executed the intended results is that the deeply entrenched values of constitutionalism or abiding by way of the Constitution of India have not taken roots inside the society. Corruptions, Terrorism etc. Are all antithesis to Rule of Law. In recent times, common law traditions, the Constitution of India, and the perseverant role of the judiciary have contributed to the improvement of rule of law. But on occasions we have slipped returned into government via will handiest to return

Book References-
sadder and wiser to the rule of thumb of law when hard records of human nature proven the selfishness and egotism of man and the reality of the dictum that strength corrupts and absolute strength corrupts absolutely. A few examples of how our judicial gadget has upheld the rule of regulation and ensured justice is absolutely seen within the creation of latest avenues seeking treatments for human rights violations through PIL pleas and promotion of proper interventions through the judiciary inside the regions of bonded and toddler labour, prostitution, smooth and healthy surroundings etc. however on the darker side there had been violations of fundamental rights as well.

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RULE OF RABBLE: UPRISING MOBOCRACY

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ABSTRACT

“A society with lynch culture needs a big zoo, not for the animals definitely, but for the very people themselves.”

-Mehmet Murat Ildan

Mobocracy is the rule or domination by the masses in order to punish an alleged suspected wrongdoer. The reports of honour killing, attacks, torture and beating by the mob are very common in India. There cannot be a right higher than the right to live with dignity as enshrined in Article 21 of the Constitution of India. What the law have provided can be taken by lawful means only. Thus, no citizen can assault the human dignity of another and take law in his own hands. Mob lynching can not be allowed to become a new norm and the courts will never permit mobocracy to overwhelm the law of land. Through this article titled as ‘The Rule of Rabble: uprising Mobocracy’, the authors tend to extract the fossilized and structured thought on mob violence which is casting the shadow on problems faced by the society at large. This problem cannot be solved by merely one solution, but has to be dealt by making reforms in various realms of the criminal justice administration.

KEY WORDS: Lynching, Vigilante, Dehumanization, Social Learning, Group Influence, Collective Identity.

THE RULE OF RABBLE: Uprising Mobocracy

I. INTRODUCTION

“And then they had me, stripped me, battering my teeth
Into my throat till I swallowed my own blood.
My voice was drowned in the roar of their voices,
And my black wet body slipped and rolled in their hands
As they bound me to the sapling.” 1791

Mob lynching comprises of two words—“mob” and “lynching”. The term lynching is derived from an Arabic verb ‘linch’ which literally means to beat severely by a pliable instrument or to maltreat someone. Thus, it refers to an extra-judicial killing of a human being without following the “procedure established by law.” It is usually characterized by informal public executions by a group in order to punish alleged or convicted transgressors. In India, mob lynching has emerged as a collective hate crime or national crime. It targets the people of a particular identity or forms a minority community or strangers under the suspicion of committing an alleged offence. It can be an extreme instance of unruly mob having no social or moral constraints resulting in maximum intimidation. The alleged criminal is punished by an agreement of crowd especially by hanging without a genuine criminal trial by ascribing any justification.

The origin of the term lynching can be traced back during the American Revolution (1765-1783). The two Americans, Charles Lynch and William Lynch were credited for coining the phrase; it is believed that Charles Lynch is more
likely to have coined the phrase in 1782. He described his actions of violence against a suspected ‘loyalist’ (an American colonist who remained loyal to the British crown during American revolutionary war) emerging in 1780. These subjects were tried summarily at an informal court and sentenced with the punishment like whipping, conscription, coercive patriotism, property seizure etc.

Group violence is usually non-lethal in intention and consequences. In United States, free Blacks, Latinos in South West and runaways were the targets of racial lynching during the decades of civil war. After slavery was abolished and Right to vote was vested in US Blacks especially in South, this dramatically increased the instances of lynching in USA. During the twentieth century, when southern states adopted new constitution or set of laws which prevented Black citizens from casting the votes and established separate public facilities on the basis of race, nearly 3500 African Americans, 1300 whites were lynched in USA between 1882 and 1968. In British Empire, lynching coincided with the period of violence which denied people participation in white dominated society on the basis of race during the 19th century.

II. INTERNATIONAL PERSPECTIVE

United States
Lynching took place in US most frequently in the late nineteenth century mostly in southern states and western frontier settlements. In St. Louis, the first lynching was recorded in 1835. The Great Hanging at Gainesville, Texas in 1862 was the largest in US history where 41 men were hanged who were accused of treason or insurrection. In 1871, United States enacted Civil Rights Act which punishes two or more persons who unlawfully conspires to injure, oppress, threaten or intimidate any person of any state or any territory while exercising any rights granted by the Constitution with imprisonment up to life or death penalty and/or fine. In 1981, US recorded its last lynching of Michael Donald who was found hanging from a tree by the members of Ku Klux Klan (KKK).

Europe
In 1990, race riots broke out between white and black sailors after while sailors stabbed a black sailor in a pub and reciprocally revenge was taken by his friends which further resulted into an ‘enraged lynch mob’. In 1944, Wolfgang Rosterg, a German prisoner of war who was known to be unsympathetic to the Nazi regime was lynched by Nazis.

South Africa
The residents of Black townships formed people’s courts and used the practice of whipping and necklacing offenders and political opponents. Necklacing is the practice of extra judicial summary execution by a black community to punish its members by igniting a kerosene filled rubber tire that is forced around victim’s chest and arms.

India
Mob lynching incidents have outreached in number because of social psyche of mob vigilantism and its acceptance by the mob. Every time such incidents occur and the lives of people are back to normal and no penal consequences are faced by the increasing rule of mobocracy. India from

1792 Statistics provided by Archives at Tuskegee Institute.
the last few years has witnessed a number of cases in which mob assumed the responsibility of administering justice without undergoing trial. India has been a witness related to mob violence under the veil of secularism, vigilance against cow slaughter, kidnapping and many others.

The 2015 Dadri Mob lynching represents a very sad picture and psyche of the society where a 52-year-old Muslim man Mohd. Akhlaq was under the suspicion of killing a cow in Bisara village near Dadri, Uttar Pradesh. The local villagers attacked the person suspected of stealing and slaughtering the cow calf which resulted in his death. Later in the court of justice, evidence was put to decide that whether the accused was storing beef for consumption or not. The government’s inquiry concluded that he was not storing for his consumption. Later the charge-sheet was filed under sections 147, 148, 149, 302, 307, 458 and 504 of Indian Penal Code. The local temple priest made an announcement that the cow head been stolen and subsequently killed by the suspect and the local villagers were asked to gather near the temple. But later the priest said that he was forced to make the announcement by some youngsters. On July 2016, the case went to the trial court that the meat found at the site was not of the cow but suggested to be mutton as per the samples sent to Mathura for conclusive test.

The assault on 24 years old Muslim man Tabrez Ansari in Jharkhand in 2016 resulting in his death is another glaring incident of mob violence where the ultimate object of the mob was to apprehend a motorcycle thief but theft being a religion neutral offence took a communal angle forcing him to chant ‘Jai Sri Ram’ and ‘Jai Hanuman’. Even after complying with these communal demands, he was tied to a tree and beaten for hours before the police officials came to his rescue. The spine-chilling effect of this case was that the protector of the state (police) became the life takers of the victim. Had he been medically examined before the arrest or given the minimal rights of the accused under Criminal Procedure Code; his life could have been saved.

In 2017, Muslim Pehlu Khan was brutally beaten by the group of 200 so-called cow vigilantes (Gau Rakshaks) in Alwar. The mob beat Pehlu Khan and six others with rods and sticks resulting in the death of Pehlu Khan whereas others survived though they were seriously injured. Recently, the trial court at Alwar acquitted all the six accused in the case giving them the benefit of doubt. Whereas, Additional Public Prosecutor said to the media that they will knock the doors of higher Judiciary by making an appeal against the verdict of the trial court.

Thus, there have been numerous incidents relating to mob lynching in India. These incidents reflect the internal tensions between ethnic communities or it is mainly due to cow vigilante violence, mainly involving Hindu mobs lynching Indian Muslims.

III. LYNCHING LAWS IN INDIA
At present, there is no codified lynching law in India under which penal consequences can be meted out against the mob. The mob usually indulges in committing the offences against the alleged or suspected offenders like murder, gangrape, grievous hurt, assault, harassment etc. The Indian Penal Code 1860 explicitly provides punishment for all the above mentioned offences and usually the cases are registered under sections 302, 304, 307, 323, 325, 34, 120B, 143, 147 and 149.
The Hon’ble Supreme Court in the case of Nandini Sundar & Ors v. State of Chhattisgarh, held that no one has the right to become the guardian of law claiming that he was to protect the law by any means. It is the duty of the state to promote fraternity among the citizens so that the dignity of every individual is protected.

Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to a procedure established by law. No one is entitled to take law into his own hands and annihilate anything that the majesty of law protects. The right of citizens is only to inform the crime to law enforcing agencies as they are no one to punish a person by giving any justification. The protectors of law that is police officers are given wide powers under Sections 149 to 152 of the Code of Criminal Procedure by virtue of which they are vested with the powers to take preventive action against the commission of cognizable offences.

The incidents of mob lynching are usually accompanied by offences like murder, gang-rape, grievous hurt, assault, harassment etc. which are cognizable offences and the preventive arrest can also be made where there is apprehension of commission of such violent acts by the mob under section 151 of Criminal Procedure Code.

The so-called claimants of law protector (mob) if have to exercise their rights to supress certain offences or want to help the administration of justice, the section 39 of Criminal Procedure Code provides for public to give information of certain offences to the police officer so that the criminal justice system is given a kick start. Also Section 43 of Criminal Procedure Court provides that any private person may arrest or cause to be arrested any person who in his presence commits a non-billable and cognizable offence or any proclaimed offender. No law gives the authority to the public to take law in their hands and conduct investigation, trial and punish the offender on the streets. The process of adjudication must be conducted within the hallow precincts of courts of justice. The very purpose of framing law is the orderly and peaceful working of the society. No doubt can be raised regarding with whom the responsibility of the “vigilantism” lies, it is clearly the law enforcers who are under the obligation to look after all kinds of vigilantism, whether it is “cow vigilantism” or any other. No stretch of imagination or interpretation of law can justify the acts of violence committed by the mob under the garb of vigilantism.

In the case of Tehseen S. Poonawala v. Union of India, the Hon’ble Supreme Court has rightly observed that the lynching is antithesis to ‘Rule of law’ propounded by AV Dicey which is enshrined in Article 14 of the Constitution of India. These acts of violence tend to break down the legal institution, legal order and peace of the society by extra judicial trials. In Cardamom Marketing Corporation v State of Kerala, the Supreme Court stated that the ‘Rule of law’ reflects man’s sense of order and justice. There can be no government without order; no order without law.

MASUKA (Manav Suraksha Kanoon)
As there is no specific law against mob lynching, the accused generally gets away

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1793 Writ Petition (Civil) No. 250 of 2007.
1794 (2018) 6 SC 72

1795 Civil Appeal No. 4453 of 2008.
with the most heinous crimes. Therefore, the society is coming forward to make the new law. The MASUKA has been proposed by the National Campaign Against Mob Lynching (NCAML), a committee consisting of eminent individuals which drafted Protection from Mob Lynching Act, 2017. The salient features of this drafted law are as under:

i. The objective is to protect the Constitutional rights of the person who has been attacked by the mob.

ii. Establishing special courts for adjudging speedy and expeditious justice.

iii. The Act provides for victim rehabilitation and compensation for their families connected with the incident thereto.

iv. It also provides for the investigation, prosecution and trial procedure with relation to the commission of mob violence.

v. It further provides for the heavy imposition of fines ranging from 1 lakh to 5 lakhs depending upon the gravity of offence committed.

vi. The provisions relating to the duties of Police officers and District Magistrate to prevent any act of mob lynching are also mentioned.

vii. The act makes abetment, conspiracy and aiding mob lynching punishable as if the actual commission of mob lynching has taken place.

5. **U.P. Combatting of Mob Lynching Bill, 2019**

The Uttar Pradesh government also took an initiative to curb the offence of mob lynching in their respective State by introducing Anti Mob lynching Bill in year 2019. The Bill is drafted on the same lines and legislative intent as that of “Protection from Mob Lynching Act, 2017”. The bill proposes to punish any legal obstruction made in the course of trial or arrest with imprisonment for a term which may extend to 5 years and with fine. It also proposes to punish abetment, conspiracy and aiding of mob lynching.

6. **The Rajasthan Protection from Mob Lynching Bill, 2019**

The Rajasthan Legislative Assembly (Vidhan Sabha) passed a bill named “The Rajasthan Protection from Mob Lynching Bill” by a voice vote amid vociferous protest by the opposition BJP. The Bill provides for life imprisonment and fine up to rupees 5 lakhs to convicts in the cases of mob lynching which involves death of the victim. The offence of mob lynching is made a cognizable, non-bailable and non-compoundable under this Bill.

7. **Madhya Pradesh Agricultural Cattle Preservation (Amendment) Act, 2019**

The Madhya Pradesh government amended Agricultural Cattle Preservation Act, 1959 by incorporating provisions relating to cow vigilantism which indirectly dealt in curbing the problem of mob lynching; since cow vigilantism is the major cause of mob lynching in this state. Following are the peculiar features of the Amendment Act, 2019:

i. The act of cow vigilante is made punishable with the imprisonment up to 3 years and with fine of 25,000 to 50,000 rupees.

ii. It provides for compulsory and special permission to be taken by the magistrate where cattle have to be transported from one place to another.

Thus, the Act provides for strict permission from the competent authority while transporting the cows, which will ensure that it is taken for a legal purpose.

8. **The Manipur Protection from Mob Violence Act, 2018**

The objective of this legislation is to create deterrence in the minds of people who are
involved in horrendous acts of mobocracy. This law was drafted after the landmark case of Tehseen S. Poonawalia v. Union of India1796, in which the Hon’ble Supreme Court directed to make law on the increasing menace of mob lynching. The state of Manipur adhering to the Supreme Court guidelines deemed it necessary to enact such law for the protection of Constitutional rights of the individuals and to prevent the commission of mob violence.

IV. GOVERNMENT’S INITIATIVES

Apart from the initiatives taken by the various State Governments, the Central Government also made efforts to tackle and suppress the enhancing rule of mobocracy in the country. Following are the main initiatives taken by the Central government:

Creation of Nodal Officers
The Central Government has asked the appropriate State governments to appoint a Nodal officer in each and every district to detect and prevent the incidents of mob violence. These officers as recommended by the Central Government should not be below the rank of Superintendent of Police. The Central Government also suggested establishing a Special Task Force (STF) in every state. The Ministry said where the Police officers’ derelicts from his duties or deliberately fails to prevent the crime of mob lynching, he shall be punished. Under this initiative the Police officers are given strict instructions to register a FIR against those who spreads the explosive messages which have the tendency to incite the mob lynching of any nature.

Establishing high Level Committees
The Central Government suggested the constitution of High-level committees dealing with the cases of mob violence and lynching. Presently, one of the two committees is headed by the Home Minister and by the Union Home Secretary. The function of these committees is to advise the State Government to take effective measures to curb the mob violence.

Creation of “Group of ministers” (GOM)

A very innovative and peculiar initiative of joining together all the major Departments of Ministry to form the GOM who shall submit its report and recommendation to the Prime Minister relating to the data, statics, incidents etc. of mob lynching.

V. CRIMINOLOGY BEHIND MOB LYNCHING

The criminology of mob lynching presupposes it to be a typical form of the behavioural reaction driven by numerous factors. Mob is a group of two or more individual, assemble with the intention to commit any act or series of acts, either spontaneous or planed, in lieu inflict extra judicial punishment upon the alleged offender.

The following are the six propositions to unravel the anatomy of mobocracy:

Group Influence: Since mob is a group of people, “conformity to group norms” is driven by two motivations- to fit in the group and the desire of obtaining the information in the group. Every group have the ‘Authoritarian Figure’ which tend to control and influence the behaviour of other people. This also stands true in the case of mobs, where sometime few people do not want to commit a wrongful act but, there behaviour is influenced by the authority figure which leads to the desired results of the mob. The famous Asch Effect explains that individual judgment is influenced by the group majority and the conformity to

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such majority is more likely to occur when the responses are public than private.

iii. **Social Learning Theory:** It is not correct to say that only psychopaths indulge in the mob violence. The renowned psychologist Albert Bandura propounded the Social Learning Theory which states that the people learn from others through observing, imitating and modelling the behaviours of others. The violence is deep rooted in the social structure of India among the sprouting youth. These people have grown witnessing violence as easy response of a problem in most of the situations. Thus, the mobocracy is result of such faulty social learning.

iv. **Collective Identity:** Le Bon states that, individual identities are tend to melt in a crowd which results in the formation of “collective identity”. Therefore, the individual’s rational consciousness, morals are controlled and influenced by the ‘authority figure’. Hence, the sense of personal responsibility is reduced and sense of anonymity is increased which insists to direct the actions.

v. **Deindividualization:** Leon Festinger and Albert Pepipone, found that in the group of people, personal morals, individual blame and personal responsibility takes the back seat and normal prudent person is driven by the behaviours of mob.

vi. **Contagious Cohesiveness:** It is the primary feature in mob violence as stated by Mc Doughall that greater the number of people in the group, greater will be the unity, resulting in higher level of contagion. Sigmund Freud stated that individual’s conscious mind has three limbs: Ego (Real me), Super Ego (Moral me); and Id (Bad me). He further said that the censor within the individual i.e. Super ego. It is set aside in the crowd and primitive ego or basic id come into play.

vii. **Dehumanization:** Dehumanizing is another reason of mob being frenzy. The Theory of Allport states that a common stimulus (violence) prepares two individuals for the same response to be released and increases that response in other members of the group, to commit the same stimuli (violence). Hence, it is suggested that any law to be effective must take into consideration the human instincts and behaviours because mob violence is not merely an act of physical actions. But it does involve the interplay of minds and other cognitive faculties.

VI. **LEADING CASE LAWS**

In the case of *Mohd. Haroon and Ors v Union of India and Another*, it involves the case of riots and communal tension in the city of Muzaffarnagar, Uttar Pradesh, which compelled the people to vacate their homes due to the fear. The petitioners contended that the local administrator instead of enforcing the law allowed the assembly to take place and failed to monitor the crowd. It was held by Supreme Court that the victims of mob violence can’t be discriminated on the basis of community or religion and must be granted the compensation. While pointing out the duties of the Police officer, the court went to ruling that in any case of irresponsibility and dereliction of duty, would attract penal consequences against such Police officer.

In another case of *Archbishop Raphael Cheenath S.V.D. v State of Orissa & Another*, a writ petition was filed highlighting the failure of the Police force to maintain law and order in Orissa during the assassination episode of Swami Laxamanananda Saraswati and others by the mob. In the present case as well, the Hon’ble Court emphasised on “peace
building measures” which must be undertaken by deploying the Police force.
In Shakti Vahini v Union of India\(^{1799}\), the iv. Supreme Court while dealing with another form of mobocracy “Khap Panchayats” held that these panchayats have no authority to take law into their own hands. These are not law implementing agencies. v. The Court also observed that where an offence under INDIAN PENAL CODE has been committed, the so called “assembly of elderly people” (Khap Panchayats) has no authority to impose and inflict punishments. They are entitled to inform vi. the police officer and lodge FIR so that the accused is dealt with in accordance of law.

In Tehseen S. Poonawalla v Union of India\(^ {1800}\), the Supreme Court while dealing with the writ petition filed under Article 32 of the Constitution against the cow protection groups indulging in violence issued number of guidelines. These guidelines are as following:

7.  
A. Preventive Measures
   i. The State Government shall designate a senior officer, not below the rank of Superintendent of Police as Nodal Officer in every district who shall be assisted by i. one of the DSP rank officers. They shall constitute a Special Task Force to procure intelligence reports about the people who are likely to commit such crime.
   ii. The State Governments shall identify ii. Districts, Sub-Divisions and/or Villages where instances of mob lynching have been reported in the recent past.
   iii. The Secretary, Home Department of the concerned States shall issue directions to the Nodal Officers of the concerned iii. districts to ensure that the police officers of the identified areas are extra cautious if any instance of violence comes to their notice within their jurisdiction.

   The Director General of Police/the Secretary, Home Department of the concerned States shall take regular review meetings with all the Nodal Officers and State Police Intelligence heads.

   The police officer shall cause a mob to disperse by virtue of his power under Section 129 of Criminal Procedure Code, which, in his opinion, has a tendency to cause violence in disguise of vigilantism or otherwise.

   Superintendents of police shall be issued with the circular by the Director General of Police with regard to police patrolling in the sensitive areas.

   The Central and the State Governments shall broadcast on radio and television and other media that lynching and mob violence of any kind shall invite serious consequence under the law.

   The police shall cause to register FIR under Section 153A of Indian Penal Code and/or other relevant provisions of law against persons who disseminate explosive messages and videos having content which is likely to incite mob violence of any kind.

   The police shall cause to register FIR under Section 357A (2018) 6 SC 72.

B. Remedial Measures
   The jurisdictional police station shall immediately cause to lodge an FIR if it comes to the notice of the local police that an incident of lynching or mob violence has taken place.

   Investigation in such offences shall be personally monitored by the Nodal Officer and the charge-sheet must be filed within the statutory period from the date of registration of the FIR or arrest of the accused, as the case may be.

   The State Governments shall prepare a lynching victim compensation scheme in the light of the provisions of Section 357A.

\(^ {1799}\) WRIT PETITION (CIVIL) NO. 231 OF 2010.  
\(^ {1800}\) (2018) 6 SC 72.
of Criminal Procedure Code within one month from the date of this judgment.

iv. The trial of mob lynching cases shall be conducted by designated court/Fast Track Courts in each district and the trial shall preferably be concluded within six months from the date of taking cognizance.

v. The trial court must ordinarily award maximum sentence as provided for various offences under the provisions of the Indian Penal Code.

vi. The victim(s) or the next of kin of the deceased shall receive free legal aid and engage any advocate of his/her choice from amongst those enrolled under the Legal Services Authorities Act, 1987.

C. Punitive Measures

i. Wherever it is found that a police officer or any other officer has failed to comply with the aforesaid directions in order to prevent or investigate or facilitate expeditious trial of any crime of mob violence, the same shall be considered as an act of deliberate negligence and/or misconduct for which appropriate action must be taken against him/her which will not be limited to departmental action under the service rules.

ii. In Arumugam Servai v State of Tamil Nadu\(^{1801}\), the States are directed to take disciplinary action against the concerned officials if it is found that (i) such official did not prevent the incident, despite having prior knowledge of it, or (ii) where the incident has already occurred, such official did not promptly apprehend and institute criminal proceedings against the accused.

8. VII. CONCLUSION

Mob lynching has emerged as a distinct psyche of the mob to punish the offender through extra judicial punishments. This is a result of various factors, some of them are- not having faith in the judicial system because of pending cases in the Courts, as it is truly said “Justice delayed is Justice denied”. Another reason is the increasing social tensions amongst the various classes, castes, communities, religious groups and conflict in political ideologies. The major cause of frequent happening of mob violence is the poor criminal justice system which requires the strict evidences. In majority of the cases evidences are not collected due to the faulty and immature police investigation thus, consequently leading to the release of the offenders. There must be a special law dealing with the offence of mob lynching having uniform application to the entire territory of India. There must be a Special Task Force to investigate in such incidents with no bars of territorial jurisdiction. The provisions relating to grave punishments and high amount of compensation for the victim and his family must be included, to have deterrence over the minds of the people. Therefore, the need of hour is, along with the special laws to be made on the subject matter of mob lynching, our criminal justice system must render actual and speedy justice to the people. The police personnel must perform their duties and be made accountable under the ambit of the provisions contained in the Indian Penal Code. Further, there is the need of reforms in the police functioning and they must be equipped with new technological tools and techniques to deal with the socio-legal problems. The police officials must also have frequent and effective communications with local people, where they can discuss the problems prevailing in their locality, which will help people in believing in the criminal justice system.

Thus, the problem of mob lynching cannot be solved merely by enacting new laws, but in addition to it, effective working of

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\(^{1801}\) Criminal Appeal No. 958 of 2011.
already enacted laws. In our opinion, it demands the combination of reforms in the arena of judicial working, political ideologies and police administration. Thus, no single solution can tackle this problem. Few structural reforms are necessary which need to be prepared with the help of local people on the lines of ground realities.

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COVID-19: INFRINGEMENT ON LAW FIRMS IN INDIA

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ABSTRACT
As the world is surrounded and remodeled by coronavirus outbreak, many industries, organizations, business units will face a huge transformation in management and working of the company.

Due to lockdown and shutdown of the economy, delays in the hearings of the case, cancellations of depositions, rescheduling of the cases, deadlines being extended are taking place which is hampering the legal system. The persistence that acquires the application of law has been to a great extent eliminated. So has the requirement of individuals to appoint attorneys in the short term. The delays and the hindrances faced constitutes ultimatum to income.

The circulation in the cash flow has been hampered and finances are in disruption. People in this situation acquires access to funds which includes structured payment plans, investments etc. In this situation, attorneys who assisted their clients in providing with the financial activities should be ready to act expeditiously.

The COVID-19 pandemic will encourage the business owners and industrialists to hire attorneys and seek support in incorporation and legal protection to their business. The business owners will need assistance in making decisions regarding tax and further to resolve which type of entity should be created whether partnership, sole proprietorship or limited liability corporation. Customers will also acquire help in handling membership consensus who are accountable for voting shares, profit and loss, stock and various other fields.

Law firms will reappraise and accomplish more strategies during COVID-19. The transformations and accommodation from this outbreak will recoup the attorneys and legal firms in a much better and greater position.

Keywords: COVID-19, Coronavirus Outbreak, Epidemic, Law Firms, Pandemic

INTRODUCTION
While the world is bounded by COVID-19 pandemic and resumes to hamper the wealth of the economy, law firms are brawling with queries related to how to proceed further and provide assistance to their clients. Each and every industry or firm will respond to the pandemic differently. For some of them the coronavirus outbreak will spell the termination of their workings, while for others it will be challenging and coerced to adjust with these changes.

But for law firms, this will set out as an propulsion for change. Accepting the substantial and major changes is censorious in the working of the law firm and is not only the modulation for survival but flourishing throughout and post COVID-19 pandemic. The inceptive position of firms in COVID-19 is a glitch on the radar be it financially or socially.

- Debt taken by the industries or organisations or business units of all sizes in this pandemic will essentially require all the firms to the centre of attention on the substitutes and accolade costs to create at least a minimal income to brace the debt.
Clients became habitual and comfortable to deal and seek assistance from their professional service contributor through auto-electronic systems. The law firms possessed such things so that the level of comfort and efficiency in dealings can be provided to their clients.

Due to the shutdown there is huge backlog in the court proceedings which have not taken place due to the virus. The courts will respond to the backlogs in addition to the person who files and maintains documents, signatures and more. For non-criminal hearings, tele-conferencing including members from home will be more feasible and manageable.

Video conferencing and meetings taking place on zoom, google meet and so more has provided an easement in the workings of the firm and includes comfort in computing from office to home, workplace requirements, intensified network security, reduction spending to customers in accommodations, travel etc.

For the effective working in the near future firms, considering the increase in demand. Firms should be aware with the advanced technology and hiring technology consultant experienced in teleworking. Auditing of the firms with the current software and hardware. Planning in the management and working of the internet connections which not only involves software and hardware but includes they type of internet connections used in homes, location and placing of site to organise the clouds, apparatus outline for setting up home computers. Adopting and developing cybersecurity policies and operations for home and offices. Upgradation in the hardware of virtual private network for home and office.

Transmission of documents at home is expensive and adequately high, where the firms ensure that lawyers must have a proper machinery or hardware and to avoid any type of happening or risks well established cybersecurity should be installed. Furthermore to have a positive and healthy relation between the firms and their clients, firms should provide virtuous and satisfactory assistances and favours to the clients. Firms need to be adaptive and transform with the passage of time.

Outspread range of demand retaliation covering legal areas and practice sectors. It is anticipated that litigation, prosecution and reconstructing practice sectors will do much better than the transactional operations. During the coronavirus outbreak there are unparallelled slowdowns in the working of the court systems, investigation and dispute applications are as a matter of fact less harmonized from the entire world than transactional operations are.
COVID-19: PECULIAR TO FORCE MAJEURE?

In India, the outset of COVID 19 pandemic has not affected to be magnanimous crisis, but also constitutes to an economic depression. Precisely, curtailment on movement of individuals and commodities, set aside for those who are engaged in essential services, uplifted the significant issues on the capacity of parties to discharge their duty mentioned in contracts when it is not specifically restricted as ‘essential services’. Uncertainty as to the performance of contracts has led to parties envisaging breaches of contract and assessing their rights and remedies in relation to the same.

Epidemic or Pandemic is equivalent to Act of God

Indian courts have not straight away concluded or governed that whether the epidemic COVID-19 will constitute as an ‘Act of God’. In the case of The Divisional Controller, KSRTC v. Mahadeva Shetty\textsuperscript{1804}, the Supreme Court concluded that Act of God means the occurrence of the natural forces without any interventions of humans with the admonition that every unforeseen natural happening does not function to defend from liability if there exists any rational probability of predicting their occurring. Alike judgements were also proceeded by Kerala High court\textsuperscript{1805} and Madras High court\textsuperscript{1806}. Nevertheless, courts in U.S and U.K. stated that Act of God embraces pandemic or epidemic.

The case of Lakeman v. Pollard\textsuperscript{1807}, workman left his job due to spread of cholera pandemic with the harm that he may contract this disease and failed to finish his work as prescribed under the work contract. The mill owners took an action against the worker for the breach of work contract and wanted to claim compensation. It was held by the court of Maine that the cholera pandemic was an Act of God, thus it will not result in the breach of work contract.

Broadly, there are following tests which must pass for event to be force majeure:
1. Uncertain- The event occurred must be unforeseeable and unpredictable.
2. Externality- Cause must not be created and produced by the party who is at fault.
3. Irresistibility- The event must make implementation of the contract unattainable.

COVID-19: Is the frustration self-imposed or voluntary?

In scrutinizing the doctrine of frustration, it was perceived by the Supreme Court that section 56 states the rule of positive law and matter is not left and governed according to the purpose and objective of the parties. When the happening of an event which is ostensible to have frustrated the contract makes an appearance from the action of a party, doctrine of frustration will not provide any yield to it. Presumptions

\textsuperscript{1804} 2003 7 SCC 197
\textsuperscript{1806} P.K. Kalasami Nadar v. Ponnumswami Mudaliar, A I R 1962 Mad 44
\textsuperscript{1807} 43 Me 463 (1857)
observed by the Supreme Court can be asserted that commercial requisites cannot escort to frustration. Exemplifying, the above situation may appear in contract of sale of goods, where parties agree to sell and purchase material or product on certain particular terms and conditions. Eventually, overdues to the government foisted lockdown persuaded by COVID-19, the purchaser seeks to jiggle out of the contract in particular adducing commercial reasons. The contract, although, lays out for the transfer of title and the menace of the goods upon shipment. In this situation, besides to self-induced frustration, the purchaser’s request for discharge of the contract may not be assisted since the buyer's act of election may not encounter the tests set out above. 

Judicial lens

Indian courts have started to witness the explosion in particular to commercial conflicts involving around doctrine of frustration. Various orders have been passed by Bombay high court and Delhi high court. 

Rural Fairprice Wholesale Ltd. & Anr. vs IDBI Trusteeship Services Ltd. & Ors.1808, The Bombay high court acknowledged the market situation following the COVID-19 and perceived that share market had subsided due to coronavirus outbreak. Accordingly it was an appropriate case to impede the bank from the stage of acting upon sale notifications and a way to extract any unresolved sale orders for guaranteed shares. 

Standard Retail Pvt. Ltd vs Gs Global Corp And Ors.1809, The Bombay high court refused to accord the interlude measures to petitioner noticing that commodity is an indispensable item and the lockdown exists for restricted time. Therefore, the petitioner cannot rebound from its contractual commitment to make payments to the defendants. 

M/s. Halliburton Offshore Services Inc. vs Vedanta Limited & Anr.1810, The case was concerned to impede on invocation of bank guarantees. While permitting interim relief on the invocation of bank guarantees, it was observed by the Delhi high court that the entire nation was in lockdown in the event of force majeure. Consequently, it could be said that special valuation do exist, as would account for granting of the prayer, citing bank guarantees on an injunct basis. 

Indirajth Power Private Limited v. UOI & Ors.1811, The Petitioner on the outlook for injunction of the bank guarantee inter-alia on consequence of the lockdown in the nation due to spread of coronavirus pandemic, which would result the petitioner to be declared as non-performing assets. The court noticed that despite of the extension of 12 months the petitioner was unable to fulfil its commitment under the contract hence, the grant relief was refused. It was observed petitioner’s position was not worsened by lockdown. 

The performance of contract ought not to be pretentious by the coronavirus outbreak, and where the employees have to isolate themselves working in the service industries. Since the workers have been working from home, hence there is not much impact on the carriage of

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1808 Suit (L) 307 of 2020, decided on 30-03-2020] 
1809 COMMERCIAL ARBITRATION PETITION (L) NO. 404 OF 2020 
1811 W.P.(C) No.2957/2020 & Cr.I.A.10270/2020
commodities. The non-performance of any kind in the business due to economic shutdown and deterioration from the epidemic are not sufficient grounds resulting to force majeure, to seek justification from performance of contract. In a contract, force majeure may also have relevance on how direct the informal link between the force majeure occurrence and the non-performance desires to be. A clause that mentions the party which prevents force majeure occurrence by performing its responsibility will probably be interpreted as this will acquire more direct and forthcoming informal link than one which only needs party to be obstructed or impeded in performance of its responsibility.

The force majeure clause comprises of ‘best efforts’ clause, then the party necessarily needs to grip reasonable endeavour to execute the contract by oscillating means. Although in the non-appearance of expressed provision, the party who anticipates on the force majeure happening to defend its non-performance needs to illustrate that it was impotent to carry out its responsibility in spite of taking steps to alleviate the consequence of force majeure occurrence.

Although some contracting parties might try to recoil from the contracting commitments considering the COVID-19 pandemic, fortunate dependency either under force majeure clause or under section 56 of the Indian Contract Act. The liability of exhibiting that whether the performance of specific contracting responsibility was actually affected by COVID-19, but in some specific cases it relies on the party for the non-performance justified. It is being scrutinized that whether COVID-19 epidemic lies within the purview and in context to force majeure.

**TECHNIQUES TO ENDURE IN THE COURSE OF COVID-19 PANDEMIC**

1. **Availing and utilizing advanced technology**
   Telecommunicating and geographically neutral technology are unparalleled, that is it has never been more easy going, approachable, easily acquired and grasped, strapping than it is today. From cloud computing services to documents to three way calling and attending phone meeting through meeting apps. Multiplex organizations including law firms have managed and co-operated with the employees and workers in the pandemic. After COVID-19 outbreak ends, cooperating and accommodating tele working will become much feasible. But that does not mean law firms can just rely on the video conferencing and meeting apps. Physical presence is more significant as it necessary to embrace digital modification. Lawyers who have been obtuse in adapting the advanced technology must learn to clasp it. It will be considered as animating spirit of firm potentiality to work.

2. **Safeguard against Cybersecurity threats**
   These days workers and labor force have shifted to virtual jobs and home-based office, it has become imperious for law firms to examine security activities and procedures associated to authentication of corporate system. Lawyers must ensure that their systems are not being hampered and any personal information or sensitive data related to client should not be exposed off. Encrypted zip files should be used and two-factor authentication on the applications and documents for security purposes. Additionally, lawyers must prevent connecting their devices or mobile phones to any public WIFI be at any tea shop or any
cafeteria. It amounts to Phishing where personal information, passwords, information from e-mails, Social Security numbers or any sought of attachments can be hacked, misused and misinterpreted. Various guidelines have been issued related to cyber-attacks and crime by the World Health Organization, U.S Secret service and other different institutions.

3. Munificent and Positive Attitude to Clients
In the pandemic days, its important to note that it is not only clients that are being impacted to businesses, clients are also being personally impacted through COVID-19. Firms must have a healthy and generous relationship with clients, reach out to them as to how have they been doing in these pandemic days and lend a helping hand to them even if it is not concerned to legal work.

The purge of the COVID-19 outbreak will have long running inference. Due to the shutdown and lockdown of the economy various challenges have to be faced by the business and organisations where they were forced to make enormous conclusion without understanding what the legal consequence will be. Labour and employment issues are being raised regarding the shutdowns, layoffs, tele commuting, video conferencing etc. The increase in the cyber-attacks, data and privacy issues is crucial scrutiny for the businesses. It is binding on lawyers to have hard-boiled consultants for clients to take them through this situation and issues.

5. Bone of Contention of this opportunity to master plan for next crisis
The whole world is suffering from the consequences of COVID-19 pandemic. As rightly said by the philosopher George Santayana “Those who cannot remember the past are condemned to repeat it.” Various organisation and business units should learn from the steps taken in these crisis. For the continuation and existence of business numerous actions have taken place and continuity plans have been mastered. Advanced technology should be utilized and the lawyers must be skilled to adapt it.

POST COVID-19: CONFRONTING CHALLENGES AND REMEDIES IN LEGAL SECTOR

The catastrophe that the globe is surrounded by unmanageable and out of control spread of the coronavirus is not only unparalleled in modern period but hampering and damaging on numerous fronts. Since the whole world was in complete lockdown, only the movement of essential and necessary services were permitted and operated. The post COVID-19 will bring out a drastic change and transformation in the way of living, hygiene and what further challenges and how things will be embosomed remains a million-dollar question. It is undoubted reality that unforeseen changes lead to manifold challenges, but in the present situation will be adaptable and extensive. Only focusing on financial commotion and fall down in economy will be wrong. The world has experienced financial requisites in the past with a constricted and engrossed objective to come out from such financial problems and crisis. Nevertheless, after

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1812 https://www.iep.utm.edu/santayan/
pandemic things will turn out to be completely divergent. Changes in psychological and sociological behavior of humans will be reflected more. The precision and ethos of globalization will be calamitous. Countries would bring out changes in the policies concerned to globalization. After the coronavirus outbreak, more intractable and multiplex policies will be expected.

In the legalized sphere of our country, things will undergo with major transformation. With all industries currently dealing with financial crisis the legal industry has also succumbed to the same pressure, it is difficult for clients to empty their pockets for payment of legal fees where it’s hard to earn bread butter for home. Big multinational companies and corporations are at the verge of dissolution as they cannot bear the losses coming their way due to the pandemic in addition to that paying salaries to employees, dividend and interest to security holders is another issue. Here the corporate players are trying to avoid the legal expenses since in a country like India it’s not easy to find a good attorney with minimalistic fees. Moreover, the amount to be spent on litigation cannot be ascertained before-hand since it is very uncertain in nature the number of hearings that will take place the amount of court fee to be paid and other petty expenses aggregate to a big large figure.

As they say when life is at stake you don’t want to take any chances, like in the case: if you are suffering from an ailment you will visit to the best doctor available since that will provide you with the confidence to healaster. Same is the case with lawyers when a person has a sword of litigation hanging on his head he would want a person of Experian to save him from going to prison rather than some junior attorney not considering the fact that the juniors form the case files from the scratch and are responsible for doing all the field work. The writer does not intend to argue demerits of senior councils as advocates but the fact that litigations cannot take place the way they used to after the pandemic.

Lawyers with singular practice are safe players at this point in time because they do not have to bear exorbitant costs of maintaining offices, a staff of multiple people etc. Medium size law firms that were at the verge of expansion may be suffering high risks because the cash inflow has decreased and outflow of cash has increased.

A resilient water like attitude has to be adopted in a situation like this to tackle it successfully. The law firms have to equip themselves with the right means to ensure social distancing and ensure digitization of work environment because the legal proceedings are taking place virtually. Junior lawyers are also required to become self-sufficient (aatam nirbhar) so that they can function and deal with clients without senior lawyers. Senior councils have to take a slight hit on their prestige and charge slightly less from their clients. A lump sum payment structure might come to the rescue instead of per fee charges with cause a hole in the pockets of the clients.

**Law firm to confidence**

Law firms and individual lawyers must equip themselves with the necessary means to deal with matters in the times to come after the pandemic comes to an end. Though the litigation work is bound to increase post COVID because of the current halt at proceedings, however the rising volume of work might not be able to satisfy the expected revenue by lawyers. The working structure of firms has to be reformed in a manner that establishes a
balance between stake holders. As per statistics, Law is one of the most sought after profession therefore a lot of law graduates become part of the legal fraternity and have to be accommodated amid the crisis. One has to instill confidence in their clients and the legal sector is also fully prepared to face all the challenges. Utmost care has to be taken that due to lack of revenue the quality of legal support is not compromised because in certain cases it is a matter of life and death. Prospective cost cutting avenues have to be identified without subjecting employees to harsh methods. All the above factors have to be taken care of.

In order to deal with the coronavirus pandemic effectively various bar councils have come up with proposals to deal the crisis. The legal fraternity also consists of lawyers who earn living on a day to day basis which means that they need continuous income generation on a day to day basis. We can say they are the ultimate sufferers in terms of financial dependence. The Delhi bar council as a response to this issue deposited Rs 5000 in bank accounts of young lawyers in order to help them in financial sustainability. The challenges faced during this effort were that the bar council does not have its own income cycle also it is very difficult to identify lawyers actually in need of funds. Even though a lot of senior lawyers have contributed funds it is difficult to establish how many layers actually received benefits.

It would not be out of place to mention that the apathy of the state towards the legal fraternity is not the only reason which has restricted which has formulated and restricted welfare politics for lawyers. It is saddening to notice that despite occupying ministerial positions bar council associations have failed to pitch policies for lawyers welfare.

The fraternity including well settled members have to step their foot down to support their suffering brethren. Every senior member of the bar knows one lawyer or the other who is suffering to meet ends, it is humbly submitted to support them and form a corpus. The corpus should be promptly deliberated and finalised. Time however tough it may change we must adapt and have the potential, capacity and aptness of embracing change.

Contrary, it could also be contended that the legal sector would witness an inundation of work in the fallout of COVID-19 since the reopening and restarting of economic and social order would result in an aggressive rise in litigation. This may be accurate and veracious to certain extent as well. Nevertheless, this incursion of litigation would not escort the revenue proportionate to what it could have delivered before. There emerges a strange and unusual situation where the lawyers, on one hand, have to deal with post COVID-19 corporate and contractual disputes, while on the other, they have to embrace and overcome the challenges of such disputes not generating adequate revenue, as it used to generate earlier.

CONCLUSION
Outspread range of demand retaliation covering legal areas and practice sectors. It is anticipated that litigation, prosecution

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and reconstructing practice sectors will do much better than the transactional operations. During the coronavirus outbreak there are unparalleled slowdowns in the working of the court systems, investigation and dispute applications are as a matter of fact less harmonized from the entire world than transactional operations are.

It is natural to expect that litigation and restructuring practice areas will do well while other transactional practices will suffer, but the reality will be more nuanced. While there are unprecedented near-term slowdowns in some court systems, over time, dispute and investigation practices are indeed less correlated with the rest of the economy than transactional practices are.

REFERENCES
EUTHANASIA IN INDIA – AN ANALYTICAL STUDY

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ABSTRACT

Death is inevitable and whoever has taken birth has to die sooner or later. Euthanasia has been a standout amongst the most talked about moral issues in recent times. It has been debated for centuries over its ethics and legality. Euthanasia has been riddled with controversies with arguments for and against it. Mercy killing has been regarded as the only viable option when all life care interventions fall short of ensuring a better life for terminally ill patients or for patients who are in a persistent vegetative state. The fundamental right of ‘right to life’ guaranteed under article 21 of the Constitution is an inalienable right which cannot be taken away by anybody. However, the essence of human life is to live a dignified life and to force a person to lead an undignified life is against the personal choice. To die with dignity is a movement that has encouraged legislatures to allow people to decide how they want to die. Euthanasia refers to deliberately ending someone’s life, usually to relieve the patient from the suffering. Euthanasia is performed at the request of person who has a terminal illness and is in a lot of pain. However, there are times when the concerned person might be too ill and the decision is made by close relatives, medics or in some instances, even the courts.

Euthanasia has been a much debated subject throughout the world. Euthanasia is a controversial issue as it involves deliberate termination of human life. It encompasses the morals, values and beliefs of our society. It has been at the centre of many heated debates since a long period of time, which surrounds religious, ethical and practical considerations. There have been heated debates, not only within the

Key words – euthanasia, passive euthanasia, mercy killing

INTRODUCTION

Every human being desires to live a long and healthy life. However, sometimes due to unforeseen circumstances a person might desire to end his life by unnatural means. To end one’s life by unnatural means is a sign of abnormality. When a person ends his life by his own act, we call it “suicide”, although ending the life of a person upon a request made by the deceased, is known as “euthanasia” or “mercy killing”. Euthanasia is mainly associated with people suffering from terminal illness or who have become incapacitated due to any reason and do not wish to go through the rest of their life suffering. A person suffering from a terminal illness should be given the choice to decide whether he wishes to live or die.

Euthanasia refers to deliberately ending someone’s life, usually to relieve the patient from the suffering. Euthanasia is performed at the request of person who has a terminal illness and is in a lot of pain. However, there are times when the concerned person might be too ill and the decision is made by close relatives, medics or in some instances, even the courts.

Euthanasia has been a much debated subject throughout the world. Euthanasia is a controversial issue as it involves deliberate termination of human life. It encompasses the morals, values and beliefs of our society. It has been at the centre of many heated debates since a long period of time, which surrounds religious, ethical and practical considerations. There have been heated debates, not only within the
confinces of courts, but also among elites, intellligentsia and academicians alike.

MEANING AND DIFFERENT TYPES OF EUTHANASIA

The English philosopher Sir Francis Bacon coined the phrase “euthanasia” early in the 17th century. It is derived from the Greek word eu, meaning “good” and thanatos meaning “death,” and early on was signified as a “good” or “easy” death. According to Oxford dictionary, the term euthanasia means “The painless killing of a patient suffering from an incurable and painful disease or in an irreversible coma.” According to Merriam Webster Dictionary, Euthanasia means “the act or practice of killing or permitting the death of hopelessly sick or injured individuals (such as a person or domestic animals) in a relatively painless way for reasons of mercy.

The Black’s Law dictionary (8th edition) defines Euthanasia as act or practice of killing or bringing about the death of a person who suffers from an incurable disease or condition, esp. a painful one, for reasons of mercy. Encyclopedia of ‘Crime and Justice’, explains euthanasia as an act of death which will provide a relief from a distressing or intolerable condition of living. Simply euthanasia is the practice of mercifully ending a person’s life in order to release the person from an incurable disease, intolerable suffering, misery and pain of the life. The British House of Lords select committee on medical, defines euthanasia as "a deliberate intervention undertaken with the express intention of ending a life, to relieve intractable suffering."

Euthanasia has been defined as the administration of drugs with the explicit intention of ending the patient’s life. Euthanasia literally means putting a person to painless death especially in case of incurable suffering or when life becomes purposeless as a result of mental or physical handicap. Euthanasia or mercy killing is the practice of killing a person for giving relief from incurable pain or suffering or allowing or causing painless death when life has become meaningless and disagreeable. In the modern context euthanasia is limited to the killing of patients by doctors at the request of the patient in order to free him of excruciating pain or from terminal illness. Thus the basic intention behind euthanasia is to ensure a less painful death to a person who is in any case going to die after a long period of suffering.

Euthanasia may be classified as follows:

- **Active or Positive euthanasia** – A direct intervention by a person to end someone’s life is known as active euthanasia. It involves painlessly putting individuals to death for merciful reasons. For instance, a doctor administering a lethal dose of medication to a patient to end his life. It is also known as aggressive euthanasia.

• **Passive or Negative euthanasia** – It refers to intentionally withholding or withdrawing life sustaining treatment. It is usually a slower process than active euthanasia and more uncomfortable. In this case the doctors are not actively killing the patient, instead, they are simply not saving him.\(^{1818}\) It is also known as “euthanasia by omission”.

• **Voluntary euthanasia** – When euthanasia is carried out at the request of or with the consent of the patient, it is known as voluntary euthanasia. The concerned person must give their full consent and demonstrate that they fully understand what is about to happen.

• **Non-voluntary euthanasia** – It involves someone else making the decision to end someone’s life. Usually it is a close family member who makes such decision. This is generally done when someone is completely unconscious or permanently incapacitated and in no condition to give the consent.

• **Involuntary euthanasia** - It refers to the case where euthanasia is practised against the consent of the patient. In involuntary euthanasia, a person is killed who made an expressed wish to the contrary and it clearly amounts to murder. It is prohibited all around the world.

**HISTORICAL BACKGROUND**

Euthanasia is a concept not new to human civilization as it is being practised for centuries. Euthanasia is believed to have begun in ancient Greece and Rome in fifth century B.C. It was permissible in certain situations. In ancient Greece, Socrates viewed death as nothing to be afraid of and therefore, there were liberal feelings regarding euthanasia in ancient Greece. The famous physician Hippocrates, separated the function of killing and healing by making all the doctors take the Hippocratic Oath, an ethics code which physicians took and swore never to do harm to anyone. The Hippocratic Oath that doctors of old Greece and Rome took had them swear to the gods that they wouldn’t give a patient poison, even if the patient asks for it. However, many doctors did not actually abode by the oath and often helped patients in ending their lives.

During the Middle Ages, euthanasia became a taboo and was considered a sin throughout Europe. The human body was considered a temple of God and therefore the destruction of it was a sin under the Christian God. Although, people started advocated in favour of euthanasia in 17th century but it was short lived. Euthanasia continued to be rejected during late 17th century and 18th century.

During the late 1930s, Euthanasia again started to gain support in the US and societies in favour of it started to pop up not only in the US, but in England as well. The organized movement for legalization of euthanasia began in 1935, when Voluntary Euthanasia Legalisation Society was founded by C. Killick Millard. However, the society’s bill was defeated in House of Lords in 1936, as was a motion again on the same subject in 1950. However, World War Two did change euthanasia forever. Hitler and the Nazis killed hundreds of thousands of people using euthanasia. Hitler and company did this by gassing, drugs, and starving the people. This put a halt on the

\(^{1818}\) *Aruna Ramchandra Shanbaug v. Union of India*, (2011) 4 SCC 454
euthanasia movement as Americans grew less fond of euthanasia.

Legalisation of euthanasia again gained momentum in the late 20th and early 21st century. Netherlands became the first country to legalize euthanasia in 2002, closely followed up by Belgium. In 1998, Oregon became the first US state to allow euthanasia, followed up by Washington and Montana.

Religious suicides have been depicted in Hindu sagas i.e. ‘Mahabharata’ and ‘Ramayana’. The Pandavas eulogized “Mahaprasthana” or the great journey through their Himalayan sojourn when they walked in pilgrimage, thriving on air and water till they left their bodies one after the other. The Hindus have two views regarding euthanasia. Some Hindus consider it wrong as it against the karma of the patient as well as the doctors. However, some believe it to be a good deed to end the suffering of a person. Majority of the Muslims are completely opposed to euthanasia because they consider life to be a gift given by Allah and destruction of life is certainly a disrespect towards God. Christians also are generally against the practise of euthanasia as they believe that human beings do not have authority to interfere in the phenomenon of death.

STATUS OF EUTHANASIA IN DIFFERENT COUNTRIES

The practise of euthanasia and the laws pertaining to it are quite different in each country, some of which have been illustrated below.

NETHERLANDS

Netherland became the first country in the world to legalize both euthanasia and assisted suicide. In Netherlands, euthanasia is regulated by the "Termination of Life on Request and Assisted Suicide (Review Procedures) Act", 2002. It states that euthanasia and physician-assisted suicide are not punishable if the attending physician acts in accordance with the criteria of due care. It is permissible to practise euthanasia in very specific cases and under very specific circumstances. The penal code states that killing a person on his request is a punishable offence with twelve years of imprisonment or fine. However, the law allows medical review board to suspend prosecution of doctors who have performed euthanasia when each of the following conditions are fulfilled:

- The patient’s suffering is unbearable and there is no prospect of improvement.
- The request for performing euthanasia must come directly from the patient i.e. it has to be voluntary and should persist over time (the request cannot be granted when under the influence of others, psychological illness or drugs).
- The patient must be fully aware of his/her condition, prospects and options available.
- The concerned physician must consult with one more independent physician who has prior knowledge and experience in the field.
- The death must be carried out in a medically appropriate fashion by the doctor or patient, and the doctor must be present.
- The patient is at least 12 years old (patients between 12 and 16 years of age require the consent of their parents)

BELGIUM

Voluntary euthanasia and doctor-assisted suicide have been made legal in Belgium since the year 2002. Similar as to in The Netherlands, Belgium allows euthanasia only if an individual who is incurably ill and encounters insufferable pain, makes a
voluntary, informed and repeated request without any external pressure. However, if the patient is not terminally ill, there is a waiting period of 1 month before euthanasia can be performed. The candidate for euthanasia need to reside in Belgium to be granted this right.

On February, 2014, Belgium legalized euthanasia for children by administering a lethal injection. Minors shall be allowed to end their lives with the help of a doctor in the world’s most radical extension of a euthanasia law. There is no age limit to minors who can seek a lethal injection. Although, consent of the parents is paramount in this regard.

AUSTRALIA

The Northern Territory of Australia became the first jurisdiction to legalize euthanasia in the year 1996 by passing the Rights of Terminally Ill Act, 1996. In doing so, the law permitted both physician assisted suicide and active voluntary euthanasia under some circumstances. Euthanasia was legal in the Northern Territory for a brief period between 1996 and 1997, until a federal law overturned the territory law and removed the right of territories to legislate on euthanasia was passed. All throughout Australia, voluntary euthanasia is illegal, although, a patient can choose not to receive any treatment for a terminal illness and can elect to have their life support turned off.

CANADA

In Canada, patients have a right to refuse the life supporting treatment, however they do not have a right to demand for euthanasia or assisted suicide. Physician assisted suicide is illegal as per Section 241(b) of Criminal Code of Canada. The Supreme Court of Canada in Sue Rodriguez v. British Columbia (Attorney General)1819, held that in the case of assisted suicide the interest of the state will prevail over the individual’s interest.

UNITED STATES OF AMERICA

Active euthanasia is illegal throughout the United States but patients have the right to refuse medical treatment or withdrawal of life sustaining treatment on the request made by the patient voluntarily. Euthanasia was made totally illegal by the United States Supreme Court in the cases Washington v. Glucksberg1820 and Vacco v. Quill1821. However, passive euthanasia is considered legal as it does not involve the act of killing a person.

Physician assisted suicide is legal in nine US states which are Colorado, Oregon, Hawaii, Washington, Vermont, Maine, New Jersey, California and District of Columbia. The concerned individuals must have a terminal illness and a prognosis of six months or less to live.

UNITED KINGDOM

Active euthanasia is prohibited in the United Kingdom. Any person who is found to be assisting suicide is breaking the law and can be convicted of assisting suicide or for attempt to do so. Passive euthanasia is legal for patients taking informed decisions for refusal of life sustaining treatment. Assisted suicide is also illegal under the terms of the Suicide Act (1961) and is punishable up to 14 years of imprisonment.

1819 (1993) 3 SCR 519
1820 521 US 702 (1997)
1821 521 US 793 (1997)
SWITZERLAND

According to article 115 of the Swiss Penal Code, suicide is not a criminal offence, although assisting suicide shall be a crime if it is done with a selfish motive. There is no requirement for the involvement of a physician in the procedure nor for the patient to be terminally ill. It only requires the motive to be unselfish. Swiss law only allows providing means to commit suicide, and reasons for doing so must not be based on self-interest. While euthanasia is illegal in Switzerland, physician assisted suicide has been legal. Deadly drugs may be prescribed to a Swiss national or a foreigner, where the recipient takes an active role in the drug administration. All forms of active euthanasia are prohibited in Switzerland.

STATUS OF EUTHANASIA IN INDIA

Right to life is one of the basic human rights. It is a fundamental right guaranteed under article 21 of the Constitution of India. Right to life is fundamental to our very existence without which we cannot live as a human being and includes all those aspects of life, which go to make a man’s life meaningful, complete, and worth living. It means human beings have an essential right to live, particularly the right not to be killed by another entity including the government. All other rights add quality to the life in question and depend upon the pre-existence of life itself for their operation. Therefore, no other rights can be enjoyed without the right to life.

Right to life commences from the time of birth and continues till the death of an individual. It means to live with dignity but does it also include to die with dignity? The question has arisen several times in the Indian Courts. The courts have expressed different views in this context. The legal impediments in recognition of right to die are sections 309 IPC and 306 IPC containing penal provisions for attempt and abetment to suicide respectively.

Maruti Sripathi Dubal v. State of Maharashtra was the first case where a constable with psychiatric illness tried to commit suicide and subsequently was tried under section 309 of IPC. The Bombay High Court held that every fundamental right has positive and negative aspects, and the negative aspect of articles 21 includes the right to die, hence Section 309 IPC violates article 21 of the Constitution. However, the Andhra Pradesh High Court in Chenna Jagadeeswar & Anr. v. State of Andhra Pradesh, held that right to die is not a fundamental right under article 21 of the Constitution. The next case to follow in which the same question arose again was that of R Rathinam v. Union of India, where the Supreme Court held that right to life does include within its purview the right to die. The apex court said that section 309 IPC was a cruel and irrational provision which needs to be effaced from the statute books to humanize penal laws, hence section 309 IPC was not held in line with article 21 of the Constitution.

The constitutional validity of section 309 was again challenged in the case of Gian Kaur v. State of Punjab. In this case, Gian Kaur and her husband were convicted by the trial court under section 306 IPC for abetting the suicide of Kulwant Kaur. The
appellants sought relief on the ground that Section 306 IPC is unconstitutional. They urged that since the validity of Section 309 is questionable, therefore abetting the commission of suicide by another is merely assisting in the enforcement of the fundamental right under Article 21 and Section 306 IPC penalising assisting suicide is equally violative of article 21 of the Constitution. The Supreme Court drew distinction between natural and unnatural extinction of life. The Court said that right to die with dignity at the end of natural life should not be confused with right to die an unnatural death curtailing the natural span of life. The constitutional bench of five judges held that “Right to life which includes life with dignity which means existence of life till the natural end of life and upheld the constitutional validity of Section 309 of IPC”.

Till date, there is no legislation in India regarding euthanasia. The law of the land is operating through various judgements by the Hon’ble Supreme Court. The issue again surfaced in the famous case of Aruna Ramachandra Shaunbag v. Union of India 1826. A deep analysis of euthanasia was done in this case.

The writ petition was filed under Article 32 of the Constitution by Ms. Pinki Virani on behalf of the petitioner Aruna Shanbaug. On the evening of 27th November, 1973, Aruna Shanbaug, a Junior Nurse at King Edward Memorial Hospital, was attacked by a ward boy, Sohanlal B Walmiki, in the hospital who wrapped a dog chain around her neck and yanked her back with it. He tried to rape her but finding that she was menstruating, he sodomized her. During the act, to immobilize her, he twisted the chain around her neck. The next day at 7.45 a.m. a cleaner of the hospital found her lying in an unconscious condition on the floor with blood all over. It was alleged that due to strangulation by the dog chain the supply of oxygen to the brain stopped and her brain got damaged.

In her writ petition, Ms Pinki alleged that since the incident 36 years have passed and on that day Aruna Shanbaug was about 60 years of age. She was featherweight, and her brittle bones could break if her hand or leg are awkwardly caught, even accidentally, under her lighter body. She had stopped menstruating and her skin was now like papier mache’ stretched over a skeleton. She was prone to bed sores. Her wrists were twisted inwards. Her teeth had decayed, causing her immense pain. She can only be given mashed food, on which she survives. Thus, Aruna was in a persistent vegetative state (P.V.S.) and virtually a dead person, without any state of awareness, and her brain virtually dead. She can neither see, nor hear anything nor can she express herself or communicate, in any manner whatsoever. Mashed food was put in her mouth, she was not able to chew or taste any food. The prayer of the petitioner is that KEM Doctors and Staff be directed to stop feeding Aruna, and let her die peacefully. The Supreme Court appointed a committee of three doctors to thoroughly examine Aruna and give a report to the Court about her physical and mental condition. After hearing the petition and the opinion expressed by the committee of doctors, the Supreme Court rejected Pinky Virani’s Plea. Aruna Shanbaug died on 18th May 2015. The Supreme Court, however, issued a set of broad guidelines legalizing passive euthanasia in India. The court also

1826 Supra 5
made a significant statement on attempted suicide, stating that a person who attempts to take his/her life needs help rather than punishment and recommended the Parliament to decriminalize attempt to suicide by erasing the punishment provided in Indian Penal Code.

The court formulated guidelines that shall be in force until the central and state government draft rules pertaining to termination of life. This is important in a country like India with its vast and culturally diverse population where unfortunately the ethical standards of the society have descended to new low. There is an impending possibility that people might misuse passive euthanasia in order to inherit the property etc. The guidelines are as follows:

- The decision regarding discontinuation of life support system should be taken by parents, spouse or close relatives and in their absence of them it can be taken by the next friend. In the absence of next friend it can be taken by a doctor who is treating that patient.

- The Decision of discontinuation of life support system should be made bona fide and in best interest of that patient.

- If decision is taken by the close relatives, next friend and doctors, the approval should be taken from high court under Article 226 which empowers high court to issue directions and order.

After the decision of the Supreme Court in the Aruna Shanbaug case, the law commission presented its 241st report \(^{1827}\) in 2012. It was proposed in this report that a proper legislation regarding euthanasia has to be ruled out in India by the Parliament to prevent the misuse of this right. As a result of efforts of various people, the Health Ministry drafted a bill for public opinion in the year 2016. The Bill is known as “The medical treatment of terminally ill patients bill, 2016”.

The Supreme court in Common Cause (A regd. Society) v. Union of India\(^{1828}\), issued a landmark judgement by allowing ‘passive euthanasia’, stating that individuals have a right to die with dignity under strict guidelines. The five judge bench in a broader prospect gave recognition to living will by permitting its citizens to draft a living will that specifies life support not to be provided in the case of coma. A living will is a written document which allows patient to give instructions in advance about the medical treatment to be administered when he/she is terminally ill or no longer able to express informed consent, including withdrawing life support if a medical board declares that all the lifesaving options have been exhausted.

The Court observed that :- “The right to life and liberty as envisaged under article 21 of the Constitution is meaningless unless it encompasses within its sphere individual dignity. With the passage of time, this Court has expanded the spectrum of article 21 to include within it the right to live with dignity as component of right to life and liberty”.

The court held that the individuals are allowed to draft a living will while they are in a normal state of health and mind. It was also held that the right to live with dignity also includes the smoothening of the

\(^{1827}\) Law commission report no. 241. “Passive Euthanasia – A Relook”

\(^{1828}\) (2018) 5 SCC 1
process of dying in case of a terminally ill patient or a person in persistent vegetative state with no hope of recovery. The apex court issued comprehensive guidelines on the procedure for execution of an advance directive as well as for giving effect to passive euthanasia. The Supreme Court allowed passive euthanasia in certain conditions, subject to the approval by the competent High Court following the due procedure. It held that when an application for passive euthanasia is filed, the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who shall decide that approval has to be granted or not. Before doing so, the Bench should seek the opinion of a committee comprised of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Simultaneously with appointing the committee of doctors, the High Court Bench shall also issue notice to the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the committee to them as soon as it is available. After hearing them, the High Court Bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject.

CONCLUSION

Euthanasia is an exceedingly emotive and delicate subject. The principle of self-determination and the best interests of the patient have been considered as fundamental for arguing in favour of legalizing euthanasia. The Supreme Court has paved the way for execution of passive euthanasia through advanced directives and setting stringent procedural guidelines for it. Although, with this latest judgement, euthanasia has become even more difficult to give effect to, as the procedure prescribed involves execution of the directives in presence of two witnesses, authentication by a Judicial Magistrate, permission from two medical boards and a jurisdictional collector.

One major issue regarding euthanasia is the concern for its misuse, which needs to be addressed by the Parliament before it becomes a law in the country. There are several other issues which remain unaddressed in the latest judgment passed by the Supreme Court such as recognition of the capacities of minors to give advance directives and access to palliative care.

In essence, the decision of judiciary to legalize passive euthanasia is a progressive step and the legislature should also take steps to make a law in this regard. A well framed law is required, which takes care of the interminable philosophy, culture and sensibility of our nation where religion is the indispensable and unavoidable wellspring of life.

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DRACONIAN MEASURES OF DRAGON: HONG KONG SECURITY LAW

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INTRODUCTION:
The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Law or commonly known as The National Security Bill of Hong Kong is a legislation passed by the People’s Republic of China with the aim to improve legal systems and enforcement mechanisms for safeguarding national security in the Hong Kong Special Administrative Region along with enforcing the policy of one country, two systems; preventing, suppressing and imposing punishment for the offenses of secession, subversion, organization and perpetuation of terrorist activities, and collusion with a foreign country or with external elements to endanger national security concerning the Hong Kong Special Administrative Region.\(^{1829}\)

HISTORY OF HONG KONG:
Hong Kong first came in control of Chinese in 3\(^{rd}\) B.C when the Qing dynasty gained power in the area. The Chinese held onto Hong Kong as a part of their mainland for about 2000 years. China lost Hong Kong to the British Empire in 1839 in the first opium war. According to historians, the first opium war was fought because the Chinese were trying to crack down on illegal trade of opium by British smugglers in Hong Kong. The war cost the Chinese a fortune and not to forget, the islands of Hong Kong too. Hong Kong, through the Treaty of Nanjing, fell into the hands of the British Empire for perpetuity. But in July 1997, the flag of the British Empire was lowered and the territory was handed back to the Chinese after 150 years of prosperous rule.

SPECIAL ADMINISTRATIVE REGION:
These areas are those which have a certain degree of political and economic independence. Mostly Special Administrative Regions (SAR) fall under the general auspices of one country.\(^{1830}\) This term is widely used to refer to Hong Kong and Macau, the two SARs of the People’s Republic of China. These SARs are given special considerations like the people of Hong Kong can elect their leaders but this idea other ideas is also based upon one country, two systems formulated by Deng Xiaoping. This is because although the people have the right to vote but the candidates standing are those who have been nominated by the Communist Party of China.

ARTICLE 23:
Background:
Hong Kong has a long history with China. It was in Chinese control for around 2000 years and then in British control for around 156 years. In 1997, it was given back to the Chinese and was given the tag of SAR (Special Administrative Region) of China. The people of Hong Kong in 156 years, the time it was under British rule showed the world what Hong Kong can achieve and how much it can progress without Chinese interference. But, when in 1997, Hong Kong went back into the hands of Chinese, people didn’t celebrate. For them, this


meant going back to their old ways of being oppressed and not being free anymore. To curb this negative feeling while holding the territory of Hong Kong posed a problem for the Chinese. Therefore, the policy of one country and two systems was adopted and put in place. Under the same policy, Hong Kong was given the ‘Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China’; this acts as a de facto Constitution of Hong Kong. This also fulfilled the aim of the Sino-British Joint Declaration.

Provisions of Article 23:
One of the most important parts of the Constitution of Hong Kong is its Article 23, which reads as;

“The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.”

1831

Article 23 stated above is a mandatory provision that needs to be implemented by the Government of Hong Kong.

Article 23 is China’s way of showing the people of Hong Kong that it trusts them. The SAR government in 2003 tried to introduce a National Security (Legislative Provisions) Bill to the Legislative Council. This was followed by huge unrest in the streets of Hong Kong. This bill was an attempt to implement Article 23 of the Basic Law. Since this attempt failed, it can be said that Article 23 has never been implemented before. The attempt in 2003 failed because the citizens of the concerned area feel that the implementation of Article 23 would mean the destruction of their basic rights and freedom.

Article 23 while being drafted in early 1989 simply mandates Hong Kong to make laws to prohibit treason, secession, sedition, and theft of state secrets. Later on, in 1997 the basic law saw Article 23 having a new word, ‘subversion’. It is pertinent to note that this word, i.e., ‘subversion’, is common for the people of mainland China and not for people of Hong Kong because Hong Kong followed the common law system. Post Tiananmen Square Massacre of 1989, there were widespread protests in the city of Hong Kong. Following that, the lawmakers added the words, ‘subversion’ and ‘foreign powers’. Although the addition of the phrase ‘foreign power’ did not meet any opposition, it was not the case with ‘subversion’.

HONG KONG NATIONAL SECURITY LEGISLATION, 2020:
The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region is a legislation passed by Beijing which gives it unprecedented judicial powers in the financial hub, with jurisdiction over cases, secret trials without a jury and a national security agency.1832 This law

Hong Kong, as laid down under Article 23 of the Basic Laws was also meant to have a security law. This security law was not passed until recently because of the unpopular opinion associated with Article 23 and security law.

China passed this act in complete secrecy and the details of this legislation’s 66 articles were known to very few people. This is because in the past few months many bills and statutes have been passed by the governments of China and Hong Kong. One such example is that of Fugitive Offenders Bill passed in June. Due to such drastic steps being taken by the governments, the citizens came out in huge numbers on the streets and protested against such bills which harmed the autonomy of Hong Kong and gave the Chinese mainland plethora of powers. Following all of these protests and violence, the government of China started blaming the Hong Kong government for not implementing Article 23. The example of Macau implementing the same provision was cited again and again by the relevant authorities.

Key Provisions:
Chapter III under the title of ‘Offences and Penalties’ lays down that crime of secession, subversion, terrorism, and collusion with foreign forces are punishable by a maximum sentence of life in prison.

Article 20 and Article 21 deal with secession and lay down the provisions regarding punishments based upon the seriousness of the crime.

Articles 22 and 23 deal with the offense of subversion whereas articles 24-28 deal with terrorist activities and part IV of this chapter deals with collusion with international forces. These articles also state rules such as damaging public transport will be considered as an act of terrorism and individuals found guilty will not be allowed to stand for elections and companies involved in any of the above-stated offenses will be fined.

There are various more provisions like those in Chapter IV of the act which states that laws of China will prevail over Hong Kong’s laws and that Beijing will have the power over interpretation of laws. Also, some trials now can be held behind closed doors in complete secrecy. The privacy of people is also at risk since the authorities have the power to wire-tap and put the offenders under surveillance.

One of the most worrying provisions which would hurt the autonomy of Hong Kong SAR is Chapter V of the Security Law. According to this chapter which contains Article 48 to Article 61, the government of China now has the authority to establish its own National Security Commission in Hong Kong to enforce the laws and that too with a Beijing appointed adviser.

Why is this Security Law worrying?
To answer this question, one needs some time, to think about where to start. This is a draconian law aimed at harming the autonomy of the SAR of Hong Kong and suppressing the voices and freedom of the citizens of the abovementioned SAR.

In just a few hours of the introduction of this law, there were reports of people deleting their posts and comments from social networking sites, thus showing the fear that has set into the minds of people.

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1833 Hong Kong has only itself to blame for failing to implement Article 23 South China Morning Post, https://www.scmp.com/comment/opinion/article/30

there. Professor Johannes Chan, a legal scholar at the University of Hong Kong while making a statement to BBC, said that “It is clear that the law will have a severe impact on freedom of expression, if not personal security, on the people of Hong Kong”\textsuperscript{1834}.

With this law in hand, the freedom of citizens of Hong Kong is in question. For example, Article 29(5) of the Security Law, 2020, states that:

“provoking by unlawful means hatred among Hong Kong residents towards the Central People’s Government or the Government of the Region, which is likely to cause serious consequences.”

The question now is whether this would include criticism of the Chinese Communist Party or not? Such vague provisions not only are ambiguous but tend to create an atmosphere of confusion that develops into a sense of fear.

Hong Kong’s autonomy was protected through its mini-constitution which was granted to it by China. According to Article 27 of the Basic Laws, freedoms of speech, press, publication, association, etc. have been granted to the people of Hong Kong. These have been violated by the law passed by China. As stated above, one of the examples is that of Article 29(5).

The International Covenant on Civil and Political Rights has also been enshrined under Article 39 of Basic laws. This Covenant aims to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial. Making laws to curb protests and ensure the security of citizens is completely different from making a law which ambiguous, vague, curbs the freedom of people affected by it and above everything else, creating a sense of fear in the people on whom such law is applicable. The law is wearing a veil of securing national security of Hong Kong but inside the veil hides provisions such as those in Chapter IV. These provisions have incited fear in the minds of people there and they are afraid to raise their voices now. Thus, curbing the right to protest of the people of Hong Kong, a right granted to them by the Basic Laws of the territory. Article 41 (trials behind closed doors), article 44 (judges can be handpicked) and article 46 (no jury trials) are few examples set out in the new provision which harm the judicial autonomy of the SAR of Hong Kong. It is pertinent to note that Hong Kong follows a common law system, unlike the Chinese mainland. The judges in Hong Kong are appointed by Chief Secretary of Justice who is appointed by the chief executive of Hong Kong. The catch is here is that autonomy is just a facade. Although elections are democratic the people contesting for the post of Chief executive are appointed directly by the Central Government party.

The judicial autonomy of Hong Kong is fighting for its survival. This legislation is a multi-pronged attack on the judiciary and its freedom in Hong Kong. The legislation gives the Chinese mainland power to try cases related to the national security of Hong Kong in the territory of China. Although certain rules have been laid down by the lawmakers as to when a case can be transferred, all of that is ambiguous and vague since they all are revolving around the same object, i.e., if national security of Hong Kong is in danger or not. Article 57

very clearly states that if a case related to national security and state secrets is being tried by authorities other than those belonging to the Judiciary of Hong Kong, the laws of China will prevail over laws of Hong Kong.

Also, the act of establishing an Office for Safeguarding National Security of the Central People’s government in the Hong Kong SAR as laid down under chapter V is an extreme step and a desperate attempt to take over control by giving the office unquestionable powers under Article 60 of the National Security legislation. Giving authorities unfathomable power to act on an apprehension is not at all justified. Moreover, anyone questioning or verifying documents of the members of the office is liable to be charged as obstructing the duty of a government official.

Above mentioned reasons are why this legislation is worrisome and why it induces a sense of fear. Individually stated, these provisions don’t seem to be dangerous to autonomy, freedom, etc.; but coupling an office of security with immense powers and no one to answer to with the state’s judiciary not having any control over cases in its territory and passing extremes punishments for not so grave offenses is frightening.

CONCLUSION
The Law of the People’s Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Law is the law that might be termed as the beginning of the end of the autonomy of Hong Kong.

This law was passed to put a full stop to the ongoing protests in Hong Kong. Under article 23 of the Basic Laws, Hong Kong was to implement a security law but failed to do so on previous occasions owing to widespread protests. Using this as a reason, the Chinese Central Party formulated and implemented this law and used it as an opportunity to set up its own office of Security in Hong Kong.

Through this law, the Chinese Communist Party has not only created a sense of fear in the minds of the people of Hong Kong but also curbed a few basic rights. This law has invoked responses of the same kind from many countries and all say the same thing, that, this law is draconian legislation that aims to reduce the autonomy of the SAR of Hong Kong.
THE JURISPRUDENCE OF DHARMA IN THE HINDU EPICS

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“In Dharma lies truth, virtue, conduct, law and even religion. It is in each day and in every action. Dharma is to walk on the path of righteousness and also to carry those who have fallen.”

Indian heritage and culture is very affluent in its natural law jurisprudence and the conception of Dharma. ‘Dharmasya tattvam nihitam guhayam’ which means that the truth of dharma lies in the dark cave. There is no specific or rigid definition of dharma as it changes according to the conduct and perspective of people. But dharma can be most closely related to “one’s duty” and “right way of living”. Dharma is “law of the being”. It is immensely important to know the subtle concept of dharma to understand the legal and judicial system of India, with Yatho Dharma Tato Jaya itself being the motto of Supreme court of India.

According to ancient Indian culture this whole universe is based on certain law which every living being is obliged to follow. For example the sun, moon and the planetary system obey the eternal law of nature. The divine form that is the supreme power does not have to follow or administer the law as He is the law himself.

SOURCES OF DHARMA-
The term dharma has been first mentioned in the vedic texts for ex. in the Rig Veda. These texts claimed that God inculcated the principles of dharma in each and every living being and the highest form of dharma for humans is Moksha or Salvation. The roots of Indian judiciary have been inculcated from ancient history. Apart from Vedas, Dharmasutra, Dharmasastra, Arthasastra, Smritis and Nibandhs are the major sources of Dharma. Dharma has also been taught in epics like Ramayana, Mahabharata and in various Jain and Buddhist texts.

According to Rigveda Dharma (Rta) was of divine origin and it was the responsibility of Varun to uphold dharma.1835 Further the Puranas gave Dharma a moralistic perspective. Puranas also mentioned about Matsya which is said to be the first incarnation of lord Vishnu on Earth. The literal meaning of Matsya is “fish”. The Matsya Nyaya refers to the theory that small fish in the sea would always be eaten by a bigger fish which exhibits that strong would destroy the weaker. This is similar to that of law of jungle. So to create a society where even the weakest can thrive, dharma that is law was needed and Matsya Nyaya was subsequently referred to as Adharma.

DHARMA AS PROCLAIMED IN DHARMASUTRAS-
Dharma has been attributed in Dharmasutra as “Swadhrme Nidhanam Sreyah”, the often quoted verse of Bhagvat Gita which means Swadharma is the most righteous thing for a man to do.1836 Swadharma here means the duty which an individual is ought to perform. Dharmasutras are mainly treatises written in the form of prose and verses which tells about individual and social conduct, laws and virtues. In Dharmasutra king was considered as administrator of
justice and he derived power from Vedas. Some of the prominent Sutras are Gautama, Apastamba, Baudhayana and Vasistha Sutras. Gautam Sutra is regarded as the earliest sutra. This Sutra proclaimed the existence of civil law as well as procedural law. Vedas were the sources of all these laws and the law was termed as Dharma. King used to administer justice with the help of his Parishad. Parishad was a group of ten Brahmins well versed in law. Here we see that the whole justice system was caste orientated and was totally in the hands of Brahmins. Brahmins were not given any harsh punishment, the only punishment for them was banishment. In Apastamba sutra criminal law was also created and it also prescribed procedure for punishment for transgression of Dharma. In Baudhayana Sutra decisions were made on consensus basis. It focussed more on collective decision making rather than individual decisions. This made the justice system more strong. In Vasistha sutra the main aim was speedy justice and Brahmins were considered as the law givers. After in depth study of Dharmasutra it can be stated that Rta which was mentioned in the Vedas was substituted by Dharma. Dharma was the main law.

**KAUTILYA’S CONCEPT OF DHARMA**

Arthashastra of Kautilya uses the term dharma in a totally different sense than it is used in Dharmasutra. Dharmasutra defines dharma in the most comprehensive level i.e. to maintain legal order in a society whereas Arthashastra contains exclusive chapters regarding the administration of Dharma.

As we see today there is a distinct increment in scholarship on China’s ancient knowledge and its traditions as it relates to international relations and security studies. But Indian’s ancient past which is as rich as that of China and contains various themes of political philosophy is not that much recognized. Not much efforts have been done by scholars to revisit Indian’s ancient philosophy which could be building block to various modern philosophies. In IDSA’s contemporary work, the leading institutes of India and Norway claimed that- “The Indian tradition and customs accentuate the concept of Dharma in its strategic strength as a set of rules that bind the rulers and the ruled in a similar way.”

Kautilya ascribed dharma in 3 senses- dharma as social duty, dharma as moral law and dharma as civil law. Kautilya gave much importance to Rajdharma. He describes Rajdharma as the protector of all the other dharmas and also the varnasrama dharma. He also gave the concept of danda, vyavhara, and vivada in context of Rajdharma. In arthashastra arth has been referred as the base of dharma which leads to happiness, so Kautilya provided dharma a materialistic aspect with worldly goals.

King was referred to as protector of dharma. He says, “A king who dispense justice according to dharma, customs and evidence can conquer the whole world.” He signified that king’s law must be in accordance with traiyidharma (i.e dharma in three Vedas: Rigveda, Yajurveda and Samveda). But Chanakya prompted varnasrama dharma (dharma of four varnas) to such a great extent that he went

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1837 Pradeep Kumar Gautam, Kautilya’s Arthashastra: Contemporary Issue and Comparison, IDSA Monograph Series No. 47, October 2015, p. 83.
1838 Dr Arvind Gupta, Director General IDSA, and Professor Sven G. Holtsmark, Director, IFS, Oslo.
1839 Kautilya, Arthashastra, Chanaky Praneet Sutram, 1-3.
against the general and basic principles of dharma. The concept of dharma which was mentioned in Vedas had nothing to do with the varnasrama dharma. In his justice system too, Bhramins escaped all type of punishments.

**Dharma in Manusmriti**

Manusmriti also referred as manava-dharmashastra, written by Manu also discusses the subtle concept of dharma. According to the chapter 6, verse 92 of manusmriti-

“dhṛti: kṣamā damo’steyam śaacamindriyanigraha: / dhīrvidyā satyamakrodho daśakaṃ dharmalakṣaṇam /।।

Patience, forgiveness, mastery over the mind, non-stealing, purity, control of senses, righteous action, knowledge, truth and giving up anger - are the ten indications of dharma. Manusmriti talks about nitidharma which covers all the aspects of human behavior. Manusmriti provides a spiritual view to the concept of dharma. Manu says, “All the worldly attachments are detached at the time of death from an individual except his dharma.” Manusmriti clearly uses the divine theory of origin of state. God created both dharma and the state and made the king responsible for the protection of dharma. According to him it is the duty of king to regulate the behavior of people according to dharma for which he can use the concept of dand (punishment). In Manusmriti dand has been given more importance than Dharma. Dharma can legalized Dand.

**Dharma in Ramayana**

The very essence of Ramayana, the oldest epic of India in which Rama has been beautifully sung, played and displayed is Dharma. The epic begins with Valmiki asking Sage Narad “In today’s world who is the heroic man, well versed in duties and action, true in speech and firm in his vows.” To this Narad replied “the descendant of the line of Ikshvakus, he is known to men as Rama, firm in nature, he is greatly heroic, wise and just, true to his promise and is devoted to welfare of his subjects. In truthfulness he is another Dharma.” In this context Ram himself becomes the epitome and personification of Dharma.

Each character of Ramayana abides by his or her Dharma and set example for ideal relationships between human beings. Dharma was used when Janak tells Rama that “Hey Rama I present my daughter to you. Sita is beautiful. She has a big dowry. She brings elephants, horses and jewellery with her. But the greatest dowry that she brings is her Dharma.” Further we see the total dedication of Rama towards Dharma when Kaikayi asks Rama to go to forest for fourteen years, he gently replied “I am not after the world’s goods my lady and don’t live for them. You must know that I am like Rishi in my Dharma. If I could do any little thing to please my grieved father that would be done at all cost, for there is no greater Dharma than service to one’s father.”

There has been conflict regarding dharma at various levels in the Ramayana. For e.g. there has been significant conflict between love and dharma when Bharata requests Rama to come back to Ayodhya . Rama and Bharata are both surrounded by hundreds of sages and Rama says, You all are true masters of dharma that is why I believe you all will protect my dharma while Bharata

1841 Manusmriti, I Chapter, 54.
1842 THE NATURAL LAW IN THE HINDU TRADITION, M. S. Sundaram.
1843 Nagaiah, S : Vaimlki Ramayana, p.194.
says, If my love is true and I am not on the path of adharma justice should be given in my favour. Janaka while addressing them says, On one side is the apotheosis of dharma and on the other side is the ultimate embodiment of love. He says, “Rama, your resolute adherence to dharma is such that even the gods bow before you. Dharma is the greatest force that keeps the world stable. Scriptures say that nothing greater than dharma exists in all three worlds, we all are bound by it. But love is the only divine ethic that no dharma can even compel. Love steadfast, unselfish love is above all dharma, that is why now the scales are heavy in Bharata’s favour.

Further Dharma has also been centroidal object of Bali Vadh in which Rama shot Bali with an arrow from behind. Bali said, “Though my lord you are the incarnation of Dharma ...You have shot me like a cruel huntsman. Without any reason, why have you slain me O Rama? You have used Adharma to kill me. This injustice will never be condoned by history.”

To this Rama replied “O King of apemen at the threshold of death, now you invoke dharma, morality and justice but in your own lifetime this dharma did not enter even your dreams. Even without comprehending Dharma fully you want to preach Dharma to me. Let alone dharma intoxicated by your strength, you have disregarded the most common ethical norms. You forcefully kept your younger brother’s wife with you in the most immoral way. A younger brother’s wife, a sister, and a sons bride are as one’s own daughter. Listen O wretch whoever looks upon them with a lustful eye may be slain without any sin. In my younger brother Bharat’s rule no being can do anything against Dharma. Me who steadfastly obey Bharat’s rule of dharma punished a corrupt being like you. A sinner is absolved once he his punished but if a king does not punish a sinner justly, the king himself must suffer that punishment. O King of apes for the sin you have committed your death will be always held right by dharma”

Further we see Rama even set an arrow to dry the ocean to follow his Dharma. In this he even violates the natural law as the five elements of nature Ether, Earth, Fire, Wind and Water are the pillars of creation and violating the limits of water would be against the norms. So it is said that anyone naturally following his own dharma, acting spontaneously partakes the light of Rama. He wheels the authority of Rama in the feed of action. The fire and the wind obey him, support him work for him.

There is another story in Ramayana which concerns sage Vishwamitra and deals with the manifold concept of dharma. In this episode Indra was angry so for twelve years it did not rain and there was drought and famine where there was no food to be hacked. Sage Vishwamitra could not find food to feed himself and his family. So he went travelling around looking for food and comes across a village of Chandalas. There he finds a rope slung across the courtyard of a Chandala and on that rope is slung half eaten carcass of a dog which the Chandala has killed. Sage Vishwamitra decides to steal the carcass of the dog but while stealing the Chandala caught him. He argues with Vishwamitra that you are a Brahmin so you should certainly not eat flesh. If you eat flesh, you should certainly not eat the flesh contaminated by the association of Chandal. If you eat flesh contaminated by the association of Chandal, you should certainly not eat the flesh of a dog. To this

Vishwamitra replied, Dharma comes later, first let me survive. If I don’t survive, there is no dharma. So we see the subtle conflict between dharma and one’s mere existence. At the end of Ramayana, we even see Rama banishing Sita due to Rajdharma. But in this does he follows the dharma of a husband? Till now we are all constantly struggling to know what is the right course of action in any situation according to the insights of Dharma.

DHARMA IN MAHABHARATA
Mahabharata is possibly the greatest and most enduring epic of all time. The sheer size of it is daunting, it is eight times the size of the iliad and the odyssey put together. There has been substantial conflict of dharma in the Mahabharata. Mahabharata examines some of the abiding dilemmas of human existence as they manifest in different situations be in times past present or future. The word dharma is used in several different senses in the Mahabharata. The usage of the word dharma depends on the contexts. At one level it is used in the sense of varnashrama dharma in Mahabharata that is the dharma of four varnas and the four ashramas of life.1845 At another level it is used in the sense of good behaviour that is sadacharya or good conduct. At the third level it is used in the sense of governance. For example you should not imprison a rich person for a crime because imprisoning that rich person for a crime is a burden on public exchequer. A monetary penalty should be imposed on a rich person. This was stated by Bhishma to Yudhisthira while he was lying down on his bed of arrows. He also told seventeen kinds of court cases which a king must pay attention to in which the first one was breach of contract. So dharma has also been used in the sense of rajdharma. But what is most important for dharma in the Mahabharata is that in the last sort, dharma is an individual choice. So there is no absolute notion of what is right or what is wrong, you take your decision and you face the consequences. The same has been told by Krishna to Arjun when he didn’t want to battle against his own kin. He said, “O Parth if you accept me as a friend, listen to me and fight. Without this war there can be no peace. Running away from Dharma will not lead you to peace. This war is your Dharma. Follow your Dharma Parth.”1846 So we see that there is significant conflict of dharma in Mahabharata too.

CONCLUSION-
After intricate study of dharma it can be said that dharma is a multi-facet concept which embraces in its scope gradation of being in the sense of a hierarchical system, whether it is the laws governing the universe or the prescribed conduct set for individuals or a specific group. So in totality it can be said that dharma is an inexorable movement of the evolution of universe.

1845 Kenji Takahashi, Reconsidering the Developments of the Accounts of Creation and Dissolution in Mānavadharmaśāstra 1 and Mahābhārata 12.224-225 (2019).
1846 https://www.academia.edu/16134055/The_Concept_of_Dharma_and_its_Significance_in_the_Mahabh arata.
COVID 19 PANDEMIC SITUATIONS:  
- UNDERSTANDING THE LAW, 
RIGHTS AND RESPONSIBILITIES

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INTRODUCTION

Pandemic means a wide spread Epidemic Disease which in critical situation affects a larger number of people or group and over a very large Geographical area transcending many countries. It occurs suddenly due to some viral or other outbreak conditions and influenced by various factors including climatic changes. Seasonal Epidemics occur across international borders which in turn affects a large number of people. It also should be noted that just because a disease spreads among people little widely and kills them, it cannot be recognized as a Pandemic. To classify as Pandemic, a disease must possess a strong infectious character and have wildfire spread and also pose serious threat over a large geographical area affecting more number of people than expected. Some of the Pandemics apart from Novel Corona Virus (2019) which affected the world in the past few Centuries are Spanish Flu, Plague, Influenza, Smallpox, Cholera, AIDS, Ebola Virus, H1N1 or Swine Flu etc. causing a huge spread and fatalities. Similarly some Epidemic diseases like Nipah, Meningitis, Marburg Virus, Monkeypox etc have been posing trouble to mankind with outbreak or occurrence on and off and continue as threat to mankind.

The major pandemic that is presently the cause of concern world over is Corona Virus which is also known as COVID-19 (Corona Virus Disease) which emanated from the City of Wuhan (China) which reportedly started in September 2019 and has caused wildfire spread globally. In Pandemic situations the lives of greater majority of the people is at great risk. So Governments, Individuals, Corporates (which includes producers, employers etc) own big responsibility and the rights and duties of each assumes great relevance to bring order and safer living for all.

IMPORTANT PANDEMICS/EPIDEMICS THE WORLD HAS FACED

- Influenza(1580) and Spanish Flu 1918

Influenza is a disease which affects the respiratory organs and causes pulmonary illness and suffocation has been there since 1580 and a major one was in 1918-1919 from Spain and spreading over 500 million people and death to more than 4 million people. A live Vaccine was invented in 1933 and improved upon in 1942 which has a success rate of 50%. A word of caution at this juncture is that Flu can reoccur and timely treatment and secondary follow up is the key for successful treatment. Even now annually to 40 to 56 million infections are reported and death of 2.5 to 5 Lakh due to Flu worldwide.


Cholera is an infectious disease that spreads due to contaminated water causing severe watery diarrhea. Cholera disease is caused by a Bacterium vibrio cholera which releases a toxin in the small intestine giving severe pain in the abdominal area and leads to large mucus discharge and frequent stool release which causes severe dehydration and even lead to fatalities. The treatment is with ORS supplements and medication and when attended in time it is safely treated and cured.

In India in 1817 in Ganges plain the Cholera disease started and spread till 1824 to
various places in India and Pan Asia leading to death of little above 1 million then. In the 1800s United States of America had a severe spread of Cholera leading to and this was controlled with implementation of modern sewerage and good sanitary water treatment systems. However between 1832 and 1849 in 2 major bouts about 1.5 Lakh people died. Cholera has been recorded sporadically further like the 1961 outbreak in Indonesia further hits globally on and off is observed. It is estimated that every year millions of Cholera cases are reported globally and people in Lakhs die due to delay and improper treatment.

**Bubonic Plague (1896)**
Bubonic Plague is caused by a Bacterium, Yersinia pestis which can be transmitted from a host such as a rat to a human through the bite of an animal or insect (such as flea). Hence a great spread became inevitable in the conditions as then was in Mumbai in specific and in India in general. The death was about 25million people. The severity of this disease lead to the first legal enactment in India under British rule with the passing of The Epidemic Diseases Act 1897, which is being followed in India till the present to deal unto such situations.

**Crimean-Congo Hemorrhagic Fever (1944)**
This viral Haemorrhagic fever is caused by ticks. Symptoms include headache, muscle pain, dizziness, neck pain and stiffness, backache, sore eyes and photophobia (i.e. sensitivity to light). The risk of death is about 25%. High risk people are those who work in slaughter houses. Direct vaccine is not available and only supportive treatment is there.

Monkeypox is a viral zoonotic disease primarily occurring in tropical rainforest areas of Central and West Africa and some traces outside was first traced in Monkeys in 1958 and spread to human beings in 1970. Symptoms are fever with rashes and swollen lymph nodes. This virus is mostly transmitted to people from wild animals such as rodents and primates, but human-to-human transmission also occurs by contact with lesions, body fluids, respiratory droplets and contaminated materials such as bedding. The fatality is upto 10%. Treatment is not clear but at best is controlled with some vaccines.

**Marburg Virus (1967)**
Marburg Virus is considered to be extremely dangerous with symptoms of high fever, severe headache, malaise and muscle aches, watery diarrhea, abdominal pain and cramps, nausea, vomiting and severe hemorrhage and fatality of about 50%. People get infected from prolonged exposure to mines or caves inhabited by Rousettus bat colonies. Cases first reported in Marburg and Frankfurt Germany in 1967 and further reported in Belgrade, Serbia etc. and there is no specific treatment.

**Lassa Fever (1969)**
Lassa Fever is a dangerous infectious disease that causes a type of Viral Hemorrhagic Fever in humans. It is endemic in West African countries, especially Sierra Leone, the Republic of Guinea, Nigeria, and Liberia, where the annual incidence of infection is between 300,000 and 500,000 cases, resulting in 5,000 deaths per year. Treatment is with Ribavirin intravenous administration along with fluid support, oxygenation and BP management.

**Ebola Virus (1976)**
It is a virus that causes severe bleeding and organ failure that results in causing death. It spreads among humans through contact of body fluids and results in symptoms such as fever, aches and pains,
abdominal pain, bleeding, dehydration. A single dose of rVSV-ZEBOV vaccine is used to cure Ebola.

**Human Immuno-Deficiency Virus – HIV (1920 & 1985)**

HIV was first reported in Monkeys in 1920 and it spread in large measure in human beings in 1985. This virus damages the immune system hence one becomes weak to fight against infections and die. Worldwide so far more than 75 Million were infected and more than 32 million people have died. Even now this disease cannot be cured completely but proper medication can decrease the infecting power and rate of spreading.

**Hendra Virus Infection (1994)**

Hendra Virus Infection is a rare emerging disease and the host virus is from fruit bats and passed through contact from Horses. In most cases the fever is severe and often fatal in both infected horses and humans. Treatment is only by Secondary management.

**Nipah Virus (1999)**

Nipah virus is a zoonotic virus (it is transmitted from animals to humans) originated in Malaysia. It is transmitted through contaminated food or directly between people. The symptoms are fever, cough, headache, confusion and gets complicated with inflammation of brain and seizures leading to coma and death. In 1999, the Malaysian Government ordered for killing of Lakhs of pigs to control this disease spread. Even now there is no direct medical treatment and only secondary treatment is possible.

**Meningitis (1887 & 2001-2002)**

Meningitis is an inflammation of the Meninges (which consist of three membranes) that cover the brain and spinal cord. It is usually caused by a viral infection but can also be bacterial or fungal. The Symptoms include headache, fever and stiff neck. First reported in 1887 it had a viral spread in 2001-2002 with about 40000 cases spread over larger areas. Bacterial and Fungal Meningitis is cured with medication and Viral Meningitis controls only by self immunity development as no medicine is developed in proper.

**Malaria**

Malaria is one of the most severe deaths causing disease in different forms world over causing death of millions every year. Some of the feared ones are Dengue, Chikungunya etc. The treatment is more by fever management with Chloroquinine and secondary treatment, but prevention is not possible.

**H1N1 Virus or Swine Flu (2009)**

This viral infection is of the flu category. There is no direct vaccination and only secondary medication care and assistance is provided. It is estimated that since 2009 worldwide 700 to 1400 Million cases are reported with death of about 1.5 Lakh to 6 Lakh worldwide. No clear vaccine but it is believed that with secondary treatment and developing immunity mankind has survived.

**Corona Virus (1960 and Present)**

Corona Virus is a group of related RNA viruses that cause diseases in mammals and birds. In humans, these viruses cause respiratory tract infections that can range from mild to lethal. Mild illnesses include some cases of the common cold. The Corona Virus infection has been seen for many decades since 1960 causing cold sort symptoms and with various strains mutating out. The present one called the Novel Corona Virus a mutagenic strain of the year 2019 causing Corona Virus Infection Disease or more popularly called as COVID19. The present
strain is highly infectious and very highly contagious and spreading by contact physical and of source point touch or by airborne infection spread. The infection treatment is tough as there is no direct antidote and the disease is proving more fatal. The Symptoms include fever, tiredness, and dry cough. The infection spread is seen in all countries in few months itself and infected more than 11 Million people and caused death of more than 5 Lakh people worldwide and in India nearly 5 Lakh people are infected with about 17000 (as on June 30, 2020).

GOVERNMENT AND GLOBAL SCENARIO – LAW, RIGHTS AND RESPONSIBILITIES
In Pandemic situations a heavy responsibility rests with Governments and also with others and also of World Bodies. In such situations all the Nation States and every possible Individual and Social Groups should render assistance, support and follow disciplined response for common good.

World Health Organization (WHO) under United Nations after the Wuhan outbreak of COVID19 issued a series of statements and advises to the whole world and sought all Nation States, Organizations and Individuals to understand the seriousness of this COVID19 viral spread which has been very highly contagious and spreading by contact physical and of source point touch, airborne infection spread and the infection treatment was tough and even proving more on fatal nature.

WHO and all medical teams in the absence of anti-viral medication had advised Social Distancing and to avoid physical contact with others and further use of Face Mask and other secondary safety measures at home, work and public place etc. WHO also advised all to follow safe measures all out. In furtherance to same most Nations prescribed Lockdown measures and prevented movement of people since December 2019 till now globally. Similarly since 23rd March, 2020 India is under a virtual lockdown and the economy and society is put to deep slumber.

The lockdown has closed all activities and movement of people, produce and economy is almost on standstill. Whereas the community spread and deaths etc are not controlled and the claim of Vaccine and for complete cure seems far-fetched. Under these further trying circumstances a collective responsibility is there to bring the situation to normalcy and control. State has role to deliver social justice and pursue amongst other on support and enforcement measures.

Legal Enactment and Enforcement
The first legal enactment in India regarding Epidemic Diseases is The Epidemic Diseases Act, 1897 enacted when the Bubonic Plague infection which originated in China sometime in early 1800s was not quarantined by the ruling Qing Dynasty and it over the decades spread beyond its borders and somehow spread in Mumbai in September 1896 through wild rats. This infection from rats in the low community tenements of Mumbai spread virally and the initial symptoms of fever etc were mistaken for Typhus or Malaria and within a week of infection there was swelling of lymph nodes in Groin and Armpits (buboes) and within 48 hours death resulted in most cases and mortality was more than 60% and death was piling up. Further the famine was also adding to the problem of death more in numbers and the death started to spread to Pune, Ahmadabad and other places without respite. The extension of the Bombay Municipality Act 1888 did not give enough scope for the administration to contain the epidemic and death. Hence the British Government based on the Venice Sanitary
Convention 1897 enacted The Epidemic Disease Act 1897 which came to force on 4th February 1897.

Under the 1897 Act Government passed regulations prohibiting the following:-
(1) Pilgrimages to Mecca, (2) Emigration from India, (3) Railway bookings, (4) Religious gathering, (5) stocking of essential items etc. and also gave to powers to search house to house and take out the infected and put in hospitals. Further makeshift hospitals were also created to treat patients. The British Officer in Pune Walter Charles Rand who was deputed as Plague Commissioner who was aggressive in follow-up which was disliked by the great Freedom Fighters Gopalakrishna Gokhale and Bal Gangadar Tilak and there were some other agenda for opposition for them. Tilak went to condemn the British action in his Newspaper “Kesari” and “Maratha”, accusing their search operations as ransacking actions and tarnished the British which incited violence. Influenced by this article, Damodar, Balakrishnan and Vasudev Chapekar (Chapekar Brothers) shot dead Commissioner Rand when he was returning from the Queen Victoria Golden Jubilee celebrations. The Chapekar Brothers were tried for extremist’s activity and hanged.

Further for inciting violence by wrong reporting Tilak was tried under various provisions including the provision of 1897 Act and was punished with 18 months of Rigorous Imprisonment. This was the first case law on Epidemic period disturbances in India.

**THE EPIDEMIC DISEASE ACT, 1897**

**A BRIEF EXTRACT**

- **Section 1** - Explains Title and Scope of Act.
- **Section 2** - Deals on Power to take special measures and prescribe regulations as to control the dangerous epidemic disease

When at any time the [State Government] is satisfied that [the State] or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease, the [State Government], if [it] thinks that the ordinary provisions of the law for the time being in force are insufficient for the purpose, may take, or require or empower any person to take, such measures and, by public notice, prescribe such temporary regulations to be observed by the public or by any person or class of persons as [it] shall deem necessary to prevent the outbreak of such disease or the spread thereof, and may determine in what manner and by whom any expenses incurred (including compensation if any) shall be defrayed.

**Section 2A – Details on Powers of Central Government**

When the Central Government is satisfied that India or any part thereof is visited by, or threatened with, an outbreak of any dangerous epidemic disease and that the ordinary provisions of the law for the time being in force are insufficient to prevent the outbreak of such disease or the spread thereof, the Central Government may take measures and prescribe regulations for the inspection of any ship or vessel leaving or arriving at any port and for such detention thereof, or of any person intending to sail therein, or arriving thereby, as may be necessary.

**Section 3 – Deals on Penalty**

Any person disobeying any regulation or order made under this Act shall be deemed to have committed an offence punishable under section 188 of the Indian Penal Code (45 of 1860).

**Section 4 - Protection to persons acting under Act**

No suit or other legal proceeding shall lie against any person for anything done or in
good faith intended to be done under this Act.

**INSTANCES OF IMPLEMENTATION OF 1897 ACT BY NOTIFICATION**

- **In Pune (2009)** to tackle the great outbreak of **SWINE FLU** and screening centres was set up at all the hospitals in Pune thereby marking this as a notifiable disease and a priority.

- **In Chandigarh (2015)** to deal with the widespread of Malaria and Dengue there and enforcing penalties and collected huge fines.

- **In Vadodara (2018)** The District Collector of Gujarat’s Vadodara issued a notice in 2018 under this Act declaring Khedkarmiya Village, Waghodia Taluka as a hotspot for Cholera area after 31 persons complained about the symptoms of Cholera.

- **On Pan India basis (2020)** the latest COVID-19 crisis presently has been a challenge and Government ensured to declare the Act to be enforced upon very tightly since the cases were multiplying in large numbers. Further to save a Nationwide lockdown was implemented and other further measures were initiated. The State of Karnataka has been the first State to notify enforcement of measures under 1897 Act and this was followed by other states.

In present times as one finds our Nation grappling with unprecedented challenges from maintaining law and order and to contain the viral spread and to ensure safety and provide access to medical facilities, food and social security to availability of medical facilities to all people. The Ministry of Health and Family Welfare in its press release dated April 22, 2020 said that, “perceived as carriers of the diseases, there has been stigmatization and ostracisation and sometimes worse, acts of unwarranted violence and harassment against our medical professionals. Such a situation tends to hamper the medical community from performing their duties to their optimum best and maintaining their morale, which is a critical need in this hour of national health crisis.”

Further to the developments in the present trying situation in 2020 and due to urgency the Central Government passed a Special Ordinance to strengthen the 1897 Act.

**Special Ordinance 2020**

At hour of crisis there have been certain very serious adverse developments affecting the activities and safety of support staff under COIVD19 duty. In Indore there was a serious issue of attack over doctors and nurses in a particular area where they had gone to conduct a regular health check-up. Similar threats and difficulties were faced at various places. These adverse activities seriously jeopardized the morale of the COVID19 Warriors in duty. Hence the Government of India on 22nd April 2020 passed an ordinance to amend the existing Act of 1897 with special provisions to punish those who attack doctors and other health workers.

Under present Ordinance, any person or individual who attacks a Doctor or any other Health Worker is liable to be sentenced with seven years of jail (imprisonment) and the offence is cognizable and non-bailable. Further these Cases have to be adjudicated within prescribed period of 1 year. The Ordinance
also specifies that the guilty will have to pay twice the market value of damaged property as compensation for damaging the assets of health care staff including vehicles and clinics etc.

OTHER LAWS & ACTS RENDERING SUPPORT ENFORCING LAW ON PANDEMICS IN INDIA

1) INDIAN PENAL CODE, 1860

Section 188 - makes disobedience of an order promulgated by a public servant with punishment of simple imprisonment upto a period of 1 year or with a fine exceeding upto Rs.200 or both. In case if the act causes or tends to cause danger to human life, health, or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to Rs.1000/-, or with both.

This provision is in correlation to Section 3 of the Epidemic Diseases Act, 1897, provides penalties for disobeying any regulation or order made by the authorities.

Section 269 - makes any negligent act likely to spread infection of disease dangerous to life as punishable with imprisonment of either description for a term which may extent upto 6 months or with fine or both.

Section 270 - makes any malignant act (i.e. deliberate intention) likely to spread infection of disease dangerous to life punishable with imprisonment of either description for a term which may extent upto 2 years or with fine or both.

Section 271 - is a non-cognizable offence and anyone who disobeys the quarantine rule is liable for punishment for a term of six month or fine, or both. The offence is bailable but non-compoundable

Section 505(1) – prescribes punishment for making, publishing or circulating any statement, rumor or report which may cause fear or alarm to the public, or to any section of the public or incite or likely to incite any class or community of persons to commit any offence against State or public tranquility. The Punishment for same is Imprisonment which may extend to 3 years or fine or both.

2) THE INDIAN CONSTITUTION, 1950

Article 21 guarantees everyone the protection of life and personal liberty. This enshrines the highest attainable standards of physical and mental health and thus every citizen of our country has the foremost right to seek any form of medical help or service that is provided by the Government in an effective and proper manner.

The Directive Principles of State Policy under Part IV prescribes responsibilities to State to create a condition of social and economic well-being enabling citizens a good
life. Though it is not justifiable, yet States shall make every endeavor to take steps.
- Article 39(a) – To provide adequate livelihood
- Article 41- state within its capacity to provide public assistance.
- Art 43- To take steps to ensure a decent standard of living
- Article 47 - It is the duty of the State to raise the level of nutrition in order to improve public health and a standard of living.
- Article 47 – To prohibit the consumption of intoxicating drinks and drugs – TASMAC etc shops closed
- Art 37 – DPSPs are fundamental in governance of the country and it shall be the duty of State to apply these principles in making laws.
- Article 243ZD which is a mandatory constitutional provision for existence of a District Planning Committee in every state which consolidates all the plans prepared by the Panchayats and Municipalities. Hence these arms have a great role in local administration support in present Pandemic situation.

The States abiding by above provided free rations, food, provisions etc to people, some States like TamilNadu Delhi etc. provided free food for all through localized central distribution centres. Further Medicine, testing and treatment was provided by State Free of cost as far possible and also involved each and every arm of local self government and volunteers to enlist and screen details and take tests etc. State also permitted NGOs to provide support with food, essential, medicines, masks, sanitizer, cleaning and clearing etc

It is also observed that further to the 1897 Act some of the States have passed their own special enactments in line with the Central Act they are Rajasthan (1957); Punjab (1958); Madhya Pradesh (1958) Dadra Nagar Haveli (1965)

3) ESSENTIAL SERVICES MAINTAINANCE ACT, 1968

This Act has been passed to ensure the delivery of certain services, which if obstructed would affect the normal life of the people. Each state has a separate state Essential Services Maintenance Act with slight variations from the Central Law to regulate and protect essential services like –Telecom, Electricity, PDS, Banking, Milk, Medicines, etc which provide support to common man. Under the scope of this Act such service personnel have been exempt from lockdown directions, since their role needs to be there for serving needs of people.

4) CODE OF CRIMINAL PROCEDURE, 1973

The Code of Criminal Procedure commonly called Criminal Procedure Code (CrPC)(1) is the main legislation on procedure for administration of substantive criminal law in India and enacted in 1973 (came into force on 1st April 1974).

Section 144 of the Code authorizes the Executive Magistrate of any state or territory to issue an order to prohibit the assembly of four or more people in an area as preventive measure. Wrongdoers under Sec.144 of the Code are punished with an imprisonment of 6 months. It is further to be noted that no order under Section 144 shall remain in force for more than two months but the State Governments can extend the validity for two months and maximum up to six months. It can be
withdrawn at any point of time if situation becomes normal.

5) INFORMATION TECHNOLOGY ACT, 2000

Under Section 66A the punishment for spreading offensive or inappropriate information through any communication service which is false in nature and has menacing character in order to cause annoyance or mislead the situation, shall be imprisoned for a term which extend to three years and with fine.

Though Supreme Court has struck down this section as unconstitutional because it has a wide scope and violates article 19(1)(a) which is freedom of speech and expression, yet considering the situation of Pandemic crisis Police have initiated action in many places as many fake news and messages were shared in tech-media.

The Maharashtra Police has filed more than 400 Cyber crime cases linked with COVID19 and 234 persons have been arrested. Of the above 169 relates to Whatsapp, 157 to Facebook, 18 to Tik-Tok and 4 to Instagram. Similarly in Bengal a 29 year lady Chandrima Bhowmik was arrested for posting false and wrong information that a Doctor at Government ID Hospital, Beliaghata was Corona infected.

6) DISASTER MANAGEMENT ACT, 2005

This Act was enacted to provide guidelines and enforcement scope to manage disasters, including preparation of mitigation strategies, capacity-building etc. in times of crisis and calamities, the salient provisions are :-

- Section 11 - To draw a National Plan. This could refer to the National Disaster Management Plan, 2019 and of the Biological Disaster Management Guidelines, 2008.
- Section 14 - To establish a ‘State Disaster Management Authority with Chairmanship of the Chief Minister of the State assisted by State Executive Committee, the Chief Secretary of the State to prepare the State Disaster Management Plan following the guidelines of National Authority along with the District and Local Authorities.
- Section 25 - stipulates the constitution of ‘District Disaster Management Authority’ which falls under the District Collector/ Magistrate who has to be assisted by the Chairperson of the District Council in the capacity of Co-Chairperson of the District Authority.
- Section 31 - To prepare a District Plan in vulnerable areas and for measures to be taken.
- Section 41 - Local authorities which include Panchayats, Municipalities and Cantonment Boards which have to carry out all the relief, rehabilitation and reconstruction activities under the directions given by the District Authority.
- Section 51 - Prescribes punishment for obstruction, where (a) Anyone without a proper and a reasonable cause opposes any officer or any employee of the Central or State Government in the discharge of his functions under this act. People who don’t accept the above said laws shall be punishable with an imprisonment upto one year or fine or both. Those who don’t abide by the said order or direction shall be punished with an
imprisonment for a period of 2 years upon conviction.

Section 52 – Prescribes punishments for false claim, under which anyone with his knowledge gives or makes a false statement for obtaining any relief, repair, assistance, reconstruction or any other benefits related to disaster from any officer of the Central or State Government shall be punished with imprisonment which may extend to a period of two years and also with fine upon conviction.

Section 53 - Prescribes punishments for misappropriation of money or materials that are meant for providing relief in any disastrous situations where they are used for any of their own purposes or dispossession of such money or materials are punished with an imprisonment terms of two years and also with fine.

Section 54 - Prescribes punishment for creation or circulation of a false alarm regarding any disaster, its severity or magnitude which leads to a panic situation. Punishment under this section which involves an imprisonment up to a period of 1 year or fine.

Section 55 - Specifies about the offences by the Departments of the Government

(1) Where any Department or the head of any Department of the Government is found guilty of committing any offence shall be liable to punishment unless he proves that he is not guilty of the said offence that was done without his knowledge.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a Department of the Government and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any officer, other than the head of the Department, such officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Section 56 - Describes about the failure of officer in duty or his connivance at the contravention of the provisions of this act, where any officer who ceases or refuses to perform or withdraws himself from the duties prescribed to him without obtaining any form of written permission from that of his superior officer shall be punished with an imprisonment for a term of one year or with fine.

Section 57 - Prescribes penalty for contravention of any order regarding requisitioning, where any person who contravenes any order made under Section 65 (Power of requisition of resources, provisions, vehicles, etc., for rescue operations) shall be punished with an imprisonment term of one year or with fine or with both.

Section 58 - Describes the offences by Companies

(1) any offence committed by a company or body corporate, every person who at the time of offence was committed, any person in relation to the company shall be held guilty of contravention and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this act committed by a company, and it is proved that the offence was committed with the consent of connivance of (or) is attributable to any neglect on the part of any director, manager, secretary or any other officer of the company, such directors, manager, secretary or other officer shall also, be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
Section 59 - states that, no prosecution for offences punishable under sections 55 and 56 shall be instituted except with the previous sanction of the Central Government or the State Government, as the case may be, or any officer authorized in this behalf, by general or special order, by such Government.

Section 60 - Specifies about the Cognizance of offences, where no court shall take cognizance of an offence under this Act except on a complaint made by:-
1) The National or State or the Central or the State Government, District Authority or any other authority on behalf of the Government.
2) Any person who has given a notice of not less than thirty days in the manner prescribed, of the alleged offence and his intention to make a complaint to the National authority, State Authority, the Central Government, the State Government, the District Authority or any other . Authority or officer authorized aforesaid.

Section 62 – Provides extraordinary powers to The Union Government by which any authority in the Union such as Ministries, Statutory Bodies and State Governments are bound to take directions from the Nodal ministry of the Central Government.

OTHER UNIVERSAL LAWS

Article 25(2) of the Universal Declaration of Human Rights and Article 7(b) of the International Covenant on Economic, Social and Cultural Rights have been cited by the Supreme Court in determining the right to health by a worker. The above mentioned covenants find their statutory acceptance from the Statement of Objects and Reasons of the Protection of Human Rights Act, 1993.

The International Health Regulations, 2005(2) gave powers to the World Health Assembly under the World Health Organization to adapt to regulations that were designed to prevent the international spread of any disease or such.

In 1997, the WHO established an Outbreak Verification System to gather information, verify reports of, and track infectious disease outbreaks. In addition, the WHO regularly distributes to certain public health officials and scientists an Outbreak Verification List as a means of following up on reports of various outbreaks of disease.(3)

In 2000, WHO established a network of surveillance systems called the Global Outbreak Alert and Response Network (GOARN)(4). The WHO gathers this raw intelligence and converts it into “meaningful intelligence,” using six main criteria “to determine whether a reported disease event constitutes a cause for international concern.” This Response team includes WHO Country Offices, WHO sub-Regional Response Teams, WHO Regional Offices, and the Alert and Response Operations Centre team in Geneva and disease specialists.”

The first global conference on SARS held June 18–19, 2003, in Kuala Lumpur, Malaysia, was convened by WHO to provide technical guidance for the ongoing and long-term response to SARS. The officials discussed about the proper treatment and control of the SARS-CoV disease, where various clinical laboratories could not distinguish this form of disease from that of the other respiratory illness rapidly enough to inform management decisions that must be made soon after the
patient presents to the healthcare system,” and so early clinical recognition of the disease “still relies on a combination of clinical and epidemiologic features.”(5)

**WHO (World Health Organization)**

The World Health Organization under the United Nations is responsible for maintaining public health at international level advising and implementing measures globally on health care and global well-being. WHO has been mandated by a series of world health assembly that provides various resolutions to member states with guidance and technical support in Pandemic situation. They are:-

1) **WHA 56.19:** This deals with prevention and control of pandemic at large.
2) **WHA 58.5:** Explains about straightening the pandemic preparedness and response plan.
3) **WHA 60.28:** explains about the pandemic preparedness plan, access to vaccines and other benefits.

**International Health Regulations (IHR 2005)**

It is an international legal instrument framed by the World Health Assembly in 2005 which legally binds its Party states worldwide to provide a legal frame work globally to aid, control, prevent and to respond to public health risks that may spread between countries. Under this, a list of reporting requirements obligate the party states to provide information to WHO of the list of cases or events involving a range of public health risks and disease. The notification is followed by the ongoing communication of detailed public health information on the event, including, where possible, laboratory research, case definitions, no. Of cases and deaths, conditions affecting the spread of disease etc. WHO is the sole authority mandated under the IHR (2005) which collects reports from official and unofficial sources of the serious international public health risks, after preliminarily assessment, to obtain verification of such reports from states. The party states are required to respond to the WHO within a prescribed time period and include the available relevant public health information.

All public health events, including those which may involve a pandemic situation are notifiable under the IHR (2005) if they fulfill at least two of the contextual risks assessment criteria in the regulation:

1) If the event is unexpected or unusual.
2) There is a significant risks on international travel or trade restrictions.
3) If there is significant risks of international spread.
4) If the public health impact is serious.

The IHR (2005) instructs the party states to develop a national public health capacities to assess Detect and respond to event and to report all these information to WHO.

**Instances of invocation of Special Legal Provisions and the Ordinance of 2020 to the 1897 Act**

So far 55 Journalists all over India have been booked for violation and further to same 22 FIRs were filed and action initiated. In Tamilnadu the newspaper Nakkeran as tried for irresponsible reporting in 2020.

Under the scope of the Act Maharashtra Government has initiated 51 cases for spreading rumors.

In Lucknow (UP) the Fake Godman Ahmad Siddiqui claiming as Coronawala Baba, who prescribed his talisman against use of facemask was arrested for Fraud and Forgery.
In Odisha a person was arrested
In Tamilnadu the famous News reader and actor has been booked for spreading false information of Non-Availability of Hospital Beds for COVID19 treatment.

ROLE OF GOVERNMENT IN A PANDEMIC SITUATION

Society is a mixture at large who are regulated and controlled by a superior authority which is Government/State. This authority is responsible for a proper governing of a particular area and is also responsible of the safety of citizens who fall under its ambiguity. The Government focuses in a pandemic situation for controlling and for necessary preparedness by playing a significant role not only through the health sector, but also with the help of all other sectors and further reaching individual and families, and communities in mitigating the effects of the pandemic. All these sectors of the society work together as a whole involving themselves in a pandemic preparedness under the Control of the National Government.

The National Government at the Centre under the Indian Quasi Federal setup is responsible for ensuring uniform and better practices and coordination in a pandemic situation and ensure for preparedness response. It has to identify, appoint, enact or modify the given set of legislations and policies that are required to sustain and optimize pandemic preparedness, across all sectors and provide all the additional resource for national pandemic preparedness, response measure and capacity development

On 14TH April, Prime Minister Mr. Narendra Modi prominently pronounced the role of local self governments to combat COVID-19. On 12TH MAY, he urged the people to be “vocal about local”. He ensured that this contagion can only be prevented by changing the attitudes and the behaviors of the human individuals.

The Directions of the Central Government and State Government thus have a strong role to enforce proper regulations and ensure good safety for all citizens and common man in the society within the area of the State. The directions are given through and under various departmental arms of the state being – Health, Non-Health Sector, Police, Revenue and General Administration.

The measures taken by Government during this Pandemic are:-

1) Lockdown of society is stages and with restrictions and relaxations,
2) Social Distancing concept to be adopted with atleast 3 feet distance to be maintained between 2 individuals
3) Use of Face Masks
4) Sanitization and Frequent washing of Hands with Soap water with minimum 20 seconds to enable surface tension to remove possibility of Virus transmission
5) Frequent spraying in locality with Bleaching powder and solution
6) More deployment of cleaning staff
7) Deployment of Volunteers to enlist people and follow up their health status at doorstep.
8) Municipality/Corporation in coordination with Medical staff providing testing measure, checking basic health parameters of people.
9) Tracing of infected people and their contacts and test them and treat infected people
10) Passengers from abroad and in travel provided health check up and if any infected were found, then to take them for treatment.
11) Supply essential food grains to all
12) Provide food supply to needy
13) Charge Polluters and violators of norms
14) Regulation of market and vendors
15) Permit active participation of Individuals and NGOs to provide support to public at large with food, essentials, medicine etc.
16) Giving Directions to Hospitals to charge at not exceeding prescribed price and treat patients well
17) Giving Directions to Insurance Companies to consider COVID19 infection within present policy and entertain claims.
18) Giving Directions for continuation of essential services and deployment strength of staff by rotation at prescribed levels.
19) Prescription of Arogya Sethu Application software for all to monitor health status of individuals and for their personal knowledge of potent threat and infected people information.
20) Aged people were taken care and ensured by and large from venturing out.
21) Vehicle movements and of individuals restricted and permission in limited nature with issue for Pass from Competent authority was made.
22) Giving directions for protection of staff involved in monitoring and providing support role in society through the team of Doctors, Nurses, Sanitary Workers, Police, Revenue staff, etc. They were addressed with special name as COVID Warriors.
23) Passing the 2020 Ordinance to the 1897 Act and arming with special powers and protection to COVID Warriors and ensuring safety and recognition to them
24) Special service of extension by 1 year to current retiring staff.
25) Directions to permit online classes for students and liberal approach to education assessment and tests
26) Providing Cash subsidy to people.
27) E-Learning encouraged.
29) Directions to Banks to provide liberal credit.
30) Directions not to classify accounts as NPA and provide moratorium for repayment of loans.
31) Changes in Income Tax filing period.
32) Toll charges waiver.
33) Suggestions made to common man to take up personal initiatives to support neighbours and needy.
34) Courts and its procedures provided leniency.
35) Exemption of time under Limitation Act.
36) Banks advised to provide Mobile ATM’s.
37) Directions to close places of worship and other places to prevent larger social gathering.
38) Directions on total.
39) Endeavour to produce vaccines and engaging ICMR.
40) Frequent Meetings of Centre and States and Government frequently in touch with people.
41) Travel restrictions and Passenger Domestic Air Travel was banned within the country from March 24th till April 14th 2020 and which has been extended over the period.
42) International Passenger travel was banned till April 14th 2020 and this is extended periodically.
43) Special permission granted for transport of cargo and essential items and daily livelihood materials.
44) Shramik Trains a stream of special train and Special busses to transport the dislocated migrant labourers to reach back their native place.
45) PPE kit usage encouraged to prevent infection.
46) Government directed employers to provide salary assistance even though it was lockdown condition existed.
47) Centre gave funds to States for providing relief and States in turn provided funds to local bodies.
48) Frequent meetings of enforcement agencies and monitoring team to coordinate welfare activities.
49) Exemptions under scope of GST etc for essential services.

Many more further measures were initiated by State. We observe that till date the pandemic situation is largely controlled through State measures with remarkable cooperation of all the state governments etc. various Public servants and security forces have been enforcing lockdown in a strict and stringent manner. In this situation it is to be noted that local governments/bodies must be prominent at least in the Disaster Management Act, 2005. In this trying times, the Police force, Home Guards, Social Service Organisations, NGOs, Sanitary Workers, Administrative body officials, Revenue Officials, Private Individuals.

Role Rights and Responsibilities of Communities, Individuals and Families

Civil society organization, individuals, families also have their own role in mitigating the effects of a pandemic outbreak. NGOs should involve along with Governmental groups or organizations to help whole communities to prepare and respond to a pandemic outbreak. Under civil society organizations, groups that have a close and a direct relationship with communities are often well placed to communicate accurate information, counter rumors, raise awareness and liaise with the government during an emergency. These groups must augment the efforts of organizations in other sectors, such as hospitals or clinics. It is important that all the individuals and families of households must take measures to ensure the access to accurate information, water, food and medicines. Access to reliable information from sources such as WHO and local and national governments will be essential for families. Individuals, especially those who have recovered from a pandemic outbreak must consider a proper volunteering with an organized group to assist others in the community.

As a matter of right the individuals are entitled to better support from Government to control, prevent and treat pandemic diseases and a right for quality life. At the same time, each and every individual is bound to duty and obligation to follow. However there have been many instances of non-compliance and violations by individuals. Many individuals were found loitering and not maintaining social distance or responding to medical advice. Unwanted movers were charged and penalties imposed which accumulated to more than Rs.50Crore which could not viewed as a good development as this only negatives the Government efforts to contain the spread of disease. Similarly quarantine of visitors and the infected is to be seriously pursued. People are also found to be in grabbing mode the relief materials that come to be distributed thereby preventing the proper reach of same to all needy. Under PDS there are many instances of flawed supplies and duplicated procurement by beneficiaries and so supply flaws are seen. The Market is ripe with hoarding traders and inflated pricing which is not being controlled and Individuals seek right of protection from this and Government has a sincere role to play and ensure equity.

Conclusion
The COVID 19 Pandemic has thrown a huge challenge to the whole world. The Governments by and large have put their best possible steps to improve the hygiene, health care, awareness and prevention and control measures. Occasional excess by authorities and also unfortunate non-compliance of safety measures is seen from individuals. The Corporates bound by the burden have started to squeeze on its employees. The Viral infection as of many past Pandemics is still on upsurge and the news of some vaccine production is providing a glimmer of hope. The stage 3 community spread in India is slightly low compared to world statistics, may be due to herd immunity. The Economy is shambles with organizations being closed and employment being cut, which needs to be addressed and rectified soon. The lockdowns need to end soon and education, production, service activities should bounce back to improve the economic front. Media need to be more sensible and corporations have also join force to rectify the situation. The basic necessities such as food, medical support, water, electricity etc must be provided and available in a regular manner and at affordable price so that people will not panic and urge for the things that are in demand and lead to a massive lose by getting affected to the infections. The sole responsibility is with the government to open up and protect the people in each and every manner as of now people must also need to cooperate will the government to overcome this pandemic situation and same length people have to raise their levels and corporate ought to support their employees and stimulate economy. Tracing Testing and Treatment is a system practiced should continue. Irrespective of all precautions and severe lockdown there COVID19 infections alarmingly and sporadically spread all over. As we all know pandemic is not new, the government by the sheer size of the population of our Nation would find it tough in such situation so all the individual must be supportive and helpful in this period. At the same time we should remember that History has shown that many a Pandemic dies on its own more than medication and curative support. As Thomas Mockaitis the History Professor at DePaul University states “As to how the Plague ended, the best guess is that the majority of people in a Pandemic somehow survive and those who survive have immunity” This Pandemic situation COVID19 has brought out global challenge and domestic difficulties and the State being responsible for Welfare of people and safety has to ensure proper measures to be implemented. At the same time the corporates should support their employees and more particularly each and every individual should strive to follow guidelines and also ensure for better hygiene and sanitization and better social living. The fear of the disease need not kill the system or because of worry and let all carry forward with Enthusiasm, Care and Caution.

FOOT NOTES
1) Code of Criminal Procedure is the main legislation on procedure for administration of substantive criminal law in India. It was enacted in 1973 and came into force on 1 April 1974.
4) The criteria listed here are unknown disease, potential for spread
beyond national borders, serious health impact or unexpectedly high rates of illness or death, potential for interference with international travel or trade, strength of national capacity to contain the outbreak, and suspected accidental or deliberate release.

5) Clinical Guidance on Identification and Evaluation of Possible SARS-CoV Disease among Persons Presenting with Community-Acquired Illness.

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CYBERCRIME: A SURVEY FOR PERCEPTION OF ADULTS

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Abstract
In today’s scenario, cybercrime, criminal activity, has become a matter of great concern across the globe. Primarily, cybercrime is an umbrage committed by the hackers via digital means. Cybercrime could be committed for various reasons say for instance money, political purpose, etc. It has been observed that with the growth as well as development of technology, everything is getting rife with digitization and thus it enhances the chances of ooze of private information. This paper aims at expounding the rationale behind the cybercrime and how Mobile Applications and SIM Swapping contributes to cybercrime. Another intent of this paper is to ascertain the thoughts of common citizens pertaining to cybercrime via questionnaire. The Data which has been collected through questionnaire would be scrutinize both quantitatively as well as qualitatively in great detail.

Keywords: Cyberthreat, Private Information, Digitization, SIM Swapping, Money, Political purpose.

INTRODUCTION
Cybercrime has gained currency under the aura of technology. Since the technology advances, people across the countries have gradually started stowing their personal data digitally in the laptops/computers. Lets say for instance stowing the credentials on google drive or I-cloud. In 2014, according to the International Business Times, almost 4.93 million google accounts were printed on Russian Language Bitcon Security form. Those google accounts were belonged to English, Spanish as well as Russian users. Similarly, whenever customer buys any goods online from any website, numerous option is available to them to make payment for the same say for instance digital wallet, net banking transfer, etc. Thus, he has to supply his personal details. According to the J.P Morgan, trend of payment 2019 (Global Insight Report), it has been observed that while making payment for any purpose, 25% of the people preferred digital wallet, 29% of people preferred either debit card or credit card, 17% of the people preferred cash mode, 20% of the people preferred bank transfer and 9% of the people preferred other mode. can we give assurance to ourselves that making payment digitally is devoid of any kind of cyber threat? Can we give assurance to ourselves that stowing data digitally on google drive or I-cloud is devoid of any cyberthreat?

We firmly agree with the fact that advancement of Technology is decorously enriched with numerous benefits including growth as well as development of country but besides this is an important aspect, require on the part of each and every
individual to take into confidence that is to say security of our credentials. Generally, it has been observed that people usually go to public cafes for their work. But here on this point an important question tends to arise namely Are people well acquainted with the term keylogger? As we know that key logger is a kind of malicious act, committed with the intent to get accessibility to the credentials by monitoring or recording all the keys which get struck on keyboard by any person. In other words we could say that keylogger is a kind of software program which is specifically designed with the intent to monitor the keystroke. Keylogger can affect the people adversely. They can easily encrypt the private information via keyboard. Consequently, hackers then get access to the account number, PIN codes, email address as well as their password, accessibility to the password of online gaming accounts, etc. The Notion with respect to keylogger is to get accessibility between two vital aspects that is to say when any key is pressed on the keyboard and another is information which is exhibited on the screen of monitor about the keystroke and this could be attain in various ways say for instance video surveillance, hardware bug in the keyboard, obstruct the input or output, to substitute the driver of keyboard, etc.

In United States of America, a similar case has had occurred, there was a businessman named Jeo Lopez, belonged to Florida, had file a suit against the Bank of America, contended that 90,000 Dollars from his bank account had been stolen and when an investigation was conducted for the same it was realized that Mr. Jeo Lopez’s computer was enveloped with a malicious program named backdoor coreflood and this malicious program had monitored each and every single key of keyboard, pressed by Mr. Jeo Lopez’ and the same had been relocated to the fraudster through internet and hence, it gave rise to the ooze of his username as well as password. This is how he got trapped via keylogger as well as his own negligence. However, it is pertinent to note that the supreme court of Florida rejected the contention of Mr. Jeo Lopez’ and said it happened because Mr. Jeo Lopez’ did not take any precautions for his credentials.

Cyberbullying is one of the another main, aspect of cybercrime. Cyberbullying, primarily includes sending mean texts or IMs, trying to get access to social media account to lies about someone or with the intent to raise money, creating the nasty webpage of anyone else, etc. In November, 2019 a case related to cyberbullying was bring into light. A 24-year old boy named Bathula Venkateswarlu, was illegally using the social media profile of a woman and that woman in her complaint contended that he was trying to spill the money from one of her facebook friends by claiming that the money will be used to pay off the medical bills and when the investigation was conducted, it has been detected that Bathula Venkateswarlu has sent link to that woman from one of the phishing, websites and stole her, I’d as well as password of the facebook account. Then after impersonating that woman he had started chatting with her friend. That woman also contended that she

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1848 Nikoloy Gribennikov, Keyloggers: how they work and how to detect them, Keyloggers Construction, May 14, 2020, 10:17 PM, https://securelist.com/keyloggers-how-they-work-and-how-to-detect-them

1849 “id.”

was unable to get access to her Facebook account since September 2019. After all this, is it plausible on the part of us to say that our private information, is out of harm’s way? The answer to this question is absolutely No.

RATIONALE AFTER CYBERCRIME

1. To Attain Monetary Purpose

Primarily, cybercriminals resorts to hacking with the intent to gain money. Generally, cybercriminal are rife with major techniques to achieve the said goal that is to say Infringement of credentials for the purpose of identity theft as well as Attack to inflict fraud on business and under the former, the swindler of the third party contributes to the identity theft and the spill of personal data give platform to the cybercriminals to rupture the credential of any person so that they could end up with the identity theft whereas under the latter, deflection take place with respect to the fund or money from the targeted account to that account which is controlled by the fraudster and to attain the said they ordinarily deploy various techniques say for instance Phishing, vishing, etc. to spring out the private data\textsuperscript{1851}. The fraudster will send you an email which exactly looks like that it has come from admissible person but it is not. Such kind of attack is ordinarily invoice. They will either ask you to furnish your credentials with respect to your bank account or alter your bank details. But in reality, those emails primarily comes from cybercriminals with the intent to ruse people in their cyber trap.

2. Political Motive

Another reason is political purpose. Cybercriminals attempts such attack with the purpose to destabilize the normal activity of government, political bodies, etc. The spill of Panama Papers in 2016 is a spellbinding example of it\textsuperscript{1852}. The Panama Papers implies the slip of 11.5 million confidential documents. And those personal documents belonged to law firm named Mossack Fonseca and the same got published in a German newspaper on 3\textsuperscript{rd} April,2016 Suddeutsche Zeitung. These documents covered the personal financial documents of businessman, politicians, public officials, etc. Almost 2.76 terabytes data were published. Before the slip of data it has been observed that the German Newspaper Suddeutsche Zeitung has been contacted by a person John Doe. And even John Doe did not ask for any money but during the conversation names of some public officials, politicians, businessmen had been revealed. This clearly depicts that the spill of Panama Papers is related to Political Motive. Because during the conversation names of some Politicians were also revealed.

Even in 2016 the Russian government tried to demolished the system of democracy during the period of elections in United State of American and when the investigation for the same was conducted it has been realized that Russian government tried to hack the rolls of voters as well as electoral system\textsuperscript{1853}. The Russian government wanted to debilitate the trust of people in the system of democracy. They wanted to destabilize as well as deranged the government from their legitimate PM.


targeted activities. It has to be noted that Russian government not only did it with America. Besides America, there are many other countries namely France, Ukraine, etc. which had been affected by the Russian government.

Are Teenagers into Cybercrime?
The teens of today’s generation are very effectively well versed with the technology. It has been observed from the report of National crime agency in United Kingdom that 61% of hackers were belonged to the age of below 16 and it is pertinent to note that according to the report Australian Bureau of Statistics and crime investigation, it has been observed that cybercrime perpetrated by below the age of 18 have been surged by 26% in the preceding two years and also it has been observed that in Spain almost 300 teens have been dismissed because of their involvement in the cybercrime.

To get into this, it is vital that we have to take Traditional Criminology Theory by Gottfredson and Hirschi into meditation. According to this theory, teens who do not have self-control are more likely to commit the cybercrime. In other words, we could say that teens with such kind of characteristics are of impetuous nature. Before attempting they don’t ponder the pros as well as cons of that particular aspect that is to, say they act impulsively. Due to lack of requisite brain structure, it become impossible on the part of them to create self-control. Thus, it has been described that this directly implies getting into the business of cybercrime.

How does sim Swapping contribute to Cybercrime?
Generally, Sim Swapping is a new form of fraud which primarily allows the hackers to purloin your private data of your bank account. Fraudster will block your SIM card and replaced that blocked SIM card with a new SIM card. This technique is also known as SIM splitting. SIM swapper will send you phishing emails. They will try to ruse the person by claiming that they are from health insurer or credit card companies or any other association so that they could get access to your personal data. They also deploy various software to get the same. Then next they will contact to your Mobile service provider and try to deceive them by claiming that their sim card is lost or damaged or any other rationale.

Once the SIM Swapper is able to deceived the Mobile Service Provider, they easily get a new SIM card. And once a new SIM card is issued to the fraudster, the SIM card of the targeted victim gets deactivated, now the targeted victim will not be able to receive any kind of information in the cell phone. From this we could easily inferred that the ball is now in the court of SIM Swapper that is to say they have the accessibility now to the personal details including the details of the bank. In such favorable circumstances, the fraudster could easily use the OTP (one Time Password) for any kind of financial transaction.

Recently, in 2019 a case of SIM Swapping was discovered in Mumbai. There was a businessman, who have had received 6 calls

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1855 “id.”

1856 Saurabh Gupta, How 6 Missed calls left Businessman Robbed of nearly 2 crore, Mumbai, May 24, 2020, 3:19 PM, https://www.ndtv.com/mumbai-news/how-6-
on his cell phone between 11.44pm and 1.58am on 27th December as well as 28th December. Among the 6 calls which he had received, 2 calls were from the United Kingdom. Even his SIM card was no more working. Aggrieved by this he called on the service provider and discovered that the SIM card was not working because he himself made a behest to service provider to occlude his SIM card on 27th December around 11.15pm. Then afterwards the service provider gave another new SIM card on 29th December.

In totality there are 28 transactions with respect to the transfer of money into 15 different accounts took place. Even the businessman himself gave the statement that “I was not acknowledged with respect to these transactions because the SIM card was not working. Akbar Pathan, Deputy Police Commissioner, said “Almost 1.86 crore had been relocated from the businessman’s current account.”

**Statistical Facts with respect to Cybercrime in India**

Since we know that advancement of technology facilitate necessary growth as well as development. Besides this it is quiet, germane to pay heed to the fact that the more we are into the aura of digitalization, the more we are surrendering our credentials to the innovative cybercriminals. Recently in 2019, a survey was conducted by the Norton Life Lock Cyber safety and the following data has been collected:

1. Out of 350 million worldwide cybercrime victims, India’s victims of cybercrime stands out to be 131.2 million.
2. Due to cybercrime India has lost almost 1.24 trillion amount.
3. Out of 131.2 million victims of cybercrime, 63% of Indians are exposed to cybercrime financially.
4. 63% Indians do not know what they should do if circumstances like where their identities are stolen, appears to them.
5. 73% Indians are well versed with the fact that their identities will going to be stolen by the cybercriminals.

In 2019, an official annual report with respect to cybercrime by cyber securities venture was published. It clearly states that cybercrime will cost the world 6$ trillion by 2021. It is predominant to note that this will facilitate a shift on large scale with respect to the economic wealth and thus affecting the field of Investment as well as Innovation. Steve Morgan, founder as well as Editor-in-chief at cyber security venture, contended that cybercrime covers the numerous vital aspects namely credentials, personal financial data, Intellectual property which is being stolen, Production cost, Damaged cost, Money, etc.

**How does Mobile Applications contribute to cybercrimes?**

Another important aspect which blossoms the cybercrime is that various mobile apps have become the source for cybercriminals with the intent to achieve the private data.
including details of bank. And such apps include Malware, Coat-trailing trojans, etc. contribute to cybercrime. Such kind of software could be easily pierce into the cell phone and could encrypts the data. There are primarily three ways deploy by the cybercriminals to extract the private data from mobile or laptops that is to say through browser or applications or internet network which claims to provide free WIFI. The Aarogya Setu Application, designed in the name of covid-19, could be cite as an example. The cybercriminals are sending the phishing messages or phishing emails in the name of Aarogya Setu Application so that they could be able to steal the private Data. Fraudster are sending illegitimate emails or messages say for instance ‘check who all are infected by covid-19’, ‘How to use Aarogya Setu Applications’ etc. It was also observed that cybercriminals are dispatching the phishing emails which are appearing to the people that they are originating from World Health Organization.

Not only this, cybercriminals are trying to ruse the people by providing free Netflix passes in the name of covid-19. Even some of the people are getting the link on the WhatsApp that to get entitled to free subscription of Netflix, click on this link. But in reality, it is nothing but only a scam to trick people so that cybercriminals could get the credentials of people. It has been observed that one of the spoke person of the Netflix has given a confirmation that we have not accord any free subscription of Netflix. This clearly shows that free subscription is a kind of scam for common citizen to deceive them.

Methodology
The concept of cybercrime have had been elaborated in great detail. Along with this the rationale after the cybercrime have had also been discussed. And the another important aspect that is to say to find out the opinion of the common citizens pertaining to cybercrime, the data for the same has been collected in the form of questionnaire. And the same had been scrutinized both quantitatively as well as qualitatively. Some general questions related to cybercrime were asked in the questionnaire. All the respondents were assured of the confidentiality.

Discussion and Inferences
Demographic Profile
In this survey the data has been collected from the undergraduate students, Postgraduate students and those who does job. There is almost an equal distribution of both male as well as female. Various other aspects of the questionnaire are now discussed individually one by one.

Do you think that making payment via Digital wallet is devoid of any cyber threat?
To this question, it was observed that 82.1% of the respondents said making payment via digital wallet is not free of any cyber threat whereas 17.9% of the respondents said it is. This clearly depicts that 82.1% of people are well versed with

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the fact that digital wallet holds cyber threat. It means they are cautious whenever it comes to hit digital wallet for payment and can scrutinize the situation. But when it comes to latter category that is say 17.9% of the respondents, it gives rise to exigency that people should be heedful to cybercrime. The fact that as of now they are not vulnerable to cybercrime could not be taken as a justification for latter one. The chief ratiocination is that we cannot predict about the numerous aspects of cybercrime. Hence, we need to be careful.

How often do you react to the promotional emails?
This is the another question which was asked in the questionnaire and it was asked in the three category that is to say occasional category, frequently category and never category. It was found that 20.5% of the respondents went for occasional category, 69.2% of the respondents went for never and 10.35 went for frequently category. This shows that 69.2% of the respondents are well aware that promotional emails is threat in the form of cybercrime. Because promotional emails is a kind of weapon deploy by the cybercriminals in the form of phishing so that they could get access to personal data. But when it comes to occasionally as well as frequently category, people should become cautious with respect to challenges of cybercrime. They should avoid such kind of illegitimate emails and if the circumstances are such that it is quite crucial to react on such emails then before hitting the response they should scrutinize the integrity of such emails.

Can we say that laws regarding the cybercrime are enough?
This is the another question which was asked in the questionnaire and it was observed that 84.6% of the respondents said we need more stringent laws to curb the cybercrime at the earliest whereas 15.4% of the respondents said the laws regarding the cybercrime are suffice. This shows that the former category is more conscious with respect to cybersecurity. An important noteworthy aspect is that we cannot let the cybercrime to prevail over the advancement of technology. Thus, we need to tefurbish the cyberthreat at the earliest. The latter
one needs to understand the relation of stringent laws with respect to cybercrime. Because we required an indestructible cybersecurity.

**Do you think that laws regarding the cybercrime are enough?**

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<th>Yes</th>
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<tr>
<td>%</td>
<td>84.6</td>
<td>15.4</td>
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**Do you keep your bank details in your mobiles and Laptops?**

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<td>%</td>
<td>66.7</td>
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**Are you aware of the term SIM swapping?**

This is the another question which was asked and it was found that 57.9% of the respondents are well aware about the SIM Swapping whereas 42.1% of the respondents are not aware about the term SIM Swapping. Thus, it is important on the part of latter one to become familiar with the term SIM Swapping. Hence, there is an exigency to create awareness with respect to numerous aspects of cybercrime among the common citizens. The more we create the awareness, the more we are able to control or restrict the cyberthreat.

**Do you keep your bank details in your mobiles and Laptops?**

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Do you think that cybercrime is increasing day-by-day? And to this, we have had received 100% vote in favor of the question. It means that people are cognizant that cybercrime is scaling up. It is to be noted that though people are conscious about the fact that cybercrime is scaling up. Although people are conscious about the fact that cybercrime is increasing day-by-day besides this it is pertinent to note that cybercrime holds various parts. Being aware about the fact that cybercrime is increasing day-by-day will not suffice. Therefore, it is important that they should aware about the sub-parts of the cybercrime. As in the above question which talks about the SIM Swapping, we could see that 42.1% of the respondents are not aware about the SIM Swapping.

Do you think that Mobile Applications are contributing to cybercrime? To this question it was observed that 92.3% of the respondents went for the motion whereas 7.7% of the respondents went against the motion. As we could take the example of Aarogya Setu App, Cybercriminals are sending illegitimate emails (phishing) in the name of Aarogya Setu App to ruse the people. Hence, before deploying any such applications people should analyze the same in detail.
How aware are you about cybercrime?
This question has been asked in three category that is to say very well, Don’t know and Not so well. And it was observed that 56.4% of the respondents went for very well, 38.5% of the respondents went for very well and 6.1% of the respondents went for Don’t know. Thus, from this we could infered that awareness regarding the cyberthreat is must. Because if we are aware about the challenges of cyberspace then we could be able to take the requisite precautions against the cybercrime. Unless we are not across to the cybercrime in detail then Law in such situation is equivalent to vain. Mainly, cybercrime takes place because of not being cautious. As in the aforesaid case of Mr. Lopez with respect to key logger, the supreme court of Florida said Mr. Lopez had has suffered loss because of his own negligence.

How do you feel about your information when you are online?
This question is primarily asked in four category that is to say Safe, very safe, not safe and don’t know. And it was found that 40% of the respondents contended that they don’t feel safe with respect to their private information when they are online, 55% of the respondents said that they feel safe about their information when they are online, 5.1% of the respondents don’t know that whether their information is protected or not and none of the respondents went for very safe. This implies that 55% of the respondents do not feel any kind of inconvenience with respect to information. But still they need to safeguard their credentials because the negligence on the part of us could create a room for cybercriminals. But 40% of the respondents knows that storing the data digitally can lead to leakage of the same or in other words we could say that they are not in a favor of uploading the data whereas when it comes to 5.1% of the respondents we could see the uncertainty because they don’t know whether uploading the data is reasonable or not. An important noteworthy point is that respondents are well aware that it is not very Safe to upload the private information. Hence, we need to be careful.
Conclusion
As we know that everything has its own pros as well as cons. Similarly, when it comes to technology, we could say that technology facilitate the progress of a country. But on the other hand, we cannot disregard the cons of the same. In other words, it means we cannot let the cons of technology to prevail over the pros of technology. Because we know that the area of technology is vulnerable to cyberthreat. Thus, on the basis of the data which has been collected via questionnaire, we could say that mainly cybercrimes take place because of the negligence on the part of we people. We need to focus on two aspects that is to say at first, we have to create awareness with respect to cybercrime among the people, we have to educate them about the types of cybercrime and how we can prevent ourselves from becoming immune to cyberthreat. Secondly, before reacting to any kind of emails, it is necessary that its integrity should be taken into confidence. Because the more we will become aware about the cybercrime, the less we will be prone to cybercrime.