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EDITORIAL

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ASSESSING THE COMPLEMENTARY NATURE OF INTELLECTUAL PROPERTY RIGHTS AND ANTITRUST LAWS IN A RAPIDLY ADVANCING WORLD

By Aaryan Mohan
From Symbiosis Law School, NOIDA.

Abstract: In a semi-developed world, rapidly advancing technology requires a systemic equilibrium of laws which can facilitate judicial regulation. Universally harmonized laws could pave way to malpractices such as patent picketing where the IPR holder of a new technology occupies a rent hoarding position and exercises their patent in protest, selectively working and depriving some countries of their innovation. To combat such scenarios and enhance the industry wide goal of dynamic competition, competition authorities like CCI (Competition Commission of India) and the judiciary need to work in consonance with worldwide judicial developments to keep up with evolving technology and find a robust footing in seas which can otherwise be considered alien.

Keywords: Intellectual Property Rights, Copyright, Antitrust laws, Competition Commission of India (CCI and DG), the Copyright Act 1957, the Competition Act 2002, TRIPS, unfair trade practices, trademark, semi-developed world, patent picketing, trade secrets.

Introduction

1 MHRD IPR Chair Professor at the Indian Institute of Technology Madras, and Advocate, Madras High Court

Courtesy of the nature of the circumstance humans thrive in, much of the phenomenon, natural or otherwise that we experience is derivative of democratized stimuli. On the base level every describable human interaction can be abstracted into building blocks of human ingenuity, but those that integrate these building blocks and extrapolate them through their thought and labor into the domain of creative expression are certainly deserving of recognition. Therefore, a copyright is earned by an author through his original work by not only investing his/her “sweat and brow” but also by proving their creativity through expression.

Copyright offers limited protection (so as to not allow monopolistic stagnation) for a myriad of novelties that tilt towards the aesthetic side of the expression spectrum and aims to strike a delicate balance between creative incentive and public good. Copyright is an incorporeal right through which restrictions can be imposed on those who seek to violate the copyright holder’s copyrighted property for their own gain without securing the copyright holder’s assent and consent. As an incorporeal right, a copyright can only protect tangible things much like property. Therefore, abstract ideas cannot be copyrighted.

The Indian Intellectual Property Rights position is overseen by the Copyright Act, 1957, successor of the Indian Copyright Act of 1914, which is in accordance with “Trade Related Intellectual Property Rights”. The former is further complemented by the Competition Act, 2002 which finds its basis

3 Blackwood And Sons Ltd. And Ors. vs A.N. Parasaruman, AIR 1959 Mad 410
5 Baker v. Selden, 101 U.S. 99 (1879)
in a *prima facie* contradictory economic philosophy of antitrust\(^6\). Alleviating concerns of contradiction, the grundnorm of both these Acts aim to facilitate dynamic industrial competition, which is a necessary component of a free market economy, thereby maximizing consumer welfare.

1. **Calculus of Interests in a Technologically Advanced Matrix**

   In *Sony Corp. v. Universal City Studios*\(^7\) the perplexing issue of “calculus of interests” arose, where a suit against Sony Corp. was instituted basing the cause of action on the manufacture of VTRs (Video Tape Recorder) by Sony which were used to record copyrighted media of Universal City Studios. The court held that there is no contributory negligence by Sony as there is no constructive knowledge of any such activity, further there are a number of legal uses of VTR which involve no infringement of Universal City Studios copyright, the court also pointed out that contributory infringement can only be justified when a direct infringement is induced or intentionally encouraged. In *Consim info pvt. Ltd. v. Google India pvt. And Ors.*\(^8\) the plaintiff brought a suit against the defendant for wrongfully using the plaintiff’s trademark as registered under Trade Marks Act, 1999 through the Google’s AdWords program (Keyword Triggered Advertisements), the plaintiff also accused matrimonial sites that would come up when the plaintiff’s site was being displayed through the search engine on the basis of issues like dilution of the trademark, free riding on the coat-tails (passing off) and likelihood of confusion.

   The similarity of the two aforementioned cases lies in the issues regarding justification of liability that is being incurred by the defendants, where Sony’s liability is *prima facie* more non maintainable due to the control factor, the complexity that shrouds Google’s case in the form of technical advancement leaves much to be analyzed. In *Google vs. Guangdong Ganyi Electrical Appliances Co. Limited* a Chinese case, saw Google evading joint-liability on the basis that Google did not possess the ability to check or control the data submitted by the competitor nor did it have an obligation to examine the legality of that information. Operating on the order passed by Madras High Court in the case of *Consim info pvt. Ltd. v. Google India pvt. And Ors* confirming Google USA to be a proper defendant, the CCI and its DG in *Consim Info Private Limited and another v Google Inc., USA and another*\(^9\) with respect to their power to review abuse of dominance and the assertion of their jurisdiction over the conduct of firms based abroad having anti-competitive effects in India found Google to not be in contravention of Section 4 of the Competition Act, 2002 due to the lack of necessary analysis brought on record through their investigation. This can be chalked up as a lacunae in the Competition Act, 2002 for it leaves much to the discretion and analysis of the CCI on anti-competitive agreements, a luxury even countries with far greater experience cannot afford\(^10\).

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\(^7\) 464 U.S. 417 (1984)

\(^8\) 2010 (7) MLJ 497 [LNIND 2010 MAD 4297]

\(^9\) 2014 Indlaw CCI 34

\(^10\) The parliamentary committee that reviewed the 2006 amendment bill was well aware of this problem, and directed the government to make suitable amendments to the Consumer Protection Act.
It is to be noted that CCI’s analysis also went against *Rescuecom Corp. v. Google, Inc.*\(^{11}\) a factually similar case where it was held “regardless of whether Google’s use of Rescuecom’s mark in its internal search algorithm could constitute an actionable trademark use, Google’s recommendation and sale of Rescuecom’s mark to its advertising customers, are not internal uses” the court went a step further and established that the insulation the rejected logic(internal use) provides the defendants, may in the future present a possibility of corruption where every search engine may design trademark components in a way that would inflict much confusion upon the consumers. The courts due to the infinitely varying circumstances have come up with different tests like the 9th circuit’s eighth factor test\(^{12}\) set forth in *AMF Inc. vs. Sleekcraft Boats*\(^{13}\).

The European position as represented by *Interflora Inc v. Marks and Spencer*\(^{14}\) holds the view that keyword advertisement does not lead to copyright infringement on the other hand it can encourage healthy competition as the competitor’s product can gain a unique identity as an alternative. Infringement arises when a “well-reasoned and observant” internet user fails to distinguish between the source of the product and the origins of the product alleging infringement.

2. **Abuse of Dominance through Innovation**

The decision to favor exclusivity or limiting competition depends on the function (as in a graph) of what the nature of the information being protected is, the duration of its protection, who could be the infringer along with the nature of possible infringement\(^ {15}\). Similar rationale was seen in the controversial inclusion of “relative advantage, by way of the contribution to economic development” clause in the Competition Act, 2002 as a power bestowed upon the CCI which could be manipulated in the favor of large firms to justify blatantly anti-competitive practices in the name of development. The aforementioned clause also seems to draw inspiration from the view of Scandinavian scholars that is, to let right holders benefit from reasonable, rational use of their rights and any intervention should be warranted only after veritable legal scrutiny\(^ {16}\).

A welcome addition to the fairly new Competition act, 2002 is its deviation from “unfair trade practices” which distracted the MRTP commission\(^ {17}\). As seen in *Walker v. Time of Life Films*\(^ {18}\), unfair competition claims based solely in

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11 562 F.3d 123 (2d Cir. 2009)
12 (1) strength of the mark (2) proximity of the goods (3) similarity of the marks (4) evidence of actual confusion (5) marketing channels used (6) type of goods and the degree of care likely to be exercised by the purchaser (7) defendant’s intent in selecting the mark and (8) likelihood of expansion of the product lines
13 599 F.2d 341 (9th Cir. 1979)
14 C-323/09
17 Monopolies and Restrictive Trade Practices Commission was established under MRTP act, 1969. The Monopolies and Restrictive Trade Practices Act, 1969 (“the MRTP Act”) stands repealed and was replaced by the Competition Act, 2002, with effect from September 1, 2009.
18 615 F. Supp. 430 (S.D.N.Y. 1985)
copyright claims can be preempted, but unfair competition claims based on breach of confidentiality, breach of fiduciary duty or trade secrets cannot be preempted, and was upheld in Computer Associates International, Inc. v. Altai, Inc. a landmark judgment which enforced the three step method of abstraction, filtration and comparison to distinguish idea from expression in a computer software, which was considered a literary work despite its utilitarian effect, the decision made sure that necessity should render protection to any innovation docile. A similarly deceptive position plagued the CCI commission when they dealt with "unfair trade practices" in Toyota Kirloskar Motor Private Limited and others v Competition Commission of India and Ors. where the DG through investigations found the appellants to be in a dominant position regarding spare parts, COMPAT had previously established ancillarisation, network and vendor development to be a natural consequence of setting up an Automobile firm. The findings of the court led them to believe that the appellants through their conduct had an appreciable adverse effect on competition.

Democracy and market competition both aim to maximize public welfare. In the case of United Bands v. Commission The European position on “abuse of dominant position” was clarified, the commission held that a position that is enjoyed by a firm asserting dominance pro tanto it behaves in a way that is self-sufficient, independent of the competition and ultimately the consumer itself. The European commission upheld their stance when adjudicating the fairness of the Mc Dornell Douglas and Boeing merger where the merger was rejected in lieu of the facts that it posed certain anti-competitive effects contrary to the commission’s U.S counterpart. After intense restructuring however the same was approved. The Commission’s Decision of 24.03.2004 relating to a Proceeding under Article 82 of the EC Treaty found Microsoft in violation of Article 82 of the EC treaty where the tech giant was refusing to supply the Interoperability Information and allow its use for the purpose of developing and distributing work group server operating system products thereby having an adverse effect on competition.

3. Combatting Public Health Concerns by using Externalities to Regulate IPR

"The IP system cannot operate in isolation for broader public policy questions such as

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19 17 U.S.C. § 301
20 982 F.2d 693 (2d Cir. 1992)
21 On 09 December 2016, reported in 2014 Indlaw COMPAT 24
22 The Competition Appellate Tribunal's (COMPAT)
25 Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:
(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
how to meet human needs: basic health, food and clean environment”

Long before the modification of copyright to entertain IPR requests concerning technical advancements, firms big or small used to rely on the trade secret doctrine to protect the edge that their recipes granted them over the competitors. The nature of trade secrets has since accrued much deliberation, some legal scholars even comparing them to private property rights, in India the nature of trade secrets is prospectively enclosed in a legislation that has not yet been fleshed out “the National Innovation Act, 2008”. Secrets that would no longer remain so due to employee malfunction could then be protected through the doctrine of “Law of Confidence” as seen in Computer Associates International, Inc. v. Altai, Inc, but the need of the hour suggests that externalities should guide certain IPR affairs which directly affect competition (“adverse effect on competition”) or a domain of subjectively far greater relevance, public health.

Regulatory data protection seeks to provide firms of those pharmaceuticals which are required by law to undergo meticulous clinical and on field trials to ensure the efficacy and safety of their product, which can be considered an incentive to encourage further research.

The same firms after gaining market exclusivity aim to remunerate themselves through extravagant pricing, which the common man who is also in need of their product can rarely afford. On the other hand the lack of this exclusivity period could de-incentivize research and stifle innovation. The proposed solution could be government funding of clinical trials, as even relatively advanced countries have agreed to their being no fixed general rule to be applied to all IPR matters, tampering with current TRIPS qualified law could call for unprecedented problems in many sectors. The solution lies in externalities like competition law.

Para 6 of the DOHA declaration of 2001 which includes in its discourse a humanitarian policy which states that public health shall always supersede private interests guarded by patent protection when it comes to life threatening diseases, was met with the declaration of the TRIPS council in August of 2003 which resulted in the formation of a policy aimed to provide effective patent protected medicine to developing countries at affordable costs, but the lack of adequate technology required to effectively manufacture these patented medicines by the importing countries made this policy extremely cumbersome to implement, which indirectly resulted in a more docile form of patent picketing. The TRIPS council
meeting in 2009 saw member nation India making cogent arguments regarding the need of a practical, legal and operational policy to effectively implement provisions enclosed in para 6 of the DOHA declaration, due to India’s insufficient technical faculty to fully utilize the compulsory licensing system. A similar problem was faced by member nation Canada.

Non-working patents, or patents that are registered in a specific region which are not being worked locally; are a source of significant nuisance and stifle local development in particular and global development in general. These types of patents cloud a developing country in a non-permeable membrane which blocks dissemination of essential knowledge which in turn leads to a lack of advancement of the product being protected by the non-workable patent. Non-working patents have been historically considered an IP abuse, however in a global setting favoring free trade regulations the final word regarding abuse is heard by the agent of harmonization in a semi developed world, TRIPS, which is silent regarding the issue. This is where antitrust laws come in, when patents picket countries can make the products they are protecting a subject of compulsory license. Compulsory license regulations therefore could level the playing field as seen in the case of Bayer Corporation v. Union of India through The Secretary and Others. Nexavar, Bayer’s patented drug was not being worked locally and hence became a subject of India’s first compulsory license. Compulsory licensing is however an exception and should be used rarely or in a situation that warrants such reaction.

In a recent turn of events a slightly erroneous interpretation of ‘trade secrets’ in Prof. Dr. Claudio De Simone & Anr. Vs Actial Farmaceutica has hurt the fabric of patent law, it is common knowledge that when a patent expires the innovation being protected by the patent belongs in public domain, and no trade secret protection can be afforded. The court observed that ‘know how’ agreements and trade secrets cannot be equated to property in India. Different procedures of innovation are protected differently and many scholars consider trade secrets and patents to be complementary, as patents require a patent to fully disclose its innovation including the best mode, certain ways are therefore protected through trade secrets as seen in Wyleth v. Natural Biologics Inc, even after expiration of the patent of the patented drug, the manufacturing process of the drug was protected through trade secrets. The failure of disclosing the best mode of an innovation in its patent cannot render the trade secret (best mode) to be in public domain on expiration of the patent. This instance is testimony to the existence of a multifaceted system of rights, the sine qua non of which lies in balance.

4. Conclusion and Recommendations.

35 LNINDORD 2013 IPAB 93
37 17 March, 2020 IN THE HIGH COURT OF DELHI AT NEW DELHI
38 2003 U.S. Dist. WL 22282371
India as it currently stands is a developing country in a semi-developed world, and has enacted laws in accordance with harmonizing treaties like TRIPS. Bottlenecks are a common phenomenon, when some components of a working system are relatively underdeveloped (IPR) and hold it down hindering it from achieving its maximum potential; to alleviate this problem surrounding components (Competition laws, Antitrust laws) and the machine itself (judiciary) is upgraded rather than concentrating all efforts on the defaulting component as the aphorism "a rising tide lifts all boats" aptly suggests. In the field of IPR our judiciary often finds itself chasing new grounds, authorities like the CCI and foreign precedents level the playing field by lending their expertise to help strike a delicate balance between private incentive and public good and help achieve industry wide dynamic competition in a technologically advancing world. Interpreting IPR laws in isolation could lead to the formation of "a discredited intellectual property system which risks collapsing under its own weight".39

Recommendations include:
➢ An efficient framework which includes in its discourse outsourcing to more techno savvy firms for research, or the formation of an advisory board which can advise the DG on ongoing investigations.
➢ A comprehensive legislation regarding definitions of “trade secrets” which leaves relatively less on the discretion of a wide variety of courts.
➢ Government funding of clinical trials to help come midway with private firms for the sake of public good.
➢ Careful examination of alleged patent abuse cases, to prevent anti-competitive practices like over-protectionism and protect the competition in the market more than the competitors.
➢ To shed light on the complementary nature of trade secrets and patents, and the importance of their coexistence for big firms with the help of foreign precedents.
➢ Working on an international reference point for conventions and authorities to render their behavior amenable to the needs of the semi-developed world keeping in mind their shortcomings.
➢ Compulsory licensing to be used as a rarity which warrants the existence of exceptional circumstance, and to not let the legal device become an instrument of overuse and eventually malpractice.

IMBIBING FUNDAMENTAL DUTIES AMONG INDIAN CITIZENS

By Adrija Datta
From NMIMS Navi Mumbai

Abstract
The importance of fundamental duties could be felt in the tremors of the violent CAA protests in Delhi. As evident from the use of brute force and blatant violence in Delhi, there is a need to imbibe fundamental duties among Indian citizens. Rights and duties are considered to be two sides of the same coin. They are said to perform a balancing act in a democracy. However, the courts and Constitution of our country ascribe much importance to fundamental rights, but often do not do the same for fundamental duties. People also show a general tendency to forget duties and to remember their rights, this has resulted in an imbalance between rights and duties. In order to maintain a balance between rights and duties of citizens and contribute towards progress of the nation, one must remember their duties alongside their rights.

There is a need to remind and imbibe among citizens their fundamental duties. Considering the importance of fundamental duties and the lack thereof, this article traces the means available to us to imbibe Fundamental Duties among citizens.

Incorporation of fundamental duties in our Constitution

More than 50 countries in the world have a chapter on both Fundamental Duties and Fundamental Rights. These countries include Japan, Yugoslavia and Mongolia among others. For most of these countries, the idea behind having a chapter on both rights and duties was to safeguard against arbitrariness, exploitation and misuse of rights. They recognised that unbridled freedom can be a danger to the very freedom itself, they recognized their basic obligations and incorporated them as their duties into the Constitution.

Initially, the Indian Constitution did not have a chapter on fundamental duties. To our Constituent Assembly, the concept of duty or dharma was so deeply enshrined in the Indian society that they did not feel the need to incorporate a chapter on fundamental duties. Gandhi considered rights to be nothing but a well performed duty. Freedom fighters used to think their participation in the freedom struggle as a sacred duty towards the nation. Further, they felt that Fundamental Duties were spelt out by the Preamble to the Constitution which contains the ideals and aspirations of the people of India and the dedication of Constitution for fulfilling such ideals and aspirations. Lastly, since the true source of rights is duty, the Constituent Assembly considered that the rights enshrined in Part III on Fundamental Rights have inbuilt obligations therein.

But, in 1970s certain developments led the legislature to introduce a chapter on fundamental duties. In 1970, the Supreme

40 Chapter III, Constitution of Japan
42 Evolution of fundamental duties and their incorporation (March 4, 2020)
https://shodhganga.inflibnet.ac.in/bitstream/10603/45387/7/07 CHAPTER%201.pdf.

44 Supra 4.
Court recognised that citizens need to have duty in order to build a welfare state. The decade of 1970 saw India bloodened by protests. The protesters were taking advantage of fundamental rights enshrined in our Constitution existing in isolation from duties, crumbling the spirit of the nation in the process. This led H.R. Gokhale, the then Union Law Minister to comment that people were over-emphasising the Fundamental Rights available to them with “a zeal much more than that shown for fulfilling their fundamental obligations of respecting the established legal order.”

Around this time, people all over the world started recognising environmental degradation and global warming as a serious issue. In 1972, Indira Gandhi attended the United Nations Conference on Human Environment and Development at Stockholm. In that conference the following two resolutions were passed which are known as the Magna Carta of our environmental law:

(a) Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and well-being; and
(b) Man bears a solemn responsibility to protect and improve the environment for present and future generations.

In 1976, these developments led the Congress Party to appoint the Swaran Singh Committee to review the Constitution. The Committee, among its recommendations said that certain Fundamental Duties and obligations which every citizen owed the nation should be included in the Constitution. In 1976, the Parliament accepted the recommendations and in the same year, a chapter of fundamental duties under Article 51 A was introduced in our Constitution. Originally, there were 10 fundamental duties. The fundamental duties were increased to eleven by the 86th Amendment in 2002, which added a duty on every parent or guardian to ensure that their child or ward was provided opportunities for education between the ages of six and fourteen years.

Importance of fundamental duties

The riots of 1970s and other violent instances that have taken place in India demonstrate how fundamental duties is a means towards responsible citizenry. A 2009 report claimed that the lack of awareness about fundamental duties posed a major barrier to good governance in the country. No democratic polity can ever succeed where the citizens are concerned only about their rights and are not willing to be active participants in the process of governance by assuming responsibilities, discharging citizenship duties and coming forward to give their best to the country.

The importance of fundamental rights was beautifully summed up Justice A.V. Chandrasekhar (citation), who opined:

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48 42nd Amendment Act, 1976.
49 86th Amendment Act, 2002.
51 Supra 6.
52 Justice A.V. Chandrashekar, Fundamental Duties-Need to Effectively Propagate them, KARNATAKA JUDICIAL ACADEMY https://kjabl.kar.nic.in/sites/kjablr.kar.nic.in/files/05.%20Fundamental%20Duties.pdf.
Man does not live for himself alone. He lives for the good of others as well as of himself. It is this knowledge of what is right and what is wrong that makes a man responsible to himself and to the society and this knowledge is inculcated by imbibing and clearly understanding one’s citizenship duties. The fundamental duties are the foundations of human dignity and national character. If every citizen performs his duties irrespective of considerations of caste, creed, colour and language, most of the malaise of the present-day polity could be contained, if not eradicated, and the society as a whole will be uplifted.

Fundamental duties are important because nation is what the citizens are. If the citizens of a nation do not work for the progress of their nation then that nation cannot progress. The entire responsibility rests upon the citizens to take their nation to new heights. In India, sovereignty lies in the hands of citizens of India. It is the citizens' responsibility to take upon their shoulders the task of seeing that order, justice and freedom are maintained. The inclusion of fundamental duties in our constitution did not guarantee people following it. Unlike, fundamental rights, there is no constitutional remedy for breach of fundamental duties. However, there are other means available for the effectuation of fundamental duties.

**Legislative action**

At the time of introduction of fundamental duties, many along with the Swaran Singh Committee itself suggested sanctions. The government did not favour sanctions because the fundamental duties were worded in very general words. Further, Indira Gandhi opposed the enforcement of fundamental duties. According to her, “If people only kept the Fundamental Duties in their mind, we will soon have a peaceful and friendly revolution”. But there are other laws which accord for few of the fundamental duties. In 1999, the Justice Verma Committee Report recognised the fundamental duties are protected through statutes. According to their report, some fundamental duties are protected by statutes (Article 51-A(c),(e) & (g)), while some are merely declaratory(Article 51-A(b),(d),(f),(h) & (j)).

More recently, a book released by Haryana State Legal Services Authority, identifies the following legal statutes that enforce fundamental duties on citizens:

<table>
<thead>
<tr>
<th>Article 51A</th>
<th>Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>to abide by the constitution and respect its ideals and institutions, the national flag and the national anthem</td>
</tr>
<tr>
<td>c</td>
<td>to uphold and protect the sovereignty, unity and integrity of India</td>
</tr>
<tr>
<td>e</td>
<td>to promote harmony and</td>
</tr>
</tbody>
</table>


54 Government of India, Deficiencies Observed During the Working of Constitution In General
56 Supra 14.
<table>
<thead>
<tr>
<th>The spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women</th>
<th>Multiple acts for eradicating discrimination towards women</th>
</tr>
</thead>
<tbody>
<tr>
<td>g to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures</td>
<td>Multiple acts</td>
</tr>
<tr>
<td>i to safeguard public property and to abjure violence</td>
<td>Prevention of Damage to the Public Property Act, 1984</td>
</tr>
<tr>
<td>k to provide opportunities for education by the parent or the guardian, to ms child, or a</td>
<td>Right of Children to Free and Compulsory Education (RTE) Act 2009</td>
</tr>
</tbody>
</table>

The 1999, the Justice Verma Committee Report suggested that there is a need for adopting curative measures for inculcating duties instead directly adopting coercive measures except in exceptional cases squarely and clearly satisfying the components of offence.\(^{57}\) The committee asserted the need to set up an autonomous body to act like ombudsman on Citizenship Values which could create a mechanism to act as catalyst towards overseeing operationalization of Fundamental Duties. In 2017, Supreme Court rejected a PIL to implement fundamental duties. In the opinion of the court, the legislature was better equipped to enforce fundamental duties than the courts.\(^{58}\)

In 2002 National Commission To Review The Working Of The Constitution suggested the following measures to enforce fundamental duties.\(^{59}\)

- Article 51(A) should be shifted to Part II of Constitution which deals with constitution.
- Can be added as a compendium as fundamental rights

This committee also recognised that a comprehensive legislation is needed for clauses (a), (c), (e), (g) and (i). The remaining 5 clauses, which are exhortation of basic human values, have to be developed amongst citizens through the education system by creating proper and graded curricular input from primary level of education to the higher and professional levels.\(^{60}\)

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\(^{59}\) Supra 4.

\(^{60}\) Supra 4.
“There can be laws which imposes an obligation on an individual or authority even though it may not be enforceable. The obligation exists prior to and independent of the mechanism of enforcement.”

Thus, it is evident that the Committees have favoured the enforcement of Fundamental Duties. However, there has been little developments in enforcement of fundamental duties. The government has widely considered Fundamental duties to be guiding principles than principles that need to be enforced.

**Judicial interpration**

The Judiciary has viewed Fundamental Duties in two ways: Fundamental duty as the duty of the state and its employees and as a means of interpretation of fundamental rights. Though this is not a general trend, in some cases, the Supreme Court has viewed fundamental duties and fundamental rights complementary to each other and considered Fundamental duties to be equally important as fundamental rights.

**Fundamental duty as a duty of the State and its employees**

While Article 51 does not expressly cast any fundamental duty on the State, the Apex court considers that the duty of every citizen of India is the collective duty of the State. In L. K. Koolwal v. State of Rajasthan, the Rajasthan Government opined:

“We can call Article 51A ordinarily as the duty of the citizens. But in fact, it is the right of the citizens as it creates the right in favour of citizens to move to the Court to see that the State performs its duties faithfully and the obligatory and primary duties are performed in accordance with the law of the land. Article 51-A gives a right to the citizens to move the Court for the enforcement of the duty cast on State instrumentalities, agencies, departments, local bodies and statutory authorities created under the peculiar law of the State.”

In Mohan Kumar Singhania & Ors. Vs. Union of India & Ors., officers in All-India Services were not taking the training seriously resulting in deterioration of the services. Service Rules were amended so as to give weightage to the training and penalize the failure. On a challenge being laid to the constitutionality of the amendment in the rules. The courts referred to article 51A which commands every citizen of India to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. It was held that the effort taken by the Government in giving utmost importance to the training programme of the selectees so that this higher civil service being the topmost service of the country is not wasted and does not become fruitless during the training period is in consonance with the provisions of article 51A (j).

Similarly, in State of U.P. Vs. Yamuna Shanker Misra & Anr., the object of writing the confidential reports and making entries in the character rolls were read in the light of article 51(j) as giving an opportunity to a public servant to improve excellence.

In State of Punjab & Ors. Vs. G.S. Gill and Anr., (1997) 6 SCC 129, kindling the spirit of clauses (e) and (j) of article 51A and the Directive Principle contained in article 38...
(1), the court reminded the administrators of the government that they too are primarily the citizens and, therefore, their vision should be of national interest. Fundamental Duties oblige the administrators of the government to be good administrators. While these judgements give a higher onus of responsibility to government servants, these responsibilities won’t be fulfilled until citizens are aware about the duties of the government servants.

Fundamental duties as a means for interpretation
The Supreme Court has time and again used fundamental duties as a means of interpretation. According to the Supreme Court, rights and duties are not to be read in isolation. Rights have to be read in relation to fundamental duties. There has to be a balance and proportionality between the right and restriction on the one hand, and the right and duty, on the other. It will create an imbalance, if undue or disproportionate emphasis is placed upon the right of a citizen without considering the significance of the duty. The true source of right is duty. When the courts are called upon to examine the reasonableness of a legislative restriction on exercise of a freedom, the fundamental duties enunciated under Article 51-A are of relevant consideration. A common thread runs through Parts III, IV and IV-A of the Constitution of India. While interpreting any of these provisions, it shall always be advisable to examine the scope and impact of such interpretation on all the three constitutional aspects emerging from these Parts. The courts have also been empowered to uphold the constitutionality of a statute, the object of which is in consonance with a provision in Article 51A of the Constitution.

In State of Gujarat v. Mirzapur Supreme Court held: “It is thus clear that faced with the question of testing the constitutional validity of any statutory provision or an executive act, or for testing the reasonableness of any restriction cast by law on the exercise of any fundamental right by way of regulation, control or prohibition, the directive principles of State policy and fundamental duties as enshrined in Article 51-A of the Constitution play a significant role.” By looking at issues through the lenses of Fundamental duties, the Supreme Court enforces the fundamental duties. For example, in 2012, the Supreme Court held that the right to education places a burden not only on the State, but also on the parent/guardian of every child because, children won’t receive access to education solely with the support of the State.

Article 51-g
As mentioned above, Supreme Court often employs fundamental duties as a means to interpret laws. One fundamental duty frequently used by the Supreme Court is Article 51-g which imposes upon citizens the duty to (insert 51 (g) whenever a problem of ecology is brought before the court, the court is bound to bear in mind article 48A of the Constitution and article 51A (g).


69 In re Ramlila Maidan Incident, (2012) 5 SCC 123.  

72 (2005) 8 SCC 534.  
73 Society for Un-Aided Private Schools of Rajasthan vs. U.O.I & Another, (2012) 6 SCC.  
“Preservation of the environment and keeping the ecological balance unaffected is task which not only governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his Fundamental Duty as enshrined in Article 51A (g) of the Constitution.” In Rural Litigation and Entitlement Kendra & Ors. Vs. A State of Uttar Pradesh & Ors., (1986) Supp. SCC 517, Ranganath Misra, J. held.

“preservation of the environment and keeping the ecological balance unaffected is task which not only governments but also every citizen must undertake. It is a social obligation and let us remind every Indian citizen that it is his Fundamental Duty as enshrined in Article 51A (g) of the Constitution.”

Similarly, in RLEK Dehradun V. The Court assigned paramount significance to Fundamental Duties, placing the Fundamental Duties owing to people at large above the Fundamental Right of a few individuals. The Court held that such closure of limestone mines would undoubtedly cause hardship, “but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimum disturbance of ecological balance and without avoidable hazard to them and to their cattle, homes and agricultural land and undue affectation of air, water and environment”.

In Vellore Citizens’ Welfare Forum Vs. Union of India75 and Bandkhal and Surajkund Lakes matter76 the Supreme Court recognized ‘The Precautionary Principle’ and the ‘The Polluter pays’ principle as essential features of ‘Sustainable Development’ and part of the environment law of the country. Article 21, Directive Principles and Fundamental Duty clause (g) of article 51A were relied on by the Supreme Court for spelling out a clear mandate to the State to protect and improve the environment and to safeguard the forests and wild life of the country.

**Awareness programs**

In recent times, the government has turned its attention towards awareness programs to ensure effectuation of Fundamental Duties. Among the many objectives of the Verma Committee, they were also tasked “to work out a strategy as well as methodology of operationalizing a countrywide programme for teaching fundamental Duties in every educational institution as a measure of in-service training”. The Committee further suggested celebrating 3rd January every year as our Fundamental Duties Day. The National Commission for the Review of Constitution suggested sensitising people and to create a general awareness of the provisions of fundamental duties amongst the citizens on the lines recommended by the Justice Verma Committee on the subject.

Even the courts in India have constantly iterated the need to create awareness about fundamental duties. In 1988, Supreme Court directed all educational institutions throughout India to give weekly lessons in the first ten classes, relating to protection and improvement of the national environment including forests, lakes, rivers and wildlife.78 This was done in pursuance of Article 51-A(g). Justice Ranganath Mishra once addressed a letter to the Government of India. The letter read as79:

“As a nation-building measure, teaching Fundamental Duties in every educational

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75 (1996) 5 SCC 647.
77 Supra 17.
78 MC Mehta V. UOI, 1987 SCR (1) 819
79 Supra 4.
institution and as a measure of inservice training everywhere, was necessary as these cannot be inculcated in our citizens unless these are brought into their minds and living process through teaching and education.”

He further stated that it is the obligation of the State to educate the citizens in the matter of Fundamental Duties so that a right balance between Rights and Duties may emerge.

In 2016, the Karnataka High Court had also mentioned the need to remind people about their fundamental duties. According to the Court, “A study shows that even highly educated citizens do not appear to be aware of the fundamental duties appearing in part IV-A of the Constitution. A systematic effort should be made to spread awareness on the fundamental duties which would educate the citizens to effectively discharge the duties and actively involve them in the nation-building exercises. At all levels, effort should be made to generate awareness of fundamental duties and the importance of discharging the fundamental duties to enable citizens to practice the citizenship values.”

Recent developments

Recently, the need to create awareness about fundamental duties has gained momentum. As a part of 70th Independence Day celebrations, the law ministry undertook a massive outreach plan to educate people about their fundamental duties. Under the scheme, the Bar Council was engaged law students to give presentations in the neighbouring schools.

The views on fundamental duties of seventy eminent personality from each state was recorded and circulated across social media platforms with a view to create awareness on Fundamental Duties. Similarly, on the occasion of 50th anniversary of Constitution Day, 2019, Vice President Venkaiah Naidu suggested a three point action plan including introduction of Fundamental Duties at an appropriate level in the curriculum, displaying the duties at all the educational institutions, offices and public spaces across the country and reaching out to the youth through appropriate campaigns. In January, 2020, the Centre announced a year-long plan for the raising awareness on Fundamental Duties.

Conclusion

“Begin with duties of a man and rights will follow as spring follows winter”
Gandhi

The chapter on Fundamental Duties was introduced to ensure that people don’t misuse their Fundamental Rights. But the lack of effectuation has failed Fundamental Duties in what it set out sought to achieve. There are several limitations on Fundamental Duties being enforced through laws. Even the Supreme Court has widely considered Fundamental Duties to be something individual and not public. In light of above, raising awareness remains the only plausible option, and is being explored extensively in current times.

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ABORTION SYSTEM: AN INHERENT RIGHT OF WOMEN AND NEED FOR REFORMS

By Akriti Sonwani and Sasweta Mohapatra
From NLIU, Bhopal

INTRODUCTION

The laws related to abortions has emerged an issue in the today’s Indian society with the statistics showing an increase in the rate of maternal death in India as the legislation regulating the abortions policies are unworthy to curve the situation are much based on the old school of thoughts not recognizing the human rights of women, right to choice or fundamental rights under the constitution. In our democratic journey, the country has realized and recognized the idea of human and individual rights which has led a remarkable change in the social structure of India such as homosexual rights, striking down of adultery rule which considered women as property of the husband, Sabrimala case, yet there has to be much need of change considering women rights and abortion system is one such issue. There are many issues related to abortions, such as illiteracy, unawareness, stringent laws and many more but the paper discusses the present issues taking the laws or statute related to abortion into consideration and the impact over women at large, were the focus is on constitutional aspects of the laws and the violation of the rights of women autonomy to her body, taking in the note the international and regional treaties and convention, case-law of international courts and the constitution of India itself.

ABORTION SYSTEM ACROSS THE WORLD

The right of abortion is a concept which has still not come into the picture, major practice in countries shows abortion as not a right but some legal allowance to women in certain cases such as rape, mental, physical challenge to women or foetus or in case of contraceptive failures, there are countries with least in numbers that give rights to women on grounds of choice that is on request or in case of economic crises, about two-thirds of countries accepts abortion when the physical or mental health of the mother was endangered, and only in half of the countries when the pregnancy resulted from rape or incest or in cases of foetal impairment and only about one third of countries permitted abortion for economic or social reasons or on request. According to reports by United Nation’s and other such organizations the world prospect to abortion is not pleasing, almost all states still have not recognized abortion to be necessary in certain conditions that is a mental and physical health issue to mother or child, but states still have not recognized it as a right of women, developing countries are high in number with not considering abortion as right to choice of women despite the fact that they have already accepted such rights in the international forum under relevant conventions, the UN report 2015 states, average unsafe abortion rate was more than four times greater in countries with restrictive abortion policies in 2011 (26.7 unsafe abortions per 1,000 women aged 15 to 44 years) than in countries with liberal abortion policies (6.1 unsafe abortions per 1,000 women aged 15 to 44 years). The document published by OHCHR, shows the statistics of an annual rate of 22 million unsafe abortions, causing 47,000 death in a year, resulting violation of their human rights to life, health, privacy and reproductive rights, restrictive rights to women legally and morally too, lack of health care and facilities to women are major reasons for such conditions.
INDIA ON ABORTION SYSTEM
In India, the legalization of abortion is among 2/3 of the countries, which legalized abortion on the ground of risk to child or mother, in cases of sexual assault, mental and physical harm to mother and failure of contraception only in cases of married women but not on the request of the women or socio-economic causes, the studies conducted in relation shows that the country faces huge cases of unsafe abortion not done by medication but different methods due to restrictive laws followed, the Nuffield Department of Population Health deals with abortions system in India claims, there were 89,447 abortions among 1,876,462 pregnant women in 2007-2011 (4.8%; 95% CI 4.8 to 4.9). Of these, 58,266 were classified as unsafe (67.1%; 95% CI 66.7 to 67.5). There were 253 abortion-related maternal deaths (0.3%; 95% CI 0.2 to 0.3)iii; yet another report of Indian Journal of Medical Ethics said 10-13 percent of maternal deaths in India are due to unsafe abortions, the major reason being a restriction on abortion after 20 weeks and women being using alternative unsafe local methods to terminate their pregnancies. There are many problems which cause death due to unsafe or refusal of abortion or mental trauma, the lack of awareness, illiteracy, stringent and weak backing of law for the right of abortion and failure in facilities are the major issues where country lack.

IMPACT ON THE WOMEN
The reports on abortion in the world indicates that the women in the world are not safe in legal as well in social terms as the laws, social norms, restrictive legal rights and protection, adoption of weak administrative policies are the major issues responsible for such situation of abortion system, major religious norm does not allow women to terminate even if in a worse situation, the legal policies adopted by legislators does not protect women and compel women to adopt unwarranted methods which are the major cause of death, the lack of proper functioning of administrative bodies have also been the reasons, countries have also not adhered to the guidelines provided by the WHO.

Who suffers the most?: Women aged 15-19
Adolescents or women of minor age of 15 – 19 are the most affected class, the social practice unawareness and non-medical methods of giving birth and abortion of child are being the huge reasons, adolescent pregnancy is the most concerning issue, the underdeveloped mentally and physique of the minor women leads to death of the child and most of the times women too, the WHO document ‘Adolescent Pregnancy’ shows almost three millions of 15-19 going unsafe abortion from poor class or middle-class family, the underdeveloped countries showing the high ratio where less educated or rural areas are most affected, the social practice of child marriage has stimulated the process at a high rate, the study published in ‘The Lancet’ shows clear proves to claim child marriage one big of adolescence pregnancy “Nguyen and colleagues analyzed data on 60,096 primiparous women aged 15–49 years who gave birth between 2010–16 from the fourth National Family Health Survey (NFHS-4) 2015–16. 26-8% of girls (17.5% in urban and 31.5% in rural areas) were married before 18 years of age in 2015–16, and the states of Bihar (42.5%), West Bengal (41.6%), Jharkhand (37.9%), and Uttar Pradesh (21.1%) reported high prevalence of child marriage Early marriage of girls infringes on their social and health rights and, as gender researchers have shown, often leads to school dropout,
fewer livelihood options, lower bargaining power within households concerning their autonomy or say in family planning, social isolation, and domestic violence.

ABORTION LAWS IN INDIA

Medical Termination of Pregnancy Act, 1972

The MTP Act is the major act which regulates the abortion mechanism in India, it legalizes the in a certain situation, the major problem is the law though legalizes abortion in India but it totally refuses the right of women over her body and her reproductive rights, pushing the person to unsafe and expensive abortions, affordable by only some people resulting other non-medicinal and insecure methods causing maternity death on high ratio, the studies done on abortion system clearly proves the fact of unworthy legislation one of the issues, a study done by the ‘Abortion Assessment Project’ concluded that the 56% of abortions are unsafe in India, it also violates the fundamental and human rights of the women in India.

1. The constitutional aspect of MTP,1972

The constitution as in Indian history has played a huge role in governing rights of the individuals, India being a society where institutions are based on community rights, the constitution comes in the picture where it comes on the individual right of a person, the law concern also having the same effect violates the individual rights of women such as,

1.1. Article 14, Right to Equality

Maneka Gandhi v. UOI idea of ‘intangible differentia’ that is, reasonable classification was explained, where it was confirmed classification made in legislation should meet the reasonability test, that it should not be arbitrary and cause some infringements to the fundamental right of the individual, the class created in the act of married and unmarried women does not stand the reasonability test, it violates the right of unmarried women of equality excluding them from the right of abortion under section 3(2), explanation 2 which does not provide right to unmarried women discriminating them and violating the rights guaranteed by the constitution.

1.2. Article 21, Right to Life and Personal Liberty

In K.S. Puttaswamy v. UOI, the supreme court explicitly held that the privacy is the fundamental right under the article 21 of the constitution which confirms autonomy, dignity the important aspects of privacy, integrated all together, the act also violates this right of the women as it does not gives choice to women in India to abortion, which interfere their autonomy on their body and health as well. In, State of Punjab v. M.S. Chawla, it was held that the right to health is the fundamental right under article 21, but the act also violates it as it does not confer right of abortion under section 3 to unmarried women who also suffer from mental illness due to unwanted pregnancy which risk their mental status. Anil Kumar Sharma v. Dr. Mangla Dogra, the Supreme Court refused to interfere in a decision of the Punjab and Haryana High Court which had held that a husband is not entitled to damages from his wife or her doctor on account of the wife’s decision to terminate a pregnancy without his consent.

2. The Threshold of 20 weeks and after intervention of courts

The scope and evolution in technology have led a new dimension in abortion system, as the practitioners are well able to terminate the pregnancy even at the stage of 24 weeks, but India not recognizing such
advancement has kept the barrier of 20 weeks causing issues to minor and later stage difficulties in pregnancy to adult women, the fact that the minor not having developed body shows the sign of pregnancy late, crossing the limit of 20 weeks, the intervention of the court, that is to seek court’s permission to abort after 20 weeks creates a huge issue as court generally rejects that bound by the law under MTP Act, the long going and stringent procedures of the court is also a huge drawback even when the plea is filed before 20 weeks, India has an almost 40% situation under this causing complexity in physical and mental conditions.

3. The Indian Penal Code, does it criminalize abortion?

It’s always been a misconception by the medical practitioners with laws under IPC, 1860 that it criminalizes the abortion totally, however it is to be noted that the section 312 and 315 makes an exception of good faith, section 313 provides the exception of the consent of women, the law provide miscarriage as an offence only if done in malafide intentions to cause death to child or mother, it does not make a crime per se the intention or purpose remains to protect women or child but not to avoid abortion with consent of women or guardians, moreover the MTP itself creates an exception under section 3 clause 1 that any act done under the act does not affect the offences under IPC.

INTERNATIONAL AND REGIONAL CONVENTIONS

The international and regional conventions such as ICCPR, CEDAW and UDHR, to which India is signatory, has laid down the foundations for the courts in India, especially in matters of rights such as fundamental and individual rights to be recognized by the state in their domestic laws, the conventions define the rights of women in relation to their reproductive rights and about the privacy and autonomy towards life and physical state too.

1. Universal Declaration of Human Rights (UDHR), Article 19, ‘all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.’

2. Article 14 Health and Reproductive Rights (MAPUTO PROTOCOL)

States Parties shall ensure that the right to health of health of women, including sexual and reproductive and promoted,

This includes,

The right to their fertility;
The right to decide whether to have children, the number of children and the spacing of children;

3. International covenant on civil and political rights (ICCPR)

The human rights committee held that the access of abortion is the right of every women and restriction to this causes the violation of her right to privacy and autonomy over her reproductive right, where the violation of article 17 of ICCPR convention was confirmed

4. Convention on Elimination of all forms of Discrimination against Women (CEDAW)

Article 12 of the convention provides for the protection and safeguards to women in terms of pregnancy, granting free services to them, which also includes the right to access free abortion.

The policies under these conventions binds the country to adopt through their policies and laws, however, the court has found a way to impose such duty on government but
the policies laid always lack the adherence to such conventions which should be followed accordingly.

SOLUTIONS NEED TO BE ADOPTED

1. Proper Legislations and Policies

1.1. The MTP act being the most relevant and regulating act should be reformed, abortion by request and on economic crises should be brought with some limits confirming right of privacy, right of choice, right to health of women, proper policies and laws need to be drafted for administration abortion across the country and should be in consistent to the WHO guidelines as much as possible for the government.

1.2. The POCSO Act, the Center of Reproductive rights, India, suggests to amend section 19(1), ensure that pregnant adolescents can access abortion without risking their confidentiality being violated by mandatory reporting requirements stands out valid as it takes a lot of time sometimes crossing the threshold of 20 weeks and should be amended.

1.3. Reforms in Prohibition of Child Marriage Act, the act though prohibits child marriage but with certain exceptions, that marriage is sustainable with the consent of child or guardian, which rapture the purpose, the reason of being child marriage conducted are because it is mostly done by guardians due to social norms and other reasons that is poverty and other

2. Lack of public awareness, reforms, education and family planning

The lack of public awareness and illiteracy is one of the biggest cause for such situation in the country, better family planning and awareness at small scale levels such as panchayats and ‘Aganbaadi’ should be performed. Access to free counseling to people should be given regarding the pregnancy as essential functions of these institutes.

3. Medical management and administration

The Guidelines provided by the WHO in relations to pre-abortion, abortion and post-abortion should be followed in a wide sense, in India there has been a great initiative and awareness program performed in terms of girls education, child discrimination, but abortion or pregnancy has remained untouched, the need to study done by medical professionals and awareness program by them is must in their study course.

CONCLUSION

The study and research done on the abortion system considering laws and policies adopted in Indian context present the state of country as high need reforms and transformation in relation to not only policies but administration, it is found that the ratio of maternal death in India is less a compared to other developing nations but is still high as 56% of women are affected, the main reasons are the lack of awareness, medical support, societal norms depriving rights of women to terminate pregnancy but weak laws is the fact need to be taken care of, the MTP Act, abortion regulating act does not stands with the human rights or even fundamental rights of women of right of equality it does not provide right to unmarried women and right to healthy life, right to privacy or autonomy to their reproductive rights recognized under constitution of India and other international laws to which India is party, intervention of court has also become a huge drawbacks to most cases as the court itself does not consider the right of abortion as human right or choice but are bound by laws of MTP Act, adolescence pregnancy is another main reason for death of women beside unsafe and alternate methods of abortion by people as 30% of women are
minor and die due to inability to bear child due to underdeveloped body or need consent of husband or guardians to terminate pregnancy but are not given due to stereotypes or social understanding of abortion as sins in many religions. The solutions with all these all starts with a strong and practical law and policies striking all the old thought violating human rights of women, providing better schemes on abortion rights, addressing issues related and awareness programs.

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MULTI-FACETED IMPACT OF EPIDEMICS ON HUMAN RIGHTS

By Ameya Thachappilly, Anusha Mohapatra, Nandini Jiva, Surabhi Srinivasan and Winnie Mathew
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RESEARCH QUESTIONS
1. How does the government as natural leader, in times of a crisis, operate to keep the nation afloat?
2. Whether public health emergencies override an individual’s right to privacy?
3. Whether media is infringing people’s rights and privacy?
4. Whether the steps taken by the legislature and the government with regards to media and privacy are in the right direction?
5. How interrelated are human rights and pandemics and how is India’s response to the Covid-19 with regards to Human Rights?
6. Whether the international mechanisms to deal with pandemics are adequate?
7. Whether the international community’s response to the COVID-19 outbreak has been proportional and effective.

LITERATURE REVIEW
For this research, extensive reading of several articles and reports was done which laid the base for the hypothesis of this research, as the methodology used was a Non-doctrinal one, the articles that ranged from the journals of communication and management to the Cambridge quarterly healthcare ethics, as it was quintessential to cover all aspects, most importantly the timely reports by the WHO and the United Nations. People may perceive privacy to be a static concept, yet it is seen to differ from time to time, culture to culture, society to society, as seen in Adrienn Lucas’s article on Privacy. Yet, Durga Das Basu talks about the dimension of privacy as a legal right in the Constitution of India, in his book, Introduction to the Constitution of India, 1950. Since the interpretation of privacy as a legal right in countries like India gives us an idea as to what extent can we claim it as our legal right the Constitution of India, 1950 gives us an insight into the same. This understanding is then coupled by an understanding of how much Personal Data exposure, is considered invasive, as scrutinized in Surith Parthasarathy’s article, Privacy in a Public Health Crisis.

All the articles, reports and commentaries have aided the research for this paper.

ABSTRACT
A pandemic like COVID-19 comes with a set of challenges like no other. In a prolonged scenario of blatant chaos, misery, scarcity and unfamiliarity, it all comes down to appropriate response and measures taken to stop mankind and the economy from falling to destruction. This paper sheds light on various aspects affected by a pandemic like no other where the resilience of the government is tested to prevent the collapse of a nation. The issue of privacy during a pandemic is dealt with, with regards to the line between public and private good. The importance of media and its role in challenging times is addressed along with several other aspects like information reliability, and spreading awareness when the nation ceases activities and operations. Besides this, the upholding of human rights when nations are probed by a challenging pandemic is thoroughly discussed. In addition to this, the response and effectiveness of the international community, backed by the support of organizations like the WHO is addressed, along a discussion on the loopholes that exist in the pandemic response system. All in all, this paper is a thorough discussion on the multifaceted impact of fusion of pandemics on nations, governments, economies, fundamental human rights and mankind.

Keywords: pandemic, COVID-19, human rights, government, international.

CHAPTER I: ADMINISTRATIVE RESPONSIBILITIES

We are all living in a time like never before where a global pandemic is testing the abilities and resilience of mankind. For public health administrators and national governments all over the world, their manner and measures for handling this novel crisis will not only prove critical for their legacy but also for damage control in many aspects. Irrespective of what stage a nation is on the global level, it is clear that the pandemic preparedness and readiness of each administrative state will ultimately determine how the pandemic was dealt with, how it was curtailed and how the possible deaths of thousands was prevented. The government’s role and duty as the protector of its citizens makes them responsible for how they react and deal with the ongoing pandemic crisis at every stage.

When the first case of COVID-19 was reported in Wuhan, China in late 2019, no nation’s government, public administration bodies or healthcare systems predicted devastation of this scale. It was a studied prediction that the next big thing that would result in the death of thousands around the world wouldn’t be a world war but a disease. No nation is prepared to sustain its health as well as its economy without damage. What ultimately matters is the amount of damage control, curtailing of the spread of the disease and the consequent deaths, owing to the measures of the administrative state. On the advice and protocols issued by doctor, virologists and health organizations, national governments have called for lockdowns on economic and social activities involving travel and physical interaction to curb the spread of the disease. Personal hygiene, cleanliness, taking adequate precautions like wearing a mask, avoiding touching the face, and implementing social distancing are few of
the common measures adopted by governments and people all around the world. The safety and good health of the citizens is of paramount importance. However, the government and administrative bodies being responsible for the overall functioning of a nation cannot ignore other factors and aspects being affected because of this disastrous pandemic. The abilities of the limited healthcare systems to meet the challenges posed by this pandemic, the economic status of the nation, the livelihood of millions of daily wage workers, labourers, pensioners and other sectors of the society, the functioning and survival of businesses, supply of essentials, production and supply of medical supplies and machinery for doctors and medical staff are few of the many responsibilities of the national government as the natural leader of a nation in a time of crisis. The ability of a government to assure its citizens of these abovementioned needs and further essentials is what ultimately determines its pandemic readiness and preparedness.

The Indian government like many others has implemented certain measures to curtail the pandemic and mitigate its devastating consequences and effects. As natural leader of the nation, it is the government’s responsibility to enact policies and legislations to optimize pandemic preparedness, technical support and capacity development across all sectors.\(^8^4\) It is the government’s duty to ensure responsibility and sincere efforts on the part of the citizens by ensuring they act as per the guidelines given by organizations like the WHO in order to curtail the spread of the virus. Circulation of correct, bias free information, providing support and assistance to healthcare workers and doctors, ensuring that the pandemic fear doesn’t give way to acts of racism or other acts of hatred or politics, etc., are all issues that require the government, especially in a country like India, ought to control and monitor. Since various organizations and institutes are still working towards making a vaccine that ensures immunity from this disease, it is the duty and responsibility of the government and the citizens to work together in cooperation to help buy more time for all those in the front lines of this fight against the pandemic.

At the moment, the number of confirmed coronavirus cases worldwide is above to 1,900,000. Even the best healthcare systems in the world aren’t equipped to meet the worst this virus. Countries like Italy, Spain and the USA are where the disease has hit with particular cruelty, with several European countries witnessing a surge in the number of cases. The unprecedented and ongoing nature of this virus has created panic even amongst the most well-equipped and capable nations. Social media and networks are flooded with stories, suggestions, precautions and news from all over the world, regarding what each nation is experiencing as a combined result of the pandemic and their government’s response and measures adopted to tackle the consequent havoc.

Announcing nation-wide lockdowns, restricting travel, advising companies and organizations to ask employees to work from home, shutting down of schools, colleges, public areas, religious assemblies and other recreational areas has helped control the spread of the virus and buy the

https://apps.who.int/iris/handle/10665/44123

www.supremoamicus.org
science and medical community more time to find a suitable vaccine. Community spread, lack and unavailability of test kits and shortage of ventilators are some of the grave concerns the governments all around the world need to address in order for the healthcare staff to treat the infected and prepare for the worst. The importance of knowledge and awareness about the virus and its spread is as crucial a weapon as any vaccine. For example, Iran, with more than 50,000 confirmed cases and more than 3,100 deaths is suspected of having under-reported and delayed the revelation of the spread of coronavirus in their country.\(^{85}\)

This form of irresponsible behaviour on the part of a government is deplorable when the fate of mankind is at test. An administrative state that curtails its role and investment in public health, preparedness for an environmental crisis and is misinforming or is not being transparent to its citizens of an existing crisis\(^{86}\) is paving way for its own downfall and that of its citizens.

**CHAPTER II: CONSTITUTIONAL QUESTION OF PRIVACY IN THE PANDEMIC**

**PRIVACY AS A CONCEPT**

Privacy in its most basic sense, is “the right to be let alone”. Although it is widely acknowledged and in stricter sense, is an evolving concept and not static in nature, it has come to be a fundamental human right in developed societies. Legal systems ensure the protection of this very right, yet there is no common consensus on what the true meaning or privacy is, and what herein, is sought to be protected. Most of these definitions that were inevitably derived upon, highlighted just an aspect or element of the broad concept of Privacy. What is to be considered as private has differed with eras, societies and individuals.\(^{87}\)

**CONSTITUTIONAL NOTION OF PRIVACY**

The right of privacy is derived from Article 21 of the Constitution of India.\(^{88}\) Since the Constitution of India, has no elaborate guidelines for ensuring Privacy, its evolvement and understanding stems from a multitude of cases in the courts of law. The Law also propounds that this very right can be restricted by procedure established by law provided the reasoning behind it is just, fair and reasonable.\(^{89}\) Constitutionally, there is also an interplay of Article 19(2) of the Constitution.\(^{90}\) This clause imposes reasonable restrictions in lieu of imposing social control, wherein the Supreme Court has stated that the restriction should strike a perfect balance between the Individual and Society. It states:


\(^{86}\) Supra note 1.

\(^{87}\) Adrienn Lukacs, *What is Privacy? The history and definition of privacy*, UNIVERSITY OF SZEGAD 256 (2016)

\(^{88}\) DR. DURGA DAS BASU, *INTRODUCTION TO THE CONSTITUTION OF INDIA*, 124 (21\(^{st}\) ed., 2013)

\(^{89}\) Maneka Gandhi v. Union of India, 1978 AIR 597

\(^{90}\) INDIA CONST. art. 19 cl. 2

“(2) Nothing in sub clause (a) of clause (1) shall affect 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 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.”
“The nature of the right alleged to have been infringed, the underlying purpose of the restriction so imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of imposition of the prevailing times should all enter into judicial verdict.”

This elucidates that the government is expected to, in accordance with an Advisory Board to review the materials based on which a government seeks to override a particular freedom which includes not curtailing the right to freedom of association except during emergent or extraordinary circumstances. Thus the Right to Privacy can be restricted if there is a compelling state interest to be served. In the issue at hand, the Puttaswamy case is important since it reiterates the following principle:

“any infringement of a right to privacy by the government must be reasonable and proportionate, wherein the following conditions are met: the restriction in the right to privacy must be effected through a law which pursues a legitimate state aim, has a reasonable nexus between the objects and means to achieve them, and is the least intrusive means to achieve the state aim.”

PRIVACY AND THE PANDEMIC

The Covid-19 Pandemic, has brought into picture the concept of Health Privacy. In a quest to swiftly identify and isolate potentially infected people, countries are using means and measures that may be considered as invasive and illegitimate. While phone tracking devices are being used in countries like China and Israel, to monitor the movement of those either infected by the virus or likely to have contracted it, EU has urged telecom operators to share anonymised mobile data to track the spread of the virus and provide the required medical aid and supplies. When it comes to India, it seems to have become a specimen of erosion of privacy. While India has aimed to draw inferences from countries like China, Singapore and South Korea, who have, by means of close tracking and isolation, effectively limited the death toll, India’s efforts have just been a series of blunders. The State of Karnataka for instance, published on a database, 14,000 people’s personal details including their residential address, travel history, which further reached people on WhatsApp, making the information easily accessible and tweakable, to spread fake news. The question that arises is, whether one should waive our civil liberties in the perceived interest of public health. The Ministry of Electronics and Information

91 State of Madras v. Row, (1952) SCR 597 (607); Laxmi v State of U.P., AIR 1981 SC 873. (This proposition is now to be read subject to the exceptions under Arts. 31B, 31C.)
94 K.S Puttaswamy v. Union of India, Writ Petition (Civil) No. 494 of 2012, Personal Data Protection was recognized as falling under the Right to Privacy
96 Supra note 13.
97 Casey Ross, After 9/11, we gave up privacy for security. Will we make the same trade-off after Covid-19?, STATNEWS (Apr 8, 2020), https://www.statnews.com/2020/04/08/coronavirus-will-we-give-up-privacy-for-security/
98 Supra note 9.
Technology on 14th of April, 2020, launched the Aarogya Setu Application, which geo-traces user location and informs them if they have come in contact with an infected person. Travel data from railways and airlines as well as tracking hand stamped people is also being carried out by the Indian government. These measures although invasive, work well towards limiting the spread of the virus, especially from Quarantine Jumping. Yet the state governments have performed their parts miserably, by having used telephone records, mobile phone GPS systems, and have made names and personal addresses of suspects public through local newspapers and official websites. The Personal Data Protection Bill, tabled in the year 2019, comprises of a certain Clause 12 including guidelines about using personal data during a health emergency. This bill incorporates certain safeguards such as grievance redressal mechanisms or erasure of data mechanisms etc, yet the ultimate say of using it nevertheless or not stands with the government.

In summation of the abovementioned, it can be so understood, that although the Right to Privacy is a basic human right, also enshrined in our Constitution, yet it is subject to curtailment upon the discretion of the state and its limbs. In other words, the right is not an absolute one. The State interest and the Individual Interest must go hand in hand, which in this case results from the eradication of the virus through multiple measures. So, in terms of privacy, the information of the public must be disclosed only as much as necessary and proportional to the requirement and exigency at hand. During a public health emergency like this, it is a compelling justification for sacrificing an individual’s right to privacy. The choice between public and private health has an obvious answer.99 Yet, this oversimplification of declaring this issue and the question of privacy cannot be an either-or choice. No right of a citizen should be completely sacrificed, and it is important to not disproportionally infringe the rights of citizens. 100

CHAPTER III: MASS MEDIA AND THE PANDEMIC

The media in terms of either mass media, social media or even the Press itself plays a large role in our day to day life, as its primary objective is to provide information on the current happenings of the world, and that is one aspect that is extremely integral during testing times and can even be termed as a tool that is powerful101. Studies have shown that a vast majority of people rely on the news and view it at an average of 24 hours a week and especially during the current times of the global pandemic people are seen to rely on the media for any source of information, as parts of the world and all of India has been on a lock down. In India, it has been reported that it is a leading market for social media usage, especially Whatsapp, as the number of users as of three years ago were over.102

100 Id.

102 Stefan Hall & Cathy Li, COVID-19 proves that media’s value is growing – but we need to find better ways to measure it, WORLD ECONOMIC FORUM (Apr 2, 2020), https://www.weforum.org/agenda/2020/04/covid-19-media-value/
EFFECTS OF MISINFORMATION AT A GLOBAL LEVEL

The relationship between mass media and the pandemic is mutual and yet multifaceted, the upside being that people are well informed about the current scenario with regards to the case count or even the development regarding vaccines, however the down side happens to be the rumors regarding possible cures, the misinformation and the publicity of the personal details of patients. It is observed that these downsides have infringed the basic Human Rights of the public at large directly as well as indirectly, in an Instance at the Global level where there was rumors with respect to a lockdown had been fuelled in the United states, it caused a massive outbreak of panic buying which led to multiple casualties as well as deprivation of basic needs for a majority of people. There were multiple casualty cases regarding overdose of a drug in Nigeria where due to the false information that Chloroquine helped battle Covid-19. These are the Global Instances that have infringed rights indirectly however, in a direct approach to India, the issues battled are false information on social media applications which include name, religion, Caste of people that are not required to be disclosed and further the Patient tracking apps.

VIOLATION OF RIGHTS OF PEOPLE BY MEDIA IN INDIA

The rapid spread of the false news has been used as a tool to induce fear in the common man as well in light of recent events, publicly degrade a religion. Though the constitution has made provisions vide Articles 14 and 15, which are fundamental rights vested on all citizens, where it is said that the State shall not discriminate any citizen on ground of religion, race, caste, sex, place of birth, and the term discriminate refers to not distinguishing unfavorably, the media has been wielded as a power tool while reporting positive cases and connecting them to the recent gathering known as Tablighi Jamaat, as the event has been attached to every report of positive cases of people who have attended the aforementioned event however in reporting other cases there have been no such tags made or nexus drawn to their whereabouts while contracting the virus. This leads to a serious discrimination as well as a gross infringement of basic Human Rights. This has also adverse effect, by sidelining the actual news, with regards to the requirement for testing kits, equipment, and


104 Weike Zhou, Aili Wang, Fan Xia, Yanni Xiao, Sanyi Tang, Effects of media reporting on mitigating spread of COVID-19 in the early phase of the outbreak, MATHEMATICAL BIOSCIENCES AND ENGINEERING 2693-2707 (2020)

105 Samia Tasnim, Md Mahbub Hossain, Hoimonty Mazumder, Impact of rumors or misinformation on coronavirus disease (COVID-19) in social media, SOCARXIV (Mar 29, 2020), osf.io/preprints/socarxiv/uf3zn


other socio-economic issues which needed to be covered.

**STEPS TAKEN BY THE GOVERNMENT INFRINGING MEDIA’S RIGHTS**

The government however has not been proactive in setting right the infringements, but has merely tried to further infringe rights of the press as well by the recent Supreme Court mandate regarding restrictions as these restrictions do not curb the discrimination but merely curbed the rights of the Press which has been vested by the Constitution under Article 19(1), as the National Disaster Management Act, 2005 has been invoked, there is a provision under s.54 of the Act which categorizes the fuelling of fake news in order to create panic as a crime and states that the offenders shall be punished, nonetheless the provision for the prosecution of false news by the media has been over-looked by the government, and now what can be published in only the official version of news which is vetted by the government.\(^{111}\) Though the Supreme Court did not explicitly curb the Press, the government inferred it and imposed restrictions with regards to the Journalists who could attend briefings as well as question the Healthy Ministry officials.\(^{112}\) It has further been reported that during Press Conferences hosted by the Government, the questions of the Journalists are not answered unless the particular issue needs to be reported by the Government.\(^{113}\)

However, apart from the downside, Media or mass Media can be used as a tool to curb the transmission. This has been proven by formulating dynamic compartment model.\(^{114}\) There have even been research conducted on the mathematical models to correlate the media coverage and the spread of the virus, these can only be delved into or implemented if the Media and Press that have become mere tools that are infringing the rights of the common people as well as fuelling a religious divide and has created Panic mongering via fake news on social media.

There have been measures taken by the major social media companies to ward off the fake news that is circulated on their domains like having a fact check done by a professional, however at the grassroots level, In India it is necessary that the implementation of the legislature that exists must take place rather than mere curbing or propagating a divide and infringing on Human Right of the people at large.

**CHAPTER IV: HUMAN RIGHTS AND PANDEMICS**

Human rights need to be the underlying factor that determines all decisions taken in the world. Basic human rights are universal, inalienable, indivisible, interdependent and essential to attain freedom, justice and peace for all.\(^{115}\)

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\(^{109}\) Id. at 8


\(\text{“Whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment which may extend to one year or with fine”}\)


\(^{112}\) Supra note 26.

\(^{113}\) Id. at 12.

\(^{114}\) Supra note 22.

\(^{115}\) *What Are Human Rights?*, AMNESTY INTERNATIONAL, INDIA (Apr. 10th, 2020, 15:44),
regards to pandemic outbreaks, human rights play a very important role. Bioethics form the backbone of successfully dealing with pandemics, and human rights should be considered as the lingua franca of bioethics. One cannot work towards achieving public health without human rights, for the two are interlinked. International mandates and rules are aplenty with regards to human rights, and its importance can never be negated.

The Covid-19 has proven to be the biggest health concern among nations across the world. India has not been an exception. India has been thrust with the daunting task of ensuring the protection of 1.3 billion citizens of India. India's constitution has guaranteed various fundamental rights to its citizens that uphold the integral value of human life. The most important one is the Right To Life which encompasses a multitude of things like the right to an adequate standard of living, the right to have housing, water, food and sanitation and the right to a clean environment. Apart from this it guarantees rights such as the Right To Freedom Of Expression, the Right To Freedom Of Religion And Conscience and the Right To Education.

Though responses to a pandemic require the upholding of human rights, India has witnessed human right violations in various aspects during its fight against Covid-19. The primary form of violation that has been observed is discrimination, that goes against Article 14. It also goes against the international mandates on human rights during health crises.

The first form of discrimination that is observable in India is discrimination based on religion. India has not been immune to discrimination on grounds of religion, race, caste, sex or place of birth.

“Following the World War II, the Universal Declaration of Human Rights (UDHR) was born which is unarguably the single most important legislation in the world, at present. It guarantees basic rights to every citizen of the world and must shape policy making of all nations across the world. Apart from the UDHR, the UN has constantly remarked on human rights and laid down various mandates to be followed in situations, including pandemic outbreaks.”

“Emergency declarations based on the COVID-19 outbreak should not be used as a basis to target particular groups, minorities, or individuals. It should not function as a cover for repressive action under the guise of protecting health... and should not be used simply to quash dissent.” Governments should ensure that all healthcare services related to COVID-19 are provided without stigma and discrimination of any kind, including on the grounds of sexual orientation and gender identity, and should make clear through public messaging campaigns that everyone has the right to access health care.”


communalism for time immemorial. The dark seeds of communalism have been sown in India since before the partition. Even during a virus outbreak, which requires the entire nation to act in unity, communism seeped into the narrative. India, being a primarily religious country, faced its biggest task in getting religious communities to practice lock downs and social distancing. Across the nation there were worrying cases across religious communities continuing to gather in large groups despite the lock down being effective since March 2020. A particular incident, however, that was brought to the common man attention and extensively covered by the media was the gathering by the Tablighi Jammat, a sect of Muslims.


Coronavirus: Islamophobia concerns after India mosque outbreak, BBC (April 10th 2020), the prominent website newslaundry held The nation faced a lot of difficulties post this gathering due to the large number of people who had assembled for the same. Now what was meant to be seen as a disregard to rules and irresponsible behaviour by individuals, came to be seen through a communal lens. The fact remains that the Tablighi Jammat was not the only religious community who disobeyed rules and regulations. There were also other religious communities that continued to gather in the places of offering despite the rules set out by the nation. However, only this incident sparked nationwide agitation and resulted in hatred against Muslims spreading like wildfire. Unfortunately as a result, there was even reported case of a woman being denied treatment in a hospital...

“The internet erupted with trending hashtags such as #coronajihad and fabricated videos that accused the Islamic Community of using the virus as a weapon to propagate their religion. Corona jihad became the idea that Muslims were weaponizing the virus to target Hindus. A minister of the BJP, even went to the extent of labelling the incident as a Talibani crime Furthermore even a popular news channel India Today, as well as a leading editor in the prominent website newslaundry held the Muslim group accountable for over 60% of the countries cases. The government even announced that a few members of the group would be charged under the National Security Act for violating the quarantine, which shows blatant discrimination on it’s part, as other religious groups were not dealt with in a similar manner.”
owing to her being a Muslim which resulted in her losing her newborn child. The fact that the Islamic community has been blamed for a majority of the crisis reflects India’s discriminatory and communal attitude towards situations. The media has always used the prefix of Hindu or Muslim when reporting crimes or any important events, which has constantly ingrained into people’s minds the divide between the two communities. Apart from communalism there have also been cases of xenophobia as well as racism in India. Owing to the fact that the virus was said to originate in China, various North-Eastern communities have been discriminated against for their features.

The second form of discrimination that is being seen in India is economic or class inequality. One of one of India’s primary concerns is its vast migrant workforce which is facing the brunt of the lock down. Migrant workers were seen crowded at borders and stations during times that require social distancing. A large number of them were attempting to return home. There were also incidents of the workforce facing unnecessary attacks by the police. A particularly shocking incident was the spraying of disinfectants on labourers in an inhumane manner in Uttar Pradesh. Migrant labourers, however, are only among the few members of the lower class who face discrimination. The poor, as a community, face the brunt of the virus vulnerable populations that they do not risk reprisal or deportation if they access lifesaving care, especially in the context of seeking testing or treatment for COVID-19.”


“Governments should take steps to create firewalls between healthcare providers and undocumented migrants to reassure


“The migrants crowded at the borders and at inter-state bus stations presenting a frightening picture at a time social distancing is crucial to prevent the rapid spread of coronavirus.”

129 “The migrants crowded at the borders and at inter-state bus stations presenting a frightening picture at a time social distancing is crucial to prevent the rapid spread of coronavirus.”

“Governments should take steps to create firewalls between healthcare providers and undocumented migrants to reassure
Slums and dwellings with people from the lower class witness an unequal access to resources, including water, which put most of the poor at the risk of diseases and catching the virus. ‘Hunger and poverty will kill us first’ has been the common concern of all of India’s poor.

CHAPTER V: RESPONSE OF THE INTERNATIONAL COMMUNITY

INTERNATIONAL MECHANISMS

The management of any public health emergency comes from a meticulous system of rules and regulations that must be followed. In cases of the emergency being of an international nature, it is imperative to have mechanisms in place to suit the needs of the people and their safeguard. The World Health Organisation (WHO) provides for the International Health Regulations (IHR), 2005. The rules under the IHR are applicable to all countries, and it bestows a certain obligation on the nations to ensure that they notify the WHO of any kind of event that would fall under the banner of a public health emergency.

The IHR lays down several such regulations in a meticulous step-by-step procedure to deal with such emergencies. This extends from the first step of notifying the WHO of a potential threat of such a situation, of the role that the WHO must play in such circumstances, taking reports from other reliable sources, and after due diligence, verify the information that principles and then communicate information on the event to the State Party in whose territory the event is allegedly occurring. Before taking any action based on such reports, WHO shall consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring in accordance with the procedure set forth in Article 10. To this end, WHO shall make the information received available to the States Parties and only where it is duly justified may WHO maintain the confidentiality of the source. This information will be used in accordance with the procedure set forth in Article 11.”

See also art. 12(1):

“1. The Director-General shall determine, on the basis of the information received, in particular from the State Party within


132 International Health Regulations (IHR) art. 6(2) (2005)

“2. Following a notification, a State Party shall continue to communicate to WHO timely, accurate and sufficiently detailed public health information available to it on the notified event, where possible including case definitions, laboratory results, source and type of the risk, number of cases and deaths, conditions affecting the spread of the disease and the health measures employed; and report, when necessary, the difficulties faced and support needed in responding to the potential public health emergency of international concern.”

133 International Health Regulations (IHR) art. 9(1) (2005)

“1. WHO may take into account reports from sources other than notifications or consultations and shall assess these reports according to established epidemiological principles and then communicate information on the event to the State Party in whose territory the event is allegedly occurring. Before taking any action based on such reports, WHO shall consult with and attempt to obtain verification from the State Party in whose territory the event is allegedly occurring in accordance with the procedure set forth in Article 10. To this end, WHO shall make the information received available to the States Parties and only where it is duly justified may WHO maintain the confidentiality of the source. This information will be used in accordance with the procedure set forth in Article 11.”

134 International Health Regulations (IHR) art. 10(1) (2005)

“1. WHO shall request, in accordance with Article 9, verification from a State Party of reports from sources other than notifications or consultations of events which may constitute a public health emergency of international concern allegedly occurring in the State’s territory. In such cases, WHO shall inform the State Party concerned regarding the reports it is seeking to verify.”

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they receive at the earliest possible opportunity. It also lays down, among other things, the kind of response that the WHO must provide to the State parties and various other intergovernmental and aiding organisations, and in turn, the people of the countries. The IHR is quite comprehensive when it comes to the kind of treatment that is to be meted out to a case of a public health emergency.

HISTORICAL PERSPECTIVE
These regulations have been brought to force in several historical outbreaks in the past. The IHR was brought to life from paper through the 2009 H1N1 pandemic, and this also tested how effective the regulations could be. There was much conflict when it came to the overall pre-response tactics that must be followed when such an emergency does strike. It was also pointed out that the regulations, though thorough in various aspects, lacked whose territory an event is occurring, whether an event constitutes a public health emergency of international concern in accordance with the criteria and the procedure set out in these Regulations.”

International Health Regulations (IHR) art. 14(1) & (2) (2005)

1. WHO shall cooperate and coordinate its activities, as appropriate, with other competent intergovernmental organizations or international bodies in the implementation of these Regulations, including through the conclusion of agreements and other similar arrangements.
2. In cases in which notification or verification of, or response to, an event is primarily within the competence of other intergovernmental organizations or international bodies, WHO shall coordinate its activities with such organizations or bodies in order to ensure the application of adequate measures for the protection of public health.”

RESPONSE TO THE COVID-19 PANDEMIC

“Despite these positive features, many member states did not have in place the capacities called for in the IHR, nor were they on a path to meet their obligations by the 2012 deadline specified in the document. Of the 194 eligible states, 128 (66%) responded to a WHO questionnaire on their state of progress in 2011. Only 58% of the responding member states reported having developed national plans to meet their core capacity requirements, and only 10% claimed to have fully established the capacities called for in the IHR.”

135 International Health Regulations (IHR) art. 14(1) & (2) (2005)

136 Global Health Risk Framework: Governance for Global Health: Lessons from Past Outbreaks,
When we consider the background of the IHR as a functioning mechanism in today’s context, several questions crop up. With the outbreak of COVID-19 being declared as a global pandemic, the IHR has been put to test again and there is still scepticism as to the kind of reach these regulations can have. It is really important to, first hand, note that these regulations are not binding. Essentially, no State Party is bound to follow the regulations or directions that the WHO lays down. In other words, there is no penalty for non-compliance. And as a result, no WHO Member state has fully complied with the regulations laid down under the IHR. This non-compliance could be as a result of the non-availability or lack thereof of the required provisions in tackling the COVID-19 pandemic. However, it could also be because of the Member States themselves refraining from participating in global cooperation. This premise stems from the fact that countries have violated the basic principles of the IHR, which require the notification of any potential public health emergency to be reported to the WHO. The accusations made on China about the veracity and accuracy of the information that they were providing to the WHO were brought into picture. Furthermore, several reports questioning China’s steps of implementing censorship and mass quarantine as violation of human rights and civil liberties were brought under scrutiny. If proved, it would again be in violation of the IHR guidelines of 2005.

The other kind of international accountability that can be reflected here is the kind of international cooperation that the COVID-19 outbreak has brought out in times of collective losses. Despite very many hiccups when it comes to the kind of responsibility that certain countries show towards international compliance of the IHR provisions to fight the pandemic. Countries like South Korea have gone to the greatest extent possible to measure the pandemic and provide transparency to the people as much as they can. Furthermore, the country also set up initiatives to reach other lesser advantageous countries like Ghana and Kenya. This is the kind of cooperation that the IHR ideally aimed to achieve amongst countries, but sadly it has not been able to reach this goal internationally and collectively. And furthermore, countries like Singapore, Europe achieved the highest level of compliance at 72% across all competencies, according to the WHO’s State Parties Self-Assessment Annual Reporting Tool (“SPAR”).

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142 Id.

143 Id.

144 International Health Regulations (IHR) art. 3(1) (2005)


146 Laignee Barron, What We Can Learn From Singapore, Taiwan and Hong Kong About Handling...
Taiwan have shown prompt and excellent response mechanisms towards the pandemic and this falls in stark contrast with the kind of response that countries like the United States of America and the United Kingdom have adopted. Naturally, it can be assumed that the response, and that too, a positive response, is much easier in countries smaller in geography as compared to the USA and the UK. The countries have made considerable efforts when it comes to mitigating the pandemic’s effects, but the response has come several days, even weeks behind time. Lack of prompt responsibility and understanding of the gravity of the situation at an optimal stage in a pandemic can derail the effectiveness of mitigation tactics.

The problem ultimately comes down to lack of credibility that countries hold when it comes to tackling a global pandemic or health emergency collectively. It is very important that countries understand the importance behind collective responsibility. It is ultimately, the responsibility of every human being to be treated with dignity and respect, which not only for COVID-19 symptoms.

On December 31, Chinese officials notified the World Health Organisation that China had several then-unknown cases of pneumonia. And that same day, the Taiwanese Center for Disease Control began monitoring passengers who arrived in the country from Wuhan. Government officials boarded flights from Wuhan as soon as they landed, monitoring passengers for COVID-19 symptoms.


“But the tally indicated more about the thorough testing conducted on the island of 5.7 million. A study by Harvard University’s Center for Communicable Disease Dynamics estimates Singapore detects almost three times more cases than the global average due to its strong disease surveillance and fastidious contact tracing. In order to uncover COVID-19 infections that may have otherwise eluded detection, Singapore’s health authorities decided early on to test all influenza-like and pneumonia cases.”


“The government pivoted away from herd immunity, yet did not move fast or far enough. Institutions and large parts of the public have proved themselves far ahead of authorities: the Premier League suspending the season; the Church of England announcing that only five people would be allowed at weddings.”


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“When the first coronavirus cases were identified in the US, Donald Trump dismissed the seriousness of the spread. In January he said the virus was under control, in February he said it would "go away", and suggested Democrats were using the virus as a "hoax" to make him look bad."

“Even before the first cases were confirmed, health officials were treated with dignity and respect, which not only for COVID-19 symptoms.”

But even more important is the pressure to move beyond a charity model of foreign aid to a global social contract. “The very values of an enlightened and civilized society demand that privilege be replaced by generalized entitlements – if not ultimately by world citizenship then by citizens rights for all human beings of the world.”

only the IHR, but the UDHR it itself lays down very poignantly.

**CHAPTER VI: SUGGESTIONS**

**ADMINISTRATIVE:**
- When all the communities, organizations, and sectors of the economy are engaged in pandemic response and preparedness, it is the responsibility of the government as natural leader to ensure overall coordination and provide resources and technical assistance to the medical community who are on the front lines in the fight against the pandemic.
- Providing the citizens with reliable information allows a better preparation against the pandemic.
- Implementation of legislations and policies which help optimize pandemic preparedness allows for the entire economy to handle the crisis better prepared.

**PRIVACY:**
- Firstly, one of the options could be for the Personal Data Protection Bill to be implemented, since it provides provisions for the erasure of data so collected and for grievance redressal mechanisms along with a limit on the unchecked ability of the Data Fiduciary or the government to claim the data on account of national security, foreign relations etc.
- Secondly, if there is such a collection of data for public health purposes, it is essential that there be no access of this information to private companies and firms, so as to wield more political power and win elections as in the case of Cambridge Analytica and Facebook, since this shall add onto the already skewed election process in India. The exception here being the ICMR for health-related purposes.
- Thirdly, the data so collected should be one-time use, and erased later, and must not be used multiple times. The consent so received should be one time and not implied to be endless.
- Most importantly, a sound legal framework should be in place, which should be run by a tribunal independent of the government’s reach, to regulate the data better, and this regulator mustn’t be open to be manipulated by the authorities in power.

**MEDIA:**
- There have been measures taken by the major social media companies to ward off the fake news that is circulated on their domains like having a fact check done by a professional, however, it needs to be approached more at the grassroots level.
- In India it is necessary that the implementation of the legislature that exists, for example, S.54 must take place rather than mere curbing or propagating a divide and infringing on Human Rights of the people at large, it would also be better if there was post censorship rather than a pre-censorship, and the personnel involved in the circulation or propagation be prosecuted by means of introducing apt legislation that specifically deals with such atrocities.

**HUMAN RIGHTS:**
- The right to a clean environment, and access to resources including shelter and food and water, is guaranteed under the constitution and international mandates. All classes of society also have to Right To

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150 Universal Declaration of Human Rights (UDHR) art. 1 (1948)

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

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Education, and at times of online classes, this too seems unfulfilled.

- During a pandemic, ethical and practical dilemmas arise concerning the provision of treatment and the allocation of resources.\textsuperscript{151} It is pertinent to keep in mind that treatment needs to be accessible to all, and resources need to be allotted across classes. Planning processes for pandemics, must include ethical discussion, and they should be carried out in advance in order to avoid human right infringements.

- The migrant workers, slum dwellers, low income families, and daily wage workers have to be given first priority, during the planning stage, and physicians too need adequate gear as well as protection. Furthermore, ethics and human rights need to take an upper hand when discovering vaccines for the virus.

- The true test of democracy is during such trying times. Though the government has excessive power in their hands to curb freedoms to ensure the flattening of the curve and curing of the virus, it is its constitutional as well as moral duty to uphold all the citizens basic human rights and prevent discrimination of any sort. It is also the media’s duty to report in an un-bias and uninfluential manner, and thus the prefixes of ‘Muslims’ or any other religious tags must be avoided.

RESPONSE OF THE INTERNATIONAL COMMUNITY:
- First and foremost, reform required is the accountability that these countries have to the WHO or the United Nations. These regulations are drafted with full approval and ratification of the Members. However, they do not have a binding or obligatory nature. This must be changed. If not absolutely, then variably. Certain crucial aspects must be made compulsory to abide by, and there must be repercussions for non-compliance.\textsuperscript{152}

- Additionally, organisations like the WHO must be more neutral, because it is weaker and developing nations that require its support most. In cases like the present pandemic, it should be kept in mind that where there is appreciation, there must also be criticism.\textsuperscript{153}

- With respect to nations, cooperation is crucial. Steps must be taken by every country to mitigate a pandemic instead of adapting after it has caused considerable, irrevocable damage.\textsuperscript{154} This might be multi-party to inclusive models of democracy…”


\textsuperscript{152} Supra note 68, at 7.

“The United Nations Development Program has recently issued a list that indicates the directions a new global approach to governance must take. As a matter of principle, we must move: • from nation state to multi-actor accountability, • from national to international and global accountability, • from a focus on civil and political rights to one on economic, social and cultural rights, • from punitive to positive ethos (name and shame), • from

\textsuperscript{153} Supra note 60.

“Additionally, while the WHO stated that it is not in the business of shaming Member States for missteps, it has praised China for what many call draconian measures. Critics call such politically motivated support a “deception” that gave the global community “a false sense of assurance” about COVID-19’s manageability.”

\textsuperscript{154} Jamison Pike, Tiffany Bogich, Sarah Elwood, David C. Finnoff, Peter Daszak, \textit{Economic optimization of a global strategy to address the pandemic threat,} 111 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 18519, 18522 (2014)
costlier than adaptive measures taken after a pandemic, it proves to be a more effective alternative in the long-run, reducing pandemic casualties or threats considerably at the right time. The problem must be foreseen and responded to in compliance with the IHR and WHO guidelines.

- Lastly, the concept of “global citizenship” must be inculcated in the citizens of every country, to make them more socially active in such times.

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155 Id.
156 Supra note 68, at 8.
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INTRODUCTION
Sodium Pentothal in a technical term is a mixture of Nitrogen, Sodium, Sulphur which are thereon bonded chemically together with C\textsubscript{12}H\textsubscript{18} which is an organic mixture. As it is a branched chain complex substance therefore it is very rarely sighted in the medical pharmacies. Indian as well as Global jurisprudence have conducted very limited number of cases where Sodium Pentothal which is also known as the “Truth Serum” was administered in the body of the subject and thus the interrogations were conducted. According to the Indian Journal of Medical Research the said substance have a limited but extrinsic use which shall be conducted in a very specialized supervision. Some of the functions of Sodium Pentothal are as follows:

1. It is very vibrant mixture that helps in the conduction of Anesthesia,
2. Medical practitioners use this substance for inducing medical coma in the subject,
3. It is used for status epilepticus,
4. It is also used for administering in the patient who has been in a vegetative state for a long period of time, euthanasia,
5. High doses of the said substance is also used for arming up the lethal injections as it directly targets the brain stem.

According to United States National Library of Medicine Health\textsuperscript{157}, when there is a high or continuous registration of Sodium Pentothal in the human body or brain, then it dilutes the somatosensory functions of the humans thus dilapidates the reaction time of the brain and the brain stem goes into a temporary subtle pause therein the human brain becomes very easy to be altered or exploited.

Narcoanalysis is a derivation made out of Greek word known as ‘Narke’ which defines Anesthesia. Therefore a plain meaning is the analysis of anesthesia is Narcoanalysis. According to Black’s Law Dictionary\textsuperscript{158} definition, Narcoanalysis is a process of injecting a truth serum drug into a subject to as to induce semi consciousness and then interrogating the subject. This process has been utilized to enhance the memory of a witness. This method helps and allows to bring the memory of a subject into semi-sleep state and sinks down the self-consciousness. Narcoanalysis is basically carried out by taking help of two drugs that are:

1. Sodium Amytal,
2. Sodium Pentothal.

Some of the tests are Polygraph Test and BEAP Test, there are other methods as well but these two are the most common in the Indian context. According to American Psychological Association\textsuperscript{159}, polygraph test is another method of detection of truth out of the statement of the subject. It is basically functional upon heart rate, blood pressure, respiration and the conductivity of skin. There are questions that are asked by the subject with respect to understanding of


\textsuperscript{158} 1 Henry Campbell Black, Black's Law Dictionary p. 1044 (7\textsuperscript{th} ed. West Group Press, 1999).

question, control and lie detection. One of the international legal instruments most frequently invoked as a bar to the use of truth serum is the 1949 Geneva Convention Relative to the Treatment of Prisoners of War.\textsuperscript{160} The articles of the said convention were in very consonance with the rights and privileges to be made available to the prisoners of war after the war ceases. Article 17 of the convention sought to protect such rights of the prisoners by granting them the necessary and equal human dignity that whoever wanted to confess, they could have and those who didn’t, weren’t forced.

“No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”\textsuperscript{161}

This convention particularly marked the end to the use of truth serum thereby asking the prisoners the questions needed to be asked in interrogation in their full consciousness. But it should be kept in great consonance that article of the Geneva Convention is only a mere bar to stop the use of truth serum in investigation. There have also been the use and emergence of another convention in the ICCPR. Article 17 of the Geneva Convention is a predominant work on this point, which is also focused upon the preservation and protection of human rights in international scenario.

Indian Judiciary have always reserved its standpoint whenever it comes to the view of admissibility of narcoanalytical evidences\textsuperscript{162}. In some of the cases the judiciary is of viewpoint that Narcoanalysis shall not be allowed as it is against the provisions of Article 20(3) of the Constitution of India. In the cases like, Selvi v. State of Karnataka wherein the Supreme Court thereby laid some of the guidelines in conducting and administering the truth serum in the body of the subject. But in the case of Ramchandra Ram Reddy v. State of Maharashtra\textsuperscript{164} it was held by the Indian judiciary that Narcoanalysis test is an essential test in nature when it comes to the topic of deciding the innocence of the parties. Under S.161 (2)\textsuperscript{165} of the Code of Criminal Procedure, the rule against self-incrimination is given a place on legal platform.

Talking about the Ethical standing of the conduction of the truth serum registration in the human body it shall and should seem to be on purely not ethical as it asks and forces a person to say a statement that he never intended to make rather it has been termed as a way of torture according to the article 17 of the ICCPR and also according to the US national library of medicines\textsuperscript{166} it kind of creates within a human a feeling of non-


\textsuperscript{161}Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 17, 6 U.S.T. 3316 (consented to by the U.S. Senate on July 6, 1955, with reservations) [hereinafter Third Geneva Convention].


\textsuperscript{165}Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

trust and also of fear and torture. In fact the United Nations Convention against Torture enshrines upon a legit stoppage of harassing the prisoner or a person guilty of committing an offence\textsuperscript{167}.

**TECHNIQUES OF TRUTH IDENTIFICATION- WORST OF THE BEST**

There is a wide use of the chemical known as sodium pentothal, in medical science as described above it is widely and categorically used in various fields. In, forensic science this chemical plays a very major role in the administration of justice. According to the American Psychological Association\textsuperscript{168}, there are various types of tests that can be used to administer truth in the court of law. Some of the most commonly used methods required for the interrogation of a particular person are as follows:

1. **Polygraph Test**, this test in layman’s language is also known as Lie Detector Test,
2. **BEAP Test,**
3. **Sodium Pentothal Test**, also known to the general public as truth serum test.

The above three methods are the most commonly and frequently used methods when it comes to interrogation of a particular accused. All these test have one thing in common, that, there is a prior permission of the court that is required to attest the viability of the test upon an individual. The court on approval of the tests to be conducted should bear the responsibilities of giving concrete and absolute reasons as to why there is a necessity to conduct such type of tests so as to interrogate the accused.

Now let us discuss these tests in brief so as to get the idea of what the chapter exactly deals with.

**POLYGRAPH TEST**

In history, there are certain cases wherein forward steps have been taken into cognizance, so that the lie of the accused can be certainly pointed out in the adjudication of the trial. For the accomplishment of the above idea the technique known as polygraph method is used. There are several uses of these techniques such as, it can be used in investigation required to examine a particular course or action in the scene of crime, and it is the one that can be helpful to the company, as the company may use this kind of test so as to identify the perfect employee for them\textsuperscript{169}. In this test the somatosensory organs and senses of a particular person are set to scrutiny, as the questions being put to the individual are duly configured up upon the screen which duly records the working statement of the senses, the senses here in question are blood pressure, heart rate, etc. the skin of the individual is also kept under inspection as the electric pulses are recorded by the examiner\textsuperscript{170}. There are many other types of polygraph test which identify the conduct


and truthfulness of a particular individual, these are like, Control Question Tests, Probable Lie Tests, guilty knowledge test etc. These tests have their own validity and method of operation in interrogation. Apart from all these different kinds of tests, the polygraph test conducts a particular pre-test which enhances the reliability of the lie detector\textsuperscript{171}.

METHOD OF OPERATION OF POLYGRAPH TEST- A polygraph test when instituted upon an individual, requires set of equipment that are duly instated upon the somatosensory organs of the human being, some of the steps to be monitored are as follows:

1. Heart Rate of the accused in interrogation should be noted before the test and after the test is conclude, in-transit of the test, the heart rate of the accused should be noted properly,
2. Blood pressure, be it the rise or fall in the same should be considered, the blood becomes the vital component in the administration of such kind of test,
3. The skin conductivity that is the electric pulses going through per nerve should be categorically monitored as it derives the behavior of the accused, if the question points towards his guilt the accused shall experience a bump in the nerves thereby resulting to sweating or dryness in the throat because of the fear of getting caught.

There are two type of questions that are prepared for the administration of interrogation, these are control questions and relevant questions, and the accused is always having a sense of fear in his mind when it comes to the interrogation with the help of controlled questions. This is because control questions are designed to arouse a subject's concern about their past truthfulness, while relevant questions ask about a crime they know they did not commit\textsuperscript{172}. The response to both the set of question decide the truthfulness of the accused and can also lead to the stage of non-deception on the part of the accused if the questions are duly answered in accordance to the standards set by the examiner of the lie detection test.

EVIDENTIARY VALUE OF THE TEST- There is a case in the Mexico, known as Lee v. Martinez\textsuperscript{173}, the Supreme of New Mexico, in full majority held by law that the polygraph evidence taken by interrogation if satisfies the Daubert’s Standard then the said evidence should be without any discrimination to the contrary be considered as the scientific evidence and should be duly considered in the court of law, and the evidence should be of corroborative or substantive in nature depending upon the changed circumstances of each and every case.

In the context of the judgement thus given by the Supreme Court of Mexico seems to be premature and not sensible as, when the accused is asked for his interrogation by the court or the authorities then there can be places where he is actually an innocent person, but under pressure acts under the obligation and thus when the circumstances around him changes and he answers certain question then he actually can give wrong answers or rather his body and the senses may act in a disproportionate pattern which is unlike the answers he was considering giving.

\textsuperscript{172} Supra Note 15.
\textsuperscript{173} Lee v. Martinez, 6 P.3d 291 (2004).
BEAP TEST
The general full form of BEAP Test is known as the Brain Mapping Test, this technique of interrogation was discovered and founded by Dr. Farwell. This method of interrogation is basically interview based, in a way that, the accused is set forth a number of questions and then upon asking the same questions that whether accused has given all the concerned information with regards to the case or whether there is any doubt wrt the transparency.

Here the accused is made to sit in front of a computer as in a way that the sensors thus connected to the hands of the accused give relevant somatosensory data, which helps the examiner in catching the accused whether he is concealing any important matter of fact or not. The other notional and technical name of the said technique is P-300Test.

In a way of consideration this test is conducted in three illustrative parts, which are as follows:

1. The first part consists of neutral wordings, meaning hereby that there is no specific relation of the same with the facts and circumstances of the case,
2. The second part consists of probable words, which state the direction in which the accused thereby being interrogated came across with any other fact and circumstance of the case,
3. The final part consists of the targeted wordings which are direct and which are very important wrt the technicalities of interrogation as involved.

LEGALITY OF BRAIN MAPPING TEST-
The Supreme Court of India have put on a very strong viewpoint that the administration of any of the narcoanalytical techniques should be the violation of the principle as bestowed under the articles of the Geneva Convention and also as that of the ICCPR. The bench consisting of Judges like KG Balakrishnan, RV Raveendran and JM Panchal held that these coercive methods should be proliferated and stopped, or else the practice of the same shall be considered to be the violation of the rights of an individual.

SODIUM PENTOTHAL TEST-
According to United States National Library of Medicine Health, when there is a high or continuous registration of Sodium Pentothal in the human body or brain, then it dilutes the somatosensory functions of the humans thus dilapidates the reaction time of the brain and the brain stem goes into a temporary subtle pause therein the human brain becomes very easy to be altered or exploited. According to Black’s Law Dictionary, Narcoanalysis is a process of injecting a truth serum drug into a subject so as to induce semi consciousness and then interrogating the subject. This process has been utilized to enhance the memory of a

witness. This method helps and allows to bring the memory of a subject into semi-sleep state and sinks down the self-consciousness.

JUDICIAL VIEWPOINT- Indian Judiciary have always reserved its standpoint whenever it comes to the view of admissibility of narcoanalytical evidences\textsuperscript{178}. In some of the cases the judiciary is of viewpoint that Narcoanalysis shall be allowed as it is against the provisions of Article 20(3) of the Constitution of India. In the cases like, \textit{Selvi v. State of Karnataka}\textsuperscript{179} wherein the Supreme Court thereby laid some of the guidelines in conducting and administering the truth serum in the body of the subject. But in the case of \textit{Ramchandra Ram Reddy v. State of Maharashtra}\textsuperscript{180} it was held by the Indian judiciary that Narcoanalysis test is an essential test in nature when it comes to the topic of deciding the innocence of the parties.

**POINT OF DIFFERENCES BETWEEN THE THREE METHODS OF INTERROGATION**-

<table>
<thead>
<tr>
<th>S. No.</th>
<th>POLYGRAPH TEST</th>
<th>BEAP TEST</th>
<th>SODIUM PENTOTHAL TEST</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Generally known as Lie Detector Test.</td>
<td>Generally known as Brain Mapping Test.</td>
<td>Generally known as the basis of Narcoanalytical techniques.</td>
</tr>
<tr>
<td>2.</td>
<td>Inspects and supervises the heart rate and blood pressure of the accused being interrogated.</td>
<td>Analyzes the electrical nerves of the brain by relating to the actions of the accused wrt questions.</td>
<td>Questions the accused, where the subject is in a state of insomnia, not able to think properly.</td>
</tr>
<tr>
<td>3.</td>
<td>Major components are Blood pressure, Heart Rate, Skin Conductivity.</td>
<td>Major Components are Electrical Nerve reading recorded by the BEAP Machine.</td>
<td>Major components are Sodium Pentothal and Sodium Amythral.</td>
</tr>
<tr>
<td>4.</td>
<td>Accused is made to face questions and answer the same.</td>
<td>Accused is made to face questions, and the behavior is recorded by the machine.</td>
<td>Accused is made to face questions and the accused answers the same under the influence of drug.</td>
</tr>
<tr>
<td>5. Conclusiv e</td>
<td>Not Conclusiv e</td>
<td>Conclusiv e</td>
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**INTERNATIONAL TREATISES AND CONVENTIONS**

In the international scenario, with regards to the humanitarian standards there are indeed a good number of treaties that have placed

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the reliance on the protection of human rights and also to preserve the idea of human rights in the international scenario. There are two very significant treaties and conventions which duly tell us about the protection of the life and standard liberty of the individual, these are, the protection of the privacy rights of an individual under the code of ICCPR\(^{181}\), the provisions of the ICCPR have in length discussed about the protection of the rights of the individual, with in consideration of the due process established by law have analyzed the scope which are unlawful in nature and arbitrary in nature. Not only have this, the ICCPR categorically analyzed the scope of the word torture under its ambit, with special regards to the convention on torture.

**ARTICLE 17 OF THE ICCPR**

According to **Article 17 of the ICCPR**, which states that, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation\(^{182}\).”

According to the conditions as placed under this section the privacy of a particular individual should not be breached at any cost, or, for any other purpose whatsoever. Let us now understand the Article by integrating the same into various points for better understanding of the topic, which is now is as follows:

1. No one shall be subjected to arbitrary or unlawful interference, this part of the section says that no one that means even the government or the judiciary of a particular country have the authority to interfere in the privacy of the individual using unlawful measures, which are expressly barred by the law or are not in accordance to the ethical standards of the international society.

2. With his privacy, family, home or correspondence, this part of the article states and claims that, the privacy is a very broad term and it shouldn’t be strictly limited to the concepts rather a view of practicality should also be attached to it. The privacy of an individual should not be interfered or restrained.

3. Nor to unlawful attacks on his honor and reputation, privacy of an individual as it is a very broad term gives us the nature and scope that privacy shouldn’t be hindered and the reputation of the individual should be respected and the honor of the said person should be recognized and respected by the government and the judiciary of a particular nation state.

**TRUTH SERUM AND ARTICLES UNDER THE ICCPR**

- **On the judicial analysis of the administration of truth serum, upon a particular will be seemingly looking absolutely prefect that the judiciary and the legislature are adhering to the provision of law, but this can be certainly a clear violation of all the principle of the respecting of the privacy and consideration of honor of the individual in consideration.**

   This administration of the truth serum in a way tries to take from the mouth of the person that he wants to keep as a secret and just wants to reside with the same.

   On the analysis of the same there can be two alternative thinking wherein, the law have prescribed for the certain methods and the other can be the ethical standards and their violation while administering the truth serum to the accused. The right to privacy.

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\(^{181}\) ICCPR stands for, International Covenant on Civil and Political Rights.

\(^{182}\) International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, art. 17,
guaranteed under Article 17 is not absolute, as every nation state shall follow its own principle of administration rather looking or considering the other international standards. Similarly to the contrary of the same, the definition of privacy of an individual and its representation, haven’t been given a precise definition under the said article in contention.

The article 17 of the ICCPR is only a limited scope section where it has given two points of consideration where the particular Article can be invoked, the first is unlawful administration of the serum in the body of the individual, and the second is the arbitrary injection of the serum in the body of the individual.

In India, there are only a few statutes which talk about the right against self-incrimination these are as follows:

1. Article 20(3) of the Constitution of India,
2. Section 161(2) of the Code of Criminal Procedure.

These statutory provisions protect the rights of any individual up to an extent but when it comes to the clauses titled as ‘due process established by law’ then the judiciary can actually infringe the rights of a particular citizen. Similarly in the USA the rights of the individual are duly protected by the Fourth, Fifth and Fourteenth Amendment, which asks for no unreasonable and non-cautionary searches, right against self-incrimination and due process adherence to the laws but at the same time the individual’s right should also be kept in mind.

In addition to requiring that interference with privacy be lawful in order to be justified, ICCPR Article 17 further requires that the interference be non-arbitrary. The Human Rights Commission have made it clear through their comment that article 17 can be used only if it approves the reasonability test and thus the privacy of an individual should be scrutinized upon the hands of the judiciary. The interference in regards to the privacy should be scrutinized as under reasonable circumstances.

TORTURE UNDER THE ICCPR

As we have discussed article 17 of the ICCPR which states that the right of privacy of an individual is a matter of utmost importance and it should not be interfered upon by anyone else, but there is a certain exception which allows the interference in the privacy of a particular individual and could be asked for interrogation under the effect of truth serum.

But the ICCPR have also adhered to the ethical standards and have made a step forward so as to protect the rights of a particular individual. The said contention is vested under Article 7 of the ICCPR, article 7 talks about torture inflicted upon a particular human under the scope of truth grounds on which such findings were made). Illustrative note. Please consider the same.

187 For a discussion, see Catherine Hancock, Due Process Before Miranda, 70 Tul. L. Rev. 2195 (1996) (cataloging different cases in which due process violations have been found and the various
serum. In India there have been cases where the same have been decided that when case a particular drug be administered in the body of a human being for the sake of interrogation. Like in the case of Selvi v. State of Karnataka\textsuperscript{190}, where the guidelines wrt the administration of Narcoanalysis was postulated by the Supreme Court of India. Similarly in the US, fifth, eighth and fourteenth amendment of the Federal constitution have been drafted so as to protect the citizen from the torturous methods. Even under the ICCPR’s own terms, however, the case for regarding truth serum as torture is weak at best. Given Article 7's vagueness, it is difficult to reach a definite conclusion.

**LEGAL OVER ETHICAL IN INDIAN JUDICIARY - WHO SHALL WIN?**

In India. Several cases have been there which have been duly discussed by the Indian judiciary, thereby withholding the intention of the societal norms in accordance to the administration and adjudication of the criminal justice system. In India, cases such as the Selvi Case, Ajmal Kasab case, have find a peculiar point where there was the need of these was justified by the Supreme Court of India, and, also a special reliance was placed upon the respecting up of the privacy rights of the individual in question. In India this concept have been developed in the pretext of the latest decade. Starting from injection of hyoscine to the administration of sodium pentothal, we have come too far to back and identify the glitches this step had, as, it was having the intention to fire on the privacy rights of the individual\textsuperscript{191}.

In the case of Selvi v. State of Karnataka\textsuperscript{192}, the Supreme Court laid down the guidelines by considering these kinds of cases as invalid in nature as it takes away from the person the basis of fair trial. It adjudicates upon the person the right and obligation that he never intended to share upon the solace of stringent adjudication. The bench of Supreme Court in this case, have considered and laid down the following guidelines, which have elucidated as to when the particular test can be set to be violative of the postulated right of the individual as guaranteed by the constitution of India. Forcing up of an individual for the sole purpose of the upliftment of the due process clause should amount to a step making away such right from the individual. The above stated case helped and postulated upon the following guidelines, which are as follows:

1. No lie detector test shall be conducted against the free will of the individual and any such resiprocative shall be considered to be rendered the report as invalid,
2. The consent for the same shall be recorded before a judicial magistrate,
3. At the hearing of the trial, the individual should be told regarding the implication of such statement made during the test,
4. The magistrate shall also consider every factor relating to the detention of the individual,
5. A full medical check-up shall be conducted prior to the test.

Under the principal bench’s supervision the narcoanalysis test was considered to be violative of the Article 21 and also Article 20(3) of the same. In the Selvi case, the

\textsuperscript{190} Supra Note 7.


following facets were discussed in brief resulting into laying down of different guidelines, these are as follows:

1. There should be free and compulsory point of legal advice, therefore which is considered to be the main ingredient of the fair trial process, because in this case after the administration of drug, the person shall have no control over himself and thus is induced to give answers which he doesn’t call on shots for,

2. There may be suitable cases, wherein it can be duly contended that the terms and conditions of the tests were not properly conveyed to the test subject,

3. The credibility of the test subject and the examiner should be duly considered in the lieu that human errors and fallacies are possible,

4. The test results are sometimes not valid in the eyes of law as they have been considered to be inculpatory and breaching the privacy of the individuals thereby leading to public pressure,

5. The tests duly disturb the procedural sanctity thereby established by due process of law,

6. There shouldn’t be the scenarios which are false and therefore which require for increment in the malicious litigation.

ETHICAL STANDARDS IN THE CONDUCTION OF NARCOANALYSIS

According to critics, the process of extraction of truth from a person when an induced state of disorientation and subconscious has been in effect is a violation of basic human rights. The process is considered ethically invasive of one’s privacy. The entire procedure is considered manipulative because it involves the questioning of a person when he is not in mere senses, which can often lead to self-incriminating statements. The process of administration of such chemicals might also affect the blood stream of the receiver and induce anti histamine allergies which can impair the mobility, neurological balance and dermatology of the epithelial cells. Furthermore, articles of ICCPR and UDHR also mention that a person should not be subjected to any such extreme measures or provocation and harassment which affects the dignity of the said person. The questioning during a hallucinating state might alter the details of the case, and hence completely derail the course of investigation. The person subject to such analysis also remembers various fragments of the interrogation which can affect his capacity to lead a normal life in the near future. Sometimes this interrogation can lead to violence which also amounts to police brutality. The ethical standards which are benign in our constitution and safeguard the interests of the citizens are also affected by the rampant misuse of police power. Thus, by the implementation of the above mentioned techniques the future, health and the chance of leading a normal life of a person are being grossly affected.

CONCLUSION AND SUGGESTIONS

Narcoanalysis is a process of injecting a truth serum drug into a subject so as to induce semi consciousness and then interrogating the subject. This process has been utilized to enhance the memory of a witness. This method helps and allows to bring the memory of a subject into semi-sleep state and sinks down the self-consciousness. Indian Judiciary have always reserved its standpoint whenever it comes to the view of admissibility of
narcoanalytical evidences. In some of the cases the judiciary is of viewpoint that Narcoanalysis shall not be allowed as it is against the provisions of Article 20(3) of the Constitution of India. In the cases like, Selvi v. State of Karnataka wherein the Supreme Court thereby laid some of the guidelines in conducting and administering the truth serum in the body of the subject. There are certain international treaties which have on a step tried to postulate about the torture and unlawful techniques that are performed on a particular test subject. First of all before the approval of this certain technique two conditions have to be qualified, first that the test shouldn’t be unlawful and the other thing is the other thing shouldn’t be arbitral nature. The ICCPR lays down in Article 17 and Article 7 gives the prevention and protection of the rights of privacy of a particular individual and it also debars the torturous methods performed for the limited sake of interrogation.

The researcher is of the view that the method of Narcoanalysis involving Lie detectors, BEAP Test, Truth Serum test shouldn’t be completely barred rather it should be used in the following conditions:

1. In sake of national interest,
2. In sake of adjudication of a case that is of utmost importance to the country,
3. The case, where by deciding the rights of the parties a new precedent can be established.

SUGGESTIONS:
The researcher will be pleased in giving the following suggestions:

1. If the Indian Judiciary is of the view that Narcoanalysis is essential for the adjudication of a particular case then the test of unlawfulness and test of non-arbitrary nature should be established by taking into consideration Articles 7 and 17 of the ICCPR.
2. The magnitude of importance of the case should be decided after extensive debate, research and careful consideration and then the test should be conducted.
3. Conditions of the approval of Narcoanalysis should be on recommendation by the legislature should be included in the Article 20 of the Constitution.
4. Both the interest of the nation and as that of the individual should win.

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CORPORATE GOVERNANCE IN PUBLIC SECTOR UNDERTAKINGS

By Anish Roy
From KIIT School of Law, Bhubaneswar

What is Corporate Governance

Corporate Governance is a few set of principles, rules and system by which a company is controlled by the owners. It also provides guidelines for the smooth running of a company and maximizing its profits for the betterment of the stakeholders in a long term. The principals on which corporate governance relies on are basically based on integrity, fairness and transparency in all transactions and doing all the business abiding by the laws of the land and doing business in the manner to profit the stakeholders and maintaining good relation among the stakeholders and the company.194

History of Corporate Governance

Corporate Governance first came into view in the United States in the 1970s. The main reason behind its growth was the arising conflicts between the owners and the managers of the companies. In the early 1600 the East India Company was one of the biggest and first companies to come into the market. Then the companies used to run on partnership basis for doing any specific job. A Joint Stock Company, which mainly operated in India. Then the shares of the company were mainly divided amongst the active members and they only comprised of the board of Directors. Due to absence of any organized market the selling of shares were not at all easy thus shares were mostly transferred to friends, relatives or in the family. In those days the companies were made for carrying out certain small purposes and they were not allowed to hold shares in any other companies. After the Industrial Revolution, between the years of 1890-1910 the companies transformed from state controlled organization to privately controlled organizations with limited responsibility which created a large capital demand in the market for the multinational companies at it gave birth to the Stock market which helps in creating a relation between the investors and the companies. For these purposes market for exchange of shares of the private companies capital markets were formed in many cities in the Europe like New York. The Organization for Economic Cooperation and Development was established in 1961 with the goal of expanding the world trade and to contribute a sufficient amount to the world economy from the trades. The term Corporate Governance was mentioned in the report of the Federal Securities and Exchange Commission due to reference of corporate scandals. Due to which it became mandatory for the Government to set down rules and regulations regarding the corporate governance for the betterment in the relation between the investors and the owners of the companies. In 1976 finally the principles of Corporate Governance were laid down by the U.S Government and finally it came into role.195

Principles of Corporate Governance

There are 3 principles around which the corporate governance has developed for years

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194 What is corporate governance, policy, (March 2, 2019, 10:00PM), https://www.icsa.org.uk/about-us/policy/what-is-corporate-governance

Transparency – transparency refers to disclosure of all accurate and adequate information’s timely of the company to the stakeholders. It’s very important to keep this transparency to maintain the good relation between the managers and the stakeholders. Transparency in maintaining all the record books and display of right accounting figures as of operating results and etc. transparency is also called as one of the foundation principle of the corporate governance. It helps in development of the public confidence on the corporate sector at huge levels. The publishing of the details must be made at an public platform so that the information is easily accessible to all public in quarterly or half-yearly basis.

Accountability – Accountability refers to the liability of the managers to explain and give every reason for the decision that they have taken in the interest of the company. It also refers to seeing that the company’s resources are best utilized for the betterment of the company’s stakeholders and members.

Independence – Independence is very necessary for a good and strong corporate structure where the top level managers of the company are independent in making any decisions for the company. The board of directors must maintain a strong non-partisan body to take all business decisions on the basis of business prudence.

Needs for Corporate Governance

In the last decade, there have been a numerous frauds in India which has led to the importance for lying down of the Corporate Governance norms. Thus India provides proper norms aligned internationally for governing of a firm. The reasons behind it are discussed below:

Corporate Governance provides a code of conduct for implementing democracy of the shareholders as different shareholders have different approach to any affairs regarding any corporate issue.

Corporate Governance is a set of code that deals with situations where large corporate investors start influencing the decisions of the company and becomes a challenge for the management to run them on their own terms.

It also helps in rebuilding the confidence of the investors those trusts were shaken by the frauds that had happened in the recent past years. It was very crucial for regaining the trusts for the investors.

The society expects the corporate to take care of the pollution, environment, sustainable development, quality of goods and services etc. to fulfill the expectations of the public by formulating a code of conduct. It is also important to keep this code for development of the country.

Globalization had made the communication with the foreign countries easy due to which many Indian companies are listed in many foreign national stock exchanges. So for regulating these companies and the foreign companies coming to India the code of conduct of the Corporate Governance is essential.

The code of conduct of the Corporate Governance is also essential to nullify the affect that is created on the company managements due to the excessive cash flow of foreign currency in an Indian company.

Corporate Governance Framework in India

The standards for Corporate Governance has been laid down in India through a certain laws and norms, it is in accordance to all the international standards. They are described in:
The Companies Act 2013 which has laid down provisions concerning Independent Directors, General Meetings, Board Meetings, Audit Committees, Board Constitution, Board Processes, Related Party Transactions, etc.

SEBI Guidelines or the Securities Exchange Board of India has laid down guidelines for the protection of the investors and all the companies are compelled to follow those guidelines.

Accounting Standards Issued by the ICAI, ICAI (Institute of Chartered Accountants of India) regulates and issues accounting standards that all companies have to maintain. It being an autonomous body has made the disclosure of accounts of any company mandatory in accordance with the Companies Act 2013.

The Standard Listing Agreement Of Stock Exchanges that every company has to agree those want to list their companies in any Stock Exchange.

Secretarial Standards Issued by the ICSI, ICSI is the Institute of Company Secretaries of India has issued standards regarding General Meetings, Board Meetings, etc. The Companies Act gives authorities to many autonomous bodies to create and lay guidelines for the companies and such guidelines if not maintained or followed they are to be held in violation of the Companies Act and hence may be punished.

The Issues in Corporate Governance in India

Though there are many issues that are faced by the Corporate Governance in India, highlighting a few major ones:

- Board Performance: It is very important to maintain the balance between the executive and non-executive directors director’s for which it’s important to have a women director. Due to non performance of evaluation from time to time the transparence gets lost. Performance is not all the time result oriented.

- Independent Director: In the present scenario in India the purpose for which the Independent Directors are appointed are not fulfilled. Though the guidelines has been laid down by the SEBI regarding the time to time audits and the appointment of an separate audit committee or give an separate meaning to the independent directors, in the present condition of the country is worst where none of them are fulfilled to its outmost useful extent.

- Accountability to Stakeholders: The Company or the stakeholders are not the only people who are considered accountable for any action. It’s important for the directors to keep in mind that the company not only works for their own interest but also for the interest for the community too.

- Risk Management: It is important for the directors to mention in the report to the shareholders the techniques that they take up compulsorily for the risk management factor of the company. This point is also not yet fulfilled in the outmost sincere manner that it must be taken.

- Privacy and Data Protection: Cyber security is an important Governance issue and also one of the most important security factor of the now governance. It’s very important for the directors and other managers to know the cons or hazards of this issue.

- Corporate Social Responsibility: In India the legislature on investing in social causes is very fixed, that is an company must invest at least 2% of their last profits of the past 3 years in CSR activities but these are also not fulfilled by the companies and they are reluctant in these investment too. It is mandatory to show proper causes in reports if CSR is failed.
The Guidelines Laid By the SEBI on Corporate Governance

The main overviews of the guidelines laid down by SEBI (Securities Exchange Board of India) are:

- **Board of Directors:**
  a) The board must combine of an optimum combination of executive and non-executive directors.
  b) Whether the chairman is an executive or non-executive member will decide the numbers of the independent director. In case the chairman is an non-executive member then there must be one-third of the board of directors be independent directors; and if the chairman is executive person then the half of the board must comprise of independent directors.
  Independent Director means a person who other that just taking the remuneration from the company doesn’t have any other pecuniary relation with the company.

- **Audit Committee:**
  a) There must be an independent audit committee in the company whose constitution would be of such layout:
  i. The committee must constitute of at least three members, majority of them must be independent in nature, all three members must be non-executive, and at least one of the directors must have financial and accounting knowledge.
  ii. The chairperson of the company must be an independent director.
  iii. All the queries of the share holders must be answered by the director in an annual general meeting.
  b) The powers of the audit committee are as follows:
  i. The audit committee must be given free authority to investigate any matter that it finds relevant and in accordance to its reference.
  ii. They should be given the authority to talk to any employee and gather any information that they want.
  iii. The committee must be given full liberty to take any kind of legal and professional help from outside the company.
  iv. If the committee finds it relevant and necessary it can take attendance of the outsiders with relevant expertise.
  c) The role of the Audit committee would include:
  i. The committee must oversee the company’s financial reporting process and also make sure that the financial information are disclosed at the right time to make it credible and to check if they are sufficient and correct.
  ii. They have the authority of appointing and also the removal of the external auditor.
  iii. It must review the credibility and efficiency of the internal audit function.
  iv. It must review all the companies risk taking factors and disclose them.
  v. The committee should discuss with the external auditors about the way of audit and if there are any special concerns for the audit, they are also free to hold a discussion after the audit if any concern still persists.

- **Remuneration of the Directors:**
  In the Annual Report a certain disclosures are mandate to be made regarding the remuneration of the directors are as follows:
  a) All the heads of remuneration of the directors must be disclosed, that is the salary, bonuses, benefits etc.
  b) All the details of the fixed salary and also the performance based bonuses including

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*196 Corporate Governance, Circulars, Legal, (MARCH 3, 2019, 12:00AM),
the criteria’s required to qualify and details of such bonuses.

- **Some procedures of the Board:**
  a) In a year at least four board meetings should take place and not having more than four months gap between two board meetings.
  b) A director should not be members in more than ten companies and if he is a chairman then not more than five companies in total.

- **Management Discussion:**
  A report must be prepared and attached with the Annual Report on the decisions taken by the management with an analysis report of it. The must comprise of the following topics:
  a) Threats and Opportunities
  b) Performance reports based on segments of the company or on the products of the company.
  c) Factors of concern and risks.
  d) The report should include an analysis on financial performance in regard to operational performance.
  e) It should include detailed reports in human resource or industrial relations front.

- **Shareholders:**
  The guideline says about disclosure of certain points to shareholders are:
  a) The shareholders should be provided with certain information’s during appointment of a new director or if a director is re-appointed:
     I. The resume of the Director must be disclosed.
     II. The fields in which the director has expertise and its nature.
     III. It must be disclosed the number of companies in which he is a dictator and also holds memberships in any other companies.
  b) A Shareholders or Investors Grievance Committee must be formed to hear out the issues faced by shareholders like transfer of shares, non receipt of declared dividends or non receipt of balance sheets, etc. This committee must be formed under the supervision of a chairperson of board committee who is a non executive member. The main aim of the committee is to look into any complaints of the investors and redressing them.

- **Report on Corporate Governance:**
  A separate section must be maintained in the Annual Report for the report on corporate governance and in a detailed manner. It is important to maintain this section according to the guidelines.

- **Compliance:**
  Every company must obtain a certificate of compliance from its auditors regarding compliance of the conditions of the corporate governance. It is important to attach this certificate with the director’s report and to be send to every shareholder and also must be sent to the Stock Exchange too.

**Corporate Governance in Public Sector**

The Government in the past few years has tried to increase the amount of transparency and accountability levels with respect to the Public Sector Undertakings or PSUs. The norms that bound the Central Public Sector Enterprises or CPSEs were made compulsory for all the Public Sector Undertakings (PSUs) those were not listed. Now the Government wants to implement corporate governance to tackle a few major issues that are being faced by the public sectors. The issues faced are:

- **Issue 1:** Current structure of corporate Governance in public sector in relation to private sector
  A public sector undertaking should work ideally by setting standards of accountability and transparency of its working rather than following the footsteps of the private sector enterprises. The PSUs must create their own standard by implementing corporate governance structure of its needs. The big and major
public sector companies like the Navaratna should implement the corporate governance by adopting the guidelines set by the Ministry of Corporate Affairs (MCA). Many central agencies like the Public Enterprises Selection Board, Department of Public Enterprises, The Central Vigilance Commission and the Standing Conference on Public Enterprises has been discussing the different ways and mechanisms of implementing and bringing a reform in the structure of the corporate governance in the public sectors. The guidelines developed by the Department of Public Enterprises have now been made mandatory to follow by all the Central Public Sector Enterprises or CPSEs.

**Issue 2:** Balancing commercial and managerial autonomy
Theoretically it has been seen to be true that there is a strong correlation between autonomy and accountability. It is also applicable in case of enterprise performance and autonomy as well. Though the Indian Government has granted autonomy to the public sector undertakings (PSU) in various levels but the main control lies in the hands of the government only and they keep all major decision makings in their hands itself. In the present day situation as it lays it’s very important to maintain an autonomous relation in the board regarding decision making and it is dependent on the ratio of the non-executive directors present in the field. Lastly the PSU must be kept aloof from any kind of political influence and also from bureaucrat involving in there working.

**Issue 3:** Public Sector Undertaking Board structure and Independent Directors
An initiative must be brought forward by the government to appoint good competent and skill full directors in the boards of the PSU. The shareholders must also be allowed to elect their representatives in the board. The board members and directors must not be politically influenced and there must be independent directors in the board as well as non executive directors. The non executive director plays a vital role in formulation of the strategies for the working of the company and they also provide an overview of the risks of the company.

**Issue 4:** Ensuring compliance with SEBI listing Agreement
Many listed Navratna and Miniratna PSUs are insulation behind in yielding with minimum needs expressed in Clause forty nine of SEBI listing agreement. This directly hampers the future prospects of India incorporated once the Ministry of company Affairs is action powerfully on the implementation of corporate governance pointers. The corrective action will be in create correct disclosures at intervals director’s and company governance reports and guaranteeing answerability. Conjointly implementation of company governance norms for CPSEs, each listed and unlisted, ought to be supervised systematically.

**Issue 5:** The government being the promoter
The government desires to perpetually monitor the performance of its Board of administrators in cases wherever it acts as a promoter and a majority shareowner of the PSU while not mitigating the independence and alternative powers of board of administrators, it ought to clearly give the strategic layout for effort numerous problems. According to the organization for Economic Cooperation and Development (OECD), the government ought to develop associate in the issue of possession policy that defines the general objectives of state ownership, the state’s role in company governance of
state-owned enterprises and the way this policy is probably going to be enforced.  

**Conclusion**

Recent institutional failures in the world economic situation typically rise from inappropriate policies or poor models of company governance. In India too, there’s an eternal battle amongst stakeholders for worth maximization and increasing transparency and answerability. Undoubtedly every public sector enterprise is distinctive and has its own set of strategically outlined goals and means of functioning and therefore, demands for a singular set of governance policies. However, sure corporate governance guiding principles must be categorical in nature to be applicable over a large span of public corporations to give a common performance analysis parameter. This would entail providing autonomy to the public sector on with observance it. And guaranteeing managerial autonomy to the PSUs doesn’t limit the role of the government rather enhances it.

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197 Sinha, Pankaj & Singhal, Anushree, A note on Corporate Governance in Public Sector Undertakings in India, 2012
THE DOCTRINE OF BASIC STRUCTURE: ORIGIN AND LEGITIMISATION

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“The constitution just not protect those whose views we share, it also protects those with whose views we disagree.”

Edward Kennedy

ABSTRACT

The Indian Constitution is considered to be the most comprehensive document of its kind but at the same time, ‘glitches’ are what run the business of law. This paper aims at addressing the question of how important is the ‘basic structure’ to remain extremely ‘fundamental’ in the Constitutional law so as the Parliament does not grow into a tyrant. This topic has been chosen because it is the most discussed issue in the Constitutional law not only because it has been the forever roadblock in the Parliament’s journey to enable a control over judiciary but also because such an ‘indefinite possibility’ term requires a better understanding. Numerous deliberations are required to understand this concept and the paper attempts to be one. The course of this paper will be the introduction to the supreme law of our land, a deeper understanding of how amendments work followed by emphasizing on the origin of this doctrine eventually leading to its grand commencement in the Indian Judiciary.

INTRODUCTION TO THE INDIAN CONSTITUTION

The ‘Constitution’ is a written instrument embodying the rules of governing a polity and guaranteeing the most basic rights ‘fundamental rights’ to the citizens. The Indian Constitution is a beautiful framework of political code, it is the longest handwritten constitution, which when came into existence had a total of 117,369 words in containing 444 articles in 22 parts, 12 schedules, it took nearly three years (2 years, 11 months, 18 days) for the constituent assembly to reach its final draft, and then it became the ‘Supreme Law of the Land.’

Our Constitution is decorated with various ideas from constitutions all over the globe for the government as well as the citizens. The ideas of bicameralism and single citizenship were taken from the British Constitution. Judicial review and Impeachment of The President were procedures borrowed by The Constitution of United States. The Irish Constitution lay out the systematic structure of DPSP’s (The Directive Principles of State Policy) this was carefully observed and borrowed by our constituent assembly. The feature of suspension of Fundamental Rights during Emergency was stated in the Weimar Constitution (of Germany). The Soviet and French Constitution gave landmark principles to our Constitution, ideas like Fundamental Duties, economic, social and political justice along with ideas of liberty, equality and fraternity. South African, Canadian, Australian and Japanese Constitutions principles, structures and procedures were also borrowed. This is an important criterion to be kept in mind.

198 https://www.merriam-webster.com/dictionary/constitution
because amalgamation of so many different ideologies, not all in depth contribute to a larger understanding of the basic idea that is behind the Constitution of India.

The Idea Behind Amendments
The Indian Constitution as much as carefully designed, is important to note - it has been more than 70 years to the birth of this document and hence like every other thing in this world, it is ‘aging’. It is aging because it was made in an era in a country trying to establish its existence, since then generations have witnessed the evolution of our motherland and it is important to observe how radically this transformation has taken place. And simultaneously while the country continuously tried to establish reform, adjust and alter its original form, the welfare state also found it essential for the Constitution to amend itself in order to accommodate the needs of the people. Now it needs to be understood that these needs are in existence as long as the like-minded people’s perspective continues to persist, as long as there is a shift in perspective, again the idea supporting the features will have to be amended. So it’s an organic process, it’s an ever evolving process of adapting to the changes in the requirements followed by the amendments supporting the same. As noted by Alexander Hamilton, “the ability to remedy defects and unintended consequences of a constitutional text can make constitutions more enduring. As political practices change over time, adjustments to the constitutional text keep it aligned with current practices and help ensure its continued relevance”. Our constitutional makers made this process easy, there is a feature already embedded in the document making amending very flexible for the Parliament, in spite of that, making changes to the constitution involves more procedure, more actors and higher vote thresholds, something that is not essentially required in an ordinary legislation. Hence, constitutional amendments go through a more intense test. The idea behind constitutional essence cannot be compromised or ignored. This is where the idea of ‘Basic Structure of Constitution’ comes in.

THE FIRST AMENDMENT
“It is impossible to hand up urgent social changes because the Constitution comes in the way,” Prime Minister Jawaharlal Nehru wrote to his chief ministers in early 1951. “We shall have to find a remedy, even though this might involve a change in the Constitution.” And this marked the beginning of amendments journey in India. Part XX of the Constitution under Article 368 deals with the amendment of the Constitution. It provides for three kinds of amendment i.e., amendment by simple majority; amendment by special majority; and amendment by special majority and ratification by the States. The first ever amendment to the constitution was passed within one and a half years of its adoption. After some really fierce parliamentary discussions, The First Amendment successfully placed restriction on freedom of speech along with introducing caste-based reservation and finally circumscribed the right to property, formalised and legalised the complete abolition of the zamindari system; it also inscribed a new schedule of the so ‘contradicting’ constitutional laws immune to judicial reviews. This amendment was a highly debated topic back in its time and was

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200 https://www.theweek.in/review/books/2020/02/2/16-stormy-days-when-nehru-decided-to-amend-constitution.html
202 https://www.prsindia.org/tags/article-368
criticised heavily. In the case of Shankar Prasad Singh Deo v UOI it was ruled that, as the newly inserted articles 31A and 31B seek to make changes in articles 132 and 136 in Chapter IV of Part V and article 226 in Chapter V of Part VI, they require ratification, and not having been so ratified, they are void and unconstitutional.

BEGINNING OF THE JOURNEY: The Case of Shankari Prasad Deo v UOI & Sajjan Singh v State of Rajasthan

The problem of validity of the Constitutional amendments came up for the first time on the issue of right to property. The Bihar Land Reform Act, 1950 was declared unconstitutional by the Patna High Court but after being challenged in the apex court there came up conflicting views on the matter leading to intense deliberation on the ‘point of law’. This led to the passing of ‘First Amendment’ explained in the aforementioned paragraph. This was religiously challenged in Shankari Prasad vs. Union of India questioning its validity. Applying the principle that Art. 13(3) did not acclaim explicitly the ‘law of constitutional amendments’ it rather stated that the ambit of Art 13(2) could not include any law made by constituent power and it was argued that it was only restricted by laws formed by the virtue of legislative power. This constituent power was stated to have no exception as amendments (except the fundamental rights). So, in the landmark cases of Shankari Prasad Deo v. UOI and Sajjan Singh v Rajasthan, both, the power of parliament to amend any part of the constitution including the part of fundamental rights were upheld. Although the two dissenting judges expressed their concerns over such bombarding of laws shielded by the factor of their addition in the IX schedule. The Constitution has "basic features" was first thrown light upon in 1964, by Justice J.R. Mudholkar in his dissent, within the case of Sajjan Singh v. State of Rajasthan. He put forth a very curious proposition of whether the entire scope of Article 368 included the power to alter a basic feature or rewrite a part of the Constitution. He quoted, “It is additionally a matter for consideration whether making a change in an exceedingly basic feature of the Constitution are often regarded merely as an amendment or would it be, in effect, rewriting a section of the Constitution; and if the latter, wouldn’t it be within the purview of Article 368?” Since the ruling passed in the case of Sajjan Singh relied heavily on the judgement of Shankari Prasad, the second judge, Justice Hidayatullah observed “I would require

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205 Only Constitution amendments which affect the Centre-State relations or division of powers in a federal structure require subsequent ratification by the States

206 Shankari Prasad v. Union of India A.I.R. 1951 S.C. 2193


208 ibid


210 Sajjan Singh v. State of Rajasthan[1965] 1 SCR 933. 39The amendment inserted 44 Acts in the Schedule. It was noted that Articles 31A and 31B were added to the Constitution realizing the State Legislative measures adopted by certain States giving effect to the policy of agrarian reforms have to face serious challenge in the in the Courts of law on the ground that they contravene the Fundamental Rights guaranteed under the Constitution

www.supremoamicus.org
stronger reasons than those given in Shankari Prasad to make me accept the view that Fundamental Rights were not really fundamental but were intended to be within the powers of amendment in common with other parts of the Constitution and without concurrence of the states”.

**EVOLUTION OF THE IDEA OF BASIC STRUCTURE**

**Prof. Conrad’s view on the ‘Doctrine of Implied Limitations’**

Constitution is a very adaptable document. Parliament and state legislatures have been given power by the constitution to formulate laws within their territorial jurisdiction as laid out in the Article 246. Now although this power is not restricted explicitly, it has certain limits which cannot be crossed. The Constitution vests in the judiciary. The judiciary is responsible for protection of all the constitutional rights and authorities given to the citizens and governments respectively. Prof. M.P. Jain so beautifully summarizes: “It has been fashionable for politicians in India to say that Indian Parliament is sovereign, meaning it can do whatever it desires. Such an assertion is not realistic. (...) Indian Parliament is not sovereign if it means that it has uncontrolled power to do what it likes. Since Parliament functions under a written Constitution, it has to observe the restrictions imposed on it by the Constitution. It can do what the Constitution permits it to do but cannot do what the Constitution prohibits.”

Therefore, even if article 368 allows the government to add, vary or repeal any provision, the parliament cannot damage or tamper with the ‘essence of Constitution’ behind the process of amending it. This essence or say the ‘original idea’ is intrigued in the provisions and not defined, it is understood as the Basic Structure of The Indian Constitution. The Constitution was first amended in 1951, but the dangers inherent in granting such wide scope of power to the legislature was perhaps best called out in a lecture delivered by a German professor, Dietrich Conrad. His talk “Implied Limitations of the Amending Power”, delivered in February 1965 to the law department of the Banaras Hindu University. Conrad expressed his concerns that Parliament’s power to alter the Constitution was unconditional. Parliament, he argued, was, aftermath, a creature of the Constitution. It could therefore not make any changes that had the effect of overthrowing or vanquish the Constitution itself.

A.G. Noorani has pointed out, Conrad had analysed his own country’s historical fate. In Germany, the destructing end brought to the Weimar Republic by Nazism had been followed by the fact that when the country adopted its Basic Law in 1949, it notably placed checks on the unfettered powers of the Legislature. This

211 https://mhrd.gov.in/article-246
213 https://www.cambridge.org/core/books/dimensions-of-dignity/doctrinal-dimension/5F37F0FBAA500A07FB4EE23A258BFFDBF/core-reader
215 https://books.google.co.in/books?id=BIAYdWAAQBAJ&pg=PT12&dq=A.G.+Noorani+has+pointed+out,+Conrad&hl=en&sa=X&ved=2ahUKEwjBtprsyszoAhWkxjgGHRZKCGcQQAwEwAxoECAwQKA
comprehended a restriction on the lawmakers from amending those provisions of the Basic Law that damaged the country’s federal structure, made human rights inviolable etc. This German connection was acknowledged by the Supreme Court in *M Nagaraj v. Union of India*216. Thus, it is clear that this doctrine was not an ‘invention of the Indian judiciary’ as is believed by some, but was rather a necessary inspiration from a civil law system. In his lecture, Conrad said India hadn’t yet been confronted with any extreme constitutional amendment. During his lecture he pointed out that India was not affected by any extreme Constitutional amendment yet, but the judiciary, he berated, had to be extremely cautious of the fallout by granting Legislature limitless power to change the Constitution. He seldom used extreme examples of potential consequences like: what if the Parliament were to amend Article 1, by dividing India into two parts. “Could a constitutional amendment,” he asked, “abolish Article 21,” removing the guarantee of a right to life? Or could Parliament use its power “to abolish the Constitution and reintroduce… the rule of a Moghul emperor or of the Crown of England?”

The term ‘basic structure’ cannot be found in constitution itself, it is the brainchild of our judiciary, introduced so as to protect the original ideas of our founding fathers against the unfettered ability of Parliament to amend the supreme law.

**THE CASE OF IC GOLAKNATH V THE STATE OF PUNJAB, 1967**

Finally, in the landmark judgement of *Golaknath v. State of Punjab*217 fundamental rights were given a ‘transcendental and sacrosanct’ position. In the given case, ‘the doctrine of implied limitations’ owed to the idea of Professor Conrad, was brought forth by M.K. Nambiar, a constitutional lawyer, but was not accepted by the Supreme Court. So, the apex court had finally reversed it’s position in the previous cases and held that no amendment of any kind could contribute to the progress of country at the stake of fundamental rights of the citizens. Pointed out in the same judgement, the debates in the Constituent Assembly, particularly the speech of Nehru (the then Prime Minister) and the reply of Dr. B R Ambedkar, who piloted the bill disclose clearly that it was never the intention of makers of Constitution by putting Art. 368 to enable the Parliament to repeal fundamental rights. Amendment of Part III is entirely outside the ambit of Art. 368. Chief Justice Subba Rao also gave a very interesting point of law in her ruling - It is understood that the ‘power to amend’ is provided by Art 368, and we say so because we acknowledge it as an ‘implied power’, this ‘implied power’ is derived by the virtue of existence of Art. 368 and the procedure drawn out is the same. It can also be inferred by Art 245218,

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216 (2006) 8 SCC 212
217 I. C. Golakh Nath and Ors. V. State of Punjab[1967] 2 SCR 762
218/6 Article 245: Extent of laws made by Parliament and by the Legislatures of States. - (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State. (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.
246\textsuperscript{19} and 248\textsuperscript{20} that Parliament is given ‘legislative power’, the scope of the same is also laid out clearly. This ‘legislative power’ is the only broad concept under which ‘power to amend or amending power’ can be studied. Legislative power can be regarded as the umbrella term. By the understanding of this terminology it can be inferred that the restrictions placed by Art 13 (2) on formulating ‘laws’ would also be applicable on ‘amendments’. Conclusively it was stated that the reasonable barriers placed the founders of Constitution worked on both the legislative as well as amending power of the Parliament which was- absolute no formulation of laws which would hinder, alter or even destruct the fundamental freedoms of citizens. But, at the same time Chief Justice Subba Rao ruled that there are no basic or non-basic ‘features’ to the Constitution, everything is basic and can be amended as and when required for the progress of our country. The Supreme Court in this case, also put forth the doctrine of “Prospective Overruling” under which the decisions would only have prospective operation and not retrospective and also stated the Parliament shall have no power to abridge the fundamental rights. While some dissenting judges like Justice Wanchoo, expressed his view that “no limitation should be implied on the amending power of the Parliament under Article 368. He gave the argument that “basic feature would lead to the position that any amendment made to any Article of the Constitution would be subject to the challenge before the Courts on the ground that it amounts to the amendment of the basic structure”. Therefore, finally it was held by the SC that some features lay at the core of the Constitution and cannot be amended under regular circumstances. Although even this landmark judgement did not pronounce yet the ‘basic structure doctrine’.

The Period Of Tussle

The period between 1967 and 1973 witnessed a very bitter confrontation as well as tussle between the Judiciary and the Legislature. The problems very transparent and becoming more and more with each passing day as Judiciary had ruled absolute restriction on the constituent power of the Parliament whereas the Legislature i.e. the Parliament found it extremely difficult continuing it’s functioning while being stuck to the values of constitutional provisions. The Constitutional restrictions came as roadblocks in the path of Country’s progress. The struggle for supremacy between Legislature and Judiciary was very evident through this phase. Even a Private Members Bill was introduced by Nath Pai seeking to give effect to the supremacy of

\textsuperscript{19} Article 246: Subject-matter of laws made by Parliament and by the Legislatures of States.- (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the —Union List). (2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the —Concurrent List). (3) Subject to clauses (1) and

\textsuperscript{20} Article 248: Residuary powers of legislation.- (1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.
Parliament. But it failed due to the political disturbances in it’s time. Nationalisation of Banks, Abolition of Privy Purses by Indira Gandhi were forced upon under the reasoning of Directive Principles of State Policy. Constitution becoming electoral issues were all the star marked moves of the government as well as the contenders. Finally Congress regained power by emphasizing more on socialist agendas and DPSP’s. Indira Gandhi said in 1967 “Change is inevitable but it is in us to control it’s content and directions.” Subsequently, momentous changes were sought to be effected the Constitutional 24th and 25th Amendments. Both the amendments introduced, hindered the below mentioned features of the Constitution-

(i) The rights and liberties of citizen of India;

(ii) The extent of the judicial power that can go so as to help the citizens in the assertion of their basic and fundamental rights as against State action;

(iii) The supreme sovereignty of the Constitution of India over the three limbs of Government, the legislature, the Judiciary and the Executive;

(iv) The extent of legislative power observed in the Constitution of India.

LEGITIMISATION OF ‘BASIC STRUCTURE’

The case of Kesavananda Bharti v State of Kerala

His Holiness Kesavananda Bharti filed a petition under Art 32 of the Indian Constitution for the proper and procedural enforcement of Fundamental Rights. The petition was filed mainly to question the validity of Kerala Land Reforms Act along with the 24th and 25th constitutional amendments. It was for the Supreme Court to decide with the largest ever Constitutional Bench of judges – which would be thirteen in number – whether these legislations/amendments were ultra vires/ unconstitutional in the eyes of law, for the same the Bench issued eleven separate judgements which altogether reach a volume of approximately thousand pages. It is considered as one of the most important cases in Indian history and is often referred to as “the case that saved Indian democracy”. The agenda was also to judicially review The Golaknath judgement. Although, Chief Justice Sikri states, that “the core issue of the Kesavananda case is the extent of the amending power conferred by Article 368 of the Constitution and not the decision about overruling Golak Nath case.”

The issues, first of their kind, were a beautiful complexity. Even the most basic questions moved along with a wide scope of controversy. The issues aimed for addressal were-

1) What should be the rule of interpretation?
2) What is the meaning of ‘amendment’?

221 http://constitutionnet.org/vl/item/basic-structure-indian-constitution
223 See Arvind P. Datar, The case that saved Indian democracy, The Hindu, 24 April 2013
3) What is the source of ‘amending power’ in the Indian Constitution?
4) Can people of India be authorised solely for the purpose of amendment?
5) By declaring constituent power has Parliament acquired for itself a position above Constitution?
6) Does Art.13(2) control Art.368?
7) Are the Fundamental Rights subject to amendment?
8) Does the ‘Doctrine Of Implied Limitation’ apply upon Indian Constitution?
9) What is the scope of Judicial Review?
10) What is the scope and extent of amending power with respect to Art 368?
11) Is not the Doctrine Of Basic Structure a vague doctrine?

The size of the bench in Kesavananda Bharti (13 judges) was the largest ever bench and this fact is of great importance because while deliberating on such issues which do not have any inherent authority, various perspectives are absolutely incremental. It is the most cited case in constitutional law. It holds high importance. It was also decided beforehand that if any ambiguity related to interpretation is met with Hyden’s rule would be followed. Hyden’s rule can be used to interpret a statute and strictly only when the statute was passed to remedy a defect in common law.  

All the issues were addressed and summarised - The amendments are essentially to be followed within the limits of constitution.

These ‘limits’ are to be followed by the principles. Before anything debatable arose ever, the Constitution was and has to be considered ‘Social Document’. The freedom struggle went through with a promise of ‘revolution’- socio economic revolution. So any amendment should relate to these principles. The ‘Constitution’ is a remarkable entity in it’s own and it definitely does not come with a mechanism that could steal away this identity. Art. 368 is the only source of amending power, it cannot be considered as a green signal to the law makers to go ahead with distortion/ destruction of it’s essential identity. In a representative democracy like ours, it is not possible for the people to the directly amend it, it has to be done by the Parliament. While dealing with the 5th issue the Court held the ‘constituent power’ of Parliament is not similar to that of the Constituent Assembly.

Moreover, yet again it was emphasized that Parliament is creation of the Constitution and hence all the powers it has are a derivation from Constitution. Therefore, The Parliament even while using constituent power or any other power has to strictly move within the limits of the ‘Supreme Law’

Chief Justices Hedge and Mukherjea JJ suggested a need for co-ordinated understanding between Art. 13(2) and Art. 368. Art 13(2) is ordinary legislative power and Art.368 is constituent power and is definitely above the limitation of Art. 13 but at the same time it is subject to the ‘Doctrine of Basic Structure’. Part III of the interpretation has to be applied which serves that purpose the best. The Constituent Assembly Debates, the examination of all the provisions of the Constitution and the larger purpose of the society shall be examined for that purpose.
Constitution is basic, it includes the ‘fundamental rights’ and these are vital to the citizens living in a democracy, especially. The words used in articles of these ‘rights’ are amendable as decided by the Court but they cannot be amended at the cost of bruising the ‘basic structure’. Only 6 judges assented that ‘fundamental rights’ could not be amended. Hence it was a ‘minority view’. And the amendment of Art. 368 was also held to be on similar grounds. On the last issue, it was held that a few legal principles like Natural justice, divine law cannot be rigidly defined, still they continue to be essential and binding.226

Chief Justice Sikri pointed out in his view that the respondents claim that Parliament can abrogate fundamental rights such as freedom of speech and expression, freedom to form associations or unions, and freedom of religion. They claim that democracy can even be replaced and one-party rule established. Indeed, short of repeal of the Constitution, any form of Government with no freedom to the citizens can be set up by Parliament by exercising its powers under Article 368. 227

Nani Palkhivala put forth a curious argument while the proceedings of the case continued that even if the Article 368 were examined broadly, the preamble was not amendable and Article 368 could not be read as “expressing the death wish of the Constitution or as a provision for its legal suicide.”228

Whereas all the judges confabulated their opinions over the ‘Doctrine of Basic Structure’ they interpreted it with the same essence but different literary, Justice Khanna delivered the majority view and is forever unforgettable in the books of law for being the profounder for legitimising the concept of ‘basic structure’.

The Court ruled the test in this regard: “Any principle of law abridged from the Constitution would potentially give rise to a loss of the very principle of unity and integrity of the nation, the basis on which we revolutionised our freedom struggle, and the dignity of the individual would be considered to be an essential feature of the Basic Structure. It also held that the amending power of the legislature shall be subject to a doctrine called the doctrine of ‘basic structure’ and therefore the parliament cannot use its constituent power under Article 368 so as to ‘damage’, ‘emasculate’, ‘destroy’, ‘abrogate’, ‘change’ or ‘alter’ the ‘basic structure’ or framework of the Constitution.”229

Justice Sikri observed that the phrase ‘amending the Constitution’ does not give the Parliament the authority to destroy it’s very identity or take away fundamental rights or even damage/ change the very features of it’s acknowledged existence.

Justices Reddy, Mukherjee and Hedge explained the basic features to be a broad category term under which sovereignty, democratic character, unity and essential Constitution. Kesavananda also answered an important question which was left open by Golak Nath, as to whether Parliament has the power to rewrite the entire Constitution and bring in a new Constitution. The court answered this by saying that Parliament can only do that which does not modify the basic features of the Constitution.
freedoms were secured to citizens.\textsuperscript{230} Justice Grover and Justice Shelat also believed that there were implied limitations on amending power of Parliament\textsuperscript{231} and there were certain basic elements to the Constitution.\textsuperscript{232}

On the other hand, Justice Ray observed that ‘power to amend’ has a broad scope and no limitations\textsuperscript{233}. Justice Palekar also stated that in his view, taking away fundamental rights can’t be declared as illegitimate.\textsuperscript{234}

The term ‘basic structure’ was used only by Justice Khanna, which was lifted by Chief Justice Sikri and adopted in his view of the majority.\textsuperscript{235} T. R. Andhyarujina in his book wrote that the _view of the majority_ cannot be the ratio of the Keshavananda case.\textsuperscript{236}

\section*{POST-KESAVANANDA}

\subsection*{A strategic aftermath}

The Kesavananda case aggravated the serious conflict between the judiciary and the Parliament. On the 24 April 1973, the Kesavananda judgement was delivered. Definitely there was a rush for the judgement and the judges gave the both the views by a wafer thin ratio of 7:6 in less than 3 months, the judgement, one of it’s kind 703 paged came in a day before Chief Justice Sikri’s retirement. Surprisingly on April 26th, Justice A.N. Ray, the loudest among the dissenters, was appointed as the new Chief Justice of India, it was a very politically motivated move, because the judges namely Shela (Sikri’s recommendation) Grover and Hegde were left behind. They also resigned as a sign of protest. This gave the Government a golden opportunity to appoint different judges. Between 1973 and 1975 political disturbances between the Prime Minister Indira Gandhi and Jayprakash Narain (who went to the extreme of calling out slogans like ‘Sampoorna Kranti’) are observed. From being an adored woman raising slogans like “Garibi hatao” till trying to stake all the unconstitutional moves for power, the phase is remarked as the actual

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\item \textsuperscript{230} (1973) 4 SCC 225, 405\textsuperscript{231} (1973) 4 SCC 225, 512, Para 744(3).
\item \textsuperscript{232} though the power to amend cannot be narrowly construed and extends to all the Articles it is not unlimited so as to include the power to abrogate or change the identity of the Constitution or its basic features; even if the amending power includes the power to amend Article 13(2), a question not decided in Golak Nath case, the power is not so wide so as to include the power to abrogate or take away the fundamental freedoms; See (1973) 4 SCC 225, 462, Para 608 (b) and (c).
\item \textsuperscript{233} Ibid, 637, Para 1159.
\item \textsuperscript{234} (1973) 4 SCC 225, 593, Para 1064.
\item \textsuperscript{235} See supra n
\item \textsuperscript{236} T. R. Andhyarujina, The Keshavananda Baharti Case: The Untold Story of Struggle For Supremacy By Supreme Court And Parliament, Edition 2011, P.56. He wrote, —If a ratio had to be extracted from the eleven judgments in the Kesavananda case it could not have been done in the manner of asking judges to merely subscribe to —The View of Majority‖ paper on the day of pronouncement of the judgments in Court. Deriving a ratio from the 11 judgments could have been done only after a full hearing by a later Constitution Bench to which the Petitions were remanded for disposal according to the unanimous Order of the Court. No later Constitution Bench to dispose of the petitions was convened to dispose off the petitions. Alternatively, the ratio could have been extracted by any later bench from the differing judgments as had been done in other cases.\textsuperscript{1} He further remarks, —Look whatever way, there was no majority view, no decision and no ratio in Kesavananda case that Parliament could not amend the basic structure or framework of the Constitution. This was only the conclusion of Justice Khanna. By a strategic roping in of his view in with six other judges —The View of the Majority‖ a majority of 7 Judges to 6 was created and approved by nine judges.
\end{enumerate}
\end{footnotesize}
test of ‘Doctrine of Basic Structure’ in this young country.

Finally due to ‘internal disturbances’ on 25th June 1975, the then President, Mr. Ali declared nation wide ‘Emergency’, it was again a very well read move because Gandhi was accused of electoral malpractices and the petition by Raj Narain, her opponent from the same constituency. As soon as the emergency was imposed, the government decided to ban RSS and in less than two weeks all the star leaders were put under preventive detention. The political tensions discussions of the time are not a subject matter of this paper and detailed deliberation on them would consume a lot of space and time. But all the happenings and the pressure of judgement increased on Gandhi and that led to the arrival of 39th Constitutional Amendment Act, 1975. The said amendment prevented judicial review of electoral practices against Prime Minister, President etc. So focusing on the judgement in Indira Gandhi vs Raj Narain, it was held that Indira was not guilty of maliciously winning the elections but the 39th amendment was struck down on the basis of ‘Doctrine of Basic Structure’, because it is very fundamental to the concept of democracy that all the three branches, Executive, Judiciary and Legislature are expected to be co-ordinated rather than overpowering one over the other. It was a landmark case because once again the Court had kept it’s promise bravely, protected the essence of democracy and most importantly reassured the citizens that the judiciary is to sole protector of the Constitution and will continue to be.

**The ‘final move’ and A ‘lost review’**

Within a week of Gandhi’s judgement, Chief Justice Ray suo moto decided to review the iconic Kesavananda Bharti case. And this was followed by the most surprising turn of events, Palkhivala (who had argued the same matter previously) with his team again deliberated on how the reconsideration of the case was invalid. By the third day of the proceedings, all the judges were impressed and persuaded except for Ray and the bench got dissolved on his discretion. The review is not officially observed anywhere but it is important for the readers to know about the facts because ‘transparency’ is one of the essential features of ‘Democracy’. And as a writer I feel obliged to share the same with you.

**Conclusion**

The space of this paper will not be sufficient to provide a detailed analysis of the events followed by the ‘emergency’ but nevertheless the origin and legitimisation of this absolutely marvellous doctrine and it’s emergence in Indian Judiciary has been tried to explain with absolute devotion. The Legislature continued to negate the judgement in Kesavananda Bharti and these attempts can be noted in Waman Rao, Minerva Hills but all the deciding justices have uphold the fact that ‘Judiciary can

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237 KN Govindacharya’s article on livemint.com on 22 June 2015.
239 (1975 AIR 865, 1975 SCR (3) 333)
only protect the Constitution’ and this will continue to be the same way till India continues to regard Constitution as the ‘Supreme Law’. The ‘basic structure’ has to be protected so that it continues to protect the fundamental ideologies of our country left by the Constituent Assembly.

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Abstract

Judiciary is one of the important pillars of democracy and to realise the true spirit of democracy the institute of judiciary must be independent. Independent judiciary means that the judges and the institute of judiciary are free from any kind of influence whether externally or internally. Independence of judiciary is necessary to ensure a system of checks and balances within different branches of government. People should have faith in justice delivery system of their country and this faith could be reassured by way of establishing a powerful and independent judicial system. The constitution makers envisioned a democratic nation through the guarantee of fundamental rights to its citizens and to guard and protect these rights an independent judiciary was established. Further, Supreme Court of India at time to time realised the need for its independence to protect the rights of people. However, this independence of judiciary is under threat now a days due to various factors. People's faith in judiciary is declining. This paper attempts to critically analyse some threats which are hampering the independence of judiciary. These threats are categorised into two broad headings which are external threats i.e. threats from the government due to which people lost their faith in system and government is using its power arbitrarily and other political and non-political organisation to serve to their benefits, and internal threats which exist within the institute such as corruption and appointment through collegium which has resulted in nepotism to some extent. All these threats are eroding the very independence of judiciary and consequently hampering with the democratic spirits of the nation.

What is judicial independence?

We all somehow have a different meaning of independence. Is it not astonishing that there is a term “Fully Independent” as if the word independent did not in itself mean complete and absolute freedom? Black law dictionary defines independence as “not subject to control, restriction, modification or limitation from a given source”. Considering that there is no spec of conditionality or probability in the definition, why then is independence restrictive? This is extremely relevant when we talk about judicial independence. Judiciary being the backbone of a democratic country must be independent and free from all types of improper influences or supervision. Independent judiciary is the hallmark of democracy. The main reason to separate powers (i.e. Executive, Legislative and Judiciary) was to create a clear demarcation of powers assigned to each body and to maintain a system of checks and balances. It is difficult to come up with a standard definition of judicial independence as judicial independence is a concept which is perpetually developing with the changing needs of society and also with the change in the political atmosphere. Judicial independence can be defined as the ability of individual judges and the judiciary as a whole to perform their duties
free of any influence or control by other actors. When we talk of judicial independence as an essential feature of a democratic nation, we need to understand what independent judiciary essentially means. Does it mean independence of judges or does it refer to the independence of the institution of judiciary? Actually, it means both.

Judicial independence means independence of all those who are responsible for imparting justice to the public at large i.e. the judges as well as the independence of judiciary as an institution. Neither could be preferred over the other. On one hand, if judicial independence is guaranteed at the institutional level but not at the individual level, individual judges can be forced to obey the wishes of the leadership of the judiciary, which may result in a less-than-wholehearted enforcement of the rule of law. In Chile and Japan, for example, the extent to which the judiciary as an institution commands obedience and conformity from its members has been blamed for producing timid judges who are unwilling or unable to rule against the government. On the other hand, if judicial independence is ensured at the individual level, individual judges will find themselves at liberty to pursue their individual preferences. Unchecked discretion of that kind not only invites abuse but also raises the likelihood that judges will decide cases in inconsistent ways, with the potential effect of undermining the predictability and stability of the law.

Ideally, the Judiciary should work in a “political vacuum” for the benefit of the public at large because the judges are not directly or personally accountable to the legislation or to any political party. Political vacuum means that it should be free from all kinds of political interferences and should not propagate political agendas. Neither any political party nor the government should have any say in the working of the judicial institution. It could be debated that “political vacuum” is only possible in theory and not in practical world considering the leakage of power dynamic in every institution. However, the least we could do is to minimize the interference of only the government executives and that too to a limited scenario.

The common man notion of independent judiciary is that it must be free from governmental actors. However, if we take the broader perspective, it does not necessarily mean independence from Government only, it has to be independent from all kinds of economic and sectional interests. Many times, the much-vaulted independence from government may cleverly conceal partiality towards another particular interest. A judge has to be independent of himself. He should be shielded from the public opinion and should be able to deliver justice impartially and based on law.

In short, judicial independence means that judiciary must be insulated against and protected from sources of direct or indirect influence, coercion, threat or harassment from government, politicians, persons in authority, relatives, neighbours, interested parties, fellow judges, chief justices, judicial bodies, organizations or any private individual.

Why is judicial independence important?
To safeguard the ideal enshrined in the preamble of our constitution that is the sovereign, socialist, secular, democratic, republic and to secure all our citizens Justice, liberty, equality and fraternity it is important to maintain eternal vigilance to safeguard the independence of our judiciary which is the true foundation of a real democracy.

The concept of an independent judiciary exists for the benefit of citizens and not that of the judges. Judges are obliged to decide issues arising out of a dispute between two parties. In a trial before the judge there will always be a winner or a loser and one may or may not be pleased with the judgement. Our system of law believes in the concept of a fair trial and not in the concept of a favourable outcome. Judges’ duty is to take into consideration the law of the land and the aspiration of nation and public at large.

An independent judiciary is not an end but is a means to an end. Our end goal is to have a fair and impartial justice system and an independent judiciary aids us in achieving this end. Some may say that this goal is impossible to achieve because justice depends upon the conscious of an individual judge and consciously or unconsciously a judge may be biased in his approach based on his personal lifetime experiences but when we speak of fair and impartial justice, we must ensure that these personal lifetime experience of judges have a less impact on them and they should be impartial towards dealing with different cases we have to restore the faith of citizens in our justice system. Around 17766 cases are filed in India every day. This could mean two things, firstly we as a society have a lot of unresolved problems and secondly that we still have immense trust in our justice system to provide us an adequate solution. It could be concluded that even during these tough times, the citizens have considerable amount of faith in Judiciary but, people are beginning to lose faith due to influence of other external factors upon judiciary. To safeguard this faith of people on our justice delivery system it becomes very important to ensure an impartial and independent judiciary. Citizens should feel that they were dealt with fairly, that they received a fair trial, and a fair hearing. If this faith is lost the common objective of justice system will cease to exist. Judicial Independence is important because it guarantees that judges are free to decide honestly and impartially, and in accordance with the law and evidence, without concern or fear of interference, control, or improper influence from anyone. If the faith of people towards judiciary has been eroded, the basic concept of justice would be at stake.

Many jurists have emphasised on the importance of independent judiciary time and again. At the inaugural session of Supreme Court of India 28th January 1950, the First Chief Justice of India Harilal J Kania said that “political consideration should not influence appointments to the bench”.245

Alexander Hamilton wrote in *The Federalist Papers* that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative

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244 https://www.bccourts.ca/documents/Why_is_Judicial_Independence_Important_to_You.pdf

245 Supreme Court takes seat: Simple ceremony at Delhi. Times of India.1950 Times of India, Jan. 29, 1950, P.3
authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”

To secure the democratic principles of our constitution and to control the arbitrary use of power by other organs of the government, independent judiciary is necessary. We as citizens must see to it that there should not be any circumstances which hampers the independence of judiciary so that our interest could be protected.

Views of constitutional makers on judicial independence?

Even during the Constituent Assembly Debates, our constitution makers had repeatedly focused on the need for an independent judiciary. They expressed their strong opposition against any kind of political interference in judicial matters and institution of judiciary. Though they wanted to have the system of checks and balances they would have never envisaged so much of political interference as we are experiencing today.

Jawaharlal Nehru evidently expressed his concern of executives controlling the judiciary wherein he said that the executive being the appointing authority of the judiciary will begin to appoint judges of their own liking for getting decisions in their favor.

Naziruddin Ahmed objected to the need for approval by the executive in regards to the administrative matter of the court in its judicial functions. “The President for all practical purposes will mean the ministry or the government of the day. The Supreme Court with whom vests the supreme authority of the judiciary should by absolutely independent of the executive in its internal matter”

Z.H. Lari had expressed a similar opinion as that of Mr. Ahmad. He was of the opinion that “the necessity of having the approval of the President is in a way interference by the executive with the judiciary. The Supreme Court shall be competent enough to frame all the necessary rules and there is no necessity of securing the previous approval of the president”

Shibbanlal Saxena while discussing about the appointment of judges of the Supreme Court had clearly stated that the Chief Justice of the Supreme court shall be completely independent of the executive and the highest tribunal of justice should be above suspicion and no executive should be able to have influence upon him. He also proposed that Chief Justices of High Court should be appointed on the advice merely of the Chief Justice of the Supreme Court so that they may derive their authority from the Chief Justice and not the Executive.

These views of our Constitutional makers certainly narrate their vision of the Judicial System in independent India.


247 Constitution Assembly Debates, Volume 8, https://www.constitutionofindia.net/constitution_assembly_debates/volume/8

248 Id.

249 Id.

250 Id.
The Supreme Court’s view on judicial independence

The Supreme Court being the highest court of justice in India has time and again emphasized the importance of Judiciary from all kinds of external factors. The Supreme Court has opined his view in the famous three judges’ case.

Following are the three cases:

First Judge Case
S.P. Gupta v Union of India, 1982 (famously known as First Judge case or Judges’ transfer case)\(^{251}\)
The primacy lays with the executive. It was laid down that in Clause 1 of Article 217 of the Indian Constitution the word consultation does not mean concurrence.

Clause 1 Article 217\(^{252}\) reads as follows (1):

Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the chief Justice, the Chief Justice of the High Court, and shall hold office, in the case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty two years Provided that

(a) a Judge may, by writing under his hand addressed to the President, resign his office;
(b) a Judge may be removed from his office by the President in the manner provided in clause (4) of Article 124 for the removal of a Judge of the Supreme Court;
(c) the office of a Judge shall be vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court within the territory of India.\(^{253}\)

Justice Bhagwati propounded the rationale for the said interpretation as follows “The power of appointment of Judges is not interested to the Chief Justice of India or the Chief Justice of the High Court because they do not have accountability to the people and if any rule or improper appointment is made they are not liable to account to any one for such appointment”. This judgement had struck down the independence of Indian Judiciary. There was general dissatisfaction with the appointment being made.\(^{254}\)

The Second Judge Case: Supreme Court Advocates on Record Association vs Union of India, 1993\(^{255}\)

A nine judge Constitution Bench Overruled the decision of S.P.Gupta, through this judgement the court corrected their mistakes by reducing both political and executive interference. ‘Primacy’ to appoint judicial members and ‘best equipped’ to appoint judicial members these two factors were the center of controversy those days. The elected government or the judiciary themselves who is to be considered apt for this role? The vagueness of Article 124 added more fuel to this ongoing debate. The Constitution gives President of India the power to appoint Judges of Supreme Court “after consultation with such judges of the Supreme Court and of the High Courts”. Also, the appointment of Judges of High Court is done by the President “after consultation with the Chief Justice of India, the Governor of the State and. the Chief Justice of High Court”\(^{256}\)

\(^{251}\)S.P. Guptav Union of India, AIR 1982 SC 149.
\(^{252}\)Indian Const. Article. 217
\(^{253}\)Indian Const. Article. 224
\(^{254}\)S.P. Gupta vs Union of India, AIR 1982 SC 149.

\(^{255}\)Supreme Court Advocates on Record Association vs Union of India, Writ Petition (Civil) 1303, 1987.
\(^{256}\)Indian Const. Article. 217
The judgement of the Second Judge case held that the Chief Justice of India has a primacy in the matter of appointment of Judges, but the Executive also has a considerate role in appointment. Supreme Court explicitly stated that the decisions on appointment of judges should be mutual and neither Judiciary nor executive will have an upper hand in the appointment process. The Judgement not only mentioned the Executive and Judiciary powers but also went ahead and distinguished amongst the role of Chief Justice of High Court and Chief Justice of India during the appointment process.

Third Judge Case

The said case raised 9 prominent questions contending almost every aspect of Judiciary and its independence. Both the First Judge case and the second Judge Case were taken into consideration. This is considered to be the most important opinion delivered by the Supreme Court in regards to judicial independence. The issues raised were as follows;

1. Whether Article 217(1) and 222(1) means “consultation” with a plurality of Judges in the formation of the opinion of the Chief Justice of India or “consultation” is the sole opinion of the Chief Justice of India? Supreme Court stated that “consultation” in the Constitution of India requires consultation with a plurality of Judges in the formation of the opinion of the Chief Justice of India.

2. Whether the transfer of Judges is judicially reviewable or is there a limitation on judicial review with respect to matters of transfer? Supreme Court held that the transfer of Judges is judicially reviewable only to an extent that the recommendation that has been made by the Chief Justice of India without consultation with the four senior-most puisne Judges of the Supreme Court.

3. Whether article 124(2) of the Constitution of India requires the Chief Justice of India to consult only the two senior-most Judges or whether there should be wider consultation according to past practice? Supreme Court clarified that in case of appointment of Supreme Court Judges consultation with 4 senior-most judges is required and in case of appointment of High court Judge consultation with 2 seniors most judges is sufficient.

4. Whether the Chief Justice of India can act in his individual capacity, without consultation with other Judges of the Supreme Court in regards to materials and information conveyed by the Government for non-appointment of a Judge recommended for appointment? Supreme Court refrained the Chief Justice of India from acting in his individual capacity and advised him to consult with other Judges of Supreme Court.

5. Whether the requirement of consultation by the Chief Justice of India with his colleagues, who are likely to be conversant with the affairs of the concerned High Court refers to only those Judges who have that High Court as a parent High Court and excludes Judges who had occupied the office of a Judge or Chief Justice of that Court on transfer from their parent or any other Court? Supreme Court stated that the requirement of consultation by the Chief Justice of India with his colleagues who are likely to be conversant with the affairs of the concerned High Court does not refer only to those Judges who have that High

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257 Supreme Court Advocates on Record Association vs Union of India, Writ Petition (Civil) 1303, 1987.
Court as a parent High Court. It does not exclude Judges who have occupied the office of a Judge or Chief Justice of that High Court on transfer.

6. Whether justification is required in case of departure from general order of seniority? The Supreme Court held that only a positive reason of recommendation is required. The Judges are not obligated to provide reasoning for any departure.

7. Whether the Government is entitled to require the opinions of the other Judges in writing in accordance with the Supreme Court judgment and that the same be communicated to the Government of India by the Chief Justice of India along with his views? Supreme Court stated that the view of the other Judges consulted should be in writing and should be transmitted to the Government of India by the Chief Justice of India along with his opinion.

8. Whether the Chief Justice of India has an obligation to comply with the norms and the requirement of the consultation process in making his recommendation to the Government of India? The Supreme Court held that the Chief Justice of India is strictly obliged to comply with the norms.

9. Whether recommendations made by the Chief Justice of India are binding upon Government of India, even if the recommendation is without complying with the procedure? The Supreme Court explicitly expressed that any such recommendation will not be binding on the Government of India in any manner.  

This case highlights that the Supreme Court has put its trust on the existence of an independent judiciary, however in the course of this paper we will also see that the system of appointment has some fault within it.

**Threats to an independent Judiciary**

The concept of an independent judiciary is very crucial to the functioning of a democratic nation yet very difficult to achieve in a practical sense. Various ills and evils are threatening this independent nature of the judiciary. Some factors are at the forefront and received a lot of criticism, whereas others have not received much attention of the critiques, and therefore seeped into the system to such an extent that now it becomes very difficult to eliminate those. We can categories these factors into two broad headings:

a) External factors: it includes the outside forces i.e. role of government in hampering judicial independence or the interference of political or non-political organizations, etc.

b) Internal factors: these are the internal matters of the institute of judiciary such as corruption, economic and social interests of the judges or their personal biases, etc.

We will discuss these factors in detail in the following section.

I. **External Factors**

First, let us consider the external factors which hamper the independence of the judicial institution. It includes interference of the government that is the legislative and the executive, influence of political parties and the non-political organisations. It is said that the judiciary should be safeguarded from those who have a high stake in its decisions. Any political party may use the judiciary to fulfill its political agendas, therefore it becomes important to protect it from political pressure. The present-day government may also exercise control over the judiciary in many

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259M A Rashid, *Supreme Court Guidelines and Precedents*, Universal
forms such as appointments to the higher judiciary and transfers. Fixation of service conditions and provisions of facilities like housing, transport, etc.; appointments to various tribunals, commissions and posts after retirement are some of the ways to provide them benefits and hence existing control over them. Therefore, due to these factors a judge may wish to appease the government to avail other benefits. His decisions are influenced by political ideologies of the government, though he may not agree to such ideologies but for receiving those post-retirement benefits when he accedes to the policies of government.

The Government may also indulge in retro-active legislation and legislative decision to revert an unfavorable judicial decision or to forestall it. The common example of this may be the passing of THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT, 1986. The Rajiv Gandhi government tried to nullify the impact of the Shah Bano case by inserting contradictory provisions. In Shah Bano vs. Imran Khan the SC has held the secular principle for the protection of Muslim women. In the Supreme Court’s decision in the said case it was held that a Muslim woman who was unable to maintain herself is entitled to maintenance form her husband even after the iddat period under section 125 of CrPC as against the Muslim personal laws where she is not entitled to be maintained after the iddat period. Section 3 (1) (a) of the act made the following provision

1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to

Though following provision has been interpreted broadly by the judiciary in Daniel Latifi vs. Union of India where the court laid down that this provision should be interpreted keeping in mind the previous judgment of the court and the word ‘within iddat period’ should be read as during iddat period and husband has to maintain his wife during iddat period and also after that under section 125 of CrPC, yet Prima Facie this provision laid down same provisions as that of Muslim personal laws. The reason for this act of government may be appended to their vote bank politics to appease one religion.

**Confrontation between Government and Judiciary**

In today's time one can make a fine distinction between matters where political stakes are involved and the matters where political stakes are not involved. The question arises why is there a distinction? Is such distinction beneficial for the public at large? Or are these distinctions serving a political agenda?

Is there a common thread between Sahara-Birla, Bhima-Koregaon, Rafale, Aadhaar, Loya, Money Bill or between Ram Mandir Case, Triple Talaq Judgement? Is the alarming similarity between cases such as Abrogation of Article 370, Citizenship Amendment Act, Petition challenging Demonetisation and Electoral bonds evident to the public?

It could be a mere coincidence that agendas stated in the mandate of the ruling party and the decisions of Supreme Court comes at the same time. But the unprecedented press conference called by 4 Senior Supreme Court Judges directs otherwise, the Judges

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260 THE MUSLIM WOMEN (PROTECTION OF RIGHTS ON DIVORCE) ACT Sec 3(1)(a)

261 Daniel Latifi vs. Union of India, Writ Petition (Civil) 868, 1986
handed over media a letter stating “cases having far-reaching consequences for the nation and judiciary were selectively assigned to benches of preference without any rational basis.” Justice Kurian Joseph, post retirement publicly spoke about the outside influence on the Chief Justice of India. This creates suspicion not only regarding the time when the judgement was delivered but all the other aspects comes under scrutiny such as the bench of judges, duration taken to deliver judgement, the approach of the judges. Prashant Bhushan, a senior lawyer in Supreme Court alleged that the government was blackmailing Misra political sensitive cases are being assigned to hand-picked benches with no senior judge on them so that the desired outcomes are achieved. He reaffirmed that the Chief Justice is clearly working under government pressure.

II. Internal Factors

Internal factors which are responsible for the erosion of the independent nature of the judiciary includes all those elements which constructs a judge’s personal approach and all those factors which corrode the image of the judiciary as a whole as an impartial institute and makes it a bargaining counter.

- Corruption

The problem of corruption in the judiciary has taken many forms. It has to be taken a more serious note of, than in any other branch, and cannot be excused on the grounds that judges are bound to be affected sooner or later by the general phenomenon. Corruption in court may take many forms, direct or indirect, subtle and not so subtle, at the Judges level or unknown to him at the ministerial level below him, everything which is calculated to influence the Judge comes under this category.

Corruption also works in insidious ways. Favoring the form of lawyers which send briefs to the judges’ relatives, if they are practicing in the same or other court or courts, favoring the juniors or other associates of the Judges’ kith and kin, trying to be popular with the dominant section of the bar to earn their praise, trying to favor lawyers and law firms with a view to earn briefs or arbitration or opinion work after retirement are some to the damaging modes of corruption.

Prashant Bhushan, senior lawyer in December 2009 in the affidavit in response to the notice of contempt issued by Supreme Court stated that out of the last sixteen to seventeen Chief Justices half have been corrupt and he also provided evidence to support his statement. The former Judge of the Calcutta High Court Justice Soumitra Sen was impeached by the Rajya Sabha for misappropriation of funds in 2011. He became the first judge in India to be impeached.

Anupam Gupta a member of the Bar Association, a prominent lawyer and a legal columnist spoke at the meeting for the Bar Association of the Punjab and Haryana High Court on August 28th 1993 “No system of Justice, it has been said, can rise

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262Manu Sebastian, How Has the Supreme Court Fared During the Modi Years?, The Wire (Feb. 05, 2020, 20:32 PM), https://thewire.in/law/supreme-court-modi-years


265 Motion for removal of Justice Soumitra Sen https://rajyasabha.nic.in/rsnew/Soumitra_Sen_Judge.pdf#page=409
above the ethics of those who administer it when abuse of judicial power outgrows individual aberration and becomes an institution lifestyle, when judicial corruption ceases to be a mere rumor and develops into a universal perception, then judges scramble for ministerial favor and perks and state government and chief minister acquire greater clout over the court than the court has over them under the constitution. It becomes a moral and constitutional imperative to take action, in the celebrated lines of President Roosevelt, to “save the constitution from the court and the court from itself”.  

Some of the recent examples in this regard could be recalled. In March, 2019 a former Supreme Court judge had made allegations on relatives of the then Chief Justice of India, Justice Gogoi for corruption and that they were taking bribes from the parties.  

A FIR has been filed in CBI against justice SN Shukla from Allahabad High Court for favoring unjust admission process in a medical college in Lucknow in 2017-18 batch.  

The evil of corruption has taken over the judiciary and it is high time now for the caretakers to curb this evil and progress towards a better nation.

- **Faulty appointment mechanism**

The judges to the higher judiciary are appointed through the system of collegium in which senior most judges of the Supreme Court have the power to appoint/elevate judges to the Supreme Court and to transfer the judges of High Court and Supreme Court. It consists of the Chief Justice and four others seniors most judges of the Supreme Court. The foundation of this system has been laid in the three judge cases as discussed earlier. The power is vested in only one organ of the government and in such cases the chances of misusing it is more rampant and this is what is happening in our judicial system.

Dr. B.R.Ambedkar expresses his concern over the collegium system, though it was not a concept of collegium during those time but he described it as system of judges selecting judges, “to allow the Chief Justice practically a veto upon 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”.

Justice Rang Nath Pandey of Allahabad High Court said, in his letter to PM Narendra Modi, that this system of appointment is very unfortunate. In the same letter he claimed that only criteria for selecting judges through collegium is nepotism and casteism. He also alleged that appointments are done in close chambers over cups of tea.

These are the serious issues highlighted by Justice Pandey which demands immediate cognizance.

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268Pradeep Thakur, Govt gives collegium ‘proof’ of nepotism in picks for HC judges, Times of India, Aug. 1, 2018
269Santosh Paul, Appointing Our Judges (2016)
In 2013, the collegium of the Punjab and Haryana High Court — comprising the then chief justice (now Supreme Court judge) AK Sikri and justices Jasbir Singh and SK Mittal — had recommended the names of eight advocates to be promoted to the high court. The lawyers recommended for elevation were Manisha Gandhi (daughter of former chief justice of India AS Anand), Girish Agnihotri (son of former justice MR Agnihotri), Vinod Ghai and BS Rana (former juniors of Justice SK Mittal), Gurminder Singh and Raj Karan Singh Brar (former juniors of Justice Jasbir Singh), Arun Palli (son of former justice PK Palli) and HS Sidhu (additional advocate-general in Punjab).

One-third of 33 senior advocates recommended for judgeship in India’s largest high court — the Allahabad high court — are blood relatives of sitting or former Supreme Court judges or judges of the Allahabad high court. The list of 33 names allegedly includes the brother-in-law of a sitting Supreme Court judge and the first cousin of another judge. Sons and nephews of former Supreme Court and Allahabad high court judges have been recommended for judgeship apart from a senior advocate, who is a law partner of the wife of a senior Delhi politician.

Also, we cannot shift this power to the executives as the history clearly demonstrates misuse of this power to serve the political benefits. Some of the Examples are

Controversies:

1) January 1997 at the time of supersession of Justice Khanna by Justice Beg and the other in February 1978 at the time of the appointment of Justice Chandrachud to that August post. The formal supersession was explained away by the fact that Justice Khanna would have served for a very short term as a chief Justice, though earlier Judges were appointed to that post for a shorter period than Justice Khanna would have got. In the latter case 2 public men and advocates, joined in by no less a person then Late. Shri M.C.Chagla, opposed the appointment of both Justice Chandrachud and Justice Bhagwati for no other reason than their decision in the Habeas Corpus Case.

2) In 1977, when Justice D.A. Desai who was then 5th in the seniority list of the Gujarat High Court was appointed as the Supreme Court Judge as if there were no such supersessions earlier.

3) When Justice Krishna Iyer, then the 6th and 7th puisne judge in the Kerala High Court, was appointed to the Supreme Court, he was 106th in the All India Seniority list of the High Court Judges no controversy was evoked by the said appointment.

4) In a recent case, when Justice Muralidhar expressed his anguish over failure of Delhi Police to register FIR against political leaders for making hate speech, the Centre notified the transfer of Justice Muralidhar to Punjab and Haryana High Court. An attempt is made upon the citadel of injustice that Judges will be appointed or referred only when they are willing to toe the land of the executors and if they do not do so they will be shown the boot.

271 Shishir Tripathi, Supreme Court yet to acknowledge nepotism in judicial appointments, even as Centre seems intent on curbing it, First Post (Feb. 05, 2020, 20:43 PM), https://www.firstpost.com/india/supreme-court-yet-to-acknowledge-nepotism-in-judicial-appointments-even-as-centre-seems-intent-on-curbing-it-4871401.html

272 Olav Albuquerque, Nepotism hovers on India’s Judiciary, First Post (Feb. 05, 2020, 20:46 PM), https://www.freepressjournal.in/analysis/nepotism-hovers-on-indian-judiciary-olav-albuquerque

www.supremoamicus.org
N.A. Palkhiwala “If the whole chapter of fundamental rights were to be deleted, the damage to the future of democracy and civil liberties would not be so great as would ensue for fragrant erosion of Judicial independence. The final guarantee of the citizens’ rights is not the constitution but the personality and intellectual integrity of the Supreme Court Judges”

Justice HR Khanna former Judge of Supreme Court “in the context of independence of judiciary the appointment of the judge of the Supreme Court merits special consideration. In view of the special rule which has been assigned to this court under the scheme of the constitution it is essential that only persons of the highest caliber are appointed judges of the court and that no other factor except that of merit alone should weigh in the matter of appointment. The law laid down by SC constitutes the law of the land. The fact that the court sets as the court of appeal against the judgement of the High Court makes it necessary that the judges of the Supreme Court should be persons of high esteem and stature and command; such great esteem that even when the judgement of the high court is reversed on appeal by the supreme Court, the judges of the High Court should have a feeling that it has been done by a court which is not only higher court in legal sense of the term but also because it is composed of the judges whose acumen is, by and large, acknowledge to be superior to that of High Court Judges.

Could this be the “beginning of the downfall of judiciary”?

Conclusion
If all these dynamics are to be changed it becomes important to provide for an independent body namely Judicial Commission which should be responsible for the appointment, transfer and conduct of the Judges. It should be made responsible for investigation and prosecution of judges on the charges of corruption and judicial misconduct. The commission should see to it that judges are performing their duties efficiently and be required to publish annual reports mentioning all the statistics of pendency and disposal of the cases. This would ensure an independent judicial system along with adequate supervision on the same.

To ensure independence of the judiciary and its freedom from any external pressure or internal influences, more rigid safeguards are needed to ensure the impartiality of judges and for the benefit of the nation. Suggestion by the Fourteenth Law Commission of India had barred the Judges of the Supreme Court and the High Courts from accepting any employment under the union or the state after retirement and the appointment procedure of the Judges of High Court should be modified so that the state executive has a lesser voice in the selection of judges.

“Take away the impartiality of judiciary from judiciary and you take away the judiciary itself”

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273 K.S. Hegde, Crisis in Indian Judiciary (1973)
CASE COMMENT ON MUKESH & ANR vs STATE FOR NCT DELHI & ORS “NIRBHAYA CASE”

By Astha Chaudhary
From ICFAI Law School, Hyderabad, Telangana

INTRODUCTION

In the history of human, race, and mankind, rape is considered as one of the most heinous crime. In the 21st century where both woman and man should treated and respected equally, herein we are standing in such a position from where we can witness the unfortunate growth of crimes against woman, rather witnessing the growth of economy and mankind. It is quite ironical, strange and disappointing at the same time that the fact, a country which worships women as goddess and believe in the ideology of women empowerment stands fourth with rape being the most common type of crime happening on the streets of India.

The case of MUKESH & Anr vs STATE FOR NCT DELHI & Ors famously known as the “NIRBHAYA CASE” is one of the most landmark case with a landmark judgment which showed the road ahead that somewhere the laws related to sexual assault, sexual abuse and rape have to be more strict and it showcased the scenario of woman not being safe in our society, they need to be protected.

After this case, there was a massive jump in the no. of cases filed in India and the main reason behind the no. of cases to be filed was the outrage created by the Nirbhaya Case. Still, there have been cases about sexual abuse, assault, rape which have been filed but then there are cases which are not filed, however, it is quite unfavourable for the unregistered cases related to sexual assault, abuse, rape are double in numbers than the cases which are getting registered. This case not only gave power to woman to come in front and fight for themselves but also the judiciary in administering justice for Nirbhaya played an important role.

MUKESH & Anr vs STATE FOR NCT DELHI & Ors,(2017) 6 SCC 1

FACTS

On just any other chilly night in the month of December in the year 2012, the prosecutrix and her friend where returning from the movie theatre in Delhi, and were waiting for the bus to come. One of the culprits was calling for the commuters and was successful in convincing the prosecutrix and her friend that they are going to side of the prosecutrix and her friend’s destination, as they entered the bus they already saw there were only six people in total including the bus driver and the bus had tinted windows.

Slowly the feeling lonely suffocation and danger began to barge in as they did not allow anyone else to board the bus and they even let the darkness rule the bus. The prosecutrix and her friend were robed and beaten up by the other five people as the 6th one was driving among them there was child aged 17 years of age, i.e. the child was a minor, then they injured her friend and assaulted and gang raped the prosecutrix one by one, they even inserted an iron rod into her vaginal parts and mutilated her body which is par human imagination. The prosecutrix intestines were pulled out and private parts were mutilated.

Later, after lot of treatments and medical help, she died of multiple organ failure,
internal bleeding and cardiac arrest on 29th of December, 2012.

**JUDGEMENTS**

After reviewing and going through the facts of the case, the Trial Court said that it comes under “rarest of rare cases” where the culprits have used their power and in aggression and kept the humanity aside and murdered, raped her as if she isn’t a human being and treated her as an object and much more worse than that. The Trail Court and the High Court of Delhi, had the same judgement as well as punishment that was the death penalty for all the four culprits and a fine of Rs 10000/- to be paid by each convict and in default of payment fine the convict shall undergo simple imprisonment for a period of one month.

The culprits even appealed to Supreme Court where it upheld the High Court and Trial Court’s judgement. All the three courts Trial Court, High Court even the Supreme Court termed this as the “RAREST OF RARE CASES”.

The 5th culprit who was a minor was treated as a minor even though he committed a heinous crime and it was held that he will be imprisoned for three years and the Juvenile Justice tried him and the punishment was given by them. The 6th died during the trial session, where he committed suicide.

After, the judgement of the Supreme Court was passed, they then appealed for Review Petition in the Supreme Court which was also dismissed by the Court as it had no substantial question of law and no further merits to review to the same. Review Petition getting rejected then Curative Petition getting rejected even then they went on to file a Mercy Petition, every single culprit filed for Mercy Petition as well, where the Mercy Petition got rejected i.e. the President after consultation with the central cabinet rejected the petition and upheld the death penalty of all the four culprits.

After delaying the judgement and punishment thrice, they were finally hanged on 20th March, 2020.

**ANALYSIS**

Famously, known as the Nirbhaya Case, a landmark case which shook not only the whole nation but also the legal system of India. No one would have ever imagined that a crime like rape could go so far, where the humanity took a seat back somewhere in the bus, maybe.

Everyday, in every house a woman comes or goes out late, hoping and praying that she returns home safely and sanely.

This case bought a lot of outrage in people not only in India but worldwide, whereas the politicians blaming the girl that they do not know how to behave or they do not how to dress and someone making a political move by making this case their agenda for next election.

Nirbhaya case brought a lot of woman to come up and take stand for themselves and even fight for oneself. The outrage was so much that it led to candle march and justice for nirbhaya march, putting a lot of pressure on the government and on the legal system. This case actually brought a lot of change in the legal system with Nirbhaya Act, The Juvenile Act, Evidence Act, every part of the legal system was amended, looking into the matter and case.

As days kept on passing by, one by one then more cases where added to the list of rapes, even after the outrage of the people and
legal system being strict the people did not stop, reportedly from the year 2013, there have a drastic increase in the no. of rapes cases.

Before, this incident, hardly people took the whole rape crime in seriously, this case urge to people think about it. Even in the department of the police, they do not take few rape cases seriously or for that marital rape is one such example, it is not a crime in India, it is assumed that when a woman is getting married to a man she is giving the consent for cohabitation, where is it written no one knows except the old adage of people and society, this case i.e. Nirbhaya case did put some light on the marital rape as well, but still no one really discusses about it because marriage is sacred, the society does not permits. The society’s perception too some extend has destroyed the humanity, too, few men still think that they live a patriarchal society, whereas, we have passed that phase long back, hardly the male section of the society wants to accept it, so when they want to show some power and rage they end up doing crimes like rape, sexual assault, beating up the woman, touching or looking inappropriately, this isn’t done by the outsiders only somewhere in some part of the country, maybe a family member like father or uncle must be doing this to their daughter or daughter like girl, these kinds of cases are not taken seriously, because obviously our society can never accept that a father or a uncle can do this, the Government to sometimes fail to take these crimes seriously and take it into consideration. Nirbhaya case gave light to these kinds of issues, sexual assault, sexual abuse, rape, voyeurism, stalking, sexual harassment issues to be tackled and to be handled with care.

Somewhere the case helped women and somewhere the inhuman nature of the people of the society increased these kinds of crime like sexual assault, sexual abuse, rape, voyeurism, stalking, sexual harassment more because the legal side was standing for woman.

The Nirbhaya case is more about the men anger and rage, how a woman can argue or say no to a man. This case has such kinds of fact which are disturbing as well as it makes us contemplate as to what exactly are we doing for the safety of woman, and why is that people specifically the male section think that woman are weak, how? Woman are the most strongest because they carry a human inside them for nine months and work outside and inside of home, they run the family. Wasn’t the society should be like all are equal both, men and women. It’s a case which is rare, a case like this seen after years or ages, maybe. No one even came to help the victim and her friend, because it was a matter of police and legality. People should stop being so selfish. Half of the people back out or take a step back because of the police involvement, the society and people need to understand they are there to help, it’s not always about putting someone behind the bars or calling them to court for years, sometimes they do create trouble, but they are the ones who can actually help us, the victim specially, in getting justice.

Justice a word which means having a quality of righteousness. In India it is always seen that the trails, the walk to the court has no end and often people forget about justice, it takes years to give a judgement or a punishment, many die waiting for the judgment. Same happened with the victim of the case she was hurt so much and was so much in pain that she succumbed to her injuries, she must be
brave as she fought till her last breath, but couldn’t survive to see the justice being served. It took 7 years and some months to serve the justice still its half, because the minor who was not so minor in doing the crime he did, was treated like a juvenile, and was released after three years of imprisonment, the minor should have been tried like an adult, but the Indian legal system didn’t permit that. The convicts should be tried the way of the crime they do.

Some say they should have been hanged or given to the public, but our legal system believes in “to be heard” irrespective of howsoever the crime is bad or heinous. In that “to be heard” scenario the victim died with a hope that she would not be denied justice. Trials then High Court then Supreme Court then Review Petition then Curative Petition then Mercy Petition, this wasn’t some steps which were being followed this was the waste of time which is exactly what the not so innocent convicts were doing. In the history of Indian Legal System, four convicts i.e. the four rapists were hanged, they were hanged, justice was served, but the questions lies in the fact is that will girl child, girls or woman still be blame for the rape or are they safe. Even though the justice was served, what about the ugly rebuttals and words and sentence utter for the innocent woman, who is not even alive, does she or the whole woman community deserves it? No. As time passes, the whole case becomes a personal attack and same story again the opposite side of the party makes it uglier day by day. It’s the lawyer who speaks irrespective of taking into consideration how heinous the crime is, the case does gets ugly and disturbing.

Still, in the rural parts of the country, girl child or maybe woman suffer this and are unaware of it or maybe they are aware of it but they do not know who to complain or who will take them seriously or their complain seriously, it is necessary for a woman to get knowledge about this, but then they have to be strong enough to face the blame and not to be blame game with the society or a relative maybe.

The whole agenda of the punishment is imprisonment, still, still the punishment for rape, sexual assault or sexual offences is imprisonment why not it can be death penalty, it is not necessary to make all the crime look same when it comes to punishment. Then comes the socio-political agendas, taking this kind of a sensitive topic for election and making it a political move. We can grow the economy, but the old perspective will never go away, no matter how hard we try.

This crime does not only happen to girl child or woman, this type of case has happened with some months old child, sometimes really difficult to understand as to what these kind of man or men want, aren’t they sacred of the law. There are cases where the relative, father or friend has done such a crime, slowly or maybe it’s already done, that a woman can trust no one, because it’s happening in one of the purest relations. In the acid attack side, few cases have woman who have had helped a man to throw acid on another woman, don’t they feeling anything, don’t these man or woman have woman or daughter or girl at home. It is true that when it happens with oneself then only one can understand the pain otherwise one cannot.

This case saw a lot of ups and downs, mostly down, maybe, because the appellant side being so ugly and harsh and too patriarchal in the thoughts and words they spelt in the court, where the appellant even went to question the medical evidence, the
semen samples, the DNA tests, the identification, the rod used, the injuries on the victims, inner thighs, the private parts, the bite marks, the whole contention was changed to these culprits did not rape to these culprits did not rape in same amount or density, who is deciding the density of the rape, the victim, the judge or the lawyer or the rapists themselves?, wasn’t rape supposed to be rape. The appellant side went on to say that as the rape wasn’t done by all in the same amount of density then the punishment shouldn’t be the same, the rod was inserted by one, the punishment of which wouldn’t be for all, they did not have the meeting of minds, it was just the course of action that happened, there was no intention for rape or assault or murder. Then, there must be meeting of minds for clearing out the evidence, switching of the phone, running away or throwing them out of the moving bus in such a way that they are no more alive.

The appellant was cross questioned by the Judge about the Joint Liability, even if one person among the group is doing a wrongful activity or crime, each and everyone will be equally liable, and here in this case, it is rape, if the intention or meeting of minds wasn’t same then anyone from the group could have stopped the other for committing such an heinous crime, but there it was inserting rod in her private parts taking out the intestine, mutilating her whole body. The words “bacho, bacho” uttered by her and the pain she suffered can never be felt or understood by anyone except for herself. Because of the joint liability in our legal system all of them where given same punishment, the punishment they deserved i.e. death penalty. When there is a sensitive issue like rape or something which involves national security or esteem of a person irrespective of the gender, the whole case trials get conducted in a camera and the issues, facts, evidence, nothing wasn’t released to the media or to any official site because of so much anger and outrage see in the public, was seen for the first in India.

Death penalty is an exception which used when the life imprisonment does not equalizes the crime, it is the last option. In this case it was said by the judge that with respect to the aggravating circumstances, outweighing the mitigating circumstances there is no way to justify the conversion of whole death sentence imposed by the courts to ‘life imprisonment’. The gruesome offences and crime committed were with highest viciousness. Human lust was allowed to take such a demonic form in the rapists. The accused maybe not be the hardened criminals but the cruel manner in which the gang raped the victim in a moving bus; iron rods were inserted in the private parts of the victim and with the coldness the both the victims were thrown out of the moving bus naked in a cold night of December, shocks the whole conscience of the society. The case is tagged with the ‘rarest of rare case’ where the question of any other punishment rather than death sentence is unquestionably foreclosed. The death sentence to be rewarded in any case is, this case, if the dreadfulness displayed by the culprits in gang rape, unnatural sex, insertion of rod in the private parts of the victim does not fall under the ‘rarest of rare case’ then one may wonder what falls in such a category of crime. The evidence did prove the convicts guilty but they weren’t guilty because they did what they had to, and they did so much that they took the life of the victim, out of rage and demonic actions they performed, they won somewhere. Now, the only option left was death sentence for the convicts, the case which was referred here was Bacha Singh Vs. State Of Punjab, where the death
sentence was questioned brought in as a topic to look into.

Giving deadline of 7 days to file a Mercy Petition, in these cases all the legal advantage should be taken away like Reviewing Petition, Curative Petition or Mercy Petition for that matter. The whole long due process of hanging was finally executed which was to be done long before was finally done, one of the reasons for the punishment getting delayed was the fact if anyone of the culprit in a group of death penalty uses the legal option then all of the culprits have to exhaust theirs and going by the books and rules it took time, and the culprits did seek for mercy besides they also wasted a lot of time of the legal system, Government, society, public, and everyone. Finally, justice was delayed but no denial; the victim isn’t alive but if she was she must have been a lot happy and better because the pain she went through could not be felt or understood by anyone except her but her mother and her family finally did it and made it happen, a history, a landmark judgment, a landmark punishment of death sentence of four rapists which was executed on 20th March, 2020.

The incident did led to the protest not only in the capital city of India but nation-wide. We live in a civilized society where the law is supreme and where the citizens enjoy the fundamental human rights. But when it comes to incident like this it causes ripples and serious questions of living in a civilized society, where both man and woman should feel the same sense of liberty and freedom which they should have felt in the ordinary course of the society which is supposedly to be assumed civilized and driven by law. Certainly whenever these kinds of grave violations of human dignity comes to fore, an unknown sense of helplessness and insecurity grabs the entire society, specifically woman in particular and succour people, the society look for, is where the State should take command of the critical situation and remedy it effectively. The whole battle for gender equality and justice can only be won when the strict implementation of whole legislative provisions, sensitivity of emotions of public, taking of pro-active steps at all the levels for extreme and combating violence against women and ensuring the widespread attitudinal changes and comprehensive change in the current existing mind set. It’s a hope that this incident will pave the way for the same.

**BACHAN SINGH VS STATE OF PUNJAB, 1980 (2 SCC 684)**

**CONCLUSION**

Certainly or Un-certainly, it showed us, the loop holes we were carrying out with us these years in our legal system. With taking into consideration of 80,000 suggestions and petitions, a bill was passed during the trials of the convicts, this incident opened the eyes to look into a wider concept of rape and other sexual crimes happening on the dark side of the day.

After the Nirbhaya Case, the women protests were at its peak, but with due course of time, it lost its spark and at last faded away. But this case is counted in the horrific cases of crime against the woman in the history of India, had a lasting impact on the Indian populace, and even though the steps taken to improve the condition, has not helped the woman much.

The bill was an amendment to the Criminal law, and named The Criminal Amendment Act, 2013 also known as the Nirbhaya Act, 2013. The bill was passed and now, the act i.e. the Nirbhaya Act, 2013, amended the
punishment for such kind of crime and gave a way to punish the acid attackers as well as to the exception of rape i.e. marital rape, and to talk about marital rape. The amendment gave a broader meaning to the term rape. It amended the definition under section 375 of Indian Penal Code. Section 375 of Indian Penal Code after amendment defines rape as involuntarily and forceful penetration without the consent of the woman into woman’s body parts like the vagina, urethra, mouth or anus.

There were two development which had major impacts on the amendment. These were the Nirbhaya incident and the Justice Verma Committee report, the report which stood up for woman’s rights, to provide quicker trial and enhance the punishment and criminal provisions to commit sexual offences against women. It also said that it should not only be limited to private body parts but also any consensual penetration whose nature is sexual should be included in the definition of rape. It was also recommended in the report that a marriage should not be considered as a license to perform any sexual offences and any gesture that creates threat of sexual nature should be termed as sexual assault and should be punishable for the same.

Sometimes, the whole rape gets deviated to some other topic of the case, and itself becomes an issue. The demonic character of the civilized people of the civilized society needs to understand that when a woman says NO, it means NO, “you cannot force yourself and commit rape or any other sexual offence.”
BLOCKCHAIN TRANSFORMING TECHNOLOGY: LEGAL CONSTRAINTS & ISSUES INVOLVED IN ITS IMPLEMENTATION

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ABSTRACT

In a world of digitized business as a primary contributor to a potentially better and more fluid economy. There is a great demand for a more systematic arrangement and assessment in terms of regulation and governance so as to ease the intricacies. In a centralized payments network like PayPal. We instill trust in such payment companies to safeguard our money and the transactions that follow. They keep track of the money and have access to it. We ought to trust their ledger. But, in a decentralized payments network, there are thousands of computers around the globe; all trying to update the ledger. Whose ledger do we trust? That’s the innovation we are seeking here. That is where ‘Blockchain’ comes in. In the IT sector, the term ‘Blockchain’ has been thrown around like confetti and used so extensively in recent years and continues to grow exponentially. In this paper, we discuss the various advancements in blockchain technology and how this technology network is going to redefine technology and e-commerce as it is today. The aim of doing so is to recognize prevalent analysis topics for open challenges for future studies in matters concerning various features of the blockchain technology such as - decentralization, smart contracts, enhanced security etc. the following is done by an in-depth research into four significant articles and journals consisting of an interdisciplinary array of topics which would result in the thorough completion of this study. The research stretches across a number of topics which include smart contracts based on blockchain technology, innovation of business through the application of blockchain, the role of blockchain in developing and remodeling today’s e-commerce and the status check on the implementation of blockchain technology in India. Blockchain is a great tool that helps multiple parties to collaborate without having to instill trust in one another. For investors, developers & entrepreneurs, now would be the right time to step in and invest time and money in this technology network. Blockchain is deemed to revolutionize the e-commerce sector by a mammoth proportion. There is now a technological institution that will fundamentally change how we exchange value, and it is called the blockchain.

1. INTRODUCTION

1.1. Background

Ever since the inception of internet, there has been a great degree of influx with regards to the number of websites catering to large groups of people. This insane and drastic growth of the electronic marketplace desperately calls for the implementation of a more secure, rigid and a stringent system that would be rid of the middle man and would not require a trust factor between the transacting parties. Ever since a plethora of infamous money laundering scams surfaced, people began to lose trust in the centralized system of transaction. Blockchain has emerged as a beacon of hope for the present and future generations. However, there are many significant aspects regarding blockchain one must consider looking into.
As of today, this blockchain technology is gaining popularity and mainstream attention and it is already being used in numerous applications. This technology is considered as one of the most disruptive technologies over the years with regards to the number of industries, insurance, healthcare etc. Blockchain technology is deemed to change the internet towards a more cryptographic transparent network from a centralised server based internet system.

1.2. Research Problem
With the introduction of blockchain, there are new legal challenges yet to be explored and made aware of to the common people who have, though, heard the term ‘Blockchain’ thrown around, wouldn’t claim to understand it in its entirety. Hence, it is significant to understand the legal constraints and elucidate the reasoning behind such constraints on the implementation of blockchain technology.

1.3. Rationale & Scope
The aim of this study is to discern legal actions concerning the legal limitations or restrictions on the implementation of blockchain technology & also to recognize prevalent research topics for open challenges for future studies in matters concerning – smart contract, status on the regulatory framework of the technology, data protection and other privacy issues.

1.4. Objective
The paper emphasizes on the following objectives:

- To determine whether blockchain, a disrupting technology, would affect the practice of law;
- To determine how the immutability of blockchain technology would manage to prevent security breaches;
- To determine the type and extent of data protection regulations which are or may be appropriate in the application of blockchain;
- To determine whether blockchain technology is truly a promising technology of the future.

1.5. Literature Review

This Article, as the title reads, deals in an eclectic systematic mapping study of research concerned with Smart Contracts from a technical perspective. As the significance of Smart Contracts powered by Blockchain technology is growing exponentially globally, the need for such awareness and understanding grows alongside. The article talks about a number of topics regarding the generic background of Blockchain & Smart Contract technology and their platforms, codifying issues, privacy issues, performance issues & security issues.


The Article is mainly concerned with the plethora of applications of blockchain technology through research in areas of E-Commerce, Finance & Energy. The study of this article would help readers understand the many attributes to the blockchain network i.e. blockchain technology components, blockchain application programming interfaces, and applications. The blockchain based applications cover supply chain finance, e-commerce transactions, product
traceability, user credits, financial services, trust systems, new energy etc.


This Article elaborates on the globally changing trends mainly in the field of e-commerce and the various roles played by Blockchain networks in remodelling and developing the e-commerce model. The article discusses the advantages to the e-commerce operations through the proposed model & how the model facilitates business processes between consumer & consumer by eliminating the central role of large business companies in controlling and setting restrictions.


This paper attempts to do a status check on blockchain implementations in India by an in-depth analysis of significant corporate bodies such as – Mahindra group & IBM, Bajaj Electricals & Yes Bank, ICICI Bank & Emirates NBD. The Government of Andra Pradesh’s role in the implementation and application of blockchain technology. The implementation of blockchain technology by the Telecom Regulatory Authority of India (TRAI). The massive application of demographic and biometric technology by the UIDAI in its Aadhar Project & the various challenges faced by government agencies and other corporate bodies in such implementation.

1.6. Research Methodology

This study is conducted by an in-depth research on blockchain technology and seeking assistance from 5 significant articles and journals consisting of an interdisciplinary array of topics which would result in the thorough completion of this study. Comprising exclusively of secondary data which stretches across a number of topics which include smart contracts based on blockchain technology, innovation of business through the application of blockchain, the role of blockchain in developing and remodelling todays e-commerce and the status check on the implementation of blockchain technology in India.

2. THE INCEPTION OF BLOCKCHAIN AND SMART CONTRACT

Every cryptocurrency we come across is wired with an underlying technology called the blockchain. The question of trust does not arise here as this technology helps related parties to the transaction to come to an agreement without having to believe in one another. The concept and idea behind blockchain technology was described in early 1991 when research scientists Dr Stuart Haber and Dr W. Scott Stornetta helped get rid of backdating and tampering of sensitive information by launching a computationally practical solution for timestamping digital documents. The timestamped documents were stored in a system which used a cryptographically secure chain of blocks. Furthermore, in the year 1992, a data structure used in computer science applications called the Merkle Tree was integrated into the conceptual

design. This improved its efficiency by allowing the collection of numerous documents in just one block. Unfortunately, the patent lapsed in the year 2004 due to lack of utilization. In the same year a system called Reusable Proof of Work (RPoW) was brought to light by Dr Hal Finney. The system worked by registering and holding the ownership of tokens on a reliable server which was proposed to allow anyone across the world to authenticate its faultlessness in real time. Through this, the RPoW fixed the double spending complication. This RPoW was later considered as a noteworthy step for the inception of cryptocurrencies.

Later in 2008, a peer-to-peer and decentralized electronic money system called the Bitcoin was uploaded to a mailing list using cryptography by a group or a person going by the pseudonym Satoshi Nakamoto. Here, bitcoin provided protection to the double spending problem by a peer-to-peer decentralized protocol for locating and authenticating the transactions. In the year 2013, Vitaly Dmitriyevich Buterin, co-founder of Bitcoin Magazine and also a programmer, argued that a scripting language was necessary for the development of decentralized applications. Vitalik failed to gain the communities consensus on his ideologies and hence began developing a blockchain-based platform with a more general scripting language. This was known as ‘Ethereum’. This blockchain-based platform is comprised of a scripting functionality called ‘Smart Contracts’. These contracts are scripts or programs which are carried out on the ethereum blockchain. This ethereum cryptocurrency came to be known as Ether.

2.1. Smart Contract
During the process of a business transaction. The transacting parties instil trust in a centralized system in order to transact with one another. The centralized system acts as an intermediary between the two transacting parties and hence, it costs both; the business and the customer to make transactions in this manner. However, with the use of blockchain technology integrated with smart contracts, the smart contract acts as a contractual intermediary between the transacting parties.

The rules for negotiating certain contractual terms are stored in a particular type of software called the smart contract. It is an automated piece of software that automatically authenticates a certain contract and then executes the terms agreed upon. It could be better understood as an executable code that runs on a blockchain to facilitate, execute and enforce agreement terms. Thus smart contracts promise low transactions fees compared to traditional systems that require a trusted third party to enforce and execute the terms of an agreement.

Blockchain coupled along with smart contract technology annuls the requirement and dependence on the centralized systems by the transacting parties. Blockchain technology is immutable in nature i.e. If any

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party attempts to modify a contract or a transaction on a blockchain, all the other parties to the same contract or transaction can detect and prevent it.

A Brief History on Blockchain

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<th>Year</th>
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<td>1991</td>
<td>Research scientists Stuart Haber and Scott Stornetta elucidated the working of a secured chain of blocks through cryptography.</td>
</tr>
<tr>
<td>1998</td>
<td>Nick Szabo, a computer scientist worked on 'bit gold' and developed a decentralized mechanism for digital currency.</td>
</tr>
<tr>
<td>2000</td>
<td>Theory on cryptographic secured chains was published by Stefan Konst along with ideas for its implementation.</td>
</tr>
<tr>
<td>2008</td>
<td>There was a white paper released during this year by a person or a group going by the pseudonym Satoshi Nakamoto which set up the blockchain model.</td>
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<tr>
<td>2009</td>
<td>Bitcoins first transaction took place between Satoshi Nakamoto and Hal Finney for an amount of 10 BTC in turn implementing the first blockchain.</td>
</tr>
<tr>
<td>2013</td>
<td>Introduction of a cryptocurrency called Ether and the release of Ethereum's White Paper by Viyalik Buterin.</td>
</tr>
<tr>
<td>2014</td>
<td>Birth of Blockchain 2.0 Blockchain began to receive its own recognition distinguished from the currency</td>
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</table>

1. IMPLEMENTATION AND REGULATION OF BLOCKCHAIN TECHNOLOGY

Jamie Dimon the CEO of JP Morgan issued a fantastic statement about bitcoin in 2017 by comparing it to Tulip Mania. It is in my view that certain level of executives have cottoned onto a soundbite about a technology they don’t fully understand and wheels it out every time they’re asked about it; which is quite unfortunate because, JPMorgan has one of the most sophisticated developments concerning the blockchain as a Distributed Ledger Technology (DLT). Their projects regarding the Quorum blockchain platform and Z-Cash headed by Amber Balbet is some really interesting work that is going on.

It turns out that this Crypto Bubble was really useful for many and is the reason why the regulators are paying attention. Of course, that comes with a lot of problems. However, it exists for a reason. It is a reaction to far too much debt piling up in the economy and far too much quantitative easing being the only policy response and as a result we’ll need some sort of a balance. Cryptocurrencies like bitcoin and other altcoins may seem like merely a bubble to

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some. It may seem like madness to others and may seem like they’re at the fringe for those sitting in the C-suite of a bank. I have understood that maybe, just maybe there’s something interesting and a new way of doing things. We can now come to an agreement that all bitcoins need blockchain, but not all blockchain’s need bitcoin and to further understand that blockchain as a technology has managed to singlehandedly pave the way for other Distributed Ledger Technologies (DLT). Furthermore, my belief is that blockchain or decentralized ledger technology is the greatest thing since sliced bread. Both centralization and decentralization have its share of pros and cons. The mainstream problem related to decentralization is that it’s risky with very little consumer protection, it’s early, there’s regulatory uncertainty, there’s currency risk, so on and so forth. Moving on to centralization related problems, such as; slow working of the banks, service costs, anticipation of a financial crisis and a number of other problems in the old world banking. Hence, the answer cannot be an either-or situation. The answer can’t solely be decentralization or solely centralization.

1.1. Banking Through Blockchain
Up to this point we can agree that there are problems with the centralized systems and there are problems with banking today.281 Some of those problems could be resolved by a simple upgrade to the way banks function and deal with each other. The idea is to automate inter organizational workflow that could put together a workflow across corporations and banks. Even so, it needs to be kept in mind that the idea of integration with old and overused systems is difficult. What excites me is dealing with something I could have full control over as an individual, a corporate or an organization. For as much as considering the fact that most banks do not have the strategies set up for the internet of things. The old conventional banking infrastructure just no longer measures up to the change brought about by new and upcoming technologies. This is where the blockchain is introduced as a technology which is fundamentally changing everyday life.

Blockchain is and will not just affect our business, but it will also change our day-to-day life dramatically. If we’d have to imagine blockchain as a game, it would be considered as a team sport. Most people believe, laypersons in terms of technology and programming need a PhD to understand a technology like blockchain. I believe this kind of thinking is erroneous. We can understand blockchain as a combination of three simple but significant concepts:

- **Business Networks** – Wealth is generated by flow of good and rendering of services across business networks e.g. customers, banks, suppliers, government institutions, partners, cross geography and regulatory boundary.
- **Digital Assets** – Anything that is capable of being owned or controlled to produce value. Tangibles, e.g. a house, a car, real estate etc. Intangibles, e.g. bonds, stocks, patents, music etc.
- **Ledger** – It is the system of record for an institutions finances and totalling economic transactions and conditions for such transactions.

If we could put these three concepts into a jar and shake it up, we get the foundation for a blockchain—a shared ledger technology allowing any participant in a business to securely transact directly, with accountability and with higher resistance to malicious tampering. It’s an environment where all the participants have control but alongside, none of them exclusively have control. Hence, I call blockchain transactions a ‘team sport’.

With respect to the application of blockchain in a plethora of different fields and industries, the general public need to acknowledge and put up with this significant yet disruptive technology. This is due to the fact that a lot of lower middle-class and working class individuals would be affected by its widespread implementation. The use of blockchain technology is deemed to wipe out great many jobs and negatively affect employment in the corporate world. On the flip side, blockchain technology can revamp the working of many industries towards a more efficient and automated environment.

1.2. The Big WHY?
Blockchain has received a tonne of attention through the press, both in popular media and the legal circles. This system could be relied upon to remake institutions and industries throughout the world. Also, there are a variety of different ways in which blockchain technology can be used to make real-world improvements. Blockchain technology will surely move into areas way beyond the present digital currency movement. Whether it is for transacting or saving money, the way we vote or even the way we practice the law.

Most start-ups have begun integrating blockchain technology into their business models resulting in the system having a widespread effect on the corporate world. Also, government bodies have begun looking into this technology which could again result in a fairly large transformation in the way a nation is governed. This surfacing wave of blockchain technology disruption would result in influencing many businesses and certain democratic processes like the elections and the way we cast our vote. Illegalities like electoral hacks and voter frauds are major issues which has been discussed time and again. The proponents of blockchain technology believe that this peer-to-peer, decentralized and immutable technology if used as a public ledger voting system can not only help in faster counting of votes but also provide the governments with a system which is almost impossible to be hacked. As blockchain continues to revolutionize business, more and more businesses like FedEx, IBM, Microsoft, MasterCard, KIK and Walmart are adhering to this technology by adopting the system due to its cheaper, faster and far more efficient methods of transaction. The idea of the blockchain being a public ledger is true to its word as all transactions on a blockchain

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are visible to users across the globe. Through this substantially transparent form of transaction between customers and their businesses, the demand for such a technology is sure to skyrocket. Apart from curbing illegal acts such as corporate fraud and other means of corruption this immutable, decentralized ledger system can be useful for preventing other unlawful activities like hacking, identity theft, phishing, scamming etc. Through the use of this system it would be impossible for hackers to tap into the various databases filled with sensitive information. This technology becomes a need of the hour as a plethora of infamous scams have surfaced over the years. Through the implementation of blockchain, thefts and breaches affecting a large number of people would be a thing of the past. Businesses and its consumers can transact between one another with a feeling of safety and security.

2. BLOCKCHAIN AND THE LAW

With regards to the legality of cryptocurrencies like bitcoin and other altcoins, governments are always on their toes in order to curb such activity from advancing any further, the sole reason being; matters concerning lack of governance, regulation and control over the movement of digital currencies over various networks is believed to potentially instigate the masses so as to curtail government intervention and subservience, in turn resulting in the people lacking reliance on their governments followed by the enfeeblement of sovereign power.

There is a certain degree of discontent expressed by government bodies in terms of fully understanding and coming to terms with the technology of today. The lack of understanding has unfortunately resulted in delaying the implementation of such technology and has the government drawing the short straw. On the other hand, blockchain technology has been lauded by millions including the governments of several nations. Though it is still acknowledged as the underlying technology behind bitcoin, there are far too many applications which are yet to be encountered by this transformational system in order to be acknowledged as an entirely distinctive system.

When we talk about the currently conspicuous legal issues involved in the application of blockchain technology, it is the usual suspects that you find on tech related aspects like:

- Data Protection in light of GDPR
- How personal data is store on a blockchain node
- Whether the data is regulated by privacy laws
- Awareness of end user rights
- The extent of the licence
- Ownership of Intellectual Property
- Options for the protection of Intellectual Property
- The indemnities and warranties provided by the supplier of the blockchain technology
- Whether there’s an open source software being used and

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If this software is licenced under copyleft or permissive terms of licensing, while speaking about the incorporation of distributed ledger technology (DLT) for application of data protection laws, we need to keep in mind that there are no actual global data protection laws. Though universal standards such as OECD Privacy Standards established in the 1980’s and Article 12 of the Universal Declaration of Human Rights provide a common source for many data protection regimes, there is considerable variation worldwide. The first international conference to assess the various effects of blockchain across a wide range of public concerns and government affairs was the OECD Blockchain Policy Forum. Both the benefits and the risks of such a technology were discussed at the policy forum with emphasis on economic and community related topics in order to decide upon better approaches towards strengthening governance.

All distributed ledger technologies (DLT), which are used by an industry, organization or enterprise must adhere to the nations data requirements. Many individuals or corporations may not consider blockchain technologies for codebases of ethereum and bitcoin as the most suitable option for use in financial services in terms of easy access of private transaction data by all participants of the network.

In today’s digital word, new technology is being developed each and every day and so is the need for a much more comprehensive regulatory measure and stringent legal requirements to evolve rapidly. It is crucial that the consequences of similar upcoming technologies need to be addressed by a more technologically sound and appropriate counsel. Lawyers have begun to pay more attention to this system and are researching the legal implications involved and the scope for advocating such technology.

Now, with respect to what this might all mean to business or corporate law, there are a number of different implications. What intrigues me the most is the idea of ‘traceable shares’. Instead of having stocks mused together in a mutually interchangeable bulk by some centralized entity, we can consider a strategy for clearing stock on the blockchain. If a corporation ‘A’ were to issue stock, it would be issued in a way that would be referenced by the blockchain and we could now look back and have perfect historical provenance over who had owned any specific share of stock over any period in time. Here, as far as corporate law is concerned I believe that there could be some really significant implications.

Matters concerning shareholder voting issues can be conceivably alleviated because we would not have as many complexities trying to figure out who had the right to vote at any given moment in time. We could just look at the moment of the vote or who owned the shares by taking a peek at the blockchain and then giving them the voting rights and processing their votes. Similarly, if we were trying to figure out whether or not any individual shareholder had a legal right that required specific share identification we could just look at what shares they actually owned.


Nevertheless, I feel it’s more likely that we have a system where there continues to be intermediaries.

In the technical world, a smart contract is understood as an executable code that sits on top of a blockchain it is essentially a program running and interacting with the information on a blockchain. It is a code which may be employed to form an organization known as a Decentralized Autonomus Organization (DAO). This Decentralized Autonomus Organization can be used to run similar applications. With regards to the case at hand, it can also be used to facilitate a legally binding contract. In 1996 Nick Szabo coined the term smart contract. He compared a smart contract to the functioning of a vending machine which is essentially an example of an electronic contract. Here, we have both offer and acceptance, the two significant elements of a legally binding contract followed by the dispensing of a particular food or beverage from the vending machine which satisfies the performance of the contract. Smart contract boasts an equal share as blockchain technology in terms of disruptiveness. It is known to disrupt many industries and affect many jobs from acting as an alternative to escrow agents to a decrease in the need for lawyers due to lack of lawsuits.

Anyhow, I believe that smart contract will certainly not disrupt the legal field by replacing lawyers in the short term. Firstly, smart contract integrated blockchain’s would mostly work in very simple cases or very low budget transactions. The more complex cases and high budget transactions are still bound to lie on the desk at an advocates office. Secondly, smart contracts cannot ensure the enforceability for all contracts. For example – whether you can charge a prepayment penalty, whether the prepayment penalty can be treated as interest. Thirdly, Business contracts are replete with subjective language like ‘reasonable’, ‘best efforts’ or ‘good faith’, these are not things that can be codified. Hence, the technology lacks the understanding of acceptable performance.

3. BLOCKCHAIN AS A GAME – CHANGER FOR INDIA

While nearing the end of the year 2016, in the month of November, India experienced demonetization. This directed the country towards seeking any outcome which could likely be beneficial and hence resorted to adopting innovations like the blockchain and cryptocurrency which was a different approach involving a potentially disruptive and new form of technology which had the likelihood of being the best alternative to paper money. This alternative was also considered to be a safe means of transaction consisting of a built-in firewall which strengthened its reliability. This wave of change was seen to be a potential to transmogrify India into a cash free economy. This blockchain technology was known to make a huge impact on the Indian economy concerning areas related to stock trading and cross-border transactions. Smart contracts integrated with blockchain technology was known to improve the management of online identity with respect to credit ratings and banking.

We are all aware of the fact that India harbours a reputed number of skilled IT

professionals. Despite the large population, India has managed to up-hold a very well regulated banking and financial sector with a decent banking penetration. In this chapter we will discern whether blockchain is truly a game-changer for India.

- What if we could utilize this technology in order to save up on tonnes of paperwork and time. It can be an easy task when we speak about going to a bank to open an account. The difficulty sets in when it comes to providing KYC information every single time. Most financial institutions and banks would rather lean towards a concept involving a single identity who enjoys the rights to make changes to sensitive information like a private permissioned blockchain. Through the implementation of a common blockchain network connecting all banks of the same branch or different branches or even entirely different Lines of Businesses (LoBs), KYC details can be shared in a safe and secured manner without having to repeatedly provide such information.

- Agro industries implementing agricultural technology into the supply chain comprising of farmers, suppliers, producers, processors, wholesalers, retailers and consumers could speed up the whole process from farm to shelf with a record of every transaction. The application of blockchain in such fields would help improve the sharing of data and subsequently resulting in the control of food quality by the consumers.

- In terms of strengthening India’s political structure due to the magnitude of corruption in the nation, blockchain technology implementation in democratic processes like voting would restructure and influence today’s political system to a large extent in-turn making it more rigid and stringent.

Regarding already existing real world applications of blockchain technology, there are already a plethora of organizations which are incorporating this technology into their systems. To name a few companies which have already begun experimenting with blockchain tech:

- Telecom Regulatory Authority of India (TRAI)
- Government of Andra Pradesh
- Institute of Development and Research in Banking Technology (IDRBT)
- ICICI Bank
- Mahindra Group
- Yes Bank
- Bankchain

In the year 2005 the Information Technology Act was formulated to provide the legal framework which accorded legal sanctity to all electronic records and activities carried out by electronic means. Amendments were made to The Indian Penal Code 1860, The Indian Evidence Act 1872, The Bankers Books Evidence Act 1891 and The Reserve Bank of India Act 1934 to bring them in line with the provisions of the Information Technology Act. The Information Technology Act of 2000 was amended by the Information Technology Amendment Act 2008 in order to provide additional focus on

291 Viswanathan, K S. ‘Securing Trust through Blockchain: The Use Cases for India.’ Economictimes.indiatimes.com, ET Rise, 1
292 Ibid.
informational security. It also added several new sections on offences including cyber terrorism and data protection. Cases relating to offences on creating false electronic records with the intent to commit fraud, damage or injury were brought under the ambit of Sec 463 of the IPC. Incidents of cyber fraud and cheating were held liable under Sec 420, web jacking under Sec 383 and email abuse under Sec 500 of the IPC. However, in today’s techno savvy environment the world is becoming more and more digitally sophisticated and so are the crimes. This helps us understand where we stand as a nation and how far we are from technically related legislations and fully achieving regulatory control over the rapidly evolving digital world.

Today, blockchain has numerous applications as explicated previously in this paper. It’s important to make this technology legal in its entirety so as to have complete access to the system. India is predominantly a cash based economy. Infrastructure and payment systems in India have been largely fashioned around the concept of cash transactions. In the last two decades, there has been a revolutionary change in the way we perform financial transactions. The internet’s super connectivity opened up various opportunities for the use of new technology in financial services. Like other nations, India too is moving towards a cashless economy. An area that blockchain technology finds many applications in. This implementation strategy could significantly increase transparency in the governance and also position India at par with other global economies that are surging ahead on the path towards digitization.

4. CONCLUSION

We have witnessed many changes in innovation. Technology is improving the practice of law in general. It is helping lawyers deliver their services faster and cheaper. This does not merely benefit the lawyers and their clients but also the community at large in turn moving us closer towards a far better delivery of fair and speedy justice. This is definitely going to be an interesting area of study for lawyers. Blockchain as a revolutionary technology is extremely intricate in itself and is believed to be in its nascent state. We can merely imagine the enumerated list of wide ranging applications for such a technology and the widespread corporate disruption it is capable of sallying forth. The future of this impressive technology is turning out to be greatly rewarding especially concerning governments and various enterprises; all, investing time and money in order to awaken this transmogrifying system.

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FREE EDUCATION TO EVERYONE: SHALL IT BE IMPLEMENTED?

By Barath Kumar.K.M and Sanjay Rakul R
From Sastra Deemed To Be University

Abstract:
Education is considered a powerful tool to compete over the world's day-to-day development. It is compulsory for the children aged between 6 to 14 years to complete their primary and secondary education, in 135 countries of the world. The government and charitable organizations are funding for free education to the children. In this socio-legal research paper, the authors convey that education should be available free to all classes of people in general. We will clearly describe free education in India, Article 21A of the Indian Constitution made education a fundamental right. In India, the government education institutions offer free education but to avoid the overcrowding in those institutions, the demand for the private educational institutions to provide free education under Government funding is still a debate. This paper will also deal with the merits and demerits of providing free education in detail by differentiating the countries providing free education to their people and also to the students of other countries the economically backward countries which are having least literacy rate and conclude with the relation that the higher literacy develops the economy of the nation and it can be achieved by providing free education to all.

Introduction:
The term Education is derived from the Latin word educatio in the mid-century. It is defined as the process of giving or receiving systematic instructions to acquire information about a particular subject, in simple terms. There is a historical background beyond education. In the pre-literate societies, the knowledge was transferred from one to one by storytelling orally and through imitation. Like that education has been following from earlier centuries. Horace Mann was called the father of modern education which has been in practice nowadays. Prussia was among the first country to made tax-funded primary education compulsory in the 18th century. Afterwards many were developed. Thus education has been developing since human civilization had started.

Education gives us knowledge and develops in us a perspective of looking at life. Education helps us teach other morals, manners, and ethics in our society. The standard of Education has certain decorum. It has issues in implementing free education. Free education is one of the ways to attain the overall development of the country. Education is important in one’s life. Education helps us to bring our dreams into reality. It leads the people to the right path and gives a chance to have a wonderful life. Education gives the ability to people of doing new interesting things that can be improving human living conditions and standards. Education helps us to learn more things and gaining new useful knowledge. Everyone should always remember that getting a good education is imperative in today’s society as it is a foundation of our successful future. Education is a worthy investment. To make a better future one might get enough Education and it can be more possible if it is available at free of no cost.

KEYWORDS

1. Free education to all 2. Barries to free education 3. Merits and demerits of free education

www.supremoamicus.org
**Why education should be free?**

The term free education does not refer to the education provided by the government institutions for free but, it is the education provided at totally free of cost. Even some private charitable organizations are also providing education for free of no cost. The priceless knowledge is the most property, one can gain. So, the Constitution makers provided the provision for free and compulsory education in our Indian Constitution of 1949. The 86th amendment incorporates the article 21A in the constitution. It made education a fundamental right stating that free and compulsory education to be provided to all the children in the age group of 6 to 14 years. The right to education act was also formulated to give effect to Article 21A after this 86th amendment made in 2002. India made Education compulsory in 2009. From this context, the importance of education has come to knowledge. That is why education should be made free. An educated citizen is a more productive citizen and the availability of equal and qualitative education is essential for the betterment of the human race. So that education can be accessible to everyone once it has been made free. Hence, education should be free to make every citizen literate in the country to attain economic development. There are more advantages to providing free education. If the citizens of the country are educated well, the feeling of patriotism will be developed in the individual. The more productive citizens will pay higher taxes so that economy of the country starts to rise automatically and the nation will become a superpower nation. By providing equal opportunities, every educated individual can show their skills out which they got during the quality education and can change the Nation. Ideas, creativity and ability to think are the tools that can be gained by education to build the perfect society. It can be achieved only if every individual is educated properly. The race and caste system can be also demolished only if the people are educated. Overcrowding in government educational institutions is the major reason for those children to enter into and the quality also seems dull. So they prefer private institutions and standing in the position of not be able to pay the fee sometimes. Most of the citizens cannot go to school because of financial status. Only by having complete free education, the dreamed growth of the nation can be achieved.

**Free education in India:**

The enactment of the Right to Education Act after the 86th amendment of the Constitution in 2002 introduced the Article 21A. Article 21A made education a fundamental right and provide free and compulsory education to all children between the ages group of 6 and 14 years.

The key features of the Right to Education are as follows:

- Free and compulsory education to all children between the ages group of 6 and 14 years.
- The government should ensure that every child gets free and compulsory elementary education.
- Private educational institutions have to reserve 25% seats for economically backward children.
- Admission shouldn't be denied to a student in a school.

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"INDIAN CONST. art 21A"
• All schools should have trained teachers.
• All schools must have the necessary facilities like water, toilet, playground, good infrastructure, and adequate teachers.
• Prohibits physical punishment and mental harassment.
• Screening procedure for admission of children is prohibited.

Cases:
Mohini Jain Vs St. Of Karnataka\textsuperscript{296}

The Supreme Court held that the right to education is a fundamental right under Article 21 of the Indian Constitution. The right to life includes the right to education because the right to life cannot be fully appreciated without the enjoyment of the right to education.

Unni Krishna Vs St. Of Andhra Pradesh\textsuperscript{297}

The Supreme Court accepts the judgement of Mohini Jain's case and held that the right to life and personal liberty includes the right to education. This is available to children until they complete 14 years of age and beyond the age of 14 years, the right to education must also be interpreted in the light of Article 41, 45 and 46 under Directive Principle of State Policy.

M.C.Mehta Vs St. Of Tamilnadu\textsuperscript{298}

The Supreme Court held that the provision enshrined under part III and part IV are supplementary and complementary to each other and discard that the rights under part III are superior as compared with part rights in part IV.

Education in the Republic of India is one of the major factors in Indian economical development. The minister of Human Resources Development (HDR) of India has made the budget Rs. 99,300 crores (14 billion US dollars) for the department of education\textsuperscript{299} in India. The Indian education department has divided into federal, state or private. India established compulsory education on 4\textsuperscript{th} August 2009. In 2011 approximately, 74\% of the population aged between 7 and 10 years were literate\textsuperscript{300}. While enrollment in higher education has increased steadily over the past decade, reaching a gross enrollment ratio of 24\% in 2013. It is estimated that only 20\% of aid for education goes to low-income countries, according to the Global Partnership for Education (GPE)\textsuperscript{301}. But it costs an average of $1.25 a day per child in developing countries to provide 13 years of education. Since 2000, the World Bank has committed over 2 billion dollars to education in India. As an outcome, the number of students in the age group 6 to 14 who are not enrolled in school has come down to 2.8\% in the academic year of 2018 as per the Annual Status of Education Report (ASER)\textsuperscript{302}. The approximate ratio of public schools and private schools in India is 7:5.

\textsuperscript{296} Mohini Jain Vs. St. of Karnataka, 1992 AIR 1858, 1992 SCR (3) 658
\textsuperscript{297} Unni Krishna Vs. St. of Andhra Pradesh, 1993 AIR 2178, 1993 SCR (1) 594
\textsuperscript{298} M.C.Mehta Vs. St. of Tamilnadu, AIR 1997 SC 699
\textsuperscript{299}(Feb 1, 2020) https://www.businesstoday.in/union-budget-2020/decoding-the-budget/budget-2020-education-
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India is a mixed economy where the public and private sectors coexist. Though the private sector has enormous rights to build their own body (e.g., educational institutions, private hospitals, and service agencies), their rights are limited to some extent and they are not allowed to create the body which the Government is only permitted to function by the state and national policies. At the primary and secondary level, India has a large private school system complementing the government-run schools with 29% of students receiving private education in the 6 to 14 age group. The revenue of the private market in education is 450 million US dollars in 2008. So while the private sectors being the part of the educational department providing education by collecting tuition fees from the students, India is no more considered as a nation that provides completely free education but it would be giving partial free education to everyone. Because only the nationalized schools provide education without any fee. So India will be one of the nations that provide free education to everyone only if the permission of the private educational institutions to collect tuition fees is cancelled. Private educational institutions can be build and allowed to functions with their regulations. But it's financial needs should be funded by Government taxation. Internationally, an income of less than Rs. 150 per day per head of purchasing power parity (PPP) is defined as extreme poverty. By this estimate, about 12.4% of Indians are extremely poor. So education can be reached to the people who are belonging to that category by making it completely free. Otherwise financially weak sections cannot attain education as they desired. India's per capita income as per the statistical data of 2017 is 7,090 PPP dollars (purchasing power parity dollars) and 25% of GST is more than enough to fund for the private educational institutions to function out of the government control but with satisfying financial needs as the private trusts and to attain free education. i.e. completely free education.

Position of other countries in dealing with education policies:

Among 196 countries recognized by the United Nations, Just one-third of countries have achieved all of the measurable Education for All (EFA) goals set in 2000. Bhutan, Oman, Papua New Guinea, Solomon Islands, Vatican city are some of the countries where education is not compulsory. Germany, Italy, Belgium, Norway are providing completely free education even to the postgraduates. There are also several countries dealing with different educational policies in their nations.

Finland is being at the top of the list, which provides well quality education to its citizens and abroad students for free of no cost. All the schools in Finland are nationalized. There is no private educational institution. Finland Educational Ministry budgets 6.8 billion Euros for Education in 2020. It follows the current system since the 1970s and achieves the literacy rate of 99.5%. The main motive of Finland is to achieve equal and standard education to everyone. They

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want to give education to every student but they never include any screening test for students. Finnish students have some other great perks, along with not having to do homework. In US public schools there are many standardized tests, wherein Finland they have almost none. These educational policies make Finland stand in the top rank.

Somalia has the least functional system in the world with just 10% of its children going to primary school. Access to quality education is a problem that felt hard in Africa. 9/10 countries with the highest percentage of children who have never attended school were in Africa during the 2000s. At present, the 10 lowest-ranked countries in the United Nations Human Development Report Education Index are African as well. Niger with 34% of literacy rate, Eritrea just spends 2.1% of its GDP on education, Burkina Faso has 29% of literacy rate, Chad with 35% literacy rate, In Guinea, 41% are school dropouts, Sierra Leone with 52.2% of dropouts rate. In Mali more than 2 million children never attended school. 1/3 of children never attended school in Djibouti, 21% never got secondary education in Sudan and Ethiopia has 39% of literacy rate. Like this most of the backward nation cannot provide quality education. As they cannot provide education to its citizens, the situation in the Nation and among the world becomes worse day by day. The countries providing good and quality education are rising rapidly in economic competition. Hence it confirms that the differentiation between the economically developed and economically backward nation is focused on education policy in the country and literacy rate of its citizens.

Merits and demerits of free education:

Merits: By providing a completely free education, no one will be illiterate in the Nation because of financial status. It can approach all the individuals of different races and classes and attain a 99% literacy rate as in North Korea. The lifestyle of the society will be completely changed and the life below the poverty line will have completely vanished from society. Everyone can get equal opportunities to join or start up an institution with their knowledge and skill. The mature mind can decrease the rate of suicides in the society and it can be obtained through good knowledge. It can make the Nation without beggars in the upcoming years. It provides economic fairness to the country and also promotes the living standards of the individual. It paves the way for undergraduates to study more and more to know completely about their specific career by completing their PhD and results in coming up with great researchers with great ideas.

Demerits: The demerits such as overcrowding in public institutions bullied because of social status and class, unemployment rate, carelessness of citizens in paying taxes, private seeing Education from a business point of view, quality lacuna, inadequate teachers can be rectified by the necessary measures taken by the government.

It can be minimized if private schools become

306(Aug 3, 2016)
https://www.globalcitizen.org/en/content/worst-schools-world/

307 http://uis.unesco.org/country/KP
nationalized with the same quality. The unemployment rate can be minimized by the government making several departments that suit the current situation and employ the educated graduates. So, they can be part of the newly formed functional departments. Employing more skillfully trained teachers, restricting religious and castes thought from the minds of students and society by eradicating community and religion-based scholarships in education and other privileges gained with them are some of the adequate measures to be taken by the government to sort out the demerits.

**Education, Poverty and crime rate:**

Illiterate people are more likely to commit violent crimes such as homicides, sexual assaults, arson and robbery, a new study has found. The crime rate in India is 3.22 as per the last recorded statistical data in 2016.\(^{308}\) Higher the educational level, lower the crime rate as per the statistics. 85 percent of all juveniles who interface with the juvenile court system are illiterate. More than 60 percent of all prison inmates are illiterate. Penal institution records show that inmates have a 16% chance of returning to prison if they receive literacy help, as against 70% who receive no help. This equates to taxpayer costs of $25,000 per year per inmate and nearly double that amount for juvenile offenders. Their estimators suggest that a ten percentage point increase in high school graduation rates will reduce crime rates by 4 percent and total crime rates by about 3 percent.

Maternal death rates drop significantly in societies with high education rates. Women with no education within the least are 2.7 times as likely to die during birth as women with 12 years of education\(^{309}\). Women with one to six years of education are twice as likely to suffer maternal mortality. This is because educated mothers are more likely to use health services, even in their low socioeconomic status. Lack of education is also a stressor for women during childbirth. The more stressors a woman has during pregnancy, the higher the likelihood of negative outcomes. Since females are less likely to be the offenders, it is expected that the increase in their education level from secondary to college will have no significant effect on the homicide rate. Research from The CIBC, Centre for Human Capital and Productivity at The University of Western Ontario shows that education is the key to success and can reduce crime rates, improve health, lower mortality rates, improve economic status and increase political participation\(^{310}\). The level of poverty in one area does impact that same area's crime rate. Although there are other factors for committing the crime, poverty is a big one. Using our resources and focus to help to solve poverty and raising the income levels will lead to positive changes in crime and result in a lower crime rate. Increased access to education can contribute to reducing poverty. A newly published paper by UNESCO\(^ {311}\) shows that education is the way to escape from chronic poverty and to prevent the transmission of poverty between generations. The rate of return is


higher in low-income countries than in high-income countries.

Poverty and education are interlinked, because people living in poverty may stop going to schools and colleges so they can work, which leaves them without literacy and numeracy skills they need to further their careers. Poverty reduces a child's attention in school and college because it results in poor physical health and motor skills, diminishes a child's ability to concentrate and remember information, and reduces attentiveness, curiosity and motivation. Giving all children around the world a standard education can help reduce poverty, promote peace and foster development.

Education, poverty and crime are all interlinked with each other. Education is a fundamental way to reduce the rate of poverty and crime. As mentioned, providing education can get rid of poverty and crime in the Society.

**Barriers to free education:**

1. **Lack of Quality in education**
   
   Even the budget, syllabus and statutory provisions were made, they are not being properly used by the functional heads. Many people have no faith in the quality of the education system. There are several various syllabi for the same subject and being taught differently in public schools and private schools. Poor quality of education includes the absence of around 25% of teachers every day.

   Solution:
   
   Training to plan quality measures to increase the quality of education, quality of syllabus and lessons, focusing on students centred teachings and learning and exploring new methods are some of the solutions to this barrier.

2. **Lack of Income**

   Many countries fail to spend enough of their national income on education for their population. In addition to dealing with the family income of a family, the children in the poverty line are most likely to be affected as they drop out of schooling. The economy of the people below the poverty line is getting worse.

   Solution:
   
   Economic mismanagement by the local government and economic sanctions from the United Nations International Children Emergency Fund (UNICEF) have compounded the issue. There are also many charities helping the children in poverty line to get Education.

3. **Lack of learning materials**

   The non-availability and late availability of learning materials such as textbooks, reference books, journals, materials, notebooks, notes and literacy books make the big difference in gaining good knowledge. This creates the major difference between the private school education system and the public school education system. It put forth the preferences to choose (public school or private school) and confuses.

   Solution:
   
   Publishing books from local authors and illustrators can prevent this barrier.

4. **Child labour**

   According to Educate a Child, there were 168 million children were in work in 2012. It is tempting to say that families who allow their children to work instead of going to school are irresponsible and immoral. But it is a pity necessary for the child to contribute financially to the family's poverty.
Solution: The child labour can be reduced through increased labour standards and economic growth that brings family out of poverty.

5. Violence and bullying in classrooms

A school is a safe place for children. Unfortunately, it is a place where most of the children experience violence (at home and abroad). Many countries had banned corporal punishment in schools but the ban isn't enforced. Many girl children faced sexual violence in schools and the innocent students are bullied by other students. Some children will often drop out of school altogether to avoid these situations. Even when children stay in school, violence can affect their social skills and self-esteem. It also harms their educational achievement.

Solution: It can be rectified by strict actions taken by the school management. The fear in the students' mind can reduce the risk of violence and bullying. But make sure that the relationship between the colleagues should be friendly.

These are some important barriers to be rectified. There are several other barriers as reasons for not implementing good education.

Conclusion: In 1984, the Indian government has total control of all information distribution to society, resulting in an absence of knowledge and common sense in citizens. Without the education of people, a society cannot flourish or grow because it doesn't have the intelligence to build up and maintain society. 74.04% is the literacy rate of India as per the last census and it is placed at the 123rd position in the global literacy rate ranking\(^{312}\). India has placed as 9th country in the world's overall economic ranking. The nominal Net National Income (NNI) of India (at Current Prices) is likely to be ₹181.10 lakh crore for the year 2019-20 and it was ₹168.37 lakh crore for the year 2018-19\(^{313}\). India ranks 62nd in total public expenditure on education per student and measures the quality of education (pupil-teacher ratio in primary and in secondary education). The country spent 3% of its total GDP on education in 2018-19 or about 4.6 lakh crore as per the economic survey. Whereas, Norway spends 6.4% and the United Kingdom spends 6.3% and so on. India’s spending on education is lower than that of middle-income and low-income countries.

As these nations spend more national income on education, why India, the most populated and youngest Nation in the world cannot spend more on education? Why does complete free education not implemented? As described above, India being the most populated country covers 39% of children under the age group of 18 years (approximately 472 million children). India is home to over 30% of children (almost 385 million children) living in extreme poverty, ranking the highest in South Asia, according to a new report by World Bank Group and UNICEF. Education is one of the fundamental things in our life. Without education, success in our lives is difficult. So, education should be free and compulsory for all. All kids

\(^{312}\)(Feb 13, 2020)

\(^{313}\)(Apr 6, 2020)
should deserve equal and standard education, no matter who they are or what they look like or where they come from. Everyone is equal. Treat them the same. Complete free education is a debatable topic but a possible topic. It can be implemented if executed properly. Like Finland, every country should have a nationalized and compulsory education system through public funding to make the children's life brighter. A quality education given with experience of the staff can enlighten the students.

It is concluded that during the upcoming years, India should make all the private educational boards to nationalized boards and make them function with public funding. The national expenditure on education should be more to enhance the education system of the country. The barriers should be sorted out. So that each child can easily get enough education. Hence, India will also be ranked top in the list of countries providing good Education and completely free education.
TRANSGENDERS AND THEIR RIGHT TO MARRIAGE

By Bhakti Parekh
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ABSTRACT:
Transgenders, from the very beginning have suffered and fought for their rights. With the landmark NALSA judgement, hope was given to transgenders. Recognition of their gender and as well as according them with all human as well as constitutional rights was a long-awaited decision. Further, with the partial slashing of section 377 of the IPC by the Supreme Court of India led to further happiness and hope for a better tomorrow. However, a lot of loopholes and gaps remain in the legislations which hinder the enforcement of the rights of Transgenders. The Transgender (Right to Protection) Bill of 2016, 2018 and 2019 only scratch the surface of what needs to be done and do not get to the nitty gritties. Through this research paper, an attempt has been made to highlight the gaps and provide suggestions to overcome those gaps with reference to the right to marriage of transgenders. The Right to Marriage is a human right but there is no law or legislation which would help transgenders enforce this right. Through this paper, an attempt has been made to first of all understand the term transgender and discuss and compare the laws relating to marriage or the lack of such laws for transgenders and how this can be changed.

Background:
Even though the Transgenders have the same amount of rights as the other people do in the eyes of law, in practice this does not hold true. In India, the Supreme Court in its 2014 judgement in the case of NALSA held that transgenders have the right to identify their gender as it is while not conforming to the binary gender categories. It also held that they have all the rights that other individuals do and that these rights should be safeguarded. The Transgender (Protection of Rights) Bill, 2016 which was introduced in the Lok Sabha in 2016 and then amended and reintroduced in 2018 talks about protection of rights of the transgenders. But nowhere in the two bills is there any mention of the rights that the transgenders are entitled to such as the right to inheritance and the right to marriage. The right to marry is a right that they are entitled to because they can marry out of their own free will and choice. If they are not allowed to practice their own free will and choice, then how can one say that they have the equal status to those of the binary gender categories. Isn’t it like saying that you have rights but you cannot practice or exercise your rights to the fullest because there are no provisions under the law which allow you to do so?

Need:
The need for this is so that all contradictions can be rid and there be more clarity and so that the Transgenders can exercise their right of choice freely without having the restriction of law as a hinderance. The Law is supposed to be facilitating in nature for the rights of minorities as well and should not restrict their rights. Gender is by nature and one does not have much choice in that matter but Marriage is by choice and everybody no matter who, should have the right to exercise their choice.

Research questions:
In this research paper, I would like to answer the following questions.

- Who are Transgenders? How does science, society, history and law define Transgenders?
What are the provisions for the transgenders under various legal systems for marriage?

How India could possibly amend its personal laws to allow the marriage of a transgender and the need for such amendments?

Research Objectives:
The research objectives are as follows:

- To understand and probably define the term ‘Transgender’ with the help of science, history and society.
- To analyse the provisions which exist around the globe for marriage of transgenders.
- To analyse whether India can amend its personal laws and how India can do so.

Outcome:
It seems that even though the rights of transgenders is a widely debated topic, there are no amazing actions taken in this regard. Their rights are spoken of even in the Bill, but to some extent all that has been spoken of is only on the surface and the Bill does not dig deep into what can be considered rights for them. Through this research paper, I hope to clarify certain concepts and the need for the laws where there are no laws or where the laws are inadequate.

Methodology:
The research methodology used for this research is doctrinal as well as deductive method. The inadequacy of the law is going to be examined with the help of how the judiciary and the legislature are trying to bring about change but do not realise that there is a certain depth to the issue which needs to be examined as well as answered.

Literature Review:

- Transgender Persons (Protection of Rights) Bill, 2016 and 2018: This bill was introduced in the Lok Sabha in the year 2016. A primary reading of the bill shows that though it was for the protection of the rights of transgenders, the bill did not even define transgenders in a proper scientific manner. The amended bill of 2018 does have certain changes like the definition has been made more comprehensive as well as scientific in nature. It still lacks in the protecting of rights area as there is no mention of inheritance or marriage rights. The 2018 bill should have considered marriage rights after the partial striking down of section 377 of the IPC through the Navtej Singh Johar v Union of India judgement.

- Sexuality and Gender Identity under the Constitution of India314: This article talks about how the Indian judiciary has had inconsistencies in its decisions in famous judgements. This article criticizes the way India sees sexuality and gender identity as two completely separate subjects or topics while in reality they are interrelated and interconnected.

- Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework315: This article touches upon the subject or topic of family and how transgenders should also be able to make use of scientific progress just the way other can. The article suggests pursuing family rights from a different venue: a relational approach to the universal right to enjoy scientific progress and its application under Article 15 of the International

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314 Bret Boyce, Sexuality and Gender Identity under the Constitution of India, 18 J. Gender Race & Just. 1 (2015)

Covenant on Economic, Social, and Cultural Rights.

- **Shifting Subjects of State Legibility: Gender Minorities and the Law in India**[^316]: This article takes us through the history of the rights of transgenders. It talks about how the term eunuch evolved and how the NALSA judgement tried to broaden the horizon and inadvertently just ended up restricting the rights of transgenders which they actually in spirit wanted to broaden.

- **Hijras: The 21st Century Untouchables**[^317]: This article talks about the Indian transgender community and how they are denied most of the basic human rights. This article is an analytical framework and deals with and provides for a recommended course of action for India as it continues to face dilemmas.

- **Transgender Science: How Might It Shape the Way We Think About Transgender Rights**[^318]: This article or paper presents some insight on the existing knowledge that is available on transpeople or transgenders and how understanding the term ‘transgender’ may help us understand the rights they have and shape the way we think.

- **Legal Recognition of Same-sex Relationships in India**[^319]: This article analyses the different ways in which same-sex relationships could be recognised in India and concludes that the best way would be by amending or reading down the provisions of the Special Marriage Act so as to give rights and not unfairly discriminate against the members of the LGBT community.

- **Disgust or Equality? Sexual Orientation and Indian Law**[^320]: This lecture mentions and takes us through how same-sex laws evolved or changed with time and how they may have regressed with times especially in India and how the thought process of Indians was affected by the colonial rule and the British. It also talks about the disgust principle and how there are times the law is based on what the majority may like and something may be illegal on the basis of the majority disliking it.

- **India’s Hijras: The Case for Transgender Rights**[^321]: This article talks about the Hijras or the Indian Transgender Community and the perceived rights that they have. They have been given rights but there is no way in which they can get them implemented or there is still a lot of inadequacy in the legal provisions.

In conclusion, going through all the literature available on the topic of Transgenders and their marriage rights, I believe that there is inadequacy of legal provisions as well proper understanding of the term ‘Transgender’ itself. There is a need for better understanding the concept of Transgenders and their rights and also for providing proper legal recognition to such rights. Gender is by nature and one does not have much choice in that matter but Marriage is by choice and everybody no matter who, should have the right to exercise their choice.

[^316]: Dipika Jain, Shifting Subjects of State Legibility: Gender Minorities and the Law in India, 32 Berkeley J. Gender L. & Just. 39 (2017)


[^318]: Sam Winter, Transgender Science: How Might It Shape the Way We Think about Transgender Rights, 41 Hong Kong L.J. 139 (2011)

[^319]: Nayantara Ravichandran, Legal Recognition of Same-Sex Relationships in India, 5 J. Indian L. & Soc’y 95 (2014)

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Chapter 1: Understanding the term “Transgender”.

Who are Transgenders? How does science, society, history and law define Transgenders?

To understand who transgenders are, we first need to understand the difference between a few key concepts which are many a times used interchangeably. Sex and gender are two different things and need to be understood first to get a clear understanding about transgenders. A widely used definition quoted from a pamphlet published by the American Psychological Association is: “Sex is assigned at birth, refers to one’s biological status either male or female and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy. Gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women. These influence the ways that people act, interact, and feel about themselves. While aspects of biological sex are similar across different cultures, aspects of gender may differ.”

This definition points to the obvious fact that there are social norms for men and women, norms that vary across different cultures and that are not simply determined by biology. But it goes further in holding that gender is wholly “socially constructed” – that is detached from biological sex. Anthropologist Gayle Rubin writing in 1975 states “Gender is a socially imposed division of the sexes. It is a product of the social relations of sexuality.” She means to say that if it were not for the social impositions of roles, males and females would still exist but not ‘men and women’. Furthermore, Rubin argues, if traditional gender roles are socially constructed, then they can also be deconstructed, and we can eliminate “obligatory sexualities and sex roles” and create “an androgynous and genderless (though not sexless) society, in which one’s sexual anatomy is irrelevant to who one is, what one does, and with whom one makes love.” The Oxford English dictionary defines the term Transgender as denoting or relating to a person whose sense of personal identity and gender does not correspond with their birth sex. Being Transgender does not limit gender identity to the two categories of male and female, as many who identify as transgender do not feel exclusively masculine or feminine. Now, legally, in India, according to the Transgender Persons (Protection of Rights) Bill that was passes in 2018, transgenders are defined under section 2(k). Section 2(k) states the following: “transgender person” means a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta.”

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323 The New Atlantis, No. 50, Special Report: Sexuality and Gender (Fall 2016), pp. 10 143
325 Ibid, 204
326 The Transgender Persons (Protection of Rights) Bill, 2018
From reading and analysing the article Exclusion as Language and the Language of Exclusion: Tracing Regimes of Gender through Linguistic Representations of the “Eunuch” written by Shane Gannon, I have come to the understanding that in India, historically, there were various gender identities which existed and were accepted. Each type had a very specific name but during translation of our ancient and historical texts to English, the intricacies were lost and a universal term “eunuch” was given and used. This term did not come close to explaining all the different gender identities one of which was transgenderism. Historically, transgenders were also defined as people who were abnormal and had certain mental issues. So, society, to a great extent still may believe in this even if they wish to change this thought, because it has been drilled into the subconscious of the societal morals or definitions through history that what is not understood by most is abnormal.

So, to understand the complexities and intricacies of the term transgender, we need to understand a host of different concepts and have a proper understanding of these to come to the real meaning of transgenderism. So, to my little understanding, Transgender means anyone whose gender identity, expression or behaviour differs from the sexual identity they were assigned at birth which may be so naturally or by choice.

Chapter 2: Legislations across the World for Transgenders regarding Marriage

What are the provisions for the transgenders under various legal systems for marriage?

Over the years, slowly and steadily, a lot of countries have come up with legislation for the rights of Transgenders. These countries were also to some extent in a place where Transgenders were not recognised and were looked down upon. With the help of the international conventions as well as their judiciary, these countries have also managed to come up with laws for the Transgenders. Various countries are moving towards development of proper legislation that will enable gender recognition and also marriage. For marriage among transgenders to be recognised, the transgenders need to be recognised first. Various countries have done so with the help of legislation. The United Kingdom in its Gender Recognition Act of 2004 recognises and sets down a procedure for transgenders to have the choice to be recognised like that in the eyes of law. One of the most important legislative changes of recent times is the enactment of the Argentinian Gender Identity Law 2011, a comprehensive law that allows a person to change their gender identity in all documents including the national identity document.327 While this is amazing, there are certain problems faced in recognising their marriages. Countries which do have legislation on and have legalised same-sex marriage are quite few in number and they too face certain problems. For example, after Britain had passed their gender recognition act, they faced certain issues and they were not dealt well. Transgenders who were already in marriages and wanted to be recognised legally so, had to divorce their partners or remain unrecognised by the government. In cases where both the partners wanted to continue with their marriage, while still wanting legal

327 Siddharth Narrain, Gender Identity, Citizenship and State Recognition, 8 Socio-Legal Rev. 106 (2012)
recognition of their gender, had to divorce their partners, get their gender recognised and then enter into civil unions or partnerships which if you go to see is not exactly equivalent to marriage. Netherlands became the first country to legalise same-sex marriage. Other countries like Canada, Spain Sweden, Iceland, Portugal all have legalised same-sex marriage. There are no specific laws for transgenders, but they do fall under the ambit of same-sex marriages as sex and gender are two different things as discussed earlier.

Chapter 3: The Indian Scenario
How India could possibly amend its personal laws to allow the marriage of transgenders and the need for such amendments?

Personal laws in India are vast and varied. There are personal laws for each religion and then there are personal laws which are common if someone may wish to opt to use the universal laws. For example, Hindus have codified marriage law under the Hindu Marriage Act while the Muslims follow the Sharia law. The Parsis, Jews and Christians also have their set of laws regarding marriage. There is also something known as the Special Marriage Act of 1954 which lets two people get married if they are of different religions or castes or if they wish to follow this universal law. Now, there is a pressing need to make amendments in these acts so as to accommodate the rights of Transgender people.

For the first time, the “third gender” was recognised by the Indian Law, in National Legal Services Authority v Union of India328 which was decided in 2014. The Supreme Court held that India recognises a third gender category (beyond the male-female binary) entitled to equal rights under the Constitution of India. In Navtej Singh Johar v Union of India329, the Supreme Court partially struck down section 377 of the Indian Penal Code which made “carnal intercourse against the order of nature”.

These two judgements along with the various international conventions that India is a signatory to, like Universal Declaration of Human Rights, the Yogyakarta Principles and the International Covenant on Civil and Political Rights, can facilitate change. With the help of these laws and directions, India can facilitate amendments to the already existing laws and bring about a massive change and relief for people of the LGBTQ community. These changes can be brought about by making quite simple amendments into Acts like the Special Marriage Act, 1954.

Amendments are needed because, currently there is a legal situation, where the Courts declare that Transgenders and other persons of the LGBTQ community have rights according to the constitution under Articles 14 (the Right to Equality), 19 1(a)(the Right to freedom of speech and expression) and 21 (the Right to Life) which is called the golden triangle as well as rights against discrimination under Articles 15 and 16. But, there are no statutory laws or the statutory laws that exist go against this philosophy. It has come to a stage where these people have rights, but no way to enforce or express those rights. The recent Transgender Persons (Protection of Rights) Bill, was a completely dissatisfactory or half-hearted work where when it was first introduced in 2016, transgenders were defined in a humiliating manner and their choice to be what they are was ignored in


329 Navtej Singh Johar v Union of India, 2018 SCC Online SC 1350.
the definition. The 2016 Bill defined transgenders under section 2 clause (i) as follows:

“transgender person’ means a person who is –

(A) Neither wholly female nor wholly male; or 
(B) A combination of female or male; or 
(C) Neither female nor male; and whose sense of gender does not match with the gender assigned to that person at the time of birth, and includes trans-men and trans-women, persons with intersex variations and gender-queers.”

The bill was amended and then finally passed in 2018 where the definition was tweaked and changed. Still, many consider it to not be of a satisfactory nature because it does not mention choice anywhere. Also, the Bill passed in 2018 just touches the surface, it talks about how transgenders should not be discriminated by establishments or persons on nine grounds that have been enumerated in the Bill. These grounds consist of denial, discontinuation or unfair treatment in educational establishments, healthcare services, with regard to right to movement, in relation to employment or occupation, with regards to facilities available to general public, with regards to property rights, with regards to standing for or holding public office, and with regards to unfair treatment in Government or private establishments in whose care or custody a transgender person is. This just scratches the surface and if you go to see, provides no real rights which have not been provided for through other statutes. There are remedies which already exist for these rights. The Bill doesn’t dig deep and look into matters where to a great extent no legal recourse or remedies are available, for example, rights to inheritance, rights to adoption or marriage. It wholly ignores these rights which exist where no legal recourse is available. Thus, amendments are needed to facilitate transgenders to enforce or practice rights which the Constitution and the Courts have given them. It’s like saying that you have rights but you can’t enforce them because there is no provision through which you can do it.

Amendments to the Special Marriage Act, 1954 can be made where it mentions the age after which a male or female can marry. Section 4 of this Act mentions the conditions for solemnisation of special marriages and states: “Notwithstanding anything contained in any other law for the time being in force relating to the solemnisation of marriages, a marriage between any two persons may be solemnised under this Act, if at the time of marriage, the following conditions are fulfilled, namely: - …”

Clause (c) states: “the male has completed the age of twenty-one years and the female has completed the age of eighteen years.” If section 4 (c) is amended and changed to: “the persons have completed twenty-one years of marriage”, then transgenders and persons of the LGBTQ community could marry through this Act. They would be able to give legal sanction to their right to marry because the section provides for the solemnisation between marriage of, and I emphasize, “ANY TWO PERSONS”.

An alternative to this would be to think about civil unions or civil partnerships, which is basically not marriage and thus, may be easier for people in India to accept. But this again goes against the principle of equality and it is to a great extent still discriminatory in nature and thus, goes
against the basic principle of equality, and right to life of our Constitution.

CONCLUSION
In conclusion, as we can see, the laws in the country are of conflicting nature. The Transgenders have been given rights to be recognised officially as the Third Gender and the process for gender recognition is present. It has also been stated to them that they have the same fundamental rights as the other citizens of the country. Fundamental rights include the right to life and personal liberties which consists of a lot of rights which have been read into Article 21 of the Constitution by our Supreme Court. The reality is that the transgenders have been given rights but they do not have proper ways of enforcing the rights. This is because the various acts and statutes that we have in this case, regarding marriage laws are gender binary in nature and do not mention the third gender anywhere. Also, our courts have had a great problem in realising that gender identity and sexuality may be vastly different things but these concepts are connected and interlinked with each other. The recent Transgender Persons Rights Bill that was passed in 2018 proves that the gravity and depth of the situation is not seen and what the legislature has come up with is something that barely scratches the surface and only talks about things which can be enforced using Chapter III of our Constitution which deals with fundamental rights. This Bill did have an opportunity to actually dig deep and give and provide for rights which cannot be enforced directly by the fundamental rights chapter. Our legislature is having a hard time in understanding the need for laws regarding marriage, inheritance and adoption. It is like I have mentioned earlier; the transgenders have the rights but they have no feasible way of enforcing them.

The Right to Marriage for transgenders, is something that the Indian judiciary and the legislature can begin with as this as it deals solely with their choice, and nobody else can have a say in it. This can be the beginning of changing the mindsets of people as well as the beginning of acceptance which can then lead to changes in other aspects of personal laws such as inheritance and adoption as well. As Indian citizens, they have the right to choose and this right to choose should be exercised and their choice to marry should also have proper legal recognition and what better way to do that but by providing for laws or amending the existing laws in such a manner as to accommodate transgenders as well.

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THE ISSUE OF TRIPLE TALAQ-
ONE OF THE VIBRANT FACTS
THAT BURNT INDIA

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The issue of "Triple Talaq" is one of the vibrant factors that burnt India in and out, in its most possible sphere of exploitation. The practice was as such that it could affect the country in any possible way from both in and out. The country faced the persecution of it for more that centuries and now also is no more relieved from it. The country is facing every burn, wounds, pain, screams, depthness of the matter and the well of this pain is so deep that nobody can imagine it. The depth is unmeasurable, unimaginable, darkest of darkest and sacred of the most. The well is dark but not so unimaginable because of the screams of the wives and children who exist in the society with us and also for us but face those type of consequences that they were never entitled to on the grounds of humanity which others don't face in a normal society. They reside with us as they are a part of "us" but why still they are not in "us"? Why they are the one who face the consequences of the ill mindset that exists even in the 21st century? Why they are the one who get oppressed by every curse that society builds for people? Why they are the only one to face every type of ill-mindality of the society? And that is what why they are not within "us" where everybody get chance to prosper, have well and dignified life and get every type of opportunities that they deserve to have which secludes a group. And that is the question why they are separated from others?

This is a group that lies in every part of the country, whether it is rural area or urban area, backward area or prosperous area, secluded area or prominent area, over-populated area or less-populated area. This is a group of the vibrant Muslim women community who preserves a outset of humanity within themselves and speaks out for truth. They understand what is right and wrong, what is just and unjust, what is fair and unfair. They understand what is the core basis of society and with what it is made of and how it functions further. They too understands the outset of everything and still speaks for what is right and wrong and at the same time they also demands for their Right that they deserve to get in the society but some harming mentalities of society day-by-day, months-by-months, and year-by-year violates those rights only to satisfy their own wills. This practice too contains the practice of "Triple Talaq" that Islamic community have put upon them to abide by but why that no argument can describe it judicially. Triple Talaq is a practice that crushed down not only the development, progress but the pillar of survival of a Muslim woman in India. It didn't only restrict their life but decreased the chance of their survival at a far down level. Triple talaq is a form of divorce that was practiced in Islam, whereby a Muslim man could divorce his wife by pronouncing talaq three times. The pronouncement could be oral or written, or, in recent times, delivered by electronic means such as telephone, SMS, email or social media. The man did not need to cite any cause for the divorce and the wife need not have been present at the time of pronouncement. After a period of iddat, during which it was ascertained whether the wife is pregnant, the divorce became final.  

330 the aggregate of people living together in a more or less ordered community.  
331 a group of people living in the same place or having a particular characteristic in common.

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irrevocable. In the recommended practice, a waiting period was required before each pronouncement of talaq, during which reconciliation was attempted. However, it had become common to make all three pronouncements in one sitting. While the practice was frowned upon, it was not prohibited. A divorced woman could not remarry her divorced husband unless she first married another man, a practice called nikah halala. Until she remarried, she retained the custody of male toddlers and prepubescent female children. Beyond those restrictions, the children came under the guardianship of the father.

So, what was the most significant problem in it that most of the Muslim women in India are not so highly educated and even most of them are not employed. Due to this reason a large number of Muslim women are dependent on their husbands for their and their children's maintenance and well-being. So basically, maximum of the Muslim women in Indian society are dependent on their husbands and so the husbands take advantage of it and make their wives do whatever they desire. This desire at a certain level rises so much that it takes form of torture and women don't have any choice apart from accomplishing the task because if they don't abide the instructions their husbands will give them 'tin talaq' instantly and in consequence of that their whole life gets dumped into the bin of exploitation, ignorance and uncertainty because they don't have any way out to arrange their own living by themselves. Various times husbands also give their wives 'tin talaq' due to small mistakes and that is a type of tyranny on the women. Incidents took place where husband gave 'tin talaq' to his wife as because the baby was crying loudly and due to less salt in the food. So, these were the incidents that took place that totally exploited the condition of Muslim women in India, not only in present context but the system is said to be exist from the past 1400 years, since the era of Caliph Umar.

But the story of "Triple Talaq" is not one which has been existent in the society from extreme past. If we study about its existence in society so it is a very modern one which came into picture much after the religion of Islam came into existence but this practice is popularly known as a Islamic practice and if its existence doesn't give records of its emergence from the birth of Islam so for sure the actual core of Islam didn't propagate it. Even the holy text of "Quran" also disapproves the concept of " Triple Talaq", so why does the modern practices in Islam propagates "Triple Talaq" as one of the most important aspect of itself? What is the plot behind this? Actually, instant divorce is termed "talaq-e-bid ‘at" and we will find this aspect if we read the emergence of this practice at its root level. So, its emergence is stated out from a story where a hadith by An-Nasa'i stated that Muhammad had accused a man of mocking the Quran by uttering divorce thrice in one go. Talaq pronounced thrice simultaneously from Muhammad to the first two years of Umar's reign as caliph was only considered as a single divorce according to Sahih Muslim. The latter however allowed it, upon seeing the people did not observe the iddah, but also had men using such divorce flogged. Abu Hanifa and Malik ibn Anas considered it irrevocable despite its illegality. Al-Shafi'i considered it permissible but Ahmad ibn Hanbal

[332] no longer married because the marriage has been legally dissolved.

[333] make use of (a situation) in a way considered unfair or underhand.
considered it to be invalid. So, basically Triple talaq, in Islamic law, is based upon the belief that the husband has the right to reject or dismiss his wife with good grounds. Even in present context this concept is very widely practiced, supported and propagated by the All India Muslim Personal Law Board (AIMPLB), a non-governmental organization, says that women could also pronounce triple talaq, and could execute nikahnamas that stipulated conditions so that the husbands could not pronounce triple talaq. According to AIMPLB, "Sharia grants right to divorce to husbands because Islam grants men a greater power of decision-making."

So, this is a practice which has been affecting women in India since ages and now also. The practice of "Triple Talaq" have grounded the women of Muslim community of India like they are any toy to play around and throwing them out of the house anytime they want. It curtailed their functioning of life, happiness, dignity, mental peace, progress, empowerment, status in society, growth in a large way. This restricted them for years to outgrow in society and put their stake in society with total uprightness and dignity. This deteriorated a great part of the society with exploitation, infringement of Rights, curtailment of dignity and backwardness in society which arose due to lack of education and confidence within them. This restricted a huge part of the total population in India to develop and thus the society could not progress\textsuperscript{1} at a level where it deserved to arrive. A large part of society lacked behind which resulted into class struggles in society as well, which devastated the whole demographic scenario in India in a overall level. This led to the exploitation of all Muslim women in a very other way. For years only it restricted the society and also India at large to develop further and the exploitation of women have affected it in a very negative way. The country witnessed the cries of the women of Muslim community and of their children's as well and it went on witnessing these extreme deeds of the people for years. Till when will the country could witness it and also how it could bear and resist it? There is a limit of everything and now the limits got crossed and a need of revolution came in forth in front of every citizen of the country because the cries of Muslim women concerns not only them but also to everyone because they are also the part "us" and society at large. But how this revolution was about to take place and how the ways be generated out of the waves that emerged with the change? What could be the course of these waves and what would be the directions of the ways, what type of battles it was supposed to address and fight, what were the persecutions of it and what would be its destiny were all the questions that came into picture. Any change does not come only in a day but takes a long time to revolve to address a new vibe in an overall aspect. And among these days the first day witnesses the first brave step to come out which destinies at large to bring a change in the world. No one really knows how many women got affected out of it, what type of situations they faced, how they really bared up the situation, how much they faced the situations before, what was the intensity of that and how they struggled in their life. No one really knows about the exploitations they faced and how it affected them. So, it was a matter in disguise and there was not much debate\textsuperscript{2} on it that how the issue could be resolved. It was a matter which

\textsuperscript{1} forward or onward movement towards a destination.

\textsuperscript{2} argue about (a subject), especially in a formal manner.
was like a closed case of a police diary. All these were like frozen ice. The country was filled with the pains and cries of these Muslim women who were facing the persecutions of it. But still something could have been done. The waves took its way and the first case came into the picture, which made people know about the issue in the social front and the matter gained importance.

Among all the incidents the first case that was presented in front of the administration of India was the case of Mrs. Shah Bano who faced various persecutions in due to this untidy practice of "Triple Talaq". In consequence of it, as a result of her bravery she filed numerous suits in different tiers of Courts in India and for the first time in India the matter of "Triple Talaq " came into picture in a social forum and people came to know about it. So, in this case in 1932, Shah Bano, a Muslim woman, was married to Mohammed Ahmad Khan, an affluent and well-known advocate in Indore, Madhya Pradesh, and had five children from the marriage. After 14 years, Khan took a younger woman as second wife and after years of living with both wives, he divorced Shah Bano, who was then aged 62 years. In April 1978, when Khan stopped giving her the Rs. 200 per month he had apparently promised, claiming that she had no means to support herself and her children, she filed a criminal suit at a local court in Indore, against her husband under section 125 of the Code of Criminal Procedure, asking him for a maintenance amount of Rs. 500 for herself and her children. On November 1978 her husband gave an irrevocable talaq to her which was his prerogative under Islamic law and took up the defense that hence Bano had ceased to be his wife and therefore he was under no obligation to provide maintenance for her as except prescribed under the Islamic law which was in total Rs. 5,400. In August 1979, the local court directed Khan to pay a sum of Rs. 25 per month to Bano by way of maintenance. On 1 July 1980, on a revisional application of Bano, the High Court of Madhya Pradesh enhanced the amount of maintenance to Rs. 179.20 per month. Khan then filed a petition to appeal before the Supreme Court claiming that Shah Bano is not his responsibility anymore because Mr. Khan had a second marriage which is also permitted under Islamic Law. On 3 February 1981, the two-judge bench composed of Justice Murtaza Fazal Ali and A. Vara Pratap who first heard the matter, in light of the earlier decisions of the court which held that section 125 of the Code applies to Muslims also, referred Khan's appeal to a larger Bench. Muslim bodies All India Muslim Personal Law Board and Jamiat Ulema-e-Hind joined the case as intervenor. The matter was then heard by a five-judge bench composed of Chief Justice Chandrachud, Rangnath Misra, D. A. Desai, O. Chinnappa Reddy, and E. S. Venkataramiah. On 23 April 1985, Supreme Court in a unanimous decision, dismissed the appeal and confirmed the judgment of the High Court. Supreme Court concluded that "there is no conflict between the provisions of section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself." After referring to the Quran, holding it to the greatest authority on the subject, it held that there was no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide

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336 the legally or formally recognized union of two people as partners in a personal relationship

337 apply to a higher court for a reversal of the decision of a lower court.
maintenance to the divorced wife. Shah Bano approached the courts for securing maintenance from her husband. When the case reached the Supreme Court of India, seven years had elapsed. The Supreme Court invoked Section 125 of Code of Criminal Procedure, which applies to everyone regardless of caste, creed, or religion. It ruled that Shah Bano be given maintenance money, similar to alimony. The Court also regretted that article 44 of the Constitution of India in relation to bringing of Uniform Civil Code in India remained a dead letter and held that a common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.

So, after this landmark judgement the issue of "Triple Talaq" became very prominent and widespread persecutions started taking place in consequence of it. But, the Shah Bano judgment, as claimed, became the center of raging controversy, with the press turning it into a major national issue. The Shah Bano judgement elicited a protest from many sections of Muslims who also took to the streets against what they saw, and what they were led to believe, was an attack on their religion and their right to their own religious personal laws. Muslims felt threatened by what they perceived as an encroachment on the Muslim Personal Law, and protested loudly at the judgment. Their spokesmen were Sunni Bareli leader Obaidullah Khan Azmi and Syed Kazi. At the forefront was All India Muslim Personal Law Board, an organization formed in 1973 devoted to upholding what they saw as Muslim Personal Law.

Due to this the urge of many political leaders shattered down because on sensitizing the issue they could ensure much of the extraordinary benefits and could safeguard their Muslim vote bank. Due to this, The Congress government, headed by then Prime Minister Rajiv Gandhi, overturned Supreme Court’s landmark judgment in 1986 by passing the Muslim Women (Protection on Divorce Act). The Act said maintenance is only liable for the iddat period and that the courts only had the power to direct the Waqf Board for providing alimony to an aggrieving wife who is not able to fend for herself. Even though Shah Bano’s lawyer Danial Latifi challenged the Act’s constitutional validity, the top court upheld it, saying the liability can’t be restricted to the period of iddat. Shah Bano later withdrew the maintenance claim she had filed.

This was a clear outbreak of the matter which affected the whole matter in a different wavelength. The society witnessed the ill-will of the then Central Government that how they turned the decision and made a law which was totally violating the directions mentioned in the judgement of Supreme Court. It was like taking over the liberty of Muslim women, doing injustice with them and satisfying the political will in stake of the lives of thousands and lakhs of Muslim women in India. No political move can’t be so dirtier than it. And so various oppositions also took place against it. Both the Hindu right and liberals have pilloried Rajiv Gandhi for the flip-flop in the Shah Bano case and have viewed it as a move to appease minorities for votes by giving in to the orthodox.

338 a statement or action expressing disapproval of or objection to something.

339 following or conforming to the traditional or generally accepted rules or beliefs of a religion, philosophy, or practice.
Muslim clergy, even if at the expense of gender inequality. The Opposition called it another act of "appeasement" towards the minority community by the Indian National Congress. The All India Democratic Women's Association (AIDWA) organized demonstrations of Muslim women against the move to deprive them of rights that they had hitherto shared with the Hindus. This law has been alleged to have been brought by then prime minister Rajiv Gandhi for Muslim appeasement. The Bhartiya Janata Party regarded it as an 'appeasement' of the Muslim community and discriminatory to non-Muslim men and saw it as a "violation of the sanctity of the country's highest court". The 'Muslim Women (Protection of Rights on Divorce) Act' was seen as discriminatory as it denied divorced Muslim women the right to basic maintenance which women of other faiths had access to under secular law. Makarand Paranjape sees the overruling of Supreme Court verdict in Shah Bano case which happened when the Congress party was in power, as one of the examples of the party's pseudo-secular tactics which "cynical manipulation of religion" for political ends. Lawyer and former law minister of India, Ram Jethmalani has termed the act as "retrogressive obscurantism for short-term minority populism". Rajiv Gandhi's colleague Arif Mohammad Khan who was INC member and a minister in Gandhi's cabinet resigned from the post and party in protest. Critics of the Act point out that while divorce is within the purview of personal laws, maintenance is not, and thus it is discriminatory to exclude Muslim women from a civil law. Exclusion of non-Muslim men from a law that appears inherently beneficial to men is also pointed out by them. Hindu nationalists have repeatedly contended that a separate Muslim code is tantamount to preferential treatment and demanded a uniform civil code. However, in the later judgements including the Daniel Latifi case and Shamima Farooqui v. Shahid Khan, the Supreme Court of India interpreted the act in a manner reassuring the validity of the case and consequently upheld the Shah Bano judgement and The Muslim Women (Protection of Rights on Divorce) Act 1986 was nullified. But still it was an Act that infringed the Rights of Muslim women in India at a large level.

So, the matter was raised in a huge level and a lot of debate, discussions, protest took place in the context but no final justice could be ensured because of the Act that the Legislation passed which restricted Muslim women to practice their Rights with full dignity and liberty. But the urge for justice didn't stop and after a bold step taken by Shah Bano more cases came and both Courts and Government had to take consideration of matters. The courage of Shah Bano gave courage to other women also to come in forefront and fight for their Rights. And so many cases came into being and the issue got a lots importance in National forum. But many things could not have been changed as the Court could only give decision on specific matter only. It could not make it uniform with all the protection provided to it in a uniform level. So, it was a matter to be think upon. But ultimately a single Judgement of Shayra Bano case led to a consecutive wave of changes which revolutionized the whole matter all over the India.

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340 the belief in and worship of a superhuman controlling power, especially a personal God or gods.

341 the process of making or enacting laws.
In this case Shayara Bano, a muslim women, was married in 2001 but after 15 year, in 2016, her husband divorced her through talaq—e-bidat which is another name of "triple talaq". So, in consequence of it Ms. Bano filed a writ petition in the Supreme court of India. She argued before the Supreme Court of India that three practices – triple talaq, polygamy, and nikah halala which is the practice requiring women to marry and divorce another man so that her previous husband can re-marry her after triple talaq were unconstitutional. Specifically, she claimed that they violated several fundamental rights under the Constitution of India Constitution namely, Article 14 which ensures equality before the law, Article 15(1) which ensures prohibition of discrimination including on the ground of gender, Article 21 which ensures right to life and Article 25 that ensures freedom of religion. Her petition underscored how protection against these practices has profound consequences for ensuring a life of dignity. Further, it asserted that failure to eliminate de jure and de facto, discrimination against women including by non-State actors, either directly or indirectly, violates not only the most basic human rights of women but also violates their civil, economic, social and cultural rights as envisaged in international treaties and covenants. But, in this case, the Court focused solely on the practice of triple talaq. In August 2017, the Court, by a majority of 3:2, set aside the practice of triple talaq. Of the justices who voted against the practice, two held it to be unconstitutional while the third relied on case precedents to reiterate that such practice was impermissible under Islamic law. The majority judgment held triple talaq to be unconstitutional under Article 14 read with Article 13(1). In this regard, the Court held that the practice had been sanctioned as a matter of personal law by the Muslim Personal Law (Shariat) Application Act, 1937. The Court clarified that an action that is arbitrary, must necessarily involve negation of equality. It also determined that the marital tie can be broken capriciously without any attempt at reconciliation so as to save it and this arbitrariness violates Article 14. The Court concluded that the 1937 Act is void to the extent that it recognizes and enforces triple talaq, on the basis that as per Article 13(1) all laws in force immediately before the commencement of the present Constitution (which includes the 1937 Act) shall be void in so far as they are inconsistent with the fundamental rights set out in the Constitution. The Court also considered whether triple talaq is protected under Article 25 but, following a review of relevant precedents and Islamic scholarship, concluded that it is not essential to the practice of Islam. So, this decision totally supported Muslim women on its behalf and declared the practice of "Triple Talaq" totally void and unconstitutional. So the Judiciary took every possible to measures to improve the situation and for that they gave as much as stronger Judgements that they could, to safeguard the dignity and Rights of Muslim women and provide them with every possible aid so that their Rights don't get infringed and they live with all possible way of upliftment in their life so that they can endure themselves and move forward in their life.

But is it all sufficient to ensure that in future women will not face the same consequences? Does that really mean that

342 a judge or magistrate, in particular a judge of the Supreme Court of a country or state.
in future no such violation of Rights will happen with women and nobody will give them "Triple Talaq" or any exploitation will not happen with them again? Is that really so? No, with a single Supreme Court Judgement we can't say that. It is not binded by Law to function like "totally preventive". For making it totally preventive we need to make the aspect very strong and upright by providing it an appropriate structure, establishing the framework of it, protecting it with all other forms of Law and finally enforcing it and all these can be ensured by making a Law by Legislation on "Triple Talaq" which will make it totally ineffective and invalidates its existence. So, to ensure this, the present NDA government in Center made various tries to curb down the practice of "Triple Talaq" and ensure justice to lakhs and thousands of Muslim women in India. So, for this the first attempt that was made by the NDA Central Government was in the same year, when Supreme Court's Judgement on Shayra Bano vs Union of India came in, that was in 2017. The Government formulated a bill named 'The Muslim Women (Protection of Rights on Marriage) Bill, 2017' and introduced it in the Parliament after 100 cases of instant triple talaq took place in the country since the Supreme Court judgement in August 2017. In consequence of it, on 28 December 2017, the Lok Sabha passed The Muslim Women (Protection of Rights on Marriage) Bill, 2017. The bill was planned to make instant triple talaq (talaq-e-biddah) in any form — spoken, in writing or by electronic means such as email, SMS and WhatsApp illegal and void, with up to three years in jail for the husband. However, for securing their untidy political interest, sensitizing the issue of Muslims and gaining further in their Muslim vote bank, MPs from RJD, AIMIM, BJD, AIADMK, and AIML opposed the bill, calling it arbitrary in nature and a faulty proposal. On the other side Congress supported the Bill tabled in the Lok Sabha by the then Law Minister Mr. Ravi Shankar Prasad. In this bill, 19 amendments were moved in the Lok Sabha but unfortunately all were rejected when it further went to Rajya Sabha. Due to this, to curtail the practice in present and to safeguard Muslim women, on the grounds that practice of instant triple talaq was continuing unabated despite the Supreme Court striking it, the government issued an ordinance named The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 to make the practice illegal and void. The Ordinance stated that Instant triple talaq remains cognizable with a maximum of three years imprisonment and a fine. With this, only complaint with the police by the wife or her blood relative will be recognized. The offence is also declared non-bailable i.e. only a Magistrate and not the police can grant bail. Bail can be granted only after hearing the wife. And the Custody of the minor children from the marriage will go to mother. Also, maintenance allowance to the wife is decided by the magistrate. The ordinance was cleared by the President Ram Nath Kovind on 19 September 2018.

But the Ordinance was about to expire on January 22, 2019. So due to this, the government introduced a fresh bill in the Lok Sabha on 17 December 2018 to replace the ordinance. The bill was named The Muslim Women (Protection of Rights on Marriage) Bill, 2018. The provisions of the

343 the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.

344 contrary to or forbidden by law, especially criminal law.
bill were various. It stated that all declaration of instant triple talaq, including in written or electronic form, to be void and illegal. It also stated that Instant triple talaq remains cognizable offence with a maximum of three years’ imprisonment and a fine. The fine amount is decided by the magistrate. The offence is regarded as cognizable only if information relating to the offence is given by the wife or her blood relative. The offence is also regarded as non-bailable. But there is a provision that the Magistrate may grant bail to the accused. The bail may be granted only after hearing the wife and if the Magistrate is satisfied with reasonable grounds for granting bail. Here, the wife is entitled to subsistence allowance. The amount is decided by the magistrate. The wife is also entitled to seek custody of her minor children from the marriage. The manner of custody will be determined by the Magistrate. Also, the offence may be compounded by the Magistrate upon the request of the woman against whom talaq has been declared. And so, the bill was passed by Lok Sabha on 27 December 2018. However, the bill remained stuck in the Rajya Sabha due to the opposition’s demand to send it to a select committee. But, as the triple talaq ordinance of 2018 was to expire on 22 January 2019 and also because the triple talaq bill of 2018 could not be passed in the parliamentary session, the government re-promulgated the ordinance on 10 January 2019. On 12 January 2019, the president of India Ram Nath Kovind approved the ordinance of 2019. But afterwards the Muslim Women (Protection of Rights on Marriage) Ordinance, 2019 was repealed on 31st July, 2019 when the bill was passed by both houses of the legislature, Lok Sabha and Rajya Sabha, and was notified by the President of India in the official gazette, and thus, finally the Muslim Women (Protection of Rights on Marriage) Act, 2019 became law on 31 July 2019.

The Act has 8 sections. The act says any pronouncement of talaq by a Muslim husband upon his wife, by words, either spoken or written or in electronic form or in any other manner whatsoever, shall be void and illegal. It also states that any Muslim husband who pronounces talaq upon his wife shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine. Under this a married Muslim woman upon whom talaq is pronounced shall be entitled to receive from her husband such amount of subsistence allowance, for her and dependent children, as may be determined by the Magistrate. Also, a married Muslim woman shall be entitled to custody of her minor children in the event of pronouncement of talaq by her husband, in such manner as may be determined by the Magistrate. The offence punishable under this Act shall be cognizable, if information relating to the commission of the offence is given to an officer in charge of a police station by the married Muslim woman upon whom talaq is pronounced or any person related to her by blood or marriage. Also, the offence punishable under this Act shall be compoundable, at the instance of the married Muslim woman upon whom talaq is pronounced with the permission of the Magistrate, on such terms and conditions as he may determine. The Act also states that no person accused of an offence punishable under this Act shall be released on bail unless the Magistrate, on an application filed by the accused and after hearing the.

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345 a person or group of people who are charged with or on trial for a crime.

346 an authoritative order.
married Muslim woman upon whom talaq is pronounced, is satisfied that there are reasonable grounds for granting bail to such person.

So, it was a landmark move by the Government of India which penalized the whole practice of "Triple Talaq" and made it illegal. The Act ensures protection of women against all form of torture, violence and exploitation. The Act also ensures other technical aspects which will ensure the benefit of women in all possible ways. The Act also ensures punishment to those who will give "Triple Talaq " to their wives and so this gives a message to every person to not practice "Triple Talaq ". This gives strict warning to them to respect women and to give them their respectable position. The Act thus ensures in giving protection to the women of Muslim community their dignified position so that they upheld their position proudly in society.

But still there are cases of Triple Talaq which took place after the Act passed in the Legislation. But due the enforcement of this Act in the Parliament, proper actions were taken to safeguard the Rights of women and to protect them from the consequences of the grievous crime of “Triple Talaq”.

So, the issue of “Triple Talaq” is not just an issue of giving divorce in an unjust manner but also for safeguarding the side of a women that she deserves in the society. She deserves respect, dignity and sense of benevolence from others. She should not be supposed to be a toy with whom everyone will play in any of the matters they want. Instead she should be viewed as a respectable human being who can take up any type of situation and fight against it in a justified way. She should be viewed as the sign of correctness, not the sign of a torn toy. Ultimately, a woman is the one who makes a house a home, gives birth to the whole existence of the world, decides the future of the world and frames it accordingly so she should be respected, not neglected. A woman is the power of whole human existence so she should be awarded that respectable and able position in society.

We should not view women as a liability, instead we should all view them as a symbol of asset because they are that. Triple Talaq is a practice which curtails not only Rights of women but also curtails their life so it was necessary to ban it immediately. As before India, 23 Islamic countries also banned the practice which shows how grievous was that practice that was destroying the life Muslim women in a global community at large.

The Judgement of Supreme Court and the Act passed by Parliament is a message as well as an asset to the society. It dragged out thousands of Muslim women from the loophole of “Triple Talaq” and gave them the life free of mental stress and fear so that they can fearlessly raise the voice against “Triple Talaq”, file complaint, go for their voice and finally do justice to them. Specially the Act gave them much more immunity and an all-round assurance to be safe in a wider perspective and aspect. The Act revolutionized the vibe of the whole Muslim community and India as a large sect of society is getting empowered as soon its effects will be seen visible in the national for a of India. The Act also worked on revolving out the whole women cult in India as Muslim women is also a big part of

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347 subject to a penalty or punishment.

348 A decision by a court or other tribunal that resolves a controversy and determines the rights and obligations of the parties.
women in India and if they lag behind the whole women community will fail to progress and if women don’t progress, the whole country will lag behind not only in one perspective but also in every possible aspect. This will also make our country lag behind in International context regarding every aspect related to development. So, ensuring Women empowerment is a great aspect regarding the position of country in every aspect. This empowerment will also help our country\(^{349}\) to improve in every aspect as their participation in every sector will help the country to improve. This will ensure development of all as well as of the country at large. It will ensure overall development of all and thus will lead the country towards betterment.

\(^{349}\) country refers to a political state or nation or its territory. It is often referred to as the land of an individual’s birth, residence, or citizenship. Countries can refer both to sovereign states and to other political entities, while other times it can refer only to states.
MULTIFACETED ACCESSION TO DATA FORTIFICATION LAWS IN INDIA, LACUNAE AND EXPLICATIONS

By Deep Kumar Mohanty and Shreeja Utkalika Jena
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Introduction
In the current times there is an interminable materialization of cyber crimes buttoned up the sphere. The thievery and deal of embezzled dossier is ensuing transversely acreage where substantial province pretense no hindrance or emerge non-existent in this hi-tech era. It is germane to prognosticate that India being the leading throng of deployed data might become the centre of cyber atrocity as there is nix explicit legislation for data fortification in India.

Connotation of Data Protection
Data protection refers to the fending of susceptible data from tumbling into erroneous grip in order to preclude extortion and graft. Perceptive information stability is based on 3 imperative purpose such as a) regulating substantial and plausible approach to susceptible data b) Individual liability of that receptive notification and recognition of mobs who have admittance to it c) audit grooves both palpable and cogent of who accessed the perceptive information i.e. who, when, how, what and why.\(^{350}\)

Jurisprudential Ambit of Data Preservance

Data allocation is an innate part of right to privacy. Privy info such as birth date, financial competency, health are all comprehended within the bounds of privacy. Privacy is an individual right relished by each person which may elongate to bodily virtue, personal sovereignty, illuminating self persistency, safeguarding from state vigilance, grace, privateness, urge expression and emancipation to discord or maneuver or foresee. The right of privacy or concealment is the immunity to be unfettered from unprovoked notoriety, to animate a life of solitude, and to live outwardly from gratuitous intrusion by the commonality in matters with which the populace is not necessarily implicated.

In case of Campbell v. MGN\(^{351}\), the court held that if “there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified”.\(^{352}\)

The Semayne’s Case (1604)\(^{353}\) relates to the entry into a property by the Sheriff of London in order to execute a valid writ wherein Sir Edward Coke, while recognizing a man’s right to privacy famously said that “the house of everyone is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose”. The concept of privacy further developed in England in the 19th century and has been well established in today’s world.

International Conventions and Reports

\(^{350}\) W. Boni and G.L.Kovacich, Nespionage: Global Threat to Information, 147( 1st ed., 2000)
\(^{351}\) 2004 UKHL 22.
\(^{352}\) Strutner v Dispatch Printing Co., 2 Ohio App. 3d 377 (Ohio Ct. App., Franklin County 1982).
\(^{353}\) Peter Semayne v Richard Gresham, 77 ER 194.
1. Article 12 of the Universal Declaration of Human Rights states, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

2. Article 17 of the International Covenant on Civil and Political Rights states that, “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.” Everyone has the right to the protection of the law against such interference or attacks.

3. Article 16 of the UNCRC states that, “No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation and the child has the right to the protection of law against such interference or attacks.

4. The congregation and holding of personal information on computers, data banks, and other devices, whether by public establishment or private folks or bodies, must be keeping pace by law. Every individual should have the right to determine in an comprehensible form, whether, and if so, what delicate dossier is stored in mechanical data files, and for what objectives. Every personality should also be able to find out which are public powers that be or private individuals or bodies control or may have power over their files. If such records have been composed or processed divergent to the requirements of the regulation, every individual should have the right to appeal modification or eradication.\(^{354}\)

**Indian Mandate on Data Privacy**

In the case of K.S. Puttaswamy (Retd.) v Union of India\(^{355}\) the Hon’ble Supreme Court, in which case the ‘Aadhaar Card Scheme’ was challenged on the ground that accumulating and assembling the demographic and biometric info of the dwellers of the terrain to be used for numerous objectives is in dereliction of the fundamental right to privacy exemplified in Article 21 of the Constitution of India. The Hon’ble Supreme Court by its decision pronounced on August 24, 2017 unanimously held as under:

1. M P Sharma\(^{356}\) decision which commands that the right to privacy is not secured by the Constitution stands abrogated;
2. The judgement in Kharak Singh\(^{357}\) to the degree which prerequisites that the right to privacy is not insured by the Constitution sets to be overruled;
3. The right to privacy is preserved as an elemental part of the right to life and personal liberty under Article 21 and as a part of the privilege assured by Part III of the Constitution.
4. Privacy is a constitutionally safeguarded right which looms principally from the assurance of life and personal liberty in Article 21 of the Constitution. Fundamentals of privacy also occur in changeable substance from the other facets of exemption and poise renowned and assured by the fundamental rights enclosed in Part III.
5. Privacy includes the fundamental part of the perpetuation of personal intimacies, the blessedness of family life, nuptials,
proliferation, the dwelling and sexual orientation. Privacy also designates a right to be left unaccompanied. Privacy preserves individual independence and inculcates the capability of a person to have power over imperative aspects of his or her life. Personal preferences overriding an approach of life are native to confidentiality. Privacy protects heterogeneity and perceives the multiplicity and miscellany of our traditions. While the lawful anticipation of seclusion may vary from the personal zone to the classified zone as well as from the private to the public arenas, it is significant to draw attention that privacy is not vanished or capitulated only for the reason that the individual is in a communal place.

(vi) As per Article 21 an incursion of privacy must be vindicated on the basis of a law which lays down a modus operandi which is flaxen, just and rational. An assault of existence or personal freedom must meet the three-fold constraints of (i) legitimacy, which hypothesizes the existence of law; (ii) requirements, defined in provisions of a lawful state aim; and (iii) proportionality which guarantees a lucid nexus linking the stuffs and the means adopted to accomplish them.

Diverse Governmental Legislations in India do not grant shield to all class of data

1. **Aadhar Act, 2016**

   a) Biometric information means snap, finger stamp, Iris examination, or such additional organic aspect of a human being as may be precise by guidelines.  
   b) Central part of biometric information means finger stamp, Iris scan, or such other biological attribute of an individual as may be specified by regulations.  
   c) Demographic info includes data relating to the forename, date of origin, address along with further pertinent information of a person, as may be précised by organization projected for the target of issuing an Aadhaar digit, however shall not include race, religious conviction, social group, ethnic group, traditions, dialect, records of power, earnings or medicinal account.  
   d) The Authority shall make sure the safekeeping of identity information and verification records of persons  
   e) No court shall receive cognition of whatever misdemeanor is liable to be punished by under this Act, accumulate on a grievance made by the Authority or any bureaucrat or person authorised by it.

**LACUNAE**

a) Section 28 of the Act speaks that the Authority shall take certain the safety measures of individual information and verification records of persons. Section 2(e) of the Act delineates ‘authority’ which refers to the Unique Identification Authority of India established under subsection (1) of Section 11 of the Act. It is to be noted that Section 139AA of the Income

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358 S.2(g), The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016  
359 S.2(j), The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016  
360 S.2(k), The Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016  
Tax Act, 1961 grants for the linking of Aadhaar to PAN. The proviso was defied in the Supreme Court and was consequently upheld by a Hon’ble Division Bench of Justices A.K. Sikri and Ashok Bhusan in Binoy Viswam Case. However, when Aadhaar is linked, the information which were collected via UIDAI would be split by means of the Income Tax Authorities. But, the Income Tax Act doesn’t bequeath with any title or any authority for the rationale of fortification of those information and data. Therefore, a major loophole remains in the verdict.

b) Section 33(1) of the Act says that revelation of information as well as identity dossier or verification records may be made agreeable to an order of a Court not mediocre to that of a District Judge and additional to that no regulation by the Court may be made beneath the sub-section shall be made devoid of giving a chance of investigation to the UIDAI. However, it doesn’t endow with for an opportunity of trial to the data foremost, which aligned with the doctrine of natural impartiality and in flouting of surveillance of the Hon’ble Apex Court in Puttaswamy’s case. Constitutional probity necessitate an administration not to do something in a manner which would develop into violative of rule of law and not giving opportunity to the affected party is against the perception of rule of law. Hence, it is against constitutional morality.

c) As the federal body for the storage and union of information is Central Identities Data Repository (CIDR) there is an gigantic likelihood of information fall foul of or piracy and formerly the national depository is hacked , it may escort to the infringement of the personal facts and information of millions of populace.

d) As per Section 47(1), a court be able to acquire cognizance of a crime condemned under the Act only if a grievance is given by UIDAI or any bureaucrat or any other individual authorised by it. Section 47 of the Act is capricious, absurd and specious as it doesn’t endow with a method to persons to seek efficient remedy intended for desecration of their right to privacy. Therefore, it can be firmly said that section 47 infringes the rights of general public to seek remedies in case of breach of their deep-seated rights.

e) It is a elemental belief that possession of an individual’s information be required to at all times vest with the entity. But it is appertaining to prognostic that the specifications to Section 28(5) of the Aadhaar Act, outlaws a person to admittance to the biometric dossier that outlines the central part of his or her inimitable ID and thus contravenes this elemental rule.

f) As per Section 23(2)(s) UIDAI which is managing the Aadhaar scheme, is also liable for instituting an accusation redressal apparatus to categorize in order may request the Authority to provide access to his identity information excluding his core biometric information in such manner as may be specified by regulations.

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363 Binoy Viswam v. Union of India and Ors (2017)7 SCC 59

364 Notwithstanding anything contained in any other law for the time being in force, and save as otherwise provided in this Act, the Authority or any of its officers or other employees or any agency that maintains the Central Identities Data Repository shall not, whether during his service or thereafter, reveal any information stored in the Central Identities Data Repository or authentication record to anyone: Provided that an Aadhaar number holder

365 Section 23(2)(s) states, “Without prejudice to sub-section (1), the powers and functions of the Authority, inter alia, include—(s) setting up facilitation centres and grievance redressal mechanism for redressal of grievances of individuals, Registrars, enrolling agencies and other service providers;”
to tackle grievances cropping up from Aadhar thereby extraordinarily compromising the sovereignty of the complaint redressal body.

2. Section 29(4)\textsuperscript{366} is too expansive as it provides ample of unrestricted supremacy to UIDAI to exhibit, put out or place core biometric dossier of whichever personality for principles precisely by the regulations.

Non Acquiescence of the directives positioned by the Supreme Court in the Aadhar Amendment Act 2019

a) The Supreme Court in the Aadhar Judgment\textsuperscript{367} (Para 322) has held, “No doubt, the Government cannot take offense under the aforementioned proviso to broaden the extent of funding services and reimbursement. ‘Benefits’ should be such which are in the temperament of welfare proposal for which reserves are to be careworn from the combine finance of India. As consequence measure by CBSE, NEET, JEE and UGC constraints for scholarship shall not be enclosed under Section 7, except it is verified that the disbursement is incurred from consolidate subsidize of India. We are of the opinion that the litigants shall not irrationally develop the scale of ‘subsidies, services and assistance’ by this means enlarging the web of Aadhaar, where it is not allowable.” The court went on to comprehend that Sections 24 & 25 of the Aadhar Amendment Act 2019 cites the use make of Aadhaar by telecom service bringers, depository and financial establishment for doing reporting purpose under the Prevention of Money Laundering Act ( PMLA) which have no correlation with subsidies, advantages, wellbeing or DBT. Merely making Aadhaar

\[ \text{online or hard copy} \] as two out of four alternative in these sections, without stating the third one ( simply authorizing the government to do so) and providing identification as the fourth one ( which a preponderance of people do not acquire) does not act in accordance with with the SC objective which first and foremost subdued implement of Aadhaar to “ benefits” from the Consolidated finance of India, as above trynically defined.

b) Section 57 of the original act states, “Nothing enclosed in this act shall avert the exercise of Aadhaar for instituting the distinctiveness of a person for any reason whether by the State or any person business or person.” In a prolonged conversation in the Aadhar verdict (paras 355 to 367), Section 57 was affirmed illegal, and struck down of being too outstretched. The re-personification of the analogous illogical 57 is obtainable in 5(7) of 2019 amendment Act, where an comparable condition, deliberately superseding all other requirements consent to essential use of Aadhaar single-handedly if Parliament by any decree ( not yet specified) so endows with Sections 24 and 25 discussed above, furthermore replicates a alike re-embodiment.

c) The Supreme Court in the Aadhar Judgement(Para 349), while continuation of Section 33 which contracts with obligatory revelation in wellbeing of nationwide security, distorted the resolution-maker from Joint Secretary to a higher level and significantly supplemented, “ There has to be a privileged grade official beside with, preferably, a legal executive.” In the 2019 Aadhar Amendment Act though a Secretary rank administrator has been delegated, no legal constituent along publicly, except for the purposes as may be specified by regulations.”

\textsuperscript{366} Section 29(4) states that, “No Aadhaar number or core biometric information collected or created under this Act in respect of an Aadhaar number holder shall be published, displayed or posted

\textsuperscript{367} K.S. Puttaswamy v. Union of India
with has been provided, thus strikingly breaking the command put down by the Supreme Court.

**Information and Technology Act**

a) Section 43A of the IT Act commands that where a body corporate acquirers, dealing or conducting any thin-skinned clandestine information or data\(^{368}\) in a computer source which it owns, reins or operate, is slipshod in executing and perpetuating prudent security measures and actions\(^{369}\) thus precipitating reprehensible loss or illicit gain to any individual, such body corporate shall be accountable to pay off reimbursement by way of compensation, that shall not surpass a summation of INR 5,00,00,000 (Rupees Five Crore).

b) Section 66 C accords with individuality of larceny and states that whoever, deceitfully or underhandedly exploits the electronic signature, code word or any other inimitable recognition feature of any individual, shall be castigated with incarceration for a period which may pull out up to three years and shall also be accountable to confiscate upto INR 1,00,000.

c) Section 72 entails that whichever person who has held entrée to any electronic record, book, register, correspondence, materials, file exclusive of the approval of the person apprehensive and thereafter, unveils such electronic record, book, register, correspondence, information, document or other material to any other personality shall be rebuked with detention for a tenure which may lengthen to two years, or with fine which may expand to INR 1,00,000 (Rupees One Lakh), or with both.

d) Section 72A stipulates, any person, including a intermediary\(^{370}\) who, while providing services in the terms of a legally recognized bond, has unbolt admittance to every material containing personal dossier.

**LACUNÆ**

a) The Information & Technology Act does not hold a classification of dossier transgression.

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\(^{368}\) The term “sensitive personal data or information” of a person is defined to mean such personal information which consists of information relating to— (i) password; (ii) financial information such as Bank account or credit card or debit card or other payment instrument details; (iii) physical, physiological and mental health condition; (iv) sexual orientation; (v) medical records and history; (vi) biometric information; (vii) any detail relating to the above clauses as provided to body corporate for providing service; and (viii) any of the information received under above clauses by body corporate for processing, stored or processed under lawful contract or otherwise; provided that, any information that is freely available or accessible in public domain or furnished under the Right to Information Act, 2005 or any other law for the time being in force shall not be regarded as sensitive personal data or information for the purposes of these regulations.

\(^{369}\) The term "reasonable security practices and procedures" has been defined to mean security practices and procedures designed to protect such information from unauthorised access, damage, use, modification, disclosure or impairment, as may be specified in an agreement between the parties or as may be specified in any law for the time being in force and in the absence of such agreement or any law, such reasonable security practices and procedures, as may be prescribed by the Central Government in consultation with such professional bodies or associations as it may deem fit.

\(^{370}\) The term “intermediary” with respect to any particular electronic records, has been defined to mean any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes.
b) The equipping of Information & Technology Act solitarily deals with the compilation and allotment of information by a ‘body corporate’.
c) Also the Information & Technology Act does not comprise the underlying clause that the interference can only emerge in the case of communal crisis or in cases concerning civic wellbeing. Moreover, section 69 of the IT Act consents that any individual or conciliator who falls short to lend a hand to the specific agency with the interception, scrutinizing, decoding or prerequisite of dossier accumulated in a computer source shall be chastened with a sentence of detention for a term which may pull out to seven years, and shall be accountable for a fine.
d) The term “consent” has nix characterization under IT Act.
e) The regulations and provisions of the IT Act predominantly required to cover ‘private information’ and ‘sensitive intimate compilations or information’, i.e. the data analogous to (i) password; (ii) monetary information such as bank account or credit card or debit card or other payment mechanism particulars; (iii) physical, physiological and intellectual wellbeing state; (iv) carnal acclimatization; (v) medicinal statements and antiquity; and (vi) biometric information. However, the information which is candidly handy in communal area is not studied within the realm of ‘receptive delicate information or data’.

LACUNAE

Despite the fact that the bill provides a scrawny structure of data fortification law and attempt at strives certain facets of data shield yet it undergoes from major outlets.

1. **Non-existence of norms for equitable and plausible data analysis**

   As per the suggestions of Justice Srikrishna Committee courts of law and governing bodies should be permitted to formulate doctrines of impartial and logical data processing. The Bill inserts the responsibility on data administrators to amass data in a fair and rational manner that compliments the privacy of the person but does not unambiguously denote just and logical manner of personal data processing which could result in evenhandedness and reasonability doctrines to contrast transversely fiduciaries processing similar kinds of data and fiduciaries within the equivalent business might develop and pursue diverse principles.

2. **Tenders for data localization is somewhat pertaining**

   Data localization could radiate an unfavorable impact on minor data fiduciaries who way out to substitute inexpensive storage apparatus through
compliance load and elevate costs and several possibly will be demoralized from investing in India as a marketplace for the reason that of additional expenditure occurring from putting up second copy servers as a consequence of which consumers may not encompass the preference of availing services of each and every data fiduciaries. In several cases where the data fiduciary is listed as an unit in a far-off nation law enforcement may perhaps not essentially be expedited. Moreover India requires to invest and boost on data centre infrastructure and network aptitude prior to authorization of data localization.

3. Responsibility of the legislature for non-consensual processing of data is uncertain

Personal data may be processed if such processing is obligatory intended for any role of Parliament or any State Legislature.371 The Bill permits for giving out of an individual’s private data devoid of their approval if it is crucial for every role of the Parliament or state legislature which is unreasonable plus it is pretty uncertain to envisage a propos to the probable prerequisite of the Parliament or State Legislature for admittance of any personal data lacking the approval of the person.

4. Certain categories of data are excused which possibly will not gratify the analysis of proportionality

The State is capable of progression of data for the reason that (i) national security, (ii) deterrence, inquiry and hearing of contravention of a law, (iii) legal procedures, (iv) individual or familial reasons, and (v) research and journalistic purposes. An imperative query is whether all exceptions present in the Bill are reasonable. The Supreme Court, in Puttaswamy vs Union of India, allowed exceptions to the right to privacy of a person merely in cases where a larger communal purpose backed by law is contented by the contravention of privacy of an individual and tinted that the exemption be required to be obligatory for and balanced to achieving the point. As a result it is clear that an exception for national security, pursuant to a law, may be justified. But, it is vague if exceptions for lawful procedures, or for research and journalistic purposes congregate the rudiments of requisite and proportionality.

5. Data processing for providing all services of the state without consent is unjustified

Personal data may be processed if such processing is necessary for the exercise of any function of the State authorised by law for: (a) the provision of any service or benefit to the data principal from the State; or (b) the issuance of any certification, license or permit for any action or activity of the data principal by the State.372 The recommendations of Sri Krishna Committee cite that only those government entities which are exercising functions directly related to the provision of welfare should be allowed non-consensual processing of data and acknowledges that non-consensual processing by government entities for all types of public functions may be too broad to an exception to consent. But the Bill utterly disregards the recommendation and allows non-consensual data processing for all services of the State.

6. A grievance might be filed solitarily in case of possibility of impairment

371 S.13(1), Personal Data Protection Bill 2018

372 S.13(2), Personal Data Protection Bill, 2018
A data prime may hoist a complaint in case of a breach of whichever provisions of this Act, or set of laws approved, or regulations precised there under, which has caused or is probable to cause damage to such data principal, to— (a) the data shield official, in case of a momentous data fiduciary; or (b) an officer chosen for this purpose, in case of any supplementary data fiduciary.  

It is dubious as to why the absolute infringement of the rights of the principal isn’t ample to file a complaint. Nothing enclosed in sub-section (1) shall make any such person answerable to any penalty provided in this Act, if she verifies that the violation was committed exclusive of her acquaintance or that she had implemented all due conscientiousness to avert the commission of such crime.  

The data principal moreover has to demonstrate and confirm that damage has been caused to them as a outcome of unlawful data processing thereby inserting needless burden on the data principal.  

7. No predetermined time limit for reporting data breach  
If we take into contemplation notification of data violates the bill states that the data breach notifications are to be prepared by the data fiduciary to the Data Protection Authority For India(DPAI) “as soon as possible”, in case they pretense budding “harm” to data principals. On the other hand there is vagueness in this proviso as it does not unequivocally states how rapidly and within what predetermined instance the violation is to be notified.  

8. Discretionary exposure of data breaches might upshot in conflict of interests  
The Bill states that the fiduciary shall notify the DPA in the occurrence of a data breach (i.e., an unintentional or unlawful use or revelation of data) only if such a violation is expected to cause damage to any data principal. The query which remains unreciprocated is whether the fiduciary should have the discretion to resolve whether a data breach needs to be reported to the DPA. From a bare interpretation we can infer that the fiduciary has the discretion to decide if the data breach has caused data principal any damage. This may perhaps result in picky reporting of data breaches which will shun the DPA from being burdened with towering volume of low-impact data breach reports on one hand and on the other also not make the fiduciary answerable of the duty reporting. On the contrary, there may be a conflict of interest while deciding whether a breach is to be reported, as the fiduciary is synchronized by the DPA and cases of breaches and swiftness of notice are assessed in autonomous data audits ordered by the DPA whose outcomes are reviewed into a score, made open and sway the insight of a fiduciary’s trustworthiness.  

9. Imprisonment, Captivity, Attachment of possessions in the form of damages can be made by DPA exclusive of court order  
The Recovery Officer, as per the orders of the Data Protection Authority, may perform numerous enforcement proceedings in opposition to the person including (i) attachment and transaction of the persons variable assets; (ii) attachment of the persons bank financial statement; (iii) attachment and sale of the persons unbending possessions; (iv) seizure and imprisonment of the individual in prison; (v) appointing a receiver for the managing of the persons movable and immovable possessions.  

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373 S.39(2), The Personal Data Protection Bill, 2018  
374 S.96(2), The Personal Data Protection Bill, 2018  
375 S.32(3), The Personal Data Protection Bill, 2018  
376 Ibid
properties. The Bill vests unleashed authority to the Recovery Officer to act in implementation of the guidelines of the Data Protection Authority and do not insist on sanction of a court order for the above enforcement procedures contrasting the RBI or the IRDA.

10. The classification of ‘Serving copy’ and ‘Critical personal data’ are not granted

It is vague what is intended by a ‘serving copy’ of data. It may be a live, a concrete instance of replication of data on a server within India, or it might be a support at a scrupulous frequency. Exclusive clarity needs to be provided, as expenditure, connotation and implementation timelines for fiduciaries would vary considerably with the precise temperament of a ‘serving copy’. Additionally, what envelops the domain of ‘critical personal data’ needs to be unambiguously mentioned, as it is an essential pre requisite for fiduciaries to set up for storing this data solely in India.

Contrastive Contemplation of European Union’s General Data Protection Regulation (GDPR) and the Personal Data Protection Bill, 2018

1. Though Section 27(1) which states that the data principal shall have the right to limit or avert ongoing revelation of personal data by a data fiduciary allied to the data principal where such disclosure (a) has done out the reason for which it was prepared or is no longer essential; (b) was made on the substructure of approval. The foremost disparity is that in India, a citizen has not been sanctioned the right to stipulate his/her data to be obliterate. Data bolster, which is an appraisal in itself in GDPR does not even smack upon a mention in the Indian draft bill.

2. Provision of underpinning of delicate data to data principal The data fiduciary does not need to apportion the basis of the individual data to the data principal in case the data has not been collected from him/her as per PDPB which is a blatant preconception in GDPR.

3. As per the Personal Data Protection Bill proclamation of data flout are to be made by the data fiduciary to the Data Protection Authority For India (DPAI) “as promptly as feasible”, in case they facade plausible “harm” to data principals but does not unequivocally cite how abruptly and within what preset instance the violation is to be clued-up in division to GDPR which has a time edge of 72 hours.

4. Rupture notice to data issue is indispensable in GDPR while in PDPB it depends upon forethought of DPA In case of a contravene, there’s no constraint by Indian draft bill to split it with the data principal; rather, the data protection Authority shall resolve whether such breach should be accounted to the data principal. This is also in dissimilarity to GDPR requirements.

5. Answerability: GDPR places further prominence on unambiguous responsibility for data protection thereby putting a direct liability on corporation to establish that they abide by the principles of the guideline, rather than the nonjudgmental approach of the Data Protection Act which means firms will have to execute binding actions such as staff guidance, interior data check and keeping comprehensive

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377 S.78, The Personal Data Protection Bill, 2018
378 Reserve Bank of India
379 Insurance Regulatory and Development Authority
certification if they desire to shun declining foul of the GDPR rules.

6. **GDPR unambiguously necessitates data principal to be endow with a copy of data processing while PDPB imprecisely mentions synopsis of data to be provided**

GDPR entails that the data issue (data principal) is presentated with a copy of data undertaking processing. The Indian legislation authorizes a précis of that data to be spilt, with no description of what that outline is.

7. **Responsibility on data fiduciary** - There is no commitment on data fiduciary in the Bill to allocate with the data principal for how much time phase the data will be hoard while assembling or at any time, as GDPR consents.

8. The Data Protection Bill does not directs the data fiduciary to apportion the names and class of other addressee of the personal data with the data principal dissimilar to GDPR.

9. **Approval policies**

Under the PDPB data assemblage does not fundamentally consent an opt-in but beneath GDPR perceptible confidentiality notices are provided to consumers, permitting them to make a familiar conclusion on whether they ought to assent to allocate their data to be stored and used and the approval can be inhibited at any occasion.

**RECOMMENDATIONS**

- The PDPB should absolutely point out set of laws and procedure for the just and evenhanded principles of data processing by data fiduciaries because the requirements of Section 4 of the Bill commands that the data fiduciary ought to assemble data in a rational and reasonable method.
  - The Data Protection bill should empower the Data Protection Authority to proclaim pattern for assortment of approval, and the essential trade should conform with these templates.
  - The mention of subsidiary functions and the vague words of Section 5(2) of the Bill should be abrogated in order to evade false impression.
  - Section 32 of the Personal Data Protection Bill should slot in a explicit time frontier to account the breach of data by the data fiduciary to the data processor instead a substitute of using a fuzzy expression like as soon as possible.
  - The clauses of Section 13 are very extensive and there is a likelihood that this proviso might be capriciously used under the coverlet of state functions and for that reason this prerequisite must classify in a more elaborate and comprehensive approach the sphere of needed data.
  - Data fiduciaries might be requisite to deliver information concerning any data breaches on their website to certify clearness.
  - Inclusion of a competent right to elimination in the Bill as mandated in the GDPR will be of momentous significance to the privacy rights of the populace.
  - In case there is violation of data then in such a case the Data Protection Authority in order to preserve transparency could make the data fortification impact assessment and data audits accessible openly.
Despite the fact that the bill stipulates broad doctrines, additional exertion needs to be done in order to make approval work in custom.

**CONCLUSION**

Though the prevailing laws in India do not bestow indispensable data protection but India is on the way of drafting a governmental endorsement for data protection. A profound approach into the above loopholes and further deliberations and negotiations in the Parliament to grant essential recommendations to exterminate the same would lay concrete the way for generating a brawny data fortification law in India.
THE HUMAN RIGHTS REGIME AND RIGHT TO EQUALITY DO NOT SUFFICIENTLY ACCOUNT FOR INTERSECTIONALITY OF DISCRIMINATION

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I. INTRODUCTION
What is Intersectional Discrimination?
Intersectional Discrimination refers to the discrimination on the basis of personal grounds or characteristics like age, sex, ethnicity, sexual preference, disability, etcetera, which ‘interact with each other at the same in such a way that they are inseparable.’\(^{380}\) However, it is imperative to mention that ‘multiple discrimination’, ‘cumulative discrimination’, ‘combined discrimination’ and ‘intersectional discrimination’ are often used interchangeably but needless to say, they ‘subtly have different meaning.’\(^{381}\) It has been noticed that discrimination can occur on the basis of more than one group. This throws light on the topic of cumulative discrimination and subsequently intersectional discrimination where a person can be discriminated not only on the grounds of her race but also on the grounds of her sexual orientation, age and religion. Hence, the ‘ethnic minority women, older women, black women and disabled women’\(^{382}\) are among the most disadvantage classes in the world.

The question of intersectional discrimination is growing with great popularity in the world as most people are being subjected to it. Most countries in the world are still figuring out the way to counter the problem and incorporate it with the international regime and the right to equality that is there in the International Human Rights Statutes. This paper aims to elucidate the insufficiency of the international human rights regime and right to equality to not account for the question of intersectionality of discrimination. The paper is divided into five different section to address the topic. The first part will highlight the problems and challenges that is associated with intersectionality i.e. discrimination on multiple grounds. The second section forms the backbone of the paper and addresses the question of right to equality and intersectional discrimination. The third section elucidates the approaches taken by different nations to address and tackle the question of intersectional discrimination in their nation. The fourth section is a continuation of the preceding section and throws light on the different decisions given by the international human rights monitoring mechanisms to reach to a conclusion. The last section will evaluate all the evidences produced in the paper and include the comments of the author to show whether intersectional discrimination finds its way in the current framework of the international human rights regime and right to equality.

II. CHALLENGES TO THE ANTI-DISCRIMINATION LAWS
This section will elucidate on the challenges faced by anti-discriminatory laws as intersectional discrimination is recognized. The contributions of Kimberle

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\(^{382}\) Id at 27.
Crenshaw to articulate the concept of intersectionality has been of utmost importance. Although the theory has been well received by global community but the associated problems are yet to be resolved. Crenshaw criticized the anti-discrimination laws that ‘tend to homogenize protected groups, rendering invisible those who experienced discrimination from more than one direction.’\textsuperscript{383} She explained through her work that ‘discrimination is experienced very differently by differently situated individuals sharing a protected characteristic.’\textsuperscript{384} In one word, intersection theory ‘aims to disrupt the group descriptions’\textsuperscript{385} that has been portrayed in the anti-discrimination laws. Intersectional theory highly criticises the flaws in the notion of discrimination based on one ground. It completely disregards the fact that similar characteristics are attributed to a class or group. It criticises the fact that the law completely ignores the exclusivity of each individual. Every individual is attributed with different sexual orientation, religious beliefs and ethnicity. Such unique characteristics cannot be ignored. Further, the concept can be better explained in the scenario when the middle-class white feminists were highly criticised by black women for giving a universal nature to the feminist movement for the struggle against discrimination based on gender. However, as Larissa Behrendt puts it, the struggle of the black women cannot be associated with that of the feminist movement that is led on by the middle-class white women. This is because black women not only face discrimination on the grounds of gender but also on the ground of race. In order of words, they face multiple discrimination. Additionally, there have been instances when they were discriminated by white women. Hence, attributing a universal nature of discrimination on the grounds of gender to the entire sex and subsequently associating it with the feminist movement cannot be excepted since black women have their own sorrows.\textsuperscript{386}

It is important to mention that anti-discrimination law only considers ‘a single source of identity’\textsuperscript{387} and ignores the ‘power in structuring relationships.’\textsuperscript{388} As Timo Makkonen successfully explains the term ‘social location’ and claims that discrimination ‘focuses on power rather than a group or even a personal characteristic,’\textsuperscript{389} such challenge cannot only be countered with the individuals’ social location. Also, power not only operates symmetrically but also operates diagonally and vertically. To simplify things, it is important to refer to the black men too who faces discrimination on basis of their race but in a position of power on the basis of their gender. Similarly, white women are in a position of power when it comes to their race but discriminated on the basis of their gender. Such differences are not addressed in the anti-discrimination laws and subsequently poses challenge to the international human rights regime

\textsuperscript{383} Fredman, supra note 2.
\textsuperscript{384} Id at 30.
\textsuperscript{385} Id.
\textsuperscript{387} Fredman, supra note 2.
\textsuperscript{388} Id. at 30.
which required immediate attention so that humanity can benefit from it.

III. RELATIONSHIP BETWEEN RIGHT TO EQUALITY AND INTERSECTIONAL DISCRIMINATION

This section will elucidate on the relation between the right to equality and intersectional discrimination. Equality can be divided into two major types i.e. formal equality and substantive equality. Formal equality has been heavily criticized for its approach to treat all human beings equally and ignoring other attributes that can be a source of discrimination. For example, a white gay man may be subjected to discrimination for his sexual preference and subsequently ostracised by the society. Hence, a more reasonable approach towards equality should be adopted to take all factors into account. Substantive equality has been developed under the principle of inclusivity of all factors. It has grown in popularity and has taken into consideration that each individual is unique and should be respected. Substantive equality has four different approaches to solve the problem of intersectional discrimination. Firstly, substantive equality aims to remove disadvantages among different groups. Secondly, it counters prejudice, stigma, stereotyping and violence based on protected characteristics. Thirdly, it ‘voice (s) and (allows) participation, countering both political and social exclusion.’\(^\text{390}\) Lastly, it should be aimed towards accommodating the differences and structural changes.\(^\text{391}\) Thus, substantive equality aims to eradicate ethnic minority groups and other groups which have a higher chance of being discriminated. Such marginalised groups should be put at a higher pedestal to accommodate them in the society and strike a balance among the different communities. This will ensure that every human being irrespective of their caste or race or gender is equal and subsequently prevent discrimination. However, progressive nations like UK and USA have failed to appreciate the merits of substantive equality whereas South Africa and Canada have used the principles of substantive equality in order to tackle the problems of intersectional discrimination.

IV. APPROACH TAKEN BY DIFFERENT COUNTRIES IN EUROPEAN UNION

There was a survey conducted on the legal framework of different countries in Europe to study the laws on multiple and intersectional discrimination which are present in the countries. An interesting picture was revealed as a result. This section will highlight the approaches of different countries in the European Union to tackle the problem of intersectionality in their jurisdiction. This will mainly highlight and analyse the legislation of different countries and the approaches of the court towards the issue of intersectional discrimination. While, in most of the occasions it is seen that the concept of multiple discrimination has been side-lined, the courts have made a fair approach in order to tackle such issue. But the question still lies; Is it enough?

Although most states condemn the idea of multiple discrimination and has taken effective measures such as compensating the victim in order to address the issue of multiple discrimination. But, sadly only


\(^{391}\) ibid.
Serbia has explicitly referred to ‘intersect discrimination’ in their legislation. Countries like Germany, Austria, Spain, Macedonia, Greece have appreciated the concept of multiple discrimination and subsequently referred to it in their legislation. Several countries have referred to multiple discrimination without defining it.

Several Countries focusses on ‘enhanced compensation’. Countries like Croatia, Austria and Serbia have referred to multiple discrimination as serious form of discrimination which has been taken into account when ‘determining the sanction or amount of compensation’. Some countries integrate ‘multiple discrimination into positive duties of powers of inspectorates’. Bulgarian legislation places a statutory duty to give ‘priority to positive measures for the benefit of multiple discrimination victims’. Bulgarian legislation places a statutory duty to give ‘priority to positive measures for the benefit of multiple discrimination victims’.

Similarly, countries like Germany, Italy and Greece have taken a step forward to integrate multiple discrimination into the picture while assessing the conditions of the people in their respective countries. It is imperative to mention several countries like France, U.K, Belgium do not have ‘multiple grounds’ addressed in their legislation. Often, it has been noticed in France and Belgium that citizens have to bring separate grounds in the court which is then cumulatively recognized by the courts. Now that we have seen how the legislation of the EU nations approach the question of intersectionality and multiple discrimination, it is important to see how the judiciary interprets in the region. It has been reported that very few case laws based on multiple discrimination have been notified. However, even when they have been adjudicated upon, they have not been able to provide with a constructive solution. The Italian courts have rightly recognized the discrimination that the non-EU disabled members were subjected to and have adequately compensated them. Reference has to made to courts in France too. Although, France do not have a legislation on multiple discrimination, it has cumulatively considered discrimination as a whole from the many grounds of discrimination that French law prohibits. Similarly, Swedish courts have found it difficult to adjudicate on the grounds of multiple discrimination since there is no explicit reference to it. A reference should be drawn to a Swedish Case where the courts have provided compensation to the plaintiff for alleging sexual harassment at work based on ethnicity and race. Lastly, UK judiciary has never appreciated the merits of multiple discrimination. In UK, it is important to prove each ground separately to successfully bring a claim on it. References has to be made on the famous case of Ministry of Defense vs. DeBeque where one of the claims of the women who was recruited in the British Army was accepted, the others were rejected. Such practice clearly indicates that each ground of discrimination needs to be proved and accepted by the court rather than the court cumulatively considering the grounds of discrimination.

V. INTERNATIONAL HUMAN RIGHTS LAWS AND DIFFERENT BODIES ADVOCATING FOR HUMAN RIGHTS

392 Fredman, supra note 2.
393 Id.
394 Id.
395 Id.
International human rights mechanisms have majorly focused on the ‘single-axis’ approach to implement legal provision against discrimination. The focus of these international mechanisms like Committee on Elimination of Discrimination against Women (CEDAW), Committee on Elimination of Racial Discrimination (CERD), etcetera was mainly discrete and worked together to uphold the mutually exclusive grounds of discrimination as enshrined in the UN Declaration Charter. The trend followed by these committees in giving remedies on various cases that come to them indicate the fact that they have tended to ‘singular conception of discrimination.’

This section will specifically analyze the existence of the international human rights laws and the different human rights bodies adjudicating on the issues of discrimination. The section will heavily rely on four major cases to show the change in the attitude of the CEDAW in determining the remedies awarded in each case. The cases being A.S vs Hungary, Kell vs. Canada, R.P.B vs Philippines and E.S and S.C vs Tanzania. In the case of A.S vs Hungary, the CEDAW failed to appreciate the different grounds of discrimination that was faced by the Roma Women in Hungary. However, subsequently in the years to come there was a change in the attitude of the CEDAW and CERD and their ambit to interpret the question of discrimination, widened. The CEDAW’s initial failure to include intersectional discrimination was ‘counterbalanced with a strong affirmation of intersectionality in its decision Kell vs. Canada.’ However, in the recent cases of R.P.B vs. Philippines and E.S and S.C Tanzania, the CEDAW took a step backward by ignoring the disability factor in the girl which contributed towards discrimination, in the former case and did not engage with the claimant’s status in the latter case. Hence, it can be said that the international human right laws though have addressed the question of intersectionality and discrimination in the recent times but there is a huge loophole in the law which needs to be rectified and updated by the global community and different organizations advocating for human rights.

VI. CONCLUSION

Thus, in light of topics enumerated in the previous sections, it can be concluded that international human rights regime and the right to equality does not sufficiently appreciate for intersectionality of discrimination. Intersectional discrimination was introduced as a result of the criticisms of the African Americans towards the white middle-class feminists who attributed the movement to the entire sex. It was proclaimed the experiences of the African Americans cannot be attributed towards the white women. Hence, there exists the requirement for the international regime to recognize the fact that each individual is different and have characteristics like ethnic group, sexual orientation, religious belief which are unique. Intersectional discrimination poses

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two major challenges to regime of human rights. In the past, human rights have not appreciated the discrimination which remained unrecognized. Therefore, it will take a lot of effort in order to recognize each and every ground of discrimination. Secondly, the legal framework of human rights regime is not adequate enough to fit the topic of intersectional discrimination.\(^{404}\) However, the acceptance of the concept of intersectional discrimination by several countries brings a ray of hope to integrate it within the human rights regime. Although the scope has been limited to the extent of intersection of gender and race while other grounds remain ignored\(^{405}\). Hence, it is required to put across certain recommendations so that intersectional discrimination can be incorporated within the legal framework of international human rights. There is an immediate requirement to promote and provide funds for extensive research on the possible grounds of discrimination. Secondly, all the institutions associated with human rights should adopt the intersectional approach and propagate it. Thirdly, there is a requirement to draft new policies and human rights instruments in order to accommodate the idea of intersectional discrimination. Fourthly, a new kind of approach such as holistic approach of discrimination should be adopted. Lastly, it is required to empower the ‘vulnerable groups and persons.’\(^{406}\). Hence, it can be concluded by saying that each individual is different and a blanket attribution of characters cannot be applied to all. There is a requirement to appreciate the ambit of intersectional discrimination and subsequently, recommendations need to be acted upon to eradicate the gap among different groups of human beings and uplift the dignity of each individual.

\(^{404}\) Makkonen, supra note 10.

\(^{405}\) Makkonen, supra note 10.

\(^{406}\) Id.
DISQUALIFICATIONS UNDER HINDU SUCCESSION ACT, 1956

By Devansh Agarwal
From Bennett University

STATEMENT ABOUT THE PROBLEM
This paper will deal with the disqualifications related to Hindu Succession according to the Hindu Law and will make an attempt to understand the judicial and statutory evolution of the succession of the property of a Hindu and the people who are disqualified by the act.

OBJECTIVE AND SCOPE OF STUDY
This paper aims to seek an answer to the disqualifications under the Hindu Succession Act and how they stand today. The disqualifications are widely discussed with the help of relevant statutory provisions and leading case laws.

METHODOLOGY
This research paper is a combination of two types of research methods namely doctrinal and theoretical approaches. This research is mainly focused on the law enforcement of the Hindu Succession Act, 1956 and the amendment Act of 2005, laws related to Murderer in context of disqualification, Consequence of disqualification and under which circumstances person shall not be disqualified from succeeding to any property. Therefore, this research paper would constitute a critical analysis of the law related to disqualifications under the Hindu Succession Act as it is today as well as the various judgments of the court.

CHAPTERIZATION
This research paper consists of five chapters. The first chapter is the introduction to the scheme of the paper; the second chapter will discuss the first disqualification i.e remarriage which was governed by Section 24 of the Hindu Succession Act, 1956. Section 24 is now omitted. Further, chapter three deals with the disqualification of a person who murders which is governed by Section 25 of the Hindu Succession Act. The fourth chapter deals with the disqualification of a convert under Section 26 of the Hindu Succession Act. This chapter also portrays light on defects or deformities of a person which do not disqualify him under the act. Chapter six finally concludes the research paper.

CHAPTER I – INTRODUCTION
This article sheds light on the researcher's assessment of the 1956 Hindu Succession Act disqualifications. In personality, family law is subjective and split into different branches, one of which is the Hindu Succession Act. A legal heir cannot be disqualified from his rights according to the general principle. Although this law has some exceptions. Under Hindu law, the inheritance rights of a person were not absolute.

Family law is a legal area that deals with family-related problems and domestic relationships, including but not restricted to: the nature of marriage, civil unions, and domestic partnership issues that arise during the marriage, termination of the relationship, and ancillary problems. Family law is a very broad term and its scope is subjective in nature. There are different branches of family law. The most important part under family law is the Hindu Succession Act 1956. In this paper, we concentrated primarily on disqualification under the Hindu Succession Act and what ancient Hindu regulations and modern Hindu regulations say about disqualification. There are certain laws linked to disqualification law, such as certain remarrying widows may not inherit as widows, disqualified murderer,
disqualified deceased converts, disqualified heir succession. There is one exception to exclusion in which individuals will not be disqualified - disease, deformity, and so on - not to exclude. Regardless of the proximity of relationship, a person could, in any case, be disqualified from acquiring property by virtue of his specific physical or mental ailment, or an unmistakable lead. This exclusion from inheritance was not simply on religious grounds, and inadequacy to perform religious ceremonies, yet relied on social and good grounds and substantial imperfections too. In this article, I have talked about the extension, applicability of all the sections identified with disqualification to succession. I went through various case laws, legislative acts that helped me throughout. After the completion of my research work, I have given some suggestions for disqualification to succession that can be seen at the end of this paper. By this, I have concluded my research work. In this research work, I have tried to fulfill all the loopholes of disqualification to succession.

CHAPTER II – REMARRIAGE
(SECTION 24)

According to the law, remarriage disables a widow from succeeding to the property of a male Hindu when on the date succession opens; she has ceased to be the widow by reason of remarriage. The section applies only to intestate succession and applies only to Class I and Class II heirs. Prior to the Amendment of 2005, Section 24 given to exclusion of a certain class of female beneficiaries on the ground of remarriage. Before its exclusion Section 24 keeps running as under:

“Any heir who is related to an intestate as a widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as to such widow, if, on the date the succession opens, she has remarried.”

Before Amendment of 2005, under old section 24 remarriage became disqualification for -
(i) Intestate’s predeceased son’s widow; or
(ii) The widow of a predeceased son of a predeceased son; or
(iii) The widow of a brother of the intestate.

Before its exclusion Section 24 keeps running as under:

“Any heir who is related to an intestate as a widow of a predeceased son, the widow of a predeceased son of a predeceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as to such widow, if, on the date the succession opens, she has remarried.”

407 Section 24, Hindu Succession Act, 1956
408 Smt. Kasturi Devi v. Director of Consolidation 1977 SCR (2) 25
Any consequent remarriage after the progression has opened won't deny a widow of the offer which she has just acquired as a beneficiary. The area doesn't have any significant bearing to the widow of the intestate or father's widow. It was held by the Patna High Court that a Hindu widow prevailing to the properties left by her husband as a widow after the passing of the Hindu Succession Act would not be divested of the said properties on her remarriage thereon.

In the case of Cherotte Sugathan v. Cherotte Bharathi & Ors, Supreme Court has ruled that a widow, even after her remarriage, is legally entitled to get a share of her first husband’s inherited property. This reiteration of the legal provision came from a Bench comprising Justices S B Sinha and V S Sirpurkar while it dismissed a petition by one C Sugathan’s heirs, who had challenged a Kerala High Court judgment allowing inheritance rights to their paternal uncle’s widow even after her remarriage. The property in question belonged to one Pervakutty, who willed it in favor of his sons – Sugathan, Surendran and Sukumaran. Sukumaran, who died in 1976, was married to Bharathi. Bharathi married one Sudhakaran, who also died in 1979. But, when the question of sharing the property inherited from Pervakutty arose between his heirs, none were ready to give any share to Bharathi on the ground that she had remarried after Sukumaran’s death. The HC held that in the facts of the case, coupled with the provisions of the Hindu Succession Act, Bharathi was entitled to her share in the property. The apex court, rejecting the appeal against the HC judgment, said, “The succession law brought about a sea change in Shastric Hindu Law. Hindu widows were brought on equal footing in matters of inheritance and succession along with the male heirs.” on the grounds that in perspective on Section 24, of Hindu Succession Act supersedes arrangements of the Hindu Widow Remarriage Act, 1856.

The disqualification expressed in Section 24 is limited to the instance of three female beneficiaries. Any beneficiary who is related to the intestate as the widow of the predeceased child, the widow of a predeceased child of a predeceased child, or the widow of the sibling will not be qualified for acquire to the property of the intestate in that capacity widow, if on the date the progression opens, she has remarried.”

The father's widow, i.e., the progression mother has not been referenced in this section however she involves a spot as a beneficiary in Entry VI of class II beneficiaries. The mother has been referenced in class I of the Schedule and she acquires by prudence of that not as the father's widow. Aside from the arrangements of the Hindu Widow's Remarriage Act a mother may acquire from her child after her remarriage on the grounds that the blood relationship doesn't stop with her remarriage. After the passing of the Hindu Succession Amendment Act No. 39 of 2005, presently the referenced classes of widows can acquire regardless of whether they have remarried.

Where the remarriage by the widow after the demise of her significant other and suit property held as ancestral property, she would not be qualified for any offer in familial property due to her remarriage.

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409 Cherotte Sugathan v. Cherotte Bharathi & Ors
CHAPTER III - MURDERER (SECTION 25)

Section 25 of the Act has the impact of lying down that an individual who commits murder or abets the commission of murder is excluded from acquiring the property of the individual killed or some other property he may become qualified for prevail by reason of furtherance of succession because of the murder. It isn't necessary for the appliance of this section that the individual Disqualified ought to have been sentenced for murder or abetment of murder. The disqualification will apply on the off chance that it is built up in any following proceeding that the individual to be disqualified had committed or abetted the murder.

The section as per the Hindu Succession Act, 1956 reads as follows “A person who commits murder or abets the commission of murder shall be disqualified from inheriting the property of the person murdered, or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.”

The murder is treated as non-existent and in this manner doesn't shape the stock for a crisp line of descent. The disqualification on the ground of murder extends to every kind of property to which the individual would have been qualified to acquire, had the person not submitted the murder of the intestate. At the end of the day, the murderer is likewise avoided from acquiring the property of some other person, to which the person in question would have succeeded if the person (intestate) murdered had passed on the normal death.

The heir of the murderer is additionally disqualified from acquiring the property of the person killed. For the property doesn't vest in the killer and thus doesn't devolve on their beneficiaries. The abetter of murder is additionally excluded. Where an individual who had participated in a murderous assault on his father alongside others, who were indicted for murder, all things considered, was given an advantage of uncertainty and was sentenced under Section 324 I.P.C. rather than Section 302 IPC, and still, at the end of the day the disqualifications referenced in Sections 25 and 27 will become possibly the most important factor and act against that individual acquiring or determining any beneficial interest in the property possessed or held by his dad.

In Vallikanna v. R. Singaperumal 411, it has been held that a person who has killed his father or a person, from whom he needs to acquire, stands completely disqualified. Section 27 of the Hindu Succession Act makes it further certain that if any person is disqualified from acquiring any property under this Act, it will be considered as though such person had died before the intestate.

That shows that a person who has murdered a person through whom he needs to acquire the property stands disqualified on that record. That implies he will be regarded to have pre-deceased him. The impact of Section 25 read with Section 27 of the Hindu Succession Act, 1956, is that a murderer is completely disqualified from prevailing to the estate of the deceased. That means that a person who is blameworthy of committing the murder

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410 Section 25, Hindu Succession Act, 1956

411 Vallikanna v. R. Singaperumal AIR 2005 SC 2587
can't be treated to have any relationship at all with the deceased's estate.

In *Chamanlal v. Lai Mohanlal*, it has been held that where a widow was prosecuted for the murder of her better half however at the end was cleared from that charge; she was not disqualified from acquiring the property of her husband.

**CHAPTER IV – CONVERSION (SECTION 26)**

Section 26 of the abovementioned act deals with disqualification upon conversion to another religion. It is laid down under this section, where a Hindu ceased to be a Hindu by converting to any religion whether before or after the commencement of this Act, the children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives unless children or descendants are Hindus when the succession opens.

Section 26 disqualifies the believer's relatives and the kids destined to such relatives to acquire the property of any of their Hindu relatives. Be that as it may, the youngsters or relatives of such kids brought into the world after his change are not influenced by the standard on the off chance that they are Hindus when the progression opens. Section 26 keeps running as under: “Where before or after the commencement of this Act a Hindu has ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives unless such children or descendants are Hindu at the time when the succession opens.”

It is intriguing to take note of that the converts have not been precluded to acquire; just his relatives or offspring of relatives have been excluded to acquire, in the event that they don't stay Hindu when the progression opens. The section is a review in activity and applies to those people likewise who had progressed toward becoming converts before the initiation of this Act.

Accordingly where 'W' has got three children specifically 'X' 'Y' and 'Z' and 'Z' changes over to Christianity during the existence time of W. On the demise of W, 'Z' will be qualified for an offer alongside 'X' and 'Y'. He would not be excluded to acquire according to Section 26 of the Act and would get 1/3 offer in the property of W.

In the above illustration if Z dies after conversion during the lifetime of 'W' leaving behind him his two sons 'M' and 'N', who are born to him after conversion, 'M' and 'N' would be excluded from inheritance.

Under the old Hindu law physical incapacity or need for organ, deafness, dumbness, and incurable visual impairment, incurable disease, etc., mental incapacity like lunacy, idiocy, etc. were the grounds of exclusion from inheritance. The Hindu Inheritance (Removal of Disabilities) Act, 1928 removed all the disqualifications except lunacy or idiocy.

Section 28 of the Act has declared that defect, disease, deformity, etc. shall not be the grounds of exclusion from inheritance. The only disqualifications under the Act area unit those that are mentioned in

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412 Section 26, Hindu Succession Act, 1956
Sections 24 to Section 26. Section 26 runs as follows-

“No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity or save as provided in this Act, on any other ground whatsoever.”

CHAPTER V – CONCLUSION

Despite the fact that the Hindu Succession Act, 1956, and its amendments have gone far in simplifying the standards managing succession among the Hindus, there are different discrepancies still to be settled. The principle of equality is likened with "equal treatment" in a basically inconsistent society. Law of disqualification under HSA is managed by S. 24 to 28 and as for these sections, a person can be excluded distinctly if there should be an occurrence of remarriage by few widows explicitly referenced in the area, when a person submits murder for the encouragement of property and when an individual is a descendant of a convert. Under just these three conditions an individual can be excluded to acquire and not all disqualifications regular under old Hindu Law are canceled. As indicated by my view the accompanying ought to be incorporated into the disqualification of succession there is no uncertainty that these sections ordered by the governing bodies are very much established and it has worked superbly in giving a couple of explicit grounds of exclusions. Be that as it may, in regard to above exchange it is presented that not many different grounds of disqualifications ought to be included expansion to those as of now referenced and they are as per the following-

Firstly, a person tormenting someone else ought to likewise be precluded to acquire the property of that someone else. Besides, Attempt of murder should also be a ground to disqualification to succession even that attempt was unsuccessful under S.25. Secondly, the Stepmother of the expired individual should also be precluded on remarriage under S.24 of the Hindu Succession Act, 1956. Thirdly, a person committing assault of the woman from whom he will acquire should also be excluded.

Notwithstanding, it can’t be contended that The Hindu Succession Act rolled out a progressive improvement in the law identity with succession. Hence the author submits that the present law of disqualification under Hindu Succession Act is appropriate for Hindu law and as such there is no need for any kind of change or alteration in these laws except that some other grounds of disqualifications as mentioned in the paper shall be added in Hindu Succession Act.

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‘proliferation’ Non-weapon states felt only a comprehensive disarmament treaty can prevent further proliferation: It majorly focused on vertical and horizontal proliferation.

Consensus (by 1965) at ENDC that a non-proliferation treaty should have following provisions:
(a) Not to transfer nuclear weapons or technology (non-dissemination)
(b) Non-use against those not possess them and safeguard against threat
(c) Disarmament should include a test ban treaty, freeze on production of nuclear weapons and delivery means, reduction in existing stocks

Eight nation memorandum leading to Resolution 2028 at UNGA with principles for the Treaty:
(a) should be void of loopholes,
(b) balance of mutual obligations and responsibilities,
(c) means to disarmament

Disagreements on accessing nuclear energy resources (safeguards as hindrance); Peaceful Nuclear Explosion (PNE) and Security Guarantees - Alternate proposals (Fanfani) for a phased non-proliferation treaty in addition to it different drafts by US and Soviets with common goal of ensuring “no additional fingers on the trigger” or mitigating new weapon states. Demanded that commitment of non-weapon states not to produce weapons be simultaneous with renunciation by nuclear powers of their arsenals and further production NAM members wanted the treaty to fulfill Resolution 2028 obligations Eventual NPT
text was a joint US-Soviet (reconciled) draft particularly the text did not contain provisions for reductions of P-5’s nuclear stockpiles and allowed expansion of arsenals (1 January 1967 cut-off) Uninhibited access to nuclear energy for all but subject to safeguards – voluntary for nuclear powers and full-scope for others Disarmament was kept a common goal, not obligation of P-5 UNGA adopted treaty through Resolution 2373 (XXII) on 12 June 1968 by 95 votes in favour, 4 against and the remaining 21 abstaining UNSCR 255 passed a day later that enshrined security guarantees for non-weapon NPT member states – implying any of the UNSC members could intervene if non-weapon states faces nuclear threat Entry into Force in 1970; period of 25 year with Review every five years; Indefinitely extended in 1995 as Article VI goal remained unfulfilled.

The main areas of the Treaty text were:
Article I – NWS should not transfer or assist nuclear weapon acquisition;
Article II – NNWS should not seek or attempt to make nuclear weapons;
Article III – safeguards and restrictions on fissile materials and technology;
Article IV & V – inalienable right to access peaceful nuclear energy resources;
Article VI – negotiations for a treaty on general and complete disarmament;
Article VI – for negotiations in good faith for a treaty on general and complete disarmament kept as a common obligation for all states
Article X – Exit clause. North Korea became only member-state in 2006 to exercise this option. Speculation on whether Iran will be next.

Touted as balance of three pillars – non-proliferation, disarmament and peaceful uses of nuclear energy. Treaty does not solemnize an end objective – of a world without nuclear weapons, or define non-proliferation – as either means or end! The text: “...calling for the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons,... achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament... to achieve the discontinuance of all test explosions of nuclear weapons for all time as well as to facilitate the cessation of manufacture of nuclear weapons, liquidation of all existing stockpiles and elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control...”Cessation and elimination listed as PURSUANT to a disarmament treaty (following or in accordance with?) The preamble does not solemnize a single-point objective – of a world without nuclear weapons, total elimination or for delegitimizing nuclear weapons. Instead, it conceives the formulation of an agreement on the prevention of wider dissemination of nuclear weapons it only conceives of effective measures towards nuclear disarmament’, with the calibrated steps leading to a Treaty on general and complete disarmament when read together, NPT demands a set of actions that will naturally culminate in a disarmament treaty. In practice, NPT provides for a conglomerate of measures to stop the spread of weapons and create ideal conditions for disarmament Absence of an enshrined objective of elimination and a time-frame to achieve this goal leaves NPT open-ended. Only 1995 NPT extension document list “ultimate goals of complete elimination and a disarmament treaty”.

NPT text does not conceptualize non-proliferation – either as means or the end
Two conflicting approaches have been expounded:

(a) Non-proliferation was to establish a global framework to inhibit the spread of nuclear weapons alongside a series of calibrated measures, pursued in a parallel and phased manner, together leading to disarmament;

(b) Non-proliferation could facilitate the progress towards a tipping point – a post-proliferation world from where proliferation no longer happens and sets conditions for disarmament measures to be initiated.

INDIA’S CIVIL LIABILITY FOR NUCLEAR DAMAGE ACT & RULES

Introduction:
In 2010, the Civil Liability for Nuclear Damage Act, 2010 (CLND Act) was enacted – came into effect on 11 November, 2011. The Civil Liability for Nuclear Damage Rules, 2011 (CLND Rules) were notified in 2011. India signed the 1997 Convention on Supplementary Compensation for Nuclear Damage (CSC) in 2010 and has ratified it in 2016, declaring the compliance of its national law with the CSC.

Preamble:
An Act to provide for civil liability for nuclear damage and prompt compensation to the victims of a nuclear incident through a no-fault liability regime channelling liability to the operator, appointment of Claims Commissioner, establishment of Nuclear Damage Claims Commission and for matters connected therewith or incidental thereto.

Applicability (Section 1):
- It applies to nuclear damage suffered:
  - In or maritime beyond territorial waters of India.
  - On board or by a ship
  - On board or by an aircraft
  - On or by an artificial island, installation or structure
- It applies only to the nuclear installation owned or controlled by the Central Government either by itself or through any authority or corporation established by it or a Government company.

Atomic Energy Regulatory Body to notify a nuclear incident (Section 3):
The AERB shall within a period of 15 days from the date of occurrence of nuclear incident, shall issue a notification as well as cause widespread publicity. Provided that AERB is satisfied that the gravity of threat and risk involved in a nuclear incident is insignificant, it shall not required to notify such an incident.

Liability of Operator (Section 4):
Operator is liable for nuclear damage arising from a nuclear incident. The liability of the operator of the nuclear installation shall be strict and shall be based on the principle of no-fault liability. Where there are more than one operator liable then the liability of such operators shall be joint and several. Where several nuclear installations of one and the same operator are involved in a nuclear incident, such operator shall, in respect of each such nuclear installation, be liable to the extent of liability specified.

Limitation of Liability (Section 6):
The maximum amount of liability in respect of each nuclear incident has been specified as the rupee equivalent of 300 million

http://www.barc.gov.in/about/10.pdf
Special Drawing Rights (“SDR”) or such higher amount as may be notified by the Central Government.
Liability of the operator for each nuclear incident has been capped at:
- **INR 1,500 crores** - nuclear reactors having thermal power equal to or above 10MW.
- **INR 300 crores** - spent fuel reprocessing facilities
- **INR 100 crores** - research reactors having thermal power below 10 MW, fuel cycle facilities other than spent fuel reprocessing plants and transportation of nuclear materials.

**Insurance & Financial Security (Section 8):**

- **INSURANCE REQUIREMENTS UNDER THE CLND ACT:**
The operator, before commencing operation of its nuclear installation is required to obtain insurance policy or other financial security, or combination of both, to cover its capped liability. The operator is required to renew such policy or financial security from time to time, before the expiry of its validity period.

- **INDIAN NUCLEAR INSURANCE POOL (“INIP”):**
  Launched on 12 June, 2015 with corpus of INR 1,500 crore (approximately USD 211.65 million) by General Insurance Corporation of India (“GIC-Re”) along with several other Indian insurance companies. The INIP was formed as a risk transfer mechanism to cover / transfer the risks of operators’ and suppliers’ liability with the CLND Act (Section 6 (2) and Section 17, respectively) to INIP. It was instituted to addresses liability concerns of the suppliers and paves the way for Indian as well as foreign supplier’s to participate in the Indian nuclear power projects.

**Liability of the Central Government (Section 7):**
Central Government is liable for nuclear damage in certain situations, like certain force majeure events and where liability exceeds the amount of liability of an operator specified, to the extent such liability exceeds such liability of the operator. The Government shall establish a nuclear liability fund for the purpose of meeting part of its liability.

**Claims Mechanism:**
- Claims Commissioner (Chapter III)
- Nuclear Damage Claims Commission (Chapter V)

1. **Claims Commissioner**
The CG shall appoint one or more Claims Commissioners for the purpose adjudicating claims. Qualifications - is, or has been, a District Judge; or in the service of the Central Government and has held the post not below the rank of Additional Secretary to the Government of India or any other equivalent post in the Central Government. The CC shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908. The CC shall dispose of the application within a period of three months from the date of such receipt and make an award accordingly.

**Extinction of right to claim**
The right to claim compensation for nuclear damage shall extinguish, if such claim is not made within a period of –
- 10 years, in the case of damage to property;
- 20 years, in the case of personal injury to any person, from the date of occurrence of the incident.

**Nuclear Damage Claims Commission:**
Where the Central Government, having regard to the injury or damage caused by a nuclear incident, is of the opinion that it is
expedient in public interest that such claims for such damage be adjudicated by the Commission instead of a Claims Commissioner.

- There shall be not more than 7 members including in the Chairperson in the Nuclear Damage Claims Commission.
- They shall be appointed for a period of 3 years.

**RIGHT OF RECOURSE AGAINST THE SUPPLIER:**

Section 17 of the CLND Act provides for operators right of recourse against the supplier, after paying the compensation for nuclear damage in accordance with Section 6 of the CLND Act. The operator has a right of recourse against the supplier in the following instances: if this right is expressly provided in the contract (Section 17(a)); If nuclear incident has resulted as a consequence of an act of supplier or his employee, which includes supply of equipment or material with patent or latent defects or sub-standard services (Section 17(b)); The nuclear incident has resulted from the act of commission or omission of an individual done with the intent to cause nuclear damage (Section 17(c)). The concern is that Section 17(b) provides for an additional right of recourse. In order to clear this ambiguity, (along with ambiguities related to various provisions of the CLND Act), the Ministry of External Affairs under the Indian Government had issued and published the ‘Frequently Asked Questions and Answers on Civil Liability for Nuclear Damage Act 2010 and related issues’ (‘FAQs’). Relevantly, the FAQs state that:

- The situations identified in Section 17(b) relate to actions and matters such as product liability stipulations / conditions or service contracts. These are ordinarily part of a contract between the operator and the supplier.

- According to the FAQs, operators right of recourse is to be read along with the contract between the operator and the supplier referred to in Section 17(a).

- Rule 24 of the CLND Rules states that the contract referred to in Section 17(a) “shall” include a provision for right of recourse:

  - For an amount not less than the (a) operator’s liability under the CLND Act (Rs. 1500 crores), or (b) contract value, whichever is less; and for a period of (a) initial license period under the Atomic Energy (Radiation Protection) Rules, 2004, currently 5 years, or (b) the product liability period, whichever is longer. Further, Product Liability Period is defined in Explanation 1 to Rule 24 as: "product liability period" means the period for which the supplier has undertaken liability for patent or latent defects or sub-standard services under a contract.

**WHO IS A “SUPPLIER”????**

The CLND Act does not define a “Supplier”. However, the CLND Rules, in clause (b) in Explanation 1 to Rule 24, defines supplier to include a person who:

(i) Manufactures and supplies, either directly or through an agent, a system, equipment or component or builds a structure on the basis of functional specification; or

(ii) Provides built to print or detailed design specifications to a vendor for manufacturing a system, equipment or component or building a structure and is responsible to the operator for design and quality assurance; or

(iii) Provides quality assurance or design services.

**CLAIMS UNDER OTHER LAWS – SECTION 46:**
Section 46 of the CLND Act preserves applicability of other laws and states that: “The provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt the operator from any proceeding which might, apart from this Act, be instituted against such operator”.

Concerns have been expressed by suppliers, both domestic and foreign, that the first part of Section 46 may support third party claims directly against the supplier under other laws.

Overall scheme of CLND Act is to channel the liability to the operator and thus Section 46 should apply to operator – supported by:

- Long Title – channeling liability to the operator
- Statement of Objects and Reasons – law that deals with nuclear liability for nuclear damage in the event of a nuclear incident, to be compliant with the CSC and to join an international liability regime.
- The instrument of ratification of the CSC submitted by India declared that “its national law complies with the provisions of the Annex to the Convention”.

The FAQs published by the Government of India clarify the position of law in favor of the suppliers: “...applies exclusively to the operator and does not extend to the supplier is confirmed by the Parliamentary debates at the time of the adoption of this Act. It may be noted that the CLND Bill was adopted by a vote. During the course of the vote on various clauses of the Bill, in the Rajya Sabha two amendments were moved for clause 46 that finally became Section 46 of the CLND Act that inter alia sought to include suppliers in this provision. Both those amendments were negatived. A provision that was expressly excluded from the statute cannot be read into the statute by interpretation…”

Constitutionality of the CNLD Act:
Constitutionality of the CLND Act and the CLND Rules has been challenged in the courts in India.

The Kerala High Court in the case of Yash Thomas Mannully and Ors. Vs. Union of India and Ors has upheld the constitutionality of certain provisions of the CLND Act (which has been challenged). A separate writ petition was filed before the Supreme Court of India (Common Cause & Ors. vs. Union of India & Ors) which challenged the constitutionality of the CLND Act and is sub-judice.

Another petition inter alia challenging Rule 24 of the CLND Rules as being ultra vires the CLND Act was filed before the Supreme Court in the case of Centre for Public Interest Litigation & Ors. Vs. Union of India.

Environmental Law and Nuclear Projects:
Key Legislation in India:
- 2010 - The National Green Tribunal Act was enacted to pave the way for enactment of new Tribunal namely: National Green Tribunal to expeditiously address the civil matters pertaining to Environment
- 1986 - The Environment (Protection) Act authorizes the central government to

418 WP(C),No. 27960 of 2011
419 (2018) 5 SCC 1
420 W.P.(C) 5235/2018, CM No. 34109/2018
421 http://cpcbenvis.nic.in/pdf/NATIONAL%20GREEN%20TRIBUNAL%20ACT,%202010.pdf
protect and improve environmental quality, control and reduce pollution from all sources, and prohibit or restrict the setting and/or operation of any industrial facility on environmental grounds.

-1981 - The Air (Prevention and Control of Pollution) Act\(^\text{423}\) provides for the control and abatement of air pollution. It entrusts the power of enforcing this act to the CPCB.

-1974 - The Water (Prevention and Control of Pollution) Act\(^\text{424}\) establishes an institutional structure for preventing and abating water pollution. It establishes standards for water quality and effluent. Polluting industries must seek permission to discharge waste into effluent bodies. The CPCB (Central Pollution Control Board) was constituted under this act.

Statutory Consents under Indian Environmental Laws:
1. Costal Regulation Zone Approval
2. Prior Environmental Clearance under 2006 Notification
3. Consent to Operate

Introduction to Environmental Clearance-2006:
2006 Notification imposed certain restrictions and prohibitions on new projects and activities based on their potential Environmental impacts. Categorized all projects into Category ‘A’ and ‘B’ based on potential impacts on human health and natural & man-made resources. Mandated that all scheduled projects or activities shall require prior-EC from regulatory authority before any construction work or even preparation of land is started.

Why EIA is required?
Environment Impact Assessment\(^\text{425}\) (EIA) is a formal process used to predict the environmental consequences of any development project. Environment Impact Assessment in India is statutory backed by the Environment Protection Act in 1986, which contains various provisions on EIA methodology and process.

EIA looks into various problems, conflicts and natural resource constraints which may not only affect the viability of a project but also predict if a project might harm to the people, their land, livelihoods and environment. Once these potential harmful impacts are predicted, the EIA process identifies the measures to minimize those impacts. Thus, the objective of the EIA is to identify the environmental, social and economic impacts of a project prior to taking a decision on its implementation.

2. Mitigation of harmful impacts and maximizes the beneficial effects.

Once the assessment is complete, the EIA findings are communicated to all stakeholders viz. developers, investors, regulators, planners, politicians, affected communities etc. On the basis of the conclusion of EIA process, the government can decide if a project should be given environment clearance or not. The developers and investors can also shape the project in such a way that its harms can be mitigated and benefits can be maximized.

Types of project which require prior EC:

a. Nuclear Power Projects/Thermal Power Plants
b. Coal washeries
c. Building/Construction projects/Area Development projects and Townships


\(^{425}\)https://www.cseindia.org/understanding-eia-383
d. Airports  
e. Highways  
f. Petroleum refining industry  
g. Chemical Fertilizers  
h. Cement Plants,  

**Categorization of projects and activities under the 2006 notification**  
Projects requiring prior EC are broadly categorized into two categories:
- Category ‘A’  
- Category ‘B’  

Based upon the spatial extent of potential impacts and potential impacts on human health and natural and manmade resources.

**Link Regulatory Authority of Category ‘A’ Projects**  
The Environment Clearance for Category – ‘A’ projects is granted at Central level by MoEFCC, after relying on the appraisal by the Expert Appraisal Committee (EAC) Regulatory Authority of Category ‘B’ Projects  
The EC for Category ‘B’ is granted at State level by State Level Environment Impact Assessment Authority (SEIAA) on the recommendation of SEAC. For B2 projects pertaining to mining of minor minerals of lease area less than 5 hectare, granted by DEIAA on recommendations of DEAC.

**Process to Obtain EC:**  
**SCREENING**  
This step is restricted only to Category ‘B’ projects. To examine whether the proposed project or activity requires further environmental studies for the preparation of an EIA for its appraisal prior to the grant of an EC depending upon the nature and location specificity of the project. Those projects requiring an EIA are further categorized as Category ‘B-1’ projects and remaining projects which do not require EIA are categorized as Category ‘B-2’ projects. The categorization is in accordance with the guidelines issued in this regard by the MoEFCC from time to time.

**SCOPING**  
At this stage detailed and comprehensive TOR is determined for preparation of the EIA report, which addresses all relevant environmental concerns. Information furnished by the applicant in Form 1/Form 1A along with the proposed ToR form the basis for the preparation of the ToR. The ToR must be conveyed to the applicant within 60 days of the receipt of Form 1, failing which, the ToR proposed by the applicant shall be deemed as approved.

**PUBLIC CONSULTATION**  
This stage involves the process by which the concerns of local affected persons are ascertained with a view of taking into account all the material concerns in the project or activity design as appropriate. This stage comprises two components:
(i) A public hearing at the site or in its close proximity – district-wise; and
(ii) Procurement of written responses from concerned persons having a plausible stake in the environmental aspects surrounding the project.  
The detailed procedure is stipulated in Appendix IV.

**APPRAISAL**  
This stage involves detailed scrutiny by the EAC or the SEAC of all the documents submitted by the applicant for the grant of EC. In appraisal process applicant shall be invited for furnishing clarification in person or through an authorized representative (Accredited Environment Consultant Organization). Appendix V stipulates that the detailed process and documents to be submitted to the regulatory authority.

**Grant or Refusal of the Prior-EC**
The Regulatory Authority shall consider the recommendations of the EAC or SEAC or DEAC as the case maybe before granting or refusing the proposal. The decision is to be accorded within 45 days of the receipt of the recommendations. The Regulatory Authority shall ordinary accept the recommendations, however, RA may disagree and send the proposal back for reconsideration to recommending, with grounds for such disagreement and with a copy to the applicant. If no decision is taken/communicated by the Regulatory Authority within 45 days, the recommendations would be considered as final.

For Category – ‘A’ projects the Regulatory Authority is MoEFCC.
For Category – ‘B’ projects the Regulatory Authority is SEIAA.
For Category – ‘B2’ projects the Regulatory Authority is DEIAA.

Validity of EC
Validity means the period from which EC is granted to the start of production operations by the project or completion of all construction operations in case of construction projects. Validity of Prior-EC may be maximum of 10 years in cases of river valley projects, 30 years for mining projects, and 7 years for all rest projects and activities. Period of validity may be extended by the concerned regulatory authority by a maximum period of 7 years.

For extension of validity, an application has to be filed within the validity period along with updated Form-1. The concerned regulatory authority may also consult EAC or SEAC or DEAC, as the case maybe, for grant of extension.

Post EC-Monitoring
For Category ‘A’ projects, PP has to advertise the EC granted (along with Environmental Conditions and safeguards) in 2 local newspapers where the project is located. These shall also be displayed in the PP’s website permanently.

For Category ‘B’ projects, the PP shall advertise in the newspapers that the Project has been accorded EC and the details of the MoEFCC website where it is displayed. Copies of the EC would be displayed by Local Bodies and panchayats for 30 days.

PP shall submit half yearly (June & December) compliance reports of the conditions stipulated in the EC to the regulatory authority concerned. The Compliance reports submitted by PP are public documents.

Transferability
Prior-EC may be transferred from the name of Project Proponent to the name of other legal person, entitled to undertake the project it may be applied by transferee or transferor along with a written NOC from transferor. It can only be transferred within the validity period. No change in validity and terms & conditions under which prior-EC was originally granted

Establishment of NGT:
Constituted vide - The National Green Tribunal Act, 2010. Constituted to expeditiously address the civil matters pertaining to Environmental concerns. NGT consist of a Chairperson and Judicial & Expert members (not less than 10 and maximum 20). Chairperson is appointed by the Central Government in consultation with the Chief Justice of India the Judicial and Expert members are appointed on the recommendation of selection committee. The Tribunal shall not be bound by the procedure as laid down in the Civil Procedural Code but shall be guided by the Principles of Natural Justice. Tribunal has power to regulate its own procedure.
Tribunal is not bound by the rules of Evidence as contained in the Indian Evidence Act. Tribunal shall have for the purposes of discharging its functions under the act the same powers as are vested in Civil Courts.

**Objects and reasons of NGT Bill:**
There were large number of Environmental cases pending in higher courts and there were involvement of multi-disciplinary issues in such cases. The right to healthy environment has been construed as part of Right to life under article 21 of the Constitution by the Courts Taking this into account Hon’ble Supreme Court requested the Law commission of India to consider the need for constitution of Specialized Environmental Court. The law commission thereafter recommended the setup of Environmental Courts having both original and appellant jurisdiction relating to environmental laws. Accordingly, it was decided to enact a law to establish NGT for effective and expeditious disposal of civil cases relating to environmental protection and conservation of forest and other natural resources including enforcement of any legal right relating to environment.

**Original Jurisdiction of NGT:**
The Tribunal has Jurisdiction over all civil matters where substantial question relating to Environment is involved, including enforcement of any legal right relating to environment. Issues relating to Implementation of the statutory enactments as mentioned in the Schedule – I of the NGT Act. Applications are to be filed within 6 months from the cause of action. The Tribunal can award relief and compensation to the victims of pollution and other Environmental damages. The tribunal may also impose penalty towards restitution of property and environment. The application for relief and compensation is to be made within 5 years from the occurrence of the incident. The tribunal is empowered under the act to condone the delay of upto 2 months, in filing of the above two applications. The tribunal may refer to Schedule II, to divide the compensation/relief into separate heads.

**Appellate Jurisdiction of NGT:**
The Tribunal has Appellate Jurisdiction to under certain enactments specified in section 16 of the Act including orders of EC granted or refused. The Tribunal is vested with the limited powers of judicial review to examine the constitutional validity/vires of the subordinate or delegated legislation. (**SPEB Vs Union of India**) Period of limitation is prescribed as 30 days from the date of communication of such orders to the applicant. The tribunal is empowered under the act to condone the delay of up to 2 months, in filing of the appeals.

**Environmental Principal followed by NGT:**
The NGT Act makes it a requirement for the NGT to apply the Principle of Sustainable Development, the Precautionary Principle and the Polluter Pays Principle. The Principle of Sustainable Development promotes inter-generational equity, i.e. better quality of life for present and future generations. The principle of sustainable development envelopes within it the following two principles:
- **Polluter Pays Principle**
The 'polluters pays' principle is the commonly accepted practice that those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment. The Hon’ble Supreme Court of India in the judgment of **Indian Council for Enviro-Legal Action**
vs. Union of India\textsuperscript{426} had incorporated the Polluter Pays Principle as being a part of the Environmental Law regime.

\textbf{Precautionary Principle}

Whereas traditional regulatory practices are reactive, precautionary measures are preventative and pre-emptive. In its simplest form, the precautionary principle (also known as PP) provides that if there is a risk of severe damage to humans and/or the environment, absence of incontrovertible, conclusive, or definite scientific proof is not a reason for inaction. It is a better-safe-than-sorry approach, in contrast with the traditional reactive wait-and-see approach to environmental protection.

\textbf{Bar of Jurisdiction on civil courts due to establishment of NGT:}

The NGT is empowered to adjudicate the civil matters of Environmental matters, hence the Jurisdiction of Civil Courts to entertain the Matters pertaining to environment has been curtailed by the enactment of NGT Act. The Bar of Jurisdiction includes the Appellate Jurisdiction as well as the Original Jurisdiction of the NGT. Further, no other civil Court can entertain and adjudicate upon the claims of relief or compensation or restitution of property or environment damaged except for NGT.

\textbf{Important Decisions of NGT:}

\begin{itemize}
  \item \textbf{G. Sundarrajan Vs. Union of India - 2016}
  \begin{itemize}
    \item This matter pertains to the EC granted to the Kudankulam Nuclear Power Plant Units 3 – 6
    \item Contentions for the challenges
      \begin{itemize}
        \item EIA Consultant i.e. M/s Engineers India is not accredited consultant
        \item The EAC while recommending the KNPP noted that the requirement of fresh water would be met by the desalination plant already installed at the project site (desalination plant installed with Unit 1&2), however, NPCIL stated that separate desalination plant would be installed for the KNPP unit 3-6.
      \end{itemize}
  \end{itemize}
  \item 3. The procedure of comprehensive EIA study in consultation with the state government as required under the CRZ notification was not followed properly.
  \begin{itemize}
    \item The defence pleaded that since the issues writ Unit 3-6 were also considered by the Hon’ble Supreme while upholding the EC granted to the Plants unit 1&2 NGT cannot reopen the decision rendered by the Supreme Court.
  \end{itemize}
  \item NGT upheld the defence pleas.
\end{itemize}

\begin{itemize}
  \item \textbf{Satendra Pandey Vs Ministry of Environment, Forest & Climate Change - Original Application No. 186/2016 – Directing Ministry to carry out certain amendments}
  \begin{itemize}
    \item Petitioner challenged the EIA amendment Notifications dated 15.01.2016, 20.01.2016 and 01.07.2016 on the ground that the procedure for obtaining Environmental Clearance has been diluted by bringing mining of major minerals within B-2 category
    \item Exempting such category from Public Consultation, EIA and EMP which is in contravention of the judgment of the Hon'ble Supreme Court in \textit{Deepak Kumar v. State of Haryana}\textsuperscript{427} The NGT held that the procedure laid down in the impugned Notification be brought in consonance and in accord with the directions passed in the case of Deepak Kumar (supra) by providing for EIA, EMP and therefore, Public Consultation for all areas from 5 to 25 ha falling under Category B-2 at par with Category B-1 by SEAC/SIEAA as well as
  \end{itemize}
\end{itemize}

\textsuperscript{426} Writ Petitions No. 967 of 1989 with Nos. 94 of 1990, 824 of 1993 and 76 of 1994

\textsuperscript{427} (2012) 4 SCC 629.
for cluster situation wherever it is not provided.

- **Vidhi Vidyut More and Ors. vs. Ministry of Environment, Forest and Climate Change and Ors.** - Appeal No. 11/2016 (WZ) – Appeal against grant of EC

  Challenge on following grounds:

  - Allegedly EC was granted by the authorities without considering the impact of the project on the existing Tarapur Atomic Power Station.
  - That the impact of the project on the livelihood of fishermen community in that area.
  - The additional pollution load that is likely to be caused on the sea on account of this project, is not considered while allowing the project.
  - The impact of the project on marine livelihood or habitat and on the ecological and environmental impact of the project in toto.
  - While referring to the decision of **Sterlite Industries India Limited vs. Union of India**, where it was held by the Supreme Court that “the High Court has noticed some decisions of the SC on sustainable development, precautionary and polluter pays principles and public trust doctrine, but has failed to appreciate that the decision of the Central Government to grant of EC to the plants could only be tested on the principles of judicial review such as on the grounds of illegality, irrationality, Wednesbury unreasonableness or on the grounds of procedural impropriety. However, on the ground of procedural impropriety, the High Court can quash the EC only if it is satisfied that the breach was of a mandatory requirement in the procedure.” and found that the ruling of Bombay High Court upholding the Lease and NOC granted by Maharashtra Maritime Board, satisfy all the requirements as laid down by SC, hence, the grant of EC cannot be interfered by NGT.
CONSTITUTIONALITY AND EVIDENTIARY VALUE OF SCIENTIFIC CRIME DETECTION TESTS

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ABSTRACT:
Scientific crime detection tests have been carried out for a considerable period of time to detect deceptiveness and provide an aid to investigation. However, their validity is yet to be properly determined. While this paper provides a brief analysis of the three major scientific tests used: Narcoanalysis, Polygraph and brain mapping test, its focal point is to provide an insight into the constitutionality and evidentiary value of these tests in light of the guaranteed fundamental rights and existing Evidence Law and Criminal Procedure Code provisions, to understand whether the ends justify the means. The paper also seeks to analyse the judicial interpretation accorded to these tests and the guidelines issued for their conduct. While these tests have emerged as a guiding light for criminal investigations, safeguards need to be developed to prevent misuse of these tests. At the end of this paper, an attempt has been made to give recommendations for future research and improvement in the administration of these scientific crime detection tests.

Keywords: Scientific crime detection tests, polygraph, crime, consent, evidence, investigation.

INTRODUCTION
An ever developing and expanding society, which gets more and more complicated with each passing second, results in new forms and ways of committing a crime, making it increasingly difficult to procure admissible evidence in courts. As a result, the contemporary world has witnessed a surge in the use of modern and scientific crime detection tests like polygraph, narcoanalysis, brain mapping etc., to help guide criminal investigations. These tests are valid, not only for modern crimes, but also traditional ones. The need for such scientific measures was even recognised by the Supreme Court in Som Prakash v. State of Delhi. A major distinction between these scientific tests and the conventional investigative procedure is that tests demand a great sense of cooperation from the persons accused of the crime. This cooperation may be voluntary, but more often than not, is coercively obtained. Despite this widespread use of scientific tests in investigations, the law regarding them is not clearly defined, and mostly depends upon judicial interpretations. This poses a challenge in ensuring a fair, just and equitable procedure, to be followed in criminal cases, a right guaranteed to accused persons.

An important concern associated with the use of scientific tests in investigations is that, while there are safeguards ingrained against the abuse of such tests during a judicial proceeding, there are no such prescribed safeguards when it comes to the investigation itself. This concern becomes


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even more severe in cases of narcoanalysis test wherein there is no clear distinction between the investigative and the evidentiary stage, as seen in the infamous Aarushi Talwar murder case. This paper begins with a thorough analysis of the most prominently used scientific tests, and then proceeds onto discussing the relevance of such an evidence during judicial proceedings as per the Indian Evidence Act, 1872. The main focus remains on testing the validity of such tests against the principles imbibed in the Constitution of India, including right against self-incrimination and right to privacy and health.

**RESEARCH OBJECTIVE**

The objective of this research paper is to test the constitutionality and evidentiary value of scientific crime detection tests used in investigations. Additionally, it seeks to critically evaluate the procedure and accuracy of these tests and the concept of its legal deception.

**HYPOTHESIS**

This paper works on the hypothesis that the scientific crime detection tests play a significant role in investigations and high evidentiary value is accorded to these tests.

**RESEARCH METHODOLOGY**

The research encompassed in this paper primarily comprises of secondary data collected from international journals, articles, online libraries and websites. The literature reviewed and books referred give an idea of the topic and the scope of research. The secondary sources of research are cited in the reference section of this paper.

**LITERATURE REVIEW**

The literature has been reviewed from journals and articles to understand the constitutionality and evidentiary values of scientific crime detection tests in the current criminal administration system. In the paper titled ‘Constitutionality and Evidentiary Value of Narcoanalysis, Polygraph & BEAP Tests’ by Dr. Dharmendra Kumar Singh (2017), the author opines that while polygraphs and brain mapping tests are constitutional, narcoanalysis fall within a grey area of the law, since it involves the giving of testimonial evidence in a state where the subject has no control over his statements and his inhibitions are lowered. Furthermore, the author believes that the tests also have a place in the civil justice systems and encompasses a detailed analysis of the landmark judgement in Selvi v. State of Karnataka. In the paper titled, ‘Polygraph and Narco Test in Indian Evidence Law through Case Laws’, authored by Arya and Pricilla (2018), the author, while discussing the procedure of the conduct of these scientific tests in depth, analysed these tests in the light of the various provisions of the Indian Evidence Act, 1872. It also relied upon judicial analysis of these tests to form an opinion as to their reliability and validity. In ‘A Critical Analysis of the Theory, Method, and Limitations of the “Lie Detector”, the author, Benjamin Burack (1995), analysed the efficacy of these scientific tests and explained the psychological impact of such tests on the subject, and makes recommendations for proper administration of such tests.

**ANALYSIS**
THE PROMINENT SCIENTIFIC CRIME DETECTION TESTS

The prominent scientific crime detection tests are as follows:

Narco-Analysis

The Narco-analysis test entails the administration of a specific amount of chemicals to the accused’s body in a controlled and monitored environment for two to three hours, to induce the accused into a hypnotic or semi-conscious state.\(^{432}\)

In this semi-conscious state, the accused is interrogated, and his response recorded by the means of audio or visual cassettes.\(^{433}\)

The information so procured, is used to carry out further investigations against the accused. The hypothesis behind this is that the drug administered to the accused, lowers their reasoning and inhibitions, making them more susceptible to speaking the truth when questioned. As a result, this test is also referred to as the ‘truth-serum test’. Ideally, narco-analysis is performed only when the suspect is found to be medically fit for the procedure.\(^{434}\)

Brain Mapping Test

The brain mapping test, also referred to as the P-300 Test or the Brain Wave Finger Printing, was developed two decades earlier, in 1995. It involves asking the subject three types of questions, which include neutral questions, probe questions and target questions. Neutral questions are questions which are directly related to the facts of the criminal investigation and case, probe questions are those questions which attempt to make the subject reveal vital information not shared by him, and target questions are questions about facts of the case that the subject might be unaware of.\(^{435}\)

Oral responses to such questions are not necessary, brain activities of the subject on asking such questions is marked and analysed subsequently. If the subject has knowledge about the question asked, the brain is said to emit P-300 waves which are tracked and noted by sensors. These reports are then analysed by experts, and then an in-depth interrogation is carried out about the facts known to the subject, either by conventional means or other scientific tests.\(^{436}\)

Lie Detector or Polygraph Tests

The Lie Detector or Polygraph tests involve the attachment of several probes to a subject’s body and examination of his responses and pulse patterns, etc. to questions posed by experts. The subject is seated on a chair, with paraphernalia attached to his chest and upper arm to measure changes in breathing, heart rate and pulse patterns.\(^{437}\)

The hypothesis behind these tests are that the heart beats start acting erratically when a person lies, and the same is mapped by the polygrapher on a graph.\(^{438}\)

The expert first establishes a baseline by asking the subject questions he

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\(^{433}\) Daubert v. Merrell Dow Pharmaceuticals, 125 L Ed. 2d.


\(^{435}\) Marchand and Smith, Use of Event-Related Brain Potentials (ERPs) to Assess Eyewitness Accuracy and Deception, 73 International Journal of Psychology 218, 220 (2009).


\(^{437}\) Senese, L., Accuracy of the Polygraph Technique with and Without Card Test Stimulation, 4 Journal of Police Science and Administration 274, 276 (1976).

already knows the answers to, for example, the subject’s name. This is taken to be the truth line and deviations from it due to the answers of the subject are taken to be lies. These deviations occur due to bodily responses to lies, which makes a person nervous, and are beyond the control of the subject, being caused by the nervous system.

**UNDERSTANDING EMOTIONS- CRITERIA USED IN THESE SCIENTIFIC TESTS**

The term emotion, is not capable of having a precise definition, which would be accepted globally. It is an intangible characteristic, which can only be felt, is often faked and easily misunderstood. It is an abstract term. Traditional emotion theories state that there are certain fundamental or core emotions, which exist in every human, which have evolved over time, owing to human evolution process. These core emotions have specific trigger points, or provoking patterns, that elicit a particular type of response when triggered. With time, modern emotion theories, instead of focusing on emotions as an individualistic feature of humans, have started looking at it from an integrative aspect, considering it to be a sum of feelings, behaviour, cognition and neurobiology.

There is a specific stimulus to initiate a particular emotional response in a person, and delve them into the associated emotional state. These stimulus or trigger points differ from person to person. An emotional state is the state a person falls into, when that particular emotion is triggered. Every emotional response in a person is a culmination of a cognitive component, an affective component, a biological component and a behavioural component.

It is not possible to determine an exact response to a stimulus in a person or to successfully measure an emotional response or state. However, it is possible to measure fluctuations from a normal baseline of emotions, wherein the person is not experiencing any heightened emotion as much. Then, the change in measurements caused by the stimulus or trigger point, can be studied to effectively differentiate between a truth and a lie.

**VALUE OF THE SCIENTIFIC TESTS**

The results of these scientific tests are either utilised as evidence in the court by itself or serves as a clue to reach the next step in investigation. In cases where the subject makes an incriminating statement during the course of a test, it may directly be utilised in the court as evidence, if it amounts to admissions under the Indian Evidence Act, 1872. Admissions are statements that guide the investigating agencies to arrive at a relevant fact or fact in issue. However, such a statement must

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445 Section 17, Indian Evidence Act, 1872, Act No. 1 of 1872.
not amount to confession because a
collection made to a police officer, in the
_custody of police officers during the course
_of investigation, is inadmissable as evidence
in court.\textsuperscript{446} In cases where no statement is
given by the suspect or witness during the
tests, the report itself might be produced
before the court, along with an analysis of
the same by an expert witness.

When the statements made by the suspect
are not presentable as evidence before the
court, they may act as clues for the
investigating agencies, to decide the next
course of action and move one step closer
to solving the crime. These statements are
then merely seen as investigative hints, not
as evidence. The evidence procured as a
result of these statements are independently
produced before the court, and not as a
subset of the statement made.

In addition to police investigation and
evidence purposes, the scientific tests are
also used for pre-employment screening of
prospective candidates in law enforcement
agencies, to ensure credibility and
truthfulness of the candidates.\textsuperscript{447}

**CONSTITUTIONALITY OF THE SCIENTIFIC
CRIME DETECTION TESTS**
The constitutionality and validity of the
scientific crime detection tests, or deception
detection tests has been questioned since
the time of their inception.

Polygraph testing was first brought into the
purview of courts in U.S. in 1923 in the case
\textit{Frye v. United States},\textsuperscript{448} wherein it was held
that the technique of lie-detector test or
dygraph was yet to get popularity and
acceptance in the scientific community, and
therefore, was not acceptable as evidence.
However, in 1993, the admissibility of
dygraph tests was left to the discretion of
the courts on a fact to fact basis and the
intelligence of the judges,\textsuperscript{449} in the case
\textit{United States v. Scheffer}.\textsuperscript{450} While
polygraphs are not admissible as evidence
in courts at all in Canada,\textsuperscript{451} they are
acceptable in Japan.\textsuperscript{452} In USA,
narcosis analysis is seen as a tool to fight the
war against terrorism. As held in
\textit{Indianapolis v. Edmond},\textsuperscript{453} the truth serum
can be administered to a suspect without the
need of a actual warrant or probable cause,
in the case of grave offences or offences of
terrorism.

The tussle is between the protection of
larger public interest by conducting an
efficient investigation and protecting the
individual interests of the accused who is
subjected to these tests, either by will or by
coercion. The Constitution guarantees
certain fundamental rights to every citizen,
which cannot be compromised under any
circumstance as it forms a part of the basic
structure of the Constitution.\textsuperscript{454} One of
these rights is the right to life and liberty
guaranteed under Article 21 of the
Constitution.

\textsuperscript{446} Section 25 & 26, Indian Evidence Act, 1872, Act
No. 1 of 1872.

\textsuperscript{447} Ewot H. Meijer, Bruno Verschuere, The
Polygraph and the Detection of Deception, Journal
of Forensic Psychology 1, 3 (2010).

\textsuperscript{448} Frye v. United States, 293 F. 1013 (D.C. Cir.
1923).

\textsuperscript{449} Goldzband M.G., Polygraphy Revisited: U. S. v.
Scheffer. 27 J. Am. Acad. Psychiatry Law 133, 136
(1999).


\textsuperscript{452} Yamamura T. and Miyata Y., Development of the
Polygraph Technique in Japan for Detection of

\textsuperscript{453} Indianapolis v. Edmond, 531 US 32 (2000).

\textsuperscript{454} Kesavananda Bharati v. State of Kerala, (1973) 4
SCC 225.
Right Against Self-Incrimination and Right to Remain Silent

According to Section 20(3) of the Indian Constitution, no person can be compelled to give evidence against himself. This is the right against self-incrimination guaranteed to every person accused of a crime. This right extends only to cases of compulsion and not to cases where the accused voluntarily gives evidence of his crime.\textsuperscript{455} Cases of compulsion include both physical as well as mental compulsion including psychic torture, coercion, intimidation tactics, taxing interrogative practices, etc.\textsuperscript{456} This right is an integral part of a fair trial under the existing criminal laws. It is only available when the evidence is testimonial in nature and not when it involves taking of blood samples, fingerprints, etc. This right is also accompanied by the right to remain silent,\textsuperscript{457} as enshrined under Section 161(2) of the Criminal Procedure Code, 1973, which makes it mandatory for every individual to truthfully answer every question posed to them by the police, except those that would make them liable to a criminal investigation.\textsuperscript{458}

As a result of Article 20(3), no person can be compelled to answer the questions posed to them during a polygraph test. It was held by the Honourable Supreme Court in the case of \textit{State of Bombay v. Kathi Kalu Oghad},\textsuperscript{459} that no polygraph of an accused should be carried by the police without the consent of the person accused, otherwise, such a test would be violative of Article 20(3) of the Constitution. However, this right is only available during court proceedings and not during police investigations. The same was affirmed in the famous case of \textit{Selvi v. State of Karnataka},\textsuperscript{460} wherein it was held that an individual has the right to remain silent or make a statement. This case also laid down certain guidelines to be followed during the conduct of polygraph or lie detector tests, which have been discussed in depth later.

In \textit{Ramchandra Ram Reddy v. State of Maharashtra},\textsuperscript{461} the constitutionality of narcoanalysis test was analysed. It was held that no person can be forced to be subject to the narcoanalysis test against their will as statements are required to be made by the subject while he is in a semi-conscious state. Any incriminating statement made while under the influence of the drugs administered during this test, would be inadmissible in the court as evidence, being barred by Article 20(3). However, such a limitation would only be applied in case of self-incriminating statements.

Right to Privacy

The protection guaranteed against self-incrimination also aids in protecting the privacy of a person in the criminal justice system. Narcoanalysis, Polygraph and Brain Mapping involve intrusion of this privacy and might constitute mental torture at times, making their constitutionality questionable. The right to privacy is impliedly included under the right to life and personal liberty, guaranteed under the Article 21 of the Indian Constitution.\textsuperscript{462}

\textsuperscript{457} Ibid.
\textsuperscript{462} Justice K.S. Puttaswamy (Retd) v. Union of India, 2017 (10) SCC 1.
Privacy is defined as being free from outside disturbance and intrusion in one’s life and affair. In the Selvi case, it was held that the conduct of narcoanalysis, brain-mapping or lie-detector tests without the consent of the person would be a violation of their fundamental right under Article 21.

In the present scenario, the scientific tests have not been challenged on the grounds of violation of right to privacy, they have mostly been challenged as being violative of the right against self-incrimination. Therefore, the tests have been found to be ‘compulsive’ in nature, and not invasive of privacy. It can be said that while the tests are not directly violative of the right to privacy, their administration to extract personal information about their subjects without their will, would be violative of the right to privacy.

Evidentiary Value of the Scientific Crime Detection Tests

Polygraph tests and Brain mapping tests merely provide graphs and representations of a person’s behaviour which are analysed and explained by experts. Therefore, these reports account as opinions given by experts, based on their understanding of the recorded readings, which may or may not be correct. The evidence presented by them is merely an opinion, unless corroborated by additional evidence. Narco-analysis poses huge questions about its correctness, given that the statements made by a person when under the influence of drugs, is a confession made in a semi-conscious state, it is not generally admissible in the courts as evidence. However, keeping in mind the circumstances under which such a confession was obtained, it might be granted limited admissibility on a fact to fact basis.

Explanation (a) to Section 53, 53-A, and 54 of the Code of Criminal Procedure, 1973 talks about the examination of tests by medical practitioners. The explanation talks about ‘any other tests’, which raises a question as to whether this phrase includes the scientific tests like polygraph, narco-analysis or brain-mapping. This question was analysed in depth in the case of Selvi v. State of Karnataka, and it was argued that legislative intent behind the Act was such as to provide for inclusion of such tests under the Code of Criminal Procedure. In a response to this, the court distinguished between physical evidence and testimonial evidence by stating that while the other tests mentioned in the explanation like blood, sweat, semen, hair tests, etc., would comprise as physical evidence tests, physiological tests like polygraph, brain-mapping and narco-analysis would amount to testimonial evidence, giving rise to a statement by the accused or witness. Therefore, on the application of the rule of ‘ejusdem generis’ to the section, i.e., the general words should be construed in

463 District Registrar and Collector v. Canara Bank, 2005 (1) SCC 496.
accordance with the specific terms used in the Section, the Court came to the conclusion that since testimonial evidence is distinct from physical evidence, the same cannot be read into the Section.  

**Test Conducted with Consent**

In the landmark judgement of *Selvi v. State of Karnataka*, no person shall be forced to undergo a scientific test or technique, not even for the purpose of a criminal investigation. This is because it would amount to an invasion into the personal liberty of a person, guaranteed under Article 21. However, at the same time, such tests were held to be allowed and valid, if the person subjected to the test had himself consented to the conduct of the test, which had been carried out, keeping in mind all necessary safeguards. Despite this, the actual report of the test is not admissible as evidence in the court because of the fact that such statements are made under the influence of drugs and chemicals, and the subject has no material choice but to respond to the answers. However, the information subsequently collected as a result of such statements are admissible in court under Section 27 of the Indian Evidence Act, 1872.

In the infamous Arushi Talwar Murder Case, all the three tests, Narco-analysis, polygraph and brain mapping tests were carried out on the accused persons, to determine the true occurring of the fateful night when Arushi, a fourteen-year old girl was found dead at her home and her parents were the ones accused of her murder. In light of the *Selvi v. Karnataka* judgement, it was held by the court that the reports of such tests cannot be leaded as evidence in the court unless they were performed after the due consent of the accused persons.

In the case of *State of A.P. v. Inapuri Padma*, it was held that where the persons are arrested by the police on the request of the Court, no separate permission is required by the police to conduct the narco-analysis of such persons, provided, they do not pose any resistance to the administration of such a test. However, when such resistance is shown, it becomes the duty of the police to satisfy the court that vital information as to the commission of the crime is known to the persons, but not disclosed by them, so as to warrant the conduct of such tests.

**Test Mandated by Court**

The pursuit of truth is the ultimate goal of the investigating agency and the court. No efforts are to be left to be made to discover the person guilty of committing a crime, and therefore, when the circumstances warrant, courts sometime interfere and ask the police to carry out one of the scientific tests of discovery on the suspected persons. In *Abhay Singh v. State of U.P.*, the court held that in cases where these scientific tests are essential to uncover the actualities and facts of a particular case, the court ought not to prevent their conduct, and the same shall be carried out under the supervision of the court. In the case of *Mohinder Singh Pandher and Surender*

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472 Dr. Rajesh Talwar and Another v. Central Bureau Investigation, 2013 (83) ALLCC 283.


Singh Koli v. State of U.P.,\textsuperscript{476} infamously known as the Nithari Murder Case, the Court directed the conduct of narcoanalysis test to ascertain whether the statements made by the accused during their custodial cross examination were truthful or not. Through this test, significant information was obtained by the police for carrying out their investigation, including the names of the youngsters that had been killed by them. However, no such tests shall be carried out on a victim of a crime as it would amount to an invasion of their mental privacy and no necessity of investigation can mandate the conduct of such tests on a victim.\textsuperscript{477}

**Evidentiary Value in Civil Cases**

Section 75(e) of the Civil Procedure Code, read along with Order 26, Rule 10-A, empowers the civil court to instruct the investigating agencies to conduct a scientific, technical or expert investigation to discover facts relevant to the case.\textsuperscript{478} This would imply that the courts are empowered to carry out the scientific tests of polygraphs, narcoanalysis and brain mapping.

Moreover, the Selvi case, in its landmark judgement, talks about ‘criminal cases and otherwise’, implying that the ratio laid down in this case is also applicable to civil cases. Therefore, while such tests are acceptable in civil cases, they still cannot be administered forcibly, without the consent of the subject.

**Guidelines for Conduct of the Test**
The National Human Rights Commission (NHRC) has laid down certain guidelines in the year 2000 to be followed for the administration of polygraph or lie-detector tests on an accused. These guidelines are to be strictly followed, and the same guidelines are also applicable in the case of narcoanalysis and brain mapping techniques.\textsuperscript{479} These guidelines are stated as follows:

- The tests shall be administered on a voluntary basis, and the accused will be given a choice as to whether he/she wants to go through with the test or not.
- In cases where the accused gives his consent to the administration such tests, he shall be provided with a lawyer. The physical, emotional and legal attributes of such a test are to be properly explained to him by the police and his lawyer, and understood by him.
- A valid consent shall be said to have been taken if the consent is recorded in the presence of a Judicial Magistrate.
- In such a hearing before the Judicial Magistrate, the accused shall be duly represented by a lawyer.
- The accused shall also be duly informed that the statements made by him during the conduct of such tests shall be in the nature of a statement made to the police and not a confession made before the Magistrate.
- The Magistrate, while recording the consent, shall take into account the length of detention and the nature of the interrogation to be carried out.
- The interrogation during the test shall be carried out in the presence of the accused’s lawyer, and a record of the same shall be

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\textsuperscript{478} Pricilla, Arya, Polygraph and Narco Test in Indian Evidence Law-Through Case Laws, 120

made by an independent agency like a hospital.

- The medical and factual narration of the way in which the test was carried out shall be placed on official record.

**ETHICAL ISSUES**

The various ethical issues associated with the conduct of these scientific tests are as follows:

- These tests often amount to psychological torture, which can be as invasive and violative of basic human rights like the use of third-degree torture during investigations.
- It often involves feeding lies to the subjects, to make them more pliable to the investigative process. For example, in the case of polygraphs, the subjects are often told that their pre-test and stim-test responses are also monitored to detect lies, however that is not true, and emotions can be controlled at this stage.
- Sometimes, the tests are highly intrusive of a person’s privacy and even personal questions that have no nexus with the crime committed are asked.

**RECOMMENDATIONS**

- Proper environment and infrastructure for the conduct of these scientific tests should be established.
- Scientific tests should be made mandatory for offences like rape and other heinous offences.
- Strict sanctions against use of these tests to inflict psychological torture on the accused should be imposed.
- The guidelines for the conduct of these tests should be strictly followed to ensure personal liberty of the accused and accountability of the police.

- A clear policy should be laid out for the conduct of narcoanalysis test because it is the one often challenged on the ground of its constitutionality.

**Conclusion**

The three tests, while different in their administration, have a common goal, to discover relevant facts, and lead to an expeditious investigation process. In essence, polygraph tests, which result in a graph, and brain mapping tests, which result in a sensor developed map of the brain, are similar to the evidence found on a person after carrying out a thorough search. This is because, it does not involve the making of a statement or testimony, however the situation gets complicated in the case of narcoanalysis, it being self-incriminatory in nature. The apex court, in *Selvi v. State of Karnataka*, has laid down that such tests can only be carried out on a voluntary basis, and cannot be compulsorily enforced upon a person. If such tests are administered without the consent of the person subject to it, it would be violative of Article 20(3) and Article 21 of the Constitution of India. The reports of these tests themselves, are not admissible in Court as evidence, however, information subsequently obtained as a result of these tests, are admissible as evidence in court. The application of these tests is not limited to criminal cases alone, it also extends to civil cases.

Therefore, it can be said that, as long as the tests are not administered coercively, their constitutionality cannot be challenged. It is the duty of the courts and other law enforcement agencies to ensure that justice is served, hence, where a person who is likely to have committed the crime is identified, the court may direct the police to

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carry out these tests on him, so as to provide a lead during the investigative process, even if the statement made by the subject cannot be utilised at the trial stage by the prosecution. This is because public interest outweighs individual interest. Moreover, the NHRC has laid down guidelines to be followed during the conduct of these scientific tests, which has to be strictly adhered to.

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NRC-A DISCORDANT NOTE ON THE LEGACY DATA OF INDIANS!

By Gayathri J Chothar
From VITSOL, VIT, Chennai

ABSTRACT

Citizenship has always been and remained a sovereign power, whether it is from the Ancient times of Monarchy or the 21st century of democracy. Citizenship is enumerated under entry 17 of List I of Seventh Schedule of the Constitution, that is under Union List which makes it the sole power of the Central Government to determine criterion of Nationality. States have zero role in this aspect. Thus, the ruling parties in India have time and again amended the rules of the same. 2019 Election manifesto of the BJP Govt contained for implementing a PAN-Indian National Register of Citizens (NRC), which created outcry and protests nationwide. Earlier, the State of Assam updated NRC and the completed final draft was published by July 30, 2018 which excluded 19 lakh people from the list. Thus the precedent shows that though the process of NRC though legally mandated u/s 14 A of The Citizenship Act of 1955 and thus constitutionally valid, comes with a lot more chaos and difficulties in terms of its implementation and authenticity. Since it is on the government to decide the rules which determines “citizens” and “illegal migrants”, a PAN Indian NRC, followed by the passing of Citizenship Amendment Act, 2019 leaves the minorities especially those belonging to the Muslim community, stateless. The paper aims to analyse the Constitutional validity of NRC and reason(s) why NRC in terms of its implementation has become a controversial process in the Indian democracy!

INTRODUCTION

According to a 2013 survey conducted by Gulam Nabi Institute on refugees in Kerala, it amounts to 25 lakh people. This was parallel the time when the Supreme court ordered to come up with NRC in Assam. Rohingyas are another major immigrant group in India, which according to the present figures put out by United Nations Refugee Agency (UNHCR) is nearly 14,000 Rohingya are spread across different states of India including Jammu, Delhi, Hyderabad, Jaipur, Nuh in Haryana’s Mewat district, and Chennai. The country has already given the “status of refugee” certificates to approximately 11,000 Rohingyas in India. Thus, in such a situation the need for implementing a nationwide NRC is on the right note. Population explosion and increasing unemployment creates a pressing need for giving priority to the citizens over migrants. NRC, through publishing the names of citizens of India on the said criteria, aims at finding the “illegal” migrants and weeding out from the country. Assam has already implemented NRC and on line of this, many States expressed to implement the same as well. Recently Haryana, Delhi, Maharashtra and Uttar Pradesh Governments announced about implementing NRC in these respective states.

Despite its positive objective, the announcement of a proposal for a nationwide NRC in 2019 by Home Minister Amit Shah has created much chaos and confusions in the country. Going by Assam NRC guidelines, eligibility criteria will be determined based on whether their names appear on NRC 1951, Electoral Rolls upto 1971 and in their
absence the admissible documents upto 24th March (midnight) 1971. Coupled with this, the Citizenship Amendment Act which was passed in the Parliament the same year envisages the grant of Indian citizenship to all refugees of minority communities belonging to Pakistan, Bangladesh and Afghanistan for those who has suffered religious persecution in these neighbouring states. In this light, whether introduction of PAN India NRC will disentitle a particular community, say Muslims of Indian Citizenship, is at stake. NRC has not yet been legislated thus the criterion for inclusion in NRC is not very clear. Although NRC 1951 and Electoral rolls till 1971 are to be said standard documents for proving citizenship. In such case, there are high possibilities for minorities in the State to lose their citizenship. Whether such bewilderment makes sense has to be analysed on a serious note by looking into the background and history of the country and analysing constitutionality in introducing the registry at this point of time.

- BACKGROUND
The ‘hunt’ for infiltrating foreigners is 70 years old, when it was first implemented in Assam with the National Register of Citizens (NRC) mechanism. The process began with the Immigrants (Expulsion from Assam) Act, 1950, enacted before the first democratically elected Parliament took office in 1952. With the core ‘ethnic cleansing’ goal, NRC was first established in Assam during the 1951 Census to implement this Act. Several laws and regulations has supplemented the Act over the years with this idea. Ramnath Kovind, President of India has said previously that a nationwide NRC would be introduced on priority basis where infiltration has occurred the most. Later, on November 2019, Union Home Minister Amit Shah said that NRC will be extended to the whole of India. The root of the idea came due to the mix of citizens into the country from neighbouring nations from the time of partition as well as in search of employment and livelihood, since India has been always welcoming to such migrants.

- CONSTITUTIONALITY OF THE REGISTRY
Any legislation to be legally valid, must be in accordance with and compliance with the Constitution. The Constitution is the supreme law of the land which cannot be superseded by any Act passed by the Parliament. Such an Act can be struck down by the Judiciary as “unconstitutional”. But in order to determine the constitutional validity of the Register which is not yet a legislation, only the Assam NRC can be taken for analysis. First it has to be analysed that the introduction of such a register violates any of the Articles. But before that, let us first analyse what does the Constitution says about citizenship. Part II of the Constitution exclusively deals with citizenship. Articles 5-11 enumerates various criterion for citizenship.

ARTICLE 5 - CITIZENSHIP AT THE COMMENCEMENT OF THE CONSTITUTION OF INDIA
It entitles any person who has domicile in the territory of India and was born in the territory of India or either of his parents are Indian born or he has been an ordinarily Indian resident for at least 5 preceding years of the commencement of the Constitution. This Article considers “domicile” in India as the criteria for determining citizenship. The term “domicile” though not defined anywhere in the Constitution, it can be mean to refer to a “permanent home” or place where a person resides with the
intention of remaining there for an indefinite period.481

Thus, any person who was born in Indian territory or if any of his parents are Indian born, he or she cannot be rejected Indian citizenship on any basis. The supersedence of Constitution over all other legislations declare all such legislations which goes against the above criteria of citizenship to be illegal and thus void.

- **THE CITIZENSHIP ACT, 1955**

The Constitution of India has recognised a wider principle for citizenship; it is inclusive, that is recognises citizenship on *jus soli* or birth-based principle as well as *jus sanguinis*, that is citizenship by blood or descent. But the huge immigration and migration of people in the aftermath of partition to and fro has pushed the need for creation of stringent rules for determining the citizenship of the country. Through Articles 5–11 of the Constitution, the constituent Assembly defined nationality (citizens) for the time. Later, the Parliament in 1955 came up with the Citizenship Act. The Act was formulated after heated arguments in the constituent assembly. The confusion was regarding whether citizenship is to be granted on basis of *jus sanguinis* or *jus soli*. The latter was based on the concept of “racial citizenship” while the former settled for “enlightened, modern, civilized” and democratic citizenship.482

The Citizenship Act incorporated both these concepts. The Act which has been amended 10 times, comprises of 19 provisions. **Section 2 (b) defines an “illegal migrant”** and included only any foreigner does not carry a valid passport or any other travel document while entering into India, and any foreigner who has a valid passport but stays in India beyond the stipulated period. But the amendment of 2019 narrowed down the scope of illegal migrants by exempting any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from the neighbouring states of Afghanistan, Bangladesh or Pakistan who entered into India on or before 31 December 2014 and who has been exempted by central government under 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 made thereunder. This has sparked controversy from those excluded minority belonging to Muslim community, which will be dealt in the next section. Now let us analyse the circumstances under which the Act grants citizenship to people.

Under this Act a person is deemed to be the citizen of India under four ways, as given under Article 5.

a. **Citizenship by Birth**

Born on or between January 26, 1950 and July 1, 1987. After July 1, before commencement of Citizenship (Amendment) Act, 2003, where either both of his parents are citizens of India or where one is an Indian citizen and the other is not an illegal migrant (amended by 2003 amendment).

b. **Citizenship by Descent**

A person who is born outside India can acquire citizenship through descent if he is

481 Burgin and Fletcher, The Students’ Conflict of Laws (3rd Edn.1937) p 60.
born on or between 26th January 1950 and December 10th 1992 if either of his parents at the time of his birth, is a citizen of India.

c. Citizenship by Registration
A person can acquire Indian citizenship if he ordinarily resides in India for 7 years before applying for the same under S 5(1) of the Act if he is not an “illegal migrant” as per the Act.

d. Citizenship by Naturalization
Under this, a foreigner can acquire Indian citizenship if he or she is ordinarily resident of India for 12 years (throughout the period of 12 months immediately preceding the date on which the application is made and for 11 years in the 14 years preceding the 12 months) and other qualifications as specified in Section 6 (1) of the Citizen Act,1955.

Section 14A reads follows – “The Central Government may compulsorily register every citizen of India and issue national identity card to him.” Thus the Act itself mandates NRC under section 14A of Citizenship Act, 1955 which was inserted by way of Amendment Act, 2003 w.e.f. 3.12.2004 at the time of Congress Government and since then there is no challenge to this provision.

CITIZENSHIP AMENDMENT ACT, 2019

Article 10 of the Indian Constitution clearly says that a person who is deemed to be an Indian citizen, shall continue to be such a citizen, subject to the provisions of any law made by the Parliament. Further, the Constitution has conferred power upon the Parliament under Article 11 enabling it to make any provision with respect to the acquisition and termination of citizenship”, and also to all other matters which relates to citizenship”. Thus the Parliament can legislate on matters relating to the grant and refusal of citizenship in consistent with the Constitution. Entry 17, List VII, Schedule 7 enables the Parliament with the power to make laws with respect to citizenship, naturalisation and aliens. This makes the object of this Article very clear that the Parliament shall have unfettered power to make any provision relating to citizenship.486

The Parliament using this power conferred, passed the most controversial Amendment on citizenship, the Citizenship Amendment Act (in short referred hereto as CAA) on December 2019. The Act inserted a new proviso to S 2(1)(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,”

This Act sparked the most agitating and strong oppositions from various sections, religion and communities of the country which is ongoing. The Act together with creation of nationwide NRC has created fear in the minds of many, which has led to

484 Section 14A, supra note 3.
485 INDIA CONST. art 10.
486 MAHENDRA PAL SINGH, V.N Shukla’s CONSTITUTION OF INDIA, Twelfth Edn, p 23.
violent protests and agitation nationwide. Whether NRC when clubbed with the 2019 Citizenship Amendment render many people especially belonging to the Muslim community, homeless is to be analysed by looking into the constitutionality and legality of both.

NRC is nothing but a procedural aspect of the mandate granted under section 14A of the Citizenship Act. But Amit shah has said that NRC will be carried out in the country after passing the CAA. Now as CAA has been passed, updation of NRC will be conducted soon. Thus if it has nothing to do with CAA, why the govt waited for the Act to be passed first? Since under the Act, Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan automatically gains Citizenship (if they migrated to India before 2014) the fate of the only left out people belonging to Muslim communities from these countries is clearly in danger. Since their names may not be in the electoral rolls upto 1971, and do not satisfy any of the criterion for citizenship under the Act, they will be termed “illegal migrants” and would be deprived citizenship if going by that criteria.

**THE CITIZENSHIP (REGISTRATION OF CITIZENS AND ISSUE OF NATIONAL IDENTITY CARDS) RULES, 2003**

The act was enacted by the Central Government on December 10th, 2003 by exercising the powers under section 18 (1) and (3) of the Citizenship Act, 1955. Rule 2 (c) defines citizens as “citizen of India in terms of the Constitution of India and provisions of the Act”. The citizenship (registration of citizens and issue of national identity cards) rules, 2003 defines National Register of Indian citizens under rule 2(k) as “the register containing details of Indian Citizens living in India and outside India”.

Rule 3 (1) says that the National Register of Indian Citizens shall be established and maintained by the Registrar General of Citizen Registration. Such a register is further divided into 4 parts –

- the State Register of Indian Citizens,
- the District Register of Indian Citizens,
- the Sub-district Register of Indian Citizens and
- the Local Register of Indian Citizens

This register has to contain all the details which, the Central government in consultation with the Registrar General of Citizen specifies and shall contain all the details [S 3(3)] such as:

(i) Name;
(ii) Father’s name;
(iii) Mother’s name;
(iv) Sex;
(v) Date of birth;
(vi) Place of birth;
(vii) Residential address (present and permanent);
(viii) Marital status (name of the spouse, if married);
(ix) Visible identification mark;
(x) Date of registration of Citizen;
(xi) Serial number of registration; and
(xii) National Identity Number.

For maintaining an NRC, a National Population Register is to be first prepared at the local level. Through revival of NPR, the

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488 S 2 (k). The citizenship (registration of citizens and issue of national identity cards) rules, 2003
normal residents can be identified which makes it easier to determine the origin of people. In the month of December, 2019 to be approx, on December 21st 2019, the Union Cabinet has given approved funding for the updation of the National Population Register (NPR). A gazette notification has already been issued and the Census of 2021 is soon to take place in April – September, 2020. In 2010, National Population Register (NPR) of all the ‘usual residents’ in the country was created. The field work for NPR data collection was undertaken along with House listing and Housing Census 2010. The electronic database of more than 119 crore usual residents of the country has already been created under NPR in English as well as the Regional Languages by collecting specific information of all usual residents. Then the Local Registrar will have to verify and scrutinise this data. Individuals whose citizenship is doubtful, will have to be entered in the NPR with remarks for further enquiry; such a person or his family has to be informed in proforma of the same immediately after such verification.

Rule 6 says that a draft of the local register has to be published before the final entry into NRC, for the individuals to raise objections. Such objections have to be considered and disposed off within 90 days; an appeal lies before District Registrar, whose decision shall be final and binding. However, writ can be filed before the High court as per Article 226 and then the Supreme Court (A 32). Otherwise, details of the Local Register have to be transferred to the District Registrar, who further transfers the same to the National Register of Indian Citizens.

Rule 11 prescribes that Registrar General shall cause to maintain National Register on the basis of extracts from various registers specified under Registration of Births and Deaths Act, 1969. National Identity Card has to be issued to every citizen whose particulars are entered in National Register of Indian Citizens as per Rule 13. The National Register of Indian Citizens after preparation, has to be maintained in electronic or some other form which shall entail its continuous updating, for which the basis of extracts from various Registers specified under the Registration of Births and Deaths Act, 1969 (18 of 1969) and the Citizenship Act. Thus the main document for getting name included in the NRC is the National Population Register and registers of Birth and Deaths. But the illiteracy and lack of awareness of a wide majority of population might cause hurdles to the same. Whether people will be able to prove their births make introduction of NRC, a fear of losing citizenship.

But all these remain speculations. Home Minister Amit Shah recently said that NPR data would not be used for NRC. He drew a distinction between the National Population Register (NPR) and the National Register of Citizens (NRC) saying both were governed by different laws. But that NRC shall be carried out on the basis of NPR is enshrined in the Citizenship Rules of 2003 under the Citizenship Act 1955. Indeed, NPR is part and parcel of the rules framed for NRC. The 2018-19 Annual


Report of the MHA, released recently, says that NPR is the first step towards implementation of the NRC under the provisions of Citizenship Act. On November 16, 2016, Kiran Rijiju reiterated this during question hour in Rajya Sabha. “The Government has approved the preparation of Population Register comprising details of usual residents in the country. The preparation of Population Register is a part of preparation of National Register of Indian Citizens under provisions of the Citizenship Act, 1955 read with the Citizenship Rules (2003).”

Thus NPR data can be used as the base for preparing NRC cannot be negated even in spite of political assurances.

**SOLUTION FOR PEOPLE EXCLUDED FROM NRC**

By analysing the case of Assam, those who are excluded from the list stands the chance to appeal first before the Foreigners’ Tribunals (FT), which is a quasi-judicial court originally set up under the Illegal Migrants (Determination by Tribunal) Act of 1983. Then, they can subsequently appeal before the High court or Supreme Court. Limitation period given for such appeal is 120 days or 4 months. The state of Assam has 100 FTs already and where a proposal to open 200 more is considered. Suppose a person lose his case after such appeals, then comes the problem as they will have to be arrested and further send to the detention camp. In 2018, the centre gave sanction to Assam to build the first standalone detention camp in the state, capable of housing 3,000 inmates. They can annul the Indian citizenship of even those who have been included in the final NRC. This will lead to their names being struck off from the citizen register.

Referring to paragraph 2A of the Foreigners (Tribunals) Order of 1964, it is clear that it allows the government to refer a person to a tribunal to determine whether he is a foreigner. Foreigners Tribunal was established by the Central Government vide Order 1964 w.e.f. 23.9.1964, which deals with any question regarding nationality of any person. It is a judicial Tribunal that shall have powers of a Civil Court and shall decide the question on the basis of judicial scrutiny after giving proper opportunity of being heard to such person. In the opinion of legal experts, there is no explicit law or provision to prevent referring a person who has already made it to NRC before a foreigners’ tribunal.

But still there has been no clarification from the Central Government to the actual fate of those who did not make it to the final draft of NRC. Those persons who are finally confirmed as “foreigners” are rumoured to be deported to their particular nations. For this, the Ministry of External Affairs will have to approach the concerned nations. If that nation identifies the person as its national by verifying the details of the detained, deportations will follow. But what again creates the problem is that the absence of a “repatriation treaty” between India and those States. Say in case of Assam, those identified as Bangladeshis have to be deported to Bangladesh, but there exists no repatriation treaty between India and Bangladesh.

**Is that a vital solution?**
The whole concern and controversy regarding updation of NRC is the query regarding those who did not find their way on to the list. Even after the appeal, what if still they cannot prove their legacy as Indian? What happens in detention camps? Where will they be prosecuted to? Such questions raise serious fear in the minds of people. If such excluded people are not deported nor detained in camps, they lose their Indian citizenship. This also makes them vulnerable as it takes away their various constitutional rights including fundamental rights as under Article 19, Article 15 as well. In the words of Home Minister Amit Shah the purpose and existence of detention centres are clear. He said, “Whatever detention centres are there are part of a continuous process. People can’t just come into the country and start living here. There is a law. If a foreigner enters any country without documents, they are kept in a detention centre until they can be deported to their country. There is no connection between detention centres and NRC. Whatever illegal migrants are caught have to be kept in these detention centres that are being discussed. No detention centre is functional and none have come up under the Modi regime”. This situation of statelessness further creates chaos.

What makes it even more confusing was a series of notes which was released on August 31 said that, “Receipt at any point of time of opinion by any Foreigner Tribunal declaring any person a foreigner, will lead to exclusion of person from NRC.” This opens a further subjection to trials for those who has their names included in the final draft as well. This gives the Assam border Police the power to summon those who has been suspected as “illegal migrants” before a foreigner tribunal. This provision thus can put a person who even after layers of process check made it to NRC, to be put by the Executive, again through the process of proving his citizenship again. Moreover, An appeal to a tribunal would cost a minimum of Rs 50,000 per case, which would further be a hurdle for the “poor” people. The Assam NRC also raises a question of why its neighbouring state Tripura is excluded from preparing NRC which was inundated by war refugees even after Bangladesh was founded on December 16, 1971. Such immigration made the indigenous community of Tripura into “minorities”. What is more interesting is the current BJP Government’s Chief Minister of the state was a Bangladeshi born. Thus the mens rea behind preparing NRC in the state of Assam is doubtful as to clarity.494

One infamous case of how the NRC fails in terms of its implementation is Mr Mohammad Sanaullah who was, a former soldier in the Indian Army, was declared as a foreigner by an Assam Tribunal. On May 27, 2019, when he went to a Foreigners’ Tribunal, set up to deal with cases like this, Sanaullah was placed under arrest and sent to a detention camp in Goalpara in Assam exposing the lacunae in the National Register of Citizens.

-Mr. Samsul Ahmed, a retired Sergeant of Indian Air Force who returned to his home in the village of Balukuri NC in Assam was declared as D-voter. He approached the Foreign Tribunal which declared him to be an Indian Citizen in 2017. Yet his family still doesn’t make it to NRC.

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494 Ditilekha Sharma, Determination of Citizenship through Lineage in the Assam NRC Is Inherently Exclusionary, Economic and Political Weekly, (Vol. 54, Issue No. 14, 06 Apr, 2019), ISSN (Online) - 2349-8846
-Father of Shahnaz Khatoon, Mohammed Shah Ali has been declared a d voter in 1997 and has been in detention camp since 2016. She had documents dating back to 1940, yet they were unable to prove his citizenship, they lost the case in Guwahati High Court and then in the Apex court as well the poor family had lost all their wealth to fight the case, yet they failed.

-Assam has a history of treating the minorities with violence. The village called Nellie witnessed the worst massacre in the Indian history, were more than 1800 Bengali speaking Muslims were massacred. When we look into the names of those people mentioned in these cases, one thing is doubtful. Whether this whole process of NRC targets a particular religious minority? Are they alone accused as Bangladeshis? But the truth points out that in Assam, it has been a linguistic and nationality fight between the indigenous and the Bengali speaking people. 14 lakh people who has been asked to prove their nationality belongs to both Muslim as well as Hindu community, but they had one thing in common, that is they are Bengali-speaking.

- A case where the Mandal family are Bengali speaking Hindus from Nagaon District were out of 33 people who had applied, 6 didn’t make it to the final draft of NRC in spite of showing land records and legacy from 1965.

**CONSEQUENCES**

STATELESSNESS

Nationality is acquired or lost according to rules set by each State. These rules determine which links between the individual and the State – some kind of connection usually either with the territory (place of birth or residence) or with a national (descent or marriage) – should be reflected in the formal bond of membership.495 The greatest aftermath of NRC will be a large set of denationalised individuals with no legal safeguards. The state has always showed a longstanding passivity towards this concept in its national legal domain as well as international. The state is neither a party nor signatory to the 1954 Convention relating to the Status of Stateless Persons nor the 1961 Convention on the Reduction of Statelessness, the two central pillars of statelessness prevention within the United Nations treaty system.496

Since India does not have any laws for remedial measures and according to the Constitution, it is on the Parliament to decide the fate of people identified as illegal migrants. NRC which aims at identifying “illegal migrants”, that is those individuals without any valid citizenship papers (which again will be decided by the Govt) are de facto “illegal immigrants” who can then be legitimately deported without safeguards, contingent on how the higher courts understand each situation of displacement. Since it is constitutionally valid and the Supreme Court has mandated for NRC in Assam before, court’s intervention may end there. One example is when India forcefully made seven Rohingya men to return to Myanmar from Assam in October last year. When faced with a petition to stop the deportation, a senior bench at the Supreme Court led by the Chief Justice of India, refused to interfere in the government’s statelessness?” (Oct 30, 2019 · 06:30 am), https://scroll.in/article/940712/why-is-the-indian-state-shockingly-blind-to-the-problem-of-statelessness.

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496 ANGSHUMAN CHAUDHARY, “Why is the Indian state shockingly blind to the problem of
decision on the grounds that Myanmar “had accepted them as citizens”, which was a faulty assumption. The Rohingya community, till this date, remains denationalised by law in Myanmar. The Myanmarese government had only issued temporary travel permits to the deportees, not full citizenship documents. Yet, the Indian Supreme Court showed scant understanding of this unique situation, completely skirting the core question of statelessness, besides the violent conditions that Rohingya returnees face in Myanmar’s Rakhine State. This shows how the Indian government’s move was illegal and violated the peremptory norm of non-refoulement – the practice of not forcing refugees to return to a country in which they are liable to be subjected to persecution.

India’s perennial statelessness crisis are the myriad gaps in its restrictive nationality laws. The minute provisions within the principal nationality law, that is, the Citizenship Act of 1955, operate on strict or ambiguous definitions of citizenship and non-citizenship. Besides proactively creating stateless individuals within the national borders, these provisions make life harder for stateless asylum seekers as well.

The court has from time to time tackled the issue of statelessness; the Punjab and Haryana High Court mentioned the word “stateless” as far back as in 1958 while adjudicating a case on a Punjabi refugee from Pakistan living in India. In a landmark case in 1996, the Supreme Court took it a notch higher and established the categorical right of citizenship for Chakma refugees from erstwhile East Pakistan living in Arunachal Pradesh, despite mass opposition from local civil society groups in the North East Indian state.

But the judiciary needs to be much more proactive in preventing statelessness and compensate for the lack of legislative and administrative will to do so. It also needs to offset India’s non-participation in the international treaty regime on statelessness prevention and reduction through judicial activism and specific case-based precedents. The higher courts are fairly well-placed in this context to facilitate a gradual normative change in how Indian state institutions understand and respond to the phenomenon of statelessness.

Further with the CAA, Muslim migrants from Bangladesh, Pakistan and Afghanistan may find themselves selectively denationalised over Hindus, Buddhists, Jains, Sikhs, Parsis and Christians of these countries. It would only be a historical travesty if the higher courts fail to intervene in this undoing of India’s constitutionally-marked secular credentials.

- CHALLENGES

The task of updating NRC comes up with a lot more challenges than its political outbursts.

1. NO PRECEDENT NOR LEGISLATION IN INDIA NOR THE WORLD

The mechanism adopted to update the NRC 1951 has been developed from scratch owing to the fact that there is no precedence of such a mammoth task ever undertaken in India or elsewhere that involved identification of genuine citizens and detection of illegal immigrants using technology since it involved data of over 3 crore people and over 6.6 crore documents.

But some of the states have already begun the process; the Chief Minister of Haryana already announced that the state government is working on a fast pace on

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Ibid at 27

http://www.nrcindia.in/
family identity card to use this data in NRC seeking assistance from retired Justice HS Bhalla. The CM said that the Govt will look to constitute a law commission and a separate department.

2. **DECIDING THE CUT-OFF DATE**
The cut off period for inclusion in NRC of Assam was fixed on 24th March, 1971, because, the largest migration happened in the period of March 1971 after the war started on March 25, when the Pakistan army crackdown forced many Bangladeshi residents to flee to India.

3. **MAMMOTH TASK IN TERMS OF WORK AND COST**
It includes several officials to update NRC for a population of 137 crores plus. This is a tedious task which involves both high training as well as budget.

4. **ABSENCE OF REPATRIATION TREATY**
India does not have any formal repatriation treaty with Bangladesh, Pakistan nor any of its neighbouring countries. This makes the situation even worse, making people absolutely stateless.

- **CONCLUSION**
It was the gravity of the situation in Assam where “50 lakh illegal Bangladeshi immigrants” residing in the State and the continuous demand of removing such immigrants by the indigenous people of the state that provided the judicial and political justification for the updation of NRC in Assam. But the onus of applying the same throughout the nation at this point of time has yet to be analysed. But since these kind of activities are done clandestine and surreptitious, accuracy of number of such immigrants may not be accurate.(in response to an RTI filed on Sept 5, 2018 regarding the count said in the Parliament of 1.2 crore illegal Bangladeshi migrants in India the MHA’s reply was corroborating this count.)

Citizenship acquired through descent, registration or naturalisation, chances of confusion are negotiable. It is in case of citizenship by birth fear is being spread among people. Since any proposal nor bill has been proposed, from the cumulative speculation of the existing laws and procedure in this aspect, a person can prove his birth in India by any document such as Birth Certificate, School certificate, PAN Card, Passport, Voter ID card, Aadhar, Bank Account, driving license and so on (even affidavits or certificates by village panchayats or municipalities or by an order of a Magistrate under Registration of Births and Deaths Act, 1969 might be sufficient). Even if the nationality of a person is found to be doubtful in the absence of these documents, their might be reasonable opportunities given to him or her to prove the same. The hierarchy will start with the Sub District Registrar who must decide the same after giving him opportunity of being heard. An appeal shall lie before the District Registrar. And as the courts to protect fundamental rights of any citizen, before declaring a foreigner he or she can file writ petition before High Court under Article 226 of the Constitution and then before the Hon’ble Supreme Court under Article 136 of the Constitution. Apart from this, there is a parallel procedure in case of illegal migrants to refer their cases to the designated Foreigners Tribunal for judicial scrutiny, against whose order writ petition before High Court and thereafter SLP before Hon’ble Supreme Court will lie. Therefore, the provocation which is now only on the basis of fear as to the criteria which will be laid down for proving citizenship in the future NRC is very premature since it is expected that the
Government should ensure that the NRC, being an important register for welfare schemes and smooth functioning of the country should not be a tool in the hands of some mischievous persons to spread rumours or to disturb peace and harmony in the nation. Thus proving citizenship is for the betterment of the country and its citizens; thus instead of politicising the same, every citizen has to abide by the Government to produce valid documents to provide citizenship. Supreme Court has laid down that the onus of proving we are citizens is on us, not on the state.
THE STUDY ON JUVENILE CRIMINOLOGY AND HUMAN RIGHTS

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Abstract
This paper focuses on reducing Juvenile criminology and making them understand their responsibility towards the society. Basically juvenile is a person who has not attained the age of 18 years or who not comes under the category of an adult. The problem arises when we see that access of liberty given by the law to the juveniles, lead to an increase in offences day by day, they are not punished and victims are not getting justice. The frightful incident of "Delhi Gang Rape Case" has forced the law makers to take step regarding the above issue. So in the present scenario, the question arises whether to reduce the age of juveniles? Whether the punishment given to the juveniles is a reformatory or retributive form of punishment? More issues arise regarding the violation of the Constitution of India by the Juvenile Justice Board.

Criminology means to know their psyche, to understand the mental capacity or maturity. To know whether they realize their consequences caused due to crime committed by them violating the basic interests of the people and how committing these crimes will affect those interests.

Human Rights are the rights which everyone is entitled to from his birth. Human rights are basic standards without which people cannot survive and develop on dignity. They are inherited to every human irrespective of their sex, race, caste, religion and birth.

This paper also focuses on the scientific study of crime, including its causes, responses by law enforcement and methods of prevention. We will also study Social behavior of Juveniles and the rights of Juveniles against the crime committed by them.

Keywords: Juvenile, age, penalty, sociological jurisprudence, rights, violation, criminology.

Introduction
Children are the rock of any nation; they are the future of our nation. They are the leaders of the nation, who care and protect human dignity. As they grow up by seeing the environment and their parents, they develop their own imaginary world. From there itself the problem arises. They grow on the learning’s of their elders, what elders used to teach them they will perform only that. They develop discrimination, comparison and deceitfulness among others if proper guidance was not given to them during their adolescence age. As general observation is that criminality peaks in adolescence and diminishes with age. All the above defines how criminology develops into a child’s brain.

Juvenile Justice Act, 2015 replaced Juvenile delinquency law, Juvenile Justice Act, 2000 and allow for a juvenile in conflict with law in the age group of 6-18 years involved in heinous offences to be tried as an adult in light of Nirbhaya case. This above case proves the criminology of today’s youth. A juvenile of 17 years and 6 months involved in a rape case and According to JJA, 2000. A juvenile is
entitled to Maximum Imprisonment of 3 years. The JJA, 2015, will consider any minor between the ages of 16 – 18 years as an adult only in case of commission of a heinous crime by him. But JJA, 2015 doesn’t reduce the age to 16 years of criminality in case of juveniles.

**Thesis**

Provisions Children in Conflict with law under the Juvenile Justice Act, 2015

1. The Juvenile Justice Act, 2015 classifies the term ‘child’ into two categories:
   a) Child in conflict with law
      - means a child who has committed an offence or found to have committed an offence but he or she is under the age of 18 years.
   b) Child in need of care and protection
      - who is found without any home or settled place. Basically a child found begging or a street child is known as the above.

2. Juvenile Justice Act, 2015 enacted rules to ensure justice to the children and their rehabilitation and reintegration to the society. The model rules of 2016 repealed the existing rules of 2007, some of these procedures include:
   - The Child should not be handcuffed.
   - The Child should not be sent to jail.
   - Parents or guardians must be informed about legal aid etc.
   - The Child must be provided with medical assistance.

3. Juvenile Justice Board will take a decision whether a juvenile between the age group of 16 to 18 years would try as an adult. If the board decides against, then he will be sent for rehabilitation.

4. The Juvenile Justice Act, 2015 will consider any minor between the ages of 16 to 18 years as an adult only if he commits any heinous offence.

5. In a case juvenile committed a serious crime and gets apprehended 21 years of age in that case then he will be tried as an adult and the imprisonment of three to seven years can be given.

6. The children’s court shall ensure that the child who has found to be in conflict with law is sent to a place of safety till he attains the age of 21 years and thereafter, the person shall be transferred to jail.

7. No Life imprisonment or death sentence shall be given to a juvenile.

**Claim of juvenility**

Juvenility means the quality or condition of being juvenile, especially of being immature. The concept of Juvenility which was based on the age of the child being below 16 was raised retrospectively to below 18 by the amendment act, 2006. The benefit is available to a person undergoing sentence if he was below 18 years of age on the date of occurrence. The above can also be claimed even if a matter is finally decided.

In case Kulai Ibrahim it was observed by the court that accused has the right to raise the question of juvenility at any point of time during the trial or even after the disposal of the case under Sec. 9 of Juvenile Justice Act, 2015.

In case of Satbir Singh supreme court again reiterated that for the purpose of determining whether accused is juvenile or not, the date of birth which is recorded in the school records shall be taken into consideration by Juvenile Justice Board.

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500 Juvenile Justice Act, 2015, Sec. 2 cl. 13.
From the above Supreme Court cases, juvenility in question is proved. In present times juvenility can also be proved through aadhaar card and also from the birth certificate.

Age Factor

Whether The Age Of Juvenile Should Be Reduced From 18 Years Or Not

In today’s era as of increasing technology, environmental changes, mentality and maturity of children are getting developed or increasing at an early stage. And to prove any crime done by a juvenile, court focus on the maturity level of the child. If a child is matured or capable or being committing such an offence, then he should be given punishment or Reformative form of punishment – a rehabilitative form of punishment which makes criminal a good citizen as much as possible.

Issues Regarding Reducing The Age Of Criminal Responsibility Of The Juveniles Between The Age Of 16-18 years Committing Heinous Crimes As Adults Will Not Be Fruitful And Productive Are Discussed Below:

India is a member of the United Nation Convention on the Rights of Children (UNCRC). But hereby, India by breaking the laws of the UNCRC, by amending the JJA, 2015 which says apprehension, detention, penalty or imprisonment and institutionalization of the child is the only way to reform the children in conflict with law. The UNCRC has clearly stated that all the children are deprived of their liberty and adults. The Convention on rights of children has clearly established that a child placed in a facility of children, does not mean that after he/she turns eighteen they will be moved to a facility of adults.

Juvenile Justice Act, 2015 has not taken into consideration Article 37(c) of UNCRC and this act describes the clear and distinct definition of adult and children and this act also clearly mention that the latter to be transferred to adult jail once the child turns 21 years of age.

By the above facts and laws we can say that, India indirectly by not following the laws of UNCRC and also by saying that children between the age group of 16-18 years will be treated as adults, if they commit any heinous offence.

Violation of Fundamental Rights of Children by JJA, 2015

A petition filed by activist Tahseen Poonawalla challenging the constitutional validity of Juvenile Justice Act, 2015 is arbitrary and in violation of the fundamental right of right to equality under Article 14 of the Constitution of India, 1949.

Although the age of criminality to 16 years doesn’t reduce by the Juvenile Board it is clearly said by the Board that any juvenile between the age group of 16-18 years commits heinous offence shall be tried and sentenced as adults.

Added to this Juvenile Justice Act, 2015 also goes against Article 15(3) and 20(1) of the Indian Constitution. Before describing further in Nirbhaya case and many other cases it is said by the Supreme Court that fundamental rights of a person can be denied, if he has committed such offences (especially rape) which are beyond or of such nature that person committing such offence should be held guilty, without taking into consideration their fundamental rights.

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504 Juvenile Justice Act, 2015 Sec. 1 cl. 4 para (i).
505 Juvenile Justice Act, 2015 Sec. 20 cl. 3.
506 Tahseen S. Poonawalla v. Union of India, 2108 6 SC 72.
Further Article 15(3) of the Indian Constitution states that nothing shall prevent the state from making special provision regarding women and children. United nation set some rules stating the prime importance while dealing with children in conflict with law. And not only the offence but also the circumstances lead to committing the offence should be taken into consideration. But the present JJA, 2015 only give importance to the type of crime committed and not the psychological aspect behind which the crime was committed.

Article 20(1) of the Indian Constitution states that a person cannot be subjected to a penalty greater than what would have been applicable to him. According to JJA, 2015, if a juvenile who has completed the age of 1 and still has a period of sentence to serve, then the juvenile must be sent to jail for the completion of his remaining period of a sentence based on the reports of the juvenile submitted to the board. So government by implementing the JJA, 2015 took a good step towards the juvenile crime as an increase in the number of crimes (crimes against women especially rape), by the juveniles in the age group of 16 to 18 years.

Form of Punishment
Whether Reformative Form of Punishment as a Method of Prevention of Crime by JJA, 2015 or;

The purpose behind making amendments and introducing JJA, 2015 is not only to lessen the crime committed by juveniles of the age group 16 to 18 years but also to make understand the juveniles the crimes committed by them and their duty towards the society. Several questions were raised and many debates were made during the implementation of JJA, 2015 regarding the reformatory form of punishment. As in the act, it is clearly defined by children’s court that we will send the child if found guilty of heinous crime to juvenile home at an initial stage and can further order a child to be shifted to adult jail when he turns 21 years old if he still has got time to serve and also on the basis of his report which describes his behavior in juvenile home or whichever the place of safety the juvenile is kept. The provision present in the JJA, 2015 shows that it had completely ignored the preamble of JJA, 2015 which states “the principles of restoration, rehabilitation, social-reintegration, care, protection and development of children, by adopting child friendly techniques or approach in the adjudication and in the best interest of the child”.

Whether Retributive Form of Punishment as a Method of Prevention of Crime by JJA, 2015
It was considered as retributive by many experts because it looks over the principles of restoration, rehabilitation and reintegration of juveniles. It also looks on points or basic requirements of juveniles like protection, development, treatment, adjudication and disposal of matters in the best interest of the children and contained a provision for punishing the children between the age group of 16 to 18 years as adults if they have committed heinous crimes (punishment of seven years) by children’s court.

Both the above methods are correct from their point of view. So we can say that there is both types of punishment is given under the JJA, 2105 i.e. reformatory and retributive form of punishment based on the circumstances of the case.

Juvenile Justice – Is it a Criminal Justice or Social Justice
The base of Juvenile Justice in most of the countries of the world the concept of
Juvenile Justice is considered to be that of criminal justice, but at the same time, the ministry or the department which is responsible for making laws and implementing them is the one from the Department of Social Justice.

Scientific Reason behind Juvenile Criminology

The behavioral changes occur in a juvenile during his adolescence period, during that period hormonal changes occur in juveniles, such as physical and sexual changes of maturity. These physical changes are accompanied by mental changes. Hereby, children in conflict with law have a crucial impact on their mindset if they are not treated equally.

Sometimes it is very difficult to explain whether the juvenile understands the consequences of his action or whether the juvenile has that much mental and physical capacity to commit such a heinous crime. Psychology and neuroscience fail to understand the ongoing development that goes on during adolescence phase of the child.

Social factors such as poverty and low education are also one of the reasons behind a juvenile commits offence. The one who lives in dysfunctional family settings or disadvantages family has more chances of getting involved in delinquent behavior.

In young adolescents, the reasoning capacity of the child is not such comprehensive that he is able to understand the basic interests of the people and how committing these crimes will affect those interests. Developing such understanding will require the development of cognitive skills and moral reasoning towards the best interest of the people.

One of the most important factors during the age of adolescence is that, what we teach to the child during that age he will perform that for his whole life, he will work accordingly to his teachings by his elders. According to psychology and neuroscience, it becomes very difficult for a child to leave those habits what he got during the age of his adolescence.

All the above are the factors which directly or indirectly affecting the juveniles/children/adolescents and government or the juvenile board took some strict steps towards juvenile by implementing JJA, 2015 is not illegal or violates the law.

Human Rights of Juvenile

Under the Constitution of India

- Right to free and compulsory education to all the children aged between 6 – 14 years of age – Article 21A.
- Right to be protected from any hazardous employment under the age of 14 years – Article 24.
- Right to be provided with the proper standard of living and Good nutrition – Article 47.
- Right to be protected from human trafficking and forced Labour – Article 39.

Under Indian Penal Code (IPC) and Criminal Procedure Code (CrPC)

- Nothing is an offence which is done by a child under 7 years of age – Section 82 of IPC.
- Nothing is an offence which is done by a child above 7 years of age and under 12 who has not attained the sufficient maturity of understanding the nature and consequences of his act – Section 83 of IPC.
- If a male minor who hasn’t yet attained the age of 16 and in case of a female minor who

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508 People: International Journal Of Social Sciences, 3(3), 1365-1383.
hasn’t attained the age of 18 if removed from their lawful guardians without their consent then that will amount to the offence of kidnap – Section 361 of IPC.

- The Jurisdiction in case of Juveniles lays down that – any offence which is punishable with death or imprisonment for life, which is committed by a person below the age of 16 years, may be tried by a court which is especially empowered under the children act or juvenile justice board or any other law for the time being in force – Section 27 of Cr.P.C.

- Section 437 of the Cr.P.C. lies down that a child in conflict with law can apply for an Anticipatory Bail. Justice Narayan Pishardi of Kerala High Court held that a child in conflict of law has all the rights to apply for anticipatory bail and there is no bar on this by Juvenile Justice Act. The Anticipatory Bail of a child in conflict with law is maintainable in the High Court or the Court of Sessions. 509

National Crime Record Bureau Reports Showing Increase in Crimes by Juveniles
‘Educated’ juveniles committed crime more than the ‘illiterate’ ones in 2017 as per the National Crime Record Bureau. This also includes the number of educated juvenile offenders, who have studied up to matriculation and higher secondary levels, commit more crimes according to the report. 510

Over 40,000 juveniles were caught across the country in 2017 for their alleged offences committed by them which include 1614 rape cases and 1456 other sexual assaults and all these crimes are committed by the juveniles between the age group of 16 to 18 years. In 2016 total 4244 was the number of juveniles who committed serious/heinous offences and in the year 2017 it increased to 6260 that is merely 32 per cent and this report was released in October, 2019. 511

On the other hand, the number of illiterate juveniles caught for criminal activities was reduced by 20 per cent as per the report. According to society, and news reporters most of the crimes are committed by the illiterate, but according to the report of the National Crime Report Bureau data, from 5412 illiterate juvenile delinquents in 2016, the number came down to 4324 in 2017, according to the data.

Conclusion
It is clearly written in the JJA, 2015 that if any juvenile between the age group of 16 to 18 years has been found committing or committed any heinous offence (especially rape) then those juveniles will be tried as an adult, and that is a good step taken by the government of India. But they should keep in mind the universal rule, ‘Let a hundred guilty be acquitted, but one innocent should not be convicted.’

Experts, jurists or board say that punishing juveniles as an adult will not be beneficial for the society. But government by implementing this law wants to create fear in mind is of children, to prevent them from committing the heinous crime. It does not mean from the above that this does not abide by the main aim of juvenile justice; it will abide reformation and re-integration technique. The act also says that before giving punishment to the juvenile between the age group of 16 to 18 years, we will understand the adolescent mind, their

509 Namrata Kondankovi, Juvenile justice system, blog.ipleaders.in.
maturity level and accordingly we will treat them.

The government should try to improve and eliminate the factors that have led the children to commit such an offence and provide the children who are already in the system, and provide with public awareness, and the interest of the public. So, people have a better understanding of the system and the rules thereby preventing their children from committing any kind of offences.
M.V. ELISABETH AND ITS TRAIL WHERE THE INTERNATIONAL BECOMES DOMESTIC

By Jagannath Chatterjee
From Amity Law School, Amity University, Kolkata

INTRODUCTION

Arrest of seagoing vessels is an issue which has a global evolution and has a quite unique significance. Arresting a Motor Vessel means the confinement of a ship by the due process of law in order to secure the oceans, it however, does not include the seizure of a ship after a judgment has been delivered. The Admiralty jurisdiction of the High Court would be considered to have been progressed up to at least the level of the Supreme Court of Judicature (Consolidation) Act, 1925, the last of the series of enactment in England on the subject prior to the year 1947 when India became independent. The Supreme Court of India took cognizance of the Arrest Convention, 1952 and held that such Convention itself has been enacted based on the felt necessities of the International trade and would therefore be applicable to India in order to enforce maritime claims against any foreign vessel. The Supreme Court of India in the famous case of M. V. Sea Success (Liverpool & London S. P & I Association Ltd. v/s. M. V. Sea Success)\(^{512}\) considerably widened the scope of Admiralty jurisdiction with the inclusion of the Arrest Convention 1999.

SCOPE AND OBJECTIVES

The study is primarily focused on understanding the nuances of International Law which have been accepted and have thus become a part of the domestic law.

This study is aimed to obtain an understanding the International Conventions and principles being made a part of the domestic legal jurisprudence and contributing to the development of the regime of admiralty law in India. Further, the interplay between the Constitutional scheme and the power of Courts to introduce international conventions into domestic jurisprudence is also an area of enquiry.

RESEARCH QUESTIONS

1. Whether the admiralty jurisdiction of local Courts for arrest of vessels extends to a foreign vessel where the claim lies in a foreign land?
2. Whether India is bound by international conventions on arrest of ships, in the absence of ratification, and to what extent?

RESEARCH METHODOLOGY

Doctrinal Research Methodology has been adopted. This method is the traditional method of research in the legal field. This method primarily deals mainly with the existing documents, data and authoritative materials on particular and specific matters. Doctrinal research is also based on secondary data such as conventional legal theories, laws, statutes and precedents.

HYPOTHESIS

I. Admiralty jurisdiction of local Courts for arrest of vessels extends to foreign vessels irrespective of where the claim has arisen, but such power extends to the territorial waters of India.

II. India is bound by the convention on the arrest of ship even without ratification of the same.

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\(^{512}\) JT 2003 ((9) SC 218
CHAPTERISATION

The presented study is a detailed research on the topic “MV ELISABETH AND ITS TRAIL - Where the International becomes Domestic”. The study is an analysis of the M.V. Elisabeth case and its trail laying down various doctrines and the power of Courts to adopt international Conventions. The research study has been presented with the chapterisation scheme. Each part of the study has a significant role in this paper. Hereunder a chapter-wise introduction of each chapter.

Chapter 1 – Introduction

Chapter 2 – MV Elisabeth and its dictum

Chapter 3 – The Trail – other decisions

Chapter 4 – International Conventions induted into the Domestic Law

Chapter 4.1 – International Conventions regarding arrest of ships.

Chapter 4.2 – Article 253 of the Constitution of India and the supremacy of Parliament in such matters.

Chapter 5 – Summary and Conclusion

Chapter 3

Maritime laws are considered to be one of the oldest branches of law. It can be traced to origin of Rhodean Sea Laws and the Rules of Oleron. When Britain conquered the world’s major sea power, the other common law countries had to rely on the jurisprudence as they evolved in the courts of England as was called the Court of the

Lord High Admiral or in today’s term the admiralty courts of adjudication.

The colonial courts were given powers similar to that of the admiralty courts of England through various statutes. India, even after independence continued to adhere to these statutes, oblivious of legal developments around the globe. However, the decision of the Indian Supreme Court in the M. V. Elizabeth case had raised several questions and also forced both the shipping community as well as the legislators to look into the plight of maritime law in India.

The advancement and improvement of Admiralty Law in India can be followed to the celebrated decision of the Supreme Court in the M. V. Elizabeth v. Harwan Investment and Trading. The vessel, MV Elizabeth had a place with Greek owner and was enrolled abroad. While carrying merchandise of the claimants, it disobeyed requests of the petitioners to remove the load cargo from India and carry them abroad. The claimants got the vessel arrested at the Vishakhapatnam Port in Andhra Pradesh by the decision of the High Court of Andhra Pradesh, on its arrival venture. The power of the Andhra Pradesh High Court to capture the vessel was not an issue in the case as the court, as per Thommen J.

The essential issues to be chosen by the courts were: (a) regardless of whether the admiralty jurisdiction could be practiced on a vessel conveying payload 'out of the nation' and (b) whether Indian courts could practice such power over a remote vessel in its waters. The Admiralty Courts Act, 1861, which was and still, at the end of the day relevant to India, confined admiralty
jurisdiction to activities against ships conveying payload into a nation.

Various prior choices by different high courts attested that office of the admiralty was a locale unmistakable from whatever other power which the high court had and that the high courts had no forces past those given by the Admiralty Court Act, 1861.

The court deciding on the basis of sections 2 and 3 of the 1890 rule reached the conclusion that the rule has just pronounced the Indian courts of inherent original unlimited civil jurisdiction as provincial courts of admiralty and elevated them to the position of the English High Court. There was no fusion of any English rule into Indian law or legal conferment of forces. The admiralty jurisdiction of the English High Court was extended throughout the years through different enactments. In this way, the court said that "it would have been sensible and sound to credit to the Indian High Courts a comparing development and extension of admiralty jurisdiction during the pre-independence period."

CHAPTER 4

This case concluded that the India courts have the admiralty jurisdiction to even arrest a foreign ship in the Indian waters.

The clarity in respect of the fact that the admiralty was a jurisdiction that knew no boundaries, Justice Thommen threw light on the fact that it required a much-needed backing by a statute. The contention that all high courts could arrest ships, it was imperative to know the claims in which admiralty courts would have an exclusive jurisdiction for adjudication. The claims are referred to as ‘maritime claims’. The Ship Arrest Convention, 1952 mainly deals with maritime claims. But in India, the legal framework does not have a definite legislation on it. The maritime claims laid down in the Common law and the many international conventions, by virtue them being an integral part of customary international law, would get inducted into Indian admiralty law, when the legislation is deficient on it.

The issue whether the breach of a contract in connection with the ship would invite an action in rem or not, it was considered that maritime claim is capable of attracting a maritime lien, in case of ordinary maritime claims the remedy available was an action in personam and not in rem. The Ship Arrest Convention of 1999 should be used more often whereas it being among those conventions which are sparingly used in Indian admiralty decisions.

The convention of 1999 states that maritime claims can be enforced without any exception by way of an in-rem action.

CONCLUSION

The Supreme court dictated that the principles of International Convention on Maritime Laws would be applicable in India.

Although the Brussel convention has not been adopted by legislation, the principles incorporated in the International Convention Relating to the Arrest of Seagoing Ships, Brussels (1952), are now a part of the common law of India and are, thus, applicable to the enforcement of maritime claims against foreign ships. If a foreign ship is in territorial waters of India and a maritime claim is made under the admiralty jurisdiction of High Court, it is irrelevant where cause of action arose or
defendant resides or carries on business or the nationality of the ship.

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SUSTAINABLE DEVELOPMENT FRAMEWORK FOR MINING SECTOR IN INDIA

By Jitesh Kadian
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INTRODUCTION:
India is mineral rich country so its development of mining sector is marvellous. With the development of Infrastructure and manufacturing the consumption of minerals became much. Due to the increase in exploration environmental disturbance is much wide. So we need binding essential and standardised approach so that there is no loss done to our natural resources e.g. air, soil, human beings so there we should have mining at low level. The mining sector is mixed activity with the economic reforms that we have to look after the environment and social problems. We should adopt the strategy so that we can have the social + economic + environmental development together lead into output of Sustainable Development. “This requires a robust framework based on an agreed set of principles, an understanding of the key challenges facing the sector at different levels and in different regions and the action needed to address these problems; a process for responding to these challenges for protecting the rights and interest of people involved, abilities to set priorities, ensure that action is taken at appropriate levels and an integrated set of institution and policy instrument to ensure standards of compliance as well as responsible voluntary actions”514. So to requires to measure the development we need the Sustainable Development Framework (SDF) in the development of mining sector.

BACKGROUND:
In the year 2005, a high level committee was made under guidance of Anwarul Hoda, member of Planning commission to look the National Mineral Policy for the environment management, to leaning on international direction for the sustainable development. The mentioned committee examined the influence of the effect of mineral advancement with the need to create standards in mining, best practices, what’s more, detailing principles which might be estimated dispassionately. “The Committee held that a portion of the moves confronting the Indian mining area to create in a supportable way is distinguish the suitable utilization of land inside a Land Planning system through a popularity based basic leadership process based on incorporated evaluation of natural, ecological, practical and social sway”515.
The High Level Committee likewise held that mining ought to add to monetary, social and social prosperity of indigenous host population and nearby networks by making partner enthusiasm for digging activities for the Project influenced Persons (PAP). The assessment done by the High-Level Committee depended upon the SDF outline laid down by the International Council of Metals and Mining (ICMM), International Union for Conservation of Nature and Natural Resources (IUCN). The principles of the both these were laid down in the domestic regulations of India. The mentioned SDF emphasised upon the 3 sectors of the mining – SME, Captive and Large stand alone sectors. After the due implementation in India they will be monitored by the regulatory authority. These suggestion of the High Level Committee were apted by the government. The National Mineral Policy 2008 laid

514 Sustainable development framework ch-7 (9)
515 ibid

www.supremoamicus.org
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down the obstructive effects of mining on the land, water, air etc. "The policy was framed in such a way that it focused upon the development as well as principles of conservation of natural resources contributing to the Sustainable Development"516.

**DEVELOPMENT OF SUSTAINABLE DEVELOPMENT FRAMEWORK:**
The committee was formed after due consultation of conditions with government. After the due confirmation with terms of draft of SDF it covers the following aspects of non-coal and non-fuel minerals (both major and minor minerals)

1. Factors and limitations affects the sustainable and traditional mining
2. Wide criteria past which mining may not be esteemed adequately maintainable and logically reasonable.
3. Fundamental measures should have been taken or worked to expand sustainability of mining operations considering as long as its can remember cycle bury alia.
   - Safeguarding the rights of person affected.
   - Guaranteeing the bad effects on the life of local populations.
   - Making new policies for social and economic development.
   - Conservation of minerals.
   - Minimising the residue generation and their treatment.
   - Reducing the negative impacts on the environment – on surface and water.
   - Guaranteeing negligible natural aggravation in plants and animals.
   - Advancing rebuilding and recovery exercises in order to utilize mined out land to serve the local populations.
4. Frameworks to devise quantifiable markers of manageable improvement and draft shapes of Supportable Mining Management System.
5. The administrative and different systems to guarantee that the foundational measures are set up and are working.
6. Consultative components with partner bunches directly from pre-mining stages (counting investigation) through the existence cycle and up to present conclusion organizes on guarantee that the partner bunches association and support in distinguishing and tending to the manageability issues, in building up the expansive shapes of the ways to deal with the practical administration of the considerable number of exercises including plan of the quantifiable pointers and checking systems for the reason.
7. Measures to guarantee industry acknowledgment and reception of the SDF including pointers for benchmarking the nature and degree of SDF reception.
8. Take off system for appropriation of the SDF at the grassroots dimension including the preparation, attention, leading workshops, handholding and so forth what's more, time allotments for the Roll-out.

**SDF – CONCEPT:**
The Consultant designated for the reason arranged the draft report and recommended a structure for supportable advancement in Indian Mineral Sector. The working definition for 'Reasonable Development' in the Mining Sector laid out in the draft report is that "Mining that is monetarily feasible; socially capable; ecologically, actually and experimentally solid; with a long haul perspective on advancement; utilizes mineral assets ideally; and guarantees supportable post-conclusion land employments. Additionally, one dependent on making long haul, authentic, commonly useful association between government,
networks and excavators, in light of respectability, participation and straightforwardness"\textsuperscript{517}. The report additionally elucidated a portion of the terms as offered underneath to all the more completely show and characterize the assignment close by. The SDF considers the greatest issues confronting the Sector with regards to existing laws and guidelines and characterizes a lot of rules that all things considered would advance the Sector towards supportable improvement. It joins administrative necessities, yet in addition goes past that and suggests practices and top tier angles to address the difficulties of manageable advancement completely. It gives a way to accomplish reasonable advancement supported by direction steps, quantifiable results and announcing and affirmation. The system approach is an adaptable one that permits accomplishment of manageable advancement goals without being excessively prescriptive and conventional. At any rate, the SDF gives direction to the mining organizations to improve execution on natural and social viewpoints. Be that as it may, over a long haul, it can likewise turn into the regular benchmark against which all mining activities might be assessed regarding their near execution on practical advancement terms. The SDF can be utilized by mining organizations to exhibit responsibility to feasible improvement, and might be submitted to controllers at the season of looking for freedom or restoration or expansion. It might likewise be utilized by controllers to assess the mining organization's duty to accomplishing natural and social objectives. Financial specialists and financers may utilize this to survey chance and could also utilize it to request better execution of the related mining activities. The draft report recommended that the way toward driving the SDF will incorporate a few initiatives. It is normal that the business could, over a period, drive the more extensive appropriation of the SDF as show of execution and responsibilities to feasible improvement objectives. Common Society and the nearby network can utilize the SDF to drive digging organizations and controllers for expanded responsibility and mining execution related revelations.

\textbf{SDF – IMPLEMENTATION :}

1. The key part of SDF draft report is that it requires mining organizations, the state government and Ministry of Mines to give an account of their SDF execution (as important) all the time. By revealing this report, the SDF opens the execution accomplished for examination by an entire scope of partners, in this manner expanding responsibility and exchange. Also, there is an arrangement of affirmation that empowers the SDF report to be screened by autonomous evaluators for its legitimacy and verifiable precision. Offices like Ministry of Mines, Indian Bureau of Mines, State Departments of Mines and Geology and the Ministry of Environment and Forests will utilize these examined report to evaluate applications for mining lease, extensions, ecological clearances and so forth. In this way, the key checking component is self-evaluation on SDF execution notwithstanding observing by administrative offices.

2. The draft report on the SDF provides for public participation in the following manner:

(1) \textit{At the Mining Company} – It require the prior permission from the starting of the mining to the closing of the mining. In case of big mining industry it should be done

\textsuperscript{517} ibid
with the due process of law to show the accountability, to transfer the information and to summarize their obligations.

(2) At District level – According to this every year at district level they should consult from the public on issues relating to the mining. In every 5 year the Regional Impact Assessment to be done with the view of public under consultation of the District Mineral Foundation.

(3) At State level – SDF reports of the mining companies will be entertained by the State SDF cells and further they will be transferred to the IBM and taken permission from MoEF for their regulation and screening.

3. For improved consistence and conveyance, the SDF report recommended for establishing instruments and channels of standard detailing and divulgence to people in general to empower more prominent examination at the neighborhood network level as additionally by common society on the loose.

One of the suggestion to this end is to frame joint checking/reviews of SDF duties by the mining organizations and the neighborhood networks;

Third gathering survey of execution through licensed offices, SDF reports to be considered amid IBM endorsement and observing of mining plans. Significantly expanding the limits of IBM to have the capacity to direct mining all the more viably and along the necessities of the SDF, Engage with the MoEF to consider SDF reports amid the natural freedom process just as continuous observing.

4. For execution of SDF, the draft report stressed that the SDF as an institutional framework is comprehended to be completely incorporated, however working at various dimensions through a course of action of delegate cells. The draft report recommended four dimensions with explicit capacities which are connected to various dimensions, and associate with existing substances. The four dimensions recommended in the draft report are:

- 1. National Level with Ministry of Mines.
- 3. At region level for the environmental and social impacts.
- 4. At the lease level, where each mine has to be made according to the principles of sustainable development performance.

5. The draft report on SDF has laid out in detail the job and capacities at various dimensions for execution of SDF. “It has explicitly suggested that the Ministry of Mines sets up a discrete National-level SDF cell in charge of driving strategy, looking for vital coordinated effort with MoEF specifically, guaranteeing assembly with related services/divisions, and drawing in with state governments to convey forward its command”. The draft report likewise perceived that a critical volume of work of this element, at this dimension will include the creation and the executives of complex databases to advise strategy, and serve coordination and assembly works. In this way, it suggested that the secretarial elements of the SDF will be housed inside IBM.

An IMS unit visualized to turn into an asset and storehouse of data regarding the matter will be set up explicitly to embrace SDF related information preparing and data stream. The draft report additionally prescribed that the National Level SDF Cell would include a group of specialists from the Mining Sector just as Environmental and Social Sectors (some deputed from
important Ministries) with involvement in getting ready economical improvement techniques. Outer specialists might be acquired, in view of explicit necessities as they develop. This cell will be in charge of growing further rules, principles and help steer the administrative changes that will definitely be required to completely operationalize the SDF.

The report likewise proposed that a state-level SDF Cell be built up in every mineral rich State with mining exercises. This Cell will set up the state-level mining zone chance based categorization plan, make proposals based on this arrangement to the Directorate of Mines and Geology or fitting state organization, characterize conditions and measures expected in various hazard class zones for mining, audit SDF execution report as a piece of the ability of the digging organizations for new rents, development or reestablishment and so forth. It can likewise be a piece of the implementation group that is regularly driven by IBM on digging and the SPCBs for natural compliances to give guidance on feasible advancement execution.

The report saw that at a territorial dimension, there is at present no organization assuming the imagined job. This is a vital appraisal/arranging job, and should be ordered through proper guideline; a meaning of its operational space viz. its capacity is likewise required. IBM may have a wide order to guarantee economical and logical mining yet does not have the broadness of skill to deal with natural and social difficulties. Then again the State Pollution Control Boards have the legitimate order to screen ecological execution. Be that as it may, they will require huge limit improvement to take on an administrative and consistence job at a territorial dimension.

**NEED FOR CAPACITY BUILDING IN MONITORING SDF:**

IBM has the order to assume a proactive job in limiting effects of mining on the earth by attempted ENVIRONMENTAL ASSESSMENT thinks about on a local premise. The Committee saw that however the methodology upheld under these standards has been incorporated with the order of IBM, it has so far not practiced this adequately aside from on incidental cases, and might not have adequate inside abilities to do so.

To advance and screen network improvement exercises in the mining regions is likewise one of the assign function of elements of IBM. Notwithstanding, the Committee saw that this sanction too stayed to be in any way notional in feeling of assemblage of data on the network advancement exercises completed by the mining organizations. By and by, no statutory instruments are accessible with IBM to screen the equivalent. There is no following component in IBM that can be utilized to survey the amount of the eminence gathered is utilized for neighborhood in mineral zones. The mining organizations call attention to that they pay their because of the State Governments as eminence and it is the States right and duty to guarantee that the neighborhood formative advantages from the eminence. It is seen that most advantage sharing plans are CSR exercises centered around the network improvement rather that conveying direct advantages to individuals who have lost their work to assets to the mining action.

IBM is likewise commanded to guarantee the logical mine conclusion by attempted satisfactory safeguarding and rehabilitative measures. There has been expanded administrative spotlight on conclusion,
given the considerable budgetary necessities to do it in a way that is logical and in accordance with the environmental norms. It is fundamental that the mining activities must plan, oversee and continuously chip away at a procedure for inevitable mine conclusion. This procedure must cover every applicable angle and effects of conclusion in a coordinated and multi-disciplinary way. In this way, the institutional structure required to control the component requires a multi-disciplinary methodology in which IBM is shy of the equivalent.

Mine Closure centers around a mind boggling aggregate of complex issues extending from natural, social, economic and development viewpoints. The Mine Closure might be by virtue of a few factors, the preeminent of which is the end of mining tasks because of fatigue of mineral store because of removal of minerals. Here, the necessity of rebuilding of land assumes the most huge job as a mind boggling mix of geography, geology, hydrology, soil, greenery. The past mining activities affected condition contrarily, all things considered, as far as gotten things started, contaminated water bodies, decimated backwoods, hazardous mine inclines, and so forth. The worldwide pattern towards Mine Closure arranging has seen a significant more extensive acknowledgment in various nations since eighties. In our nation, it has been presented in the year 2003.

The usage of the arrangements of the SDF will require new layers of data and detailing, checking, limit improvement and institutional component to arraign and rebuff the violators. The institutional course of action for a SDF isn't basic as it visualizes the association of a scope of controls. Along these lines, it is important to reinforce the current structure to manufacture abilities to comprehend, create procedure and screen the SDF at each dimension. The draft report on the SDF prescribed that it can rope in to turn into a piece of the authorization group that is ordinarily driven by Indian Bureau of Mines on mining and State Pollution Control Boards for natural consistence to give counsel on manageable improvement execution. The draft report on SDF proposed that for the Mining Sector to embrace this system, it will require reinforcing of capacities of the current controllers, organizers just as the mining organizations. The draft report suggested that the key organizations that would require their aptitude to be differentiated and limit altogether improved incorporates Indian Bureau of Mines to have the capacity to manage the mining organizations to get the SDF as a piece of the mining plan where conceivable, or as extra angles they would need to cover for endorsements. IBM itself ought to have the ability to audit the SD reports, responsibilities and assess these in the field.

The SDF report suggested that SDF selection will be effectively observed by the SDF Cell proposed to be set up in IBM, with the Ministry of Mines looking for normal updates from the IBM. The draft SDF report likewise proposed that the mining organizations, extensive or little, ought to have the capacity to comprehend the SDF and its suggestions for their mining investigation or tasks and to acquire demonstrable skill that will enable them to meet their SD obligations and duty.

The Committee feels that IBM as a specialized wing of the Central Government needs to assume extra liability of usage of SDF as an administrative part and furthermore as a teacher to the Mining Industry for accomplishing the ideal outcomes. In any case, the Committee saw
that IBM does not have the fundamental aptitude and capacities to bear the obligation as conceived in the draft SDF report. IBM would need to enlist people having skill in the field of mining condition and financial viewpoints with specific reference to mining ventures so as to screen the administrative and formative piece of the SDF, and, in this way, the Committee prescribes for acceptances of people of these orders in IBM. The Committee suggests that a "SDF Cell" involving people of the orders of mining condition and financial subjects might be shaped at Headquarters who might work under the general supervision of the Chief Controller of Mines.

**LIAISON OFFICE AT NEW DELHI:**

At New Delhi, March 1948, the Indian Bureau of Mines was made. Further the headquarters of IBM were shifted to Nagpur. Also a small liaison office of IBM was formed at New Delhi with administrative staff and Group ‘C’ employees. Their task is fixed to help the ministry in the administrative work. And also large no. of other institutions are established with each other.

They are assisted by also other ministries and office of IBM consist of following staff:
- Steno Grade I
- Senior Technical Assistant (Mining Eng.)
- Senior Hindi Translator
- UDC
- LDC
- Staff Car Driver
- Multi Task Force
- Adm. Officer
- Senior Legal Officer
- Regional controller of mines
- Regional Geologist
- Mineral Economist

**CONCLUSION:**

So our future of mining lies in the shade of the Sustainable Development Framework for the mining sector and simultaneously our other purpose will be justified accordingly.

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UNDERSTANDING THE INTERPRETATION OF ‘EVICITION’ BY THE RECENT ORDER OF SUPREME COURT BY CASE STUDY OF WILDLIFE FIRST & OTHERS V MINISTRY OF ENVIRONMENT & FOREST & OTHERS

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This paper intends to throw light on the concept of rights under the Forest Rights Act, the obligation the statute entails on the government in protection of such minorities and what happens if such rights are not redeemable? The question of the obligation of Supreme Court towards protection of vulnerable communities vis-à-vis environment conservation can be scrutinized by understanding the reason behind such petition filed by an NGO. The direction of Supreme Court for a state carried eviction in 22 states, which was recently stayed and whether any other direction such as checking the implementation of FRA could have been more effective. Another question would rise if eviction would have been carried out is, whose responsibility would it be to rehabilitate the displaced forest dwellers??

A specific legislation for the purpose of protecting forests and related rights was passed, known as the Schedule Tribe & Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 also called FRA. The Act passed with the object of undoing the “historic injustice” done to the forest dwellers. The Act recognizes the rights of the forest dwellers over forestland and resources, which they have been using as part of their livelihood.

A claim is made either for individual or community rights by the people/communities covered by the FRA. This is a plain reading of the Act, which is unambiguous on the grounds of eviction of rejected claimants therefore being unjust towards certain communities.

The preamble of the Act recognizes rights of forest dwellers and Scheduled tribes on forest/ community resources vested which includes sustainable utilization, conservation of biodiversity and maintaining balance of ecology as responsibilities attached with such vested rights. It addresses the colonial and historical injustices, while recognizing the traditional dwellers as integral to the survival and sustainability of the forest system by addressing the insecurities.

The Act defines important terminologies to clearly demarcate the ambit of jurisdiction. The consecutive provisions recognize these rights, permitted activities and responsibilities of those whose rights are recognized under the Act. The procedure and processes of vesting if such rights are clearly mentioned along with the duties towards forests whose rights are vested under this Act. Several recognized authorities under the Act are the Gram Sabha, to initiate the process, then subsequently Sub-divisional Level Committee, constituted by the state government, which shall consider and dispose such petitions, for any person aggrieved by the decision, the District Level Committee shall consider and dispose such petition, and for any person

518 The Schedule Tribe and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006, Preamble.
519 Supra § 2.
520 Supra § 3.
521 Supra § 4 & 5.
aggrieved by the decision, the State Level Monitoring Committee shall monitor the process of recognition and vesting.\textsuperscript{522} Although section 6 clearly indicates the process of recognition, the authorities involved and limitation periods, the vesting of rights has not been ensured in practicality and the nodal agency i.e., the Ministry of Tribal Affairs does not have any role to play in ensuring the implementation of this Act. Subsequent provisions of the Act discuss the offences and penalties, composition of authorities and powers of the central government. The Act does not in anyway discuss the aftermath of rejection of claims, and impliedly does not talk about the process of eviction to be carried out in case where claims are not maintainable.

The Indian judiciary has been proactive, seeing the recent trends of environmental activism, for the conservation and protection of ecological balance. These decisions are based on the impact of anthropogenic activities and for the welfare of environment and habitat of wildlife whether it is forest, river, mountain or marine ecosystems. The case that is the focal point of this paper has elements of conservation of forest areas but there is an underlying ‘injustice’ that will be discussed as we proceed. Before understanding the case, it is important to understand the concept of forest rights of scheduled tribes and other traditional forest dwellers.

Writ filed in the Supreme Court by Wildlife First NGO and some other civil societies collectively, to challenge the Constitutional validity of the Schedule Tribe & Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 also known as FRA and also the questions pertaining to the preservation, conservation and protection of forests in the context of the Act. The details regarding claims made under the FRA that were placed before the court by the petitioner in 2016 showed that of the 44 lakh claims filed before appropriate authorities in the different States, 20.5 lakh claims (46.5\%) were rejected. The order of 2016 went on to observe: “Obviously, a claim in the context of the above-mentioned Act is based on an assertion that a claimant has been in possession of a certain parcel of land located in the forest areas.”

The petitioners, Wildlife First & Others\textsuperscript{523} seek to challenge the FRA and sought the eviction of forest dwellers whose claims were rejected under the law. This meant that their contention was that the forest dwellers whose rights had been rejected, should not continue their dependence on forests for shelter, food or other resources. Which seems to be increasing the vulnerabilities of an already vulnerable and indigenous rural settlement, thus leaving them exposed to harsher social and economic problems such as homelessness, loss of income, lack of nutrition, starvation and illiteracy due to lack of resources.

Interestingly, in this case it appears as if a civil society institution, Wildlife First, an NGO was pitted against the state. But closer examination may reveals that it was, in fact, Wildlife First and the state together, that had joined forces against the most vulnerable communities in the country living in areas constitutionally protected from encroachment even by the state.

In a recent order passed by the Supreme Court, on February 2019, the court addressed the affidavit submitted for the

\textsuperscript{522} Supra § 6.

\textsuperscript{523} Wildlife First & Ors. v. MoEF & Ors MANU/SCOR/14380/2018

www.supremoamicus.org
eviction of rejected claimants. The following were the requirements put up by the court:

- Eviction ordered from the following twenty one states- Andhra Pradesh, Assam, Bihar, Chattisgarh, Goa, Gujarat, Himachal Pradesh, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Odisha, Rajasthan, Tamil Nadu, Telangana, Tripura, Uttarakhand, Uttar Pradesh & West Bengal
- Compliance report to be submitted by the respective Governments of the aforementioned States, on or before July 24th 2019, before the next hearing is conducted
- Bench directed Forest Survey of India for the satellite survey to determine encroachment positions

The SC order was passed on the basis that “If the claim is found to be not tenable by the competent authority, the result would be that the claimant is not entitled for the grant of any Patta or any other right under the Act but such a claimant is also either required to be evicted from that parcel of land or some other action is to be taken in accordance with law”. In other words, the claimant cannot contest the decision of the authority, said the court. With respect to action to be taken against those “unauthorisedly in possession of forest land”, the States were then asked by the Supreme Court to report on concrete measures taken to evict the Scheduled Tribes and Other Traditional Forest Dwellers from the forest. In the very next paragraph, which pertained to the State of Tamil Nadu, the order referred to action against those people whose claims had been rejected as “eviction of encroachers”.524

“The most obvious one has to do with the meanings attached to the rejection of claims. According to the 2014 report of the High-Level Committee on Socio-Economic, Health and Educational Status of Tribal Communities in India, constituted by the Government of India (Xaxa Committee), 60% of the forest area in the country is in tribal areas — protected by Article 19(5) and Schedules V and VI of the Constitution. With specific reference to claims under the FRA, reiterating the finding of several other studies that have documented the deep procedural flaws in processing claims, the Xaxa Committee observed that “claims are being rejected without assigning reasons, or based on wrong interpretation of the ‘OTFD’ definition and the ‘dependence’ clause, or simply for lack of evidence or ‘absence of GPS survey’ (lacunae which only require the claim to be referred back to the lower-level body), or because the land is wrongly considered as ‘not forest land’, or because only forest offence receipts are considered as adequate evidence. The rejections are not being communicated to the claimants, and their right to appeal is not being explained to them nor its exercise facilitated.” The mere rejection of claims by the state therefore does not add up to a finding of the crime of “encroachment”- the sheer volume of rejections should instead set alarm bells ringing in the court of procedural improprieties.”525

Legally speaking, any claim rejected can be challenged and the claimant cannot be evicted solely a particular reason. In fact, the apex court had passed a similar order on January 29, 2016, in the same case.526

524 https://www.thehindu.com/opinion/lead/without-land-or-recourse/article26344370.ece
525 https://www.bestcurrentaffairs.com/virginius-xaxa-committee-tribal-affairs/
526 Wildlife First & Ors. v. MoEF & Ors 2016 SC
asking “state governments to file affidavits detailing the number of claims rejected and why they have not been evicted within two weeks. This order was immediately followed by a clarification by the Union Ministry of Tribal Affairs (MoTA) for the implementation of FRA on February 5, 2016. In this clarification, the ministry had pointed towards the process to be followed after a claim is rejected and the need to put that data in court along with the data on just the number of rejected claims.”

There were no such affidavits filed, no concrete data was collected and in the subsequent hearing in 2019, there was no reference to previous court directions and the non-performance of State governments on the SC order.

“In order to place the complete information before the honourable court, it may be necessary to provide details of the process that is followed in case of rejection of claims, including communication of reason, opportunity of appeal, and cases where claims are being re-examined due to wrongful rejection,” the clarification said. The claimant has to be informed about the reasons for rejection, if the claim is rejected. Then, the claimant has 90 days to appeal against it. “No petition of the aggrieved person shall be disposed of, unless he has been given a reasonable opportunity to present anything in support of his claim,” the law says.

Despite having such mechanisms in place, since 2016, and no rejected claimants have taken legal recourse nor has there been any increase in the number of granted vested forest rights, according to available data. There has been no improvement in the process of Gram Sabha’s duty in creation of a consolidated data bank of granted rights. But Gram Sabha has majorly failed in providing the reason for rejection of claims, which not only curbs rights of the most marginalized communities, but also hinders the process of appeals, on the basis of which aggrieved persons may file to appellate authorities. Orders given by the court in 2016, to the state governments have also not been followed and the upcoming hearing for this case, it will be easier to see that concerned authorities, have been unprepared to address issues arising from FRA, have lacked in the proper implementation of the Act and not been efficient enough in information dissemination to the communities that ought to benefit from this legislation. This shows that there is gross misconduct in the part of empowered authorities starting from Gram Sabha all the way up to the nodal ministry in the performance of duties and responsibilities it holds towards the citizens.

Some questions that arise from studying this case are:

First question being: What is the role of the different governmental bodies involved and can it be considered as a lack of accountability of duties and responsibilities of various governmental bodies? Court mandated order given to Chief Secretaries of all states concerned for the eviction to be carried out with submission of compliance report before next hearing. But there was no information about the reasons of rejected claims, on the basis of which such eviction was to be carried out. MoTA had no role in implementation of FRA, which seems to be irrational. The Central and State
governments, along with the MoEF should have taken the initiative in ensuring implementation, institutional mechanisms that promote autonomy and restrain interference in self-governance, which should have been addressed by the Court, before ordering eviction.

Second question; Why didn’t the SC ensure the status of implementation of FRA, instead of passing order for eviction of rejected claimants? If the State Governments actually follow the order given by the SC, the immediate result will be the forced eviction of over one million people belonging to the Scheduled Tribes and other forest communities. Most of these areas marked for eviction fall under areas listed in the Schedule V and Schedule VI of the Constitution and there is no reference to the implications for governance in such areas and whether the SC has the authority to order evictions of Scheduled Tribes from Scheduled Areas. A democracy treats people as citizens and not subjects, where the written Constitution affirms the people who are sovereign, how can the supreme judicial body become a part of the dismantling of an entire constitutional apparatus that prescribes the non-derogable boundaries to ‘Adivasi’ homelands.

Third question; Why did the organizations challenge the FRA after 10-12 years of implementation? The organizations challenging the constitutional validity of a statute nearly after a decade may seem lazy but can also be opportunist. It may have been in the name of ‘forest conservation’ but it would also have been easier for diverting forestland for non-forest purposes to large industries.

Fourth question; Who shall be responsible to rehabilitate the evicted forest dwellers and what land can be diverted for such action? Whether it was the responsibility of the court, central ministries- MoEF or MoTA, State Governments, Gram Sabha, Gram Panchayat or any other.

Fourth question; What recourse could be availed by the rejected claimants after the order of SC? SC ordered eviction without review or appeal of rejection of claim and anyone who had information about such process; it would have been long drawn and continuous, if initiated. But most forest dwellers did not have proper means of recourse to file for appeal. In my opinion, court order stands to be in gross disregard of the rights of rejected claimants as any one could not contest the decision of the authority and no reason was given for such rejection.

Fifth and most important question; Is the SC not obligated to protect the rights of Scheduled Tribes and other vulnerable communities under the Constitution? Why is such obligatory responsibility missing in the SC ordered eviction? At a fundamental level, some special protections under the Constitution are guaranteed, especially with the current scenario of judicial activism. The Article 19 clause 5, in the Fundamental Rights chapter of the Constitution, specifically obligates the state to make laws “for the protection of the interests of any Scheduled Tribe” and deems it ‘vital’. The SC ordered the eviction in complete disregard of this core and express fundamental right (higher priority) protection to Adivasis which is different from legal protection, which protects them from a range of “state and non-state intrusions in Scheduled Areas as well as from the perennial threat of eviction from their homelands”. With respect to action to be taken against those “unauthorisedly in possession of forest land”, the States instead have been asked by the SC to report on concrete measures taken to evict the STs
and OTFDs from the forest. The order referred to action against those people whose claims had been rejected as “eviction of encroachers”.

In conclusion, as the conflict between protecting land rights of tribals and conservation of forests continues, there comes a requirement of a different approach. When the model of development has been that some people have to lose so that others can benefit. This is a disparity that needs to be resolved equitably through a joint efforts of the state as well as the central government, civil society action that does not deprave vulnerable communities and their well being and local participation in decision making for local communities in the actions of private or government actors. Concept of eviction is not mentioned in any of the legislations that are specific to forests and conservation. The FRA specifically does not address the issue of “eviction” in case of rejection of claims, then the SC can be said to be indulging in over-interpretation of law, which marginalizes the most vulnerable communities in India.

The inability and inefficiency in government action at all levels, starting from gram sabha, panchayat, state department, state governments, central ministries and the whole government system, including the judiciary, for proper implementation of the FRA has to be ensured. The understanding of “encroachment” is that those forest dwellers whose claims under the FRA have been rejected are encroachers, which is creating injustice towards such a vulnerable community. A major lacking among these communities is the information regarding provisions of FRA, which give the claimants the right to appeal against the rejection of their claims. This is not only putting them in a far worse situation than before, with the SC and the governments unable to protect their fundamental rights under the Constitution rather than ensuring proper implementation of existing laws, interpretation of law and equity between development, social and environmental concerns. There should also be a mechanism to ensure that state and local governments are working for the collective development, without infringing on the rights and claims of the most vulnerable among their citizens, to keep a check on corruption and proper regulation of non-forest activities in forest areas, especially industrial activities, which may be more harmful than beneficial in the long run.

There is a need of a more efficient governance, widespread awareness and information about the claims and rights of the citizens, easy legal recourse for vulnerable and underprivileged as well as a moral and ethical obligation towards the three pillars of sustainable development-Social, economic and environmental equity.
UNCERTAINTY IN APPLICATION OF DOCTRINE OF EJUSDEM GENERIS IN CIVIL SUITS WITH SPECIAL REFERENCE TO THE SARFAESI ACT

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ABSTRACT
The principle of ejusdem generis is a part of a wider principle – noscitur a sociis which is a principle used in the interpretation of statutes. This means that when two or more words have a similar meaning and can be put in the same category, they are understood in a correlated sense. This rule is used to reconcile the incongruous relationship between a specific word and a general word to which category the specific word belongs. The general word must be confined to the things of the same kind as those specified.

This rule has certain essentials that will be highlighted in this paper. It is also supported by many other rules such as the whole act rule. However, it is still unclear as to when it is applicable as it comes in conflict with other rules of interpretation such as analysing the legislative intent behind the provision and the context rule. In order to apply the rule for restricting the broad meaning, the word in question must accompany more than one species of same genus for application of the rule.

The study is purely doctrinal and seeks to analyse the effects of this doctrine through various national and international judgements and legislations with special reference to the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. It will be seen that the application of this rule can also lead to miscarriage of justice and deviation from the purpose of the statute thus impacting the framework of civil law.

KEYWORDS: Civil, Ejusdem Generis, Interpretation, Justice, Legislature, Noscitur a sociis, Socio-legal.

INTRODUCTION
Ejusdem Generis is a Latin term which means “of the same kind”. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. For example, if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, “vehicles” would not include airplanes, since the list was of land-based transportation. The term ‘Ejusdem Generis’ in other words means words of a similar class. The rule is that where particular words have a common characteristic (i.e. of a class) any general words that follow should be construed as referring generally to that class; no wider construction should be afforded.

The Supreme Court has laid down the following five essential elements of this rule528:

1. The statute contains an enumeration of specific words
2. The subjects of enumeration constitute a class or category
3. That class or category is not exhausted by the enumeration
4. The general terms follow the enumeration
5. There is no indication of a different legislative intent

There has been misuse and incorrect interpretation of this principle as many times courts do not ensure that there is a basic relation or genus running through the words in a statute. For example, in the case of *Rajasthan State Electricity Board v. Mohanlal and Ors.*,\(^{529}\) it was seen that the High Courts had erred in interpreting the terms “other authorities” under Article 12 of the Constitution. They held that this body fall under the ambit of the state and the mere fact that the board is a body corporate and is autonomous within certain limits or that it has to work out its own finances can hardly be accepted as a valid argument for holding that it does not fall within the ambit of the expression “slate” as defined in Art. 12 of the Constitution.

Dismissing the appeal, the Supreme Court held:

“In our opinion the High Court [in these cases] fell into an error in applying the principle of *Ejusdem Generis* when interpreting the expression 'other authorities' in Article 12 of the Constitution, as they overlooked the basic principle of interpretation that, to invoke the application of *Ejusdem Generis* rule, there must be a distinct genus or category running through the bodies already named.”

### ORIGIN OF THE DOCTRINE FROM *NOSCITUR A SOCIIS*

The principle of *ejusdem generis* is a part of a wider principle — *noscitur a sociis* which is a principle used in the interpretation of statutes.\(^{530}\) According to Maxwell,\(^{531}\) this means that when two or more words have a similar meaning and can be put in the same category, they are understood in a correlated sense. This rule is used to reconcile the incongruous relationship between a specific word and a general word to which category the specific word belongs.\(^{532}\) The general word must be confined to the things of the same kind as those specified.\(^{533}\)

This maxim contemplates that a statutory phrase is recognized by the words that surround it. This can clearly be inferred by the word ‘sociis’ which means ‘society.’ Thus, when general terms are juxtaposed with specific terms, they cannot be read in isolation and derive their colour from the context. This rule will apply unless it is seen that there is contrary legislative intent.

### DIFFERENCE BETWEEN *EJUSDEM GENERIS* AND *NOSCITUR A SOCIIS*

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<th>Basis</th>
<th>Ejusdem Generis</th>
<th>Noscitur a Sociis</th>
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<tr>
<td><strong>Meaning</strong></td>
<td>Of the same kind</td>
<td>It is known by the company it keeps</td>
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<tr>
<td><strong>Usage</strong></td>
<td>It is used by courts to decide the classification that falls under a particular definition.</td>
<td>It is used by the court to interpret legislations and statutes.</td>
</tr>
<tr>
<td><strong>Objective</strong></td>
<td>To interpret loosely</td>
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\(^{529}\) *Rajasthan State Electricity Board v. Mohanlal and Ors.*, AIR 1967 SC 1857.

\(^{530}\) *State of Bombay v. Hospital Mazdoor Sabha*, AIR 1960 SC 610.

\(^{531}\) Maxwell, *Interpretation of Statutes*, (12th Ed. 2010).

\(^{532}\) Assistant collector of central excise Guntur v. Ramdev tobacco company, AIR 1991 SC 506.

written statutes and legislations | words in a statute or legislation

**EJUSDEM GENERIS IN THE CONSTITUTION**

The constitution of India is the supreme law of the land and lays down the framework for enacting legislations regarding policies, laws, procedures, structures, directive principles, powers etc. of government authorities and also sets out the basic fundamental rights and duties of every individual. 534

The judiciary is the final arbiter and guardian of the constitution. Its duty is laid down in the constitution which mandates it to prevent any legislative or executive action from infringing any legal, constitutional or fundamental rights of individuals. 535 The courts are expected to be unbiased and must always based their decisions and judgements on sound principles of law, justice, equity and good conscience. An independent judiciary is a part of the basic structure of the constitution. 536

- Article 12

Before using the doctrine to interpret article 12, we must ascertain whether it can be used in the first place. As mentioned earlier, only when there is a distinct genus can this doctrine be put into play. Article 12 reads as:

“Unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India”

the genus constituted under this Article can be identified through the words “government,” “Parliament” of India,” “legislature of each State,” and “local authorities.” These words give meaning to the word “other authorities” which must be interpreted in relation to these phrases.

The doctrine of ejusdem generis is mainly applied under article 12. This article gives the definition of “state” i.e. what bodies or authorities come under the purview of the government and can be termed as organs of the state. This has led to a lot of debate and has been shaped by various interpretations by using the doctrine of Ejusdem Generis. The most problematic expression under Article 12 is “other authorities” as this expression is not defined in the Constitution. Thus, it is for the courts to interpret this term, and it is clear that the wider the term is interpreted, the wider the ambit of fundamental rights would be.

This latin phrase was actually first used by Justice VS Ayyar Rajmannar in the case of University of Madras v. Shanta Bai where he said that those bodies that carry out government functions will come under the term “state.” This means that any authority carrying out the sovereign functions of the state is a functionary of the state and is

With regard to the application of the doctrine of *ejusdem generis* to interpret the term “other authorities,” there are many


536 *Id.*

537 University of Madras v. Shanta Bai, AIR 1954 Mad. 67.

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opinions that have evolved through various case laws and doctrines.

The most followed belief is that the words preceding “other authorities” are all related to those that carry out functions of the central or state government. This means that any authority that carries out state functions comes within this phrase on application of this doctrine. In the case of Sukhdev Singh v. Bhagat Ram, the court held that corporations like ONGC, IFC and LIC are instrumentalities of the state as they have all been constituted by statutes and carry out state functions. Justice Matthew also stated that any action carried out by these instrumentalities would amount to state action. His concurring opinion led the courts to lay down a framework for deciding the same in the case of RD Shetty v. International Airport Authority,\(^\text{538}\) The test that was laid down has certain factors that must be considered:\(^\text{539}\):

1. Entire share capital must be owned and managed by the state.
2. The company must enjoy monopoly status.
3. The governmental department is transferred to the corporation.
4. Functional character must be governmental in nature.
5. There must be deep and pervasive state control.
6. The aims and objectives of the authority must be considered.
7. If the financial assistance of the state is so much as to meet almost entire expenditure of the corporation.

This test however is not exhaustive but is only inclusive.\(^\text{540}\)

In many cases, the court uses the above test to determine whether a body comes under article 12. The principle of ejusdem generis may also be used. For example, in the case of Zee Telefilms Ltd. v. Union of India,\(^\text{541}\) the word the Board of Control for Cricket in India (BCCI) was said not to come within the ambit of “state” because the words that preceded other authorities only included governmental bodies which constituted a genus. The BCCI did not fit in as a specie of that genus and was therefore excluded from being a part of the state as the government only regulates its functioning and exercises no control over it. A similar view was also taken in the case of Lt. Governor of Delhi v V.K. Sodhi,\(^\text{542}\) where the State Council of Education, Research and Training (SCERT) did not come within the ambit of the state as it was not a governmental authority.

Application of this doctrine leads to easy determination as to whether a body falls within the ambit of the state. For example, it was an issue of great debate that the judiciary must also be a part of the state. But on reading article 12 it can be seen that only government organs can be a part of the state. The judiciary being an independent organ does not fall under the umbrella of “government” that constitutes a distinct genus. This view was further upheld in the case of Naresh Shridhar Mirajkar V State of Maharashtra,\(^\text{543}\) where it was said that only administrative functions of the court

\(^{538}\) RD Shetty v. International Airport Authority, 1979 SCR (3)1014.

\(^{539}\) Ajay Hasia v. Khalid Mujib, AIR 1981 SC 487.


\(^{542}\) Lt. Governor of Delhi v V.K. Sodhi, AIR 2007 SC 2885.

can be called state action and not the judicial functions.

The courts have also pointed out that “instrumentalities of the state” is different from “state government” but they both come within the ambit of article 12.\textsuperscript{544} This kind of interpretation led to a contrary opinion that rejected the application of ejusdem generis. The courts have also held that even if a body passes all of the tests, it may not come within the purview of “state government.” This phrase ordinarily foes not encompass local or state authorities. In the case of State of Assam v. Barak Upatyaka,\textsuperscript{545} it was held that even though a cooperative society fulfils the criteria of “state,” it will not ensue that the state government must pay their salaries. This shows how the courts have applied the doctrine of ejusdem generis strictly and have come to the conclusion that since the preceding words do not have any relation to the body in question, it will not come under the state government.

However, the supreme court in the case of Indian Medical Association v. Union of India,\textsuperscript{546} where the rights of non-minority educational institutions to admit students of their choice was in issue, the court only departed from this doctrine because education plays a very important role in society and anybody carrying out this function can be considered as state action so that fundamental rights of individuals are protected. Thus, it can be said that the doctrine of ejusdem generis operates with some exceptions that are important for public order and morality.

Another important question that crops up is whether private institutions that pass some aspects of the above-mentioned tests will also fall under the bracket of the state. Since there is vast privatization and globalization, more and more companies are being set up. These companies have a high possibility of infringing fundamental rights of citizens and therefore, the courts have encouraged the hypothesis of widening the ambit of article 12 to include them as well.\textsuperscript{547} Through this upcoming school of thought we can see how the ideal of horizontal application of Fundamental rights is being popularized (Horizontal rights are applied against private actors while the vertical rights are right can be applied only against public authorities). However, In Tashi Delek Gaming Solutions Ltd. and Anr. v. State of Karnataka\textsuperscript{548} the Supreme Court held that the enlarged definition of “State” under Article 12 would not extend to Article 131 of the Constitution.

The national commission to review the working of the constitution in 2002 recommended the following addition to article 12, to make it clearer and unambiguous:

“Explanation: – In this Article, the expression “other authorities” shall include any person in relation to such as it functions which are of a public nature.”

However, this change was never made.

Therefore, the safest and surest way to understand this article is by using the principle of ejusdem generis so that this rights and duties that fall within the ambit

\textsuperscript{544} Srikant v. Vasantrao, AIR 2006 SC 918.
\textsuperscript{545} State of Assam v. Barak Upatyaka, AIR 2009 SC 2249.
\textsuperscript{546} Indian Medical Association v. Union of India, AIR 2011 SC 2365.
\textsuperscript{547} M.C. Mehta v. Sri Ram Fertilizers Ltd, 1987 SCR 819.
\textsuperscript{548} Tashi Delek Gaming Solutions Ltd. and Anr. v State of Karnataka, AIR 2005 Kant 261.
There can be easy misuse of this article by the courts in proceedings and to curb this, the basic jurisprudence on the application of this doctrine must be clearly understood and implemented.

- Article 31 A
This article relates to acquisition of estates and clause 2 consists of enumeration of words relation to the meaning of the term “estate.” Article 31 A (2)(i) reads as:

(2) The expression "estate", shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include-

(i) any jagir, inam or muafi or other similar grant and in the States of[6]Tamil Nadu] and Kerala, any jannam right;

Here, the words “jagir,” “inam,” “muafi” form a genus according to which the term “similar grant” must be understood. An example of this can be seen in the case before the Supreme Court,549 where the validity of the Rajasthan Land Reforms and Resumption of Jagirs Act, 1952550 was impugned. It was contended that land holders were not jagirdars. The court agreed with his contention however, they did not base this conclusion on the ground put forward that the word 'Jagir' in Article 31-A of the Constitution551 should be read Ejusdem Generis with 'other similar grants', because, the true scope of the rule of Ejusdem Generis is that words of a general nature following specific and particular words should be limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow.

EJUSDEM GENERIS IN CIVIL LAWS
The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, also known as the SARFAESI Act, is an Act that was made to allow banks and financial institutions to action properties of defaulters to recover loans.552 In order to do this, Asset Reconstruction Companies (ARC) are set up. Section 5(4) of the Act states that if on the date of acquisition of the financial asset, any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the financial institution, the same shall not be discontinued or affected by reason of the acquisition of the financial asset by the ARC. The expression “other proceedings of whatsoever nature” used in section 5(4) must be read ejusdem generis with the words preceding it i.e. “suit” and “appeal.” If this is not followed, the entire provision would go against the spirit of the SARFAESI Act. The act was made so as to cater to actions that arose that are civil in nature. This section is a usual provision found in most laws on continuation of legal proceedings. They must be related to the

550 Rajasthan Land Reforms and Resumption of Jagirs Act, 1952.
551 Constitution of India, 1949, Art. 31-A.
financial assets and must not have anything
to do with offences of any kind committed
by the transferor.  

Furthermore, the SARFAESI Act is a Civil
Act and caters only to those cases that are
civil in nature. Therefore, all questions and
cause of actions arising from the SARFAESI Act will be heard as civil
proceedings. "Civil proceedings may be
defined as judicial process to enforce a civil
right and includes any remedy employed to
vindicate that right."  

It is a process for the
recovery of an individual right or redress of
individual wrong and is opposed to criminal
proceedings.  

According to Black's Law
Dictionary, the term "proceedings" may
be used synonymously with action or suit to
describe the entire course of an action at law
or suit in enquiry from the issuance of the
writ or filing of the complaint until the entry
of a final judgment. The proceedings of a
suit embrace all matters that occur in its
progress judicially.

The term “suit” is also widely debated
upon, the question with relation to this is,
whether a suit can mean civil and criminal
proceedings or only civil proceedings. The
two views are considered below:

The first view suggests that the word 'suit'
is capable of having a very wide
connotation which may include any legal
proceedings concerned by one person
against another in order to enforce a civil
right.  

In its narrower sense, a suit means
a civil proceeding which is initiated by
presenting a plaint in the court and in its
wider sense embraces within it exhaustively
all proceedings of civil nature, which as
noticed above, means all proceedings that
relate to private rights and remedies given
to individuals or corporations as members
of community and not those that are public
and relate to Government for the purpose
either of preventing the commission of
crime or for fixing the guilt of a crime
already committed and punishing the
offender, properly discussed as criminal
proceedings. 

As stated in the case of Amar Chandra
Chakraborty v. The Collector of Excise, Government of Tripura and Ors., the
expression “other legal proceedings” must
be read ejusdem generi with the word
suit. The usage of the expression “suit” in
its wider sense means all proceedings that
are civil in nature only. Using the principle
ejusdem generi we can prove this as the
provision was formed to cater to civil
proceedings and only relates to remedies
given to individuals or corporations and not
for the prevention of a crime or punishing
an offender etc. which are all discussed as
criminal proceedings. 

Another factor that must be considered is
basic structure and aim of the statute in
question. In Kochadai Naidu v. Nagaswami
Naidu where the court was considering
the petition for a transfer of a criminal
proceeding to a civil court, the court stated
that the meaning of the word ‘Proceeding’
would depend upon the meaning governed
by the statute thus, since the SARFAESI act

553 Taxmann, Guide to SARFAESI Act 2002 &
Recov ery of Debts and Bankruptcy Act 1993, (Gen.
Ed. 2016).

554 Brijlal Suri v. State of Uttar Pradesh, AIR 1958
All 621.

555 Bradlough v. Clarke, 52 LJ AB 505.


557 Hayatkhwan v. Mangilal, AIR 1971 MP 140.

558 GSL (India) Limited v. Bayer ABS Limited.,
(2000)1 GLR 651.

559 Id.

560 Amar Chandra Chakraborty v. The Collector of
Excise, Government of Tripura and Ors., AIR 1972
SC 1863.

Mad. 247.
is a Civil statute, the word would be understood to be limited to civil proceedings only and not criminal proceedings.

There is an easy mechanism to determine whether the rule of *ejusdem generis* applies in a particular case. We must always look at the prefix of the sentence and not the suffix. It is the prefix that limits the ambit of the expression. A series of examples can be given in this regard:

In an American case, a tax provision that advantaged "income resulting from exploration, discovery, or prospection" was held not to apply to income derived from patented cameras and pharmaceuticals that the taxpayers had "discovered." "Discovery," is the prefix and was used as a conjunction with "exploration" and "prospecting". Similarly, the Court inferred that "defalcation" in a bankruptcy code provision required the element of intentional wrongdoing based on its placement in the phrase "fraud, defalcation, embezzlement or larceny." Because "fraud," "embezzlement," and "larceny" act as a prefix and require intentional wrongdoing, "defalcation" presumably is similarly intended. It is also opined that the term “whatsoever nature” cannot refer to legal action that includes criminal as well as civil proceedings. This cannot be allowed as the words of any statutory provision must first be read in the context provided by the statute as a whole. In the case of *Metropolitan Gas Co. v. Federated Gas Employees' Industrial Union*, it was stated that,

"If, when so read, the meaning of the section is literally clear and unambiguous, nothing remains but to give effect to the unqualified words."

The second view suggests that this doctrine does not show a distinction between civil proceedings and criminal proceedings and embraces all actions under the law. Thus, the word “proceedings” is a very general one and it is not limited to proceedings other than the criminal proceedings and civil proceedings other than suit.

The rule of *ejusdem generis* was explained in the case of *State of Bombay v. Hind Mazdoor Sabha*, Gajendragadk Qar, J., speaking for the court said –

"The maxim is only an illustration or specific application of the broader maxim 'noscitur a sociis.' It must be borne in mind that noscitur a sociis is merely a rule of construction and it cannot prevail in cases where it is clear that the wider words have been deliberately used in order to make the scope of the defined, word correspondingly wider. It is only where the intention of the Legislature in associating wider words with words of narrower significance is doubtful or otherwise not clear, that the present

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564 Bullock v. Bank Champaign, 569 U.S.
566 Metropolitan Gas Co. v. Federated Gas Employees' Industrial Union, 1925 HCA 5.
rule of construction can be usefully applied.”

In order to apply the rule for restricting the broad meaning, the words “other legal proceedings” must accompany more than one species of same genus for application of the rule. The enumerated words before the general one must constitute a category or a genus or a family of which there must be a number of species or members. If this is not followed, then the expression of *ejusdem generis* cannot be invoked.

In the Supreme Court case of *Western India Theatres Ltd. v. Municipal Corporation of the City of Poona*, the respondent would levy tax amounting to rupees 2 per day as a license fee under Section 59 (1) (x) District Municipal Act, 1901, which provides that the municipality could levy any other tax to the nature and object of which the approval of the Governor shall have been obtained’ of the Bombay on the appellants who were lessees of the cinema hall. This was contended to be unconstitutional. Although the principle of *Ejusdem Generis* cannot be invoked in this case, for items (i) to (x) do not, belong to the same genus, they do indicate that the kind and nature of tax which the municipalities are authorized to impose. Similarly, the words other legal proceedings do not belong to the same genus – civil proceedings.

British jurists and lords also shared the same opinion. For example, Lord Thankerton did not approve of the usage of the *ejusdem generis* rule. He stated that:

“There is no room for the application of the principle of *ejusdem generis* in the absence of any mention of a genus, since the mention of a single species - for example, water rates - does not constitute a genus by itself.”

In a case before the Supreme Court of India, through the Fruit Products Order, 1955, issued under Section 3 of the Essential Commodities Act, 1955, it was made obligatory that the peonage of fruit juice in fruit syrup should be twenty-five. The appellant argued that the order did not apply to his product, *Rooh Afza* even though it contained fruit juices because clause 2 (d) (v) of the Order includes squashes, crushes, cordials, barley water, barrelled juice and ready-to-serve beverages or any other beverages containing fruit juices or fruit pulp and that the expression any other beverages containing fruit juices or fruit pulp should be construed *Ejusdem Generis*. The Supreme Court rejected the contention and held that the rule had no application here because the things mentioned before the general expression any other beverages containing fruit juices or fruit pulp did not fall under a determinable genus.

Another case of a similar kind is the case of *Jagdish Chandra Gupta v. Kajaria Traders (India) Ltd.*, interpretation of the words

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572 Western India Theatres Ltd. v. Municipal Corporation of the City of Poona, AIR 1959 SC 586.
573 District Municipal Act, 1901, Sec. 59 Cl. 1 Sub Cl. 11.
575 Hamdard Dawakhana v. Union of India, AIR 1960 SC 554.
576 Fruit Products Order, 1955, Sec. 2 Cl. 4 Sub Cl. 5.
577 Essential Commodities Act, 1955, Sec. 69.
“or other proceeding” in the phrase ‘a claim of set off or other proceeding to enforce a right arising from contract’ appearing in Section 69 of the Partnership Act, 1932 was involved. The Supreme Court did not apply the principle of *Ejusdem Generis* because the preceding words a claim of set off did not constitute a genus. It was also observed that interpretation *ejusdem generis* or *noscitur a sociis* need not always be made when words showing particular classes are followed by general words. Before the general words can be interpreted, there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted.

In the Old English case of *Evans v. Cross* the words ‘other devices’ in Section 48 (9) of the Road Traffic Act, 1930 which defined a ‘traffic sign’ to include ‘all signals, warning sign posts, direction posts, signs, or other devices’ had to be interpreted. Applying the rule of *Ejusdem Generis* the court held that a painted white line on a road could not be called a traffic sign because a painted line on the road is not a device.

**FACTORS TO BE CONSIDERED WHILE INTERPRETING THIS PHRASE**

1. **Intent of the legislature**
   The true legislative intent must be retained and not misinterpreted.\(^{581}\) It is said that a statute is best interpreted when we know why it was enacted. It must be read, first as a whole, and then section by section, clause by clause, phrase by phrase and word by word. When this is done, the context of the provision clears all ambiguity.\(^{582}\)

2. **Whole act rule**
   Another way of interpreting the term “whatever nature” would be by using the whole act rule which a tool for the interpretation of statutes. It states that the term or phrase in question should be interpreted in a consistent manner if used multiple times in a statute. They are drafted in a way that is “internally consistent in its use of language and in the way its provisions work together”.

   The entire act is based on civil proceedings only and if criminal proceedings are allowed, this would render many provisions in the act as superfluous. It is also observed that the context of the other words give meaning to the word in question. In a British case,\(^{583}\) a ring at a racecourse was held not to fall within the terms “house, office, room or other place” because the list of words indicated that “other place” should be construed as an indoor place.

3. **Surplusage must be avoided**
   A construction which renders any expression of legislature as mere surplusage must also be avoided.\(^{584}\) If one expression is exhaustive of the meaning falling in its broader sense, there will not be any requirement of another expression to widen or limit the scope of the first expression and the latter expression would be mere surplusage.\(^{585}\) A statute should be construed so that all its provisions are in consonance with each other, so that no part will be

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\(^{580}\) Road Traffic Act, 1930. Sec. 48 Cl. 9.

\(^{581}\) SV. RM. AR. Ramanathan Chettiar v. Murugappa Chettiar And Anr., AIR 1942 Mad. 390.

\(^{582}\) Consortium Self Financing v. State of Tamil Nadu, INTNHC 2130.

\(^{583}\) *Powell v Kempton*, AC 143.

\(^{584}\) *Montclair v. Ramsdell*, 107 U.S. 147, 152.

inoperative or superfluous or void. For example, the Securities Act of 1933 defines the term “prospectus” as “any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security.” If the term “communication” was interpreted to include any type of written communication, the words “notice, circular, advertisement, letter” would serve no independent purpose in the statute. However, if “communication” were interpreted to include oral statements made through radio or television, then all the words in this section of the statute would contribute something to its meaning, and none would consider “surplusage.”

Similarly, if the term “whatsoever nature” were interpreted to include criminal proceedings, then the entire Act would be superfluous as it was constituted only for civil proceedings.

It was also stated in the case of Man Singh Tusaria vs. J.M. Financial Asset Reconstruction Co. Pvt. Ltd. that Section 5(4) was framed to validate the lawful rights that banks possess, and these rights cannot be taken away or altered when the assignment deed is signed. This is a civil proceeding whereas the proceedings under section 138 of the negotiable instruments act is criminal in nature. This is supported by the case of Port Rico Railway, Light & Power Co. v. Mor: there was a provision of the Federal Criminal Code which mandates restitution for the full amount of the victim's losses, which are defined to include five specific types of loss (e.g., medical costs, lost income) and "any other losses suffered by the victim as a proximate result of the offense." Thus, it was said that When several words are followed by another word which is applicable as much to the first and other words as the last, the natural construction of the language demands that the word be read as applicable to all.

CONCLUSION
The doctrine of Ejusdem Generis is only part of a wider principle of construction, namely, that, where reasonably possible, some significance and meaning should be attributed to each and every word and phrase in a written document. That being the object of the doctrine, it is difficult to see what difference it can make whether the word 'other' is or is not used, provided and this is essential that the examples which have been given are attributed to a clearly ascertainable genus.

From the above study, it can be noticed that this rule of interpretation is very flexible which makes it less of a rule. There is no set guideline or pattern of applicability and differs from statute to statute. The rule of ejusdem generis was constructed to help courts interpret ambiguous provisions in statutes. But instead, it is being used as per the discretion of the judges. Although this doctrine is subjective in nature, a framework must be devised and must be used in all cases to set clear precedents and avoid miscarriage of justice.

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ASSESSING INDIAN SPACE LAW IN INTERNATIONAL CONTEXT

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Introduction

India’s relationship with space dates back to the Vedic age. Ancient Indian’s interest in astronomy was an extension of their religious beliefs. In modern times, Indian’s tryst with space began in the early 1960s when the first rocket was launched under the guidance of Dr Vikram Sarabhai. Since then, the country’s advancement in the space sector has put it on the path towards becoming a space superpower. ISRO is the crown jewel of India’s space program, its success stories revolve around its ability to develop its own satellites, launching systems and ground control technology to put Indian and foreign satellites into space on a commercial basis. Moreover, the Indian Space Research Organisation does it at a fraction of the cost of its competitors, making it a perfect fit for a developing country like India. Owing to the success stories of the ISRO, one might assume that India would soon surpass other nations in the bid for space supremacy, however, this is far from the truth. India still seems to be a step behind its competitors. The reason for this predicament is the lack of a legislative framework for the space sector in the country. Today, all major nations have developed comprehensive domestic space laws. Such legislations provide greater clarity to the relationship between the private sector and the public sector, govern the launch and operation of spacecrafts, regulate the design and manufacturing of space technology and govern space exploration and research. Such nations are able to successfully commercialise their resources and are able to safeguard themselves from the loopholes in international space law.

This article will highlight briefly recent developments in India’s space program, assess the role of the private entities in the space sector, illustrate the fields of the Space sector, summarise the international legal framework governing space before exploring the existing legislations relating to space activities in India.

Development of space sector in India

Ancient Indians’ interest in astronomy was an extension of their religious and social beliefs. There is extensive information related to astronomy in the Vedic texts, Jain literature and the Siddhantas. In India, the study of space as a science was pursued in the form of astrology and astronomy as early as 3000 BC. Principles like gravity and the shape of earth were propounded by Ancient Indian Scientists long before the western world.

In the modern times, India’s tryst with space began in 1960s. Dr. Vikram Sarabhai, the Founding Director of Physical Research Laboratory, presented a paper to the government outlining the need to harness the country’s space technology to address India’s developmental challenges. Subsequently, the central government

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591 Mehmood Pracha, Indian space law and policy a private sector perspective, Workshop on Capacity Building in Space Law, 2002.
592 Id. at 1.
started investing in Space science and technologies. By the end of the decade the Thumba Equatorial Rocket Launching Station was set up and a US-supplied rocket, carrying a French payload was successfully launched into orbit. Later, in 1969 the Indian Space Research Organisation (ISRO) was set up.\textsuperscript{593}

It is interesting to note that the space sector administrative model is similar to that used for atomic energy. However, unlike the atomic energy sector, the space sector does not have an established legislative framework. In the absence of a specific law the ISRO has been guided by a set of Mission and Vision statements\textsuperscript{594} that declare the use of space technology for societal and national development needs and not for strategic or security objectives. This however has changed in the recent years as space activities have expanded to include defence applications under the purview of the Ministry of Defence and a new range of civilian commercial applications driven by startups in various areas.\textsuperscript{595}

India’s space programme has grown exponentially. Its achievements include the design and development of a series of launch vehicles, satellites and related technologies for earth observation, telecommunication and broadband, navigation, meteorology and space science; applications for societal development; R & D in space sciences; and most recently, planetary exploration.

ISRO, in February 2017 launched 104 satellites from single payload on a commercial basis. It also launched a lunar orbiter in 2008, successfully carried out an Anti Satellite weapon’s test and plans to launch the first state-of-the-art agile Earth observation satellite later this year. Most notably, ISRO put an orbiter around Mars on its very first attempt.

Use of Indian space sector for national developmental needs

ISRO’s Mission and Vision statements cover both the societal objectives of the country’s space programme and the thrust areas that have evolved periodically over time. ISRO’s first major project, the Satellite Instructional Television Experiment (SITE), was undertaken in 1975-76 by leasing an US satellite for one year and using it for educational outreach to 2,400 villages covering five million people.\textsuperscript{596} This experiment demonstrated the potential of satellite technology as an effective mass communication tool.

The SITE experiment paved the way for effective satellite communication in the country. The Indian National Satellite system and the GSAT serves as the backbone for the country’s communication, broadcasting and broadband infrastructure. Today, 200 transponders on Indian satellites provide services in the fields of telecommunication, tele-medicine, tele-education, TV, broadband, radio,
disaster management, and search & rescue missions.\textsuperscript{597}

A second area of focus of the ISRO is Earth observation and using space-based imagery for various areas, ranging from weather forecasting, disaster management, and national resource mapping and planning. It provides wide-field and multispectral high-resolution visual data for land, ocean and atmospheric observations. These resources have expanded the scope of application of Geospatial Information Systems (GIS).\textsuperscript{598}

A more recent area of focus of the ISRO is satellite-aided navigation. GAGAN is a joint project between ISRO and the Airports Authority of India. GPS Aided Geo Augmented Navigation or GAGAN augments the GPS coverage of the region, improving the accuracy and integrity, mainly for civil aviation applications and better air traffic management over Indian airspace.\textsuperscript{599} ISRO has also started to undertake more ambitious exploration projects, most notable of which have been the Chandrayaan and the Mangalyaan mission. A manned space mission named Gaganyaan is also planned for its first test flight in 2021. These missions are not only technology demonstration missions but also meant to expand the frontiers of human knowledge in atmospheric and space sciences.

Much of these missions are dependent on mastering launch vehicle technology. ISRO has developed and refined the Polar SLV as its workhorse for placing satellites in low earth orbits. With the growth of the small satellite sector globally, PSLV is a preferred launch vehicle on account of its competitive cost and reliability.

As a responsible nuclear powered state India’s interest in using its space capabilities for defence and security has been growing. While some of the earlier remote sensing satellites acquired high-resolution imagery for defence forces, there was growing interest in having dedicated defence satellites for secure communications as well as other potential military applications.

As defence services have begun to call for increased space-based assets to assist in surveillance, communications, navigation and intelligence, the natural corollary is ensuring protection and resilience of these space-based assets, especially in the context of escalating tensions. Some nations are also actively pursuing counter-space capabilities such as ASAT i.e. anti satellite missiles and have created a integrated High command for space which could deceive, disrupt or degrade an adversary’s space capabilities. India has also successfully carried out a kinetic kill ASAT test and set up of a tri-service Defence Space Agency to assess space-based threats and make strategies for protecting Indian interests and assets in space.\textsuperscript{600}

Privatisation of Space sector

The private sector race into space has been going on for quite some time now, with

\textsuperscript{597}Id at 5.
\textsuperscript{598}Earth Observation Satellites, Department of Space, ISRO, Government of India.
\textsuperscript{599}Satellite Navigation, Department of Space, ISRO, Government of India.

\textsuperscript{600}Kai Schultz, NASA Says Debris From India’s Anti satellite Test Puts Space Station at Risk, NY TIMES, April 04, 2019 at 12.
Elon Musk’s Space X pioneering reusable launch technology, Richard Branson’s vision of putting civilians and tourists into space and even Bangalore based Team Indus recently taking up the Google challenge of putting a rover on the moon.\footnote{Akshar Nath, Space Law in India, LEGAL SERVICES INDIA (Mar, 30, 2020)}

As technology increasingly enables and empowers private companies to provide space related services on a commercial basis, more and more private entities are getting in the sector. While it is telecommunications and geo-mapping services today, tomorrow, it could be far more exotic activities, that were once the exclusive domain of science fiction.

Today, the space industry is valued at US$350 billion and with a annual growth rate of 5.6 percent, it is expected to surpass the US$500 billion mark by 2025. Despite ISRO’s impressive technical capabilities and recent success, India’s share is estimated at US$7 billion, merely two percent of the global market.\footnote{Id. at 5.}

India’s space market has been largely been regulated, scrutinised and funded by the government of India and is under the direct control of the Prime Minister’s Office. This extreme control of India’s space market has been detrimental to its growth. Even through the ISRO has made huge strides in space technology, India still lags behind its competitors due to the lack of involvement of private entities in the space sector. Countries like U.S., Russia, China and France have successfully privatised their space market and integrated public and private entities thereby yielding exponential returns. This is due to a strong legal framework regarding the space activities in these countries. For example the U.S. Commercial Space Launch Competitiveness Act of 2015 allows the citizens of the USA to “engage in the commercial exploration and exploitation of space resources”. This law, among others, have enabled the likes of Elon Musk’s Space X and Jeff Bezos’ Blue Origin to take the driving seat in space technology. On the other hand, Indian Indian space market is still in a transition phases from being a controlled sector to an open sector.

The development of Antrix Corporation, the commercial arm of ISRO and the launching of 104 foreign satellites on a commercial basis gives evidence that the country is moving in the right direction. India is ushering in an era of privatization and commercialization of space activities. It is trying to monologise on its impressive capabilities to build satellites and offer launch services from indigenously designed and tested workhorse of ISRO, the Polar Satellite Launching Vehicle.

ISRO/Antrix through its GAGAN programme is trying to get into the navigation market dominated by Google Maps, through India is still a relative beginner in this field it has great potential to expand. However, with HD services and 5G on the rise, ISRO/Antrix will have to depend on leasing foreign transponders, until India’s private sector comes in. Moreover, recent developments in artificial intelligence and big data analytics has led to the emergence of vast new range of space sector activities driving the space sector to a more business and services-oriented approach using end-to-end efficiency concepts. Various new space entrepreneurship have emerged in India with almost two dozen startups in areas

such as crop insurance, infrastructure monitoring, watershed development, flood monitoring and forecasting, forest fires and asset mapping. However they’re yet to take off due to unclear regulations and the outdated vendor-supplier model.\(^{603}\)

A suitable policy environment is required to manage these activities and ensure the overall growth of the space sector. The draft Space Activities Bill introduced in 2017 has lapsed, giving the legislature the opportunity to focus on a new bill that will be welcomed by the private sector, both the larger players and startups alike. Recently India has taken baby steps towards better domestic laws and opening up the space sector to private entities. In 2018 ISRO, under its technology transfer policy, outsourced satellite manufacturing to a private sector enterprise for the first time. This was done to promote the ‘Make in India’ campaign, ISRO has also signed a contract with an Indian start-up to launch a spacecraft to the moon.\(^{604}\)

**International Space Law**

The international system has a plethora of space laws regulating transactions and disputed between nations relating to the space sector. The principle of using space in good faith for peaceful purposes forms the bedrock of the international legal regime. The existing international legal framework is a broad statement of principle and it does not address particular nuanced legal questions related to specific activities.

Following the launch of the first satellite, Sputnik, into orbit in 1957, the United Nations established its Committee on the Peaceful Uses of Outer Space (COPUOUS) and created two different sub-committees: a scientific and technical committee; and a legal committee. The UN Office of Outer Space Affairs essentially serves as a secretariat for the COPUOUS and maintains the register of objects launched into space, amongst other things. COPUOUS has been instrumental in formulating five international treaties regarding space, namely The Outer Space Treaty (1967), Rescue Agreement (1968), Liability Convention (1972), Registration Convention (1974) and Moon Agreement (1979).\(^{605}\)

The Outer Space Treaty broadly, forms the basis of international space law, with 109 ratifications and 23 signatories. It prevents states from putting weapons of mass destruction into space or installing them on any celestial body, it however does not prevent the putting of conventional weapons into space like Anti Satellite Weapons systems. It limits use of the moon for peaceful purposes. It also prevents states from making territorial claims on the moon and other such celestial bodies and maintains that space shall be free for the use and exploration by all nations. The Outer Space Treaty makes a launching state international liable for damage to another State Party, its own natural or juridical person on earth, air and outer space, if its space object or component or debris causes damage.

The Rescue Agreement, 1968 as provided in the article V of the Outer Space Treaty requires signatory states to provide all possible assistance to recover space objects


\(^{604}\)India’s Space Policy, Department of Space, ISRO, Government of India.

\(^{605}\)Id. at 1.
and astronauts that may come down within its territory, at the cost of the state that launched it.

The liability Convention, 1972 makes the launching state liable to pay compensation for damages caused by its space components and debris on the surface of Earth or to aircraft. It makes the state liable for damage due to its faults in space. Where two or more states work together, they are jointly and severally liable.

The Registration Convention, 1974 requires the nations to provide information about the orbit of each object it puts into space, in addition to the general function of the space object. The states launching objects and astronauts in space are also required to maintain a register and documentation of the launches.

The Moon Agreement, 1979 reaffirms that the celestial bodies should be used exclusively for peaceful purposes and that their environment should not be disturbed. It states that moon and other celestial body are the common heritage of mankind and no country should try to assert claim on it.

It is to be well noted that India is a signatory of the Outer Space Treaty which forms the main corpus of international law on outer space, in accordance with the article 51 of the constitution of India.

India has also been actively participating and extending support to a variety of International forums such as United Nations Committee on Peaceful Uses of Outer Space, International Council of Scientific Unions, and International Astronautical Federation etc. in shaping global space and law policy. Even though India is a member to all these treaties it still has no comprehensive legislation on space related matters. India’s space sector has been under the control of the government which did not necessitate the need for a comprehensive space laws in India. But, as India takes a leap towards privatisation it becomes imperative for India to have a dedicated space law.

India falling victim to loopholes in International Space law

The lack of domestic space laws in the country has resulted in India being a victim of loopholes in international treaties. In 2017, the nation found itself in the midst of an International dispute with Japan regarding the fall of space debris from an ISRO satellite retracing back to earth on a Japanese fishing village.606

With India being a signatory to the Convention on International Liability for Damage Caused by Space Objects (1972), India is absolutely liable and obligated to compensate for damage caused by its space objects on the surface of Earth or to aircraft and liable for damage due to its faults in space. Therefore, Japan demanded that India pay for the destruction caused by its space junk. However, with no national space law and policy to ensure protection of its specific interest or to limit liability in cases of damage, India could not calculate the quantum of damages owed or protect its interest, allowing Japan to exploit this loophole to extract funds from India that exceeded the actual amount of damage resulting in huge financial loss to the country. Had there been a holistic legislation in place, the said loss could have been prevented.

606David Dickson, What India’s Anti Satellite Test means for Space Debris, SKY AND TELESCOPE

been prevented entirely. The non-existence of national laws does not absolve liability under this convention. States ideally should have national laws to ensure that their specific interests are protected while entering into a contract with any other international entity in areas which involve collaborative space R&D and also to limit liability in case of damage.

The development of such law becomes important for India, now more than ever as the country recently successfully conducting an Anti Satellite Weapons test leading to 400 new pieces of space debris in the lower orbit of the earth. Moreover, the rockets berating on the launch pad damaging payloads from multiple counties and debris from commercial launching to foreign satellites also makes India accountable to any accidents that happen. Therefore, India has to make a space law governing the issue to space debris if it wants to prevent the sequel of the 2017 incident.

**Existing space laws in India**

India is emerging as a serious player in the international commercial space market. The country is developing at a great pace in the space sector. India needs a comprehensive space legislation to keep pace with its growing needs, the failure of which shall lead to financial losses as well as brain drain to the country. Due to the growing demand of the space sector, important issues such as of control, safety, authorisation, agreements and dispute resolution mechanisms for space related activities needs to be addressed. Laws governing contract, transfer of property, stamp duty, registration, licensing and intellectual property also need to be revised to bring space related issues into the purview of domestic laws.

The regulatory framework for space activities in India is defined by a combination of policies, procedures and guidelines of the Government. The salient ones include: a policy framework for satellite communications in India (SATCOM), Remote Sensing Data Policy, 2011 and the technology transfer policy of ISRO. Owing to these developments, currently, provisions for participation of private satellite systems are permitted but there is no legal lacuna to protect the operator and the government when liability arises in the case of damage. Moreover, India has a comprehensive remote sensing national policy but there is no national law.

The Remote Sensing Data Policy, 2001 had provisions relating to acquisition, distribution and National security. It was revised in 2011 and restrictions on supply of satellite data up to 1m resolution were lifted. The 2011 policy also established National Remote Sensing Centre as the central authority to acquire and disseminate satellite remote sensing data in India for development purposes. This process however is highly regulated by the central government which has the right to impose control when issues of national security and/or international obligations and/or foreign policies arise. This policy has failed to evolve and thus has limited effectiveness. As technology develops, the need and demand increases for higher resolution data and therefore there is need for a comprehensive space policy which can

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607 *Id.* at 11.
608 *Id.* at 16.
609 *Id.* at 16.
coordinate national and foreign satellite data.

Another major policy of the Indian Space Research Organisation is the technology transfer policy which is aimed at increasing the participation and investment from private parties in the space sector by outsourcing the manufacturing of satellite components, space radars, rocket engines and other components to local as well as foreign companies. This policy is a welcome step in the right direction but it is not sufficient in its own.

The current legal lacuna related to space would run fine as of now, but there is a need to enact a specific law. The current practice followed need to be re-examined particularly with respect to Article 51 of the Constitution. The national space law be balanced according to the industry and should be able to deal with the present and future developments in the field. It should address legal issues connected to launch services, satellite telecommunications, data processing and distribution, satellite navigational systems and intellectual property rights (IPR) regime and transfer of technology. It should also provide rules regarding funding, safety, insurance, licensing, Liability, Responsibility, Dispute resolution, Protection of environment and International cooperation. A comprehensive national policy shall allow ISRO to focus its entire manpower on R&D thereby opening better avenues for the country in outer space.

In 2017, the government tried to form such a comprehensive national policy. The draft Space Activities bill was presented and discussed in Parliament. It was said to promote, support, and regulate space activities in India by allowing private and non-governmental agencies to involve themselves in space sector under the guidance of the Department of Space of the government of India. Prima facia the bill was quite general and encompassing, similar to most of the initial regulatory attempts to get to grips with technological advancements and the changes they brings in the society. The Bill takes the off-the-shelf model law solution prepared by the International Law Association, with local customisation in the Indian context. It has a limited scope to police acquisition, publication and distribution of geospatial information of India to a certain extent, though it acknowledges that the private sector will play a crucial role in the future use of space to develop and enhance human communications and other scientific endeavours, it still provides a great deal of discretion to the state to control access to space. The draft Space Activities Bill introduced in 2017 has lapsed, giving government the opportunity to focus on a new bill that will be welcomed by the private sector, both the larger players and startups alike.

Conclusion

India’s space technology is well developed and has shown incredible promise. However, Indian space sector needs to orient itself for a quantum jump in technological growth, adopt organisational models and collaborative strategies if India aims to achieve 10 percent of the global space economy by 2030. India must play an important role in creating a working environment for space activities in India.

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610 Id. at 16.
611 Adarsh Pandit, Draft Space Activities Bill, PSR INDIA ( Mar, 29, 2020,11:20 PM)
conducive legal environment in the field of space, for balancing both public and private interests and for responding to evolving international environment.

ISRO is best placed to concentrate on this challenge. It must shed some of its activities and focus on what it can do best with its limited budgets. It may need to cut the umbilical link with Antrix to avoid conflicts of interest while letting MoD look after the military dimensions of space technologies. Moreover, ISRO should harness the potential of the vibrant startup culture is emerging in India by using the incubator approach used by both the US space agency NASA and the European Space Agency. ISRO needs to continue developing Tier-I vendors and original equipment manufacturers. The commercialisation of the tried and tested PSLV launch technology and the newly made small satellite launch vehicle (SSLV) to send Indian and foreign satellites into low earth orbital are welcome steps in the right direction.

A suitable policy environment is required to manage these activities and ensure the overall growth of the space sector. Special care needs to taken to ensure that the government doesn't overly regulate the sector and adequate consideration is given to issues like intellectual property rights. The new space regimen should be permission enough so as to improve foreign direct investment which would help make India a hub for the international space activity. The lapse of the Space Activities Bill 2017 has given the government the opportunity to focus on a new bill that will address the above mentioned issues.

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INTELLECTUAL PROPERTY RIGHTS - A LONG WAY TO GO

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WHY ARE IPR PROVISIONS NECESSARY?
Intellectual property includes artistic, scientific, technical or literary creation. Intellectual property rights are rights associated with these creations and are provided to the inventor or creator, for his invention or creation, but for a certain period of time. IPR associated with a property, provides the owner with exclusive rights which enable them to use that property for commercial benefits. These kinds of property play an important role in development of Indian economy.

For enhancing innovations, it is necessary to give importance to the intellectual labour associated with it. With increase in competitions, there has been considerable increase in the costs of research and development to bring out new innovation or creations. Subsequently there has also been a rise in the investments to come up with new technologies. With the increase in stakes there is also increase in risks associated with it. Major risks include theft of such property. Thus there is need to protect these properties, and the resources used for their creation and lastly the time, money and energy of the investor through stringent legislations. The Intellectual property rights, through various acts protect these properties and promote healthy competition, encourage industrial development and thus help in economic advancement. But with the advancement of time they also need reform, because people intending to abuse those exclusive rights come up with new methods, and the existing laws might fail to protect them.

This paper is an attempt to explore the reasons behind the infringement of intellectual property by understanding the rights and the loopholes that might be present especially in the acts for patent, Copyright Trademarks and geographical Indication. Further some suggestions to improve the conditions of the IP in India are also stated.

TYPES OF IPR

- **Patent**
  A patent is a contract between the inventor of the intellectual property and the state. The state provides monopoly to the inventor, but only for a certain period of time, in exchange of which the inventor agrees to provide the information related to the invention which can be used for public good. Patenting inventions ensures that the patent is in good hands at the same time it can be used for public good. Giving this exclusive right to the inventor promotes technological and scientific inventions that can be used for the public good.

  When the government realised the need for protecting the inventions, the patent act of 1970 was made. The objective of this act was to encourage scientific research and development, help in developing new technology and progression of industries. This act mandates the inventor to pay the fees for the patent application and maintenance of the patent.

- **Copyright**
  Copyright is the property of the work of a person's mind in various forms, such as a book, song, poem, painting or film. It gives the original creator the exclusive rights over the work for a certain period of time. The work of the mind cannot be used by others without the consent of the owner. Copyright is needed to protect the creator from plagiarism.

- **Trademark**
  Trademarks are symbols or words that are used to identify a product or service. It is a word, name, symbol, design, or any combination thereof used to identify products or services.

- **Geographical Indication**
  Geographical Indications are geographical names denoting a product origin. It enhances the reputation of the product which identifies it with the place of origin.

612 Raghbir Singh, I Law relating to intellectual property: a complete comprehensive material on intellectual property covering acts, rules, conventions, treaties, agreements, digest of cases and much more ... (2004)

613 Anonymous. Research and development statistics. New Delhi: Department of Science and Technology (DST), Government of India; 2002

price for the monopoly, in exchange of the disclosure of information related to the invention at the patent office, for a fixed period of time, which according to the s. 53 of patent act 1970 is 20 years, after which it passes in public domain. The fundamental principle behind this act is encouraging the inventions which have novelty and utility. The patent is granted to the inventor only when the invention is the inventor’s own innovation and not just mere conferment or verification of the already existing notion which was known. The invention, in order to eligible to have a patent, can be an improvement of something known before, or a combination of different matters already known before the date of patent, but it should more than a mere workshop improvement and it should satisfy the condition of being an invention. Further the invention should result in a new product, or a better version of an already existing product, or a cheaper version of an already existing product. If this product does not include any inventive quality, it becomes ineligible for a patent.

Infringement of patent can happen when someone uses the invented product for which it was not authorized. This use can include selling, offering to sell, manufacturing; importing or using is in a way which was not allowed by the owner. Proceeding against this kind of infringement can only be initiated when the patent of the infringed product has been granted in India, but may include a claim retrospectively from the date of application for the grant of the infringed product. Under the patents act, only a civil action can be initiated. The guidelines relating to the infringement of patents is provided in Section 104 to 114 of Indian patents act 1970.

> Trademark

With the globalization and privatisation, the value of brand names or trademarks, through which the organization maintains its uniqueness, has attained immense importance. TRIPS has recognized this importance and has thus framed certain standards of protection of these brand names or trademarks and guidelines to ensure there enforcement. India, keeping in stride with the global standards, framed Trademarks act 1999 which confirms with TRIPS, a modification or the earlier law Indian Trade and Merchandise Marks Act, 1958.615

The Trade Marks Act provides, inter alia, for registration of service marks, filing of multiple applications, increasing the term of registration of a trademark to ten years as well as recognition of the concept of well-known marks, etc.616

Infringement of a trademark of a product or service mark of a service, is violation of the exclusive rights that are given to the registered owner of that trademark or service mark. This violation occurs when somebody other than a registered owner, uses an identical or similar mark without the authorization of the registered owner or proprietor. This law protects the right of someone who has used the trademark or service mark identical or similar to the one registered, before it was registered.

Passing off is a common law tort used to enforce unregistered trademark rights. Passing off mostly occurs where the reputation in the trademark of party A is misappropriated by party B, such that party B misrepresents as being the owner of the trademark or having some affiliation/nexus with party A, thereby damaging the goodwill of party A. For bringing an action of passing off, registration of a trademark is irrelevant.
Copyright is a proprietary right and its infringement is actionable without proof of damage or likelihood of damage. If thus, infringement is established there is no need to consider whether the defendant's work is likely to compete with the plaintiffs' work, it becomes apparent. Given below are the loopholes which are the reasons for copyright infringement.

**Geographical indication**

Protection of GI has been one of most contentious issues of IPR in the realm of TRIPS. TRIPS define geographical Indication (GI) as indication which would identify a product as originating from a place, and where certain quality, reputation or any other characteristic of the product are attributable to that place. GI gives exclusive rights to a region to use its name for a product, which has certain characteristics that corresponds with the region. Section 1(3) (e) of the GI act has clarified that any name which is proposed to be used as the name of the GI but it is not the name of a country town or origin can also be considered as GI if it relates to a specific geographical area and is used in relation to particular goods of that that country, region or locality, as the case may be. This provision enables the providing protection to symbols other than geographical names, such as 'Basmati'.

India, keeping in strides with the global standards made, Geographical Indications of Goods (Registration and Protection) Act, attributable to its geographical origin and in 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.
1999 and Geographical Indications of Goods (Registration and Protection) Rules, 2002 (GI Rules) to protect the GI’s in India. If a product is registered under the act as GI, protection in terms of Infringement is granted.\(^{618}\)

GI has gained enormous significance because of its increased commercial potential. Therefore it has become necessary to have legal protection for GI. Without it the competitors not having any legitimate rights might use its reputation for their own personal benefits. Then this would result in loss of revenue of for the legitimate holders of the GI. Moreover, such practices may eventually hamper the goodwill and reputation associated with the GI.

Unlike TRIPS\(^{619}\), in the GI Act does not restrict itself to wines and spirits\(^{620}\). It has left the discretion to the central government to decide which products should be granted higher level of protection. This is an attempt to provide stringent protection to GI, similar to the one guaranteed under TRIPS.

WHERE DO WE LACK?

- Patent law

The law seems to work fine on the paper. But when it comes to practical implication there are many shortcomings which might be the reason for increasing patent infringement cases in India. Between 2005 and 2014, 143 patent infringement cases were filed in different high courts across the country.\(^{621}\) In the amended patent law of 2005, section 107 A(b) of the Indian patent act allows local companies to import drugs, which are a copy of the generic drugs of the less developed nations such as Bangladesh and several African Nations, without the authorization of the patent holder. Earlier this authorization was mandatory. This new provision may not be in compliance with the WTO guidelines. But a simple reading of this section would suggest that a pharmaceutical company of India could set up its subsidiary in these nations and then export patented drugs to India. This might also violated the exclusive right to import under the Trade related aspects of Intellectual property rights or TRIPS.\(^{622}\)

Apart from this problems arise in the filing of the patents, which can act as discouragement for inventors and might refrain from patenting the product. For instance – A period of protection of patent is upto 20 years, but the filing may take upto 3-4 years. Further the costs of the patent might range from 10000 to 100000, if the person is lucky enough to have not forced to give bribes. This might encourage the inventor to go around the system, instead of following it.

The major problem arises when the patent law is implemented. Because there is lack of scrutiny, low quality patents are granted. A study published in 2018, has mentioned that 2293 patents are granted between 2009 and 2016. Most of them are granted to flaws-and-dealing-with-them.html (last visited Apr 14, 2020)

618 The Geographical Indications of Goods (Registration and Protection) Act, 1999 – Section 22
619 TRIPS AGREEMENT – Article 23
620 The Geographical Indications of Goods (Registration and protection) Act, 1999 – Section 2 (e)
products that are marginal improvements drugs whose patents already existed. A study published by Azim Premji University, found out that the only 15 percent of the patents were subject to strict scrutiny.  

India acts as a pharmacy to most of the developing countries by providing medicines at the time of crisis. Our priority is to make sure that people have medicines when needed. But the administration is not aligned with such generous objectives. Pharmaceutical companies invest millions into research and development, but are unable to receive full patent protection like Stockpiling, compulsory Licensing etc. Thus these companies, under the pressure of maximizing profits, maintain the monopoly. Although this is allowed under international agreement such as TRIPS and Indian patent laws, but when this looked from humanitarian aspect is completely wrong. Thus there is a need for compensating the pharmaceutical companies for their investments made to come up with beneficial innovations. Otherwise the objective of the patent act, that is encourage innovation would not be successfully achieved.

Trademark law
Trademark law is also not devoid of imperfections. There are many provisions in the trademarks act which when implemented without any malicious intent of any person, are beneficial to public interest. For Instance section 134 of the trademark act, confer jurisdiction in the case of infringement upon district court.

But the plaintiff can only institute the suit from where he resides. This section is inserted in addition to the general provision of CPC. This can be grossly misused by the multinational corporation against and individual or a smaller unit who operates only from India.

Further the statute does not have any provision for awarding cost of damages. Although the courts have been following a high court judgement of Hero Honda Motors Ltd. v. Shree Assuramji Scooters to award damages, but is put little restraints on the infringers. Same is in the case of ‘Passing off’, as copying well known marks are a big phenomenon in India.

Further the exparte orders are also causing a menace in the industry of trademarks, as these orders are passed without a sufficient cause or reason. Mostly courts pass exparte temporary injunctions orders, which more than often hurt the business against which it is issued. This is mostly the case for small business holders, as there business find it hard to revive once they are shut down after the court’s order. Further once a temporary injunction is issued, and the business does not revive then the business owners find it hard to fight off the injunctions.

Copyright Act
Fair dealing is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. It permits reproduction or use of copyrighted work in a manner, which, but for the exception carved out would have amounted to infringement of copyright. It has thus been kept out of the mischief of copyright

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624 Daureeawo, Raheel. (2009). Controversy of Section 3(D) of the Indian Patent Act
625 Trademarks Act 1999
626 125 (2005) DLT 504
The defence of "fair dealing" was initially originated as a doctrine of equity which allows the use of certain copyrightable works, which would otherwise have been prohibited and would have amounted to infringement of copyright. The main idea behind this doctrine is to prevent the stagnation of the growth of creativity for whose progress the law has been designed.

The laws relating to fair dealing have been incorporated in Section 52 of The Copyrights Act, 1957. As the Indian Copyright Act does not define the term "fair dealing", the courts have on various occasions referred to the authority English case Hubbard v Vosper on the subject matter. The words of Lord Denning in this case lay down a much descriptive outline of fair dealing-

"It is impossible to define what is "fair dealing". It must be a question of degree. You must first consider the number and extent of the quotations and extracts... then you must consider the use made of them....Next, you must consider the proportions...other considerations may come into mind also. But, after all is said and done, it is a matter of impression." Undoubtedly, "fair dealing" is a necessary doctrine, not only in the Copyright laws but also in strengthening the protection given to the citizens under Article 19 of the Constitution of India. But the Indian law related to fair dealing is very limited and confined as compared to the US fair dealing laws which is more elaborate and keeps a flexible approach. Perhaps, the Indian legislators wanted more certainty in the provisions that is the reason behind the conservative approach which reflects in Section 52 of The Indian Copyright Act.

### GI Law
India, a home to social, cultural, ethnic diversities, has thousands of products that can qualify for the tag of GI. But most of the times, the products that are unique to these diversities are made in households or small production units. So it becomes difficult to recognize these products. Also most of the producers are uneducated and thus don’t know the importance of getting GI for these products. Further If an Indian Product is given GI tag, infringement of that would only be punishable if the infringement is in India, if the infringement is outside India then the petition would have to file in India, in the country where infringement has taken place. To prevent that problem from happening again, GI has to filed in that country also.

### What Can We Learn?

#### Strong Administration
As mentioned above, IPR provisions fail when they are implicated. Mostly, because administrative functioning in India is not strong enough to cater to such large population. Therefore crimes like ‘passing off’ happens. To curb these, foremost need is to strengthen the scrutiny procedures at the level of administration. This would also avoid the accidental infringement of patents, as before the patents are filed there would be strict cross checking to see if the similar patents exist or not.

#### Practical Implication of Laws
Further, there are some provisions which are not practical at the ground level because of malicious intent of one party. The focus should also be on eliminating this factor.

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627 Sk Dutt v. Law Book Co. & Ors. AIR 1954 ALL 750

628 (1972) 1 All ER 1023 p. 1027.
Sections like 134 of the trademarks act 1999 should be amended the affected person should be allowed to institute the suit where the cause of action has arisen rather than, from his place of residence. Similarly, the provision of ‘proposed to be used’ registration should also be amended. The objective behind the trademark law is to protect the person who uses such trademark which is identified by the good and services. Existence of such provision might result in fraudulent registering of trademarks, with ulterior motive of selling them to reap commercial benefits. If the administration is strong, there are chances that these problems are eliminated.

The abuse of IPR can also be prevented through competition law, as fundamental objective of the competition law is to protect the integrity of the markets by promoting healthy competitions. But the competition law should be inconsistence with the TRIPS agreement.

- Managing Costs
  The cost for registering a patent, trademark, or especially GI which includes cost of application, cost of running the system and cost of compliance apart from whatever was invested in the research and development of the product, are very high which is not possible for the some of the economically backwards creators to bear. Thus, among other schemes by the government there needs to be such schemes which encourage creators to come up with innovations. Through these kinds of schemes government can bear some, if not all, of the financial burden.

- Strict Scrutiny
  Strict scrutiny should be maintained in terms of GI protection, where the persons register The GI in its own country and the data is uploaded on the WTO website. This should be alternate to registering in every country. This would allow the non-infringement of GI in other countries as well.

To avoid copyright infringement, the registrar and the owner should prepare a notice which shall state that the work is protected under law. In that notice the date of registration should be mentioned. Along with it, the evidence of progression should also be made, such as rough sketches, recordings etc. This is normally done to protect the works of larger artists. But it should also be extended to smaller artists as well. The company should keep strict scrutiny to ensure that the artists has compulsorily maintained this.

- Promoting Research and Development
  Funded institutions should be established to promote research in unexplored areas. This would ensure maximum IP capture. The results of these institutions should be allowed to commercialize and the innovators be allowed to reap benefit from them along with the delineation with the name and ownership. Through this a network of innovators should be established to share experience.

CONCLUSION
The importance of IPR has been acknowledged over and again. They are important for progression of every sector. India, with the advancement of time also acknowledged the fact, and became signatory to various international conventions and treaties. This has helped country to become attuned to world

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629 Amiti Sen, *Competition law could be an effective tool to check IP abuse*, Hindu Business line, June 8, 2018.
approaches and change its attitude towards IP protection. India through various IP laws has complied with the TRIPS regulations and guidelines. On lower level also, India has taken steps to protect IP rights. Many IP cells has been established, with special trained police officers keep in check IP infringements. Indian music industry, a group of music companies headed by a retired police officer also became more proactive in battling music piracy. Still there is a long way to go. Not having proper fund for research and development, limited to access to resources, hoarding of resources by larger private players, theft of intellectual property, etc. acts as a demotivating factor to the innovators or creators. Thus there is a need of getting rid of these problems to promote more innovations or creations. Start could be done by taking small steps instead of large decisions, such as a new policy or large funds. Smaller steps such as appointing more people to take care of IP filing, more people to check the proofs and previous records, can be taken. Stringent rules should be made to see that the funds that are allocated for the development of intellectual property are only used for that purpose only. People should be made aware about their IP rights and should be encouraged to not keep their ideas in the bud, but to let it grow. Because every innovation was idea at first.

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630 FICCI, National Intellectual Property Rights Policy (Industry Concerns and Suggestions), (2014)
IS SHAREHOLDER ACTIVISM - A TRUE MEANS TO CORPORATE GOVERNANCE?

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ABSTRACT

The term ‘corporate governance’ which was unheard till 1980’s had predominantly occupied the landscape of corporate environment as a panacea to all the problems cropped out of the series of scandals occurred across the world. Essentially, the concept of ‘corporate governance’ evolved as a reformative measure to secure the interests of shareholders. Today’s corporate economy is witnessing a transition in the role of shareholders i.e. from being as a passive equity holders oblivious of their rights to that of an activists, serving as custodians of corporate governance. However, the industrial growth in every nation had simultaneously perceived the existence of corporate raiders. The only difference between the previous era green mailers and today’s activists is the objective behind their protests. Along with the demand of a transparent, accountable and efficient corporate environment, securing their monetary interests, today’s shareholder activists are demanding the corporate executives to consider the needs of future generations emphasizing on socially responsible investments. To one side of the coin, presence of active shareholder community is resulting in the establishment of an accountable and efficient corporate sector resulting in the healthy economic development, to the other side these ‘active shareholders’ were perceived by many directors as the intruders into their decision making process and red flags to the company’s public relations. In the light of above raised issues, the researcher in this article would like to throw light on “whether shareholder sovereignty serves as a catalyst to corporate governance or not?” The researcher adopted doctrinal methodology to compile the data collected from primary & secondary sources.

Key words: Corporate governance, shareholder activism, socially responsible investments, shareholder sovereignty.

INTRODUCTION: The term ‘corporate governance’ which was unheard till, “1980s” had predominantly occupied the landscape of corporate environment as a panacea to all the problems cropped out of the series of scandals occurred across the world. Globally, the period of 1997-98 had experienced literally a financial contagion, initially due to the collapse of Thailand currency and then affected the economies of Indonesia and South Korea to a major extent and other countries like Singapore, Japan, China and Taiwan etc. to a lower extent. Indian economy during late twentieth century [period of 1991] highlighted by the process of globalization and privatization boosting the industrial development, had simultaneously witnessed the series of corporate scandals like starting from Harshad Mehta, Ketan Parekh, Bhanalsi, UTI to very recently Punjab National Bank scam, DHFL and YES Bank fraud that had taken away the confidence of all its investors. The decision of Reserve Bank of India in imposing a moratorium on operations and withdrawal limits of YES Bank, due to the bad loans it sanctioned and its inefficiency in raising new funds to cover its non-performing assets had put many of its customer’s in dismay. At this juncture, it is solely the governance reforms that serve as a reformative measure to secure the interests
of shareholders, creditors, other stakeholders and help in instilling a sense of accountability among companies towards general public.

Today’s corporate economy is witnessing a transition in the role of shareholders i.e. from being as a passive equity holders oblivious of their rights to that of activists, serving as custodians of corporate governance. However, the industrial growth in every nation had simultaneously perceived the existence of corporate raiders. The only difference between the previous era green mailers and today’s activists is the objective behind their protests. Along with the demand of a transparent, accountable and efficient corporate environment, securing the interests of all its investors, today’s shareholder activists are demanding the corporate executives to consider the needs of future generations emphasizing on socially responsible investments.

**ACTIVE SHAREHOLDER COMMUNITY- A CATALYST TO GOVERNANCE?** In the above discussed context, the researcher felt the necessity of addressing two key issues. The primary issue here is “Despite tenacious efforts and sound legal framework, corporate governance had remained as a long-term goal to be achieved and as a subject matter for academic seminars & conferences”, the other issue required for an introspection is, “Whether shareholder activism is a roadway to corporate governance or an intrusion into the corporate affairs turning out to be an impediment in implementation of key decisions of the company?” Simultaneously, addressing these two issues, the researcher would like to provide a brief glance of evolution of corporate governance in India and the role of shareholders in democratic exercise of their rights and in pressurizing the corporate executives in complying with the governance norms.

The increasing role of institutional investors, hedge fund managers and other shareholder associations gave impetus to shareholder engagement in corporate affairs. The establishment of “Securities and Exchange Board of India” on 12th April 1992, as a regulator of equities market, laid a strong legal foundation to secure the interests of investors from corporate executives oppression and mismanagement. Corporate governance reforms in India had its genesis in the recommendations of the committee under the chairmanship of Shri Kumar Mangalam Birla, that came up with two types of recommendations i.e. voluntary and mandatory. The major objective advocated by this committee is “incorporation of best governance norms with primary focus on securing the interests of shareholders and other investors. “Few key recommendations suggested by this committee by way of amendments to the listing agreement, that resulted in alteration of legal framework i.e. [insertion of clause 49] are the following:

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631 Here in after referred as “SEBI.”
634 Ibid.
• Composition of Board with both executive & non-executive directors out of which not less than fifty percent of them to be non-executive directors.

• Companies are mandated to constitute audit committee comprised of chairman and a minimum of three non-executive directors, where the chairman is obliged to interact with the shareholders during annual general meeting and resolve all their queries.

• This amendment gave sufficient attention to the interests of the shareholders by involving them in the process of director’s appointment and provided for the setting up of a “Shareholders/Investors grievance committee” to redress issues like non-registration of transfer of shares, non-receipt of dividends declared so on. Very importantly, companies are mandated to include a section on corporate governance in their annual reports and in case of non-compliance of mandatory recommendations, they are supposed to explain the reasons for the same. Subsequent to this, to enhance the corporate standards, SEBI constituted two more committees.

Right of access to whistle-blowers- A turning point: One of the key recommendations suggested by Narayana Murthy committee is, right to be sanctioned to whistle blowers to approach the audit committees, directly without informing to any of their immediate superiors about any suspicious unethical or illegal practice undertaken by the said corporate executives.

Corporate governance voluntary guidelines: [2009] Following this, again in the context of global recession and other governance failures like Satyam scandal, CII had constituted a task force under the chairmanship of Mr.Naresh Chandra in the year 2009 to review the existing practices of companies and accordingly to suggest the higher standards so as to comply with the corporate governance norms.

Companies Act, 2013- A historic Milestone: Statutory framework pertaining to the corporate environment had undergone radical changes with the passage of Companies (Amendment) Act, 2013. Few such major changes are:

• Provision for appointment of at least one-third of total number of directors as independent directors.[See, Section 149(4) read with Rule 4 of Companies (Appointment and Qualifications of Directors) Rules, 2014].

• All listed and non-listed companies are supposed to have at least one woman director in their board. [See, sec149(1) of the Companies Act,2013]

• Section 135(1) of Companies Act, 2013 provided for constitution of corporate social responsibility committee with at least one independent director to monitor the activities. However, with the recent

635 In compliance with Clause 49 of the Listing agreement, shareholders are supposed to be provided with the personal details [like resume, no. of companies they worked as directors] of the directors intended to be appointed.

636 One was “Naresh Chandra committee and the other was Narayana Murthy committee in 2002 and 2003 respectively whose recommendations were parallel to suggestions of Kumar Mangalam Birla committee.


638 Non-listed companies with a paid-up capital of Rs.100 crores or a turnover of Rs.300 crores comes within the ambit of this clause.
statements made by our Hon’ble finance minister, Nirmala Sitharaman, the legal position of CSR had been changed. Now it’s no more a criminal offence. It is treated as a civil wrong.

Along with this there were certain other provisions inserted relating to constitution of audit committees, mandatory disclosure of information relating to the related party transactions etc. in order to attain transparency, integrity and accountability in corporate transactions.

SEBI (Listing Obligations and Disclosure Requirement) (Amendment) Regulations, 2018: “Incompliance with the powers conferred by sec.11, section 11A sub-section 2 and sec.30 of SEBI Act, 1992[15 of 1992] read with sec.31 of SC(R) Act, 1956[42 of 1956], SEBI had amended SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015. Key features of this amendment are as follows:

- All the top most 500 and 1000 listed companies are mandated to constitute their board of directors with at least one independent woman director by 1st April, 2019 and 1st April 2020 respectively.
- No person shall serve as a director for more than eight listed companies from 1st April 2019 and seven listed companies from 1st April 2020.

A prior notice had to be served to the shareholders regarding the appointment/reappointment of statutory auditors. Companies are supposed to constitute committee to redress the grievances of security holders. Unfortunately, despite many efforts put forth by Ministry of corporate Affairs and SEBI altogether, corporate scandals could not be put to an end, resulting in huge monetary losses to the millions of investors.

Case Studies reflecting the Shareholder activism as a tool to corporate governance:
No doubt in the changing times, the role played by shareholder activists is acting as a means to corporate governance. A brief overview of different episodes taken place in India and abroad would help us in understanding the same. In 2010, SEBI came up with a mandatory requirement for domestic mutual funds to disclose their sub-regulation 1, clause (a) had been amended through SEBI [Listing Obligations &Disclosure Requirement] (Amendment) Regulations, 2018.

640 Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 17.
voting policies as well as voting actions at their investee Companies, on an annual basis.

- ‘NO-TO EXCESS REMUNERATION TO EXECUTIVES OF TATA MOTORS’: The year 2014, marked the first instance of shareholder activism in India, when the minority shareholders of Tata Motors Ltd. had rejected its company’s proposal to pay remuneration to its managing director, Karl Slym, in excess of the permissible limits prescribed by companies Act, due to the inadequate performance of the company. However in the subsequent year, shareholders gave their acceptance to enhanced remuneration upon the proposal put to second voting. Tata group owned Indian Hotels had appointed Mr. Shapoor Mistry as an independent director. Proxy firms had raised an issue that he cannot be designated as independent director on account of his personal relationship with Cyrus Mistry. Acknowledging the same, the Company had derecognized him as an independent director.

- REJECTION OF SALE PROPOSAL AT RAYMONDS: The recent incident of shareholders of Raymond Company, rejecting a sale proposal of JK house to its promoters & family members at a price disproportionate to the market value stands as a reflection of the fact that “shareholders are custodians of corporate governance.”

643 Pertaining to remuneration matters.
645 This incident had taken place in the year 2017.
and thereby protect the interests of its beneficiaries.\textsuperscript{649}

- **BUY-OUT OF PANAYA BY INFOSYS:**

  Amidst several whistle-blower complaints surrounding the India’s largest software company in reference to the Panaya acquisition deal and other issues regarding high remunerations paid, the founder shareholder Narayana Murthy had finally involved and wrote a letter to the board seeking clarification on all these issues and asked the company to give explanations to the public about compliance with the corporate governance norms.\textsuperscript{650} Later, there was a negotiation between the board members and Narayana Murthy consequent to which the company executives had tagged him as a well wisher but not as an activist. This clearly shows that companies are not feeling so comfortable with the presence of shareholder activists.

Along with above mentioned case studies, the current corporate scandals so as mentioned in introductory lines like Sahara India Parivar Investor fraud, ICICI-Videocon loan transfer, Punjab National bank scam.\textsuperscript{651} Yes Bank fraud had once again highlighted the need for corporate governance and shareholder empowerment. Aravind Gupta, who in his capacity as an individual investor and stakeholder in Videocon and ICICI bank, had unveiled this loan fraud at ICICI bank in 2016 which was a clear case of conflict of interest with the executive directors\textsuperscript{652}. Post these issues brought to limelight; few other senior most banking officials like Sandeep Bakhshi, and K.V Kamath were being interrogated by C.B.I.

Ousting of Prannoy Roy and his wife Radhika Roy, the then directors of broadcasting channel, NDTV (New Delhi Television Ltd) for two years, and not to hold any key managerial position for non-disclosure of material and price sensitive information about loan agreements entered into with ICICI Bank and Vishvapradhan Commercial Pvt. Ltd(VCPL) based on a complaint given by NDTV shareholder Quantum securities in 2017, by SEBI, stands as another incident of activism and growing vigilance among shareholders.

**Conclusion:** The concept of shareholder activism is vast and there are many facets imbibed in it. It ranges from addressing monetary issues to that of non-monetary policies like adoption of environment friendly resolutions, disinvestment from particular companies not complying either statutory or ethical norms so on. The fact that the research field of shareholder activism is relatively young and vibrant, coupled with the growing incidence of the phenomenon in our country and in fact across the world, as well as its potential benefits for society as a whole, renders future investigation into the topic necessary.

A clear understanding of the concept at the global level will help one understand how


\textsuperscript{651} The legal aspects of these cases were put before the judicial scrutiny.

\textsuperscript{652} Bhasha Singh, “ICICI-Videocon: Arvind Gupta tells National Herald why he blew the whistle”, published on 7\textsuperscript{th} April, 2018, available at <https://www.nationalheraldIndia.com> [Last visited on 11/27/2019]
the activist approach had to be perceived by the companies in addressing the unrepresented interests of the small and minority shareholders. Corporate governance reforms had become the need of the day. In this context, the suppression of the activism or negative projection of this concept as a threat to the functioning of companies will shake the very confidence of the investors thus allowing the tyrannical approach of the companies in dealing with the state of affairs. Activist shareholders act as a bridge between internal governance by board of directors and external governance by the market for corporate control, especially during the takeover transactions. Finally to sum up, whether activism is a true means to governance or not, the researcher perceives that shareholder activism is like a double edged sword with its own pros and cons. Where positive usage will ensure socio-economical benefits to the society, misuse of the same to meet the personal interests of few individuals would hamper the efficient functioning of companies. Hence reference about the drawbacks and misuse of shareholder activism will help in striking a balance between the interests of both shareholders and corporate’s.

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THE POLITICAL MEDIA- A CRITICAL ANALYSIS OF THE CURRENT INDIAN MEDIA

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ABSTRACT

Introduction
“‘The Press is another way of stating an individual or a citizen.’”
B.R AMBEDKAR
In India, freedom of press is implied from the freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. Media is being considered as the fourth estate and the fourth pillar of our democratic society after the executive, legislature and judiciary. The media plays a vital role in a democracy; informing the public about political issues and acting as a watchdog against abuses of power.

Purpose
The aim of this paper to highlight that how the media is getting politicized and affected by getting into the hands of the political parties or specifically under the ruling party. And we will be analyzing the current India and the policies of the media as to how political the media has become.

Methodology
This study is based on critical analysis of past events and practices, various codes, acts and rules as well as on reading of public documents and research papers.

Findings
While doing this paper we have mentioned how back in history the media was controlled by the Britishers and at the time of emergency and how many journalists have fallen to the prey of the ruling government and a slight over view of the world which tells us about as the rule established has always made it difficult for the media to function independently.

Conclusion
If you control public communication you can control the way people think and how they behave.

Today most media platforms speak the same language. The society which falls within the ambit of their influence is left with very limited options to seek facts. For instance communalism has already been covered with the garb of nationalism. The media has now begun to present communal attitude as valid legitimizing them as nationalism.

INTRODUCTION

“This Press is another way of stating an individual or a citizen.”
B.R AMBEDKAR
This quote vehemently describes the importance of media i.e. to raise the voice of an individual to the state, and to distinguish between what is right and what is wrong independently. But currently the Media world has changed suddenly and has come under massive criticism as it is getting fully controlled by the political parties.

The former American Minister Malcolm X said; “The media’s the most powerful entity on earth. They have the power to make the innocent guilty and to make the guilty innocent, and that's power. Because they control the minds of the masses”.

Media is often regarded as the fourth pillar of the democracy. It has been vested with a lot of responsibilities to maintain a
relationship between the Government and the people. The subjects are heavily dependent upon the media for the news.

The freedom of speech and expression is a Fundamental right which enshrined under Article 19(1) (a) of the Constitution of India and the freedom of press and media is implied under this statute.

Political parties have undermined and sorted out the ways to regulate the Media and even control the mind of the people so they have used all ways to capture media. This has always been the case with media as they have always controlled and used by the political parties for their benefits. The high profile Republic TV, majority of the shares of the channel are being owned by the member of NDA. And if any channel tries to speak the truth or analyze the working of the political party or to dissent from any policy of the government, either it is banned for a day or two or is threatened on work, For E.g. NDTV India and journalist are not allowed to do their work as they are threatened now and then.

WORLD PRESS FREEDOM INDEX

The World Press Freedom Index is the measure of level of freedom available to journalists. It is of 180 countries around the world and it is being studied since 2002. There are various things which are taken consideration which assessing the data i.e. media independence, transparency, etc.

We slipped two ranks on the 2018 World Press Freedom Index (138 from 136) even below our rivals Pakistan. The reason for this downgrade is simple there has been many prominent killings of the journalist in 2017 as well in 2018. Gauri Lankesh was killed during this process. There nothing as such criticizing the government those who do suffer the example is Gauri Lankesh who was murdered and mocked over social media. Times have been very dark and for the press and the journalists.

HISTORY

STRUGGLE FOR INDEPENDENCE

The British India was the period of strict control over media by British Empire. The British were well aware of the power of media and how it helped the masses rallying; this made the British Government fear the freedom of press. Hence, during the British rule several acts like Censor Act 1799, Licensing regulation Act 1823, Vernacular Press Act IX 1878, Newspaper Act 1908, Paper regulating Act 1942 were passed.

One such act was the Gagging Act which was passes by Lord Lytton to stop the uprising against the Government through words. The British Government tried all means to control the India Publications. The act made it necessary to apply for license from Government so as to make sure that the Indian Publications were not writing anything against the Government. The media, however, stood unaffected and this act did not stop the media from publishing the news. This made the Government to shift to more severe methods. The Government was now more focused to regional vernacular publications.

One such incident was when the Bengali Weekly Publication, Amrita Bazaar Patrika’s editor denied handing over the final approval of editorial content to Sir Ashley Eden.

Such events made the Government pass the Vernacular Press Act, through which the British Government claimed stronger control over these regional vernacular
newspaper so that the “seditious writings” in publications could be put to an end.

The Press Act of 1910 smacked the Indian Paper hard. Under this Act nearly 1000 papers were prosecuted. A number of editors were charged with Sedition. It did not take long for the Government to pass the Press Emergency Act of 1931.

At the time of World War II, when India was forced into the war, the Congress Party protested. The Government out of fear made censorship even more rigid and the punishment more severe. It controlled and filtered International News that was coming in and consciously manufactured news rooted in propaganda. There was pre-censorship of media relation to certain matters. The media lost itself to the Government.

EMERGENCY OF 1975- INDIRA GANDHI GAGGING MEDIA

Indira Gandhi knew that elections were due in one year. She also knew that she made promises in 1971 elections which were still bare. The only escape she could see was the declaration of the Emergency and media was its first causality. The Government enticed and threatened the media to become their mouthpieces.

A political leader and writer, Era Sezhiya was shocked to find out that most of the newspaper and websites made conclusion that the Shah Commission Report which contains the background of Emergency and all the investigations done to review specific cases and misuses of power during Emergency has disappeared, claiming that no copies exist. The disapproval of report by the media and the Government gives us a brief of attempts of the control of politics over media. All the attempts were made to erase the history of Emergency.

The Emergency of 1975-77 is the most shameful period in the history of media. It was controlled by the Indira Gandhi Government and had to submit to total censorship. Media at that time was printed i.e. it comprised of newspapers and magazines. To release the editions they depended upon electricity supply. The Government so as to cause delay or cancellation of newspaper for the next day, cut off the power supply in Bahadurshah Zafar Marg because four of the newspapers were located there: The Express, The Times of India, The Herald and the Patriot.

The then Information and broadcasting minister, Inder Kumar Gujral was slammed by Sanjay Gandhi even before the declaration of emergency because he felt that the “expected spin” to the news was not given by All India Radio and Doordarshan. He was also criticized for not telecasting Indira Gandhi’s massive Club rally live on television by Sanjay Gandhi. The chain of criticism continued. Gujral was blamed to have forgotten to cut off the power of newspapers located at Connaught Place namely, Hindustan Times and Statesman. The Political leaders at no cost wanted any news to slip off their hands Indira Gandhi demanded to see radio and television scripts of all news bulletins. Gujral protested and was soon replaced by VC Shukla who acted as a puppet of Gandhi family.

The government expelled foreign correspondents. Seven foreign correspondents were expelled and 29 others were banned from entering India. The Centre withdrew accreditation of 54 Indian journalists including six photographers and two cartoonists. Most of them were active in New Delhi and known for their critic of the government policies and action. More
than 250 journalists had been put behind the bars during Emergency.\(^{653}\)

**JOURNALISTS - A PUPPET**

Journalist getting fired for showing the truth, Journalist threatened for exercising freedom of speech and expression, Journalist getting killed for speaking truth. This is prevalent in ‘New India’ people don’t want to see the truth and well if someone is criticizing the Government policies and their working. Isn’t dissent an option? Punya Prasun Bajpai reveals the story behind his exit from news channel his editor in chief called upon him and had a conversation that he should avoid mentioning the name of the PM Modi and stop aiming and criticizing the policies of the government the whole show was telecasted under surveillance and ultimately Punya Prasun was fired from his own show masterstroke.

**GAURI LANKESH**

“The idea that the IT cell of the BJP is using this episode as a tool to threaten other journalists is what is shocking.”

-Gauri Lankesh

She heavily criticized the working, drawbacks and short comings of the government of the NDA Government and exercised her freedom of speech and expression. Then in Bangalore Gauri Lankesh was shot returning back home with four bullets. After her death she was severely mocked over the social media and the people who mocked her were followed by PM Narendra Modi on social media and she always stood for the truth and that might be reason for her death in New India.

**RAVISH KUMAR-FREE VOICE**

Ravish Kumar in his famous book The Free Voice writes; “Rumors and fake news have always been the preferred weapons of fascists and majoritarian fundamentalists in democracies. By inciting mobs to fulfill their agendas, they use democracy to subvert and destroy democracy itself. Their perverse logic is this: if democracy is the will of the majority, is not a mob the majority? And which political party can afford to criticize democracy? They also know that a mob cannot be named, arrested, tried and convicted, so murder and intimidation can carry on unchecked”.

And he further adds and critically states as what media has become? He says that “The web of lies, the motivated twisting of facts and the building of false narratives-none of this happens overnight. It is done over months and years and on a large scale. It begins at the top, in the corridors of power. The results are seen in the streets. After months of malicious propaganda about cow slaughter, a man was pulled out of his house and lynched by a mob of several hundred people, many of whom had been his neighbors for years.”\(^{654}\)

There have been various journalists who have been portrayed as the puppet of the ruling government who has always defended the shot comings of the ruling party and often taken a stand which has disrupted the social order of the country whether it is ZEE NEWS or AAJ TAK. Those who don’t have their own tongues often they speak what they are made to

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\(^{653}\) Prabash K Dutta, When media was muzzled: History retold, India today, 3 August 2018

\(^{654}\) Ravish Kumar, The Free Voice, Pg 60.
speak this has destroyed the fundamental principles of journalism.

MEDIA TRIAL- A MOCKERY

When the matter is sub judice, trial by media is not permissible as held by the apex court. The SC in the recent case namely in *Siddhartha Vashisht v. STATE (NCT of Delhi)* reiterating their earlier observations cautioned the Article 19(1)(a) did not permit the media interfering in the administration of justice in matter sub judice.655

While the fourth and essential pillar of democracy, the media, every night at 9 p.m. seems to organize a debate, a panchayat or moreover a court which incalculates or even influences the audience that a person who is an accused yet to be proven guilty is a actually guilty.

If we look at the unfortunate Aarushi murder case the trial by media cannot be appreciated as they solely accused the parents for the murder but the CBI didn’t find any clue regarding that and the final sentence came after many years. Now if we go and search for recent example of media trial and if we look closely we will find some political motives related to the same and one such example is Kathua rape case.

KATHUA RAPE CASE.

Dainik Jagran is regarded as one of the leading newspapers, while sipping tea in the morning majority of the people get the glance over the front page to know what’s happening around the globe so this leading newspaper alleges that the eight year old Kathua victim wasn’t raped.

And it even mentioned that there are two post mortem reports submitted by the doctors to the Jammu crime branch. The media portrayed it as communal issue even marches in support of the accused were organized and tri color was used in the march for a rape accused.

ALIGARH MUSLIM UNIVERSITY

On May 2 2019, the AMU students’ union had invited former Vice-President Hamid Ansari, he reached the campus and he was suppose to be conferred with AMUSU lifetime membership, later ABVP and HYV members, escorted by policeman, marched towards the guesthouse with arms in their hands where the former VP was residing.

On the very day when this incident the students who gathered near the incident spot planned to file an FIR regarding the incident and demanded strict actions to be taken against the anti social elements who deliberately wanted to destroy the peaceful environment in the campus during this when the students moved towards the police station to lodge FIR they were not lathi charged but brutally attacked by the police and that can be seen in the videos circulated later. Later in the evening all the media houses portrait this as AMU students protesting for the Jinnah picture which is in hanging on the walls of the union hall as they want to keep it but we meant it really very clear that Jinnah is a part of our history not our faith.

Media houses like NDTV India clearly pointed out that the students of AMU are protesting for the picture of JINNAH but later after a day or two when the picture was much clear AAJTAK clearly covered the scenario and reported the truth. The protest was against the anti social elements that came to disrupt the social order of the university and they have been

655 Dr.Sukanta K. Nanda, Media Law, Pg 24, 2014.
targeting Aligarh Muslim University for quiet a time.

**NAVJOT SINGH SIDDHU CONTROVERSY**

Navjot Singh Siddhu the former cricketer of India was invited for the oath taking ceremony of the newly elected PM of Pakistan, Imran Khan this beautiful gesture among the two former cricketers turned out to be quiet controversial as the Indian media criticized it as he shared a hug with the Pakistani Army Chief. Previously our late former Prime Minister Atal Bihari Vajpayee had travelled on the bus to Lahore. On the occasion of the birthday of the then Pakistani PM Nawaz Sharif, Prime Minister Narendra Modi made an unscheduled trip to Lahore in 2015, on his way back from an official visit to Afghanistan.

Later in Bihar court a case of sedition was filed against the former cricketer for insulting the feelings of Indian Army by hugging the Pakistani chief. Twitter became trial courts and troll media was active destroying the image of the former cricketer and Media trial was the only way to get Siddhu convicted.

**LOK SABHA ELECTIONS 2014**

Media astoundingly won the BJP and Narendra Modi the Lok Sabha elections of 2014 all over the news panels there were debates regarding that Modi are only the option to the new India in making. Social media had its own influence over the masses as it played with minds of the people while they were even playing normal videos on YouTube. Slogans like were given but later they only described as the persuasive jumlas which was used by the BJP to contest the elections.

Advertisement, social media, fake news, IT cell all played crucial role in the making of new stand in Democratic India and all sorts of tampered history and WhatsApp created information’s were all over circulated.

WhatsApp has become such a big disease that whatever the people are being told in the course of the day they believe it blindly and there was sense of fear created among the majority regarding the minority, issues were saffronised and communal discourse started prevailing over the tea stalls. We Indians always had an issue that apart from Our Gods we have often idolized the politicians when we idolize a politician we often lose the character of a citizen and we are only left with being a devotee of that particular person.

“bade logon se milne mein hamesha fasla rhkha”
“jahan dariya samandar se mila dariya nhi rahta:”

If you support anyone or you meet a person with a bigger personality always maintain a distance in between cause once a river falls into ocean is no more a river. In 2014, Narendra Modi became the second most-liked politician on Facebook.

**DEMONETISATION A SUCCESS ON SOCIAL MEDIA**

Demonetization was shown as a huge success by newspapers and news channels under the political influence. It was regarded as the bold step by the government by many top leaders but it soon turned out to be a failed step. And RBI Report revealed that 99% of scrapped currency notes came back. And further the ministers were given the homework to tweet #demonetizationsuccess. This political influence over the media created a Halo
around this blunder called Demonetization. There was all over one sided debates on news channels like Zee News, Republic, India TV, News18 India to justify Modi’s currency gamble.

Media went a step further and they even started declaring the people as anti nationalists who dissented with the steps and put forth the argument that the army personnel who is guarding the border is also sacrificing for the country and you can’t even make through the line for the wise step taken by our PM but it all turned out into a failed step. The daily wage earners had to let go of their daily earnings so as to wait in the lines to hide this failure the Government later came up with the defend that the aim of the move was to make India a cashless economy. The same made headlines in the news channels but recent RBI report shows that have again started to keep lots of cash as savings. Even the increase in digital transaction is not enough to justify such an extreme move that weakened the Indian economy.

ANI is considered very close to the Government so they created a fake tea stall owner one of its own journalists which were later exposed by a twitter user of which they later apologized. One thing common for both the rich and the poor was exchanging notes on discount. The only difference was the poor did it not to starve and the rich to get something out of their unaccounted cash. The media did not show this side of Demonetization.

AN OVERVIEW OF THE WORLD

OBAMA TOO FAMOUS ON SOCIAL MEDIA
Barack Obama, the former President of United States of America, is the third most popular person on twitter with around 103 million followers. Social Media played an integral part in the victory of Barack Obama in the United States Presidential Elections 2008 & 2012. His campaign was all over the social media networks like YouTube, Facebook, Twitter and Instagram.

The Social Media strategy of Obama was crafted in such a way so as to bring transparency & accessibility, organized by a team of young people who presented the president in the desired way keeping the tone positive, articulate and appropriate on social media. The team gave directions to the president so as to grab opportunities to be win hearts of the masses. Media has always helped candidates in winning the Presidential Elections. For Thomas Jefferson, it was Newspapers for John F. Kennedy, it was Television and for Obama, Social Media served the purpose of capturing the eyes of the masses.

VLADIMIR PUTIN IS A NEWS JUNKIE
After assuming the presidency, Putin took control over major news mediums cross the country. It was not only the State media that was under his command but privately owned broadcast media also came under Kremlin’s control. Putin’s Government suppressed the internal media networks which reached the majority of the population. News Channels regulated by the State are streamed with Kremlin’s messages and the independent ones were pushed to extinction.

In the first days as President, the Government Security forces seized the documents of an independent news channel, NTV that was gaining popularity. Later the justification was given that owner of the channel; Vladimir Gusinsky owned his creditor $300 million and did not pay them back. NTV now has been politically neutered or conforms near to Kremlin’s point of view.
Putin’s Government has been manipulating media’s coverage of the happenings to influence people not only domestically but internationally. Media mirrors the state. Putin has turned media into a weapon to manipulate public opinion.

**CHINA – CENSORING PEOPLE’S MIND**

Talking about political control of mass media there cannot be a better example than China.

One such example is that of a student who gave her speech at University of Maryland. She compared the life at United States of America to that of China. She described how in her growing years she saw the control China had over the media and praised USA for the freedom here. She was called a traitor for the speech and accused of going against the State.

Government’s strategy to control minds of the people demands strict media control using monitoring systems and firewalls, shuttering publications or websites and jailing dissident journalists, bloggers and activists. Incidents like the clash between Google and Chinese Government Norwegian Nobel Committee’s awarding of Nobel Peace Prize to Chinese activist Liu Xiaobo who was jailed fighting against this despotism over media led to increase of Global attention over this issue. In China, the media has no freedom of Speech. People see what the Government wants them to see. The people of China have been shut off from the world.

**CONCLUSION**

Media has an important role to play in a democratic society. The job is to keep the society informed about the happenings which have a direct or indirect impact on it and draw conclusions. Where do we go? Without media democracy cannot function effectively. To make accountable to the people, an independent autonomous public institution like the Media Council is, therefore, a constitutional need. In some countries, it is established by the various constituents of media as a voluntary organization, while in other countries like ours, it is constituted by the Legislature under a statute. These bodies by whatever name they may be called whether voluntary or statutory evolve a code of conduct or of ethics for the media with regard to honesty and fairness, duty to seek the views of the subject of any critical reportage before publication.656

Today most media platforms speak the same language. The society which falls within the ambit of their influence is left with very limited options to seek facts. For instance communalism has already been covered with the garb of nationalism. The media has now begun to present communal attitude as valid legitimizing them as nationalism.657

Various spokespersons of the ruling party get favored by the news anchor and even communal comments mixed with the view of polarizing the people are made and are often regulated all over the media even the various spokespersons are invited to organize debates on these channels they vow to stay impartial but unfortunately the family of politics they belong cannot be separated from them and all this has degraded the level of fourth pillar. A powerful fear is created over maniacal debates on TV channels. Many news anchor

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656 Dr. Sreenivasulu N.S. and Somashekharappa M, Media freedom- dimensions, Indian bar Review, Vol XLI (1), 2014, pg 35.

swarm like fearsome attackers all over who ask questions. The common viewer of TV channels see this and starts losing confidence. He can see what becomes of those who raise questions. He feels that there is danger standing apart from the mob. This is how the politicization of media works and inculcates fear in the minds of the people.

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THE LINE BETWEEN JUDICIAL ACTIVISM AND JUDICIAL OVER-REACH: A PERSPECTIVE ON ARTICLE 142

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Abstract

India is the dynamic country and we practice separation of power through the system of checks and balance, where every organ of the state has its own duty to perform according to the power and functions given to it and also cannot interfere in the matters of other organ. But, when one of the three organs fails to perform their function then one of the other organs can step in to protect the State to continue its smooth functioning. Hence, if there is any failure by the Executive or Legislative, the Judiciary can step in by the power given to it under Article 142 of the Constitution of India.

It provides that in order to do “Complete Justice”, Supreme Court can pass any decree or order or judgment. This article provides unlimited and discretionary power to the Hon’ble Supreme Court to decide any matter. In the recent years, it is observed that in order to do complete justice Supreme Court have interfered in the matters of legislature and executive. This may seem beneficial for the state but threatens the basic foundation of our democracy, that is, the system of separation of power.

Article 142 is a great power that protects our democracy and prevents from misuse of power. Hence, Supreme court not only have the duty to provide complete justice in accordance to judicial activism but also practice judicial restrain to not exceed its power as provided by the doctrine of separation of power.

Key words – Judicial Over-reach, Complete Justice, Article 142, Judicial Boundaries, Separation of Power, Constitution

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The line between Judicial Activism and Judicial over-reach: A Perspective on Article 142

Montesquieu introduced the concept as the Doctrine of Separation of Power. It is a renowned doctrine according to which if legislative and executing powers are given to same person or body, it will enact tyrannical laws, which give rise to apprehension in the state. If judiciary power is joined with legislative power then the judge will be the legislator and act arbitrary which will hinder life and liberty. Where it joined with executive there will be violence and chaos. Further, if judicial powers are not separated with legislative power and executive power there will be no liberty. This doctrine is accepted and practiced around the world. For example, in United States of America where the all the three

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organs maintain their separate powers and keep a check on each other.

Our state has three primary organs, namely, Legislature, Executive and Judiciary, and they maintain their mechanism and power with the help of the system of checks and balances. According to which one organ keeps a check to prevent arbitrary exercise of power by the other organs. In India, we follow this doctrine but not in the strict sense. Our executive is interlinked with the legislature whereas the judiciary is independent. The Cabinet of Minister that forms the executive is also part of the lok Sabha that forms a part of the law making body i.e. legislature. Over the years, India has upheld this doctrine of separation of power through the system of check and balances but as observed this is not done in a strict sense.

In Golak Nath v. State of Punjab, Subba Rao CJ observed:

“The Constitution brings into existence different constitutional entities, namely, the Union, the States, and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them.”

In Ram Jawaya Kapur v. State of Punjab, the court held that the Indian Constitution has not indeed recognized the doctrine of separation of power in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contempt assumption, by one organ or part of the State, of function that essentially belong to another.

Judiciary is the organ which posses the supervisory power which is given under Art. 142 of the Constitution of India. It provides power for the enforcement of decrees and orders by the Supreme Court. It states that for the Hon’ble Supreme Court to exercise its jurisdiction, it may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before the Supreme Court.

In Supreme Court Bar Assn. v. Union of India, the Court established that Art. 142 gives it unlimited power, but it also adopted a deterrent and balanced approach. Dr. A.S. Anand, J. (as the learned Chief Justice then was) for the unanimous Constitution Bench observed:

"Indeed, these constitutional powers cannot be controlled by any statutory provisions but these powers, at the same time, are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

Further, in the case of M.C. Mehta v. Kamal Nath, it was held that the exercise of power under Article 142 of the Constitution couldn’t be imposed in a situation where action under it would lead to a contravention of the specific provisions of a statute. Similarly, In M.S. Ahlawat v.

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660 INDIA CONST. art. 142, cl. 1
661 Supreme Court Bar Assn. v. Union of India, AIR 1998 SC 1895
State of Haryana & Anr.\textsuperscript{664}, the court held that under Article 142, the court cannot altogether ignore the substantive provisions of a statute and pass orders concerning an issue which can be settled only through a mechanism prescribed in another statute. While reviewing its earlier order, the court corrected its order punishing the petitioner under Section 195 of Code of Criminal Procedure, 1973 holding that the requirements of the provisions cannot be ignored in the exercise of powers under Article 142.

The law on Article 142 was well summed up in Laxmidas Morarji v. Behrose Darab Madan\textsuperscript{665}, wherein the court held that:

“Article 142 being in the nature of a residuary power based on equitable principles, the Courts have thought it advisable to leave the powers under the article undefined. The power under Article 142 of the Constitution is a constitutional power and hence, not restricted by statutory enactments. Though the Supreme Court would not pass any order under Article 142 of the Constitution which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these constitutional powers cannot in any way, be controlled by any statutory provisions. However, it is to be made clear that this power cannot be used to supplant the law applicable to the case. This means that acting under Article 142, the Supreme Court cannot pass an order or grant relief, which is totally inconsistent or goes against the substantive or statutory enactments pertaining to the case. The power is to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties.”

But what is complete Justice? Is it to only protect the rights and liberties of a person? Or to provide maximum happiness to the maximum number of people as was dictated by Bentham? The idea of Justice differs from person to person, meaning, what is justice for one may not be justice for another. It is an illusion, which cannot be defined because the definition in itself varies from person to person. As John Rawls determined that justice depends on the interest and perspective of an individual failing to distinguish between their interests with the other. Hence, to provide “complete justice” under Art. 142 is a discretionary power provided in the hands of the court.

In Ram Janmabhoomi-Babri Masjid land dispute case in Ayodhya in which the Supreme Court granted entire 2.77 acre of disputed land in Ayodhya to deity Ram Lalla had also exercised its power under 142 and held that by depriving Muslims of the structure of the mosque would be a great injustice against the commitment towards a secular nation as given under rule of law. The Constitution postulates the equality of all faiths. Tolerance and mutual co-existence nourish the secular commitment of our nation and its people. Hence the court had allotted 5 acres of land to be allotted to the Sunni Central Waqf Board in order to do justice.

However, in recent years, it is observed that judiciary not only acting as a supervisory body but also meddles in the administrative functions of the government. This act of judiciary is highly appreciative and beneficial for the state but it also dilutes the concept of separation of power. For

\textsuperscript{664} M.S. Ahlawat v. State of Haryana & Anr, AIR 2000 SC 168

\textsuperscript{665} Laxmidas Morarji v. Behrose Darab Madan AIR 2004 SC 2236
instance, in the case of State of Tamil Nadu v. K. Balu & Ors, the Hon'ble Supreme Court banned the sale of liquor within 500 meters of state and national highway but does not apply within city limit granting relief to the liquor and hospitality industry. The Supreme Court was highly praised, as there were a remarkable reduction in drink and drive cases and rash driving cases. But the execution of the same could be tricky as there was no guideline given as to how to measure 500m from the highway. Further, the loss incurred by hotels, the restaurant had directly affected the employees resulting in a reduction of jobs that form part of their livelihood.

Excessive power for any organ in the system is perilous for any country. Although the Hon’ble Supreme Court must uphold the rule of law by exercising power given under Art. 142 of the Constitution of India, yet, there is no guideline to it.

For instance, when the Hon’ble Supreme Court in a bench headed by CJI Ranjan Gogoi exercised its power of “complete justice” and appointed a former High Court Judge, Justice Virendra Singh as Uttar Pradesh’s Lokayukta after expressing its frustration as the UP government did not meet the Supreme Court deadline.

“The failure of constitutional functionaries to comply with the orders of the highest court of the land is deeply regretted and astonishing,” Justice Gogoi observed.

Further, In Damodar S. Prabhu v. Sayed Babalal H, the court framed the guidelines relating to compounding of Section 138 of Negotiable Instruments Act 1881 and reasoned that it was aware that framing such guidelines may amount to judicial lawmaking, thereby breaching the perimeters of its jurisdiction, however, in order to do complete justice the court would be justified in framing such guidelines in cases where there is complete legislative vacuum.

The Judiciary must step in to exercise the power of Article 142 where there is a failure to constitutional functionaries as observed above. But, does government failure equals to constitutional failure by the government?

In November 2019, the Supreme Court was asked to intervene when the BJP has formed its government in Maharashtra when Shiv Sena Chief Uddhav Thackeray was claiming the support of 162 legislators. The Court had directed the newly formed BJP to take a floor test and prove its majority but it had failed to do so.

The utmost importance in today’s society is the protection of our democracy and to do so we need to protect our system of separation of power and rule of law that forms the basis of our democracy. If the government fails in any way, judiciary steps in.

But, if the government continued to fail and judiciary continued to step in then that may lead to totalitarianism. Hence, the current situation raises a milestone for our Judiciary that is to differentiate between judicial activism and judicial overreach. To draw a line of what would amount to judicial activism and judicial overreach. This distinction will protect the judiciary from over utilization of its power resulting

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666 State of Tamil Nadu v. K. Balu, (2018) 3 SCC 336
667 Damodar S. Prabhu v. Sayed Babalal H, AIR 2010 SC 1907
in protection and continuance of the doctrine of separation of power.

Thus, to conclude, the Supreme Court has been given wide discretionary power to do complete justice between the parties under Article 142 of the Constitution. It can pass any order which it deems fit in the facts and circumstances of the case. However, an order which the Court passes to do complete justice between the parties must not only be consistent with the fundamental rights guaranteed under the Constitution but should also be consistent with the substantive provisions of the relevant statute. Further, the court must exercise judicial restraint in relation to invoking Article 142 and it should not exercise the power on the ground of sympathy or on mere asking. Thus, it is a great power that protects our democracy and prevents from misuse of power.\textsuperscript{668} The protection granted under the said article forms an integral part of all our institution and upheld the rule of law.

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\textsuperscript{668} Dr. Justice B.S. Chauhan, Courts and its endeavor to do Complete Justice, http://www.nja.nic.in/17\%20Complete\%20Justice. pdf
MALE SEXUAL ABUSE IN SAARC COUNTRIES

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ABSTRACT

Sexual abuse, a term very common yet when heard, people do confine the ambit of this offence to the female gender of society. Yes, it’s a matter of fact that females are the majority of victims of sexual abuse but male gender is no exception to it. It is evident that in a patriarchal society where female counterpart has been viewed as a weaker gender, sexual abuses with men have been remarked as unthinkable. Since the ancient times, female have been a prominent victim to certain offences that now even when the tables have turned, it is difficult for them to associate such offense to the male section of the society. Sexual abuse in a layman language can be defined as “intentional sexual touch to the other person without that persons consent, by way of force or coercion.” This definition of sexual abuse applies to both male and female genders equally. While men are physically stronger than their female counterparts, they have equally seen to be the victim of offense of sexual abuse. This paper seeks to establish male as a prominent victim of sexual abuse in the SAARC Countries, it aims to decentralize the abuse of sexual assault only to the female gender. It is solely based on research, legislation, programs, policies, and responses to the male sexual abuse in the South Asian region.

This paper confines the discussion of male sexual abuse particularly in SAARC Countries not only because it is geographically in pace but because it shares common concerns. Keeping aside the main issues such as terrorism, piracy, combating corruption, cyber crimes, the crimes against the human body have also anticipated being common, more or less in certain south Asian countries.

DEFINITIONS:

While acknowledging that the following terms have been interpreted in numerous ways, in this research paper, the following definitions are used:

THE INCLUSIVE TERM “SEXUAL ABUSE”

Sexual abuse, which is commonly also referred as molestation ranges from child sexual abuse to forced sexual behavior such as rape. It involves child trafficking, indecent exposure, being a target to exhibitionism, child pornography, stalking. It in extreme form it may result into pedophilia and pederasty. Sexual abuses in the mentioned forms have not been an exception to the male gender. It is worth mentioning that though the offence of sexual abuse can be in various forms, it is never the victims fault.

CHILD TRAFFICKING

Trafficking shall be defined as “recruitment, transportation, transfer, harboring or receiving of any person for the purpose of exploitation, either within or outside the country”1.

A child means “every human being below the age of 18 years, unless, under the law applicable to the child, majority is attained earlier”2.

Child Trafficking means a child for sale. Such a heinous offence is carried out for the purpose of slavery, forced labor, sexual exploitation, drug trade. Children may also
be trafficked for the purpose of adoption. However, it must be noted that there is no universally accepted definition of child trafficking for the purpose of sexual abuse. There may be various causes for the existence of such crime ranging from poverty, lack of resources to voluntary migration.


According to relevant provisions of national law and who is rendered incapable of understanding the true nature of the act is Child sexual abuse. Child sexual abuse can be witnessed in various forms:

- Masturbation in presence of a minor or forcing a minor to masturbate
- Obscene phone calls, text messages or any digital interaction
- Producing, owning, or sharing pornographic movies or images of a child
- Intercourse
- Sex of any kind with a minor, including vaginal, oral, or anal
- Any other sexual conduct harmful to child’s mental, physical or psychological well being

According to the Council of Europe Convention on the protection of children against sexual abuse or exploitation (articles 18-23) the definition of sexual exploitation of children includes child prostitution, child pornography, intentional causing for sexual purposes, of a child who has not attained the legal age for participation in sexual Activities.

CHILD PORNOGRAPHY

Child pornography means using a child to obtain sexual stimulation. It is produced with the direct involvement of the child. Abuse of child occurs during the lascivious exhibition of child genitals or public area which is recorded in production of child pornography. It may use variety of media platforms including magazines, videos, photos, drawing, film, sound recording, and animation.

The Council of Europe Convention, article 20 paragraph 2 defines ‘child pornography’ as .... “Any material that visually depicts a child engaged in real or stimulated any sexually explicit conduct or any depiction of a child’s sexual organs for primarily sexual abuse”

Child Pornography is a prohibited act under various national laws of SAARC Countries. It is a penalized offense under the law. “It is duty of the law to protect the innocence of the child and make efforts to prioritize child’s physical, mental and psychological welfare”

ARENAS OF ABUSE IN SOUTH ASAIN COUNTRIES

THE HOME

Male sexual abuse has been widely reported against people who are in fiduciary relationship with the victim. In the cases of sexual abuse at home, most cases go unreported. Sexual abuse at home is not only a forceful misuse of the body but also abuse of trust. Father, Brother, Sister, uncle and aunts who are responsible for the well being of child use its vulnerable position for fulfillment of sexual desires.
Children have natural tendency to inform family regarding any act of discomfort, they come across. However, if such act is done by a person within the sphere of fiduciary relationship, the child suffers from mental torment and helplessness. It is also worth mentioning that due to fear of loss of honor of the family or the family member ending up in jail are the main reasons why such offenses are unreported.

Sri Lanka is the state among the other SAARC Countries, where boys appears to be more at risk of sexual abuse than girls at home.

3. National Child Protection Authority 2003 ” Many Children are abused and Neglected in Sri lanka”

WORKPLACE :

While most of the sexual harassment cases involves women victims, male have been no exception to such offense. Sexual Harassment at workplace can be defined as “Unsolicited request for sexual favors, and any verbal or physical Conduct of a sexual character that is likely to affect an individual’s employment, unreasonable interference with an individual’s work performance; or creates a hostile work environment”. Employees have the right of protection against sexual abuse irrespective of their gender. Perpetrators of sexual abuse committed at workplace can be co-workers, supervisors, company owners; they can be both men and women. There is no exact statistical information on how many men are sexually harassed at work, and how many of these men actually initiate legal proceedings for sexual harassment. Male Sexual abuse at workplace goes unreported due to the fear of being mocked by the co-workers, or being harassed by another man implicates their own sexuality.

On the other hand, Male Children with absence of caregivers and protectors are under absolute authority of the employer and are more likely to face the torment of sexual exploitation from their employers. Children may also suffer sexual abuse from police officers, Customers, Labor workers

EDUCATIONAL SETTING:

Sexual Abuse in South Asia is a contemporary offense. While teachers have much influence and close proximity to children, sexual abuse in schools occurs at a high anticipated rate.

4. International labor organization , 2006 “violence against children at work place”

Peers are also identified as culprit of a sexual act. Though not much has been reported regarding male sexual abuse in educational institutions, the fact is that, it is highly prominent. The Majority of Male sexual abuse in the primary and secondary school setting occurs in “Empty hallways, classrooms. While each child may be a victim to sexual abuse at school, some may be more.

Such Criminal act against the innocent goes unreported as children feel that no elder would believe them, Children have also been noticed to deny such act of abuse for fear of being shamed by peers. There is no available evidence that reveals that whether boys or girls face more sexual abuse in school settings in South Asia.

At the same time, Teachers in fiduciary relationship with the children have optimal potential to identify sexual abuse faced by the students, whether the source is school,
community or home. Presently, in India, each educational institute has a counselor which not only addresses the educational goals of students but also help them to maintain their psychological well-being.

In a study among 811 adolescents in grade 11 in Goa, a state in southern India, boys were more likely to report that someone had talked to them about sex or forced them to touch the perpetrators. 6

INSTITUTIONAL SETTINGS:
In institutional settings such a orphanage, day care homes, juvenile detention facilities, home for children with disabilities; maltreatment, violence and abuse is an emerging arena of concern.


With the absence of protectors or guardian, the children have proved to be vulnerable to sexual abuse. In culture of abuse by staff at orphanages, older children also learn to bully and sexually assault the young. Poor infrastructure of orphanages, cramped accommodation, failed adoptions and severe rate of abandonment also contributes to vulnerability of children to the perpetrator.

According to Supreme Court of India, over 11 million children were abandoned in 2013.

Children with disabilities may be at higher risk for sexual abuse than children without disabilities. As per the United Nations report ‘Tackling Violence in Schools’ 2011, states “Powerless social association and stigma faced by children with disabilities make them highly vulnerable to violence and exploitations”. A 2013 report by the Asian Centre of Human Rights (ACHR), “India’s Hell Holes: Child Sexual Assault In juvenile justice homes ... have becomes India’s hell holes where inmates are subjected to sexual abuse and exploitation, torture and ill treatment”. In prison weaker or younger children may be subjected to sexual assault in exchange of “protection”. There is no data indicating the abuse of boys in institutions in South Asia. “The weaker, the offender, the abandoned-all must have be protected from any kind of abuse and exploitation”.

While institutional directors have recognized the need of counselor to help children report any case of sexual exploitation, there is no such decrease in crime sexual exploitation against children in south Asia.

THE COMMUNITY:
The community may influence the action against the sexual exploitation. If perpetrator is an individual of political influence, community leader, police officer or any other individual in power in the community, it may lead to victimization for fulfilling the pursuits of sexual desires. In such scenario, retaliation is influenced by the fear of social ostracism.

HOMELESS ON STREET
It is of no doubt that children who are separated from their families or who are orphans living on the street are more prone to the acts of sexual exploitation. Such children have no registered record and hence are easily abducted for the purpose of prostitution. Studies indicate that children living on the street engage in sexual activities within their communities. Such children are also more likely to contract the HIV/AIDS.
Children, under the age of 18 years contribute to 37% of India’s population with large proportions experiencing great deprivations such as lack of access to basic nutrition, healthcare and shelter.

CHILDHOOD IN BROTHELS
Children of sex workers in south Asia spend their childhood in brothels where they witness sexual acts since a very young age. Such children may be prepared to enter prostitution by modeling their Parents. There is little or no evidence which proves indulgence of male child into prostitution. However, they may end up working as guards, pimps in community brothels.

MALE CHILD PORNOGRAPHY
Among the Eight South Asians Countries, Male Child pornography has been highly witnessed in India and Sri Lanka. With the emergence of information and technology act in India, online pornography witnessed a raise in child pornography. It is noticed that in mentioned countries the perpetrator are foreign nationals. However, on male child pornography research is lacking and there is no accurate statistics regarding the same.

COUNTRY PROFILE: NEPAL
Nepal’s laws can be seen in context of traditional view of sex in which males are aggressive and assertive and females are passive and thus this makes women a normal prelude to sexual behavior. Just like any other existing law, the law relating to offense against body, is a product of society.

Article 219 of the Nepali Criminal Code which defines “Rape” as ; jabardasti karani which means forcible Sexual Penetration . The Law of Nepal follows the traditional view and hence views force and penetration a necessity to constitute the offense of rape. There is also exclusion of boys, men and gender and sex minorities from Article 219, it is exclusionary, archaic and violation of Constitutional right of equal treatment of law. Article 219(2) Defines Rape as “ sex with a women without consent or with the consent of the child under 18 years” , thereby the law makers and presumed that it’s the man who is to be commit the offense of Rape, man here is seen as an offender not a victim. There is no presumption of reciprocal act.

Furthermore, Article 226 of the Nepali Criminal Code stipulates that “No one should have unnatural sex with another person without consent”, that protects male child victim of rape. The laws of Nepal are formulated by the Patriarchal Structure that governs the country and the institutions within it and therefore are incompetent to protect male from any kind of Sexual Exploitation‟.

CHILD LAWS
Nepal is a state where 40% of the country’s population constitutes Children 7, it also has the highest proportion of working children in the world which recalls the need of the strong legislation to protect the children from any form of sexual exploitation. The Government of Nepal has ratified various international laws such as United Nations Convention on the rights of child;

The legislations addresses the sexual exploitation of children through the Human trafficking and transportation (Control) Act 2007; Children’s Act 1992; Some Public Offenses and Penalties (1970); Open border agreement 1950. The Research of laws in Nepal evidently show that the laws to protect male child from sexual exploitation are more observed by the country then the necessity of protection of male adult from the same act. The laws in Nepal that address child pornography do not specifically define or prohibit Child pornography, the prohibition focuses on protecting the public from obscene material than to penalize sexual inflict upon Children.

**NON-GOVERNMENTAL ORGANISATION**

Mental Organization such as NGO Maiti Nepal and Counterpart NGO in India have helped to improvise the scenario, numerous child clubs have been formed in rural areas, providing a structure for children to gather mutual support and discuss issues of sexual abuse and exploitation. It is observed that participation of children in advocacy against sexual abuse and trafficking has lead to empowerment to confront such abusive situation and to communicate dialogue with parents, teachers, and guardians.

CWIN was the first Non Governmental Organization to address the concern of sexual abuse of boys along with girls. It has established Child Helpline with the assistance of Child Helpline international, which provides children with emergency response in case of sexual abuse and exploitation in Katmandu Valley and the cities of Biratnagar and Pokhara. It provides boys with medical care, psychological counseling, night shelter, health clinic, educational support, transit homes for children at risk.

A network of NGOs based in Kathmandu, the Children at risk networking groups, conducts research and disseminates information of Child Sex Abuse. Bal Bikas Samaj, Child rights organization in the City of Biratnagar, conducts awareness raising programs on child rights and child sexual abuse to child clubs in rural areas. There is lack of Statistics and legislations particularly addressing Male Sexual abuse throughout the state of Nepal. The Country needs a shift from traditional view of crime to modern view and the need of amendments to fit the changing scenario.

**COUNTRY PROFILE: PAKISTAN**

In a Country like Pakistan in south Asia, combination of inadequate literacy, poverty, extensive child labor creates a situation vulnerable to child abuse and exploitation. Nearly one third of population lives below poverty line and half of the population are children aged below 18 years, Pakistan as a country has low literacy rate. In such circumstances the vulnerability to exploitation is powerful and the need to protect children is the need of hour.

Pakistan has a patriarchal society where cultural silence has shove individuals into reporting offences such as male sexual abuse. The laws against sexual exploitation are female centric with no recognition of male sexual abuse as an offense against the human body. There is little mechanism of reporting in Pakistan hence there are no statistics as to male sexual abuse in the state. The legislations are incompetent to identify

male sexual abuse as an offense and to provide specific relief to male counterparts. A report indicates that both boys and girls aged less than 15 years are equally vulnerable to abuse in Pakistan. Pakistan has rectified International treaties such as Convention on Rights of the Child; the SAARC Convention on preventing and Combating Trafficking in women and children for Prostitution. Pakistan is a signatory to optical protocol on the sale of children, Child Prostitution and Pornography. Pakistan has adopted the Stockholm Declaration on Agenda and Action in 1996. Pakistan was a part of ECPAT South Asia Region Meeting on online sexual exploitation of Children. Pakistan has national legislation to combat sexual abuse and exploitation. However, the laws are incompetent to tackle the large population of children aged less than 18 years.

The primary legislation in Pakistan tackling with issue of sexual abuse includes the Pakistan Suppression of Prostitution Ordinance 1961; the Prevention and Control of Human trafficking Ordinance 2002 and subsequent rules of 2003 and 2004; the protection of women (Criminal laws Amendment) 2006; Pakistan Penal Code 1860; The Protection of Children Act 2009.

Just like Nepal, the legal definitions of Sexual abuse, Sexual Consent are inadequate, Pakistan legislation only Criminalizes Rape, the punishment of which is imprisonment or death. The legislations on pornography in primarily found in Pakistan Penal Code 9, the ban on child pornography was much later introduced by Pakistan in 2011. In study of child sexual abuse in Rawalpindi and Islamabad, out of a sample of 300 children, 17% claimed to have been abused 10.

Gender roles play an important part in the manifestation of child prostitution in Pakistan. A number of local newspaper and micro-studies have exposed incidents of child sexual abuse in the schools of Islamabad. In a child scandal reported in 2003, a boy of a boarding school in Peshawar were first abused and forced to have sex with their teachers and then later blackmailed into Commercial Sex 11

9. Section 226, Pakistan Criminal Code, 1860

IN 2010, Save the Children launched a report, Commercial Sexual Exploitation of Children- A situation analysis of transport industry of Pakistan 12 Research disclosed that commercial sexual exploitation of boys in transportation terminals is happening at a large scale and in a institutionalized manner.

NON-GOVERNMENTAL ORGANISATION-
NGOs in Pakistan play an active role in helping and rehabilitating trafficking victims. WAR is a Non-Governmental Organization in Pakistan whose mission is to publicize the problem of Rape; the NGO has documented the severity of the rape problem in pakistan 14 In a research conducted by the provincial Coordinator of, Sahil, an NGO working since 1996, it was held that child sexual abuse rate in Pakistan as per 2019 continues to be 7 children per Day. Since 2010, Sahil, has run youth information and counseling sectors that provide HIV/AIDS information and prevention advice. LHRLA, in Karachi, AGHS Legal Aid Cell, in Lahore and
SPARC, IN Islamabad, provide legal aid to abused and exploited Children. SACH in Islamabad provides shelter to children who have endured sexual violence.

COUNTRY PROFILE – AFGHANISTAN

The Islamic Republic of Afghanistan has is a state where approximately 46% of the population lives below the poverty line. Afghanistan, according to UN Statistic is the Second Poorest Country in the world. The Country has among the lowest social indicators in the world, ranking 174 out of 178 Countries. The Country has suffered decades of foreign Military occupation and safety resulting in erosion of safety nets for Children. Afghanistan also holds a saddening record of a country which has the highest number of terrorist attacks on Schools.


Afghan Society is constructive and patriarchal, the structure and law of the state has proved to be incompetent to protect females from sexual abuse and exploitation to the extent that male sexual abuse laws are unrealistic to imagine.

CHILD ABUSE

A report published by Unicef identifies Afghanistan as the “Worst place to be born in the world”, Children are subjected to extreme poverty and violence on daily basis. Child mortality, malnutrition, sexual abuse is common yet critical issues faced by children in the state of Afghanistan. About 1500 incidents of child abuse are reported each year, while large numbers of cases go unreported. Boys since a young age are expected to assume adult responsibilities which leads them to child labor, where they are prone to abuse and exploitation including trafficking. The statics on the sexual abuse of boys in Afghanistan is scant. Military Conflict in Afghanistan has discouraged research work. Afghanistan has ratified the convention on the Rights of the Child; the SAARC Convention on preventing and combating Trafficking in women and Children for Prostitution; Optional Protocol for sale of Children, Child Prostitution and Child pornography. The legislations and practices of Afghanistan into combating child abuse are complex because the state uses various customary laws, jurisprudence and sharia (Islamic) law. Within the domestic laws, the penal code 1976; Civil Code 1977; labor law of Afghanistan 1940 are most applicable laws to the abuse and exploitation of boys. Much later in 2019, the Afghan government started implementing laws on protection of child rights.

CUSTOMARY LAW

“Bacha Bazi” is a custom in Afghanistan involving sexual relationship between young adults and boys, who are called dancing boys. It is connected to sexual slavery and Child Prostitution. Bacha Bazi is widely practiced in parts of Afghanistan in 21st Century, research reveals that men involved in the practice of Bacha Bazi are powerful and well armed, thus it has been difficult to put a end to this torment.

RAPE LAW

Afghanistan currently does not have any law that directly addresses protection of rape victims. However, in Islam it is a sin to rape.

COUNTRY PROFILE – SRI LANKA

Male rape in Sri Lanka is a torment that is rarely spoken and widely practiced as
evident by the “Freedom of Torture reports 2012 and 2015, the 2013 Human Rights Report, 2016 UN report on Sri Lanka. The International truth and justice report held that the arenas of male sexual abuse in Sri Lanka are rehabilitation Centre’s, army camps, prisons, detention Centre’s. Human rights investigation in Sri Lanka concluded that incidents of sexual abuse with male were a part of deliberate policy to obtain information, intimidate, and inflict fear. In Sri Lanka, the issue of male sexual violence is largely hidden and stigmatized. There is a lack of legal protection for men and boys against sexual violence which informs social attributes and contributes to an environment in which violations can take place with virtual impunity. Legal discrimination against men and boys is accurately reflected in Sri Lankan laws.

RAPE LAWS
Sri Lanka does not recognize the possibility of male rape under the law. Men are defined only as perpetrators of rape. Article 363 of the Penal Code starts with “a men is said to commit rape…” The prohibition of statutory rape applies to only girls under the age of 16 years and not to boys as read in section 363(e).

CHILD ABUSE
Sri Lanka has ratified the Convention on the rights of the child and the SAARC Convention on preventing and combating Trafficking in women and children for prostitution. It is a signatory to the protocol to Prevent, Suppress and Punish Trafficking in Persons. The legislations of Sri Lanka relevant to child sexual abuse include the Penal Code of Sri Lanka; The brothels Ordinance; National Child policy authority Act 1998; National plan to address sexual and gender based violence 2016-2021; National plan for protection and promotion of human rights 2017-2021. The State of Sri Lanka can be seen moving towards legal implementation to curb child violence. However, there is no relief to male sexual abuse that is highly practiced in detention Centre’s of Sri Lanka.

COUNTRY PROFILE – BANGLADESH
Bangladesh has witnessed constant denial of male victimization of sexual assault, the country has highly traditional and patriarchal structure, that the popular conception is that men and boys are not raped or sexually harassed. An anthropological study of men’s experiences of sexual harassment in Bangladesh found that 1 out of 10 males encountered sexual harassment by another male or female. Various cases of male sexual abuse in Bangladesh have witnessed suicide by victims.

Bangladesh has ratified the convention on the Rights of the Child; the optional protocol on sale of Children, Child prostitution and Child Pornography; ILO Convention on the Worst forms of Child Labor; SAARC Convention on Preventing and Combating trafficking in women and children for Prostitution. The state laws addressing the sexual exploitation of children include the penal code 1860; The Children’s Act 1972; Suppression of immoral traffic Act 1933.

The state laws of rape and sexual harassment are women-centric and do not provide any legal remedy for male sexual exploitation. Section 376 of the Penal Code 1860 reads as “whosoever commits rape shall be punished with imprisonment of life, or with imprisonment of either description of a term which may extend to 10 years and shall also be liable for fine, unless the women raped is his own wife.” The legal machinery views male as perpetrators, there
is no provision of law in Bangladesh to provide justice to male sexual abuse.

NON-GOVERNMENTAL ORGANISATIONS
BRAC, a nongovernmental Organization in Bangladesh reported 713 incidents of rape and attempted children of rape. Bangladesh National women’s lawyers association provides rehabilitation and legal support to girls as well as boy victim, it provides legal aid counseling, medical assistance, education, skill training. The organization has rescued 40 boys from trafficking, sexual exploitation and abandonment.

COUNTRY PROFILE- INDIA
India since the ancient time has witnessed grave exploitation and abuse of women from domestic violence, child marriages to gang rape which at present still continue to operate as heinous crimes in the country with an increasing scale. With time, the root of rape as an offense has deepened in the country and humanity has been taken over by torment. However, there is not only an increase in crime against women; men have also emerged as a victim to sexual exploitation.

India, the world’s largest democracy has a patriarchal structure where men are viewed as strong gender and women have been assigned the role of vulnerable and victim. According to PEW research statics 2014, 13% of men aged between 18-32 have experienced sexual harassment online.

There is no accurate statistics as to how many men are raped and sexually abused in the state. The constitution of India guarantees gender equality, however there are no domestic laws in India that deals with male rape and sexual exploitation as an offense against the human body.

India, via section 377 Indian penal code criminalizes any non consensual act between the individuals of LGBT Community as an act punishable with imprisonment up to 10 years and shall also be liable for fine.

India has been seen moving apart from the traditional view but the country requires establishment of gender neutral laws and abolishment of portraying of Male counterpart as the offender. ‘Abuse and exploitation has no gender’.

CHILD ABUSE LAWS
India is a signatory to the United Nations conventions on the rights of the child 1992, optional protocol to CRC on sale of children, child prostitution and child pornography 2000. Social stigma and macho stereotypes are the main reason why male sexual abuse cases go unreported in India.

The protection of children from sexual offences (POCSO) Act ,2012 is a gender neutral act that criminalizes offence of sexual assault, sexual harassment and child pornography while safeguarding the interest of child at every process. It involves child friendly reporting, recording of evidence, speedy trail through special designated courts. It also makes abetment of child sexual abuse an offence.

Juvenile justice act 2000 also plays a crucial role in preventing sexual abuse and exploitation in detention, while catering to needs to care and development of the child who are in conflict with the law.

The immoral trafficking prevention act, 1995 deals with offences related to sexual exploitation of children for commercial Purpose.

Indian penal code, 1860 also criminalizes wrongful confinement, theft, abduction, buying, procuring and selling of minors for immoral purposes.
India as a developing country is seen to be committed to the prevention of male Child. However there is no legal provision to protect adult male from any kind of sexual assault.

Non government organizations such as save the child India, Arpan NGO, Prosthan India foundation are fighting child sexual abuse in India.

** The Republic of Maldives and the State of Bhutan are excluded from Country overview due to lack of information available.

RECOMMENDATIONS-

There would be no improvement if the legislation does not suit the changing needs of the society; if the legislation does not match with the necessary implementation.

- The existing legislations must widen its ambit to include all possible scenarios of child abuse with its penalized punishment.
- The bodies established under the child protection legislations must be adequately funded ensuring uniform implementation of the act in the SAARC Countries.
- Allocate sufficient budget and resources for the implementation, monitoring and evaluation of child welfare and protection.
- Incorporate awareness rising in children to guide them towards protection from sexual abuse.
- Allocate enough funding to public awareness campaigns to address the root cause of child sexual exploitation and its prevention measures.
- Put in place mechanism to evaluate the progress of awareness rising.
- Incorporate awareness rising at school to establish gender neutrality in youth.
- Incorporate legislations to establish uniform laws while catering to the needs of all the genders in the state.
- Amend the penal code of all the SAARC countries to include male rape as a penalized offence.
- Amend the legal framework to involve male in sexual harassment laws.
- Amend laws to remove the social stigma of male as an offender and create gender neutrality.
- A helpline must be established for male sexual abuse victims, providing them with psychological and legal aid.
- Amend the existing legislation of all SAARC Members to include a legal definition of "child pornography".
- While religious and customary laws play a significant role in SAARC Countries, criminal penal code must be equally applicable to all citizens without any religious exceptions.
- Research work must be facilitated by the Governments of SAARC Countries to widen the ambit of knowledge regarding child sexual abuse in the state.

CONCLUSION

Some Countries in South Asia are beginning to fill the lack of Legislation regarding Child Sexual Abuse and Exploitation of boys. However, all the South Asian Countries have absence of Male Sexual Abuse Laws due to their patriarchic Structure. There is a necessity to shift from traditional norms of law and emerge into legislation embracing Gender Neutrality.
CREATION OF DATA PROTECTION REGIME IN INDIA

By Mervyn Vivek Tamby
Advocate

PRIVACY AS A MATTER OF RIGHT

In this contemporary period, privacy is a basic right of each and every individual. There are plethora of legal instruments and court decisions which recognise privacy as a fundamental right, almost in every country. Especially, in the world engulfed with technologies and in internet activities, there is a high chance of violation of privacy rights of an individual. Here, it is important to draw our attention to some of the prominent international legal instruments which recognise the concept of right to privacy. The Universal Declaration of Human Rights; The International Covenant on Civil and Political Rights; as far as European Union is concerned, the European Union Charter of Fundamental Rights and the Treaty on the Functioning of European Union are the primary instruments which recognise the privacy rights of the Europeans. Therefore, it becomes obligatory for the signatory parties to recognize the right of privacy, under the rules of public international law.

For India, it took approximately 67 years from the date, the Constitution of India came into effect, to firmly consider privacy as a part of the fundamental right of the Constitution. Prior to this, the validity of right to privacy was like a tumult situation. Finally, the Hon’ble Supreme Court in the case of Justice K.S. Puttaswamy & Anr. V. Union of India & Ors., held, unanimously that “the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution”. Most of the countries in the globe legislated the Data Protection laws, particularly among them, the General Data Protection Regulation, 2016 (GDPR) of the European Union has been a wake-up call for rest of the countries who didn’t have an adequate or a properly legislated statutory material, particularly dealing with the subject of privacy law in view of information technology.

In India, the privacy law referred as the Information Technology Act (IT) 2000, is the prevailing law. Nevertheless, there is no vacuum in India in the area of data protection, but the aforesaid law and its rules remains to be infirm under many aspects for the people, do not contain the stamina to tackle the modern privacy issues and indeed lack proper protection and regulation. In the age of internet, one’s privacy right could be easily and evasively transgressed. There are colossal of people who are still flummoxed about their rights and obligations of the data fiduciaries in view of the prevailing IT law. Let’s see some of the significant features of the new

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672 See, Article 16(1) of the TFEU, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.
data privacy Bill which has been introduced in Lok Sabha\(^{675}\)

**INTENT OF THE BILL**

First let us, explore the object and purpose of the bill. For the sake of easy understanding, I have mentioned below the actual intent of the bill in the following seriatim.

1. To protect the privacy of the individuals in respect of personal data.
2. To bring to the individual’s knowledge about the purpose or usage of the collection of the data.
3. To construct trust between the actors i.e., the individual and entity which process the data.
4. To protect the individual’s rights in this context.
5. To establish a regulatory framework for organisational and technical measures.
6. To lay down norms for social media and cross border transfer of data.
7. To make the processing entities accountable.
8. To sanction and lay down the remedies in case of unauthorised and harmful processing of the individual’s data.
9. To appoint a Data Protection Authority to monitor and undertake the activities under the bill.

On the whole, the Bill’s main purpose is to protect, safeguard and provide remedies when an individual’s right is jeopardized.

**SCOPE OF THE BILL**

Under the Bill, an individual is referred as “Data Principal” and the information relating to that individual is referred as “Data”. The scope of the Bill can be divided into Territorial scope and Material scope.

**a) Territorial scope**

The scope of application of the bill is not limited to the processing of personal data within the territory of India, it also extends to cover the activity of processing of personal data by the data fiduciaries or processors who are outside the territory of India, but the processing is be done in relation to services or goods provided to the data principal within India, or includes profiling such as analysing the behaviour, attributes or interests of the data principal, taking place in India.

**b) Material scope**

When it comes to material scope, the bill applies when the processing is done by the following persons: -
- Citizen of India
- Company incorporated under the Indian Companies Act (Includes both Public & Private company).
- State has defined under Article 12 of the Constitution.
- Other persons or body of persons incorporated under the Indian law.
- Data fiduciaries or processors includes any company, any person, any juristic person outside India and also includes a foreign state.

The purpose of processing must be lawful with proper consent and should be in consonance with Chapter II of the Bill. The Bill also proposes some circumstances in which the consent is not a prerequisite\(^{676}\). It

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\(^{676}\)See, Chapter III of the Data Protection Bill, 2019.
is pragmatic, to have few exceptions for the purpose of processing of personal data without consent in certain circumstances so as to ensure, the functions of the sovereign are not impeded, because as we all know “Too much of anything is good for nothing”. For instances, providing a service to the public, for compliance with court judgments, for rendering rescue operation in times of any disaster etc., in all such cases, the consent of the data principal is not at all required because requiring consent in those cases, obviously seems to be ridiculous and nonsensical. Further, the exemption is applicable in employment services, but the data fiduciary cannot gain the shelter if, the processing contains sensitive personal data of the data principal. Moreover, the Bill says, it is open for the Authority to extend the exemption by way of regulations.

The combination of both the scopes, may result for example, if a foreign company, in the process of doing business with an individual in India collects the personal data of that individual, the company has to comply with the Data Protection law of India.

As a result of bare reading of the bill, it could be inferred that the law once enacted, may come in aid not only for the citizens of India but also to the other citizens residing within the territory of India.

### RIGHT TO ERASURE AND RIGHT TO BE FORGOTTEN – The crux of the Bill

The concept of right to be forgotten was well established in the case of Google Spain by the European Court of Justice (ECJ). In this case, the ECJ held that the interpretation of Article 12(b) read with Article 14 of the Directive 95/46 has given birth to the principle of “right to be forgotten” which the data subject acquires through, the protection of privacy right guaranteed under Articles 7 and 8 of the fundamental rights Charter and the ECJ also took into account that the principle of right to be forgotten would have an overriding right not only to the economic interest of the operator of the search engine but also to the interest of the public. However, in order to determine the overriding effect of the right of the data subject, the court applied the preponderance test, the privacy right of the data subject on side and on the other, the interest of the general public. On the whole, this principle was expressly incorporated under Article 17 of the GDPR regulation 2016 with some exceptions as provided in Article 17(3) of the GDPR.

In India, the principle of Right to be forgotten was first recognised in the case of Registrar General of Karnataka High Court. The petitioner in this matter, prayed for veiling of his daughter’s name which appeared in the order of a compromised case between his daughter and her husband. The daughter of the

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petitioner was worried that as a result of her name search in a search engine such as google; yahoo, etc., her name could be easily be available in the public domain. The petitioner’s daughter apprehended that it would badly affect her family relationship and reputation in the society. Therefore, the petitioner approached the court for an order directing the registrar general to anonymise her name. The court ordered and held by stating that the western doctrine of right to be forgotten could be applied in highly sensitive cases involving woman as a party, in order to shield her image in the society.

In the matter of Zulfiqar Ahman Khan V. M/S Quintillion Business Media Pvt.Ltd. And Ors680, the defendant published in its online platform, an article containing a baseless and frivolous harassment allegation against the plaintiff. Aggrieved by this article, the plaintiff filed a suit in a trial court and the court ordered in favour of the plaintiff. The defendant complied the order and removed the article published. Then, the article was republished by another news agency platform. On noticing this, the plaintiff approached the High Court of Delhi, to remove from all other sources. The High Court of Delhi, by considering the reputation of the plaintiff in the realm of his professional and personal life, ordered for erasure from all sources including, the search engines thereby, protecting and recognising the plaintiff’s Right to privacy and its species, the “Right to be forgotten” and the “Right to be left alone”, respectively.

Since the Data protection Bill is very much akin to the GDPR, this principle was included in section 20 of the Bill. The language of this section elucidates, inter alia that the right to be forgotten could be effectuated only on the application made to the Adjudicating officer and the enforcement of the right depends on the discretion of the Officer who is bound to follow the factors enumerated in sub clauses (a),(b),(c), (d) and (e) of section 20(3) whilst, arriving at a conclusion. Unlike GDPR, right to erasure is an absolute right which can be invoked under section 18(1)(d), where the personal data is no longer necessary for the purpose for which it was processed. In this connection, it is important to draw a distinction between the right to be forgotten under GDPR and the Bill. In accordance with GDPR, right to erasure could also be known as right to be forgotten because both the rights are not absolute and subject to the exceptions laid under the chapeau of Article 17 of the GDPR. But in the Indian Bill, it is obverse, as both rights are dealt with separate sections. Precisely, in pursuance to the Bill, right to erasure could be claimed as an absolute right and right to be forgotten is a right subject to some restrictions by virtue of structural interpretation of the Bill. In my point of view, the right to erasure and to be forgotten shall be more beneficial when compared with other rights in the Bill.

SANDBOX FEATURE – Striking a balance between privacy right and innovation

The sandbox is a great step taken by the government to encourage innovation in the field of emerging technologies for the benefit of the public, the intention behind this feature is not to render this Bill as an obstacle for innovation in the field of artificial intelligence, machine learning and other emerging technologies. This feature

680 See, Delhi High Court, Zulfiqar Ahman Khan V. M/S Quintillion Business Media Pvt.Ltd. And Ors


www.supremoamicus.org

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would be useful for start-ups and other companies working for interest of the public. As novelty is an essential tool which contributes to the country’s social and economic development, it becomes indispensable for a country’s growth and the welfare of its people. Hence, in order to strike a balance between individual’s privacy and innovation, this feature has been inserted as an exception in section 40 of the Bill.

Section 40 which deals with sandbox creates a “safe zone” in which the data fiduciary engaged in the technological innovation in the public interest can make use of this space as per the terms and conditions prescribed by the data protection authority to experiment their innovative products, to put it in other way, it is like an experimenting phase for the innovation using personal data of the data principals under the surveillance of the data protection authority. A significant responsibility lies on the data protection authority to ensure that this feature shall be made available to innovators only, who work solely in public interest. Regarding the procedure concerning for the inclusion in the sandbox, the data fiduciary should mention the period for enjoying the sandbox’s benefits, however such period must not be beyond twelve months; usage of the technology; information in respect of participating data principals and other information as may be provided in the regulation, to the data protection authority. On the other end, the data protection authority has the obligations to mention the period; to specify the safeguards, terms and conditions bearing in mind, the purpose of processing; limitations on the collection of personal data and restriction on holding the personal data.

Thus, it can be deduced that sandbox is not an ordinary exception, it is a regulated feature in which both the data protection authority and data fiduciary should act cautiously, like walking on a tightrope, by finding a balance between innovation and privacy right of the individuals. But at the same time, there may be a chance for partiality when a government as a data fiduciary applies for the sandbox, as the exemption is granted by a public authority.

FINDING BALANCE BETWEEN DIGITAL JOURNALISM & DATA PROTECTION LAW

Journalism and privacy are mirrored as right to freedom of expression and right to privacy, under Articles 19(1)(a) and 21 of the Indian Constitution, respectively. The question of prevailing right among the rights (supra), in case of repugnancy, is enshrouded by various conflicting decisions of the courts. However, one can witness, based on the interpretation of the Hon’ble Supreme Court of India, in cases involving the question of prevailing right under Part III of the Constitution, the court usually employs the test of proportionality or balance as warranted by the facts and circumstances of each and every case. Here, I would like to narrow my discussion to digital journalism; data privacy and social media. In technological world, one can easily transmit or pass the news, article, etc. from one side of the country to another, even it can be swiftly transferred across the world. So, in the event of violation of privacy right, the ramification would be on a large scale. On the other hand, each and every individual has the “right to know” which is an offspring of right to freedom of speech and expression, is also a sine qua non for the application of such right. Hence, the courts have to look the matter in issue through microscopic eyes to find an equilibrium between those rights.
In the case of M.L. and W.W. V. Germany\textsuperscript{681}, two applicants requested before a regional court of Hamburg for the anonymization of personal data regarding their conviction and the result of their application for a retrial in a murder case which appeared in the archive of a radio broadcaster. The regional court ruled in favour of the applicants. The Court of Appeal upheld the regional’s court judgment by holding that based on the test of proportionality, privacy right of the applicants well outweighed the public interest as the public were well informed about the news.

Furthermore the case was appealed in the Federal Court of justice which overturned the decision by taking into account that “blanket prohibition on access or an obligation to delete any reports concerning offenders named in an Internet archive would result in the erasure of history and in wrongly affording full immunity to the perpetrator in that regard”. The Court also noted that the media’s act is within the remit of media privilege and they could not be deprived of their work which subsequently, affects Article 11 – “Freedom of expression and information” of the Fundamental Rights of the European Union.

The case reached its final stage when the European Court of Human Rights affirmed the views and assessment of the Federal Court of justice and held that there was no infringement of the applicant’s right to respect for their private life.

\textsuperscript{681} See, ECHR, M.L. AND W.W. v. GERMANY, 2018, available at https://hudoc.echr.coe.int/eng#{"fulltext":"MI%20v%20germany"},"documentcollectionid2":"GRANDCHAMBER","CHAMBER"},"itemid":"001-183947"}

In my perspective, this case might be an eye opener for the inclusion of section 36(e) in an elaborated form under Chapter VIII of the Bill which says that, the processing of personal data has to comply with the code of ethics issued by the Press Council of India or by any media self-regulatory organisation. Indeed, it envisages an unequivocal intention of the government to prescribe or specify the limits of journalism in cases involving privacy issues of an individual, nonetheless, this provision might arise a question of interpretation in the Hon’ble Supreme Court of India when it is in conflict with data privacy issues as aforesaid, the provision has to be construed according to the facts and circumstances of each case. 

SOCIAL MEDIA UNDER THE BILL

The Bill captions social media which are engaged in offering services like online interaction among its users, creating, uploading, disseminating, modifying and sharing information to its users as social media intermediaries, explicitly negates intermediaries providing commercial transactions, search engines, email services, on-line encyclopaedias, on-line storages services and internet service provider. The Bill empowers the central government in consultation with the data protection authority to label the social media intermediaries “whose action have, or are likely to have huge impact on the electoral democracy, security of the State, public order or sovereignty and integrity of India”\textsuperscript{682}. ” as significant data fiduciaries and


\url{www.supremoamicus.org}
makes them to act according to the additional obligations as laid down in the Bill. The language of the provision tends to be broad and seems to discourage the social media intermediaries’ growth because today most of the people use these platforms as a conduit to express their opinion, expression and voices, in addition, this provision may provide the government to tacitly control the dissenting voice of the user, which is consider as a safety valve of the democracy by the apex court in the Bhima koregaon case. Sec 28(3)&(4) directs the social media intermediary to be tagged as a significant data fiduciary and to make the registered users of their service who are from and in India to voluntary verify their accounts. The users who underwent such process will be given an identification mark which can be seen by other users. Albeit, India is a first country to introduce such measure, these kinds of provision make the social media intermediaries burdensome.

DATA PRIVACY AND BANKING COMPLAINCE- Head to Head

The Bill is likely to hit the banking sector as the Bill remains silent regarding the processing of personal data of the customers of banking and financial institutions including online payment or money transfer platforms such as Google pay, Paytm, Phonepe, Amazon pay, etc. The concept of Know Your Customer (KYC) is in direct conflict with the privacy Bill. The master circular issued by the Reserve Bank of India mandates the banks and financial entities to comply with KYC and due diligence procedures for the sake of preventing money laundering and other tax evading activities. Therefore, it is going to be cumbersome for the banks to comply with the data privacy bill as they have colossal of personal information relating to customers such as passport numbers; pan details; address proofs – electricity bill, telephone bill; pay slips; ration cards, email address, property details in case of availing loans etc., for the compliance and effective banking purposes. So, as per the data privacy bill, the banks and financial institutions are bound to acquire prior consent for using or processing the personal data of their customers. Their duty doesn’t stop here, their role as a data fiduciary makes them obligatory to provide access to their customers to all documents and matters relating to their personal information.

Coming to recovery of debt action and privacy issue, the apex court in Ram Jethmalani & Ors V. Union of India observed that, “The revelation of details of bank accounts of individuals, without establishment of prima facie grounds to accuse them of wrongdoing, would be a violation of their rights to privacy. Details of bank accounts can be used by those who want to harass, or otherwise cause damage, to individuals.”

Since, the recovery of debt comes under the exceptions category it may not be necessary for the banks and financial institutions to obtain the consent of the data principals. But it cannot be left alone like this, because this kind of exception may subject the customers to harassments. Thus, in my point of view, based on the conjoint reading of the data privacy Bill and the above-mentioned case, to recover a debt,

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mere existences of debt should not be encouraged, unless the fact of existence of debt is substantiated with sufficient material evidence in order to claim the shelter under section 14(2)(f).

CONCLUSION

The government of India has brought this robust Data Protection Bill with the aim to protect and safeguard the individuals from invasion of their privacy rights. Apart from the above-mentioned rights, the Bill proposes other rights such as right to confirmation and access, right to correction, right to data portability in case of cross border transfer of data and special rights relating to persons below the age of 18, it is obligatory to get the consent of the parent or guardian. Thanks to the Justice B.N. Shrikrishna Committee, which played a significant role for the construction of this Bill. India, at present, suffers from lack of strong privacy law which leads to violation of privacy right in the world of technologies. In my opinion, this Bill is well structured except some chance of favouritism towards government because, as we have seen, it also includes government as a data fiduciary and allows the major gaps in the Bill to be filled by the government through regulation as and when required. It’s like framing rules for themselves. Apart from this, once it is enacted would surely fill the grey areas left by the prevailing information technology law and tends to streamline the present situation which is flummoxed, in the field of data privacy in India. On the other hand, the Bill opens the doors for employment opportunities in the field of Data protection managers or officer in many sectors. Overall, this Bill is a panacea of rights in which, the individuals could find a solution in a timely fashion. It’s also good to see the flexibility of the Bill, so as to counter any future developments because this area is like a wave subject to frequent changes and modifications.
PENITENTIARY REFORMS IN CONTEMPORARY INDIA

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ABSTRACT

There is an old saying that a stitch in time saves nine and this article predominantly enlightens the need for reformation in the existing Criminal Justice System of India. For a long time, there have been many instances where prisoners are not treated as human beings and are denied basic rights. This research work begins with an attempt to define the concept of Prison, incorporating restorative values in it. A critical analysis has been made on the current status of Indian prisons with the help of illustrations and judgements given by the Supreme Court. India’s existing prison reforms had been examined carefully and the best rehabilitative practices were elucidated. This study further looks at some of the interesting correctional programs in other countries. Finally, countermeasures to tackle the problem were discussed. Several research papers and eminent websites were scrutinized for this study.

The main aim of this article is to unbox people’s thinking about the prisoners and the problems they face in jails.

Keywords: Prison reforms, Overcrowding, Rehabilitation, Indian prisons.

INTRODUCTION

“Darkness cannot drive out darkness; only light can do that. Hate cannot drive out hate; only love can do that”. - Dr. Martin Luther King, Jr.

Punishing the perpetrator is the foremost culture of all the civilized community. Incarceration is the most common measure of retribution addressed by almost all the legal systems. A layman has a sulky myth that people are usually sent to prisons 'as' punishment but not 'for' punishment. The main objective of the penal system is to permute the prisoners into reputable and law governing civilians, but in reality, the jail officials try to bring out transformation of inmates by the use of excessive force which includes torture to cruel treatment.

"Criminals are not born criminals, society makes them that way".

In the present circumstances prison is considered much like a correctional or improvement proficiency which straight away signifies that there is more prominence on reconstruction of prisoners in the form of punishment. There is a greater realization that reforms in the prison system should be globally encouraged and alternatives to confinement should be further developed. Reformation should be a dominant objective of punishment.

MODERN DEFINITION OF PRISON

Originally a prison or penitentiary was considered as a place of confinement for felons whose freedom has been denied under the authority of the state. Section 3 of the Prisons Act, 1894 had also defined the term Prison, but these traditional and old definitions of prison are inappropriate to the present scenario in the world.

The correctional reforms have impacted the whole world. Mahatma Gandhi also supported the reformative theory in a way that we should kill the crime and not the criminal. There is a need to incorporate reformative values into the meaning of prisons. Justice V. Ramakrishna Iyer, proposed prison as:
“A reformative philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner’s personality through a technology of fostering the fullness of being such a creative art of social defenses and correctional process activating fundamental guarantees of prisoner’s rights is the hopeful note of national prison policy struck by the constitution and the court.”

Through his opinion Justice Krishna Iyer rightly emphasized the need for national prison policy in the current situation. His thoughts flawlessly reflect the modern correctional ideology with the use of technology.

CURRENT SCENARIO OF INDIAN PRISONS

Innocent till Convicted?

- **Undertrials**: As interpreted by the common public of every society or simply a layman, ‘Undertrial’ is a person who is presently under investigation or who is imprisoned because he is not proven guilty. Persons who are constricted in prisons are believed to be innocent in the eyes of law. But the general commoner forms a sticky assumption that once a person visits jail he has definitely committed an offence which not only affects the person’s dignity in the society but also his family.

  Undertrial prisoners contribute a major part of the entire prison population. According to the reports of Prisons Statistic India 2015, Released by National Crime Records Bureau (NCRB) of the government of India on October 2016, declared shocking results relating to the inhibition of undertrials, it states that 67.7% of the people in Indian jails are under undertrials which is almost 2/3rd of the total prison population. Numerically, out of 4,33,003 prisoners recorded in jail as on December 31st in the year 2016, the number of undertrial were reported as 2,93,058 which is really a nerve breaking situation.685

  The Constitution of India, The Universal Declaration of Human Rights and the emerging Prison Reforms clearly defines the standard treatment with prisoners on trial. But the expected scenario is completely different when it is practically applied.

- **Overcrowding**: An essential aspect of prison management is the populace that its officials have to command in a legitimate manner. The major problem which all our Indian jails are going through is the overcrowding population. The national average occupancy was announced as 117.6% in the year 2018.686

  There are various overriding reasons which contribute to this issue. Overcrowding directly relates to the available space for prisoners which results in increasing pressure on already available facilities in jail.

  Table 1: Prison population in India

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From the table one can easily analyze that the rate of prison population is slowly increasing within every 2 years.

- **Problems faced by Female Prisoners:**
  Gender lamination has always remained a problem in our society. It is only the women who suffers from the discrimination while fighting for their rights for decades. If one would grade the population relating to the solemnness of the health issues, female inmates would be placed at the top of the hierarchy.

An important note is that a greater part of female inmates falls under the category of menstruating age group that is from 18 to 50 years, which states that they should be facilitated with sterilized sanitary napkins from time to time as per their requirement, but sadly this is vanished. Women are delivered only a specific set monthly regardless of their requirement, which encourages the women to adopt contaminated materials such as cloth, pieces of left out mattresses including inner stuff of cushions, papers, newspapers, magazines etc.\(^{687}\)

### Table 2: Female Prison Population in India

<table>
<thead>
<tr>
<th>YEAR</th>
<th>PRISON POPULATION</th>
<th>PRISON POPULATION RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>272,079</td>
<td>26</td>
</tr>
<tr>
<td>2002</td>
<td>322,357</td>
<td>30</td>
</tr>
<tr>
<td>2004</td>
<td>331,391</td>
<td>30</td>
</tr>
<tr>
<td>2006</td>
<td>373,271</td>
<td>32</td>
</tr>
<tr>
<td>2008</td>
<td>384,753</td>
<td>33</td>
</tr>
<tr>
<td>2010</td>
<td>368,998</td>
<td>30</td>
</tr>
<tr>
<td>2012</td>
<td>385,135</td>
<td>30</td>
</tr>
<tr>
<td>2014</td>
<td>418,536</td>
<td>32</td>
</tr>
<tr>
<td>2016</td>
<td>433,033</td>
<td>33</td>
</tr>
</tbody>
</table>


687https://wcd.nic.in/sites/default/files/Prison%20Report_Compiled.pdf
From the table we can clearly state that the prison statistics at every five-year interval reveals an increasing trend in the population of women inmates.

- **Mother & Children in the prison:**
  Women who are pregnant on entering the prison or become pregnant during the time of confinement (due to the sexual abuses faced by them) require appropriate health care facilities which are often inadequate or bitterly unavailable. Children are usually traumatized by the detention of their mother and the sudden as well as the forced separation. Due to such detention it imports various mental disorders among children which includes anger, anxiety and also depression. “Reintegration” into society after their release is another challenge for many women prisoners as they undergo severe social scar, failure of family relations, fall of employment, absence of financial independence and so on.

- **Health Problems:** The prison environment is rather unhealthy and it serves as “hot-spots” for various infectious transmissions. Hygienic conditions of prisoners are negatively affected due to shortage of latrines, urinals, and bathrooms which is also because of overcrowding. The majority of the health problems are Drug abuse, Alcoholism, Trauma, Homicide, Violence, Neuropsychiatric, Infectious Disease, HIV/AIDS, Tuberculosis, Sexually Transmitted diseases, Hepatitis B and C infections these health problems also include the mental issues faced due to the torture as well as the abuse.

  - **Custodial Rapes:** Custodial rape takes place when the rape is done by a man in whose custody the woman is. Men who are generally in a very strong and powerful position sometimes misuse their power to sexually exploit women under custody. The landmark Mathura rape case was an incident of custodial rape case in India. 
  
  - **Custodial deaths:** Custodial death is the event of demise of an individual, who has been detained by the police on being convicted or undertrial. As per Asian Center for Human Rights (ACHR) in its report which was released on June 26th declared that a total of 1,674 custodial deaths which includes deaths in the judicial custody were 1,530 and 144 deaths in police custody. That means on an average there were 5 custodial deaths per day during that period 2017-2018.

**Ground Reality:** The Apex court delivered a historic order on police reforms in 2006. Which stated that, every state should have a police complaints authority where any citizen can file a complaint against police officials for any act of misdemeanor. But in reality, only a few states such as Kerala, Jharkhand, Haryana, Punjab and Maharashtra have implemented this order. Other states have not taken this matter into consideration.

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689 Chaitanya Mallapur, *Story in numbers: As many as 100 custodial deaths in 2017, shows NCRB Data,* BUSINESSES STANDARD,(Nov. 18, 2019, 00:58 AM),
In rural areas, there is no scientific aid to support the process of investigation and in such cases the police officers have the upper hand to use such force. Police stations in such areas lack facilities such as telecommunications signals or network, internet connection, vehicles and sadly even the motorable roads. Conditions in "hawalaat" which means lockup are so bad that just living in such an atmosphere is a torture.

- **Education**: The role of "prison education" is widely recognized in the modern concept of prison reform. Most of the crimes are committed only because of lack of proper education and job opportunities.

Table 3: Statistics of educated prisoners in India.

<table>
<thead>
<tr>
<th>S. No</th>
<th>Category of Education</th>
<th>Year (2016)</th>
<th>Year (2017)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Availing Education</td>
<td>1,30,443</td>
<td>1,16,968</td>
</tr>
<tr>
<td>2.</td>
<td>Post-Graduation</td>
<td>7,647</td>
<td>7,896</td>
</tr>
<tr>
<td>3.</td>
<td>Graduation</td>
<td>25,396</td>
<td>27,561</td>
</tr>
<tr>
<td>4.</td>
<td>Higher Education</td>
<td>12,923</td>
<td>13,538</td>
</tr>
<tr>
<td>5.</td>
<td>Elementary Education</td>
<td>54,776</td>
<td>50,751</td>
</tr>
<tr>
<td>6.</td>
<td>Adult Education</td>
<td>53,965</td>
<td>44,338</td>
</tr>
<tr>
<td>7.</td>
<td>Computer Course</td>
<td>8,779</td>
<td>8,341</td>
</tr>
</tbody>
</table>

Source: The New Indian Express

From the above table we can analyze that the proportion of graduate inmates in the country’s prison population showed an overall increase of 0.2%. Reports state that this decline has resulted from lack of proper class-rooms, equipment and also lack of proper staff in spite of various reforms available.

- **Unnecessary Arrests**: The power lying in the hands of police to arrest is very vast. The Third Report of the National Police Commission (NPC) recognizes the wrongful use of arrest powers as one of the leading sources of bribery in the police officers and also according to this report it states that nearly 60% arrests made by the police officials are unnecessary and unjustified.

In Joginder Kumar Vs. State of Uttar Pradesh & Others the Hon’ble Supreme Court declared the guidelines as to what should be the basis of arrest as followed: “Arrest should not be made merely because the police official has the authority to do so in a routine manner”. Later, in Arnesh Kumar Vs. State of Bihar has reviewed the amended provision on arrest by declaring here by’ That police officers should not arrest the accused unnecessarily and magistrate should not authorize detention so casually and mechanically.

- **Delay of trials**: Many prisoners are continuously detained under process of
investigation by the official authorities for a long period of time which is really unnecessary with respect to both the investigator as well as the criminal. No person can hope to get justice under a fairly reasonable period. Comparatively civil cases are much more delayed.

- **Delay in the process of investigation:** This is one of the major problems faced by all the offenders in and around the globe. The criminal spends half of his life as well their wealth in the process of inquiry. There are many such reasons for these delays such as:
   - Inadequate number of courts
   - Abuse of Public Interest Litigation (PIL)
   - Vacancies in Judiciary
   - Large number of appeals
   - Frequent Adjournments
   - Delay in filing Written Statement, the list does not stop here the major issue due to this delay leads to prolonged detention of the prisoners.

**PRISON REFORMS IN INDIA**

- **All India Jail Committee (1919-1920):**
  The appointment of this panel was the foremost step taken towards correctional reforms in India. A first-ever study has been made exhaustively on the problems faced by prisoners. From its inception, amelioration and refinement of inmates were recognized as necessary for the administration of prisons.

- **Jail Administration in India:** Indian Government invited Dr. W.C. Reckless from the UN to examine jail administration in the country and suggest ways to improve it. His report marked another landmark document in the history of correctional reforms. He recommended the establishment of Probation and Revising Boards, Advisory Board for Correctional Administration, National Forum for exchange of expertise and experience, and Specialized training of prison personnel.

- **Indian Jail Manual Committee (1957):**
  A Model Prison Manual was prepared to inspect the problems of correctional administration and to suggest ways of improving it. The Central Bureau of Correctional Services was set up following the recommendations made by Dr. Reckless and the committee to frame uniform policy and to advise the State Government on the latest methods of prison administration, probation, juvenile homes, after care etc. It also appointed a Working Group on Prisons which highlighted the need for National Policy on Prisons.

- **All India Prison Reforms Committee (1980-83):**
  A Committee led by Justice A.N Mulla was set-up by Government of India in 1980 to assess the prison administration and laws. The final report consisted of 658 recommendations on penal management which was communicated to all the States and Union Territories for implementation. Some of the recommendations include:
   1. Setting up of Department of Prisons and Correctional Services in each State and Union Territory to deal with adult and young lawbreakers.
   2. Undertrial prisoners should not be unnecessarily detained and shall be confined in separate institutions.
   3. Efficacious enforcement of Probation of Offenders Act, 1958 throughout the country.
   5. Segregation of juvenile offenders and women prisoners from other prisoners.
   6. Development of inmates through vocational training and work programmes.
with fair wages and incentives to encourage them.

- **National Expert Committee on Women Prisoners**: This committee was appointed under the chairmanship of Justice Krishna Iyer 1986. It has recommended employment of more women into police force to deal with female prisoners, national policy for women prisoners, separate jail for women, proper medical care of the child born to a woman offender in gaol.

- **The Malimath Committee 2003**: A committee headed by Justice V.S Malimath was formed to examine the fundamental principles and functions of the criminal justice system and suggest ways of improving it. The final report comprising 158 suggestions was submitted to Deputy Prime Minister, L.K Advani in 2005. Some of the key recommendations include:
  a. The Committee felt that few good features of the Inquisitorial system followed in France and Germany should be adopted into the Adversarial system. The main feature of the Inquisitorial system is that the investigation is monitored by a Judicial Magistrate with an aim of seeking the truth.
  b. Pregnant inmates and children of women prisoners who are under 7 years of age can be placed under house arrest during that period instead of imprisoning them for the welfare of innocent children.
  c. A retired judge of a High Court should be put in charge of the “Arrears Eradication Scheme” to tackle all the pending cases and dispose of them effectively.
  d. All the rights of accused must be subsumed in a Schedule to the Criminal Procedure Code and should be translated into regional languages for the free distribution of pamphlets among prisoners.

- **Non-Plan Scheme on Modernization of Prisons (2002-07)**: Most of the prisons are old and were built during British rule. The Government of India took initiative to modernize prisons in India through this scheme in 2002-03 in 27 states for 5 years. The objectives of the scheme include construction of new jails, expansion and renovation of existing jails, construction of staff quarters, sanitation and water supply. This scheme lasted till 2009. As per the report received in September 2011, 119 new jails, 1572 additional barracks in the existing prisons, 8568 staff quarters for the prison personnel have been constructed by the State Governments.

- **CCTV Surveillance for Prison Security**: For the safety and security of prisoners and to ensure there is no VIP treatment to rich and influential inmates, CCTV cameras have been installed in prisons. West Bengal, Andhra Pradesh, Tamil Nadu, Karnataka, Chhattisgarh, Bihar and Delhi have CCTV systems. Tihar Jail which is the largest in the country has 942 cameras and with the approval of the Government it is set to get 5,692-night vision cameras.

- **Open Prisons**: The problem of overcrowding in jails can be vanquished to a great extent by the open prison system. The first open prison was built in Uttar Pradesh in 1953. There are about 77 open jails in India with the highest numbers being in Rajasthan. These are designed to rehabilitate the prisoners who had almost completed their sentence. It facilitates offenders to socialize and get employed. At the end of 2015, out of a total of 419,623 prisoners in India, 3,789 (0.9%) were held in open prisons693.

- **Video Conferencing**: This system initially began in Andhra Pradesh in 2001 and has

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now expanded in Maharashtra, Karnataka, Tamil Nadu, Gujarat, West Bengal, Jharkhand and Delhi. It ensures safety and production of undertrials in courts. This system minimizes transportation and manpower. Some crucial trials have been carried out on the guidelines of the Apex Court. To limit human interface and spread of Covid-19 the apex court had directed to conduct hearings through video conferencing.

- **Educational programmes**: Most of the prisoners are illiterate. Educating them through various degree programs will enhance their decision-making abilities and increase their confidence levels to face the society post release. IGNOU (Indira Gandhi National Open University) through its ‘Free Education for Prisoners’ initiative is providing higher education to all the convicts across the country. They also facilitate inmates with study materials and a library in jails. Sometimes they are even allowed to attend convocations. Computer courses are also available for prisoners.

An education project had been initiated in 2006 by Amritsar Central Jail. As a result, the literacy rate of Amritsar Central Jail is 74% which is higher than that of Punjab (70%) as well as India (60%). 29,000 prisoners in 2015 and 17,000 prisoners in 2016 were educated through the “Vidyadaana Yojana Program” by the Telangana state government. The main highlight of this scheme is that it encourages educated prisoners to teach their fellow illiterate inmates.

- **Vocational programmes**: Training sentenced persons with various courses will rehabilitate and foster them with required work-skill to re-socialize after their release from jails. Vocational Training Institutes are established in prisons which provide numerous courses like: - welding, carpentry, cooking, tailoring, bakery, weaving, agriculture, horticulture, pottery, soap making, toy making, driving, handicrafts etc. Training facilities in any prison depend on the availability of raw materials, demands, local market needs and marketing of finished products. A total of 52,105 inmates were trained under various vocational training programmes in India in 2015.

- **Prevention of HIV /AIDS /Drug Use**: A number of programmes on health issues like HIV and drugs were conducted in jails with the support of NGOs to raise awareness among inmates. Tihar Jail currently has a 120-bed disintoxication center for drug rehabilitation and treatment of withdrawal symptoms. After detoxification, inmates are placed in therapeutic communities run by NGOs. Tihar Jail in collaboration with UNODC and AIIMS was the first prison in South Asia to start the Opioid Substitution Treatment (OST). De-stress activities like Yoga and Meditation courses, Art of Living courses and vipassana are also conducted.

- **Welfare of Mother and Children in Jails**: According to a study in 2015, 1,866 children of incarcerated women are living

in prisons across the country. Children up to six years of age are allowed to stay along with their imprisoned mothers in jails after which they are sent to boarding schools with the help of NGOs. In the case of *R.D. Upadhyay v. State of AP and ORS*, the Supreme Court directed all the States and Union Territories to follow the issued guidelines to take proper care of pregnant prisoners and children of convicted mothers in prisons throughout India.

Recreational facilities like T.V, picnic, playground, library, toys etc. are provided to children and female inmates. Special diet, clothing, education and medical facilities are also furnished to them. Festivals like Diwali, Dussehra, Christmas, Raksha Bandhan etc. are also celebrated in prisons.

- **Legal Aid:** The right to free legal aid has been granted under Art. 39 A of Indian Constitution. Most of the prisoners are illiterate and poor to afford an advocate and seek justice. The Supreme Court laid emphasis on legal aid in its historic decision, *Hussainara Khatoon & Ors Vs Home Secretary, State of Bihar*, where it ruled that, “If free legal services are not provided the trial itself may be vitiated as contravening Art.21[5]”. In 2017, National Legal Services Authority (NALSA) took an initiative to provide legal services to those needy prisoners. As a part of this initiative 1,128 Jail Legal Services Clinics were established in jails. Awareness sessions were also conducted to make inmates aware of their rights. NALSA provided legal assistance to 1,63,656 inmates and 2,55,836 inmates more, through the clinics.

- **Visitor Management System:** National Prisons Information Portal (NPIP) provides vital information of inmates along with online visit requests and grievance redressal. Visitors’ chambers in Tihar Jail are now facilitated with a microphone system, echo proof, better visibility and audibility to ensure privacy and security. Telephone facilities are also available to prisoners for their good conduct. Biometric fingerprints of inmates are recorded for safety purposes.

**SOME INTERESTING REHABILITATION PROGRAMMES IN OTHER COUNTRIES**

- **Electronic Monitoring System (EM):** Netherlands is one of the countries with lowest incarceration rate in the world. Prison population in the country has decreased by 50% that it had to close the only 29 prisons it had between 2013 to 2018. The main reason behind it being community service and electronic monitoring systems. The ankle monitoring system is given to prisoners on leave or at pre-trial stage or conditional sentence or penitentiary programmes. This system enables prisoners to work outside and earn. The monitoring officer receives notification as soon as the prisoner violates his location order with the equipment. This reduces the recidivism rate. India needs to adopt this system.

- **The Mekelle Prison Project:** The Mekelle Prison in Ethiopia has initiated a marvelous...
rehabilitative programme that provides decent work to prisoners through cooperatives, microfinance and microinsurance. 1280 prisoners have been trained in financial literacy and 31 active cooperatives have been established. This project mainly focuses on gender neutrality by providing equal support to women. It also incorporates business development skills in offenders.

- **Prison Cloud**: In Belgium jails, prisoners are equipped with private clouds and virtual desktops that give them access to e-learning programmes and restricted internet access providing a platform for work and entertainment. It also allows offenders to do online food purchasing. These desktops are under continuous supervision by the officers.

- **Redemption through Reading**: Another interesting programme was initiated in Brazil to solve prison overcrowding where inmates can reduce four days of their penalty just by reading a book. Books related to philosophy, classics, science and literature can be read and at the end an essay should be written related to the book. Their reading activity is strictly evaluated by a panel. This was mainly designed to encourage the habit of reading and increasing literacy. Similar programme was proposed in Calabria, Italy but this is applicable to convicts who have been sentenced to serve more than six months in prison. 701

- **Norwegian Prisons**: Norway is one of the countries with lowest incarceration rate and recidivism rate of 20% in the world. 702 The main reason is that it focuses on “restorative justice”. The offenders are not sentenced with life imprisonments and capital punishments with 21 years being the maximum life sentence given to criminals. The Halden prison has been regarded as the world’s most humane prison by TIME Magazine 703. The prison is designed in such a way that it connects inmates closely to nature and brings them back to a sense of normalcy. The prison officers support inmates by mentoring them to reform.

**CONCLUSION**

The evolution of penitentiary reforms in India is dawdling. But the need for transformation has been realized all over the world as a result, laws safeguarding the rights of the prisoners have been granted by the United Nations and Constitution of India. Since then several law commissions and committees were set up to review the existing criminal justice system and have proposed recommendations. After being subjected to close scrutiny it revealed that only few of them have been put into actual practice. The Supreme Court of India through its landmark judgements has been consistently protecting human rights. But are these existing reforms in India sufficient to subjugate the increasing crime rate?

Reformation needs to take place from the root level i.e. the District Courts. The Legislation, Executive and Judiciary have to work hand in hand. The criminal justice system should equip itself with the latest technology. The correctional facilities available in few prisons should reach out to all other prisons. Some of the best rehabilitation practices can be adopted from

701 Carlo Macri, *The more books you read, the less you stay in prison*. From Calabria the bill, CORRIERE CHRONICLES (Mar. 30, 2020, 14:25 PM), https://www.corriere.it/


other countries in the world. Raising consciousness among fellow humans regarding the rights of prisoners is another indispensable aspect.

After all prisoners are human beings too!

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DEFAMATION AND SUING OF THE COMPANY

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From Sastra Deemed to be University

DEFAMATION

Abstract: As we are living in a corporate world, we need to face every day challenges in this field. So in order to protect the interest and economic stability of the company, the company must show its creditability to its consumers. Defamation is the main aspect which tends to lower the status of the corporate entity. We can easily compare defamation with coronavirus since coronavirus spreads easily likewise the defamed statement also spreads easily and it may affect the huge profits of the company or results in the closing of the company. Hence, the law is there to protect the individual reputation from false defamatory actions. And this paper going to deal with the defamation and suing of company. We also compared the English law and the Indian law about defamation and differentiated libel and slander and also differentiated civil defamation and criminal defamation. Nowadays, defamatory posts in social media became very common and it is one of the biggest problems, we also discussed these issues. There are many contradictory views available which confuse the person or the corporate to sue or getting sued for defamation. This paper concerns about the corporate and individual relationship with defamation. There is a debatable issue that whether the company is liable for criminal defamation? And if the company is liable for criminal defamation, whether the company is sentenced to jail?

We gave a full stop to these issues and gave a clear conclusion

Introduction: The word defamation is derived from the Latin term ‘Diffamare’. It means 'spreading evil report about someone'. Defamation is the false statement by one about another. It may be an oral or written statement. It is a statement that made to injures someone's reputation. It harms the plaintiff's reputation, reduces the respect, regard or confidence of the plaintiff and it induces disparaging, hostile and disagreeable opinion about the plaintiff among the people. It was made to create a bad opinion among the people about a person. In other words, defamation was easily defined as it is the statement that tends to lower a person in the estimation of the right-thinking person or the society. Everyone is entitled to have his reputation and self-esteem. Reputation helps the person to hold in high esteem and honour in the society. That reputation about that person mainly depends on opinions made by others. A good opinion about a person makes his move freely among society. Thus, every person has the right to keep a good reputation about him among others. Defamation will spoil the reputation of a person. So, defamation was considered as an offence in Indian law. It was either a civil wrong or a criminal wrong. Not only individual can sue a case for defamation, but also companies can sue a case for defamation. For a company, reputation is a valuable asset. If the reputation of a company was damaged there was a chance in the closing of the company. If a company makes false statements about another company, the offender company is liable for defamation. Thus, the company can sue

1.Civil and criminal defamation  2.Suing against company  3.Online defamation

www.supremoamicus.org
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a case for defamation and can also be liable for defamation. The true statement about a person, harms his reputation is not considered as defamation. The defamation should be a false statement which reduces the reputation of that person. The republication of someone else’s defamatory statement is also considered as defamation.

**Comparison of English law and Indian law:**

**English law:**

In English law, the action for defamation is divided into Libel and Slander. Slander is the statement that was made by an oral e.g speaking. Libel is the statement that was made in a permanent form by writing, printing and pictures. In a film, not only the photographic part is considered as a libel and also the speech which was synchronized with the photographic art is considered as slander. 

*In youssoup vs M.G.M pictures Ltd* [705]. In a film, the princess, Natasha was shown as raped by a man, Rasputin. The photographic part which was permanent and seen by the eyes is libel. The speech, heard by ears that were synchronized with the photographic part is slander.

Reasons for the distinction between libel and slander:

1. In criminal law, only libel is considered an offence but the slander is not an offence.
2. In civil law, the libel is actionable per se i.e the plaintiff doesn’t have to prove that he was suffered some damages but the slander is not actionable per se.

Exceptional cases where slander is also actionable per se:

1. Imputation of a criminal offence to the plaintiff
2. Imputation of a contagious or infectious disease to the plaintiff.
3. The imputation that a person is incompetent, dishonest or unfit to the office or profession or trade or business carried on by him.
4. Imputation of unchastity or adultery to any woman or girl

**Indian law:**

In Indian law, both libel and slander are criminal offences under sec. 499 if IPC. Defamation is either civil or criminal in Indian law. Under Indian law, the remedy for a civil defamation is monetary and for criminal defamation is sentenced to jail or fine or with both. This is highly unusual since defamation is a crime in most of the countries. Civil defamation comes under the Law of Torts, it is not codified as legislation and depends on only judge-made law. Criminal defamation comes under IPC. Sec.499 to 502 of IPC speaks about defamation. In a civil action, the plaintiff needs to prove that the statements injured the person’s reputation. Then, it is the duty of the defendant to prove that the statement is true or fair comment or uttered or qualified privileges under parliamentary or judicial proceedings. In a criminal action, the plaintiff needs to prove that the defendant has an evil intention to defame him. If the defendant proved that his statement comes under the ten exceptional cases provided under Sec.499 of IPC, then he was not liable. The freedom of speech and expression is a fundamental right provided under Art.19(1)(a) of the Indian Constitution and is subject to reasonable restrictions for defamation.

*Subramanian Swamy Vs. Union of India* [706]:

[705] Yousoup Vs. G.M pictures Ltd, 50 T.L.R 581

[706] Subramanian Swamy Vs. Union of India, 2003 (69) DRJ 202
In this case, the plaintiff argued the punishment for criminal defamation was against the right to speech and expression. The Supreme Court held that the criminal offence of defamation is a reasonable restriction on the right to speech and expression. So, it was not unconstitutional.

**Difference between Libel and Slander:**

**Libel:**
Libel is a false statement in written form or a published defamatory statement. It was found in printed media such as newspaper, magazines, on blogs, social media, websites etc. Libel is both civil and criminal offence. The publisher is also held liable. It is actionable per se i.e., the plaintiff needn’t prove that he suffered any damages so as to possess an explanation for the action. The punishment for Libel is fine but the punishment for seditious libel is imprisonment.’

**Slander:**
Slander is a false statement by spoken words or gesture tending to injure the reputation of another. It is found in television, programmes, varied public gathering places, face-to-face, phone call, voicemail etc. Slander is an only civil wrong and in English law, slander is not an offence. It is actionable per se i.e., the plaintiff has to prove some special damages. The publisher is not liable. The punishment for slander may vary according to country. General punishment includes civil lawsuit and financial damages.

**Difference between civil defamation and criminal defamation:**

**Civil defamation:**
The defamed person can claim damages in the form of monetary compensation. It comes under the Law of Torts. The defamation is the publication of a statement which tends to lower a person in the estimation of the right-thinking member of the society.

For civil defamation, the following condition has to be satisfied:
1. The statement must be defamatory
2. The statement must be referred to as the plaintiff
3. The statement must be published

**Defences:**
1. **Justification or truth:** If the said statement is true or justified, then the person is not liable.
2. **Fair comment:**
The fair comment on matters of publishing interest is a defence for defamation. For the defence, the following conditions should be satisfied.
   1. It must be a comment
   2. The comment must be fair
   3. The matter commented upon must be a matter of public interest

**Criminal defamation:**
Sec. 499 to 502 of I.P.C deals with defamation. Under Sec. 500 of I.P.C, the accused person was sent to jail for two years (or) to pay the fine (or) with both. The offence is bailable, non-cognizable and compoundable offence i.e., no police can register a case and start an investigation without the court’s permission. The mala fide (bad) intention of the accused is necessary for criminal defamation.
Defences:

The punishment for defamation is provided under Sec.500 of IPC but Sec.499 also provided ten exceptional cases for defamation. If a defamatory statement was made without any bad intention or in good faith, then it is not defamation. The good faith refers to the lack of a desire to fraud any person or contempt of any person. Good faith should have these characteristics:

- Decency
- Being fair
- Being reasonable

The ten exceptional cases provided under Sec.499 of IPC:

1. Imputation of truth with the public good, it is not defamation if a statement is true about that person and published for the public good. If it is not for public good then it is a question of fact.
2. Public conduct of public servants, it is not defamation if a statement made in good faith that conducts a public servant.
3. Conduct of any person touching any public questions, it is not defamation if a statement expressed in good faith that opinion whatever respecting the conduct of any person touching any public question.
4. Publication of report of proceedings of courts, it is not defamation to the public the true report of the proceedings of the court.
5. Merits of the case decided in court (or) conduct of witnesses, it is not defamation that the opinion made in good faith, respecting the merits of the case which decided by the court or the conduct of witnesses or agent.
6. Merits of public performance, it is not defamation that the opinion in good faith respecting the merits of performance made by an author.
7. Censure passed in good faith by a person having lawful authorities over another, it is not defamation in a person having any authority over another, either conferred by law or arose by a lawful contract and passed a censure in good faith that conducts that person.
8. Accusation preferred in good faith to the authorized person, it is not defamation if the accusation, in good faith against any person to any of those who have lawful authority over that person.
9. Imputation made in good faith by a person for the protection of his (or) other’s interest; it is not defamation to make an imputation against another. The imputation was made in good faith for the protection of the interest of other person or the public welfare.
10. Caution intended for good of a person to whom conveyed (or) for the public good, it is not defamation to convey a caution that is in good faith, to one person against another.

A defamatory statement must refer to Plaintiff:

The defamatory statement must refer to the plaintiff. It is not necessary that the plaintiff should have been described by his own name. It is sufficient if the plaintiff is described by an initial letter of his name or even by a fictitious name, the plaintiff should satisfy the court that he was the person referred to. If a statement refers to a group or a class of people, then no member of that group or class can sue a case unless he can prove that the statement refers to him.

E.g: If a man wrote that, ‘All lawyers were liers’. Here the statement refers to a group of people. Hence no particular lawyer could sue him for defamation unless there was something to point to the particular person.

Innuendo:

The word innuendo is derived from a Latin word ‘innuere’ which means ‘to hint’ or ‘to insinuate’. It is an indirect contempt of an individual. It’s generally
critical, disparaging or salacious in nature. Innuendo is a statement doesn’t refer to the plaintiff directly, the doctrine of innuendo may be pressed into service. The word prima facie innocent are not actionable unless their secondary or latent meaning is proved by the plaintiff. Innuendo is the word which is not defamatory in their ordinary sense, but may nevertheless convey a defamatory meaning owing to the circumstances.

E.g:
‘A’ made a statement about ‘B’ that, “‘B’ never stole my watch”. It is an innuendo.

Social media and online defamation:

Internet and social media pave the way to interact with people worldwide. It has brought the world as a ‘small village’ to everyman who has access to it. It provides enormous information that a common man could not easily access. It has also given new dimensions to the trade, business, and profession. A common man can easily promote his product or creativity via the medium of the internet and social media and easily made the product to sale. Internet and social media play a major role in our day-to-day life. There are many advantages to the internet and social media but at the same time, there are many disadvantages to the internet. The internet and social media have also given a new face to the crime and a new medium to the bad elements to commit the crime. With the use of the internet and social media can some time causing damages to the companies’ business due to the message passed on the internet about the companies because it’s easily spread than a physical medium.

Swami Ramdev & Anr. Vs. Facebook Inc & Ors

Swami Ramdev, the plaintiff, is a well-known person and yoga guru. Many defamatory posts were posted about him on Facebook. The court ordered Facebook to remove all defamatory content posted online against Ramdev.

Online defamation against the company:

Not only individuals are affected by online defamation even companies are also affected by these. A company is defamed if any false negative statement about that company was made and that would tend to negatively impact its standing in the business. The defamatory statement about a company will reduce the company’s financial status and its reputation among the people.

Tata Sons Ltd. Vs. Greenpeace International and others:

In this case, the Delhi High Court made the subsequent statement, It is true that in the modern era defamatory material could be communicated broadly and rapidly via other media also. The international distribution of newspapers, syndicated wire services, radio and satellite television broadcasting are some examples. Internet defamation is distinguished from the physical deformation, the internet defamation can easily damage the reputation of individuals and corporations, by the features described above, especially by its interactive nature, its potential for being taken at face value, and its absolute and immediate trending and accessibility. The mode and extent of publication is,

707 Swami Ramdev & Anr. Vs. Facebook Inc & Ors (2001) 8 SCC 344

708 Tata Sons Ltd. Vs. Greenpeace International and others, 14 (1988) 3 SCC 319
therefore, a significant consideration in assessing damages in Internet defamation cases.

**Civil defamation against companies by an individual:**

Not only a person can sue another person if there was any damage to his reputation. A person can also sue a company if his reputation was damaged by the company. This right is acknowledged as a personal right and is a jus in rem i.e., a right against all persons in the world. There are many cases that a person sues a company for civil defamation and get the remedy in monetary form.

1. **Chris Cairns vs Lalit Modi**

Chris Cairns, the former New Zealand cricketer. He filed a defamatory case against former IPL chairman, Lalit Modi for posted a defamatory statement in the Twitter. In that Modi referred to Cairns' alleged involvement in match-fixing as the reason for barring him from the IPL auction. So, he filed a case against Modi and the court ordered the defendant to pay $142,000.

2. **Subhas Chandra Bose Vs. R. Knight and Sons and Anr**

The plaintiff Subhas Chandra Bose is a well-known person and also a freedom fighter. The defendant is an editor. He sued the defendant for the defamatory statement made in an article against him. The court held that the defendant was held liable and the plaintiff got the remedy in monetary form.

3. **Narayanan Vs. Naryana**

The defendant is an editor and a publisher of a Tamil journal. There was an article in his journal which defames the plaintiff. So, the plaintiff sued a case against the defendant for compensation. The court ordered the defendant to pay Rs.100 as compensation.

**Criminal defamation against the company by an individual:**

Even though the company is an artificial person, it is a billion-dollar question of whether a company was sentenced to jail for criminal defamation? In the case of companies, imprisonment cannot be imposed even for serious offences mentioned under the IPC. In many cases, P.V.Pai Vs. R.L.Rinawma, Kusum products Ltd. Vs. S.K.Sinha and Modi industries Industries Ltd. Vs. B.C.Goel, the court held that it is better to impose only fine upon the companies even in the cases where there is a punishment for imprisonment since a company has no soul and body to imprisonment. The legal difficulty was noticed by the Law Commission and in its 41st Report, the Law Commission suggested an amendment to Sec. 62 of IPC by adding the following sentence, “If the offender is a company or a corporate or an association of individuals, it shall be competent to the court to sentence to only fine instead of a sentence to jail”. The parliament has understood the problem and decided to amend in IPC by imposing fine instead of imprisonment where companies are involved in 1972. But the bill was not passed and lapsed. But the judgement of

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709 Chris Cairns Vs. Lalit Modi, [2012] EWHC 756 (QB)
710 Subhas Chandra Bose Vs. R. Knight and sons and Anr, AIR 1929 Cal 69
711 Narayanan Vs. Naryana A.I.R. 1961 Mad. 254
712 P.V.Pai Vs. R.L.Rinawma, ILR 1993 KAR 709
713 Kusum products Ltd. Vs. S.K.Sinha, 1980 126 ITR 804 Cal
714 Modi industries Industries Ltd. Vs. B.C.Goel, 1983 144 ITR 496 All
Standard Chartered Bank and Ors, etc. Vs. Directorate of Enforcement and Ors\textsuperscript{715}, make it clear. In this case, the Supreme Court held that the legal position as it obtains today is that prosecution can be initiated against a Company and fine can be imposed where the imprisonment is given as mandatory punishment with fine. But if the custodial sentence is the only punishment prescribed for the offence, the Company cannot be prosecuted for that offence.

Sunilakhya Chowdhury v. H.M.J.H. Jadwet\textsuperscript{716}:

A Juristic person or an artificial person or a Juristic entity is incapable of having any mind or soul and hence any state of mind cannot arise. It was, therefore, concluded such an artificial person cannot commit an offence of defamation of which malice is one among the essential ingredients though the managing directors and other officers of that company may be liable for committing such an offence in certain circumstances.

Anath Bandhu v. Corporation of Calcutta\textsuperscript{717}:

A company cannot be prosecuted for an offence since mens rea is an important ingredient. It may be possible for a company to prosecute for an offence which does not require mens rea or a particular state of mind to be one of the important ingredients of the offence. But, If the statute requires that mens rea is an important ingredient of the offence, then a company can't be prosecuted for such an offence as such company is incapable of getting a mind or intention or mens rea.

Kalpnath Rai v. State\textsuperscript{718}:

The Hon’ble Supreme Court has laid down that unless the statute excludes mens rea in the commission of an offence, the same must be treated as an essential ingredient of the criminal act to become punishable. A company cannot be said to have requisite mens rea to harbour a terrorist if any terrorist was allowed to occupy the room in its hotel.

The doctrine of attribution:

For many years, the companies in India were not held liable for a criminal offence because malice is the essential integrant for committing a criminal offence and the inability to award imprisonment to the company. But also a company can be convicted of offences involving mens rea by applying the ‘doctrine of attribution’. By applying this doctrine, the company also be held liable for a criminal offence. The doctrine of attribution says that the directors and managers were held liable for the offence committed by the company. Thus, the criminal intention of the company’s directors or officials can make the company be liable.

Sunil Bharti Mittal Vs. Central Bureau of Investigation\textsuperscript{719}:

In this case, the question arises whether the officials of the company can be held responsible for acts of the company? The court held that an individual who has perpetrated the commission of an offence on behalf of the company was held liable,

\textsuperscript{715} Chartered Bank and Ors, etc. Vs. Directorate of Enforcement and Ors, (2006) 4 SCC 278
\textsuperscript{716} Sunilakhya Chowdhury v. H.M.J.H. Jadwet, AIR 1968 CAL 266
\textsuperscript{717} Anath Bandhu v. Corporation of Calcutta, AIR 1952 CAL 759
\textsuperscript{718} Kalpnath Rai v. State, (1997) 8 SCC 732
\textsuperscript{719} Sunil Bharti Mittal Vs. Central Bureau of Investigation, AIR 2015 SC 923
along with the company. It is not mean that the person who occupies the position of a chairman or managing director was only liable for the offence committed by the company. It is not necessary only a director of a company is in charge of every day. A person who fulfils the ‘legal requirement’ of being a person is responsible to the company or the person in charge of and responsible at the time of the offence, liable for the offence along with the company. Unless the person proves that the offence was committed without his knowledge or that he makes an effort to stop such an offence. If it was proved that the offence was committed with the consent of the director, manager, secretary or any other official of the company may also be held liable.

Can companies sue for defamation?

A company can also sue for defamation against an individual or any other companies when a false statement was made about their business or reputations. Sec. 499 of IPC, explanation 2 gives the right to companies to sue defamation. Generally, company defamation suits must have three requirements

- The statement must be false.
- It must come to the knowledge of a third person in written or verbal form.
- It must cause the company damage.

Indian Express newspaper Vs. Jagmohan Mundhara and others720: The defendant made a film called ‘Kamla’ that contempt an article which was published in Indian Express newspaper. The court held that innuendo is made clear and the respondent was held liable.

Dabur India Ltd. Vs. Emami Ltd.721: The plaintiff is the manufacturer of pharmaceutical products and ayurvedic products in the name of ‘Dabur’. The defendant also manufactures many ayurvedic products. The advertisement of the defendant in television, contempt the plaintiff’s product. The court passed an injunction restraining the defendant, its agents and distributors on its behalf from telecasting the advertisement.

Hindustan Unilever Ltd. Vs. Reckitt Benckiser (India) Ltd.722: The plaintiff manufactures a soap called ‘Lifebuoy’. The defendant also manufactures a soap called ‘Dettol’. The defendant made an advertisement that stated, ‘Dettol is described as 10 times more effective than Lifebuoy’. The court passed an injunction to remove that advertisement.

Conclusion: In the world, no one wants to bend their head down for any reason including defamation. The purpose of the defamation is to protect the individual as same as a company from a false defamatory action. And this paper determined the criminal liability of the company on the ongoing issue of criminal defamation. A company can sue defamation case but cannot send to imprisonment for its criminal offence. Still, malice is an essential integrant for committing a criminal offence but a company couldn’t have any mind or soul to have malice. By

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720 Indian Express newspaper Vs. Jagmohan Mundhara and others, AIR 1985 Bom 229
721 Dabur India Ltd. Vs. Emami Ltd., 2004 (29) PTC 1 (Del)
722 Hindustan Unilever Ltd. Vs. Reckitt Benckiser (India) Ltd, 2014 (57) PTC 78 (Cal)
applying the doctrine of attribution, the person who is in charge of at the time of the offence committed, held liable along with the company and the person will be sentenced to jail. Unless he proved that the offence was committed without his knowledge or he takes steps to stop the offence. If cannot find any individual person as liable then monetary benefits can be awarded by the court i.e., the company is only liable to pay the fine.

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**THE BATTLE OF BIOPIRACY AND THE TREASURE OF TRADITIONAL MEDICINAL KNOWLEDGE**

*By Natalia Sunil Poojari*

*From Jindal Global Law School*

**INTRODUCTION**

"Dear Mr. Moore,

Sub.: BIOPIRACY AND WTO

India is a country which has centuries' old indigenous knowledge systems based on its rich biodiversity which the Indian people have conserved through their traditional lifestyles and local economies. Two-thirds of our population even today is directly dependent on the biological resources and the indigenous knowledge. These resources and knowledge are used in an ethic of sharing so that the livelihoods and needs of the poorest are met. This is in direct contradiction with the ethics (or the lack of it) perpetrated by the World Trade Organisation through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). TRIPS has globalised and legalised a perverse and unethical intellectual property rights system which encourages the piracy of our indigenous knowledge and subverts our decentralised democratic system.⁷²³⁴

This letter was written to WTO head by the citizens of India. It outlines a disputable discussion that has emerged between the supporters of a universal system of intellectual property rights and a network of masses who feel their knowledge has in effect unreasonably appropriated under such a system and this constitutes the general backdrop that situates the current debate over the issue of misappropriation and exercise of proprietary rights by the developed nations over the biological material of the developing nations, within the framework of TRIPS. This is what has been labeled as "biopiracy," a term that describes the means by which corporations from the industrialized nations claim ownership of, free ride on, or otherwise take unfair advantage of, the genetic resources and traditional knowledge and technologies of developing countries. ⁷²³⁴

The paper will answer the following question as what do we mean by biopiracy. The mechanism of appropriation and commodification of traditional Indian medicine by multinational companies and what legislation and policies the Indian government has taken to stop biopiracy and evaluating the same.

**CONCEPT OF BIOPIRACY**

An overview of trips:

To understand biopiracy it is necessary to have an overview and background of TRIPS patent regime under TRIPS and traditional medicines. Trade-Related Aspects of Intellectual Property Rights Agreement. TRIPS agreement led by USA was signed by many countries under the auspices of WTO. TRIPS was basically an instrument signed to provide a conducive environment for free trade it envisaged to provide for a basic framework for intellectual property rights. It established a very important link between intellectual Property and TRIPS.

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⁷²³ https://ratical.org/co-globalize/BPandWTO.html
Another aspect is that is Amalgamated and unified the rudimentary features of IPR ,TRIPS also broadened their scope. In addition to consolidating the basic features of IPRs, TRIPS also broadened their scope. It allows any invention, in any field of technology, to be patented, provided that it is (1) new, (2) involves an inventive step (non-obviousness) and (3) is capable of industrial application. Novelty and non-obviousness are judged against everything publicly known before the invention. This body of public knowledge is called ‘prior art.’ TRIPS does not define ‘new’ and ‘prior art’, which, in the absence of a global minimum standard of novelty, are left for states to decide.

TRIPS also introduces the principle of non-discrimination, which ensures that once a foreign patented product has entered a Member State’s national market, the holder of the patent should be treated no differently from nationals (national treatment, Article 3); (2) if granting privileges, nations must treat all foreign nationals equally, with certain exceptions (most favoured nation treatment, Article 4). TRIPS obliges to treat pharmaceutical invention like any other invention thus giving it the power to Pharma Companies to exploit its patent. Such cannot be in the case of developing countries where Healthcare can become a pricey affair due to the same provisions.

The next question that arises is what traditional medicinal knowledge is

**THE CONCEPT OF TRADITIONAL MEDICINAL KNOWLEDGE**

WHO Defines traditional medicinal knowledge as

“Traditional medicine refers to the knowledge, skills and practises based on the theories, beliefs and experiences indigenous to different cultures, used in the maintenance of health and in the prevention, diagnosis, improvement or treatment of physical and mental illness.”

In India, traditional medicinal knowledge is categorized into 2 -Codified and Uncodified

- **Codified**: Codified refers to Documented and is present in the Ancient manuscripts and related to medicine and surgery. This includes systems like Siddha, Unani, Ayurveda and the Tibetan system. Codified Traditional medicinal Knowledge is easily available in Public Domain.

- **Uncodified**: Uncodified refers to the traditional medicinal knowledge which passed from one generation to another orally. It is based on empirical experiences.

**UNDERSTANDING THE IPR AND TRADITIONAL MEDICINES NEXUS**

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727 Suchita Shah, plants, Patents and Biopiracy: The Globalization of Intellectual Property Rights and Traditional Medicine, 2014
728 Traditional medicinal knowledge definition, https://www.afro.who.int/health-topics/traditional-medicine
An estimate of 7,500 species of Plants and Animals and also metals are utilized in Indian folk medicines. Companies use this same Traditional Medicinal Knowledge to develop medicines on which patents can be granted via bioprospecting. Bioprospecting is a process of scrutinizing the biogenetic resources. The Patents granted to such bio prospected products is problematic if due credits are not given to the exact source of knowledge and the communities who possess such knowledge. The origin of biopiracy can be traced here. The biopiracy sermon has emerged as a powerful counter to the perception of new hegemonies imposed by IP rules with global reach, such as the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The principle of misappropriation is given out by the WIPO draft of protection of traditional knowledge and the principles goes by the following words:

Any acquisition or appropriation of traditional knowledge by unfair or illicit means constitutes an act of misappropriation. Misappropriation may also include deriving commercial benefit from the acquisition or appropriation of traditional knowledge when the person using that knowledge knows, or is grossly negligent in failing to know, that it was acquired or appropriated by unfair means; and other commercial activities contrary to honest practices that gain inequitable benefit from traditional knowledge.

Taking this concept of misappropriation in the current paper the misappropriation done by leading pharmaceutical companies of the traditional medicinal knowledge derived from plant and other natural resources to derive patents. Biopiracy was present in the society from colonization period till the present day. Just the way this was done has changed over a period of time with the advent of globalization and the strengthening of IP Regime which has made Patents more of cash minting business especially in the pharmaceutical industry. Developing Countries like India have always been a hotbed to biopiracy thanks to its rich biodiversity and diverse Ancient traditional knowledge of which not all were documented thus giving an easy pass from the novelty requirement of patent regime. The rate of biopiracy has reduced to a considerable amount thanks to legislations and traditional knowledge digital library we shall be discussing at length about the same later in this paper. This brings us to the cases where traditional medicine faced the brunt of biopiracy.

**BIO-PIRACY CASES THAT CHANGED THE COURSE OF HISTORY.**

Turmeric is medicinal plant from the ginger family which grows extensively in the Indian sub-continent and south east Asia. Turmeric is used is known because of the bright yellow colour which is produced by the rhizome or root. As Turmeric is a very important part of the Indian Cuisine and has healing properties turmeric finds a pivotal place for itself in the Indian households. USTPO had granted a patent on turmeric. In 1995 the USTPO granted patent Dr suman cohly and Dr. Hari har P for wound

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730 Ibid.
731 Palpu Pushpangadan*, Varughese George, Thadiyan Parambil Ijinu and Manikantan Ambika ChithraBiodiversity, Bioprospecting, Traditional Knowledge, Sustainable Development and Value Added Products,2018
732 WIPO/GRTKF/IC/7/5, Annex II, page 310
733 Ibid
In their abstract the scientist spoke about their about the ability to isolate the active ingredient of the turmeric and use it for healing of ulcers and wounds. And it could be administered both topically as well as orally.

The Council of Scientific and Industrial Research in India challenged the validity of this patent stating it to be devoid of any novelty and stated that the use of turmeric was cited in many of the ancient literatures, and the healing properties of was a known fact. The USTPO cancelled the patents given out to turmeric.

This was India’s first victory towards medical biopiracy also after this episode, the concept of misappropriation of traditional knowledge was taken as a serious concern. Activist like Vandana Shiva who have played a pivotal role in protection of traditional knowledge opined that India should revisit all the international IP agreements and the there is need of cross-cultural scrutiny of Prior art to avoid such acts of biopiracy. Another case of biopiracy is the neem case.

Neem a tree native to the Indian subcontinent. A controversial patent was filed by a pharmaceutical giant W.R grace, the patent was "for storage of stable insecticidal composition comprising neem seed extract" which permits "increasing the shelf-life stability of azadirachtin solution." The Indian government wanted to cancel the patent citing it to be devoid of the requirement of novelty. European patent office cancelled the patent license for the above patent.

The Indian government’s reaction to the traditional knowledge issue when all is said in done, and to the neem case specifically, additionally represents the vital employments of intellectual property rights. In 1999, the Indian law making body considered changes to the Patent Act that would explicitly give patent rights to indigenous people. The proposed revisions would give assurance to plant assortments to any individual or gathering of people or any administrative or non-legislative associations following up for the benefit of a town or nearby network. India has come a long way from these days to the present day where the government proactively is making new policies a digital library to counter the issue of bio piracy. In the following part of the paper we shall be evaluating these legislation and policies.

**LEGISLATIONS MADE TO PROTECT TMK FROM BIOPIRACY**

These legislations may not be providing for protection directly to traditional medicinal knowledge but they are competent to enough to include plant and other natural resources based ingredients that are highly under the threat of misappropriation under the hands of corporation these acts provide a safe haven for the communities who posses such knowledge and give them the due credit for the same.

**THE BIOLOGICAL DIVERSITY ACT**

The Act was ordered to meet the obligations under Convention on Biological Diversity (CBD), to which India is a gathering in 2002. A outsider, non-inhabitant Indian as characterized in provision of section 2 of The Income tax Act, 1961 or a remote organization or body corporate need to take permission from the HERITAGE IN THE AGE OF BIOPIRACY 12-17 (1996);

734 U.S. Patent No. 5,401,504.
736 VANDANA SHIVA, PROTECTING OUR BIOLOGICAL AND INTELLECTUAL
NBA before getting any biological assets or related information from India for investigate, study, business utilisation. Indian residents or body corporates need to take permission from the concerned state biodiversity board 738.

After effect of research utilizing biological assets from India can't be moved to a non-resident or an outside organization without the permission of NBA. Be that as it may, no such permission is required for publication of the exploration in a diary or course, or in the event of a shared research made by institutions affirmed by Central Government.

No person ought to apply for patent or other type of licensed innovation protection dependent on the exploration emerging out of biological assets without the permission of the NBA. The NBA while allowing such permission may make a request for advantage sharing or royalties on utilization of such protection.

**THE PROTECTION OF PLANT VARIETIES AND FARMERS RIGHT ACT.**

The act was enacted to provide Protection to plant varieties through a sui generis system. this was an attempt made to grant IPRs to the farmers and the local breeders and to encourage them to innovate new varieties of plants

**THE KERALA INTELLECTUAL PROPERTY RIGHTS POLICY**

The Kerala intellectual Property Rights policy was a step forward initiative taken by the kerala government in the year 2008. It was implemented to protect its traditional knowledge especially that of Ayurveda. The rights are given out to the people who own and practice that particular traditional knowledge since generations any other person who wants to practise the same has to obtain a commons licence. The kerala traditional knowledge authority looks after the affairs. This policy runs parallel to the National Biodiversity Act. The authorities of the act decide on factors such as benefit sharing ad see to it that the owners of the knowledge get their dues.

Another pro-active step that the government had taken was in the establishment of Traditional knowledge Digital Library.

**Traditional Knowledge Digital Library.**

India’s TKDL is a collaboration work between the Council of Scientific and Industrial Research (CSIR) which is India’s largest state-owned research body, and the Department of AYUSH. 740 One of the eligibility criteria for getting a patent granted is Novelty. Many of the patents have been granted outside India thanks to the unavailability of prior art as most of the traditional medicinal knowledge was not recorded in the database.

“Today, thanks to its TKDL, India is capable of protecting some 0.226 million medicinal formulations and at zero direct cost. Access to the database helps patent examiners root out at an early stage those applications that clearly do not satisfy the novelty requirement. Absent a database such as the TKDL, the process of revoking a patent can be a costly and time-consuming affair. It takes, on average, five to seven

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738 Section 7 of Biological Diversity Act, 2002
740 n 2003, the Department of Indian Systems of Medicine and Homeopathy (ISM&H) which had been created in March 1995, was renamed the Department of Ayurveda, Yoga & Naturopathy, Unani, Siddha and Homeopathy (AYUSH) with a view to focusing attention on the development of education and research of these systems
years and costs between 0.2-0.6 million US dollars to oppose a patent granted by a patent office. Multiply this by India’s 0.226 million medicinal formulations and it is clear that the cost of protection, without a TKDL, would be prohibitive.\textsuperscript{741} The TKDL is a unique, proprietary database that integrates diverse knowledge systems – Ayurveda, Unani, Siddha, modern science and modern medicine – and languages – Sanskrit, Arabic, Urdu, Persian, Tamil, English, Japanese, Spanish, French and German. It is based on 148 books of prior art relating to Indian Systems of Medicine, available at a cost of around US$1,000. The TKDL connects patent examiners around the world with these books of knowledge. Thanks to the TKDL, Sanskrit slokas\textsuperscript{5} can be read electronically in English, French, German, Japanese and Spanish by an examiner at the EPO or any other patent office.\textsuperscript{742}

**CONCLUSION**

There is a conflict of interest between those who are rooting for a strong IP regime to protect their scientific innovations and those who claim biopiracy of their traditional knowledge as these legislation are not strong enough to protect the interest of the one who originally holds out this knowledge. The innovation process which includes the system of isolating modification of the compounds present in the natural resources in a way offends the communities.\textsuperscript{743} Another view point is as SUBHA GHOSH in her paper\textsuperscript{744} argues that blocking of patents which are derived from traditional medicinal knowledge and claiming biopiracy just because the content was available in public domain would vitiate the growth of new ideas and inventions and that broad interpretation of prior art and public domain are harmful for new innovations. The problem of biopiracy has to be addressed with not always with the solution of cancellation of patents by the authority but also by giving more emphasis on the concept of benefit sharing. Corporations should be made responsible for the social and economic development of communities of which they source the knowledge from. Another point is As given out in the judgement of Bishwanath Prasad Radhey Vs Hindustan Metals\textsuperscript{745} as the supreme court judgement gave out:

> In order to be patentable, an improvement on something known before or a combination of different matters already known, should be something more than a mere workshop “improvement, and must independently satisfy the test of invention or an inventive step. It must produce a new result, or a new article or a better or cheaper article than before. The new subject matter must involve “invention” over what is old. Mere collocation of more than one, integers or things, not involving the exercise of any inventive faculty does not qualify for the grant of a patent.”

If this judgement is applied in present context the principle can be used as a suggestion that when it comes to patenting of traditional medicinal knowledge now that the Indian pharmaceutical markets are also big players worldwide. Patents when

\textsuperscript{741} Dr. V.K Gupta, Protecting Indian Traditional Knowledge from Biopiracy
\textsuperscript{742} ibid
\textsuperscript{743} Suchita shah ,Plants, Patents and Biopiracy: The Globalization of Intellectual Property Rights and Traditional Medicine,2014
\textsuperscript{744} Subha ghosh , GLOBALIZATION, PATENTS, AND TRADITIONAL KNOWLEDGE,2003
\textsuperscript{745} Bishwanath Prasad Radhey Vs Hindustan Metals, AIR 1982 SC 1444
applied to traditional medicinal should be given out to the medicines which are cheaper and a better alternative of the present traditional medicine which does the same function keeping in mind the concept of benefit sharing and due accreditation. This step would in course of time improve the Quality of traditional medicines as it would come in contact with proper research and development thus increasing its efficacy, such a step can also improve the health care scenario of the nation and prosperity and development would usher in the communities rich in traditional knowledge. The battle of biopiracy is long drawn international organizations like WIPO and countries rich in Traditional medicinal knowledge should come together and frame a policy akin to the Nagoya Protocol which strikes a balance for multinational corporations as well as owners of traditional medicinal Knowledge.
ANALYSIS OF THE EQUAL REMUNERATION ACT AND THE NEED FOR EQUAL WAGES FOR WOMEN

By Omkar Apugol
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ABSTRACT
The Equal Remuneration Act was passed in the year 1976, the Act aimed at reducing the wage disparity among men and women. The Act has been in existence for 4 and half decades and has helped improve the wages of female workers in the country, but the growth in women’s wages has been slow. The paper will look into the Equal Remuneration Act and analyse the Act and its provisions. The paper will also discuss the international conventions which have been considered by most countries as the basis for remuneration of women workers. The paper will consider the Constitutional validity of the Act and discuss the relevant Articles from the constitution of India. The paper shall also check the landmark cases with regards to the Act. The paper will finally deal with the research question on why equal pay for women is the current need of the hour and how it will help the economy and society as a whole and the author would conclude with the final remarks.

CHAPTER I
1. INTRODUCTION
1.1. OVERVIEW

In the Vedic period, men and women were given equal status in the society, but by the time the British established a monarchy in India, men had completely dominated women in societal dominance. The Indian society can be without a doubt considered a patriarchal society. Historically the rules and religious laws had a higher inclination to the male gender with regards to property succession, marriage or remarriage. The norm of the land has been a distinct bifurcation with regards to the functioning of a family, men go work in farmers and their businesses whereas women are expected to take care of the children and complete household chores. Education was not considered an essential requirement of life and women were not allowed to study further than their primary or secondary schooling; even men barely got education equivalent of a degree or higher. By the time we attained independence, the inequalities of the genders were evident and even the framers of our Constitution made sure they addressed it. Constitutional provisions and various legislations have become the foundation to provide equal opportunities to both men and women. Once opportunities are provided with the legislation must make sure that equal remuneration is also provided to women, but to make sure this is possible the onus is on the employer.

1.2 REVIEW OF LITERATURE

The article Duties of The Employer under the Equal Remuneration Act, 1976 746 by Hari Manasa explains the features of the Employers Remuneration Act, 1976. The article takes a look into the history of Indian society and how women have been sidelined by men in all aspects of social life. The article explains the duties that the Act enforces on the employer and what liabilities the employer has concerning his

or her employees. The article explains the relevant section of the Act and how they dovetail with the Equal Remuneration Rules. The article also explains the penalties which are imposed on the employers who violate the Equal Remuneration Act, 1976.

In *5 Facts You Need to Know About Gender Pay Gap In India* by Vandana K of Oxfam, the article discusses the five major statistics regarding the wage gap between male and female employers or workers in India. The article discusses the female workers in the informal sector and how they are impacted, how much extent of the wealth gap is visible in the formal sector, the extent of the gap in the corporate sector and the global rank of India in the wage disparity.

ILO: Strong wage policies are key to promote inclusive growth in India

In the article *Critical Assessment of Labour Laws, Policies and Practices through a Gender Lens*, the paper assesses the impact of labour laws on female work participation rates (WPR) in India. It is argued that women workers in the informal/unorganized sector have minimal legal rights and social protections. In the formal sector, women workers who are employed as contract labour are not covered by regulatory legislations and cannot avail of all the protections of the law in the same manner as regularized employees. Women are discriminated at two levels, firstly, at the entry-level, and secondly, on employment, women workers are treated differently from male workers within the organized and unorganized sectors.

1.3 SCOPE AND OBJECTIVES

The scope of the paper is to analyse the Equal Remuneration Act, 1976 passed by the Central government. The primary objective of the paper is to understand the fundamentals of the Act and the analysis of the provisions of the Act. The paper will critically analyse the Act and how successful the Act has been in reducing the wage gap in India. The author will finally conclude with his opinion on the Act and shall provide with some possible suggestions which can help in better implementation of the Act.

1.4 RESEARCH QUESTION

Why equal pay for women is the need of the hour?

1.5 HYPOTHESIS

Paying women for equal work done as men is found on logic. Payment of equal wages helps in the development of the economy and society as a whole.

1.6 RESEARCH METHODOLOGY

Considering the objective of the paper the ‘qualitative research method’ is applied. Qualitative research is generally more

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748 ILO: Strong wage policies are key to promote inclusive growth in India (INTERNATIONAL LABOUR ORGANISATION 20 August 2018) https://www.iло.org/newdelhi/info/public/pr/WCM S_638937/lang--en/index.htm accessed on 12 April 2020

explorative, that is dependent on the collection of verbal, behavioural or observational data that can be interpreted subjectively. The hypothesis will be either validated or refuted at the end of the paper.

CHAPTER II

2. HISTORY OF EMPLOYMENT OF WOMEN

Women were seen as ‘distracted’ employees who had to go home and take care of their homes and their children, women were also considered as lacking technical knowledge and expertise in comparison to men despite there being no scientific backing for such opinions. Hence industries only provided women with minimum wage jobs, even the wages given to women were lower than their male counterparts because the employers were aware that female employees still had financial dependence on their parents or husband and therefore could not attempt to bargain for equal wages.

2.1 THE NEED FOR EQUAL REMUNERATION ACT

The wage gap in India has been an issue that has been plaguing our country for decades. The statistics show us the ground reality of the wage disparity that exists in the country. According to a UN report of 2016, around 120 million female workers who are employed in the informal sector, which roughly equates to 95 per cent of the female working population of India. The disadvantage of working in the informal sector is that women are not only paid lower rates than the men but the workers do not receive any social security benefits either.

The 2016 report by McKinsey Global Institute (MGI) has given an estimate that women contribute 17 per cent towards the GDP of the nation, which is way lower than the global average of 37 per cent. This statistic can be a bit misleading as the report does not consider self-employed agriculture workers, household work and traditional occupations. The report states that the factors mentioned about cannot be quantified but the report does state that the low contribution of women contradicts the huge amount of unpaid care work they do.

In the ILO reports on wage inequality in the workplace, Indian women constituted more than 60 per cent of the lowest-paid workers and only 15 per cent of the high paying jobs were women. These statistics prove that wage disparity exists through the entire class of employees and not just the floor level employees. But the percentile gap is the highest in the low-income group of women and the negative impacts are harmful to the growth of the nation.

Despite these worrying statistics, there’s some hope. The report also mentions that

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752 Ibid

the average wage for women in India has grown by 60% in the last 10 years.\textsuperscript{754}

### 2.2 IMPLEMENTATION OF THE ACT

The Equal remuneration Act, was the 25\textsuperscript{th} Act passed by the Parliament in the year 1976 An Act to provide for the payment of equal remuneration to men and women workers and the prevention of discrimination, on the ground of sex, against women in the matter of employment and for matters connected therewith or incidental thereto.\textsuperscript{755} The Act contains 18 sections in total and amended once in 1987.

After the success of education programmes in the country, there has been a gradual increase in the employment of women in all sectors of employment and jobs which were considered to be gender-specific have gone through major changes to be gender-neutral. Women in the current age are not restricted to minimum paying jobs or traditionally female roles. Women are considered as an employee at par to their male colleagues, this has been enshrined and ensured with legislations drafted by the state and central governments. Statutes such as the Workmen Compensation Act, Payment of Wages Act, Factories Act, Minimum Wages Act, Maternity Benefits Act, Employee State Insurance Act, along with The Equal Remuneration Act aim at ensuring equal wages without gender bias.\textsuperscript{756}

### 2.3 INTERNATIONAL CONVENTIONS

India is a signatory to the UN special charters and the Equal Remuneration Act complies with the guidelines set up by the Universal Declaration of Human Rights (UNDHR), the International Labour Organisation (ILO) and the Convention on Elimination of all form of Discrimination Against Women, 1979 (CEDAW).

Under the UDHR, Article 23\textsuperscript{757} ensures that everyone without any discrimination has the right to equal pay for equal work.

The International Labour Organization held a Convention with regards to the Equal Remuneration for Men and Women Workers for the Work of Equal Value in 1951. It was the 100\textsuperscript{th} convention held by the ILO, signatory States were given the choice to achieve the goals of the convention either through legislation, the introduction of a mechanism for wage determination or collective bargaining agreements. This convention is among the eight fundamental conventions of the ILO.\textsuperscript{758}

The CEDAW, 1979 was signed and its main objective is to prevent discrimination himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

- Everyone has the right to form and to join trade unions for the protection of his interests.

\textsuperscript{754} Ibid
\textsuperscript{755} The Equal Remuneration Act, 1976 Act No. 25 Of 1976 accessed on 12\textsuperscript{th} April 2020
\textsuperscript{756} Supra note 1
\textsuperscript{757} Article 23 of the UNDHR reads as
- Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- Everyone, without any discrimination, has the right to equal pay for equal work.
- Everyone who works has the right to just and favourable remuneration ensuring for

\textsuperscript{758} ILO C100 - Equal Remuneration Convention, 1951 No. 100 (International Labour Organisation 29 June 1951)
against women especially those who are a part of the labour force.

- To incorporate the principle of equality of the genders in their legal system and to abolish all discriminatory laws and adopt appropriate legal setups prohibiting discrimination against women;
- To establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and
- To ensure the elimination of all acts of discrimination against women by persons, organizations or enterprises.

2.4 CONSTITUTIONAL VALIDITY OF THE ACT

The Act fulfils the rights provided to citizens under the following Articles-

- The Preamble of the Constitution provides for Justice and Equality to all people.
- Fundamental rights
  - Article 14 emphasises on equality before the law
  - Article 15 guarantees a right against discrimination based on gender.
  - Article 15(3) recognizes ‘protective discrimination’ to bring women at par with men in all possible respects.
  - Article 16 provides the right to equal opportunity regarding public employment irrespective of the gender of the person.
- Directive Principles of State Policy.

- Article 39(a) states that the citizens, men or women have equal rights to have an adequate means of livelihood.
- Article 39(d) “that there is equal pay for equal work for both men and women”.
- Article 42 requires the state to make provision for securing humane conditions of work and maternity relief.

The Doctrine of ‘equal pay for equal work’ is a Directive Principle of State Policy and not a Fundamental Right therefore it is a Constitutional Right. As equal remuneration is a right of employees regardless of the gender, the Equal Remuneration Act, 1976 was enacted to comply with Article 39 of the Constitution of India.

2.5 THE VITAL FEATURES OF THE ACT

- The objective of the Act is to protect against the discrimination of female labourers based on their gender.
- To pay equal remuneration to the female employees on the same level as their male counterparts.
- The Act is applicable in the whole of India.
- To restrict the employer from drafting terms or conditions in the employment contract which goes against the spirit of the Equal Remuneration Act and the doctrine ‘equal work for equal pay’.
- The Act does not have a provision for eligibility of the employee i.e. the employee does not need to be employed for a set minimum number of days for the Act to apply to them.
- Any condition or settlement introduced by the employer on the employee which is detrimental on the employee is void.

759 United Nations Convention on Elimination of all form of Discrimination against women (United Nation Organisation, 18 December 1979)

760 Constitution of India, 1950.

The enforcing authority is the Ministry of Labour and the Central Advisory Committee.

Under the concept equality of work is not solely based on the designation or the type of work but also on the experience, responsibilities, qualifications, reliabilities, etc. which are attached to the employee. Comparison can be made with only those employees who have a similar level of factors mentioned above.

The Act imposes criminal liability on the employer if they violate any of the provisions of the Act, the punishment can be a fine, a period of imprisonment or both.\(^\text{761}\)

### 2.6 IMPORTANT SECTIONS OF THE ACT

**Section 4 - Duty of employer to pay equal remuneration to men and women workers for the same work or work of a similar nature.**

The section states that no employer shall pay remunerations to an employee at less favourable rates in comparison to the remuneration paid by the employer to the workers of the opposite gender who is employed in the same establishment to perform the same work or work which is of similar nature.

The sub-section (2) plugs the possible loophole of complying with the by preventing the employer from reducing the rate of remunerations given to the male employees for the remuneration to be equal.

**Section 5 - No discrimination to be made while recruiting men and women workers.**

No employer shall discriminate against female candidates while making recruitments (or promotions or training or transfer) for the same work or work of similar nature. Except where the employment of women in such work is prohibited or restricted by another law.

Proviso: the provisions of the Act will not affect the priority given or reservation for SC, STs, ex-servicemen, retrenched employees.

**Section 8 - Duty of employers to maintain registers**

Every employer should maintain a register and other documents about the workers employed by him/her as may be prescribed from time to time

**Rule 6 read with Section 8 provides that:**

The employer has to maintain proper registers and relevant documents of all the employees and workers as prescribed by law in Form D. The Form needs to have:

- Category of workers
- Description of work
- Number of men employed
- Number of women employed
- Rate of remuneration
- Components of remuneration\(^\text{762}\)

**Section 7. Power of appropriate Government to appoint authorities for hearing and deciding claims and complaints.**

The Government may, by notification, appoint an officer for hearing and deciding complaints regarding contravention of the Act or claims arising out of non-payment of wages at equal rates to male and female employees for the same work which or work which is similar.

**Section 10 - Penalties**

If an employer -

\(^{761}\) Supra note 1

\(^{762}\) Supra note 2
• fails to maintain a register or
• any other relevant document with
relation to the workers employed or
• fails to produce any register, muster-roll or other documents
• Omits or refused to give any
evidence or
• Omits or refused to give any information

Shall be punishable with simple
imprisonment for a term of one month or
fine which may extend to ten thousand rupees or both.

(2). Any violation of section 4 and section 5 of the Act shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with imprisonment for a term which shall be not less than three months but which may extend to one year or both for the first offence, and with imprisonment which may extend to two years for the second and subsequent offences.

(3) If any person is required so to do, omits or refuses to produce to an Inspector any register or other document or to give any information, he shall be punishable with fine, which may extend to five thousand rupees.

2.7 IMPORTANT CASE LAWS

A few landmark cases have been dealt with by our courts concerning equal pay for women

• Randhir Singh V Union Of India

The apex court adopted an equitable solution and deviated from the strict interpretation of the laws in favour of the employees. The court relied upon the

Preamble and in particular the phrase “Socialist” as envisaged by the drafters of our Constitution. The court held that the principle of equal pay for equal work was deduced from Article 14 and Article 16 of the Constitution of India and can be applied to the cases of the unequal scale of remuneration based on classification, though those drawing a different payment scale do identical work under the same employer. Here the court observed that “equal pay for equal work” is under the ambit of Articles 14 and 16 and the Directive Principle under Article 39(d) along with the assistance of the Preamble.

• M/s Mackinnon Mackenzie and Co. Ltd. v. Audrey D’Costa and other

In this case, the female employee was discriminated in the process of paying her salary as the employer contended that the employee was a confidential stenographer which is a different class of employee. The court rejected the argument of the employer and the woman was considered as a full-time employee. The court in its decision held that ‘if only women are working as Confidential Stenographers it is because the management wants them there. Women are neither specially qualified to be Confidential Stenographers nor disqualified on account of sex to do the work assigned to the male Stenographers. Even if there is a practice in the establishment to appoint women as Confidential Stenographer such practice cannot be relied on to deny them equal remuneration due to them under the Act.’ Therefore, the Court applied the Equal

763 The Equal Remuneration Act, 1976 Section 10
764 Randhir Singh V Union Of India (1982) SCR (3) 298
Remuneration Act to grant an equal salary to female stenographers.

- **Inder Singh & Others v. Vyas Muni Mishra & Others**

The court decided that if any two groups of individuals are working in the same or similar posts and performing the same kind of work, equal pay shall be paid to them and remove the unreasonable discrimination the two individuals that are equal in stature.

**Meaning of same work or work which is of similar nature**

**Mackinnon Mackenzie & Co. Ltd. v. Audrey D’Costa & Another**

The court considered that the term ‘same work or work which is similar in nature’ under section 2(h) of the Act, shall consider the following:

- The authority should take a broad view.
- Ascertain if any differences are of practical importance, the authority should take an equally broad approach to the very concept of similar work implies differences in detail, but these should not defeat a claim for equality on trivial grounds.
- It should look at the duties performed, not those theoretically possible. In making a comparison, the authority should look at the duties performed by men and women.

The relevance of conditions to employment:

**Bhagwan Dass & Others v. State of Haryana & Others**

The Court held that when there is sufficient proof that the nature of the work and functions discharged are similar, then the mode of selection of employees and appointment periods are irrelevant to the remuneration and immaterial to the applicability of equal pay for equal work.

**Constitutional relevance:**

- **Sita Devi & Others v. State of Haryana & Others**

The learned Judge held that the “doctrine of equal pay for equal work is recognized as a facet of the equality clause contained in Article 14 of the Constitution.”

- **S. Nakara v. Union of India**

A Constitutional Bench reaffirmed and upheld the decision taken in the case of Randhir Singh v UOI. In the present case the courts held that “having regard to the constitutional mandate of equality and inhibition against discrimination in Articles 14 and 16, in service jurisprudence, the doctrine of “equal pay for equal work” has assumed the status of a fundamental right.”

- **C.B. Muthamma v. Union of India**

The petitioner had filed a complaint against her being unconstitutionally denied...
promotion to Grade I officers of the Indian Foreign Service (IFS) and further that at the time of joining the Indian foreign service she has to been asked to give an undertaking that if she got married she would resign from the service, this was enshrined under Rule 8(2) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961 wherein a female member shall be asked to resign if her domestic commitments came in the way of discharging her duties in the Service. The petitioner challenged the constitutionality of Rule 8(2) of the Indian Foreign Service (Conduct & Discipline) Rules, 1961, according to which a woman member had to get permission from the government before she got married and that the woman member can be asked to resign if her domestic commitments came in the way of discharging her duties in the Service. The government then decided to omit Rule 8(2) of the Rules. The court directed the government to appoint the petitioner as she deserved her promotion based on seniority. This case had been decided in the year 1979 before the 1987 amendment which then added the provisions to protect women from discrimination during promotion, training or transfers.

- People’s Union for Democratic Rights and Others v. Union of India

The petitioner had alleged that workers engaged in construction work were being discriminated in the matters of payment of wages based on their gender. The petitioners contended that the female workers were being paid Rs. 7/day whereas the male workers were paid Rs. 9.25/day. The Supreme Court held that the lower wages for female workers was a violation of the Article 14 of the Constitution of India and directed the government to ensure that the provisions of the Equal Remuneration Act were not violated by the contractors.

Chapter III
3. Research Question
Why equal pay for women is the need of the hour?

The wage gap in genders is not an issue of the developing countries or the underdeveloped countries, it is an issue persisting across the world. The USA might be considered as the flagbearer for the western civilisation, but the even USA has a wage gap between the genders as well as the ethnicity or race of the person. According to labour data of the United States, for every dollar a man earns, women earn 79 cents for the same work\(^775\), the values fall even further for women of colour like African-American women, on average, are paid only 60 cents on the dollar and Latinas are paid only 55 cents on the dollar\(^776\). In India, women earn 25% less than their male counterparts\(^777\). The median hourly salary for men is around INR 345 and for women, the amount is around INR

\(^{774}\) People’s Union for Democratic Rights and Others v. Union of India AIR 1982 SC 1473.


equal pay for women has been considered a war cry by egalitarians and activists fighting for gender equality. Paying women less in comparison to men is not only demeaning and unfair but it also has economic and social implications. Paying women at the same level as that of men does the economy and society a world of good. To start, transparent pay systems and equal pay sends a positive message across the workforce and speaks volumes of the organisation’s values. Equal pay for women helps improve relationships among workers and builds solidarity among them and has been proven as a management hack to improve productivity among workers.

If all the nations were to match with the “best of the region” pay scales of women with their male colleagues then the McKinsey Global Institute estimates that around $12 trillion could be added to the global GDP by the year 2025. The report calculated that if the change was brought in today then by 2025 to a full potential equal wages then the GDP would be boosted by about $28 trillion or 26 per cent of the current value.

The positives of providing women will equal wages as men are only going to help boost the economy as more women will have the capability of spending money and helping the flow of capital which in turn helps the growth of the Gross Domestic Product (GDP). If women are provided with better pay, it reduces the burden on men to provide for the family and in turn, men can work for lesser hours in a day as they are not under pressure to keep the household functioning.

With all the positives that the equal remuneration of women does for the individual, for the family and on the macro scale for the economy, the change in the system of remuneration has been slow across the world. The Equal Remuneration Act was passed in the year 1976 but even in the 21st-century women are paid 3 quarters of men are in India, the Equal Wages Act was passed in the American Congress 57 years ago but even then women earn 21% less than men. There has been an improvement in the remuneration provided to women as the Monster Salary Index 2016 reported that, the gender pay gap was 24% in 2014 and 27% in 2015, this is a promising improvement but the growth rate has been too sluggish. With the current data and predicted rate of growth in the growth of female remuneration, it would take us 202 years to close the global pay gap according to the World Economic Forum. To bridge the gap of pay between men and women across the world should be the among the highest priority of international organisations like the ILO and national governments alike, the move would benefit the society, in general, it would not only help improve the economic standards of the country but also lift families out of poverty.

Ibid


Supra note 32

4. Conclusion
The disparity between male and female workers has been a well-documented fact of the labour industry. The fact has been acknowledged by the International Labour Organisation who passed the CEDAW and the national government passed the Equal Remuneration Act in 1976 to ensure that women are not discriminated or exploited for the wages that they deserve. The Act is questionable with regards to the lack of provisions and the low penalties set for the employers if and when they violate the Act. The inclusion of women in the labour force has allowed them to not be dependent on men for their survival and given women a sense of pride which is commendable. But the next step for the betterment of the society is to provide women with equal standing with men and provide women with the pay that their work inherently deserves, this would provide women with the capital to live a better life, to increase their spending which would boost the economy and to it will help in lifting families out of poverty. The reduction of the wage gap between genders is the need of the hour and the sooner the organisations and governments put in efforts for such ideas, the sooner the society will progress.

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AN ANALYSIS OF JUVENILE JUSTICE SYSTEM OF INDIA

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ABSTRACT:
The youth of the nation is its biggest asset as they are the ones who carry forward the torch of growth and success and hence it is of utmost importance to provide the children and adolescents with basic necessities and to provide them with proper care and protection. In fact, the Indian Constitution ensures that education and protection from child labor are fundamental rights ensured to every child. But what happens when the same children or adolescents commit offences? Shall they be put through the same hardening process of law that the adult offenders go through and be subjected to similar atrocious punishments as them? All these questions are answered under one uniform act, the Juvenile Justice (Care and Protection) Act, which ensures that no child suffers at the hands of the prison authorities or correctional centers. Rather than sending the juveniles off to jail, the Act specifies other measures to deal with juveniles who are in conflict with law, in a more systematic, sophisticated and friendly way.

The causes of crime by juveniles cannot be narrowed down to one cause. While poverty is an important factor while looking at the causes of petty offences such as theft but much serious offences like murder, kidnapping and rape cannot be quite justified by poverty. Other factors like socio-economic issues, family issues, obnoxious societal practices and psychological problems also have a great impact on a child’s mind. Due to all these reasons, it is crucial to understand a minor’s perspective and then take correctional measures. It is believed that a child’s mind is like a plain board where people can write and engrave anything they want. Hence, what a child learns from his surroundings in his childhood and adolescence, gets embedded in his mind. It is believed that no child is born evil. It is these surroundings and the experiences that transforms him into someone who might adopt behaviors which are defined as “delinquent” and sometimes being “in conflict with law”. Proper care giving and fair treatment nurtures a child and helps him from staying away from delinquent behavior. Hence the question lingers, whether rehabilitation or stricter punishment is the solution to decrease juvenile delinquency in India? This paper tries to answer this very question.

INTRODUCTION:
Back in the December of 2012, the whole country was shook from its root when the nude body of a woman was found lying on the roadside in the capital city of India, New Delhi. With bite marks all over her face and profusely bleeding from every nook and corner of her body, the victim was gang-raped in a moving bus by six men, beaten and left to die on a cold wintery night. She was thrown off the same moving bus along with her male friend, who also received several injuries. Eventually, when it came down to convicting the men for her rape and murder, out of the six men, five were convicted and sentenced to death by hanging, but one of them had escaped this punishment. This was solely because he was a few months shy of turning 18. This meant, that he, being a minor, could not be convicted of the crime in the same way as the other men were.

\(^{783}\) The Constitution of India, arts 21A, 24
This single incident in Delhi sparked a series of serious changes in the Indian Legal System. One of the major changes that took place was the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2015. It was a replacement for the Juvenile Justice (Care and Protection of Children) Act, 2000. One of the major changes that was brought in with commencement of this act was that it allowed for juveniles in conflict with law in the age group of 16-18 years, involved in heinous offences, to be tried as adults. Here, the age of juvenility remained unchanged, but a categorization was made. Obviously, the new change had its fair share of criticism. Juvenile justice is an integral part of national development and that is why many critics have argued that convicting a minor in the same way as an adult is a gross mistake as the psychology of the two are completely different.

Under the Juvenile Justice (Care and Protection) Act, 2015, (hereinafter referred to as JJA, 2015), a child is defined under section 2 (12), as someone who has not yet attained the age of 18 years, whether male or female.

Further, according to the Indian Penal Code, 1860, a child below the age of 7 years cannot be convicted of any crime whatsoever. While from 7 to 12 years of age, children can only be convicted of certain crimes, if it is found that they understand its nature and outcome. Under the United Nations Convention on the Rights of Child, 1989, a child has been defined as any human being below the age of eighteen years unless the law declaration applicable to child, majority is attained earlier.  

Most of the time, a child and a juvenile mean the same thing more or less, but the difference lies in the context of implications in the eyes of law. A juvenile is mostly used as a reference to young offenders. Under the Act, a juvenile in conflict with law has been redefined from the previous act [Juvenile Justice (Care and Protection) Act, 2000] to a child in conflict with law. In simple words, a juvenile is a minor who is accused of an offence.

A BRIEF HISTORY:
In the ancient and the medieval society, there had been several laws which focused on the issues of crime and hence guided the behavior of the society, but none of these legislations or laws specifically addressed the issue of crimes committed by juveniles. But soon the society started realizing that the issue of delinquent children had been increasing and there had to be a legislation to guide the behavior of the minor offenders. Hence during the 1850’s when India was under the British Raj, the Britishers drafted the first legislation which somewhat dealt with the growing issue of juvenile delinquency. It was called the Apprentices Act, 1850.  

Under this act any child between the age of 10 to 18 who was found committing petty offences was placed as apprentices under trade. Although this act did not entirely deal with the issue of juveniles, it can still be viewed as one of the earliest attempts to address the issue of juvenile delinquency. Later on, the Indian Penal Code, 1860, came into existence which made it clear that children below the age of 7 cannot be convicted of any crime whatsoever.
the earliest legislations to deal with children who commit crime. Then in 1876 came the
Reformatory School Act\(^\text{786}\) which was a landmark legislation as it aimed at setting
up reformatory schools in India in order to
deal with delinquents. This act was the first
big leap towards the management of the
delinquent juveniles in the Indian society.
The act was in accordance with the Indian
Penal Code, 1860 and gave completely
immunity to children below the age of 12,
thereby exempting them from any sort of
punishment or reform. The said act also
gave protection to the children; the court
could only sentence the children for two to
seven years in a reformatory school
(children below the age of 18) and
thereafter, if it was found that if the youths
placed in such schools could find gainful
employment, they were let out.\(^\text{787}\)

Under the Indian Penal Code, 1860,
(hereinafter referred to as IPC) according to
Section 82 a child under the age of seven i
is given complete immunity. The principle of
“doli incapax” has been imbibed under this
 provision which literally translates to
“incapable of crime”. Further under Section
83 of the same Act, any child between the
age on seven to twelve is to be excused of
any offence, provided he or she does not
understand the nature or consequence of
their acts. IPC assumes that a child below
the age of seven has absolutely no
understanding of crime and thus does not
have the capacity to form criminal intent.

In the 20\(^\text{th}\) century, different states across
India had started coming up with their own
juvenile legislation, with the first one being
the Madras Children Act, 1920 which was
then followed by Bombay and Bengal. This
was followed by the report of the Indian Jail
Committee, which was formed by the
Indian government under the British rule.
They submitted a detailed report of their
observations and suggested that children
should not be tried in adult courts and
therefore, a separate court especially
dealing with young offenders shall be
established. These state’s Children’s Act
had divided children into two basic
categories: -

(a) Youthful offenders (Child in
conflict with law, as per present day
legislation)

(b) Destitute and neglected children
(child in need of care and
protection, as per present day
legislation)

The legislation that the states had for
themselves varied from each other. For
example, the definition of child varied in
different state legislations. These variations
prompted the Supreme Court to observe in
the case of Sheela Barse v. Union of
India\(^\text{788}\) that there shall be a uniform law
instead of various state legislations: -

“...we would suggest that instead of each
state having its own Children’s Act
different in procedure and content from the
Children’s Act in other states, it would be
desirable if the Central Government
initiates Parliamentary Legislation on the
subject, so that there is a complete
uniformity in regard to the various
provisions relating to children of the entire
territory of the country...”\(^\text{789}\)

Eventually, after the judgement of Sheela
Barse v. UOI, the word juvenile, combined
with justice, was adopted in domestic law
of India under the Juvenile Justice Act,
1985 (hereinafter referred to as JJA, 1985).
With coming of the new act, a lot of
changes were also brought in. Prior to the

\(^{786}\) Reformatory School Act, 1897 (Act 8 of 1897)

\(^{787}\) Ibid.

\(^{788}\) 1986 SCALE (2)230

\(^{789}\) Ibid.
act, words such as maintenance, welfare, training, education and trial were used in the Children’s Act, 1960. But then in the JJA, 1985, words such as ‘development’ and ‘treatment’ were used. The use of word development implied to a more holistic development of a child, which included not just educational opportunities but also the opportunity to be a part of a family and live a life of dignity. The term treatment connoted to the fact that the child shall go through rehabilitation and reformation. The JJA, 1985 worked towards the overall well-being of a juvenile, which meant that it worked along the universally accepted and agreed guidelines and norms of care and protection of the Juveniles.

With advent of The Juvenile Justice (Care and Protection) Act, 2000 (hereinafter referred to as JJA, 2000), the concept of “juveniles in conflict with law” and “child in need of care and protection” came into picture. Since there had been a gradual increase in the number of offences committed by juveniles, the children who were previously seen as troubled and vulnerable, were now seen as criminal and violent juveniles from whom the society was needed to be protected. The main objective of the JJA, 2000 was to provide proper care and protection to the child/juvenile and adopting a child friendly approach in the adjudication and disposition of matters in institutions established under the same Act. Also, unlike the JJA, 1985 which differentiated between a boy and girl by stating that a juvenile is a boy under the age of sixteen while for a girl it is below the age of eighteen, the JJA, 2000 has defined juvenile as anyone below the age of eighteen. There was no segregation between a girl and a boy, and both were treated the same under the law. It is also worth mentioning that while JJA, 1986 only defines “juvenile” while JJA, 2000 defines both “child” and “juvenile”.

**THE ADVENT OF JUVENILE JUSTICE ACT, 2015**

The present functioning Act with regards to the juvenile of the country is the Juvenile Justice (Care and Protection) Act, 2015 (hereinafter referred to as JJA, 2015 or as the Act). The JJA, 2015 was enacted by the Indian Parliament on 7th of May 2015 amidst intense controversy and debate surrounding the Delhi Gangrape incident in 2012. Even though the Act was brought in after a lot of protest by the citizens across nation who demanded stricter laws for the juveniles of the country committing heinous crimes, it was still met with a lot of criticism by the advocates of rights of children.

After the Delhi Gangrape case, tremendous amount of people across the nation had protested against the juvenile law of the country. This was because one of the most hostile accused involved in the incident was a minor and hence not tried as an adult. He was sentenced to 3 years in a reformatory home. A Public Interest Litigation was filed by Subramanian Swami, a BJP politician, who sought that the boy be tried as an adult. But eventually, the Juvenile Court gave its verdict and the accused was sent to a reform home in 2013. It was after this that the then Minister of Women and Child Development, Maneka Gandhi said that a new law to try 16-18-year-old as adults was underway. And finally, after a lot of deliberations, the Juvenile Justice (Care and Protection) Act, 2015 was enacted which allowed minors belonging to the age group of sixteen to eighteen years to be tried as adults if they committed heinous crimes. The crime would be analyzed by the Juvenile Justice Board to ascertain if the crime was committed by the minor who was...
capable enough to understand the gravity of the crime.

But these provisions are in direct contravention of the United Nations Conventions on Child Rights which defines a “child” as any human being under the age of 18 years and thereby forbids any capital punishment inflicted upon them. Article 37 (a) of the same Convention obliges to all the member states to prohibit as well as eliminate any kind of corporal punishment, including any other form of punishment that is cruel, inhumane or degrading in nature on children below 18 years. India has ratified the same in 1992.

A committee, headed by former Chief Justice of India Justice J.S Verma, was formed and was tasked with the job of making recommendations on women safety. In their report, among other recommendations related to how to tackle the ever-growing issue of sexual assault and harassment, the committee also recommended that the juvenile age bracket should be maintained to comply with the UN Convention.

ANALYSIS OF THE JUVENILE JUSTICE (CARE AND PROTECTION) ACT, 2015
One of the key aspects of the JJA, 2015 is that it has been sculpted with utmost precision so as to ensure the well-being of children and so that their rights are not violated by an authority. But there are a few provisions which are in complete contrast with each other. While at some places, our justice system believes in reformation of the child, in other places it talks about punishing 16-18-year old in the same way as adult offenders. Chapter II of the JJA, 2015 enumerates the general principles of care and protection of children. Section 3 under the same chapter lays down sixteen general principles. One of the most significant principle out of all these is the first principle where the act presumes that “any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.” This is very different from the principle of “innocent until proven guilty”. An adult is presumed innocent until proved otherwise by the prosecution, but a child is not just presumed to be innocent, but also presumed to have a mental capacity to form any type of criminal intent or have any mala fide intention. This is a very significant principle as this marks a clear line of demarcation between an adult accused of an offence and a child in conflict with law. According to the Indian judiciary as well as the legislature, a child is too young and naïve to be able to form any criminal intention. As we go further down, we see that the other principles, collectively, ensures that a child does not come under any pressure, nor does he have to follow any procedure that the adult offenders have to go through. This makes it certain that the fragile mind of the young offenders does not get affected in any way. A child’s psychology is very different from that of an adult. While the JJA, 2000 defines some twenty-five words under section 2, i.e., the interpretation clause, the JJA, 2015 has added many more words under its interpretation clause under section 2. This (last visited on March 15, 2020)

790 Id. at 4.
791 Justice Verma Committee on Amendments to Criminal Law (January, 2013)
793 Juvenile Justice (Care and Protection) Act, 2015 (Act 2 of 2016), s.3
goes on to show that the JJA, 2015 is much more elaborate and has addressed many new issues. The Act largely takes into account the psychology of a child and has adopted a lot of child friendly measures while also ensuring that the child is not punished but rather reformed. For example, under section 10 of JJA, 2015 a child in conflict with law shall never be placed in jail or police lock up, unlike adults who are placed under the custody of police when accused of any criminal offence under the Indian Penal Code, 1860 in accordance with the procedures layed under the Code of Criminal Procedure, 1908. Section 12(1) of JJA, 2015) states that a person, who is believed to be a minor and is held in the custody of the police shall be released on bail, with or without any surety, into the custody of a fit person. But then in the same sub-section it is also stated that “provided that such person shall not be so released if there appears reasonable grounds for believing that the release is likely to bring that person into association with any known criminal or expose the said person to moral, physical or psychological danger or the person’s release would defeat the ends of justice, and the Board shall record the reasons for denying the bail and circumstances that led to such a decision.”

This shows that while the act understands that a child should not be put through hardening situations like an adult offender, it also makes sure that no one is put in any danger because of these young offenders. This section of the said Act answers the very important question which is whether a child in conflict with law be released on bail even if he poses danger to the moral, physical or psychological security of someone else. The section makes it plenty clear that a young offender cannot be released if his presence might threaten another person’s well-being or if releasing him would defeat the purpose of justice.

But out of all the changes brought in by the act, Section 15 onwards remains the most significant and controversial till date. Section 15 of the JJA, 2015 is the main change which was brought in by the legislature. Under section 15, if a child has been accused of any heinous crime and he has either completed the age of sixteen or is above the age of sixteen, then the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence. But before expatiating in detail about section 15, it is important to understand what exactly comes under the category of “heinous crime”. Section 2 (33) defines heinous crime. According to the said section, a heinous offence is an offence for which the punishment under the Indian Penal Code or any other law for the time being in force is minimum imprisonment for seven years or more. On close reading of the Indian Penal Code (hereinafter referred to as the Code), it becomes plenty clear that a huge chunk of the offences mentioned under the Code have punishment which gives minimum 7 years of imprisonment and above. It is very essential to understand that for a crime to be titled as heinous under the JJA, 2015, the minimum punishment shall be 7 years of imprisonment; the key word here being “minimum”. This means that a crime which does not mention the minimum punishment under it as 7 years (or more) then the

794 Juvenile Justice (Care and Protection) Act, 2015 (Act 2 of 2016), s.12(1)
juvenile cannot be tried for those crimes as adults.

But before any juvenile can be tried as an adult, a Board has to conduct a preliminary assessment in cases of heinous offences, and it shall be done within a period of three months from the date of first production of the child before the Board. Under the preliminary assessment, the Board gauges mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which the juvenile allegedly committed the offence. In layman’s language, the Board’s job is to do a preliminary evaluation of the child’s mental capacity and then conclude whether the child had the mental capacity to commit the crime he has been accused of, and whether he could understand the consequences and outcomes of his act. Once the board is satisfied that the child did have the understanding that is needed in order to commit the crime, then he would be tried as an adult. Every step hereon that juvenile needs to follow is similar to that of an adult offender and hence, the case no more remains under the purview of the JJA, 2015. The Board is required to take help of psychologists’, psycho-social workers and other experts before reaching any decision. But this part of the JJA, 2015 has been subjected to heavy criticism. In May of 2015, when the debates were being conducted in the Lok Sabha pertaining to the JJA, 2015, Sashi Tharoor, an Indian National Congress, Member of Parliament (MP), brought into light some major issues which came with the advent of the said act. He pointed out that the JJA, 2015 was in direct contradiction with international standards. He also stated that many children who break the law come from poor and illiterate families. He further added that the children should be educated instead of penalizing them.  Many have gone onto call the said Act regressive and have strongly condemned it. But there is also a large section of the society which feels that this was a much-needed change that had to be brought in as the crime being committed by juveniles have started getting more horrendous over the time. But how true is this? According to National Crime Records Bureau, total crime committed by juveniles in states and union territories was 33,606 in 2017 while it dropped down to 31,591 in 2018. Although there is a sharp decline in the number of crimes committed by juveniles, one cannot look over the fact that the number is still very high.

Other provisions of the JJA, 2015 which makes it remarkably different from the JJA, 2000 are the provisions related to adoption and foster care. In the new 2015 Act, a new chapter has been introduced altogether titled “Adoption” which extensively lays down the procedure for adoption of a child unlike the 2000 Act.

STATISTICS, ANALYSIS OF THE CURRENT TRENDS OF CRIME COMMITTED BY JUVENILES AND REASONS OF SUCH DEVIANT BEHAVIOUR:


TABLE 1: Various offences against the human body committed by Juveniles in Conflict with law in the year 2016, 2017 and 2018

<table>
<thead>
<tr>
<th>TYPE OF CRIME</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder(^{797})</td>
<td>892</td>
<td>727</td>
<td>767</td>
</tr>
<tr>
<td>Culpable Homicide not amounting to Murder(^{798})</td>
<td>45</td>
<td>37</td>
<td>28</td>
</tr>
<tr>
<td>Causing Death by Negligence(^{799})</td>
<td>319</td>
<td>360</td>
<td>424</td>
</tr>
<tr>
<td>Attempt to Murder(^ {800})</td>
<td>933</td>
<td>844</td>
<td>830</td>
</tr>
<tr>
<td>Attempt to Commit Culpable Homicide(^ {801})</td>
<td>53</td>
<td>67</td>
<td>68</td>
</tr>
<tr>
<td>Assault or Criminal Force with Intent to Outrage her Modesty(^ {802})</td>
<td>1540</td>
<td>1456</td>
<td>1408</td>
</tr>
<tr>
<td>Rape(^ {803})</td>
<td>1903</td>
<td>1614</td>
<td>147</td>
</tr>
<tr>
<td>Attempt to Commit Rape(^ {804})</td>
<td>67</td>
<td>46</td>
<td>42</td>
</tr>
</tbody>
</table>

SOURCE: National Crime Records Bureau, Home Ministry of India\(^ {804}\)

From the above table, the following observations can be deduced:

1. The overall number of offences committed against the human body by juveniles in 2016 was the highest in almost all the categories.
2. Contrary to the popular belief, number of serious offences like murder, rape and Culpable Homicide not amounting to Murder has decreased over the period of 3 years.
3. Number of murders by juveniles was highest in the year 2016, dropped down in 2017 and then increased again in 2018.
4. Offences against women which includes Assault or Criminal Force with Intent to Outrage her Modesty, rape and attempt to commit rape has decreased constantly over the period of three years. Highest number of rapes were in 2016 and then the number dropped sharply in 2017 and then again, a little in 2018.
5. Although there has been a decline in offences by juveniles in general, offence of causing death by negligence has increased over the period of three years with the highest number in 2018.

It also worth noting that according to the National Crime Records Bureau, majority of juveniles in conflict with law apprehended under IPC & SLL crimes were in the age group of 16 years to 18 years (75.5%) (28,867 out of 38,256) during 2018.\(^ {805}\)

To conclude, even though there has been a considerable amount of decrease in the number of offences from 2016 to 2018, the number is still high and in thousands and most of these offences are committed by minors falling in the age bracket of 16 to 18. In the recent past, the number of heinous

\(^ {797}\) Indian Penal Code, 1860 (Act 45 of 1860), s.300  
\(^ {798}\) Indian Penal Code, 1860 (Act 45 of 1860), s.304  
\(^ {799}\) Indian Penal Code, 1860 (Act 45 of 1860), s.304A  
\(^ {800}\) Indian Penal Code, 1860 (Act 45 of 1860), s.307  
\(^ {801}\) Indian Penal Code, 1860 (Act 45 of 1860), s.308  
\(^ {802}\) Indian Penal Code, 1860 (Act 45 of 1860), s.354  
\(^ {803}\) Indian Penal Code, 1860 (Act 45 of 1860), s.375  
\(^ {805}\) Ibid.
criminal incidents being reported, which involve juveniles, has increased exponentially.

In 2017, a 22-year-old woman had alleged that she was raped by five people, including four juveniles, in northwest Delhi’s Jahangirpuri area.\(^{806}\) Then in 2016 Nine-year-old schoolboy died after being assaulted by classmates in Tamil Nadu.\(^{807}\) In 2018, an 11\(^{th}\) standard student had brutally murdered a seven-year-old boy named Pradyuman Thakur within school premises.\(^{808}\) In the infamous case of murder and rape of an eight-year-old girl in Kathua, Jammu & Kashmir, one of the accused’s apprehended was a juvenile. From these instances, it is plenty clear that even though the numbers of offences might be going down on paper, but the gravity of the crime keeps increasing. The above-mentioned crimes have all been committed after 2015, which implies that these crimes were committed after the implementation of JJA, 2015. It also needs to be noted that contrary to popular belief, minors living with their parents or guardians tend to commit crime more than the minors who are homeless.\(^{809}\) The causes of such deviant behavior cannot be pin pointed or narrowed down to one particular reason. There are several factors which play a very significant role in such cases. When a child is growing up and entering the phase of adolescence, he goes through various changes biologically and psychologically. Along with these changes are hormonal changes which leads to emotional surge which in turn brings heightened feelings of aggression, pride and sexuality. Safe to say, that at this stage the mind of minors is extremely vulnerable, fragile and easily manipulated. Social values, morals and ethics in a society shapes a child into who he/she goes on to become in future. The values imparted in a child is a reflection of the society where they are brought up. Moral degradation, social deviance, immoral practices, other negative values and norms prevalent in the society, have a negative impact on the attitude of the adolescent, thereby contributing in becoming delinquents.\(^{810}\) In places where the child is neglected, abused or treated inhumanely, there are high chances of them resorting to violence to cope up with such abuse. It has been proved time and again that the behavior of adult offenders is most of the times linked directly to childhood abuse, neglect and poverty. Hence family abuse, peer pressure and other social factors have a huge impact on a child’s mind and his actions. According to the NCRB’s 2018 crime statistics,\(^{811}\) the number of juvenile

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\(^{808}\) Ryan International Murder Case so far: Accused sent to remand; Boy’s parents want death penalty, available at, https://www.firstpost.com/india/ryan-

international-school-murder-case-live-updates-charges-class-xi-boy-for-killing-seven-year-old-pradhyuman-minor-detained-4198901.html (Last viewed on March 26, 2020)


offenders living with their parents (32,433) or guardians (3,432) was significantly higher than the number of them who were homeless and not living with family (2,391). Hence family along with society plays a very significant role in the upbringing of a child. Poverty ridden youth is also many a times outcasted by the middle and upper strata of the society which results in resentment.

In the Indian society, where 21.9% of the population still lives below the National Poverty line and ranks 129 in Human Development index, poverty plays an important role in a child’s growth. It has been stated several times that the majority of the juveniles in conflict with law come from a poor background. Poverty can lead people to take extreme measures and sometimes such measures can be violent and criminal in nature. Many a times, in order to survive and earn their bread, the parents of such children stay outside of their homes for long period of time. During this time, the children might end up joining hands with the wrong, elder crowd and thus, might get involved in the criminal offences. Children are left uncared for, for long periods of time which puts them under risk. Poverty coupled with lack of education is a very harmful mixture. Education has been, without a shadow of doubt, the most powerful tool to combat any type of evil prevalent in society. When children leave education at an early stage, they do not get the required knowledge to understand right and wrong. Even though the constitution of India guarantees education for every child up to the age of 14 years as a fundamental right, many children are either forced not to get education due to lack of money and other resources or they leave schools voluntarily. Another factor is media representation and presence of internet in almost every household. Internet is very easily available to everyone and hence access to media platforms and other harmful websites including pornographic material is rather facile. Media these days has been showcasing juvenile offenders in a fancy environment, undeterred by law and police, with many online series coming up and showing such juveniles in extravagant light. One can also not ignore the psychological factors. An uncared-for child who ends up with wrong group of peers can be a major root cause for stemming psychological disorders which mostly goes untreated. These are just a few causes of juvenile delinquency and the list does not end here. Every child is different hence the causes can be varied.

SUGGESTIONS AND CONCLUSION:
Many people fail to understand that a juvenile is very different from an adult offender and hence their psychology and mindset is also divergent. Even though JJA, 2015 is a progressive step towards holding juveniles in conflict with law accountable for their action especially when a crime is as heinous as rape or murder. But one needs to remember that the globally accepted norm states that a child should be rehabilitated and not punished. The legislature should focus more on a child’s rehabilitation and understand the problem better than subjecting the younger generation to punishment. In order to combat the issue of juvenile delinquency, it is very essential to understand the

813 Ms. Abhilasha Belwal, Mr Ashish Belwal, “Juvenile Delinquency in India” 7 BLR (2016)
814 The Constitution of India, art 21A

0India%202018%20-%20Volume%201.pdf (Last visited on March 27, 2020)
psychology of a child and then understand the reasoning behind why a child does what he/she does. There is a need to understand the root cause of the child’s behavior and hence the first suggestion would be to maximize the presence of psychologists and educate the police officers, workers employed in the rehabilitation centers or anyone who deals with young offenders. The workers, police officers and psychologists shall be trained well enough to understand the mindset of a child. Along with proper training, it is necessary to make sure that the rehabilitation center and other places where the juvenile is sent, these places shall be child friendly and in good condition. A 2013 report by the Asian Centre for Human Rights (ACHR), can be quoted saying “It will not be an understatement to state that juvenile justice homes….have become India’s hell holes where inmates are subjected to sexual assault and exploitation, torture and ill-treatment, apart from being forced to live in inhuman conditions.” Keeping same in mind, the quality of these juvenile homes and rehabilitation centers shall be improved. It is also important to create awareness regarding the mental health of children. There is stigma associated with mental health in the Indian society, and therefore the mental well-being of a child is never a priority. Hence, it shall be the duty of state and central government to organize campaigns in order to educate people about the importance of mental health. Although education has been made compulsory for children below 14, strict implementation of the law is need of the hour. The teachers in these schools shall also be well equipped to teach the children. Other solution can be as follows:

- In order to improve the outcome of rehabilitation, the situation of juvenile homes should be improved by providing cleaner washrooms, bedrooms, more activities to engage the child and educating children on subjects like life skills. Also, teaching them any one practical skill which can be used later in life. Such places shall be kept under constant check or else these places tend to become breeding grounds for more crime.
- The mental and psychological health of these juveniles shall be checked upon by a child psychologist time to time.
- Since many a times, the problems arise within the family itself, it is important to educate the families on importance of giving proper care, affection and attention to the children.
- The police should be made more vigilant regarding the issues surrounding. The police authorities might lack the sensitivity required to deal with situations involving children accused of committing crime, hence programs to make them understand child mindset would be beneficial.
- The legislature should look for provisions which are more rehabilitative in nature rather than punitive.
- The board which is put in place to decide whether a juvenile shall be tried as an adult or not, shall consist of experienced and authorized psychologists/legal persons/doctors/officers only.
- People who are experienced in the field of child psychology shall hold extensive observation to understand the psyche of the juvenile offender as the report made by this board decides the future of the child and whether the child should be rehabilitated or sent off for punishment like the adult offenders.

Hence, the most effective way to combat the issue of juvenile delinquency is by rehabilitation and not punishment as the former offers proper guidance and training to the child which ensures that he does not go down the path of crime in future. Stricter implementation of JJA, 2015 is the need of the hour. One should remember that juveniles are not evil and hence they shouldn’t be treated as one. The society needs to be more compassionate towards the children and rather than punishing the young offenders, focus should be shifted on their rehabilitation, while keeping in mind what is in the best interest of the child and society, alike.
CRITICAL ANALYSES OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE ACT 2013

By Pallavi Deol
From Banasthali Vidyapith

ABSTRACT
There are so many crimes against women which are continuously increasing. There is requirement to take serious steps to stop such crimes so that the women can live with peace and they are able to get freedom from such crimes. Women are very important in the society in modern society every women has her own job and duty but then also the men is the “stronger gender”. The role of the women has been overseen in the society in the last few decades. But in the early days the women were seen in the role of wives and who were limited to cooking and cleaning and take caring of the kids. But the women who have achieved great stature in the industry, sports, government and the media have become familiar sight. I am criticising The Sexual Harassment Of Women At Workplace Act 2013. According to me there are so many things that can be improved in this act. There are so many points that are not covered in this act. Now also we see so many cases of sexual harassment this shows that this act has not been implied properly because now also we see so many cases of sexual harassment this act has be implied properly so that the no. of cases can decrease. I have taken many cases to show that this has not been implied properly.

INTRODUCTION
In this research paper I am going to criticise The Sexual Harassment Of Women at Workplace Act 2013. The sexual harassment is not only forcefully came physical with anyone but if anyone is standing on road and making comments on any girl or women then this will come in sexual harassment even if anyone is staring any women and if anyone is following any girl or women then it will also come in sexual harassment. This act has been come due to a statement given by the supreme court of India in 1997 due to a case suit by Vishaka. According to me this act has not been implied properly because now also we see so many cases of sexual harassment this act has be implied properly so that the no. of cases can decrease. I have taken many cases to show that this has not been implied properly.

SEXUAL HARASSMENT – it is unlawful to harass a person because of that person’s sex. Harassment can include “sexual harassment or unwelcome sexual advances, requests for sexual favours and other verbal or physical harassment of a sexual
nature". Sexual harassment do not involve only doing physical harassment with the victim. If anyone done or make any comments on anyone then also it would be treated as sexual harassment. The sexual harassment can be done in many ways. If any women is going or walking on road and then anyone make any comments on that women or girl then it would be treated as sexual harassment. The sexual harassment can be done with anyone at any time. As the sexual harassment is conducted by their family members that’s why they don’t take any step against the person who sexually harassed her due to many reasons. As we can see in many cases where sexual harassment is done by the family members and the female victim does not take any step against him. she don’t went to any police station or even she don’t went to advocate to file against the person who has done wrong with her or we can say the person who sexually harassed her. There are so many reasons due to which she is not able to file any case against the person who harassed her because they fell that if they will take any step against the person who sexually harassed them then the reputation of her family will decreased. Even a victim want to file the case against the person who had committed wrong with her then there family don’t support them. There family members stop them to went to police station or to take any steps against the person who harassed her. They do all the settlements by themselves. they even not tell anyone that anything wrong has been done with their daughter or any other female member of their family and if she tell that something wrong has done with her then everyone blame her everyone behave with her in such a way wrong has not been committed with her but as she has done something wrong with anyone else. when anyone follow any girl or women then it will come in sexual harassment or even when anyone stare any girl or women then also it will come in sexual harassment activity and if anyone do so then she will be punished for his conduct or we can say he will be punished for his wrongful conduct or misbehave. As the cases of sexual harassment are increasing the suicide cases are also increasing because many times victim is not able to handle herself and they committed suicide. Even in many cases the victim are killed by the criminals so that if any victim want to take any step against the person who committed wrong with her she is not able to do because they know that if they will leave the victim alive then she will take step to achieve justice and for justice they will go to court and if they will able to prove that the person against whom she has filed case has committed wrong with her then they will get punishment for their conduct or work. So that’s why many criminals murdered the victim so that they can avoid the punishment or can save themselves from punishment. As sexual harassment is increasing day by day there are so many laws which are made by the court so that there can be decrease in the number of sexual harassment of women cases .As sexual harassment increasing that’s why so many amendment are made by the Supreme Court. The increase percentage of cases shows that the sexual harassment is increasing day by day and even there are so many women and girls those who don’t file case when sexual harassment is done with them they just ignore and move on. the supreme court think that the women don’t want to disclose their identity that’s why they don’t go to police station for doing complain so now supreme court / government provide

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SUKANTA SARKAR, VIOLATION OF WOMEN RIGHTS pg. 113 (1st ed. 2015).
the facility by which a women can complain against the man who sexually harassed her. So many women don’t file case due to the fear of loss of reputation but according to me every women should file case whenever she sexually harassed by any one even if she is sexually harassed by any of her family member. She should take full use of her rights which have been provided by the court to her. When we all come together and take step against the sexual harassment then only we can fight with this issue and the cases of sexual harassment can decreased because as we all know the big changes can only bring when we start from small things because small changes are the cause of big changes. No one fight with this issue alone we all have to come together to fight with this issue. If everyone will think that this is his or her responsibility to remove sexual harassment from the country then only a big change can bring in the country. The women or anyone with whom the sexual harassment has taken place they don’t take any action against the criminals even when the government provide so many services mean facilities. We should be aware of our rights and use them where required. As a member of the society we all should support them so that they can come in front and can fight for justice. The justice can only be given when anybody asked for justice. First the victim has to come in front of everyone and tell to everyone that what wrong has been done with her then only the court will came to know that what wrong has been done with the victim and what relief can be provided to the victim according to the injury cause to her. The court and the government can’t do anything until the victim come in front and tell that what wrong has been done with her by whom. The goal to form such a country in which every women or girl can move freely anywhere at any time can only achieve when we all will come together and fight against this issue. When sexual harassment has been done with anyone then it not only affect her physically but it also effect the victim mentally and emotionally. Emotional effects can be anger, humiliation, fear, guilty, shame, violation, powerless and loss of control. So Victim takes so much time to overcome from the effects of sexual harassment so the time should be extent more for complaining. Every day we see so many cases of sexual harassment of women at workplace as more and more cases of sexual harassment are increasing at workplace with women that’s why government done many things but they don’t work properly and to stop all these the act has been passed by the court of India. By seeing the no. of increase in cases “The Sexual Harassment Of Women At Workplace Act 2013” has been passed. This act has been come from the statement given by the Supreme Court on “Vishaka And Others V/S The State Of Rajasthan” in 1997.

VISHAKA AND OTHERS V/S THE STATE OF RAJASTHAN

In Vishaka and others v/s the state of Rajasthan the Bhanwari Devi was a social worker in a village of Rajasthan. She works under a social development program in rural places. This social development program work to stop the child marriage in the village and the Rajasthan state government administrate their program. Bhanwari Devi got information from anyone that the child marriage is going to conduct in a village. After receiving this information she immediately went to that village to stop that marriage. When she

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823 Id. at 5.
reached there than she saw that Mr. Ramkaran Gujja (Thakurs) is doing her daughter’s marriage and her daughter is one year old. By seeing all this Bhanwari Devi start stopping the marriage as it was a child marriage and her work is to stop the child marriage means she was doing her job. The Bhanwari Devi make many steps to stop the marriage of that one year old girl but even due to her so many steps she was not able to stop that marriage because that marriage was conducting from her father’s concern and when she try to stop that marriage then the persons standing there they stop her from doing so. After marriage has been completed then on September 1992 the Ramkaran Gujjar raped Bhanwari Devi with his Five friends in the front of her husband and they all together hit her husband very badly due to which her husband has got many injuries means she was gang raped by Ramkaran Gujjar including his five friends with an intention to take revenge from Bhanwari Devi as she has try so much to stop Ramkaran Gujjar daughter’s marriage who was only one year old girl. After this the male doctor at normal primary health hospital has done her survey at Jaipur. The doctor confirmed only her age and without any recommendation of her raped in the medical report. Whole of the midnight she was continuously taunted by the women constable at the police station. In the past midnight the policeman ask her to leave her cloths in the police station as evidence and then she can go back to her village. After this she left only with her husband dhoti to cover her body and due to which Bhanwari Devi and her husband had to spend their whole night in the police station. After all this the trial court not find the Ramkaran Gujjar and his five friends guilty and that’s why trial court discharge them all. After this Vishaka who was eyewitnes of this incident she filed petition on Bhanwari Devi behalf. By focussing on all the things and facts or we can say after focussing on whole matter the high court in his judgement mention that “It Was A Case Of Gang Raped Which Was Conducted Out Of Revengefull Situation “ after this the supreme court pass an landmark judgement in 1997. The witness of this case was Vishaka who file a petitioner for this. The judgement of Vishaka and others v/s the state of Rajasthan was given by Chief Justic J.S Verma who was a representative of Justic Sujata Manihar and Justic Kripal. According to me any of this conducted directly violate the right to live with dignity and right to life of women. There should be equality maintain between the gender at the workplace and the sexual harassment should be avoided. The Supreme Court after this case established that the in charge person of a particular institution, organisation or office weather it is public or private, will be fully responsible to take effective steps to prevent the sexual harassment activities. The accused person will be charged penalties for his conduct. This had become a very crucial topic on which an act should be made so that woman can fell themselves safe where they work. In the case of the private companies strict rules should be made regarding the punishment for sexual harassment to prevent the female employees from sexual harassment activities and the strict actions should be taken by the person in charge of that institution or organisation if the sexual harassment is conducted by an outsider or any other employee of the same institution or organisation. Bhanwari Devi was ganged raped in 1992 and the supreme court had given the statement or we can say the supreme court had given the judgement in 1997 then on the bases of judgement given by the supreme court an act has been passed in 2013 for the protection of women at workplace this act is known as “the sexual
harassment of women at workplace act 2013”. This act has been came in force on 9 December 2013 by the ministry of women and child development the India’s first specific legislation that rendered to this issue. The aim of the act is to prevent and protect the women from the sexual harassment activities at workplace.

THE ACT HAS BEEN MADE BUT IS IT PROPERLY IMPLIED?
The act has been made but this has not been implied properly. This act has been came on 2013 for the protection of women from sexual harassment at workplace but after coming of this act in 2013 there are so many cases in which the sexual harassment has been committed with a women employee at workplace. The cases get doubled between 2014 and 2015. According to national crime records bureau data 2015 the cases has been increase from 57 to 119. The cases has rise by 51 % at workplace. The total number of case which has been take place in 2014 are 469 and cases which take place in 2015 are 714 so by seeing this data we can say that the sexual harassment cases with women at workplace has been increased by 22%. This all show that this act has been made but this act has not been implied properly because if this act has been implied properly then the number of cases of sexual harassment with the female at workplace has been decreased from 2013 to 2019 but in this data we see that the situation is totally opposite that the cases has been increased from 2013 to 2019. There are some of the cases of sexual harassment take place which are enough to prove that this act has not been properly implied.

SHANTA KUMAR V/S COUNCIL OF SCIENTIFIC AND INDUSTRIAL RESEARCH AND ORS

The full name of this case is Shanta Kumar V/S Council Of Scientific And Industrial Research And Ors Delhi High Court 2017 On 29 April 2005. In this case the petitioner made complain regarding the incident with her. She said that she has been sexually harassed by the respondent. She said that when she was working in the laboratory the respondent came in the laboratory and then he stopped the machines because the machine were on as work was going on after this he snatched the samples from the petitioner hand which she was holding after this the respondent throw the material which she was holding. After this respondent pushed the petitioner and then respondent locked the laboratory. After this the petitioner said that respondent start shouting on the petitioner and then she start using derogatory language for the schedule casts communities because petitioner was married to a person who was a member of scheduled castes communities. After this the petitioner said that when she had made complain to the higher authority then no action has been taken by the higher authority on the complain made by the petitioner. After this the petitioner also said that the respondent was very harsh in his behaviour when he was talking with the petitioner and even the respondent told the petitioner not to enter in the laboratory again. The petitioner also said that the respondent also abuse the petitioner. The petitioner tell all the things or whole incident to the higher authority but then also no action has been taken by the higher authority.

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824 Sexual harassment of women at workplace act, 2013.

authority against the respondent and the higher authority has told her to complete the formalities related to the equipments. When this all questions arises then the workers or employees working in the premises said that the respondent is low tempered and at small thing he got angry but this don’t mean that he had sexually harassed the petitioner even the employee or the workers working there they said that there is nothing such happen in the premises. They said that there is no fault of the respondent. The petitioner was not having any of the evidence to prove that sexual harassment has been done with her by the respondent and so she is not able to prove the claim which she has made on the respondent. On 31 Oct 2017 this case was dismissed and no action has been taken against the respondent as petitioner was not having any evidence to prove that the sexual harassment has been committed with her by the petitioner and so she was not able to prove the claim.

VIDYA AKHAVE V/S UNION OF INDIA, DEPARTMENT OF WOMEN AND CHILDREN AND ORS\(^{826}\)

The petitioner was an employment in a bank name Indian Government Owned Development Bank. She filed a complaint against the general manager of the bank that she has been sexually harassed by the general manager of the bank. The general manager of the bank was also the immediate superior officer means he was also the supervisor of that office. She said that when she filed a case then also no action has taken for this crime. When no action has been taken by the employer then petitioner file another complain for the sexual harassment with her. As the law lay down by the supreme court of India in the case of “Vishaka And Others V/S The State Of Rajasthan\(^{827}\)” that the employee filed complaining seeking establishment of an ICC as was necessary to be set up. The petitioner said that the sexual harassment done with her by the general manager took place before Feb / Mar in 2012. The petitioner filed complaint of sexual harassment after the expiry of three months. As the three months has been prescribed as the limitation period under the sexual harassment act and that’s why when she complain the about the sexual harassment after the expiry of three months than this is not taken into account by ICC. However when no action has been taken by the ICC then the human resource department had taken separate action based on the facts told by the petitioner which are beyond the scope of sexual harassment act but based on the ICC report the disciplinary authority had passed an order in the favour of the petitioner that the general manager who had sexually harassed her has been transfer to some another city and even he demoted to the lower rank by the two ranks and even her received a pay cut as per his lower rank means before this his salary was much more than now because he was on higher rank and now as a punishment his salary has been cut off and he is now on lower rank. But the petitioner was not happy with this decision she said that more punishment should be imposed on general manager for her bad deed. She said that this is not enough as a punishment for the respondent according to his crime or behaviour means the punishment to the respondent should be given according to his crime. The validity of the observation of the ICC was challenged by the employee as she said that the evidences are not taken on records after

\(^{826}\)Vidya Akhave V Union Of India, Department Of Women And Children And Ors, MANU 2016 MH 2037.

\(^{827}\)supra note 1, at 2.
this the general manager was not held guilty as the petitioner has filed the case after the expiry of three months and no action has been taken. After listening the decision the petition was not happy so she argue that the general manager was on higher post then her and due to which she has a fear that if she will go against him or if she will complain against the general manager / supervisor than she may lose her job and that’s why she was not able to complain against the general manager before the expiry of three months and she also told that she was also having fear that if she will complain then she may not get the job in her future. But at this the supervisor argue that the penalty or punishment given to the supervisor is more than enough as he had suffered psychologically and financially as now he is at lower position and due to his act his salary has also cut off. Due to which he has also suffered by the financial problem. It was also contended that the general manager or the supervisor also living apart from his family members as he has been shifted or we can say he has been transferred to any other city. After this it was said that the court will not re-appreciate the evidences as they has already once seen by the disciplinary committee and when disciplinary committee passed the order then court cannot look into the proportionality of the order passed by the disciplinary committee. The court observed that the inquiry done by the disciplinary authority and said that the interference will be warranted only when there is wednesbury principle, non –compliance of the principle of administrative law and doctrine of proportionality by disciplinary authority. Court said that it would held to be seen whether there is the proper balance between the adverse effects like liberties or interests of person, order may have on the rights, the purpose for which they were intended to serve. The court observed that all the evidences are properly and fairly considered and after that the decision has been taken and so the court cannot give the second opinion because then it will discretion to do so. But the court felt that there is a need to have a effective rules and regulations in the workplaces for reducing the cases of sexual harassment of women. The court also said that the male employees must be aware about the rules and regulations if they will misbehave or misconduct with the female employees are now not only contributing in the national economy but they are also contributing in the international economy. The court also remark that there are rules and regulations which should be made by the companies so that cases can decrease to and to deal with the issues of sexual harassment. The court also said that the ICC should trained to deal with the sexual harassment cases in fair , proper and dispassionate manner and the justice should be based on the natural justice and there is no violation of natural justice.

PROFESSOR ASHISH KUMAR DAS V/S NORTH EASTERN HILL UNIVERSITY ON – 30 AUGUST 2017

In Professor “Ashish Kumar Das V/S North Eastern Hill University“ the petitioner and the respondent both was the employees of same organisation means the petitioner and the respondent both work at same place. The petitioner was a professor of mathematics in the university and the respondent was another subject professor of that university. The name of the university was “North Eastern Hill University “. The

828 Professor Ashish Kumar Das V North Eastern Hill University, MANU 2017 FENT 0097.
petitioner complain against the respondent. The petitioner complain that the respondent has sexually harassed the petitioner. For this act of the respondent the petitioner file a petition against the respondent. When complaint has been made by the petitioner against the respondent. Then the argent action has been taken by the directors so that the sexual harassment not committed again with the other professors working in the university and the students studying in the university working in the university or we can say the same thing don't happen with the other employees. The respondent has been given the compulsory retirement as the punishment or penalty for committing the sexual harassment activity with an employee of the same organisation. After this in the university in which the respondent and the petitioner was working a research scholar in the department of mathematics made a complaint to the vice chancellor. The research scholar made complaint that the petitioner has sexually harassed her. She told to the vice chancellor that while she was working under the supervisor of any other professor as she supervisor take no interest in her work and her professor remain busy her other students and that’s why she was not able to pay attention on her work or we can say that her professor don’t give attention to her work and due to this reason she has to take advice or she has to work under the petitioner or we can due to this she has to work under another professor. The complaint said that due to her work or to take advice she have to go to the petitioner chamber or room. The complaint said that when she went to the petitioner then petitioner show extra attention on her health and figure and even many times the petitioner make comments on her. The complaint also said that when she went to the petitioner the respondent flirt with the complaint. The complaint said that one day the petitioner made her uncomfortable by cheap and unrelated talks and by flirting with the complaint in the room or chamber of the petitioner. After this the petitioner next day also call the complaint in his chamber or room and then the petitioner told the complaint to sit and then the petitioner start touching her and then the petitioner told the complaint to do sex with the petitioner. The complaint said that the petitioner start talking with the complaint on unrelated and useless matters and then the petitioner also include the unwelcome physical contacts. The complaint said that the petitioner also tell her that if she will do whatever the petitioner is telling the complaint to do then the complaint will be able to complete her work. After this the complaint made the allegation on the petitioner that the petitioner also made call on the complaint phone to talk with the complaint and the petitioner talk all rubbish with the complaint on phone and due to which the complaint got disturbed and because of this the complaint is not able to focus on her studies or we can say that the complaint got disturbed and due to this the complaint is not able to concentrate on her work. The complaint said that the calls of the petitioner make her uncomfortable means due to the calls of the petitioner the complaint fell uncomfortable as the petitioner sexually harassed the complaint. After this the complaint was handed to over to the women’s cell of the respondent university by MR. T. There has been seen that there are so many complains made by many other women in the university against the petitioner. The complaint also said that the suggestion given by the petitioner to the complaint fell uncomfortable as the petitioner sexually harassed the complaint. After this the complaint was handed to over to the women’s cell of the respondent university by MR. T. There has been seen that there are so many complains made by many other women in the university against the petitioner. The complaint also said that the suggestion given by the petitioner to the complaint is not good or related to the complaint work. After this the complaint said that after making the calls to the complaint the petitioner came to the complaint hostel and then the petitioner
tried to convey the complaint that there is no need to tell about all this matter to anyone even not to her family also the petitioner also tell the complaint that there is nothing wrong what the petitioner done with the complaint. When questions are asked from the petitioner by the vice chancellor then the petitioner told to everyone that the complaint is mentally disturbed means the petitioner said that the complaint is suffering from mental disease and due to her mental disease the complaint is making allegations on the petitioner after listening the whole situation has been observed once again properly then it was found that the petitioner has committed wrong with the complaint and the petitioner is found guilty for committing sexual harassment with the complaint and by observing whole situation it was decided that the petitioner will remain suspended till the whole matter get solved. After this the decision given by the disciplinary authority was that the petitioner will remain permanent suspended from the university as wrong has been done by the petitioner and he has found guilty for his wrong deed.


In this case the petitioner and the respondent both were working in the same industry. The petitioner filed a complaint against the respondent. The petitioner filed a complaint that the respondent had sexually harassed the petitioner. After this the committee to whom the petitioner has complaint said the petitioner to give or provide the evidences related to the claim which she has made on the respondent. By listing all this the petitioner brought all the evidences of sexual harassment and then she given all that evidences to the committee to whom she had done complain against the respondent. By seeing the whole matter it was decided by the committee that an in camera proceedings will be conducted by the committee on this matter and the statements related to the complaint from the relative staff has been taken for the complaint as well as for the respondent. The respondent was a workman in that industry and after this the committee done an meeting and by observing all the available evidences the respondent was held guilty for committing the sexual harassment with the petitioner and then the committee decide to dismiss the workman or the respondent as the punishment to the respondent by the committee. On this the Industrial Tribunai said that the evidences are not have been seen properly and there is not proper treating of the evidences in this case means the Industrial Tribunai said that the evidences has been ruin by anyone and even the industrial Tribunai said that the available evidences are not enough to prove that the sexual harassment has been conducted by the respondent with the petitioner or we can say that the industry Tribunai said the evidences are less and by the evidences it can’t be proof that the sexual harassment has been committed by the respondent or employee with the petitioner. At this on the request of the industrial Tribunai the evidences are checked once again means the evidences are once again has been checked by this time. The supreme court found that the respondent is guilty for sexual harassment and then the supreme court tell that the respondent should be dismiss from the premises. Now the industrial Tribunai has no choice rather than dismissing the respondent from the premises at the

829 The Management Of Christian V Mr. S.G. Dhamodharan, MANU 2019 TN 1137.
decision was given by the supreme court of India so the industrial Tribunai dismissed the respondent.

CONCLUSION
The sexual harassment with the women at workplace take place very frequently and due to which the rate of the sexual harassment has been increasing day by day in India and if strict action has not been taken then it will directly hamper the working ration of the women in the India and due to which the economic situation of India will also get hamper. The government should take strict actions. By making acts and laws against the sexual harassment activities the activities of the sexual harassment will not decreased till they are not properly implied. The rules and regulation should be such that the sexual harassment of the women can decreased by the act and laws made by the court. When government will make rules and the regulation for the sexual harassment then and if they are properly implied then only we will be able to form a country in which everyone women can live without fear and can walk anywhere and at anytime. For this change we all have to come together and work for this than only the change can be brought because the big change can be brought only when everyone will work against the sexual harassment an individual or a small group of person can’t brought a big change. According to me the proper rules and regulation should be made and they should be properly implied to fight against the sexual harassment.

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• The second book from which I have taken help is “CRIME AGAINST WOMEN” which is written by SUKANTA SARKAR which was published by D.P. YADHAV for MANGLAM PUBLICATION DELHI-110053 (INDIA). The first edition of this book was published in 2014.

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FOREIGN FUNDING OF NON-GOVERNMENTAL ORGANISATIONS (NGOS) - A MATTER OF CONTENTION?

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INTRODUCTION
Charity is a supreme virtue, and the great channel through which the mercy of God is passed onto mankind.
- Conrad Hilton

NGOs are those that exist outside the public government and private market sectors, within what is referred to as the third, voluntary, or non-profit sector. Basically, it is formed when a group of people come together and form an institute with the sole purpose of discharging their moral duty towards the community. It is an umbrella that covers all the legal establishments, seeking charitable and philanthropic funds towards the betterment of mankind without the profit motive. What started off as social-work has now swerved towards developmental work and community mobilization. The burgeoning of voluntary organizations has been observed across the board, with their specific perspectives, priorities and strategies.

The term is a post-World War II expression which originated from the UN when in the year 1945 the UN Charter was adopted; it was demanded in Article 71 that NGOs could be certified to the UN for consultation purposes. An NGO that’s wholly or part funded by the government maintains a non-governmental standing by excluding government representatives from membership within the organisation. In developing countries, NGOs are playing an increasingly important role. They are known for their distinct function in filling the gaps ignored or bypassed by other agencies, both operating in the private and public sector.

In India, the registration of an NGO can be done under various Acts and Laws of different states. Under the Indian Trusts Act, a Charitable Trust can be registered whereas a society can be registered under Societies Registration Act. Withal, a non-profit company can be registered under Section 8 of Companies Act with the Registrar of Companies.

What started off as traditionally conservative organisations are now evincing themselves as dynamic and open to new insights and thinking. There has been a proliferation of voluntary organizations, which in near future will prove to be both an outcome and a challenge to what is elucidated as development in today’s parlance.

Conventionally, NGOs are referred as private agencies in more economically developed countries (MEDC) that support international evolution; aboriginal inhabitants grouped regionally or

830 Salamon and Anheier, 1997.
831 Article 71 of the UN Charter, 1945– “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.”
833 Section 5 of the Indian Trust Act, 1882.
834 Section 3 of the Societies Registration Act, 1860.
835 Section 8 of the Companies Act, 2013.
nationally; and member groups in villages. Withal, NGOs include charitable and religious consortiums that mobilize private funds for development, dispense food and family planning services and promote community organization. NGOs can also include independent cooperatives, women’s groups, pastoral associations and water-user societies. Citizen groups that raise awareness and influence policy are also considered to be an NGO.

ROLE OF NGOs IN DEMOCRACY

We live in an era of blossoming global interdependence. There have been many economic benefits be it in spreading information and knowledge, or in deeper connection of ‘planetary society’. A set of profound global threats are being faced by the human security and prosperity and in addition to this, to the sustainability of our planet- from the diffusion of deadly weapons to the diffusion of deadly disease; from the perseverance of the noxious poverty to the global warming. Ergo, the existence of the NGOs has turn out to be a necessity rather than a luxury in societies throughout the modern world.

In his speech bestowed to the US Senate Department, Barry F. Lowenkon, Assistant Secretary for Democracy, Human Rights, and Labour, speaks to the role of NGOs in the development of democracy, dated 17 January 2007. He reports the role of NGOs as international actors as well as shapers of national policy as being among the finest trends in international relations. He reemphasises that NGOs working in democracy help to establish and strengthen democracy in three key ways:

1. Democracy NGOs operate to institute awareness of and respect for the right of the public to exercise freedoms of expression, association, and assembly, which is pivotal to participatory democracy.

2. They function to guarantee the level of playing field upon which aspirants for elective office can contest and that the entire election process is free and fair.

3. Withal, democracy NGOs work to establish and strengthen the rule of just laws and accountable government institutions, to protect the rights of the mankind, heedless of which persons or parties may be in the office at any given time.

Further, he mentioned that it’s not surprising anymore today, if someone says, that those in power don’t welcome the NGOs or any other agent of peaceful, democratic change. What NGOs and other agents have in common is empowering individuals to reunite to create an autonomous voice discrete from, and at times in disagreement with, the government’s perspective. States are developing and employ tools to depose, Heintz, President Rockefeller Brothers Fund, Annual Conference of the Institute for Civil Society, Zhongshan University, Guangzhou, China January 14, 2020. 


squelch and silence these organizations. They conjure or erect restrictive/confining laws and regulations. They inflict onerous registration and tax requirements. Vague charges, such as "disturbing social order," and execution and compliance are arbitrary, emboldening a climate of self-censorship and fear. Governments play favorites, considering NGOs "good" or "bad," and they deal with them accordingly. NGOs deemed "good" is often the Government Organized NGOs or "GONGOs." He further elaborated on how China sends GONGOs to UN NGO functions to defend China's human rights policies. Moreover, some light was thrown on why should every State support such agencies and stop treating them inhumanly and for this, the case of Egyptian civil society activists Mohammed el-Sharkawi and Karim Shaer who were beaten and arrested for participating in demonstrations in support of the independence of the judiciary was cited. In conclusion, it won’t be wrong to say that a society’s political and economic growth is limited to the extent the political space of an NGO is restricted. A powerful nation promotes the development of NGOs and other elements of civil society. Ergo, since the bygone era, it has been observed that a state that attempts at controlling everything from the centre becomes frail. A society that allows broad participation by its citizens in national life will flourish the most.

When NGOs are under an atmosphere of fear and beleaguerment, freedom and democracy are undermined.

Compliance to the principles mentioned below enables an economy to function well and will distill the basic commitments to the various rights enshrined in documents as the U.N. Universal Declaration on Human Rights and other international as well as national documents.

- An individual should not be restricted to form, join and participate in NGOs of his or her choice in the peaceful exercise of the right to freedom of expression and assembly.
- Restrictions placed on the exercise of the rights must be consistent with international law.
- Governments are prohibited from taking actions that will prevent NGOs from carrying out their peaceful work.
- Laws, administrative measures, regulations, and procedures governing or affecting NGOs should not prevent or delay their operations.
- NGOs should be permitted to receive financial support from domestic, foreign and international entities.

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842 China has its army of GONGO at its disposal in Geneva especially, when its records are at review. Reuters calculation shows that out of 41 NGOs 34 are Government organised NGOs (GONGOs). https://www.reuters.com/investigates/special-report/china-softpower-rights/

843 For example, in 2006, the president of the Moldovan separatist government in the Transnistria region ordered the prohibition of foreign funding of NGOs registered in the region. Although it was amended just over one year later stating “to apply only to those organizations, whose statutes stipulate involvement in electoral campaigns,” https://www.icnl.org/wp-content/uploads/Moldova_foreign_eng.pdf. The impact was such that it can’t be ignored or overlooked. According to the CIA World Factbook, Moldova is one of the poorest countries in Europe, with a GDP per capita of only around $6,700 (2017 est.) https://www.cia.gov/library/publications/the-world-factbook/attachments/summaries/MD-summary.pdf.

Whenever NGOs are under siege, it is crucial that democratic nations act to defend their rights.

THE FUNDING ISSUES TO THE NGOs

1. **State as the Regulator**

In modern society, one in all functions of the government is to regulate the social, political and economic house. All manner of regulative mechanisms is ordained by the State through its agencies furthermore as through laws and legislations. Today, three forms of legislations directly have an effect on the functioning of the NGOs in India. The first legislation relates to the laws of registration or incorporation. In some fundamental ways, registration grants a legal individuality to the organizations and, thereby, caps the culpability of its backer and creator. Nonetheless, it also means' playing by the rules the game' as entrenched by the state. Thence, per ensuing reform to the Society Registration Act has been an effort to slim the noose round the neck of the NGOs. The amendments gave unilateral and exorbitant power to the officials of the State to intercede, govern and check the destiny of the NGOs registered underneath the Act of the states.

The second set that affects NGOs is said to finance. One is the Income Tax Act of 1961. The second legislation associated to finance is that the Foreign Contribution (Regulation) Act. The act was enacted during the 1976 emergency to regulate the flow of foreign grants and contributions to any or all forms of Non-governmental organisations. Over the last 20 years, it's been ascertained that the state has been tightening its role and acting a lot of typically than not for limiting the space, activities, and work of these organisations that transcend the mere provision of charity, help, and welfare of the poor.

2. **State as the Funding Agency**

Since the bygone era, the State is playing an increasingly important role as a funder. The Central Social Welfare Board (CSWB) supports welfare activities since 1956 when the grants-in-aid program was launched. The active promotion of NGOs and also the growth of the state’s role as funder began with the sixth five-year plan (1980-1985).

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845 Formation and registration of Non-governmental Organisations in India as Trust, Society, or a private limited Non-profit Company.
846 For instance, The National Trust portal states that, “the registration of such organization shall be necessary with the Trust for availing benefits under the schemes of the Trust”. https://thenationaltrust.gov.in/content/innerpage/ngo-registration.php.
848 Foreign Contribution (Regulation) Act, 2010.
849 Section 3 of the Foreign Contribution (Regulation) Act, 2010.
851 The Board was established to support welfare activities furthermore, it aimed at promoting voluntarism, providing technical and financial assistance to the organisations for the general welfare of family, child and women. http://www.cswb.gov.in/about-cswb-0.
A distinctive set of mechanism were bought up to help those organisations that are engaged in social welfare and a few of those were- Khadi and Village Industries Corporation (KVIC)\textsuperscript{853} engaged in promoting Khadi and Village Industries, Central Social Welfare Board, and its counterparts in several states providing assistance to those engaged within the welfare of the poor, the weak, destitute, mainly focus on women, and also the Council for Advanced of People’s Action and Rural Technology (CAPART) of 1986 was got wind of to finance NGOs underneath varied schemes and programmes.

A large variety of those organisations rely on the state for grants. In such a relationship with reference to the donor the donee has less power, autonomy and control\textsuperscript{854}. Numerous sequels flow from this relationship. Between 1986 and 2007, the CAPART ostracized 511 NGOs. By 2009, the CAPART had ostracized 830 NGOs\textsuperscript{855}.

Mostly funding for specific schemes and programmes are conceptualized and designed by the State itself. To avail these resources the agencies, have to fit their proposals into them. Over a period of time, these agencies have become mere implementors of the concepts, programmes and conception crafted by the State. On one hand the supply of resources from the state is exclusive and helpful, and on the another, it’s been dominant, limiting, and dependence making.

### 3. The Funding issues

The nature of funding of NGOs additionally considerably affects its overall organization and operating. Traditionally, they have accumulated funding from diverse sources. For small, local, community-based NGOs, native resources are adequate. For bigger projects, funds have hail either from richer members of society or from spiritual establishments or Trusts. Howbeit, the overall percentage of such offerings towards the funding of the NGOs in the post-independence era has been rather limited. Since independence, government funds, and foreign grants and contributions have been the preeminent sources of financing for the NGOs.

Acceptance of foreign funds for the work of the NGOs continues to be a cultural and political blasphemy in several sections of the Indian society. Therefore, it’s vital to know that foreign funding of the non-governmental organisations in the Republic of India may be a far more difficult and sensitive issue than perhaps in several alternative countries of the globe. It is, therefore, not just a matter of access to funds, however the implications of exploitation it among the community of NGOs, on one hand, and within the larger sociopolitical context, on the opposite\textsuperscript{856}.

Supply-led contract the NGOs have less say in the activities of their own organisation. https://scholarship.claremont.edu/cmc_theses/1429/.


India is the “world's largest democracy”. However, in practice there are many restrictions on the freedom of expression. The space is restricted to civil society organizations.
In 2010-2011, offerings were acknowledged from 161 nations, together with Ghana, Ethiopia, Myanmar, Gabon, Niger, Sudan, Congo, Senegal and Burkina Faso where international aid hands these nations to satisfy the requirements of their residents.\(^{857}\) Reports reveal that certain NGOs were engaged in anti-national and political activities.\(^{858}\) In another case of those opposing the Kudankulam nuclear project, the government has lodged cases against four NGOs for allegedly transmitting money to fuel protests, acting in violation of Section 7 of the Foreign Contribution (Regulation) Act, 2010. Furthermore, they were accruing funds from foreign nations for social welfare causes like serving to the physically handicapped and obliteration of leprosy however these were used for anti-nuclear protests.\(^{859}\)

The two most debated yet dominant reasons for not accepting foreign funding to the NGOs are: -

1. Several sections of the Indian society claim that the representatives of foreign funding agencies influence the agenda of the non-governmental institutions;
2. Furthermore, they believe that there is an availability of funds more than the amount required at a given point in time in the life of an establishment.

However, the other section of the society while strongly disagreeing claim that foreign funding, is a necessity: -

1. Availability of funds for innovation and experimentation;
2. Government funding is tied to schemes and programmes further limiting the functioning;
3. New ideas, new initiatives, new approaches, new models, new technologies, new designs in a wide range of areas have emerged largely.

Institutions in the Republic of India are currently facing the challenge of ensuring their autonomy, on one hand and securing a viable and sustainable funding base, on the other.

THE MARCH, 2020 SUPREME COURT RULING

The right to dissent, the licitness of protests as a democratic tool, together with the funding of protests have all been matters of clamant discussion over the previous few months. Recently, the Apex Court, in the petition\(^{860}\) filed by the Indian Social Action Forum, challenging Section 5(1)\(^{861}\) and


\(^{861}\) Civil Appeal No.1510 of 2020 (Arising out of SLP (C) No.33928 of 2011).

\(^{861}\) Section 5(1) of the Foreign Contribution (Regulation) Act, 2010: “The Central Government may, having regard to the activities of the organisation or the ideology propagated by the organisation or the programme of the organisation or the association of the organisations with the activities of any political party, by an order published in the Official Gazette, specify such organisation as an organisation of a political nature not being a political party, referred to in clause (f) of sub-section (1) of section 3: Provided that the
of the Foreign Contribution (Regulation) Act, 2010 and Rule 3(i), (v), (vi) of the Foreign Contribution (Regulation) Rules, 2011 pronounced a judgement that ought to provide much-needed comfort to democratic protestors just fighting for his or her, or their community’s, rights.

The appellant contended that the Foreign Contributions (Regulation) Act, 2010 outlaws the organisations of political nature from receiving foreign grants and contributions. This included organisations of farmers, workers, students or youth, which are not directly political, but whose objective is to advance political interests, or organisations which habitually employ or engages in common and legitimate methods of political action, such as ‘bandh’, ‘hartal’, ‘rasta roko’, ‘rail roko’, or ‘jail bharo’. This, it was quarreled, directly in violation of Article 19(1)(c), the Court asserted that this does not extend to a right to receive foreign funds.

The Supreme Court effectively read down the provisions to hold that the expression ‘political interests’ in Rule 3(v) has to be interpreted to be in connection with active politics or party politics. Furthermore, the Central Government may, by rules made by it, frame the guidelines specifying the ground or grounds on which an organisation shall be specified as an organisation of a political nature.”

As argued by the appellant not weighing on whether the Fundamental Rights are being violated or not will make the right to form association nugatory as none can exercise a right without the resources to do so.

Albeit, even as the NGOs acclaim, there are glaring complications with the half-hearted nature of the judgment. The laws framed by the Parliament are principally subjected to public debate, as a result of that the problematic provisions are weaned out. In the instant case, the Act grants the government the power to invent rules whereby an establishment will be declared to possess political objectives, while not shaping what a ‘political objective’ is, the officials primarily bypasses such parliamentary audit by wadding the void. This then has the twin impact of leaving the citizen outguessing what his rights actually are, whilst consistently living under the shadow of vindictive action by the government. Various sections of the Indian society often believe that this gives the government a benefit of the doubt with regards to the misuse of power.
Concurrently, foreign grants and contributions will proceed to be looked upon with scepticism for masked political motives. It is suggested and recommended that the government will have to construct clear linkages before sullying a recipient organisation.

CONCLUSION

The NGO’s come into permanence to venture those tasks and activities associated with the social welfare, which the government & the private sector could not do, or could not do adequately. Withal, there’s a powerful ought to take steps streamlining grants-in-aid procedures, coaching of cadre to improve personnel competence, enhancing the organizational structure to bolster Non-governmental organizations. The Voluntary work and the state action are the two sides of the equivalent coin of every aspect of development and governance. Moreover, they should acknowledge their essential interrelatedness. Majority of the issues confronted by the Non-Governmental Organizations can be ascribed to wariness between such agencies and the Government departments. Such organizations often procrastinate to contact the political parties or to the Government fearing that they would lose their sovereignty and reliability. Howbeit the endeavors of the organizations are praiseworthy, it should be admitted that they will do very little within the space of development that need huge human and money elements. These organizations and also the government ought to come back to the bargaining table and with reciprocal respect and maturity explore on development problems as long because the concentration is on the poor and their well-rounded development. These organizations and government officials are to be deemed as associates in advancement. Hence, they’re the voice of the sidelined, the destitute, the weak, the survivors of the society and the state.  

NGOs are to be perceived as vehicles of legitimation of community. By granting statutory realization to the fundamental right of freedom of expression and freedom of association, statutes sanctioning the enterprise and governing the functioning of NGOs originate strong maintenance of democracy in India. Their work should be distinctive like an Oasis within the desert that has got to be wisely visible, beneficial, sustainable and replicable and not sort of a mirage. To rephrase John Donne, “No voluntary organization is an island, entire in itself.” Organizations born, live and typically die during a complicated surrounding created of alternative establishments, the government, the private sector, and the general public. This surrounding isn’t static however is chop-chop ever-changing and Non-Governmental Organizations home to require under consideration the prevailing social and economic conditions.

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SEXUAL RIGHTS OF THE PRISONERS

By Prithivi Raj
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ABSTRACT
This article examines the sexual rights of the prisoners by justifying loneliness, sexual satisfaction, and quality of life among prison inmates having heterosexual romantic relationship with a fellow prisoner, inmates with a partner outside the prison, and inmates without a partner. After controlling for age, nationality, total time in prison, actual sentence time served, and estimated time to parole, the results showed a lower level of romantic loneliness, and a higher level of sexual satisfaction and global, psychological, and environment quality of life. A right of the prisoners raises a question as to what extent it can incorporate conjugal rights to the prisoners in the jail premises. This article is intended to discuss whether conjugal rights are a privilege or a right. In India, conjugal visit is not permitted. A conjugal visit is a private meeting between sexual partners with an inmate of jail. The original purpose for marital visit is to urge detainees to keep up family ties. The Consultation suggested that to achieve sexual health, sexuality and sexual relationships should be approached positively and respectfully. Apart from conjugal rights the author also examines the sexual autonomy of the prisoners and their right to it. Further, the sexual rights of every person must be protected the laws and policies which must reflect a positive and respectful approach to sexuality and sexual relationships of prisoners.

STATEMENT OF THE PROBLEM
Homosexuality is the emerging social problem in society. The most enabling environment to involve in same sex activity is prison centres. Consequently, there might be consensual or non-consensual sex among inmates which ultimately violates the right to physical integrity of a person because of instances of an act of rape of same sex.

Prison conjugal visits were used as an incentive to motivate working prisoners to be more productive. It can also be seen in the point of rehabilitation. States believe that preserving the bond of the family unit makes the chances of the inmates rehabilitation greater. They were scheduled visits that allowed the prison inmate to spend one-on-one time with his or her legal spouse. Permits prisoners to have a conjugal visit is also respecting the right of the spouse of the inmate because a spouse who hasn't committed a crime shouldn't be punished.

INTRODUCTION
It is not disputed that sexuality is a central aspect of being human. Sexuality is experienced and expressed in diverse ways in relationships to the self or others, in solitude or in communion. Sexuality is therefore part and parcel of all cultures, including prison cultures. Various factors influence the expression of sexuality, including biological, psychological, social, economic, political, cultural, ethical, legal, historical, religious and spiritual factors. These interrelated factors also influence prison conditions, and how society treats prisoners. The experience and expression of sexuality in prison is inevitably shaped by
prison conditions which are influenced by the above-mentioned factors. In prison, men (and women) spend long periods of time together and in close proximity. This increases the likelihood of sexual activity amongst them. Persons who do not identify as homosexual may nevertheless be involved in sex with other men simply because there are no women in prison. Although prisons have the power to shape sexual expression, it would be illusory to suppose that prisons have control over the sexuality of prisoners. Prison systems can only shape the expression and experience of sexuality. This is crucial because prisons contribute towards the sexual health of prisoners, positively or negatively.


Sexual health in prisons is not merely the absence of disease or dysfunction. It is not merely the absence of HIV in prison. Indeed, neither is it the mere absence of sexual violence or abuse. Sexual health involves the whole person; the physical, the emotional, the mental and social aspects of the person. Advancing sexual health in prisons means paying attention to all these aspects, and addressing the needs of the prisoner holistically rather than piecemeal. Sexual health is related to life’s basic necessities, such as food, clothing, bedding, leisure activities, the personal security of the person, and adequate living space. General living conditions are not dissociated from sexual health. Separating these from sexuality and sexual health is perhaps another illusion of prison systems.

A crucial step to advancing sexual health in prison is to foster a positive and respectful approach to sexuality and sexual relationships. Prison systems must imagine the possibility for healthy sexual experiences among prisoners. This, however, is one of the greatest challenges and involves a shift of social attitudes about sexuality and gender relations. The technical consultation also stated that, in

The technical consultation defined sexual health as follows: “Sexual health is a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence.”
order to achieve sexual health, sexual rights must be respected, protected and fulfilled. Sexual rights were defined as follows: “Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus documents. They include the right of all persons, free of coercion, discrimination and violence, to … respect for bodily integrity … consensual sexual relations … pursue a satisfying, safe and pleasurable sexual life.” The concept of sexual rights is still a contested one and there is no consensus at the global level. However, the technical consultation appeals to the fact that sexual rights are not new rights but the very same human rights already recognized in national laws and international human rights documents. Freedom from violence, respect for bodily integrity, and the right to choose one’s sexual partner and to pursue sexual intimacy that enriches one’s life are founded upon the fundamental and basic rights already articulated in various human rights documents. Human rights are sexual rights when the basic fundamental rights are applied to sexuality and sexual relationships. Sexual rights are therefore a conceptual tool for advocating for sexual health, because without the realisation of these rights, sexual health cannot be attained. Prisoners also have the right to the highest attainable standard of physical and mental health, including sexual health.

ASPECTS OF SEXUAL RIGHTS

Sexual Rights can be divided into Conjugal Rights & Sexual Autonomy of the prisoners.

CONJUGAL RIGHTS OF PRISONERS

Prisoners’ Right to Conjugal Visit is the most controversial and not as such widely researched theme of right at National and International level. Some scholars and peoples believe that the right to conjugal visit is the extended family visit which gives a chance for spouses to spend some private time. Even if, this right is not widely acknowledged by many states, still there are countries in which the right to conjugal visit is expressly recognized under their law and the enjoyment of this right is fully respected. In India, the jurisprudence on the concept of conjugal rights is still in its infancy. There is no statutory law that discusses or confers conjugal rights to prisoners. In the absence of the same, the prisoners knock the doors of courts under Article 21 of the Constitution. This is because the facility will be made available only to those prisoners who are married and have their marriage intact. Such visits cannot be allowed to unmarried prisoners or prisoners with broken marriage. That is, such visits cannot be made available on the basis resembling “equal opportunity” for all prisoners. Thus, conjugal visitations can

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876 Supra. Note 1
877 Art 25 Universal Declaration; art 12 ICESCR.
878 Supra Note 1
be enjoyed only by those prisoners who have their marriages intact whereas parole or furlough does not require this as a pre-condition for release.

Psychology behind Conjugal Rights
A marriage is a natural bond guided by natural laws taught by motivation conscience, nature and custom. Marriage is defined as: The contract made by a man and a woman to live as husband and wife.\textsuperscript{880} It can also be described as culturally or legally sanctioned union. So, marriage is supposed to be a relationship that joins a man and a woman together through an implied binding contract or a spiritual belief; as is applicable and accepted in different societies. It legalizes sexual activities, makes couples feel relaxed; builds compatibility in tune with each other, and smooths the overall relationship. The ancient and basic idea behind marriage is to legalize sexual intercourse meeting the sexual urge and to bring virtuous child and to build a good society. Thus the word marriage itself suggests that sex is permitted between the couples which strengthens the emotional bonds and drives the stress away between them. Sex is accepted as a sign of loving the partner alternative to verbal expression of showing of care and emotion.\textsuperscript{881}

A conjugal visit can be defined as in which an inmate's has a right to meet his or her spouse, during which the couple is allowed to engage in sexual relations. Mostly visits are meant to associate with sexual activity. Physical intimacy in conjugal visits includes any personal activity which they desire such as holding hands, hugging, kissing, romantic touching and sexual activity. The ideas behind allowing conjugal visits were to bind the family ties from being broken. It was thought that if inmates are allowed to meet their family once in a while then there will be moral reform in the prisoner’s and social adjustment will be there. The general biological characteristics of men are not good in expressing their concerns to other living partners, so making love is a way of their expression. To women, sex is an act. They need to be caressed, kissed and loved. Thus both help to deepen the couple’s wife and to build a strong bonding and to also help to drive the stress away. Physical intimacy when welcomed by our bodies by hug or a touch or other experiences, then it releases various chemicals: serotonin oxytocin and dopamine. Oxytocin increases our desire to bond. Dopamine improves our mood and serotonin helps us to fight against depression and left with a very pleasurable feeling on the couples.\textsuperscript{882}

The psychological impact upon the inmate is even more profound. Virtually all contacts with the opposite sex are cut off. The denial of conjugal visiting rights deprives the inmate of an important source of emotional support.\textsuperscript{883} Perhaps the most significant psychological effect of the deprivation of heterosexual relations, however, is the impact upon the prisoner’s self-image.\textsuperscript{884} The sexual frustration felt by a male inmate deprived of heterosexual relationships can cause him anxiety concerning his status as a male.\textsuperscript{885} Where the inmate’s adjustment to the sexual deprivation of prison evokes latent homosexual tendencies and behavior the result is likely to be an acute psychological

\textsuperscript{880} Dictionary.reference.com
\textsuperscript{881} International Journal of Pure & Applied Mathematics, Vol.119 No.15 2018,P. 3019-3035
\textsuperscript{882} Ibid.
\textsuperscript{883} C.Hopper, Sex in Prison 5-6 (1969) P.147; H.Klare, People in Prison 64-66 (1973)
\textsuperscript{884} G. SYKES, THE SOCIETY OF CAPTIVES 71 (1958)
\textsuperscript{885} Ibid.
onslaught upon the inmate’s "ego image."  
Even where homosexual tendencies do not develop into behavior, they will "arouse strong guilt feelings at either the conscious or unconscious level." Moreover, especially in the case of adolescent inmates, life-time patterns of sexual behavior may be shaped by homosexual experiences in prisons. Finally, conflicts arising from relationships may lead to physical violence. The fact that the prisoner’s right of marital privacy is shared by a non-prisoner spouse provides another reason for according this right great weight.

In Jasvir Singh and Another Vs State of Punjab and Other Punjab and Haryana High Court has given a very novel judgment recognising conjugal rights of the prisoners within the jail premises, considering it as part and parcel of right to life under Article 21. The petitioners thereafter sought enforcement of their perceived right to have conjugal life and procreate within the jail premises. They sought a command to the Jail authorities to allow them to stay together and resume their conjugal life for the sake of progeny and make all arrangements needed in this regard. Amicus curiae was appointed by the court keeping in view the vital issues of public importance. Various observations made by him are reproduced below:

"The husband claimed to be the only son of his parents and eight months into their marriage they got caught in the criminal case. The petitioners claimed that their demand is not for personal sexual gratification. The petitioners were also open to artificial insemination. The petitioners’ fundamental focus was on Article 21 of the Constitution. They insisted that the right to life has two essential ingredients, namely, (i) preservation of cell; and (ii) propagation of species of which sex life is a vital part."

The following, amongst other issues emerged for determination before the Court:

i. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our Constitutional framework?

ii. Whether penalogical interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

iii. Whether ‘right to life’ and ‘personal liberty’ guaranteed under Article 21 of the Constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

If question number (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)?

Judgement

The State of Punjab was directed to constitute the Jail Reforms Committee to be headed by a former Judge of the High Court. The other Members shall include a Social Scientist, an Expert in Jail Reformation and Prison Management amongst others;

The Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits,

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886 Ibid.
887 Ibid.
888 H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 510-11 (3d 1959)
889 P. BUFFUM, HOMOSEXUALITY IN PRISONS 28 (1972)
890 CWP No.5429 of 2010 Date of Decision: 29 May 2014
keeping in mind the beneficial nature and reformatory goals of such facilities;

iii. The said Committee shall also evaluate options of expanding the scope and reach of ‘open prisons’, where certain categories of convicts and their families can stay together for long periods, and recommend necessary infrastructure for actualizing the same;

iv. The Jail Reforms Committee shall also consider making recommendations to facilitate the process of visitations, by considering best practices in the area of prison reforms from across jurisdictions, with special emphasis on the goals of reformation and rehabilitation of convicts and needs of the families of the convicts;

v. The Jail Reforms Committee shall suggest ways and means of enhancing the facilities for frequent linkage and connectivity between the convict and his/her family members;

vi. The Jail Reforms Committee shall prepare a long-term plan for modernization of the jail infrastructure consistent with the reforms to be carried out in terms of this order coupled with other necessary reforms;

vii. The Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

viii. The Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child;

ix. The Jail Reforms Committee shall make its recommendations within one year after visiting the major jail premises and it shall continue to monitor the infrastructural and other changes to be carried out in the existing jails and in the Prison Administration System as per its recommendations.

The Jail Reforms Committee shall be allowed to make use of the services of the employees and officers of the State of Punjab, who is further directed to provide the requisite funds and infrastructure including proper office facilities, secretarial services, travel allowances and all necessary amenities and facilities, as required by the Jail Reforms Committee.

The decision in State of Andhra Pradesh V Chalaram Krishna Reddy 891 was relied upon to urge that a prisoner whether convict, under trial or a detenu, continues to enjoy the Fundamental Rights including right to life which is one of the basic Human rights. The petitioners also referred to well regulated concept of conjugal visitations successfully implemented in the advanced countries like the USA, Canada, Australia, UK, Brazil, Denmark and Russia etc. The State of Punjab opposed the petitioners’ prayer essentially on the plea that the Prisons Act, 1894 contains no provision to permit conjugal visitation; its section 27 rather mandates proper segregation of male and female prisoners. Para 498 of the Punjab Jail Manual, lays down the method for separation of male and female prisoners. Even artificial insemination as a viable and alternative solution suggested by the petitioners, was not acceptable to the State of Punjab as according to its affidavit “there is no such provision in the Prisons Act, 1894 and Punjab jail Manual to allow the husband and wife convicts to be in the same cell in the jail or to allow for artificial insemination of the convicts...”. The father of the minor victim, who was murdered for

891 (2000) 5 SCC 712
ransom by the petitioners, also joined these proceedings to oppose the petitioners’ prayer.

The following, amongst other issues emerged for determination:

I. Whether the right to procreation survives incarceration, and if so, whether such a right is traceable within our constitutional framework?

II. Whether penological interest of the State permits or ought to permit creation of facilities for the exercise of right to procreation during incarceration?

III. Whether ‘right to life’ and ‘personal liberty’ guaranteed under article 21 of the constitution include the right of convicts or jail inmates to have conjugal visits or artificial insemination (in alternate)?

IV. If question number (iii) is answered in the affirmative, whether all categories of convicts are entitled to such right(s)? (either the convicts or the under-trials)

Judgment
The writ petition was disposed of with the following directions:

The Jail Reforms Committee shall formulate a scheme for creation of an environment for conjugal and family visits for jail inmates and shall identify the categories of inmates entitled to such visits, keeping in mind the beneficial nature and reformatory goals of such facilities;

The Jail Reforms Committee shall also recommend the desired amendments in the rules/policies to ensure the grant of parole, furlough for conjugal visits and the eligibility conditions for the grant of such relief;

The Jail Reforms Committee shall also classify the convicts who shall not be entitled to conjugal visits and determine whether the husband and wife who both stand convicted should, as a matter of policy be included in such a list, keeping in view the risk and danger of law and security, adverse social impact and multiple disadvantages to their child.

The impact of the judgment was;

The court observed that the learned amicus curiae canvassed that the right to life includes right to ‘create life’ and ‘procreate’ and this fundamental right does not get suspended when a person is sentenced and awarded punishment thereby limiting him to stay in the jail. In Lawrence v. Texas, 892 the court noted that “after Griswold, it was established that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.” Also Planned Parenthood v. Casey 893 recognized the right to “bear or beget a child” as fundamental. In Skinner v. Oklahoma 894 held that the right to procreate is a fundamental right guaranteed by the Constitution. A person does not lose his human rights merely because he has committed some offence as he also has some dignity which must be protected. 895

COMPARATIVE ANALYSIS OF CONJUGAL RIGHT

Canada
The Private Family Visit (PFV) was established by the Correctional Service of Canada (CSC) to encourage inmates to develop and maintain family and community ties in preparation for their return to the community. If they meet certain criteria identified in their correctional plan, inmates have the opportunity to use special units within the

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892539 U.S. 558, 565 (2003),
893505 U.S. 833, 851 (1992)
894316 U.S. 535, 542-543 (1942)

895 JUDICIAL INTROSPECTION OF CONJUGAL RIGHTS VIS-A-VIS HUMAN RIGHTS OF THE PRISONERS by Dr. Sunaina
confine of a correctional institution. Most units are simple two–bedroom structures with combination of kitchen and living area. Inmates are eligible for private family visits unless they are at risk for family violence, participating in unescorted temporary absences for family contact purposes, in a special handling unit, or recommended or approved for transfer to special handling unit or in disciplinary segregation at the time of the scheduled private family visit. Under the Canadian rule the immediate family members are the first group of persons entitled to private family visit which ultimately incorporated the inmate’s spouse or common-law partner. 896

MICHIGAN
The Supreme Court also adopted the balancing approach in Pell v. Procunier 897 In that case inmates challenged under the first and fourteenth amendments a California prison regulation prohibiting press interviews with specific inmates. Assuming without deciding that first amendment rights were at stake, the Court characterized Pell as a case "where we are called upon to balance First Amendment rights against legitimate governmental interests." 898 An important factor in the balancing process was the Court's recognition that the prisoner's right to communicate by mail or through visits provided alternative means of communication with the outside world. Moreover, permitting the press interviews would have created security and administrative problems. The combination of these factors led the Court to hold the regulation valid. Such a balancing technique is not necessarily inconsistent with the established constitutional doctrine that deprivations of fundamental rights must be justified by compelling state interests. The state, through criminal convictions comporting with due process of law, has presumably shown compelling reasons for incarcerating prisoners. The state thus has already shown a compelling interest in depriving convicted persons of those rights that are inconsistent with incarceration. The sole issue presented when a prisoner challenges a particular deprivation, therefore, is whether the exercise of the right is inconsistent with incarceration. In Pell the Supreme Court seemed to base its use of balancing with regard to first amendment rights on a similar analysis, stating: “A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law." 899 The Court apparently viewed balancing as the appropriate means of reconciling the asserted first amendment rights with the legitimate policies and goals of the correctional system. Balancing seems equally appropriate where other fundamental interests are at stake. 900

In Procunier v. Martinez 901 the Supreme relied upon the non-prisoner rights infringed by censorship of to

897 417 U.S. 817 (1974)
899 417 US 822
900 Ibid.
901 416 US 396 (1974)
invalidate prison censorship regulations. Because non-prisoners' rights were at stake, the Court employed a strict standard of review, holding that the prison officials' discretion to censor "statements that 'unduly complain' or 'magnify grievances,' expressions of 'inflammatory political, racial, or religious, or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate' was "far broader than any legitimate interest of penal administration." The Court found it unnecessary to decide whether the first amendment rights of prisoners alone would invalidate the censorship. Finally, the prisoner's right of marital privacy is entitled to great weight because the deprivation is total: Prisoners have no privacy in their marital relations when conjugal visitation is prohibited. The situation is thus fundamentally different Pell, where the Court relied upon the availability to inmates of alternative for achieving means of communication to uphold a prison regulation prohibiting press interviews. A prisoner's only alternative for achieving marital privacy is the home furlough, which is frequently available.  

EUROPE

In Europe, conjugal rights of visitation and artificial insemination are claimed on the basis of European Convention on Human Rights. The Convention guarantees right to respect for privacy or family life as well as the right to marriage. Article 8 of the Convention provides that everyone has a right to respect for his private life, his family life and his home and that there shall be no interference by a public authority with the exercise of that right, save in accordance with law or as necessary in a democracy for certain named purposes (which include public safety, health or morals). Article 12 of the Convention provides that a prisoner of marriageable age has a right to marry and to found a family according to national laws governing the exercise of the right. All parties of Council of Europe are member to this Convention and are under an obligation to make provisions in accordance with the Convention. In accordance with it, many states in Europe allow conjugal visits of prisoners. For example, conjugal visits are allowed in Spain, France, Sweden and Denmark to name a few. The Spanish prison system gives prisoners access to conjugal visits on a monthly basis and prisoners can invite members of their families as well as close friends. Swedish prisons allow inmates to have visits with family members that can last for up to nine hours. It is pertinent to note that the European Court of Human Rights has not yet interpreted the Convention as requiring Contracting States to make provisions for such visits. And this is an area in which the Contracting states enjoy wide margin and it is for the states to see that what steps are taken to ensure compliance with the convention. The European Court of Human Rights in the case of Dickson v. the United Kingdom has denied permission of

902 416 US 396 at 413-414
903 Ibid.
904 Supra Note.17; An Evaluation of the Home Furlough Program in Pennsylvania Correctional Institutions, 47 TEMP. L.Q. 288 (1974
907 Ibid, at p. 635.
908 Jasvir Singh vs. State of Punjab 2015 Cri LJ 2282 (2293)
909 Application No. 44362/04 decided on 4th December, 2007 by European Court of Human Rights
artificial insemination to prisoners. The petitioners in this case were husband and wife and both were incarcerated. They sought permission for access to artificial insemination and relied on Article 8 and 12 of European Convention on Human Rights. Their application was turned down by the Secretary of State as well as by the High Court. The European Court of Human Rights also turned down their application and observed that more than half of the states have provisions for conjugal visits. In such a scenario, there was no need of obviating the authorities to provide additional facilities for artificial insemination. The Supreme Court of Judicature in United Kingdom in the case of R v. Secretary of State for Home Department also denied the claim of a prisoner for artificial insemination. The Court held that the refusal to permit the appellant the facilities to provide semen for artificial insemination of his wife was neither in breach of the Convention nor unlawful or irrational. The Court culled out three reasons for sustenance of the policy that restricts the provision of facilities for artificial insemination. Firstly, it is an explicit consequence of incarceration that prisoners should not have the opportunity to beget children while serving their sentences except when they are allowed to take temporary leave; secondly, there is likelihood of a serious and justified public concern if prisoners continue to have the opportunity to conceive children while serving sentences; and thirdly, there are disadvantages of single parent families.

UNITED STATES OF AMERICA

There are 195 prison facilities operated by the Federal Bureau of Prisons; the facilities house approximately 211,000 prisoners. In relation to Conjugal visit currently, only six U.S. states allow prison conjugal visits within their prison systems; California, Connecticut, Mississippi, New Mexico, New York and Washington. All of these states have their own regulations and policies on the management of conjugal visits. For the purpose of this topic let us have a look on Mississippi Prison. The Conjugal visit at Mississippi state penitentiary for example should not be viewed as an isolated phenomenon; it is only a part of the general visitation and leave program which has been in operation in the prison since 1944 and which is the most liberal in the United States. Under the Mississippi program, called the Holiday suspension program, each year from December 1 until March 1, inmates who have been in the penitentiary at least three years in good behavior records may go home for a period of ten days. As evaluated by Mississippi prison and state officials, this program has proved a success and an important element in the rehabilitation and morale of the inmates. Apparently, much of the success of conjugal visits depends on the adequacy of the facilities provided for the privacy of the inmate and his wife. For this effect the Mississippi prison made considerable change building the so called Red Houses, which are private rooms. But the red houses are still unsatisfactory in terms of absolute privacy. Another important element in the Mississippi prison, conjugal visiting appears to be the small community camp arrangement. This arrangement seems to be amenable to the conjugal visit. It affords more freedom of visitation in general since each camp is somewhat isolated. The visitors go directly

910 [2001] EWCA Civ 472
911 American Prison culture in an International Context ;an examination of Prisons in America ,Netherlands and Israel ,Lucian E.Dervan,p.415
912 Nahom Duba, The Status of Prisoners’ Right to Conjugal visit in Ethiopia, 2016
913 Ibid.
to the camp they wish to visit, where the sergeant searches the male visitors and the sergeant’s wife searches the female visitors. Since all inmates are not married one and because of the arranged schedule the number of inmates wishing to visit to use the red house is never large. The small numbers add a more respectable atmosphere and provide a more informal situation.\textsuperscript{914} One unified policy that all six states agree on is that Extended Family visits are “not a right, but a privilege”. Prisoners must earn the opportunity to participate in this program. They must be low-to-medium security level prisoners, with no history of disciplinary problems within the prison system. They cannot be incarcerated for violent offences or have a history of child abuse or domestic violence.\textsuperscript{915}

In USA, federal prisons do not allow conjugal visitations. However, many states allow conjugal visitation programs. These visitations are subject to a variety of restrictions which are provided by the concerned state. The oldest conjugal visiting program for inmates is at the Mississippi State Penitentiary in Parchman. Conjugal visitation privileges in this institution date back to 1918, although many penitentiary employees believe the program has been in existence since the institution was first opened in 1900.\textsuperscript{916} Earlier, the program was open only for black inmates only but later on it was extended to all prisoners. The conjugal visitation program in the Mississippi got evolved with time and was never formally established by law. The visits take place every two weeks and can last for up to three days. Prisoners and their families are taken to the cottages located on the prison grounds, which are equipped with beds and tables.\textsuperscript{917} In addition to conjugal visitation, the prison authorities also use the program of home furloughs. Various other states in USA also have programs for conjugal visitations.\textsuperscript{918} For example, in the state of California the first conjugal visit program was instituted in 1968 and has been expanded since then. The inmates in California are allowed to have visits with their children, spouses, siblings and parents in modular homes located on the prison grounds.\textsuperscript{919} Similarly, conjugal visitation programs are also available in New York,\textsuperscript{920} New Mexico, Washington and Connecticut. However, the programs in New Mexico\textsuperscript{921} and Mississippi have been closed.\textsuperscript{922} The United States Court of Appeal, Ninth Circuit, in the case of William Gerber v.

\textsuperscript{914} Journal of Criminal law and criminoology, the conjugal visit in Mississippi State Penitentiary, Columbus B.Hopper,vol.53.Issue 3 Sept. p 342-343  
\textsuperscript{915} http://crime-punishment.yoexpert.com/prison-system/2-what-us-states-allow-prison-conjugal-visits-3543.html  

922 Ibid.
Rodney Hickmen\textsuperscript{923} denied the claim of petitioner for allowing him to provide a sperm to his wife for artificial insemination. In this case the husband was imprisoned for a sentence to a hundred years to life plus 11 years. He wanted a baby and no date was set for his parole due to long sentence. Therefore, he claimed that he should be allowed for providing a sperm to his wife for artificial insemination and denial of such a claim would amount to violation of his constitutional right.\textsuperscript{924} The Court of Appeals with a majority of 6-5 held that (i) many aspects of marriage that make it a basic civil right, such as cohabitation, sexual intercourse, and the bearing and rearing of children, are superseded by the fact of confinement and (ii) prisoners have no Constitutional right while incarcerated to contact visits or conjugal visits. The Court further observed that keeping in view the nature and goals of a prison system, it would be a wholly unprecedented reading of the Constitution to command the warden to accommodate Gerber’s request to artificially inseminate his wife as a matter of right.

\textbf{RIGHT TO SEXUAL AUTONOMY IN PRISON}

...the body implies mortality, vulnerability, agency: the skin and the flesh expose us to the gaze of others but also to touch and to violence. The body can be the agency and instrument of all these as well, or the site where “doing” and “being done to” become equivocal. Although we struggle for rights over our own bodies, the very bodies for which we struggle are not quite ever only our own. The body has its invariably public dimension; constituted as a social phenomenon in the public sphere, my body is mine is not mine. (Butler, 2004, p. 21).

In the passage above, Butler writes of a body that is both “mine and not mine.” Indeed, my experience as a free world body in carceral spaces is an exaggerated but apt example of exactly this truth: under white supremacy and capitalism, bodies are not only not-free, but also contingent, limited, and conditional. As sexual beings, then, different bodies are granted different access to humanizing interaction, whether they are sexual or not. As previously discussed, being forbidden to touch inmates was always already about a presumed sexual deviance—despite the fact that touch in yoga is non-sexual.\textsuperscript{925}

In \textit{Turner v. Safley},\textsuperscript{926} the Supreme Court articulated the standard of review for constitutional challenges of prison regulations. The Court attempted to strike a balance between ensuring that prisoners retain the right to seek redress of constitutional grievances and making sure that courts accord appropriate deference to the expertise of prison administrators. The Court recognized that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution” and that the “expertise, planning, and the commitment of resources” that go into running a prison are “peculiarly within the province of the legis-lative and executive branches of government.” Ultimately, the

\textsuperscript{923} 291 F. 3d 617 (2002)
\textsuperscript{925} RAECHEL TIFFE, Toward a Decarceral Sexual Autonomy: Biopolitics and the Compounds of Projected Deviance in Carceral Space, Journal of Prison Education and Reentry, Vol. 4 No. 2, December 2017
\textsuperscript{926} 482 U.S. 78, 89 (1987).
Court held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” Courts consider four factors to determine whether a prison regulation is reasonably related to a legitimate penological interest: (1) whether there is a “valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;” (2) whether there are alternative means available for exercising the asserted right; (3) how the accommodation of the asserted right will impact guards, other incarcerated persons, and the allocation of prison resources; and (4) that “the absence of ready alternatives is evidence of the reasonableness of a prison regulation” and vice versa.

First, Supreme Court precedents arguably support a general constitutional right to masturbate. While the Supreme Court has never directly addressed this question, *Griswold v. Connecticut* and *Lawrence v. Texas* imply a constitutional right to masturbate. The right to masturbate may be the correctional context by applying the four *Turner* factors. The Supreme Court has not directly addressed whether the Fourteenth Amendment includes a constitutional right to masturbate. One reason for this might be the sheer unadministrability of a masturbation ban outside of the prison context. The right itself may also be so obvious that states simply would not seek to prevent the practice in the first place. Whatever the reason, the fact that the right to masturbate has not been specifically upheld by the Court does not make that right any weaker or less fundamental. Indeed, Supreme Court precedent strongly implies a fundamental right to masturbate in private. The strongest support for this right derives from the Court’s decision in *Lawrence v. Texas*. Before discussing *Lawrence*, it is instructive to consider the decisions undergirding the Court’s holding in that case.

At the root of the Supreme Court’s jurisprudence surrounding sexual privacy rights is its decision in *Griswold v. Connecticut*. In *Griswold*, the Court found that a state law prohibiting the use of contraceptives and any consultation regarding contraceptives violated a fundamental right to privacy. The Court held that the “sacred precincts of marital bedrooms” were protected by a right to privacy that was “older than the Bill of Rights” itself.

In *Eisenstadt v. Baird*, Seven years after the decision in *Griswold*, the Court extended the right to make decisions regarding contraception and sexual conduct beyond the marriage relationship. In *Eisenstadt*, the Court recognized that the right of privacy articulated in *Griswold* was dependent on the marital relationship, and extended it to unmarried couples as well. The Court also recognized that the marital couple is made up of two individual people. It ultimately held that “[i]f the right of privacy means anything, it is the right of the individual, the husband, to make certain of his own personal decisions.”

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927 Ibid.
929 Williams v. Pryor, 220 F. Supp. 2d 1257, 1296
931 Ibid.
932 Ibid.
933 381 U.S. 479 (1965)
934 Ibid.
935 Ibid.
936 405 U.S. 438, 447 (1972)
937 Ibid.
938 Ibid.
939 Ibid.
married or single, to be free from unwarranted governmental intrusion” into family planning decisions.\textsuperscript{938} The Court’s strongest proclamation in favor of sexual autonomy and the constitutionally protected privacy interest in private sexual conduct came in \textit{Lawrence}.\textsuperscript{939} In \textit{Lawrence}, the Court overruled \textit{Bowers v. Hardwick} and invalidated a Texas statute prohibiting sodomy. In doing so, the Court reaffirmed the “promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Most significantly for present purposes, the Court held that the right to be free from governmental intrusion into “the most private human conduct, sexual behavior” is a liberty protected by the Constitution. Finding no legitimate state interest in prohibiting homosexual sex, the Court proclaimed that the government is not permitted to “demean [the] existence or control [the] destiny” of anyone who chooses to engage in homosexual conduct in the privacy of their homes. Although the Court did not explicitly address masturbation in \textit{Lawrence}, it is difficult to imagine how a masturbation ban would pass constitutional muster in the wake of \textit{Lawrence}.\textsuperscript{940} The Fifth Circuit has held that, in the wake of \textit{Lawrence}, individuals enjoy a constitutional right to “to engage in private intimate conduct” without interference from the government.\textsuperscript{941} In \textit{Reliable Consultants, Inc. v. Earle}, the Fifth Circuit relied on \textit{Lawrence} to invalidate a Texas statute that criminalized “the selling, advertising, giving, or lending of a device designed or marketed for sexual stimulation.” The court held that the Texas statute heavily burdens the constitutional right of an individual who “wants to legally use a safe sexual device during private intimate moments alone or with another” and that the state’s interest in public morality “cannot constitutionally sustain the statute.”\textsuperscript{942}

When inmates enter prison, they begin to adapt to the prison lifestyle and the subcultures that are present. According to Einat and Einat (2000), they are participating in the concept of “prisonization.” Multiple researchers have attempted to provide theoretical explanations of the adjustment and

\begin{footnotesize}
\begin{footnote}{938} Eisenstadt, 405 U.S. at 453 \end{footnote} \\
\begin{footnote}{939} 539 U.S. at 579 \end{footnote} \\
\begin{footnote}{940} Compare Williams v. Att’y Gen. of Alabama, 378 F.3d 1232, 1236–37 (11th Cir. 2004) \end{footnote} \\
\begin{footnote}{941} Reliable Consultants, Inc., 517 F.3d at 744 \end{footnote} \\
\begin{footnote}{942} Ibid. \end{footnote}
\end{footnotesize}
behavior of prison inmates (Clemmer, 1940; Irwin and Cressey, 1962; Sykes, 1958; Toch, 1977), with two main theories receiving the most support. The deprivation model asserts that deprivations (or losses of liberties) experienced in prison are the main influence on an individual’s response to incarceration. According to Sykes (1958), five main pains (or losses) result from imprisonment:

1. Liberty and freedoms available to those not incarcerated.
2. Goods and services, ranging from choosing a grocery store to picking a mechanic.
3. Heterosexual relationships with men and women of an individual’s choice.
5. Security and protection from harm.

As a mechanism for coping with the loss of these freedoms and liberties, the inmates form a new set of values and norms, some of which lead to inappropriate behavior during incarceration (Marcum, Hilinski, and Freiburger, forthcoming). For example, individuals on the outside have the freedom to participate in heterosexual relationships at their leisure. As incarceration only allows the cohabitation of others of the same sex, many inmates choose to participate in homosexual relationships, an activity that is banned in prison.\(^{943}\)

 Participating in autoerotism is often a behavior inmates will choose to relieve sexual tension. Of the few studies done on this behavior, it appears to be acceptable among the inmate population. Wooden and Parker (1982) found that every inmate in their study reported masturbating while incarcerated, with 46 percent masturbating three to five times per week and 14 percent masturbating daily. Furthermore, Hensley, Tewksbury, and Koscheski (2001) found that 99.3 percent of their male inmate sample reported masturbating while incarcerated. Interestingly enough, the more educated inmates were more likely to be frequent masturbators. Although Hensley, Tewksbury, and Wright (2001) found that less female inmates admitted to the behavior, a large portion (66.5 percent) of female inmates in a southern facility participated in regular masturbation. Inmates know this behavior is normally forbidden during incarceration.

 However, research has indicated that male inmates will rationalize this behavior in order to continue to participate in masturbation. Worley and Worley (2013) tested this behavior with Sykes and Matza’s neutralization theory, which has been used to explain many types of criminal behavior, such as shoplifting (Cromwell and Thurman, 2003), digital piracy (Morris and Higgins, 2009), and sex trafficking (Antonopoulos and Winterdyk, 2005).\(^{944}\)

 While the majority of correctional facilities have rules against public autoerotism, this behavior still occurs in prison, sometimes to the point of creating an adverse environment for inmates and correctional staff. In Beckford v. Department of Corrections (2010), a federal appellate court ruled that the Florida Department of Corrections failed to fix a hostile work environment for female health-care workers and correctional staff. Male inmates in maximum security continuously masturbated in the presence of fourteen female employees over the course of three years. They would participate in “gunning,” where the inmates openly masturbated in the presence of the employees by standing on toilets or

\(^{943}\) Catherine D. Marcum and Tammy L. Castle, Sex in Prison: Myths and Realities, 2014

\(^{944}\) Catherine D. Marcum and Tammy L. Castle, Sex in Prison: Myths and Realities, 2014
mattresses to ensure the victims could see the behavior. They would ejaculate through the food slot on their doors. The staff resorted to wearing sunglasses and headphones to avoid the harassment, as the Department of Corrections refused to attempt to amend the inmates’ behavior.  

COMPARATIVE ANALYSIS OF SEXUAL AUTONOMY

Prison rules and regulations are essential to combating threats to safety and security and to maintaining order within the institution. An appeal to the “orderly operation of the institution” often undergirds the justification for a ban on sexual activity and masturbation while in custody. However, the experience of correctional facilities in the rest of the English-speaking world suggests that institutional order can be maintained without a draconian ban on masturbation.

Prison regulations in Queensland, Australia, do not contain categorical prohibitions on masturbation or other consensual sexual activity. In the State of Western Australia, condoms are made available to incarcerated persons of all genders. Far from encouraging an over-sexualized and dangerous institutional environment, Australia’s relatively liberal attitude towards sex in prison is correlated with institutional order. A recent study from the University of South Wales found that sex in prison was a relatively rare phenomenon and when it did happen between two prisoners, it was overwhelmingly consensual.

Canadian prisons also recognize significantly more sexual rights than American prisons. In Ontario, the Ministry of Correctional Services Act authorizes the promulgation of regulations “respecting the …… discipline, control, grievances, and privileges of inmates.” The regulations do not include any prohibition on sexual activity or masturbation. Other Canadian provinces go even further than Ontario; prisons in Nova Scotia provide condoms and dental dams to facilitate safe sex while incarcerated. The lack of prohibitions on sexual activity, ready availability of condoms and dental dams, and a generous conjugal visit policy all suggest that Canadian corrections officials recognize that an opportunity to establish healthy sexual practices is important for rehabilitation and consistent with maintaining institutional order.

CONCLUSION & SUGGESTION

[References]

945 Ibid.
947 Corrective Services Regulation 2017 (Qld), sub-div 2(i) (Austl.) (prohibiting indecent or offensive acts only in someone else’s presence).
950 Ministry of Correctional Services Act, R.S.O. 1980, c 275, s 47(d) (Can.).
Sex is a physiological need that strengthens the bond between couples thus the plea from some prisoners to be allowed to satisfy their sexual needs in a move to cut down on sodomy in prisons is reasonably justified. Sexual health in prisons cannot be attained unless these misconceptions and misunderstandings about gender and sexuality based on hegemonic masculinities ideals are quashed. It requires transforming laws and policies to accommodate sexual and gender diversity and to protect every person from sexual violence, and to allow every person the freedom to pursue sexual relationships safely and freely without discrimination, coercion and violence. The protections of the Constitution do not end at the prison walls. It is incumbent upon our criminal justice system to respect and protect the rights of the accused and of the convicted. Those rights include the right to sexual autonomy. A system that can punish a natural, private activity like masturbation with solitary confinement is an extraordinarily flawed system. If prisons refuse to lift these draconian restrictions on a fundamental right, courts must step in to protect those whose constitutional rights are being trampled. The right to procreate through artificial insemination as a supplement should be viewed as an alternative. However, in view of limited resources available with the state the state shall initially focus on developing facilities for conjugal visitation in jails and this method must be a part of long term planning. There should be provisions of parole and furlough should be used liberally by the state so as to ensure that prisoners can establish relations with their families. The state should allocate resources for construction of facilities for conjugal visitations. Although there are weighty interests on both sides of the issue, a strong argument can be made that a court must find that married prisoners and their spouses have a constitutional right to participate in a program of conjugal visitation. If rehabilitation remains the favoured goal, as it now seems to be, the benefits of conjugal visiting should tip the scales in the prisoner's favour. Prisons will remain unpleasant places even if conjugal visiting is allowed several times a month. Imprisonment will confer no less of a social stigma because of the presence of such a program. If a prisoner is not allowed to meet his spouse in the prison, than the spouse of prisoner equally faces similar torture for no offence. Imprisonment is a legal punishment imposed upon the offender by the state for the commission of a wrongdoing or defying the rule. The State is under a commitment for securing the human rights of its citizens and also to ensure the society everywhere and is approved to do so. To shield the nationals from any conceivable mishandle of this authority, they ought to be given certain fundamental benefits which are perceived by the Constitution of India as of Rights. That it would offer potential psychological benefits to the prisoner, reduce prison homosexuality, and allow the inmate to preserve or her marital ties.
CRITICAL ANALYSIS OF LAWS RELATING TO REFUGEES IN INDIA

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“Abstract”
“Among all countries which have had an influx of refugees in the last century, India is leading the pack with over nineteen million refugees living in this country”. The first such instance which saw the forceful migration of millions of people into the country was during the Indo-Pak partition in 1947 when a lot of families lost their shelter and were forced to relocate depending on whether they were Hindus or Muslims. In this context, one needs to look at the history of refugee crises that has generally plagued our planet earth ever since World War II and has been unsolved in India as well ever since the country became independent in 1947.

Chapter 1”
“INTRODUCTION”
1.1 Definitions
“Ordinarily, the term “Migrant” denotes a person who moves around from one place to another within the same country in search of better work and better living conditions”. “An “immigrant” is one who migrates from one country to another in search of better job opportunities and better living conditions.

“An “Internally Displaced” person is defined under International Humanitarian Law as a person who is displaced from his original shelter due to war, armed conflict, any natural or man-made disaster.

“Finally, the term “Refugee” is defined in the United Nations Convention Relating to the Status of Refugees, 1951 as a person who has been staying outside the country of his nationality or that of habitual residence, i.e. domicile, as a result of the fear of persecution and is unable to return to the country because of the fear”. It is noteworthy that such persons are also alternatively known as “Asylum Seekers”.

“Asylum seekers are those who seek international protection from another state because of the fear of persecution in their own country”. People who are granted Asylum by the host country become refugees whereas those who are not recognized as such remain illegal migrants/immigrants. “Asylum is generally granted only when there is a “well-founded” (what is well-founded varies from case to case but is generally understood as the proof of fear backed up with solid factual evidence on the basis of incidents of persecution that a particular group of refugees may have faced in the past and that may have been discovered through media reports, legislative and executive action) fear of persecution and also in furtherance of the principle of “Non-Refoulement” (This is explained in Art. 33 of the UN Convention Relating to the Status of Refugees, 1951 which provides that “No
Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”) in International Refugee Law\(^{956}\).

1.2 Massive Overflow of Refugees into India

“India has seen a huge influx in its refugee population since 1947 wherein a good part of its population comes under the unacknowledged category of “Refugees” by the Government of India”. “After Independence, 25 years were involved in accepting over 15 million refugees due to the India-Pakistan partition. Initially, over a 100 relief camps were set up and a total expenditure of over Rs. 59 crores were incurred by the Government of India\(^{957}\). Step of primary importance that was taken to deal with the refugee crisis during this period was the enactment and enforcement of the Rehabilitation Finance Administration Act, 1948\(^{958}\).”

India faced another refugee crisis in the year of 1959 wherein the spiritual leader of the Gelug, Dalai Lama, along with his followers had to flee from Tibet due to China’s Communist approach to Anti-Religious legislations. The Government of India provided the Dalai Lama and his followers a Political Asylum\(^{959}\).

The refugee influx continued in 1971 when more than a decade millions of refugees fled from East Pakistan to India during and immediately after the Indo-Pak war. In this case, India had no choice but to consider the plight of the refugees on humanitarian grounds forced by the humanitarian obligation to give shelter to such refugees\(^{960}\).

“With the increasing gap of time, India’s already-bursting population continued to be affected by the massive in-take of refugees from Sri Lanka and Bangladesh in 1983 and 1986 respectively”. “As per the World Refugee Report published every year by the UNHCR, India hosted approximately at least over a million refugees and some 2,37,000 internally displaced persons\(^{961}\).”

1.3 Insight into the Rohingya Community

“A group of Stateless People, The Rohingya have Indo-Aryan as their origination roots who are described as the “world’s most persecuted minority”\(^{962}\). Alternatively known as Arakanese Indians the sake of transparency and accountability to the government, the rehabilitation finance administration had to maintain proper books of accounts and was registered as a company with a common seal and perpetual succession\(^{958}\).”

\(^{956}\) supra note 2 .
\(^{957}\) supra note 2 .
\(^{958}\) See Rehabilitation Finance Administration Act, 1948, No. 12, Acts of Parliament, 1948 (India) (This piece of legislation was enacted to provide financial support for rehabilitation and resettlement of people who were displaced to the Indian side post-partition. Under the Act an authority called the rehabilitation finance administration was formed under the direct supervision and control of the then central government which was supposed to lend money to displaced individuals and families so that they could arrange for their basic needs such as food, clothing and shelter by starting a new industry or business. The authority also received financial support from the government for easier disbursement of loans. For the sake of transparency and accountability to the government, the rehabilitation finance administration had to maintain proper books of accounts and was registered as a company with a common seal and perpetual succession) .
\(^{959}\) supra note 2 .
\(^{960}\) supra note 2 .
\(^{961}\) supra note 2 .
and hailing from the Rakhine State of Myanmar, such community comprises majorly of Bengali Muslims and minority as Hindus. In October 2017, the Rohingyas were highlighted by the fickle Media because reportedly around 5 lakh Rohingyas crossed the Myanmar border and entered into Bangladesh and India due to the persecution and being a constant subject to fear, violence and torture by the Myanmar Law Enforcement Authorities. The point of conflict arises when the fact that this community has been residing in Myanmar since the 12th century is acknowledged; “A large number of Migrant Rohingya Labourers, during 1824 - 1948, migrated from India and Bangladesh to Myanmar, which was still under the rule of British.

“Following Myanmar’s Independence from the British Rule in 1948 and passing of the Union Citizenship Act of 1948, the Myanmarese government began to look at the migrant Myanmar’s, i.e. Rohingyas as illegal”. They were denied full citizenship rights and basic amenities as the aforesaid act defined which ethnicities would be granted citizenship and “according to a 2015 Report by the International Human Rights Clinic at Yale Law School, the Rohingyas were not included”. “However, The Citizenship Act did allow those people whose families had lived in Myanmar for at least two generations to apply for Identity Cards”. “Rohingya were initially given such identification under the generational provision”. “During this time, several Rohingya also served in the state’s Parliament as well.

“After the 1962 military coup in Myanmar, things changed drastically for the Rohingyas”. “All citizens were required to obtain National Registration Cards”. “The Rohingyas, however, were only given Foreign Identity Cards which limited the jobs and educational opportunities they could pursue and obtain”.

“In 1982, a new citizenship law was passed, which effectively rendered the Rohingyas stateless”. “Under the law, the Rohingyas were again not recognized as one of the state’s 135 ethnic groups”. “The law established 3 levels of Citizenship”. “In order to obtain the most basic level of citizenship, i.e. Naturalized Citizenship, there may be proof that the person’s family lived in Myanmar prior to 1948, as well as fluency in one of the national languages”.

“Many Rohingyas, despite being fluent in Burmese, lacked such paperwork as it was either unavailable or denied to them”.

“As a result of the new legislation, the following rights of Rohingyas has been restricted: To Study, To Work, To Seek Shelter and Safety, To Travel, To Marry, To Practice their Religion, To Access Health Services, To Vote and so on”. “Furthermore, limits are placed on them as to enter certain professions like Medicine, Law or Running for the Office”. “Since the 1970s, a number of crackdowns on hundreds of thousands of Rohingyas in Rakhine State has caused them to flee to neighboring states of Bangladesh, as well as Malaysia, Thailand and other Southeast Asian countries. During such crackdowns, refugees have often reported rape, torture, arson and murder by Myanmar Law Enforcement Forces.”
1.4 “Research Questions”

“In the light of the above-mentioned objectives the researcher dealt with the following questions in the research work”:

a. What are the laws prevailing in India regarding Refugees?
b. How is the treatment by Indian Government towards refugees?
c. Why doesn’t India have a National Legislation regarding Refugees?
d. Why hasn’t India ratified International Refugee Treaties and Obligations?
e. What is the history of refugees in India?
f. Why did Rohingyas enter India and what is their condition?

e. To observe why Rohingyas entered India of all the countries and their current situation.

1.7 Significance of Study

“This research work will be helpful in finding out the reasons behind India being put on trial for not ratifying the Refugee Convention and Protocol, and apparently abusing human rights and due process of law”. Furthermore, it will also give us insight into the pros and cons of India’s different action towards Refugees. A critical analysis of Indian Law with International Law pertaining to refugees has not been done in detail. This research work will add on to the literature available and make valid and authentic information easily available to the public at large.

1.8 “Research Methodology”

“There are mainly doctrinal and non-doctrinal methods of study for conducting research work”. “Doctrinal method mainly gives emphasis to conducting research by analysis of materials available in the library whereas, non-doctrinal research requires researcher to undergo field work to do the research work.

“Doctrinal method is found to be suitable for the present study since the research involves analyzing the laws related to refugees in India, the situation of Refugees in India and action taken by the Indian Government towards refugees”. The research analyses the concept of Non-Refoulement.

1.9 Review of Literature: Need for Present Study

Since 1947, India has observed an influx of refugees. However, it has failed to adopt any kind of National Legislation or ratify an International Obligation pertaining to Refugees. “This has led to arbitrary and discretionary power vested in the hands of
the Government of India which was duly and appropriately exercised”. “The highlight is the fact that India, despite numerous successful endeavors in dealing with refugee crisis and letting refugees stay on humanitarian grounds, it has come under sharp criticism from the international community for not adopting the 1951 Refugee Convention and 1967 Refugee Protocol”. “This study is important as it delves into the nuances and intricacies of International Law on Refugees with respect to India’s subsidiary resort to deal with the refugee matters on an ad-hoc basis in the backdrop of absence of a National Legislation.

1.10 Chapterisation
“This whole work is divided into 4 chapters”:
“Chapter 1 – Introduction”
This chapter introduces the definition of certain terms related to refugees; it provides insight on the history of refugee influx in India, and it provides a detailed background on the Rohingya Community. “Besides, the chapter discusses elaborately the research problems existing in the research field, enumerates the research questions, hypothesis, narrates the objectives and explains the significance of the study. The chapter also chalk out the methodology adopted, scope of the study and 4. Chapterisation.

“Chapter 2 - Critical Analysis of Legal Provisions”
It gives a detailed insight into the various laws pertaining to refugee’s prevalent pre-independence and post-independence in India by taking into consideration a 3-tiered structure: Non-Refoulement, Constitution of India and International Obligations of India towards the International community.

Chapter 3 - Critical Analysis of India’s Behavior
“It gives a detailed insight into the way India has treated its refugees and the refugee crisis on an ad-hoc basis by considering the merits and demerits of each and every case”.

Chapter 4 - Conclusion and Recommendations
“The 4th chapter being the last chapter summarizes the whole work and enumerates the findings of the research”. The chapter also enumerate recommendations for the better functioning of refugee laws between the Government of India and Refugees.

Chapter 2
“CRITICAL ANALYSIS OF LEGAL PROVISIONS”
“Before the Supreme Law of the Land was enforced in 1950, certain provisions existed in order to take care of the non-citizens of India. Such provisions are:

1. “East Punjab Evacuees (Administration of Property) Act, 1947”
2. “UP Land Acquisition (Rehabilitation of Refugees) Act, 1948”
4. “Mysore Administration of Evacuee Property (Emergency) Act, 1949”
5. “Mysore Administration of Evacuee Property (Second Emergency) Act, 1949”

After the Constitution of India was enforced in 1950, the following provisions were enforced alongside the aforementioned:

1. “Immigrants (Expulsion from Assam) Act, 1950”
2. “Administration of Evacuee Property Act, 1950”
3. “Evacuee Interest (Separation) Act, 1951”
4. “Displaced Persons (Debts Adjustment) Act, 1951”
5. “Influx from Pakistan (Control) Repelling Act, 1952”
10. “Goa, Daman & Diu Administration of Evacuee Property Act, 1969”

The rights of a refugee are described in a 2-tiered structure as follows:

2.1 Non-Refoulement

Non-Refoulement, the practice of forced repatriation, is discussed in elaboration below:

1. “Non-State Actors like United Nations High Commissioner for Refugees (UNHCR) and National Human Rights Commission (NHRC) prevent the return of Legal Refugees back to their home country”:
   “UNHCR’s presence is not guaranteed by any constitutional provision”. “The reason why UNHCR exists in India is solely because of political agreement between the Government of India and the United Nations”. “The short-term political considerations outweigh the long-term interests to protect the refugees”. Furthermore, the Indian Judicial system provides the mere right to apply to UNHCR to refugees which is also decided on an ad-hoc basis; it doesn’t give them the right to non-refoulement. “In Zothansangpuri v. State of Manipur, Imphal bench of Guwahati High Court held that the refugees have the right to not to be deported if their life was in danger”. “UNHCR’s funding can cater to only to above 21,000 refugees and considering the sudden influx of refugees in India, UNHCR had to cut back on the level of aid per refugee”. Finally, UNHCR has been accused of secretly repatriating the Sri Lankan refugees back to Sri Lanka on the context of ‘liberated zones’; However, no such liberated zones existed and the Sri Lankan Refugees were forced to come back to India.

When it comes to NHRC, it just provides a ‘procedural mechanism’ through which the refugees petitions and cases are brought to the Indian Courts. NHRC just investigates human rights abuses, provides non-binding recommendations to the Government of India and helps in litigation but in no way provides new rights to citizens or non-citizens. Considering the current budget of NHRC, it cannot possibly attend to above 40,000 human rights abuses cases

2. “Article 21 promises Non-Refoulement as a fundamental and substantive right to non-citizens”:

In Louis De Raedt v. Union of India and State of Arunachal Pradesh v. Khudiram Chakma, the Supreme Court of India held that foreigners are also entitled to the protection of Article 21. However, Article 21 provides different rights in different contexts because it provides less protection when applied to foreigners as against

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971 supra note 17.
citizens and when it conflicts with state’s interest in immigration or national security. Moving on, it provides no protection to a person whose life or liberty has been deprived by a Non-State Actor (NSA).  

Indian Constitution’s and Judiciary’s ad-hoc approach to Article 21 neither confirms nor denies that it is granting substantive rights to a citizen only because there are very few cases involving non-citizens being granted the substantive rights as mentioned under Article 21.

In NHRC v. State of Arunachal Pradesh, wherein there was a dispute between Chakma Refugees who were forced to move migrate from Assam to Arunachal Pradesh and the All Arunachal Pradesh Students Union (AAPSU), the Supreme Court ruled that the Chakma Refugees cannot be moved – “because Arunachal Pradesh formulated plans to move these displaced people to another state despite these people being under the threat of severe violence, harm and death - unless and until the Federal Government ruled on their citizenship, and Arunachal Pradesh government had an obligation to protect these group of people, i.e. Chakma Refugees from harm.”

Firstly, the NHRC merely assisted the Chakma Refugees by taking their case to court and petitioning the State and Federal Governments: No new right of Non-Refoulement was given to such non-citizens.

Secondly, this case does not involve whether the rights involved were procedural or substantive in nature because the court was clearly not trying to protect the Chakma Refugees from freedom from involuntary movement as the court expressly permit non-citizen Chakmas to be moved by the state after they are given a valid opportunity to apply for citizenship. As for the Right to Life, the Ministry of Home Affairs demanded that the state government provides protection. Therefore, any contrary policy pursued by the state government would not be according to a procedure established by law since that would violate the federal law. If the state does not follow proper procedure in carrying out its policy, then it violates the procedural aspect.

Thirdly, the Supreme Court clearly upheld the principle of primacy of state’s interest over individual interests because it was just protecting the citizens but not the non-citizens because it was trying to prevent an interstate feud from taking place. Furthermore, in Dr. Malvika Karlekar v. Union of India, the Supreme Court of India held that the authorities should consider whether refugee status should be granted, and until this decision was made, the refugees should not be deported.
chooses to exercise some sort of discretionary power over such cases which leads to variable customary practices finding no common ground. Secondly, India has not signed any agreement that expressly or impliedly requires non-refoulement and therefore is not bound by any treat-based international obligations, i.e. United Nations Convention Relating to the Status of Refugees of 1951 and the Protocol Relating to the Status of Refugees of 1967.

“Thirdly, Customary International Law has never been incorporated into Indian Law under Article 51 despite having numerous opportunities to do so in Vishaka v. State of Rajasthan. “Even if Customary International Law suddenly became acceptable to incorporate into Indian law, it would not happen in the refugee context because while non-refoulement definitely qualifies as customary international law, there are three problems with non-refoulement as binding customary law”:

a. First, India’s several broad statutes covering immigration 'occupy the field' of refugee law. Domestic Legislations in India 'occupies the field' of immigration and refugee law completely, thus leaving out any hope for incorporating new rules into the domestic sphere. The incorporation of Customary International Law is not permitted when parliament 'occupies the field' of a given area. Parliament is said to 'occupy the field' when it legislates in such a broad and comprehensive manner that it indicates it 'owns' a particular subject matter of legislation. According to this logic, the legislator has not forgotten to include an extra norm or rule but must have intentionally left that rule out. The exclusion of the rule or norm is considered intentional due to the broad legislation of Parliament in the area.

“India has passed several laws governing immigration, including the Passport (Entry into India) Act of 1920, the Registration Foreigners Act of 1939, the Foreigners Act of 1946, the Foreigners Order of 1948 and the Citizenship Act of 1957”. As previously mentioned, the Constitution also grants parliament broad powers over these areas. “Both the Foreigners Act and the Foreigners Order permits India to restrict movement of foreigners inside India, to mandate medical examinations, to limit employment opportunities, and to control the opportunity to associate”.

b. Second, India’s statutes directly oppose the principle of non-refoulement. Foreigners Act, 1946 deals with the matters of “entry of foreigners in India, their presence therein and their departure therefrom”. “Third condition is that unless exempted, every foreigner should be in possession of a valid passport or visa to enter India”. “If refugees contravene any of these provisions, they are liable to prosecution and thereby to the deportation proceedings just like any other foreigner or illegal alien”. “Thus, there is no clearly defined category of refugees under Indian law”.

“Foreigners, generally, are a classified category which can be further subdivided as per the Foreigners Act regime, but no such

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981 supra note 17
982 supra note 17
983 Vishaka v. State of Rajasthan, (1997) AIR 3011 (India)
984 supra note 17
985 supra note 17
sub-classification has been made for refugees"). “As such, refugees, like other foreigners, are generally subject to deportation with minimal due process”.

“Therefore, the status of refugees is presently determined by the extent of protection they receive from the Government of India which in turn has been influenced more by political equations than by humanitarian or legal obligations986”. “There are certain refugee communities like Tamil refugees from Sri Lanka, Jumma and Chakma refugees and Tibetan refugees who have received (at least normatively) full protection according to the standards set by the Government of India”. “Apart from security screening, no formal status-determination procedures exist for these groups of refugees and there is a prima facie recognition”. “Asylum policies have been generous as far as these groups are concerned”. “They are accorded legal stay indefinitely through executive discretion exercised under the Foreigners Act987”. There are few other communities like the Burmese, Afghan, Iranian, Somali, Sudanese and Iraqi refugees whose presence in Indian territory is acknowledged only by the UNHCR and there is no protection from the government of India except those under the principle of Non-Refoulement. They remain as foreigners and on the basis of UNHCR refugee certificates are issued temporary residence permits under the Foreigners Act pending durable solutions. However, the condition of such communities is precarious. They do not have any work permit and are not able to make subsistence for themselves. A small number of refugees who have been able to gain employment in the informal sector are subjected to persistent harassment and abuse from their employers and the police. The subsistence allowance that the UNHCR provides is meagre and entirely inadequate for survival. “To make their survival more difficult, the UNHCR has arbitrarily started terminating payment of this subsistence allowance988”.

“There are other refugees like the Chin refugees in Mizoram who have entered India and have assimilated into local communities or have not been recognized by the UNHCR”. “Neither the Indian government nor the UNHCR acknowledges their presence.

“The government has also denied UNHCR access to the seven states of the North-East including Mizoram where the vast majority of Burmese refugees are sheltered”. “Thus, these refugees receive no official acknowledgement whatsoever”. “As such, they have been consistently subjected to harassment and periodic eviction drives by sections of civil society in Mizoram and other parts of the north-east989.”

Third, India has clearly expressed its interest to not be bound legally by the Refugee Convention. As previously mentioned, India has considered and rejected the idea of being bound by the Convention multiple times. Indian courts only incorporate international law via Article 51 when domestic law and policy are ‘ambiguous’. Therefore, Indian courts would be hesitant to enforce a customary norm that clearly violated the policy of the nation990.

“Finally, Article 51 remains a 'Directive Principle' and is not a mandatory rule of governance or not enforceable upon the courts”. “Instead, Article 51 has merely

986 supra note 17
987 supra note 17
988 supra note 17
990 supra note 17
been a way for courts to construe legislative intent, assuming that Parliament does not intend to violate international law unless given indications otherwise”. The courts do not operate under compulsion of law to effectuate the language of Article 51.

4. “The Parliament retains full control over citizenship and foreign affairs as granted to them in Railway Board v. Das that stated the primacy of nation’s interest and security must be ‘read into’ other parts of the Constitution and such international affairs are of paramount importance when a nation’s interests and security are concerned. In Mohammed Sadiq v. Government of India and Khadija v. Union of India, the Supreme Court of India and the Delhi High Court clearly confirmed the state interests in national security and criminal matters outweigh the refugees’ life and personal liberty”. “In the aforementioned cases, the courts were found to have returned the refugees back to their home countries”, despite serious threats against their lives, because “their presence interfere with the criminal laws or National Security of India”.

“In the matter of Gurunathan and others vs. Government of India and others, and in the matter of A.C. Mohd. Siddique vs. Government of India and others”, the High Court of Madras expressed its unwillingness to let any Sri Lankan refugees to be forced to return to Sri Lanka against their will”. “In the case of P .Nedumaran vs. Union Of India before the Madras High Court, Sri Lankan refugees had prayed for a writ of mandamus directing the Union of India and the State of Tamil Nadu to permit UNHCR officials to check the voluntariness of the refugees in going back to Sri Lanka, and to permit those refugees who did not want to return to continue to stay in the camps in India”. “The Hon’ble Court was pleased to hold that “there is no question of deporting the Iranian refugee to Iran, since he has been recognised as a refugee by the UNHCR”. “The Hon’ble Court further permitted the refugee to travel to whichever country he desired”. “Such an order is in line with the internationally accepted principles of ‘non-refoulement’ of refugees to their country of origin”.

“In the matter of Malavika Karlekar vs. Union of India, the Supreme Court of India directed stay of deportation of the Andaman Island Burmese refugees, since “their claim for refugee status was pending determination and a prima facie case is made out for grant of refugee status”. 
“The Supreme Court (SC) Judgment, Romoni KR. Chakma v. State of Arunachal Pradesh\textsuperscript{1003}, in the Chakma Refugee case clearly declared that no one shall be deprived of his or her life or liberty without due process of law”. “Earlier judgments of the Supreme Court in Luis De Raedt vs. Union of India\textsuperscript{1004} and also State of Arunachal Pradesh vs. Khudiram Chakma\textsuperscript{1005} had also stressed the same point\textsuperscript{1006}.

There is yet another aspect of non-refoulement which merits mention here. The concept of ‘International Zones’ which are transit areas at airports and other points of entry into Indian territory, which are marked as being outside Indian territory and the normal jurisdiction of Indian Courts, is a major ‘risk factor’ for refugees since it reduces access of refugees to legal remedies. This is violative of the internationally acknowledged principle of non-refoulement. In Mukesh & Anr vs State for Nct Of Delhi & Ors\textsuperscript{1007}, a Palestinian refugee who was deported to New Delhi International Airport from Kathmandu was sent back to Kathmandu from the transit lounge of the Airport. He was once more returned to New Delhi International Airport on the grounds of being kept in an ‘International Zone’. Such detention is a classic case on the above point barring legal remedies to the detained refugee. The only relief in such a case is through the administrative authorities.

\textbf{2.2 Constitution of India}

“In addition to the above legislations, the Indian Constitution also lays down certain provisions such as Article 51 and Article 253, and Entry 14 of the Union List all of which collectively directs the Indian state to promote respect for international law”. “It also gives the Parliament the power to sign and ratify international treaties and conventions pertaining to the granting of asylum and refugee protection\textsuperscript{1008}.

“Normally the Centre and the States are not supposed to encroach upon each other’s law-making powers”. “However, Article 253 read with Entry 14 creates an exception in the sense that while attempting to enact domestic laws to give effect to international treaties to which India may have become a signatory, the Centre may make laws upon any subject that may be a part of the state list because the true spirit of proper incorporation of international law into domestic laws puts forth the idea that even though international law is enacted at the global level with common consensus of the international community, the real enforcement of international law happens within the domestic sphere\textsuperscript{1009} and encompasses issues which may concern both the Centre as well as the states within a particular nation”. “Therefore, any law made by the Centre in accordance with these provisions that gives effect to an international convention cannot be invalidated on the ground that it contains provisions relating to the state subjects”.

“Articles 22 (1) ,22 (2) and 25 (1) of the Indian Constitution reflect that the rules of natural justice in common law systems are equally applicable in India, even to refugees”. “The established principle of rule of law in India is that no person, whether a citizen or an alien shall be deprived of his life, liberty or property without the authority of law”. “The Constitution of India expressly incorporates

\textsuperscript{1004} supra note 19 .
\textsuperscript{1005} supra note 19 .
\textsuperscript{1006} supra note 17 .
\textsuperscript{1007} Mukesh & Anr vs State for Nct Of Delhi & Ors, (2017) (India) .
\textsuperscript{1008} supra note 1 .
\textsuperscript{1009} Civil Rights Vigilance Committee, Bangalore v State of Karnataka (AIR 1983 Kar 85) .

www.supremoamicus.org
the common law precept and the Courts have gone further to raise it to the status of one of the basic features of the constitution which cannot be amended1010.

“The Indian Constitution does not contain any specific provision which obliges the state to enforce or implement treaties and conventions”. “A joint reading of all the provisions as well as an analysis of the case law on the subject shows international treaties, covenants, conventions and agreements can become part of the domestic law in India only if they are specifically incorporated in the law of the land”. “The Supreme Court has held, through a number of decisions on the subject - Gramophone Company of India Ltd v. Birendra Bahadur Pandey1011, Civil Rights Vigilance Committee, SLRC College of Law, Bangalore v. Union of India1012, Jolly George Verghese v. Bank of Cochin1013 - that international conventional law must go through the process of transformation into municipal law before the international treaty becomes internal law”. “Courts may apply international law only when there is no conflict between international law and domestic law and also if the provisions of international law sought to be applied are not in contravention of the spirit of the constitution and national legislation, thereby enabling a harmonious construction of laws”. “It has also been firmly laid that if there is any such conflict, then domestic law shall prevail1014.

2.3 International Obligations

India became a member of the Executive Committee of the High Commissioner’s Programme (EXCOM) that shows India’s commitment and particular interest towards protection of Refugees”. “Furthermore, India voted affirmatively to adopt the Universal Declaration of Human Rights (UDHR) which affirms rights for all persons, citizens and non-citizens alike wherein Article 13 guarantees ‘Right to Freedom of Movement’, Article 14 ‘Right to Seek and Enjoy Asylum’ and Article 15 the ‘Right to Nationality’”; “India voted affirmatively to adopt the UN Declaration of Territorial Asylum in 1967”; “India ratified the International Covenant on Civil and Political Rights (ICCPR) wherein Article 15 deals with ‘Freedom to leave any country including the person’s own’ and Article 16 ‘Prohibition of expulsion of aliens except by due process of law’”; “India also ratified International Convention on Economic, Social and Cultural Rights (ICESCR) in 1976”; “India ratified the UN Convention on the Rights of the Child in 1989 wherein Article 2 (a) of the UN Convention on the Rights of the Child, the State must ensure the rights of each child within its jurisdiction without discrimination of any kind. Article 3 lays down that in all actions concerning children the best interest of the child shall be a primary consideration, Article 24 relates to ‘Right to Health’, Article 28 to ‘Right to Education’ and Article 37 to ‘Juvenile Justice’”; “India also ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1974 under which Article 1 imposes legally binding obligation on the

1010 Sreya Sen, Understanding the Importance of a National Legislation for Refugee Protection in India, RIGHTS IN EXILE REFUGEES LEGAL AID (2017).
1012 Civil Rights Vigilance Committee, SLRC College of Law, Bangalore v. Union of India, (1983) AIR (India).
1014 supra note 41.
India accepted the principle of non-refoulement as envisaged in the Bangkok Principles, 1966, which were formulated for the guidance of member states in respect of matters concerning the status and treatment of refugees. These Principles also contain provisions relating to Repatriation, Right to Compensation, Granting of Asylum and the minimum standard of treatment in the state of Asylum. This obligation is further strengthened, as India is a signatory to the 1984 Torture Convention. A wider legal basis for respecting Customary International Law has been articulated by the Torture Convention, including the principle of non-refoulement. Article 3 states that,

1. "No State Party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. "For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Chapter 3

CRITICAL ANALYSIS OF INDIA’S BEHAVIOUR

India has told the UNHCR that the scrutiny of a potential national legislation is under process. However, the catch is, such statement was given by the Indian Government over a decade ago. Furthermore, the Supreme Court has also enumerated a bright future that can lead to signing of international treaties and obligations such as the United Nations Convention Relating to the Status of Refugees of 1951 and the Protocol Relating to the Status of Refugees of 1967 but that is too far-fetched because:

1. "The Indian borders are highly permeable and porous, and lack the political, administrative or military capacity to enforce rules with regard to population entry. Cross border movements of people in South Asia are known to affect political stability, international relations and internal security, and not simply the provision of services to new arrivals or the composition and structure of the labor market.

2. "Refugee inflows would result in or be seen as effecting change in the religious or linguistic composition within the receiving area of the country.

3. "Another anxiety is the existence of a perceived economic or cultural threat leading to a dilution of decision-making. In 1971, for example, owing to the substantive presence of Bengalis in the North Eastern States of Tripura, Assam and Meghalaya, state authorities were concerned that this Bangladeshi ‘influx’ would lead to indigenous people becoming minorities in their own land leading to a potential loss of cultural identity and leading up to communal riots.

Governments within South Asia believe that international agreements could end up constricting their freedom of action due to heavy interference by International Organizations leading to a dissolution of power and control, and have thus largely concluded that unwanted migrations, including those of refugees, should be the

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focus of bilateral rather than multilateral relations.

“Third World Nations are highly sensitive to international humanitarian operations, even if these are conducted by neutral multilateral organizations”. “There are many examples of the unshakeable faith that the South Asian Association for Regional Cooperation (SAARC)’s member states have in bilateral negotiations to resolve conflicts. “The SAARC’s exclusion of population movement concerns from its purview, which was done primarily out of fear that its inclusion might disrupt the organization, is one such example, as are the ongoing dialogues between Bhutan and Nepal to improve the plight of the Lhotsampa Bhutanese refugees in the South of Nepal, and between India and Bangladesh to resolve the situation of Chakma refugees given asylum in the Indian state of Arunachal Pradesh. “Article 35 of the convention which vests the responsibility of supervising the refugee processing on UNHCR”. “India does not want its sovereignty to be threatened by any International community. In addition to this, Indian government along with the governments of other South Asian countries voiced that migration is not a matter of multilateral relations but bilateral relations, and International agreements can restrict their freedom of action”. “India also fears uncontrolled infiltration of terrorists, criminals and unwarranted elements.

4. “The rights that are incorporated within the 1951 Refugee Convention are entirely impractical for Third World countries like India which can barely meet the needs and requirements of its own citizens considering its lack of self-sufficiency, rampant poverty, an unstable economy and growth rate, rising crime rates, dearth of employment opportunities and the over-bursting population”. “India could always make use of or invoke a reservation clause in order to accede to the Convention but doing so would not restrict criticism from the Indian NGO community and the UNHCR.

5. “Legal scholars in India often reference the Eurocentric definition of a refugee as defined in the Convention. “These scholars have argued that the definition confines itself to the violation of civil and political rights of refugees, but does not extend to economic, social and cultural rights.

“The definition does not allow for the protection of groups or individuals fleeing situations of generalized violence or internal warfare”. “If India is to be a party to the 1951 Refugee Convention, it would also have to allow for the intrusive supervision of the national regime by the UNHCR, via Article 35 and the UNHCR would be granted permission to access detention centers and refugee camps”. “The apprehension that NGOs could embarrass India before the international community by presenting negative reports that fail to take into cognizance the practical difficulties faced by a Third World nation like India is present”. “The Indian representative raised this concern at the 54th session of the Executive committee meeting of the United Nations High Commissioner for Refugees (UNHCR) in 2003 by stating that the definition fails to recognize “the fundamental actors which give rise to refugee movements”. “He further said that “most of the refugee

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1016 126 ACHARYA AMITAV AND DEWITT B. DAVID, LEGAL CONDITION OF REFUGEES IN INDIA (7th ed. 2008).
1017 CHIMNI B.S, STATUS OF REFUGEES IN INDIA: STRATEGIC AMBIGUITY 444-445 (2nd ed. 2008).
1018 supra note 21
movements are directly related to widespread abject poverty and deprivation around the globe...particularly in the developing world such as most of South Asia”. “Thus, there are various categories of displaced people which the convention does not cover”.

6. “India retains a degree of skepticism about the UNHCR”. “This apparently flows from the Bangladesh war of 1971”. “At the time, UNHCR played a stellar role in helping devise India’s administrative response to the 9.8 million Hindu refugees who poured in from Bangladesh”. “It also helped to mobilize huge international finances to pay for Indian bills which wasn’t even the Western part of the world’s war. “And when it came to repatriation of the refugees, then again the UNHCR helped roll out an orderly return journey. “But India was upset that the UNHCR began talking about the need for repatriation of refugees—something India had emphasized from the very start of the Bangladesh crisis—only in June 1971, just around the time Pakistani atrocities were causing millions more to flee to India. New Delhi felt talk of repatriation at that particular point in time gave the wrong signals to the world. “Additionally, India was far from pleased by a visit to Bangladesh (then East Pakistan) by the UNHCR high commissioner, Sadruddin Agha Khan, on the invitation of Pakistani President, Yahya Khan”. “This was seen as an endorsement of Pakistani propaganda that its eastern territory was normal.

Chapter 4
CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion
prevent persecution by the International Community and obtain a permanent Seat in the Security Council. “India’s unwillingness to ratify the 1951 Refugee Convention and 1967 Refugee Protocol is justified as the definition of “refugee” is outdated because it does not deal with economic and social aspects of the refugee’s situation”. Furthermore, India’s ad-hoc stance towards every refugee crisis is also justified as Indian government is skeptical about foreign interference by NSAs that will lead to a reduction in sovereignty and dilution of powers over regional matters of bilateral importance.

4.2 Recommendations
The following recommendations are advisory in nature:

4.2.1 From Government of India’s Perspective
It should continue with its Ad-hoc approach by not shifting away from the status quo. Indian government has continued to exercise its discretionary powers on a case-by-case basis that has worked out successfully in the past. However, minor discrepancies have arisen that were resolved due to the speedy trial offered by the justice system of India. If India decides to ratify the “1951 Refugee Convention” and the “1967 Refugee Protocol”, then:

a. “It will lead to a reconstitution of its refugee crisis redressal system. This will be a time-consuming process considering the urgency of the matter”;

b. Furthermore, pending refugee crisis matters will be brought to light that will add an extra burden to the Indian Legal System;

c. The influx of refugees would rise immensely considering India is a hotspot for refugees owing to its relatively better socio-economic conditions and diversity as compared to Pakistan, Bangladesh, Thailand, Vietnam, Myanmar, Nepal, China and Bhutan;

d. The sudden rise in refugees would create a butterfly effect that will lead to disruption of the already existing communities in India as the aforesaid international statutes aim at integration. This will plant the seeds of communal riots, uprisings and rebellions by communal leaders looking at it as an opportunity to increase its voter bank;

e. Apart from communal riots, the already strained and almost-depleted resources of India will be overburdened as these refugees come from third world nations possessing little to no employable skills. They will be an extra mouth to feed;

f. In the International context, the convention and the protocol will lead to loss of sovereignty as it will subject India to interference by Non-State Actors and International NGOs. This kind of interference will lead to a loss of appropriate dominion over one’s own state; “Ratifying the 1951 Refugee Convention and 1967 Refugee Protocol will lead to an opening of Pandora’s Box with respect to the National Register of Citizens which required Citizenship to be proved” - I. “If the Applicant’s first family name was in the original draft of NRC of 1951 or in the electoral roll up in 1971”, or II. “applicants also had the option to present documents such as refugee registration certificate, birth certificate, LIC policy, land and tenancy records, citizenship certificate, passport, government issued license or certificate, bank/post office accounts, permanent residential certificate, government employment certificate, educational certificate and court records” - “Citizenship Bill 2016 which provided citizenship to illegal migrants of Hindu, Sikh, Buddhist, Jain, Parsi or Christian religion”; “it received huge criticism as it excluded Muslims and citizenship couldn’t be granted on the basis of religion leading...
to an outright violation of Article 14 of the Indian Constitution, and Uniform Civil Code”;

h. “If refugees are not granted benefits, that a normal citizen would get, on the basis of their religious history and home country’s background, then the Supreme Court should direct the Central Government to take appropriate measures that it employs while giving the suited benefits to the other class of refugees”.

4.2.2 From Refugee’s Perspective:
Refugees that are granted the benefits similar to that of Citizenship should follow certain guidelines:

a. “When Refugees are provided Long-Term Visas by the Government of India or the UNHCR, then the refugees should strive to be gainfully employed in the informal sector in order to improve the economic condition of the host country i.e. India in this context”;

b. Neither should they increase the burden on the state resources by being a subject of hidden unemployment nor should they indulge in any unlawful practices prohibited or banned or forbidden by the Law of the Land;

c. The refugees should assimilate and integrate themselves into the already existing culture of India. At the same time, in order to prevent loss of homogenous cultural identity, they should practice, profess and propagate their religion in private that does not lead to cultural disharmony or with the consent of an existing communal group in their surroundings.

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HUMAN RIGHTS OF PRISONERS IN INDIA: DIFFICULTIES AND APPROACHES IN THE NEW DECADE

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Abstract
The criminal reforms in India in recent decades have led to one remarkable change in people's attitudes towards the perpetrators. The old concept criminals and convicts have changed radically about crime. The emphasis is now shifted from deterrence to criminal reform. The age-old discriminating and draconian punishments no longer take place in the modern criminal system. A prison serves three purposes today that can be described as custody, care and recovery. A person who is a prisoner cannot seize all his rights the authority, even though he has been convicted of having fundamental rights guaranteed by Article 21 of the Constitution and protected under Article 32 and Article 226 of the Constitution. A prisoner does not lose all rights when he is imprisoned. They only lose one part of the law that is the necessary consequences of imprisonment and the rest of the rights are preserved. In this background the Prisoners’ rights became more important and the study has become a work of research. This research paper discusses the development of rights of prisoners in India through the international and national instruments & also the judicial chronology of the prisoners’ rights as developed by the Indian judiciary through its landmark judgements.

Keywords: Human Rights, Prisoners, Indian Constitution, Indian Judiciary

I. INTRODUCTION

Individuals are judicious beings. Because of their humanity, they have certain essential and inevitable rights. In this way, human rights are the rights to which every individual has the right to be human. Because these rights have a place with them because of their presence, they become employable from birth. According to these lines, human rights, being the claims, are characteristic of each of the people, regardless of their caste, religion, religion, gender and nationality. Because human rights are innate, they cannot live as individuals without them. Because of their immense significance for people: human beings are sometimes also referred to as fundamental rights, basic rights, inherent rights, natural rights and birth rights. Human rights are rooted in the inherent dignity of the human person. These basic rights are based on shared values such as dignity, fairness, equality, respect and independence. These values are legally established and protected.

1021 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment [hereinafter “Principles on Detention or Imprisonment”], Principle 1; Basic Principles for
“Human Rights are a generic term and includes civil rights, civil liberties and social, economic and cultural rights.” It is therefore difficult to give an accurate definition of the term “human rights”. As per Maurice Cranston, “These are the rights that nobody can be deprived of without a serious breach of justice.”

The idea of human rights is therefore connected to the idea of human dignity. India’s Supreme Court Judge, J. S. Verma, has rightly stated that “human dignity is the essence of human rights”. However, dignity has never been determined precisely on the basis of consensus, but roughly corresponds to justice and a good society. The World Conference on Human Rights held in Vienna in 1993 stated that all human rights are rooted in the dignity and value of human inheritance, and that human beings are the central subject of human rights and basic freedoms. D. D. Basu says “Human rights as the minimum rights that an individual must have over the state or other public authority by being a member of a human family, regardless of all other considerations.”

II. WHO IS A PRISONER?

“In our world, prisons are still laboratories of torture, warehouses where human goods are kept sadistically and where prisoner spectrums range from driftwood youth to heroic dissidents.” “Convicted persons are not simply denied because of the conviction of all the fundamental rights that they otherwise have.” The word prisoner means any person detained in custody or prison for having committed an act prohibited by the law of the country. The word “prisoner” means any person who is currently in prison as a result of a requirement imposed by a court or otherwise that he is detained. A prisoner, also known as a prisoner, is anyone who has been deprived of freedom against their will. The Indian socio-legal is based on nonviolence, mutual respect and human dignity of the individual. By committing a crime, a person does not change his humanity and yet he is endowed with all the aspects that require him to be treated with the human dignity and respect that a person deserves.

III. INTERNATIONAL LEGISLATIONS RELATING TO HUMAN RIGHTS OF PRISONERS

Prisoners and human rights: the relationship has not always been easy. Some people think that if you violate the rules of society by committing a crime, you lose your rights to the protection of society. The principle of the universality of human rights is the cornerstone of international human rights Governmental Guarantee, Protections Or Promotions” (“International Organizations”, Third Edition, P. 258).

Justice V.R. Krishna Iyer.

law. This principle, as first emphasized in the Universal Declaration of Human Rights in 1948, has been repeated in numerous international human rights treaties, declarations and resolutions.

INTERNATIONAL BILL OF RIGHTS

UNIVERSAL DECLARATION OF HUMAN RIGHTS

In 1948 a movement was started in the United Nations in the form of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations. This organic document is also called a human rights statement. This important document contains some basic principles of case law. Among the provisions in the document are the following:

- No one may be subjected to torture or cruel, inhuman or degrading treatment or punishment.
- Everyone has the right to life, freedom and security of people. No one will be subjected to arbitrary arrest or detention.
- All persons deprived of their freedom must be treated with humanity and with respect for the inherent dignity of the human person.
- No one may be detained solely on the grounds of inability to perform a contractual obligation.

UN CORE CONVENTIONS AND SPECIFIC INSTRUMENTS

The ICCPR remains the most important instrumental convention on the protection of prisoners’ rights. The following relevant provisions of the covenants are:

- The principle of equality must prevail; there will be no discrimination based on race, gender, color, religion, political or other opinion, national or social origin, property, birth or other status among prisoners.
- Men and women are detained as much as possible in a separate institution.
- Complete separation between civilian prisoners and persons imprisoned for a crime; young prisoners must be kept separate from adult prisoners.
- All types of cruel inhuman degrading punishments are completely prohibited.

THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

- The ICCPR remains the most important instrumental convention on the protection of prisoners’ rights. The following relevant provisions of the covenants are:

IV. INDIAN LEGISLATIONS RELATING TO HUMAN RIGHTS OF PRISONERS

The concept of prison discipline in India has undergone a drastic change in the modern administration of the criminal justice system. The trend shows a shift from the deterrent aspect to the reforming and

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rehabilitating aspect. The recommendations of the Jails Committee of 1919-20 have paved the way for the abolition of inhumane penalties for indiscipline. This resulted in a positive enforcement of the discipline. All India Jail Reform Committee 1980-83 has also recommended various prisoner rights and prison discipline. However, it is extremely unfortunate that a humanized nation, like India, has not arranged prisoner privileges. Whatever the case, it cannot be denied that the Hon'ble judiciary has not overlooked them and has observed a significant overview of the privileges of prisoners and all of them specialists must pursue these bearings without determination. In any case, for all intentions and purposes, these rights take place without determination only on the paper with hardly any power from prison. A conviction for a crime does not limit the person to a non-person whose rights depend on the whims of the prison administration and therefore the imposition of a severe punishment within the prison system depends on the lack of procedural guarantees.

**INDIAN CONSTITUTION**

Article 14 says that the state will not deny anyone equality before the law or the equal protection of laws in the territory of India. Article 19 guarantees six freedoms for all citizens of India. Among these freedoms, certain freedoms cannot be enjoyed by prisoners, except “freedom of expression and expression” and “freedom to join an association.” Article 21 states that no one may be deprived of his life or personal freedom, except according to the legally established procedure. Article 22 (1) provides that no person arrested is denied the right to consult a lawyer of his choice. The constitution gives a suspect the right to a speedy trial.

**CRIMINAL PROCEDURE CODE, 1973**

According to Article 50 (1) Cr.P.C. “Any police officer or other person arresting a person without a warrant must immediately inform him of the details of the offense for which he was arrested or other grounds for such an arrest.” Section 50 (2) Cr.P.C. states that “when a police officer without justification arrests a person other than a person accused of a non-available crime, he will inform the arrested person that he has the right to be released on bail to be able to provide his securities.” Sections 56 and 76 Cr.P.C. provides that, “irrespective of whether the arrest is made without justification by a police officer, or whether the arrest is carried out by a person by a person, the person carrying out the arrest must bring the arrested person to a bailiff without undue delay.” It is also stipulated that “the arrested person may not be detained in a place other than a police station before being taken to the magistrate.” The Code of Criminal Procedure stipulates that a fair trial must be an open legal process.

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1028 Shodhganga, chapter 4: “Rights Of The Prisoners And The Duties Of Prison Officials”, Available at: https://shodhganga.inflibnet.ac.in/bitstream/10603/46512/12_chapter%204.pdf (Last Accessed on September 20, 2019)


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INDIAN EVIDENCE ACT, 1872

The suspect even has the right to testify in his defense in case of a police report or private defense. Confessions of allegations to the police are absolutely excluded on the basis of Article 25 of the Evidence Act.

THE PRISONS ACT, 1894
This law is the first legislation regarding prison regulation in India.
- Accommodation and sanitary conditions for prisoners.
- Provisions regarding the mental and physical condition of prisoners.
- Investigation of prisoners by a qualified doctor.
- Separation of prisoners for male, female, criminal, civil, convicted and tried prisoners.

THE PRISONERS ACT, 1990

- It is the duty of the government to remove prisoners who have been detained on the basis of an order or punishment from a court that is not wise for a madhouse and another place where he will receive proper treatment.
- Any court that is a high court may, in the case where it has recommended to grant the government a free pardon to a prisoner, allow him to be free on his own knowledge.

V. JUDICIAL ATTITUDE TOWARDS RIGHTS OF PRISONERS

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<td>1</td>
<td>Right To Fundamental Rights</td>
<td>1. Article 21 read with Article 19 (1) (d) and (5). Fair procedure is the essence of Article 21. Reasonableness of the limitation is the essence of Article 19 (5) and sweeping discretion that degenerates into arbitrary discrimination an anathema for article 14.</td>
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<td>2. The Supreme Court ruled that detention conditions cannot be extended to the deprivation of fundamental rights.</td>
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<td>3. Prisoners retain all the rights that free citizens enjoy, except those that have necessarily been lost as a detention incident. Moreover, the rights</td>
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1030 State of Maharashtra v Prabhakar Pandurang Sanzgir, AIR 1966 SC 424 104
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<th>Section</th>
<th>Right To Live With Human Dignity</th>
<th>Right To Health And Medical Treatment</th>
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| 2       | 1. In a new dimension of Article 21, the Supreme Court ruled that "right to live" does not only mean limitation to physical existence, but includes the right to live with human dignity.  
2. A prisoner does not cease to be human, even when he is put in prison; he continues to enjoy all his fundamental rights. | 1. Denial of a government hospital to an injured person on the grounds of the unavailability of a bed amounts to a violation of the "right to life" under Article 21. The preservation of human life is of the utmost importance.  
2. The right to medical treatment is the fundamental human right. The Supreme Court of Gujarat has ordered the prison authorities to treat sick prisoners well. |

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1031 Charles Sobaraj v. Supdt Central Jail Tihar, AIR 1978 SC 1514  
1032 Maneka Gandhi v. Union of India, AIR 1978 SC 597, and followed in Francis Coralie v. Delhi Administration, AIR 1981 SC 746  
1035 Rasikbhai Ramsing Rana v. State of Gujarat, (DB) 1997 Cr LR (Guj) 442
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<th>4</th>
<th>Right To Speedy Trial</th>
<th>The Supreme Court ruled that the right to a rapid trial resulting from Article 21 is available to the accused in all phases, namely the investigation, trial, appeal, review and re-investigation phase. In the interest of natural justice, the court concludes that if the right to a speedy trial is violated against a suspect, the accusations of the conviction are set aside.1036</th>
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| 5 | Right To Free Legal Aid | 1. The Supreme Court ruled that free legal aid at the expense of the state is a fundamental right of a person accused of a crime that could endanger his life or personal freedom.1037 
2. The stage where an accused

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<th>Protection Against Instruments Of Restraint</th>
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<td>a. Any undertrial accused of a non-bailable offense that was punishable by a prison sentence of more than three years if, enthralled, it was in violation of Articles 14, 19 and 21 of the Constitution of India. That is why they were held unconstitutional.1039</td>
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1036 AR Antulay v. RS Nayak, AIR 1984 SC 1630, again some directions were passed by SC in the case of Common Cause Society v. Union of India, AIR 1996 SC 1619.

1037 Sukdas v. Arunachal Pradesh, AIR 1986 SC 991

1038 Khatri v State of Bihar, AIR 1981 SC 928

1039 Prem Shankar v. Delhi Administration, AIR 1980 SC 1535
|   | Prisoner Cannot Be Kept In “Leg Irons” | b. The court instructed the government to take appropriate measures against the erring escort party because of the unjust and unreasonable handcuff of the petitioner.  
   |   |   | c. In the case of Kadra Pehadiya, the Supreme Court held that prisoners awaiting trial could not be held in leg irons. The court also ruled that no convict, or undertrial prisoner should be held in leg irons, except in accordance with the proportion of the decision of the Sunil Batra case.  
   |   |   | 7 Protection Of Custodial Torture And Mal-Treatment In Prisons | The Supreme Court has determined that those helpless victims of injustice must receive legal assistance at the expense of the state and must be protected against torture and ill-treatment.  
   |   |   | 8 Right To Education | The Hon’ble Supreme Court has instructed the state government that well-trained prisoners should be engaged in some mental-cum-manual productive work.  
   |   |   | 9 Right To Reasonable Wages For Work | The court ruled that when prisoners are put to work, a small amount can be paid as wages and must be paid, so that the healing effect on their mind is fully felt.  
   |   |   | 10 Special Rights For Female Prisoners  
   |   | a. Right To Female Security Guard | a. The Hon’ble Supreme Court has given the relevant  

1041 Sunil Batra v Delhi Administration, (1978) 4 SCC 494  
1042 Sheela Basre v. State of Maharashtra, AIR 1983 SC 378  
1043 Mohammad Giasuddin v State of AP, AIR 1977 SC 1926  
1044 Dharambir v. State of UP, AIR 1979 SC 1595

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For Female Safety
b. Rights To Pregnant Prisoners
c. Rights For Mother Prisoners
authority, detailed instructions for providing security and safety in police detention and in particular women suspects.  
**b.** The Hon’ble Supreme Court ruled that, before a pregnant woman is sent to prison, the authorities involved must ensure that the prison in question has the basic minimum facilities for childbirth and for pre and postnatal care for both, the mother and the mother.  
c. The Hon’ble Supreme Court ruled that female prisoners are allowed to keep their children in prison until they reach the age of six.  

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<th>Right To Compensation In The Event Of Judicial Error</th>
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<td>Right To Compensation In The Event Of Deprivation Of Liberty</td>
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<td>b.</td>
<td>Right To Compensation In The Event Of Death In Custody</td>
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<td>c.</td>
<td>Right To Compensation In The Event Of ‘Illegal Detention’</td>
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**a.** “Monetary or monetary remedies are an appropriate and indeed effective and sometimes the only suitable remedy for an established violation of the fundamental right to life of citizens by officials and the state that is indirectly liable for their act”.  
**b.** The Hon’ble Supreme Court ruled that it was the duty of the prison authorities to protect the prisoner’s life in prison.  
**c.** When a person has been convicted of a criminal

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1047 *Ibid*  
1048 D K Basu v. State of West Bengal, AIR 1997 SC 610  
1049 Murti Devi v. Delhi Administration, (1998) 9 SCC 604
VI. CONCLUSION

Prisoners do not cease to be human and the Supreme Court has broadly reiterated this situation and has experienced prisoners' privileges, with the aim of superior rehabilitation offered to them, to improve and prove them to be a better person during the prison sentence. The government and administrations have the duty not only to provide framework, labour and others conscious conditions for the restoration and legitimate endurance of prisoners, but also to provide information about rights to prisoners at the perfect moment, conceivable, potential and about top mistreatment of prisoners by being amazing in prisons.

1050 Article 14 (6) of ICCPR, 1966
A CHOICE BETWEEN LIFE AND DEATH – RIGHT TO LIFE INCLUDES RIGHT TO DIE

By Rashi Verma and Arush Parihar
From Hidayatullah National Law University, Raipur

Abstract: Euthanasia and physician-assisted suicide refer to deliberate action taken with the intention of ending a life, in order to relieve persistent suffering. Due to scientific and technological advancements that took place in the last century the ideas pertaining to life and death have changed drastically. A person’s life can be prolonged with the help of ventilation and artificial nutrition. Nevertheless, is making euthanasia legal still a chimeric idea? Right to Life is a significant right enshrined in the Constitution of India. Article 21 ensures the Right to Life in India. It is contended that the right to life under Article 21 incorporates the Right to Die. Along these lines, mercy killing is the legitimate right of an individual. Recently, there has been a development in this issue owing to Aruna Shanbaug’s case which opened the door for legalization of passive euthanasia. With regards to this, Section 309, IPC has been brought under the scanner with regard to its constitutionality and has been declared void. An absolute refutation of autonomy over one’s body is gross violation of natural rights. One should have the last word in the matter of his life. Right to Life is more than just physical existence, it should be chaperoned with quality. If that said quality is non-existent then a person should have the Right to Die.

Ought not the legislators formulate a law that shields the terminally debilitated from not well calculated sabotage while perceiving their right to interpret rationally to die with dignity? This matter is being widely debated all around the world as emanating issue of human rights. This paper provides some a legal view. It analyzes the judicial precedents that lead to its development in India. It also puts forth some arguments of vital importance for legalizing euthanasia. Another aim is to examine and analyze relevant factors to provide a deeper insight in conjunction with the Indian legal system and the Constitutional dispensation.

Keywords: Right to Die, Right to Life, Euthanasia, Criminalization of Suicide.

Introduction

Endurance is, without a doubt, significant yet sometimes and in certain condition life gets agonizing and incomprehensible or intolerable, in that stage survival appears, similar to a revile or curse. Here, enters the concept of Euthanasia and Right to Die. Euthanasia, simply speaking, Euthanasia is nothing else except for a grant or permit to the clinical expert for consummation the life of an individual being referred to.

Antipathy isn’t a word, but it is the position or it is an inclination on account of which Law has been generated. No doubt, father of Law, Bentham, not just portrays antipathy as the central factor of law and enactment yet additionally as an activity which cause an amazing impact over the ethics of man. As Bentham characterized antipathy in six particular parts as repulsiveness of sense, injured pride, singular obstruction and force, trust in future, want of unanimity and to wrap things up envy. Bentham portrays it as a reason that offers ascend to the sentiment of compassion in the society. The hypothesis of joy and torment is depicted as a test through which authorizations might be shaped. Without a doubt joy and agonies

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are relating to one another yet now and again the agony is too extreme to even think about explaining not exclusively to a specific yet in addition for their precious alongside the connected piece of society, this sort of torment is extremely sketchy that whether it very well may be superbly relieved by any law before the finish of topic or to left the topic in its situation to battle with its torment. Truth be told agony and sufferings in the method for kicking the bucket is a more horrible ruler of humankind than even demise itself. Here, it very well may be said "It isn't demise one feelings of dread to confront, but dying". It implies that one doesn't dread to confront the dimness of death yet fears to go through the sufferings in passing on when everybody knows the outcome that is, at last the finish of subject matter. To give the conclusion to the topic in a resentment of terrible sufferings and agony where demise is sure, is demonstration of consummation the life of an individual from empathetic thought processes, when he is now in critical condition or, when his enduring has gotten agonizing.

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. Research has revealed that many terminally ill patients requesting euthanasia, have major depression, and that the desire for death in terminal patients is correlated with the depression.

Dilemmas relating to ending life have come to the forefront of interest in many parts of the world in recent decades. The right to die with dignity and the right to euthanasia and assisted suicide entailed by it are emerging issues of human rights concern. The right to human dignity requires that the physician gives assistance to his patient to avoid unbearable physical and spiritual suffering. Although it is unlawful for a doctor to do a positive act to bring about a patient's death, the discontinuance of life support treatment is lawful when such treatment is futile and discontinuance is in accordance with responsible medical opinion. As a result of development in modern medical technology, doctors no longer associate death exclusively with breathing and heartbeat, and it has come to be accepted that death occurs when the brain, and in particular the brain stem, has been destroyed.

Legal Perspective on Right to Die

The law, though active in some countries has been a sleeping giant in India, as euthanasia and physician-assisted suicide are both absolutely illegal in India. A physician who provides lethal drugs so that another person can end his life will be liable as abettor of helping him commit suicide. In India, abetment of suicide (section 306, IPC) and attempt to commit suicide (section 309, IPC) are both criminal offences. This is in contrast to many

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1054 Ian M. Kennedy, “Switching off Life Support Machines: The Legal Implications” Criminal Law Review 443-452 (1
countries such as the US and UK where attempted suicide is not a crime. However, a doctor who tries to kill a patient at his request will fall under the exception 5 to section 300 of the Indian Penal Code and the doctor will be held liable under section 304, IPC for culpable homicide not amounting to murder. Cases of non-voluntary and involuntary euthanasia would be struck by proviso one to section 92 of the IPC and thus be rendered illegal. The Law Commission of India in its 42nd report had recommended the repeal of the provision as far back as 1971. The commission had declared the section harsh and unjustifiable.

The Court held that Article 21 is a provision guaranteeing “protection of life and personal liberty” and by no stretch of the imagination can extinction of life be read into it. In existing regime under the Indian Medical Council Act, 1956 also incidentally deals with the issue at hand. Under section 20A read with section 33(m) of the said Act, the Medical Council of India may prescribe the standards of professional conduct and etiquette and a code of ethics for medical practitioners. Exercising these powers, the Medical Council of India has amended the code of medical ethics for medical practitioners. There under the act of euthanasia has been classified as unethical except in cases where the life support system is used only to continue the cardio-pulmonary actions of the body. In such cases, subject to the certification by the term of doctors, life support system may be removed.

In Gian Kaur’s case section 309 of Indian Penal Code has been held to be constitutionally valid but the time has come when it should be deleted by Parliament as it has become anachronistic. A person attempts suicide in a depression, and hence he needs help, rather than punishment.

The Delhi High Court in *State v. Sanjay Kumar Bhatia*\(^{1057}\), in dealing with a case under section 309 of IPC observed that section 309 of I.P.C. has no justification to continue remain on the statute book.

The Bombay High Court in *Maruti Shripati Dubal v. State of Maharashtra*\(^{1058}\) examined the constitutional validity of section 309 and held that the section is violative of Article 14 as well as Article 21 of the Constitution. The Section was held to be discriminatory in nature and also arbitrary and violated equality guaranteed by Article 14. Article 21 was interpreted to include the right to die or to take away one’s life. Consequently it was held to be violative of Article 21.

Recently the judgment of our Supreme Court in *Aruna Ramchandra Shanbaug v. Union of India*\(^{1059}\) opened the gateway for legalization of passive euthanasia. In this case a petition was filed before the Supreme Court for seeking permission for euthanasia for one Aruna Ramchandra Shanbaug as she is in a Persistent Vegetative State (P.V.S.) and virtually a dead person and has no state of awareness and her brain is virtually dead. Supreme Court established a committee for medical examination of the patient for ascertaining the issue. Lastly the Court dismissed the petition filed on behalf Shanbaug and observed that passive euthanasia is permissible under supervision of law in exceptional circumstances but


\(^{1056}\) 1996 (2) SCC 648 : AIR 1996 SC 946

\(^{1057}\) 1985 Cri.LJ 931 (Del.).

\(^{1058}\) 1987 Cri.LJ 743 (Bom.).

\(^{1059}\) 2011(3) SCALE 298 : MANU/SC/0176/2011
active euthanasia is not permitted under the law. The court also recommended to decriminalized attempt to suicide by erasing the punishment provided in Indian Penal Code.

The Court in this connection has laid down the guidelines which will continue to be the law until Parliament makes a law on this point.

1. A decision has to be taken to discontinue life support either by the parents or the spouse or other close relatives, or in the absence of any of them, such a decision can be taken even by a person or a body of persons acting as a next friend. It can also be taken by the doctors attending the patient. However, the decision should be taken bona fide in the best interest of the patient.

2. Hence, even if a decision is taken by the near relatives or doctors or next friend to withdraw life support, such a decision requires approval from the High Court concerned as laid down in Airedale's case as this is even more necessary in our country as we cannot rule out the possibility of mischief being done by relatives or others for inheriting the property of the patient.

In this case question comes before the Court is under which provision of the law the Court can grant approval for withdrawing life support to an incompetent person. Then the Court held that it is the High Court under Article 226 of the Constitution which can grant approval for withdrawal of life support to such an incompetent person. The High Court under Article 226 of the Constitution is not only entitled to issue writs, but is also entitled to issue directions or orders.

According to the instant case, when such an application is filed the Chief Justice of the High Court should forthwith constitute a Bench of at least two Judges who should decide to grant approval or not. Before doing so the Bench should seek the opinion of a committee of three reputed doctors to be nominated by the Bench after consulting such medical authorities/medical practitioners as it may deem fit. Preferably one of the three doctors should be a neurologist; one should be a psychiatrist, and the third a physician. The committee of three doctors nominated by the Bench should carefully examine the patient and also consult the record of the patient as well as taking the views of the hospital staff and submit its report to the High Court Bench.

After hearing the State and close relatives e.g. parents, spouse, brothers/sisters etc. of the patient, and in their absence his/her next friend, the High Court bench should give its verdict. The above procedure should be followed all over India until Parliament makes legislation on this subject.

The High Court should give its decision assigning specific reasons in accordance with the principle of ‘best interest of the patient’ laid down by the House of Lords in Airedale’s case.\(^{1060}\)

Arguments for Legalising Euthanasia
From Ram's Jalasamadhi to Mahatma Gandhi and Vinoba Bhave's fast till death (wherein Bhave passed away), euthanasia existed in Indian culture. The Judiciary has

\(^{1060}\) Airedale National Health Service Trust v Bland (1993) AC 789.
likewise seen euthanasia from a thoughtful point, which is apparent from the perception of the different judges in cases managing right to suicide.

Euthanasia implies executing an individual rather finishing the existence an individual who is experiencing some terminal disease which is making his life agonizing just as hopeless or at the end of the day finishing an actual existence which does not merit living. In any case, the issue lies that in what manner should one choose whether the life is any longer worth living or not. In this manner, the term euthanasia is fairly and excessively equivocal. This has been a point for debate since quite a while for example regardless of whether euthanasia ought to be permitted or not. The conflict is with respect to the irreconcilable situations: the interests of the general public and that of the person.

- One way of thinking contends that it ought to be permitted keeping in mind that the life of an individual is removed by his own assent. The choice of the patients ought to be acknowledged. On the off chance, that then again we gauge the social qualities with the individual intrigue then we will plainly observe that here the enthusiasm of the individual will exceed the enthusiasm of the general public. The general public focuses on enthusiasm of the people rather it is made to guarantee a noble and a tranquil life to all. Presently if the person who is under unendurable agony can't choose for himself then it clearly will hamper his advantage. All things considered it will most likely be a refutation of his nobility and human rights. As to debate according to lawful perspective, Article 21 plainly provides for living with dignity. An individual has an option to carry on with an existence with in any event least respect and on the off chance that that standard is falling beneath that base level, at that point an individual ought to be given a right to take his life.

- Another significant point is that a great deal of clinical facilities where a ton of money is being spent on these patients which are regardless going to die. Our obligation isn't just towards the patient yet additionally to the families who seek us for emotional support and balanced choices to keep away from superfluous passionate and budgetary weights. In the event that one can end his life to spare others, a hopelessly sick individual ought to be ethically legitimised in ending his life to maintain a strategic distance from unnecessary agony. In the event that an individual has no obligations to perform, either to himself or to others when he is in critical condition, he may choose to take his life and assuage himself from the agony of living and others from the weight of caring for him. Section 309 of IPC couldn't have been proposed to include this sort of death as 'Suicide' inside it.

- The society is committed to recognise the rights of patients and to regard the choices of the individuals who choose euthanasia. It is contended that euthanasia regards the person's right to self-assurance or his right to privacy. Obstruction with that right must be advocated on the off chance that it is to secure fundamental social qualities, which isn't where patients enduring horrendously toward the finish of their lives demand euthanasia when no options exist. Not permitting euthanasia would come down to constraining individuals to endure without wanting to, which would be unfeeling and a nullification of their human rights and dignity.

- Euthanasia gives an a way to assuage the grievous pain and enduring of a person. It soothes the in critical condition individuals from a waiting demise. It not just
remembers the unendurable torment of a patient yet additionally mitigates the family members of a patient from the psychological anguish. Its point is philanthropic and valuable as it is a demonstration of easily executing to those people who are experiencing excruciating and serious illnesses. Along these lines, the intention behind this is to help instead of mischief.

- Article 21 of our Constitution unmistakably provides for living with dignity. An individual has a privilege to carry on with an existence with in any event least dignity and on the off chance that that standard is falling beneath that base level, at that point an individual ought to be given a right to take his life. A patient will wish to take his life just in instances of exorbitant distress and would like to bite the dust an effortless passing instead of carrying on with a hopeless existence with that desolation and languishing. Along these lines, from an ethical perspective it will be smarter to permit the patient kick the bucket effortlessly when regardless he realizes that he is going to die because of that terminal ailment.

A new approach to life and death

The desire for control over how one dies marks a sharp turning away from the sanctity of life ethic. It will not be satisfied by the concessions to patient autonomy within the framework of that ethic - a right to refuse extraordinary means of medical treatment, or to employ drugs like morphine that are 'intended' to relieve pain, but have the 'unintended' but foreseen side effect of shortening life. The right to refuse medical treatment can help only in the limited number of cases in which it leads to a swift and painless death. Most cancer patients, for example, are not in this situation. They are more likely to be helped by liberal injections of morphine. For most people, who are very ill, the desire for control over death is best satisfied with the assistance of a medical practitioner. That is why the traditional ethic will be unable to accommodate the present demand for how we die.

The centuries-old Hippocratic oath relating to sanctity of life ethic needs to be re-evaluated because it is too absolutist to deal all the circumstances that can arise. It is noted, a civilized society does not offer inadequate care to any of its members, however damaged or disadvantaged, nor does it reject them by failing to offer care or treatment which could be of any benefit. In the same way, a civilized society should not condemn one of its members for not to be a Victim of medical technology. It is in this context to say that prolonging life by the use of medical technology is greater burdens than benefits on terminally ill patients.

If an individual suddenly become unable to breathe on his/her own, it would have been quite in accordance with the law and the traditional ethical view not to put him/her on a respirator or if he/she was already on one, to take it away. It is not clear how much weight the traditional ethic places on the fine line between ending life by withdrawing treatment, and ending it by a lethal injection. The prohibition on physician-assisted suicide was one element of a general view that the state should enforce morality and act paternalistically towards its citizens. This view of the proper role of the state was first powerfully challenged by the nineteenth century British philosopher John Stuart Mill, who wrote in his classic On Liberty, ‘The only purpose for which power can be rightfully
exercised over any member of civilised community, against his will, is to prevent harm to others. His own good either physical or moral is not a sufficient warrant. Incurably ill people who ask their doctors to help them die at a time of their own choosing are not harming others. The state has no grounds for interfering, once it has satisfied that no one is getting harmed and the decision has been freely made on relevant information by a competent person.

The new ethical approach allows us to acknowledge that life consciousness is of no worth at all. One should treat human being as with their ethically relevant characteristics. They include conscious capacity to physical, social and mental interaction with other being conscious preferences for continued life, and having enjoyable life. Can doctors who remove the feeding tubes and ventilators from persistent vegetative state really believe that there is a huge gulf between giving the same patients an injection that will stop their hear? Doctors may be trained in such a way that it is psychologically easier to do the one and not the other, but both are equally certain ways about the death of the patient. As far as the second assumption, that it is not rationally defensible.

**Conclusion**

People are given the gift of free will, and that means the freedom to choose. If a person chooses to die because of their diagnosis, they are free to choose whether they should continue on, especially if their quality of life is severely diminished. By choosing to die, they can free themselves from the misery of what little life they have left. Every suicidal person should not be allowed to legally commit suicide on a whim, they should instead be put in therapy and given help. However, there are many for whom death is a good option. Those with terminal illnesses or who have a very low quality of life due to medical issues should be given the option to legally die to end their pain and suffering. Similarly as individuals can pick whether to have babies or adjust their bodies, they ought to reserve the option to decide to die. Individuals can reject clinical treatment that would forestall demise, and they ought to have the option to decide to rush passing too. The state shouldn’t have the lawful option to deny individuals of decision about their own bodies or lives.

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CORPORATE CRIMES: A BACKLASH AGAINST THE ORGANIZATIONS

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ABSTRACT
Corporate crime, one of the types of white collar crime refers to the criminal practices by a group of people or association often done on the behalf of the corporation to feather one’s own nest. Corporate crime emerges from the business practices and while financial scandals have existed in previous centuries, corporate crime has been in full swing in the last two decades. Modern business has dramatically dematerialized and turned into augmented reality, which, on the one hand represents a major breakthrough, but on the other hand, opens up a large area and provides avenues for committing crimes in the field of finance. However, irrespective of the state of modern industry, the fundamental explanation for corporate crime derives from human greed, mainly the desire to acquire resources that are scarce by nature. While bloods in the streets continued to capture the newspaper headlines, the crime in the suit has remained unnoticed due to the lesser intensity of direct harm; ironically the magnitude of the losses suffered from corporate crimes involving the manipulation in accounting records, investment scams, misappropriation of assets, debt hiding etc is much higher which not only dents the company’s reputation, but also hinders the growth of the nation’s economy. Although the government has introduced several legislations to this menace but unfortunately, the offenders mock the legislation and never failed to discover the loopholes.

INTRODUCTION
The world of capitalism has been rightly portrayed as a system owned by the tycoons compromising the health and security of the general civilians for corporate gain. The era of 20th century was rife with avarice and crimes. The advent of technological invasion and growth has resulted in the acceleration of the crime rate, which not only included the indulgence of individuals or group of people, but also of the corporations, which have been given a free hand to deploy both natural and human resources. Such crimes committed on the behalf of the corporation are defined as corporate crime. Corporate scandals include insider trading, embezzlement, money laundering, investment scams, adulteration etc which has successfully dissolved the modern era into corruption and cupidity.

A GLIMPSE ON CORPORATE SCANDALS IN INDIA
The modern era has innumerable corporate scandals that have come into the light of the masses. One of the big tragedies occurred in recent times was the mysterious vanish of many companies, implying that the primary objective of these companies was to raise funds, loot the investors and abscond in the future. The exponential growth of Internet technology has also escalated the evolution of online manipulation techniques. The Law Enforcement Committee on Securities and Exchange and criminal prosecutions demonstrate that the offenders use a simple way to exploit financial markets for personal enrichment. Either they typically

https://www.legalbites.in/analysis-of-corporate-crime/
disseminate inaccurate or misleading facts through so-called 'pump-and-dump' schemes that induce a sharp spike through non-demand stock values or shareholdings in firms that do not have substantial assets or leading activities. After this, the shares are sold immediately in these companies, so that they can make substantial gains until a stock price falls to usual low rates. The corporate corruption is so heavily ingrained in the capitalist structure that it has almost become a prerequisite to carry the business. Throughout these corrupt countries, several State-owned firms often build shell companies that encourage third parties to squander corporate assets or revenues. Often they use the dividends which are either paid to the shareholders or used in the organizational growth and development. As a result, stakeholders in the business do not get what they rightfully deserve. Exaction and bribery are the forms of back-room tax that demoralizes both businesspeople and investors. It dissuades investors and thus destroys the potential of a nation to grow and develop.

The dysfunctional corporate structure and managerial opportunism has contributed to the manipulation of financial statements. The allegations of corporate misconduct involve artificially inflated earnings, capital expenditure, lack of proper revenue recognition and the inappropriate use of off balance sheet. Legally approved commercial practices often generate a substantial amount that is above public scrutiny in compliance with tax avoidance laws. Too often bureaucratic regulations also offer opportunities to conceal the true status and stay out of the magnitude of one’s actions disclosed and taken into account for. Increased globalization and economic liberalization have an influence on foreign trade, which provides specialized equipment offering a platform to reduce tax expenses in adherence to the various tax laws of the different countries. International trading among multinationals has accelerated the abuse of transfer pricing, which has led to the depletion of major wealth in developing countries like India.

Many reputed companies have also been indulged in the manipulation of accounts by overstating the assets and understating the liabilities or through fictitious transactions and accounting to boost the company's profits, to portray a better financial position for tempting the investors and shareholders. Investors' capital has been massively lost as a result of fraudulent practices culminating in bankruptcy files of international corporations around the world. The market regulators and stock exchanges are not in a position to penalize or recover their assets due to which the promoters or the merchant bankers responsible for these scandals are roaming unscathed.

In 2014, the prime minister of India had formed a special committee to address the problem of black money, investigations and prosecution of high profile cases of tax evasion. The hybrid approach to curtail black money production from regulatory and legal operations comprises multiple elements, such as diverting the disincentives from Voluntary Compliance like tax rationalism, lowered transaction rates for enforcement and administration, greater economic liberalization, etc; economic transformation by reforming the financial sector, bullion and jeweler industry, stock-market, mining and granting natural resources property rights, equity trading, non-profit organizations, private sector, etc. in vulnerable sectors; efficient reliable deterrence like the incorporation of data bases leading to efficient intelligence by way of surveillance services approaches to improve the framework of direct tax administration &
prosecution; improved flows of information, tax-revenue overseas units, international taxes and transfer pricing etc; and the supportive policies like public awareness and support, strengthened accountability of auditors, security of whistleblowers and witnesses, need to enter multinational projects to use channels, need to fine-tune applicable laws and regulations, etc..


There are many instances which have revealed the true lights of many companies. A befitting example would be of the infamous Speak Asia Scam of 2011, where the investors were guaranteed quadruple of their principal income in a year. Around thousand crore rupees were invested in this scam. A criminal case was filed against the firm in 2011, but it was not fruitful enough as the panelists didn’t refund a single penny till date; moreover, there is not any conviction as the management couldn’t be traced yet. Another such catastrophe was the indelible Sahara Scam, where the two subsidiaries of Sahara Group had blatantly violated the law by issuing funds through optionally fully convertible debentures (OFCD) of Rs 24000 crore from more than 2 crore investors without the permission of SEBI or Registrar of Company. After being exposed, it was not only banned from issuing OFCD, but also was ordered to return the funds with an interest of 15%. The directors of Sahara Groups were arrested and a case of Money Laundering was filed against it.

SCANDALS AND DIRTY POLITICS.

Ironically, the politician and the government were also involved in such dirty scandal which is quite evident from the 2G scam, which was carried by the telecom minister, A. Raja, which was about the authorization of a unified access service. The former Telecom Minister A Raja has circumvented standards at all rates and carried out the suspicious scam. The Telgi scam of 2002 also revealed that Abdul Telgi was backed with government support from various departments in the procurement and sale of high security stamps. The Adarsh housing society scam of 2011 is another instance exposing the true colors of the dirty unleashed politics. Under this scam, the members allotted flats to themselves in that society far less than the market rates. Not only this, but also the politicians and the bureaucrats failed to abide the norms concerning land ownership, zoning and floor space index. Although the Central Government has not only introduced various policies and legislations but has also implemented demonetization, Goods and Service tax (GST) etc to win the battle against these scandals but the offenders often light up an escape route.

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1064 Harleen Jabbal, The Sahara Scam, Slide share (20 March 2018)

https://www.slideshare.net/harleenjabbal13/the-sahara-scam

www.supremoamicus.org
SOCIAL OBLIGATIONS VS ESCALATION OF REVENUES

While the wrangles and rage over the corporate scams concerns about the interest of the shareholders, the neglected employees or the workers continue to become the prey of these scams. They are often pushed against the wall to grapple with the shrinking revenues at the cost of their employment. The employees, especially in the private sectors, are not only burdened with the stress of overtime but also with the irrational targets set by the employer to spike up the revenues of the organizations. There are many such instances of the public sector undertakings where either the raw materials are deficient due to the inappropriate location or the machinery imported are either defective or unproductive, which highlights the recklessness and lavishness of the management which ultimately worsens the plight of the laborers. For instance, Bombay Textile mill strike of 1982 has snatched the employment of over 150000 workers\(^{1065}\). Not only this, but also the wages of the jobless employees was being disposed. The trade unions grappled with the reality of workers ‘suicide and rising unemployment and the workers ‘families strived to overcome their sufferings caused by the faceless management.

Another major mishap was the case of world’s infamous industrial disaster i.e. the Bhopal gas tragedy of 1984, where the UCC’s Sevin production plant was built in Madhya Pradesh to capitalize on the large and growing Indian pesticide market. The leakage of Methyl Isocyanate caused the death and physical impairment of thousands of victims. \(^{1066}\) The gas was so heavy and dense that it filled their lungs, essentially drowning them. Over 2,000 animals were poisoned, impaired and infected by the gas; most of them were the livestock that people relied on for food. The implementation of this project simply highlighted the double standard of the multinational corporations operating in developing countries.

Unfortunately, the food industry is also battling against adulteration, misleading claims on labels, fake brand narratives etc leading to erosion of consumer’s trust and confidence from the system, sector and the nation at large. It eventually leads to a loss of wealth and reputation of the businesses. Ironically, our recollection of food scams and human misery fades with the death of the memories and the offenders roam scot free. The dramatic growth of the controversies in the food sector calls for stringent actions like routine disclosure of all the pertinent information to the public about the product composition and environmental emissions. Commercial confidentiality should not overshadow the public interest to identify the risks and liabilities involved with corporate production. If a company has become part of the public domain, no constraints should be imposed on public access to environmental and health records on account of corporate confidentiality. Once a product enters the public domain there should be no restrictions on public access to information relevant to environment and health on the basis of commercial secrecy. If a company has become part of the public domain, no constraints should be imposed on public access to environmental and health records on account of corporate confidentiality. Corporate responsibility

\(^{1065}\) Hub Wan Wersch, Unveilling the build up to Bombay’s textile mill strike at 1992, WIRE (16\(^{TH}\) MAY 2019) https://thewire.in/books/mumbai-textile-mill-workers’strike

\(^{1066}\) Deepika, Legal Aspects of Bhopal Gas Tradegy, Legal Service India, https://www.legalservicesindia.com/article/373/Legal-Aspects-of-Bhopal-Gas-Tradegy
shall be promoted through environmental management accounting and environmental reporting management which offers a transparent, accurate report on the environmental and social implications of the companies.

CONCLUSION AND SUGGESTIONS
The buoyant broadening of these scandals calls for stringent regulatory actions against the rampant prospects of the corporate scandals. The law enforcement agencies have many ways of combating corporate scandals but the perpetrators never fail to discover the loopholes. The battle against such crimes can be won through the fostering of awareness and reinforcement of the moral compass among companies and their workers by enforcing appropriate laws and regulations in a timely manner. An efficient corporate surveillance system should complement this through internal compliance programs and regulatory requirements either by the Company Commission and Securities Commission or its equivalent. In addition, well-trained law enforcement authorities and prosecutors should vigorously administer these laws, whether they are potentially detrimental. In this regard, while sustainable enforcement against corporate crime is necessary to maintain strong deterrence and public trust in the financial markets, compliance should be treated as the measure to boost internal security rather than a potential replacement for internal surveillance.

The liability of the corporations should not be restricted to the national jurisdiction, rather to safeguard the basic human rights like the right to life, the right to safe and healthy working conditions, the right to a safe and healthy environment, the right to receive compensation for injury and damage, the right to information and the right of access to justice by individuals and by groups; the liability must be imposed beyond the domestic jurisdiction and should include the responsibility for environmental contamination and restoration. Enforcement and compliance of such rights should also be upheld and maintained by the corporations and the states.

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IS INDIA, LEGALLY READY TO FACE A PANDEMIC?

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Abstract  
The ongoing pandemic of COVID-19 (caused by the Novel Coronavirus) has exposed flaws in India’s domestic laws. There has been a vague structured legislation, which has fall back on. The Central Government in March advised states to invoke the Epidemic Diseases Act, 1897 to tackle the novel coronavirus pandemic in their jurisdictions. The 123-year-old colonial law, however, does not even define what a disease is, leave about an epidemic or a pandemic.

Furthermore, using of the National Disaster Act, 2005 was also baseless as COVID-19 has been characterized as a global pandemic by the World Health Organisation (WHO) and not as a disaster. Moreover, the Disaster Management Act, 2005 can’t cover COVID-19 under its jurisdiction because of the definition of “Disaster” mentioned in the act. The current lockdown, which is governed by the Disaster Management Act, 2005 however can’t be proclaimed as unconstitutional but, yes, the central government needs to draft a proper legislation to face a health emergency in future.

As a matter of fact, a Public Health (Prevention, Control and Management of Epidemics, Bio-Terrorism and Disasters) Bill had been drafted in 2017, intended to replace the Epidemic Diseases Act of 1897. The Bill has yet to be tabled in the Parliament. This brief aims to list the short comings of legal system of the country for a health outbreak caused by an epidemic or a pandemic.

Introduction  
The year 2020, had kicked off with a life risking disease, first emerged at China’s Wuhan City in December 2019 (and hence the name COVID-19). At the end of December, public health officials from China informed the World Health Organization (WHO) that they had an unknown health problem, a new virus was causing pneumonia like illness in the city of Wuhan. They quickly determined that it was a coronavirus and that it was rapidly spreading through and outside of the city of Wuhan. The WHO assessed the situation in China and other countries where the outbreak, caused by COVID-19 had started.

On 11th March 2020, Dr Tedros Adhanom Ghebreyesus, the director general of WHO, at a media briefing on COVID-19 declared it a Pandemic. He also mentioned that it was the first time that an outbreak caused by a coronavirus was being characterized as a Pandemic. Since, this was a new type of virus with no identified remedy and antidote, it was termed as The Novel Coronavirus.

In India, the states, which were being affected with the virus, acted systematically and closed all the public places including educational institutes and religious places including the places of worship. Prime Minister Narendra Modi was quick to react on the spread of coronavirus in the country. He firstly declared a Janta curfew on 22nd March 2020, followed by a nation-wide lockdown for 21 days starting from 25th March 2020. On 14th April 2020, when the lockdown was to be uplifted, Prime
Minister Modi, with the due acceptance from the Chief Ministers of various states decided to continue the lockdown till 3rd May 2020 in order to control the novel coronavirus outbreak.

Democratic countries such as Australia, Canada, England, and the United States have more comprehensive, detailed and updated legislations to deal with public health emergencies such as the ongoing pandemic. These countries have continuously adapted their existing laws to the present-day needs, enabling them to modify their responses to evolving and advanced emergencies. In contrast, the Indian government appears to have a limited range, comprising the colonial-era Epidemic Diseases Act, the worn-out Section 144 of the Indian Penal Code which prohibits public gatherings, and the Disaster Management Act, 2005.

A recent study conducted by the Oxford University on a country’s government responses to COVID-19, gave India a perfect 100 scoring for its steps taken to fight the novel coronavirus pandemic. The tracker is based on indicators such as closures of educational institutions, travel restrictions and bans as well as measures such as emergency investment in healthcare, and investment in vaccines by the governments.

At the time of writing (i.e. as on 16th April 2020), there were 1,991,562 confirmed cases of COVID-19 in 213 countries with 130,885 people being dead. In India, there are 10,824 active cases with 420 deaths.

The Epidemic Diseases Act, 1897: Limitations
The colonial-era Epidemic Diseases Act, 1987 is India’s only law that has been historically used as a framework for restricting the spread of various diseases including cholera and malaria. Singlehandedly, the Epidemic Diseases Act, comprising of four sections in a single page, might be insufficient and incomplete to deal with the ongoing pandemic of COVID-19.

The Epidemic Disease Act came into effect on the 4 of February 1897, amidst the outbreak of the bubonic plague in Bombay. The law proved inadequate, and the plague soon spread to Bangalore and other parts of the country.

Over the years, no standard or Model Rules and Regulations have been suggested as a consequence to the previous law. The law merely outlines a set of basic elements, including travel restrictions, examination and quarantine of persons suspected of being infected in hospitals or temporary accommodations, and statutory health inspections of any ship or vessel leaving or arriving at any port. The law specifies consequences that will be faced by those violating the concern of the Act, with penalties being pari passu with Section 188 of the

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1068 https://www.who.int/emergencies/diseases/novel-coronavirus-2019
1069 https://www.mygov.in/covid-19
1070 https://indiacode.nic.in/bitstream/123456789/10469/1/the_epidemic_diseases_act%2C_1897.pdf
Indian Penal Code\(^{1072}\), which is the law that deals with acts of mutiny to a government order.

The Epidemic Diseases Act is deficient for three key reasons. First, the law fails to define “dangerous”. There is no elaboration in the Act on the existing rules and procedures for arriving at a benchmark to determine that a particular disease needs to be declared as an epidemic. The law also doesn’t clarify on the steps to categorise an epidemic as ‘dangerous’ based on variables like the scale of the disease, the distribution of the affected population across various age groups, the brutality of the illness, or the absence of a known cure or even for that fact, an antidote.

The second limitation is that the Epidemic Diseases Act contains no provisions on the confiscating and the sequencing required for distribution of vaccines (if available), and the quarantine measures and other preventive steps that needs to be taken.

Third, there is no underlying explanation of the fundamental rights of citizens that needs to be observed during the implementation of the emergency measures in an epidemic. The Act emphasises only the powers of the central and state governments during the epidemic, but it does not describe the government’s duties in preventing and controlling the epidemic, nor does it clearly state the rights of the citizens during the event of a significant disease’s outbreak.

The punishment prescribed in Section 3 of the Act that is pari passu with Section 188 of the Indian Penal Code also needs to be revisited. This Section provides for a fine of INR 200 (a college student is imposed with a higher amount of fine) and imprisonment of one month (not clarifying whether bailable or not) for violating an order of a public servant.

**Disaster Management Act, 2005: Limitations**

The Disaster Management Act, 2005\(^{1073}\) was enacted for setting up the National Disaster Management Authority and State Disaster Management Authority respectively and to have a unified command over disaster management and not that of a health emergency.

The law that has been invoked to deal with COVID-19 and order a curfew that was fortified by a 21-day lockdown and now a 19-day lockdown, the Disaster Management Act, 2005 was never designed to cater to health emergencies. This is evident from the definition of “Disaster” in Section 2(d) of the said Act, as it states:

\[(d) \text{ “disaster” means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or}\]


\(^{1073}\)https://www.ndmindia.nic.in/images/The%20Disaster%20Management%20Act,%202005.pdf
degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.”

This definition does not indicate to a medical emergency, except perhaps by a loose interpretation. Similarly, the two sections of the said Act under which notifications have been issued, namely Section 6(2)(1) and Section 10(2)(1), are both supplemental sections to the substantive provisions of this Act. Further, Sections 6 (1) & (2) read as follows:

6. Powers and functions of National Authority.7
(1) Subject to the provisions of this Act, the National Authority shall have the responsibility for laying down the policies, plans and guidelines for disaster management for ensuring timely and effective response to disaster.
(2) Without prejudice to generality of the provisions contained in sub section (1) and sub section (1) reads as:
(1) take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary.

Similarly, Section 10(2)(1) states:
(1) evaluate the preparedness at all governmental levels for the purpose of responding to any threatening disaster situation or disaster and give directions, where necessary, for enhancing such preparedness.7

This much applauded law has so far has been used for localised disasters like floods (Uttarakhand 2013), cyclones (Odisha 2019), earthquakes etc., For the first time this law has been pressed into service on a pan India basis. It is also the first time it has been invoked to address a public health crisis; the pandemic of Covid-19.

On 25th March 2020, the Disaster Management Authority prescribed some guidelines to tackle the ongoing COVID-19 pandemic8. These Guidelines prescribe closure of certain establishments and institutions, places of worship etc. in order to avoid crowding and to ensure social distancing. Simultaneously they seek to ensure unhindered access to essential services like ration shops, pharmacies, health services, banking services, telecommunications, petrol pumps, manufacturing of essential commodities and unhindered supply of food, medical equipment etc.

The Disaster Management Act, 2005 was passed to enable the central government to provide a legal framework for setting up of a National Disaster Management Authority under the chairmanship of the Prime Minister of India and not more than nine members nominated by him. While the scheme of the Act does not specifically deal with the control of a pandemic like COVID-19, the powers of the National Disaster Management Authority under Section 6 of the Act can be broadly interpreted to give a unified command to the central government to effectively manage a disaster throughout India, which the government had done in the case of the

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7 https://www.ndmindia.nic.in/images/The%20Disaster%20Management%20Act,%202005.pdf
ongoing COVID-19 pandemic but rightfully noting that COVID-19 is not a disaster but a pandemic.

Ideally, present-day legislation should clearly provide both the cause and the cautions in empowering the state to curb or restrict certain rights of the citizens like that of liberty, privacy, movement, and property. This would then lead to predictable and transparent decision-making. India’s Epidemic Diseases Act, 1987 as well as the Disaster Management Act, 2005 fails in this regard; similarly, it fails to address the human aspect of healthcare. Indeed, the Union Ministry of Health & Family Welfare had drafted a Public Health (Prevention, Control and Management of epidemics, bio-terrorism and disasters) Bill, 2017\textsuperscript{1075} to fill these gaps. Jointly prepared by the National Centre for Disease Control (NCDC) and the Directorate General of Health Services (DGHS), it also tried to address, though in a limited manner, the need to empower local government bodies given the peculiarities of each emergency situation. It was expected that with the implementation of this law, the old Epidemic Diseases Act, 1897 would be revoked. However, for reasons that remain unclear, the Bill has not been tabled in Parliament.

The key pillar of a national epidemic law must be of equal access to healthcare services. The Epidemic Diseases Act, 1987 fails on this count, too. The obligations of healthcare professionals and other workers, compared with their rights and the safety standards that they would be entitled to, also needs to be defined, along with the responsibilities of civil society during such a crisis.

The Union government, however, has been unable to convince states to adopt the law since health is a State subject. Many Indian states have had their own epidemic disease acts since the colonial era, like the Madras Public Health Act, 1939\textsuperscript{1076}.

The National Health Bill, 2009\textsuperscript{1077} was similarly targeted at providing an overarching legal framework for the provision of essential public health services by recognising health as a fundamental right of the people. It also provided for a response mechanism for public health emergencies by exactness a collaborative central framework. However, none of these initiatives ever fructified as the states considered it as an invasion on their domains.

**Division of powers between the centre and the state government**

Article 245\textsuperscript{1078} of the Constitution of India states that the Parliament or the central government may make laws for whole or any part of India, and the state government may make laws for the entire or any part of the state. Article 245, places the basis for the division of powers between the centre and the state, whereas, Article

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\textsuperscript{1076} http://www.sanchitha.ikm.in/sites/default/files/MadrasPublicHealth_%20Act1939..pdf

\textsuperscript{1077} https://www.prsindia.org/uploads/media/Draft_National_Bill.pdf

\textsuperscript{1078} https://indiankanoon.org/doc/574894/
246 provides for the distribution of Legislative Subjects between the central and state governments. It does so by creating three lists, reckoned in the Seventh Schedule of the Constitution, namely the Union List, the State List, and the Concurrent List.

The Union List contains the subject matter on which Parliament has an exclusive power to legislate, similarly, the State List contains the matters on which the state government has an exclusive power to legislate, and lastly the Concurrent List, contains the subject matter on which, both the centre as-well-as the state governments can legislate.

Constitutionally, the state government is empowered to deal with matters related to public order and public health, listed in the state list Entry 1 and 6, respectively. However, Entry 29 of the Concurrent List authorizes the central and state governments to legislate on matters pertaining to the prevention of an infectious or contagious disease spreading from one state to another. The entry does not limit the powers of the legislating authority to simply public order or health, but allows for any relevant legislation to be passed, so long that it is to prevent the disease from spreading across state jurisdictions. Entry 29 of the concurrent list reads:

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

Since, both central and state government are empowered to legislate on an entry in the Concurrent List, a possible collision or inconsistency between the two legislations cannot be ruled out. In order to address this concern, the makers of the Constitution provided for Article 254, which reads:

Article 254 - Inconsistency between laws made by Parliament and laws made by the Legislatures of State

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by the Parliament, which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of the State shall, to the extent of the repugnancy, be void”.

The ‘Doctrine of Repugnancy’, which is exceptionally explained by the Supreme Court of India in the case of M. Karunanidhi v. Union of India, deals with an event that where the requirements of a Central Act and a State Act in the Concurrent List are fully inconsistent and are absolutely conflicting, the Central Act will triumph and the State Act will become void in view of the repugnancy.

Therefore, the Constitution recognizes the primacy of parliamentary law over state legislation in the concurrent list. The operation of Article 254 is not multifaceted. The real problem that arises in practice is that of determining whether a particular provision in the order passed by the state is

1079 https://indiankanoon.org/doc/77052/
1084 https://indiankanoon.org/doc/1930681/
1085 http://www.desikanoon.co.in/2014/05/doctrine-of-repugnancy-and-constitution-of-india.html
1086 (1979) 3 SCC 431
offensive to the order passed under the central act. Fortunately, we have a catena of judicial decision taken by the Supreme Court, which lay down the rules for determining repugnancy.

**Choices the Government had with the existing laws in hand**

There is some debate in the media and among the citizens, that the government could have declared a national emergency under Article 352 of the Constitution. However, this was legally not permissible and possible as post the amendment of this Article in 1978 (44th Amendment), such an emergency can be declared only if the security of India or any part of the country is threatened by a war or an external aggression or an armed rebellion. These are the only three grounds under which an emergency can be declared under Article 352 and in the case of the outbreak caused by COVID-19, none of the above given conditions are fulfilled. So, effectively, the only choice that the government had was to rely on Entry 29 of the Concurrent List and invoke its powers under the Disaster Management Act, 2005 which it did, thus making the most of it, as it could with the existing legislature.

**Other countries health policies**

Certain lessons can be drawn from contemporary laws that exist in advanced democratic countries such as Australia, Canada, Britain, and the US. With the intent of this study the authors recommend/suggest the government of India to realize the importance of health and have a separate legislation for the same in order to avoid (in future) any chaos and disturbance caused by any other health hazard.

- **Canada**

In Canada, emergency measures and emergency management requirements at the federal level are governed by the Emergency Act of 1988[^1087] and the Emergency Management Act 2007.[^1088] Most provinces also have their own Health Acts that clearly delineate measures that are to be implemented in case of a health emergency. However, there is a comparatively higher bar for the federal government to take the lead in the situation of a health emergency. Therefore, most health crises in Canada are handled at the provincial level, in close coordination with the Central government.

The Public Health Agency of Canada Act of 2006[^1089] led to the creation of the Public Health Agency of Canada (PHAC) which is responsible for the promotion of health, prevention and control of chronic diseases, infectious diseases, and preparation and response to public health emergencies. The Public Emergency Act gives the power to the Federal government to regulate movement of people, the requisition and disposition of property, the regulation of distribution of essential goods, the establishment of emergency hospitals, and the imposition of fines. Furthermore, the Quarantine Act of 2005[^1090] permits the Minister of Health to establish quarantine stations and facilities anywhere in Canada.

- **Australia**

[^1089]: https://lois-laws.justice.gc.ca/eng/acts/P-29.5/
In Australia, the National Health Security Act, 2007 draws the processes and structures to pre-empt, prevent and, in a contingency, deal with national health emergencies. Designated entities provide coordination and oversight at the national level, with the provinces applying their own laws, jurisdictional responses, and coordination processes. The National Security Health Arrangement, 2008 supports the National Health Security Act, 2007 and the National Health Security Regulations, 2008. Both of these give effect to the WHO’s International Health Regulations (2005). These regulations required Australia to develop multi-level capacities in the health sector to effectively tackle the public health threats and to develop, strengthen and maintain the capacity to detect, report and respond to a epidemic.

The National Health Security Arrangement, 2008 is primarily concerned with strengthening Australia’s public health surveillance and reporting system. It clearly lays down the responsibilities of the national and state level government with regard to surveillance and reporting of communicable diseases and responding to significant public health events. The National Health Emergency Response Arrangements, 2008 also called the National Health Arrangements. The document further provides structure for information flows during a health emergency, while also providing a governance structure for coordination, command and control.

Apart from having sophisticated legislation, Australia has also set up coordination entities such as the Australian Health Protection Committee, National Health Emergency Management Subcommittee, Communicable Diseases Network Australia and the Public Health Laboratory Network. They all respond to, and coordinate efforts during disease outbreaks such as the current outbreak caused by COVID-19. Furthermore, the Bio Security Act, 2005 clearly defines what a quarantine is and lays out for what purposes people can be quarantined along with punishments for those who fail to comply. The keystone of this administrative superstructure is transparency. The Department of Health, through the National Notifiable Diseases Surveillance System, provides information on notifiable diseases.

- **England**
  The Public Health (Control of Disease) Act of 1984 came into force with the aim of creating specific roles for different authorities in response to a pandemic.

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1093 https://apps.who.int/iris/bitstream/handle/10665/246107/9789241580496-eng.pdf;jsessionid=1B7812247E24A27EA3D72B261EC584BE?sequence=1
national health emergency. This Act provides for a clear chronological chain in which the primary, secondary and tertiary responders needs to operate when dealing with a health emergency. Responsibilities from the local level up till the national level are clearly defined in the Act. Not only does England have laws in place to deal with an outbreak of the magnitude of COVID-19, but it is updating these laws to adapt to current challenges.

A Coronavirus Bill was introduced on 23rd March 2020 in the House of Commons\(^1\), it is currently being debated in the House of Lords. The provisions include empowering the police to enforce isolation for those who are symptomatic, and to shut down ports. The Bill provides for a host of capacity-building measures for the National Health Service (NHS) such as return of retired staff, reduced paperwork for discharge of patients, and extra employment safeguards for volunteers to allow them to suspend their jobs for up to four weeks.

- The United States of America
  While the guiding US legislation is dated (The Public Health Services Act 1944\(^2\)), it is comprehensive enough to facilitate necessary action and creates an administrative framework through which any public health emergency can be channelled. It even foresees the need for supplemental personnel by creating a reserve corp. The law was last amended in December 2019. President Donald Trump has also invoked the Defence Production Act 1950\(^3\) to battle the pandemic.

**Conclusion**
The COVID-19 public health emergency provides the Union government a rare opportunity to update the country’s health laws; otherwise, this legislative and policy gap could soon prove to be India’s vulnerable point.

An Approach Paper on a new Public Health Act proposed by a Task Force\(^4\) put together by the government in 2012 had suggested that laws needed to be an integral part of a strong public health system. The paper contended that shortages in the public health system’s legal preparation found generally in relation to planning, coordination and communication, surveillance and protection of persons during a public health emergency, that needs to be addressed by the proposed new public health act.

When push comes to shove, India, with its bare-bones legislative structure, would find it hard to find an enabling legal framework that will allow an efficient lockdown of entire cities, the quarantining of people, the temporary closure of business, and the distribution of medicines. There is a subjective evidence of travellers who, upon returning from abroad, have been reported as unwell by their neighbours and consequently picked up by the police.

\(^{1100}\)https://commonslibrary.parliament.uk/research-briefings/cbp-8857/
\(^{1101}\)https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1403520/pdf/pubhealthrep00059-0006.pdf

www.supremoamicus.org
With little or no legal backing for the government’s actions, it has had to resort to the much-defamed and the worn-out Section 144 of the Indian Penal Code, curfews, and other draconian measures to limit the spread of COVID-19. One must bear in mind that other countries of the Commonwealth, that have analogous legal provisions in criminal law such as Section 144, are not compelled to invoke them to control the spread of an infectious diseases due to well-structured and sensitive contemporary legislation on public health situations.

This analysis of the gaps in the existing 1897 law along with Disaster Management Act, 2005, and the illustration of global best examples, make it clear that India is short of a legal architecture to effectively fight a global pandemic like COVID-19. Without an updated and comprehensive law on health emergencies, the state governments are resorting to the use of Section 144 of the Indian Penal Code and other draconian laws. Once the COVID-19 crisis abates, the country’s lawmakers should use this opportunity to repeal the colonial law and pave the way for a new one that can better address health emergencies that India might face in the future.

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THE DOWRY SYSTEM IN INDIA

By S. Laya
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ABSTRACT

The dowry system in India is very crucial part which plays an important role in death of many women's in the country. To overcome this the dowry system should be discussed and should be clarified. The dowry system in India will take place during the time of marriage where the bride family gives some gift or jewellery or immovable property to the bridegroom family. The dowry took place from the medieval period. By dowry system there are many violence against women which leads to the death of the women. Bride is treated very unpleasantly without care by the bridegroom and by his family for the dowry. This is illegal in the eyes of law in India.

Introduction:
In India marriages are made by traditional values and ethics, where the dowry system is one of it which later creating violence against women. There are many violence against women as rape, domestic violence, dowry system. The dowry system happens in all families. There is no rich or poor for the dowry. Mostly in many families both bride and bridegroom’s family have no bother about how good they are and how intellectual they are; they see only how much dowry is going to get for them. By these there is more violence after a few months or years of marriage. The women’s by these dowry systems are getting affected socially, economically and traditionally and there is no care for health by these types of harassment.

According to definition of the dowry under "section 2" of "Indian Dowry Prohibition Act 1961" it is clear that dowry is a property which a woman brings to her husband at the time of marriage and which also includes the land, properties, valuable securities given or agreed to be given directly or indirectly at the time of marriage.

2. History of Dowry System
The dowry system started at the time of the medieval period. At the time of marriages the bride's family gives kanyadanam for the bridegroom's family. Kanya means daughter and dhana means gift. The kanyadanam was followed by varadakshina (gift to the bridegroom at the time of marriage). At the time of ancient period the dowry system (giving gifts) was followed by the Brahmanic castes and bridewealth was restricted to the lower caste families and they are not allowed to give the dowries. These dowry system were not there in the vedic period. There was an increase of property rights for women in the ancient period of India. As this was followed slowly in all families in the society which was caused socially, economically and religiously this later led to the hyper cruelty in the society for women's and for her families by the bridegroom's family and they are not stopping the cruelty even at the time of marriages they also later continuing it after children birth. If the child born was a girl child then they show their cruelty towards the women on both the reasons of dowry and birth of girl child aspects. The dowry was later done with the secret when the dowry prohibition act 1961 was passed. Later the amendment of dowry prohibition act 1961 took place in 1984.

3. LAWS RELATED TO DOWRY SYSTEM:

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First the law related to the dowry system was Dowry Prohibition Act 1961 and this came into force on 1st July 1961. This act came into force for dowry harassment laws effectively prohibiting the demanding, giving and taking of dowry. Later Anti-Dowry Law has come into force to stop offences of cruelty by the husbands or from his relatives against his wife. New provisions were added to Indian ‘criminal law’ under section 498A of ‘Indian Penal Code’ and section 198A of ‘criminal procedural code’ in the year 1983. In 2005 the protection of women for domestic violence act was passed, this is added as the other layer of protection from dowry harassments.

- **THE DOWRY PROHIBITION ACT 1961.**

The dowry prohibition act 1961 combined the anti-dowry laws which were passed by certain states. There are many remedies for the dowry system such as compensation (penalties), punishments etc… The penalty for dowry prohibition act was given in the “section 3” of dowry prohibition act 1961 that is “If any person gives or takes or abscess giving or taking dowry”. and the section 4 of dowry prohibition act 1961 is “the penalty for the demand of dowry”. The punishments for this would be imprisonment for 5 years maximum and minimum of 2 years and not less than 6 months and fine of more than 15000 or the value of dowry received. Later here the punishments or penalty for giving or taking dowry is not applicable in the case where they are given at the time of marriage without any demand and by their willingness. Then later after this act came into force the dowry agreements were void ab initio (means to be treated as invalid from the outset.) The government of India has framed the maintenance of lists to bride and bridegroom rules,1985 in this there are several state level amendments to dowry prohibition act 1961.

- **ACCORDING TO THE CRIMINAL LAW THE PUNISHMENTS:**

Indian criminal law comprehensively amended dowry as a punishable offence. under “section 304” of “Indian Penal Code” 1860 which made a dowry death an offence with minimum imprisonment for seven (7) years and maximum of life time and under “section 113B” of “Indian evidence act 1872” for additional presumption for dowry death that woman had been undergone for cruelty in account of dowry death and these sections enabled conviction of many who are not caught by dowry act 1961. The abetment of suicide of “section 306” of Indian Penal Code is an offence within seven(7) years of marriage and “section 406 of IPC” is offence for criminal breach for trust and applies in the cases of recovery of dowry as it is beneficial for women and for her relatives. under “section 302 of IPC” is a murder for these the court allows the death penalty of the perpetrators of the offence made. The “section 498A of Indian Penal Code” describes the protection of women from cruelty and harassment of dowry; later this was constitutionally before the supreme court of India on grounds of abuse. There are many laws to stop the dowry harassment and crimes against women which is taking charge against the offenders.

- **DOMESTIC VIOLENCE ACT (2005)**

The domestic violence act was passed in order to provide the civil law remedy for the protection of women from domestic violence in India. This domestic violence act includes all types of physical, verbal,
emotional, economic and sexual abuse etc......and the section 3 of dowry voilance act tells that all forms of harassment, injury and harms a woman to meet an unlawful demand for dowry.

Remedies in Dowry violence Act includes:
1. Residence orders
2. Custody orders
3. Protection orders
4. Compensation orders

DEATHS:
There are many deaths of womens in society by the dowry system. As there are many laws amended in India but there is no total hundred percent or minimum percent of change in the society in the deaths of women in aspects of dowry system. As we see many deaths, that as we saw in 2012 we see 8,233 deaths all over India and in 2013 there were 8,083 deaths and there is no stop of the deaths. There are many types of deaths by women in according to the dowry, the deaths may be in the type of suicide or murder by bridegroom family or etc...... As we see the dowry deaths are more in UP and Bihar in overall India. Actually there are many child marriages in India even in this modern period also, in some rural areas as there are many girl children and womens are dead due to dowry harassment even at the time of child age for many girls. There are many girl families nowadays who are making to educate the girl as everyone has the right to education as per the law. In this modern period every parents are making their girl child to educate in equal to the boy child as the parents are even having financial problems. As previously the families used to not educate their children and used to save that money for giving the dowry. But now they are not saving, they are making their child educate because nowadays education is becoming more important for every person to survive. There should be a minimum of education to every person in the society. These families cannot satisfy the orders of the bridegroom's families and by this the bridegroom family harassed the women for their orders which are not satisfied and which leads to death of women. There are many women who are attempting suicides in the modern period also this is happening only because of these dowry systems and cruel behaviour of bridegroom and there is no change in the mindsets of many people and becoming more rude against women. As though there are many women who harass other women for dowry on behalf of the bridegroom. As many of them even now think that if the girl brought more money or property then it is proud for the bridegroom family and even for some girls families also by these small families in society are facing problems of this dowry harassment. The way to overcome these dowries is to bring the change in the mindsets of the society in their view towards the dowry system. The change only comes when every person in the society comes to know that dowry is illegal and that it makes us lose our women in the society and the people should think as they should not take the dowry and should not give the dowry .The people change only when it comes to the knowledge about the problems of this dowry system, no one can change the people in society by the strict orders and laws . The strict orders and laws also should be included with, motivating people about the problems due to the dowry system in the society. Then only we can expect justice for every woman in the society . .

SOME REFERENCE CASE LAWS

- Sunil Kumar Sharma v. Union of India
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Gopal Reddy vs. State Of Andhra Pradesh
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Bachni Devi And Anr vs. State Of Haryana
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SHAREHOLDER DEMOCRACY

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Abstract

Corporate governance is a much-discussed concept in India. There are significant changes incorporated in the Companies Act, 2013, to maintain governance in the company. However, in the company's governance, the concept of corporate democracy is always sidelined. Unless enterprise democracy is inculcated, corporate governance can not complete. It is the company's responsibility to provide all necessary information and to encourage shareholder participation in the company's affairs. The management does not, however, aim to maintain the democratic culture in the Company. Shareholders constitute the essence of any public company.

However, their role is limited merely to obtain the monetary benefit. Management is never encouraging their participation in the company's administration. The Companies Act, 2013, focuses more on corporate governance but less on enterprise democracy. Excessive executive powers and limited shareholder rights are questionable factors under the new Act. Directors are fiduciary agents and managers of the company. However, they could not enjoy excessive powers in a public company. Shareholder's checks and balance is a remedial measure to maintain corporate governance in any public company. A legal foundation is fundamental to encourage corporate democracy in the company.

Introduction

Shareholders Democracy, which is theoretically part of corporate democracy, means a company is under its shareholders' control. However, the shareholders' involvement in the corporation's work is the prime issue to be determined. Shareholders are one of the vital components in the corporate scenario, or should I say the supreme ones. In theory, they are empowered to influence and even frame major corporate decisions and are the managers of their company. Shareholders can exercise control over the Company in several ways. The one way to exert control over the decision-making process incorporate is by utilizing their rights by virtue of his shareholding.

An ordinary share usually grants on its holder the right to cast a vote on all matters, placed in the shareholders meeting except few provisions. This control mechanism is sometimes referred to as control in the form of 'voice' and can thus explore opportunities by raising their voices. Another way to control rests on the market forces. The Shareholders can express their content by reacting through market forces by way of selling or buying the shares. In contrast, the management of the Company is responsible for the involvement of shareholders in the decision making process in order to create a "check and balance" system. The informed participant can actively participate in the company's affairs, contribute effectively in the discussions, and help the management in decisions and the participation of the shareholders has been increased by way of proxies. However, after everything, if a resolution has been passed by the shareholders of a company at a general meeting which has been attended by say, hardly 1% of the total number of shareholders holding say 3% of the voting power, it cannot be said that the
shareholders’ democracy has been implemented in true spirit although there is no violation of the law.

Indian Scenario

The J.J Irani Committee constituted in 2004 to have the Companies Act, 1956 replaced by a lean and straightforward version, recommended various effective measures be initiated for protecting the interests of stakeholders and investors, including small investors, through legal basis for sound corporate governance practices. An underlying theme of the recommendations laid stress on the concept of shareholders' democracy. Unfortunately, in actual practice, shareholders' democracy means total control by the majority to the virtual exclusion of the minority, hence need of adequate checks and balances to ensure that unscrupulous promoters do not misuse the system is a must. Shareholder democracy means precisely the right to speak, communicate with the core shareholders, and to learn about what is going on in the company. Shareholder democracy plays an essential role in stimulating the Board of Directors, raising the company's performance, and ensuring a greater interest in industrial progress. However, it is the nude fact that only the majority attend such meetings as only their voice is heard. Except for only a few rights, there is minimal participation of shareholders in Toto. Moreover, Board governance also benefits shareholders by performing minor decision-making functions. They are responsible for promoting more efficient and informed business decision-making. It is difficult and expensive to arrange for thousands of dispersed shareholders to express their often-differing views on the best way to run the firm. Nor, given the rational apathy most shareholders bring to the table, should we expect shareholder governance to produce particularly good results. Accordingly, most experts agree that board governance offers essential advantages in terms of efficient and informed decision-making

Shareholders Democracy under Corporate Governance

This chapter explains the shareholder democracy as a model of corporate governance. It begins by analyzing the areas of company decision-making that are generally assigned to shareholders and considering whether it is possible to increase corporate efficiency by expanding the number of issues that members have the last word about.

The legal rights of shareholders to participate in corporate governance are often referred to as "corporate democracy." In this dynamic period, the government had been the regulator of corporations. It is unjust to legitimize the power of "shareholder democracy." Settlements in the power balance between shareholders and management try to achieve corporate governance in harmony with their self-professed governance aspirations. However, those aspirations are barely "democratic." Corporate democracy is the cornerstone of keeping company transparency. The fundamental issue of the shareholders participating in Corporate Governance is the disclosure and information flow to shareholders. It is, therefore, about sharing information with the shareholders and also about shareholders' participation in corporate administration. However, it does not mean that shareholders are an alternative to managing the dissolving role of corporate directors. A fundamental principle is that directors are not shareholders who manage the firm. However, the failure of corporate
governance makes directors liable to respond to shareholders. This essence of checks and balance is corporate democracy, where shareholders have such powers to question the management. A company with thousands of shareholders should run like democracies. Corporate democracy is a vital element of corporate governance. It is seen as stakeholder participation and contribution to corporate governance. In any public company, shareholders are a large part of the stakeholders. Shareholders can advance corporate democracy by giving their votes and electing directors to regulate the company's affairs. They can make a contribution by expressing their views on the affairs of the company. Shareholders are one of the vital parts of the company. They are statutorily entitled to influence and even frame major corporate decisions.

Like in any other Institutional Framework or system of governance in the Corporations also a system of democracy exits that follows the same principles but with less vigor. The directors in corporations are accountable to the shareholders. The shareholders, on the other hand, are required to participate in the decision-making process in order to create a 'check and balance' approach, and there should be transparency in all the company's actions, whether the company or the shareholders take them. Shareholders Democracy which is part of corporate democracy means a company is under shareholder control. In this, every shareholder has an equal opportunity to elect and constitute a board of directors to manage and conduct the affairs of the company. They act under as agents and trustees for the company in a fiduciary capacity. As such, their meaningful participation in company meetings is imperative.

Within the Indian Companies Act, 2013, there are various methods available for shareholders to participate in corporate governance. In each of these methods, both the actual procedures as well as the problems arising which obfust or increase the costs of shareholder participation were also discussed. The methods available for shareholders to take part in the Indian Companies Act, 2013, corporate governance are as follows:

1. Appointment of Directors and Power of Removal of Directors
3. General Meeting

Shareholder ‘Ownership’

The first source is the famous but misleading metaphor that describes shareholders as “owners” of corporations. As a legal matter, the claim that shareholders “own” the corporation is obviously incorrect. Corporations are independent legal entities that own themselves; shareholders own only security, called “stock,” with minimal legal rights.

Nevertheless, the ownership metaphor exerts a powerful influence on the way many people think about corporate governance. After all, if shareholders “own” corporations, should they not also control them?

The first is the casual assumption, on the principle of “agency” that shareholders are the “principals” in public corporations and that directors are shareholders’ “agents.” However, as corporate law experts have pointed out, the agency metaphor misstates the real legal status of shareholders and
directors. At law, a principal has a right to control her agent. Directors are not agents, but fiduciaries largely insulated from shareholders’ control, and they owe duties not just to shareholders but also to the firm as a whole.

Thus, none of the phrases commonly used to describe shareholders’ relationship to the corporation — whether as “owners,” or as “principals,” — is factually correct!

Conclusion

It is essential to address precisely what "democracy" means by its proponents. Democracy is a fluid concept and does not mean the same thing to everyone. In the corporate governance team production model, the role of the board of directors is not merely to act as the shareholders' agent to maximize their wealth but to manage the firm-specific inputs of all the company's stakeholders to coordinate their efforts and maximize productivity. Corporate governance is also about the participation and contribution of shareholders in the governance of the company. However, this concept of corporate democracy is enshrined under the statute. Corporate governance is not only about achieving the financial goals of the company; such progress can never be the economic development of corporations.

Indian Corporate laws have less focus on corporate democracy. The Companies Act, 2013, moreover discussed corporate governance and not democracy. The aim of the legislature gets fulfilled when shareholders are free to exercise their rights democratically. The Company’s management is responsible for involving shareholders in the decision-making process in order to create a system of "check and balance." This will ensure transparency in all acts performed by the firm or the shareholders. Informed participants shall actively participate in the company's affairs. They should contribute to decision making and help the management in decision making. To effectively create these checks and balances in different board committees' nomination of shareholders is very important. So the Nominated Director of a shareholder is very essential in the composition of the Stakeholders Relation Committee and Audit Committee. The Nomination and Remuneration Committee shall ask intent for the Nominated director of shareholders for their consideration.

It is undoubtedly not an Indian-specific phenomenon, but it is and has always been a universal issue. As is evident from the above, the rule of the majority is the hallmark of democracy. This applies equally to Corporate Democracy. However, the majority rule is not free from abuse or misuse. It is more vulnerable to such misuse because it calculates the number of shares held by a shareholder, and not the number of individuals involved. Today we need more than ever corporate activism; we need them to argue for unwieldy corporate managers. Indian shareholders' attitude is very passive in the firm's governance. The very little crowd is active in understanding and shape companies' policies. The most crowd is moreover desired to get financial benefits only. They never think that they, too, are entitled to administrative powers. The management takes undue advantage of a real scenario like this. The board also sometimes considers shareholder watchfulness a threat to their position. However, shareholders have a role not in questioning management but in maintaining corporate governance. Corporate democracy is the very essence of corporate governance. In order to create the
company's economic development, it needs more attention to statutes and addresses per company. The companies must fulfill their responsibilities towards their shareholders as a whole and towards society as a whole.

*****
INDIA THE INTERNATIONAL ARBITRATION HUB IN THE ERA OF THIRD-PARTY FINANCING

By Sanchi Chiripal, Sulagna Goswami and Tushti Aneja
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Concept of Third-Party Financing

Arbitration at international level has gained wide-scale acceptance for its flexibility, timely settlement and also offers an advantage of judicial neutrality. While this type of alternative dispute resolution ensures speedier results, the higher operation cost cannot be denied. Exorbitant litigation costs often cause hindrance in the way of getting justice.

The concept of the ‘third-party’ is a legal fact known to all yet is still hidden under the mask of secrecy. Third-party financing is the outcome of the development in the International Arbitration sector. However, it is still a concept yet to be entangled and considered admissible regulation in the ambit of national arbitration laws. The concept of Third-Party financing accelerates the number of specific virtuous and procedural issues both in International commercial and investment arbitration. These issues comprise of investor’s relationship with parties and counsels in governing the dispute, the appropriation of costs and the security for costs, clarity and the disclosure of the funding arrangements and lastly the arbitrator’s conflict of interest.

Third-Party financing is a way out to reduce or knock out the potential risk associated with the destructive outcomes of litigation. Third-party financing takes place when the third party that is the party which is not involved or an external party agrees to pay one’s legal fees which is usually a claimant. Such legal fees mostly include the of fees of the lawyer, experts, outside counsel or any other cost which is incurred in civil litigation in conformity with the stipulated agreement and postulated budget. However, the funder shall undertake the risk of losing it all as the Third-Party funding business model is non-recourse and the funder may lose all its investment if the funded party’s claim does not prevail. Further, if a situation so arises where the host country issues regulation which bars the exercise of the industry of Third-Party funding, forcing it to shut down and incur losses, the funder will be entitled to bring a claim against the host country in suitable forums and hold it liable for the losses that it has incurred.

The problems that arise concerning Third-Party financing is the economic interest and various complications which may arise due to the unforeseen circumstances in the future and lack of exploration in this domain. In simple words the concept of third party financing means the fund which is provided by the natural or a legal person who is not the party of the dispute and that person enters into an agreement with the disputed party to finance the same with regards to all the cost of proceedings in return of an agreed percentage of the damages awarded to the funded party. However, if the funded party fails and is not awarded any damages the funder will not receive any payment for the financial support so provided. The percentage of damages so paid to the funder is an already decided and agreed amount and falls outside the scope of what must be paid to the lawyers and any other litigation expenses so incurred.

However, Third-Party financing has gained wide-scale acceptance throughout the globe.
for its flexibility and timely disposal of proceedings. The main reason behind the parties opting for International arbitration is that the parties are not from the same country and are unaware of local laws of the state. Third-party funders provide access to justice for those who cannot afford due to financial incompetence, unable to bear the costs of expensive and unpredictable litigation. In this situation for a claimant to pursue meritorious proceedings, third-party funding is the only option left. Third-party funding helps the company to invest the money in other projects such that money does not get stuck in the litigation process, rather it is used to expand the company or invest in other aspects. But before making such a huge commitment funder conduct due diligence and the legal analysis on the merits of the pursuant case. This reduces the chances of losses on the part of the funders and ensures a surety of returns. Even though funders are generally prohibited from taking undue control in the arbitration proceedings, the funded party may to a certain extent lose its autonomous power to the funding party, while considering the percentage of damages as the funder may reserve the right to approval of the settlement.

Champerty and Third-Party Financing

The doctrine of champerty was derived in ancient Greek and Roman statutory system which eventually emerged in the common-law system of England during primitive times and spread to the other territories largely through the British Empire. Some of the nations preferred the modern laws which aimed at preventing frivolous and forged claims. Others have rehabilitated the doctrine of champerty in recent years and used them as a glass through which they weigh the importance and legality of the Third-Party financing agreements. Champerty is the maintenance that is provided as financial assistance to the party of the suit to receive a share of money recovered if the party wins. It would often lead in excessive exhilaration of litigation cost and creation of forged claims which was then used as a shield against the extortion and abuse of indigent client by upscale Third-Party funders. It was also considered to be the reason for endangering the inherent integrity of the judicial process which has always been deemed as a private matter restricted between the judge and the two parties. The rationale that ‘all men are equal before the law’ lead to the restrictions in the concept of champerty and maintenance to stop the unscrupulous practice of targeting the weak and demanding for frivolous and vexatious claims often leaving the claimant at a poor bargain.

However Third-Party financing arrangements are presently considered as prima facie permissible and is even deemed to be plausible for promoting easy access to justice. Such fundings are enforceable unless the integrity is not tarnished by the excessive control and over-involvement of the funder in the litigation process. The integrity of the litigation at the end depends upon the extent of influence exercised by the funder. On the face of it, the mere application of champerty and maintenance would not automatically make the Third-Party funding arrangement unenforceable just because some damages are ‘up for grabs.’

To make the third-party agreements enforceable and to ensure that it does not fall in the ambit of champerty, certain necessary measures are to be taken to avoid any kind of frauds and to keep its legality intact. Funders under the agreement should
not exercise undue influence over the funded party as it may lead to losing the autonomous position of the claimant in settlement of recovery. Further, the funded party should be the actual party to the proceeding and not act to be an ostentatious party. Even though funders perform due diligence and legal analysis of the case, the decision and strategies should be a matter of concern between the attorney and the client and not the funder. The communication between the client and attorney should be direct and not routed through the funder. In case of a dispute stemming between the client and the funding party, the attorney should have an ethical obligation to choose the client over the funder. The funder must not tamper with the shreds of evidence and must not meddle in the dispute in any such manner which might raise a question on the legality of the entire litigating process and its funding arrangements.

Third-Party Financing in India

With Third-Party financing gaining increasing global significance in providing justice to parties, the time has come for India to open its gate for financing International Commercial Arbitration as well. The pendulum of judicial opinion in India has remained uniform about the agreement between the claimant and the funder. Third-Party funding agreements would be tested on the foundation of equity, reasonableness and legality of the object behind the contracts and unconscionable terms.

Third-Party financing agreements merely on the face of it cannot be taken as an action towards the welfare of the public. Acquisition of interest in good faith is not enough to ensure that the funders have no ill faith and no such action will be taken such that it will make the entire arrangement unenforceable in the eyes of law. However, if the construction of the funding agreement is such that it is exorbitant or is affected by the undue influence of the funder, it is declared unenforceable as it offends the principle of public policy.

Third-party financing has been accepted in pro-arbitration jurisdiction by the introduction of new legislation or by amending the already existing regulations. Though it is still invalid in some territories, funders do face recovery issues which often discourages them to enter into such agreements.

The legality of Third-party financing litigation in India can be traced under the Civil Code of Procedure. High Courts of various states such as Gujarat, Maharashtra, Madhya Pradesh and Uttar Pradesh have amended Order XXV of the Code of Civil Procedure to cover the cases where the plaintiff is financed by a third-party and he agrees to provide for the security within a prescribed time limit for all the litigation cost which are likely to be incurred in the litigation process. However, this financing is available only for indigent parties and not for financially equipped parties.

A favourable report by Srikrishna committee signalled that it is time for India to formally consider permitting Third-Party financing in International Arbitration. The advantage of Third-Party financing cannot be refuted in International Arbitration as the dispute resolution tends to be heavy-costed. Currently, there is a vital absence of regulatory framework, even Arbitration and Conciliation act 1996 does not mention anything about Third-Party funding.
The validity of the Third-party funding agreement depends upon the Indian Contract Act, 1872. As per Section 23, of the act, it provides that if the object or consideration of the agreement is unlawful and the court regards it immoral or opposed to public policy then such agreements are void. The Supreme Court in the ONGC Pipes Case observed 'what is public policy or public interest...has varied from time to time.' In the absence of express regulations on the doctrine of champerty and maintenance, the focus objection of such agreements remains that it should not defy public policy. Section 70 of the Indian Contract Act states that where a non-gratuitous act by a person (third-party) benefits another person, the person receiving the benefit is bound to do good or compensate the person engaging in the non-gratuitous act. The Supreme Court observed that Section 70 will not apply to subsisting contracts and if pure funding is done then the act by the third party will become gratuitous.

The Supreme Court held in G, A Senior Advocate that the contract of champerty in which returns are contingent on the success of the case is not illegal per se, except if the other party is an advocate it is illegal. There has been no case as on date to discuss the validity of the award which has been obtained by the Third-Party funding. A recent matter of Execution Petition is filed before Hyderabad High Court, where the respondent has sought to oppose the execution of the arbitral award made by the London seat of arbitration. One of the grounds on which it has been challenged is that the petitioners have entered into the third-party financing agreement and the agreement is of the champertous nature which is against the public policy of the country. The matter is sub-judice before the court. The decision will thereof give clarity of legality of the third-party funding agreements and the execution thereof.

If a party to an arbitration proceeding is being funded by a Third-Party, the seat being in India or if the funder is in India the rules of Foreign Exchange Management Act, 1999 (FEMA) would be attracted. FEMA does not explicitly mention Third-Party funding. It classifies all the transaction of foreign exchange and/or non-resident into two categories- current and capital amount transactions. The current account transactions include ‘payment due as net income from investments’ while third-party financing can be assumed to be ‘investment’. Capital account transactions include ‘borrowing or lending by whatever name called’. Thus, in the absence of legislative clarification, a single foreign funder could end up attracting a large number of FEMA regulations making Third-Party financing both burdensome and uncertain.

The Law Commission of India has an exclusive place in the Indian legislative system. It is an advisory committee formed under the Government of India and is empowered to recommend legislative reforms. A mandate so passed after due deliberation by the Law Commission on the matters of Third-Party financing by following the Indian perspective is necessary for the development of Third-Party funding in India. Further amendments should be made in the Arbitration and Conciliation Act 1996, passing special legislation and to provide room for such Third-Party funding so that least amount of discrepancies and questions arise regarding this financial arrangement. An initiation of Law Commission with public consultation regarding the registration of Third-Party funders, transparency and disclosure of the agreements, duties and services of the
funders would aid in spreading awareness about third-party financing.

**Third-Party funding regulations in other prominent countries**

Third-Party Funding was prohibited in Singapore until 10th January 2017, and funding of state court litigation is still prohibited. The act passed by the Singapore Parliament, Civil Law (Amendment) Act, permits Third-Party funding for international arbitration and related court proceedings with certain conditions. With the addition of the legislation in Singapore, Investment Arbitration Rules of the Singapore International Arbitration Centre (SIAC) 2017, permits the arbitration tribunals to order for the disclosure of the existing funding agreements, the identity of the third-party funder, interests and involvement of the third-party funders in the outcome of the case. Besides of the guidelines provided by SIAC, it also issued a note on the standards of arbitration practice and conduct providing arbitrators with guidance for impartiality, cost, disclosure and independence.

Third-party funding was a previously prohibited concept in International arbitrations in Hong Kong. It approved the Third-party funding in arbitration through the adoption of Arbitration and Mediation Legislation (Third-Party Funding) (Amendment Bill) 2017. The China International Economic and Trade Arbitration Commission Hong Kong Arbitration Centre (CIETAC) released their guideline in 2017 regarding the Third-Party funding in International arbitration. They carved out principles and guidelines for the arbitrators regarding the code and conduct to be followed and the observations to be made in respect of arbitration. Before the amendment, the laws were based on the common law doctrine of champerty and maintenance. The new legislation not only allows Third-Party funding but also makes it mandatory for the claimants to disclose the existence of third-party funders and their respective identity.

Over recent years there has been a surge in the Third-Party financing disputes throughout the United Kingdom after the abolition of the doctrine of maintenance and champerty. Large corporates consider Third-Party funding a major deliberation while entering a complex court action in arbitration in the UK. Third-party Financing is used as a pathway to justice with the full support of judiciary as well as legislature. The legislature has not specifically drafted any legislation to regulate Third-Party financing but Association of Legal Funders (ALF), has been appointed to self-regulate litigation funding in England and Wales. The ALF has designed the code of conduct to be followed for the Third-Party funding disputes and the procedure of complaints made thereof. Currently, there are little or no regulations for international arbitration in the UK but the code that applies to arbitration is silent about international disputes.

The United States of America is the largest litigation market has developed a major Third-Party financing base. Third-party financing extends to both domestic and international markets. Even though with the wide acceptance, regulatory work remains unclear. Despite lack of regulatory framework in arbitration, it has gained majority support in the favour of Third-Party financing in International Arbitration.

**Conclusion**
Regulations supporting Third-Party financing in International Commercial Arbitration would be a step towards achieving public policy objective. It will pave the way for improvement in case management, effective representation and easy access to justice. However, lack of legal mechanism and regulatory framework has prevented the funders to make an entry in the Indian market. The recent amendments in Hong Kong and Singapore regarding Third-Party financing shows that it is high time that our country to take the edge of rejection of champerty to make Third-Party funding a viable source of financing which will in return make India the hub of International Commercial Arbitration.

To nurture a market for third-party funding, India should adopt the vision of Hong Kong and Singapore’s research by creating guidelines for the funders. However, India should also consider these issues with both the procedural as well as the ethical significance such as confidentiality, costs, disclosure of the funding agreement, termination of funding etc. Establishment of a centralized data bank will applaud the transparency and voluntary disclosures by the funders. In addition to the model of Singapore, India can also draw its vision from the UK amendment ordinance, where the conformity of disclosure will not be mandatory but the evidence of noncompliance would be admissible and can be taken in account by the courts and tribunals for determining the liability.

The rise in the International Arbitration claims finance with specialised funds has led to this inchoate industry being hyped as ‘the biggest and the most influential trend in civil justice’. Therefore, the present time is ripe for India to indisputably pave way for Third-Party financing, a measure that is certain to benefit the citizens of India as well as its reputation in the global market of International Arbitration. It is only after this we can make India a preferred International Arbitration seat and would be able to “solve in India”.

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COVID-19: LEGAL DRAWBACKS & CHANGES SEEN ACROSS INDIA

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ABSTRACT

The Covid-19 virus has proven to be one of the most deadly nightmares that the human race could have imagined. It has affected the world at large and does not discriminate between rich and poor, powerful and the meek, the good and the bad. It has caught everyone off-guard and clutches upon the life of individuals. As of now there are 2 million cases reported and we are waiting for the tables to turn on us. With this we see the changes that have occurred in society and affected us as a society at large. This pandemic has seen people perform their work in such a manner that they couldn’t have imagined 6 months ago. We critically try to examine and discuss the significant changes that have occurred in the normal chain of human living. At the first we discuss the issue of contracts that are in motion and now cannot be put in action due to the circumstances vying around us. The term ‘Force majeure’ is discussed to it’s depth taking into consideration the contemporary issue of coronavirus. Further we have discussed the impact on the constitution, the violation of rights of people and how in these times they are rendered null and void. We also discuss the critical fragment of society i.e. judiciary the functioning of which is very important to avoid further conflicts. Lastly we discuss the public health and what measures the government and we as a society should take to avoid contact and curb this deadly virus.

Keywords: Coronavirus, Force Majeure, Constitution, Courts, Public Health.

INTRODUCTION

The mighty force of nature has always proved it’s dominance over mankind through varied instances of natural calamities disrupting mankind. One such instance was faced by the Wuhan district of China which witnessed an existential crisis with the introduction of the incorrigible, novel coronavirus (COVID-19) around the world. The virus had reportedly taken thousands of lives and is spreading like a wildfire in the adjacent countries as well. With the hue and cry arising out of this entire situation, all business sectors are severely affected. Especially for a country like India, where most of the trade target is fulfilled from Chinese vendors, the economic growth is suffering.

The macabre of the novel coronavirus was present on all continents with the exception of Antarctica, including as many as 112 countries and territories in the world and foreign transportation (Diamond Princess 'ship harbouring Yokohama, Japan). There are about 10,00,000 new cases of this new virus and 90,000 deaths reported, and the number of cases is continuing to rise in many countries. On Monday 9 March 2020, the WHO reported "there's been a real threat from the coronavirus pandemic" and "pandemic spread." The WHO defines a pandemic as the “worldwide spread of a new disease,” and the determination is made based on the geographical spread of the disease, the severity of the illness it causes, and its effects on society.

The outbreak of COVID-19 was in reality described by the WHO as a 'public health emergency' on 30 January 2020 that gave rise to emergencies by governments around the world. Depending on how much effect such emergency steps are having on the nations, they vary from the enforcement of travel bans, refusal of entry into ports, stringent inspection, injection of quarantine
suspects and patients to the isolation of infected individuals to avoid the virus from spread. These emergency measures have disrupted international trade with a complete slowdown in distribution channels of export and import, hindrance in access to cheap labour and manpower from other countries and shut down of workplaces among other such drastic measures.

In this midst, COVID-19 is continuing to threat all human beings, regardless of age, sex, lifestyle, ethnic background, socio-economic status and nationality. It is causing suffering and death throughout the world. The humanity never expected COVID-19 to emerge. Outbreaks are a fact of life and the world remains vulnerable. Today we do not know when COVID-19 will end, but all that we know at present is that COVID-19 has taken a terrible toll, both on human life and on the global economy.

In the outbreak scaling of this measure, governments across the world are working expeditiously. In outbreaks of viruses with communicable properties, response time in communicating information and alerting the public and the world about the dangers of the virus is of the essence. Even a delay of a month can have a huge impact, in the absence of proper information, crowded public places act as a hub for transmission.

Force Majeure

The concept of Force Majeure has originated from French civil law and is widely applied over several common law jurisdictions. The said clauses is a provision in an agreement which allows both the parties for non-performance of their contractual duties due to unavoidable circumstances and situations beyond their control thereby reliving the parties from their respective liabilities arising in the course of non-performance.

Though the above clause allows for rescue in chaotic cases like the present situation, its applicability depends on the specific use of words. For example, for some contracts/agreements, the force majeure clause is quite extensive and it elaborately covers the circumstances describing exact state of affairs where the said clause can be invoked. In this regard, general terms like epidemic, government military actions, national or regional emergency are commonly used. With the use of the said terms, invoking the force majeure clause becomes subject to the exact situations are mention. However, in circumstances where a force majeure events are not clearly elucidated or the force majeure clause is present only in the form of a boilerplate clause, the enforcement of the same becomes a matter of varied interpretation. In these circumstances, the applicability of the clause is best determined by judicial interpretation.

Ordinarily such disruption, particularly in regarding to manufacturing/service/supply contracts may make the contract commercially unviable or in other circumstances frustrate them on account of impossibility of performance. In the former case contracts may become commercially unviable as they can be stretched over a period of time and leading from the disruptions created by the government measures may have a domino effect leading to such contracts becoming commercially unviable. Such circumstances are not contemplated under the contracts and may result in a party suffering on account of such disruption without any recourse in law or contract. However, in the latter case, the contract could be considered to be frustrated on account of impossibility of performance. The remedy in such
circumstances is often both in law and contract. More often than not, commercial contracts contemplate situations of ‘Force majeure’ which would absolve the parties of the obligations under the contracts without assuming any further liability. In case of existence of such Force majeure clause in a commercial contract, it is imperative to refer to the definition of the Force Majeure events contemplated therein to come to a conclusion if the Covid-19 disruptions would be covered by such clause. In the situations wherein the Force Majeure clause is not sufficiently wide to cover event such as Covid-19 or there is non-existence of Force Majeure Clause, the Indian Contract Act,1872 would come to the rescue of parties.

In case of existence of a Force majeure clause, it is stated that such clause may differ from one contract to another. A pandemic like the COVID-19 may fall within the category of ‘Act of God’ or ‘other circumstance which hinders the performance of the contract’ through ejusdem generis. Some definitions of Force Majeure may expressly include disease or epidemic. 1104 To illustrate, the Standard Technical and Commercial interconnection Agreements[CAS] prescribed by the Telecom Regulatory Authority of India in the Telecommunication (Broadcasting and Cable Service) Interconnection Regulation, 2004, includes any war, civil commotion, strike, Satellite Jamming, Satellite Feature, lockout, accident, epidemic or any other event of any nature or kind whatsoever beyond the control of the parties in its definition of Force Majeure. Furthermore, invocation of such clause may be subject to other conditions. Like the Bulk Power Transmission Agreements in India may require written notice of Force Majeure within a reasonable time for a party to avoid paying transmission charges for the period of force majeure when it cannot use the transmission line. 1105

Recently, on February 19, 2020, the Government of India clarified that the spread of coronavirus in China or any other country will be covered in the Force Measure clause of the Manual for Procurement of Goods, 2017. The said manual defines Force Majeure as extraordinary events or circumstances beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes.

Further, in the absence of a Force Majeure clause, or in case where one which is not sufficiently wide to cover events such a Covid-19, the parties to the contract may take recourse to Section 56 of the Indian Contract Act. The said provision is based on the English ‘doctrine of frustration’. Section 56 provides that an agreement to do an impossible act is void. It further clarifies that an event which after the contract is made and makes the contract impossible to perform will also be void. Thus, the circumstance of Covid-19, which may not have been contemplated by the parties at the time of entering into the contract, would also stand covered and parties would be discharged from performance of the contract by operation of law.

The doctrine of frustration would also apply to those contracts which were entered into after the outbreak, unless otherwise agreed to, when there were some uncertainties which subsequently made the contract impossible or unlawful as the pandemic.

1104 https://doe.gov.in/sites/default/files/Force%20Majeure%20Clause%20-FMC.pdf

1105 Himachal Sorang Power Ltd v Central Electricity Regulatory Commission & Ors, SCC 2010 SC 603.
progressed. Performance is considered to become impossible when change of circumstance totally upsets the very foundation upon which the parties entered their agreement. It is a settled principal of law, however, that unprofitability mere difficulties or rise in prices would not be considered as impossibility.

The pandemic has given rise to a unprecedented situation which is changing daily and in some aspects, on an hourly basis. The above analysis is based on the restrictions at the time of writing the article and may require significant modifications as the State’s response progressors.

**JUDICIAL INTERPRETATION**

It is necessary to understand the criterion for impossible in the present circumstances, that is, whether the widespread emergence and effects of the virus would be an impossible challenge or whether it would be regarded merely as a problem. When reviewing this threshold, it is important that we not lose sight of the rule that courts have no general power to exclude a party simply because its success has been costly because of unexpected circumstances. For instance in the landmark case of Tsakiroglou & Co Ltd v Noblee Thorl, it was observed that mere closure of the Suez Canal, given that there existed an alternative route to transport goods (through the Cape of Good Hope), did not qualify as a condition for the frustration of contracts on the sole ground that the alternative route was longer than the original route.

In the landmark decision of Satyabrata v Mugneeram, the Supreme Court discussed various theories that have been propounded pertaining to the jurisdical premise of the doctrine of frustration yet the essential idea upon which the doctrine is based is that of the impossibility of performance of the contract. It was observed that Section 56 of the Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties derogating from the general idea of party autonomy that is central to contracts, globally today. However, in terms of determining the threshold for the applicability of this doctrine, it was observed that Section 56 of the Act allowed for discharge of obligations on grounds of impossibility if “an untoward event or change of circumstance totally upsets the very foundation upon which the parties entered their agreement”.

Subsequently, however, the lines between frustration and impossibility seem to have been blurred wherein, in its decision in Energy Watchdog v Central Electricity Regulatory Commission and Anr, the Supreme Court held that “in so far as a force majeure event occurs de hors the contract, it is dealt with by a rule of positive law under section 56 of the Contract. The performance of an act may not be literally impossible, but it may be impracticable and useless from the point of view of the object and purposes of the parties ”. However, it remains undisputed that when a contract contains a force majeure clause which on construction by the court is held attracted to the facts of the case, Section 56 of the Act can have no application.

At the outset, one of the fundamental premises of contract law is the principle of “pacta sunt servanda”, which means “agreements must be kept”. Having said

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1106 Tsakiroglou & Co Ltd v Noblee Thorl GmbH, 2 WLR 633.
1107 Satyabrata Ghose v Mugneeram Bangur, AIR 1954 SC 44.
1108 The Indian Contract Act S.56.
1109 Energy Watchdog v Central Electricity Regulatory Commission and Anr, SCC 2017 SC 80
this, accounting for exceptional circumstances that may render a party unable to honour it part of the obligations, a force majeure clause forms a boilerplate clause in agreements across the world today and aims at absolving one or both parties from liability to perform contract obligations when the inability to perform is due to some factor beyond the parties control.

The courts of India have time and again identified force majeure as a relevant ground for non-fulfilment or frustration of contract. In Narasu Pictures Circuit v P.S.V Iyer and Ors, the court had observed that “Where it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some specified thing without which the contract cannot be fulfilled will continue to exist or that a future event which forms the foundation of the contract will take place, the contract, though in terms absolute, is to be construed as being subject to an implied condition that if before breach, performance becomes impossible without default of either party and owing to circumstances which were not contemplated when the contract was made, the parties are to be excused from further performance”.

Under present situation of coronavirus outbreak in several countries, vendors, airline companies, shipment companies and in certain circumstances even consumers are like most likely to invoke the force majeure clause. It is evident that force majeure clause will result in monetary losses. Considering the example of airline companies in these circumstances, it can be anticipated that pre-booked tickets of consumers can be abruptly cancelled and refund may not be processed on force majeure.

Constitutional Impact

The Coronavirus poses a number of dynamic policy issues for lawmakers, government and health professionals. Over the years, Article 21 has read about the right to health and, if the right is anything to say, a certain number of interventions will be needed to protect the population during a pandemic.

But here we talk about another matter. As scientists have said, a good "social distancing" is the most successful way of combating the spread of the pandemic. As the coronavirus spreads through contact, maintaining distance from an infected individual prevents further transmission. The problem is, however, that coronavirus carriers are often asymptomatic, making quarantine and isolation much harder to identify and monitor. That is why in many countries officials have now urged people to operate in their homes whenever possible until the spread of the pandemic is sufficiently controlled. Authorities have stopped short, however, of making this a requirement, thus, it is up to individual private employers to decide whether or not to allow their employees to work from home.

We propose, on the one hand, (a) forcing an employee to work from coronaviral exposure, and (b) losing his / her employment, on the other, forced labour in compliance with Article 23 of the Constitution of India.

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1110 Narasu Pictures Circuit v P.S.V Iyer and Ors, AIR 1953 Mad 300.
Article 23 in The Constitution of India\textsuperscript{1112}

Prohibition of traffic in human beings and forced labour

Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

In fact, Article 23 as described by the PUDR v Union of India \textsuperscript{1113}Supreme Court understands that there is forced labour where there is no true option before an employee. In relation to the case of PDR, the Supreme Court held that the right to a minimum wage was guaranteed under Article 23, which applies to private parties and not the State. The ruling of the Court was that "any factor that deprives the person of the choice of option and obliges him to take a particular course of action may correctly be regarded as 'force', and that would be 'forced labour' if labour or service were forced by that' power. The Court further explained that the non-payment of the minimum wages under the employment contract in the event of unequal bargaining power was proof of the fact that when the workers entered into contract, they "acted not as free agents with the option of alternatives but in the face of economic circumstances and the term" will "must be construed."

In other words, in "forced labour" the Court recognized not only physical coercion but also any circumstance where employers were able to use their administrative resources to efficiently deprive an employee of valid choices. The rationale of PUDR includes coronaviruses, which tells an employee "to choose between exposure to a pandemic and, on the one hand, medical advice and the loss of livelihoods" in an illusory way, just as "work for less than a minimum wage" is an illusion. Article 23 touches both.

When a pandemic is clearly shown to place an person at a non negligible risk of an infection, the right to work from home is presumed and enforceable if it fails to obey social distancing rules and self-quarantining. There is a question here, though, that the option is usually substitute, that working from office and working from home, but the majority of the cases require a physical presence of the employee. Currently, in some nations, plans have been made to offer paid sick leave where appropriate to help businesses recover losses. We may accept this, in the future, but I would like, in these situations, to point out that the full implementation of Article 23, in compliance with Article 19(1)(g), would invalidate the employer's freedom of business. Where two rights fall under the provisions of Part III of the Constitution, the Supreme Court's recent ruling on RTI held that the proportionality doctrine would apply, which in turn would entail harmonization of the two rights to ensure that both violations are not the least likely.

In accordance with the WHO advice (for example, supply of hand sanitisers as disinfectants, maintaining a minimum distance of employees and so forth), the nature of work where it needs a physical presence, the private employer is legally

\textsuperscript{1112} The Constitution of India, art.23.
\textsuperscript{1113} PUDR v Union of India, AIR 1982 SC 1473.
obligated to put in place all procedures needed to reduce the risk of exposure.

As we know, the right to privacy is a fundamental right. The Supreme Court's decision of Puttaswamy, it makes clear that it requires the right for everyone to determine for themselves, when and to what degree the knowledge about their privacy is transmitted to others. The right requires a right to self-determination. Chandrachud's thoughts, J. (Four judges on behalf), Nariman, J. J. And Kaul. And Kaul, J. Everybody in India makes clear that everyone is entitled to monitor the distribution of personal information to them. When, as the State of Karnataka has done, the government publishes residential addresses, telephone numbers and travel history of individuals contaminated or otherwise quarantined with Covid-19, the right to secrecy is prima facie violated.

The right to privacy is not, of course, an unconditional guarantee, as is the case for any other human right. But in order legally to restrict the right, the State, as the Supreme Court ruled in Puttaswamy, it must first prove that a legitimate legislative act exists which allows the State to impose a restriction on the constitution. Moreover, these constraints must be made clear in nature as rulings because Puttaswamy I (including the rulings of Puttaswamy II, Anuradha Bhasin v. Union of India and Internet and the Mobile Association of India v. RBI), which should comply with the check proposed by Court of Modern Dental College and Research Center v. State of Madhya Pradesh. There, the court held, that the doctrine of partakes four separate lines of analyses: (1) that the measure has to be designated for a proper purpose; (2) that the measure undertaken is rationally connected to the fulfilment of that purpose; (3) that there are no alternative and less intrusive measures available that may similarly achieve that same purpose with a lesser degree of limitation; and (4) that there needs to be a proper relation between the importance of achieving the aim and the social importance of preventing the limitation on the constitutional right.

In this situation, either the Infectious Diseases Act, 1897 or the NDMA does not grant the authorities the authority to reveal personal data of any sort. As such, the information received is unlawful. However, the point may be raised that if such a publication is considered necessary for the purposes of disease or disaster management, the fundamental residual power which such legislation gives the government also includes the power of publishing information of this nature within its reach. For example, the Epidemic Diseases Act gives the government the power to control temporarily. Similarly, section 6(i) of the NDMA grants to the "National Authority"—which has as its ex officio chief, the Prime Minister—the power to “take such other measures for the prevention of disaster, or the mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary.”

Nevertheless, even though such laws provide the governments with the power to make such details public, they must be proportionate in nature and they must follow the criterion laid down in Modern Dental School. In this regard, however, no explicit regulatory mechanism for disclosure of the details, such as residential

1114 Disaster Management Act 2005, s.6(i).
addresses, phone numbers, and travel history for the persons infected with the virus seems to have been drawn up under either Statute. However, the manner in which the details can be considered proportionate is also completely unclear.

The preservation of public health is without question a legitimate goal of the State, especially during a pandemic. But there is nothing documented here to explain how it is rationally related to the application of the measure undertaken — the release and the disclosure of a whole host of private data. Why do public knowledge of the residence of an infected person and his / her mobile number assist in combating the pandemic, we may ask? There are definitely less disruptive acts. Would not a large range of local information be appropriate as opposed to publishing their exact addresses as to which infected persons may reside? Consequently, at least three elements of the exam expounded in modern dentistry are revealed by the Karnataka Government. In addition, the state government has launched its "Corona Watch" web-based mobile app, which not only shows movements made by individuals infected with the virus—public places they might have been in and the time they visited those places (information that you may find helpful), but also their addresses. Again, the release of this knowledge is unreasonable for us and is also highly disproportionate to the lawful intent of the State.

Those are peculiar days, it’s no wonder. We allow the State to take special action. Chandrachud, Puttaswamy's majority opinion specifically acknowledges the public safety as legitimate grounds for the right to privacy in some types of restrictions. "To recognize and cope with a public health crisis, for example malaria or dengue, a valid interests in analysing data found in the hospital records may be claimed by the state to prevent significant public impact, â he wrote. “If the State preserves the anonymity of the individual it could legitimately assert a valid state interest in the preservation of public health to design appropriate policy interventions on the basis of the data available to it.” But while the State will inevitably have to make encroachments on certain swathes of private information that it otherwise cannot, in the interest of public health, any such intrusion, as Chandrachud, J. holds, must still be necessary and proportionate.

It is at least possible to overcome some of these illegalities if we have implemented a data protection law that enshrines basic principle of privacy, as demanded by the Supreme Court of Puttaswamy I. Such a regulation could have created a system where governments have been made more fully aware when and where private details could be revealed. In the current case, the government has opened up the possibility of stigmatization by indiscriminately revealing information regarding individuals who have been diagnosed with COVID19 or have been requested to remain quarantined due to their travel history. Therefore, leaks not only impact on the right to privacy, but also theoretically breach a range of other protections, including certain individuals 'basic human dignity. The seriousness of the pandemic may also be justifying a civil rights restriction. Yet it can have negative effects, if it is to be accepted as a legal state operation, well beyond the immediate risks which we face today.

Courts during COVID-19.

Amidst all the measures in India to curtail the spread of COVID-19, one thing that is becoming increasingly apparent is the
judiciary’s and the legal sector’s absolute inability to function remotely. Even though CJI Bobde attempted to assuage concerns by stating that virtual courts would be a reality soon, those closely following the design and the implementation of e-courts project know that the judiciary is nowhere close to having streamlined online capability. At best, a few courts might offer online hearings by relying on external service providers such as zoom or skype.

It is ironical that the judiciary, much like the government, while preaching ‘self-isolation’ and mandating work from home facility for private sector, the best that it has done for its own is decrease the number of regular benches and list only ‘urgent matters’, which as per ground report is not being followed. If the trajectory in USA and Italy is anything to go by, these measures in a typically crowded place such as courts is completely insufficient. The judges and the staff are not only putting themselves at risk, but also litigants and lawyers who are invariably compelled to be present in court. On the other hand, the CJI is right in ruling out the possibility of shutting down the top court or any other court in the country for that matter.

This choice between the devil and deep sea is a result of decades of negligence in adopting technology, effects of which are unfortunately being discovered in the face of a crisis. However, Indian legal sector or the Indian judiciary is not alone in slow adoption of technology. World over, legal technology has been one of the slowest to take off, especially in comparison to other service sectors such as banking or healthcare.

However, the present crisis might be the final push that was necessary to force both small an big players in the sector to adopt technology or risk perishing. As for the judiciary, it needs to thoroughly rethink what ‘access to justice’ means in a new world that is getting shaped by COVID-19 experience. Countries like Australia, China and US which are at the forefront in technology adoption, are in these dire times already working towards moving their judiciary entirely online. For instance, China, recognizing the importance of Online Dispute Resolution in putting the economy back on track while also preventing the spread of COVID-19, has issued a guideline calling for accelerated development of ‘internet arbitration systems’. India must similarly not let this crisis go to a waste and take immediate steps in building Online Dispute Resolution capabilities.

Even before the pressing need that is presently felt for online courts, it has been apparent for a while now that the Indian judiciary was in need of a major technology driven overhaul. The slow administrative processes, poor infrastructure and the oft-cited problem of judicial vacancy have all contributed to a staggering pendency of around 3.2 crores at district judiciary, 46 lakhs in the High Courts and around 60000 in the Supreme Court.

Judiciary as it currently exists and functions is simply incapable of handling the existing burden, let alone intake the new-age disputes that are not even entering the judicial system due to uncertainties associated with cost and time. The justice-gap is currently being partially addressed through alternate dispute resolution mechanisms i.e. negotiation, mediation and arbitration. However, ADR has failed to take off at a scale required in India for umpteen number of reasons such as lack of quality private dispute resolution professionals across the country, importing of procedural complexities from the traditional court system, high costs etc. As
an answer to these problems, private ODR platforms are making inroads into dispute resolution ecosystem in India.

Private ODR platforms essentially work as aggregators connecting dispute resolution professionals with disputing parties. For now a small number of functional ODR platforms are catering to a very small segment of disputes such as low to medium value commercial disputes, consumer disputes, insurance cases etc.

While the exceptional arrangements made at the Supreme Court in its fight against the epidemic are commendable, it is difficult to gain access to the Court without rubbing shoulders. Unfortunately, it is unavoidable and far too ambitious primarily because every individual in the corridors of the Supreme Court is discharging his professional obligation zealously. Are we in any manner exposing the lives of advocates, the officers of the Registry, the security personnel, officers of the Health Department and that of the Hon'ble Judges to any danger? This question requires immediate redressal.

In the worst-case scenario, even if one member of the bar or an official contracts the virus, hundreds would have to be quarantined which may bring the institution to a grinding halt. Considering the age of the senior members of the bar, who may also be diabetic and suffer from hypertension in certain cases, the situation requires more and immediate deliberation.

Time is ripe to close the doors of the Supreme Court while the dispensation of justice can continue by adopting the facilities of tele and video conferencing, which is accessible to all.

To illustrate, a scanned copy of the petition could be e-mailed to the registrar accompanying an undertaking by the Advocate on Record certifying the correctness of the petition along with a letter of urgency. Should the Registrar be satisfied, he may forward the same to the Hon'ble Judges, who may convene the Court at their residence and while adjudication the matter the Court Master may call the Advocate on Record and provide him audience over a phone call. At that stage if the Hon'ble Court feels that personal appearance of the advocate is warranted, it may direct so accordingly.

A large business of the Court can be handled without a roadblock. There may be problems that can crop up in the aforesaid scenario, but I am of the view that technicalities such as affidavits, court fee, common defects and other requirements of the Supreme Court Rules can be dispensed with considering the epidemic.

As per this illustration, the advocate, the Registrar and the Hon'ble Court can continue to operate from their respective residences barring the exception of the Court Masters. I would like to reiterate that the option of mentioning the case for urgent listing with a right of audience would still be open to the advocate in deserving cases.

It is only Tilak Marg, the seat of the Supreme Court that requires shutting down temporarily and not the Court itself. I am certain that the Advocate on Record, who is a responsible officer of the Apex Court along with the Registry of the Court can temporarily create this virtual Court and exhibit that ‘work from home’ is the new normal even at the Supreme Court of India and this would also mark the contribution of this institution in the fight against the epidemic. The respective High Courts may follow suit.

Without a shadow of doubt, the competence of the Registry cannot be impugned but the question is – should more be done.
Public Health and Pandemic Control.

Public International Law dictates that regardless of a health emergency or an epidemic, the measures taken to affect human rights should be legal, necessary, reasonable and proportional. Every measure must be recorded in evidence and there should be strict adherence to the procedure prescribed. An undemocratic regime leaves no scope for a consequence to the state for failures in terms of epidemic response and as a result, there is no accountability from the state. The people residing in affected areas are shunned out without any scope for the expression of dissent or discontent or even a cry for help from the international community. Human rights cannot be allowed to be violated under the garb of a health emergency and every nation should take a lesson from the incident of the Coronavirus outbreak. The priority of taking measures to restrict the outbreak lies in equal pedestal with the significance of following due process without depriving the people of their human rights. The international community needs to take a stand, and every response from a government during the outbreak of an epidemic or a pandemic must be within the four corners of human rights.

Public health care system includes not only the physical structures of public health agencies, clinics and hospitals and the human resources to operate them, but also countries’ legal infrastructure – the laws and policies that empower, obligate and limit government and private action concerning health. A health emergency tests how effectively regulatory strategies, social contract principles and human rights norms have been embodied in the written laws of a country, and how closely, in turn, those legal embodiments guide action. Disease outbreaks, for example, require a wide range of actions e.g. disease reporting, surveillance, quarantine, social distancing, curfews, lockdown import of medical supplies and personnel, and vector control, all of which are effected through, or subject to, national laws. Governments are also obliged to protect the human rights of individuals affected by an outbreak.

A long series of scourges for example the Ebola virus, in 1976, the Human Immunodeficiency Virus (HIV), in 1983, an Avian Strain Of Influenza in 1997, SARS – Severe Acute Respiratory Syndrome in 2003, the Novel Influenza Virus, H1N1 in 2009, MERS – Middle East Respiratory Syndrome in 2012-2013, the Ebola epidemic in West Africa (Guinea, Liberia, and Sierra Leone) in 2014, the Zika virus, in 2015 and the major outbreak of plague in Madagascar in 2017 have taught that public care health system must always be prepared for the unexpected. In a situation wherein there is no vaccine nor treatment available minimizing the transmission of infectious diseases is the only way before the Public health care system.

Generally the public health law play two major roles viz.,

- A proactive or preventive role
- A reactive role

1. Proactive or preventive role of public health care law

A proactive or preventive role of public health care law involves improving access to vaccinations and contraceptives, together with screening, education, counselling and other strategies that aim to minimize exposure to disease. For example diseases like measles or polio which are entirely preventable by vaccination, or diseases like diarrhoeal and parasitic diseases are preventable by access to improved
sanitation and clean drinking water and diseases like tuberculosis and malaria which are treatable when detected in a timely manner fall in this category.

2. A reactive role of public health care law

However in situation like fighting an outbreaks of contagious and serious diseases like COVID-19 public health law adorns reactive role ie., supporting access to treatment, and authorizing health departments and health care providers to limit contact with infectious individuals and to exercise emergency powers in response to disease outbreaks.

This reactive role involve a wide range of administrative powers

- Conduct of surveillance , mandate vaccinations if available , treatment options , isolation or quarantine of infected or potentially infected individuals.
- Seize property in order to establish emergency response centres and to ensure the availability and rapid distribution of pharmaceuticals and supplies;
- Expand the health care or disaster management workforce by co-opting personnel from other agencies and jurisdictions under a unified command structure.
- Interference with freedom of movement, the right to control one's health and body, and with privacy and property rights.
- The reactive role of public health care law is inevitable in the current situation but any measures taken to protect the population that limit people's rights and freedoms must be lawful, necessary, and proportionate

Thus the Epidemic Diseases Act 1897 is currently invoked viz.,

1. To restrict the movement of suspected coronavirus patients to prevent further spread of the disease.
2. To prohibited cruise ships, crew, or passengers from coronavirus-hit nations to come to India till March 31, 2020.
3. Starting from 13 March 2020, all existing visas, except diplomatic, official, UN/International Organizations, employment, project visas, stand suspended until 15 April 2020.

Though Epidemic Diseases Act, 1897, gives the Central and State Governments overarching powers but it lack speedily set up management systems required for a coordinated and concerted response to COVID-19.

Therefore, the Disaster Management Act, 2005, which provide for an exhaustive administrative set up for disaster preparedness is also invoked. The DM Act clearly lays down a multidimensional strategy to handle pre-disaster and post-disaster situations and mandates certain actions by the officers of different ministries to work in tandem, in mobilizing resources across the ministries and departments thereunder, to control and contain the damage wrought/liable to be wrought by a disaster

The powers held by the home ministry under the Disaster Management Act is currently delegated to the health ministry so as to enhance the preparedness and containment of novel Coronavirus(COVID-19). This includes inter alia lay down guidelines for preparing disaster management of novel Coronavirus plans by different Ministries or Departments of the Government of India and the State Authorities, providing necessary technical assistance to the State Governments and the State Authorities for
preparing their disaster management plans of novel Coronavirus in accordance with the guidelines laid down by the National Authority; monitor the implementation of the National Plan and the plans prepared by the Ministries or Departments of the Government of India monitor, coordinate and give directions regarding the mitigation and preparedness measures regarding COVID-19 to be taken by different Ministries or Departments and agencies of the Government; evaluate the preparedness at all governmental levels for the purpose of responding to any threatening disaster situation posed by COVID-19, require any department or agency of the Government to make available such men or material resources as are available with it for the purpose of emergency COVID-19 response advise, assist and coordinate the activities of the Ministries or Departments of the Government of India, State Authorities, statutory bodies, other governmental or non-governmental organisations and others engaged in COVID-19 management; provide necessary technical assistance and give advice to the State Authorities and District Authorities for carrying out their functions.

Invoking the DM Act, 1995 the Ministry of Health and Family Welfare directed all state/UTs Government and concerned State Authorities to take necessary steps to ensure sufficient availability of surgical and protective masks, hand sanitizers and gloves at prices not exceeding the maximum retail price printed on the pack size. The 2 ply and 3 ply surgical masks and N95 and hand sanitizers have been declared as essential commodities under the Essential Commodities Act 1955 to ensure prevention of hoarding, black marketing and profiteering of these items.

The said Act also help the concerned authorities to nab any person who makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic. On conviction, such person is liable to be punished with imprisonment which may extend to one year or with fine.

In addition to the Epidemic Diseases Act, 1897 and Disaster Management Act, 1995 the Aircraft Act, of 1934 and R.2(8) Indian Aircraft (Public Health) Rules, 1954, allow airport authorities to screen the travellers who originate from or transit through COVID-19 affected nations, and track them after their arrival in India. Passengers are also informed through in-flight announcements that mandatory self-reporting is required at immigration. The government also set up facilities at airports and ports to manage travellers showing symptoms of the disease. The surveillance system will track travellers for four weeks and persons who develop symptoms will be advised to self-report and also for quarantine. Similarly for passenger ships, cargo ships, and cruise ships detailed health measures like, non-invasive medical examination of the passengers, isolation of the passengers, surveillance for a period not exceeding the incubation period of the PHEIC to which they have been exposed, undertake appropriate vaccination or other prophylactic measures in accordance with the recommendations of the WHO as communicated by the Central Government; to undertake disinfection, decontamination, disinfection or de-ratting of the ship/vessel, as appropriate, or cause these measures to be carried out under their supervision under

1115 Indian Aircraft (Public Health) Rules, 2015, R.2.
the Indian Port Health Rules 1955, pursuant to the Indian Port Act.\textsuperscript{1116}

As the outbreak continues to evolve, Indian just like other country across the world are considering options on a war footing to prevent introduction of the disease to new areas or to reduce human-to-human transmission in areas where the virus that causes COVID-19 is already circulating. But at times one can find that irresponsible behaviour from the side of the citizens put an entire society into acute danger.

Strict action can be taken against such irresponsible behaviour and certain provisions of the Indian Penal Code comes in handy. Sec.269 of Indian Penal Code, enumerates as to how to deal with persons who act carelessly to endanger the public health and life. Once found guilty it can lead to up to six months imprisonment and fine.

The main ingredient of this section is the disease must be infectious. The section comes into play whether the communication of the disease is direct or indirect and whether they may be infectious or contagious. The diseases which the medical authorities agree to be infectious are all covered under this section and not those, which are suspected. Hence any person who is affected by diseases like plague, cholera etc exposes himself or travels through a public transport are likely to spread the disease and are attracted to this section.

In Chabumian’s case the accused resided in plague-stricken house in the Ambala Cantonment, and had been in contact with a plague patient. He was taken to the plague shed with the patient who died there. The next day, the accused left the shed against orders, and travelled by rail to the neighbouring town. He was held to have committed an offence under this section as he had sufficient reasons to believe that his act was likely to spread the infection of plague which is dangerous to life.

Similarly, sec.270 of Indian Penal Code, which talks about any malignant act likely to spread infection of disease dangerous to life, is punishable with imprisonment for a term which may extend to two years, or with fine, or with both.\textsuperscript{1117} It is evident that Section 270 deals with malignant act likely to spread infection of disease dangerous to life. The only difference between s.269 and 270 is that in s.269 deals with acts of careless or a negligent nature and sec.270 deals with a malignant or malicious act not done with a benevolent intention. If a person is traced under this section then he will be guilty of homicide and not merely nuisance.

Section 271 punishes a person who knowingly disobedys a rule of quarantine in existence made and promulgated by the government.\textsuperscript{1118} Quarantine relates to a vessel, which is segregated for prevention of contagious disease. The District Collector can also invoke sections relating to public tranquillity. Government of Kerala has already directed the police to arrest COVID-19 infected people kept under isolation and home quarantine, if found roaming in public places.

The country has many legal provisions which can be used to take public health measures to prevent and control an epidemic. Bringing all the legal provisions for preventing outbreaks under a single legislation would be challenging, though it

\textsuperscript{1116} The Indian Port Act 1908.
\textsuperscript{1117} The Indian Penal Code, s.270.
\textsuperscript{1118} The Indian Penal Code, s.271.
would be beneficial for effective implementation and monitoring. In 1955 and 1987, the Central government developed a Model Public Health Act, but failed to persuade the states to adopt this. The Public Health Act was revised by the National Institute of Communicable Disease (currently the National Centre for Disease Control) a decade ago, but the revisions have still not been approved by the government. Many states formulated their own public health laws and many amended the provisions of their epidemic disease Acts. The Madras Public Health Act was passed in 1939. This was the first of its kind in the country. The government of Himachal Pradesh included provisions for compulsory vaccinations in its Epidemic Diseases Act, while Madhya Pradesh, Punjab, Haryana and Chandigarh conferred powers on specific officials to execute various provisions of the Act. Bihar gave the state government the power to make requests for vehicles during epidemics.

While it is true that the priorities of the states are different, the platform of a common law for combating infectious disease that the states should work on should be the same. There are instances in which different parts of a state are following two different public health acts. For example, the southern districts of Kerala follow the Travancore- Cochin Public Health Act, 1955, while the northern districts follow the Malabar Public Health Act, 1939. Municipal Acts in different states vary in quality and content, and many are vague about the measures to be taken during the outbreak of a disease. Most of the public health Acts in the states are policing Acts, intended to control epidemics, and do not deal with coordinated and scientific responses to prevent and tackle outbreaks.

What we require is a legal framework relevant to the current context. A good public health law infrastructure establishes not only the powers of the government, but also shapes the government’s role in preventing and controlling diseases. There is a need for an integrated, comprehensive, actionable and relevant legal provision for the control of disease outbreaks in India. This should be articulated in a rights-based, people-focused and public health-oriented manner. The National Health Bill 2009 was one such proposed legislation.

CONCLUSION

It is evident that the aftermath of this COVID-19 is going to be very drastic. Societies, institutions, business houses will not function as they used to. They and we as individuals will experience change and we will have to cope up with it dynamically. It is suggested by most doctors that “social distancing” is the key and only way to avoid this virus. Taking into account all safety precautions we must also not forget that the economy is stumbling and we cannot do away with work. We must adhere to ‘Work from Home’ directives issued by most companies and do out bit in these desperate times and help each other. Contracts frustrated should be reincarnated and started at a later date. Constitutional rights affected have received a affirmative explanation and individuals are with the government on this issue. Courts have slowly started to adapt to technology and online dispute resolution and hearings are in course. The most important that is public health laws are being brilliantly being taken care of as the judiciary and the government at the centre and the states are in contention with each other to provide good infrastructure at low cost to individuals to counter this virus.

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SPORTS - AN ELEMENT ENHANCING GLOBAL ECONOMIC COMPETITIVENESS

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ABSTRACT:
Sports and laws are connected through multiple dimensions. Since sports is a vast sector that provides a boost to an economy when proper measures are taken, it plays an important part in developing business and economy, various legal intricacies are present to elevate its contribution internationally. Under the ambit of sports, the legal aspect is yet to achieve a strong and concrete framework nationally and globally.

As a facilitator, sports law must stress on intellectual property rights such as trademarks and patents which gives credit to the extensive sports research and development. It should also involve sports sponsorship and passing in bills and policies for the national interest. Where economy and business play a major role their legal regulations automatically share the stage. Therefore, media and broadcasting law, competition and commercial law and all business-related laws now blend well with sports. Also labour law plays a trivial role in the sports industry globally. As a prohibitor, sports law tends to curb all black-marketing practices and exploitation.

This paper is an effort that attempts to exhibit the reality of retail and industrial conditions and the support of branding and media which helps the market to flourish. To enhance the depth of the subject, the authors have focused on the social aspect, the legal aspect and the commercial aspect which includes a comparative analysis of such processes and positive suggestions to score more economic goals.

INTRODUCTION:
Sports is both a consumer good and a consumer of goods. Various studies uncover the rapid development of the sports economy as an independent and an interdependent branch of economics. It has emphasized the profit generated by sports through its infrastructure, the production and sales of sports goods and services. It also studied various methods of information dissemination which took place through advertising, sponsorship and events organized.

It is important to understand that sports economy contributes to the GNP and GDP of various countries due to its labour intensive operations and it is estimated to grow faster than most of the other sectors. Also, having a globalized economy, sports has its own share in global trade.

Moreover, it must be understood that the given statistics do not include the very considerable contribution of countries’ inhabitants who are actively involved in organizational levels of sport. Also financing in sports and other support activities varies from country to country due to the level of development, availability of funds, growth of industries and the political situation present. Thus, underdevelopment of sports is both a cause and the consequence of economic underdevelopment.

Having a paramount obligation to meet the basic needs of their citizens, many developing countries tend to reduce the importance that is needed to be given to sports. It is always considered as a secondary requirement due to the...
pressuring priorities. Even then, sports have proved to help significantly to uplift economies and it has also favorably raised the sharp exchange rates for the nations. The relation between sports and economy can be easily analyzed by studying the relationship between the media and multinational corporations. This can direct us to two conclusions- one is commercial in nature and the other political in nature.

Improved quality and performance from the workforce, media and MNC’s all lead to the development of sports which in turn contributes to the economy. Thus, it is necessary to improve the support systems for sports such as physical education and treat it as a safe investment. The framers of a country’s economy must carefully formulate policies in such a way that sports help every individual to improve their economic standards and that there are proper regulations to inculcate equity, justice and good conscience in the economy.

International economic law includes an array of topics connecting the economics with the state policies and regulations and portray it on a global platform.

IEL may be described in various ways. No clear definition has developed in practice or in theory. Both broad and restricted descriptions have been put forward. In the broadest sense, IEL could be defined as including all legal subjects which have both an international and an economic component.  

The components of International economic law are:

- First, economic activity is central to government affairs and International Law.
- Secondly, International Law, and an important component of IEL, namely International Trade Law, are each underpinned by inconsistent assumptions, or fundamentally opposed assumptions. Whereas International Law is based on the State and the notion of sovereignty, IEL is based on the dictates of comparative advantage, on promoting individual cross border exchanges and specialization.
- Thirdly, whereas as International Law is oriented towards defence and peace and economic self-sufficiency or materialism, the international economic system as reflected in the Britton Woods Institutions, is based on the market economy and the promotion of global welfare, not so much the prevention of economic welfare.
- Fourthly, key features of International Law are not present in the same manner in the field of IEL. Thus, because of globalization, it is not possible to talk about national economy.

There are essentially two dimensions to a consideration of the sources of IEL. International Law, considered merely as a body of rules, comprises those sources of law as enumerated in Article 38(1) of the Statute of International Court of Justice. These are stated as follows:

(a) international conventions, whether general or particular, establishing rules recognized by the contesting states;
(b) international custom as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations.”


However, it needs to be noted that International Law is not defined universally merely as a body of rules alone. A broader conception of International Law is entertained by some. Whilst it includes the sources mentioned in Article 38, this broader perspective of law comprehended it as a process of decision making \[\text{1121}\].

There are a number of problems that characterize this source of IEL. Some of the main problems may be described as follows: First, given the abundance of international agreements, there are serious questions as to the coordination of such obligations. A state may have entered into multilateral, regional and bilateral agreements involving the same subject matter. There is the need to ensure the avoidance of conflicting obligations undertaken in different treaty arrangements \[\text{1122}\].

Sports and laws are interconnected in many ways, sports play an important role in business and economy but there are various legal intricacies that make this a strong contributor to a booming economy. Due to the presence of a globalized market, we need to regulate prices, level of taxes, imports and export dues to be paid, black-marketing, exploitation of resources and foreign exchange. This links international economic law to sports.

Furthermore, sports have become a complex and a diversified business field with new inventions and investments. Development in sports have reached such heights and these have led to the requirement of specific statutes and legal authorities to regulate. The intellectual properties rights, competition and commercial law and all business-related laws now blend well with sports. They have paved a new path to economic contribution. Thus, international economic law plays a serious role to solve the current period’s sports related disputes.

**SPORTS – AS A SOCIO-ECONOMIC INDICATOR**

In the current era, sports is viewed as a trivial component of socio-economic development of a country. It is promoted as a key to improve health and productivity by reducing ailments and diseases and inculcating discipline and *esprit de corps*. Therefore, carrying out any mega level tournament or league contributes to the development of better infrastructure, provides greater number of employment and raises the inflow of foreign exchange capital into the country leading to a substantial growth of an economy. Hence, it can be said that the impact of sports on the society is complex and layered. Sports economics is playing more important role in our lives, which is associated with tickets, media rights, merchandising, and sponsorship. To achieve the aim, the following specific tasks were set:

- to give insight into the situation in the field of sport and mega sports events, placing a particular focus on its impact on region’s economics;
- to analyse the papers of sports impact to economic, biggest sports markets and mega sports events;

Today there are two journals devoted to sports economics namely, Journal of Sports

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Economics and the International Journal of Sport Finance. ¹¹²³

North American authors Peter A. Groothuis and Kurt W. Rotthoff stated that the economic impact of sports has been studied in two main ways: through local economic impact and through the impact of mega-events.¹¹²⁴

GOVERNMENT ROLE IN PROMOTING SPORTS

The government of a country is a critical player in the promotion of sports. Both governmental and non-governmental organisations join hands and work together to formulate policies for development of sports. It is done by allocating funds and grants for providing better infrastructure and equipments. Various schemes are brought out to find and trained talented personnel and lead to an overall development in sports as a whole.

In India prior to the year 1982, sports was not given much importance as the other sectors of development were given. Thus, this year amounts to historic significance as a separate ministry was setup for sports which led to the gradual increase in funds and its emphasis in public policies.

Although, there was a considerable increase in the grants and funds regarding sports, budgetary allocation in India was not enough to meet the needs of the sector. Thus, fundamental changes had to be brought to the framework for its betterment. This led to the development of the National Sports Policy 2001, National Sports Development Bill 2013, Khelo India etc. This helped the government to engage in a trivial role in promoting sports and realize the immense potential the country has.

MEDIA AND ITS FUNCTIONING:

Telecasting of sports works on a contractual basis and various channels bid among themselves to receive broadcasting rights. Every sport that is being played can help to earn huge amount of money by selling its broadcasting rights to the channel that gets the said rights. Usually, any sport that has a considerable number of viewers will have a demand for television rights and sport like cricket where it is considered to be a separate religion in India, it can help the Sports board or administration to get an enormous deal.

For example, in 2018 Star Sports acquired the television and digital rights of BCCI from 2018-2023 for 6138 crores by beating Reliance Industries Limited and Sony Pictures Network Limited. This will amount to increase in TRP for Star Sports and result in more economic benefits through broadcasting.

In fact, today television and digital broadcasting is very essential since different people watch different sports and it is important such sports are broadcasted which would otherwise lose its interest among people which no sports would want. The success ratio of a Tournament such as FIFA world cup massively lays on the number of countries it has been telecasted and number of people who were able to watch the Tournament. This tournament will then have a greater impact on the countries where it was broadcasted.


Therefore, it is important in today’s world that sports are to be broadcasted properly and the economic benefits are utilized carefully.

**THE ECONOMIC CONTRIBUTION OF SPORTS**

Direct income: Tickets prices; sponsorship and partners; municipal grants; state grants. 
Indirect income: increase in tourism; the national income resulted due to the winning of a tournament.

As a visitor of a country during a sports event, he/she incurs travel expenses for the purposes such as transportation, accommodation and food. One might also go around the city and visit various places of interest or shop local goodies which amounts to higher economic benefits which comes directly in contact with the local markets.

**Sports events market:**

Trends show that market for global sporting events are on the rise. This is all because of the effort of sponsor, media, growth of technology, increase in awareness about sports. Many clubs and teams have become a successful business to venture around the globe. The finance involved in such event increases every year and the revenue earned from them also raises exponentially.


The total budget allocation for the Ministry for the year 2018-19 was ₹2,196.35 crores and the revised budget allocation (RE) for 201819 is ₹2,002.72crore.

**Bloomberg** estimated that the NFL earned nearly $15 billion in 2018.

**Statista** revealed that more than 50% of the league’s revenue came from TV deals.

**Deloitte Sports Business Group** found that the EPL revenue amounted to £4.8billion for the 2017/2018 season, which is up 6% from its previous year.

**INDUSTRIAL TRENDS:**

1. eSports: It involves multiplayers connected in a same web platform and such players are usually professional gamers. With the advent of technology, online sporting trend is rapidly gaining grounds. Such sports also require its own set of skills, techniques and strategy to play. Such games flourish well due to the excessive craze and the number of downloads it has.

Sponsorships: Many brands use the concept of brand ambassadors and use sportspersons to endorse and promote their products. This concept has a wide reach and it brings in a wider demand for the goods advertised. With the development of media and internet, brands find it easier to popularise itself. Sponsorship acts as the backbone of many sporting events and in the current
market, sports cannot survive without sponsorship.

3. Media Rights: The main income for sports comes through media rights. An event is broadcasted by a channel on a contractual basis. Such channel will not only telecast the event but also promote it and has the right to all content relating to its distribution. Star network, ESPN sports etc are certain media giants in the ambit of sports.

4. Sports Gambling: In 2016, the sports betting market in the U.S. was valued at $40 billion. The legality of betting is still in question in many countries. Although it is banned in some places, it has its own share of enthusiasts and unfortunately creates an economic bad that needs to be curbed.

5. Sports Investment: Sports is a field that involves a good number of research and development to enhance its usage. Many start-ups are blooming to create various sports related technology and also produce sports attires and merchandises. An example of sports development would be the LED lights in cricket stumps or the usage of “snickom” technique to determine a leg before wicket. Similarly, usages of spider cameras and drones to have a clearer view of the game was made possible only with the help of research and development in sports.

INTELLECTUAL PROPERTY RIGHTS IN SPORTS:
Invention and creativity have always been an important thing in the area of sports. It has gained significant amount of Importance in the last decade or maybe from earlier stages. Every originator and creator is trying to go beyond the boundaries and try to invent new things to develop and exploit the sports economy. This is where the Intellectual property rights (IPR) comes into play and the Government usually gives the creator the right to have the information of his/her innovation for a limited period of time. Intellectual Property Rights are the basis of licensing that help in earning revenues to support the development of the sports industry. In Addition to that, it helps the inventor or the creator to protect his product or innovation to earn enough amount of revenue which more or less gives a monopoly power on the product for a limited period of time. This has become a very important thing because the market is huge to be exploited and with the commencement of various leagues in various sports which has led sports market to be a huge economic forum it is very important now to use IPR efficiently in sports which will lead to lead to promote sports development by making sporting organizations to finance sporting events.

Sporting events will lead to an increase in investment, telecommunications, tourism which helps to increase employment and also helps in infrastructure development. Investors would like to get some favourable returns before other companies in the market replicate their ideas. When we look at the various IPR it includes Patents, Trademarks, Design, Copyright, broadcasting etc., where patents would protect the technology used to produce the product for a limited period of time and trademark and design would protect the identity of a brand and its product from similar products and copyright generate the revenues needed for broadcasters to invest in the costly undertaking of broadcasting sports events to fans all over the world.

In sports era, the very first patent was awarded to George (US1718305) for a ball specifically designed for basketball in 1929 almost 100 years back. Then many changes were made which allowed us to attach and detach the net from the ring without any help from the lacing cord (US2053635).
The patents have been used since then and many inventors have registered for patent but however, from the 1990s has been used vastly. Data showed that over 750 patents were registered only for football boots alone, with Nike, Puma and Adidas comprising the majority of those 750 applications. In recent times various technology is being used in different sports like ball tracker in cricket, tennis and such various sports which is used to track the trajectory of the ball. Recently VAR is used in football to find out whether the ball has crossed the goal line. The patent application (WO0141884)\(^{1129}\) is registered for this technology and it was first widely talked about when it was used in FIFA world cup 2018. These are just a few patents that are being used in sports and it is expected to rise in the coming years. Trademarks which also plays an important role in sports protects the identity of a brand from its similar products, by protecting the names, patterns, slogans and such other things which gives certain brand value to the particular team or club.

For example, Manchester United have trademarks for the name ‘Manchester United’ and for the club crest. When it comes to team logo it is protected by Trademark if it is just a simple design but it can be protected by both Trademark and Copyright as well if it has some creativity in the logo as anything that is artistic would be protected by the Copyright and in sports it is mostly it is used in logos and the artistic works while promoting their team or club.

When it comes to broadcasting it helps us to know the media rights over broadcasting and it should protect online piracy on the internet and allowing unauthorized streaming of matches which would damage the growth of revenues which would have an impact on the economy. For, Example watching a cricket match in star sports and hotstar is legal because they have a right to broadcast the game but if the same is watched in online by an unauthorized broadcaster it would amount to something that is not illegal. This is very important because it is said that the broadcaster loses thousands of millions of dollars if people use unauthorized links to watch the game. Henceforth, to control all these problems it is important that the legislature make strict Intellectual Property laws to avoid all these loopholes which will automatically guide sports as a strong economic sector.

**SPORTS SPONSORSHIP:**

While dealing with sports impact on the economy as a whole it is necessary that we deal with sports sponsorship. It satisfies all the involved parties where the sponsor would get brand awareness and the sponsor see would get finance for the sport they play. There are many successful sports sponsorship – one of which was Unicef and Barcelona which provided a Win-Win situation for both of them since Barcelona paid UNICEF to sponsor them and within 2 years without any titles went to 2nd place in worldwide recognition of a football brand. Moreover, with the Goodwill and the awareness by UNICEF Barcelona was able to create a feeling of “more than a club” which helped in increasing loyalty for the club. Another such sponsorship was Adidas and NBA in which Adidas provided official uniform which helps them to try out the US market with some of the athletes and try to undo the Nike super dominating power in that locality and it also provides NBA with
some financial assistance that they would require to organize the league properly. Henceforth sports sponsorship works in both the ways – helps both the sponsor and the sponsee. As it was stated above if the sponsor tries to bring in an athlete to try out their products such as T-shirts or shoes the consumers would want to try out the product because their favourite athlete/club is one of the sponsee and due to loyalty or goodwill they would want to try that particular product and this is how it helps in generating sales.

In today’s world using advertisement on television is not a very efficient way of promotion as earlier and in order to promote the product, the sponsors try out different ways to increase their goodwill and sponsoring the favourite club or favourite athlete would bring in certain goodwill.

Therefore, sports sponsorship plays a very important role in the sports economy which would, in turn, have a great impact on the country’s economy. From the developments in sports in India for the last few years we can expect much bigger sports sponsorship deals in the coming years and it is also important we sought out and improve other sports excluding cricket as well, to improve the deals such other sports and if the government is keen to develop the sports economy it is important to give equal importance to every sport.

NEED FOR A SPORTS LAW IN INDIA
In an area where there are many economic impact and various other activities takes place it is more or less surprising that we do not have a national sports law governing various sports that are prevalent in our country. The same is necessary to eradicate various issues that are present in this sector such as broadcasting issues and issues relating to contracts and betting and black market that affects the economy as a whole. National Sports Development Bill, 2013 and the Prevention of Sporting Fraud Bill, 2013 are the two draft bills that are pending in the parliament. Necessary steps regarding this should be made and this is the right time to bring in a new law to utilise the advantages from sports with economy being one of its advantages.

AREAS TO TIGHTEN FOCUS: Intellectual Property Rights

There are many laws in IPR such as Patents, Design, Trade Mark, Copyright and Geographical Indications.

Although there are separate acts, the judicial aspect in Intellectual Property rights is considerably low. The courts are not giving adequate importance to IPR violations taking place around the country. The point of registering the ideas under particular domain is to control the use of one’s own idea by others which is not being done by the judiciary. The need for punishment be it any type of punishment is necessary and absolutely essential for improper uses of others ideas which will in turn have its impact on the economy. A need for a particular tribunal with required expertise is required to deal with IPR matters exclusively to help improve the economy which is what the government requires from sports industry.

1130 The Patents Act 2005
1131 The Designs Act 2000
1132 The Trade Marks Act 1999
1133 The Copyright Act 1999
1134 The Geographical Indications of Goods (Registration and Protection) Act, 1999
There is also a need for nation level IP policy from the government to explore the IP areas more deeply and try to maximise the use of IPR in developing the nation’s economy and will play a huge role in maintaining strong socio-economic relationship with other countries. This policy will also help others to know about IPR and create more awareness about IPR and help in registering their ideas which will make our country strong domain in IPR.

**Betting and Black Marketing**

Online gaming is something that amounts to “game of skill” and not “game of chance” and the former would not be illegal as it was stated in Varun Gumber Vs. Union Territory of Chandigarh where the court said that the online gaming such as dream 11 is a “game of skill” any game of skill, greater experience and training in Dream11 fantasy sports games provides a user with greater insight into strategies for success and a better understanding of the game's dynamics and operational constraints, and in itself heightens and attunes the element and exhibition of skill on the user's part and thereby has an material influence on generating a successful winning outcome in favour of the user.\(^\text{1135}\) However, since online gaming is a big forum now there is a law that is required to make it legal and record all those transactions which would improve the economy and eradicate the regulation of black money in the sports industry. According to 276\(^\text{th}\) Law commission of India, this is a market which can rise to $1 billion by 2021. Betting and gambling would come under Entry 34 under list II of the seventh schedule of the Indian constitution. Hence it is absolutely necessary that we have a law for online gaming which would authorise every transaction that is taking place and tax upon those transactions which would help to improve the sports industry economically. Black market today plays a significant role in depriving the growth of sports industry by taking away the actual profit by selling duplicate products by local companies which would otherwise go to that team’s net profit.

**Media and Broadcasting**

When a sports event is about to be telecasted in a channel, it gains a greater number of subscriptions than normal. Such tournament organizers and television channel work on a contractual basis. The Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act was passed in 2007\(^\text{1136}\). This act was intended to provide the masses on a free to air basis of sporting events that were of national importance. This was achieved through legislated sharing of sports broadcasting signals with Prasar Bharati. It was an important step to prevent telecasting companies from creating a monopoly and making sports content accessible to the public at large. Although this act was later repealed, it is suggested that some governmental control mechanism over media must be present for greater public and economic interest.

In the case, Secretary Ministry of Information and Broadcasting and others v Cricket Association of Bengal and Others, Honorable Supreme Court of India stated that there shall be a law controlling the electronic media and if AIR or Doordarshan find such broadcast/telecast not feasible then they may consider the grant of

\(^{1135}\) Varun Gumber v. Union Territory of Chandigar, 2017 CriLJ 3827

permission to the organisers to engage an agency of their own for the purpose. Of course, it would be equally open to the nodal Ministry (Government of India) to permit such foreign agency in addition to AIR/ Doordarshan, if they are of the opinion that such a course is called for in the circumstances.  

**Labour Rights and Protection From Exploitation**

International Labour Organisation is a key player. It is the pioneer of workers protection which was propounded with the Treaty of Versailles after first world war. It adopts and regulates labour laws to implement the standards of ILO, promote its declaration and fundamental principles and right to work along with the concept of decent work into practice. In India we have various central and state enactments pertaining to labour laws. The main aim of all these statutes are to protect workers against any exploitation and ensure the dignity of workers. Sports as an industry comprise of both the organized and unorganized sector. Many of them work in small groups and hand skilled labours making sports equipments or run small mills to produce jerseys and other attires. They are not properly aware of the exploitation they face and do not realise that their produce is worth much more than what they are paid. Acts such as Unorganized Workers’ Social Security Act of 2008 has played an important role to protect and promote the welfare of the workers. Government must take proper measures to reduce middlemen and let the manufacturer produce directly reach its global customers.

**Research and Development**

Sports policies of a country must be formulated with a view of research and development and must ensure that sports contribute to the economy s much as any field will do. In India we have the National Sports Policies formulated in 1984 and drafted in 2001 which aims for resource mobilizations, globalization and research and developments in sports. Every country must contribute for developments in sports facilities, sports education and infrastructures. It must assist in all ways possible to come out with novel methods of training and develop equipment to suit the users. Any new invention or research by a country is an economic asset and a country must claim rights over it. For example, certain techniques of swordfight, yoga, archery and wrestling are way to indigenous to India and are deeply rooted since our ancient history. It would be very creative when such methods are inculcated with the current style of the game. Thus, it is the duty for a nation to allocate funds to carry out various researches in this field to enrich and highlight their cultural significance in the global arena.

**CONCLUSION**

Sports is a trivial contributor to any economy. It is a golden opportunity for developing countries to boost their GDP especially when there is a good population willing to contribute to this sector. A country like India, which is highly populated and highly enthusiastic about sports must utilize the moment to make money.

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1137 Secretary Ministry of Information and Broadcasting and others v Cricket Association of Bengal and Others, (1995) AIR SC 1235
1138 Treaty of Peace with Germany( Treaty of Versailles), 28 June 1919
As an indicator of socio-economic improvement, we have the infrastructural development, human resource development and various other methods that help to bring talented personnel from every nook and corner of a nation to represent in international events and bring laurels back home. It is also necessary to change the mindset of people towards sports and inculcate its practices since a very young age. To ensure this occurs, various policies must be implemented to spread awareness and hunt talents across the country. Thus, the funding for this is very trivial and the government must bring in structured policies and monitor its effectiveness to ensure maximum outcome from the initial investment. It is important to allocate adequate funds and make sports infrastructure available to every citizen of this country. It is high time we realize our shortcomings and device novel ways to promote sports as a valuable career option. In its commercial aspect, we have seen that sports have given an immense contribution in integrating various economies and also helped in bringing out a borderless market and huge demands for goods and services. For the existence of a healthy competition, various regulations fill in the gaps. It is important to note that stringent laws are required to ensure there is minimum exploitation of natural and human resources. India has been a production hub for various sports and sports related goods, but many of their contribution goes unnoticed due to the regulations present. Similarly, media and brand endorsements must be monitored to ensure that nothing against the public health and welfare is promoted. Also, the element of IPR is required to be carefully legislated to ensure fair competition and to avoid the concentration of monopoly anyone’s hand. But such property laws must also encourage people to enter into the line of research and development and give the creator full credit of what he had created. Managing this in an international level is the biggest task which must be achieved with caution and cooperation without compromising on the perks that must be awarded to the creator. It is important to understand the legal nuances of sports when we see it in a globalized aspect. The rules for a fair play are as important as the rules for a fair trade. The sports industry has a dark side which has to be properly cleansed. We must realise the revenue generated through sports is a fairly huge piece of the economic pie, so we have to highlight its presence and stress more on its values. Sports law is a facet where we must bring a rigid structure and framework to it. A trivial aspect would be betting and gambling prohibitions and the black money that turns into an economic bad. Other important contexts are labour and industrial laws, to ensure removal of exploitation of the workers in sports and allied industries, entertainment and media laws to regulate the content presented in the on-screen and off-screen media, marketing and branding regulations to foster fair trade practices and notably on patents and copyrights so that the hard work and efforts of a person gets recognised.

“In a field called the world, playing the game of growth and development is required for scoring economic goals must take place without a red card”.

All we need to achieve the target is recognition of good players (i.e. various economic contributions), constant practices with discipline (i.e. structured framework of laws) and of course the readiness to compete in the global arena.

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IMPACT OF STATUTORY DEVELOPMENT ON CONSTITUTIONAL RIGHTS

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Abstract:
The Constitution of India has guaranteed various rights to the citizens of India. Though the rights are granted with an intention to protect the citizens, not every citizen is being protected by them. The law has been misused over the years, which has led to the need of introducing new statutes. The statutory developments are implemented with a view of safeguarding the constitutional rights.

The Surrogacy (Regulation) Bill, such Bill, are of very important nature introduced in the Parliament, in the last year, in order to stop the abuse of law with respect to surrogate mothers, their children.

The introduction of the bill has been a tedious process as the guidelines to introduce the Bill were provided years ago, but due to the vague provisions and criticisms faced, the Bills had to be introduced again.

Though the intention of the Bill is to safeguard the rights, the government and the law makers have ended up construing the provisions in an ambiguous manner. The rights of surrogate mothers though granted, are still not absolute. The misuse of law can still take place. This needs to be stopped as they have suffered and it is the duty of the government to implement stricter policies, so that no one will be able to take unnecessary advantage of them.

INTRODUCTION OF THE SURROGACY (REGULATION) BILL, 2020

Introduction
The Surrogacy (Regulation) Bill 2020 has been approved by the Union Cabinet which was presided over by Prime Minister Narendra Modi. The amended bill is a reformed version of “The Surrogacy Regulation Bill, 2019”. It was a much-awaited response to the Indian citizens who were calling for a serious action to be taken in the field of surrogacy. The Surrogacy regulation bill, 2019 was passed by the Lok Sabha on 5th of August 2019. The bill was pending in the Upper House and is on its way in becoming a statute.

Nature has given the ultimate gift to women to propagate a new life within themselves. Unfortunately, due to some corporal problems and biological issues, some women may be unable to bear a child. The desire of having a child drives the couples having medical setback to look for an alternative such as IVF (in vitro fertilization), Artificial Reproductive Technology, Intra Uterine Injections and Surrogacy.

Emphasizing on the concept of surrogacy, nowadays it has become a very famous concept and is widely accepted by people all over the world. This is also leading to exploitation of women in many ways, especially in India, which was once a hub of surrogate mothers. Surrogacy helps couples who have sheer intention to become parent. The concept has a number of risks associated with it and the most vital one being the abuse of surrogate mother. Surrogacy in India alone holds an industry worth $400 billion annually and as mentioned, India being a hub of surrogacy, approximately 25,000 children are born through surrogacy each year and there are
more than 3000 clinics for the same. This has also led to child trafficking.

Clinics generally charge patients between $10,000 and $28,000 for the complete package, including fertilization, the surrogate’s fee, and delivery of the baby at a hospital in India.  

Surrogacy Bill, 2020  
The Surrogacy Regulation Bill, 2020 aimed at banning the commercial surrogacy and allows altruistic surrogacy which was also a main aim for The Surrogacy Regulation Bill of 2019. The Surrogacy Bill 2020 allows any willing women to become a surrogate mother and also proposes that widow or divorced women can also willingly become a surrogate mother and take benefits from this provision besides the infertile couples. The National Surrogacy Board at the Central Level and State Surrogacy Board at the State Level and appropriate authorities in states and Union Territories respectively to be established. The Proposed insurance coverage which was 16 months in the earlier version is now revised to 36 months. The Bill also states that Commercial Surrogacy will be strictly prohibited and also the auction and purchase of human embryo and gametes will be a punishable offence. Ethical Surrogacy is being allowed to the Indian married couples and Indian single woman which also includes a Widow and a Divorcee aged between 35 to 45 years will be allowed to become a surrogate mother on fulfillment of aforementioned criteria.

Surrogacy Bill, 2019

The surrogacy bill marks the end of persistent debates regarding practice of surrogacy in India. Minister of Health and Family welfare, Dr. Harsh Vardhan introduced the Surrogacy (Regulation) Bill on 15th July 2019. The Bill defines surrogacy as modus operandi where one woman bears and gives birth to a child for an intending couple with the intention of handing over the child after birth. This bill specifically safeguards the interest of the Surrogate Mother, prohibits commercial surrogacy, and gives a framework as to how exactly and in what conditions surrogacy is currently allowed in the nation.

In early 2000s, the government legalised commercial surrogacy which means becoming a surrogate mother in return for monetary benefit. This made news worldwide which led to thriving of the industry of foreign surrogacy and tourism. Thus, India got a tag of being a “baby outsourcing” destination. The commercialization of surrogacy not only degraded but also exploited women, as majority of them were poor and had no means to earn for a living. This enactment led to various commercial firms gaining profits through guiding foreign tourists to find a surrogate mother, arranging passport and visas for the surrogate child and helping them with paper work. Not only this but it also affected the women reproductive capacity and brought a famous concept of “renting out womb” for the intended couple to be blessed with a child.

Commercial Surrogacy  
“Commercial Surrogacy” means commercialisation of surrogacy services or

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procedures or its component services or component procedures including selling or buying of human embryo or trading in the sale or purchase of human embryo or gametes or selling or buying or trading the services of surrogate motherhood by way of giving payment, reward, benefit, fees, remuneration or monetary incentive in cash or kind, to the surrogate mother or her dependents or her representative, except the medical expenses incurred on the surrogate mother and the insurance coverage for the surrogate mother.\textsuperscript{1143}

\textit{Altruistic Surrogacy}  
“Altruistic Surrogacy” means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.\textsuperscript{1144}

\textbf{Indian Council for Medical Research Guidelines}  
The ICMR proposed its draft “National Guidelines for the Accreditation, Supervision and Regulation” of ART Clinics in India, in 2002, which mentioned commercial surrogacy arrangements. The Ministry of Health and Family Welfare approved these guidelines in 2005. Commercial arrangements were not prohibited, and these guidelines were ineffective as they did not carry the weight of legislation. In response, the ICMR drafted the ART Bill in 2008. This Bill went through several revisions in 2010\textsuperscript{1145}, 2013, and 2014 as it moved through the Ministries of Health and Family Welfare, Law and Justice, and the Cabinet, successively.

The Indian Council for Medical Research had given guidelines in the year 2002, approved by the government in 2005, regulating Assisted Reproductive Technology procedures.

The Law Commission of India submitted the 228th report on Assisted Reproductive Technology procedures discussing the importance and need for surrogacy, and also the steps taken to control surrogacy arrangements.

\textit{Observations made by the Law Commission:}  
Surrogacy arrangement will continue to be governed by contract amongst parties, which will contain all the terms requiring consent of surrogate mother to bear child, agreement of her husband and other family members for the same, medical procedures of artificial insemination, reimbursement of all reasonable expenses for carrying child to full term, willingness to hand over the child born to the commissioning parent(s), etc. But such an arrangement should not be for commercial purposes.

- A surrogacy arrangement should provide for financial support for surrogate child in the event of death of the commissioning couple or individual before delivery of the child, or divorce between the intended parents and subsequent willingness of none to take delivery of the child.
- A surrogacy contract should necessarily take care of life insurance cover for surrogate mother.

\textsuperscript{1143}The Surrogacy (Regulation) Bill, 2019, Bill No. 156-C of 2019, Section 2(f)  
\textsuperscript{1144}The Surrogacy (Regulation) Bill, 2019, Bill No. 156-C of 2019, Section 2(b)  
\textsuperscript{1145}The Assisted Reproductive Technology (Regulation) Bill – 2010  
\textsuperscript{1146}Olinda Timms, Ending commercial surrogacy in India: significance of the Surrogacy (Regulation) Bill, 2016, Indian Journal of Medical Ethics, (5 March 2018), https://doi.org/10.20529/IJME.2018.019
• One of the intended parents should be a donor as well, because the bond of love and affection with a child primarily emanates from biological relationship. Also, the chances of various kinds of child-abuse, which have been noticed in cases of adoptions, will be reduced. Otherwise, adoption is a means which is resorted to if biological (natural) parents and adoptive parents are different.
• Legislation itself should recognize a surrogate child to be the legitimate child of the commissioning parent(s) without there being any need for adoption or even declaration of guardian.
• The birth certificate of the surrogate child should contain the name(s) of the commissioning parent(s) only.
• Right to privacy of donor as well as surrogate mother should be protected.
• Sex-selective surrogacy should be prohibited.
• Cases of abortion should be governed by the Medical Termination of Pregnancy Act 1971 only.

These guidelines became a curse rather than a boon for the rights of surrogate mother and the child. According to the above-mentioned guidelines, a woman will get monetary benefits for becoming a surrogate mother and the money that she will receive will be decided by an arrangement between the couple and mother. The father will donate his own semen and the gametes for fertilisation will be provided by another woman whose identity will remain anonymous during the whole procedure of surrogacy.

The surrogate mother will be infused with the zygote and after a period of nine months, she will have to relinquish all the parental rights to the surrogate child.

Although these guidelines were given by the Indian Medical Council, still the bloom in the industry of commercialized surrogacy was so rapid that the government had to intervene in between and eventually had to ban the commercial surrogacy in the year 2015. Also, this mode of surrogacy became so famous all over the world that the government had to intervene in this misuse of law. The main urge for the change in the law came after the relevant case of Baby Manji Yamada vs. Union of India (2008) 13 SSC 518. In the year 2008, Manji Yamada, a baby girl was born through surrogacy by Pritiben Mehta who was arranged as a surrogate mother for a Japanese couple named Ikufumi and Yuki Yamada. Pritiben was infused using a fusion of sperm of Yamada and an anonymous Indian woman’s egg. Post infusion the couple filed for divorce and only a month prior to the delivery of the child, it so happened that the couple got separated and the future of the new born was left in murky. The father wanted to take the child to Japan, but there was no provision for a case like this in India as it was tough to decide as to whose child baby Yamada is, the woman who donated the egg, Pritiben (her surrogate mother), or Yuki Yamada who donated his sperm. Neither the Indian government was providing any measures nor was the Japanese government approving to bring the child back home.

However, the decision of Supreme Court allowed the child to leave the country with grandmother Emiko and on humanitarian grounds the Japanese government gave the

The Supreme Court of India in 2008 held surrogacy permitted in India after Baby Manji’s case increased the international poise of going for surrogacy in India.

Evolution of the Surrogacy Bill
The Surrogacy (Regulation) Bill, 2016
The Surrogacy Bill 2016 was proposed on 21st November 2016 in Lok Sabha and the bill was passed on 19th December 2018. Legislation of the bill was drafted by the former external minister Lt. Sushma Swaraj along with a group of ministers who proposed the bill with a view to allow only married Indian couples to try for surrogacy of altruistic kind. This inference was made after going through various cases of surrogacy as inferred from the above judgment of Baby Manji Yamada and other similar cases were studied from India and abroad. The cases were a matter of sheer complication, either due to nationality or abandonment of child. One more case amongst those after Baby Yamada was the distressing case of Baby Dev. The baby boy was born along with his twin sister to an Indian surrogate mother, who was commissioned for surrogacy to an Australian couple. After the delivery, when the couple came to India, they decided to take only the baby girl and leave the boy, giving a reason that they cannot afford to raise both children and that they already have a boy at home, so taking the girl child will “complete their family,” thus leaving the boy behind. It was a disheartening situation because the Australian couple were very much aware of the fact that the baby boy would be left stateless, not having citizenship in either of the country due to the Indian surrogacy law. These were the various issues which led to the enactment of Surrogacy law of 2016.
The bill was a major optimistic landmark for the surrogacy law in India. The bill emphasized on prevention of commercial surrogacy and promotion of altruistic surrogacy, it prevented exploitation of both the surrogate mother and child and also the establishment of registered surrogacy clinics and formulating a National and State surrogacy board and Appropriate Authority. Therefore, the procedure of surrogacy can only be carried out where there is no monetary benefit to the surrogate mother except the insurance expenses during pregnancy period.

Provisions of the Surrogacy (Regulation) bill 2016
- The bill was applicable to all the states of India except Jammu and Kashmir.
- The bill provided the right of surrogacy to only Indians and abolished it for the NRI, PIOs and Foreigners.
- National Surrogacy Board and State Surrogacy Board were formulated.
- The couple intending for surrogacy should be aged between 23 to 50 years and are married for at least 5 years.

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1148 Samantha Hawley, Suzanne Smith, India Surrogacy Case: Documents show New South Wales couple abandoned boy despite warnings, ABC News, (13 April 2015, 02:09 pm), https://www.abc.net.au/news/2015-04-

13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206
The women can only surrogate once in her lifetime and should be between age group of 25 to 35. Homosexuals and single parent were not allowed for surrogacy and also barred couples who already had children. The bill provided provision for the custody and also the penalty and imprisonment if the person violated any law prescribed. You can approach only a close relative for surrogacy.

**Drawbacks in 2016 Bill**

Even though this bill covered the majority of portion and was in a positive direction, still there were many loopholes. The bill was targeted against the LGBT community and single parent as their right to have a child got violated. The bill was also criticised because it allowed only a close relative to become surrogate which could have disturbed personal space. Article 21 was also getting violated as it was denying deserving people of parenthood. There were poor women who were earning a living through surrogacy and due to the new provision, their revenue got effected. India being a country which gives importance to family orientation and practicing orthodox beliefs, peer pressure may be one reason behind problems in marriage. And most importantly, it did not mention any provisions for those who wanted to opt for a second child through surrogacy. So, to fill these loopholes a new bill was proposed, “The Surrogacy Regulation (2019) Bill”, the 2016 Regulation Bill lapsed with dissolution of the 16th Lok Sabha.

**The Surrogacy (Regulation) Bill, 2019**

- The Bill forbids commercial surrogacy and allows altruistic surrogacy. Altruistic surrogacy does not involve any monetary compensation or any reward to the surrogate mother other than the medical expenses and insurance coverage during the course of pregnancy.
- The Bill permits surrogacy if it is fulfilling the eligibility criteria that is: for intending couples who suffer from verified infertility; altruistic surrogacy; not for monetary benefit; not for producing children for auction, prostitution or other forms of exploitation.
- The intending couple should have a ‘certificate of essentiality’ and a ‘certificate of eligibility’ issued by the appropriate authority.
- The central and state governments shall constitute the National Surrogacy Board (NSB) and the State Surrogacy Boards (SSBs), respectively.
- Further, the surrogate mother cannot provide her own gametes for the process of surrogacy.
- A certificate of essentiality will be issued to the intending couple upon fulfilment of the following conditions that is, a certificate of proven infertility of either or both of the partner(s); an order passed by a Magistrate’s court of parentage and custody of the surrogate child; and insurance coverage for a period of 16 months covering post-delivery complications for the surrogate mother; such other conditions that may be specified through regulations.
- The certificate of eligibility to the intending couple is issued upon the fulfilment of the

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1151 The Constitution of India, Article 21

following conditions that is, the couple should be an Indian citizens and be married for at least span of five years; the age should be in between 23 to 50 years old (wife) and 26 to 55 years old (husband); they should not have any surviving child (biological, adopted or surrogate), except if the child is mentally or physically challenged or suffers from a life-threatening disorder; and such other conditions that may be specified through regulations.

- To obtain a certificate of eligibility from the appropriate authority, the surrogate mother has to: be a close relative of the intended couple; be an ever-married woman having a child of her own; be 25 to 35 years old; not have been a surrogate mother earlier; and have a certificate of medical and psychological fitness.

- A child born out of a surrogacy procedure will be deemed to be the biological child of the intending couple. An abortion of the surrogate child requires the written agreement of the surrogate mother and the authorisation of the appropriate authority.

- This authorisation will have to be compliant with the Medical Termination of Pregnancy Act, 1971.1153

Further, the surrogate mother will have an option to withdraw from surrogacy before the embryo is implanted in her womb.

- The central and state governments will appoint one or more appropriate authorities.

- The functions of the appropriate authority include: granting, suspending or cancelling registration of any surrogacy clinics; enforcing standards for surrogacy clinics; and investigating and taking action against complaints of breach of the Act. The authority is required to consider and grant or reject the applications for certificates of eligibility to the intending couples and surrogate mothers within a period of 90 days from the date of application. The appropriate authority comprises the Joint Director of the state Health Department, an officer of the state Law Department, a medical practitioner, and an eminent woman.

- Surrogacy clinics cannot undertake surrogacy or its related procedures unless they are granted registration by the appropriate authority. Clinics must apply for registration within a period of 60 days from the date of appointment of the appropriate authority. This application will be accepted or rejected within 90 days. No human embryo or gamete can be stored by a surrogacy clinic for the purpose of surrogacy.

- The Bill creates certain offences which include: undertaking or advertising commercial surrogacy; exploiting the surrogate mother; selling or importing human embryo or gametes for surrogacy, and abandoning, exploiting or disowning a surrogate child. These offences will attract a penalty of up to 10 years and a fine of up to 10 lakh rupees.

Drawbacks in 2019 Bill

- the bill did not discuss about NRIs who are abroad, who intend to have a child after coming back to home country.
- The unmarried couples and the LGBT community who want to have a child through surrogacy are again left out.
- Allows only Altruistic surrogacy, this concept fails in some countries.
- The surrogate mother should be paid for it while risking their lives and in return they should be getting an insurance for the course of their pregnancy.

International Surrogacy

1153The Medical Termination of Pregnancy Act, 1971 (Act No. 34 of 1971)
Commercial surrogacy is prohibited in various countries such as India, Netherlands, United Kingdom, South Africa, and Greece. These countries only practice Altruistic surrogacy.

Counties like Russia exercise commercial surrogacy.

The above-mentioned countries practicing Altruistic surrogacy allow only medical expenses,\textsuperscript{1154} rational expenses and insurance to the surrogate mother unlike Russia which gives any amount of monetary benefit having no limits.

There is a provision for penalties in the counties where commercial surrogacy is banned such as imprisonment, fine or both.

The eligibility criteria of surrogate mother in India is totally different than any other country, the surrogate mother has to be a close relative, should be married, have at least one child of her own, cannot become a surrogate mother in her lifetime after one surrogacy. All these criteria only exist in India no other country has any such provisions.

There is no provision for the consent of partner in India to become a surrogate mother but South Africa, Russia, Greece requires consent of partner whereas in Netherlands and United Kingdom, it is not required at all.

The intending or commissioning partners needs to be married only in India, no such provision is available in any other country, any person be it single or married can become a commissioning parent without getting married.


Conclusion

The Surrogacy (Regulation) Bill, 2020 has by far been in the best interest of surrogate mother and child. The market of infertility has widely spread and so the requirement for a stringent law regarding surrogacy is risen. The exploitation of women and trafficking of children born through surrogacy was rapidly increasing which had to be stopped by implementing various provisions and amendments. The Surrogacy Regulation Bill 2020, must not have brought these hitches to the complete termination but somewhere it has helped the society by accepting the concept of surrogacy and by enabling the intended couples to get a child through surrogacy and also by making a provision by which any willing women can become a surrogate mother on fulfilment of certain criteria’s.

The number of Public Interest Litigations filed in the Supreme Court has resulted in the decline of the number of incidents wherein the rights of women and children were disregarded due to Commercial Surrogacy. The new provisions for surrogacy has curb the exploitation and has also made the authorities formulate and

\textsuperscript{1154}Kishwar Desai, India's surrogate mothers are risking their lives. They urgently need protection, The Guardian, (05 June 2012, 20:30 BST), https://www.theguardian.com/commentisfree/2012/jun/05/india-surrogates-impoverished-die

\textsuperscript{1155}Issues for Consideration The Surrogacy (Regulation) Bill, 2019, PRS Legislative Research, https://prsindia.org/node/842647/chapters-at-a-glance
practice the Surrogacy Laws in India in a much better way. These laws are benefitting the surrogate mother, prospective parents and children born. The Government is taking effective initiatives for the larger good of people, but the policies have to be stricter so that no one would be able to violate them.

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GROUNDWATER AND SUSTAINABILITY: STUDY ON RAIPUR'S GROUNDWATER POLLUTION AND DEPLETION PROBLEM

By Shaheen Banoo
From Symbiosis Law School, Pune

ABSTRACT

"A development is not a development if it destroys our planet."

This article gives an encapsulation of the concept of sustainable development. It gives an overview of the concept of sustainable groundwater resource development. The world is progressing at an alarming rate where sustainable development has become the undeniable need of the hour. As per Brundtland report sustainable development as a concept advocate the use of resources in a matter that the present demands are fulfilled without compromising on the needs of the future generation.

This paper attempts at explaining how the concept of Sustainable has helped in enriching the legal environmental jurisprudence. It further provides an examination of the international legal instruments on groundwater resources viz., UNCCD and UNECE Water Convention. Further, this paper construct an analysis of The Water (Prevention and Control of Pollution) Act, 1974.

This article specifically deals with the capital city of Chhattisgarh, Raipur's groundwater depletion and how it has affected its residents. An empirical research had been conducted to this effect; an analysis of which has been reproduced in the paper.

Keywords: UNCCD, UNECE Water Convention, Brundtland report, Sustainable development, Sustainability, The Water (Prevention and Control of Pollution) Act, 1974.

INTRODUCTION AND BACKGROUND

"Sustainable development is the development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

-Gro Harlem Brundtland

CONCEPT OF SUSTAINABLE DEVELOPMENT

Genesis of Sustainable Development
The concept of Sustainable Development finds its root in the certitude that the Earth is being robbed out of its renewable and non-renewable resources. "With the advent of ever increasing population and the never ending demand of earth resources to cater to the demands of the mass has given soil for the concept of sustainable development to sow its seed." 1156

Resources being depleted at an unstoppable pace awakened the world to come together and start thinking about its check. Hence, the principle of sustainable development...
stems from international activity on the environment.

**Definition of Sustainable Development**

"The term sustainable development raised to notability in the year 1980 in the World Conservation Strategy (WCS). The concept of sustainable development became omnipresent with the publication of the Brundtland Commission Report\(^{1157}\) called as, "Our Common Future" from the World Commission on Environment and Development in the year 1987."

It defines sustainable development "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

This research paper is structured as follows. First part will lay out the framework of sustainable development and concept of water as natural a resource and the need of its sustainability. Second part will construct analysis of the international conventions relating to it and Water Pollution Act in India as its concomitant consequence. The third part provides an examination of the concept of sustainable development as an exemplar of enriching the environmental legal jurisprudence along with illustration of classic and up to the minute cases pertaining to Indian context. The fourth part will be the analysis of empirical research on ground water survey in Raipur city. The fifth part put forth the suggestions and recommendations based on the analysis of the survey. Lastly, the sixth part will be the conclusion.

**FRAMEWORK OF SUSTAINABLE DEVELOPMENT**

The objective of sustainable development is to achieve economic and social development and at the same time to preserve and protect environment as well.\(^{1158}\) It is based on Intergenerational Equity Principle (IEP) as propounded by Brundtland Report that explains that every generation should exploit the resources in a manner that it does not hinder the rights of the future generation to the enjoyment of the same.

Therefore, the old adage still holds true that well explains the concept of IEP, "We have not inherited the Earth from our forefathers, nay have borrowed it from our children."

1.1 **Stockholm Conference 1972**

The term "sustainable development" received widespread recognition in the Stockholm Conference. Principle 6 of Stockholm talks about "assimilative capacity" of the nature, "where it propagated that harm should not exceed the level where nature struggles or finds it difficult to repair the damage and to ameliorate the damage done".

However, later on in the year 1987, Principle 11 of United Nation General Assembly Resolution on "World Charter for Nature" (WCFN) on the "Intergenerational Equity Principle (IEP) of the World Commission on Environment and Development (WCED)".


for Nature", i.e., the "precautionary principle" was emphasised in place of Principle 6 that talked about "assimilative capacity principle".

1.2 The Rio Declaration on Environment and Development (1992)

The "Rio Declaration also called as the Earth Summit later after 10 years further reaffirmed the aforementioned "precautionary principle". Principle 15 of Rio advocated "precautionary principle" by doing away with the need of any scientific certainty as a condition precedent to take measures instead propagated that precaution is better than care. Simply put, the rule finds its rule in Salutary theory which espouse the idea that "it's any day better to err on the side of caution and safely then being in the opposite direction where environmental harm, once done, may not be reversible."

The "precautionary principle" promote the idea of not delaying precautions due to dearth of scientific certainty. It should not be the reason for postponing adoption of measures to avoid environmental degradation.

CONCEPT OF WATER RESOURCES AND ITS SUSTAINIBILITY

Water is essential to life and so does its sustainability is an undisputed actuality. Although, "water is a renewable natural resource but it should also be kept in kind that mankind should not exploit it beyond the nature's assimilative capacity where the damage done is beyond repair; beyond restoration of status quo if not any better."

Importance of Water Sustainability

Life on earth will not sustain if there's no fresh water on earth. "The very speculations of the third world war having water as its subject-matter has enough force in the contention to start working towards it sustainability. And not just working but also, achieving its goal as well.

The severity of the problem is such that as many as 21 India cities are on the verge of having zero groundwater level by the end of 2020 as per the NITI Aayog reports. To this effect, the reports also suggest that the capital of the country, Delhi, the city of Bangalore and Chennai will be left with no groundwater by the end 2020 owing to excessive abuse of groundwater."

INTERNATIONAL LEGAL INSTRUMENTS ON GROUNDWATER

2. International Environmental Treaties having Provisions on Groundwater

2.1 United Nations Convention to Combat Desertification (UNCCD)

The UNCCD was established in the year 1994 to tackle and withstand desertification and to also alleviate the effects of drought. "This was on 17 June 1994 adopted in Paris,

1161 Sujay Raghavendra & Paresh Chandra Deka, Sustainable Development and Management of Groundwater Resources in Mining Affected Areas,
France and was enforced in 1996. A total of 197 countries are party to it and works towards its implementation.

"It is pertinent to note that it is the single internationally legally binding agreement that actually links development and environment with sustainable land management. It is the sole agreement that addresses the problem of desertification. Its objective is restoration of degraded land to increase productivity. It closely operates on the line of Rio Conventions; the Convention on Biological Diversity (CBD) and the United Nations Framework Convention on Climate Change (UNFCCC) for the viable use of natural resources.

2.2 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

This treaty is a result of the request made to the United Nations by the International Law Commission to come up with international guidelines for water use on the same lines of The Helsinki Rules (UNECE).

Water Convention, 1992) on the Uses of the Waters of International Rivers."


The objective of the treaty "is to conserve all waters that cross international boundaries that includes both surfer and ground water. UN aimed at conservation and management of the water for the present and future use and need. It took almost 17 years to come into force finally in August 2014.

This treaty has only been ratified by 36 countries as of now but is surely seen as crucial step towards establishing international law governing water."
The Water (Prevention and Control of Pollution) Act, 1974

It is pertinent to note that India is signatory to the resolution passed by the United Nations Water Conference 1977, which provides, as follows:

"All people whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in a quantum and of a quality equal to their basic needs."

The Water (Prevention and Control of Pollution) Act, 1974 (hereinafter referred as "Water Act") Act was to prevent and to check on water pollution. "It was India's first step and the very first attempt towards environmental pollution and it is applicable to water bodies including subterranean waters, rivers, streams, inland waters, and tidal waters." It was adopted in the year 1974.

The provisions of this Act stems from the sagacious mix of "Precautionary Principle" and the "Polluter Pays Principle" of sustainable development.

This is a complex yet "comprehensive legislation that provides for pollution control boards at the centre and states both. Section 17 of this Act clearly lays down the functions of water pollution board to counter water pollution."

To this effect the Supreme Court in A.P. Pollution Control Board v. M.V. Nayadu held that the underlying principle and spirit behind this Act is that all citizens of India should get clean drinking water.

The courts have in many cases made its stance very about seriousness of check on water clear by pulling up State Boards for dismal discharge of their functions."

In D.K. Joshi v. Chief Secretary, State of U.P. the Supreme Court passed an order to ensure availability of clean and unpolluted drinking water in the city of Agra. The court had passed this order in a PIL filed under Article 32 of the Constitution.

Likewise, "in the famous case of M.C. Mehta v. Union of India the court had ordered for shutting down the tanneries plant as it was discharging its effluents in the river Ganges without installing primary treatment plants.

Furthermore, in Ramji Patel v. Nagrik Upbhokta Marg Darshak Manch the Supreme Court had ordered the Central Pollution Control Board to come up with their report so to curb even any minute possibility of contamination or for that matter pollution of drinking water".

Therefore, "it evident that the judicial intervention by the courts has led to the implementation of this Act in actuality to attain the object of Water Act to provide unpolluted and clean drinking water to every citizen.

However, it is of paramount importance to note that the courts have also interpreted Article 21 of the Constitution that Right to Life also means right to access to clean

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1174 Water (Prevention And Control of Pollution) Act, 1974 [Act No. 6 of Year 1974].
1175 (2001) 2 SCC 69.
1178 AIR 1988 SC 1037.
water and the State has an obligation to provide the same”.

**STUDY ON RAIPUR'S GROUNDWATER POLLUTION AND DEPLETION ISSUE**

**RESEARCH METHODOLOGY**

The researcher has opted "empirical form of research for the survey of groundwater in Raipur (Chhattisgarh's capital). To this effect, the researcher has collected primary data by means of surveying various people belong to different age groups by questionnaire. Hence, the data assimilated is quantitative in nature". The researcher has used the capital city of Chhattisgarh, Raipur as her subject-matter of the research.

The research is exclusively focused on the residents of the "Raipur city, as the sample for study; reason being the groundwater in Raipur city is degrading and depleting at a high pace, and the residents would be in a better position to provide the first hand experience in things like, if they felt summer was hotter than recent years and if they were affected by any disease due to consumption of the such water etc.

*Thus*, empirical method of research was adopted in order to understand the plight and to gather the opinion of the residents alongside their stance and attitude towards the protection of the environment. A well tabulated questionnaire was circulated in order to conduct the survey”.

**DATA DESCRIPTION**

**1. SAMPLE SIZE AND DESCRIPTION**

The primary data has been collected by conducting survey through questionnaire circulated to people of various age groups. "The participants are all residents of Raipur or the people who've moved to the capital city, Raipur in recent years and are currently residing in Raipur." The sample size is 50.

<table>
<thead>
<tr>
<th>Age Group</th>
<th>No. of responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upto 18 years</td>
<td>21 (42%)</td>
</tr>
<tr>
<td>Upto 22 years</td>
<td>18 (36%)</td>
</tr>
<tr>
<td>Upto 25 years</td>
<td>3 (6%)</td>
</tr>
<tr>
<td>Upto 30 years</td>
<td>0%</td>
</tr>
</tbody>
</table>

**2. SURVEY QUESTIONS**

The following survey questions were part of the questionnaire and its responses are depicted below as follows:-

**2.1 Residential period in Raipur**

- 79% 2-5 years
- 9% 5-10 years
- 4% 10-15 years
- 8% 16-20 years
- 3% 21-25 years
- 0% 26-30 years
- 0% More than 30 years
2.2 Notice in change of water pollution over the years

Notice in change of water pollution over the years

- Yes: 18%
- No: 74%
- Can't Say: 8%

2.3 Awareness about degradation of groundwater quality in Raipur

Awareness about degradation of groundwater quality in Raipur

- Yes: 64%
- No: 16%
- Don't Know: 20%

2.4 Was your health affected due to water quality in Raipur?

Was your health affected due to water quality in Raipur?

- Yes: 50%
- No: 18%
- Maybe: 32%

2.5 Ways in which health was affected

Ways in which health was affected

- Eye Infection: 6%
- Malaria: 10%
- Typhoid: 14.9%
- Dysentery: 14.9%
- Cholera: 4.3%
- Diarrhoea: 6.4%
- Any other: 31.9%

2.6 Whether the summer was hotter than recent years?

Whether the summer was hotter than recent years?

- Yes: 86%
- No: 4%
- Maybe: 10%

2.7 Would you consider moving out of Raipur?

Would you consider moving out of Raipur?

- Yes: 44%
- No: 50%
- Maybe: 6%

2.8 Aware about any organisation or an NGO working on water pollution in the city

Aware about any organisation or an NGO working on water pollution in the city

- Yes: 74%
- No: 8%
- Don't Know: 18%
Since Raipur is facing the problem of groundwater depletion, "it is of paramount importance to understand the opinion of the residents of the city. However, at the same time it is pertinent to understand their knowledge of water pollution, environment pollution, awareness about the concept of sustainable development, and so on. Therefore, all the figures stated are reproduced after mindful analysis of the responses received by the sample size.

**DATA ANALYSIS**

Since Raipur is facing the problem of groundwater depletion, "it is of paramount importance to understand the opinion of the residents of the city. However, at the same time it is pertinent to understand their knowledge of water pollution, environment pollution, awareness about the concept of sustainable development, and so on. Therefore, all the figures stated are reproduced after mindful analysis of the responses received by the sample size.

Furthermore, one of the important aspects about shift in the weather during summer time was also felt by the people. Raipur city marks as high as 50 degree Celsius during summer especially in the month of May and June".

1. Condition of water pollution in the city

According to the survey, 74% people have actually felt change in the level of water pollution over the years in the city and 64% people are aware about the degradation of groundwater which is the prime subject-matter of the analysis. "The analysis of the survey depicts that a major chunk was aware about the degradation of the groundwater.

2. Impact of water pollution on the health of residents of Raipur

The consumption of polluted water leads to many waterborne diseases. It affects the health of the people if polluted water enters into human body leading to variety of ailments and some sickness. Therefore, it was important to understand as to how the pollution has affected the health of the residents.

The participants were inquired about the ways in which the water pollution had affected their health and their day-to-day activity. The researcher has analysed how the residents were affected by different waterborne diseases and its impact on the health in the long run. They participants were affected by diseases like eye infection, dysentery, malaria, typhoid, diarrhea, and cholera"

3. Awareness about Environment Protection

The data analysis also indicates towards the fact that majority belonged to the age group between 22-25 years and it shows that the youth is aware about groundwater depletion. But the data also reflects that the educated mass don't possess knowledge about environmental problems, as 76% of them had no awareness about the NGO's and organisation that are working towards the improvement of groundwater in the city. "However, only 24% have only heard about such NGO's and different organisations working towards this effect. This survey further reflected the dismal knowledge about the..."
protection of the environment, the mass sure is aware about the problem but they lack knowledge about what can be done to improve or eradicate environment pollution.

4. Thoughts on moving out of the capital city of Chhattisgarh, Raipur

Chhattisgarh is a newly formed state in the year 2000 and is not even 20 years old as of now. Raipur, being its capital has a lot of scope and potential for development. Raipur has also been included in the smart city plan of hon'ble PM, to transform cities into smart cities.

Therefore, it was important to know the thoughts of residents of the place if they consider living in the same city or they plan to move out. Thus, according to the survey, 44% people wants to move out of Raipur and 50% are not sure about to continue living there". These statistics of the survey points to an alarming need of improvement in the water pollution level. As Raipur has no dams and the majority rely on groundwater for daily consumption, therefore, urgent concrete measures are required to improve water quality.

On the other hand, only very few are optimistic that there should be some improvement in the near future to this problem.

SUGGESTIONS AND RECOMMENDATIONS

The researcher would like to put forth various recommendations that can effectively combat the water pollution in Raipur. "Some suggestions are based upon the survey conducted in order to gather the perspective of the residents of the city, whereas others are based on general analysis of all other legal provisions available. The recommendations are framed keeping India's obligations to various international conventions in relation to water pollution and sustainability", per se.

1. Groundwater depletion is a direct consequence of excessive pumping of water. "It could be for industrial purpose or irrigation purpose and alike, therefore, a check should be there on excessive pumping of water. Misuse of groundwater should be regulated.

2. As Chhattisgarh is the rice bowl of the nation, lot of groundwater is used for irrigation purpose. The state should endeavor to promote use of surface water for such purposes. To this effect, use of surface water should be promoted.

3. Since Raipur is being nominated in the smart city project the government should keep in mind that necessary precautions should be taken before heading the way of development. Any development at the cost of ruining the nature is only going to be detrimental in the long run".

4. The government should provide incentive for rainwater harvesting and cheaper methods to harvest rainwater should be invented.

5. Government should make it mandatory to obtain license before digging out personal bore wells. "There should be a proper check on the numbers of bore well to be dug by residents and collective use of one bore well by many should be encouraged to avoid digging of surplus bore wells many a times.

6. 3 R principle of Reuse, Reduce and Recycle should be implemented not only in letter but in spirit. Reduction in the use of water is also one way of generation of water for the future generation.

7. Strict laws should be made on deforestation, "as it results in decrease in
rain and also lack of trees causes less water to seep into the ground.

8. Nowadays the phenomenon of urbanisation is on its peak, but it should also not hamper the nature's capacity to replenish its resources”.

9. Most importantly "awareness about environmental protection should be spread by resorting to new ways of reaching the mass, for instance social media could be used as a platform to further the idea of environment protection and sustainable development.

10. Budget allocation should have some shares allotted to protection of environment”.

The aforementioned recommendations are an attempt by the researcher to improve upon the problem the city is facing, however the list of recommendations are illustrative as there are various other ways which could be resorted to in order to tackle pollution level.

CONCLUSION

“The sustainable development is the pathway to the future we want for all. It offers a framework to generate economic growth, achieve social justice, exercise environmental stewardship and strengthen governance.”

-Ban Ki-moon

Therefore, to conclude in the light of the above statement the researcher is of the opinion that although the country is making efforts to combat environmental pollution and to promote sustainable development yet the resources are being depleted at a high pace. Thus, it is upon human to develop and at the same time use the resources in a clever manner so as it does not exploit it.

The earth is being robbed out of its resources "like never before in the race of development where, there shall be not clear
SOCIAL-LEGAL ASPECTS OF SUUROGACY: A BLESSING OR CURSE

By Shakti Chaturvedi
From Guru Govind Singh Indraprasth University

ABSTRACT
Surrogacy had been a blessing for every infertile couple and for all, who are unable to conceive for some or other reason and it helps them to enter into arrangement with a woman who agrees to become pregnant for them. It being legal in few and illegal in many countries, India had emerged as a biggest hub and attraction for couples who are excited for having child of their own genes. But the biggest and most concerned problem for India being a surrogacy hub is having no proper regulations and legislation for it, because of which parties to surrogacy agreement whether it be a couple wanting to have a surrogate child, or a surrogate mother or a surrogate child, are highly on risk of being exploited. This research paper has emphasized on the study of problems faced during or after this whole process and it talks also about the legislations and bills which are in a trial to be passed by the houses to make it a proper law. But as these trials are in process from more than 10 to 15 years, it seems hard for us to come up with any such law to regulate surrogacy.

Marriage is an institution between husband and wife and one of the main essential of this association is a procreation of child. It is said just not to be a physical union but spiritual and emotional union as well between the partners and is a lifelong commitment. There exist very important functions of marriage and one of them is procreation of children or in simple word reproduction i.e., extending their family. Without reproduction the continuation of society is at stake and our society believes in legitimate birth which takes place only within the wedlock. But not every couple is fortunate enough to have their own biological child, this happens because of infertility i.e., when couple cannot conceive after having regular unprotected sex. Infertility is the inability to become pregnant after one year of intercourse without conception involving a male or female partner. There are many causes of infertility, including some that medical interventions can treat. But in cases of untreated infertility, people prefer adoption or surrogacy in often. There can be many reason to opt for surrogacy other than infertility, it may include medical conditions, diversities regarding sexual identity and orientation or Complete Androgen Insensitivity Syndrome (CAIS) in this case uterus and ovaries are absent or women who might have undergone hysterectomy. The reason for opting surrogacy can also be matters of social nature reflect behind patient’s agreement to pursue surrogacy.

WHAT IS SURROGACY?
The word ‘surrogate’ means ‘substitute’. Surrogacy is an arrangement, by which couple who due to infertility or any other reasons are unable to conceive enters a legal agreement with a woman, who agrees to become pregnant and give a birth to a child for the couple who become the parent of the child. According to the Artificial Reproductive Technique (ART) Guidelines, surrogacy is an “arrangement in which a woman agrees to a pregnancy, achieved through assisted reproductive technology, in which neither of the gametes belong to her or her husband, with the intention of carrying it to term and handing over the child to the person or persons for whom she is acting as surrogate; and a ‘surrogate mother’ is a woman who agrees to have an embryo generated.” Surrogacy has come up as a dream come true method for people dreaming to achieve parenthood. Surrogacy may fulfil same sex couples’ or even a single parent’s desire for a genetically linked family.

Surrogacy is of two types - Gestational (or host) Surrogacy and Traditional (or genetic) Surrogacy.

Gestational surrogacy is when the embryo that is fertilised by invitro method is implanted in the uterus of the surrogate mother who then carries and deliver the baby. This method is usually suggested in the cases of Turner’s syndrome because these patients suffer from cardiac and medical complications in patients. On the other hand, traditional surrogacy is when surrogate mother is impregnated with sperm of intended father artificially which makes her both genetic and gestational mother.

In the process of surrogacy, intended parents enter a legal agreement with a surrogate mother, which makes sure that after the birth of a child there can be easier transfer of rights and obligation of child to the parents. This is also called rent a womb service.

BACKGROUND

The worlds second and India’s first IVF baby was born in Calcutta on 3rd October, 1978 and then created history when commercial surrogacy was legally recognised in India in 2002. It was not until 1980, the first paid traditional surrogacy was conducted. Elizabeth Kane received $10,000 to become a surrogate for another couple. Later, it was in 2005, when Indian council of medical research issued a set of guidelines for surrogacy industry. In many countries, payment for surrogacy is prohibited, solely allowing payment of necessary expenses. Specifically, Altruistic surrogacy is adopted in England, in many states of US, and Australia, whereas commercial surrogacy is permitted in India, Ukraine and California.

Although surrogacy is not legal in every country, some countries like France, Germany, Italy, Sweden and Norway have prohibited all form of surrogacy. Especially commercial surrogacy in intend to protect women and children from consequences of surrogacy. So the people of those countries whose are willing to parenthood, travel to these countries where

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1182 The Assisted Reproductive Technologies (Regulation) Bill-2010, Indian Council of Medical Research (ICMR), Ministry of Health &Family Welfare, Govt. of India, pg. 4 (a).
surrogacy is not just legal but is of much lesser pay than other countries. Now, when surrogacy got legalised in India in 2002 to promote medical tourism it soon became hub of surrogacy. Driven by facts that it offer option of surrogacy in low cost and also due to absence of legislature or legal framework regulating international surrogacy arrangements. As per the studies of confederation of Indian industry, the size of surrogate industry in India is of 2.3 billion dollars a year.\textsuperscript{1185} Also study of unites nation in July 2012, estimated the business at more than 400 million dollars a year, with over 3000 fertility clinics across India.\textsuperscript{1186}

But unregulated business concern rampant exploitation of surrogate mothers as well as their children. From multiple surveys and report on unethical practices, exploitation of surrogate mothers and abandonment of children have been witnessed in vast number.

Law commission highlighted need to enact a legislation in its 228\textsuperscript{th} report, in which it recommended prohibiting surrogacy citing concern of prelevant use of surrogacy by foreigners and lack of proper legal framework resulting in exploitation of surrogate mothers who do so due to poverty and lack of proper education. Although the Indian Council of Medical Research (ICMR), under the auspices of the Indian Ministry of Health, issued voluntary guidelines for ART clinics in 2002 and updated them in 2005, these guidelines are not binding.\textsuperscript{1187} Vagueness on key issues such as surrogates’ rights, surrogates’ minimum age, contract specifics, informed consent, and requirements regarding adoption has made the voluntary guidelines a target of considerable criticism in India.\textsuperscript{1188} And after this, in 2015 India put a stop to commercial surrogacy for foreigners. And this ban was only the start of legislation regulating surrogacy in India. Now after this, draft has been introduced to lower house of the parliament to ban it for Indian’s as well.

**PROBLEMS FACED IN SURROGACY INDUSTRY**

Surrogacy came as a blessing with a big help to all those people who were unfortunate enough to have their own child. But no blessing is a help for a long time, it soon started losing its value and began being a curse for lot of people and also a hindrance in the way of country to become develop.

Former minister of external affair of India, Sushma Swaraj said in the parliament, “commercial surrogacy becoming a luxury only for those who can afford it, while it need to be a necessity”. She pointed out the notice on one of the main issue of surrogacy which took away its fortune of being a blessing. As surrogacy after some time became a luxury for elite class and they leaving behind the fact that the purpose of surrogacy was to help couple unable to conceive, they already having their biological child and without being infertile started adopting surrogacy and which make

\begin{itemize}
  \item \textsuperscript{1185} World report on India’s unregulated surrogacy industry, priya shetty, www.lancet.com, vol- 380, 10- Nov.- 2012
  \item \textsuperscript{1186}Bhalla, Nita; Thapliyal, Mansi. "India seeks to regulate its booming surrogacy industry". Medscape. Reuters Health Information., (30 Sep. 2013)
  \item \textsuperscript{1187} National Guidelines for Accreditation, Supervision, and Regulation of ART Clinics in India. 2005. Indian Council of Medical Research, New Delhi
  \item \textsuperscript{1188} Sarojini, N.B., and Aastha Sharma. “Guidelines not enough, enact surrogacy laws.” Hindustan Times (Aug. 7, 2008)
\end{itemize}
it an act of luxury instead being a necessity. Also the process of surrogacy is not as cheap to be afforded by a middle class couple. We have many big celebrities who opted for surrogacy, for example famous film star Shahrukh Khan and Gauri Khan who already being a parent of two kids opted surrogacy for their third kid, also famous couple sunny leone and Daniel Weber has been recently in news for their successful surrogacy for their two twin baby boys after they adopted their first girl child, Lisa Roy (actor and model) who survived blood cancer few years ago became mother through surrogacy due to age and health complicacy. Ekta Kapoor (Indian producer) became single mother of baby boy named Ravi kapoor through IVF and surrogacy, similarly many other famous characters like Karan Johar, Sohail khan, Farah khan, Aamir khan, etc. These people are followed and also copied for their actions and which creates fear if having a surrogate child became a standard or some sort of status symbol in some time.

2. According to United Nations human right report 2018, “children are at risk of being commodities, as surrogacy spread and usually amounts to the sale of the children.” People through surrogacy not only achieve their parenthood but in many cases people from other country come to India get a child through surrogacy because of low cost and no proper regulation and legal framework for protection of children and then sell that child for a huge amount or also more of the times surrogacy has been used for exploitation of children. More often girl Childs are exploited who are pushed to sexual and some other inappropriate activities.

3. Surrogacy is a legal agreement but it involve a woman who holds emotional side too. In many of the cases, surrogate mother just after the birth of the child are not allowed to even see their child once because the intented parents fear that if she her child may be it become difficult for her to give up on the child and if she refuses to do so. Perhaps, the most famous case of “Baby M.” is a result of the emotional attachment that exists in a heart of a surrogate mother. In the case of “Baby M.” In 1984, Couple named Bill and Betsy Stern hired a surrogate Mary Beth Whitehead and paid her $10,000 for being a surrogate. The process used for surrogacy was of traditional surrogacy. And when baby was born, time came when whitehead was to sign over her parental rights which she refused to do so and claimed the custody. It was after long battle which ended in 1986, resulted in couple finally getting the custody of the child where whitehead got visiting rights. It was after this case people shifted to gesational surrogacy to avoid these legal entanglements. After this case US government came up with strict laws for se regulation of surrogacy. Whitehead have written about her regret and experience in her book “Birth Mother”. Through this case we witness a trauma or a heart break a women goes through while handing over a baby, who she has cherished for about 9 months and then have to hand it over to someone else. This is the case and the problem suffered by most of the surrogate mothers and in most cases these childs just after the birth are taken so far away that even if women get visitation rights, she can’t exercise it.


4. Many a times surrogate mothers breach a contract by doing something which is not allowed in contract like drinking alcohol, smoking or taking drugs which not only harms surrogate mother but also child in her womb. According to studies, it has been found that using marijuana or any other form of harmful drugs can affect the fetus. It was indicated that prenatal exposure may cause irritability to new born, abnormal visual response to the stimulus and increased risk of bronchiolities. In many of the cases these intneted couple try to get surrogate in lowest price or many times these surrogates are too young girls or immature not enough to know the consequences of few acts which may cause damage to the baby. So, these parents while agreement try to mention it as a restriction for surrogate, but women addicted to these or due to stress or social pressure end up taking drugs which can cause severe harm to the baby.

5. Medical complication can form when eggs of one woman are transplanted into the surrogate, which can cause her an infectious disease which can hurt also her baby. There are various tests a woman has to go before being a surrogate.

6. Commercial surrogacy also prohibits single parents, homosexual couples, live-in-relationship couples who all to opt for altruistic surrogacy. It’s hard for such people to get someone who get ready for them to become a surrogate without being paid.

7. Cross border childless couples face many problems not only on language basis but legal battles as well. They have to stay in India for 2-3 months to complete the formalities after a baby is born. Cross border surrogacy leads to problems in citizenship, nationality, motherhood, parentage and rights of a child. Children are sometimes denied nationality of the country of intneted parents.

MANJI’S CASE\textsuperscript{1191} - In 2008 a baby born through surrogacy was unable to leave India for three months after her birth because she held neither Indian nor Japanese nationality. The issue was resolved after the Japanese government issued a one-year visa to her on humanitarian grounds. The Japanese government issued the visa after the Indian government granted the baby a travel certificate in September 2008 in line with a Supreme Court direction.\textsuperscript{1192}

8. Many cases have highlighted the matter of abandoning of child. Intened parents disown the child and sent them to orphanage. Few reasons can be like dropping the idea of having a child, or many a times when they didn’t like the child colour or appearance they refuses to accept the child, in many cases reason for disowning the child is gender inequality. If the born child is a girl child, intened parent refuses to accept it.

9. Surrogacy helps in expanding or promoting the patriarchal sense of the society. As instead of opting for adoption of a child who need parents, they decide to go for surrogacy just for the child of their own genes. It gives option to people of rigid mind set of patriarchy and help them promote it. Hence, it restricts the growth of society.

\textsuperscript{1191} Baby Manji Yamada vs. Union Of India & Anr on 29 Sep. 2008

\textsuperscript{1192} Yamada Manji "India-born surrogate baby arrives to unite with Japanese dad". Zee News., (3 Nov. 2008).
10. There are also some ethical issues with surrogacy. Poor or illiterate women of rural background persuaded in such deals for money by husbands and such deals steals women right on their body and life. India has no provision of psychological screening or legal counselling i.e., mandatory in USA. In many of the cases these women just for money agrees to become the surrogate but don’t really know how it works and they sometimes don’t know that after baby is born she has to give it to them. Many cases they don’t know how will her body acts to it and she may not be prepared for it.

11. There are many surrogate industries which are working unchecked as the watchdog drafted regulation by India medical research is still awaited in parliament which has made these industries kept working.

**SURROGACY (REGULATION) BILL 2019**

- This bill was introduced by minister of health and family welfare, Dr. Harsh Vardhan in Lok Sabha on July 15, 2019.
- The Bill defines surrogacy as a practice where a woman gives birth to a child for an intending couple with the intention to hand over the child after the birth to the intending couple.
- This bill was passed by lok sabha on Monday, 5 Aug 2019. It aims at banning commercial surrogacy in India and also for the establishment of national surrogacy board, state surrogacy board and for appointment of authorities for regulation of practice and process of surrogacy.

- Speaking on the Bill, Dr. Vardhan said: ‘’ the bill is aimed at ending the exploitation of women who are lending their womb for surrogacy, and protecting the rights of children born through this. The bill will also look after the interest of the couple that opt for surrogacy, ensuring that there are laws protecting them against exploitation by clinics that are carrying this out as a business.’’

“There are very few countries in the world which allow commercial surrogacy, with experts arguing that this is exploitation and abuse of human dignity. We cannot allow women in our country to be exploited without them actually understanding what is happening with them. The government has a duty to protect the interests of these women,” added the Minister.

**PROVISIONS OF REGULATION BILL 2019:**

The Regulation bill 2019 consists of various provisions to regulate and maintain the surrogate industry. It provides for constitution of surrogacy boards at national and state levels to regulate it at central and state level, respectively. These boards will also look after every aspects of surrogacy happening at their boundaries. Bill also set guidelines providing restrictions and eligibility for the couple who can opt for surrogacy.

According to it, intending couples should not abandon a child under any condition and if they do so they will be punished. This provision was required to be essential as there are number of cases coming were child either being a girl child, or born disabled or due to any other reason are abandoned by the couples. Hence, this bill prohibited the abandoning of child. This bill also mentions that only Indian couples who are legally married for atleast 5 years are

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1193 The Hindu, LOK SAVHA PASSES SURROGACY REGULATION BILL, 2019, 05 Aug. 2019, available at
allowed to opt for surrogacy. It prohibited commercial surrogacy and allowed only ethical surrogacy that to only to intend infertile Indian marriage couples between age of 23 to 50 year and 26 to 55 years for female and male respectively.

This bill also seeks to allow ethical altruistic surrogacy to intending infertile Indian married couples. Here, altruistic means there can be no agreement between surrogate and intending couple and also there shall be no paying to a surrogate mother but it allow them to pay necessary expenses and if they want, as a gift or a thanking expression. Couple must also obtain certificate of essentiality, certificate of eligibility before going for surrogacy. These certificates are essential to obtain before any surrogacy takes place.

There are also essential for a woman to fulfil before becoming a surrogate. According to bill Surrogate mother must be a close relative of intending couple (eligibility criteria). This is to ensure that no one do commercial surrogacy by making it compulsory that the couple can have surrogate within their very close relation. This is also to ensure that no children or women is exploited. Also, Surrogate must be a married woman having a child of her own and should be between the ages of 25-35 years. Also, She should not have been a surrogate earlier that means a woman can act as a surrogate mother only once in her whole lifetime and also she must be certifiably mentally and physically fit.

For legal status of child, bill clearly states that child born out of surrogacy to be the biological child of intending couple. New born child shall be entitled to all the rights and privileges available to a natural child. Bill also seeks to regulate functioning of surrogacy clinics and also all surrogacy clinics in country need to be registered by appropriate authority in order to regulate surrogacy and its procedure. This is to be ensured by the boards established in central and state level including UTs.

PROBLEMS FACED AFTER REMOVAL OF COMMERCIAL SURROGACY
It’s not just that commercial surrogacy was only toxic for our society. It was also medium of livelihood to a class of people. As, these section of society are where woman are not educated and are also poor and jobless. Their husband left them because of some reasons and they are left lonely and struggling for livelihood. So these women choose to become a surrogate mother as the intended parents give all facilities to them i.e., food and medicines. Also one issue which is been raised as an emotional problem for the surrogate mother as she is not been allowed to see the child so she don’t changes her decision.

Hence, commercial surrogacy does have major issues but it can’t be just removed without seeing back problems of it.

While discussion on surrogacy regulation bill 2019, Shashi Tharoor (MP congress) puts certain objections on provision of bill:

i- It prevent same sex couple having children

ii- Also it violates Putuswami judgement of SC, as it violates Article 14 (as its treats equally unequally) and Article 21 (right to privacy).

By providing married couples to wait for 5 years to become eligible for surrogacy is an unreasonable restriction on their reproductive rights.
ANALYSIS OF LEGISLATIONS FROM DIFFERENT COUNTRIES

Aforementioned, jurisdiction in various countries have different ideas regarding the concept of surrogacy and status of its legislation on surrogacy. Countries like Spain, France, Germany, Bulgaria, Italy and Portugal prohibits all forms of surrogacy. Whereas Commercial surrogacy is banned in Canada, Denmark, UK, New Zealand and Australia, except the Northern territory which has no law on surrogacy but all these countries allow altruistic surrogacy.

GREECE- Surrogacy is legal in Greece since last few years and this is available only to Greeks and not just Greeks but according to Greek law, right to surrogacy is granted only to women and hence no single man have right to get a child through surrogacy except heterosexual couples and single mothers. Now Greece has also allowed this process for foreigners as well. Greece is the country where parentage is decided by judiciary and hence it becomes easy determine the parentage of the child born through surrogacy.

USA- Surrogacy is not legal in whole USA but is allowed in parts of it. In most states of USA there is no law for surrogacy; because of which the parentage of the child is decided by judiciary when the surrogate is pregnant and is in her sixth month of pregnancy. USA is the country who recognised the concept of surrogacy and introduced parentage through surrogacy for the first time. In USA any one can carry out surrogacy it be heterosexual or homosexual couples, single men or women and unmarried couples. Judicial decision for parentage and application of ius soli i.e., minors right to an American passport, is guaranteed so that the issue which is caused to the child in most of the case for returning to his home town is solved.

Ukraine is a country where surrogacy has a proper legislation which is been regulated by the national law. Also, Georgia is the country where surrogacy is legal and has same legal status as in Ukraine. As like in Ukraine, surrogacy is also legal in Russia and have lots of experience in the matter. Russia is known for its stronger economy and hence it also have strong terms in customer care and clinic. Kazakhstan has also similar conditions for surrogacy as of in Russia, but because of its high price like that of US it is an unattractive country for surrogacy.

India at current only provides service of surrogacy to heterosexual couples whose country allow them to opt for surrogacy and that’s why its attraction for foreign tourist for surrogacy had to the extend came to the end.

CONCLUSION

India is a vast country which brings great responsibility to the government as well as the citizens. There is a responsibility of the government to regulate the laws for everything, at the same time it is also the responsibility of the citizens to not misuse these laws or regulations made by government for the benefit of the citizens only. India is still trying to come with proper laws for regulation of surrogacy which has not yet been properly formed and is still in line for being passed by the Raja Sabah. Surrogacy is a blessing only when applied in a regulated manner and get stopped being misused. Government need to come up with strict rules and better application of it. There should be a data of each and every surrogacy to make sure that no one is being exploited. Just banning commercial surrogacy doesn’t means that
there will be no sale of children or no exploitation of surrogate women. Surrogacy is a very old issue which yet hasn’t been considered as a very serious matter in need of quick and effective laws as soon as possible. Its better late than never. And a country like India badly needs serious implementations of law and for implementation we need law on it, a proper effective law.

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POWERS OF NATIONAL COMPANY LAW TRIBUNAL IN CASES OF OPPRESSION AND MISMANAGEMENT

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Introduction
There has been tremendous growth that has taken place in the corporate sector necessitates a sound mechanism to deal with issues and disputes that may arise in its working. The National Company Law Tribunal (NCLT) were set up to provide an instant remedy, speedy justice and simpler way to access Tribunals to have an efficient free flow of company management. The aim of the National Company Law Tribunal is to dissolve the corporate dispute. With the establishment of NCLT and NCLAT (appellate authority) numerous litigations before various Tribunal benches for Merger, Amalgamation, Oppression and Mismanagement of Investors, Winding Up of Companies, Revival or Rehabilitation of sick companies and other applicable provisions of Companies Act, 2013 and Insolvency proceedings have commenced and are dealt efficiently. The NCLT has recently recover eighty thousand crores from IBC cases.

The adjudicating authority of the Companies Act, 2013 is NCLT. By virtue of Companies Act, 2013, certain powers for National Company Law Tribunal (NCLT) have been increased. The Companies Act, 2013 made several changes to the corporate framework to fortify the investor protection regime. It was enacted with several provisions which safeguards the investors and strengthen corporate democracy. The method that are used in the Act are of two types preventive and curative method. To protect the rights of the minority shareholders from abusive actions certain effective means of redressal was essential to frame in the judicial system. The Companies Act, 2013 has retained this remedy and inserted additional powers in the judiciary to protect stakeholders’ interest. The Tribunal is given freedom to bring an end to the Oppression and Mismanagement. It has been vested with certain powers to regulate the conduct of affairs of company.

Formation and Establishment of National Company Law Tribunal (NCLT)
The concept of formation of the Tribunal for dealing with various activities of Companies was first introduced in the Companies Act, 1956 by the Companies (Second Amendment) Act, 2002. As a result of the said amendment the jurisdiction exercised by the High Courts in the areas of Merge and Amalgamation of the Companies, Winding Up of the Companies were to be transferred to the Tribunals. The Company Law Board (CLB), Board of Industrial and Financial Reconstruction (BIFR) and Appellate Authority of Industrial and Financial Reconstruction (NCLAT) were, therefore, set up.

1196 Ibid.
1198 Ibid.
1199 Section 242 of the Companies Act, 2013.
1200 Companies (Second Amendment) Act, 2002.
1201 Ibid.
Reconstruction (AAIFR) were to be abolished and transferred to NCLT. In short, the NCLT was to supposed to combine the work of certain powers of High Court, CLB, BIFR and the AAIFR. The setting up of tribunal was proposed to be established partly as a result of the recommendation of Eradi committee.

Justice V. Balakrishnan Eradi was a retired Judge of Hon’ble Supreme Court of India. The purpose of this committee was to examine existing laws and to remodel it in line with the latest development and innovation in the corporate laws and governance and to suggest reforms to procedures which are followed in insolvency proceedings.

In the Companies Act, 2013, the concept of Tribunals was introduced again, however, the powers and scope of the tribunal was made much wider under this law. The NCLT and NCLAT (appellant authority) were constituted on 1st June, 2016. The NCLT is the adjudicating authority of the Companies Act, 2013, The Insolvency and bankruptcy Code, 2016 and currently the NCLAT (appellant authority) has started taking matters under Competition Act, 2002 as per the amendment brought in 2017. The validity of the NCLT was challenged in the case of Madras Bar Association v Union of India and in the case of R. Gandhi v Union of India the distinction was between the Tribunal and the Court by the Supreme Court. In the Madras Bar Association Case the Supreme Court held that the NCLT and NCLAT are constitutionally valid and also stated the necessity of establishing tribunals.

The NCLT or ‘Tribunal’ is the quasi-judicial authority under Section 408 of the Companies Act, 2013 to handle corporate civil disputes arising under this Act. It is an entity that has powers and procedures like those vested in court of law. NCLT is obliged to objectively determine facts, decide cases in accordance with the principles of natural justice and draw conclusions from them in the form of orders. Furthermore, such orders are a remedy to corporate disputes, it also impose legal penalties/costs and may affect the legal right, duties or privileges of certain parties. The National Company Law Tribunal is established under Central Government Authority, Ministry of Corporate affairs with the view of settling down the companies dispute within a limited frame time and which is also estimated to be of less expensive while compared to other courts. The judgement framed by the National Company Law Tribunal can be appealed to National Company Law Appellate Tribunal (NCLAT). The NCLAT is an appellate tribunal.

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1203 Report of the High-Level Committee on law relating to Insolvency and Winding Up of Companies (Committee chaired by Shri Justice V. Balakrishnan Eradi or the Eradi Committee, 2000.
1207 R. Gandhi v. Union of India (2004) 120 Comp Cas 510 (Madras)
1208 Madras Bar Association v Union of India (2015) 126 CLA 111 (SC)
1209 Ibid.
1210 Section 408, the Companies Act, 2013.
body which has the power to appeal the decision of National Company Law Tribunal but the decisions of the appellate tribunal can further be appealed by the Supreme Court.¹²¹²

The Remedy for Oppression and Mismanagement Under Companies Act, 2013

The term ‘Oppression’ means the act or an instance of unjustly exercising authority or power with an intention to abuse discretionary authority with an improper motive.¹²¹³ The provision of this term is read under section 241(1)(a) of the Companies Act, 2013.¹²¹⁴ It has been discussed in various Supreme Court Cases with respect to the previous section 397 of the Companies Act, 1956. In the case of V.S Krishnan v Westfort HI-Tech Hospital Ltd. and Ors.,¹²¹⁵ and ‘Needle Industries Ltd. v Needle Industries Newey Holding Ltd. and Ors’¹²¹⁶. The term oppression is made out as where the conduct of the authority is harsh, burdensome and wrongful and the action is against probity and good conduct.¹²¹⁷ The language of the current provision is different from Section 397 of the companies Act, 1956. According to Section 241(1) of the Companies Act, 2013 the term ‘have been’ has used instead of ‘had’ and another ground has been added which is ‘prejudicial to members’. The landmark case of Shanti Prasad Jain v Kalinga Tubes Ltd.¹²¹⁸ has been tested under the new legislation. Some part of the judgement has still made applicable which states ‘Continuous acts on the part of the majority shareholders, continuing up to the date of petition,’ will be the ground for the oppression.¹²¹⁹

The circumstances and effect giving rise to mismanagement has been specified under section 241(1)(b) of the Companies Act, 2013. For the petition under this section to succeed, it must be established that the affairs of the company are being conducted in the manner prejudicial to the interest of the company or public interest, or that, or by any change in the manner and control over the company and it is likely that the affairs of the company will be conducted in that manner.¹²²⁰ Under the new law the test of winding-up on just and equitable grounds is applicable to mismanagement under the Companies Act, 2013¹²²¹. This was earlier a test considered for oppression which was not an essential test.

The aggrieved Shareholder can file an application under section 241 and 242 of the Companies Act to get relief. An application can be made to the NCLT if the affairs are conducted in a manner prejudicial to the interest of the public or the company or it is otherwise oppressive to the members. Similarly, an application can also be made when there is a material change in the management and control of the company which makes it likely that the affairs of the company will be conducted in a manner prejudicial to its interest or its members or any class of members.¹²²²

¹²¹³ Black’s Law Dictionary, 9th Edition
¹²¹⁴ Section 241(1)(a) of the Companies Act, 2013
¹²¹⁵ V.S Krishnan v Westfort HI-Tech Hospital Ltd. and Ors 2(2008) CLT 823
¹²¹⁶ Needle Industries Ltd. v Needle Industries Newey Holding Ltd. and Ors (1981) 3SC 212.
¹²¹⁷ Ibid.
¹²¹⁸ Shanti Prasad Jain v Kalinga Tubes AIR 1965 SC 1535.
¹²¹⁹ Ibid.
¹²²⁰ Section 241(1)(b) of the Companies Act, 2013
¹²²¹ Section 242 of the Companies Act, 2013
¹²²² CS. Ajay Kumar, National Company Law Tribunal & National Company Law Appellate
Eligibility to Apply for Prevention of Oppression and Mismanagement

The eligibility criteria have been mentioned under Section 244 of the Companies Act, 2013.\(^{1223}\) It mentions members have a right to apply under section 241 of the Act. The member and government can apply under section 241(2). The criteria for company having share capital is hundred members or one-tenth of the total number of its members whichever is less, any member or member holding not less than one tenth of the issued share capital of the company. The criteria for company not having share capital is one-fifth of the total number of its members. A representative suit can also be filed by a member or members with the written consent from other members. However, if the tribunal considers a case it can waive or relax the eligibility criteria based on the facts of the case.\(^{1224}\)

Applicability of Limitation Act in Oppression and Mismanagement

Before filing any petition at the NCLT, one should take care that the application is within the time period as prescribed under the limitation Act, 1963 and the first cause of action has been arousing within a period of three years from the date of filing the petition at the NCLT.\(^{1225}\) If any matter is beyond the limitation period then the bench may reject the same on the ground of time barred under the limitation Act, 1963. The matter should not be bared under the limitation Act, 1963.\(^{1226}\)

Scope and Extend of Powers of the Tribunal in Cases of Oppression and Mismanagement

The powers of the Tribunal under Section 242 of the Act are fairly wide. The tribunal has been granted complete freedom to bring an end to the oppression and mismanagement. The tribunal are given wide power to pass an order in such type of cases. The relief that can be granted are suspension of the entire board and removal of auditors, conferring immunities of the nominees of the board, restraining the judicial forums from taking any action against the government nominee, introducing a strategic partner by making a preferential allotment without the consent of the shareholders etc.

As per the provision of Section 242 of the Act, the Tribunal may, with a view to bringing to an end the matters complained of make such order as it thinks fit.

The powers of Tribunal are as follows:

2. The purchase of shares/interests of any members of the company by other members thereof by the company.
3. In the case of purchase of its shares by the company as aforesaid, the consequent reduction of its share capital.
4. Restrictions on the transfer/allotment of the shares of the company.
5. The termination, setting aside or modification, of any agreement between, the company and the managing director, in the opinion of the Tribunal be just and equitable.
6. The termination, setting aside or modification, of any agreement between, the company and any other person, provided no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned.
7. The termination, setting aside or modification of any agreement between the company and any other person, provided no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned.

\(^{1224}\) Section 244 of the Companies Act, 2013.
\(^{1225}\) Limitation Act, 1963.
\(^{1226}\) Nirakar Das v Durgapur Bio Garden Private Ltd.
8. Removal of the Managing Director, Manager or any of the directors of the company.
9. Recovery of undue gains by an Managing Director, Manager or Director during the period of appointment and the manner of utilization of the recovery including transfer to IEPF or repayment of identifiable victims.
10. Manner in which the Managing Director or Manager or the Company may be appointed subsequent to an order removing the existing Managing Director or Manager of the company. (Appointing another person in his place)
11. Appointment of such number of persons as directors to report to the Tribunal as it may direct.
12. Imposition of costs as may be deemed fit by the Tribunal
13. Any other matter, in the opinion of the Tribunal is Just and Equitable.
14. A certified copy of Tribunal order shall be filed by the company with the Registrar within 30 days of the order.
15. The Tribunal may make an Interim order if it thinks fit for regulating the conduct of company’s affairs to be just and equitable.”

Analysis:
The above provision explains that the Tribunal has power to provide complete justice to the parties and pass the order for the smooth functioning of the Company. Under section 242 (4) of the Act, the Tribunal can pass an interim order if it thinks fit for regulating the conduct of the business to be just and equitable which has been discussed in PPN Power Generating Company v PPN Mauritius Company.

The Tribunal may, with a view to bringing to an end the matters complained of, make such orders as it thinks fit. The nature and powers of the tribunal has been discussed in various cases. It has been stated in various noteworthy cases such as in the Bennett Coleman v Union of India, the nature scope and extent of this powers was analysed in great detail. The powers under these provisions are not affected by the existence of an arbitration clause. The powers that are enumerated in this section, ensure that the scope of power of Tribunal at least as regards such matters with respect to the action taken by tribunal, prevents questioning in higher forum.

Considerations for NCLT
The NCLT looks into certain essential aspects while dealing in matters of Oppression and Mismanagement. The Tribunal understands whether the members are acting in good faith while making an application to the Tribunal. It sees whether there is any involvement of persons other than directors or officers of the company of any matters specified. While taking into consideration the views of the

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1227 Section 242 of the Companies Act, 2013.
1228 Peerless General Finance v Union of India (1989) 1 Comp LJ 56 Cal.
1229 Section 242 (4) of the Companies Act, 2013.
1231 Bennett Coleman and Co. v Union of India (1977) 47 Comp Cas 92 (Bom).

www.supremoamicus.org
depositor and members of the company, it checks that there no personal interest in the matter being proceeded. It sees whether in the cause of action is an act or omission that is yet to occur, whether the act or omission could be, in the circumstances would likely to be authorised by the company before it occurs or it can be rectified by the company after it occurs. The tribunal should prevent two class action application for the same cause of action. Furthermore, it should look into the limitation period while dealing with Oppression and Mismanagement.

Procedural Aspect as per NCLT Rules, 2016

The procedure for seeking relief against Oppression and Mismanagement is provided in Rule no. 81 of NCLT Rules, 2016. The form NCLT-I of the Rule shall be accompanied with the documents. The consent letter of consenting shareholders is to be attached in the application. The application shall state whether the applicant has paid all calls and all other sum due. If the company and concerned person against whom the orders are sought fails to appear, the Tribunal can dispose the application.

Moreover, if the circumstances of the case required, the Tribunal may hold a trial and assess the nature and weight of evidence produced before it. It may call for witnesses, appoint commissions for recording evidence as may be required. If the evidence is required to be led, then the evidences read with the NCLT rules must apply. The application to tribunal cannot be withdrawn with the leave of the Tribunal. The Tribunal can take steps to execute the orders. The parties at any time can seek interim relief as per the Act.

Case Analysis


This was the Delhi High Court Judgement of a Single Bench. The SAS Hospitals had filed suit seeking declaration that the allotment of shares in favour of the defendant is null and void and was seeking permanent injunction. The suit was filed on the basis allegation that the defendants were allotted shares of the company in the illegal manner. The defendants contended based on the notification of NCLT, that the court had no jurisdiction to try and entertain in section 430 and 434(1) of the Companies Act, 2013. The counsel for the plaintiff submitted that court has jurisdiction which is covered under 62 of the Act. In this case the issue that the court dwelled into was to analyse the scheme of Companies Act, 2013 along with constitution of NCLT. The court stated that ‘NCLT has been vested with powers that are far reaching in respect of management and administration of the companies. The said powers include as broad as ‘regulation of conduct of affairs of the company’ under section 242(2)(a) as also various other specific powers. NCLT is a tribunal which has been constituted to have exclusive jurisdiction in the conduct of the affair of the company and its power can be contrasted with that of CLB’

The Delhi High Court has also held NCLT is empowered to decide the issues relating

1234 Ibid.
1237 Rule 81(9), National Company Law Tribunal Rules, 2016.
1238 Ibid.
to allotment of share capital, alteration and rectification of the register of members and a civil suit before the High court would not be maintainable. The court, referring to provisions of Company Act, 2013, observed that the NCLT is not merely exercising the jurisdiction of a company court under the new Act, but is also vested with inherent powers and powers to punish for contempt. It said that the NCLT having being vested with all the trappings of a civil court, with the amendments which have now been carried out, the bar under Section 430, however, is definitely triggered. The court also rejected the argument of the plaintiff company who had relied on an apex court judgment to contend that, if the matter required rectification of the register of the Company, it is to be adjudicated before the civil court.

“The allegations in the present case relate to non-compliance of the stipulations in Section 62 of the 2013 Act. The non-compliance of any conditions contained in Section 62 of the 2013 Act also constitutes mismanagement of the company, inasmuch as under Section 241 of the 2013 Act, the conduct of affairs of the company “in a manner prejudicial” to any member or “in a manner prejudicial to the interest of the company”, would be governed by the same. The jurisdiction to go into these allegations, vests with the Tribunal under Section 242 of the 2013 Act. Under Section 242(2), the NCLT has the power to pass “such order as it thinks fit”, including providing for “regulation of conduct of affairs of the company in future”. These powers are extremely broad and are more than what a Civil Court can do. Even if in the present case, the Court grants the reliefs sought for by the Plaintiff, after a full trial, the effective orders in respect of regulating the company, and administering the affairs of the company, cannot be passed in these proceedings. Such orders can only be passed by the NCLT, which has the exclusive jurisdiction to deal with the affairs of the company.”

2. Vikram Bakshi v Connaught Plaza Restaurants Limited (2017) 140 CLA 142 (NCLT, Delhi)

NCLT, has further expanded and elaborated the concept of Oppression and Mismanagement in this case. The NCLT gives clarity of position of oppression and mismanagement in India. in this case Vikram Bakshi and McDonalds India private limited entered into a joint venture agreement by which they each held 50% of equity stake in Connaught plaza Restaurants Limited. This restaurant was appointed as the primary franchise for McDonalds for a period of 25 years and was given the right to manage all of McDonalds franchise in North India. the agreement specified that the board of director would have four people of which each party got to nominate two members. Clause 32 of the agreement stated that if Bakshi was not the MD, then McDonalds would have the option to purchase his shares as per fair market value determined by the formula specified in the joint venture agreement. In 2008, McDonalds had offered to his shares at 5 million. However, on the basis of fair market value, Mr. Bakshi demanded 100 Million. This led to his termination, blocking his reappointment. Mr. Bakashi disputed the fact and the basis on which such allegations were made. He stated that the action by the nominee directors of MIPL was oppressive in nature and done with Malafide intentions of purchasing his

shares in the company. The matter was approached to CLB and soon was transferred to NCLT. The MIPL contented that the NCLT lacks jurisdiction and has violated the clause of the agreement. The MIPL had invoked that the arbitration clause in the agreement.

The NCLT took the decision that it had jurisdiction in the present case as joint venture agreement was incorporated into the AoA of the Company. the NCLT rejected the contention of the respondents completely. It held that this case was not for mismanagement of the company. Since the company was financially stable. The tribunal held that the acts of the nominee director of MIPL was an act of oppression and was done with the malafide intentions of availing the benefits of their right to purchase his shares upon his termination. The tribunal also relied on the fact that the action of MIPL was detrimental to public interest as several employees of the franchise in the balance owing to the decision to terminate the franchise agreement. The NCLT stated that this was an continuing trend of respondents’ prejudice and oppression towards. It held that this is a case of oppression and mismanagement, the NCLT also reinstated him as the managing director of CPRPL.

3. **Cyrus Investment Pvt. Ltd. v Tata Sons Limited 2018 SCC Online NCLT 546.**

In this case Cyrus Mistry was ousted as executive chairman of Tata Sons, holding outfit of the approximately $103 billion (revenues) Tata conglomerate, was made to resign from the boards of all listed Tata companies after his removal as chairman by the Board. Cyrus Investments Pvt. Ltd. and Sterling Investments Co. Pvt. Ltd. had 18.4% stake in Tata Sons. The board of directors without even asking any explanation from him, removed Mr. Mistry arbitrarily as executive chairman, which is a clear act of oppression coupled with mismanagement of the affairs of the company. The purported reason for such removal was, the board of directors had "lost the confidence" in the leadership of Mr. Mistry. The case against Tata Sons was filed by Mistry’s family firms at the NCLT alleging that there was oppression of minority shareholders and mismanagement in the company. In this corporate battle, the contentions by Mr. Mistry regarding the oppression faced by him on the grounds of ‘loss of confidence’.

At the NCLT Mumbai bench, the Tata and Cyrus Mistry saga, regarding the maintainability of the suit on charges of mismanagement and oppression. The Counsel for Tata Sons, Dr. Abhishek Manu Singhvi argued that the petition filed by Cyrus Mistry group is not ‘maintainable’ as the petitioner does not have the requisite shareholding under section 244 of the Companies Act, to initiate oppression and mismanagement proceedings. The prescribed holding for initiating the petition is 10% as laid down under section 244(1) of Companies Act, 2013. The 10% of ‘issued share capital’ threshold ought to be read as 10% shareholding of a particular class of shares and not in totality of the shareholding and the actual issued shares were 2 percent.

The core of Petitioners argument was that the sections relating to oppression/mismanagement have to be looked at afresh, as old companies act has been repealed and in the new act the wordings are different. Sec. 241 (1)(a) of the Companies Act which started with the words “the affairs of the company have been or are being conducted in a manner prejudicial to public interest”. The new act
gave NCLT the power to waive off the requisite of 10% shareholding for the filing of the petition, and therefore, it is not mandatory for the tribunal to abide by it. He recommended the Bench to give beneficial and purposive interpretation to Section 244 for allowing substantial number of shares of a particular class of shareholders are affected then they should be allowed to file the petition in the NCLT for redressal of their grievance. They cited this ratio to argue that the 10% rule is only directory, not mandatory.

NCLT held that the removal of Mr. Mistry is substantiated by reasons because he admittedly sent the company information to Income Tax Authorities and leaked the company information to media and openly come out against the Board and the Trusts, which hardly augurs well for smooth functioning of the company. As well as the advice given by Mr. Tata & Mr. Soonawala giving advices and suggestions does not amount to interference in administering the affairs of the company. The National Company Law Appellate Tribunal (NCLAT) held that, “The NCLT is not required to decide the merit of application at this stage but required to record grounds to suggest that the application has made out some exceptional case for waiver of all or any of the requirements specified in clauses (a) and (b) of sub-section (1) of Section 244 and such opinion required to be formed on the basis of application and to form an opinion whether application pertains to oppression & mismanagement.”

The arguments presented by the respondents are negated with Mr. Mistry’s good performance in his tenure, he stated that the company portfolio investment over performed BSE sensitive index by over 5% for the last three years, the profit after tax of Tata group companies grew by 34.60% annually over the past three years, the Tata Brand value has increased by USD 5 billion, without increasing net debt, the Tata Group in the last three years, undertook capital expenditure by approx. This is clearly evident that the respondent company has practiced oppression on Mr. Mistry and there is no instance of losing the confidence in him with his consecutive good performance. The act of removing him as the executive chairman was not substantiated by reasons and this proves to be an arbitrary action taken by the company.

Conclusion
The National Company Law Tribunal was established by the Central Government with the view of settling down the companies dispute within a limited frame time and which is also estimated to be of less expensive while compared to others. The Companies Act 2013 in many ways ensures that the rights of the minority shareholders are protected in every possible manner. The aggrieved Shareholder can file an application under section 241, 242 and 244 of the Companies Act to get relief. The procedure for seeking relief against Oppression and Mismanagement is provided in Rule no. 81 of NCLT Rules, 2016. The NCLT looks into certain essential aspects while dealing in matters of Oppression and Mismanagement. The Tribunal has power to provide complete justice to the parties and pass the order for the smooth functioning of the Company. The Tribunal may, with a view to bringing to an end the matters complained of, make such orders as it thinks fit.

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1242 5. Cyrus Investment Pvt. Ltd. v Tata Sons Limited 2018 SCC Online NCLT 546.
 CODIFICATION OF INTERNATIONAL LAW

By Shashank Shekhar  
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Abstract

The foundation of International Law in academics begins with a discussion on a question ‘whether International Law is true law’. When most of scholars find themselves in between, the suggestions for improvements in International law as a seed find its place in thoughts of them. One of the important suggestion that always suggested is that International law should be properly codified. Now what actually codification means and in perspectives of International law how it is different, is part of discussions. The definitions of codification that applies to law of individual country as ‘the reduction of its unwritten or case law into form of enacted law’ does not apply in perspective of International law. Unlike Municipal laws, International laws operates in a purely decentralized system. Therefore the major success in development of International law in this respect came very long with charter of UN and the formation of International Law Commission. Today there are large number of specialized intergovernmental organisation and bodies, in which the process of codification of International Law is carried out. However still a long way to go in the process of codification and progressive development may urgently demand it.

Keywords: Foundation, True law, Improvement, Codification, Unwritten laws, Decentralized, International Law commission, Intergovernmental organization

1. Meaning and Definition of Codification

In a narrow sense the term codification ordinarily means the process reducing the whole body of law into code into the form of enacted law and in other words it generally connotes a systematic arrangement of the rules of law which are already in existence. Whereas in wider sense codification may also mean modifications of the existing rules of law. The adoption of narrow or strict definition actually defeat the very ends for which the machinery is made and in this references DR. SK Kapoor founds:

Codification means any systematic statement of the whole or part of the law in written form, and that it does not necessarily imply a process which leaves the main substance of law unchanged, even though this may be true of some cases. In other words, codification properly conceived is itself a method of progressive development of law. The two processes – progressive development and codification, far from being mutually exclusive, in fact merge. [KAPOOR 2017: 99]

Also in the matter of International law the meaning of codification as ‘the reduction of its unwritten or case law to statutory form’ doesn’t apply because no authority is empowered to enact statutes to cover it. Statutory enactments is general acceptance by states under treaty and process consists of two parts i.e. the scientific determination of law as it is and should be; and the public universal acceptance of that law as it shall be and then each states consents to be bound. Now let’s discuss more in this context how codification play a significant role any legal system.
2. Significance of Codifications: lack in perspective of International law

There is usually no any difficulty in a process of ascertaining of law on any given points in domestic legal orders as there is definite method of discovering what the laws is. In any municipal legal system there are number of necessary mechanism to resolve any disputes and is being possible by taking a look at Act of parliament or law reports or statutory provisions or court cases as precedents, may be in sequential manner. But that exactly is not the case with International law because most of areas do not have qualified laws rather they are based on customary practices. Laws are unqualified in the sense that there are numerous gaps and lack of uniformity and confusion in those laws. This is primarily because International law lacks legislation, executives and structures of courts and there is no single body able to create laws internationally binding upon everyone. There is no any proper system of courts with comprehensive and compulsory jurisdiction to interpret and extend the laws and therefore one is faced the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule. [SHAW 2017: 52]

However it doesn’t mean that there are no sources available from which the rules may be extracted and analysed rather there are international conventions, international customs, the general principles of law and judicial decisions. Then what is the problems with these sources are that the system have very less number of codified laws binding upon every states and international law is not clear as domestic law in listing the order of constitutional authority. Unlike Municipal laws, International laws operates in a purely decentralized system and it cannot be denied that the International legislative machinery operating mainly through law-making conventions is weak as compared to the legislative machinery of States because States enter into treaties and conventions on the basis of equality. [KAPOOR 2017: 44]

Even on accepting International law as weak, its sanctions are effective and it is rightly remarked by Prof. Hart that it is law because states regard it as law. International law is rather more than law as it deals with such matters, inter alia, upon which survival of mankind depends and its significance and efficacy are constantly increasing. [Kapoor 2017: 39] The codifications is however necessary for removing greater uncertainty and producing a binding effects, backed by it, on the nation-states as a whole which is actually lacking in large number of issue. There are several factors for this but before that we need to have a look upon how far we have reached in the codification process.

3. Legislative History of Codification in Modern International Law

Every society has created for itself a framework of principles within which to develop and certain of the concepts of International law can be discerned in political relationships thousands of years ago. In this reference JL Brierly have ascertained, in his book ‘Laws of Nations’ that:

Rules which may be described as rules of International Law are to be found in the history both of ancient and medieval worlds; for ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. (Quoted in SK Kapoor ‘International Law and Human Rights’)

www.supremoamicus.org
There are several evidence found in the history from ancient times like solemn treaty\textsuperscript{xv}, treaty between Rameses II of Egypt and the king of the Hittites\textsuperscript{xvi} and in India also in the work of Kautilya\textsuperscript{xvii} study of Ramayana\textsuperscript{xviii}. There are contributions of the number of civilized states in the development of international law in which Jews, Greeks, Romans, Hindus and Muslims have prominent role. Rules of behaviour in primitive society, developed subconsciously, within the group are not in the early stages written down or codified\textsuperscript{xx} and these rules can be deduced from the practice and behaviour of states. The earliest expressions of international law were the rules of war and diplomatic relations but the predominant approach of ancient civilisations was geographically and culturally restricted and therefore there was no conception of International community of states co-existing within a defined framework. Thus the notion of universal community with its ideal of world order was not in evidence.\textsuperscript{xx}

[SHAW 2017: 12]

It is generally traced that the history of codification dates back to the end of 18th century in ideas of Jeremy Bentham and others. However the development of the Law of Nations by means of conscious efforts of Governments may be said to have originated at the Conference of Vienna\textsuperscript{xxi} in 1815, in which the peace agreement negotiated included several embryonic efforts at codifying the rules of international law generally, in relation to international rivers, the abolition of slave trade, and the recognition of diplomatic envoys.\textsuperscript{xxii} Another most remarkable events in the early stages of the process of formulating rules of international law at international conferences was the Declaration of Paris\textsuperscript{xxiii} of 16 April 1856 which was signed by seven Powers\textsuperscript{xxiv} assembled and laid down principles related to –

(a) abolition of Privateering; (b) non capture of neutral goods except contraband of war, under enemy flags; (c) Blockade to be binding must be effective; and (d) except contraband of war, enemy goods cannot be captured under neutral flags. [KAPoor 2017: 100]

Another great milestones in the field of codification of International law was result of 1\textsuperscript{st} Hague conference, which was convened by Emperor Nicholas II of Russia in 1899 resulted in adoption of two conventions in the form of a code: (a) Convention on the public Settlement of International disputes; and (b) Convention on the Laws and Customs of War on land. The second Hague conference in 1907 has produced as many as 13 conventions relating to warfare and neutrality in war on land and sea, the status of enemy merchantmen at the outbreak of war. [KAPOOR 2017: 100] It was found that before First World War between 1864 and 1914 the development of written international law through the restatement of principles of existing law or through the formulation of new law was pursued at over 100 international conferences or congresses held which resulted in over 250 international instruments.\textsuperscript{xxv}

After the First World War the work of codification of International Law received a great impetus under the League of Nations as it was most important legacy of the 1919 peace treaty from the point of view of international relations.\textsuperscript{xxvi} This laid to the failure of old anarchic system and it was left to the League of Nations to come in a systematic manner the problem of codification properly called.[KAPoor 2017: 100] The Committee formed under it reported seven subjects\textsuperscript{xxvii} for codification
and further in 1928 reported two more subjects\textsuperscript{xxviii} for codification. The League of Nation however failed to maintain the International order\textsuperscript{xxix} but even then in its short existence it has achieved useful groundwork and helped to consolidate the United Nations later on. [SHAW 2017: 22] The Hague Codification Conference was the first global attempt at codifying entire fields of international law more generally, rather than addressing specific legal problems\textsuperscript{xxx} and out of three topics\textsuperscript{xxxi} selected in it, no general agreement could be reached in the two topics. Finally with the adoption of the Charter of the United Nations, in 1945, the codification movement came into its own and also the League was succeeded in 1946 by the United Nations Organisation. During the 1919 to 1946, over 700 multipartite agreements were concluded of which the prevalent majority entered into force and out of these some conventions became binding upon as many as seventy states, viz., the Universal Postal Conventions were ratified or adhered to by seventy-two states.\textsuperscript{xxxi}

Now one of the major success in development of International law came with charter of UN itself and that is because the aim to codify international law also found its place in the fundamental document establishing the United Nations. The Article 13(1) (a) of the U.N. Charter lays down that the General Assembly shall initiate studies and make recommendations for the purpose of promoting international cooperation in the political field and encouraging the progressive development of International Law and its codification.

Finally for encouraging the progressive development of International law and its codification the formation of International law Commission took place which was turning point in codification movement.

4. Further Development and International Law Commission (ILC)

The Article 1 of statute of ILC states that Commission shall have for its object the promotion of the progressive development of international law and its codification and it is provided that the commission shall survey the whole field of International law with a view of selecting topics for codification having in mind existing drafts whether governmental or not and when it considers that the codification of a particular topic is necessary or desirable it shall submits its recommendations to the General Assembly. [KAPOOR 2017: 101]

It is provided under Article 18 that commission shall give top priority to requests of General Assembly to deal with any question and further Article 24 provides that the commission shall consider ways and means for making the evidence of customary international law more readily available, such as, the collection and publication of documents concerning state practice and of the decisions of national and international courts on question of international law, and shall make a report to General Assembly on this matter. Thus the movement for the systematic presentation of international law finds its place through the commission when it starts working from 1949.

The major contribution of commission are in international conventions like Law of seas in 1958, Diplomatic relations in 1961, Consular relations in 1963, Special mission in 1969 and the Law of treaties in 1969 and apart from that the commission also issues reports and studies as it has formulated such documents as the Draft Declaration on Rights and Duties of States of 1949 and the Principles of International law recognized in the charter of the Nuremberg Trial and in
the judgment of the Tribunal of 1950. [SHAW 2017: 89] However today there are large number of specialized intergovernmental organisation and bodies, in which the process of codification of International Law is carried out. The UNCITRAL UNCTAD, ILO, UNESCO are some of the bodies, which are constantly developing in their respective spheres.

5. What next? Whether progressive development demands codification?
The advantages of codification in any legal system, generally, overshadow the disadvantages of it as it make law certain, clear, simple, intelligible and above all easily accessible. It further fills the existing gaps, brings uniformity, most importantly it is easier and convenient to amend the codified law to keep pace with time. The development in International law has tried to conform the similar truth as the role of ‘codification and progressive development’ assumes profound significance because of complex nature of growing international relations.  The most important function of law is to help in solving the problem of the society in which it exists and thus the first essential ingredient of codification is furnished by the aspect relating to progressive development. It is rightly remarked by Prof. Quinsy Wright that “Stability with change, solidarity with variety, peace with justice, international law with national independence these difficult conciliations, it is the task of international law to effect. [KAPOOR 2017: 17] Therefore International law must keep pace with the accelerated rhythm of change to develop. When any law codified in any legal system it doesn’t mean that it is not open to amend rather the amendment would be much easier than the un-codified one. Therefore to move towards Common law of Mankind the codification and progressive development in fact have to merge.

CONCLUSION
So, the discussion of ‘whether International Law true law’ have not much importance as the several evidence of history have proved its long existence (also as state regards it as law) and in modern world International law has become more than a law as it deals upon survival of mankind. However the suggestion for codification of International law has its relevance and significance as lack of codified law have problem from finding of law to application of law. It is primarily because International law lacks legislature, executives and structures of courts and there is no single body able to create laws internationally binding upon everyone. There were similar situation in ancient times as notion of universal community with its ideal of world order was not in evidence. But the modern situation has changed and thus International law must keep pace with the accelerated rhythm of change to develop. When any law codified in any legal system it doesn’t mean that it is not open to amend rather the amendment would be much easier than the un-codified one. Therefore to move towards Common law of Mankind the codification and progressive development in fact have to merge.

ENDNOTE
Ibid at pg. 10...It was signed between rulers of Lagash and Umma, the city-states situated in the area known to historians as Mesopotamia. It was inscribed on a stone block and concerned the establishment of a defined boundary to be respected by both sides under pain of alienating a number of Sumerian gods. This treaty was concluded after almost 1000 years later after solemn treaty for establishment of eternal peace and brotherhood.


In the Ramayana period relations of sovereign rulers were based on the definite rules of International law and these rules were recognised by all sovereign rulers.

United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law – (from H. "W. Malkin, "The Inner History of the Declaration of Paris," British Year Book of International Law, Vol. 8, 1927, page 2 ) that at the four rules of maritime law, "the Declaration of Paris was the first and remains the most important international instrument regulating the rights of belligerents and neutrals at sea which received something like universal acceptance"

Seven powers were Britain, France, Austria, Russia, Turkey, Prussia and Sardinia. It was signed after the end of Cremeian war in 1856.

The seven Subjects were
(1) Nationality, (2) Territorial Waters, (3) State Responsibility for damage done in their territory to the persons or property of foreigners, (4) Diplomatic immunities and privileges, (5) Procedure of International Conference and Procedure for the conclusion and drafting of treaties, (6) Exploitation of the products of the sea, and (7) Piracy.

The other subjects were
(1) Law relating to functions and competence of Consuls, and (2) The Competence of Courts regarding foreign states.

It failed to maintain legal order on multiple invasion Japan invaded China in 1931, Italy attacked Ethiopia, and Germany embarked unhindered upon a series of internal and external aggressions. For more refer to
Three Topics were namely a.) Nationality, b.) Territorial waters and c.) Responsibility of states for damage done to foreigners. The committee able to succeed in only one on questions relating to conflict of Nationality and Statelessness.

United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law, Volume 41, No. 4, October, 1947 at pg. 33


According to C.W. Jenks “The whole future of man depends on his success in three quests: the quest for world peace, the quest for social justice, and the quest for personal freedom, these quests cannot succeed unless we develop a common law of mankind in an organised world community.” (quoted in DR. S.K. Kapoor, International Law and Human Rights, 2017, Central Law Agency at pg. 17)

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EVOLUTION OF DPSP INTO FRS WITH CHANGING TIME

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Evolution of DPSPs into FRs with changing times: Taking RTE and right to clean and healthy environment as case study

ABSTRACT

The Indian constitution was drafted at the time when most of the countries had been independent for a long time and they already had their constitution. Our founding fathers of constitution after ransacking all the constitutions that were present at that time and selected the best out of them keeping in mind the aims and aspirations of martyrs, the people and concept of welfare state. All through the opportunity battle for the interest for Essential Rights was in bleeding edge. The nation was consistent that we ought to incorporate all human, political, common, monetary, social and social rights. The Fundamental Rights imagined by the Indian National Congress were at last isolated into two; (I) Political and Social equality; and (ii) Social and Economic Rights.

The former is named Fundamental Rights and the latter are called Directive Standards of State Policy. This division was embraced from Irish Constitution, The Universal Declaration of Human Rights along with a number of constitutions and conventions. In the present time we get to see that now some DPSPs converting into FRs as Article 45 which is a DPSP provides us with education for children below 6 years but as with evolving times we get to see about the change as Article 21A which gives us Right to Education (RTE) is now Fundamental right. There are other rights also which evolved from DPSPs.

This paper aims at understanding the relation between DPSPs and FRs as envied by our framers and the possible future of DPSPs in the context that whether the time has finally come to evolve these DPSPs into something else, something more powerful and whether the current initiatives taken by the government in the recent years to convert DPSPs are being fulfilled or not.

KEYWORDS: Fundamental rights, RTE, Environment, DPSPs

INTRODUCTION

In the Indian situation of fundamental rights and DPSPs are two sides of the same coin, when the country gained its independence the framers divided all the rights which they believed into two different criteria one being which the government believed that it can provide and the other being which the government want to provide but it cannot, this paper try’s to analysis the similarities and the difference between Fundamental rights and DPSPs through two case studies of environment and education.

The constitution of India is not coming from heaven or given as a gift by British Parliament. It is the outcome of great research and deliberation by a group of representatives of people who had faced all the atrocities by Britishers and know what actually we need for our country. The constitution from the very beginnings provided the citizens with some sort of expectations to have a clean and healthy environment and to get proper education through DPSPs and slowly these
expectations developed into realities when through judicial activism and popular support the constitution on provided environmental rights under article 21 and education rights under article 21 (b) though still there is a long way to go in full development of the same, this fact of development of DPSPs provide us an idea as to how DPSPs can evolve into proper fundamental rights.

Granville Austin, observed that the "Fundamental Rights and Directive Principles had their roots deep in the struggle for independence". K.S. Hegde, ex-judge of the Supreme Court of India viewed that the "inclusion of Fundamental Rights in India’s Constitution had its beginning in the forces that operated in the national struggle during the British rule. At the most, as Justice K.S. Hegde said, the inclusion of the fundamental rights in an enumerated fashion, that too in a basic document like the Constitution, can be traced to the sufferings of people during freedom struggle, but not the rights. If we see the words of Granville Austin in his book; “both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian Politics itself”.

STATEMENT OF PROBLEM

The “conscience of constitution” according to Granville Austin is in the Part III and Part IV of the constitution of India, the part III is no doubt is life of constitution but Part IV is also that important. In present time we get to see that how the things changed. The problem which is on hand is that, in the past some DPSP is evolved into FRs but is they evolved as per what is in views by Framers of constitution and the most important thing is, that till what extent the DPSPs get evolved.

The solution is that there should be in to development of DPSPs into FRs which needs in present time for well-being of citizens, the main thing, the principle what is in DPSP should must be prevailed with their evolution, other things changed then it does not matter but in case which is discussed here is that the evolution of Article 45 does not carry the very principle on the basis of which RTE is made, there is again a gap here it is what about fundamental rights of children below 6 years for education?

The solution which needed is that the core principles will not be hindered by any situation which was already happened in 86th Amendment Act, 2002 for implementing RTE and now we say that DPSP is evolved but not in the perfect way as in present also there is Lacunae.

Literature Review

For present research paper we have reviewed some scholarly articles that is in parity with our research gap for what we are researching in this paper.

ARTICLES REVIEWED

Dr. Prashant Thote, L. Mathew & D.P.S Rathoure (2013) In this paper author expressed his thoughts that the Act which was enacted in 2009 for education in whole India is for the awareness of the most

1243 Granville Austin: The Indian constitution: cornerstone of a nation, xvii
1244 Working a democratic constitution.
1245 The Right of Children to Free and Compulsory Education Act
important subject in the context for development of a wellbeing. He also do research work which includes survey in which he found that RTE awareness must still be more pronounced. He also provide some solutions in parity for Art. 45, which is the genesis of Art. 21A. Apart from it he also survey on local basis and keep his attention on teachers of Monera district. This paper also find out that there is more need for the ratification on the things.

_Mona Kaushal (2012)_ the whole paper here focuses on the implementation of RTE Act and what are the lacunae’s in that Act apart from it the author also connects education with technological developments. She also said that there is need to prove right to education in grassroots level and commented on the visions by which it incorporate under Part III of constitution and also why it is placed in the DPSPs apart from it she also she mentioned about the dealings related on what we are working that, in anyways can Fundamental Rights be related to DPSPs or not. But here in present research paper our objectives are different from it. We have analyzed a research gap and not here relating the FRs with DPSPs because in previous research the connection is already established.

_Sudhir Krishnaswamy_\textsuperscript{1246}: Author in the research paper deals with mainly on the judgements and development of rights related to education with respect to time also author divided the whole paper into III Phases, he also mentioned an important table and does an analytical analysis on the subject of education with changing constitutional form, executive competence etc. Also, he cited article which is most famous and in the present research paper we also used it for understanding the research lacunae which we were dealing here.\textsuperscript{1247}

_Nimushakavi_: Author here deals with constitutional policy and jurisprudence related to environment , he also discusses the environment framework from the very beginning and discussed everything with an bird eye view in the work, he also mentioned a very good quote which I would like to mention it here, he said that we pray that day don’t come when it happen like that, “tomorrow somebody says, I have invented a machine to produce oxygen after cutting down the trees and drilling clean energy from dry land”.\textsuperscript{1248} Also author comes up the thought of Environment as an integral right for a wellbeing. Here in the present paper we also have taken reference from the work, as we are specifically dealing with DPSPs and FRs here in the paper we took this provisions and work on research gap.

Here in the present research paper we get to know the things after reviewing the literature works on the topic related to ours, also there is some difference of opinions in the articles and the researchers here in present paper finds some different results. Here in that there is a research gap present and we took it for our research and we get to know that some of the works which we reviewed that the position of DPSPs and FRs is continuously changing in a way or other, from legislature approach to Judicial interventions. We specifically took the research work on evolution of these two important facets which is also we get to see to education a fundamental right,” Int. Jnl. of Constitutional Law, vol 2.

\textsuperscript{1246} Securing Universal Education: Directive Principles, Fundamental Rights and Statutory Rights

\textsuperscript{1247} Vijayashri Sripati and Arun K. Thiruvengadam, "India: Constitutional amendment making the right

\textsuperscript{1248} Nimushakavi, —Constitutional policy and environmental jurisprudence in India, Macmillan India Ltd, 2006.
in scholarly articles and by research we are adding a new thing in the field of the topic.

**Research Gap**

The research gap which we get to see in most of the literatures provided on the topic is the lack of understanding of both the facets in consonance with each other. Another gap which we were working on the problem is specifically in the case study of RTE and Art. 45 is the lacunae which is still present in the system and the vision is not fulfilled yet which is discussed here and on this research gap we do research work and analyzed the real problem in it. The research gap is so prominent and not many scholars pointed it out specifically. Apart from it the gap is in the understanding the development of both the facets here, which we took for research work and our case studies.

**Research Questions**

1. Whether all DPSPs should be evolved into Fundamental rights fully or partially as seen in the case of Right to education and Right to clean and healthy environment.
2. Identify the potential future of DPSPs
3. Identify the current situations of Fundamental rights.
4. What is the consonance between DPSPs evolved into Fundamental rights.

**Research Objectives**

1. To understand the current stance of DPSPs in connection with fundamental rights.
2. Implications of Right to education and right to clean and healthy environment which were originally DPSPs but are slowly been converted into Fundamental rights.
3. To try to understand the potential of DPSP, if any.

**Case Study: Article 21 and Environment**

India has been an environmental friendly country.

The Stockholm Conference held in the year 1972 highlights in its first principle:

“Man had the fundamental right to adequate condition of life, in an environment of a quality that permitted a life of dignity and wellbeing.”

In 1974, when fundamental duties were added to the constitution a special clause for environmental duties were also added. In the judgments followed since our independence, courts have emphasized on the fact that the time has come to give the people of India environmental rights which includes right to clean air, right to clean and healthy environment etc. The main focus towards environmental protection and giving environmental rights to Indian begun only after The Bhopal Gas Tragedy, the fact is that the constitution and its framers had kept a key on environmental related rights and duties. The fundamental duties and article 48 of the DPSPs prove it. In the Indian circumstance, condition affirmation, has not only been raised to the status of key convention that must be clung to, yet it has similarly been webbed with human rights approach and is at present considered as a settled in sureness that it is the key human right of every individual, to live in a pollution free condition with complete human dignity. The supreme court has from time to time, case to case raised its voice to protect the environment by making new statues, giving new principles and tights to the people.
In the Constitution of India, it is evidently communicated that it is the commitment of the state to 'verify and improve nature and to shield the boondocks and untamed existence of the country'. It powers a commitment on every inhabitant 'to guarantee and improve the customary living space including woods, lakes, conduits, and regular life'. Reference to the earth has in like manner been made in the Directive Principles of State Policy similarly as the Fundamental Rights. The Department of Environment was set up in India in 1980 to ensure a sound space for the country. This later transformed into the Ministry of Environment and Forests in 1985. The secured courses of action are upheld by different laws – acts, rules, and takes note. The EPA (Environment Protection Act), 1986 came into power not long after the Bhopal Gas Tragedy and is seen as an umbrella establishment as it fills various gaps in the present laws. Starting their incalculable laws showed up as the issues began rising, for example, Handling and Management of Hazardous Waste Rules in 1989.

The benefit of a person to tainting free condition is a bit of basic rule of the land. Article 21 of the Constitution of India guarantees a significant right to life and individual opportunity. The Supreme Court has deciphered the benefit to life and individual opportunity to join the benefit to solid condition. The Court through its various decisions has held that the order of right to life joins right to clean condition, drinking-water and tainting free atmosphere. After judicial activism and intervention, the right to live in a pollution free environment has been recognized as a fundamental right under article 21 of the Indian constitution in India. A number of different laws thereafter are made to provide clean environment to the citizens. Article 21 guarantees a key right to life—a presence of pride, to be lived in an authentic circumstance, freed from danger of ailment and sullying. We all in all think about the route that there exists a close by association among life and condition. The benefit to life would be pointless if there was no solid condition. The lawful comprehension has made Right to live in a sound circumstance as the sanctum sanctorum of Human Rights. In M.C. Mehta v. Government of India, the Supreme Court impliedly offered the benefit live in defilement free condition as a bit of focal right to life under Art. 21 of the constitution. In M.C. Mehta versus Association of India, AIR 1987 SC 1086 (Popularly known as "Oleum Gas Leak Case") – The Supreme Court said that the benefit lives in defilement free condition as a bit of focal right to life under Art.21 of the Constitution. The Supreme Court held that where an endeavor is busy with a dangerous or basically risky development and insidiousness results to any one by temperance of a disaster in the action of such perilous and normally unsafe activity realizing the break of hurtful gas the endeavor is cautiously and totally in danger to compensate every last one of the people who are affected by the accident and such a commitment isn't needy upon any uncommon case. The endeavor must be totally committed to compensate for such naughtiness and it should be no reaction to the endeavor to express that it had taken all.

1249 Bhopal Gas Leak Disaster (Registration and Processing of claims) Act, 1985; after it we developed the umbrella Act for Protection of environment.
1250 AIR 1987 SC 1086
reasonable thought and that the harm occurred without recklessness on its part. Incomparable hazard is one tort where issue need not be developed. It is no-issue chance. The Directive principals further are composed towards the objectives of building a welfare state. Strong environment is one of the essential segments of a welfare state. **Article 47** states that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health which includes the protection and improvement of environment as a part of its primary duties. **Article 48-A** of the constitution states that the state shall endeavor to protect and improve the environment and to safeguard the forests and wild life of the country. **Part III** guarantees fundamental rights which are essential for the development of an individual. A citizen cannot carry on business activity, if it is health hazards to the society or general public.

The objectives of the widespread understandings must be cultivated if all the appropriate countries become get-togethers to them. India is a signatory to different all inclusive game plans and understandings relating to regional and on occasion overall normal issues. India has expected a primary activity from 1972 **UN Conference on Human Environment** at Stockholm to 1992 UN Conference on Environment and Development at Rio de Janerio and besides in the Earth summit Plus 5 of 1997 at New York. **1251** India is subsequently under a guarantee to interpret the substance and decisions of the overall gatherings, courses of action and understandings into the surge of its national laws.

**Article 21** guarantees right to life, Life recommends that to assess with human decency in any case in the event that one can't breathe clean air, have safe consumable or sustenance, every human right neighborly, political, social or monetary square measure unmeaning. In view of dazzling condition of the ecological contamination in our nation the excellent court honed its devices and strategies all through mid-80's and 90's by keeping aside all specific principles of structure and changed the standard of 'locus standi' in order to encourage the sufferings of the misfortunes of normal debasement underneath the flag of Public Interest Litigation (PIL).

The Supreme Court of India in A.K. Gopalan V. District of Madras **1252** and Khark Singh V. Domain of U.P. **1253** held that under Article 21, the advantage of life doesn't mean minor creature closeness. Further in the Maneka Gandhi's Case set out that a law affecting life and chance of an individual needs to stand the assessment of Article 14 and 19 of the Constitution. That is, if a law is mentioned by get together which keeps an eye on the life and chance of an individual and truncates it, by then it is obligatory basic that framework created by it for decreasing the chance of an individual must be sensible, reasonable and just. **1254**

Regardless of the manner in which that the over decisions see that advantage to strong setting is understood the Constitutional affirmation of Article 21, all the while, we will in general ought to see that advantage to life isn't totally too. On the off chance that the State confirmations to its voters the

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1251 UNEP Journal  
1252 AIR 1950 SC 27  
1253 MANU/SC/0085/1962  
1254 Dr. G. P. Verma, —Human rights to pollution free clean and healthy environment- constitutional perspective, 1st Ed, Bharat law publication, 2007

www.supremoamicus.org  
512
security of life, the voters ought to owe a vow to State to deal with its blessedness. Man needs to not simply live, at any rate to gauge well and living honorably prescribes that a living decent, upstanding and solid and in good spirits life. My advantage of living joins my duty to my individual men to allow them vague state of life. Satisfaction and flourishing in an exceedingly society is an onto perform. I will savor my advantages as long as I regard the advantages of others.

As such, Indian Constitution got one of the unprecedented constitutions of the truth where unequivocal game plans were intertwined in the Suprema Lex putting duties on the State similarly as occupants to guarantee and to improve nature. This most likely is a positive improvement of Indian law. The State can't treat the responsibilities of verifying and advertisement libbing the earth as irrelevant dedicated duty. The request norms are not insignificant show-pieces in the window-dressing rather they are urgent in the organization of the country and being a bit of the transcendent law compulsory too complete. Environmental protection act is also one of the shining examples as to how much concerned the Indian government has been about environment even back when the concept of ecological protection was just an idea on the global level.

Case Study 2: Article 45 & Right To Education

There has been long debate on the topic that should DPSPs made be enforceable or not, but here we are working on different lacuna as how in past DPSPs changing into Fundamental rights and what should be future of DPSPs. As Article 37 tells about the very nature of Part IV of constitution it states as,

“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”

so, it is clear from above that they are not enforceable so now how DPSP is changing into FRs we can see from many evolvements which was done in past. It is also written here that the principles contained here are fundamental in governance of country so here something is implicitly mentioned which is not explicated till now in many areas apart from one or two cases so now is really time come to change some DPSPs into Fundamental rights as already we have two great examples for same which were done by past though legislator or Judiciary i.e. The legal advisor of constitution Sir B.N. Rau underlined on statutes instead of on justiciable rights, and furthermore consequently recognized justiciable and non-justiciable rights (a motivation from the Irish Constitution) in his work, Constitutional Precedents due to the trouble in portrayi


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precedents we get to know how important DPSPs and now in today’s world it is need that some DPSPs must be converted into Fundamental rights as in past the genesis or core values of some DPSPs already converted into Fundamental rights. Also the idea seems to have changed during the course of time and in the pasts ruling of supreme court and other courts we can see that DPSPs have given more much importance in comparison with other rights.

Apart from it many of provision in the DPSPs is simulating with the provisions of one of the biggest conventions on social and cultural rights i.e. Covenant on Economic Social and Cultural Rights (CESCR). If we say why should DPSPs to get converted into FRs we get to see it that from the very beginning, we have concrete evidence for same as the subsequent amendments of constitution have emphasized to give an upper hand to DPSPs over FRs. We can see Land Reforms, the 25th Amendment Act 1971 inserted Article 31C into the constitution which provides that in first part “No law which is planned to offer impact to the Directive Standards contained in the Article 39(b) and 39(c) will be considered to be void on the ground that it is conflicting with or removes or condenses any of the rights gave by Article 14 or 19”.

The Supreme court held Article 31C as valid and not in derogation with basic structure of constitution in the Fundamental Right Case but second part of same article is not held constitutional. From the above it is clear that DPSPs also holding a great importance and in present they are continuously getting evolved in different rights and some fundamental rights here we get to see the same here in this paper.

Part IV provide us articles which are most important for any country as we are third world country, the very basic need here is education the two most important articles were provided for the same here in this part is Article 41 and Article 45.

These two article provide guidelines for government to give education to children but as they are DPSP so they are not enforceable in any court of law so with changing time it is not followed as expected by our forefathers who framed constitution for us so here as with time this DPSP gets evolved into Fundamental right by legislature by implementing 86th Constitutional amendment Act , 2002 and adding Article 21A of the constitution of India in Part III of constitution . Here we can get to see that the core values of DPSPs in the Article 45 get changed into Fundamental right by the action of legislature as it become the need of hour. This is not only the example of evolvement of DPSP with time but here we get to know more about it in the deeper context.

When the Constituent Assembly was established to outline the Constitution of free India, the individuals from the Assembly had taken this privilege with due consideration and remembered for Article 38 of the draft Constitution. The privilege to free and necessary education was kept till the age of fourteen years as in light of the fact that its motivation was to be restrict any youngster being utilized beneath the age of fourteen years and the child must be kept.

involved in some instructive establishment. When the constitution was finally adopted the right to education was included in PART IV as DPSPs and not in PART III by our framers of constitution because they think it was not possible to commence that right at time of independence and therefore it was on the discretion of state or made dependent upon the economic stability of country. But unfortunately, state did not match the expectations of constitution makers as they wanted it to be, now the question comes then how Right to education from DPSP get evolved into Fundamental right which we get to see in today’s time. Here we see the active approach of judiciary; the court came with interpretation to evolve this right as a fundamental right under the ambit of right to life which is enshrined in our constitution in Part III under Article 21. When for the very first time the argument to include right to education in ambit of Article 21 of the constitution, it was refused by Apex court and court refused to make this right enforceable under Part III as we already have DPSPs for same i.e. Art 41 and Art 45. As after rejection from Apex Court this development which we were seeing today was at long halt and after in one decision of Supreme court in famous case named Unni Krishnan’s 1258 case this right was recognized under purview or in ambit of Part III. Apart from this another landmark case named Mohini Jain v. State of Karnataka 1259, which is popularly known as the ‘Capitation fees’ case; in this case Apex case also held that Right to Education is a FR and cannot be denied to citizen. After this decisions it is submitted that vacuum created by legislature is filled by the judiciary for better good of citizens as it is most important for better of citizen to evolve this DPSP into FR as after the very commencement of constitution there is efforts to implement this right which is completely futile for example from Gokhale’s bill of 1911 to National Policy for Children, 1974 nothing is up to mark to provide the full utility of Art 41 & 45 which were supposed by our framers of constitution. So this are some reasons we need to evolve DPSP into FR with this case and apart from it the most important reason is The Universal declaration of human rights, The UNESCO convention against discrimination in Education adopted on 4 December 1996.

After these two Landmark judgements given by Apex court it was expected that government would give effect to law so declared by apex court. It did not occur. But the legislature comes up with the Constitutional (86th Amendment) Act, 2002, which is not in toto or in conjecture to DPSP but a different variant, this amendment has inserted three new provisions in constitution of India i. DPSP (Article 45) ii. Fundamental Rights (Article 21A) iii. Fundamental Duties (51A (k)) and also made changes with DPSP regarding the same topic i.e. Article 45. This amendment was supposed to come in consonance with the judgements that are delivered by supreme court but is not the case with this amendment unfortunately, that’s why here is one lacuna and have a good research questions with objective as how DPSP is evolving into FRs and upto what mark with the constitutional principles Here we get to see that what was in article 45 was repealed by this amendment and it gives new FR for education but there is

1259 (1992) 3 SCC 666
lacuna in it that DPSP get evolved but not in it true sense as what framers of our constitution wanted education to all children till age of 14 years what new provision of Article 45 reads as "Provision for easy childhood care and education to children below the age of six years -The state shall endeavor to provide early childhood care and education for all children until they complete the age of six years".

It is different what was article, which was earlier and Article 21A which declares right to education as Fundamental right reads as: "The state shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the state may, by law, determine".

Now here we get to see that there is no fundamental right for children below the age of 6 years for right to education and also there is no DPSP for same so simply they don’t have any rights regarding this, is it really what our framers of constitution want??? That’s big question and answer is obviously no, because earlier Article 45 reads different and provides education to all till age of 14 years and there is no lower limit as it is now added by constitutional amendment now.

The present situation is that we have evolved a DPSP into FR but not in toto there are some changes that were made by legislature in that. The thing is that like this DPSP get evolved and converted into FR by way of other as contained core principles of Art 45, is in future other DPSPs get evolved if yes how and up to what extent they will in consonance with the constitution and is they really get to evolved or better stays as DPSP.

**Conclusion & Recommendations**

The basic fact is that although there is a lot of development in the arena of converting DPSPs into FR, still there is a long way to go ahead and in the development of the current Fundamental rights themselves and to develop DPSPs into full fled fundamental rights is rightly a dream as of now. Yes, there is a right of the people to have a clean and healthy environment under article 21 which the apex court in the country itself has given, yes there is a right to education under article 21 (A) for children yet still there is a lot of development that has to happen to fully backup these rights, to fully made these rights into fundamental rights.

In India, the stress for environmental security has not only been raised to the status of essential principle that everybody must follow, yet it is also hitched with human rights approach and it is directly dug in that, it is the central human right of every individual to live in sullying free condition with full human pride. The open door has just gone back and forth that the general populace, open substances, state and central government comprehend the mischief, which our developmental method has made to the living condition. For the accomplishment of the close by government laws relating to the earth it is key to make a sentiment of urban mindfulness and open tidiness in the use of city organizations like boulevards, open spots, squander, etc. Demanding approval of the game plans of law similarly is required. Law is a strong medium to move the occupants to watch tidiness and along these lines to fight defilement. Common security laws in India need another bearing in the bleeding edge setting.
The idea of rights of the people started with the introduction of Magna Carta of 1215 of Great Britain, as of now they has spread to almost all the countries on the global and it has developed far more than the original rights which were demanded in magna carta. DPSPs could be defined as part of an Indian Magna Carta which the people should be given but are not being able to get as of now due to various complexities.

As Paul Bigelow Sears said, “How far must suffering and misery go before we see that even in the day of vast cities and powerful machines, the good earth is our mother and that if we destroy her, we destroy ourselves.”

Finally to wind up this things, the top most recommendation is that there is the need of hour today to evolve DPSP into Fundamental Rights completely with complete prudence of mind by analyzing, determining and possible outcomes of the new evolution. Also in the matter of evolving some important DPSPs into Fundamental Rights there may be government refer to referendum which is related to utmost citizens of country i.e. Article 44 of Constitution of India UNIFORM CIVIL CODE, as our country is secular one so here must be government also take the views of citizens as “WE” who gives constitution to ourselves. At last there is an inference of quote that Dr. B.R. Ambedkar said on social justice:

. It might be said that a long way from being insignificant pie in the sky standards or devout considerations, the Directive Principles of State Policy have served a helpful reason in envisioning India is a Welfare State. A portion of the Mandate Principles would serve the reason for communism as well as would likewise help in guaranteeing the genuine happiness regarding Fundamental Rights with regards to the twentieth century.

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ANNEXURE
Below here the research data, which we collected from Google forms is showed for reference of the research methodology.
The above data which we collected from survey and anlayised it regarding solving our research questions and what the differnet individual from different fields think on it in various age group.

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The contagious diseases have been existent among the human race and communities since the beginning of history. Infectious diseases are constantly progressing, often acquiring epidemic potential. In recent times since travelling across the world has become easier, many people are travelling all over the world thereby exposing the whole world to epidemics or in worst case scenarios it takes a horrifying leap of a pandemic. Coronavirus disease (COVID-19) is an infectious disease caused by a newly discovered virus called as Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2). The virus spreads mainly through droplets of saliva or discharge from the nose when infected person coughs or sneezes. The most common symptoms of the disease are fever, dry cough, tiredness and difficulty in breathing. Most of the people infected with the disease recover even without getting a special treatment but it may prove fatal to older people and people with medical conditions such as asthma, heart disease or diabetes. At this hour, there are no specific vaccine and treatments for COVID-19. In March, WHO has declared Coronavirus pandemic. The term ‘pandemic’ means worldwide spread of a disease and is connected with geographical spread usually affecting large number of people. The consequence of coronavirus across the world are unmatched and has forced many countries to impose complete or partial lockdown.

The question that comes to our mind is that how did this novel outbreak start? It seems that it all started from a Wuhan seafood market where wild animals, both dead and living, including birds, rabbit, bats and snakes are sold. Such markets create high risk of viruses jumping from animal to human because standards of hygiene are difficult to maintain if animals are being kept and butchered at the same place. The markets are also densely packed letting the disease to spread from species to species. The source of virus has not yet identified but original host is thought to be bats, even though they do not typically transmit coronavirus directly to humans. Instead, the transmission might occur via an “intermediary” animal. On December 31, 2019, WHO’s China office heard its first case of previously unknown virus. Although, China took aggressive steps to stop the outbreak like shutting down the transportation, suspending public gathering etc. Government officials isolated sick people and aggressively tracked their contacts and made a dedicated network of hospitals to test the virus. For most of the people, Coronavirus appears to be mild. In the period when an infected person is mildly ill, he could transmit the virus to others.
dozens of other people through water droplets discharged by coughs and sneezes. But what started as an epidemic in China has now become truly global pandemic. There have been now over 17,05,766 reported cases and over 1,03,230 deaths. One person known as “Patient 31” in South Korea, transmitted the virus to over 1,100 people as she went on with her life. In March, the World Health Organization says, the new epicenter of the pandemic is Europe, which has more new reported cases each day than China did at the peak of its outbreak. Italy was the first European country after China to report a serious domestic outbreak. Italy has now 1,47,577 reported cases and the government immediately took some serious measures like schools were shut down, partial lockdown was imposed and public gatherings were banned. But the government has often acted erratically like it failed to impose full lockdown in another area of Lombardy which has most cases now. While Italy has done more than 2,50,000 tests but it failed to put comprehensive strategy of tracking and self-isolation. With the population so large, the serious question is that could India, by learning from other countries mistakes and taking necessary measures, contain the outbreak? Although, the government took charge to fight against Covid-19 right from the beginning. When WHO declared coronavirus pandemic, the government took no time and suspended all visas except for diplomats, official, employment and project visas from March 13. Travellers who were at risk were identified, quarantined, tested, their contacts were traced and quarantined. The government was involved from day one for staying well ahead of the invisible enemy and checking its spread. On March 19, 2020, the Prime Minister addressed the nation for the first-time regarding coronavirus and called for a 14-hours janta curfew on March 22. It came out to be huge success. And then he announced severe 21- days lockdown from March 25 and restrict all transport facilities including air, rail and roadways. The first flaw on the part of the government was that its strategy is not science-based and proactive but reactive. If it had been proactive, the government would have revealed to the public that how much diagnostic test kits, ventilators for patient-care, protective equipment for healthcare workers are on order or stockpiling? What are the plans for rapid construction of temporary hospital? Are beds, linens and sanitary on stockpile? The second flaw is that the government has put complete reliance on government-based health care institutions and hospitals, shunning out private institutions. Private health care institutions, with their hardware and software capabilities were not invited from the beginning. The lockdown has also paralyzed virtually all commerce in the


1267 T Jacob Jones, India’s corona strategy is very amoebic, THE HINDU (March 26,2020), https://www.thehindubusinessline.com/opinion/india-corona-strategy-is-very-amoebic/article31165263.ece#.
country, leaving many people struggling with basic requirements such as food and medicines. Preparing for the pandemic is not confined to the health and medical sector alone. It augments to the non-health sector also, by that means it requires complete preparedness measures. It is important to recognize all the essential and indispensable service providers and also to put together all the important provisions for their business continuity at the time of a pandemic or any biological disaster situation. The International Labour Organisation (ILO) in its report stated that in India, with the share of almost 90 percent of people working in the informal economy, about 400 million people are at risk of falling deeper into poverty during the crisis.\footnote{ILO Monitor 2nd edition: COVID-19 and the world of work, ILO, Apr 7, 2020, at 6.} Of all the people, poor have been hit the hardest. The enforcement of lockdown, should not put a halt to the services that are essential and indispensable in nature, thereby facilitating the continuation of such services amid the pandemic so that the people while following the measures of social distancing and quarantining are not deprived of any such essential services, further preventing unnecessary hoarding and chaos among the people. In one of the incidents, a daily wage-earning mother in Allahabad threw her five children into the Ganges before jumping herself due to hunger amid coronavirus.\footnote{UP woman throws her 5 kids into river before jumps in. Then she changes her mind, HINDUSTAN TIMES ( Apr 13, 2020, 13:16 IST), https://www.thehindubusinessline.com/opinion/indias-corona-strategy-is-very-amoebic/article31165263.ece#.} Millions of other daily wage earners are in a similar situation. The lockdown means that they are now facing no prospect of income. Most do not have pension or any kind of insurance. Many of them do not have bank account, relying simply on cash to meet their daily needs. In rural areas of northern and eastern India, most men migrate to cities to earn a living in factories, construction sites and other businesses. The announcement of 21-days complete lockdown triggered a mass movement of hundreds of thousands of migrant workers from their places of work to their homes in villages across India because they know that they could not afford to stay in cities if they had no income and in a desperate attempt to reach their villages, they resorted to walking because lockdown does not permit travelling in vehicles and passenger trains were also closed. At least 22 people have died while trying to make home.\footnote{22 Migrant workers, Kin have died Trying to return Home since the lockdown started, THE WIRE (Mar 20, 2020), https://thewire.in/rights/coronavirus-national-lockdown-migrant-workers-dead.} The Centre has asked State government and Union territories administration to utilize the State Disaster Response Fund for providing food and shelter to migrant workers hit by the lockdown. The State and UTs were also told to communicate about the availability of free food and accommodation to workers through volunteers and public addresses. But is lockdown enough to stop a resurgence of cases? The Director General of WHO said that the lockdown, which is being implemented in several countries to combat Covid-19 is not enough and advice countries to take aggressive measures to find, isolate, test, treat and trace to prevent coronavirus.\footnote{Lockdown is not enough to eradicate Covid-19 pandemic: WHO, INDIA TODAY (Mar 26,2020, 05:31 IST), indiatoday.in/world/story/coronavirus-lockdown-not-enough-eradicate-covid-19-pandemic-take-measures-who-1659772-2020-03-26.}
necessary, but it is not a cure. Managing the
virus needs widespread testing, tracing
system and isolation strategy which begins
by firstly, randomizing testing of people in
urban areas using voter ids. These can be
slums or unauthorized colonies. If the virus
takes root in such place then there is no
stopping of it. Secondly, randomized
testing of people who are allowed to move
around during lockdown. These include
sanitary workers, police officials, delivery
person, vegetable vendors, pharmacists,
media persons. And thirdly, randomized
test of migrants who have returned home
from cities. But testing alone will not
eradicate the virus unless we are able to
isolate infected people in local facilities.
We also need to prepare health care
facilities to take patients in larger numbers,
even built hospitals and quarantine facilities
in football fields, just like Assam is doing.
The lockdown is time to prepare so that
health care systems is not overwhelmed.

According to the Constitution of India,
health and matters related to it are state
subject. The constitutional
responsibility of dealing with biological
disasters rests with the state government.
The government by enforcing the
legislations that govern and control the
nation’s health policies can prevent and
contain the spread of infectious diseases.
Unfortunately, the prime legal weapon that
government holds is the Epidemic Disease
Act of 1897, which is a hastily drafted
short legislation to obstruct the bubonic
plague often called the ‘black death’ that
wrecked life in Mumbai in 1896. The
Epidemic Diseases Act, 1897 is an act
which provides for better prevention and
spread of dangerous epidemic diseases. This Act, still in force, gives the states the
power to appoint any of its agencies or
officers to take necessary measures for the
prevention and control of such infectious
diseases, epidemics or pandemics.
Unfortunately, this Act does not give any
authority to the Centre to make such
measures or intervene in such biological
emergencies such as a pandemic.
Therefore, it shall be repealed. It shall be
amended or substituted by an Act which not
only takes care of the prevailing and
foresightable public health needs including
emergencies such as bioterrorism attacks
and use of biological weapons by an
adversary, cross-border issues, and
international spread of diseases but
also, give enough powers to the central
government, state governments and local
authorities so that they can act with
impunity and immunity, notify the affected
areas, restrict the movement in the affected
areas or quarantine such an area and enter
any premises or establishment to take
samples of suspected materials and seal
them. The legal shortcoming to tackle with
infectious or contagious disease outbreaks
was known for a long time but instead of
coming up with an integrated act, baby
steps were taken. The country was not fully
prepared to tackle with another pandemic
which disputably is the severest since the
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around seven to eight million people in the

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1273 The Epidemic Diseases Act, 1897, [Act No. 3 of
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1274 Statement of Object & Reasons of The
Epidemic Diseases Act, 1897, (An Act to provide for
the better prevention of the spread of Dangerous
Epidemic Diseases.).
1275 NATIONAL DISASTER MANAGEMENT
GUIDELINES—MANAGEMENT OF
BIOLOGICAL DISASTERS, 2008. A publication
of National Disaster Management Authority,
Government of India. ISBN 978-81-906483-6-3,

www.supremoamicus.org
country. The Management of Biological Disaster Guidelines, 2008 drafted by the Centre pointed out the inadequacy of the abovementioned act to deal with the pandemic. During the first term of Modi’s government, with the help of Health and Family Welfare Ministry a draft was made, namely, Public Health (Prevention, Control and Management of Epidemics, Bio-terrorism and Disasters) Bill, 2017 proposing the repeal of the epidemic law of 1897. The bill so drafted explains the terms quarantining of suspects and isolation of the infected persons clearly. It also empowers the Centre to direct state governments and district or local bodies and it bestows power to states under Section 3 to issue any order related to public health measure it is found to be “expedient and in public interests” to do so. In addition to it, it also instilled a provision saying that anyone intentionally violating the law could end up with a punishment comprising of fine of up to 1 lakh and imprisonment of up to two years. The Public Health Emergencies Bill was drafted by MoH&FW and was intended to replace the Epidemic Diseases Act, 1897 and provide for effective management of public health emergencies. But the draft is presently going through some modifications. So, under the current laws, relevant provisions of the Indian Penal Code (IPC) and Criminal Procedure Code (CrPC) can be invoked to detain and question persons involved in criminal acts, or can be applied for establishing law and order, enforcing quarantine, etc. Police can charge someone under IPC’s Section 269 for negligent act, under Section 270 for malignant act for spreading an infectious disease which is dangerous to life and under section 188 for showing disobedience to order duly promulgated by public servant. In addition to the bill, the legislations governing the health policies, gives certain powers to different levels of the government. The 73rd Constitutional Amendment on Panchayati Raj Institutions (PRIs) provides for setting up a three-tiered structure of governance at district, block and village level. Health is a subject matter that can be acted upon by PRIs. The Amendment mandates setting up of health and sanitation committees in each village, the most peripheral body at the grass-root level, to take decisions on health matters for the community. The municipal Acts are civic. The Acts provide for the provision of safe drinking water, hygiene and sanitation, food safety, notification and control of diseases, and public health concerns, including containment of outbreaks. On the other hand, the Act providing for effective management of disasters, the Disaster Management Act, 2005 seeks to establish mechanisms at the national, state and district levels, to plan, prepare and ensure a rapid response to both natural calamities and man-made disasters/accidents. Under Section 6 of the

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1276 CENTRES FOR DISEASE CONTROL AND PREVENTION, National Centre for Immunization and Respiratory Diseases (NCIRD).
1277 Public Health (Prevention, Control and Management of Epidemics, Bio-terrorism and Disasters) Bill, 2017, §3(Power of State Government or Union territories Territories or District/ or Local authority.).
Disaster Management Act, 2005, which defines the powers and functions of National Authority, National Disaster Management Authority (hereinafter referred to as “NDMA”) is inter alia mandated to issue certain guidelines for formulating action plans for synchronized and holistic management of all disasters which include biological disasters, such as epidemics, pandemics, accidental release of virulent microorganisms and Bioterrorism.

The guidelines prepared by the national authority for the management of such biological disasters focuses on prevention, preparedness, mitigation, medical response, and relief of such aspects. These guidelines will form the basis for policies or action plans carried out by the central ministries and departments concerned. Ministry of Health and Family Welfare (hereinafter referred to as “MoH&FW”) is the nodal ministry for handling pandemics. Now, during such biological disasters this can be achieved only through strict conformity and compliance with the existing and new policies and also with the proactive involvement of all the sectors. It will include the development of such specialized measures that concerns with the management of such epidemics or as the case suggests pandemics.

The policies, programmes and action plans formulated by the government at central, state and district level need to be supported by appropriate legal instruments, wherever necessary, for effective management of the outbreak and appropriate legal actions must also be taken on the offenders of the lockdown. When the Prime Minister announced a 21-day lockdown in India to contain the spread of coronavirus, the government also invoked Section 51 of the Disaster Management Act 2005, which mandates up to two years of imprisonment, if the Centre’s guidelines

Powers and functions of National Authority.—(1) Subject to the provisions of this Act, the National Authority shall have the responsibility for laying down the policies, plans and guidelines for disaster management for ensuring timely and effective response to disaster. (2) Without prejudice to generality of the provisions contained in sub-section (1), the National Authority may — (a) lay down policies on disaster management; (b) approve the National Plan; (c) approve plans prepared by the Ministries or Departments of the Government of India in accordance with the National Plan; (d) lay down guidelines to be followed by the State Authorities in drawing up the State Plan; (e) lay down guidelines to be followed by the different Ministries or Departments of the Government of India for the purpose of integrating the measures for prevention of disaster or the mitigation of its effects in their development plans and projects; (f) coordinate the enforcement and implementation of the policy and plan for disaster management; (g) recommend provision of funds for the purpose of mitigation; (h) provide such support to other countries affected by major disasters as may be determined by the Central Government; (i) take such other measures for the prevention of disaster, or the

mitigation, or preparedness and capacity building for dealing with the threatening disaster situation or disaster as it may consider necessary; (j) lay down broad policies and guidelines for the functioning of the National Institute of Disaster Management. (3) The Chairperson of the National Authority shall, in the case of emergency, have power to exercise all or any of the powers of the National Authority but exercise of such powers shall be subject to ex post facto ratification by the National Authority.  

Punishment for obstruction, etc.—Whoever, without reasonable cause,

(a) obstructs any officer or employee of the Central Government or the State Government, or a person authorised by the National Authority or State Authority or District Authority in the discharge of his functions under this Act; or
(b) refuses to comply with any direction given by or on behalf of the Central Government or the State Government or the National Executive Committee or the State Executive Committee or the District Authority under this Act, shall on conviction be punishable with imprisonment for a term which may extend to one year or with fine, or with both, and if such obstruction or refusal to comply with directions
on the lockdown are violated. Spread of communicable diseases as we all know by now in almost many conditions and situations can be prevented or controlled by adopting social distancing measures, isolation and quarantining.

Due to this outbreak there has been a build-up towards educating people that social distancing is necessary, but unfortunately, we have seen that religious and non-religious gatherings continue to take place. Despite the orders of the government, over 2000 people had gathered in Nizamuddin Markaz for Tablighi Jamaat event, they did not inform the Health Department or any other government agency about the huge gathering inside the Markaz and deliberately disobeyed government orders. The Tablighi Jamaat, is an Islamic non-political organization which is highlighted for being the hotspot of novel coronavirus in every corner of the nation. As at least 2,000 people across the country as well as foreign nations such as Indonesia, Malaysia, Thailand, Nepal, Myanmar, Bangladesh, Sri Lanka and Kyrgyzstan had attended the religious congregation at its headquarter in Nizamuddin area of Delhi.

The Tablighi Jamaat was birthed in the age of another great pandemic, the most dangerous in the Indian history of epidemic. The plague of 1896-1925, and the great influenza of 1918-1919, had claimed millions of lives. Jammat is a non-political global Sunni Islamic missionary with it’s headquarter and roots in India whose basic purpose is to rev up every Muslim to be more religiously observant. The Tablighi Jamaat means society of preachers was founded by a Deobandi Islamic scholar Muhammad Ilyas al-Kandhlawi in Mewat, India, in 1926. The organization grew fast in British India. In its annual conference held in November 1941. After Partition, it grew stronger in Pakistan and East Pakistan (lately Bangladesh). The group has presence in 150 countries and millions of followers. According to the schooling of the Tablighi Jamaat, the reformation of a person and of society is achieved by the medium of personal spiritual renewal. Organization’s pillars of faith are kalmia (belief in Allah), salah (daily prayers) and dawah (preaching the message of Allah). Male tablighi grow beards, wear kurtas and white robes, while women cover themselves in public and typically devote themselves to family and religious life. The tabligihs are opposed to the syncretic nature of Sufi Islam and insist on its members to dress like the Prophet did. The focus of the organization is to engage Muslim people towards their religion and not on converting people from other faiths into Islam. Tablighi adherents will go on a 40-day mission, or chillah, during which they preach to other Muslims, encouraging them to attend prayers at their mosque and listen to sermons. The mosques are used to support the efforts of the independent

results in loss of lives or imminent danger thereof, shall on conviction be punishable with imprisonment for a term which may extend to two years.  


The Tablighi Jamaat congregation at Delhi’s Nizamuddin Markaz, from where numbers of cases have been confirmed, is the legitimate matter of utmost concern in our country and it definitely shouldn’t have taken place when a pandemic was claiming lives by the thousands in the every corner of the globe and the stake of lives were at risk. The Ministry of Home Affairs confirmed that on 13 March, approx 3,000 people, among them foreigners from other Southeast Asian countries including Covid-19 hotspot Malaysia, who had taken part in a Tablighi Jamaat were gathered in the national capital’s Nizamuddin area at markaz. In fact, the Jamaat has also been held responsible for having spread the virus to half a dozen nations in its February gathering in Malaysia, pilgrims from nearly 30 countries, gathered in Malaysia for spiritual renewal. Three weeks later, participants in the 16,000-strong gathering of the world’s biggest Islamic missionary movement had spread the corona virus to half a dozen nations, creating the largest known viral vector in Southeast Asia. More than 620 people connected to the four-day conclave had tested positive in Malaysia.

Now if we talk about India, the convention which had been go-ahead by the authorities of Delhi was attended by thousands of people and soon it became apparent that some of the attendees picked up COVID-19 and brought it back to towns and villages across India and now authorities fear that many thousands of people may have been exposed to the virus. We are not trying to fire up Islamophobia; as it will always be a parti pris topic that will need an almighty opposition. But right now the concern is if isn’t ignorance or applesauce in the name of religion, then what it is? The ignorance which is committed weather by the Tablighi Jamaat, Baldev Singh or patient 31 of South Korea is equally questionable and is considered to be the crime against the humanity. As per the reports and headlines, the Sikh priest named ‘Baldev Singh’, a resident of Punjab had a travel history of Italy and Germany. He violated the home quarantine order after returning to India and attended the Hola Mohalla festival which had thousands of people and visited many houses to give his blessings. Out of the first 33 cases in Punjab, 32 were directly linked to Singh. From all of the cases discussed above, the question that comes to our mind is that why people have urges to gather in such huge numbers when the conditions are already critical in other parts of the world. Their orthodox movement and spiritual renewal have put the whole country at a greater risk, and we can’t justify it by saying that other religions had also kept their doors open for a long time. It has also been reported that the gathering of people continued to live there even after 13th march, although Delhi government on 13 March, 2020, prohibited any such gathering of more than 200 people under the Epidemic Diseases Act, 1897, along with that, Delhi government also gave the orders, which prohibited religious

1285 Sneheshe Alex Philip, How Tablighi Jamaat emerged as the ‘largest know’ Covid-19 source in

gatherings of over 50 people from 16 March. Moreover, they also directed people coming from any Covid-19 affected country to self-isolate. Members of the Tablighi Jamaat in Nizamuddin violated both these directions. About 2,100 foreigners had visited India for Tablighi Jamaat activities since 1 January this year, of which approximately 216 were staying at the Nizamuddin Markaz in Delhi, apart from the 216 foreigners staying at the Nizamuddin Markaz 824, were dispersed in different parts of the country as on 21 March. Many Muslim scholars are urging to the people to call it a “mistake not conspiracy”, but what about the other innocent people of this country, who are going to be the real victim of their spiritual renewal process. According to the prediction of The Indian Institute of Management, using mathematical models, the Tablighi Jamaat congregation held at its headquarters in Delhi from 13-15 March will increase corona virus cases exponentially to 13,000 cases by 15 April and to more than 1,50,000 cases by the first week of May. Who would be held liable if the prediction comes out to be true? Another question that comes to our mind is that did the authorities react late to the problem? Hundreds of foreigners poured into Delhi in the last week of February and first week of March to attend Jamaat. They came to India on tourist visa, which does not allow them to conduct religion activities. A missionary visa is required for such work. Timely action by Delhi police, Delhi government and Central government could have prevented thousands of attendees from spreading the virus in India. Why did the officials not subject to the foreigners to any medical checkups or quarantines them at the airport? It is certain that if the foreign attendees were screened and tested at the airport, then the virus could have been detected there. The Ministry of Affairs, on March 21, informed the State government about 824 foreigners who visited Markaz and then travelled to other states. But neither the government nor Delhi police made any efforts to stop the entry or vacate the premise. State police were also asked to identify people who were in Markaz and get them tested and quarantined. But it was only on March 29 that government rushed in to comb the Nizamuddin neighbourhood when reports of cases pouring out of Markaz. Also, another problem from the side of the government was that the orders issued by it are debatable, as they were vague and clearly did not mentioned which sort of event shall be prohibited and when the government issued 16th march order by that time event at Markaz had taken place. It seems like government in itself wasn’t aware about its activity. In a statement home ministry said that 2,100 foreigners has visited India since 1st January for Tablighi Jammat activities. How a century old Indian muslim movement became malaysias covid-19 hotspot, FMT NEWS (18 Mar, 2020 7:30 AM) ,https://www.freemalaysiatoday.com/category/natio/n/2020/03/18/how-a-century-old-indian-muslim-movement-became-malaysias-covid-19-hotspot/.


flights and gave permission to other foreign nationals to visit India including from the country which was affected by the COVID-19. While the Tablighi Jamaat should be held accountable, so as the Government who were aware of the event but did not act as they should have been. The foreign participants were allowed to enter India even after Malaysia had drawn the world’s attention to the Tablighi Jamaat event there. The Tablighi Jamaat’s gathering was located right next to the police station, yet the police did not act at any time. It is strange that members who have attended the gathering were allowed to return to their respective towns without any checks and quarantine, considering the number of cases has begun to rise. This is serious security lapse. The authorities of Jamaat were berated by the police authorities for large number of attendees still present at the Markaz but drew a blank when they sought help for moving everyone out given the suspension of rail services across India on March 21 and sealing of Delhi’s border on 23. Ignorance can be done by anyone but no one can make an excuse and wash hands from the crime one has committed against the humanity. It could be anyone, the Jamaat, the celebrity Kanika Kapoor or the 45-year-old man who returned from Oman, he was sent home with the instructions to quarantine himself. He allegedly continued to socialize for almost a week until he complained of a fever; tests showed that he was Covid-19-positive. Officials estimate that he alone met close to 200 people. And of the 32 members in his family, 11 have tested positive. Despite having the knowledge about the critical situation of the outbreak and the worldwide crisis caused by this corona virus outbreak, citizens of India are yet to wake up to the reality. Maxwell Pereira, Former joint police commissioner of Delhi even made a comment saying, “we Indians are a unique breed. We revel in being cowardly yet rebellious, finding our courage only when we are part of a mob.” This insubordinate nature makes them find righteousness in breaking rules. They either violate the rules secretly or covertly when they believe that no one’s looking, or they violate rules when they are in a crowd finding a false sense of strength. The only question we can ask ourselves is that, how do we as a citizens acknowledge and understand the critical or dire situation we are in, where any sort of contact with a stranger carrying the deadly infectious virus could supposedly result in several deaths? The lockdown to be effective needs far more data, information and messaging on the epidemiology. Also, we should not have vigilante threats and police taking action against those people who have a valid reason to be on the roads. The former joint police commissioner of Delhi also suggested that only fear of punishment or a considerable amount of penalty can keep them in the lockdown and not violate it unnecessarily. The

**1291 THE PRINT (9 Apr, 2020 3:42 pm IST),**
community will be greatly empowered if the knowledge of the risk is communicated to them. Given the level of literacy in some states, to have a successful communication, it needs planning, trained manpower, an understanding of communication protocols, proper messaging and the media and also the ability to manage the flow of information. What we most certainly need is strong and firm messages from the influencers and the people who are widely respected. The health and medical fraternity, political leaders, civil society heads and religious community leaders must be seen via television or on social media, asking and requesting people to stay home. If our best can beat empty containers because our leader asked us to, it leaves no reason for us to believe why we will not heed his order for isolation. While many leaders, politicians and officials consider that persuasion is the best and suitable way to make people obey the government’s guidelines and orders of social distancing, fear of real punishment is perhaps the only thing that works for some people. Punishing the offenders of orders of government to set examples will not harm. The Tablighi Jamaat who allegedly violated the government directions given to the management of Markaz in Basti Nizamuddin regarding the restrictions on social, political and religious gathering and for taking safety measures, including social distancing for prevention and treatment of the infection shall be held liable to the entire nation and appropriate legal actions must be taken, mere persuasion would not make things better at hand. In this regard, An FIR has been lodged by the Delhi Police Crime Branch against seven people, including the cleric, on a complaint by SHO Nizamuddin for holding a religious congregation here purportedly in violation of the lockdown orders of the government and not maintaining social distancing to contain the spread of coronavirus under Section 31292 describing penalty for the offence of the Epidemic Disease Act 1897 and Sections 269 Negligent act likely to spread infection of disease, 270 malignant act likely to spread infection of disease, 271 disobedience to quarantine rule and 120b punishment of criminal conspiracy of the Indian Penal Code. Discipline has to be a part of national character, especially during this pandemic. However, the real question that comes to mind is whether India can bear the burden of lives lost, economic turmoil and a crumble of a weak public healthcare system during this period? It is mandatory for the citizens to understand this aspect and assume their responsibility. Coercion, requests, and appeals by the governing bodies have to be paid attention to with all seriousness. Adoption of punitive measures is an extreme paradigm but justifiable for the greater good of the community in such scenario. Social distancing is every citizen’s singular responsibility to keep himself, his closed ones and the society safe, if it is enforced and is within the legal limits and the established laws of the land. It is deemed to be appropriate to begin with convincing along with widespread education and counselling. However, if the persuasion does not work or isn’t enough, then considering the fact that section 1441293 is already been imposed, action against offenders must be taken under section 188 of the Indian Penal Code, along

1292 3. 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).

1293 The Indian Penal Code, 1860, §144 (Joining unlawful assembly armed with deadly weapon.).
1294 The Indian Penal Code, 1869, §188 (Disobedience to order duly promulgated by public servant.).
with section 269 and section 270 of the penal code. There should be no hesitation in taking necessary legal action as it is in the larger interest of the people.

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The most acknowledged definition as of now for the term transgender is by all accounts “People who were assigned a gender, usually at birth and based on their genitals, but who feel that this is a false or incomplete description of them.” It is regularly utilized as an umbrella term to mean the individuals who oppose unbending, binary gender developments, and who express or present a breaking or potentially obscuring of socially pervasive/cliché gender roles. Transgendered people normally live full or low maintenance in the gender role inverse to the one in which they were born. In contemporary use, transgender is utilized to portray a wide scope of personalities and experiences, including however not constrained to: pre-operative, post-operative and non-operative transsexual people; male and female cross-dressers (now and then refered to as transvestites, drag of sexual orientation, or drag kings); intersexed people; and men or women, paying little heed to sexual orientation, whose appearance or qualities are seen to be gender atypical. The term transgender doesn’t suggest a particular type of sexual orientation; transgender individuals may recognize as hetero, homosexual or bisexual.

From being mocked and treated in an unexpected way, to confronting unfair rejection at working environments, to being exposed to savagery and murder, India’s transgender community had a distressing time since time immemorial. In the year 2018, the World Health Organization (WHO) proclaimed that being transgender is definitely not a psychological issue or a mental disorder to be precise. While this was a dynamic move for the transgender community, WHO renamed being transgender as a ‘sexual health condition’, bringing up issues on the move notwithstanding its indicated advantages. Regardless of the declassification of being transgender as a mental illness, numerous clinics or hospitals that offer gender affirmation surgery or medical procedure require the patient to produce at any rate two psychiatrists- evaluated reports that affirm that they have gender identity dysphoria, which many still locate as a disorder. On one hand, this is to guarantee that the individual makes certain of their choice to experience this tremendous change in their life, however on the other, it just makes the procedure a ton harder for them, and disparages their right to self-identification.

The advancement of a transgender or gender-nonconforming identity includes an intricate transaction of phenomena that comprises procedures of acting naturally, both internal and external. The origination of transgender identity development, as it was depicted by youth in this study, included acknowledgment of transgender character, both progressive and prompt, and transition processes. For certain families, there were early verbal indicators, behavioral cues, and appearance-based inclinations that families deciphered as signs that their child didn’t relate to their sex doled out during childbirth. Numerous youngsters expressed that youths’
sentiments of disappointment and inconvenience with sex-connected physiology, or potentially at a more seasoned age, real changes related to pubescence, incited a young’s longing to recognize as another gender. For a few, fundamentally youth ages 7-12 years, sign of transgender identification happened early and was portrayed as “immediate.” Yet for other people, essentially youth ages 13-18 years, the self-acknowledgment and transgender identification were less instantaneous.

Transgender people frequently need models of nontraditional gender to help them in their identity development, and a few depicted accepting that they were separated from everyone else in their gender battles because of the lack of public affirmation. This absence of data has all the earmarks of being in both the public and educational sectors. The psychological literature doesn’t yet contain models for every personality identity development that falls under the rubric transgender, however, models of transsexual and butch lesbian identity development have been advanced. Devor’s basic research on transsexual identity development portrayed 14 phases of identity development. The underlying three phases were set apart by anxiety, confusion, and attempts to comprehend one’s gender through inter-personal comparisons of one’s initially allotted gender and sex with others. These stages regularly were described by relational distress, trouble perceiving oneself inaccessible gender identities, and explorations of identities that support variety in gender presentation.

The following three phases portrayed a procedure of finding transsexualism, trailed by confusion and comparisons among oneself and this identity. Often individuals led online research during this period and searched out relationships with transsexual individuals. At that point, an underlying resilience of transsexual identity grew, however, there would, in general, be a deferral before encountering a total acknowledgment of this identity while individuals decided how well it fit their feeling of themselves as well as other people’s recognitions (stages 7, 8, 9). Followed an acknowledgment of this identity, as a comparable postponement while individuals chose in the event that they might want to change or not (stages 10, 11). Following conversion to another gender, individuals attempted to acknowledge, incorporate, and develop pride in that gender identity (stages 12, 13, 14). This procedure helps in figuring out how to live and relate to others with another gender identity, including how to oversee disgrace and segregation, to incorporate their identities, and, at last, to take part in the advocacy.

Bilodeau presented a model of transgender identity development that intently reflects structure for homosexual individuals. There are six procedures that transgenders work through while in transit to a sound and healthy identity: 1. Leaving a traditionally gendered identity - includes

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perceiving that one is gender variation. 2. Building up a personal transgender identity concentrating on knowing oneself in connection to the gender difference. 3. Building up a transgender social identity - making a network of support for one’s identity. 4. Turning into a transgender offspring- turning out to relatives and rethinking these familial connections. 5. Building up a transgender intimacy status- setting up intimate personal and emotional relationships. 6. Entering a transgender community turning out to be included strategically and socially with transgender networks. This model expels a portion of the stigma that has accompanied transgender research and turned the focus back onto the transgender individual as a person. It approves what the individual is feeling and the numerous territories they should suffer change so as to set up a sound and healthy gender identity. Today, specialists and advocates bolster an ecodevelopmental approach for investigating and exploring transgender identity development. This structure isn’t constrained by what is socially expected; rather, analysts may consider numerous interacting systems of biology and environment.

It was found that numerous trans people in Asian nations who drop out of education early, particularly those drifting into the city with little education or not many family contacts, find it’s hard to find a new line of work. They experience some type of exploitation as an immediate aftereffect of their transgender identity. This exploitation ranges from unobtrusive types of harassment and discrimination to obtrusive verbal, physical, sexual assault, including beatings, rape, and even murder. Most of assaults against transgender people are never answered to the police. An attitude is a speculative develops that speaks to a person’s level of like or aversion for something. Attitudes are commonly constructive or adverse perspectives on an individual, place, thing, or occasion. Attitudes are judgments that create on the ABC model (affect, behavior, and cognition). The affective response is an emotional reaction that communicates a person’s level of inclination for an element.\textsuperscript{1299} The behavioral intention is a verbal sign or typical behavioral inclination of a person. The cognitive reaction is a subjective assessment of the element that establishes a person’s convictions about the object. Most attitudes are the aftereffect of either direct experience or observational gaining from the environment.

CRITICAL ANALYSIS OF THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) BILL, 2019

The sole reason for a social welfare enactment ought to be to ensure the rights of the marginalized. In instances where discourse by the marginalized isn’t permitted, simply due to an undeniable risk to their lives and fundamental obstacles set up to deter, yet to prohibit individuals from the community from possessing and taking part in political spaces, it is incumbent then on the state to effectively engage in with such communities to make such a discourse. History has, over and over, betrayed the transgender community. Our identities and bodies damaged to such a degree, that the word infringement would be duping the narrative. The unfairness with

\textsuperscript{1299} L. Feinberg, Transgender warriors: Making history from Joan of Arc to Dennis Rodman, Boston, MA: Beacon Press (1996).
which history has managed its hand would just be revised through a functioning exertion of the state, to recreate a discourse, the essential necessity being consultations with the community.

The year of 2014 was a turning point in the acknowledgment of the community’s identities. The formation of a draft of rights and an unmistakable disassembling of the chronicled structures worked to simply mistreat and invisibilize identities, rights and as an augmentation, people from entire societies. The NALSA vs. Union of India1300 judgment was a vindication of a centuries-old movement constraining the state to perceive and maintain gender identities. The Transgender Rights Bill 2014, presented by a member Tiruchi Siva in the form of a private member bill, and passed by the Rajya Sabha in 2015 gave a feeling of a ray of hope that the Supreme Court decision would be trailed by legislative action.

A series of bills starting with the 2016 bill followed by the one out of 2018 was nevertheless a death blow on the zenith of any hopes and expectations of the community. The trans community took over public spaces by spilling out in thousands. A more clear voice contradicting the law going to be foisted on the community couldn’t be envisioned. Interestingly, the Transgender Persons Bill 2018 carried fierceness and distress to the Indian trans community, since it proposed the foundation of a board of individuals to decide if an individual is transgender or not, based on their private parts and whether they have undergone a gender-affirmation medical procedure or not. It provoked across the country dissents by the transgender community and trans rights activists. In any case, the 2018 adaptation of the Transgender Persons Bill, cruised through the Lok Sabha. The manifestations of such activity were many, reviews about the community were missing, consultations were lacking, and any discussion in the Lok Sabha was totally non-existent. The basic reason however, could be nailed down to the total lack of care of the state to any of the concerns the network has raised.

After gathering ubiquitous criticism for its previous bills relating to transgender rights, the Government has once more concocted another Transgender Persons (Protection of Rights) Bill, 2019. This bill was introduced in the name of protecting transgender rights but saddest dehumanizes and humiliates transgender living in India. The bill was passed by the Lok Sabha on 5th August 2019 and the transgender community marked it as “Gender Justice Murder Day”1301. Presently the bill has been passed by the Rajya Sabha with no changes and is anticipating the President’s assent. The Bill has come to Parliament in this context of apathy, neglect and secrecy. A series of betrayal of affirmations and convolution of a law that would fail to help the trans community and would prefer to grab away the absolute minimum that existed. This paper is an endeavor to toss light upon the principle provisions of the bill and analyze whether they pass the assessment of legality.

LACUNAE IN THE BILL
The Transgender Persons Bill, 2019 fails the community on different records, which are as follows:

1301 Prachi Singh, Why is transgender community unhappy with Trans Persons Bill?

a) A few definitions that the Transgender Persons Bill recommends are somewhat repetitive with respect to the issues of the community. Specifically, the meaning of “family”, where the present Act gets its definition indiscriminately from prior laws in place, with no application of the brain as to the position or the subtleties related to the transgender community. Such a cliché meaning of ‘family’ has brought up after different explanations made by individuals from the community with respect to the need to extend the importance of ‘family’. With most transpersons not living with their biological family due to the discrimination and violence, they face from their natural family. Hence, there is a need to incorporate the chosen family within the ambit and meaning of ‘family’. Since, it is through the chosen family that most transpersons get support and can find their friends and relatives.

b) In spite of the fact that there is a different definition for ‘intersex person’, it appears to have been done to absolutely mollify worldwide gatherings engaging for a different definition for intersex persons. Since, in the very next line it has been conflated alongside the definition for ‘transgender person’. This isn’t only a shocking distortion yet additionally an invisibilisation of intersex persons and their concerns. This is of outrageous significance in the aspect of health as there is a scope of particular issues that intersex people face.

c) The chapter that prohibits discrimination covers discrimination against transgender people on the scope of fronts. It isn’t even a toothless tiger; it is only various teeth dispersed about with no power, reason or authority to make a move without anyone else. The part which talks about prohibiting discrimination is tormented with three significant concerns:

i) Lack of enforcing authority

ii) Lack of remedial measures, be it in terms of compensation or some other methods, for the survivor

iii) Lack of reformatory measures to be taken against the violator

d) The procedure of acknowledgment of the identity of transpersons is influenced by similar issues with the prior Bill. Despite the fact that the District Screening Committee has been disassembled, acknowledgment of a transgender person’s identity is then to be decided by the District Magistrate, who will at that point issue the certificate dependent on a specific set of documents that would be recommended. The elemental inquiry that emerges is then concerning what are the documents that would enable transgender people to be perceived as to their way of life as a transgender individual. In Justice K.S. Puttaswamy vs Union of India1302, the Supreme Court held that the right to privacy is a fundamental right under Articles 14, 19 and 21 of the Constitution. Accordingly, the non-inclusion of a confidentiality provision includes a further dent upon the legality of the bill. These follow on with another set of issues that obfuscate how gender identity is to be decided:

i) In the event that an individual is to, at that point change their favored gender to male or female, the Transgender Persons Bill looks back to the old comprehension, implementing the requirement for a Sex Reassignment Surgery (SRS) so as to change their gender identity to their favored gender of either male or female. Also, the legitimacy of the SRS would be decided by the District Magistrate. ii) Post the change

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in gender identity, the individual is then permitted to just change their first name, which brings up the issue with regards to the sacrosanct position that the last name holds to such an extent that under no condition at that point can the individual be helped in changing their last name. The sole purpose behind such an obstacle of changing one’s last name is the impenetrable idea of caste in Indian culture. In this way keeping one from changing one’s last name is the essential way through which the caste system and the hierarchy holds its solidified state.

e) The clause of ‘rescue, protection, and rehabilitation’ must be perused in setting of the experience of trans persons in rescue homes. The amount of abuse, of different forms—mental, physical, emotional and sexual, looked by transpersons has had the community being uncertain about the way in which shelter homes are built up and run. Also, prior encounters shelter homes have shown a clear cold-heartedness toward concerns of transgender people. For quite a long time, we have stayed and lived independently with help from the community, in the midst of discrimination and violence. We needn’t bother with a pointless policing of our reality by the state.

f) The Transgender Persons Bill stipulates a complaint official assigned to manage complaints under this law. The way toward having a complaint official is totally vague, it could be through nomination, and election or any other process, the way toward having the grievance official is non-existent. The procedure settled will set up the autonomy and the viability of the complaint official and its absence, the condition is a reason for concern.

g) The limitation of movement as to transpersons in isolating from their parents and enabling an individual to move out just through an order for ‘a competent court’. It is therefore dividing the community into class lines with just those having the option to get to court in any event, getting an opportunity at isolating from their family. Moving out of the family has been the need of a large number of transpersons, because of the discrimination and violence they would face from their close family and the immediate surroundings. The freedom to move and have a chosen family has been adequately restricted and destroyed through this clause. Moreover, the main option made accessible to the community other than the family is rehabilitation center, the blunders, and fears of which have been emphasized on various occasions.

h) With respect to health, however, there are issues that are covered. It is relevant to take note of that there is anything but a single organized protocol managing the medical community on healthcare for the transgender network. Without such a coordinated exertion to assemble health systems working for transgender people, a variety of individual clauses and provisions turns into a minor shuffling of health rights that play with our lives. Other than the requirement for a different protocol concerning the soundness of the transgender individual, there likewise should be ensuing incorporation in each one of the health care services that would be drafted further on and furthermore applied retrospectively. For more noteworthy usage all through the Indian health system, there should be an expansion to Primary Health Centers, which would be an executing agency for all the healthcare policies at the grass-root level. The right of a transperson concerning their fertility is basic, and inclusion in both artificial fertilization and surrogacy. These zones still follow basically heteronormative understandings of the capacity of an individual to be a parent. Besides with respect to emotional well-being or mental health issues faced by
the trans community, by prudence of discrimination and ostracization faced by trans persons, other than the association of mental health experts in checking gender dysphoria there is no further help that is given; while there should be proceeded with help for emotional wellness to be given to a transperson.

i) The National Council for Transgender Persons does not have any sort of freedom to perform any functions. The National Council which is made out of at least 30 people has an insignificant portrayal of 5 people from the transgender network. Further, the people would be designated by the Central Government, trading off fundamentally the independence of the people onboard. Each member who isn’t a worker of the central government is to be appointed by the Central Government, setting noteworthy inquiries on the autonomy of The National Council for Transgender Persons, its separation from the government and in this way its capacity to then scrutinize the government on different concerns.

j) The offenses and punishments identified, however, have seen changes from past drafts of The Transgender Persons Bill, yet comparative sections have been utilized through a mere twisting of the law. There are still issues that go over glaring blunders:

i) Though the Transgender Persons Bill has removed provisions condemning begging and sex work, it has presented another area that condemns ‘compelling or enticing’ a transgender individual to involve in forced labor. The requirement for the section ought to be under investigation, for when there is a pre-existing Bonded Labor System (Abolition) Act which condemns those engaging bonded labor and is applied crosswise over people with no discrimination on gender, the requirement for this provision is repetitive. The main explanation that can be predicted for the presence of this section is to condemn begging and sex work. The bending of words doesn’t absolve the legislators of the repercussions it would decipher in, during usage. ii) The section condemning brutality against transgender people has been reproduced with no progressions from past drafts. Truth be told any sort of savagery, as much as that which would jeopardize a transperson’s life is rebuffed by a term of a limit of 2 years. Sexual abuse rampant against transpersons is incorporated within a similar section. Such acts that should be condemned well beyond the current sections in the IPC are currently a watered down form of what is available in existing criminal law, which rebuffs an individual with at least 7 years in cases of rape. This part accordingly is a tragedy to the rights of the bodily integrity of transpersons.

In a contention between the court judgment and enactments, the enactment will come first. Till its lawfulness is challenged in courts and such a challenge is acknowledged and the absurd law is struck down. It’s anything but a novel concern that the law has been against us, and has kept on overlooking the reality. What is surprising for this situation is the law being utilized as an effective component to approve the reality and existence of transgenders, however, place them at a plane lower than that which the remainder of the general public lays on, hence legitimizing the brutality that they are put through.

**IMPLICATIONS OF THE BILL**

The bill will make all stakeholders responsive and responsible for maintaining standards underlying the bill and likewise expedite greater accountability on the part of Central and State Governments/Union Territories (UTs) administrations for issues concerning Transgender people. It will
profit an enormous number of transgender people in mitigating the maltreatment, abuse, stigma, and oppression against this marginalized section so as to bring them into the mainstream of society. The bill will likewise prompt more prominent comprehensiveness and make the transgender people productive members of society. These will bring a tremendous change in the society if only, the shortcomings are analyzed properly.

CONCLUSIONS & RECOMMENDATIONS
The bill has left a larger number of queries unanswered than the concerns it expects to addresses. If this bill is passed into law in its present structure, it would make obstacles for existing transgender who are now battling in the society. Transgender rights activists’ underlined the bill has left them uncovered, vulnerable under the steady gaze of a law. Considering these concerns and certain demerits identified above, the bill in its present structure requires reevaluation.

As the perceivability of transgenders builds, the time has come to assist them with joining the standard of society. So as to accomplish this target it is important to comprehend the mental and psychological issues and difficulties they face as well as examine the prevailing attitudes in the society. A significant challenge in the mobilization procedure has been persuading the transgender to effectively demand rights and services. There have been some dynamic steps taken to improve their personal life yet this has come following quite a while of squashing social stigmatization, abuse and general derision from the wider community. As one transgender puts it “They make narratives about us and state all these intriguing things, yet when we leave the road despite everything we get the calling and the whistles.” One of the significant issues transgender face in the general public is the absence of social acknowledgment. In spite of the fact that they have been a part of every culture and society in recorded mankind’s history, they have recently become the central point of consideration in psychological, medical and social research.

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EXTRADITION: ITS MEANING AND FUNCTION IN INDIA

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INTRODUCTION
It is quite possible for a person to escape to another State after committing a crime in his own State. Such cases have started occurring quite often with the result of development of air traffic. A question arises as to whether the fugitive shall be tried in the State where he committed the crime or in a country where he has fled away. Normally, a State finds it difficult to punish a person who has committed a crime elsewhere primarily because of lack of jurisdiction, and therefore, such persons are often surrendered to the State where the crime has taken place or been committed. Surrender of an accused or a convict is referred to extradition. Thus, in the cases where the practice of granting asylum is not followed, it is known as extradition.

The term extradition has been derived from two Latin words ex and traditum. In layman’s language it means ‘surrender of fugitives’, ‘delivery of criminals’ or ‘handover of fugitives’. Extradition may be defined as surrender of a fugitive criminal by the State on whose territory the accused is found to the State on whose territory he is alleged to have committed a crime.

According to Oppenheim, extradition has been defined as follows: “Extradition is the delivery of an accused or a convicted individual to the state where he is accused of, or has been convicted, of a crime, by the state on whose territory he happens for the time to be.”

The Honorable Supreme Court of India has defined extradition as follows: “Extradition is the delivery on the part of one State to another of those whom it is desired to deal with for crimes of which they have been accused or convicted and are justifiable in the Courts of the other State. An Extradition request for an accused can be initiated in the case of under-investigation, under-trial and convicted criminals. In cases under investigation, abundant precautions have to be exercised by the law enforcement agency to ensure that it is in possession of prima facie evidence to sustain the allegation before the Courts of law in the Foreign State.”

Thus, in a nutshell, extradition can be defined as the act of delivering, an accused or a convicted person, by authority of law, from the State where the accused fled to after committing the crime to the State in which the crime was supposedly committed.

Is Extradition a Legal Duty Of a State?

Grotius was of the opinion that a State of refuge either has the duty to punish the fugitive or surrender him to the State where he committed the crime. He recognized the principal of ‘prosecution or extradition’ as a legal duty of the state where the offender is found and this legal duty of the state according to him is based on natural law. The principle of extradition has been or participates as an accomplice in the commission of an extradition offence in a foreign State.

1303 ‘Air traffic’ means traffic created by the movement of aircraft within a given space.
1304 A ‘fugitive’ means a person who is accused of, or is convicted of, an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires or attempts to commit

1306 State of West Bengal v. Juggal Kishore AIR 1969 SCC 1171
expressed by the maxim aut dedere aut puniare\textsuperscript{1307}.

The principle was invoked in the case of Belgium v. Senegal\textsuperscript{1308} by Belgium in Questions Relating to the Obligation to Prosecute or Extradite in its application instituting proceedings against Senegal in 2009 before the ICJ stating that Senegal’s compliance with its obligation to prosecute or extradite the former President of Chad, Hissene Habre to Belgium for the purpose of criminal proceedings. Belgium contended that under International Custom, Senegal’s failure to prosecute Habre or to extradite him to Belgium violates the general obligation to punish crimes against humanity. However, in practice, the principle has not been followed by the states, and therefore it cannot become a rule of International law.

A legal duty to surrender a convicted person only arises when the treaties are concluded by the States and after all the formalities mentioned in the extradition treaty has taken place.

The first and foremost important condition of extradition is the existence of an extradition treaty between the state on whose jurisdiction the fugitive is and the state where the fugitive allegedly committed the crime i.e. the territorial state and the requesting state. For some States, such as the United States, and the Netherlands, existence of a treaty is quite important. They require a treaty as an absolute pre-condition.

Quattrocchi, an Italian businessman and an accused in Bofors Scam could not be extradited to India from Italy as no treaty existed between India and Italy. Negotiation for a treaty between the two began in the year 2001 but has not concluded till now.


It is to be observed that in the absence of any Treaty arrangements, a person may be extradited in exceptional cases on the basis of reciprocity. Germany and Switzerland extradite a person apart from a formal Treaty if their government and the requesting States have exchanged declarations of reciprocity.

In the case of Abu Salem v. State of Maharashtra\textsuperscript{1309}, Abu Salem, an accused in 1993 Mumbai blast and an underworld don fled to Portugal along with his wife Monica Bedi, Portugal, in the absence of a Treaty, extradited Abu Salem to India after latter gave an assurance that he would not be given a death sentence. As to extradition of Monica Bedi, a local Court of Portugal refused to extradite Monica Bedi on the ground that the crime committed by her in India was similar to that of the crime for which she was arrested in Portugal. Bedi was arrested in Portugal for possessing forged document. Indian point of view was that possessing forged documents and

\textsuperscript{1307} The principle has been adopted in many treaties, for instance, in the four Geneva Conventions on Humanitarian Law 1949 and their Protocols of 1977; Convention on Psychotropic Substances etc.

\textsuperscript{1308} ICGJ 437 (ICJ 2012)

\textsuperscript{1309} (2011) 11 SCC 214
wanted for forged documents are two different crimes, and therefore she is required to be extradited to India for trial. Later, the Portuguese High Court ordered her extradition.

**PRINCIPLES ALEBIT THE LAW OF EXTRADITION**

1. *Political Exception:* It means that person cannot be extradited for an offence of political character. The term political offences have not been clearly defined as international law. But, what shall be construed as a political offence usually depends on the domestic law of the requested state. Also the acts of terrorism committed by a person do not fall under the exception of political offences even if they are committed with political motive.

   - **Re Castioni:**

     In this case, Castioni who had returned to Switzerland from abroad joined the Revolutionary Movement in the Canton of Ticino (Switzerland), and in the course of it, he committed the murder of Rossi, a member of the government. It was created on behalf of Castioni in the writ of Habeas Corpus that offence was a political offence for which extradition was not available. He claimed protection under section 3 of the extradition act 1870. Lord Denman J. laid down that in order to bring the case within the scope of the act, and for an offence to be political it must at least be shown that the act is done in furtherance of, done with the intention of assistance, as a sort of overt act in course of acting in a political manner, a political rising, or a dispute between two parties in the state as to which is to have the government in its hand. Is extradition was refused on the finding that his motive for the Act was political.

   - **Re Meunier Case:**

     In the case of Re Meunier, which came before the court three years after Castioni, the principle laid down in Re Castioni was repeated. In Re Meunier, the petitioner was the French anarchist who was charged with causing explosions at a I and also in certain barracks in France, one of which resulted in the death of two individuals. His extradition was upheld.

2. **The Doctrine of Double Criminality:**

   It denotes that crime which is committed by an accused must be an offence which is recognized in the territorial as well as in the requesting state. No person is extradited unless this condition is fulfilled. In other words, extradition is made available only when the act committed by the fugitive is an offence in both the states that is the requesting State and the State requested. Doctrine is based on the consideration that if the territorial state has to extradite a person that would offend the conscience of the territorial state as its own law does not regard him as a criminal. The requesting state would not ask for the surrender of a person for those crimes which are not recognized in its state.

   - **Soering v. the United Kingdom,** in this case, a German national murdered his girlfriend’s parents in the State of Virginia (USA) and later he along with his girlfriend disappeared. They fled to England where they were arrested. Soering after committing murder in the United States, for which the punishment was a death sentence, fled to the United Kingdom where he was

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1310 (1891) IQB 149
1311 (1894) 2 QB 415
1312 28 ILM 1603 (1989)
found guilty for manslaughter and not for murder. Later on, he was surrendered to U.S.A on the condition that he shall not be given a death sentence.

- In *Chitat v. Canada*[^1313^], wherein Canada extradited a person to California where he might be executed by gas asphyxiation, which can cause prolonged suffering rather than immediate death. It was observed by the Committee that Canada has violated its obligations, as under the International Covenant on Civil and Political Rights, which prohibits ‘torture or to cruel, inhuman or degrading treatment or punishment’.

- In 2007, Delhi High Court allowed the extradition of Mahindra Pal Singh Kohli to the United Kingdom with the condition that he shall not be given a death sentence. The Court observed that there was sufficient material to establish a strong prima facie case against him for committing the offences of raping, kidnapping and murder of Hannah Foster.

### 3. Rule of Specialty:

According to this principle, an accused may be tried by the state from where he fled only for that offence for which he has been extradited. In other words, the requesting state cannot punish the fugitive criminal for any offence other than that for which he has been extradited.

In the case of *Daya Singh Lahoria v. Union of India*[^1314^], the petitioner Daya Singh who was extradited from the U.S.A in a writ petition stated before the SC of India that the criminal courts in the country have no jurisdiction to try in respect of offences which do not form a part of the extradition judgment by which he has been brought to this country and he can be tried only for the offences mentioned in the extradition decree. It was contended by petitioner that he cannot be tried for offences other than the offences mentioned in the extradition order as that would contravene with Section 21[^1315^] of Extradition Act,1962 as well as with the provisions of the International law. It was held by Justice Pattnaik that an accused brought in this country under an Extradition Decree can be tried for offences mentioned in the Extradition Decree and for no other offences.

### EXTRADITION LAWS IN INDIA

In India for the first time, an Extradition Act was enacted in 1902. Prior to the enactment of the Act of 1962 extradition in India was regulated on the basis of the United Kingdom Extradition Act of 1870. The surrender of Fugitive criminals amongst the countries of the British Empire was regulated by another act that is The Fugitive Offenders Act of 1881. The Indian extradition act of 1903 was enacted to of returning to that State, be tried in India for an offence other than— (a) the extradition offence in relation to which he was surrendered or returned; or (b) any lesser offence disclosed by the facts proved for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made; or (c) the offence in respect of which the foreign State has given its consent.

[^1313^]: CCPR/C/49/D/469/1991
[^1314^]: AIR (2001) Supreme Court, p. 1716.
[^1315^]: Section 21 of the Extradition Act, provides that an accused or convicted person surrendered or returned by foreign State not to be tried for certain offences.—Whenever any person accused or convicted of an offence, which, if committed in India would be an extradition offence, is surrendered or returned by a foreign State, such person shall not, until he has been restored or has had an opportunity
provide for more convenient administration in British India and to supplement the extradition act of 1870 and to the Fugitive Offenders act of 1881. Thus, the act of 1903 was supplementary to the above two acts.

The Extradition Act 1962 defines the expression ‘Extradition Treaty’ as a Treaty, Agreement or Arrangement made by India with a Foreign State, relating to the Extradition of fugitive criminals and includes any treaty, agreement or arrangement relating to the Extradition of fugitive criminals made before the 15th day of August 1947, which extends to and is binding on, India. Extradition treaties are traditionally bilateral in character.\footnote{1316}

In 1965, India prepared a list of 45 pre-independence extradition treaties which were stated to be in force.

Germany and Portugal expressed the view that extradition treaties are not operative with India, it was regarded by India that pre-independence extradition treaties with these states are still operative. When Abu Salim, an accused in Bombay blast case fled to Portugal in 2002, it was found that India does not have an extradition treaty with Portugal but still, Portugal extradited Abu Salim to India after latter gave an assurance that he would not be given even death sentence. A similar case happened with France, when it was suspected that Dharma Teja had fled to France, the Prime Minister of India declared in the Parliament that India has no extradition treaty with France, and therefore, his extradition cannot be requested to that country.

The central authority that administers the extradition act and processes the incoming and outgoing of extradition request is the CPV Division, Ministry of external affairs and Government of India.

It is to be noted that request for extradition on behalf of the republic of India can only be made by the Ministry of External Affairs and Government of India which formally submits the request for extradition to the requested state through diplomatic channels.

Extradition is also possible from the non-Treaty States and the process is provided under the Indian Extradition Act, 1962.\footnote{1317}

Maria Stella Rene v. Inspector of Police, CBI/SCB1\footnote{1318}, the High Court Of Madras refused release the passport of a French national (arrested in India) by the Indian Police on the ground that if she returned to France, she would not be extradited to India as the extradition treaty between France and India barred extradition of “own nationals”. In the case of Mohammed Jafeer v. The Government of India, rep. by the Assistant Director (I), CBI and Ors\footnote{1319}, the High Court of Madras upheld the decision of the Indian Government which disallowed request for extradition of an Indian national to Kuwait (though the treaty was signed but not in effect at the relevant time) on the ground that the treaty bars extradition of own nationals. The court observed, “Kuwait will not extradite its nationals to India”. In this case, however, parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention.

\footnote{1316} See section 2(d) of the act.
\footnote{1317} Section 3(4) of the act (provides for the process of extradition with non-treaty foreign states) states that where there is no extradition treaty made by India with any foreign State, the Central Government may, by notified order, treat any Convention to which India and a foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention.

\footnote{1318} Crl. R.C. No. 602 of 2016
\footnote{1319} Habeas Corpus Petition No. 1243 of 2005
the criminal proceedings for the same offence(s) were commenced in India against the accused as the offences alleged were of theft and criminal breach of trust (which are also offences in India).

Presently, India has extradition treaties with 47 countries and extradition arrangements with 9 countries. Between 2002 to December 7, 2016, 62 fugitives have been extradited by foreign countries to India on the basis of extradition treaties.1320

In the recent past India has also suffered setbacks with many fugitives such as Nirav Modi, Mehul Choksi, and Vijay Mallya fleeing from India to avoid criminal prosecution.

The most recent case of extradition in India is that of Sanjay Chawla, an alleged bookie and one of the main accused in one of the biggest match-fixing scandals that involved South African Captain Hanse Cronje. He was extradited from United Kingdom on 13th February, 2020.

India (requesting State) assured United Kingdom (requested State) that Chawla will be accommodated in a personal cell with proper security and will also comply with personal hygiene and medical requirements.

CONCLUSION
Extradition plays an important role on the international frontier. The process of surrendering the accused to the state in which the alleged committed the crime by the state in whose territorial jurisdiction the accused fled to is known as extradition. The concept of asylum is very old and traditional, and when this long-standing tradition is not followed by the States it is known as extradition. If a person is surrendered to the requesting State by the territorial State it is known as extradition, but if he has not been surrendered and instead given shelter and protection by the territorial State, then it is known as asylum. Starke has stated that where asylum ends extradition begins. It must be noted that before a person is extradited, the territorial State must be satisfied by the requesting State that there is a prima facie evidence against the fugitive for which extradition is demanded. In C.G. Menon’s case the Madras High Court held that ‘the need for offering evidence to show that prima facie the offender is guilty of the crime with which he has been charged by the country asking for his extradition has been well recognized’.1321

Thus, extradition procedures have evolved and changed in response to changing social conditions, and in particular changes in relation to improved communications and easier movement of individuals between States. Political offence exception has diminished in importance as States recognized the need to address the problem of modern international terrorism, which is very different in scale and character from what it was in the 19th century.

1320 Times of India, February 20, 2018
1321 AIR (1953) Madras, p. 729 at p. 763
1322 Article 1(2) of the Terrorism Convention defines “acts of terrorism” as “criminal acts directed against a state” (1937). Such acts must be “intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public”. The Convention is silent on the purpose of the fear generated (Chadwick, 1996). Modern terrorism can be traced back to nineteenth century revolutionary radicalism, and, in particular, the emergence of “anarchist”, “collectivist anarchist” and “anarcho-communist” groups.
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CRITICAL ANALYSIS OF THE JUNCTURES BETWEEN E-CONTRACT AND INDIAN LEGAL SYSTEM

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ABSTRACT
E-contract is any sort of contract established through the interaction of two or more persons using electronic means, such as e-mail, with an electronic agent, such as a computer program, which is programmed to recognize the existence of a contract. Since the Internet is no longer limited to pure correspondence or data measurement and analysis, electronic contracts are now the order of the day and there are no differences between online and offline contracts.

In the modern era, the whole contract can be completed in seconds but still the traditional rules of contracts are applicable in E-contracts. E-Contract is an aid in the drafting and negotiation of effective e-commerce and related services contracts for customers and businesses; and this includes model contracts for selling products and providing digital goods and services to customers and companies alike. This paper focuses primarily on the broader context of E-contract. More precisely, the first part of the paper seeks to clarify the specific laws regulating e-contract rules in India and highlights the technicalities of e-commerce and e-contract; whereas the second section focuses on issues relating to e-contracts covering the issue of jurisdiction, online signing requirements, minor entering into e-contracts, problems of unfair position and restrictive negotiation in standard form of contract etc; further it also deals with the interrelationship between e-contracts and competition law, and the penultimate part of the paper deals with the jurisprudential nature of e-contracts with specific reference to subjective theory of contract, the legality of e-contracts in government tenders; and lastly it deals with the role of arbitration in E-contract.


I. INTRODUCTION:

“...Technological revolution is transforming society in a profound way, if harnessed and directed properly information and communication technologies have the potential to improve all aspects of our social, economic and cultural life. It can serve as an engine for development in the 21st century and as an effective instrument to help us achieve all the goals of millennium declaration”

-KOFI ANNAN

The latest form in which instant contracts can be made is to enter into contracts through computer internet, which is the networking system's most innovative mode; through which messages can be transmitted from the sender to the addressee via e-mail. The internet connects countless networks all over the world and hence it is easy to enter into contracts through exchanging offer and acceptance by electronic means.


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The Internet era has brought along with itself a series of revolution where now it has also led to an impact on the preferred mode of doing business by the people. Pertinent to note paperless mode of doing business is given due regards also because of its go-green initiative, thus reducing huge amounts of paper waste. An Electronic Contract just like a paper contract is largely governed by the provisions of The Indian Contract Act’1872 (herein; ICA’1872) just in the same manner as any other traditional contract; essentially being the digital version of a paper contract. Businesses and individuals enter into it by means of an e-mail or a specialized software, the most commonly used one being Contract Management Software. Used in concluding agreements like that of employment, sales, services, or tenancy, E-Contracts in essence serve the purpose of speedy transaction for the ultimate convenience of the users. Any contract to be executed under the ICA’1872 has to go through the testing metal of satisfying the essential elements of a contract that we are already aware of. When E-contract comes into the picture alternate user conduct like exchange of e-mail/fax, downloading or accepting a condition can also imply a contract.

With regard to the relevant law of the electronic contract, we find it necessary to shed some light on issues of e-contract in various fields, including the legality of government tenders through e-contract, competition law related concerns, jurisprudential dimension of e-contracts and its outreach in arbitration.

II. ADOPTION OF SPECIFIC RULES FOR E-CONTRACTING:
The concept of contracts being entered via electronic means has been duly acknowledged in the Indian Legal System. The definition of “evidence” as provided under Section 31324 of the Evidence Act includes “all documents including electronic records produced for the inspection of the court.” Further, Section 47A1325 of the Evidence Act stipulates that when the Court has to form an opinion as to the electronic signature of any person, the opinion of the Certifying Authority which has issued the electronic Signature Certificate is a relevant fact, and Section 85B1326 of the Evidence Act stipulates that unless the contrary is proved, the Court shall presume that-

- The secure electronic record hasn't been modified since the specific point of time to which the secure status relates.
- The secure digital signature shall be affixed by the subscriber for signature or approval of the electronic record.1327

Delhi High Court in the case of Societe Des Products Nestle S.A and Anr v. Essar Industries and Ors.1328 led to the immediate introduction of Section 65A1329 and 65B1330 in the Indian Evidence Act of 1872 relating to the admissibility of computer generated

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1324Evidence Act § 3 (1872).
1325Evidence Act § 47A (1872).
1326Evidence Act § 85B (1872).
13282006 (33) PTC 469 Del.
1329Evidence Act § 65A (1872).
1330Evidence Act § 65B (1872).
in a practical way to eliminate the challenges to electronic evidence.

Section 10-A\textsuperscript{1331} of the Information Technology Act, 2000 (herein; IT Act’2000) says “Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form, such contract shall not be deemed to be unenforceable solely on the ground that such electronic means of form was used for that purpose”.

Section 13\textsuperscript{1332} of IT Act’ 2000, read with section 4\textsuperscript{1333} of the ICA’ 1872, provides that acceptance is binding on the offeror when acceptance is outside the control of the originator, and for offeree when the acceptance enters the information system of the offeror.\textsuperscript{1334} It has been noted that these rules apply only to non-instantaneous forms of communication considered to be e-mail.\textsuperscript{1335} For instantaneous forms of communication, such as ‘web click’ contracts the contract is concluded when the addressee is in receipt of the acceptance.\textsuperscript{1336} In the case of contract formation through the exchange of e-mails, the risk of non-delivery lies with the offeror-he will be bound by acceptance once it has been sent, whether or not it has received acceptance; whereas, the offeree will only be bound if the message enters the information system of the offeror.\textsuperscript{1337}

Receipt acknowledgment does not change the binding nature of the receipt of electronic records, but where the originator has stipulated that the electronic record is binding only after receipt has been received by her, an acknowledgment of such electronic record, the electronic record shall be considered never to have been submitted by the originator until such receipt has been obtained.\textsuperscript{1339} Thus, it can be concluded that India has followed a complex theory of reception with the complexities of receipt recognition.

III. What Is E-Commerce?

Globalization, in combination with digital India’s government policies, has a positive impact on the Indian economy. A survey shows a 53 per cent rise in the Compound Annual Growth Rate (CAGR) in online retail countries between 2013 and 2017.\textsuperscript{1341}

\textsuperscript{1331}Information Technology Act §10 (2000).
\textsuperscript{1332}Information Technology Act §13 (2000).
\textsuperscript{1333}Indian Contract Act §4 (1872).
\textsuperscript{1334}See also CM Abhilash, E-Commerce law in developing countries: an Indian perspective, Information & Communication Technology Law, 269, 274 (2002).
\textsuperscript{1335}Bhagwandas Goverdhandas Kedia v Girdharilal Parshottamdas and Co., AIR 1966 SC 543.
\textsuperscript{1336}Supranote 12.
\textsuperscript{1338}Information Technology Act §12 (2000).
\textsuperscript{1339}Supra note 15.
\textsuperscript{1340}Supra note 15.
\textsuperscript{1341}India is fastest growing e-commerce market: Report, The Times of India, Nov 29, 2018, https://timesofindia.indiatimes.com/business/indiamart
technological facilities, mobile phones, etc. resulted in the country's citizens entering into electronic contracts. Such contracts are accepted internationally; crossing the distance between the parties. The European Initiative in Electronic Commerce defines e-commerce as follows:\textsuperscript{1342}

Any form of business transaction in which the parties interact electronically rather than by physical exchanges. It covers mainly two types of activity; one is the electronic ordering of tangible goods, delivered physically using traditional channels such as postal services or commercial couriers; and the other is direct electronic commerce including the online ordering, payment and delivery of intangible goods and services such as computer software, entertainment content or information services on a global scale.

Hence, it is the purchasing and selling of products and services on the Internet and is often synonymous with any transaction involving the transfer of ownership or the right to use goods or services through a computer-mediated network.\textsuperscript{1343} According to a joint ASSOCHAM – Forrester Study Report, India's e-commerce revenue is forecast to rise from $30 billion in 2016 to $120 billion in 2020, at a 51% annual growth rate.\textsuperscript{1344} It can be inferred that e-commerce means; the use of electronic communication and digital information processing technology in business to establish, transform and redefine value-creating relationships within or within organizations and between individuals.\textsuperscript{1345}

### III.1. TYPES OF E-COMMERCE

An electronic contract generally speaking can be described as below:\textsuperscript{1346}

- Business-to-Business (B2B)
- Business-to-Consumer (B2C)
- Consumer-to-Business (C2B)
- Consumer-to-Consumer (C2C)
- A/G2A/G or B/C [this involves communication with other administrations or with businesses and consumers between administrations / governments (local, regional or national)].

#### III.1.i. BUSINESS TO BUSINESS (B2B)

A B2B process includes electronic transactions between and within companies. It is a system usually in the context of electronic data exchange or electronic transfer of money. Due to the dramatic rise in internet penetration, B2B transactions have seen a remarkable growth and have become a faster growing segment even within the e-commerce setting.

#### III.1.ii. BUSINESS TO CONSUMER (B2C)

It is the transaction where, on one hand, a trader’s agency and, on the other, an individual customer conducts business. The term B2C has been widely used to refer to a...
sale by a corporation or seller to an individual or 'user' performed over the internet. The Website itself serves a shop's intent in this case.

III.1.iii. CONSUMER TO BUSINESS (C2B)
In this, the sale and purchasing cycle is absolutely reversed. This is very important for initiatives that include crowd sourcing. Individuals make their items or services in this case, and sell them to companies.

III.1.iv. CONSUMER TO CONSUMER (C2C)
This is the transaction involving two or more clients with a business organization that merely offers a web-based interface to promote customer transaction. This website offers the web-based interface and enables users to freely interact with one another.

III.1.v. GOVERNMENTAL AND NON-BUSINESS
The requirements for e-commerce are also found in the government and non-commercial industries. Revenue agencies, law services, airports, branches of defense, universities, and other non-profit, non-governmental charitable organizations are some of the technology-based institutions, and calling for tenders for public work assignments, called e-procurement.

IV. WHAT IS E-CONTRACT?
E-contract is any agreement entered into by competent parties on the Internet, with lawful consideration, free consent, without any malicious intention and with the intention to create legal relationship. E-contract can be described as; a kind of contract formed by negotiation of two or more individuals through the use electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as a computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.1347

RI processed and developed a report. We have not made any claim with respect to the reported data.1348

The UNCITRAL Model Law on Electronic Commerce1348 instead of defining an E-Contract, it, merely states that, the contract can be concluded by exchanging data messages and the legitimacy of such a contract should not be questioned when a data message is used in the formulation of a contract.

The International Chamber of Commerce refers to electronic contracting as an automated process for entering into contracts through the computers of the parties, whether networked or through electronic messaging1350. Uberrimaefidei's doctrine should be strictly adhered to in the case of an electronic contract and no pressure can be placed on one party behaving to its advantage to the other's representation that he is qualified1351.

IV.1. TYPES OF E-CONTRACT
Broadly speaking e-contracts can be classified under two heads- contracts executed by


1347E-Contract Law and Legal Definition, Convenient, Affordable Legal Help - Because We Care!, (Apr. 01, 2020, 09:30 AM), http://definitions.uslegal.com/e/e-contract/.
1350Automated e-contracting, ICC Guide For eContracting, (Apr. 03, 2020, 01:20 PM),
- Electronic Data Interchange
- Cyber contracts.

**IV.1.i. ELECTRONIC DATA INTERCHANGE (EDI):**
Electronic Data Interchange (EDI) means the electronic transfer of information from computer to computer using an agreed information structure model. EDI is defined as a set of standards for the sharing of business information between computers and the electronic transfer of business transactions.

**IV.1.ii. CYBER CONTRACTS**
A cyber contract is a contract created entirely or in part by communication through computer networks. The Cyber contracts shall include:
- **E-MAIL CONTRACT**
  After the exchange of a number of e-mails between the parties, a contract may be concluded and terminated. There the e-mails have the same function as usual letters, if both parties had signed a contract by letters.
- **CONTRACT THROUGH WEB SITES**
  A vendor will usually view goods on his website and indicate the cost of such product. A consumer can navigate through the website previewing the goods or products on sale.

Shrink wrap, click wrap, and browse wrap are typical types of electronic commerce agreements.

- **Click wrap**

A click-wrap agreement is used mainly as part of the software package installation process. The term 'click wrap' originates from the use of 'shrink wrap contracts' in sales of boxed software. This has pre-determined terms and conditions where the party has no bargaining power like in the conventional contract, they will either agree or refuse this completely.

- **Shrink Wrap**
  - Shrink Wrap means licensing agreements or other formal terms and conditions. These terms or licensing agreements can only be read and approved by the consumer after the product has been delivered. When the user opens the packet, the user is considered to have read and will be bound by certain conditions.

  The validity of the Shrink-wrap agreements was first given relief in the famous case, *ProCD, Inc v. Zeidenburg*\(^{1353}\) where it was held that, the very fact that, after reading the terms of the license outside the wrap tag, the purchaser opens the cover along with the fact that he acknowledges all the terms of the tag appearing on the computer with a key stroke.

- **Browse Wrap**
  First time the term "browse-wrap" appeared in *Pollstar v Gigmania Ltd*\(^{1354}\) to describe a Web site agreement to which the user assents by visiting the Website.

  In most cases, the website or the browse wrap includes a statement that the user’s continued use of the website or the downloaded software manifests assents to those terms.\(^{1355}\)

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\(^{1353}\) 66 F.3d 1447, 39 U.S.P.Q.2d 1161, 1 ILRD 634 (7th Cir. 1996).

\(^{1354}\) 170 E Supp. 2d 974 (E.D. Cal. 2000).

wrap agreement, where the user must express consent to the terms and conditions by clicking on a 'I accept' button, a browse-wrap agreement does not allow this form of express consent. Rather, the user of the website purports to give his or her consent by merely using the product - such as accessing the website or downloading software.

V. PROBLEMS WITH E-CONTRACT
As discussed above the IT Act, 2000 has laid down certain provisions for the validity and the formation of online contracts but there is still no specific legislation incorporated for the validity of online contracts in India.\footnote{1356} This leads to a number of issues in transacting and concluding such contracts.

V.1. TECHNICALITY ISSUES:
   • Jurisdictional Issues
   Jurisdiction determines the applicability of law or resolving a dispute. In common parlance when it comes to traditional contracts the place of execution of contract is the appropriate jurisdiction. In matter of E-Contracts, the contracting parties are far away from each other and hence there is no such place of execution; they are executed in a virtual space. The boundlessness of Internet creates dilemma as to the determination of jurisdiction. The parties may mutually agree upon the jurisdiction but that still does not do away with the uncertainty jurisdiction by default in absence of a “place of execution”. As per Section 13(3)\footnote{1357} of the IT Act 2000:
   a) The place of business of the originator will be deemed to be place where the information was dispatched, and
   b) Place of business of the addressee will be deemed to be the place where the information was received.

   In the U.S. in order to determine the jurisdiction the “Purposeful Availment Test” introduced in the case of Hanson v. N.R. Denckla\footnote{1358} is significant to note that lays stress on the strong purpose behind the action of a party instead of a mere act of the party i.e., action should be purposely directed towards the resident of the state to ascertain the jurisdiction which has a high burden to prove. In the case of P.R. Transport Agency v. UOI\footnote{1359}, it was established that the place of business is the deciding factor for determination of jurisdiction. It therefore raises the question of the jurisdiction of the courts, as the case may arise in the e-contract at the place where the electronic information was sent, irrespective of the fact of the primary place of business.\footnote{1360} This becomes all the more difficult when parties are situated in different parts of the world as in matters of virtual space strict jurisdiction cannot be applied.

   • Signature Requirement
   Under Section 2(p)\footnote{1361} of the IT Act, an electronic signature is defined as "digital
signature" means the authentication by a subscriber of any electronic record by means of an electronic method or procedure in accordance with the provisions of section 3, of UNCITRAL Model Law on Electronic Signatures 2001, Electronic Signature mean data in an electronic form in, affixed or logically associated with, a data message, which may be used to identify the signature in relation to the data message and to indicate the signatory’s approval of the information contained in the data message. Although signature is not a pre-condition for executing contracts under ICA, there are still few types of contracts that mandate signature of the party like under Copyright Act and transfer certificates in case of immovable property. Thus it is necessary for establishing the genuineness of transaction. The IT Act’2000 gives recognition to digital signature in order to give legal validity to E-Contracts. When a party appends his signature to a document he gives his acceptance by affirming his identity and may not revoke it later on. The bottom-line is that there is still no standard provision of E-Signature notified by the government. It can be either a typed name or digitized image of a handwritten signature.

- **MINORS ENTERING INTO A CONTRACT.**

One of the requisites for a valid contract is that parties to the contract must have attained the age of majority which is 18 years according to Indian Standards. In the case of Mohori Bibee vs. DharmodasGhose, it was held that an agreement by a minor is void. E-Contracts on the other hand are contracts conducted by online medium where the parties can be easily duped or the identity of either of the parties cannot be determined with certainty. This leaves the party who contracts with such a minor party in a disadvantaged position as he has little remedy in case the minor commits a breach. The confirmation of age before the contract is just a self-made commitment and does not guarantee the veracity. In cases of Click Wrap Agreement or Browse Wrap Agreements, it becomes way more difficult as it enables a minor to get into such contracts easily. Many times websites, in order to check the age validity stipulates signing up steps to gain access to age related information. Even after all such consideration, it still poses problems for checking the authenticity in lack of a proper legislation in place.

- **STANDARD FORM OF CONTRACTS**

In a standard form of contract there is no scope of negotiation with the terms beings decided beforehand leaving the other party to either accept the condition or leave it. Many online contracts belong to the 'Click-Wrap' category, a standard contract form in which all conditions are specified on the software website or installation page and both parties are allowed to use a click on the required terms and conditions button which leaves no room to negotiate. As far as India's situation is concerned, Section

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1362 Information Technology Act § 3 (2000).
1365 (1918) ILR 40 All 325.
1366 Supra note 34.
1367 Daisy Roy, All that you must know about E-Contracts, iLeaders Intelligent Legal Solutions (Apr. 10, 2020, 9:34 AM), https://blog.ipliers.in/all-that-you-should-know-about-e-contracts/.
15(3)\textsuperscript{1368} of the Indian Contract Act states that if a party holds a dominant position and enters into a contract with another party and the agreement appears unfair on its face or on the evidence given, it must burden an individual in the dominant position to show that the contract has not been concluded under pressure.\textsuperscript{1369} In the case of E-commerce platforms the scope of negotiation is further reduced which leads to unequal bargaining position leaving users in an unfair position. The manufacturer, wholesaler, distributor, a carrier and other large entities with giant economic power are in a favorable position to determine terms and conditions and the other negotiating party is quietly unable to insist on its terms.\textsuperscript{1370} In the case of L.P. India v. Consumer Education and Research Centre\textsuperscript{1371}, the Hon’ble court tried defining such contracts and observed that where the weaker parties do not have a bargaining power, such type of contracts were referred as dotted contracts.

- **Stamp Requirements:**
  The Indian Stamp Act and various state legislation require that documents must be stamped in which rights are defined or transferred. A document that is not properly stamped shall not be accepted as evidence in a court of law, or even a competent authority, until it has been levied (a fine of 10 times the amount of the stamping duty required). However, documents cannot be stamped for an online contract until this date."\textsuperscript{1372}

- **V.2. Sectoral Issues:**

\textsuperscript{1368} Indian Contract Act § 15(3), (1872).
\textsuperscript{1369} Supra note 48.
\textsuperscript{1371} 1995 AIR 181.
\textsuperscript{1372} Supra note 48.

They identified the following issues:

- **Platform Neutrality:** This is a major concern among the sellers/service providers where the online platforms when acting as a marketplace as well as a competitor on the marketplace go for policies like “preferred sellers” and “private labeling of products”. In preferred sellers policy the platforms favor their preferred vendors and influence the market position to their advantage. In the latter policy the platforms use their own private label and hence enter into the competitive arena. This leads to turning around the market outcomes by compromising on the merit aspect.

- **Unfair Contract Terms for the sellers/providers:** The online platforms’ main focus is on increasing their profit and due to that they often tend to make the business users compromise on their quality, profit and the equity of the brand. There is no fairness and equity in setting the terms and conditions by these online platforms and goals which are akin to the business users. The result is that the business users enter into unilateral engagements or a revision of commission rates and hence take advantage of their superior bargaining position. Most of the times, even the discounts offered on various product or services is also done without consulting the business entity and for the sole reason of increasing crowding on the particular platform. This leads to trust deficit of business users on the online platform.

- **Exclusive agreements:** The major chunk of sellers/service providers in the travelling or food services enter into exclusive arrangements with a particular platform for advertising and selling their product. This leads to an unfair trade practice as customers in that case do not have a large variety of products to make a prudent choice by way of making comparison.

### V.2.1.i. Jurisprudential Aspect Of E-Contract In Relation To Competition Law

- **E-contracts & Subjective Theory of Contract**

The basic law of contract formation has retained the formalistic character of subjective theory of contract law. The offer-and-acceptance paradigm is not well suited to modern contracting practices and obscures and complicates contract doctrine. Subjective contract theory advocates freedom, will and bargaining for the parties to the contract. The nature of the contract is said to be a meeting of the wills of the parties; the agreement is the product of a free and consenting mind. Therefore, it was conceived as the law's obligation to give effect to the wills of the parties, and it was believed that as few limitations as possible should be imposed on 'freedom of contract.' Anson pointed out Maine's writings, which were written at a time when the proponents of individualist social theory had challenged the legal and social limits within which rights were enshrined that were almost entirely indefensible; the freedom of contract was the result of these attacks as a badge of victory. But when we see the encroachment of e-contract then it can easily be inferred that this 'freedom of contract' is diminishing and losing its life. The lack of the parties ' bargaining power' to contract in an e-contract is in direct contradiction with the principle adopted by

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1375 Id.


1377 Id.
this theory's proponents. In today's age, which is dominated by standard form of contract and where much of the contract is linked to e-commerce; it is an illusion to have the ability to negotiate while formulating a contract.

- Today with the advent of e-contract, the position is seen in very a very different light. Freedom of contracting is just limited so that no injury is done to the economic interests of the community at large. This has ceased to have much idealistic appeal in the more complex social and economic circumstances of a collectivist society. It is now recognized that economic equality still does not exist in the practical sense, and that individual interests must be rendered to represent those of the community when contracting parties are in an unequal bargaining position.

V.3. CONSTITUTIONAL ISSUES

- Legality of Government Tenders and E-Contracts:
While the Honorable Prime Minister of India launched the digital India initiative to lift the scientific temper, at the same time government tenders controlled by electronic means, violates Article 14 of the Constitution; as tenders regulated by an e-contract deprives that segment of society from participating in an e-contract which, for some reason, cannot attach to the electronic means by which an e-contract is concluded. In the case of Maneka Gandhi v UOI, J. Bhagwati said that, “Article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness which logically as well as philosophically is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.” At the same time, it is worth mentioning the judgment of the Apex court in the case of EP Royappa v State of Tamil Nadu where it was held that, “equality is a dynamic concept with many aspects and dimensions and it cannot be cabined, crippled and confined. From a positivistic view, equality is antithesis to arbitrariness. If state action is arbitrary then it violates Article 14 of the constitution.” It can be said that the existence of e-contract ‘cripples’ and ‘confines’ the right to equality enshrined under Article 14.

Text of Article 21 says- life ‘or’ personal liberty and the marginal note says life ‘and’ personal liberty. From 1950 to 1978, i.e., from A.K.Gopalan case to Maneka Gandhi case, judiciary was treating life ‘or’ personal liberty as separate or distinct right but after 1978, Judiciary has changed ‘or’ into ‘and’. So, now there is no contradiction because judiciary has synchronized the marginal note and the text of Article 21. From the majority opinion given in A.K.Gopalan v State of Madras which says that, “law means law enacted by state, i.e., law enacted by competent legislature. There is no need of confirmation with the principle of natural justice”, to the judgment given in Maneka Gandhi v UOI, “law does not mean law enacted by competent legislature only. But law becomes valid only when it confirms with the principle of natural justice. Law must not be mere lex, but jus”. Supreme Court has given massive interpretation to the term ‘law’ mentioned in Article 21. Earlier law was ‘valid law’ but now law should follow principle of natural justice. Therefore we can see the journey from ‘Gopalan case’ to ‘Maneka case’ as a journey from ‘positive law’ to

1378 AIR 1978 SC 597.
1379 AIR 1974 SC 555.
1380 Supra note 63.
‘natural law’. Formation of an e-contract through electronic means and depriving another section of the citizen of the right to take part in a government tender infringes the right of the individual referred to in Article 21.

In the case of National Textiles Workers Union V. P.R.Ramkrishnan, the Apex court held that it is the duty of the court to apply the principles laid down in Part IV. Since, these duties of the state are socio-economic rights of the citizens; court is changing ‘duty’ to ‘rights’. Article 14, 19 and 21 are considered as triangle having an interrelationship and declared as basic structure of the constitution. If one is violating Article 21, then possibility of violation of reasonableness or arbitrariness is there which results in the violation of Article 14 and 19 also. This triangle has empowered Supreme Court to change non-justiciable principle to justiciable principle which results in evolving ‘neo-fundamental rights’. This is not ordinary human rights, but it can be discovered from reservoir of fundamental right, i.e., Article 21. The court clarified that right to life includes a ‘dignified life’ in the case of Oligatelli v. Bombay Municipal Corporation and others and in Corlie Mullin v. Administrator and Union Territory of Delhi. If the dignity of any person is affected by state inaction and flows from non-performance of its obligation mentioned in DPSP, then as per Article 37, these obligations are unenforceable. Judiciary may enforce those duties by converting the nature of those duties into rights by means of a catalyst, i.e. Article 21, as previously done in the case of Mohini Jain V. State of Karnataka and Unni Krishnan v State of Andhra Pradesh, where the apex court has made the right to education a fundamental right pursuant to Article 21 which had it presence under Article 45 of Part IV of the constitution.

From the spiritual teachings of Buddha to the political lessons of Gandhi, everyone has advocated social justice and equality. The founding fathers of our constitution were concerned about the equality of every citizen of India and not of any specific or majority community. If that was not the case, then Part III of our Constitution must have used the word 'majority' instead of referring to the interests of every citizen of India, and it is therefore advisable that the rights referred to in Article 21 and Article 14 of the Constitution should not be denied to those sections of society which do not have access to the Internet and are not in a position to enter into an e-contract.

It can be argued that government tenders concluded by e-contract infringe Article 14, read with 21, because the majority of the population of our country still does not have access to the internet to participate in e-contracts and, furthermore, the apex court should ensure the proper participation of all eligible bidders in e-contracts. In order to do so, it is advisable that the 'duty' of the State referred to in Article 38, with the help of Article 21 as a 'catalyst', should ensure equality and thus maintain the dignity of the individual while participating in an e-contract.

VI. E-ARBITRATION AND E-CONTRACTS

With increasing number of arbitration institutes adopting the mechanism of E-Arbitration in their practice we can say that

1384AIR 1983 SC 750.
1385AIR 1986 SC 180.
1386AIR 1981 SC 746.
1387AIR 1992 SC 1858.
1388AIR 1993 SC 2178.
the concept is in vogue. The conventional form of conducting arbitration proceedings is governed by The Arbitration and Conciliation Act’1996(herein 1996 Act) whereas online mode of arbitration along with being governed by the 1996 Act is also regulated by IT Act’2000. The E-Arbitration practice incorporates within itself three dimensions that need to be highlighted. They are; (a) Arbitration Agreement (b) Proceeding and; (c) Arbitral award. Before submitting any dispute to arbitration, firstly, there must be in existence E-Contract containing an arbitration clause to be settled via electronic means or an agreement simply referring online arbitration. The validity of the agreement via electronic means has time and again been given legal recognition by the courts. Secondly, the proceeding has to be in consonance with the parties. The same is also reiterated by the Article 5(1)(d) of New York Convention that the procedure has to be in accordance with the parties.

As far as the legitimacy of online evidence is concerned, the IT Act ‘2000 laid down that for the purpose of any evidence the electronic records should not be considered illegal. The definition of evidence in Section 3(2) has also been amended to accommodate electronic evidence. Thirdly, for the enforcement of arbitral awards Section 31 of the 1996 Act also permits issuing of award via e-mail. For affixing signature not only digital signature but signature by way of any electronic attachment is given permission provided they are of the user and duly recognized by him so that there is no scope of fraudulent practices.

The recognition to the concept of E-Arbitration was given by the Apex Court in the case of Trimax International FZE Ltd. v. V. Vedanta Aluminium Ltd. wherein arbitration was entered into via exchange of e-mails without formally writing an agreement to that effect. In this case the offer as well as the acceptance were also entered into via e-mail and contained an arbitration clause for settlement of dispute which was duly upheld by the Apex Court. In the IT Act of 2000, Section 4 read with Section 7(3) of the 1996 Act also gives legal validity to the Cyber Arbitration Agreement.

The concept of E-Arbitration has already been recognized by World Intellectual Property Organization by the establishment of WIPO Arbitration and Mediation Centre. With this the need of in-person meetings has been done away with and deliberations and discussions by way of electronic means are encouraged. Under the scrutiny of clear-cut regulations, E-Arbitration can be conducted in a smooth manner by laying down specific laws for governing, the jurisdiction, the procedure to be followed within the scope and applicability of the 1996 Act. Be it Ad-Hoc Arbitration or Institutional Arbitration, the parties concerned should have consensus-ad-idem with respect to the technology used. It is important to understand that since there is no real time communication between the parties hence in case of a virtual space, extra caution has to be maintained in order

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1390 Information Technology Act § 3(2), (2000).
1392 2010 (1) SCALE 574.
to ensure the confidentiality in the best interest of the parties.

E-Arbitration like E-contracts is not devoid of legal issues and there lie uncertainties and blank spaces from legal point of view. In a cross-border dispute there are jurisdictional issues. Few other problems that crop up in such a situation would be the law that should govern the arbitration agreement; whether the award given would have a nature of a domestic or a foreign award etc. Although parties while entering into an agreement mutually decide on these aspects or put it as a clause in their agreement but we cannot overlook the lacunae in law that does not provide for a clear cut provision for arrangements made via electronic means. E-Arbitration is still a gray area in the Indian Legal System as there are yet many unsolved pieces to the arrangement.

VII. CONCLUSION

- When we step into the third decade of the 21st century, e-commerce will multiply its scale and will become a multibillion economy; being regulated and managed by e-contracts. Moreover, India is on the verge of a major transformation, and there is a need to capitalize on its demographic dividend, which can push it to become the next China-USA story, or even better. This can be done better by improving technological connectivity across the length and breadth of the nation and making the newer generation acquainted with the Internet; which will eventually increase the need for an e-contract that saves a lot of time and is also more economical and eco-friendly as compared to the traditional contract.
- Although the e-contracts are adequately covered by the Indian legal system, the challenge before lawmakers is to keep abreast of the problems that will emerge with emerging technology and resolve them appropriately. It is the call of the hour that some major reforms are incorporated in the various laws affecting E-Contracts. A Uniform Commercial Code like the one prevalent in U.S. can also eradicate the various loopholes in online contracts.
- The creation of an e-contract is due to the drastic shift in the evolving global technological environment; at the same time it can also be argued that the e-contracting laws are still vague in nature and need to be refined to encapsulate all the changes taking place in the complex world of e-commerce and e-contract for greater versatility leading to change of perspective with some simple outlook. So; the next time you press uninterestingly on "I accept" button without seeing the terms and conditions or hastily tearing the software cover without reading the terms typed on it; "Think Twice"!

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RELEVANCE OF SURETIES IN CRIMINAL JURISPRUDENCE WHENEVER PERSON IN INDIA HAS AN IDENTITY

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ABSTRACT

The fundamental principal of our criminal jurisprudence is that a person accused of an offence is presumed to be innocent till proven guilty after following due process of law. Grant of bail is the rule and jail is the exception. Article 21 of Constitution of India guarantees the fundamental right of speedy justice to a person accused of an offence. However, even after 72 years after independence, the trial against the accused takes years to conclude.

In this backdrop, when the accused is arrested on an accusation of having committed an offence, he has a right to apply for bail. But the right to secure bail is often defeated on the basis of considerations – (1) that the accused has to furnish a bail bond and a surety bond of a sum determined by the court. It is a fact that more than one third of our population lives in penury and they have no means of arranging a surety bond of a sum, which is to be supported by surety’s property of equivalent value. (2) Insistence of large sums of money in personal bonds and surety bonds (3) Non acceptance of sureties from an area out of the local jurisdiction of the court or from another State in India.

As a result thereof, the accused end up languishing in jails for a number of years. And it is a fact that 65% of the prisoners happen to be undertrials.

Many Committees, consisting of legal luminaries, as well as Law Commission, have recommended appropriate reforms in the system. The Apex Court has also delved into such questions from time to time.

In this background, the Aadhaar, issued by UIDAI, may replace the need for surety, as it conclusively establishes the identity of accused.

Introduction:
This paper analyses the considerations for grant of bail in criminal proceedings in form of personal bond or surety bond. “Bail is the rule and jail is the exception” is often defeated by inability of accused persons coming from poor families to furnish the surety bonds of pecuniary value beyond their means. Similarly, insistence of courts to have a surety within their local jurisdiction, also defeats the bail rights of citizens who are residents of other states or are foreign nationals. Lot of money exchanges hands for arranging a local surety before the court. This paper further analyses the relevance of surety in present times, when Aadhaar establishes the identity of a person (accused) and he could be easily located in order to undergo the punishment awarded, in case he flees from the process of law.

What is bail bond?
Bail bond is a written document signed by an accused person and his friends for families or any other person (known as surety), to ensure that the accused will appear before the court at the schedule time and date, as ordered by the court. The bail amount is determined by the court which is in proportion to the alleged offence which is to be paid if the accused fails to appear before the court on the trial date.
The bail bond acts as the security for the appearance of the accused on which he is released pending trial or investigation.

The term “bail” has not been defined in the code of criminal procedure but it has been used in the Code several times and remains one of the vital concepts of criminal justice system which is administered in consonance with the fundamental principles enshrined in the Indian Constitution and the scope of human rights.

**Different types of Bails**

- **Anticipatory bail** - Under Indian criminal law, anticipatory bail is defined under section 438 of the Criminal Procedure Code. This provision allows a person to seek bail in anticipation of an arrest on suspicion of having committed a non-bailable offence.

- **Cash bail** - In this type of bail, the accused has to pay the entire stipulated amount. The amount required for issuing the bail depends upon the seriousness and circumstances of the case. After the bail has been granted, the accused is expected to appear in all the court proceedings.

- **Surety bond** - Before any person is released on bail on his own bond, a bond for such sum of money as the police officer or court, as the case may be, thinks sufficient shall be executed one or more sureties to the effect that such person shall attend the trial or investigation at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or court, as the case may be.

- **Property bond** - If the accused is not able to pay the bail amount in cash then one can obtain the bail charging his property in lieu of cash. Accused has to show an equal value of property as the bail amount. But if the accused fails to appear before the court on the stipulated date, the property kept as guarantee will be foreclosed by the court.

- **Release on own personal recognition** - A judge may allow an accused to be released on personal recognition. The crime committed by an accused may not be of serious nature or a minor crime of non-violent nature and the accused may be released from the jail on the promise of the accused. In such cases there is no need to pay any amount for getting the bail.

- **Release on citation** - The officer may not arrest and book the offender but simply sends a citation that the offender should appear before the court. If the offender does not appear before the court on stipulated time, he may be arrested.

**How the system is exploited to disadvantage the poor, non-residents of local area and foreign nationals**

The present system of bail is heavily influenced by economic status and discriminates against the impoverished and the illiterate. Our judicial system seems to have evolved two approaches to bail - bail as a right for the financially able, and for the rest, bail is dependent on judicial discretion, exercised through manipulation of the amount that would be required to furnish bail bond.

The primary objective of the provisions providing for the bail should not be to detain and arrest an accused person but to ensure his appearance at the time of trial. The concerned system should also make sure that, if the accused is held guilty, he is available to suffer the consequence of the offence committed, in terms of punishment imposed in accordance with the law.

Since the accused is presumed innocent till he is proved to be guilty, it would be unjust and unfair to deprive him of his liberty during the pendency of the criminal proceeding. The release on bail upon
appropriate considerations and imposition of reasonable conditions is significant not only to the accused, and his family members who might be dependent upon him but also the society large. Hence the Court is duty bound to contemplate the facts and circumstances prevailing in the matter and strike a balance between considerations and imposition of the reasonable conditions and then pass the appropriate order.

The other important consideration for grant of bail remains the furnishing of a bond by the surety, which again depends upon owning property having an equivalent value to the surety bond. This is specifically relevant in a country like India where one third of the population remains in poverty. A person, mainly the accused and his friends or family members have to specifically sign a written document to ensure that the accused would appear before the court at the scheduled time, date, as ordered by the court. The document termed as a bail bond acts as a security for the appearance of the accused on which he will be released pending trial and investigation. Usually a person with sufficient financial sources and contacts would be granted bail easily but on the other hand a person with insufficient financial resources would find it difficult to arrange for sureties and also to pay the reasonable bail amount to the court. Hence, it would become difficult for him/her to come out on bail.

In case of foreign nationals, the same provisions are applied to them which makes it extremely difficult for them to be released on bail. An accused whose origin is not from India and is accused of committing a crime in India has to produce local sureties in order to get bail. In this way foreign nationals are also exploited by local people who may demand money in exchange for being a surety for the said accused.

The law presumes that the people with sufficient financial sources and sureties would be able to afford bail but poor people in that case would be deprived of pre-trial bail which would have negative consequences for them. Thus, it is the need of the hour to amend certain provisions regarding bail and sureties to ease the process of furnishing bail bonds and granting bail.

Some instances of International Practices
How the Bail Bond Industry strives in the US (USA)

The U.S. is one of the only two countries in the world with a legal bail bonds industry which allows bail bond companies to pay a defendant's bond in exchange for a fee (typically 15% of the bail price) when the defendant can't afford to pay the bail price and doesn't want to wait in jail until their trial. The bail system often favours those who are rich and hurts citizens who can't manage to organise the hundreds to tens of thousands of dollars required for bail.

In addition to the US, Philippines is another country in which the commercial bail bond industry is legal. The bail bond companies deal in about $14 billion in bonds each year. Bail is intended to ensure that the accused show up for their trial. To determine whether an accused person qualifies for bail, the judge will look at their physical and mental health, financial resources, family ties, drug and alcohol abuse, criminal history and their history of appearing in the court. If a bail is less than $2,000, bail bond companies are not always able to make a profit and they do not
take up such cases, leaving many people no other option but to wait in jail.

Bail bond companies make the profits from the criminal justice system by keeping poor people in debt even after they’ve been cleared of charges. The $14 billion-a-year bail bond industry, underwritten by nine large insurance companies including some owned by multinational corporations, perpetuates a system in which people who can’t afford bail remain in jail before trial. This leaves them with a choice between borrowing money or staying locked up. Those who remain incarcerated are less likely to win their court cases. Also those who borrow from bondsmen to buy their freedom often spend months or years paying it back. This cycle of poverty and jail makes the for-profit bail system indefensible.

Under the California’s law, those arrested and charged with a crime will not put up any money or borrow it from a bail bond agent to obtain their release. Instead, the local courts will decide who to keep in custody and whom to release while they await trial. Those decisions will be based on some principles devised by the courts in each jurisdiction.

Meanwhile, among other states of the USA, Washington D.C., already has an existing and functional cashless bail system. Other states, including New Jersey, have passed laws that reduce their reliance on money bail and other states are also considering to make similar changes in the interest of the general public.

Justice V.R. Krishna Iyer made an observation about the system of bail prevailing in the United States in a celebrated case Moti Ram vs State of MP\textsuperscript{1395}:

“It sounds like a culture of bonded labour, and yet are we to cling to it? Of course, in the United States, since then, the bondsman emerged as a commercial adjunct to the processes of criminal justice, which, in turn, bred abuses and led to reform movements like the Manhattan Bail Project. This research project spurred the National Bail Conference, held in 1964, which in its crucial chain reaction provided the major impetus to a reform of bail law across the United States. The seminal statutory outcome of this trend was the enactment of the Bail Reform Act of 1966 signed into law by President Lyndon B. Johnson. It is noteworthy that Chief Justice Earl Warren, Attorney-General Robert Kennedy and other legal luminaries shared the view that bail reform was necessary. Indeed, this legislative scenario has a lesson for India where a much later Criminal Procedure Code, 1973 has largely left untouched ancient provisions on this subject, incongruous with the Preamble to the Constitution.”

Justice Iyer further observed\textsuperscript{1396}:

“It is interesting that American criminological thinking and research had legislative response and the Bail Reforms Act, 1966 came into being. The then President, Lyndon B. Johnson made certain observations at the signing ceremony:

\begin{itemize}
  \item Moti Ram v. State of M.P. \textsuperscript{1395} (1978) 4 SCC 47 para 10
  \item Moti Ram v. State of M.P. \textsuperscript{1396} (1978) 4 SCC 47 para 15
\end{itemize}
“Today, we join to recognize a major development in our system of criminal justice: the reform of the bail system.

This system has endured — archaic, unjust and virtually unexamined — since the Judiciary Act of 1789.

The principal purpose of bail is to ensure that an accused person will return for trial if he is released after arrest.

How is that purpose met under the present system? The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.

He does not stay in jail because he is guilty.
He does not stay in jail because any sentence has been passed.
He does not stay in jail because he is any more likely to flee before trial.
He stays in jail for one reason only — because he is poor….

California Becomes First State To End Cash Bail After 40-Year Fight (USA)

California will become the first state in the USA to abolish cash bail for the accused awaiting trial which is the result of a reform bill signed by Governor of California state, Jerry Brown.

Efforts were being made by several concerned groups to change the existing cash bail system in USA and it became a reality when a California appellate court declared the state's cash bail system unconstitutional. The California state has reformed the cash bail system striving in the US so that the rich and poor are treated fairly thus not depriving them of their rights of liberty and freedom. This new law would come into effect in October 2019.

Supreme Court of India on Bail

“Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community.”
- Justice V.R. Krishna Iyer

• State of Rajasthan v Balchand

In this case, Justice Krishna Iyer explains that the basic rule is bail and not jail. In his inimitable words, he observes:

“The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court.”

• Moti Ram and Ors. v State of M.P

This remains one of the most important of cases decided by the Supreme Court emphasizing the concept of bail bonds. The accused, a poor mason, was convicted. The apex court passed an order referring the accused to the Chief Judicial Magistrate(CJM) to release him on bail, without making any specifications as to sureties, bonds etc. The CJM assumed full authority on the matter and fixed Rs. 10,000 as surety and personal bond and further refused to allow his brother to become a...

1397 Gudikanti Narsimhulu vs Public Prosecutor, High Court of AP (1978) 1 SCC 240 para 1
1398 State of Rajasthan vs Balchand (1977) 4 SCC 308 para 2

surety as his property was in the adjoining village. Moti Ram appealed once more to the apex court and Justice Krishna Iyer condemned the act of the CJM, and came to the conclusion that judges should be more inclined towards bail and not jail. Three questions were framed by Justice Iyer:

“When this Court’s order for release was thus frustrated by magisterial intransigence the prisoner moved this Court again to modify the original order “to the extent that petitioner be released on furnishing surety to the tune of Rs 2000 or on executing a personal bond or pass any other order or direction as this Hon’ble Court may deem fit and proper”. From this factual matrix three legal issues arise (1) Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond without sureties, a person undergoing incarceration for a non-bailable offence either as undertrial or as convict who has appealed or sought special leave? (2) If the Court decides to grant bail with sureties, what criteria should guide it in quantifying the amount of bail, and (3) Is it within the power of the Court to reject a surety because he or his estate is situate in a different district or State?”

With respect to insistence upon surety or demanding heavy amounts for grant of bail or accepting surety across the local area, he observes:

“This formulation turns the focus on an aspect of liberty bearing on bail jurisprudence. The victims, when suretyship is insisted on or heavy sums are demanded by way of bail or local bailors alone are persona grata, may well be the weaker segments of society like the proletariat, the linguistic and other minorities and distant denizens from the far corners of our country with its vast diversity. In fact the grant of bail can be stultified or made impossibly inconvenient and expensive if the Court is powerless to dispense with surety or to receive an Indian bailor across the district borders as good or the sum is so excessive that to procure a wealthy surety may be both exasperating and expensive. The problem is plainly one of human rights, especially freedom vis-a-vis the lowly.”

After examining various provisions of Code of Criminal Procedure relating to bail, the Court observed:

“Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigents’ rights, we hold that bail covers both — release on one’s own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.”

“Even so, poor men — Indians are, in monetary terms, indigents — young persons, infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances — put whatever reasonable conditions you may.”

Justice P.N.Bhagwati also spoke about how unfair and discriminatory the bail system is when looked at from the economic criteria of a person. According to him this discrimination arose even when the amount of bail fixed by the magistrates isn't high for some, but a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even if it’s a small amount.

1400 Former Chief Justice of India
A Committee was appointed by State of Gujarat which was headed by the then Chief Justice of State, Mr Justice P.N. Bhagwati, to delve into various aspects of law of bail and suggest its recommendations. The Committee observed:

“The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhattan Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. Moreover, the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount.”

The Committee took into consideration various factors causing prejudice to the accused on account of the prevailing system of grant of bail:

“The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In one case the poor accused is fleeced of his moneys by touts and professional sureties and sometimes has even to incur debts to make payment to them for securing his release; in the other he is deprived of his liberty without trial and conviction and this leads to grave consequences, namely: (1) though presumed innocent he is subjected to the psychological and physical deprivations of jail life; (2) he loses his job, if he has one, and is deprived of an opportunity to work to support himself and his family with the result that burden of his detention falls heavily on the innocent members of the family, (3) he is prevented from contributing to the preparation of his defence; and (4) the public exchequer has to bear the cost of maintaining him in the jail.”

Expert Committee on Legal Aid
Another Committee of Judges, lawyers, members of Parliament and other legal experts\(^{1401}\), also arrived at similar conclusion that the accused should be

\(^{1401}\)Report of the Expert Committee on Legal Aid—Processual Justice to the People, May 1973
released on his own personal bond. It was so noted:

“We think that a liberal policy of conditional release without monetary sureties or financial security and release on one’s own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under law. Conditional release may take the form of entrusting the accused to the care of his relatives or releasing him on supervision. The court or the authority granting bail may have to use the discretion judiciously. When the accused is too poor to find sureties, there will be no point in insisting on his furnishing bail with sureties, as it will only compel him to be in custody with the consequent handicaps in making his defence.”

**Law Commission Report**

The Commission observed that one of the very first duties of those administering criminal justice must be that bail practices were fair and evidence based. Decisions about custody or release should not be influenced to the detriment of the person accused of an offence by factors such as gender, race, ethnicity, financial conditions or social status.

The Law commission urged the government to amend the Criminal Procedure Code to make it easier for the poor and illiterate accused to secure bail. According to it the present system of bail was heavily influenced by economic status and discriminated against the oppressed, poor and illiterate.

The Commission noted that that 67% of the current population in jails was made up of undertrials which reflected great inconsistency in the grant of bail. Even when the bail is granted most of the accused were unable to meet the onerous financial conditions to avail it.

Often the criteria for setting bail amounts fail to take into account, the accused person's ability to pay, hence the loss of liberty is imminent in the pre-trial detention. As per the current scenario on bail is a paradox in the criminal justice system, as it was created to facilitate the release of accused person but is now operating to deny them the release. The Supreme Court has several times reaffirmed the maxim that "bail should be the rule and jail the exception.

The commission also cited the apex court’s observation in Gudikanti Narasimhulu vs Public Prosecutor, High court of Andhra Pradesh1402, ”Personal...
liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community.”

The Commission also sought to improve upon a provision introduced in 2005 to grant relief to thousands of prisoners languishing without trial and to decongest India’s overcrowded prisons. Section 436A of the Code of Criminal Procedure stipulates that a prisoner shall be released on bail on personal bond if he or she has undergone detention of half the maximum period of imprisonment specified for that offence. The Law Commission recommended that those detained for an offence that would attract up to seven years’ imprisonment be released on completing one-third of that period, and those charged with offences attracting a longer jail term, after they complete half of that period. For those who had spent the whole period as undertrials, the period undergone be considered for remission. In general terms, the Commission cautioned the police against needless arrests and magistrates against mechanical remand orders.

It gave an illustrative list of conditions that could be imposed in lieu of sureties or financial bonds. It advocated the need to impose the “least restrictive conditions”. However, as the report warned that bail law reform was not the solution for all problems of the criminal justice system. Be it overcrowded prisons or unjust incarceration of the poor, the solution lied in expediting the trial process. For instance, in our Justice system, delay remained the primary source of injustice.

Right to life and Inability of poor to furnish surety
The constitution of India contains Fundamental Rights under Chapter III. These rights are guaranteed by the Indian Constitution, one of which is Article 21 i.e. right to life and personal liberty. This article states that no person shall be deprived of his life or personal liberty except according to procedure established by law. It is the only article in the Indian Constitution that has received the widest possible interpretation. The Indian judicial system believes in the principle that a person is considered to be innocent until tried and duly proven guilty. When undertrial prisoners are detained in custody for an indefinite period, Article 21 of the Constitution is violated and every person in India, detained and arrested is entitled to a fair and speedy trial. The object of bail is neither punitive nor preventive. Deprivation of liberty must be considered as a punishment, unless it can be required to ensure that an accused person will be available when called upon for trial.

It would be quite contrary to the concept of personal liberty that any person should be arrested and put behind bars in respect to any matter upon which he has not been convicted yet. The denial of bail to the accused as a preventive measure to ensure free trial in the case has to be balanced by the principle that such denial of bail also has a punitive aspect which under law only begins after conviction.

The other questionable aspect of the bail system remains the bail bond system or the need of surety specifically when one third of the population remains in poverty. An accused with insufficient financial resources would find it difficult to arrange for sureties and also to pay the reasonable bail amount to the court. Hence, it would become difficult for him/her to come out on
bail. Therefore, this whole process leads to denial of bail to the poor. Thus it is a clear deprivation of liberty and freedom and a clear violation of Article 21

Right to freely move across India and non-acceptance of surety who is not the resident of that very state
Article 19(1)(d) and (e) of the Indian Constitution guarantees to every citizen of India, the right to move freely across the territory of India and to reside and settle in any Part of the of the Territory of India. Article 19 (1) (d) of the Constitution provides the citizens a right to go wherever they like in Indian Territory without any kind of restriction whatsoever. They can move from one State to other and also from one place to another place within any State of India. This freedom cannot be curtailed by any law except within the limits of Article 19 (5). In this way Constitution stresses that the entire country is one unit so far the citizens are concerned. The object is to create the sense of nationality in the minds of the citizens.

According to clause (5) of Article 19 of Indian Constitution State may impose reasonable restrictions on the Freedom of movement on two grounds:
1) In the Interest of General Public
2) For the Protection of Scheduled Tribes

With respect to the bail system this Article also becomes relevant in view of the practices of Courts to the effect that a person who is not a resident of a particular state or the local area, is not accepted as a surety in case in which the accused is arrested. According to the Code of Criminal Procedure, court demands a local surety to ensure the proper and timely appearance of the accused at the pending trial. This makes it very difficult for an individual, not resident of local area or the State, accused of a certain crime, to get out on bail. The non acceptance of surety, who is not the resident of that very particular state, gets questionable, as the arrested person would have minimal chances of arranging a local surety who would ensure his timely presence in the concerned court. Thus, it makes it nearly impossible for an arrested individual to get out on bail and therefore, breaches the fundamental right of right to life (Article 21) and Freedom of movement (Article 19(1)(d).

Suggestions
Aadhaar may replace surety bond for bail
Aadhaar may replace surety bond as a means of getting bail because his identity has been established and with the personal data secured with the UIDAI, it will not be difficult to track down the accused in case of his fleeing from justice. It seems much important and a much crucial reform to liberalise bail laws in India. After the introduction of Aadhar, solely generated by UIDAI.(Unique Identification Authority Of India) which is a unique identification proof of an individual, the need of surety for granting bail becomes debatable.

The Law Commission of India in it’s 268th report recommended replacement of surety bonds with voter ID cards in case of minor offences. If the recommendation is adopted by the government and necessary legislation is brought in, many undertrial prisoners will be able to walk out of jails. In the meantime till this happens the legislation may take care of that the bail bond amount and surety bond amount should be determined strictly in accordance with the financial condition of the accused. It is also very important that the courts should not insist on a local surety for out-of-town accused persons.

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UNEXPLORED SPHERES OF INTELLECTUAL PROPERTY RIGHTS IN INDIA

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ABSTRACT

Intellectual Property Law is gaining momentum on account of the critical role it plays in fostering innovation. Its inevitable role has led to intellectual property rights being recognised as essential and of utmost significance. This branch of law is composed of a cluster of doctrines that are required to make the acts enacted to protect intellectual property rights effective. However, some of these principles are infamous and insufficiently explored. This article chiefly examines two theories in depth and brings to light their pros & cons. Initially, it evaluates the concept of Post-expiration injunctions which enjoin the patent holder to recover damages after the patent’s expiration which could have been earned during the patent validity. There is no uniform principle regarding validity of such injunctions. This article critically examines the reasons justifying that granting the injunction will prove to be against the purpose of enacting the Patents Act, 1970. On the other hand, it also shows that such injunctions are valid if done for rectifying the activities of the infringer.

The article also elucidates the applicability of the doctrine of natural zone of expansion in trademark law. This common law principle is used to extend trademark prior rights into a new geographical area. In this paper, we propose to bring to light a detailed analysis about the altitude of the courts in enforcing this doctrine. It also point out the negative aspects involved in promoting this doctrine. The article aims on providing an intricate study on these two aspects in order to promote greater awareness about intellectual property law and the rights guaranteed by it.

Keywords: doctrines, post-expiration, injunction, expansion, geographical area.

INTRODUCTION

The law related to Intellectual property is increasingly assuming an imperative role with the rapid pace of technological and scientific innovation that can be witnessed in a wide range of activities. It is a broad sphere that includes and refers to a cluster of legal doctrines that act as vital tools in regulating the Intellectual Property law. However, some of these concepts and doctrines are seldom examined. This paper chiefly aims to study and analyse two of the most infamous theories relating to intellectual property rights, i.e.; Post expiration injunction in patent law and the applicability of the natural zone of expansion doctrine in trademark law. These concepts can prove to be of inexplicable use if explored and interpreted with accuracy.

Post Expiration Injunction In Patent Law

Reliefs available under the Patent Law in India are the unexplored matters of concern in today’s Intellectual Property Law fraternity. Section 1081403 of the Patents Act, 1970, empowers the Court to grant an injunction and either damage or account for profits only. Injunctions that are awarded when the patentee’s right over the patent is

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about to cease, are referred to as “Post Expiry Injunction”. Such Injunctions are debated and there has been no settle provision of law for clarifying the validity of the same. In the instant article, we propose to highlight both the reasons for the validity and invalidity of Post Expiry Injunctions.

Herein under are the reasons justifying that the grant of Post Expiration Injunction is to defeat the purpose of Patents Act, 1970: 

Firstly, patent law guarantees monopoly of patentee’s rights to cease and grant public domain unrestrictedly after expiry of patent [A]. Secondly, post-expiry injunction is infructuous in all circumstances [B]. Thirdly, improper extension of patent’s life is not valid under the realm of patent law[C]. On the other hand, post-expiry patent injunctions are valid if done for rectification of infringement [D].

A. Public Domain In Patent Law

Allowing the patent period to run longer than provided is counter to the policies and purposes of patent law1404 and such expiration may preclude an injunction1405. Upon the expiration of a patent, the patent holder is entitled to recover profits1406 but is not entitled to an injunction1407 as it would defeat the principle of public domain right under patent law.

The object has been well enumerated in a milestone judgment rendered in Biswanath Prasad Radhey Shyam v. Hindustan Metal Industries1408 as follows: “grant of the monopoly is the disclosure of the invention, which, after the expiry of the fixed period of the monopoly, passes into the public domain.” This hereby establishes that the grant of monopoly given to the patentee is on account that the monopoly will later pass on to the public domain and granting of such an injunction as after the expiry period will amount to a gross violation of this principle.

Subsidiary patents1409 like ones closer to expiration are less likely to be valuable as they give rise to situations which might concern the overall functioning of patent law & its principles1410. The Supreme Court in Mayo1411 focused on this concern and laid down the following: “When the patent expires, the public is entitled to practice the invention, this is true of all inventions; any pre-emption thus is limited.” This therefore elucidates the need for post-expiry injunctions to be against public interest.

B. Post Expiration Injunction Is Infructuous

The Delhi High Court1412 has through plethora of decisions1413 established that no injunctions can be granted after the expiration of the suit patent owing to the concerns of public domain1414 discussed herein under:

The possibility of post-expiration injunctions was discussed in Roche...
Products, Inc. v. Bolar Pharmaceutical Co., wherein Roche requested a permanent injunction, but its patent expired before oral argument. The Circuit concluded that “This case is not moot, however, because although the initially requested permanent injunction no longer is necessary, other remedies can be fashioned.” (Roche Rule)


C. Improper Extension Of Patent’s Life

Improper extension of patent’s life is against the principles contained in the Patents Act, 1970. Further, the importance of the restrictive duration has been highlighted in Ortho Pharmaceutical Corp. v. Smith, the Court limited the duration of its previously issued permanent injunction to the life of Smith’s patent which lays down the importance of impact of expiration of a patent on its reliefs. It is duly important to note that there is nothing in the statute or common law which gives the Plaintiff the right to an injunction against the happenings of the past.

Furthermore, when a patent becomes unenforceable mostly due to expiry, injunctive relief is no longer available because there are no rights to enforce. Right to injunctive relief after expiration is not expressly provided however it does take two forms in extremely rare situations. The first instance is in relation to destruction of the items made during the infringing period which is also enumerated as a power of the Court under s.108(2) of the Patents Act, 1970. Furthermore, the second instance is when courts decide on Spring Board Injunction.

Courts have established that damages improperly extend the lifetime of the patent holder’s monopoly. The landmark decisions of both, Brulotte and Scott Paper, reject the possible extension of any patent beyond its term. The court denied their requests based on expiration of patent thereby establishing that post-expiration injunction is not an affordable relief. However in extremely rare instances,
such injunctions are granted which shall be discussed herein after:

D. Post-Expiration Patent Injunction is to be granted

Justice Hughes remarks that "normally after infringement, possibility of a permanent injunction to being issued is at its highest stake." Courts that granted injunctions after the patent expired enjoined any sale or use of infringing articles that were made during the patent period and endorsed enjoining, after expiration, infringement arising from the possession of items that were made during the patent period and they adopted two main reasons to support the proposition that post-expiration injunctions did not extend the patents lifetime. Firstly, the infringer had no right to the items it had produced during the patent period, and the infringing products needed to be taken away, regardless of the status of the patent. Secondly, enjoining the sale or use of the items made in violation of the patent holders’ rights makes the patentee’s rights that were available pre-expiration a living reality. Post-Expiration Injunction was framed to rectify inappropriate actions that occurred during the patent period, not after it.

The Winston Research rule allows an injunction which extends to the amount of time an independent person, with no prior knowledge of the invention’s secret, would take to recreate the article after the trade secret was publicly disclosed. Winston Research injunction balances the public’s and the original trade secret owner’s interests. The court has in a plethora of decisions endorsed the use of an injunction instead of monetary damages to remedy an illegitimate head start and believed injunction to be an adequate remedy at law. (Winston Research Rule)

Spring-boarding is yet another form of injunction which refers to a competitor establishing a generic brand in the market in advance of the expiry of the innovators’ patent. This is similar in operation to Winston Research rule. In the view of the authors, Post-Expiry Injunctions should be allowed to operate in cases of willful infringement and not in cases of innocent infringement.

III. NATURAL ZONE OF EXPANSION IN TRADEMARK LAW

Under modern business condition a trademark performs several valuable interrelated business functions. Apart from identifying the goods and services, it signifies that all goods sold under it are of equal, although not of necessarily high, quality. Further, it advertises the

1431 Hughes and Clarizio, Hughes and Woodley on Patents, at ¶, 53.
1435 American Diamond Rock Boring Co. v. Sheldon, 1 F. at 872-73.
1436 American Diamond Rock Boring Co. v. Rutland, 2 F. at 357.
1437 Ibid.
goods/services and creates an image for the goods. These basic functions benefit both, the businesses and consumers. A business firm benefits from the competitive advantage and from the increased profits that investments in a trademark creates. Similarly, consumers benefit because trademarks reduce the cost of gathering information about products and also encourages businesses to produce quality goods. The recognition of the growing benefits of trademark increases the importance of the law of trademarks for a firm and its consumers. The law serves to ensure that Businesses are protected from infringement because of the fundamental unfairness of permitting an infringing user to profit from a legitimate user's efforts and consumers will obtain the product that they actually intend to purchase. The courts have difficulty, however, when confronted with the problem of determining the scope of the zones of protection of the trademarks.

Historically, three theories have been used to delineate the territorial scope of protection. These theories or "zones of protection" are the zones of actual market penetration, reputation, and natural expansion. The "zone of actual market penetration" is the geographical area in which the legitimate user has made sufficient sales of its goods to create a likelihood of confusion between its product and the infringer's product. Outside of this area of actual market penetration, it is also possible that a trademark is so well known that a likelihood of confusion is created by the continued use of the mark by more than one party. The geographical area into which the trademark's renown is carried by advertising or word of mouth is the "zone of reputation." Finally, there exists a "zone of natural expansion," a geographical area to which the courts extend trademark protection in order to allow a growing business room to further expand. This zone is a geographical area, located outside both the zones of actual market penetration and reputation, into which a trademark owner has the potential to expand. Herein under is a detailed analysis of the zone of natural expansion doctrine.

A. Zone Of Natural Expansion

Zone of natural expansion is a doctrine that can be used to extend a trademark's prior rights into a new geographical area, or into a new product line. It applies when a company is already using their trademark in one area, and the newly expanded area is a natural extension of the prior use. The area of natural or probable expansion is a legal fiction created by judicial decisions to preserve space for future growth if expansion was reasonably foreseeable. It is a "geographical area not yet penetrated by the first user at the time a local user adopted its trade symbol but which apparently will be entered by him in the foreseeable future."

The zone of natural expansion was first alluded to in Hanover Star Milling Co. v. Metcalf, when the Court distinguished the facts of that case from "a case where the junior or second appropriation of a trademark is occupying territory that would probably be reached by the prior user in the natural expansion of his trade." Nowadays, the doctrine is typically applied in inter

1444 S.2, Trade Marks Act, 1999.
1445 J. MCCARTHY, supra note 2, § 26.8, at 301; Alexander & Coil, supra note 47, at 105-06.
1446 Lunsford, supra note 51, at 414.
1447 Spartan Food Sys. v. HFS Corp., 813 F.2d 1279, 1283.
1448 240 U.S. 403 (1916).
parties’ proceedings where an opposer claims that its priority of use of a mark with respect to its goods/services should be extended to include applicant’s goods/services because they are in the natural scope of expansion of opposer’s goods/services. However, The expansion-of-trade doctrine has limited application in ex parte proceedings, and the Trademark Trial and Appeal Board has indicated that "it is not necessary, in the context of an ex parte proceeding, for the Office to show that the owner of the particular registration that has been cited against the application has expanded or will expand its goods or services.” In any case, a common law trademark owner is entitled to enjoin a junior user from using an infringing trademark within its natural zone of expansion. One way to lay claim to an unoccupied territory is through the doctrine of natural zone of expansion. This doctrine affords the senior user breathing space within which to expand, it is generally recognized that if a senior user has constantly expanded its business by the date of the junior user’s adoption of the mark, and if distances are not great, it may be that the senior user is entitled to exclusive rights in a zone of natural expansion which includes the junior user’s area, even though no actual sales have yet been made in that area by the senior user. Therefore, if the unoccupied territory is within the senior user’s natural zone of expansion, then it can prevent a junior user from using an infringing mark in that territory.

B. Critics View

Some courts, however, have criticized the zone of natural expansion. In addition to criticisms based upon the impreciseness of the doctrine, courts have attacked the zone of natural expansion as unnecessary in light of the availability of federal registration. Furthermore, courts have questioned the fairness of penalizing a good faith junior user in a remote area simply because it happens to stand in the unforeseen expansion path of the senior user. In Katz Drug Co. v. Katz, the district court argued that many of the cases decided under the zone of natural expansion theory had either some element of bad faith on the part of the junior user or some showing that the senior user's reputation had extended into the junior user's area. This suggests that a separate zone of expansion theory may be unnecessary because these cases could have been decided under the traditional doctrines which require a junior user to prove both elements of good faith and remoteness in order to prove its entitlement to a trademark.

In fact, the major practical consideration in applying the zone of natural expansion theory is the determination of the territorial scope of this zone. Because this zone is merely a legal fiction, courts are not capable of quantitatively measuring its territorial scope. The party that invokes the

1450 Re 1st USA Realty Prof’ls, Inc., 84 USPQ2d 1581, 1584 & n.4 (TTAB 2007); Re Kysela Pere et Fils, Ltd., 98 USPQ2d 1261, 1266 (TTAB 2011).
1454 Raxton Corp. v. Anania Assocs., Inc., 635 F.2d 924, 930 (1st Cir. 1980). 73. Id. at 930-31.
1455 89 F. Supp. 528, 534 (E.D. Mo. 1950), aff'd, 188 F.2d 696 (8th Cir. 1951).
doctrine wants the zone to be as large as possible, but the opposing party wants it to be as small as possible. These are the limitations of this doctrine that has been highlighted by the courts on applying it.

Conclusion

It would be right to conclude this article with no specific conclusion, i.e. every doctrine has two ended results. Neither of the results can be proclaimed to be right under every circumstance. Intellectual Property law, in India is a growing arena and deciding things instead of “experimenting with facts and circumstances” of each instance will do no justice to the victim. Post-Expiry Injunctions may seem to be against the purpose of expiration of Patents at the outset, but when studied in depth showcases numerous reasons for its implementation. Similarly, Natural Zone of Expansion is a see-saw trying to balance the interests of both the senior and the junior user keeping in mind the overall impact of Public interest.

The authors find no better way to conclude this article but to lay emphasis on “equity”. As strange as it might sound, we believe that equity embezzles meaning to Intellectual Property Law in India. With numerous loopholes in both the Patents Act, 1970 and Trademarks Act, 1999, the only way to justice is the unrestricted principle of equity that has been applied by Indian Courts. It is therefore absolutely important to view the two-doctrines discussed in this article in the light of natural justice to meet the end of law proposed by the lawmakers.

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ANIMAL RIGHTS AND EXPERIMENTATION: AN INDIAN OVERVIEW

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ABSTRACT

Millions of rabbits, rats, cats, monkeys and many other animals, every year, face internment and extreme torture, all over the world. Animal experimentation or animal testing is a procedure in which animal models are created to dummy run medicinal drugs, cosmetics or any other product expected to enter into the human market. India has taken some quite remarkable steps towards the abolishment of this practice and has managed to set an example for other countries across the globe. This article talks about various aspects of animal experimentation with respect to India be it the history, need, applications, regulations as well as the ethical side of the debate for the continuance of this activity.

INTRODUCTION

Around 115 million animals, approximately, are used in some or the other form of experimentation across the world. Animal experimentation is the utilization of living organisms excluding human beings, for research purposes in diagnostic laboratories as well as pharmaceutical and biotechnological private firms. It involves testing products like potential medicines, cosmetics, or any other scientific research and is a mere preliminary trial and error procedure for obtaining the successful result on a human being. This technique is adopted, as the physiology of a human and an animal are quite alike and hence it aids the researchers to acquire information as to how the human body would react to the newly introduced substance. There is a debate going on since a long period of time which asks to choose between medical advancement or animal safety.

HISTORY

Firstly, around 2nd and 4th centuries, Greek physicians like Aristotle and Erasistratus were the first ones to perform experiments on animals. Historically, especially in India, the ancient texts have a high quantum of material indicating the sacrificing of animals like a goat, horse and a cow as opposed to the sacred and holy attributes attached to animals like cows, which are revered in present times. There are mentions of animal sacrifices like goats and oxen in Rigveda, white goats, calves, bulls, speckled and castrated oxen etc. in Yajur Veda as well as chickens used for meat in the Manusmriti.

NEED

Animal experimentation is considered to be an effective and accurate means of testing an upcoming breakthrough. It is believed that humans and animals share a considerably high quantum of diseases like cancer, flu, asthma, tuberculosis etc. Also, that they have similar cell processes and functioning like digestion, respiration as well as reproductive systems. A mouse has its 95% of genes exactly same as a human being. Therefore, positioning animals as models for analyzing the effectiveness i.e, both the beneficial as well as hazardous consequences of a drug to be introduced for human use, is a valid and logical practice. Surprisingly, a staggering figure of 180 out of 216 Noble prize recipients in the field of medicine and physiology used animal
experimentation mechanism during their research. The California Biomedical Research Association asserts that approximately every medical breakthrough in the last 100 years has resulted directly from animal research and experimentation. Hence, animal testing has paved the way for several inventions. Use of Herceptine, a humanized mouse protein has helped a lot to increase the survival rates in breast cancer. Type-I diabetic patients place their reliance on insulin, which was developed through experimentation on rats and rabbits. Be it production of asthma inhalers or eradication of small pox, animal experimentation has been the key to all such marvels of the history of medicine.

APPLICATIONS

1. DRUG TESTING

The 20th century witnessed the upheaval of drug testing using animals. Animals which are to be used in the drug experiments are initially bred in laboratories where they are forcefully confined within a cage in a sterile indoor environment. There has to be a complete and verified examination of drugs, for instance, processes like absorption, metabolism, distribution, excretion and their effect on other body systems. During the testing, firstly, the animals are caged into some form of restraint. For any disease prevalent in human race, the researchers would induce similar aspects of the disease in animals with the purpose of creating an animal “model” of that disease. Areas of medicine which usually involve animal testing are neurology, digestive, infectious, genetics, connective tissue as well as chronic diseases. Following appeals from PETA India and Union Minister Maneka Gandhi, the Ministry of Health & Family Welfare has passed an amendment to Schedule Y of the Drugs and Cosmetics Rules, 1945, which spares animals testing for new drug registrations when complete data from earlier toxicity experiments already exist for drugs approved abroad.

2. COSMETICS

The animals typically used for this kind of experimentation are rabbits, rats, guinea pigs and hamsters. The tests usually included in this kind are skin and eye irritation tests wherein chemicals are rubbed onto shaved skin or poured into the mouths of rabbits repeatedly for many weeks in order to observe signs for hazards. Also, no kind of pain relief is provided even at the conclusion of the experimentation. It is estimated that approximately 100,000-200,000 animals die every year around the world due to cosmetic testing. Humane Society International has also started the #BeCrueltyFree campaign is the most effective initiative in the world which aims at ending animal cruelty in cosmetics testing. It is presently attempting to change legislations, educate and aware customers

and helping companies devise new alternatives to animal experimentation.\textsuperscript{1459}

3. EDUCATION

Around 6 million animals are dissected in research classrooms yearly.\textsuperscript{1460} The animals mainly used for this purpose are frogs, perch, cats, earthworms, grasshoppers etc.  Until a few years back, biology was characterized by the procedure of cutting of a live frog just for educational purposes. However, in 2011, the University Grants Commission, provided with guidelines to phase out animal experiments in life sciences which involved banning of animal dissection.\textsuperscript{1461} Even in the United States of America, the “choice in dissections” laws had been passed which offered the students a choice between using animals or alternatives for performing experiments and conducting research. Whereas Romania is considered to be the country with the highest use of animals for classroom education purposes.

LEGISLATIONS AND REGULATIONS

In India, Prevention of Cruelty to Animals Act, 1960, under its Section 15(1) introduced and constituted CPCSEA, or The Committee for the Purpose of Supervision of Experiments on Animals under the Ministry of Environment Forest & Climate Change. It is a statutory body which was established in 1964 and provides guidelines for animal experimentation in the country. Besides this the Indian National Science Academy (INSA) and Indian Council of Medical Research (ICMR) have also formulated certain guidelines for care and use of animals in scientific research as well as in medical colleges. Further, India set a remarkable example in 2014 by becoming the 1\textsuperscript{st} South-Asian country to ban the manufacture of cosmetics produced by animal testing followed by it imposing a nationwide ban on import of such cosmetics. Further, it went on to ban the manufacture of household products like soaps and detergents whose production involved animal harm in the form of testing and experimentation. Further in April 2016, Union Minister Menaka Gandhi along with the Indian Ministry of Health and Family Welfare established the prohibition of animal testing for household products manufactured in India.\textsuperscript{1462}

DEBATE AND ETHICS

The debate with regards to Ethics in animal experimentation has been raging from the longest time i.e, 17\textsuperscript{th} century. It is believed that animals have the same moral status as that of human beings and deserve equal and fair treatment. Many activists believe that this prejudice suffered by animals should be termed ‘speciesism’.\textsuperscript{1463} Animal ethics are not presented in the form of stringent regulations but an arena of suggestions and


morally correct practices of animal protection. There are many institutions set up to oppose this practice based on ethical views, like PETA.

Presently, India is exploring a plethora of alternatives which could effectively replace animal experiments to produce drugs and cosmetics. One of them is In vitro testing which comprises of “organs-on-chips” technology devised by Wyss Institute of Harvard which involves human cells being grown in an advanced system which then act as dummy humans and can be tested with drugs or other products meant for future human use. In fact, according to Indian Council of Medical Research (ICMR), certain technologies like Organoids and Organs-on-a-chip seem to not just substitute but outperform animal experimentation. Also in 2003, MCI’s Executive Committee concluded: “As an alternative to these tests involving animals, JIPMER, Pondicherry, has developed EX-PHARM Blank CD. This CD has been specially prepared as a 100% replacement to animals used in undergraduate courses in Medicine, Pharmacology, and Veterinary Science”. There are certain firms like EpiSkin have created 3-dimensional eye model which can replace rabbits in experimentation and which is morphologically as well as functionally same as that of human beings. The Ministry of Health and Family Welfare amended the Drugs and Cosmetics Act in 2016, which replaced animal testing with in vitro processes. There are also human volunteers, even though quite small in number, who contribute by undergoing ‘microdosing’ which is administering small amount of dose for testing models for drugs.

Further, Soumya Swaminathan, former director-general of the ICMR, headed a team which concluded that such technologies are more cost effective and humane when compared to animal testing. The paper also noted that after two decades of drug-discovery research using animals, India has not developed a single novel drug that has made it to market. The reason for this was deduced to be the fact that certain molecules which were found to be safe in animals proved to be detrimental in human bodies. The team also advised the Government of India to establish Centres of excellence as well as to increase funding and international collaborations for alternative technologies. Also, “The value of animal testing is strongly overestimated,” was asserted by Thomas Hartung, director of the Centre for Alternatives to Animal Testing at Johns Hopkins University in Baltimore, Maryland who conceived several reliable alternatives having great possibility of replacing animal testing. There is an organisation called The Society for Alternatives to Animal Experiments (SAAE) set up in India which aims at establishing a platform for scientists spread nationwide to discuss, research and devise new alternatives. It proposes to adopt the 3 Rs’ used internationally namely Reduction, Refinement and Replacement - of use of animals in education, research and testing in India.

The US Food and Drug Administration (FDA) documented that 92 per cent of all drugs that are shown to be safe and effective

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in animal tests fail in human trials because they don’t work or are dangerous. 1466

CONCLUSION

Moreover, the use of animals for research and educational purposes, has always been quite a controversial subject. Certain scholars make use of cost-benefit analysis of animal experimentation often ignoring the fact that animals too are sentient beings like human beings. In my opinion, obtaining a middle ground in this discourse can prove to be quite tricky as there are no sure shot statistics and corruption involvement to get special licenses would provide no beneficial asset to the compromise. Hence it should be ensured that the budding and undiscovered alternatives are researched upon and implemented which could act as perfect substitutes for animal experimentation. Although, India is persistently studying and trying to develop different options, not even a single one of them have proved to be successful in whole. Despite the occurrence of some humungous accomplishments with the help of animal testing, the ethical perspective cannot be ignored. It can also put animals like rabbits, mice, frogs into risk of extinction and denigrate the food chain causing an imbalance of nature.

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1466 Alternatives to Experimenting on Animals, PETA India (Apr. 6, 2020, 3:10 PM), https://www.petaindia.com/issues/animals-experimentation/alternatives-to-experimenting-on-animals/.
RISE OF POPULISM – SOCIO-LEGAL ANALYSIS ON HOW IT IS INEVITABLY THREATENING THE RULE OF LAW AND FUNDAMENTALS OF THE DEMOCRACY

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ABSTRACT
The resurgence of the concept of Populism has widely put a lot of institutions of the countries under pressure. The paper concentrates on the emergence of Populism and how it has drastically affected the discretionary decisions and policy-agenda-setting of the governmental organs. The author highlights the effect of Populism in different countries and how it will have an adverse effect on the rule of law and analysis of Penal Populism in India. Also, the author will assess how it will affect the independence of the judiciary.

INTRODUCTION
The Former CJI Ranjan Gogoi said the rise of Populism presents a challenge of independence of courts and asked the judiciary to stand up against the Populist forces to protect the constitutional ethos. It is for us to recollect that such situations across the world have heaped tremendous pressure on judicial organs, and it is no surprise that in some jurisdictions, the judiciary too has succumbed to Populist forces.

As Populist governments tend to display authoritarian traits, it is critical to limit the erosion of democratic institutions. In particular, governments should adhere more thoroughly to the existing standards of judiciary independence, as it is necessary for maintaining democracy.

POPULISM
There are a lot of marked differences where the concept of Populism is to be feared or applauded. Populism is a dynamic concept. According to Mudde & Rovira Kaltwasser Populism is termed as, a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, “the pure people” versus “the corrupt elite,” and which argues that politics should be an expression of the volonté générale (general will) of the people.

The definition of Populism used for the report is as follows: Populism is nothing but the unified ‘nation’ against corrupt ‘elites’ and external enemies, and it claims for a charismatic leader the power to speak the will of the nation. It is therefore fundamentally illiberal, rejects diversity of identity and opinion within society and discards basic principles of modern constitutional thinking and checks on the decisions of the executive.

EFFECT OF POPULISM
Populism arises from the ‘broken promises’ of democracy. The people” can never truly rule precisely because of heterogeneity and conflicts of value and interest and some voices always prevail neglecting the other voices. Populism in an illiberal democracy finds a harmonious equilibrium between

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1467 Populism: A Very Short Introduction
https://global.oup.com/academic/product/Populism-a-very-short-introduction-9780190234874
majority rule and minority rights. This equilibrium is almost impossible. It will have a drastic effect on the rule of law and governance in the country. Moreover, it illuminates its tendency towards authoritarianism and against the principles of democracy.

While Populists are not against constitutions as such, but a Populist leader can indeed colonize the state like Hitler and the legal system by enacting a ‘Populist constitution’. If there is a rise in Populist forces, the real voices of dissent and the oppressed will not be heard. The sole reason for the emergence of Populism is to hear the voices of the dissent which will not be heard since the majoritarian voices will be much louder. The voice of the Populist forces is an illiberal democratic response.

**POPULISM AND RULE OF LAW**

A powerful Populist, who holds elected office, may be able to have a decisive impact on a country’s political agenda and in policy terms. Probably the most spectacular example here is Donald Trump’s power to set an isolationist agenda through trade & foreign policy, in the name of ‘Making America Great Again’. Not to mention shaping of immigration policy and practice indecisive and human rights threatening ways. There are two further potential and diffuse impacts of what we might call partial Populism on the rule of law are also worthy of consideration. These are, first, the capacity of Populism to affect the exercise of discretionary powers and, second, the upshot of what I will call ‘convention-trashing’\(^{1468}\). It was first coined by Nicolas Lacey in her research analysis on this concept. The effect of discretionary decisions is elaborately discussed further.

The concept of convention trashing is nothing but the internalization of the normative ideals associated with the rule of law by those who exercise power. Recent examples include Donald Trump’s flouting of the long-established conventions about conflicts of interest and nepotism, by failing effectively to separate himself from his business interests & his incontinent invective on Twitter. Moreover his decision to move a large part of his family into the White House in positions of very significant executive power. In India, governance has been widely influenced by Populist regimes. The present party in power, the BJP is highly criticized for its political mobilization on the basis of religion. The interference of religious leaders in administrative decisions has been a threat to the secularism of the country. Another example is the Indian Congress party, where the party structure verges on nepotism, retaining power within the Gandhi family tree. These are some of the features of convention trashing in Populism.

**PENAL POPULISM**

‘Penal Populism’ or ‘overcriminalization’ is truly a product of Populism. Legal debates have been slower and do not address the seriousness to focus on Populism as a potential threat to the rule of law’s integrity. The political system has rendered the law-making process highly responsive to Populist considerations, whether through resort to mechanisms such as initiatives and referenda or simply through politicians’ openness to popular concerns in their

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shaping and conduct of the legislative agenda.
In simple terms, Penal Populism is the process where the political parties which are in power compete with each other to be tougher on crime in order to get the popular support of the people. The increase in the punishment for major crimes has proven to be no deterrent. The policies introduced by the Populist Party in power are mainly concerned for the electoral advantage of the party which takes precedence over the Penal effectiveness of the policy.

We all know for a fact being responsive to the public demand by the political party is just a way how democracy works, but the real problem arises when the political party works on the policy from the opinions and demands of the lesser informed public who ignore the logic of society and later consequences. The emotional reaction to the crimes which force the lawmakers to introduce policies neglects the effectiveness of the policy but gives an electoral advantage. The political party in power will have its excess concern towards the attractiveness of the policy where it neglects the evidence of the effects in the criminal justice system. The political party in power will use this as a tool to make a simplistic assumption on public opinion based on inappropriate methods. It is because people feel that crimes are committed. After all, the existing punishments are not harsh enough. The truth is harsh punishments do not necessarily act as a deterrent factor.

**PENAL POPULISM IN INDIA**

For instance, let's see how Penal Populism has had an impact on increasing the punishments on crimes in India. Every time there is a public outrage due to the increase in the number of sexual offenses, the government pacifies the same by imposing more stringent punishments for such offenses. The government responded to the Kathua rape case which was brutal where an 8-year-old girl was raped by passing an ordinance which later became an Act\(^{1469}\). The act provides stringent punishment which includes death Penalty for those who are convicted of raping girls below 12 years. This was an ordinance introduces to convince the public outcry that the government has done something for the cause. My opinion is, there is, of course, some deterrence after increasing the punishment but the later consequences have not been considered in the present case. It does not necessarily deter the rape of minors. The problem here is, the deterrence effect does not take into consideration the possibility of conviction. It is important to emphasize on the fact that the conviction rate against women has hit an all-time low in 2016 which is 18.9% and this gravely undermined the deterrent effect which harsher punishments supposedly create\(^{1470}\). If the punishment is harsher, chances are that the victim will not report the crime for various reasons. ‘Crime in India: 2015’ indicates that 94.8% of the accused under Section 4 (penetrative sexual assault) and Section 6 (aggravated penetrative sexual assault) of the Protection of Children from Sexual Offences Act (POCSO Act), 2012 were ‘known accused’\(^{1471}\). It is obvious that most of the victims will not report the crime.


\(^{1470}\) Crimes in India 2016, National Crime Records Bureau, Ministry of Home Affairs, Government of India

\(^{1471}\) Crimes in India 2015, National Crime Records Bureau, Ministry of Home Affairs, Government of India
since the death Penalty will apprehend pressure on the victim since the accused is already known to the person. Moreover, there should be a stringent justice system which is not succumbed by corruption. One of the reasons why there are a lot of underreported cases for rape is Penal Populism. The due process of law has been already stacked up by delay and when there are crimes reported on the death Penalty, there can be a huge delay on the justice served. The 262nd report of the Law Commission of India has observed that capital punishment does not act as a deterrent. “After many years of research and debate among statisticians, practitioners, and theorists, a worldwide consensus has now emerged that there is no evidence to suggest that the death penalty has a deterrent effect over and above its alternative — life imprisonment.”

The problem here is the increase in punishment has made people jump into the conclusion that the crime will be in control. But we know for a fact that there always been an increase in rape cases in India excluding the unreported cases. The stringent punishment has shadowed the problems ailing to the criminal justice system where the restorative and rehabilitative aspects of justice are not taken into consideration.

Another example here is the famous Nirbhaya case. We all know for a fact how the public responded to the situation. There were hunger strikes and a huge protest to treat one of the accused who is a juvenile as an adult. Without any delay, the government amended the Juvenile Justice Act to show its concern and made a provision to treat juveniles of the age 16-18 as adults depending upon the heinous of the crimes. The government did this to satisfy the public’s outrage and feared a huge loss in their upcoming elections. The author is here to explain how the Penal Populism has taken place in this situation. What the accused did was grotesque in nature and they deserved to be punished but the problem does not end after the amendment. The stringent punishment just shadows the real problem in this situation. Harsh punishments do not mean that juvenile crime rates have gone down. According to the ‘Crime in India-2016’ released by the National Crime Records Bureau, the juveniles in conflict with the law in 2015 was 33,433. After the juvenile justice amendment, the juveniles in conflict with the law were 35,849 in 2016. It is clear that an increase in punishment has not worked as deterrence. It is just for ensuring the electoral support and not for preventing the crime in general. Populism can be a huge threat to democracy.

EMERGENCE OF POPULISM

Populism through different forms and different degrees began to shape the political decisions of many established democracies. Populism cannot be divided as left and right precisely. It does not have an ideology. It projects depending on the political movements. These changes have overturned the conventional by keeping social movements aside, Populism from the mid-20th Century has been primarily a phenomenon of countries with presidential political systems and radical inequalities. It was always the Populist regimes in the past where they fought against major inhuman

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1472 https://www.thehindu.com/opinion/op-ed/should-those-who-rape-minors-get-the-death-Penalty/article23686547.ece

1473 http://cara.nic.in/PDF/JJ%20act%202015.pdf
activities like Sati in India, Slavery and Caste oppression. It was more of liberal Populist forces that lean towards the left ideology back in the days. It was against the majoritarian forces. But the post-millennial society has been more of a right-leaning Populism. The majoritarian forces are against the resistance. But since the Populism concept is dynamic, the concept has emerged for retaining the power by the politicians where their policy impacts, decision making are influenced by the Populist forces.

The concept of Populism emerged at the time when the political process no longer represents the normal citizens when disparities of the wealth and poverty have increased drastically, when irresponsible hubris goes unchecked by the government and the corporate world when criminal wars of aggression undermine our integrity, when the environmental cost for economic development threatens the planet itself, Populist forces helped to bring the revolution. Left Populism or progressive Populism is said to hold the potential to address crises in a manner that secures the democratic project by deepening the legitimacy of democracies and upholding civic, political, and economic rights alongside material egalitarianism. Mostly the left Populist forces take stance open to immigration and refugees and one that is adversarial to the power and privilege of financial capital, the drivers of pollution, and natural systems destruction. But now, Populism has found its negative impact on the globe. Populism, particularly in postmillennial politics, typically refers to right Populism, which is characterized by emotionally charged political appeals through neo-nationalism, masculinism, xenophobia, sexism, racism, ethnic golden ageism, a disregard for liberal democratic norms, and so forth. But the concept of Populism cannot be divided as left and right precisely. It does not have an ideology. It projects depending on the political movements. Political Propaganda of Populists is aimed at voters who don't feel represented in the established political system. According to Hannah Arendt, these are voters who are ignored and labeled as apolitical by the other established political parties. They are voters without strong political views, providing a perfect target for propaganda.

For instance, Adolf Hitler is considered to be one of the greatest Populist leaders during that political movement. He was able to influence the Germans to consider the Jews to be outsiders and deserved to be punished. Nazi Germany wasn’t there from the beginning, it was an evolution. It was the liberated dynamic of a mass movement, which drove the Weimar Republic into the Third Reich. The ideology of the Populist regimes mostly is influenced by hate towards one community, more of racist discourse, stigmatization of Muslims or Jews as terrorists. The justification of the Populist forces is mostly by spreading fear and chaos towards the masses.

"Every man a king" That was the slogan of Huey Pierce Long Jr., the Louisiana governor and senator of the 1930s who was arguably the most flamboyant Populist in American history. The country boy called himself The Kingfish and was a sworn enemy of oligarchs and corporate. In the depths of the Depression, Long's "Share Our Wealth" plan called for the federal government to confiscate the fortunes of

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https://www.eyes-on-europe.eu/Populism-through-the-eyes-of-hannah-arendt-now-and-then/
anyone with more than $8 million in wealth to provide a $5,000 annual income and health care for all American families. As governor, Long built thousands of miles of roads and improved education but was also notoriously corrupt and dictatorial. Franklin Roosevelt called him one of the most dangerous men in America, with good reason: The Kingfish was widely considered a viable dark-horse candidate to defeat FDR in 1936. But he was assassinated by the relative of a political foe. He was a great example of a populist leader.1475

In the last few years, even in countries in which its position had been largely seen as secure, things have begun to change, as a result of some spectacular instances of the capacity of Populist politics to put the rule of law under pressure.

British immigration policy since 2010 has been hugely shaped by Populist anti-immigration sentiment. The threat to some (particularly Conservative) parliamentary seats from UKIP, alongside the longstanding anti-EU sentiment of a small core in the Tory Party, helped to shoehorn a range of Populist policies onto the government’s agenda, as well as influencing the tone of political discourse, and engendering a pervasive distrust in transnational and international governance which is a natural concomitant of nationalist resurgence1476. Generally, the Populists do not have direct control of the government but these political Populist movements will have their significant presence within the government.

Narendra Modi, the Prime minister of India is the best example who rises through Populist regimes. His Populism consists certainly in his jingoism as the aftermath of Pulwama (A retaliation on terrorist groups in Pakistan) testifies, but also on his uncanny ability to impress people by working on issues that can fetch maximum publicity dividends.

Another nature of Populism in India is Hindu nationalist, which uses religion as a tool to mobilize and unite a large population of the country. The Indian Muslims are considered as foreign even after all these years by the Populist force. Populism in India that presents itself in the form of right-wing Hindu nationalism threatens not only minority groups ideologically opposed to Hinduism but also anything that runs counter to the traditional “Hinduness” of the nation. Even though India shares different ethnic, linguistic, language & cultural differences what unites the different parts of the people is Hinduism. After Indian independence, the constitution of India has followed the secular principle yet it has been riddled by the Populist forces to date. For Hindu nationalists to define Hindutva, or “Hinduness,” as the basis for nationalism and thus recent Populist movements in India, the first step needed was to redefine what counts as religion.

INTERVENTION OF POPULISM IN INDIAN JUDICIARY

Judicial independence is a vital democratic institution. According to the World Bank measure of judicial independence, Poland, Hungary, Italy, and Venezuela all experienced noteworthy reductions in judicial independence owing to specific acts pushed by their Populist

1475 https://theweek.com/articles/579018/brief-history-Populism

1476 https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1257&context=teachlearnfacpub
governments. Populism would affect the discretionary powers of the judges. It is interesting to consider whether the election of judges which prevails in many Indian jurisdictions implies vulnerability to Populist influence via electoral pressures. Moreover, Judicialization is the growing involvement of judges in assessing the executive's prerogatives and performance and the reliance on courts for addressing core public policy questions and political controversies. So the political party in power will have huge pressure on the Judiciary in their decisions of the legislation. The judges have found it difficult and have been susceptible to the Populist Party in power since they can interfere in the career prospects of the judges through transfers, promotions, and appointments.

The judiciary in India is a separate and independent body that excludes itself from the executive branch with the doctrine of separation of powers. However, the integrity of the judiciary has come under question in recent years; four of India’s most senior Supreme Court judges have warned that democracy is under threat because of the way the court is being run. It is to be noted that the judicialization of politics started from the case Kesavanandha Bharthi vs Union of India where the doctrine of basic structure was observed. If the governmental organs introduce legislation that is affecting the basic structure of the constitution, then it is void. The Court dramatically expanded its role in the realm of rights and governance, asserting the power to invalidate constitutional amendments under the basic structure doctrine, control judicial appointments, and govern in the areas of environmental policy, monitoring and investigating government corruption, and promoting electoral transparency and accountability. But the integrity of the judiciary has come to question since the independent institution has also succumbed to the Populist forces.

According to a study by Rubén Poblete-Cazeneuve, he has analyzed if the Member of Legislative Assemblies (MLA) in India has an unfair advantage in the criminal trails. If the MLA belongs to the ruling party, the cases have 17% chance that the case gets disposed of without a conviction in contrast to the MLAs belonging to the opposition party where it takes a lot of time to get the cases resolved. So it is clear that the Populist party influences the independence of the judiciary through threats and political intimidation.

One former judge of the Supreme Court, Justice Markandey Katju, claimed in 2015 that 50 percent of the higher judiciary, which consists of the Supreme Court and high court judges were corrupt, and criticized the trend of judges and their relatives practicing in the same court. The interference of Populism in the judiciary increases usurpation and tyranny by the Populist who is holding power. Also, it might be the case that legal actors are affecting legal proceedings without any political influence. This would be the case

if there are political ideologies (party loyalty) involved in their actions. It is widely recognized that judges enjoy a range of discretionary powers and considerable interpretive latitude. They are also, to state the obvious, human beings who are subject to the usual range of pressures, albeit that their institutional role and their professional training and culture equip them, ideally, with some very particular capacities for independent judgment.

**RECOMMENDATIONS**

Populism is a frightening practice, as it gains its power through democratic means, yet strips the values of democracy away as it becomes entrenched in a nation.

- The reason behind the increase of Populism is the *structure of societies*. The less educated and more orthodox the people be, chances are the Populism foster deeply within the society. The first step is Education. People should learn to not follow the herd and formulate their own opinions. They should know that the Populist leaders always peddle the dreams of the people and which of course ends with disaster. They are the opportunists that seriously care nothing about us and just create propaganda for the electoral advantage.

- People should be aware of how the Populist forces spread their agenda through biological levels. Generally, humans are easily manipulated if it’s related to them emotionally. It is fascinating to know how the Russian Populist forces target human dopamine, serotonin, adrenaline, testosterone, and oxytocin to influence the people.

- The electorate is satisfied if the government formulates stringent laws that increase Penal Populism. People should take into account that the increase in punishments will not eradicate crime rates. The administration must be definite and uniform in its work by eradicating Penal Populism. It shifts the focus of the government since they concentrate on making amusing policies to please the electorate rather than preventing the crimes.

- The country should work on having strong central bureaucracies. Countries like Germany, England, and Canada have successfully blocked their Populist practices interfering in the bureaucracy of their country.

- Corruption is a huge threat to the working of a democracy. If a law provides tough punishment to the accused, it would be immaterial if he could find his way out of the conviction through bribes and political connections, which is, of course, used magnificently in India. The next step is to legislate against the social media personalities who allow their extreme right-wing Populism to run rampant which causes more and more hate crimes, propaganda, false hopes, and the cult of personality, polarization, racism, and radicalization. Regulation on this propaganda promoted through social media must be in control since the Populist parties have always been able to sell their hate through IT cells.

**CONCLUSION**

The concept of Populism came out of nowhere; it is thrived off of the cracks from the minds of the Indian society. Evidently, the rise of Populism has been a huge threat for the country in various fields thus affecting the policy-making decisions & secular attitudes of the country. Populists exploit underlying faults within a society to convey their fundamentally illiberal message and consolidate their own power which will ultimately affect the fundamentals of democracy.
The rise in Populism has been a huge trouble for all institutions in all countries. Regarding the independence of the judiciary, in the context of India, the basic structure doctrine power has always been exercised with judicial restraint with changing political and social circumstances. The judicial restraint not only a fear of backlash from the executives in the party in power but also the court's limited capacity to adjudicate the matters pertaining to policies of the parties. Moreover, it is a fear of public image and backlash for the judicial executives. Thus let us hope for our country to get more educated and not get influenced by the Populist regimes. People should be able to formulate their own opinion regardless of the propaganda spread by them and let time decide the future of our country with strong elements of democracy.
THE PLAGUE OF FAKE NEWS AND THE LEGISLATIVE ARMOUR AROUND IT

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Abstract

“Information is power. Disinformation is abuse of power.”1481-Newton Lee.
This line effectively represents the truth of our age where the truth is inseparable from the false and misleading information. Information has become the most precious resource in today’s world and anyone who is misinformed or disinformed finds themselves at a disadvantageous position in society. Hence, it is of utmost importance that the integrity and accuracy of the information that is being made available in the public domain are maintained due to its direct impact on the development of a country.

This massive flux of fake news creates a cloud of chaos and confusion that creates a hyper-reality and makes people unaware about what is happening around them and violates an individual’s right to information which is a fundamental right. The problem lies in the standpoint of the countries that view the problem of fake news as a static complication, ignoring the effects of technological advancements and trying to counter this effect relying on the old relevant laws of the land. The solution is, however, dynamic and requires constant review and revaluation. The impact of technological developments should be realised and single legislation, covering all mediums under its ambit should be enacted. The phenomenon of fake news spreading across the print and online medium cannot be viewed as less than a plague infecting the current generations and demands a cure at the earliest.

Keywords: Misinformation, Information media, Technological development, Legislative armour, Disorder, Cyber laws, Countermeasures, Protection of information, Awareness, Cyber integrity, Legitimacy of information.

Introduction

“Beware of false knowledge; it is more dangerous than ignorance.”
-George Bernard Shaw.

In the ever-changing world of developments, especially in the modern era which is also popularly and rightly known as the “information age”, the cognizance of one’s surroundings is of extreme and utmost significance. With the evolution of mankind, it is not wrong to point out that its ways have also been witness to various modifications, with everything becoming more handy, trouble-free and effortless. In the contemporary world, with the contrivance of various life-changing tools such as the desktops, laptops, smart-phones and other such gadgets, which are practically used and owned by almost every individual, along with the World Wide Web i.e., the internet, not only are these individuals always connected, no matter in which part of the globe they are, but also have access to the current affairs or happenings from across the globe along

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with answers to every question of theirs, just a mile-second away from them, through a simple touch or click in their devices. It is often said that nothing comes without a price. The ease of use and the user-friendliness of the internet which may be considered as a boon, does have its ill-effects as well, and one such aspect is seen in the popular field of journalism which is constantly fighting the parasite of “Fake news”.

The internet is a space, open to public-access where every person may express their views, opinions, beliefs and create various websites or web-pages relating to any theme or subject. It is here that the menace of fake news creeps in where people misuse their power and the universal-accessibility of the forum, to create various online databases with faulty and incorrect information or news to satisfy their selfish goals and objectives.

The prevalence of fake news is not only seen in the online medium, but also in various other forms of print media i.e. newspapers, magazines, etc., broadcast media i.e. through the radio, television, etc., out-of-home media i.e. outdoor advertising like flyers, transit advertisements behind buses, taxis, etc., and in various other modes.

The term “news” refers to information which is verified and released in the public interest. The information which does not meet these standards thus, cannot be considered as “news” per se and it is here that the oxymoron “fake news” comes to play.

The term “fake news”, which was named as the word-of-the-year by Collins Dictionary\textsuperscript{1483}, was defined by the same as \textit{“false, often sensational, information disseminated under the guise of news reporting.”}\textsuperscript{1484}

The same has been defined by the Cambridge Dictionary as \textit{“false stories that appear to be news, spread on the internet or using other media, usually created to influence political views or as a joke.”}\textsuperscript{1485} Similarly, Macmillan Dictionary defined it as \textit{“a story that is presented as being a genuine item of news but is in fact not true and is intended to deceive people.”}\textsuperscript{1486}

The mobilization and manipulation of information have been seen as a characteristic of history which dated way before modern journalism set benchmarks and levels which set the definition of “news” based on guidelines of truthfulness. Evidence and records dating back to ancient


\textsuperscript{1483} The Guardian \textit{“Fake news is ‘very real’ word of the year for 2017”} (2017).

\textsuperscript{1484} Collins English Dictionary, HarperCollins Publishers, \textit{“Definition of ‘fake news’.”}

\textsuperscript{1485} Cambridge Dictionary, Cambridge University Press, \textit{“Meaning of fake news.”}

\textsuperscript{1486} Macmillan Dictionary, Macmillan Publishers. \textit{“fake news: Definitions and synonyms.”}

\textsuperscript{<} https://www.collinsdictionary.com/dictionary/english/fake-news>

\textsuperscript{1485}https://dictionary.cambridge.org/dictionary/english/fake-news>

\textsuperscript{1486}https://www.macmillandictionary.com/dictionary/british/fake-news>
Rome\textsuperscript{1487} can be found where Octavian, launched a smear campaign with “short, sharp slogans written upon coins in the style of archaic Tweets.”\textsuperscript{1488} against Antony, when the latter met Cleopatra, thereby becoming the first Roman Emperor and thus “fake news had allowed Octavian to hack the republican system once and for all”.\textsuperscript{1489}

However, in modern times, the 21\textsuperscript{st} Century has been a witness to the weaponisation of information on an unparalleled scale. The new technology makes it extremely easy to manipulate and falsify the content, and the public network dramatically heightens the false subject-matter propagated by various nations, politicians and their political parties, dishonest corporates, etc. as they are carelessly shared and relied upon by uncritical thinkers and the blind subjects.

Thus, it is thus imperative to put a stop and at least make an attempt to mitigate the problem in hand through the enactment of various laws, rules and regulations. Various nations across the globe have looked into the issue and have taken suitable measures through various mediums like setting up of Government Task Forces\textsuperscript{1490}, conducting media literacy campaigns\textsuperscript{1491}, passing laws\textsuperscript{1492}, setting precedents\textsuperscript{1493}, forming expert groups\textsuperscript{1494}, state broadcasts\textsuperscript{1495}, and through various other measures which have been further discussed in the research paper.

The Counter Initiatives of Developed Countries Against Fake News

The occurrence of fake news is not a recent phenomenon. It has been used as a tool for spreading anti-information since the ancient times, however, with the advent of

\textsuperscript{1489}Ibid.
\textsuperscript{1490}Glenn Greenwald “First France, Now Brazil Unveils Plan to Empower the Government to Censor the Internet in the Name of Stopping Fake News” (2018).
\textsuperscript{1491}Murad Hemmadi, The Logic, “Federal government to announce $7 million in funding to fight disinformation online ahead of 2019 election” (2019).
\textsuperscript{1492}Dhaka Tribune “President signs Digital Security Bill into law” (2018).
\textsuperscript{1493}The Washington Post “Bahrain charges lawyer of sharing “fake news” for his Tweets” (2018).
\textsuperscript{1494}DSSStandaard Newspaper “Minister De Croo combats fake news” (2018) - Where Belgian Minister for the Digital Agenda Alexander De Croo announced the formation of an expert group of academics and journalists to formulate proposals for tackling disinformation or fake news.
\textsuperscript{1495}The Cambodia Daily, Phnom Penh Post “Cambodian government to launch TV show against fake news” (2019).

www.supremoamicus.org
modern technology, the proliferation of social media platforms creating a hyper-reality along with the rapid increase in the number of users on the internet allows for a much broader and unfiltered distribution of information to its audience and makes the issue of fake news even more chronic.

Various countries in the past few years have seen a massive surge in the availability and access to fake news in the countries public domain and have conducted surveys to realise the integrity as well as the reliability of its sources of information. The surveys determined that the presence of fake news disguised as a legitimate source of information is a massive hindrance for its people to exercise their right to information and to be informed. According to a recent global survey, 86% of all the internet users have claimed to have fallen prey of fake news that was available to them.\textsuperscript{1496} The national surveys conducted further in the respective countries also draw a similar picture, in Egypt, a parliamentary commission identified a spread of 53,000 cases of false news in a duration of mere 2 months. According to the undersecretary at the General Directorate of Information and Relations at the Egyptian Interior Ministry, there exists around 4-6 million fake news pages spreading fake news on its social media.\textsuperscript{1497}

Similarly, in Germany, 59% of the surveyed people agreed to have encountered fake news and in some sections of the population this number was as high as 80%\textsuperscript{1498}. Even in a country like Kenya, where 90% of the total population has access to high-speed internet, 90% of the surveyed people agreed to be misled and received incorrect information regarding the recent elections.\textsuperscript{1499} Since information is the most important resource in today’s society, the countries have thus tried to counter these effects using various approaches.

Various developed countries all over the globe have taken the initiative to control the wave of fake news spreading throughout the public domain, these measures broadly include proper legislations and reasonable censorship of the news getting published on the offline and online media.

To counter the effect of fake news the countries are adopting one of the following approaches. Firstly, in the absence of any direct legislation which regulates the publishing of media both offline and online, the countries apply the relevant laws of the existing statues of the country, however, these old laws are not equipped to handle modern technology. Secondly, some countries realising the needs of the time are legislating specific legislation which restricts the publishing of fake news and imposes fines and other punishment to create a deterrent effect. Thirdly, countries are delegating the responsibility to authorities such as the web-site administrator or the election authorities.


\textsuperscript{1497} Arab News “Egypt reported to have 4-6m fake news pages.” (2019). <https://www.arabnews.com/node/1511301/media>


which will then result in the fake news posts getting blocked and a well-informed electorate respectively. Lastly, some countries have also taken a more fundamental approach and have started educating its citizens against the ill effects of fake news and the dangers that it brings. Now let’s look at some of the developed countries and their individual measures taken within its municipal jurisdiction against the rise of fake news.

ARGENTINA
Argentina has taken some proper legislative steps to initiate its fight against fake news in lieu of the countries elections. The legislation created the “Comisión de Verificación de Noticias Falsas (CVNF)” which translates to commission for the verification of fake news within its national electorate. The main agendas of the commission will be the censorship of news that it posted in the public domain, the removal of the published fake news already available on the public domain as well as restricting and forbidding it’s republishing on the internet again. In pursuance of this result, the social media accounts of the candidates, as well as the political parties, have been monitored and the accuracy of the news is compared to the official publication of the state to determine its correctness.

CHINA
China relies heavily on its already existing criminal and administrative laws as well as the newly enacted cybersecurity laws to contain the publishing and spread of fake news which can be detrimental to the country and its citizens.

The roll-out of fake news that disturbs the public order on the internet, or any other media has been made a crime under china’s municipal criminal law and is punishable by up to 7 years of imprisonment. Furthermore, in 2016, the country legislated the Cybersecurity Law, 2016 which prohibits the spreading of any fake news online on the internet which disturbs the economic as well as the social order of the country. Thus, the legislation in china is now equipped to handle any spread of fake news of any nature, political, social, criminal, all likewise.

Coupled with focused legislations, the country has also issued rules and guidelines for the internet service providers along with the internet news and information services to curb the roll-out of fake news so that it is not available on the public domain in the first place.

Rules requiring the internet service providers to compulsorily register the users under their real name to reduce anonymity and increase the traceability of the people so that justice can be served and people do not escape the consequences thus creating a deterrent effect.

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1501 Cyrus Lee “Spreading false information online risks seven year imprisonment in China” (2015).

The cybersecurity law of the country mandates the requirement of a licence for the information services, this assures the integrity and legitimacy of the information and the information providers themselves as well. The rules also state that once any compromised information is detected by the service providers, they must immediately stop its transmission and the information should be taken down immediately followed by a complaint to the competent authority.

EGYPT
The Egyptian parliament, in 2017, formed a “Communication and Information Technology Committee” which disclosed that Egypt and its people have fallen prey to almost 53,000 thousand cases of fake news and false information in a mere duration of 60 days. Since then the Egyptian authorities have adopted several measures to counter the surge of fake news on its information channels. The Egyptian legislation has enacted three municipal laws to regulate the distribution of information through the information providers while also assuring the accuracy of the information in both print as well as the online media.

Firstly, Law 180 of 2018 Regulating the Press and Media. Article 4 of Law No. 180 of 2018 provides that “press institutions, media outlets, and news websites must not broadcast or publish any information violating the principles cited under the Constitution.”. Article 4 gives the power to suspend or ban any information provider which violated the rules and guidelines prescribed by the law and tries to disturb the public order to the Supreme Media Council (SMC). Further Article 19, 21, 22 and 101 of the statue provides even greater powers in the hands of the government authorities to counter the rise of fake news.

Secondly, Law No. 175 of 2018 on Anti-Cybercrime, Article 7 of the statute provides and grants the investigating authority the power the suspend or block any domestic as well as foreign websites that publishes information which is deemed to be threatening to the national security. Further Article 14 and 20 of the act provides for the punishment of hacking and modifying information thus creating a deterrent effect against the formation of fake news.

Lastly, Penal Code, Law No. 58 of 1937, and Its Amendments. Article 80(d) of the Penal Code states that “whoever deliberately spreads false information or rumours abroad about the internal conditions of the country that might weaken the country’s financial credibility or harm the country’s national interests is punishable by 6 months’ to 5 years’ imprisonment and a fine.”

To facilitate the access to information that is accurate and not misleading, the courts, as well as the legislation of the country, provide for the free official publication of the judgement on cases and the legislated laws which are published in the official gazette of the country.

GERMANY
Germany relies on the already existing criminal and civil provisions what are relevant in protecting the countries citizens from the evil of fake news. Furthermore, in
2017, the legislation of the country enacted the **Network Enforcement Act** which was passed with a particular objective of preventing the emission of fake news from the social media networks by improving the enforcement of the existing laws. Hence, in lieu of the act of 2017, any social media networks that fail to remove any illegal content that is published on its domain may be fined up to 50 million euros.\(^{1509}\)

The country also provides to its people an alternate source of trustable and accurate information by providing access to the official publication of the government regarding the judgements of the courts along with the laws enacted by the legislature.

**KENYA**

In 2017, guidelines were issued by the communications authority of Kenya that made it the responsibility of the mobile network operators to censor any political message before its transmission occurs. The guidelines also make its compulsory for the authors writing about politics to be accurate in the information that they publish in the public domain.

In May 2018, the legislation of Kenya legislated **“The Computer Misuse and Cyber Crimes Act”**, this act criminalises the publication of false information or fake news. However, the constitutionality of the above provision will be decided in a pending suit and the law currently stands dormant\(^{1510}\).


In March of 2018, the united states embassy along with the Kenya government took a more basic approach to counter the rise of fake news and launched a one-year media literacy campaign. The programme has been further expanded into the academic institutions including the studies about social media trends and its development\(^{1511}\). For ensuring the availability and of accurate and correct information to the public, the Kenya government operates an online portal which provides accurate legal information such as the case laws, the enacted legislation, government orders, etc.

**The Present Legislative Armour of India Against Fake News**

Being one of the most densely populated countries in the world, India is home to a major fraction of the world’s population thus, making the country more susceptible to fake-news, thereby causing the creation of various notions, beliefs and ideas based on false premises which lead to or instigates panic, discord, upheaval, violence, disunity, animosity towards a particular religion, community or even towards a particular individual or corporate entity. With the advent of the latest technology, there has been an indisputable shift from the traditional ways of news-reporting through television broadcasting and print media to other forms like the internet, mobile news reporting applications and especially through social media platforms.\(^{1512}\)


In today’s day and age of the internet, the dissemination of fake news has become easier than ever before where practically any individual may post a report or statement, making it appear as an authentic news story and claim it to be completely accurate and factual. India being one of the most virtually-connected countries in the world, while the responsibility lies on the user of the information to verify whether the information being relied upon is well-grounded and trustworthy or not, it may be considered as the moral duty of the state to protect its people from such misleading sources in the first place.

Currently, India relies upon an array of legislations to solve and combat the obstacle of fake news. Section 505 of the Indian Penal Code (IPC), 1860 which relates to “Statements conducing to public mischief” is relied upon, with special reference to Section 505(1)(b) of the IPC, 1860 which is related to the spreading of incorrect and mischievous content and material which results in or is likely to cause “fear or alarm to the public, or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity.” Whereby, under this law, the convicted may be punished with imprisonment which may extend up to 6 years or with a fine or with both. Further, Section 504 of the IPC, 1860 which is related to matters of “Intentional insult with intent to provoke breach of the peace” is also relied upon according to which, whoever intentionally insults, “intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence” shall be punished with imprisonment which may extend up to 2 years or with a fine or with both. Thus, extending the scope of this section to those fake news, which charges false allegations on individuals or other organisations such as political parties, companies, etc.

Further, Section 66D of the Information and Technology Act, 2000 pertaining to the “Punishment for cheating by personation by using computer resource” talks about how an individual may be subject to imprisonment which may extend up to 3 years or with a fine or with both, if he is found cheating by impersonating “by means for any communication device or computer resource.” This section is hence relied upon when the matter relates to fake news posted online by one, impersonating another as seen in the case of Samdeep Vaghese vs. State of Kerala where the accused (an ex-employee) had created a fake website impersonating a business and had posted false information about the same, along with sending false emails and details to various customers of the said business.

1514 The National Portal of India- The Indian Penal Code, 1860.
1515 Ibid.
1516 Ibid.
Section 54 in the Disaster Management Act, 2005\(^{1519}\) also pertains to the creation and circulation of fake news however, its scope is limited to disasters only. According to this section, “whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction” shall be subject to imprisonment which may extend up to 1 year, or with a fine. In the present day scenario, with the existence of the global pandemic i.e. the COVID-19, also known as the novel Coronavirus, the importance of this provision has increased. With the existence of this pandemic, the need for correct and reliable news is of extreme importance for one to take the necessary precautions and measures to protect themselves and their families. However, with the existence of social media platforms like Facebook, WhatsApp, Twitter, etc. The information which is not factually accurate and authentic is being circulated and forwarded under the name of news without being verified thus, causing a global frenzy. Concerning the same, the Delhi High Court while dealing with the PIL of Pankaj Rajmachikar vs. the State of Maharashtra\(^{1520}\) which challenged a clause in an order passed by the Maharashtra Police under Section 144 of the Criminal Procedure Code, 1973, prohibiting the dissemination of false or distorted information on social media platforms like WhatsApp\(^{1521}\), Twitter, etc. related to the COVID-19 disease, declined to take up the PIL on an urgent-basis and distinguished that the said order was issued in the public interest and was reasonable.\(^{1522}\)

The issue of fake news also caused the migration of a large number of labourers\(^{1523}\) working in the cities due to the panic caused by the false news that the lockdown in India would last for more than 3 months causing the labourers great misery as observed in the writ petition of Alakh Alok Srivastava vs. Union of India\(^{1524}\), where the Supreme Court in its order stated that “we expect the Media (print, electronic or social) to maintain a strong sense of responsibility and ensure that unverified news capable of causing panic is not disseminated.”\(^{1525}\)

Currently, with regards to the infamous Nizamuddin Markaz event, where approximately 2,500 individuals assembled...

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\(^{1519}\)National Disaster Management Authority, Government of India - Disaster Management Act, 2005.  

\(^{1520}\)Pankaj Rajmachikar vs. State of Maharashtra, Public Interest Litigation (lodging) No.24 Of 2020.

\(^{1521}\)Bar and Bench “Police efforts to curb misinformation on WhatsApp, Social Media amid COVID-19 Pandemic appear genuine: Bombay HC.” (2020).  

\(^{1522}\)Stalin J Manjaly “Police efforts to curb misinformation on Social Media amid COVID-19 appear genuine: Bombay HC.” (2020).  
<https://lawsisto.com/legalnewsread/NDAwOA==/Police-efforts-to-curb-misinformation-on-Social>

\(^{1523}\)Bar and Bench “Coronavirus Lockdown: Fake news and panic driven migration caused untold misery to migrant labourers, Supreme Court.” (2020).  

\(^{1524}\)Alakh Alok Srivastava vs. Union of India, Writ Petition(s)(Civil) No(s).468/2020.

\(^{1525}\)Alakh Alok Srivastava vs. Union of India, Writ Petition(s)(Civil) No(s).468/2020, Supreme Court Order dated 31-03-2020.  
<https://images.assettype.com/barandbench/2020-03/b0e29c7e-806df-4880-99e8-561e51bb53d/Alakh_Alok_Srivastava_vs_Union_of_India__SC_Order__March_31__2020.pdf>

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amid the COVID-19 outbreak, the Jamiat Ulema-i-Hind has moved the Supreme Court and a plea has been filed by Advocate Ejaz Maqbool stating that reports on the Tablighi Jamaat by certain sections of print and electronic media were false and allegedly spreading bigotry and communal hatred.\textsuperscript{1526}

However, the Supreme Court with respect to the Nizamuddin Markaz incident stated that it would “not gag the press”.\textsuperscript{1528}

At present, there are no specific nationwide laws to deal with the menace of fake news. In 2019, the Supreme Court, with the bench headed by Chief Justice Ranjan Gogoi, dismissed and thus, refused to entertain a plea filed by Advocate Anuja Kapoor which sought to direct the Ministers of Home Affairs, Law, Information and Broadcasting, and, Electronics and Information Technology to constitute and set up a committee to tackle the issue of fake news on various social media handles.\textsuperscript{1529}

The plea stated that non-restraint of various fake news resulted in various crimes such as mob-lynching, communal riots, chaos, etc. which disturbed public peace and thus sought for the framing of necessary and required guidelines, laws and bye-laws to mitigate the issue, however, the same was dismissed by the apex court.\textsuperscript{1530}

Thus, India depends on various legislations to combat the issue of fake news but ironically does not have unified legislation devoted solely to battle the issue of Fake News. However, a bill named, “The Fake News (Prohibition) Bill, 2019”\textsuperscript{1531} has been drafted by Shrimati Rama Devi to resolve this void with the main aim and purpose to keep a check and prevent the creation and dissemination of false information along with codifying various penalties and consequences which one may have to face on noncompliance with the same. The Bill not only serves the purpose of defining what the term “fake news” exactly means, but also lays down all aspects and scenarios which are related to the same, thus taking a step in the right direction.

Conclusion

The wave of fake newsflooding this information era is like rust to steel or like corruption to democracy. It is thus essential, especially for the developing countries to counter the effect of fake news to protect is industries and people. The first step against negating the spread and


containing fake news is to define the term. Among the developed countries talked about in this paper, none of the countries have defined the term along with its scope and limitations keeping in mind the technological advancements. For a legislated definition of “fake news” we must turn to those countries which have enacted domestic anti-fake news laws and have elaborately defined the term while doing the same. The Malaysian legislation enacted the Anti-Fake News Act, 2018 to negate the spread of fake news in all media, the act defines the term “fake news” as “any news, information, data and reports, which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas.”

Similarly, Russia legislated a law which criminalises any initiative of spreading of fake news while also subscribing a punishment for the same, the law defines the term as “socially-significant false information distributed under the guise of truthful messages if they create a threat of endangering people’s lives, health, or property; create possibilities for mass violations of public order or public security; or may hinder the work of transportation and social infrastructure, credit institutions, lines of communications, industry, and energy enterprise.”

The legislation needs to keep in mind the technological developments of the society and both print and online media are covered under the ambit of the definition to prevent the spread of fake news across all platforms. Since information is the most important and precious resource of the current age and information is what ultimately fuels and feeds the growth of the country, it should be realised that the integrity and accuracy of the information that is available on the public domain of the country has a direct impact on its economy and its development and thus utmost importance should be given to the issue and focused legislation countering and containing the formation and spread of fake news should be enacted with due deliberation.

Many countries have been relying on the existing provisions of the municipal administrative, criminal and civil laws of the country, to deal with and counter fake news, however, it is evident that these laws were not made because of the recent technological additions and are not equipped to deal with the recent developments in the society. These laws do not share a common definition of the term and although may seem relevant, they do not cover everything under its ambit leaving space for loopholes that eventually lead to evasion of justice. For example, in India, fake news is countered and dealt using provisions from the Disaster Management Act 2005, the Indian Penal Code 1860 and the Information Technology Act 2000. However, the need for focused legislation is apparent. Section 54 of the Disaster Management Act, 2005 which deals with fake news is extremely limited in its scope and only deals with the spread of fake news during the times of emergency. This act is not exhaustive and does not cover the vast ambit of fake news in today’s world. Although Section 54 of the Disaster Management Act read with Section 505(1)(b) of the Indian Penal Code which criminalises the spreading of fake news


thus creating a deterrent effect may be helpful in the present scenario of COVID-19 crisis, this has observably not been the case and India and its industries are becoming prey to the strong wave of fake news. For example, the spread of fake news regarding the spread of coronavirus through poultry goods made the poultry industries in India incur huge losses and some of them went out of business thus having an impact on the country’s economy. The countries Information Technology Act, 2000 also does not satisfactorily deal with the spread of fake news on the internet and online media which is the primary medium for information and is suffering from a rapid flux of fake news which is corrupting all of the information available to the public.

Thus, focused legislation defining the term, criminalising it by prescribing a punishment, and dealing with it on all fronts and mediums under a single act is the solution to control the contagious plague of fake news that is infecting the world. the direct impact of fake news on the development of the country and the violation of human rights such as the right to information under the right to life of an individual should be realised and stopped by enacting such an integrated legislation which could contain the spread of misinformation and fake news at the times of emergency as well as peace and making it a part of the municipal law of the country. Spreading awareness regarding accurate sources of information and the presence of fake news in the media should also be an active measure undertake by the country.

Suggestions

In 2018, in lieu of the rapid flux of fake news across the European media, the European Commission set up a committee consisting of high-level experts called the “High-Level Expert Group” (HLEG) to deliberate and advise on initiatives to counter and contain the spread of fake news across the print and online portals. The committee submitted its report highlighting the fundamental principles and the suitable measures that should be undertaken by the countries. The report made some key recommendations such as: ensuring transparency in the publication of online news, promoting literacy regarding media and information to prevent the community spread of fake news, empowering editors and information service providers to prevent the publishing of inaccurate information, the formation of a single code of conduct to deal with fake news at all fronts, etc.1534

The suggestions we put forth are similar to what was recommended by the HLEG committee to prevent the spread of false information across the European Union. These suggestions should be adopted by the government at the earliest so that the workforce of the country is always well informed and are not vulnerable against inaccurate and false publications. These measures will prevent the citizens of the country from being exploited while also ensure that the integrity of the news sources of the country is maintained and the term “information” become synonyms with development in the coming future. Our suggestions are as follows:

Firstly, the anonymity on the cyberspace should be reduced through compulsory licensing of information providers on the internet. These licenses should be registered using the real names if the information providers to maintain accountability for the information. This will ensure the filtering of information and its accuracy. This will also act as a hallmark for authentic sources of information. The license holder should be under strict surveillance and should be empowered to detect incorrect information and stop its transmission and immediately deleting it while also forbidding its republication. The social networking websites such as Facebook and Twitter should also be made responsible for the fake news that is published on their domain.

Secondly, a literacy campaign should be initiated throughout the country educating its citizens about the reliability of the internet and media in today’s world and the spreading awareness regarding the presence and danger of fake news accessible to them. They should be educated regarding the authentic sources of information and should be equipped to prevent the community spread of fake news while surfing the digital environment.

Thirdly, single legislation which under its ambit, covers all the circumstances for the spread of fake news, whether during an emergency or otherwise should be drafted and made into an integral part of the country’s domestic laws. Such legislation should define the term, criminalise it as to create a deterrent effect, prescribe its punishments, and empower the relevant authorities like the election authorities or the website administrator to tackle fake news when detected. This legislation should consider all the technological advancements and thus consider all the mediums and sources through which information can be made available on the public domain. The legislation should be equipped to prevent and contain fake news through any medium and in a form.

Lastly, the government of the respective country should continuously promote further research and deliberation on the sources of spread of false news, its impact on the country and its people and better ways to mitigate its inflow.

The measures taken against fake news should be constantly updated and should be kept in pace with time. The change in sources of information and technological advancements giving birth to new mediums of information demands constant adjustments in the necessary responses. The obstacle of fake news is a dynamic complication and thus to compensate for the same, measures taken against the same also need to be constantly reviewed and updated. Thus, to counter the effect of fake news, constant research and deliberation is the key.
NON-ADMISSIBILITY OF EVIDENCE BEYOND PLEADINGS

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ABSTRACT
Pleadings are considered as the backbone of any legal action in a court of law. They entail an understanding of the mechanics of evidence adduction. The case begins and proceeds on the basis of pleadings. They can be in the form of a written statement, a claim or a defence filed and recorded in writing by either or both the parties, stating their own version of the dispute, based on which the other party shall file its counter affidavit, rejoinder, etc., explaining why the plaintiff’s or defendant’s contentions should not prevail. Pleadings also form the platform on which the edifice of the case is erected and the evidence presented in trials is the construction carried out on the said platform or plinth. They also assist the courts in determining the ambit of evidence which the parties should be allowed to produce at the trial. Within such range, the parties are allowed to submit evidence in favour of their contentions and thereby, the purpose of pleadings in a suit would be rendered unnecessary. The content of the following article shall explain the importance of pleadings and the rule of non-admissibility of evidence beyond pleadings. The article shall discuss all the important principles in relation to the rule needed to be followed by both the court and the parties, and the consequences followed in case of non-compliance with this settled principle of law. The content shall end by providing an exception to the above rule and a conclusion derived from the research conducted.

INTRODUCTION
When a lawsuit is filed, the documents that are filed by plaintiffs and defendants into the court record at the start of the case are called pleadings. Pleadings help in recognising the material facts which form the basis of the case of the concerned parties which further helps in understanding the issues the parties seek to have decided. They provide a benchmark of revelations before trial as it requires parties to recognise all material facts and issues and thus results in the inadmissibility of evidence. It can be said that pleadings provide the build-up of the procedure with the end means of achieving justice. The aim of pleadings is to offer all sides an intimation of the case of the opposite side to be met and to enable courts to work out what’s really in dispute between the parties. The basic idea behind pleadings, be it a statement of claim, defence or reply, is of identifying the real issues between the parties, to limit the evidence of the trial subject to the issues formed and to guarantee that no party is taken at any disadvantage by the introduction of matter not certain from

https://www.chenowethlaw.com/blog/2016/04/what-are-pleadings-in-civil-litigation.shtml

1536 Chenoweth Law Group, What are pleadings in civil litigation?, Chenoweth Law Group (Mar. 27, 2020, 21:44 PM),
pleading and the trial proceeds smoothly towards judgement, upholding the principles of a fair trial. In other words, it is only justified that a party while entering into a trial should know in advance the basic idea of the case they will have to face in the trial. Relief not pleaded in a pleading should not be granted is a legally accepted proposition. Therefore, the court cannot reach to a conclusion that is beyond the scope of pleading. Along these lines, the pleadings play a role of assisting the court in narrowing the scope of controversy in question and make parties aware of the issue so that they can adduce the appropriate evidence.

The issue is formed when one party denies the material facts pleaded by the opposite party. It is not necessary for a fact to be an issue only when it is explicitly denied; even a part of a fact can be an issue. The reason behind framing issues is to determine the focus of the court by limiting the scope of the dispute. For it is the formation of an issue which guide the parties in the matter of adducing evidence and not the pleadings.

It is necessary for parties to plead all the material facts and the issues should be formed on the basis of those facts. The purpose of this is to provide the opposite party with fair notice of the case before the trial to prevent any injustice. Pleadings are admitted as a record of the proceeding and on the basis of those records, issues are framed. The primary party is entitled to confine the opposing party to its own pleading as the primary party is at trial only to satisfy the issues raised on its pleading. In a situation where a party overlooked to plead all the necessary material facts on which it relies but made the opposite party aware of those facts at trial, then in such case, if the court decided the proceedings on the basis of pleadings then the party would be denied natural justice. The object and purpose of pleadings are to make sure that the parties are well aware of the issues. This also helps to avoid any unwanted lengthening of the trial process. Issues serve the objective of limiting the scope of questions of law required to be decided by the court so that a party can produce the most appropriate evidence in its support.

In Kashi Nath (Dead) through LRs. v. Jaganath, it was held that where the evidence is not in line with the pleadings and is at variance with it, the evidence cannot be looked into or be depended upon. At the point where the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot concentrate its own attention or the attention of the parties thereon claims or relief, by framing an appropriate issue. Along these lines, it is said that no amount of evidence, on a plea that is not suggested in the pleadings, can be looked into to grant any relief.

**OBJECTIVE**

The importance of a pleading is precluded by providing the case a foundation on which the parties can build their further arguments. Pleadings work as a guide in the entire journey of legal proceedings by providing the parties with a clear direction

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1539 Sayad Muhammad. v. Fatteh Muhammad, (1895) ILR 22 Cal 324.


to form their claim or defence, based on such pleadings. They ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. Thus, the object and purpose of pleading are to enable the adversary party to know the case it has to meet. In order to have a fair trial, it is imperative that the party should state the essential material facts so that the other party may not be taken by surprise. A party cannot be made to produce new evidence at the cost of causing a disadvantage to another party. A fair trial is one where parties are afforded an opportunity of presenting their side of the case without causing any prejudice to the other party by strictly following the due process of law and neither putting themselves at any prejudice as well. The rule of fair trial aims to uphold the ‘right to equality’ to meet the ends of justice and thereby, help to maintain a sense of balance in the society. If one party is given preference over the other by accepting whatever claims and evidence they have made and presented without considering whether such evidence is or will be of any relevance to the matter at hand, it would result into grave harm to the other party as it would raise a new question of law altogether and the arguments may get sidetracked from the main issue at hand. The objective of the non-admissibility of evidence beyond pleadings extends to protecting either or both parties from consequences that they may have to face because of a mistrial or an unfair trial. A party cannot be allowed to present such evidence in support of its case for which no pleading has been made in the statement of

claims by it. The other party should be made aware of the foundation on which the first party is making the other party liable for any wrong and claiming compensation or remedies and if any evidence is produced beyond such claims made then it will amount to a gross miscarriage of justice as the matters essential to the case would be side-lined. The other side should be able to prepare itself beforehand and should not be at a loss in the court of law. It should not be made a stranger in its own case. The party producing evidence outside the arena of its pleadings will be deemed to be misleading the case. Moreover, if the court allows such evidence beyond pleadings to be legally admissible and passes order based on such evidence, trials and judgements based on such evidence would be deemed to be erroneous. It will be a blatant ignorance of the settled principle of law.

Pleadings help the court in determining the burden of proof. The burden of proof is fixed on the basis of the contentions of the aggrieved party. In criminal trials, the burden of proof lies on the prosecution to prove its case or defence based on the pleas and evidence produced by the appellant beyond any reasonable doubt. In civil cases, burden of proof lies on the party to prove only a few affirmative contentions with the help of shreds of evidence. The necessity of proving the guilt beyond any reasonable doubt is not raised and required in civil suits. Thus, in both civil or criminal cases, the burden of proof has to be fixed on the basis of arguments made and thereafter, the evidence is required to be produced in the court. The burden of proof decides the level of evidence which the party is required to produce in order to help its claim. If some evidence has been produced which is not in

\[\text{1542} \quad \text{Arikala Narasa Reddy v. Venkataram Reddy Reddygari & Anr, (2014) 5 SCC 312.}\]

\[\text{1543} \quad \text{Ram Swarup Gupta v. Bishun Narain Inter College, (1987) 2 SCC 555.}\]
conformation with the written statement, plaint, rejoinder or any type of another pleading then it may disturb the position of the whole case and cause the burden of proof to be shifted from one party to another. In order for the court to reach to a conclusion, the party responsible needs to satisfy the burden of proof which is done with the help of pieces of evidence and if the same are not admissible and acceptable as legal evidence in the court, the burden of proof will not be satisfied and if the burden of proof falls or shifts on the wrong party, the judgment of court lead on such trial stands vitiated in the eyes of law.¹⁵⁴⁴

This rule also prevents the party to weaken its own case. If the party produces documents to be admissible as evidence in the court of law, facts of which have not been pleaded in the court by the party itself nor do they relate to it by even liberally constructing the pleadings of that party, their own case may look like a concocted story, baseless and misdirected. Such practice puts an impression in the court of law that the party themselves are not aware of their case. The court may even dismiss the plaint on malicious grounds which would directly benefit the defendant, at the cost of more sufferance to the plaintiff.

In the case of Prakash Rattan Lal v. Mankey Ram¹⁵⁴⁵ defendant stated in its written statement that his total holding was 25 bigha and 1 biswa only but he attempted to submit evidence which showed that his holdings extend much beyond the above-said area, which was held to be beyond the scope of pleadings. The Delhi High Court in its judgement held that the parties take a fixed stand through pleadings. Both parties are required to state the complete and true facts before the court. And once the facts are stated by both parties, the court frames the issues and asks parties to lead evidence. It is settled law that the parties can lead evidence limited to their pleadings and parties while leading evidence cannot travel beyond pleadings.¹⁵⁴⁶ Apex Court has held that if the pleadings are silent on a certain issue then no evidence can be looked in relation to that issue.¹⁵⁴⁷

Prosecutors and defendants in criminal or civil proceedings present evidence in support of their claims and arguments, which forms part of a trial. Each side should have the opportunity to review the other side’s contentions and thereby produce the evidence which is supposed to be taken in defence in a trial in order to form their own case and raise objections, if any, to the introduction of certain evidence before or during the trial. The entire reasoning behind filing pleas, be it a statement of claims, written statement, rejoinder, etc., is to characterize the issues relevant to the dispute, to limit the submission of evidence in a trial to the issues pertinent to the dispute, and to guarantee that the trial may continue towards a fair judgment without either party being taken off guard by the acceptance of evidence not reasonably determined from the pleadings. In the broad outline, the case which the parties have to meet should be known to the parties beforehand.

The Apex Court in Sri Venkataramana Devaru and Ors. v. The State of Mysore and Ors.,¹⁵⁴⁸ held that the object of requiring a party to put forward his pleas in the

¹⁵⁴⁶ Ibid.
¹⁵⁴⁸ Sri Venkataramana Devaruand & Ors. v. State of Mysore & Ors, AIR 1958 SC 255.
pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding. In Abubakar Abdul Inamdar v. Harun Abdul Inamdar, the Supreme Court observed that if the party has not raised a plea regarding adverse possession in its pleadings, it cannot substitute the pleadings with the evidence as pleadings form the foundations of the claim of a litigating party. Allahabad High Court has observed that the pleadings also serve the purpose of alerting a party in the case of another party. This will enable the adversary/opposite party to assert its defence and/or refusal in its pleadings and tender its evidence in regard thereto. The principle of pleadings is to ensure that no party spring surprise on another making him unable to defend himself.

Fair Trial and Rule of non-admissibility of evidence beyond pleadings

Conducting a trial in a fair and a just manner aids in preventing miscarriages of justice. It is considered as one of the essentials in order to ensure that justice and only justice prevails. An individual who has been accused of an offence or involved in any other type of legal dispute ought to have its innocence determined by a reasonable and successful legitimate procedure. It has the right to a fair trial, which means fair hearing opportunity, within a reasonable time and by an impartial judge. It should be given a chance to present his side of the dispute. Be that as it may, it isn't just about securing suspects and respondents. Without conducting the trial in a fair manner, there will be no confidence in the judiciary and trust in the rule of law may collapse. Hence, another object of the rule of non-admissibility of evidence beyond the pleas is to prevent the trial to be conducted in an unfair manner. The aim is to safeguard the parties from being the victim of an unfair trial and to help them keep their faith in justice. In order to do so, it is the duty of the court to ensure that no party is taken by surprise at trial and no new facts are brought through evidence that has not been stated in the written statement. Every plea should have its foundation in pleadings and in the absence of it, no evidence adduced can be looked into because it will be unjust for the opposite party as it will have no opportunity to contradict it. If the court accepts the new plea then the matter has to be remitted to the original court for a fair re-trial of the matter to give a justified opportunity to the opposite party.

The Apex Court in Ram Sarup Gupta v. Bishun Narain Inter College, held that “it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading are to enable the adversary party to know the case it has to meet”.

1549 Abubakar Abdul Inamdar (Dead)by Lrs. & Ors. v. Harun Abdul Inamdar And Others, (1995) 5 SCC 612.
1551 Supra note 11.
Ad Infinitum and Rule of non-admissibility of evidence of pleadings

Suppose a plaintiff has submitted a document to be admissible as an evidence in a trial, which does not conform to the pleadings made by the plaintiff itself. If such evidence is admitted by the court then it would only result into an unnecessarily prolonged trial of the case as the defendant would have to look into or go through the new evidence and thereafter prepare its own arguments based on the same, which may or may not relate to the pleadings. Since the evidence of the plaintiff were allowed to be admissible in the court, the defence would also be provided with the liberty to go beyond its counter on the basis of pleadings of the plaintiff as the plaintiff’s contentsions have been rendered useless the moment it produced evidence beyond its own plaint. Now, this cycle of submissions and admission of new evidence and their review and reply by the other party continues ad infinitum. It will turn into a non-terminating process with no resultant end. The proceedings will go on for an irrellevantly lengthy period and thus, where justice is delayed it is denied. Such prolonged trials would not only cause the parties to invest their valuable time in the case but also increases the expense which needs to be spent in the case by the parties, which sometimes even leads to a total drain in their wealth!

Therefore, in order not to make either of the parties go through any delay or suffer any hardship that may ensue by making them go through one or more than one rounds of litigation, it is imperative to limit the submission of evidence within the scope of pleadings.

“The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case.”

It would force the court to be distracted from the real issue which should be discussed, on to an irrelevant and meritless point. It would also cause the issues to be unnecessarily enlarged. In fact, the whole point of this rule is to bring the parties to discuss only relevant and definite issues and thereby, diminish expense and delay especially as regards the amount of evidence that would be required to be produced on either side at the hearing.

Duty of courts to abide by the rule of non-admissibility of evidence beyond pleadings

It is imperative upon the court of law to abide and follow any settled principle of law in order to set an example of its strict observation by the parties as well. In doing so, the courts not only uphold the sanctity of such principle, but they also set a precedence for other courts and protect the faith of the victim which comes to the court in hope of some remedy as to a matter of its right. If the court commits the violation of any legal provision or principle then the parties would do the same under the defence of the court itself is in violation of the principle and thus the trial will be vitiates and the only victim of such trial will be the victim itself.

It has consistently been an obligation on the Court to choose with respect to how much of an evidentiary value ought to be given to a specific bit of proof or evidence and in this manner, if a part of the evidence affidavit is seen as insignificant or if it is discovered that a piece of the evidence in


question has no establishment in the pleadings, the court has complete authority to dispose it off as inadmissible while delivering its judgement.\textsuperscript{1556}

The pleadings provide a platform for the parties to present their case in a concise manner. If the parties are allowed to lead evidence beyond pleadings then the sacrosanct of pleadings comes to an end and the entire purpose of filing pleadings also stands defeated. \textsuperscript{1557} It becomes the duty of the court to discourage the submission of such evidence and reach to a decision based on those pieces of evidence which are in relation to the contentions made by the parties in their written statements or plaints.

The Hon’ble Supreme Court has set its face against the adjudication of an issue which was not pleaded. If the pleadings are not appropriate or do not give sufficient details, they may not raise an issue and the court can reject the claim. It is the duty of the court to make sure that all the material facts are contained in the pleadings. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case. \textsuperscript{1558}

In Nand Kishore Lalbhai Mehta v. New Era Fabrics Pvt. Ltd. & Ors.\textsuperscript{1559} it was observed that all the required material facts should be pleaded by the party in support of the case set up by it. No party can be permitted to travel beyond its pleadings. A court cannot make out a case that isn’t pleaded. The court should confine its decision to the questions raised within the pleadings. Rather than emphasizing on the shape of the pleading, the substance of the pleading should be considered.

The Supreme court has observed in a case that decision of the case should be within the circumference of the pleadings. The court cannot grant the relief not asked for. And in order to get a relief not pleaded, there has to be an amendment in the pleading.\textsuperscript{1560} Apex Court in the case of in National Iron & Steel Co. Ltd. v. The State of West Bengal & Anr.,\textsuperscript{1561} held that the employers cannot be permitted to lead evidence beyond their pleadings and leading of the evidence beyond the pleadings is wholly unwarranted and the conclusions based on such evidence is vitiated in law. It is the duty of the court to be on guard while recording any evidence to prevent the admission of any evidence sans pleadings. The judgement of the court should be on the basis of the pleadings.\textsuperscript{1562}

As per the pleadings, if there are opinions that are defective or in agreement by the relevant parties, there is space for making decisions upon them. As so, those which are in admissions and those which are in issues are recorded separately.\textsuperscript{1563}

\textsuperscript{1557} K.R. Arumugam (Dead) v. P. Semmalar, (2019) Mad 666.
\textsuperscript{1558} SBI v. S.N. Goyal, (2008) 8 SCC 92.
\textsuperscript{1559} Supra note 3.
\textsuperscript{1560} Trojan & Co. v. Nagappa, AIR 1953 SC 235.
\textsuperscript{1561} National Iron and Steel Co. Ltd. & Ors. v. The State of West Bengal & Anr., AIR 1967 SC 1206.
\textsuperscript{1563} Supra note 21.
Exception to the general rule of non-admissibility of evidence beyond pleadings.

Order VII Rule 14 of the CPC provides that if the plaintiff relies upon a document in support of his claim then he has to produce such a document in the court during the presentation of the plaint. Order VIII Rule 1(A) provides that the defendant relies upon a document in support of his counterclaim then he has to produce such a document in the court when the written submission is presented by him.

Proviso of the above rule is that the proof and admissibility of such documents that are filed along-side affidavit shall be subject to the orders of the court. This means that the documents are filed along with the chief-examination. It is on the court to decide the admissibility of such documents. It has been made clear in Order XVIII Rule 4 of CPC that while recording evidence, a witness has to file an affidavit along with the copies of the document which ought to be supplied to the opposite party.

In Pushottam Shankar Ghodgaonkar v. Gaianan Shankar Ghodgaonkar, it was held that though production of documents can be allowed for cross-examination of the witness of the other party, the documents cannot be produced at the time of cross-examination of opposite party by casting surprise upon him. A defendant cannot be confronted by the plaintiff by producing documents for the first time during the cross-examination and it was not open for the trial court to allow the production of a document to confront the original Defendant.

In the case of Rakesh Kumar v. Pawan Khanna the Hon’ble Delhi High Court placed heavy relevance on its previous decision in the case of Subhash Chander v. Shri Bhagwan Yadav in which it held that Order VII Rule 14(4), Order VIII Rule 1 (A) (4), as well as Order XIII Rule 1(3), provide that the provisions requiring parties to file documents along with their pleadings and/or before the settlement of issues do not apply to documents produced for the cross-examination of the witnesses of the other party. To the same effect, Section 145 of the Evidence Act also permits documents to be put to the witnesses, though it does not provide whether such documents should already be on the court record or can be produced/shown for the first time. However, in view of the unambiguous provisions of the CPC, it cannot be held that the document cannot be produced/shown for the first-time during cross-examination.

If the witness to whom the said document is put identifies his handwriting/signature or any writing/signatures of any other person on the said document or otherwise admits the said documents, the same poses no problem because then the document stands admitted into evidence.

Even if the witness denies the said document, it cannot possibly be said that the document should be returned to the party. If the document is so returned it will not be possible for the court to, at a subsequent stage, consider as to what was the document put and what was denied by the witness. In a given case, it is possible that the answer of the witness on being confronted with the document may not be unambiguous. It may still be open to the court to consider whether, on the basis of

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the said answer of the witness, the document stands admitted or proved or not and/or what effect is to be given to the said answer. Thus, the document cannot be returned and has to be necessarily placed on the court file.

The aim or intention of our legislator behind Order VII Rule 14(4), Order VIII Rule 1A (4), Order XIII Rule 1(3) of the Civil Procedure Code, is to bring an element of surprise in a case, which is essential in the process of the cross-examination of witnesses. If the document to demolish the case of the opponent is filed in the court record with pleadings it may hamper the case. On the contrary, if permitted to show/produce the document owing to the element of surprise, the adversary or witness may blurt out the truth. Once it is held that a litigant is entitled to such right, in my view it would be too harsh to make the same subject to the condition that the litigant would thereafter be deprived of the right to prove the said documents himself. Thus, if the witness to whom the document is put in cross-examination fails to admit the document, the party so putting the document as its own evidence would be entitled to prove the same. However, the same should not be understood as laying down that such party for the said reason and to prove the said document would be entitled to lead evidence which otherwise it is not entitled to as per the scheme of CPC and evidence law.

However, the court should be cautious in this regard. It is often found that a party which has otherwise failed to file documents at the appropriate stage, attempts to smuggle in the documents in the evidence of the witness of the adversary by putting the documents to the witness whether relevant to that witness or not. Only those documents with which the witness is concerned and/or expected to know or answer ought to be permitted to be put to the witness in the cross-examination. If other documents with which the witness is not concerned are confronted only in an attempt to have the same filed and to thereafter prove the same, the court would be justified in clarifying that the document is taken on record only for the purpose of cross-examination and the producing party would not be entitled to otherwise prove the same, having not filed it at the appropriate stage.

CONCLUSION

The Code of Civil Procedure provides an extremely elaborated and explained set of codification that is to be applied in civil litigation to uphold the principles of natural justice. It may so happen some-time that fulfilling such word to word detailed procedural requirement of an underlying provision may become the cause to delay the judicial process. But any restlessness to speed up the litigating process should not be allowed to become the reason to cause havoc to the fundamental rules of civil procedure.

Maintaining the sanctity of the principle of natural justice and the right of a free and fair trial, the pleadings and issues are formed with such objectives so as to make sure that a party who comes to a trial is well versed with the issues. Another reason for maintaining such objectives is to ensure that each side is prepared for the questions of law which are most likely to be raised and the parties have the proper opportunity to place relevant evidence before the court of law for its consideration. It has been repeatedly held in various cases that the pleadings are meant to give both sides some idea about what the opposite party presents as a case and helps courts to identify the real
issue between the parties. Thus, preventing any unwanted deviation from the real issue during the course of a trial.

Significance of pleading is not limited only to satisfy the principle of procedural fairness as was observed by Mason J. and Gaudron J. in Banque Commerciale SA v. Akhil Holdings. Pleadings play a very important role for admissibility and relevancy of one’s evidence. As a case is dependent on the relativity between the evidence and the issue which is defined in one’s pleading. Pleadings are the pegs on which evidence hangs.

It is fundamental to gather evidence in support of any legal position. Evidence plays a vital role in assisting a court to reach on a conclusion. It is important to keep in mind that the decision-making capacity of the court is limited to the evidence produced before it; therefore, it becomes crucial for parties to produce as many relevant pieces of evidence as possible so that court is convinced beyond any reasonable doubt.

However, in doing so, evidence produced should be consistent with the pleading. A party cannot adduce evidence that sets the case inconsistent with the pleadings. No matter how valuable the role a piece of evidence plays, it can never overshadow the scope of pleadings which form the foundation of the case for the litigating party. Thus, when pleadings are silent on an issue, the parties should cease themselves from producing any evidence in regard to that issue. The court should also be extra-precautious while taking the evidence into account. Judge also should be well versed with the pleadings of the parties concerned to prevent any evidence to get admitted into records which is beyond the pleadings.

However, pleadings should be given a more modern and societal approach. While interpreting, it should be made sure that justice is not defeated just to please the technicalities. It may happen that the words used in a pleading limit the understanding of the case subject to the strict interpretation of the law. In such a case, it is the duty of the court to make sure that the correct substance of the pleading is determined. Instead of emphasising on the form, the substance of pleading should be considered. This means that whenever the question as to lack of pleading is raised, instead of going on its form, the court should ensure that the parties were aware of the case and the issues thus formed. If it so happens that the parties were aware of the case and moved to produce evidence in regard to the issues, in spite of the deficiency of the pleadings, then it is not open to the parties to raise the question of lack of appeal. As so observed by the Hon’ble Supreme Court in an exceptional case, where the parties proceeded to the trial being aware of the case and produced evidence not only in support of their own contention but in refutation thereof by the other side. In such an eventuality, it will not be open to submit to a mistrial and vitiate the proceeding even if there happens to be an absence of issue. A party may fail to or chose not to raise an objection when evidence beyond pleading is submitted and it comes on record. However, the court cannot obviate itself from its duty and act upon such evidence.


1569 Kalyan Singh Chouhan v. CP Joshi, (2011) 2 SC 44.
The court cannot proceed on the basis of the evidence not pleaded. In the situation of absence of pleading on any ground, evidence given in that regard is of no use. This is an established principle. As held in Rajgopal v. Kishan Gopal\(^{1570}\) that when there is no pleading regarding certain issues, no finding can be given despite being evidence.

Therefore, in the view of the above, it is clear beyond any reasonable doubt that the party must plead all the material facts and support it with sufficient evidence. The courts do not have the liberty to go beyond pleadings and issues cannot be formed unless pleadings raise any controversy regarding any law or fact. In the same manner, the court should keep an extra eye on the evidence so that no party can lead any evidence, not in line with pleadings.

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GENOCIDE: ONE OF THE GREATEST CRIME UNDER INTERNATIONAL LAW

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ABSTRACT
Genocide is called ‘crimes of crime’. In 1944 Raphael Lemkin coined the term “Genocide” by combining ‘genos’, the Greek word for ‘race’ or ‘tribe’, with the Latin suffix ‘Cide’ which mean ‘to kill’. United Nations Conventions on the Prevention and Punishment of the Crime Genocide defines genocide as “any of the following acts committed with intent to destroy, in whole or part, a national, ethical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Genocide, whether committed in time of peace or in war is a crime against humanity, wherever it occurred it has eradicated the targeted groups population around 60% to 97%. In India there is no law which is specifically for genocidal crime but there are provisions in Indian Penal Code, 1860 which criminalises the acts which are in nature of genocidal crime. To prevent genocide crime, it is critically important to understand the root cause of these crimes Genocidal crimes are not spontaneous act instead, they develop as a process over time, as a result of which it is possible to identify warning signs and can be prevented. There are three types of prevention at different stages 1) Up-stream 2) Mid-stream 3) Downstream. The victims can go to the International criminal court (ICC) or International Court of Justice (ICJ) for any type of genocidal cases for justice.

INTRODUCTION:
Genocide is one of the greatest crimes under international law and also called “crime of crimes” according to Article 2 of the 1948 United Nations Conventions on the Prevention and Punishment of the Crime Genocide defines genocide as “any of the following acts committed with intent to destroy, in whole or part, a national, ethical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Genocide, whether committed in time of peace or in war is a crime against humanity, wherever it occurred it has eradicated the targeted groups population around 60% to 97%. In India there is no law which is specifically for genocidal crime but there are provisions in Indian Penal Code, 1860 which criminalises the acts which are in nature of genocidal crime. To prevent genocide crime, it is critically important to understand the root cause of these crimes Genocidal crimes are not spontaneous act instead, they develop as a process over time, as a result of which it is possible to identify warning signs and can be prevented. There are three types of prevention at different stages 1) Up-stream 2) Mid-stream 3) Downstream. The victims can go to the International criminal court (ICC) or International Court of Justice (ICJ) for any type of genocidal cases for justice.

Now how the word ‘Genocide’ came into existence? Raphael Lemkin, a Polish-Jewish lawyer who fled the Nazi occupation of Poland and arrived in United States in 1941. As a boy, Lemkin had been horrified when he learned of the Turkish massacre of hundreds of thousands of Armenians during World War I. Lemkin later came up with a term to describe Nazi crimes against European Jews during World War II, and to enter that term into the world of international law with a hope of preventing and punishing such horrific
crimes against innocent people. In 1944 he coined the term “Genocide” by combining ‘genos’, the Greek word for ‘race’ or ‘tribe’, with the Latin suffix ‘Cide’ which mean ‘to kill’.

GENOCIDE CASES ACROSS THE WORLD

ROMANI GENOCIDE: For centuries Romani tribe had been subject to antiziganist persecution and humiliation in Europe. They were stigmatized as habitual criminals. When Hitler came to national power in 1933, anti-gypsy laws in Germany remained in effect. Under the “Law against Dangerous Habitual Criminals” of November 1933, the police arrested many Gypsies with others the Nazi viewed as “asocial” – prostitutes, beggars, homeless, vagrants, and alcoholics and imprisoned them in internment camp.

The Nuremberg race laws were passed on September 15, 1935. The first Nuremberg Law, the “Law for the Protection of German Blood and Honour”, forbade marriage and extra marital intercourse between Jews and Germans. The second Nuremberg law “The Reich Citizenship Law”, stripped Jews of their German citizenship. On November 26, 1935, Germany expanded the Nuremberg laws to also apply to the Roma. Romani, like Jews, lost their right to vote on March 7,1936.

On November 15, 1943, Himmler ordered that Romani and “Part-Romanies” were to be put “on the same level as Jews and placed in concentration camps”. When ordered to come out, they refused, having been warned and arming themselves with crude weapons – iron pipes, shovels, and other tools used for labor.

The society for threatened people estimates the Romani death approximately 220,000 to 1,500,000. The government of some Nazi German allies, namely Slovakia, Finland, Italy, Vichy France, Hungary, and Romania, also contributed to the Nazi plan of Romani extermination.

INDONESIAN GENOCIDE: Background- support for sukarno’s and presidency under his “Guided Democracy on his forced and unstable “Nasakom” coalition between the military, religious group, and communists. The rise in influence and increasing militancy of the communist party of Indonesia (PKI), and Sukarno’s support for it, was a serious concern for Muslims and military, and tension grew steadily in the early and mild-1960s. The third-largest communist party in the world, the PKI had approximately 300,000 cadres and a full membership of around two million.

On the evening of 30 September 1965, a group of militants, known as the 30 September movement captured and executed six of Indonesia’s top military generals. The movement proclaimed itself as sukarno’s protectors, issuing a preemptive strike to prevent a possible coup. After the execution of the generals, the movement’s forces occupied Mardeka square in Jakarta and the presidential palace.

A military propaganda campaign to link the coup attempt with the PKI, masterminded by the military, began to sweep the country on 5 October. Graphic images and descriptions of the murdered tortured, and even castrated generals began to circulate the country. Despite falsified information, the campaign was successful, convincing both Indonesian and international audiences. even though the 30 September
Movement killed 12 people, Suharto ultimately presented it as a nationwide conspiracy to commit mass murder. The army removed top civilian and military leaders it thought sympathetic to the PKI. The parliamentary and cabinet were purged to Sukarno loyalists. Army leaders organised demonstration in Jakarta during and west java, over 10,000 PKI activists and leaders were arrested. Communists red sympathizers and their families and being massacred by the thousands. The killing started in October 1965 in Jakarta, spread to central and east java and later to Bali and smaller outbreaks occurred in parts of other island, including Sumatra.

The communal tension and hatreds that had built up were played upon by the army leadership who characterised communists as villains, and many Indonesian civilian took part in the killing, the worst massacre were in Aceh, Bali, Central, East Java where OKI support was at its strongest. With very few exceptions, the killing were not spontaneous but carried out with a high degree organization. The method of non-mechanised violence and killing included shooting, disemboweling, castration, impaling, strangling and beheading with Japanese-style samurai swords. Most of the killing being carried out with knives, sickles, machetes, sword, ice picks, bamboo spears, iron rods and other makeshift weapons. Islamic extremists often paraded severed head on spikes. Corpses were often thrown into rivers, and at one-point officials complained to the Army of congested rivers that run into the city of Surabaya due to the bodies2. Before the killings had finished, the Indonesian army estimated 78,500 had been killed, while the PKI put the figure at 2 million most scholars now agree that at least half million were killed.

2. https://www.studyiq.com/blog/?s=genocide

DARFUR GENOCIDE: The Darfur genocide refer to the systematic killing of Darfur men, women, and children which occurred during the ongoing conflict in Western Sudan. It has become known as the first genocide of the 21st century. The genocide, which is being carried out against the fur, Masalit and Zaghawa tribe, has led the international criminal court (ICC) to indict several people for crime against humanity, rape, forced transfer and torture. According to Eric reeves, more than one million children have been killed, raped, wounded, displaced and traumatised. The crisis and ongoing conflict in Sudan’s Western Darfur Region have developed from several separate events. The first, is a civil war that occurred between the Khartoum national governments and two rebel groups in Darfur, the Justice and Equality movement and the Sudan Liberation Army. The rebel group were initially found in February 2003 due to Darfur’s “political and economic marginalization by Khartoum”. A second factor is a civil war that has occurred between the Christians, the animist Black southerners, and the Arab dominated government since Sudan’s independence from the United Kingdom in 1956. The ethic conflict in Darfur has been persistent. Darfur is home to six million people and several dozen tribes. In 2013 the United Nations (UN) estimates that up to 300,000 people had been killed. By 2015, it was estimated that the death toll stood between 100,000 to 400,000. The BBC first reported on the issue of ethnic cleaning in November 2003, and earlier that year in March. In April 2004, Human Rights Watch (HRW) released Darfur Destroyed: Ethnic Cleansing by
government and Militia Forces in Western Sudan, a 77-page report compiled by HRW following 25 days spent in the religion. The use of rape as a tool of genocide has been noted. This crime has been carried out by Sudanese government forces and Janjaweed (“evil men on horseback”) paramilitary group.

The settings in which these attacks occurred: the Janjaweed forces surrounded the village and then attacked girls and women who left the village to gather firewood or water. The Janjaweed forces went to house to house killing boys and men’s while raping the girls and women’s by bringing them to a central location.

The United Nations issued a hybrid United Nations-African Union mission (UNAMID) to maintain peace in Darfur. It was established on 31 July 2007 with the adoption of Security Council resolution 1769. The Mission has 35 deployment locations throughout the five Darfur states. The African Union (AU) and the United Nations produced a framework document for intensive diplomatic and political peacekeeping efforts. The peacekeeping mission is confronted with several challenges from security to logistical constrained. The troops that have been deployed operate in unforgiving, complex and often a hostile political environment. Also, the mission is faced with many shortages in equipment, infrastructure, transportation and aviation assests.

GENOCIDE IN INDIA

In India there is no law which is specifically for genocidal crime but there are provisions in Indian Penal Code, 1860 which criminalises the acts which are in nature of genocidal crime. India is a Secular country and its also written in its Preamble, the Articles of Indian constitution gives various rights to its citizens which protects minorities, religions and castes from any type of discrimination and also prevents genocidal crimes from occurring, even after that India has faced some genocidal massacre like Direct Action Day (1946), Exodus of Kashmiri Pandits from Kashmir (1990), anti-Sikh riots(1984), Kashmiri Hindus killing (1990), Bombay riot (1992), Gujrat riot (2002)

 PREVENTION

Preventing atrocity crimes is far preferable to responding when the crimes are ongoing or after they have been committed, there are times when it has committed and after that many actions have been taken by various international organisations and court but failed to stop or took many years to stop it.

To prevent genocide crime, it is critically important to understand the root cause of these crimes. Genocidal crimes are not spontaneous act instead, they develop as a process over time, as a result of which it is possible to identify warning signs that they may occur sooner or later and that is the time to take preventive actions immediately and be prepare in advance for all the situation that may in the state. There are three types of prevention at different stages:

 Upstream measures: this step must to be taken before a genocide occurs to prevent from occurring. There are also ongoing efforts like ‘Early Warning Project’ it is an early warning tool developed by United States Holocaust Memorial Museum and Dartmouth college. This early warning system was a “first of its kind” designed to aid policy makers in determining the risk that a state faces for genocide. The Early Warning Project aids policy makers by determining which states are the most
likely to experience a genocide. From this, preventive steps can be taken against states that pose a risk to falling into genocidal actions.

**Mid-stream prevention:** Mid-stream prevention takes place when a genocide is already taking place. The focus of the Main-stream prevention is to end the genocide before it progresses further, taking more lives. This type of prevention mostly involves military intervention, it’s very expensive and has unintended consequences.


**Downstream prevention:** it takes place after a genocide has ended. Its aim is to prevent any other genocide in future, thus rebuilding and restoring the community is the goal. Justice for the victims also plays a major role in repairing community to prevent any further genocide in future. There is also a Genocide Task Force which is created in 2007, with the purpose of developing a strategy to prevent and stop future genocides.

### CONCLUSION

Genocide is a crime against humanity, wherever it occurred it has finished the targeted groups population about 60% to 97%. We should take lessons from all the countries who faced this and we should prepare and prevent every genocide when can occur in future. There are still some countries where genocides are going on, we should take right actions to control it, and do justice the victims. The victims can go to the International criminal court (ICC) or International Court of Justice (ICJ) for any type of genocidal cases. All members of the ‘United Nations’ are party to the International court of Justice, its jurisdiction is all over the world except few regions whereas International Criminal Court has jurisdiction to some countries, it can prosecute individual for the crimes of genocide, crimes against humanity, war criminals. Genocidal crimes can be identified earlier than they occur so administrations should always be alert to catch the warning signals and take actions.

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ENCOUNTER KILLINGS: JUSTICE BY POLICE?

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Abstract
An encounter killing is when a police officer uses force against a suspected criminal, either when he tries to flee from the police or when on a search or a raid, to the extent of killing him. The genuine, unplanned encounters are the ones that happen when the police officers act in self-defence however, in recent times, some police officers have been “staging” such encounters may it be for personal gain or to settle a vendetta. This paper aims to understand the origin, past provisions, legality, several contentions regarding Article 21 and other human rights and some important judgements related to the same.

Keywords: uses force, suspected criminal, self-defence, staging.

Background
Encounter killings in India can be traced back to the pre independence times when the Quit India Movement was gaining traction in 1942. Lord Linlithgow (the viceroy of India at the time) promulgated the Armed Forces Special Powers (Ordinance) which authorised the “Commissioned Officers not below the rank of Captain in the army, to use force if necessary to the extent of causing death of a person who fails to halt when challenged by a sentry or who attempts to destroy property which the Officer has been deputed to protect”\(^{1571}\). The Ordinance openly gave the authority to any commissioned officer to use force, even to the extent of death. This can be marked as the initial wave of encounter killings. By these provisions, the authorities in charge allowed officers to control the protestors and kill them without a proper trial which violated principles of natural justices which helped them hugely in curtailing the Freedom Movement.

The continuation of such a provision was observed when the Governor-General of India promulgated four ordinances to control the situation arising of the Partition at the time. The Ordinances contained similar provisions and therefore, officers of the military were given power to use force even to the extent of death in Independent India.\(^{1572}\)

However, these legislations were passed with the intention “to control insurgencies” by the army and the dawn of encounter killings by the police emerged in the period of the 90s. Encounter Killings were on a rise with the police often dodging the due process of law. This was made most evident by the PUCL petition filed in the Bombay High Court which claimed that many of the encounters of the police were in fact staged or faked. The court took note of the 47 encounters in 1997 in Mumbai itself and allowed for a judicial inquiry.\(^{1573}\)

“Let a hundred guilty be acquitted, but an innocent shouldn’t be punished” is what one must keep in mind while trying to analyse the situation in India. Infact, the situation is much worse now with the number of cases rising. The badly affected

\(^{1572}\) Naga People’s Movement of Human Rights vs. Union of India AIR 1998 SC 431.
\(^{1573}\) People’s Union for Civil Liberties vs. State of Maharashtra 1998 BomCR (Cri) 741.
areas are Manipur, Andhra Pradesh and even Assam. In Andhra Pradesh, numbers have touched 4000 alleged encounters\textsuperscript{1574} and with such large numbers and the question of due process of law, this has become a grave problem that the society needs to deal with.

Police’s Defence

The \textit{Extra Judicial Execution Victims’ Family Association v. Union of India (2013)}\textsuperscript{1575} case shines light on the state of affairs in Manipur and this should be taken into consideration while understanding the attitude of the police. The writ petition questioned the killings of 1528 people in Manipur and alleged the killings to be extra judicial. In the counter-affidavit filed by the State of Manipur in response, they denied the above allegations and it was also stated that the NHRC found no violation of any human rights in some of the cases highlighted in the petition. The State also tried to simply justify these killings by giving the number of policemen that were killed by the insurgents in the State. However, the court opined that this was no explanation for the question raised in the petition. Insurgency, no doubt, is a menace that has troubled the state of Manipur and lots of police officers have lost their life on the line but this cannot be the answer to extra judicial killings.

In the counter-affidavit filed by Union of India, the Centre even contended that, with the different legal provisions of Criminal Procedure Code and the Armed Forces (Special Powers) Act, 1959, the act of the police killing a person during an anti-insurgency mission may be legal. The Centre, in the counter-affidavit, tried to take the defence of counter-insurgency missions however in 14 of the cases highlighted in the petition, proper judicial inquiries ascertained that none of the victims killed in these cases were part of any insurgency groups. Hence, there is no reason or possibility that insurgency was a part of these cases\textsuperscript{1576}

Atleast in the 14 cases, judicial inquiry was conducted wholly. In 10 other highlighted cases, there was a huge lapse in investigation by the Executive Magistrate. Statements of the victims’ families weren’t recorded and the police officers did not even bother appearing before the court to record their statements. Even with these gaps in inquiries, the Executive Magistrate concluded that there were no encounter killings by the police. The amicus curiae however opined not to take these inquiries into consideration\textsuperscript{1577}

Besides claiming anti-insurgency missions, the police have been dodging extra-judicial killing allegations by claiming the right to self-defence. It is imperative that each and every police officer has the ability to protect himself while he or she protects the nation however grave misuse of this has led to many complications and even abuse of power. This is said only because it is observed that in most of the cases, there is a template to what supposedly happened. It appears that the police use a similar narrative in the majority of the cases.

One of the popular and recent cases of encounter killing is the Hyderabad case


\textsuperscript{1575} Extra Judicial Execution Victim Families Association. vs. Union of India  AIR 2013 SC 818.

\textsuperscript{1576} Ibid.

\textsuperscript{1577} Extra Judicial Execution Victim Families Association. vs. Union of India  AIR 2013 SC 818.
wherein the police killed four men who allegedly raped and killed a female veterinarian. The facts of the case dictate that the police had the four men in custody but took them to the original crime scene. Ten policemen escorted the four men who were not even handcuffed to search for the victim’s phone, watch and power bank. The four men supposedly started to attack the ten police officers after which they took guns from two officers and started to fire at them. The police retaliated and killed all four.\textsuperscript{1578}

When we dig a little deeper, we can observe that this was not the first encounter for the commissioner in charge of the case, VC Sajjanar. In fact, in 2008, three men were arrested for allegedly acid-attacking two girls. Just three days later, they were killed in an encounter. The three men were taken to the crime scene where they broke free, snatched the police officers’ weapons and started to fire. The police killed all three in self-defence.\textsuperscript{1579} Now what’s the similarity in both cases? In both cases, the officer-in-charge was VC Sajjanar. In both cases, there was mounting pressure from the public and media for inaction. In both cases, the suspects were taken to the crime scene. In both cases, the suspects broke free, took the police officers’ guns away and fired at the officers. It may seem like a coincidence but in fact may not be one. VC Sajjanar was lauded as a public hero after both cases too. Increasing pressure and a personal gain for the officers? At what cost, simply killing the suspects in self-defence and closing the case.

This is just one specific police officer with a history of encounters but there are many hailed as “encounter specialists”. In the Mumbai Police itself, there are several “well-renowned encounter specialists” such as Daya Nayak, Vijay Salaskar and Pradeep Sharma - the three of them combined over three hundred “encounters” under their belt.\textsuperscript{1580}

In another shocking incident, CPI(M) activists K Parsaiah and M Ravindra Reddy were arrested and just two minutes after they were presented to a magistrate, they were killed in an encounter. The list goes on and in fact, the 3000 naxalites and 1000 ordinary citizens killed in just 38 years of Andhra Pradesh, it is estimated that 90\% of them could be fake encounters of similar nature with similar stories.\textsuperscript{1581} The police have a complete need for having the right to self-defence however, if it is misused; and misused to such an extent, there need to be serious consequences to those involved.

\textbf{The Serious Problem}

Under Article 21 of the Indian Constitution lies the right to life and even under Article 3 of the Universal Declaration of Human Rights (UDHR), it is stated that “Everyone has the right to life, liberty and security of person.” Hence, the life of any individual cannot be taken away except according to procedure established by law. When the police are required to use force to disperse a crowd (for example as in the case of Panchadi Krishna Murty) they must use minimum force and in cases of opening fire, must obtain permission of a magistrate and also shoot without the intention of

\textsuperscript{1578} Hyderabad case: Police kill suspects in rape and murder of Indian vet, BBC Asia, 6th December 2019

\textsuperscript{1579} Ians, “Andhra Police kill 3 youths involved in acid attack”, IndiaToday, 13th December 2008.

\textsuperscript{1580} Aakar Patel, “Encounter Specialist: A Rare Breed Of Policemen Whose Criminal Act Is Celebrated As Justice”, Outlook India, 8th December, 2019.

\textsuperscript{1581} Supra note 4.
causing death. Taking the same example of Murty, the police supposedly while returning for the search of him, coincidentally ran into a mob of 30 men. The Inspector in charge tried to get them dispersed however the effort was in vain and the men charged against them shouting “Kill the Police” and with this the police opened fire. Surprisingly or perhaps not, the bullets of the police ended up killing Murty and six others.¹⁵⁸²

This is, unfortunately, very similar to most of the encounters - the police run into a criminal who they have been in search of and the criminal tries to injure them to which the police act in self-defence. This results in death on the side of the criminals but not even an injury to the side of the police. What is more disturbing is that the police officer in charge of the encounter would gain personally for example an ego gratification or medals and promotions. This gives the officer an additional incentive to choose encounters as a way to deal with the criminal.¹⁵⁸³

In many other instances, the police have overstepped their boundaries and used deadly force against innocent citizens and caused the death of an innocent civilian. In another case of Extra Judicial Execution Victim Family Association v. Union Of India (2017), findings of the Commission formed as an outcome of the 2013 case were presented before the court. It was found that in 32 cases, the Gauhati High Court found a more than prima facie case of fake encounters and therefore awarded compensation to families of the victims.¹⁵⁸⁴ However, monetary compensation is not the answer to this grave issue. The police cannot have it’s way, break the law and only pay some money as a punishment. This would make it very convenient for the police to close cases quickly and skirt the law. The state cannot violate the fundamental and human rights of the citizens and be given a way out by compensating the family. Strict action and implementation of the guidelines set forth in the relevant judgements is what is required.

Conclusion
With all things considered, the extra-judicial killings are a threat to the society’s human rights and make the investigator, judge and executioner all in one. This is against criminal jurisprudence and rule of law. The mindset of the people is also a part of the problem. Many times, these police officials are valourised and it can be said that the media has a huge role in this heroism. The people accept these actions with huge celebration when in fact it is a clear violation of law. Often, the victim of an extra-judicial killing can be killed to set scores, political vendetta or even because of some kind of rivalry - none of which qualifies as a restriction to the right to life or a reason by which the police has even the slightest authority to take a citizen’s life. It has been a few good years since landmark judgements such as the ones spoken above have come to force yet there have been numerous such incidents (such as the Hyderabad case in 2019) which just goes to show that the police, not paying heed to the verdicts of even the Supreme Court, continue with their ways.

Of course not all police officers indulge in such practices and some encounters are

¹⁵⁸² Ibid.
¹⁵⁸³ Jyoti Belur, “Why do the police use deadly force?: Explaining Police Encounters in Mumbai”,
genuinely unplanned and true however those who do kill alleged criminals are the ones who are responsible for causing an unbalance in the rule of law. The Indian courts are based on the principle “innocent until proven guilty” and therefore when these suspects are shot by the police they are innocent since no court had declared them guilty of the crime. In no form or manner must the public come out to support these “encounter specialists”, political support must come to an end and those who act in a way that have even the slightest element of extra-judicial killing must be severely taken to task. There must be punishment and accountability on the other side of these acts rather than gallantry medals and ready promotions. Only then will we be free of such clear violations of law.

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RULE OF LAW; THE SOLUTION TO THE BARRIERS FACED BY THE ECONOMICALLY WEAKER SECTION OF THE SOCIETY FOR JUSTICE

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ABSTRACT
Justice is the foundation of the rule of law and without rule of law society could not be able to headway effectively. Accessibility to justice will ensure an equal opportunity of being heard before the court of law on the part of each and every individual gets an opportunity of being heard effectively, then it will give rise to free and fair justice with no prejudices. But still even after the 73 years of independence, we could see the social dogmas. Being belong to the Dalit and minority community, people have been discriminated adversely. This paper aims to shed light on the standing block with respect to accessibility to justice as well as the significance of Rule of Law.

Keywords: Discriminated, Justice, Standing block, Rule of Law, equal opportunity.

INTRODUCTION
Justice is one of the imperative aspect of the Rule of Law. Each and every individual should have accessibility to justice with no discrimination as well as marginalization. Access to justice could be defined as where every human being is able to attain remedy for affront. Effective maintenance of the state directly banks on the notion of justice because rule of law blossoms only if the parties endures pain with respect to the either civil or criminal wrong have access to the justice before the constitutional bench. And when the people are able to seek remedy against the wrongdoer, it will contribute towards the extant of the state. Accessibility to justice or in other words we could say that right to the constitutional remedies is a basic human right which shall be made available to each and every individual regardless of prejudices.

Ordinarily, it has seen that, for the economically weaker section of the society, justice become restricted or unhandy. In more simple words we could say that minorities as well as Dalits are unable to attain justice for themselves. It should be taken into the meditation that justice is an indispensable right required to maintain the uniformity as well as the dignity of the individual.

Here, the noteworthy aspect is that our society is divided into halves that is to say poor as well as rich. The leukemia is that richer section of the society nimbly has the accessibility to the every opportunity but when it comes to the poorer section of the society it has observed that the direction of the vehicle get change that is to say they undergone the numerous loopholes including effective accessibility to justice. They are unable to pony up the requisite fees with respect to the counsel as well as the representation. The chief ratiocination behind this is scarcity of economic source. Thus, such issue are of paramount nature which needs to be highlighted before the appropriate law making authority or the legislature.

As we know that we live in the era of the 20th century rife with the democratic form of government subject to the title of “Best form of Government” but that does mean that it does not constitute any loopholes or shortcomings rather it. If not then, why people who belongs to the Dalits as well as minorities community are immune to
impartiality as well as stigmatization with respect to every field whether it is housing, education, employment, public participation, etc? Why they are vulnerable to the dogmas? Thus, Franklin Roosevelt himself portended that democracy could not be able to survive market if it does not consider the rights of each and every individual including Dalits as well as the minorities1585.

Even in the Constitution of India it has been very decorously propounded that each and every Individual has a right to secure justice, equality, liberty and fraternity so that every human being is able to live his life with dignity. If minorities as well as the Dalits have not been given the equal opportunity of being heard properly then how come each and every individual is able to secure justice, equality, liberty and fraternity?

We know that justice, equality, liberty and fraternity are the vital pillars of our constitution that is to say these are the main objective of our constitution. All these are indissociable or interrelated with each other. It means if anyone of these is violated then the others’ will also get violated. Hence, hampering the right to constitutional remedies with respect to socially, politically and economically weaker section of the society directly gives rise to injustice.

Our constitution insist on that WE THE PEOPLE OF INDIA of India having solemnly resolved to constitute India into sovereign, secular, democratic and republic and to secure all to all its citizens justice, liberty, equality and fraternity. Here, the noteworthy aspect is that the word “all its citizen” constitute that every human being, with no discrimination, shall have the right to derive the benefits from their rights. Thus, right to not being heard itself implies that we are driving the vehicle against the direction provided by our founding fathers of our constitution.

In Maneka Gandhi vs. union of India1586, justice Bhagwati stated that fundamental rights are very crucial to each and every individual to maintain or safeguard the dignity of the individual. It was also said that the main object of the fundamental rights is to maintain the Rule of Law in a society.

METHODOLOGY
This research paper deals with the dilemma confront by the economically exhausted people with respect to the accessibility to justice and the same has been explicated in the great detail. The data mentioned in the said research paper has been collected theoretically in great detail.

BARRIERS FACED BY THE ECONOMICALLY WEAKER SECTION OF THE SOCIETY
1. POVERTY
Poverty contributes to the inability on the part of the poor to seek remedy for the grievances. Because they are insolvent to endow the numerous payments say for instance administrative payment, payment for legal advice, counsel, etc. Thus, lack of economic resources contributes to the infringement of their legal rights.

Abolishment of poverty does not mean that providing proper health care facilities, housing facilities, education, food,
employment besides each and every individual must have requisite authority as well as power to derive the benefits from their basic rights with no discrimination. Thus, if the law is equivalent before each and every individual then only we could be on the path to eradicate the poverty from each and every corner of our societies effectively

Being vulnerable to the poverty, they are unable to fight for their exploitation, they are unable to fight for their rights. Consequently, it give rise to the conflict with respect to their livelihood. According to the Article 14 of International covenant on civil as well as Political rights, if any individual is unable to pursue the legal panacea for the civil or criminal wrong then it merely not only violates the right to constitutional remedies rather than it also hampered several other rights like right to security, right to equality, right to non-discrimination

2. DISCRIMINATION
The word discrimination primarily means that where the growth of an individual is restricted on the basis of caste, creed, religion, nationality, language, wealth, etc. This is the general interpretation of the Discrimination. But now with respect to the those who are politically, socially and economically weak, the word discrimination means prohibition on their participation, prohibition on the decision making, prohibition on their access to education, prohibition on their access to job, etc. Here, the notion of employment is quite essential. The chief ratiocination is that lack of employment contributes to the production of poverty in the sense that lack of means of earning a living will deteriorate their other basic needs required for their survival. Here, the most important canvas which arises is that why these people prone to such an adverse discrimination? Why don’t they have adequate source of livelihood as the rest of the population has? There was a boy named Govind Gyan chand. He was 14 and used to go to the school situated near his village. At school, one day he was being questioned about his caste. To this question, he gave the answer that he belongs to the Dalit community. Thus, one day when he was going back to the home after school, some of the boys who used to study at the same school, flogged him so adversely just because he belongs to Dalit community. He himself stated that “upper caste people use to always torture the lower caste people and I wanted to skip the school but I was unable to do the same”.

Manash Firaq Bhattacharjee, professor at Ambedkar university of Delhi himself wrote that these extreme violence blossom an invisible stigma on those students who belong to the community of Dalits. After getting acknowledged with respect to such brutal treatment numerous question tends to appear. The education is denied to them just because they belongs to Dalits community. Is that how we are going to achieve the objective of our constitution by treating the students on the basis of caste? Is that how we are going to realize the right to education? Is that the way to achieve the equality by flogging the Dalit communities people? Is that how we are going to constitute India into free and fair India on the basis of caste?

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1587 Soros and Abed, 2012
1588 See https://www.ohchr.org/EN/Issues/Poverty/Pages/AccessToJustice.aspx
1589 See https://www.theguardian.com/world/2018/may/22/class-act-the-great-dalit-fightback-that-started-in-the-schoolroom
3. EDUCATION
We know that there is a famous old saying that “you do not know what you do not know”. It primarily means that there is something which each and every individual should know but unfortunately they are not well versed with that thing. Similarly, here also this old saying is quite applicable, in the sense that people who are socially, politically, and economically frail, are not aware about the certain rights available to them. How they can enforced those fundamental rights effectively grant to every human being by Part III of the Indian constitution. Thus, the notion of caste become a major problem for them.

Why the caste is the basis of education? Why not equality is the basis of education? Why the economically, politically and socially weak are not entitled to the growth as well as development?. But sometimes it also happens that though they are receiving the education but that education don’t constitute any quality that is to say that they have not been teach by the qualified teacher effectively. It is just for the name sake of right to education. Judicially, in Environmental and Consumer Protection Foundation v. Delhi administration the court held that in order to achieve the true motive of Article 21A that is to say Right to Education it is quite necessary on the part of the school that school shall have the highly qualified teacher along with the reasonable infrastructure.

There was a PHD scholar at Jawaharal Nehru university, named Muthu Krishnan, was found dead on 13th March, 2017. He was hanging by the ceiling fan. From his investigation it was realized that he was subject to the extreme depression as well as discrimination. Before dying he himself wrote that when the equality is disrespected or violated then all other things will also automatically get rejected. Even he wrote a letter to the vice chancellor that let the student of marginal background should be given an opportunity to study.

Similarly, there was a one more student named Rohith Vemula, PHD scholar at Hyderabad central university, did suicide. He himself stated that his birth was nothing but a “fatal accident”.

4. LEGAL ASSISTANCE
Lack of Legal assistance is another stumbling block to seek remedy for the wrongs. As we are well versed with the fact that our society is divided into partsd that is to say Haves and Haves no. It means Haves category ordinarily has all the opportunities to live their life with dignity. And what about Haves not? When it comes to the Haves not situation becomes contradictory. They have to fight for their dignity? Why is it so? They do not have the adequate source of food. They do not have the adequate source of education. They do not have the adequate source of deep pocket, most important source because if they have the accessibility to the deep pocket then their other needs will get the pillars to stand effectively. Lack of adequate deep pocket not only affect them with respect to the education, housing, etc but also before the constitutional bench that is to say when they are unable to pay the requisite amount before court of law with respect to the legal assistance.

1590 AIR 2012 (4) SCALE 243
1592 See https://www.indiatoday.in/magazine/the-big-story/story/20160215-dalits-untouchable-rohith-vemula-caste-discrimination-828418-2016-02-03
Dr. Bhimrao Ramji Ambedkar stated that “if somebody asked me to name the most important Article of the Indian constitution without which all the articles of the Indian constitution is equivalent to vain then I would like to shed light on the Article 32 of the Indian constitution that is to say remedies for the enforcement of the right or right to constitutional remedies and the right to constitutional remedies is both heart of the constitution as well as soul of the constitution.\(^{1593}\)

Hence, owing to the abuse of the constitutional remedies, it would not be possible to showcase their misery effectively before the hon'ble bench that is to say their opportunity of being heard gets hampered and consequently they are unable to secure justice for themselves.

And when such kind of circumstances will appear it will hamper the confidence of people with respect to Justice. Judicially, in Hussain vs. Union of India\(^{1594}\), the court held that to deliver the justice on time is part associated with the basic human rights and if the justice is not delivered then as a result it will curtail the confidence of the people with respect to the administration of justice.

SIGNIFICANCE OF THE RULE OF LAW
The concept of Rule of Law is primarily derived from the English constitution. There is an exigency to shed light on the concept of rule of law because rule of law facilitate to maintain the balance in the society. If there is no rule of law in the society then ultimately it will lead to chaos or conflict. The rule of law requires that people should abide by the accepted rules and regulations rather than focusing on the decision which are arbitrary in nature and these accepted rule should be applicable equally to every human being.\(^{1595}\) The rule of law cutback the root of arbitrariness from the society and in turn it will ensure the free and fair procedure to seek justice for every human being because it is based on the idea of justice, equality, liberty and fraternity.\(^{1596}\) It merely not only put restrictions on the employment of the arbitrary power but also shield the fundamental rights of every human being so that each and every individual is able to live his life peacefully with no discrimination and maintain the unity as well as the integrity of the nation. Thus, it will furnish the justice with no favouritism at the earliest and give birth to the consistency with respect to the law.

It has been rightly said that “the most effective way to know the interpretation of the Rule of Law in everybody life is to reminisce such situation when there was no rule of law.\(^{1597}\)” One of the famous Greek Philosopher wrote that if law is immune or subject to any authority then society would not be able to progress effectively but on the other hand here the law is the head with respect to the government then we could say that each and every individual would receive the blessings of God that shower on the state.\(^{1598}\)

Thus, we could say that Progress of society count on Rule of Law and rule of law could be realized only when the right to constitutional remedies is protected. The

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\(^{1594}\) AIR 2017 SC 1362

\(^{1595}\) Alok Kumar Yadav, *'Rule of Law'*; vol. 4, IJLLJS, p. 206 and 207

\(^{1596}\) Ibid

\(^{1597}\) Dwight D. Eisenhower

\(^{1598}\) Plato
right to constitutional remedies is the right which makes the other rights real and if there is no right to constitutional remedies then the others right are of no use.\textsuperscript{1599}

UNITED NATION PRINCIPLES WITH RESPECT TO ACCESS TO LEGAL AID

1. RIGHT TO LEGAL AID
   It is one of the vital principle of the united nation to secure justice effectively on the part of every human being. The right to legal aid banks on the rule of law. It is a duty on the part of the state that right to legal aid should be introduced in the legal system as well as in the constitution.

2. RESPONSIBILITY OF STATE
   The state shall formed some appropriate mechanism to educate people about their rights available to them with the purpose to eradicate criminal conduct as well as victimization and provide protection to those who provide legal aid that is to say their independence should not be hampered. Besides, the state shall also make people aware about the procedure to file a complaint before the court of law and how one can secure justice at the earliest.

3. LEGAL AID FOR ECONOMICALLY EXHAUSTED PEOPLE
   There is a duty arises on the part of the judges as well as prosecutors to provide lawyers who cannot afford to fight for their misery due to the exhausted economic position so that justice could not be denied to them.

4. NON- DISCRIMINATION
   The state shall make sure that legal aid shall be provided to each and every individual irrespective of caste, creed, education, color, religion. Nationality, wealth, birth, property, political or social views, etc.

5. RIGHT TO INFORMATION
   The state shall ensure that every human being has a right to know about the legal aid and also ensure that such services of legal aid should be made available to every human being free of cost.

6. REMEDIES AS WELL AS SAFEGUARDS
   The state shall formed effective remedies if the circumstances like where approach to legal aid is impede as well as undermined or where an individual is not informed with respect to the provision of legal aid.

7. EQUALITY WITH RESPECT TO LEGAL AID
   The state shall ensure that legal aid should be provided equally to every human being which includes women, children, minorities, Dalits, people who are immune to HIV and other harmful diseases, refuges, asylums seeker, migrants and also to those who are living in the socially as well as economically backward areas.

8. FORMATION OF THE PARTNERSHIP
   The state shall motivate the barristers, colleges/universities, civil society, etc to contributes with respect to the legal aid and also focus on establishing the public-private partnership with the motive to enhance the benefits of the legal aid to every human being.

CONCLUSION
As we know that right to constitutional remedies is the heart as well as the soul of the constitution because right to constitutional remedies is the only right which gives life to the other rights that is to say to derive the benefits or to enforce the other rights, conferred by the Part III of the constitution, right to constitutional remedies is quite fruitful. There is a duty or commitment arises on the part of the state to make socially, politically and

economically weak people realize about the certain fundamental rights available to them and should protect those rights from the discrimination and fund these people whenever required so that they could be able to seek remedy against the wrongdoer before the appropriate court of law. Because this would maintain the confidence among the people with respect to the system of administration of law.

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This treaty was concluded after almost 1000 years later after solemn treaty for establishment of eternal peace and brotherhood.

From Dr. S.K. Kapoor, International Law and Human Rights, 2017, Central Law Agency at page 86... Kauṭiliya in the 4th century BC elaborates rules for the conduct of diplomacy, as a, means of avoiding conflicts, and the reception and treatment of diplomats.

In the Ramayana period relations of sovereign rulers were based on the definite rules of International law and these rules were recognised by all sovereign rulers.

Malcom N. Shaw, International Law, 8th edition, 2017, Cambridge University press pg. 54

Ibid. at pg. 12

United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law, Volume 41, No. 4, October, 1947

Quoted in United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law – (from H. “W. Malkin, "The Inner History of the Declaration of Paris," British Year Book of International Law, Vol. 8, 1927, page 2 ) that at the four rules of maritime law, "the Declaration of Paris was the first and remains the most important international instrument regulating the rights of belligerents and neutrals at sea which received something like universal acceptance"

Seven powers were Britain, France, Austria, Russia, Turkey, Prussia and Sardinia. It was signed after the end of Cremeian war in 1856.

United Nations Documents on the Development and Codification of International Law - Supplement to American Journal of International Law, Volume 41, No. 4, October, 1947


The seven Subjects were
(1) Nationality,
(2) Territorial Waters,
(3) State Responsibility for damage done in their territory to the persons or property of foreigners,
(4) Diplomatic immunities and privileges,
(5) Procedure of International Conference and Procedure for the conclusion and drafting of treaties,
(6) Exploitation of the products of the sea, and
(7) Piracy.

The other subjects were
(1) Law relating to functions and competence of Consuls, and
(2) The Competence of Courts regarding foreign states.

It failed to maintain legal order on multiple invasion Japan invaded China in 1931, Italy attacked Ethiopia, and Germany embarked unhindered upon a series of internal and external aggressions. For more refer to Malcom N. Shaw, International Law, 8th edition, 2017, Cambridge University press at page 22


Three Topics were namely a.) Nationality, b.) Territorial waters and c.) Responsibility of states for damage done to foreigners. The committee able to succeed in only one on questions relating to conflict of Nationality and Statelessness.
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