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EDITORIAL

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With this thought, we bring forth this journal before you.
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A CRITICAL ANALYSIS OF PROTECTIVE DISCRIMINATION UNDER INDIAN CONSTITUTION

By Aarushi Gupta
From Symbiosis Law School, Hyderabad

ABSTRACT
The political system and structure under the Indian constitution is a federal democratic government based on the principles of justice, equality and republicanism. The framers of the Indian constitution showed absolute respect towards human integrity and dignity and unwavering commitment to non-discrimination, secularity and equality and wholehearted concern for the weak and the poor by taking certain positive measures for certain sections of the society like the schedule caste, schedule tribes and other backward classes.

Keeping in mind the growing trend of reservation, the need of the hour is to critically study and analyze the concept of protective discrimination. The objective of this research paper is to highlight the concept of protective discrimination as reflected under the Indian constitution and scrutinize its relevance in the present dynamics. The research paper would bring to light the positives and negatives of protective discrimination and would attempt to provide viable suggestions and reforms for the same. The research paper would also focus on ascertaining India’s stance on the topic as against the other prominent legal systems.

CHAPTER 1- INTRODUCTION

1.1 INTRODUCTION

Equality is one of the core concepts of the world democratic aspirations. India is riding on the same boat. Our society has always been a hub of caste stigmas. Seeped in the ancient culture, invaded by the individuals of different religious backgrounds, India emerged as an exclusive symbol of a multilingual, multireligious and multiracial society. Inequality is inevitable, all the societies are clutched by the vice of inequality. In India the traditional caste system, classified people into different social strata on the basis of their birth. The people at the lowest level of this caste hierarchy were denied even the basic inherent rights, they were at the mercy of the upper strata. Their economic backwardness was complimented by social isolation which resulted in destitution and deprived them of their dignity. The lower caste had to adhere to the whims and fancies of the upper caste with their mouth shut and hands tied. This brutal condition continued till some rational individuals of the society realized the depth of this malady which resulted in framers of the constitution to take a step towards resolving the issue.

Every democracy encounters the adversity of reconciling two fundamental contradictory political notions- one is equality before the law regardless of the difference in caste, creed, gender, race and religion and the second is attaining social justice at the cost of the same promise of equality before law. Even a developed democracy like U.S.A is no exception to this contradiction and has implemented the concept of affirmative discrimination to ensure social justice at the expense of equality before law. Even a developed democracy like U.S.A is no exception to this contradiction and has implemented the concept of affirmative discrimination to ensure social justice at the expense of equality before law. Even a developed democracy like U.S.A is no exception to this contradiction and has implemented the concept of affirmative discrimination to ensure social justice at the expense of equality before law. Even a developed democracy like U.S.A is no exception to this contradiction and has implemented the concept of affirmative discrimination to ensure social justice at the expense of equality before law. Even a developed democracy like U.S.A is no exception to this contradiction and has implemented the concept of affirmative discrimination to ensure social justice at the expense of equality before law. Even a developed democracy like U.S.A is no exception to this contradiction and has implemented the concept of affirmative discrimination to ensure social justice at the expense of equality before law.
loans and various other fields. This policy is referred to as protective discrimination. In other words, protective discrimination is the policy followed by the state granting certain privileges to the downtrodden section of the society. This practice has been enshrined in the Constitution of India and has been institutionalized. The Constitution of India has various articles which deals with reservation and highlights the concept of protective discrimination.

“The Article 15(1) states that, the state shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them”, also provides in clause (4) ‘Nothing in this article or in clause (2) of Article 24 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes and tribes’.

“The Article 16(1) states that, ‘there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State’, also provides in clause (4) ‘nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State’”.

There are many more articles under the Indian Constitution which deal with protective discrimination which will be dealt in detail in the Chapter 2 of the research paper.

The preamble of the Indian Constitution ensures “justice- social, economic and political as well as equality of status and opportunity and to promote among them all”. This proves that just like United States, India also has to harmonize the twin objective of justice and equality. The comparison between the concept of protective discrimination between India and U.S.A would be dealt in depth in chapter 3.

As established above, Indian constitution deals with the concept of protective discrimination in various provisions, however, there has always been a debate whether the notion of protective discrimination is positive or negative, whether the policy is still relevant in present context or not? What started out as a means to protect and safeguard the underprivileged group of the society, is being used as a weapon to promote personal vendetta and goals. The pros and cons of the concept of protective discrimination is further elaborated in chapter 4.

1.2 RESEARCH QUESTIONS

1. What is the stance of Indian Constitution in the case of protective discrimination?

2. How is the concept of protective discrimination different in India as against U.S.A.?

3. Whether the concept of protective discrimination is beneficial for India or a reform is needed?

CHAPTER 2 – STANCE OF INDIAN CONSTITUTION ON PROTECTIVE

1 INDIA CONST. art. 15, cl. 1.
2 INDIA CONST. art. 15, cl. 4.
3 INDIA CONST. art. 16, cl. 1.
4 INDIA CONST. art. 16, cl. 4.
DISCRIMINATION.

2.1 INTRODUCTION.

The Indian history saw a transition in almost all the affairs pertaining to this country involving the change in the ruling pattern, from the kings, to a colony and then to a democracy, it has been a rollercoaster ride for the Indian society. However, the one thing that remained static in this dynamic affair was the caste system. The essence of the Indian society is its intersecting and overlapping groups and subgroups formed on vocation, sect, wealth, religion, political affiliation and language. However, the most peculiar and overpowering characteristic of Indian society is its formation of caste based hierarchical structure. The members of the caste-based groups were decided by their birth, not everyone could be included in these predetermined caste groups. The caste groups residing in a specific geographical territory had their own beliefs, rituals and a way of leading their life. Throughout Indian history the four caste which were prominent were the Brahmins, Kshatriyas, Vaishyas and the Shudras, with the Shudras being at the lowest rung of this class strata. The Shudras were treated as subordinates to the remaining three classes and were approached only for menial jobs. They were deprived of their basic rights such as education, health and practicing their religious beliefs. Shudras came to be recognized as the untouchables in the modern India. The untouchables were treated as the outcaste and were admonished as the deferential class. This class was the most oppressed class economically, emotionally and physically.

2.2 INDIAN NATIONAL CONGRESS VIS A VIS PROTECTIVE

The stance of the Indian National Congress on the abhorrent notion called untouchability was a wobbly one till the framing of the Indian Constitution. The only step in this direction was taken in the Congress’s session in Calcutta conducted in the year 1917, wherein the Congress passed a resolution for the same. The resolution was aimed at providing social justice against the retrograde customs imposed on the opposed class over centuries. The key person behind the implementation of this resolution was Natesan, he was supported by Rama Iyer and Bhulabhai Desai.

The plight of the untouchables was highlighted during the 1922 when the Congress was under the leadership of Gandhi with Annie Besant as the president. Despite Gandhi being the torch bearer for the upliftment of the untouchables no significant step apart from the lip service was taken by the Congress. To make the matters worse, the task of eradicating untouchability was given to the Hindu Mahasabha by the Congress in 1923. The first round table conference conducted in 1930 was the turning event which was the first real step taken by the Congress to address the plight of hundreds and thousands of the silent untouchables. The round table saw the first two untouchables being given a say in the matter of governance, this became the first step in recognizing the interests of untouchables were different from the mainstream Hindu society. To further showcase their stance and seriousness on the issue, the Congress also appointed a minorities committee headed by the then British prime minister Ransay MacDonald.


With the attainment of freedom, the Congress worked for the attainment of upliftment of the scheduled tribes and scheduled caste, but the major reason for this noble deed was the political dependency on these people was the vote banks. Behind the façade of upliftment of the SC’s and ST’s, Congress was strengthening its roots in the political soil of democracy of the country by treating the SC and ST as the vote bank. The assignment of the constituencies and distribution of party tickets also involved caste system as the core criterion. This made the upper caste wary of their position in the governance of the country. However, despite all the negatives, Congress leaders specially Mahatama Gandhi were the first to recognize the problem of caste system and discrimination and worked in accordance to abolish the evil of discrimination from the country through the notion of protective discrimination as an affirmative action.

2.3 REASONING BEHIND PROTECTIVE DISCRIMINATION
The framers of the constitution recognized Article 14\textsuperscript{8}, which provides for equality before the law to be one of the fundamental rights, while, Article 14 provides for equality before the law, it also aims for equality among the equals in pursuit of social justice. Protective discrimination steps in to attain this social justice by following the policy of uplifting the downtrodden and underprivileged class who have suffered through educational. Political, social and economic oppression over the decades. To equal unequal’s is to perpetuate inequality. The dice is rolled in the favor of the advantages section of the society when weaker section of the society and the privileged section is treated equally. To provide the weaker section with a fighting chance against the privileged section, the concept of reservation was introduced. To bring both the weak and strong on the same footing, preferential treatment to the underprivileged section becomes a necessary. The same justification and logic were provided by the framers of the Indian constitution. The framers of the Indian constitution used the concept which was inscribed in John Rawl’s theory of justice\textsuperscript{9}, which explains deviation from equality for the purpose of attaining justice.

2.4 PROVISION FOR THE DEPRIVED CLASS UNDER INDIAN CONSTITUTION
With the independence, the framers of the Indian Constitution saw a chance at freedom from the evil vice i.e. untouchability and discrimination based on the caste system. To combat against the caste system, the framers of the constitution embedded various provisions granting special privileges to the downtrodden and minority castes such as the scheduled castes, Anglo-Indians, scheduled tribes and other backward classes.

The scheduled caste and scheduled tribes

\textsuperscript{7} H. KOTANI, CASTE SYSTEM, UNTOUCHABILITY AND THE DEPRESSED 5 (1997).
\textsuperscript{8} INDIAN CONST. ART. 14. (Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth)
\textsuperscript{9} Rawl theory of justice revolves around the adaptation of two fundamental principles of justice which would, in turn, guarantee a just and morally acceptable society. The first principle guarantees the right of each person to have the most extensive basic liberty compatible with the liberty of others. The second principle states that social and economic positions are to be a) to everyone’s advantage and b) open to all.
also referred to as untouchables due to several socio-cultural grounds were far away from their dream of a safe space for them in the society. The concept of occupational mobility was a far-fetched dream for them. To provide the untouchables with a safe space, the framers included various provisions in the Indian constitution. Article 15(1) provides that, “the state shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them”, also provides in clause (4) “Nothing in this article or in clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes and tribes.”

The problem faced by untouchables which is of discrimination and lack of opportunities due to their caste was also a challenge to the minorities in India. Therefore, there was a need to protect the minorities from the discriminatory practices as well. For the purpose of providing protection, three groups have been noticed, the religious minorities who are fighting for their political rights, the linguistic minorities, who are working to conserve their language, to acquire employment and education and the third group includes scheduled castes and scheduled tribes who fight for their economic, political and education rights, along with waging a war to protect their laws and culture. All the three groups have a different set of problems which have been duly acknowledged and steps have been taken to safeguard their interest under the Articles 14, 15 and 16 of the constitution.

The president under the Article 341 has the power to notify, territory wise, "castes, races or tribes or parts of our groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be scheduled castes". Article 330 and Article 332 grants reservation of seats for the scheduled castes in the House of People of Lok Sabha and State Legislature respectively. The time period for the continuance of reservation is stated under Article 334. The time period has been extended perpetually as all the political parties have showed a deep interest in the concept of reservation.

The constitution apart from providing preferential treatment to the scheduled caste and scheduled tribe also provides for preferential treatment toward the "other socially and educationally backward classes". The constitution apart from providing preferential treatment to the scheduled caste and scheduled tribe also provides for preferential treatment toward the "other socially and educationally backward classes". The other backward classes are the communities apart from the untouchables or the SC’s and ST’s. Although the main point

10 MUMTAZ ALI KHAN, RESERVATION FOR SCHEDULED CASTES, 7 (1994).
11 B.A.V. SHARMA, RESERVATION POLICY IN INDIA 32 (1982).
12 INDIAN CONST. art. 341.
14 INDIAN CONST. art. 15 cl. 4. (Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes.)
of inference here is that the constitution mentions classes and not caste. However, these backward classes are by and large recognized on the basis of caste. The authority of deciding these other backward classes is at the discretion of the state and majority of the states have adopted the communal criterion to decide these backward classes.

“After the commencement of the Constitution, the Constitution (Scheduled Caste) Order, 1950 (in exercise of powers conferred by clauses (1'5) of respective Articles 341 and 342) on 10th August, 1950, the Constitution (Scheduled Tribes) Order, 1950 on 6th September, 1950 and the Constitution (Scheduled Castes) (Union Territories) Order, 1951 on 20th Sept. 1951 were issued by the President annexing Schedules incorporating castes or as the case might be, tribes or tribal community for respective states and respective Union Territories or parts thereof. The words "Union Territories" were added by the scheduled castes and scheduled tribes lists (Modification) Order 1956.”

In the case of Bhaiya Lal\(^\text{17}\), the supreme court observed that the President under Article 341 of the constitution, might arrive at a rationale to include only a part of the group rather than the entire race, tribe or caste. Thus, a caste can be included in one district and excluded from the rest districts from the same state. The reasoning behind the formation of the two prominent schedules namely the scheduled caste and scheduled tribe was not imperative in this situation. Further in the Kishorilal case\(^\text{18}\), referring to the “Tenth Report of the Commissioner for schedule castes and schedule tribe”, the supreme court accentuated the importance of socio-economic situations and conditions in classifying a person as a scheduled caste or scheduled tribe.

Despite the importance provided to the other backward classes in terms of reservation, there is no specific or particular clause in the Indian constitution which defines the term “other backward classes”. The constitution has recognized three backward classes namely the scheduled castes, the scheduled tribes and other backward classes or OBC’s. The OBC’s are considered to be in a better position than SC’s and ST’s but not at the same footing with the mainstream society. Scheduled castes and scheduled tribes have been defined in the sub clauses 24 and 25 of Article 366 of the Indian constitution respectively, however the term backward class has not been specified. Different terminology has been provided in different provisions under the constitution for the backward classes. Article 15(4) and Article 340 use the words “socially and educationally backward classes”, Article 16(4) use the term “backward classes” and Article 46 refers to the “weaker section of people”. There is still not a definite definition of the term backward classes, it has been interpreted differently in various court judgements and have been defined differently by various commissions\(^\text{19}\). Some of the rationales behind deciding the backward classes in the court decisions are noteworthy.

\(^{16}\) RAJ KUMAR JHA, COMMENTARY ON RESERVATIONS FOR SC, ST, OBC AND OTHERS 3 (2001).

\(^{17}\) Bhaiya Lal v. Hari Kishan Singh, AIR 1965 SC 1557 (India).

\(^{18}\) Kishorilal Hans v. Raja Ram Singh & Ors., (1972) 2 SCR 632 (India).

\(^{19}\) S.N. SINGH, RESERVATION POLICY FOR BACKWARD CLASS 76 (1996).
In the landmark M.R. Balaji case, the supreme court stated that, the caste of the group is not the solitary or the forefront reason to determine whether the said group in question is backward or not. For determining whether a particular group falls under the category of backward classes, two tests have to be used, the first is that the said class should tantamount to schedule caste and schedule tribe in the terms of backwardness. The second test involves the class to satisfy the test of economic backwardness developed by the state government in accordance with the prevalent economic conditions.

In P. Sagar v. State of Andhra Pradesh, the court held that, the term “class” is a homogenous group of individuals who are bound together by certain fraternity and similar traits, and identifiable characteristics such as religion, occupation, residency, status, ranks and other such parameters. In class determination, caste therefore, has a role to play. However, we cannot consider caste as the only parameter to determine the class.

In the Periakaruppan case, the supreme court stated that “A caste has always been recognized as a class. If the members of an entire caste or community at a given time are socially, economically and educationally backward that caste on that account be treated as a backward class. This is not because they are members of that caste or community but because they form a class”.

In the landmark Mandal commission case, the case held that, the expression “backward classes” is not confined to the classes which are in the same boat or have the same conditions as the scheduled caste or scheduled tribe. Backwardness is a relative concept which should be based on the development and amelioration of the Population of the nation or the respective state. Further, the court in the case of Jagdish Negi, stated that “Backwardness is not a static phenomenon. It cannot continue indefinitely and the State is entitled to review the situation from time to time.”

The welfare policy adopted for the underprivileged sections of the society is well reflected under various provisions of the Indian constitution. Few of those provisions are the Article 14, Article 15 and Article 16 enshrined under Part III of the Indian constitution. Article 338 and Article 340 of the constitution and Article 38 and Article 46 enshrined under part IV of the constitution as the directive principles of the State Policy. The preamble of India also provides for the “Justice, social Economic and Political; liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and to promote fraternity among them all assuring the dignity of the individual and the unity and integrity of the Nation.”

The preamble of the constitution of India lays down two objectives: “justice-social, economic and political; and equality of status and opportunity”, which are dominant in the domain of improvement of the backward classes and the downtrodden section. Ambedkar in his speech delivered at constituent assembly emphasized on

23 Indra Sawhney & Ors. v. Union of India & Ors., (1992) 2 SCR 454 (India).
social democracy along with the political democracy. Ambedkar stated “It means a way of life which recognizes liberty equality and fraternity which are not treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy from liberty. Nor can liberty and equality be divorced from fraternity.”

The objective of the preamble of the constitution to secure equality of status and opportunity for the Indians is achieved by various provisions enlisted in the part III of the constitution which deals with the Fundamental Rights. The major provisions to highlighted are those which assure equality and non-discriminatory policies in general and employment in public sector in particular. Article 15(1) of the Indian constitution states “the state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them”. Article 29(2) under the “Cultural and Educational Rights” states “no citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of the state funds on grounds only of religion, race, caste, language or any of them”. However, Under Article 15(4), the state is granted the special power, as stated “nothing in this Article or clause (2) of Article 29 shall prevent the state from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.”

Another exception to Article 16(2) is the Article 335 of the Indian constitution which states “the claims of the members of the scheduled castes and scheduled tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointment to services and posts in connection with the affairs of the Union or of a State”. Both Article 16(4) and Article 335 are exceptions to Article 16(2), while the former expands to all “backward classes” and is restricted only to reservation as a means to ensure preference, the latter is applicable only to the scheduled caste and scheduled tribe and deploys any method of preference. Lastly, Article 320(4) reads that “Nothing in clause (3) shall require a Public Service Commission to be consulted as respects the manner in which any provision referred to in clause (4) of Article 16 may be made or as respects the manner in which


26 Id. at 81.
effect may be given to the provisions of Article 335.27

Furthermore, while Article 15(4) applies to all the state dealings, Article 16(4) in confined to public offices only. The public offices under Article 16(4) expands to the administrative as well as judicial offices, however, elective posts and offices are not within the ambit of Article 16(4). Article 16(4) has a broader scope; in the sense it is not applicable only to the appointment practice but expands to the promotional activities of the office as well.

In the Rangachari28 case, the supreme court observed that the term “post” under Article 16(4) includes both appointment and promotion, however, the preferential practice would not be extended to other aspects such as retirement age, salary and pension provided under Article 16(1) and Article 16(2). There is an absolute protection under doctrine of equality and opportunity for such aspects and they do not lie within the ambit of Article 16(4).

The court in the Rangachari29 appeal interprets the Article 335 of the constitution and highlights that, the state, while making provisions for the scheduled caste and scheduled tribes, should not overlook the efficiency required for the task or the job. There was a need to strike a balance between their efficiency and the claims these classes made. The decision of court in the Balaji case was along the same lines. The court observed that “the public interest in the efficiency of government services set limits to reservation in promotions, putting outside the scope of Article 16(4) any unreasonable, excessive, or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction among the employees, affecting efficiency.” Keeping in mind the efficiency factor, the court ordered for a reasonable scrutiny of the reservation policy in the domain of promotions.

The phrase “any special provision” in Article 15(4) and “any provision” under Article 16(4), embodies the state with a discretionary power to employ various schemes for the advancement of the weaker section. The government has made use of these provisions and made use of several devices to infer the backward classes with preferential treatment. Reservations is not just restricted to seats, but includes other dimensions such as reduction in fees, reducing the qualifying marks, special training for the preparation of competitive exams and waiving age requirements.

The questions to be posed is whether such practices fall within the ambit of Article 16(4). It has been contested that, reducing the marks for qualifying the competitive marks is ultra vires of the state, as it is does not constitute “reservation in any sense of the term under Article 16(4)”. However, these methods are withing the constitutional ambit. Though Article 16(4) provides the method of advancement to the state as reservation, the article also provides the state with the power to implement the methods in achieving the purpose of reservation policies. Further, the implementation of Article 16(4) presupposes that the state should be satisfied that there not adequate representation of the backward class in the services. The inadequacy can be either

27 Id. at 83.
quantitative or qualitative.

2.4.1 DIRECTIVE PRINCIPLES OF STATE POLICY

The part IV of the Indian constitution which enshrines the “directive principles of state policy” crowns the state with the responsibility of welfare promotion of the individuals and the weaker sections laying special emphasize on the “backward classes”.

Article 38 of the Indian constitution reads-

1. “The state shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of national life.”

2. “The state shall, in particular, strive to minimize the inequalities in income, and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”

The preamble and the “directive principles” sheds light on the socio-economic notions and ideals which the free India sought to achieve. The framers of the Indian constitution visualized a new India free from the clutches of the evil and on the path to “social, economic and political justice”. Eradication of inequalities deep rooted in the Indian framework was a part of this objective. Furthermore, Article 46 reads: “the state shall promote with special care the educational, and in particular, of the scheduled castes and scheduled tribes, and shall protect them from social injustice and all forms of exploitation.”

The affirmative action used by the government accelerated the socio-economic change which the framers of the constitution sought to achieve. These provisions have brought a positive change in the nation as a whole, which can be clearly witnessed from the gradual increase in the literacy rate in India. While at the time of independence in the year 1947, the literacy rate of the weaker section was just one percent, at present it has increased in leaps and bounds. Though India is still to evade the grasp of illiteracy, the policy of protective discrimination is the kickstart India required. the constitutional provisions which provides for the preferential treatment of these backward classes and weaker section have led to a social order where there is equality and respect for the entire nation and not just the few at top.

CHAPTER 3- CONCEPT OF PROTECTIVE DISCRIMINATION DIFFERENT IN INDIA AS AGAINST U.S.A.

3.1 INTRODUCTION

The problem of inequality and discrimination is not unique to the just India, rather it is a worldwide problem. To deal with the abomination that is discrimination, the democracies around the globe have adopted a series of measures. The United States has adopted the affirmative action to improve the situation of minorities and women, whereas, India has adopted the policy of protective discrimination for the amelioration of the underprivileged section of the society. While United States is a developed nation and it might appear that, U.S.A might have adopted such nondiscriminatory measures before India, but the reality is India is a step ahead than U.S.A in this regard. The geographical distance and cultural differences between the two nations and the similar discriminatory history of untouchables in India and Blacks in America, makes the
comparative study all the more interesting.

3.2 SOCIAL PATHOLOGY
The preceding chapters of the research paper have highlighted how caste system was the root cause of discrimination in India. The varna system followed in India, placed the Brahmans at the pedestal while the Shudras, the class at the lowest rung of this caste system were left to fend for themselves. There existed an inherited classification and discrimination between the four classes namely: “Brahmins, Kshatriyas, Vaishyas and Shudras” of this varna system. The Shudras later turned into the scheduled caste and scheduled tribes facing discrimination at the hand of the upper caste. This downtrodden and dismembered state of the untouchables prompted India to adopt the policy of protective discrimination.

While the discrimination in India was a result of caste system, in America, the discrimination was based on the race. In India, untouchability was the vice which was deeply rooted, in America it was slavery. The most prominent thing about slavery system in America was that it was particular to the Negros. In America the discrimination against blacks continued till the twentieth century. The Jim Crows laws and Black codes were the methods behind this madness.

The blacks lived in a separate neighborhood, and were denied the access to basic public facilities such as transportation, restaurants, schools and churches. Jim Crows rules followed the same principle of white supremacy as followed in slavery. The Pless vs. Fergusen case, established the precedent for the Jim Crows rule, where the U.S. supreme court ruled that the development of the separate facilities for the whites and the blacks was not against the thirteenth and fourteenth amendment of the U.S constitution. In fact, the court held that despite there being segregate facilities for the two races, they were equals, despite the clear deprived condition of the black neighborhood.

The contrast in the discrimination system in the two countries can be witnessed prima facie. In India the discrimination was based on the caste among the members belonging to the same race, whereas, in America, the discrimination was based on the race. The Caucasian supremacy and dominance over the Negros. However, despite, the difference in the discrimination models, the situation of the untouchables in India and blacks in U.S.A was the same. Both the groups were restricted from entering public places and were awarded menial jobs such as wage laborers.

3.3 CONSTITUTIONAL SAFEGUARDS IN INDIA AND U.S.A
With freedom which India received in 1947, there came a greater responsibility which was to free India from the unjust practices being followed under the façade of the caste system. The constitution framers incorporated several provisions to protect the weaker sections such as Article 15, 16, 38, 46, 335 and a lot more which have already mean explained and elaborated in the previous chapters. Thus, the Indian constitution expressly provides for the affirmative action or protective discrimination and there is no question as to

30 AUROBINDO, INDIA’S REBIRTH, INSTITUT DE RECHERCHÉ EVOLUTIVE, PARIS, (2000).
32 Pless v. Fergusen, 163 U.S. 537 (1896).
the constitutional validity of the action. Under the U.S. constitution, the fourteenth amendment states that “All persons born or naturalised in the U.S. and subject to the jurisdiction thereof are citizens of U.S. and states wherein they reside. No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of U.S., nor shall any state deprive any person of life, liberty or property, without due process of laws, nor deny to any person within its jurisdiction the equal protection of laws.” However, the fourteenth amendment unlike the Indian constitution does not expressly legitimize benign preferences or affirmative action. “The constitutional validity of affirmative action relies upon an implied justification for such benign classifications under the Equal Protection Clause.”

The landmark case of Brown v. Board of Education of Topeka paved the way for development of affirmative action in U.S., the Brown case, overruled the decision of Fergusen case, and ruled that segregation of facilities was a violation of the 14th amendment of the U.S. constitution. The abolition of racial segregation posed another question of the constitutional permissibility of the affirmative action. Title VII (42 U.S.C. S 2000e et seq.) of the Civil Rights Act of 1964 was one of the steps taken by the government to establish greater equality. Title VII was implemented to curb racial and other discrimination in the matter of employment including the private sector.

With the combined effort of various court decisions and the non-discriminatory aspects of the Civil Rights Acts of 1964 lead to the adoption of affirmative action. However, the affirmative action faced its first blow in the infamous Bakke case. In this case, the plaintiff, Bakke contented that medical college of the University of California is indulging in violation of the “Equal Protection, Clause of the Fourteenth Amendment, the California Constitution, and Title VI of the Civil Rights Act of 1964” by using the quota system. the judges in the ratio of 5:4 declared the quotas based on race as violative of title VI and hence declared them illegal. However, the court also ruled in the same 5:4 ratio that for establishing a student body which diverse, race at the admission program can be an operational factor.

The aftermath of the Bakke case, resulted in the continuation of benign preferences. However, the most debated question whether affirmative action was constitutionally permissible under the “Equal Protection Clause of the Fourteenth Amendment” remained unanswered. Bakke did declare quotas as illegal, however, post Bakke decisions lead to an ambiguous position on the quotas. The devices such as “Temporary quotas” which were used to represent the minority in the employment

33 "Benign" racial classifications refer to preferences for minorities. See Stone, supra note 38, at 578.
34 STEPHEN L. WASBY, "COMPENSATORY DISCRIMINATION" AND AMERICAN "AFFIRMATIVE ACTION": SOME PARALLELS - A REVIEW OF GALANTER'S COMPETING EQUALITIES, 8 LAW & POLY 379, 380 (1986).
essentially captured the essence of the quota system. “Under Title VII, mathematical ratios and membership goals\(^{39}\) have also been upheld.”

The protective discrimination policy adopted by India and the affirmative action followed by the U.S. both aim to achieve equality. However, India is clearer in its stance when it comes to protective discrimination as the Indian constitution expressly provides for the reservations while the U.S. constitution is vague on the stance of quota system. Both the democracies, nonetheless, engage in the affirmative action for the advancement of the deprived in their respective countries.

CHAPTER 4 - THE CONCEPT OF PROTECTIVE DISCRIMINATION: A BOON OR A BANE

4.1 INTRODUCTION

The policy of protective discrimination poses a host of questions and challenges. The topic of reservation and protective discrimination have always been controversial and stirred a debate. The initial clause relating to reservation in the Indian constitution was that, reservation was to be carried out for the next ten years, however, across the years, the government has time and again revised the clause and extended the time period of reservations. The policy which was started to uplift the downtrodden has become a tool for gaining votes by the political parties. The main question that surrounds the debate is whether the underprivileged are actually benefitting from the policy. The reservation policy is looked down upon and is constantly being debated, due to the relevance of the topic in the political, social and economic aspects. Here are some arguments which are used in this debate.

2 MERIT ARGUMENT

The merit principle dictates that the admissions, promotions and good should be allocated on the basis of merit. The individual should be admitted into a college or a university on the basis of their achievements, or by clearing the test for the admission based on the knowledge or intelligence. The proponents of this principle believe the merit criterion to be ideal as this structure is free from discrimination and personal bias, such as class, caste, race or religion but focuses on the intellect and achievement of an individual. The merit principle also helps in selecting the crème de la crème who not only strive for personal growth but the growth of the nation as well. The proponents argue that the policy of protective discrimination snatches the right of a meritorious student and places it in the hand of an individual who is undeserving. The policy of protective discrimination not only is applicable in the admissions but also the promotions in state owned office, an individual belonging from the general class who have better knowledge and achievements is not being promoted as the promotion is being given to someone from the weaker section which is against the merit principle.

However, the opponents of the merit principle present a strong case as well. The parameters for deciding the merit ignore the situation these weaker sections had to face over the decades. The underprivileged section of the society was never on the same footing as the others due to economical and social backwardness. The policy of protective discrimination is merely a means

to bring them on the same platform as the advanced section and provide them an equal opportunity to earn their rightful place in the society.

Merit argument in its entirety is not a loose one, however, merit solely cannot be the criterion for providing admissions and employment. If we cannot provide uniform living standard to all the individuals society, we simply cannot choose the advantageous over the disadvantaged. This course of action is prima facie unfair and unjust as it perpetuates amelioration of the former and retrogression of the latter.

4.3 RIGHTS ARGUMENT
The right argument presents a case where in uplifting the underprivileged, the policy of protective discrimination overlooks the right of the others. Due to the reservation policy the individuals who had a right of equality are denied of the same. Every individual has a right to admission in employment and university and educational institution, however, to uplift one group the others right is infringed in the process.

At the same, group equality is a concept which simply cannot be ignored, if there is a group who has been ignored and is at a disadvantageous position, then to equalize the group with the other groups is not a violation of right to equality but the establishment of the same. The constitution of India provides for reservation to the unrepresented and underprivileged groups, such as the scheduled caste, scheduled tribe, other backward classes and women. In order to provide them with their right to equality and be represented which they have been stripped down from through the years, the policy of protective discrimination is suitable.

The rights argument presents a situation of group rights versus individual rights, with the group rights taking the cake, as the aim of the state is to look after all the citizens and in such a situation group rights would supersede the individual rights. Despite all the factors, the individual rights cannot be ignored and as such the verdict regarding rights argument vis a vis reservation and protective discrimination is still out.

4.4 EFFICIENCY ARGUMENT
When a person enters an educational institute or a public office through a quota, it automatically raises a question on the efficiency of the individual as a person who was less deserving than someone else is presented with the opportunity. The entry of an individual who is less meritorious in the socio-economic institutes threatens the efficiency of these institutes such as banks, hospitals, schools etc. These institutes not only serve the office bearers but the public at large. Though the Indian constitution strives to achieve a balance between efficiency and promotion, yet the fact that there is no such requirement at the admission process cannot be ignored.

Though the efficiency of the public offices is an important issue, unequal representation the underprivileged who constitute the majority of the Indian population is also an equally pressing issue. The weaker section who have been deprived of their rights for many decades, should have a chance at proving themselves and protective discrimination provides exactly the opportunity. The policy of protective discrimination only provides for the admission not the promotion, ensuring that once an individual has been admitted to the institution, the rest would depend on the efficiency.

4.5 BALKANISATION ARGUMENT
The policy of protective discrimination has
been looked down upon with a view that it enhances the gap between the caste, and creates caste-based conflicts. In a country like India, which is famous for its multiculturalism, there are innumerable caste and the policy of protective discrimination increases the caste conflict dividing the groups on the basis of caste. As established in the earlier chapter, caste plays a role in dividing the class and most of the classes are based on the caste, this divide become more prominent. The recent situation with the Marathas and Jats claiming to be backward classes is a proof of this caste divide.

The opponents argue that, India has been ruled by its caste system and the caste divide existed even before the protective discrimination. The policy of protective discrimination in Indian context only helps the caste divide to dwindle by bringing all the castes on the same social and economic standing. The policy is to bridge the gap between the advantaged and disadvantaged. However, it must be looked after that a few at the top do not monopolize the benefits of the policy.

The policy of reservation or protective discrimination in all sectors in India has become a cynical and disturbing process. What started as a means to uplift the weaker section, has become a weapon to enjoying the perks without paying the price. With more and more groups coming forward to claim reservations, it has now expanded from SC’s ST’s to a number of minorities.

The current reservation policy followed by the government provides for 15% reservation in jobs and educational institutes for the scheduled castes and 7.5% for the scheduled tribes. Apart from these provisions provided by the central government, the state government has the discretion to grant reservations in their respective state. Approximately 50% of the seats are reserved under the policy, leaving only 50% for the majority. The reservation policy is turning out to be a bane rather than a bane for the Indian society, what started out as a means to ensure justice and equality has been turned into a political agenda to gain votes, also the real oppressed class does not receive the benefits which were established for them. The reservation or protective discrimination policy is being grossly misused and the lower section is not being uplifted by it rather the benefits are being used by the people who have the means and resources and are nowhere near being economically and socially backward.

CHAPTER 5- CONCLUSION

The initial time period of the application of the reservation policy was set at ten years for the upliftment of the scheduled caste and scheduled tribe, however, till this taste there has been no effort to revise, change or review the policy in its entirety. The only changes that can be witnessed over the years is to increase the time frame of the policy or to include another group in the section of backward classes. The objective of reservation in India was to improve the situation of the groups who have been discriminated against economically and socially, however, while classifying the classes applicable for reservation, caste has always been a predominant factor, ignoring the income or wealth. Consequently, the individuals who are not oppressed economically or socially enjoy the benefits of the policy while those who actually suffer are left to fend for themselves.

40 B.A.V. SHARMA, RESERVATION POLICY IN INDIA (1982).
Instead of opting for the protective discrimination policy at the educational level, the problem should be solved at the grassroot level by providing compulsory and free education to these underprivileged individuals. If there is lack of education at the ground level, there is no way for the real oppressed class to receive reservation at the subsequent stages.

Reservation should be based on the economic criterion rather than the caste system. Reservations based on casteism are unjust and unfair. The policies should be made for those who are actually in need of the same, the people who lack the means to afford their education. On one hand the Indian constitution and preamble is all about equality while on the other hand we are asphyxiating the same notion by the vice that is reservation, through creating caste divide.

At the time when the protective discrimination policy was drafted, people did suffer from the vile of casteism; however, over the decades, the problem of caste has been curbed down and presently there is a need to review the reservation policy and modify it to include groups from the economically weaker section rather than the groups based on caste, who have the means as well as resources to earn their representation as well as living.

The brutal reality of our society is that the policy of protective discrimination is being used to protect those who do not need this shelter and is ignoring the individuals who are in dire need of it. India is far away from the dream the framers of the constitution had in mind while resorting to protective discrimination. Indian policy of protective discrimination is one of the most, tight knit and elaborative policy. The policy unlike the affirmative action in U.S.A expressly provides for the reservation, however where India did fail is in the implementation of the policy. The policy should have achieved its goal in the initial ten years, however, due to the corrupt use of the provisions of reservation we still fail to meet ideals of the policy. It would benefit the nation to review the policy, restrict its extension and take appropriate measures to provide the benefits to those who need it and not those who exploit it.
SHOULD ADR BE APPLICABLE IN CRIMINAL CASES?

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Introduction

In India, the courts have many pending cases. Suits have been increasing with each passing day. Alternative Justice Resolution (herein after referred as ADR) gained extreme importance in almost every civilized indulgence. ADR defined under the Section 89 of CPC includes negotiation, mediation, arbitration and conciliation where the parties depends on a neutral third-party which helps in reaching a binding decision. In the process of negotiation, the lawyers of the respective parties work together to settle dispute and come to a conclusion. Mediation is a process where a neutral third party known as mediator brings both the parties to a voluntary settlement.

Alternative Dispute Resolution (ADR) is a process which are out of the court proceedings and conclusions. Due to the fact that pendency of suits and cases in the court have increased over the time, ADR practices are being prevailed and appreciated. It becomes a must to recall the famous words of US President Abraham Lincoln focusing the deep significance of ADR: To overcome the problems of formal judicial system a new strategy was evolved which is known as ADR which aims to resolve disputes outside the courts.

Overview on Alternate Dispute Resolution Mechanism.

Alternative Dispute Resolution is a newly developed mechanism for settlement of grievance of parties against each other. These methods are used as substitute of litigation. However, these mechanisms derive their authority from the judicial wing of a country and the working of the same is done under the supervision of the superior statute.

As ruled by the Courts in New York,

“Alternative dispute resolution (ADR) refers to a variety of processes that help parties resolve disputes without a trial. Typical ADR processes include mediation, arbitration, neutral evaluation, and collaborative law. These processes are generally confidential, less formal, and less stressful than traditional court proceedings.”

With the growth of disputes between the general subjects of law, the normal proceedings of judiciary is overburdened, if it was not criticized enough for being expensive and stretches to indefinite longer span of time. In such a scenario, it becomes necessary to establish such machinery for resolution of disputes that shall be effective enough to speedily dispose of cases and be easy on the pockets of the parties to dispute.

Some of the alternate mechanisms recognized within the legal systems are herein briefed:

1. Arbitration


42 Explained by the Courthouses in New York, U.S. govt.,(April 15,2020, 01:00pm), https://www.nycourts.gov/ip/adr/What_Is_ADR.shtml.
An arbitration is the reference of a dispute or difference between not less than two parties for determination, after hearing both sides in a judicial manner, by a person or persons other than the court of competent jurisdiction. Thus, it can be said that arbitration is an out of the court settlement process where the parties themselves decides the neutral third party (arbitrator) who helps both the sides in coming to a binding conclusion. It is more of a relaxed and less formal process than the court proceedings.

2. Case Conferencing

This is a simple process, where the judge or some representative on behalf of the judge meets the parties and their lawyers to resolve dispute before entering the court procedures. Participation of the parties are limited as this meeting is held for narrowing down of the dispute or resolving it altogether.

3. Mediation

Mediation is a non-binding procedure where an impartial neutral party (mediator) assists the parties in coming to a settlement. The mediator does not have any authority to make a binding decision rather helps the parties to come to a conclusion without and court proceedings or adjudication. It is mostly effective in family matters, small disputes between business partners, etc. Mediation becomes inappropriate if a party has any significant advantage or control over the other.

4. Summary Jury Trials (SJT)

In this adversarial dispute resolution process, each side presents its case in a shortened form to a jury. The jury makes a decision, which is only advisory, unless the parties request it to be a binding decision. A summary jury trial gives parties an overview of a probable verdict should be if the case goes to trial. SJTs are available in limited jurisdictions only.

- ADR mechanism can be divided into 5 major parts, i.e.,

<table>
<thead>
<tr>
<th>Preventive ADR</th>
<th>Facilitative ADR</th>
<th>Advisory ADR</th>
<th>Determinative ADR</th>
<th>Collectivie ADR</th>
<th>Court-based ADR</th>
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<tr>
<td>Negotiation</td>
<td>Conciliation</td>
<td>Arbitration</td>
<td>Ombudsman Scheme</td>
<td>Early Neutral Evaluation</td>
<td>Court Settlement Masters</td>
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<td>mediation</td>
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43 Dharma Pratisthanam v. Madhok Construction(P) Ltd, (2005) 9 SCC 689, the essence of arbitration without assistance or intervention of the court is settlement of the dispute by a tribunal of the own choice of the parties.

44 Indian Oil Corpns Lts v. Raja Transport (P) Ltd, (2009) 8 SCC 520, it is a binding voluntary alternative forum chosen by the parties.

45 www.lawreform.ie.
Advantages\textsuperscript{46}
The advantages of this system are many which can be listed as:

- Reliable information as an indispensable tool for adjudicator. Court proceedings make less progress due to reluctance of parties in providing information. ADR diminishes this drawback as it is less formal and more approachable for the parties. Therefore, ADR proceedings becomes more successful in terms of gathering information for better conclusions.
- In the process of mediation or conciliation parties themselves comes to a decision as they know their respective positions.
- The proceedings are less formal and cost effective.
- The process of ADR is much speedy in comparison to the court proceedings. The basic object for establishing the concept of ADR was to reduce the work load of the courts and to minimize the delay and expense as well as increase the approach of the proceedings.
- ADR is a distinct process from the normal court process, under this, disputes are settled by the assistance of third parties, agreed to, by the parties.
- ADR functions to resolve the disputes fast with less expense of time and money. The decision making process with maintaining confidentiality of the subject matter. Summarizing it, ADR aims at providing justice for resolving dispute as well as harmonizing relation between parties.

In general mediation procedure a confidential consensual form of dispute resolution is facilitated by a retired judge who is trained in conflict resolution. Generally, sessions are attended by the parties in dispute and their legal representatives. It involves various stages.

These stages are neither rigid nor inflexible, which can be formed to achieve the desired out-come. The stages consists:

- The mediator first makes clear to the parties that he is a neutral person and the entire proceeding is confidential that nothing of their discussion will be advanced as evidence in the court if mediation fails. The parties open their cases in the next stages. They explain their cases according to their own perceptions and interests. The gist of the statements of both the parties is noted. The major issues involved in the disputes are sorted out.
- The process of mediation starts after that, which might proceed with private meetings between the mediator. The mediator tries to narrow down the disagreements between the parties and encourage a final agreement for settlement.
- Finally, the mediator will try that the parties move to an agreement which is a voluntary settlement between the parties for resolving their issues.

From the above mentioned structured process it can be concluded that mediation does not involve rigidity of procedure. The mediator conducts the proceedings in an informal manner considering the fundamental principle that his role is neither to advise nor to adjudicate.

Applicability of ADR in criminal cases

The concept of Plea bargaining

Plea bargaining is a pre-trial negotiation technique between the accused and the prosecution, where the accused agrees to plead guilty in exchange for certain compromises by the prosecution. It is a bargain where a defendant comes clean as guilty to a lesser charge and the prosecutors in return drop more serious charges. It is not provided for all types of crime e.g. a person cannot claim plea bargaining after committing heinous crimes or for the crimes which are punishable with death or life imprisonment.47

Plea bargaining can be defined as an agreement within a criminal case between the prosecution and the defense by which the accused changes his plea from not guilty to guilty in return for an offer by the prosecution or when the judge has informally made the accused aware that his sentence will be minimized, if the accused pleads guilty. In other words, it is an instrument of criminal procedure which reduces enforcement costs (for both parties) and allows the prosecutor to concentrate on more important cases.

Plea Bargaining in India

Plea Bargaining is not an indigenous concept of Indian legal system. It is a part of the recent development of Indian Criminal Justice System (ICJS). It was inculcated in Indian Criminal Justice System after considering the burden of long-standing cases on the Judiciary.48

Section 265A to 265L, Chapter XXIA of the Criminal Procedure Code49 deals with the concept of Plea Bargaining. It was inserted into the Criminal Law (Amendment) Act, 2005. It allows plea bargaining for cases:

1. Where the maximum punishment is imprisonment for 7 years;
2. Where the offenses don’t affect the socio-economic condition of the country;
3. When the offenses are not committed against a woman or a child below 14 are excluded

The 154th Report of the Law Commission was first to recommend the ‘plea bargaining’ in Indian Criminal Justice System. It defined Plea Bargaining as an alternative method which should be introduced to deal with huge arrears of criminal cases in Indian courts.

Then under the NDA government, a committee was constituted which was headed by the former Chief Justice of the Karnataka and Kerala High Courts, Justice V.S. Malimath to tackle the issue of increasing number of criminal cases.

The Malimath Committee recommended for the plea bargaining system in India. The committee said that it would speed up disposal of criminal cases and reduce the burden of the courts. Moreover, the Malimath Committee pointed out the success of plea bargaining system in the USA to show the importance of Plea Bargaining.

Accordingly, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament and finally it became an enforceable Indian law from enforceable from July 5, 2006. It sought to amend the

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48 Id at 5.
Indian Penal Code 1860 (IPC), the Code of Criminal Procedure, 1973 (CrPC) and the Indian Evidence Act, 1892 to improve upon the existing Criminal Justice System in the country.

It is to overcome with excess of criminal cases and overabundant delay in their disposal on the one hand and very low rate of conviction in cases involving serious crimes on the other. The Criminal Law (Amendment) Bill, 2003 focused on following key issues of the criminal justice system:-

(i) Witnesses turning hostile
(ii) Plea-bargaining
(iii) Compounding the offense under Section 498A, IPC (Husband or relative of husband of a woman subjecting her to cruelty) and
(iv) Evidence of scientific experts in cases relating to fake currency notes.

Types
Plea Bargaining is generally of three types namely:

1. Sentence bargaining;
2. Charge bargaining;
3. Fact bargaining.

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<thead>
<tr>
<th>Concept</th>
<th>S. No.</th>
<th>Type</th>
<th>Meaning</th>
</tr>
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<tbody>
<tr>
<td>Sentence bargaining</td>
<td>1.</td>
<td>Sentence bargaining</td>
<td>In this type, the main motive is to get a lesser sentence. In it, the defendant agrees to plead guilty to the stated charge and in return, he bargains for a lesser sentence rather than the described one.</td>
</tr>
<tr>
<td>Charge bargaining</td>
<td>2.</td>
<td>Charge bargaining</td>
<td>This kind happens for getting much less severe charges. This is the most common form of plea bargaining in criminal cases. Here the defendant agrees to plead guilty for a lesser charge in consideration of dismissing greater charges. E.g. Pleading for manslaughter for dropping the charges of murder.</td>
</tr>
</tbody>
</table>

3. Fact bargaining

This is normal circumstances not used in courts because it is alleged to be against Criminal Justice System. Fact bargaining occurs when a defendant agrees to lay down to certain facts in order to prevent other facts from being introduced into evidence.

Relation of Plea Bargaining with ADR

1. Fast disposal of cases

The plea bargaining is beneficial for both the prosecution and the defense because there is no risk of complete loss at trial. It helps the attorneys to defend their clients in an easy way because both the parties possess bargaining power. This is how the long-standing disputes can be resolved and the court would also not need to face encumbrance of case files. Moreover, Plea bargaining helps the courts in preserving scarce resources for the cases that need them most.

2. Less serious offenses on one’s record

In a country like India, society plays a vital role. Once a person is stigmatized by society it becomes very difficult for that person to survive. Many a time stigmatization leads to banishment or exclusion from the society.

In such scenario, Plea Bargaining allows a person to come clean in order of or no contest in exchange for a lessening in the number of charges or the importance of the offenses. This results in recording less serious offenses on the official court records of an accused. This can be good for the accused when he is convicted in the future.

3. A hassle-free approach

Plea bargaining allows a person to plead guilty without hiring a lawyer. But if they wait for trial, they would have to hire a lawyer, and spend time working with the lawyer to prepare for trial and pay the lawyer. The concept of plea bargaining safeguards the interest of such persons by avoiding the hassles and is more pocket friendly, while the case remains pending.

Why ADR should not be applicable in criminal cases

1. Voluntarily adopted mechanism

As per the legal provision dealing with Plea bargaining, it is a voluntary mechanism which is only entertained when accused chooses it willingly. But the law is silent on


52 Id at 9.
the point that in case, the settlement reached is contrary to the purpose of the legal system\textsuperscript{53}.

2. Involvement of police
The involvement of the police in plea bargaining also attracts criticism. As India is infamous for the custodial torture by police. In such scenario, the concept of Plea Bargaining is more likely to aggravate the situation.

3. Corruption
The role of victims in plea bargaining process is also not appreciated. The role of victim in this process would attract corruption which is ultimately defeating the purpose which is sought to be achieved by such action.

4. Independent Judicial Authority
The provisions of Plea Bargaining do not provide for an independent judicial authority to assess plea-bargaining applications. The in camera examination of the accused by the court attract may lead to public distrust for the plea-bargaining system. The failure to make confidential any order passed by the court rejecting an application could also create biases towards the accused.

5. Not the final solution
The reasons given for the introduction of plea-bargaining are the tremendous overcrowding of jails, high rates of acquittal, torture undergone by under trial prisoners etc. But the main factor behind all these reasons is a delay in the trial process.

In India, the reason behind the delay in trials is many e.g. the operation of the investigative agencies as well as the judiciary, personal interest of lawyers etc. Therefore, the need of the hour is not a substitute for trial but an overhaul of the system which can be in terms of structure, composition and its work culture. All these measures would ensure reasonably fast trials.

Plea Bargaining and Judicial Pronouncements

\begin{itemize}
  \item In \textit{Murlidhar Meghraj Loya vs State of Maharashtra} (AIR 1976 SC 1929), The Hon’ble Supreme Court criticized the concept of Plea Bargaining and said that it intrudes upon the society’s interests.\textsuperscript{54}
  \item In \textit{Kasambhai vs State of Gujarat} (1980 AIR 854) & \textit{Kachhia Patel Shantilal Koderlal vs State of Gujarat and Anr}, the Apex court said that Plea Bargaining is against public policy. Moreover, it regretted the fact that the magistrate accepted the plea bargaining of accused. Furthermore, Hon’ble Court described this concept as a highly reprehensible practice. The Court also held that practice of plea bargaining as illegal and unconstitutional and tends to encourage the corruption, collusion and pollute the pure form of justice.
  \item \textit{Thippaswamy vs State of Karnataka}, [1983] 1 SCC 194, the Court said that inducing or leading an accused to plead guilty under a promise or assurance would be violative of Article 21 of the
\end{itemize}

\textsuperscript{53} supra note 4.

\textsuperscript{54} Murlidhar Meghraj Loya vs State of Maharashtra, AIR 1976 SC 1929, (India).

Constitution. The Court also stated that “In such cases, the Court of appeal or revision should set aside the conviction and sentence of the accused and remand the case to the trial court so that the accused can, if he so wishes defend himself against the charge and if he is found guilty, proper sentence can be passed against him”.

- In **State of Uttar Pradesh vs Chandrika** 2000 Cr.L.J. 384(386), the Apex Court disparaged the concept of plea bargaining and held this practice as unconstitutional and illegal. Here the Hon’ble Court was of the view that on the plea bargaining Court cannot basis of disposing of criminal cases. The case has to be decided on the merit. In furtherance of the same, court said that if the accused confesses his guilt, he must be given the appropriate sentence as required by the law.

- In **The State Of Gujarat vs Natwar Harchandji Thakor** (2005) 1 GLR 709, the Court acknowledged the importance of plea bargaining, saying that every “plea of guilty” which is construed to be a part of the statutory process in the criminal trial, should not be understood as a “plea bargaining” ipso facto. It is a matter of matter and has to be decided on a case to case basis. Considering the dynamic nature of law and society, the court said that the very object of the law is to provide an easy, cheap and expeditious justice by resolving disputes.

Conclusion
The concept of plea bargaining is not entirely new in India. Indian has already recognized it when it got its constitution in 1950. Article 20(3) of Indian constitution prohibits self-incrimination. People accuse plea bargaining as violative.

But with the passage of time the considering the burden on the courts, the Indian court has felt the need of Plea bargaining in Indian legal system. When a change is brought it is hard to accept it initially but society needs to grow so is our legal system. Although the concept of plea bargaining would reduce the workload of the courts, it would still be inappropriate as the criminals in order to reduce their true punishment would try to negotiate which would further lead to corruption.

In place of the concept of plea bargaining there should be some fast mechanism within the working of the judiciary system so that the justice is not delayed and the workload reduces.

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57 State of Uttar Pradesh vs Chandrika, 2000 Cr.L.J. 384(386), (India).
ASSISTED SUICIDE AND EUTHANASIA: A THREAD LINE GAP

By Aayushi Mehta and Ankita Tiwari
From University of Petroleum and Energy Studies

ABSTRACT

Euthanasia and Assisted suicide have been a topic of debate all over the world. Legalizing them has been demanded to bring the end to the sorrowful and painful life of the deceased. Being a delicate topic of discussion whenever amended will have its supporters as well as haters. Suicide can be considered as self-conviction because the very thought of suicide comes when a person has guilt of either omission to do an act or commission of an act. Assisted suicide will only mean taking aid of someone which is an offence of abetment to suicide. This is the reason assisted suicide is illegal in most countries.

The point of debate for assisted suicide arise on that point that if right to live is a fundamental right then why not right to die? Euthanasia is different from assisted suicide because in euthanasia there is mere or no scope of the person’s condition getting any better. Here, death becomes less painful than survival.

Our Constitution also lays focus on this controversy through its Article 21. There legality under the Indian laws lie in the Indian Penal Code.

This paper will cover assisted suicide and euthanasia with focus on physician assisted suicide, family assisted suicide and how the concept of euthanasia has evolved with relevant judgements.

Keywords: Euthanasia, Assisted Suicide, Right to Life, Indian Penal Code

1. INTRODUCTION

Our Constitution through its prestigious Article 21 stretches by safeguarding Right to Life with self-esteem to all its citizens. But the query lies whether Right to Life prevails in conditions where the quality of life is very underprivileged? The authors through this article would like to attract the attention of the readers on subject of debate: Euthanasia and Assisted Suicide.

Euthanasia and Assisted Suicide-both being legalized in some countries, Netherlands in April 2002, became the first country to legalize them. Though Euthanasia and Assisted Suicide are species of the identical sort, theoretically position unalike. Premeditated killing of a person to relieve him from all the agony and sufferings is recognized as euthanasia. It is basically a blend of two Greek words: eu which means “Good” and thanasia means “death”. In layman footings, it basically states “ending the life of the deceased person on his demand”. The term euthanasia is also known as mercy killing. Further, assisted suicide was been practiced in the ancient time in Greece and Rome but become a point of controversy majorly because of the
Hippocratic Oath and faith of Christian that life is a gift by the God.  

Individuals obscure themselves while distinguishing between **euthanasia** and **assisted suicide**. When an individual mostly a physician aids the deceased in committing suicide or in other words, deceased is assisted by the third person to end his life it is termed as an assisted suicide. Assisted suicide is basically Physician Assisted Suicide. Whereas, when the doctor himself confiscates the life support machines of the patients or gives a lethal dose which brings an end to life of the deceased, it is termed as euthanasia. Further, it can be alleged that there is no direct kith and kin between patient and the deceased in case of assisted suicide whereas, in euthanasia there is direct involvement of the physician.

The authors through this paper would like to induce the attention of the readers on the assisted suicide: Physician Assisted Suicide, Kith and Kin Assisted Suicide and Euthanasia and its types debated with the recent judgements.

2. ASSISTED SUICIDE

2.1. PHYSICIAN ASSISTED SUICIDE

This sort of assisted suicide is the utmost common form of assisted suicide. In such suicide the physician assists the deceased to bring an end to his life, basically to bring an end to the painful and sorrowful life of the deceased. As “Right to Life” with dignity with provided as a Fundamental Right to every citizen, “Right to Die” when found apt by the individual should not be deprived of.

Assisted suicide being lawful in countries like Belgium, Canada, Switzerland, Luxemburg, Germany and six states of the U.S. only if the lethal act is committed by the deceased himself. A brief history on legality of assisted suicide in some countries is as follows:

- **CALIFORNIA**
  Till 2014, California did not recognize the idea of Physician Assisted Suicide, so 29-year women who resided in California and was diagnosed with painful brain cancer chose the path of “Right to Die”. As her sickness had no cure, she moved to Oregon, one of the five states which had legalized the concept of physician assisted suicide.

- **AUSTRALIA**
  Australia was the first country to pass a legislation the “Right of the Terminally Ill Act” which gave assisted suicide legality in 1995. But this legislation was scrapped by the Australian Federal Government in 1997.

- **FRANCE**
  It was around 2000 that Physician Assisted Suicide gained attention in France. It aided in having a new legislation for the people who were barely suffering on artificial support system. This legislation assisted to put an end to their life. This issue basically gained attention when a car crash of a man who was unable to walk, see, smell or taste after his accident. He demanded the Right to Die but his

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62 Foram Thakar, Right to Die, Constitutional Lawyers in India (Last Visited August 12, 2020) http://www.legalserviceindia.com/article/l404-Right-To-Die.html
63 Atanu Biswas, Now, to stop fearing suicide, THE ECONOMICS TIMES (03.11.2018, 10:59 PM IST)
64 Ibid
65 Ibid
appeal was rejected. Seeing his pain and suffering his mother injected him overdose of medicine which finally brought an end to his painful life. Though his mother was firstly arrested but later acquitted.

- **COLOMBIA**
  Physician assisted suicide is permitted in Colombia. It is criticized by many Colombians. But this legality had helped many people in Colombia who wanted to put an end to their life's. One major drawback is that it paves no way to set documents, rules or regulations for the doctors and patients who want to end their life’s.

- **INDIA**
  Being a democratic country and having various cultural diversities, Right to Die has been interpreted differently founded on the cultural beliefs.
  Though our Constitution also prevail-edges each citizen through Article 21 Right to Life, its interpretation has been debatable point that whether it also gives Right to Die or not? The code in India which deals with this notion is the Indian Penal Code. In other words, its legality lies in the Indian Penal Code.

  Physician Assisted Suicide being a delicate topic of debate will always have its supporters and haters when amended, it sprawls on the law-makers whether to legalize it or not.

2.2. **FAMILY ASSISTED SUICIDE**
This is a form of assisted suicide which is found in very few instances. This form is illegal in almost every country. Family assisted suicide generally means suicide with the aid of a family member. For instance, a family member aiding a person to flee to a country where suicide is not illegal. This is per se illegal because there are vivid chances of it being misused. The Apex Court of India while dealing with passive euthanasia in the case of *Aruna Ramachandra Shanbaug v. Union of India* has therefore, decided not grant a right to decide to the family members of patient on his behalf. The deciding factor till the time a law in this regard comes into force is with-held with the Courts which shall be exercised on the recommendation of the medical committee only. There are numerous reasons for not giving any right of decision to the family of patient, like: There might be some financial and other constraints on the family therefore, they want to end patient’s life, however, the patient might not want so or the doctors might have the opinion that the patient will recover; family member might have a malicious intent behind the death of patient, etc. Moreover, assistance of any sort from family or any person, in committing suicide is a punishable offence under section 306 of IPC and the person who fails in attempting suicide shall also be punished under section 309 of IPC.

3. **EUTHANASIA**
Euthanasia in the form of passive euthanasia has been recently made illegal in India. Euthanasia has, for a long while, been a topic for debate in India. It was like ‘a ship in an uncharted sea’ as apart from the ‘sea’ which can be understood as ‘the law of the land’, the waves of moral and ethical values were also to be considered. Either way they went, some or the other fundamental principle of law was violated. The Delhi High Court went ahead and observed that the punishment for suicide is
absurd in the era of euthanasia.\textsuperscript{67} The Bombay High Court had held, ‘right not to live’ or ‘the right to end one’s life’ is an integral part of the constitutional right to live\textsuperscript{68}, however, this was subsequently overruled. Later, in the case of \textit{Gian Singh v. State of Punjab}\textsuperscript{69}, the Apex Court opined that the fundamental right to life did not cover the ‘right to die’ but definitely covered the ‘right to die with dignity’. The same was taken up by the Court in the leading case of \textit{Aruna Ramachandra Shanbaug v. Union of India}\textsuperscript{70} wherein the Apex Court for the first time made passive euthanasia legal under certain circumstances, while not changing its stand from suicide being illegal. The Court also distinguished between the forms of euthanasia: voluntary and non-voluntary euthanasia, active and passive euthanasia. Voluntary euthanasia means when the patient is in a condition to give consent whereas non-voluntary euthanasia means the condition of the patient is such that he/she cannot give consent therefore, the decision falls on kith and kin of patient. ‘\textit{Active Euthanasia}’ entails use of lethal substances to terminate a person’s life whereas ‘\textit{Passive Euthanasia}’ denotes withdrawal of life saving medical treatment. In simple sense, former involves ‘commission of an act’ whereas later involves ‘omission to do an act’. The rationale of the Court behind legalizing the passive euthanasia is because failing to save a person does not constitute a crime however, a deliberative act would tantamount to murder. Further, the very fine line of difference between assisted suicide and euthanasia is that in former, the physician/doctor prescribes the patient the lethal substance and the patient on his own consumes the substance meaning thereby, the patient is not in a permanent vegetative condition. Therefore, assisted suicide will be considered equal to murder or abetment to suicide. The Hon’ble Court in this case has recommended certain procedures to be tailed till the time legislation drafts a law in this regard. The Hon’ble Court has laid down that an application for euthanasia shall be filed before High Court and at least a division bench should decide whether or not to grant approval or not. A medical committee comprising to at least three reputed doctors shall be set to look into the patient’s state of being. The Court should base their permission on the opinion of the medical committee. Further, the decision of the Court shall be followed by specific reasons for arising at such decision.

Meanwhile, the Aruna Shanbaug Case was at the stage of hearing in the Apex Court, a NGO named Common Cause approached the Apex Court with a PIL under Article 32 to legalize living will and passive euthanasia. This NGO had already made attempts with regard to living will and passive euthanasia by writing to the Ministry of Law and Justice; and Ministry of Health and Family Welfare. This PIL was in response to no response from the ministries. The main issues raised in this petition\textsuperscript{71} were: Whether Right to Life under Article 21 includes the Right to Die? Whether passive euthanasia can be allowed on the basis of living will? Whether a person can refuse or withdraw from medical treatment or life saving devices? Before the verdict of this case, passive euthanasia was already legalized in Aruna Shanbaug case. Therefore, the Apex Court focused mainly on the fish’s eye i.e; living

\textsuperscript{68} Maruti Dubal v. State of Maharashtra, 1987 (1) BomCR 499.
\textsuperscript{69} AIR 1996 SC 1257.
\textsuperscript{70} (2011) 4 SCC 45.
will and the right to refuse medical treatment.

Living Will is a legal document which acts as an advance directive stating the medical treatment which the individual will prefer to undertake or prefer not to undertake, in the event they are unable to communicate their wishes. It is different from the normal Will because Living Will is executed during the lifetime and for the person making the Living Will whereas a Will is exercised after the death of the person making it. The right to refuse medical treatment simply means if a person is terminally ill or in a permanent vegetative state, with no hope to recover, then he/she may refuse to the medical process either by way of prior consent or present consent. Prior consent is given by Living Will and this is generally utilized when the patient is not in a state to given consent. Present consent means the patient before undergoing the medical process is in a state to give his free consent. The Hon’ble Court finely distinguished that refusal to undergo medical treatment by withdrawing or with-holding life lengthening support system will only ease the natural process of dying and therefore, it is not suicide. It is the right to live with dignity till the life span without any medical support. Denying this right would mean moving on the path opposite to the path of Fundamental Right to life, liberty, human dignity and privacy enshrined under Article 21 of the Constitution of India.

4. CONCLUSION
Assisted suicide is still not acceptable in India because the doctor actively participates in the suicide by necessary information or substances for the successful commission of suicide further, the doctor who assists in suicide will be prosecuted homicide. It is considered immoral from the point of view of religion as well as law. In the present scenario in India, notwithstanding the fact that certain requirements to be fulfilled, only passive euthanasia whether voluntary or involuntary is legal. Further, the concept of living wills is also dealt under passive euthanasia.

As said by Lord Denning72: ‘(t)hus far has the law developed up to date. Now there are further developments looming ahead’. Therefore, it can be concluded that there is need to sightsee this field of law also to advantage the ill patients and give them a painless ending of life. There is a very fine line of difference of natural and unnatural death, between assisted suicide and euthanasia.

“Death is not the opposite of life but a part of it.”
By Haruki Murakami

DETERMINATION OF JURISDICTION IN CYBERSPACE ISSUES – EVOLUTION AND PRESENT TREND IN INDIA

By Adhar Gupta
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ABSTRACT

Determination of jurisdiction, especially in cyberspace issues is important issue to be pondered upon and decided so that the forum court having jurisdiction can be looked onto for justice. There has been a lot of confusion with regard to question of jurisdiction in cyberspace as the cyberspace is borderless and covers the entire world. Various tests have been devised over the course of time to determine jurisdiction in cyberspace. An analysis as to which test fares better is an objective of this research paper.

This research paper aims to highlight the various tests that have evolved with the advent of time in the courts to determine personal jurisdiction of court in forum state, starting with the evolution in the courts of US and how they have been opted in India. The research paper discusses at length about the aspects of the various tests and an analysis is drawn out and their efficiency has also been put to test. It also highlights the drawbacks/ de-merits of the tests enunciated over time.

The research paper focusses not only on the various tests but also on the present trend that is being followed by the courts in India and also discusses recent judgement that has put to rest the uncertainty with regard to the test that has to be opted by the courts when trying to assert jurisdiction. At the end, the research paper also highlights the need of time and the solution that can be opted in this regard.

There is a need to have a certain specific law to determine jurisdiction in matters arising out of cyberspace. At present there is no particular specific law available in India, and the courts have to look into the provisions of CPC and CrPC while asserting jurisdiction. Technological advancements are taking place on a daily basis which would mean that disputes are going to get more and more complex and the tests that have been devised are going to fail soon.

INTRODUCTION

In the last few decades, the immense impact of information technology being a transnational character has become a drastic threat to the administration of justice. On this aspect, a fundamental question arises as to what will be the jurisdiction of the courts to adjudicate disputes between the parties transacting on the Internet. A widely recognized view that is gaining ground realities is that the existing law of jurisdiction is redundant to the cyber space and requires a complete overhaul with different set of rules to govern jurisdiction over the internet, which is free from the shackles of geographical boundaries.

Computer based communications happen across geographical borders creating a new medium for the human interaction/activity which in turn weakens the feasibility of applying laws based on geographical boundaries on these communications/interactions. The cyberspace needs law of its own because cyberspace is borderless and is not based on any territorial jurisdictions. The issue of jurisdiction has come to forefront with the advent of internet, for internet is not bound by
geographical boundaries. For example, a single transaction may in itself include three boundaries: the law at the place where user resides, law governing the nation where server hosting transaction is located, law applicable to nation where the person or business with whom transaction takes place.

There is no uniform international/state law governing the application of law on internet or cyberspace. The courts by their judicial decisions have devised various tests to determine jurisdiction, in cases of dispute in transactions/communication on internet, over the course of time. At first, the courts will apply to the forum all procedural laws, and then factors linking the issue to the laws of forum state. The tests evolved till date are not free from subjectivity and lack in one area or the other.

The law relating to determination of jurisdiction in domestic as well as international transaction over the internet has developed in the USA. Before deciding a case, the courts have to determine whether they have personal jurisdiction to adjudicate upon that matter or not. The power to adjudicate upon a matter, a prerequisite to jurisdiction, is the question in issue which has to be determined by applying one of the various tests evolved. These tests are very important to understand in order to delve into the various approaches used by courts to determine jurisdiction in India.

Indian courts do not have own tests to determine jurisdiction and have followed that have evolved in the USA. Indian courts have focused on the target based approach test, though different circumstances may require application of different test.

VARIOUS TESTS TO DETERMINE JURISDICTION
1. Long Arm Statute
2. Minimum Contacts Test
3. The Effects Test
4. Zippo Sliding Scale Test
5. Target Based Approach Test

LONG ARM STATUTE
A statute can be extended in its territorial application to even apply to persons resident outside the jurisdiction of that particular act. In order to have application of this long arm jurisdiction, there must be territorial and reasonable nexus with applicability of law. Long arm statute is used to bring in within its jurisdiction a permanent establishment which carries on business in another jurisdiction. Long arm statute sets out the basic guidelines for exercise of court’s power to govern conduct by non-citizens. Long-arm statutes differ from region to region and from nation to nation. For establishing personal jurisdiction in a forum state, a person who is not resident there must fit not only under the ambit of the state’s long-arm statute, but jurisdiction of the forum state must also be valid.

The first and foremost step of the forum court is to apply long arm statute, if any, to see if it permits exercise of personal jurisdiction. This gives rise to a conflict that states may have concurrent jurisdiction by

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73 <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1301&context=ilsajournal/>
75 Id.
76 Rossenblatt, Betsy. “Principles of Jurisdiction”<https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1301&context=ilsajournal/>
virtue of their respective long arm statute. The application of long arm statute to jurisdiction issues arising out of the internet transactions/ communications is quite speculative, but this has given way to the evolution of various tests to determine personal jurisdiction in matters relating to internet.

It is an extension of application of an act of a country to non-residents/residents which has caused sufferance/impact on the forum state, such as offence committed outside forum state, or offence committed in the forum state. It is generally and primarily used in offline transactions. All the other tests are based in this tests as they follow the principle of reasonable territorial nexus. It is the foundational principle governing personal jurisdiction as it sets out the importance of territorial nexus.

Section 75 of the Information Technology Act, 2000 read with Section 1(2) of the said act is an example of long arm statute, which provides that the provisions of the act shall apply for offences or contravention committed outside India. This extends the applicability of the act as provided under Section 1(2), save as otherwise provided, to any offence or contravention thereunder that is committed outside India by any person, irrespective of the nationality, domicile, status, etc.77

**MINIMUM CONTACTS TEST**

This test was evolved in the case of *International Shoe Co. v. Washington*,78 wherein determination of jurisdiction of forum state court over a defendant who does not reside or carry business within its jurisdiction was dealt with. In this instant case, the business was carried out in Washington through salesman by a company registered in Delaware. Washington enacted a legislation imposing compulsory tax in nature of contribution to Unemployment Compensation Fund on the companies operating there. The company refused to pay tax on ground that it did not have a Permanent Establishment there. The court concluded that the court of Washington had jurisdiction on account of minimum contact established.

It was held that in such cases, in order to invoke the jurisdiction of the forum state court, the plaintiff in order to invoke jurisdiction has to establish before the court that the defendant has sufficient ‘minimum contacts’ with the forum state.79 In other words, the defendant must have purposefully availed the privilege of conducting activities or concluding commercial transactions in the forum state or must have purposefully directed its business activities in the forum state.80

The minimum contacts test as laid down in the case of *International Shoe Co. v. Washington* can be understood in a manner so as to perform two distinct functions. First of all, protection of the defendant from litigation in a far located and inconvenient forum. Secondly, to ensure that the states do not extend their jurisdiction that is provided or prescribed. The minimum contacts test/ purposeful availment test, has

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77 Information Technology Act, S. 75 <https://indiankanoon.org/doc/576992/>
78 326 U.S. 340 (1945)
79 <https://www.everycrsreport.com/reports/R44957.html>
80 <http://www.kentlaw.edu/cyberlaw/docs/rfc/usview.html>
to establish the following essentials to satisfaction\textsuperscript{81}:

a. Purposeful availment of the privilege of transacting business in forum state

b. Cause of action must have arisen in the forum state

c. Reasonable nexus and fair exercise of jurisdiction

The applicability of this test is rather narrow and would apply to cases similar to that of \textit{International Shoe} case, i.e. where business carried out in another jurisdiction through some intermediary such as salesman, and would not be applicable to cases involving remote torts or goods moved after purchase\textsuperscript{82} or internet defamation and non-commercial transactions. The minimum contacts test formed the basis or foundation for the other tests that evolved over a period of time, because it is an essential feature to be established while determining jurisdiction.

\textbf{ZIPPO TEST}

The Zippo Sliding Scale Test was formulated in the case of \textit{Zippo Manufacturing Co. v. Zippo Dot Com, Inc.}\textsuperscript{83}. The plaintiff, a manufacturer of certain products, namely, Zippo Manufacturers, was registered in Pennsylvania. The defendant, “Zippo.com”, was provider of news service through internet registered in California. Trademark infringement along with dilution was claimed in the courts of Pennsylvania. The jurisdiction was based on theory of specific personal jurisdiction as under Minimum Contacts Test. The Zippo Sliding Scale Test was evolved wherein 3 kinds of websites were recognised for determining jurisdiction, namely, Active (highly interactive), Mixed Interactive, and Passive websites. It was observed that only the websites which were interactive could be sued in another jurisdiction, while the passive websites could not be sued. This led to an issue where the passive websites could easily bypass the jurisdiction of forum court to entertain matters with respect to such websites.

Professor Michael Geist, a Canadian academician, has pin-pointed a few drawbacks in the Sliding scale test. The middle category of “partially interactive” websites is a controversial shady area that caters unpredictable results, and so the test has to undergo continuous changes in order to cope with the ever changing technology, and discouraging the development of websites which are interactive by nature. The category of interactive websites is so that it grants jurisdiction to a forum court solely on the basis of whether a website could affect the residents in the forum state, not taking into account whether it was actually done or not.\textsuperscript{84}

The Sliding Scale test was welcomed by various courts as striking a balance between a lawless internet and a stringently regulated internet. The basic disadvantage of this test is that a passive website could not be expected to foresee being sued in multiple jurisdictions over the world, whereas an interactive one should expect such an outcome on account of the contact established.

After the Zippo test was devised, courts increasingly became reluctant to assert jurisdiction merely on the basis of website

\textsuperscript{81}Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997)


\textsuperscript{83}952 F Supp 1119

\textsuperscript{84}See Michael Geist, Long Arm of the Law Needs New Guidelines for the Internet.
being accessible. Foreseeability was also factored in by the courts while determining the nature of website for the purpose of jurisdiction. This test is subjective and the same facts and pleadings may lead to two different courts due to subjective interpretation by the judges.

The courts have always faced an issue in determining the degree of interactivity of website that in order to establish personal jurisdiction. Website used for mere exchange of files or information with persons over the internet has been held not to be sufficiently ‘interactive’ for the purpose of forum court to assert jurisdiction. The Zippo test is static in nature, so is ineffective for technological advancements are happening on a daily basis. The Zippo test has become outdated and is rarely used.

**EFFECTS TEST**

The Minimum Contacts test was not applicable to all kinds of cases, and so a test, namely, effects test, was evolved in the case of *Calder v. Jones*[^65], as a response to the Minimum Contacts Test. It is particularly applied in cases which involves tort or defendant’s website is either in nature passive or can be said to be only modestly active or not interactive under the Zippo test. The effects test highly depends on subjectivity. The defendant’s intent to inflict or cause injury within the jurisdiction of forum court is determined by the facts and circumstances of each and every case, along with the accessibility of the defendant’s website in the forum state.

This test does not focus merely on the degree of interactivity between forum resident and non-forum defendant, but rather on the effects intentionally caused within the forum by a defendant’s website located outside the forum state. This test is better in the sense that passive websites or less interactive websites cannot bypass this test unlike the Zippo Test.

In the Calder case, Florida residents wrote and edited an article in an American Newspaper called National Enquirer which defamed Jones, a movie actress resident in California. The National Enquirer had a wider circulation in the state of California. The Supreme Court held that the facts were such that they involved something more than foreseeability. The circumstances were sufficient to establish that such act by defendants was aimed at California and would have an impact in California, hence the defendants could have reasonably foreseen being sued in California.[^67]

The category-specific rule would also promote freedom of expression on the Internet by permitting the posting of information on websites without automatically triggering out-of-state jurisdiction in a defamation suit.[^88]

This doctrine was applied in the *LICRA v. Yahoo!*[^89] Case. In the present case, some Nazi memorabilia was being offered for sale on a web page hosted by Yahoo! US


[^66]: Supra note 6


[^89]: Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000 and November 22, 2000, No RG:00/0538 (Fr.).
through Yahoo France and accessible in France. Sale of such Memorabilia material in France was an offence punishable under the French law. A suit was filed in the courts of France, which ordered Yahoo! to take down such material/access from the website of Yahoo! France. The French court used the approach of effects test to establish jurisdiction and asserted power to implement orders beyond France. It observed that by providing access in France to participate in the sale, defendant had committed a wrong within the forum state, France. The court also considered the effect such an access would have on the public at large in France and how they were targeted.  

In effects test, the focus is on the likelihood or knowledge of harm. The mere possibility of being accessed in France did not alone determine the question with regard to jurisdiction, but also the effect of such objectionable item on public at large in France was taken into account by the court while asserting jurisdiction over the matter. The effects test is subjective in nature just as the Zippo test, and the question pertaining to jurisdiction is decided on the basis of the set of facts presented before the court. The same set of facts might lead to altogether different conclusions and inferences. All the courts are not equally rigorous while deciding the issue of jurisdiction of forum court. It is generally used in the cases involving tort or where the website of the defendant is passive or moderately interactive in nature.

**TARGET BASED APPROACH**

A stricter/tighter approach based version of the effects test is targeting effects approach and is a more clearer and filtered approach to determine jurisdiction. With the advent of time, various tests such as Zippo Test have failed in one way or the other by providing a grey area for bypassing these tests. Since, the effect can be felt in several jurisdictions, it does not necessarily mean that courts in all such forum state will have jurisdiction. To meet present requirements, a target based approach in combination with effects test is used to determine and establish personal jurisdiction of the forum court.

In developing criterion for determination of whether a website has targeted the residents in forum state, it must be carefully ensured that it is technology neutral. Furthermore, the criterion must have no bias towards consumers or producer, in any manner whatsoever, while deciding whether a customer base located in the forum state has been specifically targeted by a website located outside. Targeting basically means effects within the territory of the forum state.

In order to establish the jurisdiction of the forum court, even when a long arm statute exists, the plaintiff would have to show that the defendant ‘purposefully availed’ of jurisdiction of the forum state by ‘specifically targeting’ customers within the forum state. According to Schultz, a middle path had to be chosen between the too narrow (‘subjective territoriality’) and the too broad (‘effects’) jurisdictional bases for better managing transborder content/uploads/2015/08/1.pdf.> Accessed May 3, 2020 at 3:40 pm

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91 Supra note 17 at 18
This middle path was ‘targeting.’ Schultz defines targeting to mean “in essence that the activity must be intended to have effects within the territory of the state asserting jurisdiction.”

The law in India was quite uncertain until recently, when the Delhi High court put it to rest in the case of Banyan Tree Holding Ltd. v. A. Murali Krishna Reddy, wherein it was observed that a passive website with no intention of targeting audience outside the state where it is located cannot be subjected to jurisdiction of the forum court. The court overruled Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd. case, and affirmed the India TV Independent News Service Pvt. Ltd. v. India Broadcast Live and Ors. decision, and also held that it to be a step closer to determining jurisdiction. The court in India TV did not have the occasion to look into the finer aspects of jurisdiction based on nature of website and intention of host website to specifically target viewers outside its jurisdiction, and the effect thereon.

In the Casio Ltd. decision, the plaintiff was the fully owned subsidiary of Casio Japan which owned the trademark “Casio” with regard to products in India and the defendant had got domain names deceptively similar to the brand, Casio in its name. The court concluded that wherever the websites were accessible, the courts could assert jurisdiction at that place, and actual deception in a passing off action need not be shown and a likelihood of same would suffice. In India Tv decision, the courts opted for a newer approach. The plaintiff was a news channel, India Tv, which had got the trademark for same in 2002 and had a domain name ‘www.indiatv.com’ The defendants residing in Arizona hosted a website by the name of ‘www.indiatvlive.com’ which was deceptively similar to that of plaintiff and a passing off action was brought against them in Delhi. While determining the issue of jurisdiction, the courts held that to assert jurisdiction, it has be established that the defendant had purposefully availed the jurisdiction of Delhi, and whether there existed sufficient connection and if it would be reasonable, in the absence of any long arm statute. Only when sufficient connection was shown the court held that the audience in India was targeted and had effect on them.

The present case was filed in Delhi, and neither parties were located within its territorial jurisdiction. The plaintiff, Banyan Tree Holding, was a company located, and registered in Singapore, involved in the hospitality business. It was contended that the words ‘Banyan Tree’ had been used by them since 1994, and that they also maintained ‘www.banyantree.com’ and ‘www.banyantreespa.com’ since 1996. The main contention of the plaintiff was that these websites were accessible in India and they had created a name for themselves. The plaintiff came to know that the defendants, who were located in Hyderabad, had initiated a project under the name of Banyan Tree Retreat. It was

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92 <https://indiankanoon.org/doc/151685239/?type=print>
94 CS(OS) 894/2008 (High Court of Delhi, 23rd November 2009) (India).
95 2003 (27) P.T.C. 265 (Del.) (India)
96 2007 (35) P.T.C. 177 (Del.) (India)
97 <http://nja.gov.in/Reading_Material/P-940%20Reading%20Material.pdf>
contended that the name was deceptively similar to that of the plaintiff’s business. The plaintiff invoked the jurisdiction of the Delhi High Court on the ground that the defendant’s website ‘www.makprojects.com/banyantree’ was accessible in Delhi, even though neither of them had a place of business in Delhi.98

A passive website or posting advertisement or mere hosting of website in forum state does not result in a commercial transaction.99 The courts have given a concept of passive plus website, wherein a website is not only to be shown to be accessible at a particular place but it is also to be shown that the audience where it was accessible was targeted. It was also observed that all general procedural laws pertaining to jurisdiction need to be satisfied and mere access to website is not sufficient. It is to be established before the court that the defendant purposefully availed itself of such jurisdiction by showing that such defendant targeted the audience with the purpose/ intention of concluding a commercial transaction at the place where jurisdiction is asserted by the plaintiff, and as such caused injury to the plaintiff in the course. In the absence of even one of these elements, the court would fail to assert jurisdiction in accordance with this test. This was clearly established in the Banyan Tree Holding case. The Indian Courts have the approach to adopt a combination of sliding scale, and effects test, thus showing a passive plus or interactive website targeting at the plaintiff.

ANALYSIS AND WAY FORWARD
Various tests devised by the courts over a period of time to determine personal jurisdiction have been discussed in detail above. On an analysis of these tests, it can be seen that no test devised till date is full-fledged in the sense that it does not serve the first and foremost purpose of being universal and objective in nature. The above stated tests are highly subjective and the interpretation of these tests depends on the application judicial mind and reasoning, which in turn may lead to several inferences.

Also, there is no specific law, international or state law, that deals with jurisdiction pertaining to regulation of disputes arising in cyberspace. There is only one provision under the IT Act, 2000, i.e. Section 75 read with Section 1(2), to assert extra-territorial application of jurisdiction. While asserting jurisdiction, the courts have to apply the general law with respect to jurisdiction, i.e Sections 6, 9, 15-20 of CPC and Section 179 of CrPC to establish whether a forum court has jurisdiction or not. Long arm statute test and Minimum contacts test though are not free from demerits, serve as a foundational block for the other tests as the principle laid therein is so intrinsic for the purpose of determining jurisdiction of forum court.

There were speculations on whether accessibility of a website in a particular place is sufficient for the forum court to assert jurisdiction. The decision laid down in Banyan Tree Holding case, clearing the earlier uncertainty, has opened up new chapter to the arena of jurisdiction as the internet today is not limited and is being used widely for various commercial purposes. The ambit of the expression “cause of action” in this decision of Delhi High Court would tighten the scope of

98 Supra note 13 at 28

The trend followed in the decision of Banyan Tree Holding case is not full proof and requires new measures to deal with the issue of jurisdiction in disputes arising in cyberspace as technological advancements are taking place on a daily basis. The target based approach is subjective and as such an international treaty would much appreciated and would facilitate a uniform system of law throughout the world. International treaties would in turn mean enacting of specific state statutes for the purpose of asserting jurisdiction which would lead to a better regulation by controlling the much debated issue of jurisdiction.

International treaty for the purpose of setting up a universal approach to jurisdiction, such as the OECD Model and UN Model on E-commerce, will be beneficial and would serve the purpose as a framework for enacting state laws. Till the time, some specific statute is enacted or international treaty for this purpose is signed, a harmonious construction of the various tests that have evolved over a period of time, would be the best suited method to determine the issue of jurisdiction. Unless and until some specific law is enacted in this regard, the speculations would continue to exist and due to this uncertainty the courts would be at a discretion to assert jurisdiction on account of the subjectivity associated with each of the tests used. Till the time some law is enacted, a harmonious construction of various tests evolved must be used to seek uniformity in determining jurisdiction of forum court.

CONCLUSION
The trend followed by the Indian courts in determining personal jurisdiction is a combination of Effects test with target approach along with Zippo Sliding Scale Test. Although this trend is followed in a large number of cases, the approach to be used depends on the facts on case to case basis. The Zippo test and effects test become vulnerable to subjective results. The approach to be used in India has been clarified in the case of Banyan Tree Holding (P) Ltd. v. A. Murali Krishna Reddy wherein it has been observed that personal jurisdiction is to be easily established through a series of tests. Mere access to a website at the forum state does not conclude the jurisdiction in the forum court. It has to be shown that either on account of long arm statute or minimum contacts test, the court has jurisdiction. Better so, if it is shown that the website is interactive, the jurisdiction may be established. The jurisdiction in case of passive website may be established with the help effects test. A newer approach of combining target approach with effects test along with Zippo Test is widely recognised for the facts of case are to be tested through a series of approaches, thereby establishing the jurisdiction successfully. Seeking harmony of various rules may be more productive to seek uniformity in standards for determining jurisdiction. The application of the three tests simultaneously helps us to construe harmoniously the effects, the interactivity test using the concept of targeting, and can be said to be a middle ground.

100 Supra note 16

Seeking harmony of various rules may be more productive to seek uniformity in standards for determining jurisdiction. Schultz defines targeting to mean “in essence that the activity must be intended to have effects within the territory of the state asserting jurisdiction.”

The application of the three tests simultaneously helps us to construe harmoniously the effects, the interactivity test using the concept of targeting, and can be said to be a middle ground. It is something more than effects but less than physical presence. Even though the test to be used depends on a case to case basis, but a harmonious construction of the three tests appears to be a reasonable and fair approach while determining personal jurisdiction.

There is a need to have a certain specific law to determine jurisdiction in matters arising out of cyberspace. At present there is no particular specific law available in India, and the courts have to look into the provisions of Civil Procedure Code and Criminal Procedure Code while asserting jurisdiction. An International treaty to this effect would be much appreciated as it would lessen the chaos arising out of different state laws. Further, states need to devise specific laws for matters arising out of cyberspace as it is a new medium and requires newer laws for its regulation as well. Technological advancements are taking place on a daily basis which would mean that disputes are going to get more and more complex and the tests that have been devised are going to fail soon. Only when we have specific laws, the situation regarding jurisdiction can get certain and we can look for a better and smooth functioning, regulation of cyberspace and the better resolution of disputes arising out of it.

At the end, it can be concluded that there is a prime need for some specific legislation pertaining to jurisdiction or international treaty which tends to this issue which will help in a better and smoother application of law which is objective, free from subjectivity, and also universal, if feasible. There will always be discretion available to judges, until some laws are formulated, which might lead to different conclusions and inferences. Until specific laws are enacted, a harmonious construction is best suited to determine the issue of jurisdiction and the judges must work on some fundamentals which make these tests objective, and leave no or less room for subjectivity or discretion available to judges in this regard.

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RESERVATION FOR EWS: A MOVE ANTI OR PRO DISCRIMINATION?

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ABSTRACT

The reservation made based on the caste system has been prevalent for a long period of time in India which has been questioned on the ground that its performance has not been in consonance with the objectives it sought to attain. The provisions mentioned in the Constitution have also been studied wherein it talks about the Socially and Educationally Backward Classes along with SC/ST and also how the new provision for Economically Weaker Sections may be incorporated in the same. The role played by political forces in the reservation policy is also essential to understand as it casts a direct impact upon the citizens of the State and how they perceive the system.

Keeping the practices of other countries in mind that of India has been compared with the former and the pros and cons are thereby analyzed. The provision of 10% reservation for Economically Weaker Section of Upper castes including Christians and Muslims has grabbed limelight despite the fact that a great many attempts by the Government in the past years have failed. It is important to figure out what system would be more beneficial for the society for its wholesome development and to fulfill the goals initially set out in the policy.

INTRODUCTION

The Constitution of India is a masterpiece put together by the former leaders of our country. The vast and intricate provisions contained therein on diverse subjects are a testimony to the fact that many brilliant minds went behind its making. Article 14, Right to Equality, regarded as the basic structure of our Constitution not merely implies identical treatment. Rather, it paves way for reasonable classification. Where Article 14 lays down the general principle of equality, Article 15 and Article 16 are specifically pertaining to the prohibition of discrimination on various grounds and equal opportunities in matters of public employment respectively. After several controversial cases before the Court such as State of Madras v. Champakam Dorairajan\(^\text{104}\), Indra Sawhney v. Union of India\(^\text{105}\), the effects of such cases were overturned by way of amendments and inclusion of clauses (4) and (5) in Article 15, also clauses (4A) and (4B) in Article 16 which permits reservation for Socially and Educationally Backward Classes (SEBCs) as well as SCs and STs. Whereas the Supreme Court in M. Nagaraj v. Union of India\(^\text{106}\) has made it clear that even if the State has compelling reasons, it has to see that the reservation does not lead to an excess of 50% ceiling limit or obliterate creamy layer for extending the reservation indefinitely\(^\text{107}\).

What started as a measure to uplift the classes in need of advancement has now widened to include in its ambit upper classes as well. By the virtue of the Constitution (One Hundred and Third) Amendment Act, 2019 even the Economically Weaker Sections (EWS) of

\(^{104}\) AIR 1951 SC 226
\(^{105}\) AIR 1993 SC 477
\(^{106}\) (2006) 8 SCC 212
\(^{107}\) Dr. J. N. Pandey, Constitutional Law of India 185 (Central Law Agency, Allahabad, 54th edn., 2017)
the general categories or upper castes would be able to reap the benefits of direct reservation in government jobs and higher educational institutions. It would be an understatement to say that this Act has been a receiver of much controversy. Not only is its constitutionality challenged, but many voices have come up, especially the Opposition questioning the perfect timing of bringing forth such change right before the dawn of Lok Sabha Elections, 2019. The NDA led Government was successful in bringing the provision of 10 percent reservation for EWS of Upper Castes including Christians and Muslims, which had collapsed on various occasions even under the guidance of leaders such as P.V. Narasimha Rao or by way of Ordinance promulgated by the Government of Gujarat which was later struck down by the High Court of Gujarat. The Constitution (One Hundred and Twenty Fourth) Amendment Bill, 2019 received President’s assent on January 13th, 2019 resulting in the addition of clauses (6) in both Article 15 and Article 16 of the Constitution.

CONSTITUTIONAL VALIDITY OF RESERVATION

As depicted, the Amendment Bill of 2019 even though passed in both the Houses of the Parliament but before obtaining the assent of the President, it was challenged by an NGO named “Youth for Equality” within few hours of it being passed. It was contended that the Bill was in contravention to the basic structure of the Constitution. As the Bill aims at providing reservations solely based on economic criteria i.e. families with an income less than Rs. 8 lakhs p.a. and the Apex Court’s decision in the Indra Sahwney case clearly prohibits economic reservation, the Bill violates the doctrine of the basic structure. In addition, the Mandal Commission case also held that the maximum limit of reservation cannot exceed the cap of 50 percent. The present scenario though exceeds such capping limit as the former reservation accounted for 49.5% including 15%, 7.5%, and 27% quotas for Scheduled Castes, Scheduled Tribes and Other Backward Classes respectively.

With the newly introduced 10% reservation for upper castes, also being referred to as the creamy layer by many brings the reservation up to 59.5% in total. However, many constitutional and legal experts think to the contrary. SK Sharma, former secretary to Lok Sabha opines that “had it introduced the quota Bill without amending the Constitution, it would have been struck down by the Supreme Court. But since, the government has introduced the Bill with a proposed amendment in the Constitution, the proposed legislation – if it becomes law – would stand judicial scrutiny, as the apex court is only supposed to interpret the Constitution as it exists.”

On the other hand, Faizan Mustafa, Vice-Chancellor of NALSAR University of Law, Hyderabad holds a similar view that such kind of a legislative action via introducing an amendment to the Constitution via Article 368 will be upheld on the ground of Equality before the Supreme Court, “equality as a principle is part of the basic structure and with equality of status and opportunity in the preamble also as a basic structure, the court may agree to the economic criterion for reservation.”

108 AIR 1993 SC 477
With a rise in writ petitions being filed in the Supreme Court under Article 32 by NGO’s including Youth for Equality, TMA Pai Foundation, Janet Abhiyan and even businessman such as Tehseen Poonawala, CJI Ranjan Gogoi has said that even though they cannot pass an order restricting the 10% reservation, but the plea shall definitely be heard this March 28th, and will be considered whether it requires to be handled by a Constitution Bench. The bench further enunciated on the fact that the filing of short notes of points raised in the petition is to be done.

POLITICAL ASPECT IN INCOME BASED RESERVATION

The fast-approaching Lok Sabha General Polls of 2019 raises an important question on the genuineness and motive behind the income-based criteria for reservation. The issue at hand has been much politicized from its inception so much so that plenty are terming this move as a “masterstroke” pulled off by the NDA led Government. The Constitution of India formerly provided quotas for SEBCs and SC/ST/OBCs in the public as well as private education sector and in jobs by the virtue of Article 15 and Article 16. “The idea was to not just improve their economic status, but to address the denial of rights and oppression meted out to these groups over the years, and to work towards rectifying their utter lack of representation in public office” whereas the newly introduced reservation for General Category is entirely based on EWS of the upper castes or the forward castes. It aims at bringing citizens of general categories at the same pedestal as others in educational and employment fields which for long has been a non-reachable dream due to the constraints imposed by poverty. But, one must pay heed to the timing of the Amendment.

The Opposition Party calls this an “election gimmick” to lure in and gain support from the Upper Castes which was prior to the said change, drifting away. Another fact to ponder upon is that all such previous attempts to bring in a reservation for the general category were set aside by the Court. As in the year 1991, an attempt moved by PV Narsimha Rao’s Government to introduce 10% reservation for poor among the forward/upper castes could not stand due to the majority opinion given in the famous Mandal Case. Similarly, in 2016 Gujarat promulgated an Ordinance on similar grounds and provided justification by quoting Article 46, but the same was quashed. “The High Court of Gujarat observed that the unreserved category itself is a class and economic criteria was too fluctuating a basis for providing quota.”

Surprisingly, this time around the same was passed not only by Lok Sabha where BJP possesses major support but also by Rajya Sabha. “A jubilant BJP and its allies hailed the move as historic and masterstroke saying it is in sync with the Modi Government’s motto, sabka math sabre vikaas.” It is contended that even though the Opposition Party is calling it a mere stunt to gain vote bank, regardless it

has supported this move due to its political significance and also this far ahead of Lok Sabha Elections 2019, no party seems to lose out on the support and get in the bad books of the Upper Caste population and be regarded as anti-General by them.

RESERVATION IN OTHER COUNTRIES

The caste-based reservation has been followed in India to uplift the weaker sections of the society, this practice has been followed in other nations as well such as Nepal, Pakistan, and Sri Lanka whereas other countries such as U.S.A., Canada, Malaysia, Russia, and others generally follow the reservation which deals with affirmative action. It is a policy through which one promotes the employment and education of all those groups of persons who have suffered any form of discrimination and is different from that of the caste system.

The International Convention on the Elimination of All Forms of Racial Discrimination hosted by the UN laid down that as a means to rectify systematic discrimination, affirmative action programs may be needed by countries that had countersigned the convention. Also, the United Nations Human Rights Committee states that the principle of equality sometimes requires State parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.114

In the United States of America, affirmative action was introduced to battle against discrimination based on race, gender, creed, color, or national origin. The judicial decisions serve as the framework for implementing the policies of affirmative action. Also, the authorities are free to make their own laws concerning with such actions. In the year 2018, it was seen that the university campuses had abandoned the administrative policies that asked the universities to consider race as one of the factors for its diversification. Though in August 2020, the voters in California would be responsible to approve the return of affirmative action in November which would restore the rights of colleges and universities in the states to consider race, ethnicity, and gender in admission decisions.115

Malaysia follows a Malaysian New Economic Policy (NEP) whose main objectives are “to achieve national unity, harmony, and integrity; through the socio-economic restructuring of the society; and to minimize the level of poverty in the country.”116 It was also witnessed that where the quotas were made available for admission in universities were removed which saw a rise in people from the minority groups taking admission. The Malaysians witnessed was that there was a rise in admission in the universities by the minority groups when certain quotas that barred them from taking admission were removed. The purpose of such a provision was to make sure that there was a redistribution of wealth so as to extend ownership of enterprises which might also

114 Which countries other than India have caste-based reservation systems, available at https://www.quora.com/ (Visited on 20th August, 2020)
115 Affirmative action incentivizes high schoolers to perform better, new research shows, available at https://www.sciencedaily.com/ (Visited on 23rd August, 2020)
help in increasing the economic process. Although, if these policies were to elevate the poor Malays then they have backfired as the government ends up using them for their political gain.

In Canada, affirmative action is followed using the term “Employment Equity” wherein the seats are reserved for Canadian tribal, women, and physically disabled people in colleges and the public sector. There is an Act governing this policy which is known as the Employment Equity Act. The main purpose is to ensure that unnecessary hoops during the hiring can be removed. In April, 2020 an amendment was made by the Treasury Board of Canada Secretariat (TBS) in the Treasury Board Policy on People Management and Policy of Management of Executives introduced the modernized and broadened directive on employment equity, diversity and inclusion, and a directive on the duty to accommodate.  

The Union of the Soviet Socialist Republics (USSR) was called the world’s first Affirmative Action Empire by a Harvard historian, Terry Martin where he also says that the architects pictured it as a state that followed the principle based on self-determination of the nations. The quota system (now abolished) in the USSR was for the social groups including ethnic minorities, women, and factory workers. Though in the modern USSR, this is partially retained to the extent where the needs of some ethnic minorities and inhabitants of some territories are met.

In Nepal, minorities are included based on caste, region, religion, gender, inhabitation, and language. Here, even though the caste-based discrimination is punitive in the Article 14 of the Interim Constitution of Nepal, 2063 in 2007, as per the critics they have been promoting casteism which has not reduced and men with money in the minorities have taken good advantage over it which defeats the very purpose of existent policies.

In Sri Lanka, the caste system has been divided into three parts (Sinhalese, Sri Lankan Tamils, and Indian Tamils) which run parallel to each other. The Sinhala caste group is socially excluded as they are an underprivileged group who are considered a weaker and spatially dispersed group due to which they are excluded from services like free education resulting in poverty, limited contact with the State and limited opportunities to grow in the country. Here, the strongest caste-based discrimination is towards the Tamils leaving them deep in poverty and being powerless. Though explicit caste discrimination has been reduced over the years, but urban untouchability has continued because of their caste and their past roots.

RECENT DEVELOPMENTS

CHALLENGE TO 103rd AMENDMENT ACT, 2019:

Janhit Abhiyan.................Petitioner VERSUS Union of India & Ors............Respondents

From the moment Indian media started carrying the news reports about the Union Cabinet granting its approval for the One Hundred and Twenty Fourth Amendment


Bill, 2019, the nation became restless already and talks about its unconstitutionality started doing rounds. Several writ petitions were filed in the Supreme Court challenging the constitutional validity of the impugned Act. Certain contentions were put forth by the petitioners, which were as follows:

1. The Act violates the fundamentals of equality enshrined under Article 14 which is a part of the Golden Triangle of the Fundamental Rights enshrined in Part III of the Constitution. This Court has recognized Article 14 as one of the basic features of the Constitution which implies that it is not open to amendment by the Parliament of India vide power vested in it under Article 368.

2. The provision of reservation up to 10% meant exclusively for the Economically Weaker Sections in addition to the already prevalent reservation for SC/ST and OBC brings the reserved seats/posts far beyond the 50% capping limit set by the Supreme Court in Indra Sawhney v. UOI & Ors.119 And reaffirmed in M. Nagraj v. UOI & Ors.120

3. That the economic criterion alone cannot be a determinant of creating a reservation for citizens in educational institutes or public services of State. Providing for the same is a clear assault of the famous Mandal Commission case and various cases that followed.

4. Mandatory reservation of seats in private educational institutions either aided or unaided by the virtue of the inclusion of Clause (6) in Article 15 is a direct contravention of freedom granted under Article 19(1)(g).

5. Sri Rajeve Dhawan, learned senior counsel appearing for a petitioner while placing reliance on ‘Rules of Court, etc.’ under Article 145(3) and also on Order XXXVIII of the Supreme Court Rules, 2013 requested for a referral of the matter to a Constitution Bench of five Judges as it involved questions of constitutional importance and even touched upon the basic structure of the Constitution.121

Whereas the Counter Affidavit filed by the respondents and argued by Attorney General Sri K.K. Venugopal on behalf of Union of India presented the following defenses:

1. That the ratio of Indra Sawhney122 case has no application to the present amendments made to the Constitution by inserting Article 15(6) and Article 16(6) as in the former, an Office Memoranda (O.M.) was challenged whereas in the latter i.e. the present scenario, a constitutional provision already has been incorporated via the Amendment Act in challenge. The O.M. struck down by majority in Indra Sawhney123 couldn’t be upheld due to absence of any constitutional backing for the same, but the same cannot be said for the new clauses as a due procedure of law has been followed and the same has been done by the State to secure justice to all citizens based on social, economic and political.124

2. The limit of 50% on the reservation was decided by the Supreme Court w.r.t. Articles 15(4), 15(5), and 16(4). But the Act in question has added a separate clause (6) to both Article 15 and 16. Therefore, there exists no basis for the application of such limitation upon the 10% bracket for EWS.

119 1992 Supp. (3) SCC 217
120 (2006) 8 SCC 212
121 W.P.(C)No.122 of 2019
122 Supra
123 Ibid.
124 The Constitution of India, Preamble
3. Another contention raised by the petitioner Youth for Equality was that the said amendments violate the freedom guaranteed under Article 19(1)(g) as it mandates provision of reservation to EWS up to 10% even in private unaided educational institutions.\(^{125}\) It has been pleaded by the Attorney General speaking for UOI that Article 19(6) empowers the State to impose reasonable restrictions on such freedom in the interest of the general public and the insertion for this separate quota aims to benefit the public itself which could not get access to such opportunities owing to their lack of resources. Also, the petitioner itself is an organization in receipt of aids from the State and therefore, has no locus standi in the present matter.

4. The learned Attorney General also submitted that a three-Judge Bench of the Hon’ble Supreme Court approved and upheld the provision of reservation or classification based on economic criteria as provided for under the Right of Children to Free and Compulsory Education Act, 2009 in the case of Society for Unaided Private Schools of Rajasthan v. Union of India & Anr.\(^{126}\) Keeping this view in mind, the impugned Act can neither be termed as illegal nor said to be violating the basic structure of the Constitution.

5. Further, reference for the same can also be made to the decision propounded by this Court in Ashok Kumar Thakur v. Union of India\(^{127}\) wherein, it was held that “upon expiry of the time-limit, the criteria for identifying OBCs should only be economic in nature because our ultimate aim is to establish a casteless and classless society.”\(^{128}\)

On the 5th of August, 2020 the Supreme Court issued an order after considering all the pleadings and arguments raised by the learned counsels for both the petitioners and the respondents. Without entering into the merits of the issue, based upon the submissions made by several counsels for petitioners for a reference to be made to a Constitution Bench of five Judges to decide upon the constitutionality of 103rd Amendment Act, 2019, the Apex Court agreed to refer the matter before a five Judge Constitution Bench keeping Article 145(3) and Rule 1(1) of the Supreme Court Rules, 2013 in mind.

“The judges identified two crucial issues which motivated them to constitute a five-judge bench:

a) The section of the Act violating the basic structure of the Constitution in light of the ‘width’ and ‘identity’ ‘equality principles;

b) The issue of the 50% ceiling limits and whether reservation to EWS constituted an exception to this limit.”\(^{129}\)

Also, few transfer petitions were filed by the Union of India under Article 139A (1) read with Order XLI Rules 1 to 5 of the Supreme Court Rules, 2013 praying for these writ petitions filed in various High Courts all over the nation to be transferred to the Supreme Court of India as these pose a challenge to the validity of the Constitution (One Hundred and Third Amendment) Act, 2019 which already is pending before the Hon’ble Court titled, ‘Janhit Abhiyan v. Union of India & Ors.’\(^{130}\) It was held that the contentions raised by the Attorney General for/on

\(^{125}\) W.P. (C) No.73 OF 2019

\(^{126}\) (2012) 6 SCC 1

\(^{127}\) (2008) 6 SCC 1

\(^{128}\) Supra

\(^{129}\) EWS Reservation, available at: https://www.scobserver.in/court-case/reservations-for-economically-weaker-sections (last visited on 10 August, 2020).

\(^{130}\) W.P.(C)No.55 of 2019
behalf of UOI being deemed appropriate by this Court are fit to be allowed.

CONCLUSION

Every country in the world has at one point fallen prey to the disease called ‘discrimination’. It may have been in different forms, but essentially all mean the same, that is, to show who is superior as well as treat others as inferior and to not let them grow. Everyone who was dealt with the same fate has been subjected to years of suppression which resulted in people accepting them in the same capacity as it has been going on for decades. This was inhumane and due to this, every country placed certain rights to eradicate such discrimination and give power to the minorities so that they could grow and be an equal part of the community.

The caste system in India has been one of the oldest surviving practices, where due to dominance of the Hindu Society, many castes which were not in majority have been a victim of atrocities, social and economic backwardness. The constitutional foundation of which was laid down by the founding fathers for the upliftment of these sections in society. The essence of this policy was that those who felt weakened and helpless were given equal opportunity to make them feel more involved and given opportunities that were formerly denied to them. They have been given a certain number of limited seats that are reserved for them and could be filled only by those belonging to that category.

In today’s world, it can be evidently seen that till the time one is oppressed under the caste system, any affirmative action towards it would manifest as ineffective. With time, the minority groups have used the quotas in order to uplift their status in the society. Though in certain cases the now creamy layer of the people reaping the benefits of the quotas is using them for their coming generation as well which leaves the ones who actually require them helpless. While announcing the results of UPSC 2019, they announced that the Economically Weaker Section candidates would get a reservation of 10%. Also in July, 2020 a Brahmin Development Board was set up by the Karnataka state government to issue caste certificates to Brahmins in order to avail the benefits of the EWS quota. This came into existence when the Brahmins who were actually eligible in the quota were refused by the tehsildars on the issuance of caste and income certificates.

The reservation system has played a vital role throughout history in the political world and partly being used as an agenda to gain votes which have resulted in a slow change in the reservation system in India since a very long time. Though this type of reservation has its share of drawbacks but it has helped in making the conditions better in terms of making the weaker sections feel more powerful and lessened poverty. Many people are coming forward and pursuing their passions and are being treated as equals while doing the same. It has improved the economic and living conditions of these groups as they feel their rights are being protected and being heard by the government. Even so, this system needed to be modified and changed so that it helps those who have been suffering due to the pre-existing policy.

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CITIZENSHIP AMENDMENT ACT 2019- IS IT JUSTICE TO ALL PEOPLE RESIDING IN INDIA?

By Aditi Talan
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ABSTRACT
The enactment of the Citizenship Amendment Act 2019 which was passed by both the houses on 10th December 2019 and signed by the President Ram Nath Kovind on 10th January 2020 has created a very awful situations in our country where many students and people with fragmented information about the amended act is doing violent protests.

In Citizenship Amendment Act 2019 says that the illegal immigrants, who came to India before 2014 from Pakistan, Bangladesh and Afghanistan belonging to Hindu, Sikh, Buddhist, Christian, Parsi and Jain will be given Indian Citizenship. Here we can see that the Muslim community is being excluded, in my research paper the analysis of the Citizenship amendment act 2019 is being done and, also it gives information regarding the reason behind not including the Muslim community and how it is justice to all people residing in India.

LITERATURE REVIEW
The Prime Minister Narendra Modi in his speech mention his views regarding Citizenship Amendment Act as “CAA has nothing to do with snatching away the citizenship of any person belonging to the Muslim community who are legally residing in India at the time of partition and it only promises to give the citizenship to only those immigrants who have come to India from Bangladesh, Pakistan and Afghanistan before 31 Dec 2014 belonging to Buddhist, Sikh, Hindu, Jain, Christain and Parsi community”. Amit Shah and Narendra Modi in his speech mentioned the wordings of the Mahatma Gandhi at the time of partition that he mentioned” that any person belonging to above mentioned five community, if returned India back from Pakistan because of persecution faced by them then they will be accepted by the India and citizenship will be allotted to them”.

The Governor of Kerela ‘Arif Mohammad Khan’ mentioned the reason for not including the Muslim community in CAA in the interview with Rajat Sharma in ‘APP KI ADALAT’, he says that,” as Pakistan was declared to be the Islamic state officially because of which the minority group of Hindu, Sikh, Buddhist, Christain, Jain and Parsi community suffered from persecution and It’s the responsibility of India to give citizenship to these people so that they can live a healthy life in India and not to those illegal immigrants of Muslim who has come India because of unemployment”.

Rajat Sharma, the famous journalist in his show ‘Aaj ki Baat’ telecasted the story of the Pakistani Hindu girl who was forced to marry the Muslim men forcefully and also highlighted that the conditions of the minority group are pathetic in Pakistan and they are being compelled to come to India for their survival because what they are facing in the Pakistan, Bangladesh, and Afghanistan is persecution.

Ravish Kumar the famous journalist in his show prime time says that “the CAA and NRC is a conspiracy to create a rift between a Hindu and a Muslim community by raising a question from the BJP party that “Why Muslim community is being excluded from Citizenship Amendment Act”, he further added that the young student of Hyderabad University Rohith Vemula who committed suicide “My birth
is my fatal accident” one year ago, students doing protest are holding his photograph as a symbol to raise their voice against the acceptance of Citizenship Amendment Act and National Registration of Citizenship”.

Ghulam Nabi Azad the Leader of the congress party has brought down the distinction of President’s office by incorporating CAA in his location, he further said that Resistance groups considered the administration answerable for the far-reaching turmoil in the nation following the institution of the new citizenship law and said the general public was perilously crawling toward a common war-like circumstance.

"The general public is perilously crawling toward a common war-like circumstance and the legislature is exclusively answerable for it," CPI(M) general secretary Sitaram Yechury said.

AIM OF THE STUDY

- To study about the citizenship amendment act 2019.
- To find out whether any article of Indian constitution is violated or not.
- To relate CAA with the article 14 and 21.
- The effect of CAA in India as a whole.
- Reason behind excluding the Muslim Community.

LIMITATIONS OF RESEARCH -
Limited information was provided on online sources because of which I have only limited access to the information regarding my topic and also couldn’t find relevant and a good source to gather information regarding the problems faced by the people as because of Covid-19, the registration and identifications of people for citizenship has not started yet and also couldn’t find any research study of any professor for the reference.

RESEARCH METHODOLOGY
Doctrinal method has been used by me for my research paper where the analysis of the data is being done on the basis of second hand information collected from the online sources and books.

IS CAA JUSTICE TO ALL PEOPLE RESIDING IN INDIA?

SECTION 1: INTRODUCTION

The Citizenship Act of India was introduced by the parliament of India on 30th December 1955 in which according to Article 15 of the Indian constitution all the people who were residing in India at the time of commencement of constitution were given the citizenship and also to those people who were born in India. This act also upholds the provision to acquire citizenship by the foreigners and the overseas citizenship of India followed by renunciation and termination of citizenship as well. The Citizenship act was also further amended in 1985, 1986, 1992, 2003, 2005, 2015 and, 2019.

The latest Amendment of the Citizenship act 1955 which is Citizenship Amendment Act 2019 submits the evidence of bringing hatred and brutality among the Hindu’s and Muslim’s because in the amendment the central government ceased the citizenship of the Muslim’s who have migrated to India before 2014 from Pakistan, Bangladesh and, Afghanistan and agreed to award Indian Citizenship to the migrants of Hindu, Sikh, Buddhism, Jain, Christian and Parsi community who have come to India from Pakistan, Bangladesh and, Afghanistan.
On 4th December, 2019 the Citizenship Amendment bill was cleared by the Union ministers to be introduced in the parliament. Amit Shah, the minister of home affairs introduced the bill on 9th December in the Lok Sabha which was passed by it on 10th December with 311 members voting in favor of it and 80 against it. the Rajya Sabha passed the bill on 10th December with 125 votes in favor of it and 105 against it. after the signing of the bill by the president, Ram Nath Kovind the bill got enacted on 10th January 2020.

The enactment of the Citizenship Amendment Act, 2019 seems to be obvious but it has created a conflict between the Muslim and other communities. People criticized this Act, based on discrimination against religion and claimed their remedies for the violation of Article 14 and 21 of the Indian Constitution by undoing the enactment of the law. They are also concerned about the bureaucratic exercise of NRC where they will have to show evidence of their Citizenship.

The protest was first started when the bill was introduced in the parliament in Assam on 4th December and later spread to the northeastern states of India and eventually to major cities of India. On 15th December major protest held in Jamia Milia Islamia (New Delhi) and Aligarh Muslim University, as it broke out mobs were burnt, public property was destroyed as well as private properties and railway stations were wrecked. Police forcibly entered the campus of Jamia did the lathi charge to stop the crowd and detained over 100 Students, many were Injured and the action of the police was also criticized by the public. Another protest was held in Shaheen Bagh which was held for months before the outbreak of coronavirus causing trouble to many students and people because of which people in bulk suffered traffic jams and difficulty in reaching offices, schools and, colleges.

SECTION 2: HISTORY OF CITIZENSHIP AMENDMENT ACT 2019

The commencement of the Indian citizenship act for the first time in India was done in 1955, where under Article 11 of the constitution powers were assigned to the union parliament under which they can make a law for the acquisition of the constitution and all other related matters. The 1955 act gives the methods to acquire the Indian citizenship by the people residing in India for a longer period of time that is citizenship by birth, descent, registration, naturalization, incorporation of territory and overseas citizenship for a person in India origin, followed by termination and renunciation of citizenship of India.

The amendment of citizenship act 1955 was done for the first time that is citizenship of persons covered by Assam accord 1985, in this amendment section 6-A was inserted in the 1955 act which gives the effect to memorandum of settlement related to the foreigner's issue in Assam. It says that people who came to Assam after 1st January 1966 but before 25th March 1971 who have been identified as being foreigners would have to register themselves and they will have the same right as the rights which Indian citizens acquire but they shall be deemed to be the citizens of India for all-purpose as from the date of expiry of a period of ten years from the day they were being identified as foreigners.

Another amendment of citizenship act 1955 was done on 1986 which says that the section 3 provides that citizenship by birth
can only be acquired for such persons whose one of the parent is the citizen of India at the time of their birth and this amendment was enforced on 1st July 1987 and therefore it applies to the cases occurring on and after 1st July 1987.

In Citizenship Amendment 1992, amend Section 4 of the citizenship act 1955 in which the word “father” was replaced by the word “either of his parents” has been added. Thus, a person who is born outside India shall be a citizen of India if at the time of his birth either of his parents is a citizen of India.it has also amended subsection (2) of section 8 in which the word “a male person” is being substituted with the word “a person” and the minor children of that person, whether male or a female who renounces his/her Indian citizenship shall also cease to become the citizens of India.

In Citizenship Amendment Act 2003 again section 4 was amended which says that the birth of such a person as aforesaid shall not be registered on or after the commencement of this Amendment Act unless that person’s parents declare in such form and such a manner prescribed that the minor does not hold the passport of any other country. A minor who is a citizen of India by under this Section shall cease to be a citizen of India if he doesn’t renounce the citizenship or nationality of any another country within the time period of six months of attaining the maturity age, it also provides the registration of the following persons as overseas citizens of India:

- Any person of Indian origin of full age and capacity, who is a citizen of any country specified in the fourth schedule to the acts.
- Any persons of full age and capacity who has obtained the citizenship of a specified country on or after the commencement of the amendment act 2003 and who was the citizen of India immediately before such commencement.
- Any minor children of a person mentioned above in (a) and (b) category.

No person shall be registered as the citizen of India who has been deprived under Citizenship Amendment Act 2003 and can only be registered by an order of the central government.

The section 7-C of the Indian Citizenship Amendment Act 2003 enables an overseas citizen of India, of full age and capacity to renounce his overseas citizenship of India by making a declaration and getting it registered with the Central Government. upon such registration he shall cease to be an overseas citizen of India.

The Citizenship amendment act 2005 has inserted a new clause (5) in Article 14 of the constitution. This clause gives the special power to the state to make law based on any special provision, for the advancement of any socially and educationally backward classes of citizens or the scheduled castes and scheduled tribes as well, in so far as, such special provisions related to their admission to educational institutions, including private educational institutions, whether aided or unaided by the state, other than minority educational institutions, referred to in clause (!) of Article 30.

The citizenship amendment 2015 says that At present one-year ceaseless remain in India is compulsory for Indian Citizenship and if the Central Government is fulfilling the unique conditions exists, it might, in the wake of recording such conditions recorded as a hard copy, loosen up the time of a year indicated up to a limit of thirty days which might be in various breaks. To empower for enlistment as Overseas Citizen of India (OCI) by a minor, whose guardians are Indian Citizens. To empower for
enrollment as Overseas Citizen of India (OCI) by minor or a grandchild or a great-grandchild of such a resident. To empower for enrollment as Overseas Citizen of India (OCI) by such life partner of a resident of India or companion of an OCI enlisted under Section 7A and whose marriage has been enlisted and remained alive for a consistent time of at the very least two years quickly going before the introduction of the application under this area, regarding concerning with existing PIO card Holders, the central government may, by notice in Official Gazette, indicate a specific date from which all current PIO cardholders will be considered to be OCI cardholders.

The Citizenship amendment act 2019 says that ), in section 2, in sub-section (4), in clause (b), the following proviso shall be inserted, namely:— "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;".  

SECTION 3: IS CAA violating any article?  
As we all know that preamble of India is like a guardian of our Indian Constitution which means that the laws made by the legislature must be in accordance with our preamble, let’s have a glance at our preamble once, which says that ” WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC and to secure to all its citizens:

- JUSTICE, Social, Economic and Political,
- LIBERTY of Thoughts, Expression, Belief, Faith and, Worship.
- EQUALITY of status of opportunity; and to promote among them all.
- Fraternity assuring the dignity of the individual and the unity land of the Nation.

Now if we look at the first line of our preamble it says that “WE THE PEOPLE OF INDIA” which means that any law made and amendment in the constitution must related to Citizens of India assuring that their fundamental rights must not be violated and it should be justice, liberal, equal and fraternal to all. But there are other laws as well which gives some rights to the foreigners residing in our country on a temporary basis and it is obvious that those who have already applied the application for the citizenship will be enjoying all the rights which the Indian Citizens are enjoying by default but there is one difference that they have not get the citizenship else everything is same for them as it is or the Indian citizen.

If we relate the Citizenship Amendment Act 2019 which says that “ any person belonging to Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan, who

131 http://egazette.nic.in/WriteReadData/2019/214646.pdf

132 http://www.concourt.am/armenian/legal_resources/world_constitutions/constit/india/india--e.htm
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;”.

It is clear that this law is not for the citizens of India and it has nothing to do with the citizenship of those people who are already the Citizens of India and it is only related with the refugees and illegal immigrants who have entered in India before 31st December 2014, let's get to the point that Article 14 (Right to equality before law) and 21 (Right to personal life and Liberty) is a legal right provided to any person residing in India along with the fundamental right on Indian citizens, but any illegal migrant will be excluded from giving these rights to them because there are the legal methods provided by the Indian government so that any person from any other country can migrate to India and reside in the country as well legally.

The Central Government allow all the other communities to provide citizenship of India but not to the Muslim Communities because Pakistan, Afghanistan and, Bangladesh are an Islamic country and the minority groups are being persecuted there because of which the people who at the time of partition belonging to Hindu, Buddhist, Christian, Jain, Sikh and, Parsi who stayed back to these three countries suffered persecution and no such laws are being made for the betterment of these minority groups but India has the better laws and schemes related to these people and of course better schemes for the people who fall under the category of the poverty line and with deteriorated conditions. According to Article 15 (iii), 15(iv) and Article 16(iii), 16(iv) state has been given the special powers to make any law regarding the minority sections of the country, so the 2019 amendment is not violating the rights of Muslims who come under the majority group in Pakistan, Bangladesh, and Afghanistan.

SECTION 4: WHY MUSLIM COMMUNITY HAS BEEN EXCLUDED?

Firstly, Pakistan, Bangladesh, and Afghanistan are the Islamic countries where Islam is being followed by 96.4% people in Pakistan, 82.8% people in Bangladesh and 84.7% by Sunni and 15% by Shia Islam in Afghanistan, Which is the clear evidence, as it proves that these countries are the Islamic state. The minorities group of Hindu and other religions mentioned in the CAA is 3.6% in Pakistan, 8.2% in Bangladesh and 0.3% in Afghanistan whose percentage was less as we compared to the percentage at the time of partition which was nearly about 30% and 23% of Hindu religion and other communities in Bangladesh and Pakistan where people were being persecuted and they have to change their religion forcefully and for those whose survival was fatiguing, migrated to India with the hope of living a life with secularism and dignity.

- Amit Shah in his interview in ‘AGENDA AAJ TAK’ by Rahul Kanwal mentioned the

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133 http://egazette.nic.in/WriteReadData/2019/214646.pdf
following reasons for giving citizenship to Hindu and other 5 community as:

1. He said that the Prime Minister Jawaharlal Nehru, Rajendra Prasad and Father of the Nation Mahatma Gandhi said in his speech said that if Hindu and Sikhs are being tortured, persecuted and treated with atrocities in the name of religion then they can come back to India to live a better, religious and respectful life.

2. He said that if they allow Muslim people to come and reside in India then they will come to India in a huge ratio in the search of employment opportunities and a better livelihood in here because we all know that India is a better economic country than Pakistan, Bangladesh, and Afghanistan where there is no such laws and schemes for the minority group.

3. He further added that if people who are doing protest think that Article 14 is being violated then they should know that this amendment is not for the citizens of India but for the minority group in Pakistan, Afghanistan and Bangladesh so that in India they can have a better living opportunities.

Moreover, the Islamic state means that Muslims have been given all the rights and no such laws are being made for the minority group. But if we think for the Muslims who are being persecuted in these countries then it is contrary to the conditions of minority groups in India because if we just have a glance in Indian history then Dalits and other backward classes were treated with atrocities by the Brahmin’s, kshatriya’s, Vaishya’s and Shudra’s but it will not be justified if they illegally migrated to any other country just for the sake of better employment and living in there.

- Last but not the least, if India would allow the migration of Muslim refugees or illegal migrant than the population of 21.22 crore in Pakistan, 16.4 crore in Bangladesh and 3.77 crore in Afghanistan in which majority is of Islam’s will start migrating to India for Indian Citizenship and secularism of India can be converted into a theocracy because the majority group always have a upper hand in controlling the minority groups and making them the part of their group. Imagine the situation of the people who are living in India by birth and who fall under the category of poverty line and are struggling daily for their daily bread which will be worse than ever because of the increase in population rate because of the increase in migration rate and also it will affect the GDP of our country and various other factors in economic sense, along with the riots between Muslim and Hindu in the name of god ( Babri Masjid case 6 Dec 1992).

SECTION 5: How CAA WILL AFFECT INDIA IN GENERAL SENSE?

There would be a change in population ratio and also it will affect the lives of the illegal immigrant which will be sent back but for the poor citizens of India it will be beneficial in terms of employment and can lower the struggle of daily bread.

- It will also lower the poverty rate in India because in India these illegal migrants were living a life of poverty.

- The funds invested for the various schemes launched by the government for poor people can now be targeted to many people.

- It will also affect the GDP rate in India as well as the per day consumption of food, water resources, electricity and diesel etc.

SECTION 6: CONCLUSION
In this research paper, I have found that the amendment of citizenship act 1955 in 2019 is not taking away the rights of any person who is already the citizen of India. It only talks about giving the Citizenship to those illegal migrants who came back to India because of the persecution faced by them in Pakistan, Bangladesh, and Afghanistan. The people protesting is also being misinterpreted because of fragmented knowledge about the act. This amendment has nothing to do with the secularism of this country and does not violate any article of the constitution. This CAA is necessary because Hinduism, Sikhism, Jainism, Parsi, and Buddhism was the religion who was originally originated in India and to assure that these religion doesn’t suffer from any of the atrocities this Law was enforced by the BJP to give the rights to the minority groups of aforesaid countries. It also proves that it is justice to all the people residing in India excluding the Muslim illegal immigrants because according to our home minister India cannot give citizenship to those people who are the majority group of any other country and came to India just for the employment where already many people are struggling for their daily bread. In fact, none of the any other country would give the citizenship to any person from any country until and unless their terms and conditions are not fulfilled. This amendment also talks about the people who migrated to India after 2014 from Pakistan, Afghanistan and Bangladesh belonging to any community will not be considered as the citizen or residents of India and will be sent back to the respective countries from where they have migrated.

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INTELLECTUAL PROPERTY AND COVID-19: RECONSTRUCTION OR DECONSTRUCTION?

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ABSTRACT
The COVID-19 pandemic was a catastrophe which took the world by surprise. The outbreak undoubtedly triggered multiple social, political, economic and environmental impacts globally sparing no countries from its effects. The situation resulted in unprecedented closures and quarantines throughout the world and its impact was naturally reflected on the legal sphere as well. Intellectual Property regime was one of the areas of law where the effect of the pandemic made a significant impact. This article aims to analyze the possible impacts caused by the change in circumstances warranted by COVID 19 pandemic on the Intellectual Property regime.

The extra ordinary circumstance created by the pandemic warranted the collaborations of various countries and organizations to come up together in the larger public interest. Initiatives were made between organizations giving leniencies on exclusive rights on the IP’s to fight the pandemic. The COVID-19 pandemic affected Intellectual Property regime from a transactional, litigation and regulatory perspective. It made a massive impact not only on the Intellectual Property rights which were already protected but also on the IP’s which were on the process of getting the protection. The authors have also analyzed the effect of coronavirus on the IP regime in India. All countries and firms are frantically trying to abide by the principles of social distancing. Even though most of the fields of human life have come to a halt, IP regime continues to move forward. The authors have attempted to put out few suggestions which they believe would positively contribute to the present situation.

INTRODUCTION
The COVID-19 pandemic was a catastrophe which took the world by surprise. The outbreak undoubtedly triggered multiple social, political, economic and environmental impacts globally sparing no countries from its effects. The situation resulted in unprecedented closures and quarantines throughout the world and its impact was naturally reflected on the legal sphere as well. Intellectual Property regime was one of the areas of law where the effect of the pandemic made a significant impact. This article aims to analyze the possible impacts caused by the change in circumstances warranted by COVID 19 pandemic on the Intellectual Property regime.

The extra ordinary circumstance created by the pandemic warranted the collaborations of various countries and organizations to come up together in the larger public interest. Initiatives were made between organizations giving leniencies on exclusive rights on the IP’s to fight the pandemic.

IMPACT OF COVID-19 ON IP
The COVID-19 pandemic affected Intellectual Property regime from a transactional, litigation and regulatory perspective. It made a massive impact not only on the Intellectual Property rights which were already protected but also on the IP’s which were on the process of getting the protection.

LITIGATION PERSPECTIVE
The effects of COVID-19 had a significant impact on IP from the litigation perspective. Since most of the countries were forced to go into a lockdown, the court proceedings were disrupted in most of the countries. The courts were forced to give leniencies on the conventional rigid procedures and managed the court operations by relying greatly on technological support.

About the court operations during COVID-19, the European Patent Office (EPO) cancelled the opposition proceedings and hearings until 14 September 2020 unless the hearing is held by Video Conferencing with the parties’ consent under the pilot project. The European Patent Office (Board of Appeals) has resumed oral proceedings in person but only to a limited extent. Video Conferencing is available for the conduct of oral proceedings with the parties’ agreement. This is a big step change with respect to EPO proceedings since EPO is usually so rigid and particular with respect to the in-person attendance of the parties.

In France, the trials have generally been cancelled at the outset of the pandemic. Since the beginning of May, Video Conferencing was allowed on a case-by-case basis. Italy issued a stay on all non-urgent court operations till 11 May 2020 at the outset of the pandemic. The court operations have now resumed. However, the hearings are now taking place either in the form of the exchange of short written notes or through video conferencing. In the Netherlands also, the oral hearings, if required, are done by means of video conferencing. The courts of United Kingdom took a slightly different response as opposed to the courts of other countries in the sense that from the outset of the pandemic, the courts in the UK rejected most of the applications for the stay of hearings as the court was of the opinion that as many hearings as possible should go ahead and should go ahead remotely. Although most of the applications, hearings and trials were done remotely via video conferencing, the courts, from the beginning of the pandemic, was encouraging the parties to continue with the litigation and not to postpone the hearings. However, there were instances were trials and hearings were postponed. The most notable being the case of Huawei Technologies Co Ltd. v. Conversant Wireless Licensing SARL.

Thus, we can see that the courts in various countries are managing to different extents depending on whether remote hearings are adopted or not. It is also important to note that in-person hearings are not happening in most of the countries barring a few exceptions.

EMERGENCY MEASURES BYPASSING IP RIGHTS
One of the fundamental reasons behind the intellectual property rights protection is to facilitate the creators with a legally permissible quasi-monopoly, at least for a specific period of time, over their novel inventions so as to enable them to ripe the benefit for their invested time, money and efforts over that particular innovation.

The COVID-19 pandemic warranted the governments across the world to procure

essential equipment and medical supplies which will benefit the patients regardless of any possible backstops. Even now, there is a growing need for ventilators and medical equipment in many countries.

If the situation persists, many governments will be forced to take measures to ensure that the equipment or products that will benefit the health of the patients can be procured without any delay by the governments or by third parties authorized by the government including the products that are patented, without the fear of patent infringement proceedings. This is where emergency measures bypassing the IP rights come into the picture.

Provisions enabling the government to take emergency measures to bypass the IP rights can be seen in the IP laws of most of the countries. A classic example of this is the Crown Use Provisions in the UK Patents Act, 1977. Section 55 to 59 of the UK Patent Act stipulates the Crown Use Provisions. These provisions permit the government department or a person authorized by the government to do otherwise infringing acts without the consent of the patent proprietor. Section 55 provides that this power can be used by the government or any person authorized by the government. It applies at all time but it is supplemented further by section 59 during periods of emergency. Section 59 is very wide in its scope and expressly includes within its ambit the use of Crown Use Provisions for securing supplies or services essential to the life/well-being of the community. It is very important to note that even though the compensation for crown use may be agreed upon by the parties, there are circumstances under section 55(3) of the Act where the crown may occur without any compensation being made to the proprietor of the patent. The most recent application of these provisions was made this year in the case IPCom GmbH v. Vodafone. In this case, the Court held that an express authorization to work the specific patent is not required to bring Crown Use as a defense for infringement. All that is required is a written authorization identifying the relevant act to be carried out.

Similarly in the wake of the outbreak of the pandemic, Germany made amendments to the German Act on Prevention and Control of Infectious Diseases (Infektionsschutzgesetz - IfSG) proposed by the Federal Ministry of Health (Bundesgesundheitsministerium - BMG) in March 2020. These amendments have been enacted by the Act on the Protection of the Population in Case of an Epidemic Situation of National Significance (Gesetzzum Schutz der Bevölkerungbeineinerepidemischen Lage von nationalerTragweite). The new act gives over-arching powers to the federal

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government in the event of an epidemic like COVID-19.

The German Patents Act had an emergency provision for ‘use orders’ under section 13 of the Act which categorically says that the effect of the patent will not apply if the federal government orders that the invention shall be applied in the interest of public welfare. However, this provision was not used for decades by the Federal Government. In a significant turnaround, Section 5(2) of the new legislation enables the Ministry of Health to issue ‘use orders’ for patents according to section 13 of the German Patents Act during an epidemic situation of National Importance. Undoubtedly this newly introduced provision will have an effect of limiting the timing of the amendment it is beyond any doubt that this was introduced as a response to COVID-19 outbreak.

Similarly, Article 31 of the TRIPS Agreement also permits the use of patents without the authorization of the patent holder in cases of national emergency or circumstances of extreme urgency. It is true that emergency provisions of this nature are used rarely by the governments. However, if the existing circumstance caused by the pandemic persists over a considerable time, it may bring on a pressing need on the governments to implement these provisions. Until now the only instance of the government using such powers bypassing the IP rights to fight the COVID-19 pandemic happened in Israel where the government approved the licensing of the generic version of a patent-protected drug ‘Kaletra’ for treating coronavirus patients.

**TRANSACTIONAL PERSPECTIVE**

One of the most significant impacts of COVID-19 on transactional IP was a rise in collaborations. COVID-19 has prompted a large number of stakeholders to collaborate as well as speeding up of the pandemic response measures. This allows stakeholders to share their resources, costs and risk, involving both private and public sectors. These collaborations happened in a wide range of areas including vaccines, antigen/antibody testing, medicines etc. For example, in United States, Johnson and Johnson Company is collaborating with Biomedical Advanced Research and Development Authority (BARDA), which is part of the Office of the Assistant Secretary for Preparedness and Response (ASPR) at the U.S. Department of Health and Human Services, for developing a vaccine candidate against COVID-19.

Similarly, in United Kingdom, AstraZeneca, GSK and the University of Cambridge have formed a joint collaboration in setting up a new testing laboratory in the wake of COVID-19 outbreak. The facility is exclusively set up as a response to the pandemic outbreak.

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142 Section 13, German Patents Act.
143 Article 31(b), TRIPS Agreement.
Internationally, we witnessed multiple collaborations such as COVID-19 Tools Accelerator, which is launched by the World Health Organisation (WHO). This brings together several organisations who work together to develop new drugs to fight against Coronavirus. WHO also launched a technology pool which would make it easier to access effective vaccines, medicines and other health products to combat against COVID-19.\(^\text{148}\)

Also we witnessed a large number of licensing of the IP rights by big players in the pharmaceutical sector to smaller players to ensure mass productivity of medicines and anti viral drugs which will help to control the pandemic. A classic example for this is the issue of voluntary licensing by Gilead Sciences Inc, a pharmaceutical company in USA, to the pharmaceutical companies of India on the production of the anti viral drug Remdesivir. Remdesivir is a promising candidate for a future drug against Coronavirus. Gilead Sciences came up with this drug. It has decided to enter into voluntary patent licencing agreements with four Indian pharmaceutical companies. This allows them to manufacture and sell the Remdesivir drug. This licence is royalty free till a vaccine is found for Covid-19. As far as Remdesivir is concerned, Gilead has made it royalty free agreement, thereby ensuring affordable and easy availability of the drug. Outsourcing production and manufacture of the drug to India through voluntary licencing is essential as India is known for its capacity for mass production and export. This will help to meet the global demand. This helps us to understand that temporary waiving of IP rights can lead to easy and affordable availability of medicines which would be commonly beneficial. Since voluntary licencing does not deprive the patent holder’s their rights, they can always increases the prices at a later point in time and thereby cover the losses that they may suffer now.

Another noteworthy development in the IP regime from a transactional perspective was the initiative of Open COVID Pledge. The Open COVID Pledge calls on organizations around the world to make their patents and copyrights freely available in the fight against the COVID-19 pandemic. The Pledge was developed by the Open COVID Coalition, an international group of scientists and lawyers seeking to accelerate the rapid development and deployment of diagnostics, vaccines, therapeutics, medical equipment and software solutions in this urgent public health crisis\(^\text{149}\). Founding adopters of the pledge includes technological giants like Facebook, Amazon, Microsoft etc. These companies have pledged to make their intellectual property rights available free of charge for the fight to end the COVID 19 pandemic and in minimizing the impact. This opens a massive opportunity to the smaller companies to effectively utilize the resources of these big companies, without any fear of infringement to fight against the pandemic.

**REGULATORY PERSPECTIVE**

From a regulatory standpoint, the major change brought by COVID-19 in the IP regime was with respect to the deadlines for filing of various IP related matters. Since lockdown was inevitable in most of the countries, the IP organizations in most of


\(^\text{149}\) https://opencovidpledge.org/, (Visited on 18/07/2020).
the countries were forced to give relaxation to the deadline for the filing of various IP related matters.

The United States Patent and Trademarks Office (USPTO) issued the first official notice on March 2020 terming the circumstances caused by the outbreak of the pandemic as an “extra ordinary situation” and granted general relief with respect to payment of late fees in patent and trademark correspondence. This was followed by the enactment of Coronavirus Aid, Relief, and Economic Security Act (CARES Act) which authorized the United States Patents and Trademark Office and the Register of Copyrights to “toll, waive, adjust, or modify any timing deadline established by the relevant statutes”. Deriving the power from the CARES Act, the United States Patents and Trademark Office brought two new directions waiving the Patent related and Trademark related timings respectively under the CARES Act.

The European Patent Office provided an extension for all time limits which was originally between March 9 and April 30 to May 1. The time period for payment of renewal fees has been extended till 31 August 2020.

In UK, the UK Intellectual Property Office termed days on or after 24th of March 2020 as ‘interrupted days’. Until an official notification comes as to the effect of marking the end of the ‘interrupted days’ period, the deadlines for patents, trademarks and designs are extended.

Similar extensions, waivers or relaxations were provided by most of the countries and organizations.

EFFECT OF CORONAVIRUS ON IP IN INDIA

The effect of coronavirus can be felt with great intensity across all continents, countries, states and individuals. It has not spared any economy. Its impact can be witnessed in all facets of life. As an attempt to contain the rapid spread of COVID-19, majority of the nations have resorted to the system of lockdown. The basic principle of social distancing found the apex position in all societies. The field of Intellectual Property also has not been left alone by this pandemic. However the authors would like to point out the possibility of a bright future for intellectual property during the post-coronavirus period, as business’ holding

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intellectual property would be ready to licence their existing IP and use the proceedings to add to their financial reserves.

In Intellectual Property Attorney’s Association and Anr v Controller General of Patents, Designs and Trade Marks and Anr155, an order was passed by the Delhi High Court extending the period of limitation for any process in relation to intellectual property matters and its filings which became due on or after 15th March, 2020 until further notice. This comes as a huge relief for various stakeholders across India and even abroad, who would have otherwise found it extremely difficult to meet the due dates for IP filings. However, if a mater is of utmost urgency, then the concerned party may apply to the Court and it will be taken up without further delay. 156

The Controller General of Patent and Trademark issued a public notice on March 23rd in relation to filing of documents at the Indian Trademark Registry and it states that an applicant can request for extension to submit all necessary documents at the Registry under Section 131 of Trademarks Act, 1999 and Rules 109 and 110 of Trademarks Rules, 2017. 157 However with regard to fresh applications, since there is a statutory limitation prescribed, there is no extension of time granted.

All patent hearings which were to be done in person for matters in relation to Patents and Designs on or before April 15, 2020 made efforts to convert it to Video Conferencing. The Indian Patent Office further provided that delay in re-submitting of documents would be condoned under the Patents Act, 1970 only if an application is made by way of a petition for such condonation. 158 This is done by the Controller General of Patents, Designs & Trademarks. Such extension would be available only for one month from the date when Covid-19 outbreak ceases to exist. This is according to Rule 6(6) of Patents Rules, 2003.

The Supreme Court held by way of a notice dated 23rd March, 2020 that was also made not mandatory for lawyers and litigants need not come physically and submit documents relating IP matters.

There is a rise in applications to the Controller General of Patents, Designs and Trademarks for patents and trademarks such as ‘Corona Safe’, ‘COVID Sanjeevani’, and so on. There was even an application for a downloadable computer security software with the name as ‘Corona’. 159 The reason behind firms adopting the name ‘Corona’ is because of its widespread popularity among the consumers. This is a word which would be in the eyes of the consumers at least during

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2020 and it is good opportunity for business houses to capitalise this popularity. In order to comply with the social distancing principles, the all private and public firms have resorted to remote working or ‘work from home’ methods. There is a rising concern for protection of IP rights in this case. Proper adoption and compliance with data privacy laws is essential for businesses, especially during a pandemic situation. Business owners are advised to revise their existing agreements and add new clauses in relation to remote working and better protection of IP rights.

**SUGGESTIONS**

Patent pool is a system where two or more patent holders come together and jointly make available their patents. Often for the manufacture or production of various products different patented technologies would be needed. The manufacturer will have to take efforts to individually negotiate with different patent holders, which would prove to be cumbersome and expensive. Patent pools help to make these patents available at one single place. A third party only needs to get a licence from these patent holders, the terms of which could be easily negotiated. It is an efficient method to make available drugs against COVID-19 in an affordable manner. Patent polls have proved to useful in several circumstances, for example, in the manufacture of planes for the United States of America during World War I. it also promotes innovation and research and development.

Incentivising IP holders is of utmost importance in the current scenario. This can be propelled through government negotiations. This must however be according to the principles of just, fair and reasonable. The government may even collaborate with these innovators. The ministry AYUSH may provide them with compensation or determine a reasonable value for their product through discussions with them.

IP right owners and patent applicants must check whether existing patents, trademarks or copyright registrations are to be kept and if not, whether it should be sold, licenced or abandoned. This helps in managing costs. Selling or licencing such intellectual property will help in enlarging financial resources. IP firms could also ensure optimum level of productivity even through work- from- home methods by ensuring efficient remote access facilities.

The need of the hour is to provide for an open environment for innovation and pool of knowledge. The appeal of the Indian Civil Society to the Government of India is on this line of reasoning. Existing law and policies can be utilised by the government to regulate prices and ensure smooth availability of anti-Covid-19 drugs. The government is urged to make the research initiatives taken by various teams such the Department of Biotechnology and Biotechnology Industry Research Assistance Council (BIRAC) COVID-19 Research Consortium through open source information.

There is one convention which countries tend to forget and it is the Convention on Biological Diversity which was adopted in 1992. It is a legally binding international agreement with an aim to bring fairness and equity in the access to genetic resources between its signatories. This led to the adoption of Nagoya Protocol which requires sharing of benefits arising from use of genetic resources. Hence if a drug is knowledge-sharing-for-covid-19-healthcare-through-indian-ip-laws/ , (Visited on 19/07/2020).
found against Coronavirus, its commercialisation will be bound by this Protocol and benefits arising from it should be shared among the member countries. The Biological Diversity Act, 2002 in India stipulates along the same lines and mandates that any patent application for the use of genetic resources requires signing with the Biodiversity Authority of India that benefits arising from the resource would be shared with the Authority. 161

CONCLUSION
There is no denial to the fact that the outbreak of the COVID 19 pandemic has caused an unprecedented circumstance across the world. The IP regime was also drastically affected with the repercussions of the pandemic at various levels like litigation, regulatory, transactional etc. There were lot of deviations from the 'usual business' which were initially considered to be tampering with the rights of the inventors and investors. At the same time, the crisis had also opened the doors for some of the massive opportunities in the IP realm. The initial responses to the COVID 19 prompt us to believe that the IP regime along with technology will play a massive role in both controlling and eradicating the pandemic. For any significant development to be made towards achieving this goal, it is very important that the major players in various sectors like technology and medicine need to share their resources and work together and the onus is on the IP regime to facilitate such collaborations between various parties. From an IP perspective, the measures taken by the major players and countries so far are highly welcoming. Initiatives like Open COVID Pledge received wide acceptance and more and more big companies are coming forward to show their willingness to make available their Intellectual Property to the world to fight this pandemic together. Most of the vaccine research around the world is happening with the collaborations between various entities or countries. The changed circumstance had also provided a massive opportunity to the smaller players of various industries to collaborate with or make use of the resources of these major players to bring something significant and thereby emerge themselves as an important entity in their respective field of operations. Countries have been frantically trying to abide by the principle of social distancing and hence all IP offices including in India remain closed. Through this paper the authors have tried to highlight how measures such collaborations and voluntary licencing of IP rights help in the easy availability and affordability of vaccines against COVID-19. The authors believe that the suggestions enumerated through this paper would be beneficial for the future of IP and the society as a whole.

ANALYSIS OF NATIONAL EDUCATION POLICY, 2020

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Abstract
Article 21-A of the Indian constitution provides us with the Right to Education. So to promote the education in India government of India introduced its first national education policy in 1968. The 1968 national education policy was replaced by national education policy 1986. Now after 34 years Narendra Modi government has introduced India’s 3rd national education policy. This policy is based on the draft submitted by 9 member committee under the chairmanship of Dr K Kasturirangan. The objectives of this policy are to improve quality of education, address the gaps in implementation, and achieve the global standard of education and to increase the standard of education. This education policy has introduced many changes in the existing structure of education.

This national education policy has changed the existing academic structure of 10+2 to 5+3+3+4. In this structure importance to pre-primary education has also been given. This education policy also focuses on vocational skills and it also provides the schools with the option to teach its students in either local language or in mother tongue up to 5th class.

In undergraduate programs this policy has introduced multiple entry and exit option. In this option after completing one or two years students can leave their course and they will be provided with either certificate or diploma. This policy also abolishes MPhil.

This policy has also introduced some changes for the teachers like the qualification required for becoming teacher will be 4 years of B Ed degree by 2030. Also, under this policy, to give importance to a multidisciplinary approach, Multidisciplinary Education and Research Universities (MERU) will be created and to foster research culture in higher education, National Research Foundation will be set up as an apex body. For higher education, excluding legal and medical education, Higher Education Commission of India (HECI) will be created.

This policy also allows foreign universities to set up their campuses in India on their own.

Analysis of National Education Policy, 2020

Introduction-
Article 21-A of the Indian Constitution provides Indian citizens with the right to education. It states that “The State shall provide free and compulsory education to all children of 6 to 14 years in such a manner as the State, may by law determine.”

According to Supreme Court, “The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education. The State Government is under an obligation to make endeavor to provide
educational facilities at all levels to its citizens.”

To promote education the government made a National Education Policy which covers elementary education to college education. This policy was for both rural and urban areas. It is basically a comprehensive framework which guides the development of education in the country.

The first National Education Policy was introduced in 1968 by the Indira Gandhi Government. It was based on the recommendations given by the Kothari Commission (1966-1967). This policy made education compulsory for the children up to 14 years. It also outlined a “three-language formula” for secondary education- English, Hindi and local language of the area. Other than three language program this policy also encouraged the teaching of Sanskrit language. It also proposed equal education opportunities for all children.

The second National Education Policy was introduced in 1986 by the Rajiv Gandhi Government. This policy removed disparities in order to equalize educational opportunities for all the children. This policy also provided incentives to the families of children belonging to Scheduled Caste and Scheduled Tribe so they could send their children to school. This policy also called for recruiting teachers from Schedule Tribes and Scheduled Caste communities. To deal with the special difficulties of handicap children this policy also reoriented the teachers training program. P.V. Narasimha Rao government modified the second education policy in 1992.

National Education policy 2020-
National Education Policy 2020 is the third education policy introduced by the Narendra Modi government. This education policy replaces the education policy of 1986. This policy is drafted by 9 members committee under the chairmanship of Dr K Kasturirangan.

The objectives of this policy is to improve quality of education, address the gaps in implementation, achieve the global standard of education and to increase the standard of education so that students are ready to face the world as soon as they graduate from school.

This National Education Policy envisions an education system rooted in Indian ethos that contributes directly to transforming India, that is Bharat, sustainably into an equitable and vibrant knowledge society, by providing high-quality education to all, and thereby making India a global knowledge superpower. The Policy envisions that the curriculum and pedagogy of our institutions must develop among the students a deep sense of respect towards the Fundamental Duties and Constitutional values, bonding with one’s country, and a conscious awareness of one’s roles and responsibilities in a changing world. The vision of the Policy is to instil among the learners a deep-rooted pride in being Indian, not only in thought, but also in spirit, intellect, and deeds, as well as to develop knowledge, skills, values, and dispositions that support responsible commitment to human rights, sustainable development and living, and global well-

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162 Miss Mohini Jain v. State of Karnataka and Ors (1992) AIR 1858
being, thereby reflecting a truly global citizen.  

**Changes in National Education Policy 2020-**

The new National Education Policy has introduced many changes. The 3 most prime changes are-

1. Ministry of Education will be the new name of HRD ministry
2. Investment will be increased in education from 1.6% to 6% of GDP
3. Focus on Gross Enrolment Ratio and it will be increased by 50% by 2035

In this policy entire exams and school structure has been changed. The existing structure of 10+2 has been changed to 5+3+3+4 structure. In this structure, 3-6 years students will also be included in the school curriculum. In 10+2 structure no importance was given to pre-primary education but in this new structure, importance will be given to pre-primary education as it is important and it has been proven that 85% of child’s cumulative brain development takes place prior to the age of 6 years. Until now pre-primary education was only taught in private schools but now it will also be introduced in government schools. This has been done with the view of promoting overall learning, development and well being of students.

This structure will correspond to 3-8 years (Foundational stage), 8-11 years (Preparatory stage), 11-14 years (Middle stage) and 14-18 years (Secondary stage).

In the foundational stage, the first 3 years will be of pre-primary education and 2 years will be of primary education. Multilevel, play/activity-based learning will be focused on in this stage.

The next stage will be the preparatory stage which will include grade 3rd-5th. This stage will focus on play, discovery and activity-based and interactive classroom study.

The next stage will be the middle stage which will include grade 6th-8th. Experimental learning in sciences, mathematics, arts, social sciences and humanities will be focused on in this stage. The last stage of the school curriculum will be the secondary stage. This stage will include grades 9th-12th. This stage will focus on multidisciplinary study with greater critical thinking. This stage will also have greater flexibility and a student’s choice of subjects.

This structure is similar to the western education system.

In this policy, the exam structure in schools has also been changed entirely. According to this policy annual examination will take place only in 3rd, 5th, 8th, 10th and 12th classes and even in these exams the main focus will be on high order skill rather than on rote learning. Analysis, critical thinking and conceptual clarity will be included in high order skills.

Boards will also take place but it will take place in two parts; objective and descriptive. Rather than rote learning, these exams will focus also focus on knowledge application and will be conducted twice a year.

The result of these exams will be declared in the 360-degree holistic report card. These report cards will measure students based on

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163 Ministry of Human Resource Development, (2020), *National Education Policy* (p.6), Available at:

holistic development rather than on textbook learning. Holistic development will include curricular activities, co-curricular activities and extracurricular activities. In these report cards, equal footing will be given to all these activities. This is a good change as it is important to measure children holistically as different children are good at different things. These report cards will also include self-assessment with addition to teacher’s evaluation. Self-assessment is very important as this will improve decision-making skills in children and will also prepare them to face the world.

This education policy also gives the importance to vocational subjects. It is very crucial as vocational skills helps in developing the country. According to this policy, coding will also be taught in schools from class 6th onwards. It is very crucial as it is done in China and China has become a much-developed country.

Other than coding other vocational subjects will also be taught in school from 6th-8th class such as carpentry, pottery making, electric work, metalwork, etc. It is estimated that by the year 2025, 50% of the students will have exposure to vocational skills.

In addition to this schools will also have a 10-day bag less period in which students have to do an internship under vocational experts such as electricians, carpenters, plumbers, etc. Exposing students to internships from such a young age is very important. Students can also refer to vocational subjects online.

This policy also provides the school with the option to teach their students in their mother tongue or in their local language up to 5th class. For this, the example of Europe has been given. This thing will help children to get an advantage in understanding the concepts of the subjects clearly. However, this option has been left to schools whether they want to adopt it or not.

Other than mother tongue and local language, Sanskrit will also be offered in every level of education. Other classical languages will also be offered.

In high school education, this policy removes all the hard barriers between arts, commerce and science subjects. There is flexibility in the selection of subjects. This means that now students can study any subject of their choice from any stream. They can do major and minor just like in American schools. This is very important as different students have different interests and dividing them on the basis of their marks was unjust. Also this change will help in removing the stigma that science students are intelligent and arts students are not intelligent.

Undergraduate and postgraduate programs are also made flexible under this policy. This policy provides undergraduate students with multiple entry and exit option. In this option, students can exit college after completing one or two years of the course. If they leave after completing one year they will be provided with a certificate of the course and if they leave after two years they will be provided with a diploma and if they leave after three years they will be provided with bachelor’s degree. They can also do one extra year of multidisciplinary bachelor’s program.

In this policy, students can also transfer credits of one course to another course if they don’t wish to continue their course. This policy also provides students with the option in which they can take a one-year sabbatical after which they will be able to
continue their course from where they left off.
Also according to this policy students who have four-year undergraduate degree have to do only one year of MA and MSc. Also under this policy, MPhil will be abolished. For teachers, this policy provides that, after consulting with the NCERT, National Curriculum Framework for Teachers Education, 2021 will be created. Furthermore, by 2030 minimum qualification for becoming a teacher will be changed to 4-year B Ed degree and for those who have a Bachelor’s degree in any other specialized course, 2-year B Ed degree will be considered.

Also to give importance to a multidisciplinary approach, Multidisciplinary Education and Research Universities (MERU) will be created on IITs and IIMs level and to foster research culture in higher education, National Research Foundation will be set up as an apex body. For higher education, excluding legal and medical education, Higher Education Commission of India (HECI) will be created.

This education policy also allows foreign universities to open their campuses in India. This will help in opening of top universities’ campuses in India in the coming years. Provisions related to this were also given in Foreign Education Institution Bill 2010 but in that bill, foreign universities were only allowed to open their campuses in India with the partnership of Indian institutions and they were also required to give 50 crores as surety amount to the Indian government. But now there is no such requirement. Campuses can be opened in India by foreign universities on their own. This change will help in increasing education quality in India and will also increase competition.

Conclusion-
Overall this National Education Policy is convincing. This education policy transforms the education system as per the needs of 21st century. This education policy prepares the children from the young age to face the world as soon as they get out. Respect to vocational subjects has also been given in this policy which will help to remove the stigma that vocational subjects are inferior. Also by giving respect to vocational subjects this policy equips students with skills which are very crucial for their development and also for the country’s development.

However, effectiveness of any policy depends on its implementation. Therefore, the implementation of this Policy will be led by various bodies including MHRD, CABE, Union and State Governments, education-related Ministries, State Departments of Education, Boards, NTA, the regulatory bodies of school and higher education, NCERT, SCERTs, schools, and HEIs along with timelines and a plan for review, in order to ensure that the policy is implemented in its spirit and intent, through coherence in planning and synergy across all these bodies involved in education.  

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164 Ibid
ACT WHICH WILL DESCRIBE THE CULTURE OF JHARKHAND STATE (ANALYSING CHOTA NAGPUR TENANCY ACT)

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ABSTRACT
This article will mainly focus on the state of Jharkhand, and will examine the social and civil problems of the Adivasis related to the land tenure system. The land-related laws which are there in Jharkhand are Chota Nagpur Tenancy Act, 1908 and Santhal Pargana Tenancy Act, 1949. (This act restricts the transfer of selling or buying of tribal lands to non-tribal in Jharkhand region. CNT and SPTA were formed because many non-tribal people have lured the tribal people in remote areas to buy their lands at cheap price. It was also observed that they were forced by the non-tribal for selling their farmlands and non-farmlands). The issue which is raised above in this article are the problem of the Adivasi who are living in the state of Jharkhand is interwoven and the law which are passed by the legislature has a certain kind of relationship with the customs of the land laws like CNT and SPTA, which restrict the industries to enter into the soil of Jharkhand due to which the Non-Adivasi and the Adivasis living in the state are also facing complications where most of the tribal living in the state of Jharkhand are illiterate (with a literacy rate of 67.63%, below the national average of 74.04%, as per the 2011 Census). Despite of presence of laws which will protect their land resource, because of their asinine they sell their land illegally to the Non-Adivasi, the main reason behind this is that they require money and to earn money in a blow is to sell their land illegally because most of the land in the state of Jharkhand belong to these tribal groups. As there is an affinity in grasping the opportunity it is very difficult for the tribal to earn their livelihood. It will be demonstrated in this article, through different committee reports of state of Jharkhand through the help of NGOs and the Judgements given by different District Court and High Court of Jharkhand. After a long struggle, Jharkhand came into the existence of which Adivasis were always demanding and therefore a state called ‘Jharkhand’ was established on 15th November 2000. The state of Jharkhand has a total of thirty-two sub-communities of Adivasis. Among them, Santal, Oraon, Munda, Ho, and Kharia are the major Adivasi. A conscientious outline has been made in this article to interpret the nature of these conflicts, in terms of time and space, and also came out with a set of recommendations for civil society with a view to resolving these problems by democratic means.

Key Words: Adivasi, Land dealings, CNT, SPTA, Tribal, Non-Adivasi

INTRODUCTION
The state of Jharkhand was always demanding a major land tenure act to protect their culture of Adivasis. In the 19th century a numbers of legislations were enacted and the one which was implemented was named as Chotanagpur Tenancy Act (CNT Act of 1908), still one of the important land tenure act in force in the state of Jharkhand. This act provides not only the creation and maintenance of the land, but it has also created a special tenure category which is known as “Mundari
Khuntkattidar\textsuperscript{165} and restricts the transfer of tribal land to non-tribals. The CNT Act provides for recording of various customary community rights like water, land and Forest.

Water, Land and Forest when all three ingredients of nature combine together they constitute surrounding in the nature and these are the important source of livelihood for the indigenous communities, but their lifestyle, rites-rituals, culture, customs, folkways and even their whole life vibrates accordingly. The Adivasis worship the natural constituents and ecosystem’s like Village spirits (Hatun Bonga), Hill (Buru Bonga), the sun (Sing Bonga) as their gods and goddesses. They show their identity through respective tribes in relation with nature and resources like tete (a bird), ekka (tortoise), kujur (a creeper), lakra (tiger), Xess (rices or Paddy). Therefore, if the outer world will interfere into their lives then that will definitely affect their entire traditional, culture and natural resources. And it is very unfortunate to see that the Adivasis are struggling to save their endangered existence in this capitalistic competitive neo-imperialistic world.

Chota Nagpur Tenancy Act popularly known as CNT Act was enacted in the year 1908. The government has made certain amendment in this act for the Landlord and Tenant and the settlement of rent in Chotanagpur. The CNT Act came into force on the 11\textsuperscript{th} November, 1908. It was first published in the Calcutta Gazette\textsuperscript{166}. The Governor General give its assent on 29\textsuperscript{th} October 1908. The Chota Nagpur Tenancy Act, 1908 prohibits transfer of lands by sale, etc. Without the previous sanction of the Deputy Commissioner\textsuperscript{167}. It also prohibit the use of land for the urban purpose.

But in the case of Mathura Singh v. Tetli Dom\textsuperscript{168} the Hon’ble Court held “that the provision under section 46(1) was not ultra vires and the transfer being without permission was not valid. Section 46 is completely immune from attack of violation of Article 19(1)(f) in view of its inclusion in IXth Schedule item no 209”.

The state of Jharkhand is popularly known for its enormous natural resource. For the poor tribals, the basic survival and dignity is associated with their land. The CNT Act was placed under schedule 9 of the constitution of India and schedule 9 is beyond any judicial review. But this act has been widely violated since it has been passed. The prime reason for the violation of this act are the ruling parties of the state of Jharkhand due to which the poor tribals are exploited.

A petition filed by Salkhan Murmoo, in Jharkhand High Court on 25\textsuperscript{th} January 2011 in which the Hon’ble High Court said that “the court are very strict in implementation of land reforms laws and in the protecting the interest of the downtrodden and particularly the persons who are members of scheduled castes and scheduled Tribes as the members of other backward class”\textsuperscript{169}.

Section 49 of the Chota Nagpur Tenancy Act, 1908 says that “Tribal land can be sold to non-tribals too but only for the

\textsuperscript{165} Section 8 of Chotanagpur Tenancy Act, 1908 defines Mundari-khunt-kattidar means a Mundari, who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members of his family.

\textsuperscript{166} Section 1 of the Chota Nagpur Tenancy Act,1908

\textsuperscript{167} The Chota Nagpur Tenancy Act, 1908 Bengal Act 6 of 1908

\textsuperscript{168} 1996 (2) BLJR 1116

\textsuperscript{169} Shalkhan Murmoo v. State of Jharkhand& ors, W.P (PIL) NO. 758 of 2011
purpose of putting up industries or for agriculture work- but in this case the permission requirement has been changed. Rather than deputy commissioners (as provided in the original act), permission is needed from the revenue department”.

HISTORY BEHIND THIS ACT?
The British Government passed this Act in the year 1908. The main objective of passing this act can be figure out through the statement of Mr. Slacke who moved the Chota Nagpur Act in 1903 and later he was appointed as the commissioner of Chota Nagpur Mr. Slacke said: “Owing to the non-recognition of their rights, the Mundaris for more 3/4th of the century have been in a state of agitation which from the time has culminated in outbursts. In 1822 a horde of middlemen was let loose over the country by then Maharaja of Chota Nagpur. These persons were up countrymen. They were ignorant of and oblivious to the rights and customs of the aborigines, among whom naturally much discontent arose. This found a vent in the great Munda rebellion of 1832-1833, the immediate cause of which was an attempt by the Thakur of the Sonpurgarh to destroy Khuntkatti rights in Bandgaon and Kochang in the district of Ranchi. The attempts to destroy the Khuntkattidars’ rights did not cease, and they were the cause of the disturbances between the Landlords and Tenants in that district in the year of the Mutiny. Both sides took advantage of the disorder that then prevailed – the landlords to oust the khuntkattidars who were holding at low permanent rentals, the khuntkattidars who were holding at low permanent rentals, the khuntkattidars to recover the khuntkatti lands which the landlords had previously succeeded in making Rajhas or Manjhihas, i.e., Rayati or Sir. Eventually the Chota Nagpur Tenures Act of 1869 was passed and effected some improvement. But it omitted to deal with the all the privileged lands, as it took no notice of instant khuntkatti villages. This omission left such villages at the mercy of the spoliator. The destruction of the khuntkatti tenancies went on, and the discontent thereby created brought about the outburst of 1888, when what is locally known as the Sardari-Larai began, and has not yet ceased. Utilizing the bitter feeling of the Mundaris, some of their fellow-clansmen-they came to be known afterwards as Sardars-persuaded the people that the Hindus had no right to the lands the lands belonged to the Mundaris, that no rent should be paid, and that the Sovereign had given a decree to this effect. The outburst that occurred at the time was put down, but it again broke out in 1899-1900 under the leadership of Birsa, who styled himself as God.”

As a result, of dissatisfaction which led British Government to have a survey of whole Chota Nagpur region. Mr. Slacke further said, “But if steps are not taken to safeguard by legislation the rights of those people and to secure the finality of the record-of-rights, the latter by itself will not suffice to quiet the agitation. As long as 1839 it was reported that unless those people are protected in the possession of their lands, we never can be certain of the peace of the country. Once the necessary facts have been obtained, as is now the case, such legislation cannot be delayed, because the attacks which have been made on these rights so pertinacious and for so long a time will be carried on with a greatly

170 Section 49 of The Chota Nagpur Tenancy Act,1908 Bengal Act 6 of 1908
increased vigor, owning to the need of acting before the law can intervene”

The ownership of the land which were wasted in the hand of the Government were added under the Indian Forest Act VII of 1882 during 1893-94. In Singhbhum as in Palamau and Manbhum the forest settlement operations were launched and all the measures were taken to determine the rights of the Adivasis. The villages among the forests were marked off in the blocks of convenient size consisting not only of village sites but also cultivable and waste lands khuntkatti villages. The Colonial intervention bought number of enemy of the tribal culture. Penetrating into their identity, lifestyle and spirituality. The concept alien to the tribals such as ownership of land, accumulation of power, wealth and money began cropped up. The British Colonial Government tried to end the dissatisfaction among the large population of Chota Nagpur plateau by passing the CNT Act of 1908. This Act build peace in the region of Chota Nagpur plateau.

SITUATION AFTER THE INDEPENDENCE
Chotanagpur Tenancy Act (CNT) restricts the transfer of selling or buying of tribal lands to non-tribal in Jharkhand region and ensures the ownership of advises over their land for the protection of their culture and Khuntkatti areas. The forest which the landlords (zamindars) took illegally has to give their possession to the Munda community. But, after the establishment of the Bihar Forest Act, 1948 the scenario changed the khuntkatti land were transformed into private forest as a result the Munda has to leave the ownership and management upon their forests. Due to which the Munda started protesting against the state government to give back the possession to their land to the community. But, government didn’t change his decision and rested with the forest Department.

The Adivasi community wants their ownership over their lands because the landlords and the land mafias were using their land illegal according to their own interest. The main reason to bring CNT and SPTA to protect the identity of the tribals. The tribals get their education in mother tongue including the tribal language because of that they are not so adequate to know about their rights related to lands. So, for that reason, the CNT and SPTA came into existence. But after the establishment of the Bihar Forest Act, 1948 the exploitation of the huge asset of the forest land by the forests officials due to which the primary forest cover was almost destroyed the Adivasi community started asserting their rights over the forests.

A new act was passed in 1969 known as the Bihar Scheduled Areas Regulation Act the main reason to bring this act was to restrict the transfer of selling or buying of tribal lands to non-tribal. “For this a special regulation court was established and the Deputy Commissioner (DC) was given special rights regarding the sell and transfer of Adivasis land. According to this Act, an Adivasis cannot sell or transfer land to another Adivasi without the permission of the Deputy Commissioner (DC). When this court started functioning, a huge number of cases were registered”.172 According to the report of Ministry of Rural Development of the Government of India

cultivation by himself or by male members of his family.

171 Section 8 of Chotanagpur Tenancy Act, 1908 defines Mundari-khunt-kattidar means a Mundari, who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under

172 Secion 2 and 3 of Bihar scheduled area regulation Act, 1969
which was published in 2004-05. Jharkhand topper the list of Adivasi land alienation in India with 86,291 cases involving 10,48,93 acres of land. Which clearly indicates that cases of illegal land alienation is increasing rapidly.\textsuperscript{173}

**PRESENT SCENARIO**
The Non-tribal group applied various kinds of tricks to take the land of the tribal illegal. For that, they use many ways such as:-

I. The most popular trick that the non-Adivasis uses to buy the Adivasis lands is to get married to an Adivasi girl and transfer the land in her name.

II. Due to the lack of money, the Adivasi surrender their land to the money lenders. After Adivasi are been trapped by them through the loan.

III. False documents of the land is also used to acquire the Adivasi land illegally.

IV. The Deputy Commissioner (DC) also plays an important role in the illegal transfer of land as Non-Adivasis commissioner gives the authority to transfer tribal land illegal due to which the Adivasis has to suffer a lot.

As we know that the state of Jharkhand is rich in natural resources and the state government found many difficulties in extracting those natural resource in 1947 the state government planned to amend CNT and SPTA act for the purpose of Urbanization, industrialization and for development projects. Due to which a huge destitution was caused to the Adivasis. After the amendment done by the state government in CNT and SPTA. The Adivasis started thinking that the state government has planned to destroy their natural heritage.

The main reason for the establishment of the Chota Nagpur Tenancy Act, 1908 was to prohibits the sale and transfer of tribal land to the non-tribals. But we can clearly witness that due to the certain decision which was taken by the state government which snatched the land of the tribal forcefully. The state government has never gave emphasis on schedule V of the Indian constitution for the scheduled areas and the extension of the Panchayat act, 1996 they have never been implemented in true spirit.

Social Issues India in an article, “Status of Implementation of Chotanagpur Tenancy Act” (https://socialissuesindia.wordpress.com/2012/09/18/statusof-usage-of-the-chota-nagpur-tenure) uncovered some interesting facts. As indicated by the Ministry of Rural Development’s yearly report 2004-05, Jharkhand beat the rundown of Adivasi land alienation in the country, with 86,291 cases including 10,48,93 acres of land. After freedom and up to 1990 more than 26 lakh, individuals were dislodged in the Jharkhand due to “Development” projects, for example, dams, industrial projects, etc. Majority of them were tribal land. It has been assessed that around 22,00,000 acres of tribal land been lost since independence. These statistics talks obviously that the CNT act has failed to secure the interests of poor tribes.

In fact, the CNT Act has to pass through amended in 1947 to allow “development” projects. Besides, there are other laws such land acquisition Act of 1894 and the Indian Forest Act conflict with the soul of the CNT

Act. Therefore, the CNT Act has failed to provide any meaningful protection to the tribal community. The Bari Cooperative society case can be cited here to understand how the builder’s lobby tries to manipulate the CNT Act in their favour. “Tetulia” is an Adivasi village situated nearby the steel city of Bokaro in Jharkhand is a typical example of land alienation through tricks and breach of the laws. Forty-five Santhal families had been living in the town. They were fooled into parting with their properties. Presently the town has totally lost its character and has come to be known as Bari Cooperative where 250 posh buildings have replaced the mud house of non-Adivasis. Few of the tribal land owner still live in the mud houses outside of the cooperative area.

The 'Bari Cooperative Society' was set up in 1980 by two property sellers, who moved toward the Adivasis with a proposition to build up a garment factory and provide jobs through paying them Rs 1000 per acre for land, they procured 50 acres of land from Adivasis for the sake of Bari Cooperative however at that point supported by their guarantee. Strikingly, the garment factory was closed within a day and a posh colony was built and the houses were sold at the market rate to the non-tribals. When the matter was brought out into the light, the deputy commissioner of Bokaro investigated it in 2005 and found the infringement of the CNT Act. However, no action took place against the Bari Cooperative. The displaced tribal families are without justice even after more than three decades. One Kari Manjhi had 9.26 acres of land of which 4.26 acres of land were taken by the Bari Cooperative. He filed a suit in the Bokaro Civil Court against the Bari Cooperative in 2006 yet nothing has occurred till now. The predicament doesn't end here. The disposition of the administrators towards the execution of CNT is a sad story.

"Ranchi Land Scam" draws out the dull reality. In 1995 the Jharkhand Vigilance Bureau uncovered a land scam wherein a coordinated effort with certain civil servants and land mafia had sold in excess of 200 acres of land of tribal and Government land at prime areas in Ranchi, which was worth over Rs 400 crores. These plots of land were unlawfully moved to private housing co-operative societies in gross violation of the CNT Act. "Deoghar Land scam" years back to 2011 when it was found that about 800 acres land of non-transferable private and government land worth over Rs 1000 crores were sold or moved wrongfully.

This was continuing throughout the previous three years by forging the original land records the land-mafia has figured out how to snatch these basauri (residential category) plots in Deoghar.

**CONCLUSION**

This act was introduced by the British government in the year 1908 for the protection of tribal land and tribal culture in the Chota Nagpur region. This Act restricts the transfer of selling or buying of tribal lands to non-tribal in the Jharkhand region. The CNT Act is effective in North Chota Nagpur, South Chota Nagpur and Palamau division, including different districts.¹⁷⁴ Up until now, the CNT Act has been amended multiple times, recently in 1995. *This act is been listed in the Ninth Schedule of the Constitution, so this act is beyond any judicial review. The state legislature can*

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¹⁷⁴ Section 2 of the Chota Nagpur Tenancy Act, 1908
only make amendments in this act. At present more than 20,000 cases are pending which are registered under CNT act in the state of Jharkhand.

In the wake of experiencing the arrangements and investigation given above it turns out to be certain that the different laws sanctioned for the tribal and for securing their land to them are very adept. They are basic for giving the tribal a directly over their land and for guaranteeing that their properties right are not disregarded.

Keeping in view the tribal life which is predominantly forest-based, to deny them of the advantages of the forest would be sheer bad form, where a large portion of the individuals are yet living in the forest area and subject to the forest produce for their living. In such circumstances, it is significant that rigid laws must be there for keeping the privileges of the tribal maintained.

Each ideological group has its own say with respect to the CNT, the vote bank politics, the mollification factor all work in favor for these gatherings in encircling their opinion. Differed assessments encompassing the CNT have exacerbated things for definitive recipients. And furthermore, the destiny of CNT remains dwindled. An all-encompassing advancement of the state and tribals in specific requests a more uniform methodology towards the much discussed Act, the paramount interest of the tribals ought to undermine all basic political contrasts.

In this way, demand for an amendment to existing laws to the extent privileges of tribal must not be engaged. Incorporation of section 76 which read as “that the local custom will prevail in the absence of any written law of the land”.

In this way, remembering all these angles that the current laws need firm execution with no amendment for the government assistance of the tribal society.

However, pundits frequently refer to certain provisions in the Act as acting against the enthusiasm of the tribal communities remembering the changing situation of the general public. The banks in the state refrain from offering loans to tribes’ people because of legitimate arrangements in both the CNT and SPTA banning transfer of immovable assets of tribal to the non-tribal group.

The banks dread the arrangements to keep them from selling the sold property of a tribal. Recently, at the 50th regular gathering of the state-level bankers committee, Chief Minister said the government would before long actualize the proposals of the Tribal Advisory Council to ease the CNT and SPTA norms. He said even education and housing loans were not being disbursed to tribals’ people. The CM said the administration would soon create a corporate social responsibility trust in which organizations would be asked to deposit 2% from CSR fund share in the trust. The trust will execute the plans of the government.

175 The Chota Nagpur Tenancy Act,1908 Bengal Act 6 of 1908
176 The Chota Nagpur Tenancy Act,1908 Bengal Act 6 of 1908
INDIAN ENVIRONMENTAL GOVERNANCE- NEED FOR CHANGE

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Abstract
As India plunges into a deeply interlinked and interconnected world focused on industry driven developmental goals, there is a pronounced need to balance the negative environmental effects which have been exacerbated by rapid growth. This paper endeavours to raise new questions about this very need and attempts to examine the challenges and fractures in the current way of life and how it is affecting an already deteriorating environment. It attempts to highlight a need for a sustainable developmental model to enable the concept of peaceful coexistence of humans with its natural life source. It briefly revisits the country’s legal environmental paradigm to ensure that it is armed with proper laws and containment strategies to safeguard nature and correlates it with the international benchmark set for this era.

The paper draws parallels with the recent events which have endangered our country’s natural habitat and emphasizes on the need for a green-consensus among political leaders.

Keywords: Environment, law, green-politics, deep ecology, Environment Impact Assessment (EIA), 2020

Today India has joined the pantheon of truly advanced nations by empowering her citizens and opening her doors to liberalisation, globalisation and industrialisation for the purpose of development and modernity. With massive advances in technology and all things digital it has managed to make its mark on the world geopolitical platform albeit with a substantial cost to the environment and the nature sustaining it.

Over the years the country’s policies have had little tolerance for what it calls an environmental interference with its development agenda. It has pushed for development in all [i]industries, big or small and largely dismissed the negative environmental repercussions advancement has resulted in. From the Bhopal Gas Tragedy in 1984 and the infamous Pasarlapudi blowout in 1995 to the recent Visakhapatnam Leak in 2020, almost every environmental calamity has been a result of massive human interference directed towards ambitious developmental goals which has resulted in an irreversible impact on the rich Indian biodiversity and life.

At this point, we would like to direct attention to a few recent catastrophes which were a result of human intervention to further lay emphasis on the need for an urgent action plan to save the deteriorating environment.

2020- Visakhapatnam Gas Leak and the Assam Oil Spill
While the entire country was under siege from the worst pandemic in the century owing to the corona virus, the cities of Visakhapatnam and Assam had suddenly found themselves embroiled in an environmental battle. On 7th May 2020, Vishakhapatnam saw a massive gas leak from one of its plants - LG polymers, manufacturers of chemical products polystyrene and its co-polymers which are used as raw materials for various common disposable products. The incident claimed the lives of 12 (twelve) people, left 585 (five hundred eighty-five) affected [ii] and gravely injured the green cover in the vicinity.

The leaked gas, identified as styrene, often found in vehicle exhaust and cigarette smoke [iii] affected all plants and animals living in a 5 (five) km radius[iv] from the
plant and made the soil infertile and poisonous. The toxic long-term effects are believed to cause irretrievable damage to the massive green cover near the plant and affect agriculture produce, underground animal life so much so that it will require constant artificial and synthetic human help to regain its sustainability.

Causes: To assess the extent of causes of the leak the National Green Tribunal had taken suo moto cognisance of the issue and constituted a 5 (five) judge bench to look into it. It had imposed a penalty of 50 (fifty) crores on the company when the ongoing assessment had brought about information which stated that the company had indulged in an ignorant manner of operations and possibly failed to comply with Standard Operating Procedures which led to the leak. Additionally, documents were submitted which delineated that the company had failed to comply with the environmental norms kept in place, were operating without a valid environment clearance under the provisions of Environment Impact Assessment notification 2006, (EIA), had applied for environment clearance from the Ministry of Environment Forest and Climate change (MoEFCC) under the category of projects running in violation of the said EIA notification and were allegedly vying for consideration and recognition by an expert panel of the MoEFCC. Keeping this information as a reference point the Andhra Pradesh Police registered a case against LG Polymers charging them under several sections of the Indian Penal Code for their negligence, causing hurt and endangering the life of others and for culpable homicide not amounting to murder.[v]

However, even when officials allegedly believed to have been responsible for the leak have been arrested and questioned there seems to be a conspicuous lack of attention given to the massive environmental loss and the long-term effects it may have on the biodiversity of the area.

Assam Oil Spill:
The Assam oil spill which occurred on 27th May 2020 has been a classic example of the prioritisation of human life over environmental sustainability. The spill was caused by a damaged well belonging to Oil India Ltd. which had been spewing gas for 14 days and ultimately resulted in a massive inferno. The fire broke out in close proximity to the Dibru-Saikhowa National Park, a biosphere reserve in the Dibrugarh District of Assam, housing innumerable endemic species of plants and animals. Even though it did not result in human casualties it left swathes of vegetation, flora and fauna decimated and wrecked.

It destroyed ‘Maguri Beel’, a significant wetland in the area and one of the ‘Important bird and Diversity Areas of the world’. Located at the gateway of the biosphere reserve the wetland hosts 80 (eighty) fish species, and 300 (three hundred) bird species every year along with six vulnerable species, 2 (two) endangered and 6 (six) critically endangered animals[vi] which have all been compromised and harmed.

Additionally, the oil condensate from the spill has covered the water bodies, making it impossible for aquatic animals to survive and the area is marred by carcasses of dead animals, birds and plants. It is notable that the incident has hardly gained traction or garnered attention in mainstream media, which has pushed this catastrophe to the side-lines. This is perhaps because the absence of this wetland would have led to a complete demolition of villages situated
near the industry which allegedly justifies the ironical notion that a human life is more precious than the nature sustaining it.

Course of Action:
The action taken against the proper authorities in this case has been dismal and reckless. The National Green Tribunal had directed Oil India to deposit 25 crores and claim liability for the incident while constituting an 8 (eight) member committee to look into the possible causes of the fire, but so far could not produce substantial results. [vii] It was alleged that the public company did not have any mitigation plan for such a disaster even though the standing committee of the national board of wildlife had recommended the company to provide legal undertaking about their environmental safeguards and to specify the extent of their liability if they are faced with a situation like this. It is true, that the veracity of these claims are yet to be ascertained in a courtroom but it is unquestionable that the company indulged in malpractices and propagated a blatant disregard for its surrounding environment.

These two deadly instances have barely scratched the surface of the environmental tragedies we witness every year but it is evident upon careful study of the catastrophes that a common denominator between them is human interference and irresponsibility coupled with the immunity to flout laws and rules. This begets the need for us to have a more honest conversation about the extent to which governments should impose restrictions on industries which can potentially harm the environment and forces us to define the contours of the legal framework put in place to ensure that there is a sustainable environment for posterity.

India and International Law

Post- Independence India was heavily focused on economic development and the concept of environmental issues was only limited to health and safety laws. It was only after the UN Scientific Conference (First earth summit) that India decided to draw up the Water Prevention and Control of Pollution Act[viii] in the year 1974 which was subsequently followed by the Air (Prevention and Control of Pollution) Act[ix] in the year 1981. Since then, India has been a consistent participant in all major climate change conferences, ranging from the United Nations Conference on Environment and Development in 1992 (UNFCCC) to the Paris Accord for climate change in 2015. Up until the Paris conference, developing countries were not required to curb their green-house gas emissions however that changed during the Paris conference.

The Paris Accord & India
The Paris Conference of 2015 (COP 21) was the 21st annual session to the United Nations Framework Convention on Climate Change (UNFCCC). The conference was deemed monumental mainly because it witnessed the drafting of universal guidelines to limit global warming temperatures and was required to be ratified by UNFCCC members. There was an understanding that universal guidelines are often too vague in nature and the Paris session demanded countries who ratified the treaty to present Nationally Determined Contributions (NDC’s) which would comprise plans pertaining to the specific country and their contributions to achieving the universal goals set. The major goal was limiting the warming temperatures to 2 degree centigrade and further pursuing efforts to achieve the ideal temperature of 1.5 degree centigrade. India ratified the Paris treaty in the year 2016 and the it's NDC comprised of three main promises
which focused on reducing carbon emissions intensity by 33% - 35% and generating at least 40% of its electricity from non-fossil fuel sources. Apart from these promises, an initiative to develop a “carbon sink”[x] by increasing forest and tree covers was also set for the year 2030. A “carbon sink” is a reservoir, that could be natural or man-made, which absorbs carbon, thereby lowering the concentration of carbon-dioxide.

A treaty when adopted is only successful if the country establishes an obligation, accountability and responsibility in the rules and acts it passes for implementation of goals. As of 2019, the government has set up a climate action tracker[xi] website which comprises of goals accompanied with timelines that the government has taken towards the reduction of carbon emissions. The main issue with this website is that it only portrays the ideas and the end desired goals but there is no information pertaining to how these goals shall be achieved. The website shows that India is on track and will achieve the goal of limiting warming temperatures of 1.5 degree centigrade. The announcements regarding the NDC’s often do not specify the long-term plans and there is no follow-up process for the various committees that were created in lieu with the promises made. For instance, the National Ganga Council (NGC) chaired by Prime Minister, Narendra Modi has met just once since its creation in 2016, with a significant number of states failing to attend.[xii] Another one of the issues that side-tracks India from truly being responsible towards its promises made in the NDC is the exploitation of the Arctic Tamymyr Peninsula for coal. Dharmendra Pradhan, India’s Minister of Petroleum and Natural Gas stated that “We are the second largest coal importer in the world, and we intend to achieve production of 3m tonnes of steel per year by 2030, so we need to increase coal supplies.”[xiii]. The Arctic region is known to be extremely sensitive and the biodiversity that thrives around is in grave danger because of the constant coal-mining. Moreover, the mining raises the surface temperatures of the Arctic region which in turn contributes to global warming.

Actions like these make it hard to determine whether India’s fight against climate change is legible or a mere faux. A chain of committees and talks may happen about environmental issues but there is no sign of reassurance from the government that they consider climate change and sustainable development as major issues. The policies that have been drawn encourage extreme industrialization and allow organizations to plunder, pollute and exploit resources. Policies must be inclusive of environmental concerns rather than them being in a “give and take” manner wherein industrialization harms the nature and then the government deploys more committees to remedy the damage caused as seen in the Assam and Vishakapatnam disasters. There needs to be a transition in how we perceive sustainable development and climate change for every industry that is being set as a result of reckless policies, we move one step further away from having a future.

Internal Legal Framework
There are several legislations and provisions put in place in India which safeguard the environmental health of the country. The constitution reflects it under Part IV A (Article 51A-Fundamental Duties) and mandates that every citizen of India has a duty to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures. It also stipulates under Part IV (Article 48A-
Directive Principles of State Policies) that the “State must endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country”[xiv]. However due to the non-enforceability of the Directive Principles of State Policies it becomes imperative to have certain legislations put in place to ensure that the motive to conserve nature is met and acted upon. Due to this reason, Acts like The National Green Tribunal Act, 2010, The Air (Prevention and Control of Pollution) Act, 1981, The Water (Prevention and Control of Pollution) Act, 1974, The Environment Protection Act, 1986 and The Hazardous Waste Management Regulations among others were formulated and acted upon.

Environment Protection Act, 1986

Over the years the The Environment Protection Act, 1986 (“Act”) has been the foundational legislation governing major industrial policies. This is because it assigns a larger ambit to the term environment[xv]and includes it to mean water, air, land as well as the interrelationship which exists between water, air and land, and human beings, other living creatures, plants, microorganisms and property. The Act encompasses all legislations and has undergone many amendments and changes under Section 3 (1) to accommodate the modern world. The government has so far rolled out 3 (three) notifications since the Act’s inception and built the process on the precautionary principle, which advocates that when it comes to activities that may have harmful effects upon the environment, where the scientific data may be inconclusive, the benefit of the doubt should be given to the environment, and the activity avoided[xvi]

The most recent notification was the Environment Impact Assessment (EIA) Notification 2020 which amends the existing 2006 EIA notification, altering 12 out of its 14 clauses. It has received a lot of flak and criticism for its purported development-centric approach and has the following salient features-

• Under the existing 2006 law, projects are categorised into Category A and B, where all projects in Category A need to undergo the process of EIA which is a technical exercise wherein projects are supposed to submit norms of due process.[xvii] Category B projects are further classified to B1 and B2 by the regulatory authority, on the basis of their scope and potential impact, and only the projects falling under B2 category are exempted from the process to obtain an environmental clearance. Under Clause 26 of the 2020 notification, however, 40 different types of industries would be automatically exempted from the need for a Prior Environmental Clearance.

The Notification proposes to reduce the timeframe for conducting public hearing to 20 (twenty) days, from the current 30 (thirty) days under the EIA Notification of 2006.

The notification allows project proponents (the industrialists proposing to undertake a project) to engage private consultants for preparing the EIA reports.

Clause 17(4) states that only restricted information may be made available to the public for consultation. For existing projects that may be merely looking to expand, the notification denies any need for a public consultation, if the modernization is less than fifty percent of the project capacity, facilitating and streamlining piecemeal expansion processes for all existing projects.

Clause 5 (7) exempts all projects that are defined by national security or defence to require any kind of strategic planning.
Clause 22 of the notification allows the project owners to pay compensation in cases where they pollute the environment and continue their operations.

The validity of the environmental clearance of mining projects is proposed to be extended from 30 years to 50 years and the said entire duration would be considered as a part of the "construction phase".

The time period for conducting public hearing has been proposed to be reduced to 40 days from 45 days and general validity of the environmental permit has been proposed to be increased to 10 years.

Opposition:

Environmentalists have blamed the notification for gutting environmental laws in place and giving more importance to industrialisation and development. Some common oppositions for the notification are:

- The process of EIA stands diluted for a massive number of projects.
- The reduction of the time frame to conduct public hearing in the middle of the lockdown is bound to become unfair for local groups and communities who need to fully comprehend and respond to the EIA report.
- The engagement of private consultants to prepare an EIA report can be disastrous and lead to a situation where untrue reports can be procured or extreme technicalities can be adopted to make the process confusing and out of the public’s understanding.
- The ambiguity in the language of the notification seems to intentionally favour the private parties involved in the process, which could lead to the privatization of natural resources.
- Under clauses 14(9) and (10), all responses to the EIA are to be forwarded to the project proponent. This endangers community participation since no mention is made of the community receiving any notification, which is actually conducting the hearing.
- The term 'strategic planning' has not been clearly defined which which paves way for a loose connotation. If all projects are termed under strategic projects they will not be placed in the public domain and dissuade transparency. It is implicative of the fact that all projects need not be properly planned.
- The notification equates dangerous and irretrievable environmental damage to a monetary sum since it allows illegal industries who have not obtained Environment Clearances, to pay meagre fines. It also propagates that environmental crimes can be paid off with money which currently are punishable with imprisonment. This becomes a major cause of concern since there is a noted absence of any deterrence effect.
- Industries are now allowed to only give an annual environmental compliance report rather than half yearly reports which reduces accountability, transparency and makes the environmental measures slack and ineffective.[xviii]

Deep Ecology & Green Politics

Suggestions

For as long as scientists and anthropologists can trace, man and nature have thrived together in an ecosystem. Man depended on his natural habitat to shelter, feed and nurture him and a relationship of dependency on nature emerged. However, as the world evolved and changed, a theory of shallow ecology developed wherein man adopted a political and anthropo-centric theory that “environmental preservation was only to be practiced to an extent that it met human needs.”[xix]. Economic gains and development were put above the need to care for our environment and with this transition into a profit maximization set up of society, the protection of our natural
Habitats went for a toss. Every policy and amendment that is drawn is from a mechanistic point of view where the issue of environment is side-tracked or made secondary. The proposed Environment Impact Assessment (EIA) 2020 by the Union government portrays how much of an upper hand industry are given to maximize their gains at the cost of nature. The people of India have led some of the world’s largest environmental protests, be it the Chipko movement or the widespread “Global Climate Strikes”[xx] that took place in 2019 or even the social media backlash that the government’s EIA draft is receiving. A huge number of citizens recognize their duties as stakeholders in the fight against climate change but for a country to unanimously come together to fight for sustainability and radical change in our environmental policies, our leaders and political parties need to change their perspective with which they view environmental sustainability. There needs to be more green-parties who draft their agenda keeping environment as the central issue. There are a total of just 90 countries with green parties, of which less than 1% ever win seats in the cabinet. This is a crisis of perception and views. Humans believe that they are at the centre of the ecosystem and that natural environment is at their disposal to use and exploit. An emerging theory called deep ecology has been developed which is that “Deep ecology realizes the intrinsic values of all living things, and humans are just one strand in the web of life.”[xxi] There needs to be an understanding that man does not dominate nature. Green Parties across the world believe in this idea of deep-ecology.

There is a major mis-conception that thinking green is often too idealistic and that it is extremely expensive. However, what is forgotten is the fact that forming a green-consensus and acting on the idea of “going green” and “sustainable development” is an investment for the future. Spending more and making definitive changes will cost much less than the $300 billion - $ 400 billion that will be used up when climate change reaches its most destructive and extreme state. “The cost of not doing something about climate change is much greater.”[xxii] A green approach to policy making is about redirection of existing funds into projects, generating more funds by taxing companies responsible for their industrial waste and commodification of nature. There is a wide array of solutions that dis-prove the notion that environmental governance and free market type of economy do not blend well. However, within the strata of deep ecological thinking, commodification of nature in terms increasing carbon tax for companies, enlisting system of “debt for nature swaps”, which essentially involves “governments forgoing a portion of a company’s debt in exchange that the company looks after the biodiversity that surrounds their area and invest in local environmental protection.” [xxiii]. Development of eco-tourism by charging a fee to enter national parks and other techniques to valuate nature.

India given its wide populace and rapid industrialization has forgone the concept of environmental governance. With the EIA draft circulating, companies can get their “safe environmental stamp” within a matter of 20 days as opposed to the original time frame of 30 days. Our leaders need to rework their perception of environmental governance because they possess the power to direct masses and to provide mechanisms and rulings that could cultivate progressive environmental change. The debate over ideologies is exhaustive and perhaps people will never come to a common consensus on
how a country should be ruled, but our negligence towards our natural habitat will only prove fatal for us. Green politics is about changing the human beliefs and values when it comes to protection of nature. We need environmental movements now more than ever because they keep the momentum going. They remind masses that we are in desperate need for credible and accountable leaders, that the world as we know it is endangered.


[xv] (Section 2(a)) of The Environmental Impact Assessment Amendment (draft), 2020.

[xvi]https://www.livelaw.in/columns/undertaking-environmental-protection-from...
within-the-draft-eia-notification-2020-159388

[xvii] Any project requiring environmental clearance, first needs to undergo a thorough screening and scoping process by the regulatory authorities and, thereafter a draft EIA Report is sent for public consultation.

[xviii] https://www.livelaw.in/columns/draft-eia-notification-2020-areas-of-concern-159135?infinitescroll=1


[xx] Global Climate Strike, et al. “Global #ClimateStrikeOnline - Art, Training & Actions for Climate Strikers.” *Global Climate Strike*, https://globalclimastrike.net/


ENCOUNTER KILLINGS IN INDIA; I.
A SOCIO LEGAL ANALYSIS

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ABSTRACT
In recent times, it is evident that there has been a gradual increase in the number of encounter killings in India by the police personnel which is emerging as a threat to the principles of natural justice and rule of law. This also has serious implications on the Indian Judicial system, in which people may lose faith if this fake set up of immediate justice is not discontinued. This paper makes a socio legal analysis on the complex issue of encounter killings in India. The researchers have presented some of the most controversial cases of encounter killings in India and have analyzed the leading guidelines formulated by the Supreme Court of India as well as the NHRC on the procedures of investigation and enquiry of extra judicial killings in India.

The researchers aim to highlight the lacuna in the enabling provisions which leaves a scope for encounter killings and how the offenders manage to escape the liability of the killing of a human being without any reasonable apprehension or ground. Also, certain recommendations have been put forward by the researchers to eradicate the evil of fake encounters.

Key Words; Encounter killings, Police personnel, Indian Judicial system, Natural Justice.

INTRODUCTION
Encounter killings also known as extra-judicial killings is used as a mechanism by the police authorities or law enforcement members to provide ‘instant justice’ to the offenders which is not backed by law. Section 46 of the Code of Criminal Procedure, 1973\(^{177}\) provides that the police personnel are allowed to use force or any other means to arrest a person who has been accused of an offence punishable with death or imprisonment for life. Therefore, the police personnel have a right to perform their duties in good faith and can use force with reasonable apprehension that the accused is resisting or may abscond but nowhere it provides them a right to use force to the extent of killing the accused. Law only provides remedy of private defence under Section 96-106 in the Indian Penal Code, 1860 which provides this relief to every citizen including the police personnel. Section 96 of the Indian Penal Code, 1860\(^{178}\) provides that “Nothing is an offence, which is done in the exercise of the right of private defence”. Further, the provision dealing with public servants and the right to self defence is as under; “There is no right of private defence against an act, which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act, may not be strictly justifiable by law. There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law. There is no right of private defence in


\(^{178}\) The Indian Penal Code, 1860 (Act No.45 of 1860).
cases in which there is time to have recourse to the protection of the public authorities. Extent to which the right may be exercised—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence”. The right of private defence does not guarantee absolute authority and protection to public servants and is subject to certain restrictions. While the Code, gives an expansive interpretation to the right to self defence, it is pertinent to note that, no more harm be caused than is necessary during the exercise of this right. The researchers are of the opinion that this right to private defence in recent times has been misused and many a times, the violence caused by encounter killings, which have no substantial evidence to prove private defence and fake encounters, gets a blanket cover of private defence and the offenders easily escape the criminal liability of killing someone. The Constitution of India also known as the Magna Carta of the country’s legal system rests on the principles of natural justice which advocates ‘audi alteram partem’ and rule of law. These principles are defeated at the very moment when the instant justice is provided by the police personnel themselves without following the due process of law. Extra judicial killings that include fake encounters are a severe form of violation of fundamental rights of citizens guaranteed under Article 14 which provides right to equality before the law and equal protection of law and Article 21 that contains provisions on right to life and personal liberty. These extra-judicial killing takes away the right of the accused to receive fair investigation and trial. Therefore, the researchers believe that, the use of encounter killings is a grave danger to the independence of the Indian Judicial system.

II. CONTROVERSIAL ENCOUNTER KILLINGS IN INDIA

India has witnessed various encounters committed by police personnel which have created great controversy over the legitimacy and genuineness of police action. The researchers undertake to describe some of the most controversial staged encounters herein below;

1. IŞHRAT JAHAN CASE

The Ishrat Jahan encounter case is an ongoing case in the State of Gujrat in which Central Bureau of Investigation (CBI) had accused officers of Ahmedabad Police Crime Branch and members of the Subsidiary Intelligence Bureau of Ahmedabad of having carried out a staged encounter by shooting dead four people on 15th June 2004 including 19 year old Ishrat Jahan. Gujrat police had accused Ishrat Jahan of being a part of a terrorist attempt to assassinate Prime Minister, Narendra Modi, who was the then Chief Minister of Gujrat in the year 2004. The Supreme Court of India ordered a CBI enquiry over the said staged encounter and the trial is currently underway at CBI court in Ahmedabad. In 2011. The Special

179 The Indian Penal Code, 1860, Section 99.

182 Supra, Note 5.
Investigation Team of CBI informed the Gujrat High Court that the said encounter was not genuine after which the Court ordered that a complaint under the Indian Penal Code, 1860 shall be filed against those who were involved in the encounter. After more than a year later, in February 2013, the CBI arrested one of the Gujrat police personnel for his connection with the alleged fake encounter. In June 2013, CBI arrested another police official who was then sent to custody. All the accused police officers are now either out on bail or reinstated back to their official duties. The researchers are of the view that it has been more than 16 years but the said trial has only reached to the investigation stage and nothing concrete has been done till now. Even when various reports by medical practitioners who have done the postmortem have stated that the range of the bullets in the bodies of the accused were from close proximity which shows that they were not trying to escape from the custody of police and at the same time implies that more force was used by the police officials than it was necessary and the act was not done in private defence. Another aspect of the case also shows that the delay in investigation from time and again is to bury the case without justice being done. Therefore, the researchers opined this to be a controversial fake encounter case and people behind the said incident are being protected from any judicial proceeding against them.

2. SOHRABUDDIN SHEIKH CASE

The Sohrabuddin Sheikh case refers to a criminal case in the State of Gujrat wherein Sohrabuddin was alleged by the Gujrat Police to be associated with a terrorist outfit called Lashkar-e-Taiba (LeT) and the Pakistani Intelligence Agency (ISI) on the ground of attempting to assassinate “an important political leader”. It was reported that his wife Kausar Bi and his aide Tulsiram Prajapati were alleged to have been killed as part of the encounter, but there is no evidence to prove such an incident till date. The Supreme Court of India on a petition filed by the family members of the accused transferred the case to CBI for investigation. On investigation, CBI filed charge sheet against 38 persons including Amit Shah, the then Rajasthan Home Minister Gulab Chand Kataria and other senior IPS officials.

Later, on 22 July 2010, Amit Shah was arrested by the CBI and was later released on bail bond of Rs. 1 Lakh rupees. Thereafter in December 2014, a special CBI court in Mumbai discharged Amit Shah from the case and subsequently, also discharged 15 others including Kataria. After Amit Shah’s discharge, Sohrabuddin’s brother filed a petition against the same in the Bombay High Court which he later withdrew and then a social activist, Harsh Mander filed a petition in the Bombay High Court with respect to Shah’s discharge, but the same was dismissed by the Court on the ground that he has no locus standi on the case and cannot file a petition and this was upheld by the Supreme Court. Thereafter, the CBI special court in Mumbai framed charges against the other 22 accused in the year 2017 but on ground of no evidence and prosecution could not establish the case, they were also acquitted and released.


184 Supra, Note 5.
The researchers are of the view that, the delay in investigation and trial in similar cases of encounter killings may mislead important elements which may be aggravated by political influence and may give lot of time to the accused to tamper the evidences in their favor. This has not only delayed the justice but justice seems to have been denied.

3. LAKHAN BHAIIYA CASE

Ram Narayan Gupta, also known as Lakhan Bhaiya was shot dead by Mumbai police in 2006 in an alleged staged encounter. Few days after his killing, his brother moved the Bombay High Court alleging that Lakhan Bhaiya has been killed by Mumbai Police in cold blood. Thereafter, in 2013, a Mumbai’s Sessions Court sentenced 13 people including 13 policemen to life imprisonment for killing Lakhan Bhaiya. The Court also found them guilty of conspiring and kidnapping him. In its observations, the Session’s Court observed that the bullet which killed Lakhan Bhaiya was fired from point blank range and as such this was considered to be a staged encounter. The researchers are of the view that the Judiciary has ensured that justice is not only done but seem to be done without discriminating the status of the accused members of police departments. If in this manner, other cases will also be dealt, the evil of fake encounters will soon disappear.

4. HYDERABAD CASE, 2019

In November 2019, India has witnessed another Nirbhaya in the State of Telangana where a woman aged 26 years was brutally gang raped by four men and then was subsequently murdered. The four men accused in the case had been shot by Cyberabad police in an alleged encounter on 6th December 2019 by exercising their right to self-defense on the ground that the four accused tried to escape and began pelting stones on the police personnel. The Supreme Court on 12th December 2019 appointed a three-member committee to investigate and enquire into the alleged encounter and the committee was required to submit its report within 6 months. However, in July 2020, the Supreme Court has granted additional 6-month time period to the committee to conduct its enquiry and submit its report. Further, a seven-member team of the National Human Rights Commission have commenced with a fact-finding probe in order to ascertain whether the police personnel have killed the four accused by staging a fake encounter. The report of the NHRC in this regard is awaited and the matter is sub-judice.
The researcher believed that this encounter was widely celebrated in all the parts of the country because the entire nation was upset about the delay in Nirbhaya’s case and were not wanting to see another Nirbhaya waiting for couple of years to seek justice. They felt that the police personnel have done good in delivering immediate justice to the family of the victim. But the researchers hold a view that it should only be the Indian Judicial system, who should be responsible for delivering justice to the citizens and nobody else with due regard to due process of law and the rule of law.

5. VIKAS DUBEY’S CASE
In July of this year, Vikas Dubey was killed by Uttar Pradesh Police in an alleged encounter while exercising their right of self-defense on the ground that Dubey had snatched a police weapon and was trying to escape from the police custody. In this regard, before the Supreme Court of India, the Uttar Pradesh police has submitted that they have followed all the guidelines laid down by the apex body on conducting encounters and also informed the court that the police vehicle in which Dubey was being transported from Ujjain to Kanpur, has been overturned, and also submitted photos of the bodies of 8 policemen who were killed Dubey and his gang in Bikru village. The police also informed that the Supreme Court that the U.P. Government has established a Judicial Commission to investigate the encounter as per the guidelines laid down by the Supreme Court. The Supreme Court of India has indicated that it could order a judicial probe into the killing and has asked the U.P Government to submit its response, while hearing three petitions on the alleged encounter of the Vikas Dubey. The researchers are of the view that this a politically influenced case and the said encounter is staged and fake. The researchers believe that only an independent and impartial probe will be able to verify the genuineness of the facts claimed by the U.P. police personnel because the incidents in the case are such that an arrested accused can try to snatch a weapon from the police men and tries to escape in the presence of so many policemen and the car suddenly overturned is hard to believe.

III. JUDICIAL AND QUASI JUDICIAL TRENDS UNDER ENCOUNTER KILLINGS

THE 16 GUIDELINES – A TURNING POINT
Although there is no specific provision under the Indian law which deals exhaustively with extra judicial killings or commonly known as encounter killings but there are certain enabling provisions which are already discussed in the Chapter I of this paper. Nevertheless, the Supreme Court of India and the NHRC have from time to time provided certain guidelines or principles which have to be followed while conducting an investigation in the cases of death caused by the police encounters. The Supreme Court of India, developed a set of 16 guidelines in the case of People’s Union of Civil Liberties v. State of Maharashtra, which has to be followed in matters of investigating police encounters in cases available at; https://zeenews.india.com/india/vikas-dubeys-case-as-per-guidelines-bullets-fired-in-self-defence-up-police-to-supreme-court-2296463.html.

190 ZEE Media Bureau, “Vikas Dubey Encounter as Per Guidelines, Bullets Fired in Self Defense; U.P Police to Supreme Court”, (Updated 17 July, 2020)

191 Id.

192 Writ petition (C) No. 316 of 2008.
of death as the standard procedure for thorough, effective and independent investigation;

i. **Recording of Any Intelligence or Tip Off** - where the police received any intelligence or tip off regarding criminal movements or any information about the crime, the same has to be recorded by the police either in writing or in electronic form.

ii. **Registration of FIR** – where the police uses any fire arm and an encounter takes place after receiving any tip-off or intelligence, due to which a death occurs then a FIR have to registered and forwarded to the court.

iii. **Independent Investigation** – Crime Investigation Department or police team of another police station has to conduct enquiry into the encounter in order to identify the victim, recover and preserve evidence, identify witnesses and identify the cause of death.

iv. **Magisterial Enquiry** – an enquiry made under Section 176 of Criminal Procedure Code, 1973 must be conducted in all cases of death arising due to police firing and a report of the same must be sent to the Judicial Magistrate under section 190 of the Code of 1973.

v. **Involvement of NHRC** - information of the alleged encounter must be sent to the NHRC immediately without any delay.

vi. **Medical Aid** - the injured criminal/victim must be provided immediate medical aid and their statement should be recorded by a Magistrate and a medical officer with a certificate of fitness.

vii. **No delay** – the police should ensure that no delay should be made in sending FIR, diary entries, sketches to the concerned Court.

viii. **Report** – after the investigation is completed, a report has to be sent to the competent court following which a trial should be conducted by the investigating officer in an expeditious manner.

ix. **Inform Kin** - where death has occurred, the next of kin of the alleged victim/ criminal should be informed at the earliest

x. **Submission of Report** – six monthly statements of all cases where death has occurred in a police firing must be sent to the NHRC to the Director General of Police.

xi. **Disciplinary Action** – if on conclusion of an investigation it is proven that death occurred by use of fire arm which amounts to an offence under IPC, 1860, disciplinary action is to be initiated against a police officer found guilty of the same.

xii. **Compensation** – compensation in accordance with the provision of Section 357-A of Criminal Procedure Code, 1973 has to been given to the dependents of the victims.

xiii. **Surrender of Weapons** – the concerned police officer has to surrender their weapons for forensic analysis as is required by the investigating team.

xiv. **Legal Aid** – information about the incident has to be given to the accused police officer’s family and legal aid should be made available to such families.

xv. **No Promotion/ Gallantry Awards** – concerned officers shall not be bestowed with promotion or gallantry awards immediately after the occurrence of the encounter.

xvi. **Grievance Redressal** – if the family of the victim finds that the above guidelines are not followed then it may make a complaint to the Sessions Judge having territorial jurisdiction of the place of incident.

The Supreme Court of India has granted these guidelines the status of a statutory law under its exclusive power granted under Article 141 of the Constitution of India.

**NATIONAL HUMAN RIGHTS COMMISSION**

In March 1997, Justice M.N. Venkatachaliah, who was the chairman of
the NHRC, wrote to all the Chief Ministers of India informing them about the complaints received by the NHRC from general public and NGOs on occurrence of fake encounters by the police. Justice Venkatachaliah observed that the police do not have the right to take away someone’s life except in the following circumstances:

i. If death is caused in exercise of right of private defense;

ii. Section 46 of the Criminal Procedure Code, 1973 which authorizes the police to use force extending up to causing death when it is necessary to arrest a person accused of an offence punishable with death or imprisonment for life.

Thereafter, the NHRC has given certain guidelines to all States and Union Territories to ensure that police personnel follow certain guidelines in cases where death has been caused in police encounters.

i. Registration – the police in-charge as to record all information about death in an encounter in an appropriate register.

ii. Investigation – the police personnel have to investigate all the relevant facts, circumstances and information it has received about the death.

iii. Compensation – suitable compensation has to be granted to the dependents of the deceased, if the police officer is prosecuted on the basis of the investigation.

iv. Independent Agency – the cases for investigation have to be referred to an independent investigation agency such as the State CID.

In the year 2010, some other guidelines were also formulated by the NHRC extending the scope of the above guidelines.

i. Registration of FIR – where a complaint is made against a police officer amounting to cognizable offence, a FIR has to be registered as per applicable provisions of law.

ii. Magisterial Probe – a Magisterial enquiry has to be conducted in all cases of death caused due to police action.

iii. Reporting to NHRC – all causes of death arising due to police action have to be reported to the NHRC by the Superintendent of the police within 48 hours of the occurrence of death.

iv. Second Report – second report has to be submitted to the NHRC within three months from findings of Magisterial enquiry, postmortem report etc.

Thus, the NHRC has played a constructive role, in supporting the Supreme Court of India by contributing to the jurisprudence on the complex issue of extra judicial killings in India.

CONCLUSION AND RECOMMENDATIONS

Even though concrete steps have been taken by the Indian Judiciary and Quasi-Judicial bodies in formulating various guidelines to ensure staged or fake encounters do not take place but the intention of these bodies to curb the practice has not been achieved till date. This is evident from a fact that there has been increase in the number of encounter killings in India. There are enabling statutory provisions which supports encounter killings but the same has now seem to be widely misused by the police enforcement. It remains important that encounter killings should be resorted to by the police personnel only in the legitimate exercise of the right to self-defense only when he has reasonable apprehension that more harm can be caused, as is given under IPC, 1860. Any violation of this right of self defense will defeat not only the administration of justice
but also the due process of law and principles of equity.

As elaborated by the researchers under Chapter II of this paper, it has been observed that there are many reasons or causes which from time and again shows that very few killings were done under self defense but majorly there were ulterior motives which has caused the killings of the accused in an unusual and dramatic manner. These extra judicial killings not only violate the fundamental rights of the accused enshrined under Indian Constitution but also defeats the very nature of the criminal jurisprudence of India which speaks at length that no person is guilty unless the offence against him is proved in the court of law. These encounters not only violate the right but also portrays the accused as guilty even before the legal proceedings are initiated in a court of law which has a long bearing social implication on the family of the accused. The family has to live with the burden and stigma all their lives that their family member who was killed in an encounter was a criminal, even when nothing has been proved against their family member in judicial proceedings. The consequences could negatively affect the health of the dependents of the accused and may also cause greater disturbance to the minds of younger family members mental health. Sometimes, the media trials too have a negative impact which prejudices the interest of the accused and makes it difficult for him/her to seek justice because the public sentiment has already been built around the guilt of the accused and they celebrate the heinous forms of encounter killings without knowing the truth.

Further, the most pertinent and negative impact these extra judicial killings have been continuously causing in on the Indian Judicial system in which people of the country have gradually started losing faith because they believe that more time is invested in seeking justice through legal proceedings initiated in already overburdened court of law, wherein they can see the immediate justice done by these encounters. The researchers strongly oppose extra judicial killings by the police personnel, as their job is not to administer justice and if they will continue to do so, sooner or later a time will come when nobody will resort to judiciary for the redressal of their grievance but they will take the process of imparting justice in their own hands which has serious repercussions on a welfare State like India.

Therefor the researchers believe that an impartial independent body should be constituted to investigate and enquire in all the matters pertaining to extra judicial killings and stricter punishment and penalties should be imposed on the police officers who have staged fake encounters. This can only be achieved when enabling provisions with respect to extra judicial killings should be added in the Indian criminal jurisprudence by enactment of appropriate statutes and laws and by ensuring due compliance with these legal provisions has been made.

Further, it is equally important for the fourth pillar of democracy which is Media to refrain themselves from conducting media trial when the matter is sub-judice and ensure all the ethical and moral responsibilities should be adhered to.

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THE ‘SECURITY’ THAT WAS PROMISED: HOLDING TO THE PROMISE OF IP UTILIZATION AS SECURITY & COLLATERAL

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Abstract
India’s IPR Policy that released in 2016, despite being poorly drafted and overtly campaign-like, showed ‘strategy’ on certain grounds. One of those few grounds was the promise to “enable valuation of Intellectual Property (IP) rights as intangible assets”, its securitization and use as collateral. This Essay talks about the necessity of the measure to effectively materialize as a possible financial tool. It also brings to light the lack of follow-through of the promise made by this policy, including the glaring defects in the policy itself. The Essay also includes a comparative analysis with countries like USA, etc. that have led the world in IP-based financing as well as Asian countries like China, that have started late but with promise. Jurisprudence and literature relating to IP securitization is explored—including the difference between securing tangible and intangible assets, the challenges in implementing this newfound trend, prerequisites to implementation required in legislative as well as market framework, among other things. The prospective prominence of IP financing over traditional financing methods is also touched upon. This Essay can also be considered as a critique of the Indian IP policy in general and criticism of the lack of implementation of IP financing method in particular.

Keywords: Intellectual property, assets, intangible, collateral, securitization, financial.

Introduction: WHATs and WHYs
IP securitization, for the first time, was declared as a trend by the WIPO in 2002. Ever since, the value of Intellectual Property as an ‘intangible financial asset’ has been on the rise—many technological firms across the world corroborate this fact. In India, however, this obvious crossover between IPR and trade/finances has been least explored. Securitization, basically, is the “process in which certain types of assets are pooled so that they can be repackaged into interest-bearing securities”.

credits, to utilize assets that generate an estimated capital (typically, the rights of payment that a company expects by virtue of IP owned by it or its owner) in order to account for financing in the pendency (i.e., “interim financing”). It is advantageous when compared to other forms of raising funds. The 1970s witnessed the first prominent instance of the employment of this process as an advanced financial tool, wherein securities were issued backed by residential mortgages. With a basic understanding of universal jurisprudence of Bankruptcy Codes, it may be understood:

“By contrast, in securitization transactions the interest rate of asset-backed securities is not dependent on the risks involved in the originator’s overall business activity. Rather, the interest rate is derived only from the risk inherent to the specific assets backing the securities." By isolating specified assets and securitizing them, the originator is able, in most cases, to fund operations at an effective interest rate lower than that of traditional financing methods.

The Indian Cabinet approved the policy that provides for “enabling valuation of IP rights as intangible assets” and by means of proper technologies strives for “securitization of IP rights” and “use of IPR as collateral” on May, 2016. Although this objective was only lightly mentioned in the policy, it was streamlined as a major one. Even so, loopholes in implementing such a measure were completely ignored and an ostrich-like approach was adopted with the disbanding of the First Think Tank—which had apparently laid down the draft ‘as it should’ve been’. This is discussed in-depth in the later parts of the Essay. For a

SECURITIZATION 171, 174 (Leon T. Kendall & Michael J. Fishman eds., 1996)


comprehensive study, it is also important to understand the ‘WHAT’s’ and ‘WHY’s’ of the IP-financing paradigm. The primary reasons to employ intellectual property as collateral lie in the fact that IP is “untapped source of collateral”, the advantages of which include prompt returns on development and research products—and it also has potential for additional value. It offers investment and opportunities for obtaining income-distribution, an alternative to bank credit. Including intangible IPR as securities would increase asset base in situations of asset-based financing. It induces independence in the market, in a manner to reduce dependence with respect to matters like bank credit, reduction in difficulty for raising capital, it is also considered “off-the-books” in matters of accounting and gives impetus to creativity and innovation. The value of liquidity generated by securitizing IP becomes unusually useful if the seller’s options to raise capital are limited or if the cost of capital is high. The activity of securitization is even compared the chemical or even magically process of ‘alchemy’— an analogy suggesting a meritorious and profitable transaction, like that of converting other metals into gold.

How Will This Work? : The Difference between IP and Conventional Securitization

This study wouldn’t be complete without expressly listing the difference between IP security and other conventional assets. Given the risks as discussed, the “due diligence on IP before securitization” requires more capital than traditional/conventional assets.

It is generally classified as ‘personal property’; a security may, nevertheless, in theory be taken over such property as well, with the consent of the owner. IP is considered property in the sense that it can be bought, sold, licensed or traded in the same way as any other form of property. IP, however, has some unique attributes. The difference lies in the manner of payment of security: Rights of payment, for instance payment from royalties, are a distinctive feature of IP, which sets it apart from other properties and assets. This means a clear distinction exists between licensing with respect to IP rights and security rights originating from Intellectual Property. Securitization offers a means to capitalize one's IP to generate capital—this

204 Schwarcz, Supra note 4 at 134
205 NESBITT HARRIS, “ASSET-BACKED UPDATE” (Asset Securitization, USA), available at
can provide for interim financing for operations that require investments. IPR are intangible rights in inventions (patents), authorships (copyright), service marks or trademarks, in which a set of exclusive rights is given due protection and is exclusively available to the right holder. This forms the basis for securitizing/licensing/assignment.

The uniqueness of IP as aforementioned, gives rise to two (2) types of transportations, viz. transactions relating to IP rights and IPR based financial transactions. An analogy between contractual rights and IP rights may be created in this context. The knowledge of the former as financial assets (that serve as the object of different transactions) in modern law may help in better understanding of the latter’s use of the same. The prospect of executing transactions by employing ‘rights’ is recognized in modern law, which also allows its transfer through secured transactions, among other things. Necessity of treatment of these rights as ‘transferrable property’ by the lex loci is crucial to a country’s economic development. The notion of an assignment of rights for the purpose of raising funds is extremely prevalent and significant in the modern economy. The bonds created via the assignments are deemed to be ‘loans’ and hence are exempted from sales tax. Additionally, the process of securitization doesn’t imply loss of ownership of assets—unless of course, there’s default. Hence, IP could still be exploited for the maximization of funds.

**Position Around the World and Ensuing Challenges**

It is widely noted that the a major hurdle in using IP as collateral is risk, which may occur at not an isolated, but plural stages of the securitization process. The risk factors that may arise during the process may be listed as, inclusively, lack of...
certainty with respect to legal enforcement, complexity in technology transfer, term of the IP and its valuation.\textsuperscript{223} Other set of drawbacks for using IP as security are cost associated with securitization, non-registered factors of IP, nature of IPR as a \textit{bundle} of rights (when some of those rights do not coincide with other rights), variation in predictability of cash flow, revenue generation risk and piracy risks. Securitization also requires the expenditure and capital that are considerable, including IP valuation costs, costs incurred in company constitution, issuance costs, etc.\textsuperscript{224} A major setback may ensue to the process of securitization may happen if there is a risk of being hit by suits of infringement, etc. Also, unnamed/unregistered factors associated with an IP like confidential information or manner of operating, etc. can affect the process of IP valuation. Term of IP as a hindrance in securitization is also a risk factor/challenge in the process.

Valuation, \textit{per se}, is a difficult task in itself; without an established market, it is difficult to ascertain the value of goods. Immense variation in nature of different assets and wide-ranging associating transactions do not make it any easier.\textsuperscript{225} Patents, for instance, must be novel and unique by definition.\textsuperscript{226} Accuracy in determining value of something novel can only be limited. IP as a bundle of rights can be best demonstrated specifically in copyright as it includes within itself the rights to reproduce, publish, to rent out/exploit the creative work as illustrated in the Copyright Act, 1957 (viz., cinematographic work, photography and computer software, to adapt the work and create derivative works, public performance rights, broadcast rights and to make the work available for public use.\textsuperscript{227} Concentration of these rights in the hands of the originator for the securitization isn’t easy. One of the notable features of David Bowie’s glorious music career as well as a characteristic that was the most contributing in him becoming a successful pioneer in the IP securitization market—is the fact that he had the possession of almost all the copyrights to his musical works before the commencement of securitization transaction.\textsuperscript{228} Coming to trademarks, they are traditionally exploited by their owners by means of licensing—but in current times, given their increasing economic value, both MNCs and SMEs fully utilize their commercial value, including using them as security.\textsuperscript{229} Usually, IP valuation methods fall into one or more of three broad categories, viz. the market approach, cost approach and the income approach.\textsuperscript{230}

\textsuperscript{222} Using IP as Collateral, \textit{Id. at} 5-6
\textsuperscript{224} MAAYAN PEREL, “AN EX-ANTE METHOD OF PATENT VALUATION: TRANSFORMING PATENT QUALITY INTO PATENT VALUE”, 16(2) J. HIGH TECH. L. 148, 163–64(2014)
\textsuperscript{226} See The Copyright Act, 1957
Simultaneous risk analysis is also needed in each of these methods/approaches. The world is a witness to famous securitization of IP rights by the David Bowie (singer-originator of IP rights in music), the Domino’s Trademark and the Yale University’s HIV drug patent.

The risk in determining interest rates is a hurdle in the frequent/widespread use of IP as an asset.

“One characteristic that differentiates IP transaction from tangible asset backed transaction is that they are highly dependent on popular tastes or technological change adding a layer of complexity and risk to the analysis.”

The major deterrent, however, is the absence of a legislative framework that would instill confidence and cure the lack of consciousness to use of IP as business assets. No IP law directly provides for a method to do the same. India’s policy promised to create, or at least endeavor to/lay foundations to create an appropriate legal and marketing climate.

United States is practically the world leader in securitized financing, and the practice has gained momentum especially after the adoption of the Universal Commercial Code, from which few States depart. An increase in the valuation of intangible assets from 20% to 73% in 20 years in the late 1970s indicates the steady increase in the value of intangible assets, which were higher than increase in the value of tangible assets. From 1997 to 2000, the money involved in IP royalty financing hiked from USD 380 to USD 840—this included music, cinema and licensing of patents. The immense success of US securitization of IP, mostly royalties shows that securitization of IP assets is both possible and profitable. It is equally popular in the United Kingdom as well—in forms of mortgage and fixed charge. However, it is important to note that there is a potential grey area concerning the defining lines between these forms of security since English law provides for the same obligations when it comes to the publication and perfection of these rights. In many jurisdictions, like that of Germany, registered and transferrable IP rights are preferred for the purpose, i.e., patents and trademarks (instead of copyrights). Japan has allowed mortgaging of their IP assets for some time now. Even in China, the IP Offices’ promotion has led to an acceleration in the IP Rights system and IP financing has become an important means for
financing. In 2017, the country’s State Council has issued the ‘National Technology Transfer Plan’ and has proposed to “launch IPR securitization” and “encourage commercial banks to launch IPR pledge loan”. Although Asian countries have joined the trend comparatively late, India and China—who released their new IP plan/policy almost at the same time (2016 and 2017 respectively), there is a sharp contrast in the two drafts. While both appear to be ideologically driven, the former—as described by Prof. Shamnad Basheer, is more “faith-based than fact-based”, the latter at least appears strategic. Dr. Basheer’s critique of the 2016’s policy can be aptly used to describe the difference between the Indian and Chinese proposed plan of action and how one appears to work, the other doesn’t. Government of India’s “Creative India, Innovative India” plan doesn’t seem to follow-through. A ‘campaign’ probably wasn’t the right solution. While the draft of the First Think Tank, or whatever is known of it, sounds more rational when compared to the present Cabinet-approved draft which is labelled to be “trite at best”. Ignoring the fundamentals of the IP-law foundation, the law is represented as an ‘end’ instead of ‘a means to an end’. As was pointed out by even the powerful industry giant Elon Musk, the current IP law application is more used to stifle progress can facilitate it—a consideration any practical policy wouldn’t ignore.

“If we lay intellectual property law landmines to inhibit others, we are acting a manner contrary to the goal.”

While our subject still remains the securitization of IP and its use as a financial asset, relevant considerations were yet again ignored by the impugned policy. The phenomenon of “Patent Trolls”—as pointed out by Dr. Basheer can become a menace, stifling progress and bullying innovators. This was explained with the Indian example of S. Ramkumar and his exploitation of major telecom companies by using his patent on dual SIM; although

241 Ibid
the patent was later revoked, a great deal of *trolling* was already done. A progressive policy (*ideally*) would encompass within itself, the scope for dereliction. This policy, however, highlights *only* two hurdles and suggests overarching ‘remedies’ for the same. The first, highly discussed menace is piracy and the second, lack of awareness/use of IP laws to garner protection. The policy suggests criminalization in case of offences under the Cinematography Act, 1952—an excessive measure. Criminalization of a necessarily *civil* wrong does not count as deterrent, it is ‘disproportionate’. The manner of raising awareness illustrated by the policy, i.e., public funding, is also dubious. As pointed out, it envisages a double-investment of the tax payers’ money.\(^{248}\)

**Review of the Policy Provision and Exploring Possibility of new Laws**

In India, none of the existing laws\(^ {249}\) have fully contemplated or incorporated IP-securitization. The Indian Securitization law, apart from its definition of ‘property’\(^ {250}\) (which is specifically made to include IPR) lacks other essentials of securitization, viz. structures of securitization, in the nature of ‘pass through’ (which require charge over property)\(^ {251}\), absence of bond-investors and most importantly, the absence of an administrative machinery to value IP-assets makes it very difficult to envisage the securitization of IP rights as assets. None of the existing laws provide for a SPV-like body\(^ {252}\) (a company, a trust or a partnership; the primary purpose of creating or employing an SPV is to ensure that “the assets actually achieve the bankruptcy remoteness purpose”\(^ {253}\)), which is a characteristic feature in the securitization process, in order to acquire income streams (royalties, for instance) from IP rights and issue securities backed by the acquired rights.\(^ {254}\) It enters into an agreement with the originator for collection purposes.\(^ {255}\)

Even at the global-level, Securitization market for patents is still not booming in comparison to other fields, like Trade Marks and Copyrights, due to the complexity involved in the process of invention and also lack of awareness of prospective economic benefit.\(^ {256}\) There is also a requirement for registering these security rights. On an international standard, the International Trademark Association (INTA) has encouraged the process of security right registration by issuing a set of principles in that regard, especially focusing to Trademarks and Service Marks and has deemed them “*best practice*” to be followed whenever and

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\(^{248}\) Basheer, *Supra note 51* at 9


\(^{250}\) Id. SARFAESI Act, See Section 2(1)(t)

\(^{251}\) See *Id.* the SARFAESI Act


\(^{253}\) RESERVE BANKOF INDIA, “CHAPTER 7: SPECIAL PURPOSE VEHICLE” (on 29 December 1999), available at https://www.rbi.org.in/Scripts/PublicationReportDetails.aspx?ID=164, last seen on 24.06.2020 at 0500 hours

\(^{254}\) Intellectual Property Securitization, *Supra note 37* at 127

\(^{255}\) Structured Financing Techniques, *Supra note 19* at 548-49

wherever possible. In Canara Bank v. N.G. Subbaraya Setty, the Indian Court held that IP assignment was held unacceptable by the Court because such security (i.e., the IP security) wasn’t mentioned in the beginning; the Court didn’t permit an unrelated IP to be attached as a collateral at a later stage. A simplified global model/standard, like that of UNCITRAL in Arbitration laws, may help to reduce confusions and create a more secure financial environment—although varying jurisdictions may cause problems in creating such a standard. It is pertinent to mention here that there exists an UNCITRAL Legislative Guide on Secured Transactions Supplement on Security Rights in Intellectual Property in addition to UNCITRAL’s Model Law on Secured Transactions. The ‘guide’, however, limits itself to secured transactions only—instead of interfering with the IP legal structure. However, it “takes into account the need to address the interaction between secured transactions law and law relating to intellectual property at both the national and the international levels.”

“The law recommended in the Guide addresses only legal issues unique to secured transactions law as opposed to issues relating to the nature and legal attributes of the asset that is the object of the security right. The latter are the exclusive province of the body of property law that applies to the particular asset (…).”

The General Assembly Resolution makes it clear, “recognizing that States would need guidance as to how the recommendations contained in the UNCITRAL Legislative Guide on Secured Transactions would apply in an intellectual property context and as to the adjustments that need to be made to their laws to avoid inconsistencies between secured transactions law and law relating to intellectual property.”

Before the Guide was published, Articles 14 and 86 of the Model Law paved the way for securitization of Intellectual Property (‘intangible’). The Guide however, as the name suggests, is no modality in itself but just a guiding force that would help the countries to come up with their own laws, in light of the Model Law standards. It is still open for the nations to induce the ‘interaction of laws’ as aforementioned.

257 United Nations: 2011, Supra note 18 at 73; See also International Trademark Association, available at www.inta.org/index.php?option=com_content&task=view&id=1517&Itemid, last seen on 24.06.2020 at 0500 hours
258 AIR 2018 SC 3395; MANU/SC/0433/2018
260 United Nations: 2011, Supra note 18
262 United Nations: 2011, Supra note 68 at 167
263 General Assembly Resolution 65/23, adopted 6 December 2010, on the basis of the report of the Sixth Committee A/65/465, Draft Resolution III
264 United Nations: 2019, Supra note 69 at 12, 70
265 Id. at 1
266 Id. at 1
Concluding Remarks: The Opportunity Has Presented Itself

In the economic slowdown caused by COVID-19, the reduction in value of the conventional, tangible, non-IP assets has afforded a greater importance to the IP based assets (in contrast: intangible, less conventional), this may be an opportune time for growth of intellectual property securitization industry. IPR occupies a central and important position in the economic policies of the world, which is clear by its rampant use as a 'finance-generating' asset. The flowchart that transforms a 'creative idea' to a security or a collateral is a promising premise and USA’s long-term, successful use of the same is a testimony of the same.

Mrs. Sitharaman, in her discourse with the press as well as in the policy, envisages India sans the piracy of Intellectual Property. She proposes to do so via the implementation of policy that (barely) provides for use of IP resources, while in reality, a decrease in piracy is needed to implement the policy in letter and spirit. A defect is unmistakably detected in the chronology of the plan of action. In India, even at present, IP securitization is legal—only a road rarely taken due to the glaring uncertainties. With a strategized law and market in place, the number of buyers and sellers of IP security will increase. While recognizing the value of goodwill, licensing of patents, etc., and the sale/assignment of IP rights are already common practices in India, it is not structurally improbable that IPR securitization join the list.

The available jurisprudence of IP-securitization/financing is scanty, scattered and varied to say the least (given different legal systems in different parts of the world). It is, however, united by a common recognition and realization by countries of the world of the value of IP rights, given proper valuation.
SEXUAL VIOLENCE IN ARMED CONFLICTS

By Archita Choudhary and Declyn Gomes
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ABSTRACT
The paper deals with the kind of atrocities meted out against women during the times of conflicts. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were the first tribunals set up to prosecute individuals for war crimes that included genocide, war crimes and all such crimes against humanity. This paper dwells deeper into the issue of crimes during war. It deals with sexual violence during the times of the war. There have been umpteen reports and interviews by women that were captured and tortured and raped. They claim that they are systematically raped and tortured. More than the importance that has been emphasized upon the reported cases and the interviews, there have been claims that there are a lot more sexual violence cases than the mere reported number. What is also not focused upon is the kind of treatment that rape victims’ children get. There is a difference between when rape is a systematic ideology and methodology imposed to rape women as a method for the men of the community to succumb to the higher tribe. The case of Akayesu by the ICTR held sexual violence also as a war crime and now tribunals do prosecute individuals for sexual acts and violence during periods of war and conflicts. The Rome Statute has been considered along with the ICTR Statue and the ICTY Statute which have also been taken into consideration while understanding the framework and working nature of the criminal tribunals.

INTRODUCTION
The International Criminal Tribunal for Rwanda (ICTR) defined rape in the case of Prosecutor v Akayesu267 as, “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”. Further the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Kuranac et al case in the year of 2001 as, “the sexual penetration, however slight: (a) of the vagina or the anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.” However, these are rapes during conflicts or war time and therefore the definition of rape however being as per given by the tribunals, ‘wartime rape’ has also been defined by various people. Jonathan Gottschall defined mass rape as, “distinct patterns of rape by soldiers at rates that are much increased over rates of rape that prevail in peacetime.”268 The tribunal again in the case of Akayesu defined sexual violence as, “which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the body and may include acts that do not involve penetration or physical contact.”269 This view on sexual violence was upheld in the case of Prosecutor v Kvocka et. al.270

268 Gottschall, “Explaining Wartime Rape”, P. 129.
270 Prosecutor v Kvocka et. al, Case No. IT/98-30/1-T
For some time now there have been efforts to bring rape and sexual assaults under the realm of war crimes. However, this has been completely ignored and side stepped until very recently. The first 3 Geneva Conventions did not consider rape and sexual assault on women as a methodology and a systematic method to inflict violence and fear upon the masses during the times of war. In addition to this there was no mention of rape in the Genocide convention adopted by the UN General Assembly on the 9th of December, 1948. The Nuremburg Trials also ignored rape as a war crime. This is important because rape and sexual assault was not considered as a war crime even after there have been documentation of rape in Nazi Germany as well as enforced prostitution within the concentration camps. But, these offenders were never prosecuted for their sexual violence against women.

**INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA**

After the fall of communism in the 1990s and the death of then President Josip Broz Tito in 1980, civil infractions kept breaking out. The Government of Yugoslavia became extremely unstable and fell into deeper and deeper problems. The wars and the conflicts resulted into 10 years of complete destruction and mass wiping out of people. There were close to 300,000 deaths that occurred in this time and this was declared as the first genocide since the Second World War. The first war in was the Ten-Day War which was caused by the JNA (Yugoslav People’s Army) after the secession of Slovenia. The next war that followed was the Croatian War of Independence which had actually started weeks before the Ten-Day War. The war began when the Serbs in Croatia announced their cession because they opposed Croatian Independence. When Franji Tudman was elected as the first Croatian President, he initiated extreme changes in the Constitution of Croatia and reinstated the Croatian flag. The word ‘socialist’ was also removed from the title of the republic. In retaliation the Serbian politicians caused an insurrection in many areas. In the year 1990 the new Croatian constitution was ratified and the Serb National Council formed SAO Krajina which was a self proclaimed Serbian autonomous region. Following these clashes between the Serbs and Croats which began with the Battle of Borovo Selo and ended with Croatian independence by the Brioni Agreement. However wars continued to break on a regular basis. In the following years of 1992 to 1995 the Bosnian war started. Bosnia and Herzegovina had declared independence from Yugoslavia. The war revolved around a territorial conflict with the main aim of maintaining territorial integrity for the newly formed Bosnia and Herzegovina. This was the worst of the wars. The Bosnian Croats and Bosniaks who were once allies now turned against one another which led to the Croat-Bosniak War. The Bosnia war was followed by the Kosovo war between the years of 1998 and 1999. There was horrendous treatment meted out toward the Albanians with their jobs and medical facilities and banks all taken away. As a result the Albanians started an insurgency. The insurgency in the Presevo Valley and in the Republic of Macedonia also led to war situations.

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The International Criminal Tribunal for the former Yugoslavia was initiated after the resolution 808 (1993) by which this tribunal was created by the Security Council for individual accountability. What is of extreme importance is that the Council did specially rely on the, “grave breaches of humanitarian law that were committed on a massive scale and in a systematic fashion.” The tribunal was basically set up for prosecuting people responsible for serious violations of International Humanitarian Law. Once the ICTY was set up the decision with regards to the principle ‘nullum crimen sine lege’, was to be applied. In addition only those parts of International Humanitarian law that formed part of customary law were to be applied. Therefore, the Secretary General held that the breach of provisions of the Geneva Convention of 1949, the 1907 Hague Convention (IV) on the laws and customs of war, the 1948 genocide convention and the 1945 Charter of the Nuremberg Tribunal all formed parts of customary international law. Article 1 to 6 of the statute conferred jurisdiction upon the tribunal over all people responsible for serious violations of international law. However, due to the large amount of cases the ICTY decided that evidence that was found regarding lower level accused member were to be handed over to domestic prosecutors. These cases came to be known as ‘Category 2 cases.’ The ICTY comprehes of 14 judges of different nationalities. The judges are elected by the General Assemble of the UN. While electing the judges, it is also kept in mind about the equitable geographic nationalities. They hold tenure for a period of 4 years and are selected from a list of 22 names selected by the Security General. The tribunals and National courts have concurrent jurisdiction to prosecute people who are guilty of serious crimes of international law. Article 9.2 of the ICTY statute says that international courts have primacy over national courts. The principle of Ne Bis in Idem is followed where one person cannot be tried for the same crime by the National as well as the International courts. However, the exception is that if the individual was tried for an ordinary crime or if the National court was not impartial or independent or the trial was designed to shield the accused from an International trial, then the International Tribunal could try the person. The ICTY for the first time held that rape was a separate war crime and defined rape as, “coercion of force or threat of force against the victim or a third person.” The Tribunal then went on to hold that sexual penetration non-consensual or non voluntary on part of the victim could also amount to rape. For a long time rape during armed conflicts were considered as collateral damage and were not prosecuted for. While all other crimes of genocide and crimes of serious violations of humanitarian law were prosecuted, rape as a separate crime was not yet prosecuted. The ICTY held high profile perpetrators like Zdravko Tolimir, Radovan Karadzic and Ratko Mladic guilty for crimes against humanity. In addition to this the ICTY was the first tribunal to indict a sitting head of state Slobodan Milosevoc. The ICTY tried rape as a sexual war crime for the first time.
in the case of Prosecutor v Tadic\textsuperscript{278}. The tribunal went through the ordeal of examining the incidents. One of which was when a group of men forced one of the detainees to bite off the testicles of another detainee. Dusko Tadic was held guilty of cruel treatment and inhumane acts. The ICTY also held Hazim Delic guilty for the rape of 2 women in the camps. A woman named Grozdana Cecez testified to the fact that she had been repeatedly raped while she was in the camp for the sole reason that she could not tell the men the whereabouts of her husband. Zdravko Mucic and Esad Landzo were also held guilty for sexual violence and rape as a form of torture during war. For the first time the ICTY held that the rape of a woman could constitute as a form of torture.\textsuperscript{279} The ICTY also for the first time held Furundzija guilty for rape and sexual violence even though he personally had not raped these women. However, the tribunal were of the opinion that since he was at the time the commander of the jokers which was a special unit of Croatia, he had knowledge of the rapes\textsuperscript{280}. A shocking incident had come to light where soldiers had raped women in front of other soldiers that used to stand and laugh. The tribunal also for the first time in the Kunarac case held men guilty for the crime of sexual slavery. The court heard over 20 testimonies of women who all testified that they were kept in houses later came to be called as rape camps. Soldiers would enter rape women and leave. Testimonies relating to rape, gang rape and various sexual atrocities and intimidations were used against the women. Testimonies were also given to the fact that women were bought and sold like commodities and kept being passed around. The court was of the opinion that this kind of slavery was of sexual nature and therefore held 3 men guilty for these rape camps\textsuperscript{281}.

**INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

In the year 1994 a plane carrying Rwanda’s then President Juvenal Habyarimana was shot down and at the same time the Rwanda Patriotic Front had come into power. The Rwanda Patriotic Front’s commander General Paul Kagame gained control which came to be known as ‘Hutu Power’, systematically and organisationally raped, killed and massacred Tutsi and some Hutu people.\textsuperscript{282} These extreme atrocities against humanity kept occurring without any restriction. The International Criminal Tribunal for Rwanda (ICTR) was formed to prosecute the perpetrators of these crimes on an International front. The ICTR was established upon the passing of Resolution 955. The tribunal’s seat is in Arusha and Tanzania. Since the ICTR would have to follow International Humanitarian Law, they would not be permitted to sanction the death penalty as a punishment. This was severely criticized by many. The ICTR also like the ICTY has 3 organs. The ICTR has 3 chambers with one presiding judge and 2 other judges\textsuperscript{283}. These judges are elected by the General Assembly. At present the ICTR consists of 9 permanent judges and are assisted by 18 judges. The second chamber is the office of the Prosecutor. The office of the Prosecutor has the responsibility to investigate all the allegations that are complained off. The Registry and its staff are responsible for all the administrative support of the ICTR. The ICTR has subject matter jurisdiction over all crimes of genocide and crimes against humanity and

\textsuperscript{278} Prosecutor v. Tadic’, No. IT-94-1-T
\textsuperscript{279} Prosecutor v Delic, IT-04-83-T
\textsuperscript{280} Prosecutor v. Furundzija, No. IT-95-17/1-T
\textsuperscript{281} Prosecutor v Kunarac et al, IT-96-23-T

\textsuperscript{282} Alison Des Forges, “Leave None to Tell the Story”: Genocide in Rwanda (New York: Human Rights Watch, 1999), pp. 1, 6, 15–16

\textsuperscript{283} Art. 11(a) ICTR Statute
war crimes. The ICTR also has temporal jurisdiction by Resolution 955 covers crimes over a one year period\textsuperscript{284}. The ICTR also has personal jurisdiction over anyone who has committed any crime under the Rwandan Statute. The ICTR has primacy over any crimes under the Rwandan Statute.

If there were to occur an instance when an individual is being tried by the national court and the ICTR is of the opinion that they should conduct the trial, they can formally request the national court to defer its competence to the ICTR\textsuperscript{285}. Crimes of genocide, crimes against humanity, war crimes and individual criminal responsibility can be charged against anyone who has either committed these crimes or has planned or instigated or ordered these crimes. Article 6.1 of the statute does not give immunity to the heads of the states. The fact that an individual ordered the commission of a crime does not absolve him of the crime itself by the defence that he was not the one that committed the crime. Secondly, the fact that an individual committed a crime on the order of a superior also does not absolve him of the criminal responsibility. The proceedings initiated by the prosecutor could be on the basis of information received or evidence received from any source either direct or indirect. Under rule 11bis the Prosecutor may refer cases to the National Courts after they are confident that the National Courts would give the accused a complete fair trial and that the death penalty would not be imposed. In the case of Prosecutor v Akayesu\textsuperscript{287} was an important judgement by the ICTR for various reasons. For the first time a tribunal had convicted an individual on the grounds of genocide. The ICTR also put an end to one of the longest standing questions, whether victims of genocide would have to constitute of a distinct ethnic group. However, most importantly the tribunal held that rape could also be a form of genocide and a war crime and a crime against humanity. The tribunal held that rape could be a form of violence that could seriously affect an individual’s body as well as mental health. Rape and sexual violence have now become convictable offences and that rape could also be a method to commit genocide if there are systematic and organised orders to commit these crimes. Further in the case of Kayishema and Ruzindana\textsuperscript{288} the court held that the jurisdiction of the tribunal could be invoked of an armed conflict were to occur. This armed conflict could also be between armed forced and dissident forces. The court further held that if an individual was being tried the prosecutor would first have to establish a link between the individual being tries and either of the armed forces that were involved in the conflict. In the case of Prosecutor v. Nahimana, Barayagwiza & Ngeze\textsuperscript{289} the court held that these men were involved with the media of Rwanda. They indirectly also caused the genocide by their print and broadcast


\textsuperscript{285} Art. 8 ICTR Statute

\textsuperscript{286} Prosecutor v. Hategekimana, Case No. ICTR-00-55B

\textsuperscript{287} Prosecutor v. Akayesu, Case No. ICTR-96-4-T

\textsuperscript{288} Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-A

\textsuperscript{289} Prosecutor v. Nahimana, Barayagwiza & Ngeze, Case No. ICTR-99-52-A
media. The media created public hatred by printing against the tutsi people who were being massacred against. These men were employed by media to create hatred amongst the people and were shown to have intent to kill.

JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990s. The most important objective of this was the precedent that was set that individuals in senior position can no longer be protected from prosecution. The jurisdiction of the ICTR and the ICTY are invoked from Article 1 of the Rome Statute where in the article states that,

"An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute."

The statute created the ICTY and the ICTR in order to deal with the war crimes that were committed during these wars. The jurisdiction arises for any of the crimes that are mentioned within the statute itself. In furtherance to this these courts gain their jurisdictional powers from Article 5 of the Rome Statute. Article 5 reads as,

"1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations."

The definition of genocide in contained in Article 6 and it is identical to the definition of genocide as given in Article 2 of the Geneva Convention. However, the definition and the extent of crimes against humanity have not been agreed upon and it leaves the term to be widely interpreted. In specificity the terms genocide has been defined in Article 6 of the Rome Statute of the International Criminal Court.

For the purpose of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, 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.

The definitions given in the Rome Statute for genocide were gotten form the Convention for the Prevention and Punishment of the Crime of Genocide. The essence of Article 6 of the Rome Statute lies in the wording of the brief definition. It includes the words ‘with intent’, to depict that acts of genocide are premeditated and wilful violence against a particular section of people. According to the ICTY Appeals Chamber, “genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established.” In the Akayesu judgement the court deliberated on the word ‘killed’ and were of the opinion that it was to narrow a word to be used in the context of genocide. Forcing another person to commit a crime or forcing someone to commit suicide would be difficult to bring under the term ‘killed’ and therefore the court held that ‘caused death’ would be a more appropriate term to be used. In the case of Prosecutor v Kayisherma & Ruzindana, the court held that there was virtually no difference between the English word ‘killed’ and the French word ‘meurtre’. However, the word emphasized on the word virtually and was of the opinion that there was a minimalistic difference in the words. Issues arose with clause b as for what mental harm would mean. The general understanding of mental harm would mean more than a temporary impairment of mental facilities. The International Court of Justice extended the fact that the depraved mental health could also be a result of rape and other forms of sexual violence. In clause c of Article 6 the general understanding is the imposition of certain living mechanisms or general ways to life that would result in the destruction of them. This too would be a method of genocide. This would include deportations or putting people on a restrictive diet or withholding medical facilities or decent living accommodations. The last two clauses of Article 6 deal with prevention of birth of the group in question and transferring the children of the group to another group. In the case of A.G. Israel v. Eichmann the court held that Adolf Eichmann resorted to measures in order to prevent the Jews from giving birth to children as well as the interruption of pregnant Jew women. The Supreme National Tribunal of Poland found the directors of these camps for acts of genocide in the nature of sterilisation and castration.

Article 7 deals with crimes against humanity. Crimes against humanity vary from a lot of different crimes and the section itself tries to bring in a varied number of crimes that affect humanity. Occasions have arisen when the accused could be charged under Article 6 and Article 7. At the Ad hoc tribunals

291 Prosecutor v Krstic
292 Prosecutor v Kayisherma & Ruzindana, note 29, para. 104
293 Robinson, in his seminal study of the Convention, considered that mental harm, within the meaning of the Convention (article II), ‘can be caused only by the use of narcotics’. Robinson, The Genocide Convention: A Commentary (ix) (1960)
296 A. G. Israel v. Eichmann (D.C.), note 4, para. 244
297 Poland v. Hoess, (Supreme National Tribunal of Poland), 7 L. Reports of Trials of War Criminals 11, 25 (1948)
cumulative charges under both Articles have been allowed. This can be done when before the evidence has been produced there is straight jacket which would create specificity for whether the crime would be charged under Article 6 or Article 7. Once the evidence is produced the court would be poised to evaluate which charge would the accused be charged with. This would also not be a violation of double jeopardy because the accused would not be convicted under 2 Articles for the same crime. Crimes against humanity were first enshrined in the St. Petersberg Declaration of 1868 which initially limited the use of explosive against the laws of humanity. In 1899 the First Hague Peace Conference adopted this Martens clause. The first formal reference for crimes against humanity was in the Declaration of Great Britain and Russia when they opposed the inhuman treatment by the Ottoman Empire of Armenians in Turkey. For this paper clause 1 (g) is of extreme importance. It deals with rape and/or any other form of sexual slavery. Rape has become a widespread method of war. There have been claims by the Yazidi community that till date they are being tormented because they are considered as devil worshippers because of the Peacock Angel that people say is Satan. They have been hunted, massacred and killed and raped since time immemorial. Rape was initially identified as a war crime in the Lieber Code of 1863. However till very recently sexual assaults and sexual crimes were considered as attacks on honour rather than a crime of personal autonomy of the victim. There have been various theories in the past of why is rape and sexual assault has been used. The first theory is to induce fear into the public and as a result of this there have been times when the woman has been publicly raped in front of everyone and then made to walk through the town. There were brothels for the German soldiers all over Germany occupied Europe. The women were taken there and the raped by the soldiers as and when they desired. Some women have been able to escape and tell the world their stories. Another theory of why rape and sexual violence was used was to show a stand of dominance. The most precise example would be when the Hutu and Tutsi went at each other. As and when the man of the Tutsi family was killed or taken away the women of the family were raped by the Hutu men to show them that they were in complete control of the land. All the Geneva Conventions failed to address rape as a separate war crime. Even the fourth Geneva Convention failed to add rape into the grave breach provisions. Direct reference to rape was under Article 2 where any attack on honour; prostitution, rape etc were held to be crimes and could be prosecuted. The first major development was seen in Article 5 (g) of the ICTY statute and Article 3 (g) of the ICTR statute. Both the statutes incorporated rape and sexual assaults and crimes against humanity. It is pertinent to take note of the fact that rape has been gender neutral and applies to both men and women and therefore the definitions of rape and sexual

300 Instructions for the Government of Armies of the United States in the Field, US War Department, Adjutant General’s Office, General Orders No. 100 (24 Apr. 1863) (Lieber Code), article XLIV (‘All wanton violence…all rape, wounding, maiming or killing…[is] prohibited under penalty of death, or other such severe punishment as may be seen adequate’.)
301 Geneva Convention IV, article 27.
assault has also remained gender neutral. The explicit definition of rape for a long time did not have an express definition and courts would always struggle with it. The UN Special Rapporteur gave a definition on systematic rape and sexual assaults as, ‘the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim.’

Another form of sexual assault is sexual slavery. This is a form of enslavement itself but along with it, it has repeated sexual assaults. Forced sex, forced marriage and domestic help are also types of sexual slavery. In the case of Prosecutor v. Gagovic, the court held that keeping women in rape camps also amounted to sexual enslavement. Forced pregnancy has also been debated widely around the world. However, forced pregnancy can also invoke the jurisdiction of the International Criminal Courts. Forced pregnancy has been used when a particular set of people intentionally impregnate women of the opposition in order to stop the reproduction of those people. ‘Forced Sterilisation’ has been seen in the concentration camps during the Second World War.

Under Article 8 clause 2 (b) (xxii) the jurisdiction of the court could also be invoked for crimes of rape and other forms of sexual violence during the times of war. It is pertinent to take note of the fact that there have been no convictions under Article 8 (b) (xxii) as of yet. In the case of Prosecutor v. Katanga there was no conviction on the grounds of sexual assault or sexual violence. However, there were convictions on the grounds of rape and sexual slavery in the cases of Bemba Gombo and Ntaganda. As mentioned earlier there has been no blanket definition on the crime of rape. However, in the case of Prosecutor v. Furundzija the trial chamber concluded on a definition of rape as, ‘the sexual penetration of the vagina or anus of the victim by the penis of the.

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302 Final Report of the Special Rapporteur on the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13 (22 June 1998), para. 24. She explained that the definition of rape advanced in the study ‘reflects current international elaborations, modern applications, examples derived from municipal law and practice, working definitions of rape that have been submitted by the Office of the Prosecutor to the International Criminal Tribunal for the Former Yugoslavia and to the International Tribunal for Rwanda, and definitions that have been adopted by various international non-governmental organisations’. Taken from the commentary on the Rome Statute of the International Criminal Courts.


304 In the Medical Case, several defendants were found guilty of having committed war crimes and crimes against humanity involving different kinds of medical experiments under which sterilisation experiments, U.S. v. Brandt, Trials of War Criminals Before Nurnberg Military Tribunals, Vols. 1 and 2, Case No. 1.

305 Prosecutor v. Al Bashir, No. ICC-02/05-01-09-94, Second Decision on the Prosecution’s Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010

306 Procureur v. Katanga, ICC-01/04-01/07-3436

307 Prosecutor v. Benba Bombo, ICC-01/05-01-08-424

308 Prosecutor v. Ntaganda, ICC-01/04-02/06-309

309 Prosecutor v. Furundz’ija, IT-95-17/1-T
perpetrator or the use of any object or even the penetration of the mouth of the victim by the penetrator. The extent of the penetration is of no significance. However slight the penetration maybe, it would still constitute rape.” Along with these sexual slavery was also taken under consideration. Testimonies of people during the trials as well as interviews with people who have gotten away from these horrific incidents have brought to light the atrocities that these people face. There have been stories by women who have chosen to remain anonymous due to various reasons where they speak about how they were taken from place to place and kept their overnight and then transferred from person to person and they fell into the cycle which they could not get out off. These forms of sexual slavery have also now been condemned under International Law.

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ABSTRACT
In the recent years India has seen a sudden increase in the cross border mergers, especially in the pharmaceutical industry. These mergers pose many anti-competitive issues which the Competition Commission of India ("CCI") deals with by using various merger remedies. These issues faced by the CCI and the respective measures taken by it to deal with the problem is analyzed in the paper using different case studies. The two main issues that the paper considers is that, firstly, there is a lot of ambiguity as to how the merger remedies are approved by the CCI because as of yet, there are no specific guidelines issued to clarify the same. Secondly, the CCI only uses ‘Relevant markets’ approach to analyze the anti-competitive effects of the mergers and completely overlooks the effect on the Research and Development which is one of the most crucial elements in the pharmaceutical industry. Therefore, this paper suggests that the CCI should issue proper set of guidelines with respect to the merger remedies which will help to remove any sort of uncertainty and hence, ease the merger process in the long run. Also, the CCI should duly consider the effect of such mergers on incentive to innovate which is of utmost importance in the pharmaceutical mergers. Therefore, this paper argues that the CCI should use the ‘Innovation markets’ approach in addition to the relevant markets approach.

INTRODUCTION
In this era of globalization, there has been a wave of mergers and acquisitions ("M&A") all over the world in almost all types of industries, and the pharmaceutical industry is no exception to this. India, popularly known as the pharmacy of the world, has also witnessed a substantial rise in cross border mergers ("CBMs") between pharmaceutical enterprises. Like any other industry, pharmaceutical M&A are also subject to antitrust laws. Pro-competitive mergers will be beneficial to consumer welfare, while anti-competitive mergers will be harmful to it. This has posed plenty of challenges for the CCI as they need to make sure that the proposed merger is not anti-competitive in nature. CCI, for the right reasons, has been more in favour of approving the mergers between the pharmaceuticals rather than disapproving them, as generally they are beneficial for the economy. Until now, the CCI has approved all the mergers proposed to it, akin to any merger remedies which are considered if there is any competition issue involved in that proposed combination. Over the years, there has been a lot of uncertainty relating to these merger remedies because as of yet, the CCI has not issued any formal guidelines regarding the same.

The reason behind merger remedies being taken into account is that the proposed M&A deal was determined to be anti-competitive by the antitrust authorities. Currently, the merger analysis done by CCI is confined to the ‘markets approach’ as seen in the major pharmaceutical mergers approved by it where it only analysed the ‘Appreciable Adverse Effect on Competition’ ("AAEC") in the ‘relevant

markets’ those industries dealt in. The primary issue that lies here, especially in the pharmaceutical industry, is that the deal becomes anti-competitive if the deal affects the Research and Development (“R&D”) or incentive to innovate of the merging firms negatively and the ‘markets approach’ fails to consider that. Due to the fact that the merger remedies, as the name suggests, are there to nullify the anti-competitive effects of the merger, they give no regard to the impact on other aspects of competition, mainly the incentive to innovate of the merged firms and, thus, are likely to fail in nullifying the anti-competitive effects of the said merger. Therefore, this paper proposes that the CCI should consider a different approach to merger analysis, which takes into account the innovation aspect as well, especially for the pharmaceutical industry.

The article begins with analysing the two types of cross border mergers that are outbound and inbound. Then in part II, the paper analyses the benefits of such mergers while also considering some of its critiques. In part III, the paper looks into the relevant regulations relating to CBMs in India. Thereafter in part IV, it goes on to analyse some of the major CBMs in India that have been approved by the CCI. Consequently, with the help of these case studies, the paper critiques the merger analysis approach adopted by the CCI and proposes a new approach to deal with the same, in part V.

1. TYPES OF CROSS BORDER MERGERS

There are essentially two types of cross border mergers – Inbound and Outbound. An inbound merger refers to the merger of the foreign entity into an Indian company with the latter being the surviving entity. In this kind of merger, all the assets, liabilities, properties, and foreign company employees are transferred to the Indian company. On the other hand, an outbound merger refers to the merger of an Indian company with a foreign company with the latter being the resultant company. Here, all the assets, liabilities, etc., of the Indian company are transferred to the foreign company.

2. PROS AND CONS OF CROSS ORDER MERGERS

Cross border M & A are beneficial to the merging entities because they help to foster expansion and growth in a more cost-effective way. Also, it leads to a quick increase in the companies’ market share and enables a smooth entry into other markets. Additionally, it leads to economies of scale through increased production of broader range of products and services, enhancing the companies’ overall profitability. Moreover, it improves the global competitive strength of the companies through foreign direct investment, resource sharing, and inter-partner learning.

While there are many advantages of cross border M&A, it has some shortcomings as well. Firstly, there is a possibility of cultural differences and goal conflicts between the merging companies, which can create problems in the long

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311 Bhumesh Verma & Soumya Shekhar, ‘Key Changes Brought About by and Implications of Cross Border Merger Regulations, 2018’ (2018) 84 PL (CL) July 1
312 Ibid
313 Ibid
314 Ibid
316 Ibid
317 Ibid
318 Ibid
Secondly, the cost of operating in a foreign market is more than the domestic market’s operating cost, due to the lack of knowledge about the new market and amount of coordination required. Moreover, foreign firms face certain competitive disadvantages over domestic entities in the new market.

3. CONTROLLING CROSS BORDER MERGERS

Cross border M&A refers to the M&A transactions between two or more companies belonging to different countries. The Draft FEMA Regulations define CBM as "any merger, demerger, amalgamation or arrangement between Indian company(ies) and foreign company(ies)." There are few different acts and regulations that regulate CBM. Therefore, before proceeding with the analysis of case studies, it is important to take a look at the relevant regulations applicable to CBM in India.

3.1 REGULATIONS PERTAINING TO CROSS BORDER M&A IN INDIA

A. Companies Act, 2013

Companies Act, 1956, dealt with M&A transactions in a limited way as it allowed for only inbound mergers. However, the Companies Act, 2013 (“Act”) brought some of the key changes with regards to the regulation of cross border M&A in India. These legal reforms have helped bring Indian companies on a global level and hence, ultimately helped boost the Indian economy. The Act has permitted both inbound and outbound mergers through approval from the National Company Law Tribunal (N.C.L.T). The Ministry of Corporate Affairs (M.C.A) notified section 234 of the Companies Act, 2013, along with the companies (Compromises, Arrangements, and Amalgamations) Rules 2017 through its notifications dated December 2017. Section 234 of the Act deals with the schemes of mergers and amalgamation of an Indian company with a foreign company incorporated in the jurisdiction of foreign entities as notified by the Central Government. This allows the Central Government to make rules relating to cross border M&A in consultation with the Reserve Bank of India (RBI). The M.C.A has also amended the Companies (Compromises, Arrangements and Amalgamations) Rules 2016 and inserted Rule 25-A, which provides the scope of application of section 234 of the Act.

B. Foreign Exchange Management Act, 1999

Previously, Section 234 of the companies act, 2013 along with Rule 25-A of the Act required prior approval of the RBI for any cross-border M & A. However, with the introduction of Foreign Exchange Management (Cross border Merger) Regulations, 2018 under the Foreign Exchange Management Act, 1999 (FEMA), a cross border M&A is now deemed to be accepted by the RBI if all the Merger Regulations have been complied with. Also, FEMA regulations lay down general provisions relating to both inbound as well as outbound M&A in India, under sections 4 and section 5 of the said Regulations.

C. Competition Act, 2002

322 Foreign Exchange Management (Cross Border Merger) Regulations 2018 (India), s 2(iii)
323 Ibid Verma & Shekhar (n 2) 1
324 Ibid Datta (n 6)
In June 2011, combination regulations popularly known as the merger control regimes came into force in India under the Competition Act, 2002. This allowed CCI to review the proposed combinations broadly under section 5 and section 6 of the Competition Act. Section 5 defines such combinations, whereas regulations relating to it are provided under Section 6. Section 5 offers certain thresholds concerning the value of assets or turnover in India or outside India to determine whether a transaction amounts to a ‘combination’ or not. On the other hand, Section 6 prohibits any such combination from taking place that is likely to cause an AAEC within the relevant market in India.

All combinations do not come within the scrutiny of CCI. Only those combinations that trigger the thresholds limits set out under section 5 have to be mandatorily notified to the CCI under section 6(2) of the Competition Act. The CCI then examines such combinations as per sections 29, 30 and, 31 of the Competition Act. Moreover, under section 20 of the Competition Act, CCI can inquire into whether a combination as per section 5 causes an AAEC in the relevant market or not.

Additionally, the scrutiny of CCI has been strengthened through the inclusion of section 32 of the Competition Act, which deals with the mergers taking place outside India entirely between foreign to foreign companies. So, this provides an extra-territorial jurisdiction to the CCI concerning mergers taking place outside India but having an AAEC in India. Such mergers need to pre-notified to CCI, if it meets the thresholds under section 5 of the Competition Act.

4. ANALYSING CROSS BORDER MERGER DEALS IN INDIA

India has witnessed various major CBM deals over the years, especially in the pharmaceutical sector. These deals form a significant part of the Indian economy and highlight some critical competitive aspects that need to be considered by the competition authorities. When CCI finds an anti-competitive agreement for mergers, it does not hold that merger anticompetitive immediately. Rather, it makes itself open to changes in the agreement to ensure that there is no violation of competition. These changes made in the deal are known as ‘merger remedies’. However, the problem here is that while analysing these merger remedies, only the ‘markets approach’ is used by the CCI. It overlooks the effects of mergers in other aspects of competition, mainly the effects on incentive to innovate which is crucial in terms of the pharmaceutical firms. The following deals bring up some oversights that the CCI has made in the analysis of these deals. This paper analyses three major cross border M&A deals namely, the acquisition of Ranbaxy by Daiichi-Sankyo, Ranbaxy’s acquisition by Sun Pharma, and Mylan’s acquisition of Agila.

4.1 A PROBLEMATIC DEAL BETWEEN RANBAXY AND DAICHI

In 2008, a Japan-based company named Daiichi Sankyo acquired a controlling stake of 63.92% in India’s Ranbaxy Laboratories for $4 billion. At that time, Ranbaxy was considered to be

325 Udayakumara Ramakrishna B.N., ‘Cross Border Merger Control: Some Reflections on India’s Position’ (2018) 5(24) GNLU L. 1, 2

India’s largest generic company, while Daiichi was termed as the largest innovator company in Japan. The primary motive behind the merger was to enable both companies to gain access to international markets. This transaction helped Daiichi to combine its innovation and R&D capabilities with Ranbaxy’s low-cost manufacturing skills, hence achieving a competitive position in the generic sector across the globe. It seems that the acquisition was meant to strategize the market position of both the companies.

However, this ‘hybrid model’ could not pave off much for Daiichi in the long run. Soon after the acquisition, Ranbaxy came under the scrutiny of the United States Food and Drug Administration (FDA), relating to its irregular activities such as falsification of data, hence receiving a ban from exporting to the US market. Post the merger, Daiichi’s Earnings per Share, net profit ratio trend as well as its return on equity descended, causing huge losses to the company. This ultimately forced Daiichi to sell off Ranbaxy to Sun Pharma. All these losses can be attributed to the carelessness shown by Daiichi while investigating Ranbaxy’s financials. Daiichi failed to carry out its due diligence while making the deal, which, in turn, affected its competitive strength in the market in the long run.

Even if the deal went smoothly, we need to ask the question: In the light of this possible change in generic pharma strategy by Daiichi, will the future competitiveness of the Indian industry be affected if more such deals are allowed? Some commentators have suggested that foreign acquirers should not be allowed to take over such Indian companies that have been built up by the government through its national policies. The argument is that letting foreign stakeholders acquire such companies will ultimately remove the economic benefits that such companies were intended to secure for India in the long run.

Moreover, a few more deals like these can threaten the national capability of the pharmaceutical industry as a whole in the country. It was also argued that since Ranbaxy is a national industry, and there are laws in India protecting domestic industries from foreign industries, the acquisition of Ranbaxy by Daiichi should not have been allowed. Foreign companies should not be allowed to make use of India’s technological capabilities for their own advancement.

A study has shown that the R&D expenditure of Ranbaxy Laboratories hardly increased over the remaining years of the acquisition. This deal provides a proof of the fact that firms tend to lose their incentive to innovate while trying to enhance their growth through investment in companies with lesser R&D oriented environments. Such M&As allow these
firms to enter into a new market without any prominent innovation strategies. Hence, this study describes how innovation takes a back seat through such M&As, ultimately making the competition suffer.

4.2 ACQUISITION OF RANBAXY LABORATORIES BY SUN PHARMA

The agreement between Ranbaxy laboratories and Sun pharma is considered to be one of the biggest deals in the history of M&As in India with a valuation of approximately US $4 billion. Though the deal was announced in April 2014, it was concluded after almost a year in March 2015. Post this, Ranbaxy laboratories was transferred to Sun pharma from its parent company Daiichi Sankyo. This deal came at a very crucial time when Ranbaxy was facing huge financial losses owing to a ban imposed on the company by the FDA. So, one of the key elements of the deal was indemnification provided by Daiichi for any expenses incurred by Sun Pharma during any further investigation by the FDA. Subsequently, Daiichi continued sharing the post-merger risks and benefits with Sun Pharma. The main aim behind such a merger was penetration into new markets, diversification of the product portfolio of the company, and strengthening the global presence of Sun Pharma.

CCI’s assessment of the transaction

Since this was such a high-value deal, the merger had to get approval from various authorities before it could be initiated. This deal directly came under the scrutiny of CCI and the Federal Trade Commission (FTC) of the US. The CCI, in this case, found that both these companies were mainly involved in the generics manufacturing and dealt with the sale, manufacturing as well as the marketing of various pharmaceutical products. It focussed its investigation on the relevant markets for formulations in which the proposed combination was likely to cause an AAEC. Additionally, it also investigated any possibility of vertical foreclosure in the distinct relevant market for Active Pharmaceutical Ingredients (APIs).

Post the investigation, CCI formed a prima facie opinion, under section 29(2) of the Competition Act, that the proposed combination between Sun Pharma and Ranbaxy was likely to cause an AAEC in the relevant market. So, it directed the parties to publish the details about the said merger, so that people who were affected or likely to be affected by the acquisition.

336 Ibid
337 JM Financial Institutions Securities, Who buys best? A guide to some of the most impactful acquisitions in India’s pharmaceutical industry, Sector update India Pharma (2018)
339 Ibid Tyagi (n 1) 46
341 Competition Commission of India, CCI approves the proposed merger between Sun Pharma and Ranbaxy subject to modification, (Press Release, 2014) <https://www.cci.gov.in/sites/default/files/press_release/prs.pdf?download=1>
342 Ibid
343 Ibid
could be informed about it.\textsuperscript{345} It also invited the public’s opinion about the proposed merger under section 29(3) of the Act.\textsuperscript{346}

CCI opined that the AAEC of the proposed combination could be eliminated through some modifications. CCI gave its approval to the deal on the condition that Sun Pharma and Ranbaxy would divest seven of its brands to Pune-based pharmaceuticals company Emcure.\textsuperscript{347} This was so because Emcure was a company actively involved in a similar line of business as Sun Pharma. In addition to this, it had the required expertise and capabilities to give a tough competition to the parties in the relevant market. So, the divesture ensured that the merger would not lead to the creation of a monopoly of the merged company in the generics manufacturing, hence avoiding the cause of an AAEC in the relevant market.

4.3 MYLAN – AGILA DEAL: ISSUE OF NON-COMPETE

Non-compete clauses are an essential part of the merger agreements signed between the entities. It helps the purchasing entity realise the complete value of the transferred assets and gain trust and loyalty of the customers. It also enables them to make proper use of the acquired know-how of the company. But since such clauses give protection to the purchasers from the competition in the market, CCI is usually sceptical about them. Such clauses usually come under the scrutiny of the CCI if they raise any concerns related to competition in the market.

In the deal between Mylan Inc. and Agila; Mylan, a company incorporated in the USA, acquired Agila India from its parent company Strides Acrolab Ltd for INR 94.8 billion.\textsuperscript{348} CCI gave its approval order to the combination under section 31(1) of the Competition Act after certain merger remedies being accepted by it.\textsuperscript{349} CCI opined that the deal was not likely to cause an AAEC, as both the companies had a minimal presence in the domestic markets in India. Agila had less than 5 percent consolidated sales in 2012, while more than 80 percent consolidated sales of Mylan were export-driven.\textsuperscript{350} In addition to this, it noted that the products offered by the company mostly belonged to different therapeutic categories, except for a few which also had different characteristics and intended use.\textsuperscript{351} It also observed that the companies did not engage in similar products in the relevant market as Mylan dealt in the sales of APIs, while Agila mainly dealt in sales of injectable formulations.\textsuperscript{352} Additionally, these APIs were mostly non-sterile, so it could not be used in the production of injectable products.\textsuperscript{353}

However, the issue that troubled the CCI regarding this acquisition was the existence of a non-compete clause in the agreements signed between the parties. Under the said clause, the target enterprises were blankly discouraged from carrying

\textsuperscript{345} Ibid
\textsuperscript{346} Ibid
\textsuperscript{348} Ajay Kr Sharma, ‘Cross Border Merger Control by the Competition Commission of India: Law and Practice’ (2015) 2015 Freilaw: Freiburg L Students J 11
\textsuperscript{350} Ibid
\textsuperscript{351} Ibid
\textsuperscript{352} Ibid
\textsuperscript{353} Ibid
out any business activities relating to any injectable, ophthalmic or oncology pharmaceutical products anywhere in the world. These categories even included such products which were not currently being produced by the target company.

The parties tried to justify the agreement by arguing that such clauses were inserted in order to protect the business interests of both the companies. However, CCI referring back to its decision in the case of Hospira-Orchid merger, stated that the non-compete clauses should be reasonable in terms of its duration, geographical area and the persons on which such restraint is applicable so that it does not lead to an AAEC in the relevant market. Henceforth, under Regulation 19(2) of the Combination Regulations, the parties suggested some modifications to the agreement. They agreed to reduce the duration of the clause from six years to a period of four years. Further, they agreed to curtail the applicability of the non-compete clause to only the products being manufactured by the target enterprises. This included the products which were in the pipeline or development phase.

Therefore, based upon the following modifications made by the parties, the CCI gave its approval order to the combination.

Guidance Note Issued by the CCI

Since the non-compete clauses are prevalent in combination agreements, the CCI has issued few guidance notes relating to the same. These notes are certainly not binding upon the parties, however, it serves as an essential tool to help draft such non-compete clauses. One of the key elements of the guidance note is that the non-compete restriction must be directly related and, at the same time, necessary to the proposed combination. The guidance notes also clarified that the duration of the clause, scope of its application, and its geographic applicability shall be in line with what is reasonably required for the business to be conducted efficiently. These guidelines have been laid down in order to ensure that the companies can reap the full benefits of the combination, while at the same time ensuring that the competition does not get affected by it.

5. A NEW APPROACH: INNOVATION MARKETS

5.1 THE PROBLEM OF INNOVATION

The Daiichi-Ranbaxy deal shows that when the merger analysis is not done properly, it can harm the incentive to innovate of the firms involved. The Sun Pharma-Ranbaxy deal is an example of the situation where the CCI considered merger remedies as a solution to what was initially deemed as an anti-competitive merger. But the CCI, in this deal, only considered the effects on relevant markets and no other aspects of competition law, mainly the incentive to innovate. In the Mylan-Agila deal, the CCI again considered merger remedies as a solution to the problem of the non-compete clause and, for the first time, published a guidance note on merger remedies but only relating to non-compete

354 Ibid Tyagi (n 1) 53
356 Ibid (n 40)
357 Ibid Sharma (n 46)
358 Ibid
359 Ibid
361 Ibid
362 Ibid
clauses, and the problem of incentive to innovate once again took a back seat.

Innovation and competition are interlinked with each other. Consumers are able to enjoy the benefits of innovation in the long run through the existence of competition between the generic industries. In order to ensure that these products are available to the consumers at affordable rates, a certain number of competitors need to be maintained in the market, through merger control, to promote quantity and price-led competition.\(^{363}\) Both CCI and US antitrust authority FTC have cleared plethora of mergers till date in exchange for merger remedies being submitted by the parties, ensuring their successful entry into the market. However, the issue here with the merger control is that the CCI has not yet issued any guidelines relating to how the industries may offer such remedies and how the CCI actually considers such proposals. For now, it seems like the CCI is only operating under Section 6 of the Competition Act, that is, as long as the merger does not cause an AAEC in the relevant market, the authority approves it. So, either CCI will give its own remedies or, the enterprises may offer up theirs, post which the M&A would be approved by the CCI.

The problem, particularly in mergers between pharmaceutical firms, is that the firms generally compete over the superior quality of their new products. The introduction of new and improved drugs through innovation in the market usually commands higher prices. For instance, if a drug has no effect or has a lot of side effects, then it will lose its market share to its competitor even though it is comparatively cheaper. So, the competitive position of a pharmaceutical company in the market depends upon its innovative products and technological performance. Hence, merger analysis should consider competition with respect to R&D in addition to an effect on competition in the existing product market.\(^{364}\) Therefore, CCI needs to consider a new approach to merger remedies, especially in case of pharmaceutical companies.

5.2 THE INNOVATIONS MARKET APPROACH

There are three approaches that the authorities can undertake to analyse the relevant market affected by a merger. Two of these approaches which are already being used by the antitrust authorities include ‘current market’ assessment and ‘future market’ assessment.\(^{365}\) The third approach which is the most recent one is called the ‘innovation markets’ approach.\(^{366}\) This approach examines the effects of mergers on innovation and its impact on competition in the long run. An innovation market is defined as the amount of R&D that is directed towards production of new and improved products, and to the close substitutes for that R&D.\(^{367}\) Under this approach, any merger is prohibited which is likely to cause an effect on competition in the R&D market.\(^{368}\) This is done by examining whether a hypothetical monopolist, post M&A, would reduce his efforts in the R&D or not.\(^{369}\) Criteria such as competitive effects, market concentration, post-merger investment incentives and, efficiencies should also be

\(^{363}\) Ibid Tyagi (n 1)
\(^{364}\) Dror Ben-Asher, 'In Need of Treatment: Merger Control, Pharmaceutical Innovation, and Consumer Welfare’ (2000) 21 J Legal Med 271
\(^{366}\) Ibid
\(^{367}\) Ibid
\(^{368}\) Ibid
\(^{369}\) Ibid
applied to R&D activity, in order to determine whether a transaction would lead to a reduction in innovation.\textsuperscript{370}

It is imperative that the CCI considers the effects on innovation in its merger analysis. Both the EU and the US have tried to pay due attention to the effects of mergers on competition and ensure that innovation is not suffered in this process.\textsuperscript{371} This is especially important in the case of pharmaceutical industries with regards to the role that innovation plays in coming with new products and offering competitive prices to the consumers.

Hence, this new approach will reduce the possibility of harm to consumer welfare by identifying various anti-competitive effects. Once these effects are identified, this approach will help in the formulation of effective remedies to counter the same.\textsuperscript{372} Therefore, the CCI must consider this approach while analysing the impact of an M&A on the competition in the market.

**CONCLUSION**

The objective of competition law is to protect competition in the economy as a whole, while striking a balance between consumer welfare and producer welfare. Therefore, CCI being the antitrust enforcer in India, tries to balance both ends while it conducts its merger analysis. Although the deal between D\textaeichi and Ranbaxy brings up the challenges that CBMs might bring up, the deal between Sun Pharma and Ranbaxy is a clear evidence that if a CBM happens without any significant issues, it has a real potential of forming a synergy between the firms involved.\textsuperscript{373} Hence, it improves the competitive strength of the combination in the market. Therefore, after conducting its merger analysis, CCI has always been in favour of approving a proposed merger.

But the problem with this merger analysis is that it is solely based on the ‘markets approach’ where the CCI only takes into account the effect of a merger on the competition in the relevant market and disregards the effect on the incentive to innovate. This becomes a major issue, particularly in mergers between pharmaceutical industries because the competition in this industry is mainly based on the new innovative products that they produce. This ultimately helps them to offer more competitive prices to the consumers.

As seen in the D\textaeichi-Ranbaxy deal, the mergers between the pharmaceuticals have the tendency to affect the incentive to innovate negatively, thus affecting the competitiveness of the combination.

Henceforth, this paper suggests that the CCI should consider the ‘innovation markets’ approach in addition to the markets approach while conducting its merger analysis. This approach will help improve consumer welfare while formulating effective remedies for anti-competitive effects of the merger. As the Mylan-Agila deal shows that the CCI has made an effort to give some guidelines relating to the non-compete clause, but there are no such guidelines provided for other aspects of merger remedies. So, it is imperative that the CCI issues its guidelines relating to merger remedies, which are very important in the case of pharmaceutical mergers, where the M&A rate between the companies is very high.

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\textsuperscript{370} Ibid Asher (n 55)
\textsuperscript{371} Ibid
\textsuperscript{372} Ibid
\textsuperscript{373} Ibid Pablo & Javidan (n 10)
UNCLAIMED MONEY WITH THE BANKS

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ABSTRACT- Any country's success relies on economic growth, which the country achieves over a period of time. This concerns the very fact that the role of the financial sector in shaping Indian economy's fortunes has been even more important, because India, along with the resilient industrial sector and domestic savings in government instruments, has been equally focused on other growth channels because independence. That prompted India to rely heavily on sectors for its dynamic development. This research paper is intended as a starting point for research with the Indian banks into unclaimed capital. It provides the basic legal information available about unclaimed money equivalents, both in need and in effect. In the Selective way, guides, leading papers, bibliographies, periodicals, serial publications and documents of interest are combined to plant the seeds to enlighten the horizons. This paper links to the Database to address the query that the money is still unclaimed following government directives to provide people with information about their remaining money in bank account. Thus the paper begins with the definition of unclaimed money according to the types of institutions to claim money, and includes different law points and government guidelines in Indian law providing glimpses of unclaimed money. Particular attention is given to the work of the various legal authorities making rules and regulations for claiming the money, which will shed light on the country's required amendment. Finally, this Research Guide addresses the issue of the non-presence of information available in the public domain on leftover money with banks.

Keywords: Unclaimed money, guidelines, public domain, welfare, leftover money, claim, government.

1. INTRODUCTION
In the process in which plenty of laws, regulations and rules guide Banking Industry's conduct towards good governance, the role of a qualified lawyer becomes vibrant in meeting the demands of a more competitive market and regulatory climate on the one hand, and in ensuring timely enforcement on the other. Considering the role of a lawyer in the banking sector and promoting the concept of a thorough creation of our professional brigade, this subject under the title of Banking Laws and Practice serves as a one-sided guide for understanding the basic features of the banking and banking industries and provides a detailed account of the laws and regulations regulating the banking sector in the country.

The banking sector plays a crucial role in the growth of a country's economy and the bank's significance in everybody's everyday life is that every day. There are specific risks faced by the banks such as credit risk, market risk, operating risk, business risk etc. A financial professional who works in a bank or provides any financial sector-related service will reduce the risks
associated with the bank by acquiring sufficient banking expertise.

Banks for various goods and services, as public financial bodies. This includes accounting, exchanging vouchers, and opening accounts for various types of customers through different asset and liability products through cash, clearing, and transfer methods. Since all routine operations are basically conducted through computerized packages involving sophisticated software and hardware, proper follow-up, monitoring and reconciliation is required in the light of RBI’s guidance and guidelines provided from time to time. There is still a certain amount of public with the bank, which local people can not obtain, is known as "unclaimed money."

Unclaimed funds are those properties where the rightful owner can not be found. Usually unclaimed funds and properties are turned over to the state the assets are deposited in, after a dormancy period has expired. When reporting unclaimed funds that have risen in value, taxes can be calculated at the time as ordinary income. States have developed mechanisms whereby legal owners of assets may recover unclaimed funds.

In other terms “unclaimed funds”are money and other properties whose rightful owner can not be found. Unclaimed funds are usually handed over to the government after a fixed period of time has elapsed. To assert the properties or assets, the appointed owner or beneficiary must file a claim; if belonging to an estate, it may require the claimant to prove their claims to the unclaimed property or properties.

1.1 Understanding Unclaimed Funds
There are diverse explanations for unclaimed funds and assets. For example, a taxpayer might be owed a refund but the check for refund went unclaimed as the taxpayer moved with the tax authority without updating his / her address. Bank failures may generate a pool of unclaimed funds when customers are unaware of their closure or are unaware of who to contact to get their funds back. Unclaimed pensions are a common category of unclaimed funds, particularly when a firm closes and there is no immediate information on the administration of their pensions.375

Unclaimed property is simply property which has gone unclaimed past the time of dormancy. The dormancy period is the amount of time between declaring an account or asset as unclaimed by a financial institution and deeming the account or asset to be abandoned by the Government.376

For most states the duration of dormancy is five years. Once property is legally recognized as lost or unclaimed by the state, it undergoes a procedure known as escheatment, where the state claims possession of the property before a lawsuit is made by the legitimate proprietor.377

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Types of unclaimed property include uncashed payroll checks, inactive stocks, court funds, dividends, checking and savings accounts, and estate proceeds. When property accounts go unclaimed, they are turned over to the state for reasons that may include the death of the account holder, a failure to register a forwarding address after changing residence, or simply forgetting about an account.

Unclaimed property is not taxed while it is filed as unclaimed; however, when it is reclaimed, the property may be officially recognized as taxable income. Some unclaimed funds such as investments from a 401(k) or an IRA can be reclaimed tax-free.

2. LITERATURE REVIEW

“Effect of Unclaimed Dividend on the financial statement of selected Commercial Banks In Nigeria” by Okenwa Ogbodo. In his analysis the importance of the corporate performance and shareholder wealth dividend policy was measured. Data from the time series and the architecture of the survey study were used. Data from both primary and secondary sources is obtained for analysis. This was achieved by questionnaires and annual reports and accounts of the two selected Nigerian commercial banks from 2008 to 2012. The hypotheses were tested using statistical tool Z-test. Findings revealed, among others, that unclaimed dividends directly impact financial institutions' financial conditions by raising their overall liabilities and thereby that their owner's equity against their overall assets. Also that investors are worried about what happens to unclaimed dividend and the general impression that only their dividend affects the ordinary investors is proven to be wrong. Therefore, it is advised that businesses make alternate provisions for the supply of cash and short-term funds in the event that unclaimed dividends are moved to a different account, as that would allow the management to provide a accurate and equitable accounting of their business activities from now on.

“Hidden treasure: a study of unclaimed property management by state government” by Derek R Slagle. The first systematic research of how state governments treat unclaimed properties is mentioned in his paper. This thesis will offer deeper insight into unclaimed land management for professionals, decision makers and scholars.

3. RESEARCH PROBLEM

To clarify the word “unclaimed capital” and to connect the same with Indian laws with guidance issued by financial institutions for mixing. Analyze both one's rights to defend from any violation and to see the cycle of unclaimed assets. It should be found that unclaimed money has advanced over the course of time making it impossible to locate and collect it. Initiating global information networks and emerging media, particularly the Internet, poses new and extra-ordinary difficulties.
challenges in law and the legal theory. A far-reaching and thorough review of all these problems, and the divergent directions in which they have been encountered, will certainly entail an investigation, but such an inquiry is beyond one doctoral thesis' limits. For this reason I chose studying just one of the most contentious and complex fields of unclaimed money which is described in depth as financial institutions. I have shed light on various recommendations and strategies through this cognized analysis to eliminate inflation of unclaimed money and how they do not work efficiently and effectively. The study guide is left with the issue of where the unclaimed money is, and whether the material in the public domain is not relevant.

4. HYPOTHESIS
- Core of family money lying in financial institutions.
- No information on official bank websites despite RBI guidelines.

5. OBJECTIVE OF THE STUDY
My academic work is targeted at highlighting the scarcity of resources available for surplus money in the public sector for citizens' welfare. It should be remembered that now and then annually newspapers and journalists report about the money contained in the bank which is not claimed; and of which the government appoints officials but the questions arise where is the officials' job information? I have sited instances in my paper where government has named officials to work towards change but no action has been taken, at least the information is not available.

6. METHODOLOGY
The data needed for the paper were gathered by text books, documents, policy papers and government websites.

7. ANALYSIS

7.1 Financial Institution and Types
Financial institutions as the name suggests are those working organizations wherein financial activities takes place for economic development. Following are the financial institutions:

1. Investment Banks
2. Commercial Banks
3. Brokerages
4. Investment Companies
5. Insurance Company

Owing to long investing tenures, or / and possessing many accounts, often people forget about their savings and assets. Experts say, one of the most likely ways that occurs is that these accounts or programs were produced or purchased by others a long time ago, and people may have forgotten about them. Even if the institutions keeping the money have to get in touch with the account holder after a certain time, most say that they are unable to reach or get in touch with many clients because their address and contact information have changed over the years and are not updated with the institution.

7.2 Government Initiatives for Unclaimed Money
1. Depository Education and Awareness Funds:
Section 26A of the Banking Laws (Amendment ) Act, 2012, was inserted into the Banking Regulation Act, 1949. The

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381 Available at: https://www.financialexpress.com/money/forgotten-about-your-investments-here-is-how-to-track-down-your-unclaimed-funds/1810356/ (Last Visited on August 10, 2020).
Section empowers the Reserve Bank to set up a fund known as the Depositor Education and Knowledge Fund. Consequently, on May 24, 2014, a Scheme was formulated and published in the Official Gazette. The Scheme provides for the registration of companies, organisations and associations and provides them with financial assistance to promote recognition of the depositors. But no such representations have been made and heeded received. There is still no official website for deaf people located in order to obtain awareness of how much money was deposited. The last notification, given by RBI to all CEOs and Chairman and Legal Heads, was about interest payment and nothing more was recognized.

2. Senior Citizen Welfare Scheme Fund:
Eligible sum under the Senior Citizens Welfare Fund with Ministry of Social Justice and Empowerment is Rupees 410.23 crore. Unclaimed funds lying under Small Savings Plans, Workers Provident Fund, Municipal Provident Fund schemes, Life and non-life insurance plans or policies held by Coal Mines Provident Fund insurance companies and accounts are transferred to the Senior Citizens’ Welfare Fund.

3. Investors Education And Protection Fund:
IEPF keeps unclaimed dividends and accrued money that over the years have remained unclaimed. After seven years, unpaid money and unclaimed dividend was moved to the Investor Education and Security Fund. The Education and Security Fund for Investors has its own government-run website, iepf.gov.in. This website is dedicated to understanding of the investors and to protecting their interests. Investors may visit the platform, to see if there is any unclaimed money lying around them.

4. Employee Provident Fund:
The government reported in May 2016 that about '43,000 crore lies in inoperative accounts of the EPF (Employees’ Provident Fund), although the meaning of inactive account changed after the November 2016 notification. Earlier the account was inactive if a individual stopped contributing to PF for three years or more. But now three years after a person's retirement an account is considered inoperative if he / she is at least 55.

7.3 Department Duties to Declare Unclaimed Money
Although looking at decreasing atmosphere for decreasing impact of unclaimed money among the country's people, the government has applauded various guidelines in search of their money to reveal the sum that is unclaimed but saddening behind the same is not followed by any of them. And the truth is still unspoken and so we are here to find your esteemed institution informing our claims.

7.4 Reserve Bank of India’s Guidelines towards Unclaimed Money
Consequently, RBI is the sole institution among all the institutions to resolve the issue of unclaimed money kept by other

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383 The unclaimed amount with various banks as in 2017 has been mentioned through this circular: [Available at:](https://www.epfindia.gov.in/site_docs/PDFs/PQ_PDFs/PQ_BudgetSession2017_RS_English) (Last Visited on August 10, 2020).
rules so that this gray area can be highlighted and presented to the public interest.\(^{384}\)

RBI has required banks to post a list of inactive accounts on the bank's website for 10 years or more. To assert these numbers, the depositor will.\(^{385}\)

Thus it was stated in circular to "Review of all Operating Accounts [Savings Bank and Current Accounts]: An annual review of all accounts in which there are no operations (i.e. no credit or debit other than the crediting of periodic interest or the debiting of service charges) is to be carried out for more than one year. Customers (all joint holders) shall be contacted and/or told in writing that their accounts have not contained an operation. Such customers shall be asked to supply the same explanations. If the non-operation in the account is due to the transfer of residence, the customer may be asked to provide the information and evidence of the new address by telephone / mail / letter in case they wish to continue their bank account or they may be requested to have their accounts transferred to our bank branches near their current place of residence.

The institution had also thrown guidelines for unclaimed money through the evolving guidelines as follows-

"The interest up to maturity date is still paid for Unclaimed Term deposits which have become overdue after maturity. But interest will be paid at the time of payment as per the procedure:

At a later date, if the customer does not wish to renew the deposit as per the current guidelines, the customer would be liable for interest at the prevailing SB rate for the overdue duration.

If the customer prefers to renew for a further period the customer will be eligible for interest overdue duration as may be extended for further period according to existing guidelines and deposit.

In addition, DEAF and SCWCF schemes were implemented to eradicate unclaimed money from the stagnation.\(^{386}\)

As per the Notice-DBR No.Cell.BC.66/30.01.002/2014-15 DEA Fund Cell BC.66/30.01.002/2014-15 dated 2 February 2015 by RBI to all local area banks; specified that, in the light of public interest, banks will find whereabouts of non-claimed or inoperative account holders. As indicated by the supreme institution, they should play a proactive role in searching for information and in the preparation of properly formalized reports, and official information should also be listed on official websites so that account holders access the same information. It was asked to complete the entire mission by 31 March 2015.

The main concern here is that the banks do not follow supreme institutions' guidelines, and until official reports and data are not available on official websites. These way different ordinary citizens don't get their money properly and lurch, and left
devastating lurking around them. For example, in the case of a deceased person, the whereabouts of all bank money and insurance claims are not known to legal heirs and therefore they are difficult because the financial institutions are not cooperating with them. Therefore it is right to know the correct information as to where our money is and according to the guidelines of the supreme institution the banks of other financial institutions should navigate our way towards the recovery of the money.

7.5 SEBI Guidelines Accordance With Unclaimed Money
Capital market regulator Securities and Exchange Board of India (Sebi) has come up with a dedicated Investor Complaints Cell and the SEBI Complaints Redress System or SCORES, which will also help you, register your complaints. Other websites, managed by both government and private organisations, include Investorhelpline.in, ief.gov.in and watchoutinvestors.com that deal with investor-related issues. Sebi said in a circular, however, that AMCs will not be allowed to charge any exit load in such MF plans which are specifically launched to permit the deployment of unclaimed amounts. Sebi said investors who claim the amounts during a period of three years from the due date would be paid the initial unclaimed amount along with the income earned on its deployment. On the other hand, investors who claim these amounts after three years will be paid initial unclaimed amount along with the income earned on its deployment, till the end of the third year. It can be remembered that the wealth management firm is required to transfer the unclaimed money and even the unrecognized dividend while saving on behalf of the minor through guardian for advantageous income.

7.6 How to Get the Money Back
Every bank is expected to post unclaimed account details on the bank’s web site according to the RBI regulations. After verifying the details on the website, you can visit the bank branch with a claim form correctly filled in, deposit receipts, and

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389 Readings about sebi redemption on unclaimed funds Available at https://www.livemint.com/Money/k05gKA3eT0dr84YzxclKzL/Sebi-relaxes-mutual-fund-norms-on-unclaimed-investor-money.html (Last Visited on August 10, 2020).
381 Circular for transmission of unclaimed dividend to minor upon majorityAvailable at https://www.sebi.gov.in/sebi_data/attach/docs/1337083696184.pdf (Last Visited on August 10, 2020).
know your customer (KYC) paperwork to claim the cash.

8. CONCLUSION
Businesses might owe you lots of money, particularly if you've been working for a long time or actively spending or saving regularly. But it's not unusual to lose track of the money mainly because they made savings and acquired policies a long time ago, so you've forgotten all about it.

Therefore, it is the need of the hour to concentrate on unclaimed money details that may be accessible on the official websites of the bank as well as navigation to search and demand.

I therefore recommend that my unrecognized money which has not been posted on any official website be granted a right to details.

It is critical that you keep track of your savings and liabilities forever. The that number of unclaimed properties with banks further shows that people struggle to adequately express what they own or owe to their nearest and precious ones. Recording all the information about the investment is also relevant.

Allow at least two persons aware of the finances. One can be an actual part of the family and the other can be someone who doesn't live under the same roof; so that the other party can make sure that the money goes to the right people in case of a mishap.

You have invested a lot of hard work into making money. Make sure it's put to the best use to go to you with the right hands.

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ONSLAUGHT OF INFODEMIC

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ABSTRACT
In this digital era, the world is reachable in one click. This has brought and increased the proliferation of false or misleading information. Distinguishing between genuine facts and fabulists is not always easy, and with so much of the time we spend online committed either to sharing links or reading ones that have been shared with us, not only does the junk get trusted, it also gets widely disseminated, creating a ripple effect of falsehoods that can mislead people and even endanger lives. Fake news often reverberates in the form of rumours which is an uncorroborated compelling story or a part of the news that may be accurate or formulated and spreads rapidly among people causing infodemic of fallacious information. It undermines serious media coverage and has increased yellow journalism. Publication of false content is done in such a manner that attracts users which indirectly benefits the advertisers and improves ratings. This article posits the problems caused by misinformation and the actions taken by the United Nations to put restrictions on infodemic. It further deals with the legal provisions which are specifically prevailing in India and its effect on the on-going pandemic situation. Through this article the author wants its readers to get the proper intellect about the infodemic of fallacious information with some important suggestions attached at the end of the article.

KEYWORDS: - infodemic of fallacious information, fake news, pandemic.

INTRODUCTION
In 2013, one false report was published about the American President that he had been injured in an attack on the White House sent the Dow Jones on a US$136 billion dive.\(^{392}\) The false allegation that Hillary Clinton was operating a child-trafficking ring from the basement of a Washington pizzeria prompted a man to investigate with an assault rifle and it may have influenced the 2016 US election.\(^{393}\) Fake news is widely considered a substantial security threat, in particular, if it is state-sponsored.\(^{394}\) Accordingly, various actors are now contemplating how to counter it. These above are some of the fake news which prevailed in the past few years and had created some sort of disturbance among the people at large.


dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html.

\(^{394}\)In a December 2016 poll, 14 percent of Trump supporters believed Pizzagate to be true, 32 per cent were not sure. ‘Trump Remains Unpopular; Voters Prefer Obama on SCOTUS Pick’, Public Policy Polling (9 December 2016), available at www.publicpolicy polling.com/main/2016/12/trump-remains-unpopular-voters-prefer-obama-on-scotus-pick.html.

Fake news which is also known as junk-news or deceptive news consists of deliberate hoaxes masquerading as genuine information that permeates via traditional print, broadcast media, and social media. There could be many reasons for the publication of false information. An individual may broadcast forged information to deceive in order to damage the reputation of a person or an entity or to gain superiority over them financially or politically. This type of content can be created by the motivation of partisanship and propaganda. Information is organized around “facts” which is used to recite stories. However, the major obstacle is that fact-based evidence is not relevant to a growing segment of the population. News agencies need facts to convey stories and to engage the audience they often publish deceptive statements instead of shaping the narrative around “facts”. Nowadays many sensationalists and clickbait stories use fabricated headlines to increase their readership. The post-truth politics, easy approach to online advertising revenue and the popularity of social media are some of the reasons for the pervasiveness of dishonest news which competes with licit news stories.

Seven types of problematic content with the intent to defraud has been identified- Satire, which has the potential to fool; Misleading context, which is used to frame an issue; Imposter content, when authenticated sources are impersonated with the made-up sources; Fabricated content, which is formulated to harm; False connection, when the headlines don’t support the contents; False context, when verified content is shared with erroneous facts; Manipulated content, when genuine particulars are manipulated to deceive.

SOCIAL MEDIA: BIGGEST SOURCE OF MISINFORMATION

With the emergence of the internet and social media, the world is battling a deluge of ‘information disorder’, where it has become tremendously difficult to disambiguate genuineness from falsehood. Fabrications of rumours are the lethal weapon that influences the morale of people. Many miscreants, because of the user-friendly features, are now using social media platforms to spread rumours to cause disruption in society. The content and the network can easily be manipulated by sharing links with legitimate number of users or even the spreaders may form groups by connecting with each other. It begins by being a common source of entertainment but soon may transform into a reliable resource of knowledge. Internet falsehood has made people more reckless and less discerning.

Social media has accelerated the spread of lies and political polarization has made people believe them. There are all sorts of misleading posts ranging from incorrect data to a whole new story. The news of forest fires in Uttarakhand is not remotely as severe as online posts have been overflowed with pictures exhibiting patches of forest on fire, erroneously professed to be from Uttarakhand. The old images were circulated claiming it to be recent ones. Another false report was the controversial bois locker room case in which the screenshots of objectionable remarks about girls were circulated.
became viral, and received hatred from all over the social media. Later, it was found that a minor girl had created a fake Snapchat account in the name of a boy to judge the character of her other male friends.\textsuperscript{397} Fake news on social media can be spread through spam, crowdsourcing, troll, in the form of hate speeches, and cyber bullying. In order to tackle this problem, social media channels have taken several initiatives to calm people and avoid chaos. For instance, Facebook has claimed to develop an artificial intelligence system that can recognize and deactivate fake accounts and disseminate fake news.\textsuperscript{398}

**BOMBARDMENT OF INFODEMIC IN THE TIMES OF PANDEMIC**

“We are not just fighting an epidemic; we are fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as dangerous.”

– Dr. T.A. Ghebreyesus, Director-General, WHO

Fake news in itself is a very big issue, but as soon as the spread of pandemic took a stance, the fake news too turned into an infodemic. For four months people are fighting this pandemic with the infodemic too. The false news era has been exacerbated by the coronavirus pandemic. As defined by the United Nations Organisation, an infodemic is a profusion of information – some authentic and some not – taking place during an epidemic. It makes it extremely hard for people to find trustworthy sources and reliable counselling when they need it. Like pathogens in epidemics, disinformation has always been a destabilizing feature of disease outbreaks which spreads further and faster and adds complexity to health emergency response.

This global pandemic is controlling each and every aspect of an individual’s life. This pandemic has made people curious and turned them to believe in each & every information that surfaced online without any verification. Rumours about the novel coronavirus have advanced online as fast as the infection itself. Ranging from origins, cures, fake advisories, and conspiracy theories, no dearth of creativity is left in spreading false information. People are falling prey to misinformation day by day and are unaware of how to get out of this rabbit hole. Nevertheless, when the social media platforms are contemplated to spread awareness and factual information between the people, it is hapless that these platforms become the biggest sources of Infodemic which is hampering the response to the pandemic. Delinquents are taking advantage of the vulnerabilities of people, and the officials around the globe are forced to tackle an avalanche of false news about COVID-19 on digital platforms. One of the leading reasons why misinformation regarding pandemic is gaining traction is that it’s a topic that scares the daylights out of us. The more emotional valence something we read online has, the likelier we are to pass it on—either to share the joy


\textsuperscript{398} Thomas Macaulay, ‘How Facebook’s new AI system has deactivated billions of fake news’, TNW (4 March 2020), available at https://thenextweb.com/neural/2020/03/04/how-facebooks-new-ai-system-has-deactivated-more-than-100m-fake-accounts/
if it’s something good or unburdens ourselves if it’s bad.

Since the very beginning of this pandemic, many articles have been surfaced online on various social media platforms causing panic and confusion among people. These included- a video claiming that a man is spitting on food giving communal angle in spreading coronavirus; a fake doctor’s prescription on how to cure coronavirus; Trump’s bizarre claims on disinfectant and sunlight killing coronavirus and many more. These claims were made without any scientific evidence or research backup. Infodemic is making the pandemic even worse. It affects the decision-making process of an individual which may mentally affect him causing anxiety or depression.

Social Media is the nimblest way to propagate information with extensive coverage across the globe. It has taken over the traditional form of information sharing. Many intermediaries like WhatsApp and Facebook has taken initiatives to tackle misinformation by introducing pop-ups and information center page which redirects the user to the original WHO source. The initiatives includes the introduction of an official chatbot. It creates awareness by providing official documents verifying information about the virus.

THE UNITED NATIONS TAKE ON INFODEMIC OF FAKE NEWS

From deception about the use of disinfectants to battle the coronavirus, to bogus cases that the infection can spread through radio waves and versatile systems, temperamental information is harming the worldwide effort to vanquish the COVID-19 pandemic. By dissipating rumours, fake news, and messages of loathing and division, the United Nations is working to spread detailed instruction and directives of expectation and solidarity.

To revitalize powers behind this effort, the United Nations is propelling another COVID-19 Communications Response Initiative dependent on science, solutions, and solidarity to fight infodemic.

Here are some examples of how the United Nations is tackling the spread of misinformation.

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1. Producing and disseminating facts and accurate information

The World Health Organization (WHO), which is at the bleeding edge of the fight against the pandemic, is transmitting legitimate data dependent on science while additionally looking to counter myths.

Due to the high demand for convenient and dependable data about COVID-19, WHO has set up the Information Network for Epidemics (EPI-WIN) that joins specialized and social media teams working near the track and respond to misinformation, myths, and rumours. It will provide customized data and evidence for action.

2. Collaborating with businesses

Collaborating with WhatsApp and Facebook, WHO launched dedicated informing administrations in several languages, including Arabic, English, French, Hindi, Italian, Portuguese and Spanish, to share basic directions on COVID-19. This easy-to-use informing administration could reach up to 2 billion individuals and permits WHO to get the realities straightforwardly into individuals’ hands.

WHO additionally collaborated with Rakuten Viber to dispatch another interactive chattbot which aims to get accurate data about COVID-19 to individuals in different languages? This association gives WHO the possibility to reach more than 1 billion individuals in their nearby language straightforwardly through their cell phones.

WHO and the International Telecommunication Union (ITU), with help from the United Nations Children's Fund (UNICEF), are approaching all media transmission organizations worldwide to join their drive to help release the intensity of communication technology to save lives from COVID-19 through text messages.

3. Working with media and journalists

The United Nations Educational, Scientific and Cultural Organization (UNESCO) have published two strategy briefs that assess the COVID-19 'disinfodemic' of misinformation, fabrications and falsehood. This was backed by the International Center for Journalists (ICFJ), which is assisting journalists concerned with the frontlines of the "disinfodemic" around the world, to ensure precise, reliable and testable public health information reaches communities everywhere.

The Bureau of UNESCO's International Program for the Development of Communication (IPDC) has affirmed several activities in Africa, India and the Caribbean.

4. Mobilizing civil society

The United Nations works intimately with a large number of civil society associations around the globe that are related with the UN Department of Global Communications (DGC) and partnered with the Economic and Social Council (ECOSOC).

5. Standing up for rights

Michelle Bachelet, UN High Commissioner for Human Rights, stood in opposition to prohibitive measures imposed by several States against the autonomous media, as well as the arrest and intimidation of journalists, saying the free stream data was crucial in battling COVID-19.

LAWS PREVALENT

International Law

The Broadcasting Convention's purpose, as expressed in its preamble and operating
provisions, is the protection of 'good international understanding'. This normal intrigue is shielded from specific broadcasts. For this article, the central provision is Article 3(1),405 which, as per its 'travaux préparatoires',406 was expressly intended to cover the news.

While Article 3 of the Broadcasting Convention absolutely applies to false news, it is faulty if it is abused by just mutilated news.407 This would not exclusively be conflicting with the normal signs of 'inaccuracy' since, regardless of post-current questions in the scientific community,408 whether an announcement is ‘correct’ or ‘incorrect’ is resolved, in standard language, by a simple correspondence hypothesis of truth—that is, the agreement of the statement with reality. This was likewise the perspective on the Drafting Committee: 'inaccuracy' is taken in the current sense of charges conflicting with the truth.409 The French word 'estimation' appears to be fairly progressively open to a more extensive understanding but ultimately the purpose behind Article 3410 is to counter false data, not incorrect interpretations or a certain presentation of facts. The League of Nations previously used the category of ‘distorted’ news for the latter.411

Indian Laws
Fallacious information may have serious consequences if left unchecked. Presently, India doesn’t have a particular law to manage the 'infodemic' however there are certain legal provisions under different statutes that are evocable in case a person is caught circulating fake news during or after this pandemic.

Section 66D of the Information Technology Act, 2000
This section stipulates punishment for cheating by personation through any communication or computer device and provides that, such person shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lac.

Section 505412 of the Indian Penal Code, 1860
This provision consists of the statements conducive to Public Mischief and provides that such person shall be punished with imprisonment for a term of three years and shall also be liable for fine or both.

Section 54 of the Disaster Management Act, 2005
This provision consists of Punishment for False Warning and provides that such person shall be awarded one year of imprisonment or fine or both.

Section 54413 of the NDMA is quite certain to disasters and the bounds of fake news are much far away. Indian Penal Code is an

407 Affirmative: Krause, supra note 91, at 49; Lange, supra note 79, at 109;
408 See at https://indiankanoon.org/doc/1198526/
409 See at https://indiankanoon.org/doc/640589/
increasingly appropriate plan of action accessible to the victim of deception. The Ministry of Home Affairs in its roundabout dated second April 2020 notices the appropriateness of Section 188\textsuperscript{414} and Section 505 of the IPC. Section 188 endorses punishment for disobeying any request appropriately proclaimed by a public servant. The punishment incorporates imprisonment for a term which may extend up to six months or with fine which may reach out to ₹1,000, or both. Any fake claim in insubordination of the government’s order would land such an offender in prison.

Section 2 & 3 of the Epidemic Disease Act, 1987

The Epidemic Diseases Act deals with a pandemic of this massive extent. Section 2 of this Act gives power to the state governments and union territories to take special measures and formulate regulations to contain the disease. Section 3 of the Act states that: “Any person disobeying any regulation or order made under this Act shall be deemed to have committed an offense punishable under Section 188 of the Indian Penal Code.” A person circulating misinformation could be arrested u/s 3 of the Epidemic Disease Act, 1987.

Recent actions taken by the judiciary

In Alakh Alok Shrivastava \textit{v. Union of India}\textsuperscript{415}, the SC in its order on 31st March, 2020 asked the media to maintain a strong sense of responsibility and ensure that unverified news capable of causing chaos cannot be disseminated. It was further added that a daily bulletin by the GOI through all media avenues including social media and forums to clear the doubts of people would be made active within 24 hours as submitted by the Solicitor General of India. It also mentions the legal consequences (Section 54 of Disaster Management Act coupled with Section 188 of the IPC) one may have to face if caught spreading fallacious information regarding the pandemic.

Moreover, the Central Government and other state governments have tremendous powers under the Epidemic Act and the Disaster Management Act. These powers are not intended to encroach upon freedom of speech as long as they are used to spread genuine data and not to cause panic among the masses. Subsequently, any direction by the Government ought to be secured within the ambit of \textbf{Article 19(2)}\textsuperscript{416} of the Constitution. The Supreme Court in S. Rangarajan \textit{v. P. Jagjivan Ram},\textsuperscript{417} has held that everybody has a fundamental right to shape his opinion on any issues of general concern. Open criticism of government policies and activities isn’t a ground for confining articulation.

Freedom of speech not just stretches out to the right of expressing the perspectives uninhibitedly but also the right to know. The Apex Court in 	extit{Bennett Coleman and Co Vs Union of India}\textsuperscript{418} saw that “Right to Information” however not explicitly incorporated in the \textbf{Article 19(1) (a)}\textsuperscript{419} of the Constitution of India, the privilege of Freedom of Speech and Expression is deciphered completely and “Right to Information” is brought within the ambit of \textbf{Article 19(1) (a)}. During this Covid-19 pandemic, the significance of the right to be informed is undeniable. Free media plays a

\textsuperscript{414}See at https://indiankanoon.org/doc/1432790/
\textsuperscript{415}Writ Petition (Civil) No.468/2020.
\textsuperscript{416}See at https://indiankanoon.org/doc/493243/
\textsuperscript{417}1989 SCR (2) 204, 1989 SCC (2) 574
\textsuperscript{418}1973 AIR 106, 1973 SCR (2) 757.
\textsuperscript{419}See at https://indiankanoon.org/doc/1142233/
vital role in the dissemination of valid data to the general public.

**DISSEMINATION MECHANISM**

The rampant growth of fake news has caused the erosion of democracy, justice, and public trust. Every time we passively accept information without cross-checking it or share a post, image or video before we’ve verified it, we’re adding to the chaos and confusion. The need of the hour is to intervene and detect misinformation and its propagation patterns. It is possible that sometimes even the reliable institutions may get entangled in the web of misinformation and incorrect information may sometimes be released from an official source. This heightens the problem of fake news or the spread and leads to a certain air of distrust. In light of the above, the only effective way to prevent the spread of disinformation is self-verification. This can be done simply by a quick search on Google or visiting the official websites to verify the accuracy of the data.

A person should continuously navigate throughout the article analysing its URL, site, author, links, and other sources used. Each and every individual must understand the larger repercussions of a meagre social media forward and should avoid it. Merely because similar claims have been made on the same topic multiple times does not mean that it is authentic until and unless it has been justified by the official authority. Many people unwittingly share posts online without even checking deliberately trying to influence public opinion. The users need to debunk the pseudo reporting or when somebody posts bogus content. False information can be very challenging to correct and may have lasting effects even after it is discredited. One reason for this persistence how people make causal inferences based on available information about a given event or outcome. As a result, false information may continue to influence beliefs and attitudes even after being debunked if it is not replaced by an alternate causal explanation.

**CONCLUSION: THE WAY AHEAD**

It’s well-nigh impossible to keep the Internet free of such hoax news, but it ought not to be quite as hard to confine it to the fever swamps where it emanates and prevent it from spreading. A small intervention can clearly make a difference. Individuals lay at the center of the problem of misinformation and they have the potential to reduce or mitigate its effects. It is time that we should start placing greater emphasis on self-verification of facts as it is the most efficient way to debunk various myths, especially during a health emergency. The consumers of information have to identify and spot the false news responsibly with a higher degree of caution. They can do it by asking simple questions like “what is the source of the said information/forward?” It can effectively avert the mass spread of fallacious information. It is acceptable to trust but authenticate first.

**SUGGESTIONS:**

*On the basis of our research work, we would furnish the following suggestions which aims at seeking initiatives by the UN requesting member states to:*

1. connect a group of 200 Eastern African and Asian lady journalists through an on-line

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asset center that provides training materials on the most proficient method to cover the flare-up;

2. help a system of 25 community radio broadcasts in Eastern and Southern Africa as well as of Asia, serving 250,000 residents living in rustic and underestimated networks better cover the Coronavirus-related difficulties in these distant regions;

3. support 25 network media intently work with the disaster management authorities to reach a wide broad crowd, however most especially tribal and underestimated communities;

4. empower 50 media professionals in nine Eastern Caribbean and Asian nations to lead viable reality-checking and counter disinformation and sensationalism on coronavirus;

5. when false news violates the principle of non-intervention, its correction and acknowledgement as false could be demanded as restitution and satisfaction respectively by the government and other authorities.

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CUSTODIAL DEATH – “A CURSE TO HUMANITY”

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Abstract
“Custodial torture is often seen as one of the brutal forms of human rights abuse. There are many institutions namely, The Constitution of India, the Supreme Court, the National Human Rights Commission (NHRC) and the United Nations to combat this issue but they are opposed by the police always. A recent report against custodial torture across the world discloses a disturbing scenario in India – 1,731 people died in custody in 2019, mostly from weak communities, Dalits and Muslims. Police all across the country are observed using torturous methods in prison which gives an insight into the brutal and shameful act which is being practiced. The report shows a statistics of about 1,606 people who died in judicial custody and more than 100 people who lost their lives in the police custody as well. This paper focuses on the ideas of custody and how the law enforcement authorities should be held accountable to their crimes and further training and sensitization must be provided on the basis of science and sound morals so to promote legal principles among the masses. The paper's main objective is to examine the history of police brutality, death under custody; to inquire into which sections of society are vulnerable to illegal detention and abuse and to identify the cases of custodial violence using the provided statistics in several reports provided.

Keywords: CUSTODIAL TORTURE, CUSTODIAL DEATH, COMMISSIONS, LAWS, GUIDELINES, COMPENSATION

Research Methodology:
The data used for the study are collected from secondary sources mainly from published papers, news, articles, and various search engines.

Introduction
The custodial, without any doubts is actively practiced as part of routine procedure to extract confessions from suspects and many a time, to manipulate the truth. The concept of custodial death is not new for the Indian society. It is not something new that people are falling prey to it. The practice is being followed since the British era. Prisoners have always been deprived their basic fundamental rights and are tortured too mercilessly. The police administration is continuously criticized for custodial deaths, torture, and the practice of unauthorized means during the investigations. The word custody generally involved “guardianship and protective care.” No sinister symptom of violence takes place in custody, even when applied to specify arrest or detention.

Custodial deaths cannot be and must not be viewed in isolation. There are various caste and religious minorities who are under the privilege of punishment exemption, so when these law enforcement agencies become the source of violence, it becomes a threatening situation of abuse of authority and discrimination to these privileged people and all of this is backed by a silent state. India is considered to be one of the world’s biggest democracy and it is a very sad state to observe that the people who are supposed to be our protectors become a threat to our protection only. It becomes very essential to mention that India has yet to ratify the 1987 United Nations
Convention against Torture. The silence of the concerned authorities is a perfect example to show how so many cases of custodial deaths without a perfect reason is leaving them unbothered and how thick they are to institutions of justice and law.\textsuperscript{421} “Cases have been observed where a police arrests a person without any warrant to which the investigation is linked and the arrested person is subjected to brutal torture in order to obtain information for the purpose of investigation and in all these circumstances, the injury which has taken place to the person arrested has many times resulted to his death, - a custodial death”

Simply we can say that death of any person in custody whether Police or Judicial will amount to Custodial Death.\textsuperscript{422}

**Causes of Custodial Violence**

There are robust legal frameworks that protect the rights of the accused in judicial custody. The worst form of police excess is of course causing death to persons in custody. Many organisations including our own National Police Commission have commented on the barbarous custodial violence and deaths in India. The brutality by the police has not only resulted in third degree methods but also to custodial rapes and deaths. Custodial rapes have led to a series of Amendments namely to The Code of Criminal Procedure and Indian Evidence Act. Many such incidents may not have seen the light of day and may have gone unreported and unpunished. The few but growing number of cases in which the erring police officers have been brought to book exhibit the utter callousness of the pachyderm police system in India.

The custodial death and custodial violence is not only limited to the use of force because there are several other factors also responsible for the same. Every police officer must know all the reasons for custodial death so that they may take precautions and can save the custodial death.\textsuperscript{423}

**The detail of reasons custodial death is being given below.**

1. The police makes no proper search of the person who is arrested and no whereabouts is being looked into before his entry in the lock-up of the police station and the arrested persons have committed suicide in the lock-up by cutting their nerves, by hanging, taking poison or by burning themselves.
2. No other method of interrogation is being adopted except using force.  
3. No preparation is being made beforehand for interrogation.  
4. Involvement of such police officers of the same or other police station in interrogation who are not concerned with the arrest and whole investigation and they use to cause more harm to accused persons because they are not involved in interrogation in writing.  
5. No medical aid is given or examination of injured accused persons is being conducted immediately by the police and death occurs in police custody due to slackness of the police officers.  
6. Lack of patience in police personnel because they want immediate confession of the accused. They use force immediately if the accused person refuses to admit the guilt.

\textsuperscript{421} https://lawlex.org/lex-pedia/custodial-death-a-curse-to-humanity/24271  
\textsuperscript{423} https://thewire.in/rights/custodial-deaths-in-india-are-a-cold-blooded-play-of-power-and-class
7. Lack of supervision during interrogation by the senior officers. The officers used to come at the police station after the death in police custody.

8. There is this traditional method or say the habit of using physical force on the prisoners which still exists in the department and it is proved by the fact that the police have used force not only with hardened criminals but they have used force with those persons who have no previous criminal record and they died in police custody.

9. The death in the prison due to suicide committed by the accused in the lock-up which is the result of misbehaviour of police personnel with the arrested person

10. There exists no due respect to the law and basic fundamental rights. There is an unhealthy competition among the police personnel of being successful by adopting wrong methods of using force which results in custodial death.

Categories of Custodial Death
It is identified that there are six main categories of in-custody deaths:
(a) Officer Negligence
(b) Offender Actions
(c) Third Party Action
(d) Accidental
(e) Officer Misconduct
(f) Excited Delirium.

It is believed that these broad categories cover all instances of in-custody death. Inside each category there are several different “sub-categories”. In some instances the numbers of these really are subject only to a person’s imagination of how to commit the act. If an agency is not having a proper published written policy concerning how such instances are to be investigated, it opens the agency up to public criticism and possible civil liability. An agency should have a policy that details how an in-custody death is to be investigated. It should detail who is going to do the investigation and what notifications have to be made and who is responsible for making them. The policy should be specific enough that it takes into account the different variables of the six categories mentioned above. But, it should also be broad enough with the knowledge that very few incidents go by the book. It should give the responsible supervisors some flexibility to adjust their response as the situation dictates. It is suggested to have a bifurcated investigation to all in-custody deaths, the first being the criminal investigation. The second being the administrative investigation. Legally these investigations cannot complement each other. The whole purpose of these investigations is to find out what happened, who is responsible (if anybody), what can be done to prevent it in the future and to retain the public trust. Without the trust and support of its citizens no police agency can function.424

OFFICER NEGLIGENCE:- This is one such broad classification that includes a wide range of like situations. It is basically all about the involvement of a police officer who is very much aware of the existing situation and still fails to take the due actions required which can protect the arrested person from the threat posed to his life.

OFFENDER ACTIONS: - This category is divided into three sub-categories:
(i) Suicide  
(ii) Unintentional Suicide  
(iii) Medical Conditions.

Suicide in pre-trial detention is much higher than the general population. It is being observed by the statistics that the rate of death is almost three times as high as the rate of suicide in prison as per The AELE Law Journal, 2007.

**ACCIDENTAL DEATHS:** - This is a broad sub-category that tries to encompass a large body of accidents. Believe it or not, inmates do die sometimes from unassisted falls. There are also times when an inmate might die from some other type of accident inside the holding facility or while outside in a recreation area. In all these cases just to have a clear cut picture, a proper investigation needs to be done to make sure and conclude that such deaths were not a result of criminal or otherwise improper activity.

**THIRD PARTY ACTIONS:** - Prisoners are not just at risk when being escorted to and from police stations or jails. They are also at risk when sitting in the rear of an officer's vehicle. Suspects have been shot while confined in the rear of a patrol car.

**OFFICER MISCONDUCT:** - This category is alleged more often than any other. This category includes officers beating, torturing, or in some way physically abusing a prisoner in their custody. This does not include justifiable force used to affect an arrest or to control a combative prisoner. This is when the officer abuses the prisoner using physical force when the prisoner is compliant and non-combative. This also involves officers who intentionally use deadly force on a suspect already in custody when they know it is not justified.

**EXCITED DELIRIUM:** - This is a state of hyper-psychological activity that has been found to be present in otherwise unexplained in-custody deaths. Police usually receive a call to the subject who is exhibiting extremely unusual behaviour. The person may be nude or partially clothed, sweating profusely and in an agitated state. These usually culminate in the officer being forced to use some measure of force to bring the situation under control. The officer will then notice the suspect slipping into a sudden relaxed state with the officer then noticing that the suspect is not responsive and in cardiopulmonary arrest. Even with prompt emergency medical treatment, the suspect rarely recovers. Leaving the officers and the community asking questions about what happened and why.  

**Investigation of In-Custody Deaths**

The death of any person when he is in prison or when he is being taken to the prison can claim for some action against the policemen like civil litigation or the suitable criminal charges which can be levied and, on occasion, riots. Some sections of our society are doubting of police. On occasion, this disbelief is justified. However, in most instances, there is no misconduct. The situation is often aggravated by the news media, which seems sensation-driven. It is very essential to have a proper investigation and thoughtful analysis of an incident. The public and the media look for simple answers to complex problems. They often confuse proximity of an action with causality, an error in logic identified by Aristotle more than 2300 years ago. If an investigation into the death does not satisfy their initial assumptions, they often claim.

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In-custody deaths fall into three categories, temporally: those which happens at the time of arrest, those while being transported to jail or a hospital, and those while the deceased is a resident of the jail. There can be several reasons of death which may be a natural disease, accidental trauma, suicide, homicidal trauma, or the sequelae of a cascade of natural physiological reactions to stress, often aggravated by drugs. No matter how the case presents, it is always best to treat all cases as if one is dealing with a homicide in which there will be subsequent judicial proceedings. It is always better to do too much in such cases than too little. The investigation which is related to the medical field of an in-custody death should ideally have three components: the investigation, the autopsy, and subsequent laboratory tests. But, why have investigations at all? Are there not instances where the cause of death is obvious and no investigation needed? Why do we need to waste the precious resources to for the purpose of investigating a death of a criminal when his death is not going to affect anyone in any way?

It is believed that any death which occurs while that person is in the hands of a police department should be investigated. This investigation should be conducted in two parts. One should be the criminal side of the investigation. The other side should be administrative. This should not, however, be a witch hunt. The investigation should be specific in its scope. This type of bifurcated investigation protects the rights of the officer(s) involved, the agency administration and the appropriate city or county government and ensures that the criminal investigation is not compromised. It also shows the citizenry that the department is serious in investigating its officers’ actions and making sure that its officers are conducting themselves in a manner that brings credit to the department and thus the community as a whole. The criminal investigation should start as soon as the death is discovered. In most instances this will involve an investigator either tasked from that department or from an outside agency with which the department has a mutual aid agreement. Some departments who are not large enough to have full time investigators have brought in assistance from their state police agency or investigative bureau. This actually can have a twofold positive effect. One that there is less allegation of a cover-up. Two, it increases the public trust that the original agency is doing all it can to find out the truth. Suicides should be treated as homicides till the evidence clearly shows the death was a suicide. The scene should be treated just like any homicide scene with restricted access and the orderly and systematic collection of forensic evidence. This may require the relocation of several inmates who had shared a cell with the deceased. Any act or omission that might raise the ugly head of cover-up allegations should be avoided. All witnesses and officers involved should be interviewed. If the situation is related to that of a traffic accident, the services of an accident Reconstructionist should be called upon to conduct or assist in the investigation. If he were to find that a criminal act, as opposed to a traffic offense, was the cause of the crash, the Reconstructionist would then notify a criminal investigator. Otherwise, the Reconstructionist would be all that was necessary to complete the investigation. Even in the situation of a natural disaster, a complete investigation needs to be conducted to insure that the death happened not because of an opportunistic foe taking advantage of the confusion of the situation. While this investigation may not be exhaustive it would be required to insure
the family and public that no foul play was involved. While prisons may not investigate natural deaths the way they would an unexpected death, this state’s prison system still the deceased body to the state medical examiner for autopsy to ensure that no previously undiscovered crime was involved. This is a good example for agencies which have their own jails. Any inmate who dies of any kind of apparent occurrences must be enquired into unless and until the foul play is ruled out. Persons who have well documented medical conditions that are terminal in nature and have reached the time when death is eminent are not going to stay in a jail awaiting adjudication on some criminal charge. They will be released and sent to a hospital or residence for hospice care. The administrative investigation has several different purposes. The first is to determine if the officers involved violated any departmental policies. If the officers itself will violate policy, then what kind of violation is it anyway? Is it a violation that has no bearing on the death but that needs to be addressed? Or, is it a violation that shows the officer was negligent in his duties and who’s continued employment needs to be re-evaluated? Even though an officer may not be guilty of any criminal offense, he may be 12 found to have violated departmental policy so egregiously that it merits severe discipline or termination. The administrative investigation should also look into the capability of departmental policy. This will help to determine if a policy change might prevent this same kind of death in the future. Training of the employees must be included as a part of this investigation. This can help in developing training for officers that might let them recognize certain symptoms of medical conditions and react accordingly, possibly saving a life instead of unintentionally taking it. 426

National Commission
National Human Rights Commission (NHRC)

In 1993 a commission was established for the protection of human rights, National Human Rights Commission with the formulation of Protection of Human Rights Act, 1993. NHRC contributed to a higher extent for establishing a robust institution to maintain the human rights of citizens while compensating for any infringement. The Mission and Vision of the NHRC are, inter alia, to protect people from the atrocity and torture of state, spreading of human rights awareness amongst masses, and encouraging the efforts of all stakeholders in the field of human rights literacy at national as well as international level.

Custodial violence and torture is so flourishing in India that it has become almost routine. It epitomizes the worst form of excesses by public servants delegated with the duty of law enforcement. The Commission regards crimes like rape, molestation, torture, fake encounter in police custody as manifestations of a systemic failure to protect the rights of human beings of one of the most vulnerable and voiceless categories of victims. Therefore, it is deeply committed to ensure that such illegal practices are stopped and human dignity is respected in all cases. Besides awarding compensation to the victims or their next-of-kin, the Commission’s efforts are also geared towards bringing an end to an environment

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https://shodhganga.inflibnet.ac.in/bitstream/10603/2714/13_chapter%204.pdf
in which human rights violations are committed with impunity under the shields of “uniform” and “authority”.

**Guidelines issued regarding intimation of custodial death by NHRC**

NHRC report of 2017-18 deals with the problems relating to civil and political rights as well as deaths in judicial or police custody, high handedness of police, illegal detention, death in police encounters.

The Commission has issued various guidelines in this regard. One of such guidelines is that within 24 hours of any death in police or judicial custody must be reported to the commission. Though all custodial deaths may not be crimes or the results of custodial violence or medical negligence, it is important that no assumption is made without thorough enquiry and analysis of reports like inquest report, post-mortem reports, initial health screening report, magisterial enquiry report, etc. Compliance of the guidelines of the Commission by the State authorities, therefore, plays a crucial role in quick disposal of cases relating to custodial deaths. However, it has been seen that some deaths are reported after considerable delay or not reported at all, and in many cases reports are forwarded to the Commission only after issuance of conditional summons to the authorities concerned.

In the year 2017-18, the Investigation Division of NHRC has dealt with a total of 5,371 cases including 2,896 death cases in judicial custody, 250 death cases in police custody and 2225 fact finding cases. The Division have also dealt with 277 cases of death in police encounters.

**Guidelines or procedures which is followed in cases of deaths caused in police action:**

(a) The police officer shall enter the information regarding the death of any individual in an encounter of the police in the appropriate register.

(b) If the police officer belongs to the same police station whose involvement is in an encounter party, whose action results in the death of an individual, then it is necessary that such cases should be investigated by some other investigating agency, like state CBICID.

(c) When any particular complaint is lodged against the police for a criminal act then an FIR will be registered under the appropriate sections of IPC and investigated by a specialized agency or by the state CBICID.

(d) Almost in all the situations of custodial deaths, when it comes to the work of the police force, a magisterial enquiry is claimed in the due course of three months. For the purpose of inquiry what needs to be done is investigate the relatives of the deceased along with the eye witnesses if any of the incident. All this process needs to be carried out in order to examine the situation. The inquiry also includes all the records of the police station.

(e) If any of the officers will be found guilty for any offence related to the death of an individual in the custody then according to the guidelines of NHRC, all those officers will be punished and strict procedure will be taken against them.

(f) Almost in all the situations of death under the police authority in the states will be reported directly within 48 hours to the commission with all the details about the death like date, place of occurrence of
death, fact, investigation agency and the most importantly circumstances of death i.e. self-defense in encounter.

(g) Almost in all situations of death under the police authority in the state, a second report will be submitted to the commission in due course of three months providing the information of post mortem report, inquest report and magisterial enquiry including names and designation of police action, result of forensic examination, weapons report of examination by the expert which was used by the deceased.

Guidelines that was given by NHRC for the magisterial enquiry in case of custodial death

(1) Magisterial enquiry is to be established as soon as possible by the enquiry magistrate whose duty is to visit the crime scene and make an effort to identify the witnesses who are likely to have been present at the scene of crime and try to record their statements.

(2) The magisterial enquiry covers the important aspect like circumstances of death, the cause of death, sequence of incidents leading to death, competency of medical treatment, the enquiry also consist of any action of person responsible for death or any doubt of foul play and any death that caused due to the act of public servant.

(3) The enquiry magistrate will inspect and validate the subsequent records.

a) Inquest Report
b) Post Mortem Report
c) Viscera Analysis Report
d) Histopathological Examination Report
e) Final cause of death
f) Medical treatment records
g) Inquiry/Investigation report of the police

International Instrument

The level of torture is so much that it is always being condemned on not only national but even on international levels. The eradication of torture has always been publicly supported too. The prohibition of torture is done under the concept of “jus cogens”: which is a customary international law. It is considered as a superlative degree of law under customary law and supersedes everything that uses torture. A further discussion on the prohibition of torture is done as follows under various instruments:

1. Universal Declaration of Human Rights (UDHR): After the enormity of World War II, the UN general assembly have taken steps to protect the humans from being toured and started drafting the UN general assembly under which the UN assembly have included article 5 which speaks about the prohibition of the use of torture by the public servant. This ban on torture by the international instrument opens the way for other human rights treaties to protect the rights.

2. International Covenant on Civil and Political Rights (ICCPR): The provisions which were added in the UN assembly for prohibiting the torture in the UDHR made its space in this convention, as adopted by the United Nations in 1966. “Article 7” of this Covenant states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” The provision of ICCPR was similar to the provisions of article 5 of UDHR. The Human Rights Committee in General
comment went on further to comment on article 7 of ICCPR and specified that the purpose of this provision is to safeguard not only the individual from physical cruelty but moreover the self-respect and psychological veracity of the person. The pact was signed and approved by 153 countries to avert the use of torture in their dominions.

3. Convention against Torture and Other Cruel, Inhuman or degrading treatment or Punishment (UNCAT): The UN General assembly approved this agreement in 1984 with the intention to fight against practice of torture more active in all countries. In total, 136 countries approved this convention including India.

**Amnesty international**

Amnesty international have been vociferously clamouring about abuse of human rights in India by police and paramilitary forces. The broad head under which the police excesses have been reported are torture, custodial violence, custody gang rape, fake encounters, lack of sanctity of official records. The amnesty report 1992 describes in detail the pattern and practice of torture, including rape, and deaths in custody in India.

Amnesty International has recommended that the following steps should be taken to safeguard the rights of humans in India, to halt the practice of custodial violence or torture and to create effective institutional framework for its prevention.

(a) Adopt a formal rule for the protection of human rights.

(b) Investigate without any prejudice for each and every charges of torture.

(c) Bring the offenders to justice.

(d) Strengthen safeguards against torture.

(e) Inform prisoners of their rights against the torture in police or judicial custody.

(f) Train the police department and security forces to maintain human rights.

**Compensation to the victims**

(a) Provide fatalities with medical treatment and rehabilitation.

(b) Investigate the causes and pattern of torture.

(c) Strengthen India’s international human rights commitments.

**Prevention of Torture Bill, 2017**

India, being a third world country, signed the “Convention against Torture or Other Cruel, Inhuman, or Degrading Treatment or punishment” (UNCAT) back in 1997 but still after such a long time of 20 years, Indians has not approved it, which is considered as the utmost essential facet of obligation and infers that India will take steps legally to make Indian Laws in accordance to this UN Convention.

A bill on Prevention of torture was presented in the Parliament for the first time in 2008 for their consent but after its evaluation, it was found that it does not contain the sufficient provisions so because of that it was decided to send the bill to the select committee. The select committee after revising the bill made a draft which was represented to the Upper House of parliament in 2010, still, it got stuck over there ever since.

In 2016, a former union minister of law filed a petition in the Supreme Court of India for the India’s compliance to UNCAT
and to make the dead bill of 2010 come to life. During the trial in the apex court, the Law Commission of India submitted its 273rd report which suggested the government to approve the UNCAT and further suggested the “Prevention of Torture Bill, 2017”. On their approvals, the Bill was over presented in 2017 and it is still being discussed in the parliament. This all controversies shows that it has become nothing more than a political agenda to gain votes and it was just seen on the manifesto of Congress party for the upcoming Lok Sabha elections of 2019. Congress party promise the public to pass this bill once they come to power.

**REMEDIES AGAINST CUSTODIAL TORTURE:**

The two approaches are legal regime and judicial precedents.427

**CONSTITUTIONAL SAFEGUARDS**

It has been observed in a variety of judgements that the judicial custody of a human being does not deprive him of fundamental rights.

**Article 20 of The Indian Constitution:** There exists a right which can be used against the conviction of offences and that right is served through Article 20 of The Indian Constitution.

**Article 21 of The Indian Constitution:** This article is inserted in the Indian judiciary to protect the right to be free from torture.

**Article 22 of the Constitution of India:** There are four basic fundamental rights which is provided by Article 22 of The Indian Constitution in reference to the cases of conviction which includes that the person being arrested needs to be informed the reason of his arrest, they should be given the chance to choose a legal practitioner for their case and prevention of detention laws. Within the 24 hours of arrest, they must be produced before the nearest Magistrate.

**Other Statutory Safeguards:**

**Indian Evidence Act, 1872:** If a person makes a confession to a police officer about his offence then that cannot be treated as a proof against the person who has been accused of any offence. It is also essential to note that even if the confession is made due to the threats of law enforcement personnel, it would be considered irrelevant too.

**Code Criminal Procedure, 1973:** Policemen are often seen using brutal methods against the arrestee. To protect them from the brutality and torture, Section-46 and 49 of The Code of Criminal Procedure comes into picture.

**Indian Police Act:** There are many police officers who are very negligent in doing their duties. They do not discharge them the way it is required correctly. To provide the rights to people for the acts of such law enforcement personnel, Sections-7 and 29 of Indian Police Act is given emphasis.

**Indian Penal Code (IPC), 1860:** Rape is one among the heinous crimes that mankind can go through. There are strict laws for this too. The Mathura Rape case has already shaken the whole country. After this occurrence, an amendment was brought in that is Section-376(1)(b) in The Indian Penal Code which penalises and punishes the policemen who commit the shameful act of Custodial Rape.

**Sections 330, 331, 342 and 348 of the IPC** are framed in such a way that it deters a

police personnel who is given the power to arrest someone and interrogate to resort to third degree methods.

**Compensation to Custodial Death**
What are the remedies available to the victims of police excesses that, aside from the heinous crime of torture, also include wrongful confinement or detention for indefinite periods of suspects still awaiting formal charges and a fair trial?
In the Delhi High Court in Babloo Chauhan vs State Government of NCT, the court dealt about the issues of fine and awarding of default sentences without any proper reason. It was seen that the innocent people are put up in the judicial custody without a valid reason as well as the lack of investigation even though when the appeal is taken up the innocent persons are released but that takes place after long years of imprisonment which should not happen. In The Law Commission Of India, the Court decreed that they should undertake a comprehensive examination of the issue of “relief and rehabilitation to victims of wrongful prosecution, and incarceration”.

The Law Commission released its report in August 2018. It is a lengthy, scholarly and passionately written document that makes sweeping recommendations for reforms and remedies as outlined in my previous report on this subject. What is noteworthy in the report is the international perspective based on various United Nations Conventions on torture and wrongful incarceration. It cites examples of various other countries which have developed legal frameworks for remedying such miscarriage of justice by compensating the victims of wrongful convictions, providing them pecuniary and non-pecuniary assistance.

These frameworks, the report says, “The state should compensate the said victims and they must also put forth the substantive and procedural aspects which is able to give some effect to their responsibility and the quantum of compensation.”

**Landmark cases**
Several guidelines have been listed out by the Indian Judicial system to control the brutal abuse of power by the police personnel. There are ample number of landmark cases on this issue.

**In the case of D.K Basu vs. State of West Bengal (1997)**, a letter to the chief justice of India was submitted by the executive chairman of Legal Aid Services, who is also registered as a non-political organization worker. The letter was in reference to the deaths which take place in judicial custody and police lock-ups. It was stated for a serious investigation into the matter and the introduction of a new concept that is “custodial jurisprudence”. The letter further mentioned about the negligent functioning of the concerned police authorities and that is one of the major reasons why several custodial deaths goes unpunished. The letter was taken as a “writ petition” looking into the importance of the raised issue. Long back there was no suitable channel which could be followed in the cases of custodial deaths. After the writ petition a notice was also given to the respondents.

The Supreme Court after a proper investigation came up with certain guidelines for the investigation of case by the police officers. They are as follows;

(a) According to the provisions of the code, after the arrest of a person by the police officer, it becomes their duty to handle and then investigate the case in a fair and correct manner.

(b) A memo must be prepared by a police officer and all procedures should be
followed without fail. If a person needs to be arrested, there exits the rights of the accused to have either of his family members or friends during arrest. The police personnel without fail must give the time and place of the arrest of accused.

(c) The notification about the arrest of the accused must be given to either the family or friend within 8-12 hours of arrest.

(d) The diary should be maintained by the officers who disclose the date and time at which the accused was arrested and other required information of family and friends.

In the case of Sunil Batra v. Delhi Administration, (1978) it was observed by the Indian judicial system that inhuman torture and treatment is against the Article 21 of the constitution of India which includes the right to live with human dignity. The rights provided under article 21 is not only limited to being a fundamental right but it is also extended being a human rights as well.

In another case of A.D.M Jabalpur v. Shiv Kant Shukla, (1976) it was observed by Justice H.R Khanna observed that a person can never be denied his fundamental right to life and personal liberty. The term life was provided with another meaning which was not only limited to mere existence.

In the case of Khatri v. State of Bihar, (1980) the supreme court held that in situation wherein 30 prisoners were blinded by pouring acid by a police officer is something which cannot be condemned. The officer must be punished for violating the provisions of Art. 21 of Indian Constitution.

In the case of R.P Kapur v. State of Punjab, (1960), the SC held that if the officer is investigating a case, then he should do his duty without resorting to brutal and heinous methods. A fair and systematic method must be adopted for the whole functioning.

In the leading case of Munshi Singh Gautam v. State of Madhya Pradesh, (2004) The honourable SC of India threw light amid the increasing cases of judicial violence. A lot of concern was shown towards this issue. It was stated that the rapid increase, the nation as well as its citizens are put under a dangerous threat and their lives are in danger when they are handed to the police in criminal cases. This not only poses a threat to their lives but violates and denies their basic fundamental rights too.

In Prakash Singh v. Union of India, (2006) the Hon’ble Supreme Court of India stated that a fair investigation must be ensured by the state and suitable steps should be taken by the government in order to bring the reforms in the nation for a smooth functioning of the society. There must be a system where the rules and regulations should be abided by properly by the citizens.

RECENT INCIDENT:
The recent death of a father-son duo from Tamil Nadu in the judicial custody has sparked anger across India. It includes death, rape and torture. What has happened in Tamilnadu's Tuticorin is worse than some of the most violent cases India has witnessed (since the Delhi gang rape case in 2012 for which 4 people involved were hanged. Tamil Nadu has imposed a strict lockdown to curb COVID-19.

The family members of the accused duo has alleged that the father and the son were brutally tortured and assaulted in the police station. Few days later after this incident
took place, they were declared dead in the judicial custody. For the same purpose, an amendment was brought in the Section-176 of The Criminal Procedure Code and it was created for investigating custodial deaths.\(^{428}\)

**Analytical Analysis of Custodial Violence**

Custodial deaths and Custodial Violence is said to be one of the worst crimes a democratic and a civilised society can witness. The question which arises is “When a policeman arrests somebody, does that implies that the citizen has lost his fundamental right to life”? The answer would be probably no. It is true to say that the crime should be controlled but for that a realistic approach must be done. There should be a proper way as to how a balance must be maintained between the basic fundamental rights given to a human being and the interests of society to tackle the crimes in a positive way without denying anyone their basic human rights. (Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 260).\(^{429}\)

**Conclusion with Suggestions**

(a) **Ratification of The UN Convention against torture**: It is high time and India must ratify The UN Convention against torture. Doing this will help us to do a channelized review of all the measures, ways, practices and arrangements for the judicial custody. It will look into the methods as to how the arrested persons are treated in the prison and. This will give a clearer picture of any brutal form of torture if used inside by the law enforcement personnel. It will also help to set a mechanism relating to the compensation of the victim besides institutions such as the Board of Visitors.\(^{430}\)

(b) **Police Reforms**: Giving emphasis on Police Reforms, it is very essential to have a proper set of guidelines whose focus should be to target the officials and formulate a policy on the education and proper training of them. A senior police official must interrupt in between the cases looking at the condition of the situation. If a lower rank person is using brutal and torturous methods, it can be looked on and prevented with the interruption of the senior officials. This will also create a positive image of the authorities in the minds of general public.

(c) **Access to Prison**: When it comes to the access of prison, the independent and qualified persons must be allowed a regular and an unrestricted access to the judicial custodies for the purpose of inspection and interrogation.

(d) **Installation of CCTV Cameras** must be done in order to know the real picture of the whole investigation process.

(e) **Surprise Inspections**: The nonofficial visitors must also be made compulsory. This should be done as a prevention against the judicial violence. The same has been suggested in one of the landmark judgements by The Supreme Court that is in The DK Basu Case of 2015.

\(^{428}\) https://www.indiagallive.com/top-news-of-the-day/making-the-state-culpable
\(^{429}\) https://www.researchgate.net/publication/33269526_Police_Reforms_against_Custodial_Violence_in_India_Past_and_Present
\(^{430}\) https://thewire.in/rights/custodial-death-judicial-inquiry-crpc
GUBERNATORIAL DISCRETION: THE OXYMORON IN THE STATE EXECUTIVE

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ABSTRACT
The Governor is the Constitutional Head of the State and it is under his name that all executive decisions are taken by the Council of Ministers. Although he is a nominal head, he is vested with a few ancillary powers, among which, the discretionary powers are the most important and influential ones that help him in effectively administering the constitutional machinery in the State. The Governor exercises these powers under his singular discretion, free from the influence of the Council of Ministers. This paper explains the purpose of conferring such powers to him through the thoughts expressed in the Constituent Assembly. The ambiguities in the powers exercised by the Governor with respect to his personal satisfaction and discretion is also analyzed and contrasted in this paper. Unfortunately, discretionary powers also have their downside as there are many instances of blatant misuse by the Governor. Thus, it is crucial to prevent such misuse to ensure his role as the guardian of the Constitution. This paper examines some of these instances, analyzes the reasons and motive behind such misuse and gives suggestions so that the exercise of discretionary powers are supervised and done effectively.

Keywords: Discretion, Personal Satisfaction, Floor Test, State Emergency

INTRODUCTION
The position of Governor owes its origin to the Government of India Act 1935, which allowed the retention of control over the Indian provincial governments through the Governor. He is appointed by the President for a period of five years. The primary function of a Governor is to preserve, protect and defend the Constitution and to devote himself to the service and well being of the State. The much decorated post of the Governor holds very negligible power and exists mainly for the emphasis of the Federal structure.

The powers conferred on the Governor include:

- Executive powers like appointment of Chief Minister and the Council of Ministers.
- Legislative powers like promulgating Ordinances.
- Judicial powers with respect to granting pardon, respite, remission, reprieve and commutation.

There are many notable powers of the Governor, the chief of them all being the discretionary powers. It is the most influential, useful and, at times, an abused power of the Governor conferred on him by the Constitution, whereby he need not act as per the advice of his Council of Ministers and has the freedom to decide what should be done in specific circumstances. It is misused either for malafide purposes or political exigencies. There are both express provisions of the Constitution and implied interpretations of the Courts that empower the Governor to exercise his discretion effectively and efficiently.

431 Article 159, Constitution of India
432 Article 164, Constitution of India
433 Article 213, Constitution of India
434 Article 161, Constitution of India
DISCRETIONARY POWERS OF THE GOVERNOR

Discretion means a right conferred by law and discretionary power involves an alternative power to do or refrain from doing a certain act by free decision or choice within certain legal bounds.\(^{435}\)

The discretionary powers of the Governor are explicitly mentioned in some Articles across the pages of the Constitution. Such powers exercised by the Governor in his sole discretion bestow absolute immunity on him.\(^{436}\) He can exercise his discretion under:

- Paragraph 9 of Sixth Schedule for any dispute arising out of share of royalties accruing from the licenses or leases for extraction of minerals.
- Article 371, which may confer special responsibilities with respect to the States of Maharashtra and Gujarat for the establishment of separate Development Boards for Vidarbha, Marathwada, Saurashtra, Kutch and the rest of those States.
- Other special provisions from Article 371A – 371H

Apart from these express provisions, the Governor can exercise his discretion for sanctioning prosecution on a Minister.\(^{437}\) He can even dissolve the Legislative Assembly and can request the President, by submitting a report, for proclamation of State Emergency under Article 356 whenever he is satisfied that the functions of the State cannot be carried on in accordance with the provisions of the Constitution and eventually, leading to a failure of constitutional machinery in the State.

The purpose of giving such discretionary powers to the Governor was pointed out by Pt. Thakur Das Bhargava\(^{438}\) and Shri Mahavir Tyagi\(^{439}\) in the Constituent Assembly, by stating that it is right that so far as the concept of a Constitutional Governor goes he will have to accept the advice of his ministers in many matters but there are other matters in which the advice will be unavailable or fails to bind the Governor to accept it. Moreover, the Governor, being the agent of the Centre is the only guarantee to integrate the various provinces and see that the policy of the Central Government is sincerely carried out and thus, there should be no interference in his discretionary powers.\(^{440}\)

It is a unique power given only to the Governor and it is not available even to the President. The cogent reasons to grant such an exclusive power was put before the Constituent Assembly by Dr. B.R. Ambedkar\(^{441}\), who had refused to confer such power to the President as the provincial Governments are required to work in subordination to the Centre, and therefore, in order to ensure that, the Governor will reserve certain things to provide the President an opportunity to see that the rules under which the Provinces should act constitutionally or in subordination to the Union Government are observed.\(^{442}\)

\(^{435}\) P. Ramanatha Aiyar, Law Lexicon, Wadhwa & Company, 2000, pp. 565-566
\(^{436}\) S. Dharmalingam v. Governor of Tamil Nadu, A.I.R. 1989 Mad. 48
\(^{438}\) Hon’ble Member of the Constituent Assembly
\(^{439}\) Id. At 8
\(^{440}\) Vol. VIII, Constituent Assembly Debates dated 1st June 1949
\(^{441}\) Hon’ble Member and Chairman, Drafting Committee of the Constituent Assembly
\(^{442}\) Supra. Note 10
Though the power appears to be vast, it is not unlimited. There are checks and balances when there is an apparent abuse or conspicuous exploitation of such powers by the Governor. There are certain areas where he has to rely on his personal satisfaction even though he has been vested with discretionary powers. There is often confusion between the terms “discretion” and “personal satisfaction” as it is used interchangeably and should be construed in a more specific manner. Though the terms may vary from case to case, a line of clear distinction has to be drawn which becomes necessary for clearly distinguishing and recognizing the real intent and purpose behind such a language and the practical reality followed by the Constitutional heads of the States.

PERSONAL SATISFACTION v. DISCRETION

In administrative context, personal satisfaction usually occurs when the authority is informed about the present scenarios and advised on the possible and effective courses of action, according to which he takes a sound decision to do or not to do an act.

Though the Governor, according to the plain texts of the Constitution, can take decisions as and when he is personally satisfied to do so, this view was completely turned down and substituted by a new interpretation by the Supreme Court, which became essential in all pertinent issues on the powers of the Governor. It was construed in *Shamscher Singh v. State of Punjab*\(^443\) that wherever the Constitution requires the satisfaction of the Governor for the exercise by him of any power or function, it is the satisfaction of Council of Ministers on whose aid and advice he generally exercises his powers and functions, and not his personal satisfaction. On the other hand, discretion is the power of an authority to make decisions based on his opinion within general legal guidelines.\(^444\) It is a unique power that should be exercised only in emergency situations and in circumstances that warrant such action to be taken to address or resolve such exigencies. It is given to authorities and officials in the field to take immediate decisions without any recourse. The Governor need not seek the aid and advice of the Council of Ministers while exercising his discretionary powers. Such powers are mostly specific to the exigency present before him. Nevertheless, he can exercise it even under normal circumstances but only for those purposes and adhering to those norms and procedures explicitly mentioned in the Constitution.

Therefore, the difference between the terms “personal satisfaction” and “discretion” can be summed up by using the language of Andhra Pradesh High Court in *Ganamani v. Governor of Andhra Pradesh*\(^445\), in which it was precisely stated that all the powers exercisable by the Governor can be done on the advice of the Council of Ministers except expressed by the Constitution or by necessary implication that he can exercise such powers in his individual discretion.

The discretionary powers of the Governor are expected to be exercised only to uphold the constitutional values of responsible government and federalism. But the bitter truth is that such powers are used according

\(^{443}\) Shamscher Singh v. State of Punjab, 1974 A.I.R. 2192

\(^{444}\) Law.com Legal Dictionary, https://dictionary.law.com

\(^{445}\) Ganamani v. Governor of Andhra Pradesh, A.I.R. 1954 A.P. 9
to his whims and fancies. There are some capricious instances that depict such depraved acts of the Governors that are often condemned by the courts.

**ABUSE OF DECISION MAKING AND DISCRETIONARY POWERS – SOME INSTANCES**

In the decades-old rich history of the Constitution of India, the Governor holds a significant position in Centre-State relations. It is said that the Governor is a bridge between the Centre and the States in such a way that he ensures the effective functioning of the constitutional machinery in the State and should be impartial and non-partisan to preserve and uphold the constitutional eminence as the Constitutional Head of the State. However, the real practice is, at times, in sharp contrast to those motives expressed and procedures mentioned in paper. The Governor has violated the legal position on his decisions according to his personal satisfaction, due to which the State has suffered many tribulations caused as a result of a wrong turn of events due to his flawed decisions. He had also misused his power of discretion, which is one of the most powerful and essential powers, for political pressures and malafide purposes and, at times, been warned by the Supreme Court about the wrong implications it would have on the constitutional functioning and dignity of the Office of the Governor. The country has seen and experienced disastrous instances where a blatant abuse of discretionary powers is done by the Governor, making the exercise of his Constitutional powers and authority a shame on the Constitution.

**INFRACTION OF THE GOVERNOR IN ARUNACHAL PRADESH**

The first and the most recent instance of such malfeasance happened in Arunachal Pradesh in 2015. The situation became so complex that even a layman can understand the material facts only if he had been made aware of the events that unfolded rightly and chronologically.446 It was in the case of *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*447, in which, the apex court had found blatant misuse of constitutional powers of the Governor that had caused the crisis, rather than paving way for smooth functioning of the Constitutional machinery in the State.

It all started when a notice of resolution to remove the Speaker and Deputy Speaker was moved by the Opposition Party, BJP, and the ruling party, Indian National Congress, respectively. The Chief Whip of the Congress Legislative Party also filed disqualification petitions against 14 MLAs of the Congress Party, on which the Speaker gave them a notice period of 14 days to reply for the same.

Taking into account all the above events, the Governor of Arunachal Pradesh, Mr. Jyoti Prasad Rajkhowa, in exercise of his powers under Article 174(1), issued an order preponing the sixth session of the Legislative Assembly and ordered the House to meet at the Legislative Assembly Chamber at Naharlagun. He had also sent a message stating that the resolution for removal of Speaker shall be the first item on the agenda and the Deputy Speaker shall preside over the House on that resolution in accordance with provisions of Article

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447 *Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly*, (2016) 8 S.C.C. 1
181(1). He further stated that until the 
session is prorogued, no Presiding Officer 
shall alter the party composition in the 
House.

He took this decision as he felt that it is his 
Constitutional obligation to ensure that the 
resolution for removal of Speaker is 
expeditiously placed before the House. 
Moreover, he had also stated that he may 
not be bound by the advice of the Council 
of Ministers, since this particular matter 
neither falls under the executive jurisdiction 
of the Chief Minister nor finds a mention in 
the Executive Business Rules thereby 
restricting the advisory role of the Chief 
Minister to the Governor, only to those 
matters for which the former is responsible 
under the Constitution of India.

As this issue of high prominence came 
before the Supreme Court, it had held, inter 
alia, that the order of the Governor 
preponing the sixth session of the 
Legislative Assembly and his message 
directing the manner of conducting 
proceedings in the House is violative of 
Article 163 read with Articles 174 and 175 
of the Constitution and all steps and 
decisions taken by the House, pursuant to 
the order and message of the Governor are 
unsustainable.

The Court had carefully examined the 
powers of the Governor under Articles 163, 
174 and 175 and had recorded its detailed 
findings and conclusions as under:

**Article 163:**  
The apex Court had quoted the thoughts 
expressed by Dr. B.R. Ambedkar in the 
 Constituent Assembly with respect to 
Article 163. He had stated that Article 163 
will have to be read in conjunction with 
such other Articles which specifically 
reserve the powers to the Governor and he 
cannot completely disregard Ministerial 
advice in any matter he finds he ought to 
disregard. The Court had emphasized that 
that the framers of the Constitution desired 
to embody the basic principle, describing 
the extent and scope of the discretionary 
power of the Governor, in sub-article (1) of 
Article 163, and not in sub-article (2).

The Court had relied on the observations of 
Justice M.M. Punchhi Commission\(^{448}\), 
which stated that, the scope of discretionary 
powers as provided in the exception in 
clauses (1) and (2) of Article 163 has been 
limited by its clear language. The first part 
of Article 163(1) requires the Governor to 
at the advice of his Council of 
Ministers. However, the latter part is an 
exception in regard to matters where he can 
constitutionally function in his discretion. 
The expression "required" specifies that the 
Governor can exercise discretionary 
powers only if there is a compelling 
necessity to do so. It has to be strictly 
construed, effectively ruling out any 
apprehension that his discretionary area 
covers all of his constitutional functions. 
His choice of action in this limited area of 
discretion should not be arbitrary and must 
be dictated by reason.

Therefore, the measure of discretionary 
power of the Governor is limited to the 
scope postulated under Article 163(1) and 
such power extends to situations either 
expressly stated or where such intent 
emerges from a legitimate and unequivocal 
interpretation of constitutional provisions.

\(^{448}\) Report on Constitutional Governance and 
Management of Centre-State Relations by Justice 
M.M. Punchhi Commission, 2007
He can exercise his discretion only when there is an impermissibility to act according to the aid and advice of the Council of Ministers, which, when acted upon, would lead to conflict of interests. Moreover, any discretion exercised beyond the Governor’s jurisdictional authority would certainly be subject to judicial review.

- **Article 174:**
The Court had interpreted that the power to summon, prorogue and dissolve the State Legislature was postulated respectively under sub-clauses (a), (b) and (c) of draft Article 153(2), which was later renumbered as Article 174. The most significant feature of it was expressed in sub-article (3), wherein it was provided, that the functions of the Governor with reference to sub-clauses (a) and (c), “shall be exercised by him in his discretion”. But it was omitted, which became a matter of utmost significance for a purposeful confirmation of the correct intent of the particular Article. The only rightful inference is that the framers of the Constitution changed their initial contemplation and consciously decided not to vest discretion with the Governor in this regard. Therefore, the Governor can summon, prorogue and dissolve the House only on the aid and advice of the Council of Ministers, headed by the Chief Minister.

The recommendations of Justice Sarkaria Commission449 and Justice M.M. Punchhi Commission450 and the opinions of Mr. M.N Kaul and Mr. S.L. Shakdher rendered in Practice and Procedure of Parliament451 were accepted, as it is, by the Court, which summarized that as long as the Council of Ministers enjoys the confidence of the House, their aid and advice is binding on the Governor on the subject of summoning, proroguing or dissolving the Houses. Such advice sustains and subsists till the Government enjoys the confidence of the Legislature. The Council of Ministers lose their right to aid and advice the Governor on this matter when the issue of support to the Government by a majority of the members of the House has been rendered debatable. As and when the Chief Minister does not have the support of the Assembly, it is open to the Governor to act at his own, without any aid and advice.

- **Article 175:**
The Court had observed that though Section 63 of the Government of India Act, 1935 was a precursor to Article 175, in which the discretion to send messages to the Legislature was clearly and precisely bestowed on the Governor, as he may consider appropriate in his own wisdom, Article 175 has no such or similar expression. The framers of the Constitution did not intend to follow the regimen and framed Article 175 by omitting the discretion vested with the Governor, in this case, the Governor had neither called for a floor test nor had doubts on the confidence of the House enjoyed by the Council of Ministers. There was not even a no-confidence motion moved in the Assembly. Therefore, the Governor just could not have summoned the House, in his discretion, by preponing the session of the Legislative Assembly as he neither had the jurisdiction nor the power to do so, sans aid and advice of the Council of Ministers.

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449 Report on Centre-State Relations by Justice Sarkaria Commission, 1983
450 Supra Note 18
matter, under the Government of India Act, 1935. This was because the Governor cannot be seen to have such powers and functions as would assign to him a dominating position over the State Executive and the State Legislature. As Article 175 does not expressly provide the Governor to exercise his functions “in his discretion”, his connectivity to the House in the matter of sending messages, must be deemed to be limited to the extent considered appropriate by the Council of Ministers.

The Court had expressed that the Governor has no express or implied role under Article 179 on the subject of removal of Speaker as it squarely rests under the jurisdictional authority of MLAs, who must determine the acceptance or rejection of such a resolution on their own. His messages with reference to such matters do not flow from the functions assigned to him. He cannot interfere in the activities of the House merely because any member is not functioning in consonance with the provisions of the Constitution or in the best interest of the State. In sum and substance, the Governor just cannot act as the Ombudsman of the State Legislature as it does not function under the Governor.

Therefore, the message of the Governor to the House was beyond the constitutional authority vested with the Governor as such messages must abide by the mandate contained in Article 163(1), i.e., the same can only be addressed to the State Legislature, on the aid and advice of the Council of Ministers, headed by the Chief Minister.

This had clearly manifested the perverse decisions of the Governor to encroach upon the field of the Legislature, completely extraneous to him, and the abuse of his powers that ran contrary to the principles of federal structure enshrined in the Constitution of India.

CONSTITUTIONAL CRISIS IN UTTARAKHAND

There was yet another such delinquency that happened in Uttarakhand in 2016, immediately after the constitutional crisis in Arunachal Pradesh, but this time, it was the High Court of Uttarakhand that had noticed the blatant infractions and perverse decisions taken by the Governor that had led to the proclamation of State Emergency under Article 356. Understanding of the material facts of the case becomes easier when it is read and observed in a chronological order, as it involves numerous letters and communications.452

The High Court was adjudicating the case of Harish Chandra Singh Rawat v. Union of India453 where there was high-voltage political drama revolving around Raj Bhavan and Vidhan Sabha which had shown not only the massive exodus of MLAs to the Office of the Governor questioning the confidence of the House enjoyed by the Council of Ministers but also the Governor’s abuse of power to recommend President Rule without any basis of authenticated materials but only on the basis of possible inferences of the prevailing political situations in the State.

The crisis began to crop up when the Opposition Party, BJP, along with few MLAs of the ruling Congress party, had

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453 Harish Chandra Singh Rawat v. Union of India, MANU/UC/0007/2016
asked for a division vote on the Appropriations Bill tabled during the Budget Session in the House. The Speaker refused to put the bill for it as the bill was passed through voice vote. Aggrieved by that decision, those MLAs met the Governor of Uttarakhand, Dr. K.K. Paul, and had given a joint memorandum stating that the Appropriations Bill was not properly passed and the government should be dismissed as it was reduced to a minority due to the Bill being opposed by majority of the members in the House, leading to a breakdown of Constitutional machinery in the State. Then, another lot of three Congress MLAs submitted a letter to the Governor for the same reason stated above. These events made the Governor to send a communication to the Chief Minister, Mr. Harish Chandra Singh Rawat, to prove his majority by conducting the floor test at the earliest, to which he had finally acceded. Then, a message to the House was sent by the Governor stating that the trust vote proceedings shall be conducted peacefully with the results declared soon thereafter and it shall also be recorded, the copy of which, along with the transcripts, will be sent to him. The reports of all these events were duly sent to the President by the Governor as and when they had arisen. One day, the Governor had sent a letter to the President wherein, among other things, he referred to the fact that a letter was received from another MLA in which a pen drive containing some audio-visual content, that tended to show the Chief Minister in conversation with another person, indicating monetary and other allurements to him, was attached. Then, a Cabinet note was prepared on that same day in the light of available materials and the political developments in the State. Based on the note, the Union Cabinet met at that same night and recommended the President for invocation of Article 356, which was duly approved by him to impose President Rule in the State with the entire Council of Ministers being relieved from the Government and the suspended animation of Uttarakhand Legislative Assembly.

When the dismissed Chief Minister approached the High Court, it had held that the Proclamation issued under Article 356 stands quashed and directed restoration of the Government as on the date of the Proclamation. But as it was restored status quo ante, the Court had ordered the dismissed Chief Minister to seek the vote of confidence as he was obliged to do so, as on the date of the Proclamation.

The Court had, first, clarified that the felicity of expression of the Governor, in his reports, may not be decisive in itself of the issue as to whether the President’s Rule is to be issued because the satisfaction under Article 356 is to be entered by the Central Government. But, the Court was unable to comprehend how the removal of a Minister and the Advocate General is a relevant material for the decision of imposing President Rule under Article 356 and it had no nexus to the satisfaction that the Government cannot be carried out in accordance with the Constitution. Moreover, the mere fact that the trust vote was not sought earlier cannot, by itself, be said to have a cogent reason to invoke Article 356. In Rameshwar Prasad (VI) vs. Union of India it was stated that that the common thread in all the emergency provisions is that it should be resorted to only in exceptional circumstances when there is a real and grave situation

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454 Rameshwar Prasad (VI) v. Union of India, (2006) 2 S.C.C. 1
warranting for such drastic actions. Power under Article 356(1) is an emergency power but it is not an absolute power. It is conditional, requiring the formation of satisfaction of the President, which is the satisfaction of the Cabinet. These are not the matters of inferences and assumptions being made on the basis that there are no judicially manageable standards and, therefore, there cannot be any judicial review or scrutiny. These matters, particularly without cogent material, are outside the purview of constitutional functionaries to arrive at the conclusion that a circumstance has arisen in which the Government cannot be carried on in accordance with the provisions of the Constitution.

While pointing out the lack of veracity and genuineness of the materials placed by the Governor before the Union Cabinet, which cannot be relied upon to impose President Rule, the Court had also observed, by quoting the landmark case of S.R. Bommai v. Union of India455, that even assuming that there was horse-trading going on or the support is claimed to have been withdrawn by some members, the correct and proper course of action for the Governor to adopt was to test the support on the floor of the House except in extraordinary situations where the Governor infers that a free vote cannot be made possible in the House due to all-pervasive violence. It is the only constitutionally ordained forum for seeking all such claims openly and objectively. When such a test is possible, it cannot be bypassed and relied upon the subjective satisfaction of the Governor. Such practices of private assessments are also an anathema to the rich democratic principles followed by this country for decades, apart from being subject to personal malafides.

The Court had stated, relying on the literature on Conventions of House of Commons, that the current constitutional practice requires a Government to resign or seek a dissolution following a defeat in Parliament only when it is clearly on a confidence motion. This implies that the ability of a Government to carry on in office ultimately depends on maintaining the confidence of the House. A confidence motion is a device which directly tests that confidence. If the result demonstrates that the Government has lost the confidence of the House, it must resign or seek dissolution of Parliament. No other parliamentary event requires such an outcome. It is always for the Government to decide when and under what circumstances an issue of confidence arises for it to table such motion, unless its opponents choose to put down a motion of no-confidence in unambiguous terms.456 Thus, a failure to pass a Money Bill by the Government does not amount to losing the majority support of the House to the Council of Ministers. Therefore, the Court had denied the presumption of the Governor that the failure of the Government to pass the Money Bill leads to minority support and failure of constitutional machinery in the State.

This vividly explains the mistakes that are conspicuous through his extraneous decisions and delinquent actions with his discretionary powers backing him up in every course of action, which fails to signify the role of the Governor as the Constitutional Head of the State and also as

455 S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1

456 Constitutional Practice relating to Confidence Motion, Para 2.3
the guardian of Federalism enshrined in the Constitution.

UNPRECEDENTED POLITICAL TWISTS AND TURNS IN MAHARASHTRA

The people of Maharashtra had witnessed a thrilling political stunt in 2019 which was highly dynamic with minute-by-minute changes becoming conspicuous in its political environment. A chronological record of the events that unfolded is helpful for having a clear picture of the facts of the case. All eyes were on the Office of the Governor of Maharashtra, from where all attempts were made to form a stable government after the Assembly Elections in Maharashtra. As no party was able to stake claim to form Government, the Governor had recommended the Centre to invoke Article 356 and impose President Rule in the State. The sudden turnout of events in the State startled and took all political parties in the State by shock and had made everyone wonder the expeditious moves of the Governor all the way from communicating to the President to invoke the President Rule to inviting the incumbent Chief Minister to take oath and assume office again, all these being made possible and done in the wee hours of the day. Such an incident still stays fresh and lingers in the minds of all MLAs, politicians and people of the State. These were the events in Maharashtra that led the Supreme Court to adjudicate the case of Shiv Sena v. Union of India.

There existed an alliance between BJP and Shiv Sena, who jointly contested the 14th Maharashtra Legislative Assembly elections. The results have shown that no single party had the requisite majority in the House. The Governor, Mr. Bhagat Singh Koshyari, called upon the BJP, being the single largest party, to indicate its willingness to form Government, to which it declined due to the breakdown in the alliance with Shiv Sena. Subsequently, Shiv Sena was invited to form Government. It did not materialize successfully though it was willing to do so. Then, the efforts of the Governor to seek the willingness of NCP to stake claim to form Government also went in vain. Ultimately, the Governor recommended President Rule, which was imposed by a Presidential Proclamation. Shiv Sena, NCP and the Congress Party were in discussion to form a coalition government during this period. One day, at 5:47 a.m., the President Rule was revoked in exercise of powers conferred under Article 356(2) of the Constitution. Thereafter, the Governor invited the BJP, who had the sudden support of MLAs of NCP to form Government, which was successfully executed and done by the BJP in the early hours of the day.

When the Supreme Court was approached, it had felt necessary and expeditious to conduct the floor test as soon as possible to determine whether the Chief Minister has the support of the majority or not, and had ordered accordingly. It had also specified the manner in which the floor test should be held and also ordered that a pro-tem Speaker be appointed by the Governor solely for conducting it immediately.

The apex Court had observed, by quoting the most significant case of S.R. Bommai v. Union of India that whenever a doubt


458 Shiv Sena v. Union of India, AIROnline 2019 S.C. 1535
459 Supra Note 25
arises or where the Governor is satisfied that the Council of Ministers has lost the confidence of the House, the only way of testing it is on the floor of the House through a vote and he should ask the Chief Minister to do so within the shortest possible time. The same was the expression made by the Sarkaria Commission, Rajmannar Committee and even by the Committee of five Governors constituted by the President of India. Similar orders have been passed by the Court in Jagdambika Pal v. Union of India and Anil Kumar Jha v. Union of India where a floor test was essential to prove the confidence of the House and the appointment of a pro temp Speaker was necessary to conduct it according to Constitutional Rules and Conventions. The procedure laid down by the Court for the floor test was backed up with similar cases like Chandrakant Kavlekar v. Union of India and G. Parmeshwara v. Union of India by observing that such sensitive and contentious issues could be resolved by a simple direction requiring holding of the floor test at the earliest, thereby removing all possible ambiguities and would result in giving the required credibility to the democratic process.

The Court had opined that in Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly, it had emphasized the requirement of imbuing constitutional morality by constitutional functionaries to curtail undemocratic practices in the political arena. It had also stated, by quoting its holding in Union of India v. Harish Chandra Singh Rawat that the Court, being the sentinel on the qui vive of the Constitution is obligated to see that democracy prevails and not gets hollowed by individuals, only for the purpose of strengthening democratic values and norms. The collective trust in the Legislature is founded on the bedrock of the constitutional trust.

This clearly shows that the Governor cannot be a person above political pressures and he can also abuse his power for malafide purposes. Due to political exigency, he fails to be a person of dignity and nobility and offends his Office of Governor through his delinquent decisions.

CONSTITUTIONAL VIOLATION IN THE PRETEXT OF LEGAL IMPOSSIBILITY IN MADHYA PRADESH

Yet another instance of violation of the rules and norms of the Constitution can be seen in Madhya Pradesh in 2020. It had happened soon after the sudden change of Government with 17 legislators withdrawing their support to the Government and the incumbent Chief Minister from the Congress Party, Mr. Kamal Nath, succumbing to the political drama and resigning from the post ahead of the floor test to prove his majority in the House. The government was taken over

460 Supra Note 19
461 Rajmannar Committee Report, 1969
462 Report of five-member Committee of Governors, 1970
464 Anil Kumar Jha v. Union of India, (2005) 3 S.C.C. 150
467 Shrimanth Balasaheb Patil v. Hon'ble Speaker, Karnataka Legislative Assembly, 2019 SCCOnline S.C. 1454
by BJP and Mr. Kamal Nath was succeeded by Mr. Shivraj Singh Chouhan in just 15 months of the term of the Madhya Pradesh Legislative Assembly.470

The global outbreak of COVID – 19 has turned on to a disastrous turn of events, with the WHO declaring it as a pandemic and urging nations to take immediate measures at war footing.471 Due to this, a complete lockdown was enforced all over the country, saving only essential industries to operate. The new government headed by Mr. Shivraj Singh Chouhan was all tied up to its work of COVID – 19 prevention and lockdown measures. Consequently, it was not able to table and pass the Budget as there were no possible ways to summon the House. To exacerbate the situation, the Government was running without the Council of Ministers and the Chief Minister was present only to facilitate administration of the Government. Therefore, as it was not in a position to withdraw money from the Consolidated Fund of the State for its yearly expenditure, it had resorted to the Ordinance route to make the financial allocations and appropriations that are necessary for its day-to-day functioning and administration. It had advised the Governor, Mr. Lalji Tandon, to pass an Ordinance to which he had acted in consonance with the advice tendered and promulgated two Ordinances, namely, the Madhya Pradesh Finance Ordinance, 2020 and the Madhya Pradesh Appropriation (Vote on Account) Ordinance, 2020.

An analysis of this conundrum becomes necessary to re-examine the limited legislative powers of the Governor. It is an indisputable fact that the Governor can promulgate Ordinances whenever the House is not in session and such legislative powers are vested in him under Article 213. He can exercise such powers even to pass a whole Budget of the State, to which the Supreme Court has duly approved in State of Punjab vs. Satya Pal Dang472, by stating that the action of the Governor promulgating an Ordinance on the Budget and Financial Appropriations of the State was completely valid and eminently healthy as there was no other motive than to set right the constitutional machinery of the State. The power of legislation by Ordinance is as wide as the power of State Legislature itself. The House should not hibernate when its financial business and the constitutional machinery itself were wrecked. Due to the time-consuming nature of the Business and the scarcity of time at that point, the Ordinance was promulgated to create a law for the speedy disposal of financial business.

It is very well known that an Ordinance cannot be promulgated unless the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action. As seen earlier, such a satisfaction stated in the Constitution is not his personal satisfaction but the subjective satisfaction of the Council of Ministers.473 But, in the present situation, the competency of the Governor to promulgate an Ordinance without the aid and advice, or more so, without the Council of Ministers itself is an issue that should be resolved.

473 Supra Note 13
expeditiously. It also casts a doubt on the validity of the Ordinance passed in such a manner. There is a chance to presume that the Governor had acted in his discretion as the Constitution empowers him to do so whenever he thinks fit. But he cannot possibly exercise his discretion in promulgating Ordinances as he is bound to act according to the aid and advice of Council of Ministers for that matter and the Constitution has not allowed him to exercise his discretion on the same.

The Supreme Court had analyzed the circumstances under which the Governor may exercise his discretion in Nabam Rebia and Bamang Felix v. Deputy Speaker, Arunachal Pradesh Legislative Assembly by stating that the Governor is not at liberty to determine when and in which situation, he should take a decision in his own discretion, without the aid and advice of Council of Ministers as it is limited to expressly stated and unequivocally interpreted situations in the Constitution. It had also clarified that the function exercised by the Governor under Article 213 is, undisputedly, on the aid and advice of Council of Ministers.

Thus, it is clear that satisfaction under Article 213 has to be arrived at, only with the aid and advice of the Council of Ministers and it does not qualify as discretionary power as envisaged under Article 163(1). Essentially, the Council of Ministers has to exist in the very first place, for rendering such aid and advice to the Governor, which is missing in the present case. It also shows the blatant failure of constitutional obligation on the part of the Chief Minister to advice the Governor to appoint his Council of Ministers. Thus, relying on Article 213 to promulgate the above Ordinances in the absence of Council of Ministers is unconstitutional since the Governor could not have gone ahead by passing the entire Budget for the State, sans aid and advice of Council of Ministers.

This had clearly manifested the conspicuous infractions of the Governor in exercising his functions and the failure on the part of the Governor to fulfill his Constitutional obligations by misusing the powers vested on him by the Constitution.

EXPRESS INTERPRETATION OF DISCRETIONARY POWERS OF GOVERNOR IN THE CONSTITUTION- A NECESSARY APPROACH

The Governor basically assumes two domains: Executive Domain and Administrative Domain. In the former, he acts as a mere nominal head of the State executing his functions by being bound by the aid and advice of Council of Ministers and doing such things as advised by them accordingly. It also involves his personal satisfaction which is clearly the subjective satisfaction of the Council of Ministers. But in the latter, he acts as an administrator who ensures the smooth functioning of the constitutional machinery in the State. He may not be bound by the advice tendered by the Council of Ministers and, at times, he can exercise his discretion to decide and act effectively. It allows him to make decisions at his will in situations where the Council of Ministers have lost the competence to advice the Governor or the advice tendered by it is incompatible with the provisions of the Constitution. But there are some vague constitutional provisions which are exploited and such powers need to be expressly stated or rectified so as to stop its misuse.

It is very well known that the basic principle of Parliamentary system of Government is that the President and Governors are

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474 Supra Note 17
Constitutional Heads and the real executive powers are vested in the Council of Ministers. Article 163 obligates the Council of Ministers to aid and advice the Governor in his functions, except under such circumstances that requires him to exercise his functions in his discretion. It is a common practice that the Governor always abides by the advice tendered to him. It should be observed that the discretion under Article 163(1) must be exercised only on such functions covered by that Article and the scope of discretion by the Governor is also limited to it. This practically means that his discretion is limited to those matters on which the executive power extends. In reality, there won’t be any matter left to his discretion as all executive powers are given to the Council of Ministers, whose advice binds the Governor and all such matters are solely dealt by them. This would also make the conferment of discretionary powers meaningless, implying the same with or without such a discretionary clause. To handle such predicaments in future, he should be given such matters, apart from or not including the express discretionary powers mentioned in the special provisions of the Constitution, on which he can effectively exercise his discretion. He should be given powers on such matters which should be expressly defined in such a way that he neither completely vetoes the advice given by the Council of Ministers nor will he be bestowed with plenary powers with much plenitude. Article 174 gives the Governor the power to summon, prorogue and dissolve the House. It is a known fact that the Governor exercises his power under article 174 as and when the Council of Ministers require him to do so. But sometimes, due to political reasons, the ruling party would fail to advice for summoning the Assembly. Therefore, the Governor should be given sufficient powers to be exercised in his discretion to ensure that the Assembly is summoned every six months, though it is the Council of Ministers who come up with the business required to be done in that session. It is also the case that most of the States have witnessed many Chief Ministers advising early dissolution of the State Assembly, when they already enjoy the full confidence of the House. In such matters, the Governor must never accept such advice from the Council of Ministers as such advices are coloured mainly in political goals of ruling party and it is also against the mandate of the electorate and that of the Constitution. This clear rule in this regard must be expressly included in the Constitution. Article 175 involves the power of the Governor to send messages to the House. This power should be adapted to those situations in which a floor test on a no-confidence motion is deliberately delayed by the ruling party for peevish political purposes. He should be empowered to send messages to the House as he is obligated to ensure and place a stable government that enjoys the complete confidence of the House and to smoothly conduct the constitutional machinery in the State. There is no ambiguity in the expressly stated discretionary powers of the Governor and his significant role as an administrator of President Rule in the State under Article 356. His discretion in appointment of Chief Minister is guided by proper legal interpretations and guidelines that make it clear enough for the Governor to bring the constitutional machinery of the State back in place. But the above stated ambiguities


476 Supra Note 17
must be clarified by clear cut grounds and express interpretations which should be incorporated through proper amendments to the Constitution. This ensures that the Governor has a more active role in administrative matters, which is essential to balance and preserve the federal structure enshrined in the Constitution.

CONCLUSION
Discretionary powers of the Governor, even though the most influential and powerful of the lot, is mostly misused. It should be used, ideally, in emergency situations and only when the circumstances warrant such action to be taken to address or resolve such exigencies. But in reality, it often leads to perversive and delinquent decisions and thus results in conspicuous misuse of his discretionary powers. The use of discretionary powers is subject to significant variations on a case to case basis. We can infer its dynamic nature from the above mentioned instances. Prone to misuse and dynamism, there is an urgent need for a legal framework overseeing such discretionary powers. The existent law on the matter is insufficient and lacks clarity. The Constitution of India is known for how it adapts itself to the ever dynamic needs of a society. It is in the best interest of India and its federal structure that clear cut guidelines be given on the nature and related know-how of the discretionary powers of the Governor.

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TACKLING KICKBACKS AND BRIBERY IN THE HEALTHCARE SECTOR

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ABSTRACT
This article highlights the issue of the increasing rate of corruption in the healthcare sector in India. This paper mainly emphasises on how India needs to tackle this problem and what steps have been taken by the Indian government to deal with this situation and evaluates the need to come up with strict laws to tackle corruption in this sector.

INTRODUCTION
The healthcare sector is considered as one of the most corrupt services in India. Accepting kickbacks and bribes in the healthcare sector is one of the major forms of corruption. The term ‘kickback’ refers to the money or gifts in lieu of any recommendations or purchase of any particular product or services. In Kickback, the individual is paid in the form of a reward after the completion of the work. Whereas in bribery, the individual is paid in advance to get the unethical job done. Preventing corruption in the healthcare sector is a challenging task and requires an effective system to expose corruption and strictly implement anti-corruption laws. Due to the kickbacks and bribery in this sector, the trust of the public majorly declines, inequality increases, the population becomes insolvent and deteriorates the health status of the most vulnerable people. The present laws of kickbacks and bribery are inadequate and need a few amendments. Thus, the kickbacks and bribery in this sector should be tackled with more stringent laws and serious punishments.

CORRUPT PRACTICES PREVAILING IN THIS SECTOR
Doctors are bribed in various ways, one of them being by the pharmaceutical companies. The companies and their employees in order to increase sales and maximise profits resort to unethical practices. Unfortunately, these unethical practices are becoming common in India. The doctors are bribed by the pharmaceutical companies to prescribe a particular medicine that are manufactured by them. This strategy gets the company new for making profits. The Anti- Kickback statute specifies that kickbacks are not only in the form of cash; they can also be given in kind to doctors or the hospitals. The doctors are rewarded with gifts or holidays sponsored by the pharmaceutical companies.

There have been various instances where certain bodies or activities have provided enough proofs that the malpractices of bribing or inducing have been given. These were in the form of benefits given to participate in conferences, paid travel, accommodation and other related expenses, stated by a Delhi based civil society group called All India Drug Action Network (AIDAN) on 7th December, 2019. These

477 Healthcare is among the most corrupt services in India. Sanjay Kumar
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1168938/

478 Joe C Mathew, Pharma companies giving payouts to doctors, claims All India Drug Action Network, 10th December, 2019, https://www.businesstoday.in/sectors/pharma/aidan
all are strictly prohibited under the Uniform Code of Pharmaceutical Marketing Practices (UCPMP) as well as the Indian Medical Council Regulations, 2002 for registered medical practitioners. There has been a growing demand to frame a statutory body and code for pharmaceutical and medical equipment industry. Terming UCPMP as a failure, AIDAN wanted the government to frame a statutory marketing and ethical promotion code for pharmaceuticals and medical device industry.\textsuperscript{479}

The medical representatives are the ones who feel unprotected due to the absence of laws. They get everyday targets to give pre-planned packages to doctors.\textsuperscript{480} Santanu Chatterjee, secretary of Federation of Medical and Sales Representatives Associations of India (FRMRAI) said:\textsuperscript{481}

“If a doctor avails privileges from a pharma firm, but does not prescribe its drug, the firm catches hold of us. We are forced to go to the doctor again so that the commitment is fulfilled. If we don’t meet targets and assure profits, our salaries can be withheld. We can be even sacked.”\textsuperscript{482}

- The labs conducting radiology tests also tend to gain profits by bribing or giving a kickback to the doctors. The physicians are asked to refer a few tests to the patients even when they are not required. This is usually done by manipulating and falsifying their medical reports.

Puneet Bedi, a senior gynaecologist from private-run Apollo Hospital, said: “Drug companies are traditional villains, then come the equipment manufacturers, then are corporate hospitals for incentives, and the latest in the line are corporate labs who are major players luring doctors to prescribe unrelated tests.”\textsuperscript{483}

Bedi recounted a case of a pharma company CEO who told him, “Everyone has their price - just name yours.”\textsuperscript{484} He further added that he signed as many as 40,000 cheques per month allegedly in bribes to doctors.\textsuperscript{485} Therefore, bribery is becoming a common practice in India.

Dr. Jayaprakash, an associate professor, Paediatrician and Child Psychologist, SAT, Government Medical College, Thiruvananthapuram, quotes from his own experience that he was offered a commission of Rs. 3,000 for an MRI costing Rs. 6,000 and Rs. 200 for each EEG costing Rs. 600.\textsuperscript{486}

\textsuperscript{480} Our bureau, Id
\textsuperscript{481} Banjot Kaur, Id
\textsuperscript{482} Banjot Kaur, Id
\textsuperscript{483} Our bureau, \textit{Rise in unethical practices a concern for pharma sector}, The Hindu,
\textsuperscript{484} Our bureau, Id
\textsuperscript{485} Our bureau, Id
“They offered to open an account in my name. Medical ethics bound us not to even accept the prescription pad of the laboratory. My standard norm is to write in my prescription pad to please conduct the test with maximum reduced rate for the patient. The laboratories provide half of the cost of the diagnostic test like a CT or MRI to the doctor,” said Dr Jayaprakash.  

The patients tend to do everything the doctor asks them to, thus, the doctors take an undue advantage of this and use it as a mean to endure their business. It is a moral duty of a physician to act in the best interest of their patients and make them their priority. These misleading prescriptions and manipulated medical reports breach the trust of the patients on the doctors or the hospitals. Therefore, such instances, make the healthcare sector as one of the most corrupted and highly expensive profession.

CURRENT REGULATIONS GOVERNING THE HEALTHCARE SECTOR IN INDIA

The Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulations, 2002 laid down a few guidelines for the medical practitioners. The chapter 1 lays down the Code of Medical Ethics for the physicians. Clause 1.5 of the Code of Medical Ethics states that:

“Every physician should prescribe the drugs using their generic names and he or she shall ensure that there is a rational prescription and use of drugs.”

Whereas, clause 1.8 of the same code states that:

“the payment of the professional services should be done in the medical interest of the patients and not in the personal financial interest of the physician.”

The chapter 6 of the same IMC Regulations, lists down the acts performed by the physicians that are unethical in nature. The clause 6.4 of the Regulations talks about the rebates and commissions. It states that:

“A physician shall not give, solicit, or receive nor shall he offer to give solicitation or receive, any gift, gratuity, commission or bonus in consideration of or return for the referring, recommending or procuring of any patient for medical, surgical or other treatment. A physician shall not directly or indirectly, participate in or be a party to act of division, transference, assignment, subordination, rebating, splitting or refunding of any fee for medical, surgical or other treatment.”

Chapter 7 of the IMC Regulations,2002 deals with the misconduct of the physicians. The clause 7.7 states that:

“Any registered practitioner who is shown to have signed or given under his name and authority any such certificate, notification, report or document of a similar character which is

487 Shyama Rajagopal, Id
488 The Indian Medical Council (Professional Conduct, Etiquettes and Ethics) Regulations,2002
489 Id
untrue, misleading or improper, is liable to have his name deleted from the Register.”

Clause 7.8 states:
“A registered medical practitioner shall not contravene the provisions of the Drugs and Cosmetics Act and regulations made there under. Accordingly, prescribing steroids/psychotropic drugs when there is no absolute medical indication; Selling Schedule ‘H’ & ‘L’ drugs and poisons to the public except to his patient; in contravention of the above provisions shall constitute gross professional misconduct on the part of the physician.”

Chapter 8 of the IMC Regulations, 2002 discusses about the punishments and disciplinary actions. The clause 8.2 states that:
“If the medical practitioner is found to be guilty of committing professional misconduct, the appropriate Medical Council may award such punishment as deemed necessary or may direct the removal altogether or for a specified period, from the register of the name of the delinquent registered practitioner. Deletion from the Register shall be widely publicized in local press as well as in the publications of different Medical Associations/Societies/Bodies.”

Despite of having these provisions, people are not well aware of the seriousness of the crime. It can also be noted in the IMC Regulations, 2002, that the punishment for accepting bribes or kickbacks is not that severe and lets the physician get back to practice after a stipulated amount of time. Thus, these laws are inadequate in regard to the offence committed and needs serious amendments.

LEGAL PROVISIONS IN OTHER COUNTRIES
Various countries have enacted suitable laws to handle malpractices in healthcare sector. India can draw references from these countries to enact a law to tackle this problem.

For instance, the Anti-Kickback Statute, 1972 was passed in the US which banned the bribe or kickbacks in the federal healthcare sector. The punishment of violating the law is imprisonment up to five years and a fine of $25000. The violation of the Starks law, which prohibits the referrals from a physician for certain healthcare services gets fine up to $15000. In Canada, these ‘cut’ practices are referred to as the violation of human rights. Whereas, in UK, the doctor loses its license or gets barred from practicing medicine. India as a country, should refer to these international laws to understand how serious the issue is and implement on it.

AMMENDED OR STUCK REGULATORY FRAMEWORK
Maharashtra has planned to ban the kickbacks to doctors for referring patients by releasing a draft bill. The government after considering it decided to call it ‘cut practices’ and the law was called the Prevention of Cut Practices in Healthcare Services Act, 2017. This act...
proposed five years of punishment or fine of Rs 50,000 if a doctor, hospital, clinic, nursing home or any medical professional is found involved in getting commissions by referring patients. The Bill also allows the government to initiate *suo motu inquiry* (when the high court or the supreme court takes the matter into their own hands) against doctors. With the evidence of “cut practice”, the individuals can also file a complaint against the doctor or a hospital. The bill also allows the police to conduct searches, seizures and arrest in such complaints under the *Code of Criminal Procedure, 1973*.

This draft of the Act was denied approval as there was an objection related to the imprisonment clause. The state law rejected the draft and sent it back to the medical education ministry without its nod. The reason why the Indian Medical Association was opposing the clause of imprisonment was because they feared the harassment of medical practitioners due to fake cases. The Prevention of Corruption Act, 1988 was later amended in 2018 as the previous act lacked clarity based on the laws related to laws against the commercial organisations bribing the public servants. In the amended act, section 7 dealt with the offences related to the public servants that were bribed. The public servant who bribed another individual or got bribed would be punished with the imprisonment of not less than three years which could later be extended to seven years and shall also be liable to fine.

Whereas section 8 and 9 of the Prevention of Corruption Act, 2018 (Amendment) talks about the offence relating to a bribing of a public servant and offence relating to bribing a public servant by a commercial organisation and they seemed to insinuate that Indian companies must start including anti-bribery in their commercial agreements respectively. There is a need to have serious implications of the provisions in order to control corruption in the healthcare sector.

### CONCLUSION

Corruption, as discussed above leads to financial loss and mental agony to patients. It only benefits the corporate while degenerating the fabric of the society by encouraging corrupt and unethical practices. India needs strong regulations and stricter implementation in the healthcare sector. To reduce the corruption rate in the healthcare sector, India needs new laws and they need to be implemented effectively. Implementing the laws in India could be challenging.

The few suggestions that should be considered are:

- It should be made compulsory for the physicians to sign a contract of

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492 Tabassum Barnagarwala, ‘Cut Practice’: Maharashtra releases draft Bill to curb commissions among doctors, The Indian Express, 27th September, 2017

493 Tabassum Barnagarwala, *Id*

494 Tabassum Barnagarwala, *Id*

495 Vicky Pathare, *Draft of Act preventing cut practices denied approval*, Pune Mirror, 28th July, 2018
https://punemirror.indiatimes.com/pune/civic/draft-

496 Prevention of Corruption Act- before and after the amendment

497 The Prevention of Corruption (Amendment) Act, 2018
which states that if they are caught indulging in any activities that are in disregard of the law, they would have to face serious consequences.

- In case of a breach, the medical practitioner would lose his license to practice along with a minimum imprisonment of three years and would be charged with a fine.

Therefore, to improve the healthcare sector and to earn back the trust of the patients, there should be proper and stricter implementation of these laws.
PRISONER’S RIGHT TO VOTE

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"A man without a vote is a man without protection" - LYNDON B. JOHNSON (36th President of the U.S.A)

ABSTRACT

India is the World's largest democracy and has become a democratic republic since the inception of the Constitution of India and voting is the very essence of democracy. It is one's participation in the election process that decides his representative in the organ of Legislature. In fact, the Hon'ble Supreme Court of India has itself reckoned that free and fair elections form part of the Doctrine of Basic Structure which cannot be taken away by the Parliament by an amendment. However, when everyone has the right to vote on attaining 18 years, prisoners alone are deprived of their right to vote.

This paper in detail discusses about the right to vote for prisoners and that whether the reasons assigned by the Courts of law for deprivation of voting right to the prisoners has any plausible reasoning and nexus, along with a comparative study of position of prisoner's right to vote in other countries in the world.

Keywords: Democracy, Voting, election, Prisoners, right, Disenfranchisement

INTRODUCTION

The Right to Vote is universally recognized and is deemed to be of highest pedestal when it comes to the formation of Government. It is in fact the power of the citizen to express his preference based on the past functioning of the Government. Every country by their Constitution or by any Act limits this exercise of right by assigning plausible reasons such as age, citizenship, unsoundness of mind etc. Initially, even on the basis of sex and religion, right to vote was taken away in certain countries like India. When Legislature authoritatively decided the grounds on which one can be disenfranchised of right of vote, additionally criminality also found place. With the advent of Judicial review, while the former grounds viz., religion and sex were eradicated, the latter is still in existence.

LEGISLATIVE PROVISIONS ON RIGHT TO VOTE IN INDIA

The right to vote is derived from Articles 19(1)(a) and 326 of the Constitution of India. Vote is nothing but a formal expression of preference by the voter to a candidate as discussed before. While The former deals with the right to freedom of speech and expression, the latter deals with the provision that dictates as to who form the electorate base for election to Houses of Parliament and that of the State Legislature. A reproduction of the Article 326 is given below :-

326. Elections to the House of the People and to the Legislative Assemblies of States to be on the basis of adult suffrage:

The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; but is to say, every person who is a citizen of India and who is not less than twenty one years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under this constitution or any law made by the appropriate Legislature on the ground of non residence, unsoundness of mind, crime or corrupt or illegal practice,
shall be entitled to be registered as a voter at any such election.

Thus, the Constitution of India expressly states or stresses upon the fact that voting rights should be based on Adult suffrage which is adopted from the Universal Declaration of Human Rights which will be discussed in detail later.

It also clearly says that criminality, corrupt or illegal practice or any other ground can be made as a ground for disqualification by law which can be made by the Parliament. However, clear reading of the Article brings out the fact that the said grounds can only operate as a ground for disqualification of an individual from registration as voter in an election but never has commented or has barred such person from exercising their voting rights if he has already registered as voter.

Thus, by virtue of this Article, one cannot deny voting rights by claiming that the ground of criminality is by default present in the Constitution of India. Later, by virtue of this Article, the Parliament of India passed the Representation of People Act, 1951. It is in this legislation that there is a right to vote conferred upon the citizens of India by Section 62.

**62. Right to vote.—**

(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.

(2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).

(3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

(4) No person shall vote at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.

(5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police: Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.

(6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorized to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector.

Thus, Section 62(5) clearly casts an blanket ban on the right of the prisoners to vote without any classification of them into under trial and convicted prisoners. The Right to Vote stems from the statute and not the Constitution making it a statutory right.

**WHY PRISONERS IN INDIA MUST BE ALLOWED TO VOTE**

Prisoners are citizens of the State who have been jailed due to an accusation/finding that they have breached the law. A prisoner is a person who is kept in a prison as a punishment for a crime that they have committed. But this simple
definition of prisoners does not encompass the variety of prisoners that include under-trial, convicted of which for the under-trial prisoners, guilt is yet to be proved. The following are some of the reasons why prisoners must be permitted to vote:

- Prisoners have not lost their citizenship by virtue of their wrong(s) hence they being the subjects of the state should still be provided the right to vote just like the other citizens at liberty are provided. The words of the Hon'ble Chief Justice of the Supreme Court of South Africa is of great relevance here "The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity".  

- Prisoners if not provided with the basic right to vote, then upon release they would be forced to be under the rule of the Government elected by the electoral college comprising only of citizens at liberty. Thus, prisoners are made to suffer or submit themselves to the Government elected by the votes cast by their fellow citizens at liberty.

- Double Jeopardy is a written rule under Article 20(3) in our Constitution of India and for the wrong committed by the convict he is sent to jail which serves the punishment. But snatching away the right to vote in addition to the already imposed punishment of jail is a double jeopardy.

- For argument sake, even if it is agreed that the convicted prisoners have to forfeit their right to vote, yet there are lakhs of under-trial prisoners in jail who form the majority of prisoner population in India who are also deprived of their right to vote. The basic rule of innocent until proven guilty is also violated here.

- Prisoners sentenced for less than 2 years can contest in elections but are deprived of their right to vote. Thus, it is violative of Right to equality under Article 14 of the Constitution of India. Political rights include right to vote as well as right to contest in election hence, permitting exercise of one right and denying the other under the same circumstance is totally invalid.

- While adult suffrage is justified for the fact that below the age of 18 years, individual would not be able to make a reasoned decision while casting his vote due to lack of maturity, there is no such concrete nexus in this classification of prisoners and non-prisoners for disenfranchisement.

- Prisoners who have committed a petty offence and also one who has committed heinous crimes are equated and both are arbitrarily deprived of their voting rights.

- Unlike the ordinary citizens at liberty who choose representatives to address their issues in the Legislature, voices of the

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499 August v Electoral Commission, CCT 08/99, 1999
500 Section 8(3) of the Representation of Peoples' Act, 1951

https://www.deccanherald.com/content/652556/undertrial-population-prisons-rise.html
prisoners are made unheard of. Because of the same, prisoners cannot hope to get better facilities in jail by change of Government.

- Prisoner himself before being jailed would have been a taxpayer on whose contribution, expenses incurred for election process is spent and he himself being removed from exercise of vote is unjustifiable.

- When a person confined for time being under Preventive Detention law is not deprived by the law from voting but under-trial prisoners alone are deprived of their vote defies the logical reasoning and intelligible differentia as both are innocent in the eye of law but one is allowed to vote which again violates Article 14 of the Constitution of India .

- With the presence of this provision of law, ruling government has in the past suppressed the voices of economically poor minority communities such as the Dalits, Adivasis, Muslims and manipulated the election results by imprisoning them. Denial of voting rights to prisoners is denying valuable vote share of these particular communities.

- Violation or breach of law by a citizen is not evidence to the fact that he would be of poor judgmental capacity. This amounts to equating prisoner to a minor or unsound mind person which is totally erroneous.

- The law creates an exception to the persons released on bail and allows them to vote which clearly is violative of Article 14 of the Constitution of India as the ones who are financially well off can get themselves out on bail and entitle themselves to the right to vote whereas the poor prisoners who will not be able to afford bail sureties have to lose their right.

**JURISPRUDENTIAL THEORIES AGAINST PRISONERS'RIGHT TO VOTE**

There are two important theories or doctrines that are most widely used by those who object to the conferment of rights to vote to the prisoners. The doctrines and why the same may not stand as a proper reasoning are discussed below.

**DOCTRINE OF SOCIAL CONTRACT**

According to this Doctrine, Voting rights of Prisoners are forfeited for they having breached the Social Contract by voluntary commission of crime. In the modern state theories such as Social Contract are seldom used and have negligible importance due to the presence of written statutes and. Although, even if Social Contract theory is taken into account, by definition of social contract, contracts cannot be negotiated away by any means and hence denial of right to vote due to breach of contract is unjustified.

**DOCTRINE OF CIVIL DEATH**

The other Doctrine viz., Civil Death means total loss of all civil rights of person who has been convicted for a felony. It is a olden day European legal principle which has been used presently to justify the snatching of civil right to vote for the prisoner. It is a

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502 https://thewire.in/communalism/democracy-minorities-communalism-elections
totalitarian doctrine which prevailed during the medieval times before the Doctrine of Rule of Law was put forth. According to this doctrine, prisoner will not be entitled to Freedom of Expression, Assembly, Right to inherit property, file or appear before Court of law for his own cause. Nowadays, this doctrine is of no application in India because of the fact that the above enlisted rights are fundamental in nature and are guaranteed to the prisoners by law in India and also in almost all countries.

The Doctrine poses serious threat to application of Human Rights to the prisoners and is now rarely given effect to by the Courts of law. Even though the curtailment of other Civil rights as per this Doctrine is done away with, curtailment of right to vote alone is yet in force.

**RIGHT TO VOTE AS A HUMAN RIGHT AND INTERNATIONAL CONVENTIONS**

As discussed before, Universal Declaration of Human Rights, 1948 is a principal Human Rights Document adopted by the United Nations to secure the rights of individuals in a State. It serves as epitome of individual civil rights and constitutes the principal source from which Fundamental Rights under the Constitution of India and the Article 326 stated before is brought.

- **Article 21(1)** of the UDHR states that :- Every individual has a right to take part in the government of their country through their representative, elected directly or indirectly.

- Further, International Covenant on Civil and Political Rights (ICCPR)’s **Article 25** states vividly that :-

- Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [i.e race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. and without unreasonable restrictions:

  (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

  (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

  Similarly, the European Convention on Human Rights, the American Convention on Human Rights, the African Charter on Human and People’s Rights recognize everyone’s right to freely participate in election of governments.503

All the above Articles stress upon the fact that every citizen must fundamentally participate in the governance of the Country without any distinction and also based on any restriction which is unreasonable. Nowhere the Articles make a mention of disenfranchisement of Prisoners. Thus, when the basic Human Rights itself does not permit disqualification of voting rights for prisoners, a mere statute cannot take away the right for two reasons viz.,

- Human Rights cannot be taken away or unreasonably restricted by any statutory regulation.

- India per se, is a signatory to UDHR and has ratified both UDHR as well as the ICCPR. By virtue of principle of dualism, upon

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ratification, the International Law applies within a state as a binding law.

Moreover, the Standard Minimum Rules for the Treatment of Prisoners also known as the Nelson Mandela Rules, 1955 and The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that the prisoners should be treated with decency and dignity and for the purpose of rehabilitation with the society, they must participate in socio-political activities which clearly includes election of representatives. Articles 60 and 61 of the Nelson Mandela Rules states as follows:

**Article 60** states that: “(1) The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings.”

**Article 61** further states that: “The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it... Steps should be taken to safeguard,... the rights relating to civil interests, social security rights and other social benefits of prisoners.”

Thus, the above two article stresses the mandate that the treatment meted out to a person confined in prison must be at par with a person in liberty and the person confined must be permitted to take part in activities what persons at liberty do. While the Articles necessitate the need for bridging of gap between prisoners and citizens at liberty, snatching of Right to vote of prisoners operates rather contrarily and further distances the gap.

**RIGHT TO VOTE vis-a-vis ARTICLE 14**

The Hon'ble Apex Court considers Right to Vote as a Constitutional Right in one case and Legal right in the other. In the case of **PUCL Vs Union of India**\(^{504}\), the Hon'be Supreme Court held that the right to vote is a constitutional right guaranteed under Article 326. In this case, the Court distinguished between Right to Vote and Freedom of Voting and held the latter is covered under Article 19(1)(a). Thus, the Court stated that the Legislature can by a statute decide the modalities of voting but cannot interfere with the freedom to vote guaranteed under Article 19(1)(a). However, the Court also carefully enumerated that any law that even alters or fixes the modalities have to pass the test of Arbitrariness under Article 14 of the Constitution.

Thus, by the very own words of the Hon'ble Apex Court, the present Section 62(5) of the Representation of Peoples' Act, 1951 also has to pass the test of arbitrariness and intelligible differentia under Article 14 of the Constitution of India as already discussed.

**INDIAN COURTS' VIEW ON PRISONER'S RIGHT TO VOTE AND COMMENTS**

The Hon'ble Supreme Court of India in the case of **Indra Gandhi Vs. Raj Narain**\(^{505}\) held that free and fair election also form part of the Basic Structure which cannot be taken away by the Parliament by amendment of the Constitution. Since it instilled some faith in the Supreme Court, a challenge of constitutionality of provision

\(^{504}\) 2003 2 SCR 1136

\(^{505}\) 1975 SCR (3) 333
debarring prisoners from voting was challenged in the year 1997 in the case of Anukul Chandra Pradhan Vs. Union of India 506 but the same was heard and dismissed by the Hon'ble Supreme Court of India. The reasons assigned for the dismissal are as follows :-

(i) Resource crunch as permitting every person in prison also to vote would require deployment of a much larger police force and greater security arrangements.

(ii) A person who is in prison as a result of his own conduct cannot claim equal freedom.

(iii) To keep persons with criminal background away from the election scene.

COMMENTS : With regard to the 1st reason, mere resource crunch being an administrative reason cannot be held as a reason to deny an individual his basic civil right and when there is no impediment in conduct of elections for citizens at liberty accounting to crores in population, claiming that the conduct of elections for relatively very less significant number of prisoners alone to be impossible is absurd and unreasonable.

With regard to the 2nd reason, it is in clear violation of the Human Rights Principles especially the Mandela Rules of 1955. Also the Hon'ble Supreme Court has itself in its Judgments in the case of Rajagopalan Vs. State of Tamil Nadu 507 and in the case of State of Maharashtra Vs. Prabhakar Panduranga Sanzgiri 508 held that even though prisoner's right to movement and liberty is restricted, the Right to Freedom of Speech and Expression and Right to Life was not and thereby upheld the right of prisoners to write and publish under Article 19(1)(a) and Article 21 of the Constitution of India respectively. Thus, when a prisoner by his own conduct is been given equal freedom in one instance cannot be denied in other instance without any other added reason.

With regard to the last reason, as stated before, The Hon'ble Apex Court remains silent and turns a blind eye towards instances such as candidates with criminal records contest in elections or when they contest from prison or when there is illegal distribution of incentives to influence illiterate voters. The Hon'ble Apex Court without considering the already existing malpractices or criminality seeks to preserve the sanctum and probity of election only by disenfranchisement of prisoners.

The Supreme Court though it is not bound by its own precedents, drastically refusing to recognize a right which the very Hon'ble Apex Court itself held to be part and parcel of principle Doctrine of Basic Structure is difficult to understand.

Also not just in the 1990s, even very recently, a Public Interest Litigation was filed before the Hon'ble Delhi High Court by three law students challenging the constitutionality of Section 62(5) of the Representation of Peoples' Act, 1951 in the case of Praveen Kumar Chaudhary & Ors. Vs. Election Commission of India & Ors. 509 but unfortunately this petition also was dismissed on the ground that the Right to vote is merely a statutory right which the statute can regulate and restrict.

COMMENTS : The Court here failed to note that the existence of restriction or exception is not in question but the validity of the same is in question. However, the

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506 AIR 1997 SC 2814
507 1995 AIR 264
508 1966 AIR 424
509 Writ Petition (Civil) No. 2336 of 2019
Court with regard to the validity of the restriction simply reiterated what was held by the Supreme Court in its previous judgments. The judgments so referred by the Hon'ble Apex Courts are analyzed hereunder

In the case of Mahendra Kumar Shastri vs. Union of India & Anr\(^{510}\), the Hon'ble Apex Court held that the disability which is imposed under Section 62(5) of the Representation of the People Act is equally applicable to all persons similarly mentioned therein and that they are even prevented from contesting the election or offering themselves as candidates for such election. The provision is reasonable and in public interest to maintain purity in electing peoples' representatives and there is no arbitrariness or discrimination involved.

COMMENTS : This is clearly not the case at present as the Parliament of India in the year 2013 passed a Representation of Peoples' Act, 1951 (Amendment and Validation) Bill\(^{511}\) by which it overturned the Supreme Court Judgment in the case of CEC Vs. Jan Chaukidar & Ors\(^{512}\) that disentitled the right of individuals to contest elections from jail including under-trial prisoners. A review application filed for the judgment of the Hon'ble Supreme Court which was overturned by legislation was refused to be heard in view of the amendment and hence resulted in approval of the Amendment made by the Parliament consequently the law stands that one can contest in elections from jail. Therefore, clearly the reasoning given in the Mahendra Kumar Shastri\(^{513}\) case is not proper in the present circumstances.

In another case of S. Radhakrishnan vs. Union of India & Ors.\(^{514}\), the Hon'ble Apex Court stated that

"2. ... It was opined that the object of Section 62(5) is to prevent criminalisation of politics and maintain probity in elections and that any provision which furthers that aim and promotes the object has to be welcomed, as subserving a great constitutional purpose. We are in respectful agreement with the view expressed by the three Judge Bench in Anukul Chandra Pradhan's\(^{515}\) case and are not persuaded to take a different view.

COMMENTS : Thus, in this case the Hon'ble Apex Court upheld the provision on the ground that it seeks to prevent criminalization of politics. It is indeed difficult to understand as to how the Courts in India does not recognize the act of permitting criminals to contest elections as criminalisation of politics but applies the test with voters alone which is as pointed out earlier in clear violation of Article 14 of the Constitution of India.

The Hon'ble Apex Court in the case of N.P. Ponnuwami v. Returning Officer, Namakkal Constituency\(^{516}\), the Constitution Bench held that “The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the

\(^{510}\) AIR 1983 SC 299
\(^{511}\) Bill Number 57 of 2013
\(^{512}\) 2013 7 SCC 507
\(^{513}\) Supra Note 13
\(^{514}\) 1999 10 SCC 265
\(^{515}\) Supra Note 9
\(^{516}\) 1952 SCR 218
limitations imposed by it. The same was reiterated by the Court in Jagan Nath Vs Jaswant Singh517

COMMENTS : Here again the Court was reluctant to consider the merits of the case and determine the validity of the limitation but rather blindly permitted the right to be controlled by the statute. Also, when right to vote is not a civil right by the words of the Hon'ble Apex Court itself, then the Doctrine of Civil Death cannot be applied to the prisoners' right to vote and hence the right cannot be taken away by the application of that doctrine unlike the case of England which is to be discussed in the next section.

The Hon'ble Apex Court in the case of Jamuna Prasad Mukhariya v. Lachi Ram518, the Constitution Bench reiterated its earlier decisions by holding that - “The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute.

Almost a very similar reasoning was given in the case of Jyoti Basu v. Debi Ghosal519 held that

" 26. The right to vote is subject to the limitations imposed by the statute, which can be exercised only in the manner provided by the statute and that challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a fundamental right in the Constitution."

517 AIR 1954 SC 210
518 1955 SCR 608
519 1982 AIR 983

COMMENTS : The reasoning given by the Hon'ble Apex Court in the above judgments is not just in violation of the previous judgment in the case of PUCL Vs. Union of India 520 but is also in clear violation of Article 13 of the Constitution of India which requires that any law made by the Legislature should not take away or abridge any of the Fundamental Rights under Part III and is to be rendered unconstitutional by the Courts in cases where it is in contravention with Part III. The Hon'ble Apex Court has also in a catena of cases delved into the validity of statutory limitation. Lately, the Hon'ble Apex Court in the case of In re: Prashant Bhushan & An521 went to the extent of reading into the provision viz., Section 15 of the Contempt of Courts Act, 1971 so as to overcome a mere procedural formality prescribed in it which the court viewed it as a limitation and said that for taking cognizance of contempt, it need not get the consent of the Attorney General of India while the statute mandates the Court to get consent. It is relevant to state that this case is of absolute relevance because of the fact that the exercise of contempt proceedings is a right created by the statute and here the Hon'ble Apex Court was ready to proclaim itself not to be bound by the limitation placed to a statutory right but however takes a different view with regard to the Representation of Peoples' Act alone.

Also, when the statutory limitation is in contravention with the Part III of the Constitution of India, the Hon'ble Apex Court has declared it unconstitutional. The recent instances of the Hon'ble Apex Court would be of great relevance and evidence to

520 Supra Note 6
521 Contempt Petition (Criminal) No. 1 of 2020
that fact. In the case of Joseph Shine Vs Union of India\textsuperscript{522}, the Hon'ble Apex Court struck down Section 497 of the Indian Penal Code as unconstitutional for it absolved liability of wife as an offender and thereby violated Article 14 of the Constitution of India and in the case of Navtej Singh Johar Vs Union of India\textsuperscript{523}, it held Section 377 of the Indian Penal Code as unconstitutional for it limited consensual homosexual intercourse and branded it a crime. All the judgments mentioned above are evidences to the fact that the Court has struck down provisions but is refusing to strike it down in the present instance alone for reasons best known to it.

Thus, it is clear that the Hon'ble Courts of India are reluctant to rule the Section 62(5) as unconstitutional and thereby not ready to confer right to vote on prisoners.

**POSITION IN OTHER COUNTRIES**

**ABSOLUTE RIGHT TO VOTE**

- According to a report published by the BBC in the year 2012,\textsuperscript{524} 18 European countries have given full voting rights for all categories of prisoners which includes Switzerland, Denmark, Finland.
- Slovenia is also another country that is now guaranteeing the right to vote for all its prisoners\textsuperscript{525}
- Ireland is another country that is highly appreciated for the unprecedented nature of its move in granting right to vote without any public outcry or protest or movement or even Court decision that demanded for such a right. Ireland adhered to its human rights commitments learning through the best international civil rights practices of providing right to vote to all citizens including prisoners.\textsuperscript{526}
  - Iran gives absolute right to vote for prisoners,
  - Israel also without distinction permits all prisoners to vote and
  - Pakistan also provide right to its prisoners to vote in elections by a very recent statutory enactment viz., Elections Act, 2017
  - In the African Continent, South Africa, Ghana, Kenya and Botswana also provide their prisoners with the right to vote in elections\textsuperscript{527}

**RESTRICTED RIGHT TO VOTE**

While in the above countries, right to vote was permitted to be exercised without any fetters imposed, in many other countries the right to vote for prisoners is permitted with restrictive application by severing them based on the nature of offence committed by them or the category of prisoner that they belong to viz., permitting under-trials to vote and not the convicted.

- In New Zealand and the United Kingdom, Under-trials are allowed to vote but there stands be a blanket ban on convicted prisoners.
- In Germany, limitations related to severity or type of offence and bars only those prisoners convicted of terrorism charges from voting.
- In Australia, classification is based on the term of sentence i.e., For those sentenced to less than three years can vote\textsuperscript{528}

\begin{itemize}
  \item \textsuperscript{522} 2018 SCC OnLine SC 1676
  \item \textsuperscript{523} W.P. (Crl.) No. 76 of 2016
  \item \textsuperscript{524} https://www.bbc.com/news/uk-20447504
  \item \textsuperscript{525} Liberty (2016). Liberty’s Briefing on Prisoners’ Voting Rights. London: Liberty
  \item \textsuperscript{526} C Behan, Citizen Convicts: Prisoners, Politics and the Vote, Manchester University Press: Manchester, 2014
  \item \textsuperscript{527} Supra Note 5
  \item \textsuperscript{528} https://aec.gov.au/About_AEC/Publications/Fact_Sheets/fact_sheets/prisoner-voting.pdf
\end{itemize}
In countries like France, there is no default ban on prisoners to vote in the elections, rather the court may decide to disallow any convict on a case by case basis.

However, in some countries like Italy, Greece, Poland and some states of the US such as Florida, right to vote of convicts is even worse and harsher than the Indian law. The convicts in their state can lose the right to vote even after their release 529

FOREIGN JUDGMENTS WITH PROGRESSIVE VIEWS

Even though India continues to hold the provision curtailing the prisoners' right to vote as constitutional, Constitutional Courts in many other countries have woken up and understood the compelling need and importance of conferring the prisoners with the right to elect. Following are two important judgments wherein the Courts rejected the arguments denying the right to vote for prisoners.

The NICRO CASE (SOUTH AFRICA)

The Constitution of South Africa acknowledges the Universal Adult Franchise under Section 1. Despite this being the case, the Parliament of South Africa brought an amendment to Section 1 that restricted the application of voting rights which debarred prisoners serving imprisonment without the option of fine from voting. When it was challenged, the government’s argument was primarily based upon two grounds:-

- lack of resources to ensure prisoner’s right to vote, and
- that because prisoners had been deprived of their liberty, it was fair to deny them franchise rights as well.

The Court refused to accept the first argument on the ground that since arrangements had been made for prisoners who were serving a sentence with a fine, this meant that enough resources were available to ensure franchise rights for those serving imprisonment without option of fine as well. The Court for the second contention used the ‘proportionality principle’ enshrined in Section 36 of the South African Constitution. This principle tries to strike a balance between interests of those whose rights have been limited and interests of State, by testing whether a far more less restrictive means could have been used to achieve the same purpose. The Court then by application of the principle concluded that a ban on prisoner’s franchise rights could not be justified merely on the ground of a policy decision of addressing the alarming crime rate, since the government had failed to furnish sufficient data on how restricting franchise rights would reduce the rate of crime.

The HIRST CASE (UK)

Just like India, UK law places a total ban on prisoner’s voting rights. When this was challenged as being violative of Article 3 of Protocol No 1 of European Convention, the European Court of Human Rights held that although the right to vote is not an absolute right, a blanket ban on prisoner’s franchise rights, irrespective of the gravity of the crime and duration of the sentence, was not justified since it breached the Margin of Appreciation. The government argued that, in effect, only 48000 prisoners would be deprived of voting, since it would not include people detained on remand or those who had failed to pay the fine. However, the Court opined that 48000 was still a significant number, and that there was no
evidence that Parliament had ever sought to weigh the competing interests of the prisoner’s right to vote as opposed to the State’s interest as done by the Courts in South Africa.

Unfortunately, the UK has still not acknowledged this despite another ECHR Judgment in 2010, which asked the Parliament to bring a law to address the issue. Although a Bill is pending, which gives franchise rights to prisoners serving one year of sentence or less, it has still not seen the light of the day. 530

SAUVE Vs. CHIEF ELECTORAL OFFICER (CANADA)

A Canadian court terming the government’s arguments as “vague and symbolic objectives,” also stated531:

• “The law which denied prisoners serving sentences over two years the vote in federal elections was repugnant to the Canadian Charter of Rights and Freedoms.”
• “Right to vote is fundamental to our democracy and rule of law and cannot be lightly set aside.”
• That it could not “permit elected representatives to disenfranchise a segment of the population.” 532

In all the three cases, the arguments made against the prisoner’s franchise rights were similar to that of India. However, in all those cases, blanket bans were rejected by the courts.

RECOMMENDATIONS

• Declare Section 62(5) of the Representation of Peoples' Act, 1951 as unconstitutional for violating the Basic Structure of the Constitution and for being violative of Article 14 of the Constitution of India
• Permit all categories of prisoners to vote irrespective of any further classification of them on the basis of guilt, nature of crime, term of sentence etc.
• Recognition of Right to Vote as a Constitutional Right by virtue of Article 326 r/w Article 19(1)(a) by way of constitutional amendment and elevate it from a mere statutory right.
• Permit prisoners' to vote from prisons through Electronic Voting Machines i.e., by secret ballot system after being briefed about the working of the EVMs, how to cast their vote by demonstration wherever possible or in other cases orally or through Audio Visual presentation and also to stick the party symbols along with the political party name and their candidate at least 30 days prior to the conduct of election at any reasonable place which at all probability can be noticed by all the prisoners. Election Commissioners may by notification depute any member(s) or official(s) of the Election Commission to carry out the mentioned duties.
• To prevent misuse of the right by the Superintendent or Warden of prisons, voting exercise may be done in the direct presence of officials of the Election Commission of India or any executive authority so named by the Election Commission of India and the entire proceedings is to be video-graphed.
• Make special provision authorizing the local jurisdictional Magistrate to conduct

532 https://www.epw.in/engage/article/prisoners-right-vote-citizen-without-vote
surprise visits to prisons at any time to check if the above mentioned duties are properly carried out.

- Provide Adequate protection to the Presiding Officer and other officials involved in the Election process and
- Prisoners to be provided with the Election Manifestos of the Political parties printed in vernacular language or in the language so understood by the prisoner and must also make available the details of the candidate provided by him/her while filing Nomination in accordance with rule laid down by the Hon'ble Apex Court in the case of Association for Democratic Reforms Vs Union of India for them to make an informed decision.
- Communicate the election results once declared

**CONCLUSION**

As discussed in detail above, almost 4,66,084 prisoners in India are being deprived of their right to vote by virtue of a blanket ban in a statutory provision. Moreover, India is one of those very few countries who have been denying this right to its under-trial population as well. And, in India’s prison population, a majority are under-trials. While this being the case, candidates with criminal records or who contested from jail form 50% of the House of People of the Parliament elected in the recent Parliamentary Elections i.e., in 2019. In fact, the chances of winning for a candidate with criminal cases in the Lok Sabha 2019 elections were 15.5% whereas for a candidate with a clean record it is 4.7% and the elected candidates only if they are sentenced for any offence for more than two years, they will be faced with immediate disqualification or vacation of their seat. Without proper representation for the prisoners, any election conducted by suppression of almost 4 lakh voices can never be termed as fair election. This is a sheer violation of Human Rights, Fundamental Rights, Basic Structure and other International Agreements which when failed to be upheld by the Courts renders it as violation of Article 51 of the Constitution of India.

Courts must come to the rescue and deviate from its previous judgments and hold that possibility of misuse or lack of resources to ensure conduct of elections for prisoners is not a plausible ground to disentitle them from their right to vote. India just like the other Western and European Countries have to become more progressive and march forward to ensure that the right to vote is granted to all prisoners without any classification.

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533 2002 (3) SCR 924
536 https://factly.in/voters-right-to-know-trajectory-of-law-on-the-disclosure-of-candidates-criminal-antecedents/
537 Lily Thomas Vs Union of India ((2013) 7 SCC 653)
538 Promotion of International peace and security
THE CONTRADICTORY NATURE OF REFUSAL TO LICENSE/DEAL IPR AS AN ANTI-COMPETITIVE AGREEMENT

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ABSTRACT

In this paper the researcher will explore the conflict and nexus between intellectual property protection and competition law and how the goals of both these laws converge under the same umbrella of consumer welfare, however, their processes and short-term goals are conflicting and often lead to problems such as overlapping jurisdictions, opposing precedents and the like. The intellectual property regime is definitely pro-competitive even though it may seem statically non-competitive due to the weightage given to an inventor’s rights. In the long run, technological progress contributes far more to consumers’ welfare than does the elimination of static efficiencies caused by non-competitive pricing.

India is in the nascent state of its administration of competition laws. There are substantial amount of cases that have come before the Indian competition authorities (CCI) and courts. There are not adequate precedents and jurisprudence that is available in India for directing the Indian authorities and courts regarding the interface between intellectual property and competition in the country. It thus, becomes essential draw a comparative analysis with the jurisprudence of the United States.

Thus, the researcher will also explore the dealing of such nexus in other jurisdictions and the principles laid down by TRIPS, and then give relevant suggestions for India for a better regime to harmonize the two sets of laws.

Keywords: IPR, Competition law, India, USA, anti-competitive agreements

INTRODUCTION

Why there is a clash in jurisprudence

Intellectual Property Rights involve endowment of exclusive license to the right holders to so as to exploit the outcome of their creations for a limited period of time. Section 3(5) of the Competition Act excuses rational use of creations and inventions like these, from the purview of competition law and it is specified that reasonable conditions required for guarding of such rights would not appeal to Section 353. But Section 4(2) says that activities by enterprises that shall be treated as exploitation will be held to be correspondingly applicable to IPR holders as well. Section 3 prohibits anticompetitive practices, but this prohibition does not restrict “the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights” which have been conferred under IPR laws like Copyright Act, 1957, Patents Act, 1970, the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999), The Designs Act, 2000 and the Semi-conductor Integrated Circuits Layout-Design Act, 2000. It means that an IPR holder cannot put any unreasonable conditions while licensing his intellectual property which will be considered as violating the competition law. It includes any restrictions between the licensor and

the licensee to restrict production, distribution, refusal to deal, exclusivity conditions, restricting quantities and prices, patent pooling and tie-in arrangements. In such cases the competition commission can pass a variety of orders like cease and desist, changes to the licensing agreements as it deems fit. However, the problem arises because “reasonable conditions” has not been demarcated anywhere, and thus, it is implied that unreasonable conditions that are assigned to an Intellectual Property Right will attract Section 3.540

Other points of clash include Compulsory licensing, which forces IPR holders of certain rights to give up their exclusive right in the name of public interest and the Essential Facilities Doctrine which imposes a duty upon firms controlling an “essential facility” to make that facility available to their rivals.541

However, the other side of the coin is that a different kind of awareness is necessary in cases where the integrated firm has an unassailable upstream position, i.e., there is no likelihood of competition struggle in the upstream market. That might happen, for instance, if the firm has exclusive control over a unique, irreproducible asset such as crucial intellectual property or an essential natural resource. Competitors in the downstream market are unavoidably reliant on the upstream monopolist. That, in turn, means that they are not truly independent downstream competitors. In other words, if the integrated firm is allowed to refuse to deal, it can eliminate its downstream rivals, leaving a single firm in both the upstream and downstream markets. If the integrated firm is coerced to sell its input at the monopoly price that an unintegrated firm would charge, then there may be a monopoly upstream and a competitive market downstream. But creating some competition in the downstream market may be of little or no benefit as long as there is an upstream monopolist. Thus, regulation is needed to be undertaken reluctantly when there is no possibility of competition in the upstream market, as was said by Carl Shapiro, faculty at Berkley University.542

Need for clarity
All these concerns have an antagonistic effect on the incentive to invent as grant of intellectual property right is a mode of providing incentive to the inventor for his invention. However, without this incentive, inventor will not be able to appropriate the full value of his invention because of “free riders” problem attached with intellectual property due to its specific nature.543 In the deficiency of any such incentive by the state, the individual will keep the invention to himself or have no encouragement to invent because such inventions require labor, skill and capital.

Competition law is a tool for promoting social welfare by deterring practices and transactions that tend to increase market power.544 Competition law aims at maintaining allocative as well as productive efficiency in the market. Productive efficiency refers to production of output at the lowest conceivable cost and allocative


efficiency refers to optimal allocation of resources to their most valued use.

An appropriate address of the rudimentary nature of intellectual property rights and competition law discloses that both aim at creating competence in the market. In the long run, both have the intention of consumer welfare. It is relevant to note that intellectual property does not have much marginal cost, and the major cost incurred is due to research, development and invention of new technologies along with some expenditure of bringing these technologies into the market. Thus, absence of monopoly rights and other issues raised regarding intellectual property in the competition law regime, might disallow the inventor to recover cost of research and development and thereby discourage investors to invest in bringing such new technologies. This will have the effect of dynamic inefficiency of the market and a subsequent decrease in competition.

Thus, intellectual property regime is definitely pro-competitive even though it may seem statically non-competitive due to the weightage given to an inventor’s rights. In the long run, technological progress contributes far more to consumers’ welfare than does the elimination of static efficiencies caused by non-competitive pricing. From an economist viewpoint, intellectual property law is principally concerned with the provisions of adequate ex ante incentive (and increasing competition in innovation markets), while competition law is primarily concerned with ex post incentives (and increasing competition in product markets). Debra Valentine stated, both are deviating tracks to a same goal. There exist various technologies which may be termed as alternatives for the purpose of conferring effective constraints to effective exclusive type conduct of the IP right holders. Like, in the case of Microsoft, copyright over Windows exists with Microsoft Corp., a very well-known and successful popular operating system for the Intel based computer system. In this case since there exists alternative operating systems such as Mac, OS, etc., the possession of IP over Windows and its exclusivity with Microsoft Corp. do not give market power to Microsoft Corp. it shall be noted that what plays effective role in giving monopoly over market power is the application of entry barriers, and not the IP right, hence shifting the balance of competition in favour of Microsoft Corporation. Hence, Monopolistic positions in relevant market structure, if have to be attributed to grant of IPR, can be only when there exists no alternative technology in the market for attaining the same objective, and that also must be done after considering the balance of convenience between the rights of consumers and the rights of inventors, taking into account the need for incentive for new technologies and inventions.

Thus, a balance is to be maintained between both, as is often attempted to be achieved through trade-offs.


547 Microsoft Corp. v. Commission of the European Communities, T-201/04, 2007 ECR II-1491.
Indian Jurisprudence on the nexus between competition law and IPR

Whether IPR is a self-sustained code and immune from application of competition law

It has been recently contended in a move by IPR owners to resist the application of Indian competition law to IPR on the ground that each IPR statute is a “self-contained code” and competition law may not be the appropriate remedy for a right created by each of them. The Supreme Court of India has discussed the term ‘self-contained code’ in several judgments and held that the subsequent conditions need to be ascertained for a self-contained code:

1. It is a complete legislation for the purpose for which it was enacted;
2. It provides for all possible situations that may arise in relation to that purpose;
3. It contains an adjudicatory machinery;
4. It provides for an appeal;
5. It contains provisions for offences;
6. It contains comprehensive provisions pertaining to investigation, inquiry, and trial for offences; and
7. It gives power to duly authorized officers to search, recover and arrest, and record statements of witnesses.

The literal meaning of a self-contained code is a law that is complete and exhaustive. While some of the criteria set out by the Supreme Court of India are met by various provisions of India’s IPR laws, it is clear that the Patents Act, 1970, the Trade Marks Act, 1999 and the Designs Act, 2000 have not fulfilled all the conditions set out above. Such legislation, though dealing with the creation and maintenance of IP rights, fails to tackle the existence of such rights in the market, where they must co-exist with other rights and the economics of supply and demand. There is no common theme in the entire regime and neither do any of the IPR laws expressly include functioning of the Competition Act, thus, IPR does not have immunity from competition law.

IPR under the purview of Competition Act

As one pharmaceutical industry expert lamented, “owing to the blanket exemption under Section 3(5), the square peg of any anti-competitive practice tethered to the use of IPRs must now be brought through the round hole of “abuse of dominant position” under Section 4.”

Section 3(5) is integrated in the Competition (Amendment) Act, 2007 to deal with intellectual property and anticompetitive practices. This provision generally excludes IPR protection, but this is subject to “reasonable” condition and the unreasonable conditions or abuse of Section 3(5) is incorporated in the Competition (Amendment) Act, 2007 to deal with intellectual property and anticompetitive practices. This provision generally excludes IPR protection, but this is subject to “reasonable” condition and the unreasonable conditions or abuse of

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548 Micromax Informatics Ltd., In re, [2013] CCI 77
550 Supra
552 Supra
554 Supra

PIF 6.242

www.supremoamicus.org
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dominant position will attract Section 3. However, this section relates only to arrangements amongst parties.

Exclusions from the applicability of Section 3 have been given to those persons that are pursuing protection of their intellectual property rights as well as contracts for the export of goods. However, the CCI would still be authorized to investigate the rationality and reasonableness of the restraint while exercising intellectual property rights.557

Abuses are explained in section 4 as follows:

- Imposition of unfair or discriminatory conditions on price
- Limiting or restricting the production of goods or services or market
- Restraining or confining technical or scientific development to the prejudice of consumers
- Concluding of contracts subjective on the condition of acceptance by other parties or supplementary obligations which have no use or no connection with such contracts.
- Denying market access in any manner
- Using dominant position to protect or enter into another market

The merger or forming consortiums for R&D may also affect effective competition. The exclusive licensing and cross licensing may give rise to competition issues in the case of grant back clause and market dominance. Patent pooling can be another restrictive practice which may be used to facilitate price collaboration.558

However, it is important to differentiate such abuses from normal exercise of an intellectual property right.

The conflict between Competition law and IPRs came even during the time of Monopolistic and Restrictive Trade Practices Commission (MRTF Commission, predecessor to the Competition Commission) in the case of Vallal Peruman and Others versus Godfrey Phillips India Limited559. The commission observed: “Trademark owner has the right to use the trademark reasonably. This right is subject to terms and conditions imposed at the time of grant of trademark. But it does not allow using the mark in any unreasonable way. In case, trademark owner abuses the trademark by manipulation, distortion, contrivances etc., it will attract the action of unfair trade practices.” While bestowing the goods for sale in the marketplace or for advancement thereof, the holder of the trademark certificate misappropriates the same by manipulation, distortion, contrivances and embellishments etc. so as to deceive or confuse the consumers, he would be baring his own self to an action of indulging in unfair trade practices.

The MRTP Act also governed this relation and tried to balance IPR and competition laws.

IPR in Anti-Competitive Agreements
Intellectual property rights may conflict with Section 3 as they are assets that can be

558 Raju KD, Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India, Intellectual Properties
dealt with under agreements between entities and can affect competition in an adverse and appreciable way.

IPRs have a fundamental nature of protecting the rights of an inventor however, they may have to be revoked or compromised in the interest of the general public and the interest of the market.

However, to find a nexus between the regimes, Section 3(5) of the Act declares that 'reasonable conditions as may be necessary for protecting' any IPR will not attract s. 3. The expression 'reasonable conditions has not been defined or explained in the Act.

In other words, licensing arrangements probable to affect unfavorably, the rates, quantities, quality or varieties of goods and services will fall inside the outlines of competition law as long as they are not in reasonable association with the bundle of rights that go with IPR. For example, a licensing agreement may comprise of some strains that negatively impact competition in a goods markets due to its effect on division of the markets among corporations that would compete using diverse technologies. Similarly, an arrangement that efficiently amalgamates the Research and Development activities of two or only a few enterprises that might believably engage in Research and Development in the pertinent field may damage competition for development of new goods and services. Exclusive licensing is another category of possible unreasonable condition. Instances of arrangements comprising of exclusive licensing that might raise anti-competition concerns contain cross licensing, by parties collectively possessing market power, grants, and acquisitions of IPRs. A few such practices are described below:

(a) Patent pooling is a restrictive practice, which will not constitute being a part of the bundle of rights forming part of an IPR. Patent pooling takes place when the enterprises in a manufacturing industry agree to pool their patents and decide not to grant licenses to third parties, and simultaneously fix quotas and prices. They may earn supernormal profits keep new participants out of the market.

(b) Tie-in arrangement also another restrictive practice. A licensee may be mandated to particular goods (unpatented materials, e.g. raw materials) solely from the patentee, thus barring the opportunities of other producers.

(c) Arrangement requiring loyalty even after patent expires.

(d) there could be a clause, which restricts competition in R&D or prohibits a licensee to use rival technology.

(e) A licensee may be subjected to a condition not to challenge the validity of IPR in question.

(f) A licensee may require to grant back to the licensor know-how or IPR acquired and not to grant licenses to anyone else. This is likely to augment the market power of the licensor in an unjustified and anti-competitive manner.

(g) A licensor may fix and limit the prices of the invention at which the licensee can sell.

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561 FICCI Multiplex Association of India v United Producers Distribution Forum (UPDF), Case No. 1 of 2009.
(h) Excessive royalty by a dominant player in the market with regard to patents.\textsuperscript{562}

Thus, it can occur in forms of all sorts of anti-competitive agreements and needs to be restricted, however, such restrictions must not be applied per say and the rule of reason should be allowed to prevail as the intention of the inventor plays a very important role. To put this into perspective, a re-read of all these forms of agreements may also lead to the thought that such agreements may take place to protect the intellectual property of the inventor who has invented his labor, skill and capital in these inventions and thus, needs to recover the costs and sustain himself.

Any more restriction than what is absolutely necessary may de-incentivize such inventors and their investors.

Conflict on Jurisdiction

In Amir Khan Private Limited versus Union of India\textsuperscript{563}, FICCI filed information against united producers/distributors forum (hereinafter called as UPDF) and others for market cartel in films against the Multiplexes. In order to increase their income, UPDF refused to deal with multiplex owners. Multiplex business is 100 percent dependent upon films. So this is refusal to deal and thus, by nature anti-competitive. The UPDF and others have almost 100 percent share in Bollywood film business. UPDF was indulging in limiting/controlling supply of films in the market by refusal to deal with Multiplexes. It is violation of Section 3(3) of Competition Act 2002. CCI prima facie investigated and noted that there is anticompetitive agreement and in addition, there is abuse of dominant position. So CCI directed Director General (hereinafter called as DG) to inquire into the matter. DG inquired into the matter and submitted a report that there is cartel. CCI issued a show cause notice. UPDF instead of answering to show-cause notice, the complainant approached the Bombay High Court. UPDF contended that films are subject to copyright protection\textsuperscript{564}. Therefore Copyright board has the jurisdiction to deal with matter. Furthermore, contended that for exclusive license, only remedy is compulsory license available under Copyright Act. So the petitioner challenges the action taken by the CCI due to its deficiency in jurisdiction. Though, the issue was discussed earlier in Kingfisher v. Competition Commission of India.\textsuperscript{565} However, considering the importance the issue, Bombay High Court deliberated the impugned case and its issue in great detail. The court adjudged that Section 3(5) provides that Section 3(1) shall not do away with the right to sue for infringement of patent, copyright, trademark etc. All the defenses which can be taken up by the copyright board can also be raised before CCI. Competition law does not bar application of other laws. Matter is sub-judice before CCI.

Jurisprudence on the nexus in other jurisdictions

Background in International Law

TRIPS can be recognized as \textit{grundnorm} in respective of international law in regard to governance of intellectual property right issues. It played significant role in harmonizing and standardizing intellectual property rights. It also provides provisions regulating IPR in context of competition policy providing larger market and

\textsuperscript{562} Micromax v. Ericsson, Case No. 50/2013.

\textsuperscript{563} Supra Note 2.

\textsuperscript{564} Section 13(1) (b) and 14(1)(d)(ii)

\textsuperscript{565} Writ petition number 1785 of 2009, Vodafone International Holdings BV v Union of India, 2009 (4) Bombay Cases Reporter 258 (DB).
consumer welfare interests. In pursuance of the same, it provides taking of apt measures, otherwise in coherence with the broader agreement, for preventing the abuse of IPRs by right holders that pose restraints on trade or have potential to adversely affect the international transfer of secrets and technology.\(^{566}\)

It very well recognizes the fact that there might be some competition restraining IPR licensing practices that may adversely affect trade or impede the transfer of new technology.\(^{567}\) To prevent such violations and circumvention of fair competition policies it authorizes the participating member States to take measures so as to prevent or control the abuses, provided, strictly, that such measures are in no manner inconsistent with the TRIPS agreement.\(^{568}\) Further, the objective of Article 6 of the TRIPS Agreement is to provide for another important aspect of competition i.e exhaustion of rights. It aims to balance the rights, liabilities, and duties under the respective domains.\(^{569}\)

To promote interface of IPR and Competition policies, TRIPS permits national authorities to issue compulsory licenses, which in turn permits the domestic use of respective IPRs by parties other than the original right holder of the IPR\(^{570}\). It authorizes non-commercial government uses in national emergencies; however, such authorization shall be subject to judicial review.\(^{571}\) Article 40 of the TRIPS determines the anti-competitive licensing practices or conditions. It specifically bestows discretionary powers on the member states to specify intellectual property practices which amount to abuse in their state legislature.\(^{572}\)

The essence of TRIPS Agreement in respect of IPR and competition interface can be enumerated as the following three guiding principles:

a. It is domain of each member State to formulate and reserve its own IPR related competition structure and policy framework.

b. There has to be consonance in respect of the TRIPS Agreement, in respect of IP safeguard, and the national IPR related competition policy.

c. The priority target shall be those practices which aim to restrict the dissemination of protected technologies.\(^{573}\)

Jurisprudence in USA

‘Antitrust law in general and the Sherman Act in particular are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.\(^{574}\)

The US antitrust law bars particular business practices that adversely impact the competition in the market. Section 1 of the Sherman Act prohibits persons making a concerted effort to enter into agreement, contracts, and combinations in restraint of trade. But an individual person can refuse to deal with someone without being in

\(^{566}\) Article 8.2, TRIPS Agreement.
\(^{567}\) Article 40.1, TRIPS Agreement.
\(^{568}\) Article 40.2, TRIPS Agreement.
\(^{570}\) Article 31, TRIPS Agreement.
\(^{571}\) Article 31(b), TRIPS Agreement.
\(^{572}\) Article 40(2), TRIPS Agreement.
\(^{574}\) United States v. Topco Assocs., Inc., 405 US 596 (1972)
violation of the first provision. This antitrust principle was predominant from 1919 with the judgment of the US Supreme Court in Colgate case. After this case, the practice is called the “Colgate doctrine.” This doctrine permits a non-monopolistic manufacturer to choose the parties with whom he wants to deal. But there is a possibility of resale price maintenance (RPM) by such monopolist and eventually refuses to deal with traders who may refuse to agree to the price maintenance. In this context, the Supreme Court reexamined the “Colgate Doctrine” in Russel Stover Candies Inc. v. FTC. This decision headed to the “rule of reason” standard in judging RPM policies and progressively eliminating the “Colgate doctrine.” It is thought-provoking to examine the patent protection setting where the patent holder refuses to deal in the backdrop of antitrust provisions. The US provision on the subject is contained in 35 U.S.C. § 271(d) which provides that: (d) No patent owner who may be eligible for relief for infringement or contributory infringement of a patent can be deprived of relief or deemed guilty for misuse or illegal extension of the patent right due to having done one or more of the following:

• Derived revenue from actions which if done by another devoid of his approval would create contributory infringement of the patent. • Licensed or authorized someone else to do acts which are if done without his approval would lead to contributory infringement of the patent. • Sought after application of his patent rights against infringement or contributory infringement. • Refused to license or use any rights to the patent. (Or) • Given license subject to conditions of any rights to the patent or the sale of the patented product on

the attainment of a license to rights in another patent or procurement of a separate product, unless, in tat situation, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

In A&M Records, Inc. v. Napster, Inc., case, it was held that one of the typical element of copyright is the right to control the development of a derivative market by refusing to license copyright. Although it is probable that one-sided refusal to license copyright may lead to misuse of claim but the principle hypothesis is that the want to exclude is a presumptively effective business justification. Likewise, unilateral refusal to license diagnostic software is not to be considered an antitrust violation. However, in Blonder Tongue Labs. v. Univ. Illinois Found., it was held that the patentee can refuse a license however, it must not permit him to increase the monopoly of the patent by the beneficial attachment of conditions to its use. In Eastman Kodak Co. v. Image Technical Services, Inc., also it was ruled that power added by certain natural and legal advantage such as a patent, copyright, or business acumen may lead to liability if ‘a seller exploits his dominant position in one market to expand his empire into the next’. Thus, USA also has a harsh regime to disallow any anti-competitive agreement. However, it is pertinent to note that the US Jurisprudence is clear and does not have problems of confusion of jurisdiction regarding these matters.

Analysis and Conclusion

The lacuna in Indian law lies mainly due to the multiple application of jurisdictions

575 United States v. Colgate & Co., 250 U.S. 300 (1919)

576 Supra Note 20.
amongst statutes and thus, a confusion in the objectives aimed for. Though the overarching goal of the statutes regarding IPR and Competition law are the same, their applicability and adjudication differ and thus, the issue regarding the nexus between both must be carefully dealt with and clarified by the legislature to avoid discretion and overlapping decisions. This will save time and also be in consonance with the principles of natural justice due to the absence of arbitrariness and speedy disposal, once specific guidelines regarding the same are framed.

This paper deals mainly with Section 3 of Competition Act and IPR, but as mentioned above, Section 4 also have a major applicability in this nexus. There is existing jurisprudence on that matter but further suggestions can be made by future researchers on that account.

India should also develop such guidelines for better management of a largest market economy in the world. The exhaustion of IP rights to be reiterated in domestic laws so that parallel import of technologies can take place without violating patent laws. The interventionist approaches like IMS Health and Magill to be taken rather than the US approach like in the Trinko in refusal to deal cases. The enforcement policies must have a direct connection with economic policies and developmental goals of developing countries. It may differ from economy to economy and blanket imitation of US and EU policies and implementation in India is not going to work properly.

The guidelines developed by the US and EU in dealing with IP and competition issues can be used as a base on the background of TRIPs Agreement in order to deal with anti-competitive practices in technology licensing and transfer. More guidance is required in terms of legislative framework on the backdrop of available jurisprudence in the US and the EU which can be helpful in IP and competition policy formulation in countries like India.

In my opinion, though like the US we should also be cautious of the competition violations and protect against it, we should also remember that India is a developing country and in need of more incentivization to inventors and investors in our country, and thus, this difference in need of the countries must also be realized while clarifying the provisions under these laws, as intellectual property also has major pro-competitive effects when analyzed in trade-offs.
EVOLUTION OF IDEAS OF JUSTICE

By Harshitha Ulphas
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Abstract
In today’s day and age, and in a scenario like ours, everyone is entitled to their opinions and they also have a right to express those opinions, even though the expression of the same may be contrary to the popular opinion or belief. The same goes with Justice. The meaning, definition and expectations of justice have never been the same for everyone at any given point, these have also changed and evolved with time, and even the people living in the same age/ era have never really shared an unanimously agreed idea of justice. With this paper, the author aims to identify the various ideas of justice that have existed over a certain period of time. The paper seeks to do so, with the help of poetry named ‘The Rime of the Ancient Mariner’ as a central theme, and has opinions of various philosophers, spread over a large period of time, explain what idea of justice (with respect to animal rights) they would have stood for, done on the basis of the reading by the author. The philosophers that the paper includes are: Pythagoras, Protagoras, Marcus Tullius, Thomas Hobbes, Immanuel Kant, Jeremy Bentham.

Introduction to the Author of ‘The Rime of the Ancient Mariner’: Samuel Taylor Coleridge
He was an English poet, critic, and philosopher, who lived from 1772- 1834. He was a poet, literary critic, and philosopher, who was considered as a pioneer of the Romantic Movement, along with his friend, William Wordsworth. Romantic Movement was an artistic, literary and musical movement that began in Europe, in the late 18th century. The movement is characterized by emotion and individualism, and it glorifies the past and the nature. The main poets under the movement were, William Wordsworth, Samuel Taylor Coleridge and Robert Southey.

Samuel Taylor Coleridge’s famous works are The Rime of the Ancient Mariner, Kubla Khan, Biographia Literaria, or Biographical Sketches of My Literary Life and Opinions, is an autobiography in discourse by Samuel Taylor Coleridge, which he published in 1817.

Summary and Plot of ‘The Rime of the Ancient Mariner’:
The Rime of the Ancient Mariner is a lyrical ballad by Samuel Taylor Coleridge which begins with the introduction of the ancient mariner, who at the wedding, stops a guest and without any introduction, begins to tell his tale. The ballad is essentially the conversation between the mariner, and a guest at the wedding.

The Mariner’s tale begins with how the ship leaves the harbor and begins to sail, and when a strong wind blows, they start sailing towards a place with snow, mist, glaciers, and extensive cold. According to the tale, the place that the ship was stuck in, was a very cold and lonely place, with no trace of any person, or any animal also, for that matter.

The Mariner states, that when him and his fellow sailors weren’t expecting any company, an albatross, flew in to interrupt the pristine lifelessness of that place. The sailors consider the coming of the albatross as a good omen, as after its coming, a new wind rose and this wind propelled the ship in the right direction.
Every day, the albatross would appear, and would fly along with the ship, while it sailed. But, as the other sailors cried in dismay, the mariner shoots the albatross, the reasons of both, being unexplained. The sailors at the beginning condemned the mariner due to the killing of the albatross, but later, as the clouds cleared and the mist reduced, the sailors were convinced that the albatross was the cause of the misery, and that its killing was justified. But later, when the crew of the ship ran out of food and water supplies, they thought that the spirit of the albatross followed to trouble them. Thus, as a mark of punishment and penance, the dead albatross was hung around the mariner’s neck.

Since, the ship was trapped in the ocean, and the sailors could not drink that water, most of them began to die. The mariner was surrounded by some dead and some very weak sailors, and in this state of mind, he tried to pray, but failed. It was only in the moonlight, after enduring the horror of being the only one alive among the dead crew that the Mariner noticed some water snakes swimming beside the ship. At this moment he became inspired, and had a spiritual realization that all of God’s creatures were beautiful and were supposed to be treated with respect and appreciation. With this realization, he was finally able to pray, and the albatross at that moment, fell from his neck and sunk into the sea.

The mariner falls into a stupor and when he wakes up, he finds himself safe and in another ship. The Mariner concludes his tale by explaining that as he travels from land to land he is always plagued by that same compulsion to tell his tale, that he experiences a peculiar agony if he doesn’t give in to his urge to share the story, and that he can tell just from looking at their faces which men must hear his tale. He ends with the explicit lesson that prayer is the greatest joy in life, and the best prayers come from love and reverence of all of God’s creation. Thus he moves onward to find the next person who must hear his story, leaving the Wedding Guest “a sadder and a wiser man.”

**Ideas of Justice:**

**Pythagoras (Ionian Greek Philosopher):**

In Pythagoras’ opinion, the killing of the albatross would not be justified in any given scenario, as he was a central figure of animism, he advocated against the mistreatment of animals and also urged respect towards. Though, the killing of the albatross was under the conditions, that have not been very clearly explained, but, considering that the bird was harmless, the killing of the same for whatever reasons, is not justified, and the act is that of cruelty, which is worthy of moral objections against mistreatment of any living being, for any reason, whatsoever. He believed that all souls were deserving of the same treatment, he also believed that the soul was immortal and went through a series of reincarnations.

**Protagoras (pre-socratic Greek philosopher):**

Protagoras was of the opinion that ‘Man is the measure of all things’. Though this opinion is of his stirred a lot of controversy,

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according to Plato’s interpretation of what Protagoras said, there is no absolute truth but that which individuals deem to be the truth. Thus, according to him, the killing of albatross would be justified, if the man, that is the sailors in this case, thought that the killing of the albatross was needed, it would be considered right, also, later when the mariner concludes, that all creatures of God are deserving of appreciation, even that is justified, as in Protagoras’ opinion, whatever man deems to be truth is the truth.

Marcus Tullius Cicero (Roman Statesman)
After the news about Pompey’s death arrived, Caesar was made the dictator and he could make peace and war on his own initiative. In retrospect, Cicero was of the opinion that “once a single man came to dominate everything, there was no longer any room for consultation or for personal authority, and finally I lost my allies in preserving the republic, excellent men as they were.”

Thus, in a way, he criticized Protagoras’ opinion that men were the measure of all things. Therefore, if man were the measure of everything, it would be equivalent to one man dominating everything. Thus, according to my understanding of Cicero, he would condemn the killing of the albatross.

Thomas Hobbes (Political Realist)
Hobbes’ political theory stated that a society shall be secure only if, it was at the disposal of an absolute sovereign. Thus, according to his social contract theory, no individual can hold rights of property against the sovereign, and that the sovereign may therefore take the goods of its subjects without their consent. In his book, ‘Leviathan’, Hobbes published his doctrine of the foundation of states and legitimate governments and creating an objective science of morality. It demonstrates the necessity of a strong central authority, to avoid discord and war. Thus, according to Hobbes’ if the killing of the albatross was valid according to the Leviathan, the act of the Mariner could be justified, whereas, if the act was to be prohibited according to the same, the killing of the albatross would not be justified, even if the subject, that is, the bird in this case, was capable of giving consent.

Immanuel Kant (German philosopher in the Age of Enlightenment)
Kant believed that reason was the source of morality. Thus, if the reasons to kill the albatross were convincing, then, maybe, according to him, the killing would be moral. But, when he says that one shall not be used as a means to achieve anything, but only as an end, the killing of the albatross for reasons whatsoever, becomes unjustified. Thus, his philosophy can be subject to philosophical dispute, as using one as a means to achieve something may be a reason, which shall have the capacity to act as a source of morality.

Jeremy Bentham (1748-1832)
He was an English philosopher, and is regarded as the founder of modern utilitarianism. The fundamental axiom of

his philosophy was the principle that the greatest happiness of the greatest number is the measure of right and wrong. Thus, if the killing of the albatross gave greater happiness to a greater number, the killing was just. But, amongst advocating for individual and economic rights, and separating the church and the state, he was amongst the early advocates of animal rights, thus, whether the killing was just or not, under this premise, may oppose the fundamental axiom of his philosophy. Because, he argued that the ability to suffer, not the ability to reason alone, should be considered as the benchmark, if reason alone were the criterion to determine who ought to have rights, human infants and adults with certain forms of disability might fall short, too. Therefore, under this premise, the killing would be unjust. While under his fundamental axiom, it had a chance to be just, when the greater number of sailors were happier due to the killing of the bird.

Conclusion:
Thus, in lieu of what T.S. Eliot says in his play named ‘Murder in the Cathedral’, that human kind cannot bear too much reality; and since reality shall differ from person to person, we shall honor all opinions, while it has been absolutely left upon us to determine our belief. At the same time, we must also ensure, that the idea of justice that a certain demographic seems fit, must not be entirely different for each other when seen individually, as a stark difference or too varied an opinion may make it hard for a standard justice system to deliver/administer the justice to different people, who have entirely different ideas of justice, which consequentially may result in lesser satisfaction and faith in the judiciary of a country.

THE KILLING OF GENERAL SOLEIMANI: AN INTERNATIONAL LAW PERSPECTIVE

By Ishaan Banerjee and Yash Singhal
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The killing of the Iranian Major-General Qasem Soleimani had stunned the world. Iran had rallied on a war-cry and relations between the United States (US) and Iran have currently stooped to an all-time low. The US argues that the strike was conducted to stop ‘imminent’ terror attacks. The relations have been further aggravated by the pulling out of the US from the Iranian nuclear deal and its arguments that Iran, and Soleimani in particular, were supporters and sponsors of terrorism. This article shall study and critically analyse the killing of Soleimani through the lens of international law in order to determine whether it was lawful or not. It shall explore questions such as whether the strike was anticipatory self-defence and whether it could be used as a justification or would this be an assassination or targeted killing under international law? The arguments shall follow two basic principles of international law: opinio juris and jus cogens. Opinio Juris is part of customary international law which literally translates to ‘opinion of the law’ and is accepted as evidence of the legal obligatory practice of the State under rule of law as provided in the Nicaragua case584. Jus Cogens is the principle of international law established by a treaty and its provisions are obligatory on the international community. Any treaty violating this peremptory norm shall be declared void.

Introduction

On 3rd January 2020, a United States (US) drone carried out a strike on Iranian Major General Qasem Soleimani of the Islamic Revolutionary Guard Corps (IRGC), and commander of Iran’s special operations force: Quds Force, killing him and nine others,585 which included the deputy chairman of Iraq’s Popular Mobilization Forces and the commander of the Kata’ib Hezbollah, Abu Mahdi al Muhandis, who had been designated as a terrorist in the US.586

The brazen attack in Iraq near the Baghdad International Airport created furore all over the world. Many criticised the US, saying that it had breached international law and that it had given way to a potential war.587 Iran promised repercussions of the assassination of the second most powerful man in Iran, only behind Ayatollah Khamenei, the Supreme Leader. The US defended its actions, claiming that there was an ‘imminent threat’ of further attacks on the US and its interests in Iraq.588

588 Elliot Setzer, White House releases report justifying Soleimani strike, LAWFARE, (Feb 14,
Thus, followed repeated attacks on each other's interests and personnel from both sides, while their leaders also traded words. These circumstances call for a re-evaluation of the principle of self-defence under international law. These acts by the US raise several questions, being firstly, whether the US could use anticipatory self-defence as a justification. Secondly, is the targeted killing using a drone strike lawful? Could this be termed as an 'assassination'? Is the argument of self-defence justified?

Oil Platforms Case 2003

During the Iran-Iraq war of 1980-1988, the tension between the two countries extended to the US Navy launching attacks on the Reshadat and Resalat oil complexes in 1987 which resulted in the complete destruction of one of the oil complexes.

In 1988, US ships launched another attack on two Iranian complexes and almost destroyed one of them. The US government justified its acts under the pretext of self-defence in response to Iranian actions against American resources.

The case was heard in the International Court of Justice where Iran claimed justice under the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran. Article I of the Treaty established peaceful relations among the two countries, based on which Iran accused the US of breaching the terms of the treaty. The US sent a letter to the UN describing the attack on oil platforms as a mode of self-defence to deter Iran from misusing the platforms for 'offensive military purposes'.

Was this anticipatory self-defence? Did the strike fulfil the conditions of the Caroline Test?

Anticipatory self-defence is considered permissible to conduct the first attack in case a nation faces an imminent threat. The
Caroline test, which is a part of customary international law, determines the conditions for conducting pre-emptive strikes to counter an imminent threat. The attack must be about to occur and a nation should be left with no choice to pursue alternate methods and must not have any time to deliberate on the issue, further the need for self-defence should be ‘instant and overwhelming’. Therefore, force used as anticipatory self-defence is something which is so extreme that it should be used as a last resort. What matters here is the question of whether the threat of Soleimani attacking the US or its interests in the Middle East was so imminent that they had to kill him? It seems unnecessary that the US had to take such drastic measures. It could have explored options such as informing the Iraqi authorities to arrest Soleimani. Such was the haste, that the administration did not even consult Congress.

Alas, this question remains vague for now. However, we can certainly establish that the intelligence for the killing would be the sole deciding factor to determine whether the attack was indeed imminent or not.

The Bethlehem Doctrine: An arbitrary justification of the US
The Bethlehem doctrine was established by Daniel Bethlehem, who served as Legal Adviser to Israeli Prime Minister Benjamin Netanyahu. The Bethlehem doctrine, although not a part of international law, is still important to examine in this debate as it is an intense version of the Caroline test. This doctrine propounds that all States have the right of pre-emptive self-defence against an imminent attack. This doctrine has its own different meanings of ‘imminent’, one that the governments of the US, UK and Israel have given as justification for carrying out drone strikes on non-State actors such as terror groups like Al Qaeda. This doctrine does not define ‘imminent’ to be ‘soon’ or ‘in the near future’. If a government receives intelligence that a suspect is planning something, and it has no details about where, when or in what kind of manner, it would still be considered an imminent attack and he can still be killed since he was involved in planning. The whole doctrine is full of arbitrariness on the face of it. There would be no check on arbitrariness, and anyone suspected even a hint would be killed. If the US acted under this doctrine, it would be in contravention of international law, since the meaning of imminence in this doctrine is flawed.

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596 Merrit Kennedy, Jackie Northam, Was It Legal For The U.S. To Kill A Top Iranian Military Leader?, NATIONAL PUBLIC RADIO, (Jan 4, 2020, 8:02 AM ET), https://www.npr.org/2020/01/04/793412105/was-it-legal-for-the-u-s-to-kill-a-top-iranian-military-leader.

597 Ibid.


601 Supra note 16.

602 Ibid.
Were the conditions of Necessity and Proportionality fulfilled?

Enshrined within the Caroline test, one must take a look at the concepts of necessity and proportionality. Necessity means carrying out a particular act of self-defence is absolutely necessary when there are no other legal means to protect itself or its interests. Proportionality refers to the moral principle that the response to the threat must be proportionate, and not in excess of the threat. If the US was surely short on time and had no other alternative, then this action may be necessary. It seems like this action may not have been the last resort as the US might still have had time to consult the Iraqi government or the Congress. Talking about proportionality, the attack, if done through anticipatory self-defence, must have been proportionate to the imminent threat. According to US officials, Soleimani was planning to attack embassies. However, scholars have contended that proportionality will not apply in cases of attacks that have not yet occurred since a proportionate response to the attack which has not occurred cannot be determined.

Was there an ‘Armed attack’ by Soleimani or Iran?

Prima facie, it does not seem that Soleimani’s killing was in response to an armed attack. There had been no armed attack immediately preceding the killing of Soleimani. Reports claim that Trump had ordered the killing as a counterattack for the attack on the US embassy in Baghdad. If one were to look at whether the attack on the embassy qualifies as an ‘armed attack’, whatever view he takes would be debatable since there is no legal definition of armed attack given in statutes or by the Courts. In the Nicaragua, Oil Platforms and the Armed Activities cases, the International Court of Justice used Resolution 3314 to give some meaning to ‘armed attack’. It stated that ‘armed attack was the most grave form of the use of force’. Thus, an armed attack and a legitimate response of self-defence will depend only on the facts and circumstances of the case, which can only be verified with complete details from intelligence and conclusive evidence.

Was this a ‘Targeted Killing’ using drones?

There is no legal definition of a ‘targeted killing’ under international law, however, states have often conducted killings with the excuse of stopping potential attacks. In these types of killings, there is always a predetermined target and a plan for carrying out the killing.

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603 Supra note 9.
604 Ibid.
605 Supra note 15.
606 Alex Pappas, Trump tells Fox News' Laura Ingraham 'four embassies' were targeted in imminent threat from Iran, FOX NEWS, (Jan 2020), https://www.foxnews.com/politics/trump-tells-laura-ingraham-four-embassies-were-targeted-imminent-threat-from-iran.
607 Supra note 9.
608 Supra note 2.
The legality of these drone strikes is debatable, with academics contending that these strikes are unjustified as they can only be used in self-defence or with the Security Council’s authorisation, which the US does not seek and instead uses pre-emptive strikes to stop its ‘imminent threats’. It says that it is currently involved in a non-international armed conflict with terror groups and that the use of force is inevitable in times of conflict and it does not matter whether one is acting in self-defence or not.\textsuperscript{613} Ambiguities surround this; some say that this conflict is not equal to the status of ‘armed conflict’ and even if so, it does not allow for targeting and assassination of enemy leaders, rather it asks for the usage of peaceful means such as arrest or detention.

Drone strikes have been frequently conducted against non-state actors such as terror groups. Soleimani was not a non-state actor. He was on the way to relay a message to the Iraqi Prime Minister\textsuperscript{614} and was commanding the Quds Force and the IRGC, which are parts of the Iranian state.

Can this be termed ‘assassination’?

The general definition of assassination can be regarded as an unlawful killing in times of peace. But some say that assassinations are unlawful in both peacetimes as well as in armed conflict. They say that the Iranian attacks were intermittent and limited, rather than being direct and full-fledged.\textsuperscript{615} If Soleimani was heading forces against the US, under the laws of war of the Geneva Convention, he and his forces would be considered legitimate targets, whether the war was declared or undeclared. Thus, the claim of the US, that they are in an armed conflict with such terror groups, would have to be applied to Iran. Again, this depends on the evidence that the US had and whether the Iranian attacks were as grave and frequent as claimed by the officials so as to constitute an armed conflict.

Other possible arguments by Iran

Soleimani- A terrorist with no fair trial?

US airstrikes killed Soleimani outside the Baghdad International Airport. Every individual has a right to a fair trial under Article 10\textsuperscript{616} of the Universal Declaration of Human Rights, 1948 and Article 14\textsuperscript{617} of the International Covenant on Civil and Political Rights. Soleimani was designated a terrorist without any trial at the International Court of Justice or the United Nations to provide him with a right to defend himself against the charges.

On the contrary, the US government undertook steps that fall under the provisions of the draft Comprehensive Convention of International Terrorism defining the crime of terrorism under Article 1(a)\textsuperscript{618} as any person committing an unlawful and unjustified act of causing death. The treaty has still not been formed

\textsuperscript{613} Ibid.

\textsuperscript{614} PM: Iran’s Soleimani was in Iraq to discuss relations with Saudi, (Jan 6, 2020, 11:55 AM), https://www.middleeastmonitor.com/20200106-pm-irans-soleimani-was-in-iraq-to-discuss-relations-with-saudi/.


\textsuperscript{616} The Universal Declaration of Human Rights, 1948 art. 10.

\textsuperscript{617} International Covenant on Civil and Political Rights, 1976 art. 14.

and thus is not applicable in international law.

**Innocent until proven guilty**
The innocence of the individual is maintained until the contrary is proved through the procedure established by law as per Article 11(1)\(^{619}\) of the Universal Declaration of Human Rights. In this case, there was no conclusive evidence to prove the guilt of the General in any manner whatsoever by the US government before taking a decision to take his life. The act was *per se* unlawful in nature due to the mutual agreement\(^{620}\) signed between Iraq and the USA in 2008 to prevent attacks on other countries from Iraqi soil.

**International Protection on foreign soil**
Soleimani was a diplomat on Iraqi soil as he visited the place in his official capacity for official work. Article 1(b)\(^{621}\) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, to which the US is a party,\(^{622}\) states the meaning of internationally protected persons for the purpose of the Convention as ‘any representative or official of a State’ which includes an army general within its ambit. Article 2 \(^{623}\) of the Convention provides for the act of intentional commission of an offence against internationally protected persons, which makes the act of a drone strike an offence by the US government, meant to intentionally kill the army general by attacking him as provided in Article 2(1)(a)\(^{624}\). It is an arbitrary action driven by accusations from the US government that stand invalid unless the contrary is proved. The burden of proof lies on the one initiating an attack violating the model code of peaceful relations among the nations. The Iraqi authorities had the duty to protect the internationally protected person from any sort of attack that also involves aerial attacks from the US government.

**Other justifications of the US**

**Lack of Trust with International Law**
The US took swift actions on the information about the strategy of the Iranian General and wanted to retaliate against the rising attacks on the United States forces by Iran and Iran backed militias according to the Trump administration. The US took such extreme measures without relying on international law that involves time-consuming procedures proving detrimental to a nation in cases of individuals being successful in their mission.\(^{625}\)

The concerns over the nature of international law are restricted to soft law with no real legal obligations on the member states to abide by them but there is a choice for these states to ratify the laws through consolidation with domestic laws and provide enforceability to them. The lack of trust with international law is a long-standing debate among the nations and it shall stay until measures to bind all nations with the laws are achieved.

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\(^{619}\) The Universal Declaration of Human Rights, 1948 art. 11, cl.1.


\(^{621}\) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 art. 1, cl.b.


\(^{623}\) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973 art. 2.

\(^{624}\) Id at art. 2, cl. 1, sub cl.a.
Conclusion

The case is more or less on the side of Iran. *Prima facie*, it seems that the US did have other options than resorting to a drone strike but the final call has to be taken by using the intelligence that was available at the time with the US about Soleimani and the imminent attacks. It all comes down to whether the intelligence actually suggested that the attacks were imminent or not. Even if it is proved that this strike was illegal, Iran would not be immensely benefited from it since the concept of self-defence is constantly evolving to keep up with modern threats and international law as a soft law can only succeed so long as to regulate such relations by imposing sanctions and claiming damages, which do have lasting effects, but nations find ways to circumvent and cope with the effects of such sanctions. A nation’s standing in the UN and its power also matter in influencing accountability for actions. International law and relations will always evolve and perhaps have some ambiguities to it, with the world facing new kinds of threats in future, where nations may not rely on or think about international law when taking actions to protect their interests. These threats could be undetectable up until the last second, and may be grave, requiring nations to take adverse actions. Public opinion of States may also play a part in determining these actions. In the future, these actions will be regulated and motivated more by international relations and the balance of power, with international law having a lesser role to play.

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THE ROLE OF DISABILITY LAWS IN BRINGING SOCIAL TRANSFORMATION IN INDIA

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ABSTRACT
The largest democracy of the world, with a Constitution that enshrines principles for social democracy, India has till recent times failed to recognise the persons of disabilities as individuals with equal rights. This paper analyses the effective of the Rights of Persons with Disabilities Act, 2016 which was enacted as a rights-based legislation in line with the provisions of the UNCRPD in enabling social transformation. This paper is a combination of doctrinal and non-doctrinal research. The observations made in this paper is based on the data collected through questionnaire method involving 20 respondents in Kothrud, Pune district in the State of Maharashtra. It also analyses the past and present approach of the Indian society towards persons with disabilities and analyse whether this change was brought in with the help of the social and human rights model of disability.

Keywords: Social Transformation, Disability, Social Model of Disability, UNCRPD, RPwD Act, 2016.

INTRODUCTION
Social change occurs when there is change in the existing social structure of a society including its patterns of social relations, established norms, and roles. Of the many ways that can bring in this change, legislations are considered as the most important by many reformers especially the 19th and 20th century social reformers in India. This idea is philosophically rooted in the writings of jurists who considered law as a vehicle of social engineering. These jurists considered legislations as a tool to challenge ideas of autonomous and apolitical law. The Indian social reformers believed that legislations can reduce the existing inequality in the society and thereby release a person from the constraints of tradition or of the particular social group he belonged. However, according to Yehezkel Dror, a law attempting to bring in change in the behaviour and attitude of the society faces many problems. He, however, argues that law can bring about indirect social change indirectly by shaping the social institutions, by providing institutional framework and also by creating legal duties. While one looks into whether a law has brought in social change, it is important to analyse not only the content of the law, but also how it is put into use by the agents of change strategically and meaningfully depending on the social, political, economic and cultural background of each State. So, it is essential to understand whether a particular legislation has brought in the change it intended to create, in order to understand the effectiveness of the same.

The Rights of Persons with Disability Act, 2016 (hereinafter the RPwD Act) is the outcome of India’s international obligation which arose after the signing and ratification of the United Nations Convention on the Rights of Persons with Disabilities, 2006 (hereinafter UNCRPD).

625 P.I. Bhatt, Law and Social Transformation in India, 45, (1st Ed. 2012).
627 Ibid.
629 Ibid.
UNCRPD is an outcome of decades of efforts of United Nations (hereinafter UN) along with various disabled people’s organisations and States to change the existing social structure towards persons with disabilities.\(^{630}\) It aims at transforming the society by challenging the fundamental traditional concept of regarding the persons of disability as objects of charity. It aims at a paradigm shift in both national and international levels by recognising that persons with disabilities are subjects of rights capable of enforcing them and not people in need of charity or medical intervention or protection of State. It intends to bring about social transformation by recognising persons with disability as an equal who were systematically marginalized and excluded from society. For this, UNCRPD calls up every State party to work with and for the persons with disability based on the social model of disability and rejects the traditional medical model. The medical model of disability does not distinguish between impairment and disability and treats the persons with disability in a paternal or custodial attitude. The social model recognised by the UNCRPD highlights the difference between impairment and disability and states while impairment is any physical, mental or sensory deficiency in a human body, disability is the result of a society’s reaction to such impairments.\(^{631}\) The ratification of UNCRPD in 2007 by India, created an obligation to enact a legislation that gives effect to the rights enshrined in it and hence RPwD Act was enacted with an aim to bring about strategical difference in the lives of the persons with disability by essentially changing the society.

This article analyses the effectiveness of the Rights of Persons with Disabilities Act, 2016 which was enacted as a rights-based legislation in line with the provisions of the UNCRPD in enabling social transformation. It also analyses the past and present approach of the Indian society towards persons with disabilities, and analyse whether this change was brought in with the help of the social and human rights model of disability. The article proceeds as follows: Part I briefly overview the capability of the social model of disability in bringing social transformation. Part II understands the evolution of recognition of disability rights in India and briefly outlines the RPwD Act. Next, Part III analysis certain sections of the RPwD Act in relation to the social reality. The observations made in the Part III is based on the data collected through questionnaire method involving 20 respondents in Kothrud, Pune district in the State of Maharashtra. The respondents included 12 men and 8 women. The respondents belonged to an age group of 18-50 years. The respondents were graduates and above and about 70 % of them had locomotor disability and 30% had communication disability. About 40 % of the respondents were disabled by birth and 20 % had disability because of accident. Finally, Part IV briefly illustrates how the certain judgements by the Indian judiciary has been in line with the social model of disability and how the judiciary can facilitate social transformation.

## I. SOCIAL MODEL OF DISABILITY AND SOCIAL TRANSFORMATION


Traditionally all States, implicitly or explicitly, considered people with disabilities as not deserving of the same rights as others. Persons with disabilities have traditionally been viewed by the society as vulnerable population who should be protected by the State rather than been considered as equal to other people. The cultural and social values of different societies also was a factor in which the disabled people were treated. International law recognized disability as a human rights issue only recently UNCRPD aimed to bring about inclusion rather than segregation of the persons with disability not only in their local community but also in the international community. UNCRPD with its 50 Articles and its optional protocol represents a paradigm shift in international law. From the concept that persons with disability are in need of charity, medical intervention or protection of the State, the inception of UNCRPD brought in a concept that they are human beings having rights and capable of enforcing the same.

The world after the Second World War saw a significant rise in the number of human rights treaties signed and ratified internationally which aims to protect and preserve the rights of the human beings in order to protect their, dignity and right to life along with preventing exploitation, discrimination and inhuman treatments. In this light, the UNCRPD is the first human rights treaty in the international legal framework that addressed the needs of the persons with disability. And it is this Convention that had been the driving force for many States to take necessary steps for the same. So, the question whether mere ratification of a Convention makes a significant difference arises. The ratification of a human rights treaty is, in itself, is directly related to the human rights record of the country. Governments often ratify human rights treaties as a matter of window dressing, radically decoupling policy from practice and at times exacerbating negative human rights practices. It is overly optimistic to expect that ratifying a treaty will produce an observable direct influence in a country. Authors have identified that an effort should be made to enhance the monitoring and enforcing the treaty obligations so that the ratification of a treaty alone will not be used by States to exhibit that there is real improvement in the lives of citizens. Arlene S Kanter in her book has observed that by nurturing the application of the norms contained in the human rights treaties, like the UNCRPD, States have the opportunity to address the injustices to which people with disabilities have been subjected from time immemorial and this cannot be achieved without a combined effort by the State actors, the NGOs, and the people. So, unless an effective participation is done by the State parties, mere ratification of a human rights treaty does not make difference in the social structure of the society. The same is applicable to a legislation enacted by the legislators in a country. However, they do play a major role in initiating transformation in the society.

636 Supra 9.
637 Supra 8.
The social model of disability that the UNCRPD is based upon views disability as a “part of diversity of human experience” and places responsibility on society to remove physical, social, environmental, attitudinal or legal barriers that prevents the persons with disability in accessing facilities required to ensure their participation in society\(^{638}\). In the social model of disability, the society as a whole has to play a significant role in accommodating the people with disabilities in its various programs, facilities and services. UNCRPD recognizes certain fundamental principles including respect for dignity, individual autonomy, non-discrimination, full and effective participation, accessibility, respect for difference and equality of opportunities. Elif Celik\(^ {639}\) states that the CRPD acknowledges the subject of disability as someone who is different in abilities yet complex, interdependent and social rather than a mythic, self-sufficient superhero. UNCRPD also recognises right of persons with disabilities to access justice, right to liberty and freedom to enjoy and exercise all recognised rights. All States have an obligation to provide an adequate standard of living to the people with disability, to ensure their full and equal participation in public life, to ensure equal opportunities in all matters of employment, education, health and other related services including rehabilitation and social protection. States are to identify and eliminate barriers that prevent the persons with disabilities from accessing public transport or other facilities and services including information and communication facilities. Children and women with disabilities are specifically mentioned in UNCRPD and the States are to ensure the protection of their rights. UNCRPD does not create new human rights but rather elaborates existing international human rights law on persons with disabilities creating a “hybrid convention” containing both civil, political and social, economic rights.\(^ {640}\) Certain authors\(^ {641}\) also identify a concept of disability human rights which focuses not on the ability or inability of a person but on their talents and hence recognising their worth and dignity. The human rights model suggests that it is the individual’s own right to develop or recognize such talent and the State has to provide for adequate opportunities that ensure her participation and inclusion in the society. The human rights approach propagates that the rights enjoyed by an individual “derives from common humanity, rather than actual or potential contribution to the society in reciprocity for benefits, or even from shared vulnerabilities as members of the community”\(^ {642}\). The lack of a clear and explicit definition of disability under the UNCRPD helps an interpretation of its provisions based on both social and human rights approach. Thus, in a nutshell, the central theme that emanates from UNCRPD and its obligations is the need to ensure the full participation of people with disabilities and the related organizations in all spheres.

\(^{638}\) Ibid at 48.
of life, in the development of both national and international laws, policies and programs and also in the assessment, planning and implementation of social, economic, developmental and even humanitarian strategies. UNCRPD illuminates existing human rights obligations towards the persons with disabilities and creates an obligation to execute them to overcome the invisibility of persons with disability under the existing legal regime. The social model of disability as provided under the UNCRPD calls for a transformation of the society’s attitude towards persons with disability in both national and international level. Thus, UNCRPD is a human rights treaty with great potential for bringing social transformation. The provision that each State party has to bring about a legislation in order to give effect to the rights protected under UNCRPD and that each State has to take active steps in protecting such rights and remove barriers that prevent the full inclusion of persons with disability in the society, helps bringing about substantive changes in societies. However, as Arlene S Kanter has observed, States have an opportunity to address the injustices to which people with disabilities have been subjected from time immemorial by nurturing the application of the norms contained in the human rights treaties, like the UNCRPD, and this cannot be achieved without a combined effort by the State actors, the NGOs, and the people. So, unless an effective participation is done by the State parties, mere ratification of a human rights treaty does not make difference in the social structure of the society. This paper analysis the effect of social model of disability as enumerated in UNCRPD in the Indian society.

II. EVOLUTION OF DISABILITY RIGHTS IN INDIA
Traditionally, Indian societies has been believed disability to be a divine punishment or karma for acts of sinful acts in the previous life. This belief has guided society’s treatments towards persons with disability. Manu Smriti and Dharmashastra had called upon people to support and look after the weak and disabled and according to them, such actions ensure a place in heaven for the people. However, it has been the responsibility of family to look after the persons with disability. The joint family system that prevailed in the traditional Indian society provided the required economic, psychological and physical support to persons with disability. Being cohesive and stable social units, families provided essential physical, emotional and economic support along with a sense of security to its members, especially the ones with disability. The economic and social status of the family, thus, affected the well-being of the persons with disability. During the colonial era, the capitalistic ideology of British empire which considered the persons with disability as unproductive and incapable for the development of the economy of the country was passed on to the Indian society. The idea that persons with disability are to be rehabilitated, passed down through the charity organisations, influenced the Indian elite exposed to western education and was practiced even after the independence.

The Nehruvian model of a welfare state was the guiding principle behind all the social

643 Supra 7.
644 A Dalal, Living with a Chronic Disease: Healing and Psychological Adjustment in Indian Society, 12
645 Ibid.
646 Ibid at 72.
development programs after independence and under this model, the government was responsible for providing and implement rehabilitation programs. This led to the setting up of various centralised and institutional rehabilitation centres in the first two decades of independence. These centers viewed disability as a disease, with an emphasis to cure or correct it to let them be as normal as possible.

Despite the aims of the Constituent Assembly in bringing about social revolution in the existing social structure in India with the help of the Constitution and drafting the same with this hope and aspiration, the Constitution did not mention about the people with disabilities in it. In the right to equality wherein the Constitution prohibits discrimination on the basis of gender, race, religion, sex, language, it does not explicitly prohibit discrimination on grounds of disability. The right of persons with disabilities to respect, dignity, and freedom is thus part of only Article 21 of the Constitution. It took almost 45 years after the independence, that the Indian legislators and government took initiative to enact a law for the rights and protection of the persons with disability.

The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) 1995, though been a significant step by the Indian legislature, was based on the medical model of the disability and hence failed to bring about substantial changes in the society’s attitude towards persons with disability. The persons with disability, hence, continued to be marginalized, exploited and considered as an object of charity in the Indian society.

The RPwD Act, 2016:
The ratification of the UNCRPD by India, made it pertinent for the government to enact a law which was in consonance to its provisions. The RPwD Act, 2016 provides that the Government shall ensure by taking appropriate steps that persons with disability enjoy a life with dignity, right to equality and respect for his or her own integrity equally as others. The Section 3 prohibits discrimination on the ground of disability. The government has to ensure measures to prevent inhuman treatment, abuse or exploitation of persons with disability and to remove barriers that prevent them from enjoying their full participation in the society. The government under the Act has also to ensure reasonable accommodation to all persons with disability in the country. The RPwD Act has tried to inculcate the idea of social model of disability in the Indian society through it and to ensure that the persons with disability will be considered as right holders and not objects of charity. The Act is however, often criticised that it fails to completely understand the approach of UNCRPD and fail to adopt the UNCRPD’s social model of disability within a human rights model rather than welfare model.

However, one significant change that can be accorded to the drafting of the Act can be that it involved the active participation of the persons with disability and their organisations in the consultation and drafting proceedings. This have helped the understanding to a large section of the people to understand that they are right holders, not merely recipients of services, treatment, or charity.

The effective implementation of the UNCRPD and the RPwD Act have the potential to bring about significant changes in the society. How the RPwD Act have achieved this in its four years of enactment can be understood in the following sections.

III. ANALYSIS OF THE PROVISIONS OF THE RPwD ACT

The 2011 Census provides that there are over 21 million persons with disabilities in India. This constitutes about 2.1% of the total population and among this about 12.6 million are men and 9.3 are women. Article 15 of the Constitution provides that no discrimination shall be made on the basis of sex. The Directive Principles of State Policy also provide that State shall afford equal treatment to both men and women. The 1995 Act which had about 28 chapters did not however, address the problems of women with disabilities. The 2006 National Policy for persons with disability endorsed the need for special attention to women with disabilities, especially in areas of special education, vocational training and employment. The RPwD Act calls for both State and Central governments along with the local authorities to take measures to ensure that women and children enjoy rights equally with others.

The majority of women with disabilities in India suffer from triple discrimination of being female, being disabled and being poor. They are socially invisible category. As Amita Ghai in 2002 stated, even the feminist movements in India had failed to recognise the plight of the women with disabilities in India. Women continue to face discrimination as there is a lack of accessibility to public places which hampers their overall development. The 8 women respondents in the present study have unanimously stated that they were discriminated on basis of their gender and disability in many occasions. Many of these discriminations was mainly in relation to their right to make decisions and personal choices.

➢ ACCESS TO CRIMINAL JUSTICE:

Article 39A of the Constitution provides for right to free legal aid for persons in need. In light of this right, the Section 12(d) of the Legal Services Act, 1987 provides for free legal aid to persons with disabilities and persons with mental illness. This ensures that legal assistance to persons with disability are provided, irrespective of their disability and economic status.

The premises of the Supreme Court of India are accessible for persons with disabilities. This enables the people to approach the highest court for enforcing their rights. The Criminal Procedure Code (hereinafter Cr.P.C) prescribes that those people who are unable to communicate or understand the proceedings against her should be provided with interpretation facilities. Section 119 of the Evidence Act also provides that persons who are not able to communicate orally in open court shall be allowed to make their statements either in writing or with the help of signs. The Ministry of Social Justice has also appointed an Office of Chief Commissioner for Persons with Disabilities and this officer has powers of civil court also facilitates access to justice.

648 Available at http://censusindia.gov.in/Census_And_You/disabled_population.aspx Last seen on April 7, 2020.
The Criminal Law (Amendment) Act, 2013 and also the POCSCO Act, 2012 mandates that distinct type of support has to be provided for persons with disabilities, especially women. All these legal provisions intend to facilitate access to justice to the persons with disabilities and to make sure that their rights are protected by law. However, the question whether these were able to actually change the lives of persons with disability is to be analysed.

Social Realities:
Human Rights Watch, an international organisation, in its 2018 report “Invisible Victims of Sexual Violence: Access to justice for Women and Girls with Disabilities in India”\(^{652}\) reported that women and girls with disabilities face high risk of sexual violence in India as it makes it more difficult to escape the threat. The report studied 17 rape and gang rape cases and concluded that even after 5 years of Criminal Law (Amendment) Act, 2013 the girls and women with disabilities continue to face significant barriers to justice. As per the report the government lacks system to register such attacks.

The distinct type of support that the Criminal Law (Amendment) Act, 2013 and the POCSCO Act, 2012 mandates is not available in India\(^{653}\). This is mainly because the police are not sensitive to the issues of the persons with disability and are not familiar with the rights available to the persons with disabilities. Another main reason for the lack of access to criminal justice is that the people are ignorant of their rights. As per the report\(^{654}\) of Human Rights Watch, 16 of 17 cases reported in India reflects the lack of information in an accessible format.

In the research conducted for the present study, about 8 respondents have been to police station to register complaints of various sorts and all the 8 respondents unanimously responded that the police officers were not sensitive to the needs of the respondents. One respondent was asked to wait for hours before he could see an officer. And respondents were of the concern that police officers did not inquire their complaints properly as they were not able to frequently visit the police stations with respect to the cases. Hence, even if it is for a small petty crime or for a serious crime, the police stations are not disability-friendly and the police officers are not efficiently trained to meet the needs of the persons with disability. There is lack of awareness among the public and the police related to the right to accessible information of the persons with disability. Unless, the persons with disabilities can be ensured that their rights will be protected through the system of law, and this been fully implemented, it is impossible to say that the legislation has brought in social transformation.

\(^{653}\)Supra 22.
\(^{654}\)Ibid.
\(^{655}\)Section 2 (c) of RPwD Act, 2016.
environmental, institutional, political, social, attitudinal or even structural. The UNCRPD and later the RPwD Act has recognised and acknowledged that unless these barriers are removed in schools, colleges, or other institutions, and in public buildings, public places and even in public transport, there will be no real change in the lives of the persons with disability.

The National Policy for Persons with disability, 2006 had provided that all schools are to be disabled-friendly by 2020. The National Building Code of India, 2009 had provided that accessible designs are to be made an integral part of building plans. The 12th Five Year Plan (2012-2017) had provided that transport facilities, government buildings and government websites are to be made disabled-friendly.

The Metro Stations are constructed in such a way that they enable access to the persons with disability. The schools and colleges are to compulsorily construct ramps and to have disability-friendly classrooms. Many schools and colleges have undertaken this step. The railway stations, are also slowly becoming disability-friendly with the availability of wheel-chairs and carts for the transportation of persons with disability. However, whether the law has brought in social transformation has to be analysed in light of the social realities.

Social Realities:
In the research conducted for the present study, all the 20 respondents had unanimously pointed out the lack of accessibility to public spaces. One respondent had recollected the incident wherein she was not allowed to enter a temple as the temple was not wheel-chair friendly. Another respondent recollected an incident wherein restaurant owners commented that restaurants are not hospitals for persons with disabilities to visit.

So even when there is construction of ramps, rails, accessible public transport and so on, the law has not reached into the grass-root levels trying to change the way people behave and think towards the persons with disability.

India’s first accessibility audit report in 2016 found no disabled friendly building in the country. This situation has improved a little after the initiatives by the government, however, the present study reveals that persons with disability still find the barriers hindering them from participating in the social life. And these barriers are not only physical, but also attitudinal barriers.

The 19 out of 20 respondents had recorded that one of the greatest problems they face every day is the lack of accessible public transport system, and the sympathetic stares they receive from strangers. All 20 respondents found it difficult to communicate and interact with the society as they viewed them sympathetically and not as persons with equal rights. About 6 respondents found it difficult to access educational opportunities. The 6 respondents were of the opinion that assistive teaching aids and accessible classrooms are to be made compulsory in all academic and research institutions.

About the working conditions and opportunities about 9 respondents found it extremely unsatisfied. And 12 respondents were extremely unsatisfied with public transport facilities and the social behaviour related to the same. The persons with locomotor disabilities were the ones who had more difficulty in accessing public spaces when compared to the other disabilities in the present study.

About 15 respondents were extremely unsatisfied about the availability and
conditions of accessible washrooms and toilets in their educational, work or residential area. With regard to the assistive technologies, about 12 respondents were extremely unsatisfied with the current availability of the same in public places. About 7 respondents were extremely unsatisfied with the announcement through audio-visual techniques. And One respondent answered that there were no audio-visual techniques available.

The present study, thus, throws light to the social reality that despite the small work done by the Government and the legislators, there are many numbers of people who face discrimination and exploitation because of lack of accessible environment.

- Political Rights: Legal position and government initiatives:
  The UNCRPD provides\textsuperscript{656} that the State Parties have to guarantee persons with disabilities to participate in political and public life and ensure their right to vote and be elected. The RPwD Act\textsuperscript{657}, thus provides for accessibility in voting to the persons with disabilities. In furtherance of this, the Election Commission had initiated steps\textsuperscript{658} to allow persons with disability to access this right. Under this initiative, the persons with disability have to register as a voter or elector with reduced mobility

The Election commission have directed every State commissioner to make the polling stations accessible and also to provide priority for a person with disability in casting his vote. In 2018 during the Telangana Legislative Assembly Elections, for example, the State Election Commission launched an App which facilitated Persons with disabilities to book transport to their polling stations and back and also to know more about the facilities available.

Social realities:

The right to be elected requires special mention as the Persons with Disabilities had raised a slogan during the drafting of the UNCRPD that no law should be made without listening to their needs and aspirations. In India, though a group of persons with disabilities and their organisation were duly consulted during the initial drafting of the RPwD, Act, India did not have a disabled legislator. Till now, we have had only about less than 10 politicians who have been disabled and elected to the legislative. In this, Mr. Jaipal Reddy who was the Minister of Science and Technology in the 2014 UPA government and Karunanidhi, the former Chief-Minister of Tamil Nadu are the only prominent leaders with disability in India. In 2014\textsuperscript{659}, Mr. Karunanidhi had stormed out of the Tamil Nadu Legislative Assembly stating that it is not accessible to people with disabilities as he was unable to carry his wheel-chair inside the building. Thus, there is a need for more people with disabilities to be elected to the legislative.

The disability rights activists claim that the initiatives taken by the Election Commission has not been implemented successfully all over the country. In the survey conducted for the present research about half of the respondents were unable

\textsuperscript{656} Article 29 UNCRPD.
\textsuperscript{657} Section 11 RPwD Act.

to cast their vote in the General Elections, 2019 and 4 out of the 5 respondents answered that it was due to lack of accessibility of the polling booths or stations that they were unable to cast votes. This points to the fact that there is lack of proper implementation of the laws and even the government initiatives in creating a disability-friendly environment to enable the exercise of one of the most basic right as an Indian citizen. The study reveals that there is lack of proper implementation of the RPwD Act and this has led to the continued discrimination towards the persons with disability and their exploitation in the society.

IV. JUDICIAL INTERPRETATION ON THE SOCIAL MODEL OF DISABILITY:
The judiciary have, with the help of UNCRPD, provided a broad interpretation to rights of disabled persons, even before the enactment of the RPwD Act. Briefly, three cases can help illustrate the approach of judiciary towards the social model of disability. One of the first cases which referred the UNCRPD was in 2009 wherein the Bombay High Court held that in the absence of conflict between an international law and municipal law, it can be read into Article 21 and can be made enforceable. The court, hence found that the dismissal of the petitioner who had kidney transplant on the grounds that the employer cannot accrue the monthly medical expense, is violative of the test of reasonable accommodation.

Another important decision by the judiciary wherein it paved path to the shift from the traditional model to the modern model as understood under UNCRPD can be seen in the judgment of the Supreme Court (hereinafter SC) in Suchita Srivastava v. Chandigarh Administration. Quashing the decision of Punjab and Haryana High Court which ordered for an abortion in a pregnant rape victim with an intellectual disability, the SC observed that court did not have the power to order abortion without the woman’s consent irrespective of disability status. It was observed that court cannot exercise parens patriae jurisdiction in the best interests of the woman who clearly wanted the child. This observation by the SC that the non-consideration of the opinions of persons with disability on the basis of promoting their bests interests is impermissible, reiterates the fundamental basis of the social model of disability.

The next important judgment by the SC was in Jeeja Ghosh v. Union of India, wherein the petitioner was disembarked from the flight on the directions of pilot, without her consent, because of her disability. The court held that the shift from sympathy to equality in the cases related to persons with disability, though formally recognised was not actually realised in India. The court held that the persons with disability should be able to enjoy their rights without discrimination on the grounds of their disability. Justice Sikri through his judgments have made it clear that the reality of the persons with disabilities has changed a little with the enactment of the RPwD Act and has ever since tried to create the reality envisaged in the Act through the judiciary. He also stated that no social change is possible unless the mindset of the people changes.

661 AIR 2010 SC 235 (Supreme Court of India).
662 Jeeja Ghosh v. Union of India AIR 2016 SC 2393(Supreme Court of India).
In Rajiv Rathuri v. Union of India the Court while discussing the accessibility requirements of persons with visual disabilities with respect to safe access to roads and transport facilities, also directed the University Grants Commission to constitute a committee to recommendations mandate inclusive infrastructure in schools and colleges as well to mandate a change in the teaching and examination structure in such schools and colleges.

The judiciary in Ranjit Rajak contributed to the expanding concept of life and personal liberty under Article 21 of the Constitution to acknowledge that there exists a duty of reasonable accommodation towards persons with disability. The court through its decisions in Suchita Srivastava, Jeeja Gosh has acknowledged the paradigm shift brought in by the UNCRPD and has observed that the medical model of disability and the paternalistic approach of the State attached to it, is in contrast to the underlying principles of the UNCRPD and hence the RPwD and they do not promote the interests of persons with disabilities. Judiciary being the beacon of hope for the common people in India, these decisions that accept the core principles of UNCRPD is a big step in facilitating social transformation in Indian society.

CONCLUSION
Outcomes for people with disabilities in India are not consistent with the aims of its disability legislation or its ratification of the UNCRPD. The Constitution lays responsibility of protection of rights and guarantees of persons with disabilities on States and hence there is a need to improve the institutional capacity of the State machineries to improve the services provided to them. The government should initiate efforts to bring about effective implementation of the provisions of the RPwD Act along with creating awareness campaigns among the public that persons with disability have equal rights and that their disability is not a ground for discrimination. Only this can help achieve full and equal participation of persons with disability in the society and unless this is achieved, the RPwD Act cannot be said to have achieved social transformation in its fullest sense. A provision in the RPwD Act providing for political reservations to persons with disabilities at least for the next 10 years will help in bringing about more representatives. Unless there is a proper representation of the persons with disabilities in the three organs of the government, the true aim of the disability law in achieving social transformation cannot be achieved. Judicial decisions like in V Surendra Mohan v. State of Tamil Nadu wherein the Supreme Court approved the rule of Public Service Commission that a person with more than 50% disability cannot be appointed as Civil Judge because of the nature of the job, defeat the purpose of the RPwD Act as they rely on the disability and not on the worth or talent of the person to understand his capability. People with disability have been living in a denial of right to life and person liberty in the past due to the inaction of the State of which judiciary is also a part and hence an integrated approach which takes into account the needs of persons with disabilities can only bring social transformation. Renu Addlakha and K Kannabiran, Disability-based Discrimination in India, 156, in, Disability, Rights Monitoring, and Social Change: Building Power out of Evidence (M Rioux, P C. Pinto and G Parekh, eds.) (2015).
Saptarshi Mandal\textsuperscript{666} has observed that there is enormous need for legal literacy on the issue of disability in India and that mere awareness generation is not enough. There is also an urgent need to create mechanisms that assist persons to undertake legal proceedings in cases where their rights are violated. Unless this is done, the law will remain as a “paper tiger”\textsuperscript{667}. Proper implementation of the RPwD Act, along with active involvement of the government and the executive is required to bring about real changes in the lives of persons with disability. First and foremost, step towards this should be understanding the needs of the persons with disabilities in the society.

The executive including the police officers and judicial officials are to be trained and made sensitive to the needs and requirements of the persons with disabilities to enable access to criminal justice. The public should be enabled training and students should be taught from lower classes to treat the persons with disability with respect and not sympathy.

Only a close-knitted work among the State machineries, the executive and the local administrative bodies like Gram Sabha or village panchayats, coordinating and implementing necessary policies for the benefit of persons with disability can only bring in social transformation in the Indian society. Though the adoption of RPwD Act, 2016 in India can be seen as a paradigm shift in the Indian legislative’s approach, unless the Indian society acknowledges and responds to its past mistakes towards persons with disabilities, an inclusive society which protects the rights of the persons with disability cannot be achieved.

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SURROGACY: IS INDIA HAVING A REGRESSIVE APPROACH TOWARDS IT?

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“Conception is a blessed event. Fertilization is divine intervention. The development of embryo is a miraculous encounter. The birth of a child is supernatural spiritual event.”

-Lailah Gifty Akita, Think Great: Be Great!

ABSTRACT
Surrogacy is a practice which enables a couple or an individual, unable to bear a child to experience parenthood. India is referred to as the hub of surrogacy. It is the most desired destination for those who want to undergo the procedure. There are two primary reasons for it. Each year numerous couples from abroad are attracted to India, firstly because the surrogacy procedure here is cost effective. Secondly, the surrogates are easily available. The prevailing poverty and desire to earn money has made the business of surrogacy run well in the country. The so-called surrogacy agencies too, play an important role in this. They are the prime liaisons between the commissioning parents and the surrogates, throughout the surrogacy procedure. However, with the recent developments in the Indian legislative front, there appears to be an attempt by the government to make commercial surrogacy illegal in India. A bill was passed in 2019 in Lok Sabha and is, at present, pending in Rajya Sabha, which aims at banning commercial surrogacy. This Paper mainly focuses on whether this legislative step of banning commercial surrogacy would be right for India. With briefly introducing what is surrogacy, the paper moves on to clarifying the meaning and concept of surrogacy. The paper also touches upon the aspect of surrogacy as seen in the ancient times. Thereafter, it discusses how the law relating to surrogacy emerged in India with various bills being proposed and judicial interpretations being done. The paper is concluded by putting forth the various points for criticism of The Surrogacy bill 2019 and some suggestions and recommendations for making the bill more inclusive.

1. INTRODUCTION
Scientific advancements have reached a new high over the ages. Developments are visible in every field whether it be as complex as data science or something as simple as a glue gun which goes unnoticed by most of us. Similarly, advancements have been made by the science fraternity in the biological and reproductive field as well.

Childbirth is a beautiful process. It is a privilege that nature has particularly bestowed upon females, the capacity to procreate and expand their clan. However, there are many couples in the world who are deprived of this joy. One in every four couples in developing countries is found to be affected by infertility. All over the globe, about 15% of the couples, of reproductive age, are affected by infertility. In India, primary infertility is estimated to range between 3.9 to 16.8%, because of

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668 Demographic and Health Surveys, in collaboration with WHO, 2004.
which couples face extreme emotional and psychological trauma.\textsuperscript{669} Thus, the urge for parenthood leads couples to take up alternate methods of having an offspring. Research in the medical field has led to the development of artificial techniques of childbirth, assisting those who are unable to get pregnant. Artificial Reproductive Techniques (ART), In-Vitro Fertilisation (IVF), Intra-Uterine Injections (IUI), etc are all the other alternate techniques that have gained popularity in the lieu of this urge to have a child. The World saw its first IVF baby in the 1978 in London and the second was born in our own country, India, on 3\textsuperscript{rd} October 1978, just two months after the first IVF birth.

Robert Edwards, a scientist in National Institute for Medical Research in London, was the first scientist to make fundamental discoveries on human egg maturation, working of hormones over their maturation, and at which point in time the eggs fertilize. It was in 1965 that, after several years of hard work, he succeeded. He found the right conditions to activate dormant and immature egg cells in vitro and promoted their maturation.\textsuperscript{670}

With such advancements, research and scientific growth, the concept of surrogacy has gained popularity and has become the next best alternative along with adoption to aid the childless couples. India is a billion-dollar industry for surrogacy. Couples from various parts of the world, flock to India, to make surrogacy arrangements. Surrogacy in India, with respect to costs involved, is cheap and surrogates are easily available.

2. **MYTHOLOGY AND SURROGACY**

- **Hindu Mythology**

The Anushasana Pava, section 49 of the Mahabharat states the six type of sons that can be classified as kins and kinsmen- “one’s own son; son born to one’s wife by an accomplished person; son born to one’s wife through another by payment; son of a remarried woman by her second husband or to a woman through niraoga (levirate) son born to the wife before her marriage; and son of an adulterous wife.”

Surrogacy as a practice can be traced back to the ancient times. The instances of the same can be seen in the epic of Mahabharat. Dhritarashtra’s wife Gandhari, was pregnant for more than a year, after which she gave birth to a mass of cells. Bhagwan Vyas found that there were 101 cells that were normal in the mass. These cells were then grown to full term, in vitro, out of which children were born (Kauravs). Not only do ancient Indian texts talk about birth through IVF but there are also examples of birth without a female.\textsuperscript{671}

Sage Gautam, from his own semen, produced two children- a son Krip and a daughter Kripi, who were both test-tube babies and Sage Bharadwaj gave birth to Drona (Dronacharya). The story of birth of

\textsuperscript{669} https://www.nhp.gov.in/disease/reproductive-system/infertility.


Drishtadyumn and Draupadi is even more interesting and reflects the supernatural powers of the great rishis. King Draupad’s enmity with Dronacharya resulted in a desired to have a son, strong enough to kill Drona. It is believed, Drupad was suggested Artificial Insemination Homologous (AIH) by a rishi, who even collected his semen for the same, however his wife refused to undergo the procedure. The rishi then put the semen in a Yajna-Kunda from which Dhrishtadyumn and Draupadi were born.672

- **Christian Mythology**

There were traces of surrogacy in Biblical times too. The Old Testament contains example of surrogacy. Abraham’s wife, Sarah, was infertile and so she commissioned her maid Hagar to bear a child with Abraham. Another example is that of Rachel. She was the wife of Jacob, who had no child for reasons of infertility. She commissioned her maid Bilhah to bear her a child with Jacob.673

- **Islamic Mythology**

In Islamic culture the concept of surrogacy is completely rejected. According to Islam and various Muslim Scholars, “Maqasid al-Shari’ah” or purposes of the Law lie with Protection of Religion, Life, Progeny, Mind and Wealth. The paramount necessities of human beings of protection, preservation and promotion are clearly being defined in this classification.

Since, Maqasid al-Shari’ah includes protection of progeny, treatment of infertility is preferred over surrogacy. Protection of progeny entails care for pregnant women and the health of the children and also preserves lineage. It is always preferred that a newborn be related to both his/her mother and father.

The concept of womb renting has gained popularity in the world; however, the Islamic culture and bioethics have not yet welcomed this practice. Surrogacy procedures require a donor sperm. This sperm, which is a foreign element, is then put in the uterus of a woman, resulting in the mixing of lineage. This procedure is considered as equivalent to disregarding Allah.674

3. **Surrogacy: Explained**

The word ‘surrogate’ was derived from the Latin word ‘Surrogatus’ which means substitute, a person who acts on behalf on another. It is regarded as one of the best methods to overcome both biological and social infertility. It helps in providing an opportunity to the intending couple to have genetically related child through artificial reproduction and in vitro fertilization. The concept of surrogacy is widely recognized throughout the world. It is considered as a boon for infertile couples as it gives them the hope of having a child.

The Surrogacy (Regulation) Bill, 2019, defines surrogacy as “a practice whereby one woman bears and gives birth to a child for an intending couple with the intention of handing over such child to the intending couple after the birth.”675

Blacks’ Law Dictionary defines Surrogacy as ‘an agreement wherein a woman agrees

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672 Surrogate Motherhood: History and Concept.
674 Sharmin Islam et al. Ethics of Surrogacy: A Comparative Study of Western Secular and Islamic

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675 The Surrogacy (Regulation) Bill, 2019.”

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to be artificially inseminated with the semen of another woman’s husband. The
are basically two types of surrogacy which are practiced in India:

i. Traditional/Natural/Partial surrogacy:
In this the surrogate mother donates her egg well as acts as the carrier for the embryo. Commissioning father donates his sperm to become the genetic father of the child. Generally, the surrogate is impregnated using a process known as Intra-Uterine Insemination (IUI) or In Vitro Fertilization (IVF).

ii. Gestational surrogacy:
In this the surrogate is not related to the child biologically at all. Her eggs are not used, and the embryo is actually created through a process called In Vitro Fertilization (IVF). In this process, the biological father’s sperm and the biological mother’s egg is used to create an embryo. The surrogate only acts as a carrier of this embryo.

Like in other countries, in India too, the following two types of surrogacy arrangements are being practiced:

i. Altruistic surrogacy: In this form of surrogacy, apart from necessary medical expenses, no financial rewards are given to the surrogate mother for her pregnancy or for relinquishment of the child to the genetic parents.

ii. Commercial surrogacy: In this form of surrogacy the surrogate mother does get financial rewards for carrying the child along with the necessary medical expenses she incurs.

4. Surrogacy Regulations in India

India is a surrogacy heaven. Couples from across the globe flock the country to arrange for a surrogate and fulfil their desire of a child. The primary reason for people coming is the easy availability of surrogates and cheap facilities. Anand, Surat, Bhopal and Indore are bustling centers for surrogacy where several American, Russian and British women come to fulfil their desire for a child.

The reasons for this this booming medical tourism are varied. Some couples come here as the treatment is extremely expensive in their own country or for some, it’s the laws of their country that do not allow for surrogacy. A report stated that an account of a 37year old Russian who came to Bhopal for surrogacy arrangement as the expense for surrogacy is prohibitive in her country, ranging between Rs. 15,00,000 to Rs. 20,00,000, as compared to Rs. 2,00,000 cost in Bhopal. Also, the lack of easy availability of surrogates provokes couples to come to India.

Currently, India is the only country where surrogacy is neither banned nor regulated. There exists no strict law that can effectively control the use and misuse of this practice of surrogacy in India. There is no check over any kind of exploitation of

677 Surrogate Motherhood- Commercial or Ethical, Dr. Ranjana Kumari, Director, Centre for Social Research (CSR).
surrogates. Even the courts have not comprehensively addressed the subject.

a) Judicial Enunciations:

- **Baby Manji v. Union of India**\(^{680}\)

  It was in 2009 that the first case of surrogacy surfaced on the floor of the Supreme Court. It is considered as a landmark case on surrogacy where the custody and motherhood of the baby was a question before the court.

  A Japanese couple came to India and entered into a contract of surrogacy pursuant to which Baby Manji was born. Mr. Yamada was the commissioning father. The Japanese Civil Code does not recognize surrogate children and so Mr. Yamada was refused by the Embassy a passport or visa in the name of baby Manji. He then filed for an Indian passport for the baby, but the baby could not be issued one as the Indian passport requires a birth certificate for its issuance. The birth certificate issuance procedure in India requires the name of both the parents in it. The baby was born via surrogacy and practically had three mothers-commissioning mother, anonymous egg donor and the surrogate. The authorities hence declined a birth certificate and consequently an Indian passport to Baby Manji.

  The baby’s grandmother fought the case for baby Manji. The court however, in this case, did not give any judgement but looped in the National Commission for Child Rights for further directions.

- **Jan Balaz v. Anand Municipality**\(^{681}\)

  Famously known as the German Couple case, a childless German couple had come to India and commissioned a surrogacy contract through which twins were born to them with the help of a surrogate mother and the Anand Infertility Clinic, Gujrat. Surrogacy as a means of parenthood is not recognized in Germany, following which surrogate born children are not recognized as German citizens. This law posed a significant barrier to the parents and to avoid any legal battle for immigration, the couple requested the Gujrat High Court to permit the surrogate children to carry Indian Passport.

  Yet again the question of natural mother came up. Since there were no laws regulating the practice of surrogacy, the courts were inclined to believe that the gestational surrogate was the natural mother who has even donated the egg. The court with respect to the intending mother, held that the intending mother has neither donated the ova nor conceived or delivered the babies and is just the wife of the biological father. The court further held that, in the absence of any legislation, she can never be treated as a natural or legal mother.

  Apart from these cases, two more cases came up in Mumbai, one in 2008 and the other in 2010, where two gay couples from Israel commissioned for surrogacy and after much legal struggle were able to take their surrogate children home, to Israel.

  The Indian courts, time and again, have been faced with this challenge of dealing with questions of citizenship, motherhood and immigration of the surrogate children.


\(^{681}\) Jan Balaz v. Union of India AIR 2010 Gujrat 21.
No concrete decisive steps have ever been taken by the judiciary in this regard. The Indian judiciary has not yet comprehensively addressed surrogacy, leaving the task to the legislature.\textsuperscript{682}

b) Legislative Perspective

India is the only country where surrogacy is neither banned nor regulated. No steps have ever been taken by the legislature to regulate the practice or direct the procedure. The result of the same is the creation of an open market for surrogacy where couples both, domestic and foreign, come frequently for commissioning surrogacy. This has led to increased medical tourism and a fair chance of surrogate exploitation. Keeping in view the recent emerging problems with regard to surrogacy, the Indian Council for Medical Research (ICMR) along with the Ministry of Health and Family Welfare, after many years of deliberations, formulated the National Guidelines for Accreditation and Supervision and Regulation of ART Clinics in India in 2005.

These regulations provide an easy guide to regulation of IVF and related technologies and also highlight the guidelines to regulate the practice of surrogacy. The major points that deal with surrogacy include\textsuperscript{683}.

i. A single contract will deal with the surrogacy arrangement between the parties.

ii. A proper financial support should be provided, to the surrogate child, in situations of death of either one or both of the commissioning parents, divorce before

iii. Taking the delivery or failure to take the child after birth.

iv. No surrogate should be allowed to undergo more than five pregnancies including her own children. A maximum of 3 embryos are allowed to be implanted.

v. A life insurance cover must necessarily be provided in the contract, for the surrogate mother.

vi. The surrogate child should be treated as a natural born of the commissioning parents without any requirement for adoption or declaration of guardianship.

vii. Only the names of the commissioning parents should be there on the birth certificate of the surrogate child.

viii. Right to privacy of the donor as well as the surrogate mother should be protected.

ix. Sex-selective surrogacy should be prohibited.

In the year 2008, the ICMR drafted the Assisted Reproductive Technologies Bill, 2008 to regularize and legitimize different forms of reproductive technologies which included commercial surrogacy as well. The reasons and need for bringing up laws relating to surrogacy had been elaborated in detail in the 228\textsuperscript{th} Law Commission report as well.

A number of provisions were incorporated in the ART Bill, 2008 that attempted as regularizing the practice of surrogacy however, the same was criticized by a large number of scholars on the ground that it promotes the interest of medico-business

\textsuperscript{682} Jasdeep Kaur, Surrogacy: A Paradox Regarding Motherhood Rights with Special reference to India, 2 THE LEGAL ANALYST, 113,119 (2012).

\textsuperscript{683} National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India,
lobby and does not provide adequate protection to the rights of the surrogate mother and children.684 The draft bill of 2008 was modified by introducing The Draft Assisted Reproductive Technology Bill and Rules, 2010. This new bill aimed at bridging the gaps in the 2008 bill. Later another bill, Assisted Reproductive Technology (Regulation) Bill, 2013 was drafted as well that dealt with surrogacy and surrogates in a little more detail, however all these bills never saw the light of the day and were not even tabled on the floor of the parliament bringing us back to square one with no actual regulations in place to regulate surrogacy.

- The Surrogacy (Regulation) Bill, 2016

It was only in 2016 that the government realized the need for making a specific legislation for surrogacy. The legislation aimed at banning commercial surrogacy. There was an evident increase in the reported cases of unethical practices, ill-treatment of surrogate mothers, desertion of children born out of surrogacy and import of human embryos and gametes.685 The Law Commission too in its 228th Report, suggested banning the practice of commercial surrogacy by passing a suitable legislation.

The statement of objects and reasons, of the bill, stated that it was

“Due to lack of legislation to regulate surrogacy, the practice of surrogacy has been misused by the surrogacy clinics, which leads to rampant commercial surrogacy and unethical practices in the said area of surrogacy. In the light of above, it had become necessary to enact a legislation to regulate surrogacy services in the country, to prohibit the potential exploitation of surrogate mothers and to protect the rights of children born through surrogacy.”686

Analysis: In-depth

An in-depth analysis of the bill shows that the bill proposes to allow altruistic ethical surrogacy. Any infertile Indian married couple between the age of 23-50 years and 26-55 years for female and male are eligible to get into the process of surrogacy. However, the bill requires any such intending couple to be married for 5 years before getting into any such contract and there should not be any surviving biological, adopted or surrogate child. The only exception is when the child they have is mentally or physically challenged or suffers from a threatening or permanent disorder with no permanent cure.

Any such child born through surrogacy will have the same rights as that of any biological child and the couple is not allowed to abandon the child born through surrogacy under any circumstances.

The bill favors and promotes ethical altruistic surrogacy and so requires the surrogate mother to be a close relative of the intending couple between the ages of 25-35. The clinics acting as intermediaries for such surrogacy contracts are supposed to maintain a record for about 25 years of every surrogate mother and child so born. The termination of such a pregnancy can only be commissioned by prior permission

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684 Das, supra note 12.
685 The Statement of objects and Reasons, The Surrogacy (Regulation) Bill, 2016
686 The Surrogacy (Regulation) Bill, 2016.
of the surrogate mother and on authorization of the appropriate authority. The bill talks about setting up of a National Surrogacy Board and State Surrogacy Boards. These boards are supposed to be the policy making bodies for the practice of surrogacy and there should be Appropriate Authority for the implementation body for the Act. The total number of members in these boards should be 24. The bill clearly specifies the members and process of creation of these boards.

The bill specifically requires the Magistrate of Class I, to pass an order concerning the parentage and custody of the child to be born through surrogacy and violation of any such provision as mentioned in the bill, practice of commercial surrogacy, exploiting the surrogate mother, abandonment of the surrogate child, sale of human embryo or import of embryo for the purpose of surrogacy shall be an offence punishable with imprisonment for a term of 10 years or more and fine which may extend up to 10 lakh rupees.687

- The Surrogacy (Regulation) Bill, 2019

The 2016 Surrogacy bill lapsed as the session of Parliament adjourned for the term. The same bill again, with no changes at all was tabled in 2019 on the floor of the Parliament. This reintroduced bill was promptly passed by the Lok Sabha and so was sent to the Rajya Sabha. The Rajya Sabha now plans to send the bill again to a Parliamentary Committee Panel for detailed analysis and so clear the passage to make it into a legislation.

5. CRITICAL APPROACH

Surrogacy should not only be looked at as a means to ensure the survival of the family name or legacy in India. It must be understood as a need or practice to resolve the complex psycho-social emotions of the intending parents and the socio-economic needs of the surrogate mother. It must be noted that a ban at the present stage may create many challenges, extortion by state authorities and push the business underground.

However, the Lok Sabha in the month of July passed the Surrogacy (Regulation) Bill, 2019. It is a piece of legislation aiming at a complete ban on commercial surrogacy, allowing only altruistic surrogacy in India. The bill is on its way to become the law of the land and it is presently pending in the upper house of the Indian Parliament, Rajya Sabha. The bill is considered as a progressive measure to curtail the exploitative practice of “womb renting” or baby outsourcing by the Indian government. Following are some points in the bill which require some serious reconsiderations:

I. Violation of article 21

We currently live in a world were medicine and healthcare practices are making strides through advanced technology. Hence for someone to be a child bearer, must undoubtedly be his/her personal choice. The sweeping ban on commercial surrogacy can be considered as much more regressive. It essentially denies women autonomy, control and privacy over their

own bodies and in the process, violates their fundamental rights.

The right to make reproductive choices has been recognized by the Indian courts to fall under “personal liberty” that is guaranteed by Article 21 of the Indian Constitution. These reproductive rights of women include the right to carry a baby to term, give birth, and raise children. Similarly, the Supreme Court in the Puttaswamy judgement also recognized the very fact that every person has a right to autonomy in taking decisions that pertain to their body. Therefore we can say that the Bill in the present form is creating unrealistic and violative approach because Surrogacy laws should eventually help the already traumatized intended couples and surrogate mothers, instead it is violating their rights and is also creating an impediment in the procedure.

The Supreme Court of India in the case of Suchita Srivastava v. Chandigarh Administration also recognized the right of every woman to bodily integrity especially with respect to decisions pertaining to pregnancy and abortion.

II. Inconsistent definition of infertility

The word ‘infertility’ defined in the Surrogacy (Regulation) Bill, 2019 is inconsistent with the definition given by WHO and also as in the ART (Regulation) Bill, 2014. According to the definition of ‘infertility’ given by the World Health Organization infertility means “a disease of the reproductive system defined by the failure to achieve a clinical pregnancy after 12 months or more of regular unprotected sexual intercourse”.

In India, infertility is considered a taboo. Due to infertility, a lot of agony and trauma is undergone by couples. Therefore, it is necessary note that this five-year time bar as notified by the government would only add to the adversity of the already distressed couple. The five-year waiting period is therefore vague, erratic and without any definable logic.

The Surrogacy (Regulation) Bill, 2019 disregards any other medical condition to be a reason to opt for surrogacy. According to the bill, infertility that is defined as failure to conceive, can be the only cause for entering into surrogate agreements. For example, there can be a situation where a girl is born without a uterus or has an underdeveloped uterus or have been suffering from repeated miscarriages, but these conditions do not fall within the ambit of the bill. Majority of the experts/stakeholders in the 102nd report on The Surrogacy regulation bill 2016 understood the aforesaid problem thereby asserted that the extended time period of five year before commissioning surrogacy in the proposed bill seems to be irrational and arbitrary in many aspects. Hence recommended that the word “five years” shall be replaced with “one year” and consequential changes shall be made in other relevant clauses of the Bill.

III. Close relative not defined in the bill

The bill proposes an altruistic surrogacy model which has moral assumptions as its basis along with all kinds of value judgments. As per the bill the altruistic

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model can only be availed through “close relatives”. The major problem in this regard is that the term ‘close relative’ is not defined in the Bill.

Ours is a very conservative society. Considering the society, we live in, it is very difficult to find someone who is actually a close relative in-order to act as a surrogate mother. Even if we find someone it cannot be guaranteed that the surrogate who is a ‘close relative’ is willing to do it without any coercion. The committee on Surrogacy regulation bill 2016 also affirmed that coercion and compulsion will always be at the root of altruistic surrogacy involving close relatives. Hence, the word ‘close relative’ should be replaced.

Furthermore Having a close relative as surrogate also has a major problem that biological mother may be always or at some point of time be around the child which is a serious issue and will have an impact on the child’s bonding with the intending parents, which will also at some stage surely impact the right and relationship of the concerned party.

IV. Marital status or sexual preferences

The Surrogacy Bill 2019 also disqualifies homosexual couples and couples in live-in-relationships from having children through surrogacy in India. The Indian Constitution according to Article 14 provides that all citizens are equal in the eyes of law. Therefore, by placing such restrictions on the right to have a surrogate child the bill has only allowed the heterosexual couples to have a child through surrogacy. This entirely negates the concept of equality that the Constitution of India guarantees to single parents and homosexuals alike.

The Supreme Court rulings on live-in relationships have clearly established that live-in relationships are at par with marriage and children born out of long-standing live-in relationships are legitimate. Even clearly, after the Supreme Court judgement in the case of Navtej Singh Johar, homosexuals should also be given the right to have child through surrogacy. The bill would be setting a wrong precedent, by restricting the option of surrogacy to married couples, even after the Indian courts have given acceptance to live-in relationships and LGBTQ community.

It must be made clear that surrogacy is a practice which gives the hope to the couples who are gay, lesbian or a single man or a woman that, they can have a child of their own by this method and can complete their family. Hence, they should be allowed to have a child through surrogacy.

V. Creation of black market

India is referred to as the ‘world capital of surrogacy’ because surrogates are easily available here and the cost of surrogacy is very less. By completely banning compensated surrogacy there would be a black market in surrogacy services. As the demand for surrogacy is so high, operating a black market in surrogacy would be very challenging. It is highly probable that the surrogates could be moved to the neighboring countries by the fertility doctors or agents after the embryo transfer is completed in India and have the surrogate


692 Navtej Singh Johar & Ors. v. Union of India AIR 2018 SC 4321.
give birth in the other country. A similar practice can be seen in other countries as well, which have supported altruistic form of surrogacy over compensated surrogacy.

The commercialization of the practice raises fears that it will lead to baby-selling, breeding farms, turning destitute women into baby producers. Hence, this ban would ultimately cause abuse to surrogates, children, and intending parents. Therefore, we can say that this prohibition is likely to hurt the very people it seeks to protect, and the ban should be removed, instead a proper law with strict regulations and enforcement should be brought in place.

6. **MAKING THE BILL INCLUSIVE: SUGGESTIONS**

Surrogacy is a method that provides an opportunity to couples who are unable to conceive, to have a child genetically related to them. Usually, surrogacy is considered to be the last option available to a married couple to procure a child, however, technology has played a very important role for people to bear a child. This in turn had a great impact on the social structure, meaning of family and the institution of marriage. In order to make the bill beneficial to all classes and categories of people it must include the suggestions as given below-

1) By Imposing a ban on widows, divorced women, live-in partners homosexuals and keeping them out of the purview of the Bill, it is clearly indicated that the Bill is not in consonance with the present day modern social milieu. It indicates that the government’s understanding is “too narrow” to include all the mentioned categories as fit for surrogacy. Hence, various stakeholders like unmarried females, separated, widows, transgenders, single parents and people having live in relationships should be allowed to bear a child through surrogacy. To bear or not to bear a child is an individual choice and the government cannot prohibit certain categories of people from obtaining a child through any means. Prohibiting people to commission surrogacy on the basis of their marital status, sexual preferences and various other factors would be violative of their basic human rights.

2) In India, the economic circumstances along with an unregulated surrogacy model provides for ample scope for exploitation of surrogate women adding to their inability to effectively negotiate favorable terms for themselves. However, we are of the opinion that it is the duty of the government to provide adequate protection to the surrogates by adopting a proper regulatory. Very often, it can be seen that the agreement is signed and negotiated by the intended parents and clinic, while the surrogate mother has no say in the matter. Therefore, it appears to be a necessity that,

*Firstly*, as the surrogate mother is also a party to the surrogacy agreement, she should be provided with a copy of the contract. She should be made aware about her rights and duties and various other actions she can take if she is being exploited

*Secondly*, counselling of surrogates should be done before the pregnancy, during the period of being pregnant and after giving the birth to child. This is necessary primarily for the reason that the surrogate should be aware and should get into a contract only after knowing all the consequences of getting into a surrogacy contract. Pregnancy is a commitment that a surrogate mother has to make for good nine months which also leads to certain permanent changes in her body and...
hormonal system. The surrogate mother should be counselled for the same. Another important area for counselling is the fact that the surrogate will have to give up the baby after delivery. She cannot keep the baby and must be mentally prepared, for which counselling is a must. In India, there is no provision of psychological screening or legal counselling, which is mandatory in USA. Therefore, counselling should be made mandatory so that feelings of the surrogate are taken care of and there are no negative impacts on the child which is in the womb of the surrogate.

3) In India there is lack of screening guidelines for the intending couples before they opt for surrogacy. A proper screening of their social economic background, criminal records in past, their health, age, and family information should be done before they are permitted to commission surrogacy. In the absence of such screening guidelines the surrogate mothers and the child’s safety and interests suffer considerably. Therefore, it is recommended that surrogacy should be allowed only after strict screening of intending parents as done in the case of adoption procedure as well.

4) The fundamental right to reproduce a child is a part of a person’s personal autonomy and privacy, fixing a period of five years after which a person can opt for surrogacy will only cause breach of his or her reproductive rights and will only delay or defer parenthood. The five-year waiting period is therefore arbitrary, discriminatory and without any logic. It is recommended that the definition of infertility should be made synonymous to the definition given by WHO. The word “five years” in the definition of infertility shall be replaced with “one year” and consequential changes be made in other relevant clauses of the bill.

5) In Indian society, generally believes that, a woman’s role in the family sphere is based on notions of love and duty, and she should not be compensated for her work. Based upon this notion, commercial surrogacy is banned, and only altruistic surrogacy is allowed in India. Furthermore, altruistic surrogacy can only be performed by close relatives. The term ‘close relative’ is nowhere defined in the bill. Looking onto the other side of the story, a family has the ability to demand or force a woman in the family to be a surrogate for another family member. Such surrogacy contracts where a member from within the family is asked to act as a surrogate for another is bound to become more exploitative than compensated form of surrogacy. Another major problem with altruistic form of surrogacy is that the child remains close to the surrogate with no mother-child relationship established. This creates a heavy psychological impact on the surrogate. Hence, it is recommended that compensated surrogacy should not be banned instead should be regulated. Even if its banned, the word close relative should be properly defined in the bill.

6) One of the major issues that needs attention is that of creation of an unwanted black market for surrogacy which could come up by completely banning compensated surrogacy. As the demand for surrogacy is so high, banning compensated surrogacy would ultimately cause abuse to surrogates. The government instead of banning commercial surrogacy should adequately and reasonably compensate the surrogates. Keeping in view the elaborate procedure as involved in surrogacy, it is suggested that certain amount or quantum for compensation should be pre-decided. Furthermore, the amount of compensation shall be fixed by relevant authorities such as the National and State Surrogacy Boards,
the formation of which is already mentioned in the bill, and the compensation so fixed should not be bargained between the relevant parties.

7) Couples from across the globe flock the country to get a child through surrogacy. The Indian judiciary has come across a number of cases concerning surrogate children being taken to their country by the intending foreign couples. The most common problems that these couples go through are citizenship, acceptance in the native country of the intending parents and the question of who will be considered as the natural mother of the child. There is a strict requirement for making guidelines that can effectively regulate or lay down procedure for surrogacy contracts entered into by foreign couples. This is required to bring about minimal complications while taking away the surrogate child to the native nation of the intending parents and to ensure maximum security to the new-born surrogate baby.

7. CONCLUSION

Surrogacy, a million-dollar industry, is booming in India. It is giving hopes to a lot of parents who because of some inability or other are not able to conceive. Parenthood is a joy that every couple seeks after some time. It completes the family and brings joy. Surrogacy is now coming up as an easy alternative to all those parents who want their child to be related to them by genes and blood. It is upcoming and is gaining popularity among the newer generations as the infertility rates too are going up with years.

Many countries across the globe do not recognize or accept surrogacy. It is necessary in such countries that the child must be related to either one of the parents or they simply do not allow any such child in the country. India is a safe haven for all such couples. The lack regulations and no law with respect to surrogacy makes India a market for surrogacy- too open and unregulated. It opens various holes and empty spaces for people to manipulate. In such unregulated scenario, the most affected is the surrogate mother. The surrogate mother is always on the losing end as she does not even get to keep the child and has to undergo the long toll taking process of pregnancy as well.

Looking at the current scenario in India it is very much the need of the hour to regulate this market of surrogacy and to fill in the lacunae so that no scope for exploitation is there of the surrogate mother and to provide with utmost security to the so born surrogate child.

Banning commercial surrogacy is no solution to the problem this industry faces. Banning commercial surrogacy will lead to many more problems such as black market, greater exploitation and sociological and psychological impacts on the surrogates considering only altruistic surrogacy is being done. The government must alter the bill to make it more inclusive and comprehensive. Proper guidelines must be laid out so that surrogacy becomes an easy recourse to all those who are unable to fulfill their desire of a child. Creation and implementation of stricter regulations is necessary and a dire need of the hour.

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ONLINE DISPUTE RESOLUTION: A WINDOW OF OPPORTUNITY IN A POST COVID-19 INDIA

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Abstract

In the wake of our struggle with the pandemic “COVID-19” and the various travel and social restrictions it has brought, there has surfaced invigorated interest in online dispute resolution (“ODR”) in India. ODR is essentially e-alternative dispute resolution (“ADR”) where interactions take place online using technology, and resolution can take place through asynchronous communication. Therefore, it serves as a viable conflict resolution solution for minimising contact during the pandemic but more importantly - once fully developed it will become an affordable and easily accessible form of justice. Set in the current background of the increasing attention to ODR, in this article we will analyse how to bring ODR processes to fruition. Part II of this article will delve into the concept of ODR. Following which, Part III will discuss the need and implementation of ODR in India. Part IV will examine and suggest the best practices that can be adopted from around the world. Lastly, Part V will analyse implementation of ODR across sectors.

II. The Concept of ODR

There has been a technological presence in the law in many facets, but the focus of this article is its foray into the domain of alternative dispute resolution. There is now online mediation, online arbitration and even arbitration utilizing blockchain technology. These forms of alternative dispute resolution, known as “online

693 United Nations Development Programme, “COVID 19 pandemic – Humanity needs leadership and solidarity to defeat the coronavirus”
dispute resolution”, have been increasingly making their presence felt in recent times.

ODR casts a wide net, which may be applied to a range of disputes such as interpersonal disputes including consumer disputes, marital separation, court disputes and interstate conflicts. ODR was born from the collaboration between ADR and Information Communication Technology, as a method for resolving disputes that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable.

The UNCITRAL Technical Notes on Online Dispute Resolution issued in 2016 defined ODR as “a system for dispute resolution through an information technology-based platform and facilitated through the use of electronic communications and other information technology”. ODR will enable ADR to become more efficient, faster, and less expensive, because of which it will make ADR a real alternative to a greater number of disputes thereby bringing all of the advantages of ADR to a greater number of people.


ODR primarily has two forms: private ODR and court-annexed or public ODR. The adoption of ODR began and evolved in the private sector, with private international organisations like Smartsettle and Mediation Room that offered online mediation to resolve disputes. ODR particularly witnessed a boom in e-commerce market places such as Ebay, wherein the disputes were settled in an impersonal, efficient and objective way. These private organisations generally have independent platforms and are governed by their own rules and regulations. Their success led many of the world governments to employ ODR into their own courts for a certain class of cases that can be disposed of quickly such as motor vehicle accidents, loan defaults, insurance claims etc as is discussed further in the article. Notable examples of ODR adopted in the public sector are the Money Claim Online program set up by the Ministry of Justice of England and Wales and the Canadian Civil Resolution Tribunal.

Like any mechanism for dispute resolution, there are a number of ways that parties must determine whether ODR is appropriate for their situation. As regards to filing and exchanging documents, electronic filing is
generally more efficient, economical, environmentally friendly, and less cumbersome.\footnote{Rahim Maloo & Ors., ‘Online Dispute Resolution: An Option for Times of Crisis and Calm’ (Gibson Dunn, 30 March 2020) <https://www.gibsondunn.com/online-dispute-resolution-an-option-for-times-of-crisis-and-calm/#_ftn13> accessed 16 July 2020} Additionally, remote hearings, which avoid travel time, expenses, and other fees associated with in-person hearings, should be more efficient to schedule and less expensive for the parties.\footnote{Ibid} Hence, these benefits have helped the adoption of ODR in resolving e-commerce disputes where the parties belong to different jurisdictions and also in low-value disputes arising out of business-to-business and business-to-consumer transactions, which do not warrant the necessity of approaching the courts.\footnote{Kimhal D & Ors., “ODR: The Future of Dispute Resolution in India,” Vidhi Centre for Legal Policy (JALDI (Justice, Access and Lowering Delays in India) Initiative, 2020) <https://vidhilegalpolicy.in/research/the-future-of-dispute-resolution-in-india/> accessed August 20, 2020}

### III. The Need for ODR in India

In today’s world, where data driven solutions are the norm, ODR will play a much bigger role than just replicating the existing process of ADR online. The pandemic has re-iterated the crucial role that technology has to play in providing an accessible form of justice. Steps have already been taken to make virtual court hearings to prevent a complete shutdown of courts in India. It is extremely likely that there will be surplus of disputes in courts, particularly in lending, credit, property, commerce and retail in the coming months that will require judicious resolution.\footnote{Indulekha Aravind, ‘Online dispute resolution is beginning to find takers in India’ (The Economic Times, 12 January 2020) <https://economictimes.indiatimes.com/smallbiz/startups/features/online-dispute-resolution-is-beginning-to-find-takers-in-india/articleshow/73206371.cms?from=mdr> accessed 14 July 2020} Banks, NBFCs and even families could take recourse to ODR. Hence, with ODR, a “mechanism of justice” would be made accessible, affordable and easily available for citizens.\footnote{Amitabh Kant, ‘NITI Aayog and the SC judges’ meeting on ODR’ (The Daily Guardian, 30 June 2020) <https://thedailyguardian.com/niti-aayog-and-the-sc-judges-meeting-on-odr/> accessed 15 July 2020} A durable ODR system in India can have the potential to reduce the load on courts by resolving a large number of disputes outside courts and most importantly, providing access to justice and ease of doing business by making dispute resolution cheaper and quicker.

In a virtual meeting hosted by NITI Aayog, senior judges of the SC, secretaries from government ministries, legal experts and other key stakeholders discussed the feasibility of ODR in India, wherein the common theme was a multi-stakeholder agreement to work collaboratively to ensure efforts are taken to scale up online dispute resolution in India.\footnote{PIB Delhi, ‘Catalyzing Online Dispute Resolution In India’ (Press Information Bureau, 7 June 2020) <https://pib.gov.in/PressReleasePage.aspx?PID=1630080> accessed 14 July 2020} The meeting overall provided a much-needed boost for the recognition of the opportunity that ODR presents in India.

The two most important factors to make ODR a reality in India are a robust technological base and strong internet connectivity. However, they are also the greatest roadblocks that ODR faces in India...
due to poor infrastructure in both. It was noted at the NITI meeting that for a transformative impact the digital infrastructure and statutory framework requires changes along with a mindset more accepting of change.\textsuperscript{711} We need to take cognisance of these obstacles for successful implementation. The only solution to this is that the government, in consonance with private players will have to completely revamp the current infrastructure and provide for better capabilities for the successful adoption of ODR in India. The public sector has seen success in the use of ODR in the form of the e-assessment scheme of the income tax department, the object of which is to do away with any interaction between the assessee and the income tax officer for faceless scrutiny of income tax returns.\textsuperscript{712}

India also needs to formulate and adopt an ODR scheme, which will lay down the foundation for its adoption and give it a much-needed legal backing. The procedure for the dispute resolution process, the identification of cases that can be resolved through ODR and the enforceability of the outcome of such disputes are some of the issues that need to be expanded upon. ODR should be given recognition in current ADR legislations.\textsuperscript{713} Awareness campaigns, legislative support along with encouraging ODR in the public and private sector are the measures that need to be taken to implement ODR in India. However, in order to truly make ODR mainstream, the ADR mechanism needs to be strengthened as well, which has not been fully realized in India yet. An example of this is that India follows the ‘opt-in’ method of mediation in India, which is voluntary.\textsuperscript{714} According to Justice Indu Malhotra,\textsuperscript{715} the ‘opt-out’ method, which would make mediation mandatory, will defeat the purpose of mediation and what will work well in India is a hybrid of the two models. It is necessary to give a stronger foothold to ADR in India to make sure that ODR can be sustained.

IV. ODR around the World

When discussing the ways of developing and implementing ODR in India, it becomes beneficial to our cause to discuss the ways in which it has manifested around the world. We can draw from the ODR policies of countries in response to COVID-19 and otherwise generally from some countries for the development of a robust ODR mechanism.

In specificity to COVID-19, inspiration can be taken from countries like Hong Kong and China which have taken quick

\textsuperscript{711} Niti Aayog & ors, Catalyzing Online Dispute Resolution In India (NITI Aayog, 12 June 2020) <https://niti.gov.in/catalyzing-online-dispute-resolution-india#p3> accessed 14 July 2020


\textsuperscript{714} Niti Aayog & ors, Catalyzing Online Dispute Resolution In India (NITI Aayog, 12 June 2020) <https://niti.gov.in/catalyzing-online-dispute-resolution-india#p3> accessed 14 July 2020

\textsuperscript{715} Ibid
decisions in favour of ODR. The Hong Kong government, anticipating an influx of cases from the pandemic, has taken proactive measures such as introducing an ODR scheme for MSME sector providing a three-tier dispute resolution framework. It identifies an online platform to facilitate all three arms of ADR for disputes with a claim amount of less than HK$ 500,000. The scheme has fixed strict timelines and fees which make it affordable and fast. Similarly, China, foreseeing a surge in cases has taken steps to speed up the development of their state ‘Internet Arbitration System’. It also supports speedy arbitration if it results in resumption of production. In the past, ODR in China was primarily used for resolving internet disputes but now it is proposed to be used for debt issues, labour disputes and work injury compensations. They also want to further develop their ‘internet judiciary’ by improving the court’s online mediation platforms. The strategies of these jurisdictions serve as a good model for formulating policies and applying our existing expertise to ODR.

Moving onto general implementation of ODR, it has been observed that the shape that ODR takes in any country depends on a lot of variable factors such as the nature of the economy, the laws of the country, efficacy of the judicial systems or even cultural differences. Common trends demonstrate how judicial systems and economies can affect the development of ODR. Countries with efficient judicial systems like Japan are slower to accept and implement ODR whereas countries where the judiciary is overburdened turn to ODR as a viable alternative. Countries such as India and Brazil fall under the latter bracket and also share many economic traits such as both are growing economies with large populations which cause delays in the judicial process.

In Brazil, ODR methods in a relatively short time have become successful and are steadily gaining momentum. These strategies can be useful in an Indian context. The expansion in Brazil can be attributed to a two pronged approach legislation promoting ODR and external influences, such as the expansion of e-commerce. Although the judiciary still remains the first sought option, citizens are opting ODR mechanisms for less complex consumer disputes. Their government has also developed a platform for consumer redressal called “consumidor.gov.br” which resolves conflicts in less than 10 days and there is also a private platform “reclameaqui.com.br”. Many other large national and international companies such as Uber offer their consumers ODR mechanisms. India can incentivise

718 ‘ODR in Brazil: Challenges and Perspectives of Use’ (2018)
720 Ibid
721 Ricardo Silva, ‘ODR in Brazil: Challenges and Perspectives of Use’ (2018)
domestic and international companies to develop their own ODR mechanisms and can also develop its own ODR platform which allows direct dialogue between parties to solve conflicts.

Apart from the above, there are some execution challenges that exist in most developing nations which also need to be overcome in India. The most relevant one as discussed above is the technological challenge which includes the local digital economy and information communications technologies which need to appropriately develop for the success of ODR.  

V. Use of ODR in Different Industries

The first ODR system was first born out of the advent of e-commerce. Virtual business transactions brought people together from various jurisdictions resulting in cross border disputes. This prompted novel processes to be developed by players in the sector. The first ODR process was employed by eBay, which still remains one of the biggest ODR systems in the world. The eBay Resolution Centre resolves over 60 million disputes per year by referring its customers to its ODR platform.

Currently, it employs a dispute resolution provider which offers two services: a free web-based forum which allows users to attempt to resolve their differences on their own or if necessary, the use of a professional mediator. The original eBay model has since then been replicated and customized by various private organisations and states alike.

Other similar models are employed by other e-commerce companies like Alibaba, PayPal for conflict resolution. These companies employ processes that are impartial, objective and predictable with a 90% success rate. It must also be noted that their algorithms collect data as they resolve conflicts which keeps improving the quality of the process with each new resolution.

While ODR processes may have first been employed by the e-commerce industry, they have since been adopted to resolve disputes across many sectors.

Some of these sectors are insurance, intellectual property, small causes, small claims and disputes involving small and medium enterprises. To illustrate some of them - in the realm of insurance, some
websites like Cybersettle allow parties to negotiate through rounds of blind bidding and help arrive at a settlement point;\textsuperscript{731} the intellectual property sector has made use of ODR in the resolution of domain name conflicts through online arbitrations;\textsuperscript{732} an example of small dispute ODR can be found in Canada, where an online tribunal exercises jurisdiction over small claim disputes, strata property disputes, motor vehicle accident and injury claims, the tribunal assists parties in negotiations and even converts their resolutions into enforceable orders.\textsuperscript{733} Some other areas like family disputes can have an excellent recourse to ODR but have not yet found popularity. Although the spectrum of sectors applying ODR to disputes has increased it is still scattered and in a stage of infancy leaving much potential to be tapped.

These applications of ODR have been slow to pick up in India, however lately they have been finding more and more momentum. The most recent addition to the growing pool is the Reserve Bank of India ("RBI") which on August 6, 2020 introduced its ODR system for digital payments.\textsuperscript{734} It also issued a notice that authorised Payment System Operators ("PSO's") were to implement an ODR system in a phased manner. In the first phase the system was to be implemented for disputes and grievances related to failed transactions in their respective payment systems by January 1, 2021.\textsuperscript{735} RBI's legislation promoting ODR is a nod to the Brazilian model and a hopeful sign of the road ahead.

Another example of India embracing private ODR is the start-up NestAway, which incubated an ODR platform — Cadre or Centre for Alternate Dispute Resolution Excellence to resolve rental disputes online through a website-based platform.\textsuperscript{736} The arbitration process delivers a decision in less than 30 days where typically a traditional arbitration would have lasted for 6 months. ICICI Bank is also running a pilot project and has employed ODR platform SAMA which is helping resolve nearly 10,000 disputes with values up to Rs 20 lakhs.\textsuperscript{737}

These are all positive indicators of a paradigm shift in ADR. Organisations now have an opportunity to embrace ODR and enhance their own efficiency by reducing their reliance on external processes. We can take inspiration from the many applications

\textsuperscript{731} Norman Solovay and Cynthia K. Reed, The Internet and Dispute Resolution: Untangling the Web, (Law Journal Press 2003)<https://books.google.co.in/books?id=ebpst9j-Y7EC&pg=SA3-PA41&lpg=SA3-PA41&dq=cybersettle+insurance+pdf&source=bl&ots=1IRIPfMbWP&sig=ACfU3U06DTgzCKFRuJTh4rU_tvyujSXRg&hl=en&sa=X&ved=2ahUKEwj9t81K3oAhXGeisKHc-OBzYQ6AEwBHoECAoAQ#v=onepage&q=cybersettle%20insurance%20pdf&f=false> accessed 15 August, 2020

\textsuperscript{732} Pablo Cortés, Online Dispute Resolution for Consumers in the European Union (Routledge 2010) 196

\textsuperscript{733} Civil Resolution Tribunal, ‘Starting a Dispute’ <https://civilresolutionbc.ca/tribunal/> accessed 15 August, 2020

\textsuperscript{734} Reserve Bank of India, Statement on Developmental and Regulatory Policies (6 August, 2020)

\textsuperscript{735} Reserve Bank of India, Online Dispute Resolution (ODR) System for Digital Payments (6 August, 2020)


\textsuperscript{737} Ibid
found around the world and infuse ODR into disputes for saving time, energy and costs.

VI. Conclusion

Though ODR definitely has its advantages, its implementation comes with a fair share of drawbacks as well, especially in India as all parties involved need to have adequate access to technology, which is not yet completely feasible in India. High value disputes that have a certain complexity to them are likely to be resolved through traditional means of alternative dispute resolution. However, as has been discussed above, these traditional mechanisms are also slowly incorporating technology into their proceedings. The government and the private sector need to work in harmony for expansion and increased reliance on ODR. It is therefore important to keep up with the latest technological improvements while also taking into account the need of the hour in the wake of the ongoing pandemic.
BAIL AS A MATTER OF RIGHT: JUDICIAL TRENDS

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“A procedure which keeps large number of people behind bars without trial for long, cannot possibly be regarded as ‘reasonable, just or fair’ so as to be in conformity with the requirement of Article 21 of the Constitution of India. Therefore, it is necessary, that the law as enacted by the legislature and as administered by the courts must radically change its approach to pretrial detention and ensure reasonable, just and fair procedure. Bhagwati and Koshal, JJ. held in HussainaraKhatoon (1) v. State of Bihar

ABSTRACT
The Constitution of India is the incomparable rule that everyone must follow. The Fundamental Rights are accessible to all the "Persons" of the nation however a couple of them are additionally accessible to "citizens". While Article 14, which ensures equality before law and equal protection of laws inside the territory of India is material to "person" which would likewise incorporate the "citizen" of the nation and "non-citizen". This mirrors the Indian Legal framework does not bring the nationality of an individual into concern while giving him/her the advantage of the provision of bail. There is no differentiation or discrimination in giving bail to a foreign national in India.

The Personal liberty is of most extreme significance in our established framework perceived under Article 21. Deprivation of personal liberty must be established on the most serious contemplations relevant to welfare objectives of the general public as determined in the Constitution.

Thus, personal liberty is not checked aside except in accordance to the procedure established by law so as to find some kind of harmony between the privilege to individual liberty and the interest of society.

INTRODUCTION

BAIL DEFINED
Bail is a security given by for the due appearance of a man caught or kept to get their concise release from real guardianship or confinement. In point of reference based law, a criticized individual is supposed to be admitted to bail, when the person is released from the consideration of the officials of court and is enriched to the consideration of individuals known as their guarantees who will without a doubt convey the person in question at a predefined time and spot to answer the charge against that person and who in default of so doing are in danger to give up such total as is shown when the bail is permitted. Thusly, the custom and reliable start of bail in legitimate way infers appearance of a man from guardianship or imprisons and passes on heavily influenced by guarantees that endeavor to make that person in court upon a chose day.738

In criminal law, 'bail' expects to liberate, free or pass on the accused from catch or out for care, to the keeping of various individuals, on their undertaking to be responsible for their appearance at a particular day and spot to answer to the

charge against the person in question. These individuals are called their guarantees.\footnote{Government of India, The Third Report of the National Police Commission 31 (1980).}

Bail law, unequivocally, targets accomplishing an equalization in the midst of individual freedom and government managed savings or enthusiasm of society. Any individual can be blamed for an offense. On the Off chance that there is no degree for discharge on bail, a charged individual needs to spend the entire pretrial and time for testing in confinement. At the finish of the preliminary, there are two prospects for example a blamed individual may not be discovered "blameworthy" or he might be discovered "liable".

Without charged individual discharged on bail, the blamed individual needs to invest energy in care. on occasion, the time previously spent in care or confinement might be longer than the time of detainment, which could likely be forced on him on conviction. In the event that such a circumstance emerges, an extraordinary enduring would be caused to the individual worried, as his own freedom would be removed. It is a crime of equity that numerous poor denounced are constrained into long cell subjugation for little offenses on the grounds that the bail methodology is past their pitiful methods and preliminaries don't initiate and regardless of whether they do, they never finish up.


\footnote{L.H. Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56(3) Virginia L.R. 371, 404 (1970); M. Zander, Bail: A Re-appraisal, 67 Criminal L.R. 25, 26 (1987).} It is our ethical obligation to know and comprehend the purposes behind denying bail to the charged in specific cases.\footnote{999 UNTS 171.} One reason would be, if all charged are to be discharged on bail it welcomes appalling outcomes. The individual may slip away and may never return and may proceed with his crimes; the individual may compromise or purchase the observers or the indictment and disappoint the procedure of equity. Thusly, confinement during pretrial or time for testing, in such cases, might be defended.\footnote{L.H. Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56(3) Virginia L.R. 371, 404 (1970); M. Zander, Bail: A Re-appraisal, 67 Criminal L.R. 25, 26 (1987).} Then again, the individuals who are blamed for frivolous offenses, or who have no criminal predecessor, who are not prone to escape from the procedure of law must not superfluously be made to spoil in prison during pretrial or time for testing. Finding some kind of harmony in the above situation is a genuine test to legal executive. Krishna Iyer, J., commented that the subject of bail:

"... Belongs to the obscured State of criminal equity framework and generally depends on the hunch of the Bench, in any case called legal caution. The Code is mysterious on this theme and the Court likes to be unsaid, be the request custodial or not. But then, the issue is one of freedom, equity, open wellbeing and weight of open treasury, all of which demand that a created..."
statute of bail is basic to a socially sharpened legal procedure.”

THE CONCEPT OF BAIL OR RIGHT TO BAIL

In Maneka Gandhi v. Union of India another measurement was given to Article 21 and to the idea of individual freedom by the Supreme Court just because. The Court took the view that Article 21 manages insurance against official activity and furthermore authoritative activity. No law can deny an individual of his/her life or individual freedom except if it recommends a technique which is sensible, reasonable and just it would be for the court to decide if the methodology is sensible, reasonable and just; if not, it would be struck down as invalid. In the light of this milestone choice by the Supreme Court it is evident that individual freedom of any individual can’t be removed for the sake of detainment or something else, except if it is required and such a stage must be taken as per the strategy built up by law, which is simply, reasonable and sensible.

In Hussainara Khatoon (1) case the Supreme Court, entomb alia, held that pretrial discharge on close to home bond (for example without guarantee) ought to be permitted where the individual to be discharged on bail is poor and there is no significant danger of his slipping off. It was additionally seen by the Court that the undertrials enduring in prison were in such a position where no activity or application for bail was made, either, in light of the fact that, they didn’t know about their entitlement to get discharge on bail or by virtue of their neediness they couldn’t outfit bail.

The object of detainment of a blamed individual is basically to make sure about her/his appearance at the hour of preliminary and to see to that that individual is accessible to get sentence, in the event that saw as liable. On the off chance that his/her quality at the preliminary could be sensibly guaranteed by some other means than his capture or confinement, it would be out of line and out of line to deny the blamed for his freedom during pendency of criminal procedures. Constitution of India secures individual freedom of the person by ensuring individual freedom to its residents, an essential human right, as major rights under Articles 2o, 21 and 22 of the Constitution of India. “Individual freedom” is a major right. Article 21 expresses—"No individual will be denied of his life or individual freedom with the exception of as per methodology set up by law." It is very much settled now that the “technique built up by law” signifies a strategy that is simply, reasonable and sensible. A system, which absurdly segregates, or has the effect of irrationally separating, for all intents and purposes and actually, against a class of people, can never be named a "strategy built up by law".

RETURNING TO THE PRESUMPTION OF INNOCENCE

The ongoing choice of the Supreme Court conceding bail to the blamed in the 2G case has produced a great deal of intrigue and that the presumption was “not a relevant consideration, for grant of bail” and that “pre-trial detention in itself is not an evil, nor opposed to the basic presumptions of innocence”. This decision was cited in Pramod Issac v. State of Kerala, (2009) 3 KLT 121.
warmed discussion. In any case, to comprehend the genuine ramifications of the choice and how it influences bail law in India, it is important to return to the standards of assumption of blamelessness.\textsuperscript{746}

The standard of assumption of guiltlessness speaks to unmistakably in excess of a standard of proof.

In principle, pre-preliminary detainment or put another way — disavowal of bail — is reasonable just for keeping the denounced from departing suddenly, submitting further offenses, altering proof or affecting observers. Forcing restrictions in such cases, while conflicting with the assumption of blamelessness, is supported by open arrangement contemplations setting a premium on the sacredness of the legal procedure.\textsuperscript{747}

A restricted plan of the assumption sees it as an evidentiary standard, requiring the State to demonstrate its case past sensible uncertainty. It has been received by certain High Courts which dismissed its pertinence while choosing bail applications. On the other hand, a more extensive understanding extends it to pre-preliminary procedures to work as a shield against unfair discipline. Fair treatment securities here try to shield the freedom of the charged, rather than essentially focusing on directing investigator and police (mis) lead. The Supreme Court has not governed on the understanding conclusively. Regardless, an embrace of the thin translation will introduce a critical issue in India, where relentless deferrals in the legal procedure bring about proceeded with detainment of the denounced, pending preliminary. Given that the National Police Commission has announced that 60% of these captures are "pointless or unjustified", a reality perceived by the Supreme Court, the possibility of investing expanded times of energy in jail has brought about liable supplications being progressively considered as the most catalyst technique for making sure about discharge.

UNIVERSAL RECOGNITION OF BAIL
The idea of bail has been perceived in the different universal agreements and instruments maintaining human qualities. Article 9(3) of the International Covenant on Civil and Political Rights, 1966 (hereinafter ICCPR)\textsuperscript{748} states that the general standard will not be detainment in guardianship of people anticipating preliminary and discharge might be adapted on the certifications to show up at the preliminary. Additionally, Article 1o (2) (an) of ICCPR likewise alludes to a similar guideline as it expresses that charged must not get same treatment as a convict Above all, Article 14 (2) cardinally accommodates the assumption of guiltlessness until demonstrated blameworthy as a proverbial standard of law. This guideline forces on the indictment the weight of demonstrating the charge, guarantees that the blamed has the advantage for question and obliges open specialists to abstain from prejudging preliminary result. It moves the weight of evidence on the indictment and hypothesizes for an unprejudiced preliminary.

\begin{itemize}
  \item \textsuperscript{746} Sanjay Chandra v. CBI, (2012) 1 SCC 4o : (2011) 6 UJ 4077 (SC).
  \item \textsuperscript{747} Rajesh Ranjan Yadav @ Pappu Yadav v. C.B.I., (2008) 1 SCC 667 : 2008 Cri LJ 1o33 (SC), 1
  \item \textsuperscript{748} Human Rights Committee, CCPR General Comment No. 32, at para 3o.
\end{itemize}
The UDHR in Article 2 expresses that each individual is qualified for all the rights and opportunity in the affirmation with no separation. Article 2(1) of ICCPR likewise emphasizes the equivalent and further commits each State gathering to regard and guarantee to all people inside its locale the rights perceived in the Covenant without segregation. 34 More significantly, Article 26 accommodates uniformity under the watchful eye of the law as well as equivalent security of the law. In this way it restricts any separation dependent on fanciful factors, for example, race, shading, sex, language, religion, political or national root. 750

The Supreme Court of United States has expressed bail can't be supposed to be overabundance when set at a sum that is higher than the respondent's capacity, if the said sum is sensible. Oppositely, in Griffin v. Illinois,751 the U.S Supreme Court in its disagreeing judgment has addressed: "Why fix the bail at any sensible whole if a poor man can't make it?" The impact of commanding an irrationally high bail is that the poverty stricken is prevented equivalent security from claiming the laws, in the event that he is denied his opportunity on equivalent standing with other non-needy individual blamed for an offense exclusively based on his neediness.

The award or refusal of abandon financial conditions for example fiscal guarantee, damages Articles 14 and 15 of the Constitution of India and negates the sacred ethos. Further, it has no relationship with the goal looked for example affirmation of showing up at each phase of the preliminary alongside the assumption of honesty until demonstrated liable. Be that as it may, it must be recollected that for each situation where the poor can't bear the cost of bail the poverty stricken isn't being oppressed, however the state just requests some security that such denounced individual will show up at the preliminary. The danger of relinquishment of one's merchandise might be a compelling obstruction to the compulsion to break the states of one's discharge. In this way, people of various budgetary statuses would discover the inspiration to show up before preliminary at different measures of bail, it just appears to be intelligent that a powerful arrangement of bail thinks about the person's capacity when setting such sum. The present arrangement of bail dependent on budgetary control and target evaluation would prompt speculate characterization and separation. Besides, it would likewise encroach on the basic option to reasonable preliminary.

JUDICIAL TREND PERTAINING TO BAIL PROVISIONS

A. TREND WITH RESPECT TO S. 436 OF CRPC IN SUPREME COURT:

Legal pattern has been developing and good for the rules set down in Hussainara

749 Article 10 (2) (a) of ICCPR reads: “Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons.”

750 UN Human Rights Committee (HRC), ICCPR General Comment No. 18: Nondiscrimination, 1o November 1989

751 See generally Alan R. Sachs, Indigent Court Costs and Bail: Charge Them to Equal Protection, 27Md. L. Rev. 154 (1967).

Khatoon v. State of Bihar case\textsuperscript{753} regarding S. 436 CrPC relating to the bail arrangement. In Hussainara Khatoon case following components was detailed by the Supreme Court in the current case are to be considered for the award of bail:

(i) To what extent the guilty party had been living as an occupant in the general public;
(ii) His work status and money related condition;
(iii) Family and family members;
(iv) Notoriety in the general public;
(v) Past criminal record, regardless of whether he was discharged on bail before;
(vi) Regarded individual from the general public who will ensure his reliabilities;
(vii) Offense he is sentenced under and the likeliness of his conviction and danger of his slipping off; and
(viii) different variables connecting him to the network or bearing the danger of his wilful departing suddenly.

In Mohd. Iqbal Madar Sheik v. State of Maharashtra\textsuperscript{754}, severe view on abrogation of bail was taken. It was held that bail can't be dropped on minor documenting of charge-sheet. Bail can be dropped just when a case for wiping out has been made out under S. 437 (5) or 439(2) CrPC.

In Common Cause v. Union of India\textsuperscript{755}, it was held that undertrials mulling in correctional facilities for a significant stretch of time ought to be discharged in the event that they have gone through over 3 years of a most extreme discipline of 7 years.

Question relating to appearance of the blamed was brought up in State for W.B. v. Pranab Ranjan Roy. It was held that appearance referenced in these segments must mean physical appearance of the charged and not appearance by counsel in light of the fact that the very thought of bail surmises limitation of the denounced and henceforth the individual who wishes to be discharged on bail is to show up and give up under the steady gaze of the court. An individual who isn't under any kind of restriction doesn't require to be discharged on bail. Appearance given under the areas implies physical appearance of the blamed, portrayal by the insight can't be viewed as appearance as the idea of bail surmises that the charged is confined and subsequently he wish to demand through bail by showing up in the court. In the event that there is no limitation, at that point there is no doubt of discharge on bail.

In Lal Kamendra Pratap Singh v. State of U.P.\textsuperscript{756} concurring with the rules of the Amarawati v. State of U.P., it was held that said choice ought to be followed in full soul in all courts of U.P., especially on the grounds that the arrangement for expectant bail doesn't exist in U.P. Between time bail ought to be allowed by taking a gander at the case as detainment influences the notoriety of an individual and cause monstrous misfortune, as held by the Supreme Court in Joginder Kumar Case\textsuperscript{757}. Capture isn't compulsory in all cases and whether to capture or not must be explored by the rules set somewhere near the Supreme Court in Joginder Kumar case.

In Om Prakash v. Union of India, the Supreme Court said that on the off chance that an individual is captured without a warrant, at that point he is qualified for be discharged, in the event that he outfitted

\textsuperscript{753} (1980) 1 SCC 81.
\textsuperscript{754} (1996) 1 SCC 722.
\textsuperscript{755} (1998) 3 SCC 209.
\textsuperscript{756} (2008) 9 SCC 685.
\textsuperscript{757} 2oo4 SCC OnLine All 1112 : 2oo5 Cri LJ 755 (FB).
bail, according to S. 436 CrPC. It was held that non cognizable offenses are commonly bailable, yet at times bail might be absolved. While as of late in M. Masud v. Union of India offenses under the custom demonstration are bailable.

B. Pattern with Respect to S. 436-An of Crpc in Supreme Court:

S. 436-A CrPC was embedded through 2005 alteration to discharge those detainees who have just spent portion of the greatest sentence on bail with or without guarantees on an individual bond. In Pramod Kumar Saxena v. Union of India upwards of 48 bodies of evidence were recorded against applicant in six distinct States; bid was made for the preliminary of the considerable number of cases in a single court and for the discharge on bail under S. 436-A CrPC. Court permitting the intrigue mostly held that, as the candidate has been in the prison for a long time he is qualified for be discharged on bail with the goal that he can organize sum to be paid and shield himself in courtroom, however the combination of the considerable number of cases in a single court is beyond the realm of imagination.758

C. Pattern with Respect to S. 436-An of CRPC in High Courts:

While dissecting the pattern in the High Court judgment it was discovered that the S. 436-An is followed truly absent a lot of degree for changes and proposals, as in

758 Rajesh RanjanYadav @ PappuYadav v. CBI, (2008) 1 SCC 667 : 2008 Cri LJ 1033 (SC) (For other Supreme Court decisions on bail concerning the accused).


News Reports In re v. Province of Bihar request was recorded under the watchful eye of the court to screen the advancement of the S. 436-An of the code, which was recently actualized and headings were given in 2006.759 Appeal was excused by the High Court expressing that, as periodical administration is at any rate kept and advocate general is required to present a report in promotion of it, so there is no need of a normal request. In Praveen Kumar v. State it was held that, at most candidate is obligated under S. 324 IPC for which he previously went through over 7 years in prison, so he is superbly qualified for be discharged on bail.760 In Mohd.Mohsin Khan v. State761 note of the undertrial detainees are dealt with by giving the cure through S. 436-An of the Code, yet it was held that in post-conviction situations where request is for the wiping out of the sentence, the protest can be petitioned for long confinement, yet there is no particular equation as to after this time detainee must be discharged.762

LANDMARK CASES RELATING TO BAIL

A. RAJESH RANJAN @ PAPPU YADAV V.C.B.I.

The instance of PappuYadav v. C.B.I. (‘PappuYadav’)763, included a previous Member of Parliament being accused of intrigue to kill his political adversary visible to everyone. The Courts, both at

761 (2011) 1 SCC 784, 15.
763 Rajesh RanjanYadav @ PappuYadav v. CBI, (2008) 1 SCC 667 : 2008 Cri LJ 1033 (SC) (For other Supreme Court decisions on bail concerning the accused).
preliminary and investigative levels, dismissed ten bail uses of the charged despite the fact that he had been in jail for more than seven years and the preliminary was a long way from fulfillment.

Setting a premium on the enthusiasm of society, notwithstanding the all-inclusive detainment and postponement in procedures, the Supreme Court forced 'sensible limitations' on the privilege to freedom seeing that it would "be entirely wrong to give bail when the examination is over as well as even the preliminary is somewhat finished, and the charges against the appealing party are not kidding". Moreover, it for all intents and purposes evaded the assumption of guiltlessness by dismissing the conflict that all-inclusive imprisonment hindered the protection of the blamed, noticing that "on the off chance that this contention is to be acknowledged, at that point intelligently for each situation bail must be conceded". 

By the by, in PappuYadav, the Supreme Court disregarded the way that the indictment had finished introducing its proof and in this way, there was no chance of impacting observers or messing with the proof on record. It additionally ignored the multi year delay in finishing up the preliminary and the line of legal points of reference granting bail in such cases. Truth be told, the Supreme Court expelled the locale of the subordinate courts, as opposed to legal goal, guiding the denounced to introduce all future bail applications to itself "in the occasion any event emerges". The disavowal of bail, apparently to keep the denounced from being discharged by the High Court, which had prior conceded bail, mirrors the Supreme Court's pre-judgment in such manner.

B. SANJAY CHANDRA V. C.B.I.
The '2G trick' involved the fake distribution of 2G transmission capacity range to private elements in the telecom segment causing the exchequer an expected loss of Rs. 30,000 crores. Charges of huge scope defilement and intrigue brought about the capture of the previous telecom serve high-positioning civil servants and top-level corporate officials. While dismissing their bail applications, the High Court saw that being a monetary offense including billions of dollars, the "charges [were] itself adequate to deny bail". Additionally, regardless of participating during examination, the Court expressed that their past activities "can't be an assurance that during preliminary, they won't meddle with the legal procedure". Be that as it may, the Supreme Court allowed bail to the charged in November, 2011 in Sanjay Chandra v. C.B.I. ('Sanjay Chandra'), perceiving that the privilege to life and individual freedom was the "most essential of every major right". The Court switched the High Court's organization by taking insight of the finishing of examination, planned postponement in closing the preliminary and the half year imprisonment, expressing that the "option to bail isn't to be precluded simply in light of the fact that from claiming the estimations of the network against the charged".

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764 AIR 1945 PC 18 : (1943-44) 71 IA 2o3 : 46 Cri LJ 413

765 Sanjay Chandra v. CBI, (2o12) 1 SCC 4o : 2o11(6) UJ 4o77 (SC), 25.


THE RIGHT TO SPEEDY JUSTICE IS A FUNDAMENTAL RIGHT: IS IT NOT IMAGINARY IN TRUE SENSE?

The Hon'ble Supreme Court in HussainaraKhatoon (1) held that fast preliminary is the substance of criminal equity, and in this way, delay in preliminary without anyone else establishes forsaking of equity. In spite of the fact that fast preliminary isn't explicitly counted as a major right, it is understood inside the expansive range and substance of Article 21. the Supreme Court held that, "Article 21 presents principal directly on each individual not to be denied of his life or freedom aside from as per the technique recommended by law and it isn't sufficient to comprise consistence with the necessity of that Article that some similarity to a methodology ought to be endorsed by law, however that the system ought to be "sensible, reasonable and just." If an individual is denied of his freedom under a strategy which isn't "sensible, reasonable or simply", such hardship would be violative of his essential right under Article 21.

Applying the proportion set somewhere near the Supreme Court in Maneka Gandhi, the Court in HussainaraKhatoon (1), held that the methodology which keeps huge number of individuals in jail without a preliminary for long can't in any way, shape or form be viewed as "sensible, just or reasonable" to be in similarity with the prerequisite of Article 21. Following the proportion, in a plenty of resulting cases, this privilege has been reaffirmed.

Further, the Supreme Court in P. RamachandraRao v. State of Karnataka held that "it is the protected commitment of the state to administer rapid equity, all the more so in the field of criminal law, and scarcity of assets or assets is no barrier to forsaking of right to equity radiating from Articles 21, 19 and 14 and the preface of the Constitution as likewise from the Directive standards of State Policy. The opportunity has already come and gone that the Union of India and the different States understand their Constitutional commitment and accomplish something concrete toward fortifying the equity conveyance framework. We have to help all worried to remember information disclosed by this Court in HussainaraKhatoon (7) i.e., the State can't be allowed to preclude the sacred right from claiming quick preliminary to the blamed on the ground that the State has no satisfactory monetary assets to bring about the essential consumption required for improving the managerial and legal mechanical assembly with the end goal of guaranteeing expedient preliminary."

The legal executive additionally assumes a significant job in making sure about equity by giving fora to the authorization of such rights, or for cures against their infringement. This restorative part of the legal capacity helps in advancing social equity and empowers social strengthening and change through law by restricting the way of life of exemption for rehearses that bail. It becomes, therefore, material to consider at some length the law relating to grant of bail.' Law Commission of India. 1979. Congestion of Undertrial Prisoners in Jails, p. 4, available online at http://lawcommissionofindia.nic.in/51-100/report78.pdf (accessed on 29 September 2017).

766 The NCRB data does not clarify whether bail was granted by the court of first instance or by a higher court.
767 (1980) 1 SCC 81.
770 The Law Commission of India recognised in its 78th Report, Congestion of Undertrial Prisoners in Jails, that 'detention in prison in the case of undertrial prisoners is generally the result of arrest for an alleged offence not followed by the grant of

The Supreme Court of India has itself perceived this extended origination of Access to Justice. It has likewise perceived that tying down access to equity isn't constrained to evacuating boundaries to getting to courts, however obviously, this is a significant component. Be that as it may, as I contend underneath, the focal point of access to equity measures has to a great extent been on access to courts. Inside this structure, hindrances to access to equity are seen as an issue of absence of assets which causes a confuse among request and flexibly — there is a lot of interest for legal administrations, however its gracefully is restricted. The arrangement is to give the assets to determine the bungle by choking request, or by expanding flexibly. I will contend that not exclusively is this methodology fractional and fragmented, yet in addition it can regularly be counter-profitable to the more extensive vision of access to equity set out above.

**LEGAL FRAMEWORK FOR CUSTODIAL JUSTICE**

The legitimate structure identifying with custodial equity to ladies contains different authorizations passed by the Parliament or state councils, subordinate enactments, official guidelines, brochures, memoranda and manuals. Furthermore, there are remarkable legal choices of the Supreme Court in this unique circumstance.\footnote{Miranda v. Arizona, (1966) 334 US 436.}

The perception looks for the reception of a practical methodology in the matter of police powers.\footnote{Couch v. United States, (1972) 409 US 322, 336.} The rights, freedoms and benefits of an individual opposite the general public are to be appropriately adjusted. This is increasingly critical in light of the fact that in current occasions, a country's respectfulness is being decided by the strategies it utilizes in the treatment of the wrongdoers who are a piece of it. The Supreme Court in NandiniSatpathy v. P.L. Dani, citing Lewis Mayers\footnote{Couch v. United States, (1972) 409 US 322, 336.}, expressed that, “to find some kind of harmony between the necessities of law requirement from one perspective and the security of the resident from persecution and bad form because of the law-authorization hardware on the other is an enduring issue of...
statecraft. The pendulum throughout the years has swung to one side." It clarified that there exists a contention between cultural enthusiasm for affecting wrongdoing identification and sacred rights, which the denounced people have. Accentuation may move, contingent upon the conditions, in adjusting these interests as has been occurring in America. Since Miranda, there has been a retreat from weight on insurance of the charged and attraction towards society’s enthusiasm for sentencing criminals. As of now, the pattern in the American locale is that "regard for (established) standards is dissolved when they jump their appropriate limits to meddle with the authentic interests of society in requirement of its laws." our protected point of view has, thusly, to be relative and can’t bear to be absolutist, particularly when torment innovation, wrongdoing acceleration and other social factors influence the utilization of the standards in delivering others conscious equity.

The Police Act, 1861, characterizes powers and lead of the police for the anticipation and location of violations. Concerning ladies. It requires a new look. Fitting revisions might be made to it to mirror the exceptional needs of ladies. The Iyer advisory group has suggested for supplanting this outdated rule by another one. A total upgrading is additionally required in all other applicable Acts which have been embraced before in an alternate point of view of equity.776

776 Supra note 19 at 1034.
777 777Thus, it is evidently clear from the text of §§ 437 and 439 of the Cr.P.C (which has been reiterated in various judicial decisions) that three factors need to be considered while deciding a bail application: the likelihood of the accused absconding or committing further offences or tampering with evidence/influencing witnesses.

777 § 3148 of the Bail Reform Act of 1984, 18 U.S.C. § 3148(b) states that if a condition of release is violated, the government may move for a revocation of the release order and that the judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer finds that there is… “clear and convincing evidence that the person has violated any other condition of his release”.

777 However, see United States v. Chimurenga, 76o F. 2d 4oo, 4o5-o6 (2d Cir.1985), cited with approval in United States v. John Gotti, 794 F. 2d 773 where the Court held that in the context of an initial

RECOMMENDATIONS AND CONCLUSION: A JUDICIAL RECONSIDERATION

A potential initial step to cure this circumstance could be an administrative reexamination of existing bail arrangements. This would involve a change of the current law by consolidating extra shields and explicitly setting out its approach against pointless detainment and over the top bail, regardless of whether in the Cr.P.C itself or in the "Announcement of objects and Reasons" of the Amending Act. As clarified before, the issue with bail law in India isn't so much the nonattendance of rules, or even plainly characterized rules. It is with the courts not paying adequate notice to both the content and reason for the law and past decisions of the Supreme Court. Explaining the targets of bail through an Explanatory Note or Statement of objects and Reasons will consequently, help set a benchmark, which is simple for judges to follow. In this unique circumstance, it is educational to investigate the American standard under the Bail Reform Act requiring "clear and persuading" proof that the denounced had damaged specified bail conditions. Albeit restricted to instances of renouncement of bail, and not relevant to police captures, the American norm and its utilization on the off chance that law gives a fascinating option in contrast to the standard of evidence appropriate.777

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LEGAL PRESUMPTION OF THE LEGITIMACY OF A CHILD UNDER SECTION 112 OF THE INDIAN EVIDENCE ACT, 1872 HAS NO RELEVANCE IN THE MODERN ERA

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Abstract
Section 112 of Indian Evidence Act, 1872 is a quite different section as on the one hand it establishes marriage as conclusive proof of the legitimacy of the child and on the flip-side states that "conclusive proof" of legitimacy can be dismissed by proving "non-access" between the parties at any time when a child could have been begotten. This section itself provides an escape path to a party who wants to escape from the rigour of that conclusiveness. The escape path is if it can be shown that the parties had no access to each other when the child could have been begotten, and then this could be dispelled. The legislative spirit of this section seeks to establish that any child born during a valid marriage must be legitimate. The law does not consider instances where paternity may be disputed while having access between the spouses. Thus, the exception to this law should be broader, covering all possible situations, and modern tools must be brought to hand to ascertain paternity.

Introduction
Occasionally, circumstances come to light in which people need concrete, scientific evidence for the determination of paternity. This situation usually occurs when the biological father of an individual is in doubt regarding his paternity. Our methods for investigation have always focused on ensuring that the innocents are protected. Though our system is to be honoured, it is not something infallible, and those with the administration of justice have a duty towards its refinements and upgradations.

Law and science as two different fields, today, have amalgamated themselves to an increasing extent just for the motive of justice being done. The legal system now has to handle scientific evidence frequently, which in turn seems to be creating extreme challenges for the law. These challenges mainly emerge from the primary distinctions between legal and scientific procedures. On the one hand, scientific evidence holds out the tempting probability of immensely accurate fact-finding and a decrement in uncertainty that frequently accompanies legal decision making. On the other hand, scientific methodologies often comprise the likelihood of risk that the judicial system is unwilling to tolerate.

One of the most significant developments that the scientific community has had is the studying of DNA in criminal cases which has substantial and mesmerizing outcomes in the legal field. Although, the court gladly accepts shreds of DNA evidence in cases of theft, rape, homicide and what not. Yet it is far beyond the reasonable understanding as to why the matter of legitimacy is left open, to be decided by legal interpretations and not by scientific techniques when it can play a crucial role in establishing the paternity of disputed offspring. Gone are the days when paternity could not be ascertained scientifically, unlike the dark convincing evidence. See United States v. Salerno, 107 S. Ct. 2095 (1987); United States v. John Gotti, 794 F. 2d 773 (2d Cir 1986); United States v. Mauricio Londono-Villa, 898 F. 2d 328.
ages. Today we have travelled a lot of distance ahead in science and technology that we can with 99.999% accuracy if conducted properly conclude about paternity.

In this paper, I describe why the revolutionary changes in science and technology have started shaking the foundation of sec 112 presumption of Indian Evidence Act, 1872 and why this may not live long in context with the modern era. To do so, I first describe sec 4 and sec 112 of Evidence Act, their relevance with each other. Part II of this paper would represent the only exception to rebut the presumption of sec 112 with some instances of presumption prevailing over the fact, i.e. sec 112 prevailing over DNA test results. I argue that nothing is more shocking than injustice being done based on legal presumption when justice can be done based on the truth by also stating the possible solution. Part III would describe modern scientific tools which are in the form of DNA and paternity tests. At last, the conclusion deals with the invalid nature of this law and examines why DNA witnesses should be given a chance.

**The injustice of presumption prevailing over the justice of fact**

While it's genuine that the judiciary needs to be the protector of people who cannot exercise their rights, it's very much unfair for the court to burden the father with fatherhood as well as traumatizing for the father due to the conclusiveness guaranteed under Section 112. The father, in such cases, often does not have an absolute right to be heard since the court prioritizes social welfare over a person's fundamental rights. There exists a sublime policy that children should not bear social disability on account of the lapses of the parents and hence any such act that may bring about the ostracization of the child shall be subject to a high level of scrutiny. Even though the applicability of DNA tests is present, it must be taken into account that the court has chosen to resort to it as the last option. Although the court has admitted that the results of a DNA test have an absolute accuracy, it also added that this is not enough to escape from the conclusiveness guaranteed under Sec 112.

Now before getting into Sec 112 of Evidence Act, Let's first dive into Sec 4 of Evidence Act.

Sec 4 of Indian Evidence Act, 1872 - "conclusive proof" - when one act is declared by this act to be conclusive proof of another, the court shall, on proof of the one act, regard the other as proved, and shall not allow evidence to be given to disprove it.

It means that if "A" factor is proved, then the other element is conclusively proved, and it should not be legal to produce any amount of evidence against that conclusive presumption whether it leads to grave injustice or untruth. Sometimes we also call it "tyranny of a presumption".

Sec 112: The wording of Sec 112 is very much similar to the Latin maxim, "Pater est quem muptice demonstrat", meaning thereby, "he is the father whom the
marriage indicates''. According to this section, if a person is born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty (280) days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage have no access to each other at any time when he could have been conceived.\footnote{Indian Evidence Act, 1872, section 112.} If any of the two mentioned requirements are fulfilled, it will be enough to establish its legitimacy and transfer the burden of proof to the party, seeking to set up the contrary.

This section uses "conclusive proof" and thus Sec 4 and Sec 112 need to be examined together. However, section 112 makes a deviation from the rigour of the conclusive presumption of Sec 4, which is that there is one small window kept open in this section by which this presumption can be rebutted. It is the proof of non-access, i.e. if it can be shown that there was no possibility of access between the man and woman at the time when the conception could have taken place or the child could have begotten.

"Section 112 is based on the presumption of public morality and public policy".\footnote{Sham Lal v Sanjeev Kumar, (2009) 12 S.C.C. 454.} The rule of presumed legitimacy as embodied in this section is instead found in morality, decency and policy.\footnote{Mahendra Agatrao Lomte & Dr.SR Katari, \textit{A Critical analysis of legal presumption of legitimacy of child under section 112 of Indian Evidence} J.} This conclusive presumption can only be dismissed by non-access of the parties, and that non-access needs to be proved not on the balance of probabilities but the strong preponderance of the evidence.\footnote{Gautam Kundu v State of West Bengal, (1993) 3 S.C.C. 418.} None other than this evidence is admissible to dispel this conclusive presumption. Thus, this presumption is in favour of legitimacy and against bastardy.

The exception of non-access: high time to be revised
Sec 112 feels the necessity for the party disputing the paternity to prove non-access to dismiss the presumption. The law says if there is physical proximity or an opportunity to have sexual intercourse between the spouses, that itself is sufficient to establish access whether actual cohabitation took place or not and is of no matter. Even using contraceptives won’t be enough to disprove the presumption and legitimacy will be deemed whereas non-access in absence of physical proximity or absence of opportunity to have sexual intercourse. This creates a legal lacuna in cases where paternity may be disputed even when the parties had access to each other. To be specific, adultery.

E.g., if a husband and wife were sharing the same roof during the time of conception, but the DNA test disclosed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable.\footnote{Kanti Devi v Poshi Ram, (2001) 5 S.C.C. 331.} Here, the man, according to the law, cannot use the defending statement that he is not at all responsible for the fetus. Though this looks hard for the husband who would be compelled to undergo the fathership of a child of which he may be innocent, even in such a case, the law leans in favour of the innocent child being bastardized if his mother and spouses were living together during the time of conception. Furthermore, the same

draconian law operates here, which says even if there is an opportunity to have sexual intercourse, he cannot establish non-access whether he had or not is no defence.

Another instance can be, suppose, when some parents are genealogically English, but the child born to them is Black or parents who are Chinese, but the child born to them is an Indian. Even though the spouses may be morally convinced that he is not their child, the presumption will operate. In this situation, where it revokes against any person's common sense, knowledge and justice, the court needs to forget the presumption and switch to DNA tests for the determination of the paternity of a child. This invalid presumption cannot be just forcefully imposed on the father, thereby making the child a legitimate child of the man. A very commonsensical argument that can be made here is that if a potato is planted, potato is to come out. How come a potato be planted, and onion comes out. We cannot merely let the presumption prevail over the fact which often leads to grave injustice. In a civilized society, it is quite strange to presume the legitimacy of an infant based on the continuation of a valid marriage and whose parents have access to each other.

Under both the examples stated above, the court can't arrive at a conclusion regarding parenthood only based on the fact that the husband and wife were having access to each other. Here, there is a requirement to broaden our mentality while analyzing this point. The act of living together or sharing the same room or even the same bed cannot be concluded as an act of intercourse. Mere living together can be out of love, affection and understanding they share. It can also be highly probable when the spouses are living together only due to social restrictions or some obligations but do not have any commitment to each other. Possible is the case when they are living together just for the sake of the continuance of their wedlock, avoiding any kind of social taboo or might be for the welfare and proper upbringing of their child. There can be many many other reasons too. If under such circumstances, a child is born, utilization of unpredictable growth of scientific temperament must be done. Introduction to safe scientifically accurate DNA test results into evidence as permitted under Sec 112 and Sec 4 must be done in which "access" in a modern context where it can be easily determined that this person is the fusion of this man's sperm and this woman's ovum, should be interpreted as access of the sperm to the ovum and not to the man's hand to the wife's hand, with this accepting DNA reports as evidence of non-access.

DNA and paternity tests
The introduction and admission of DNA technology can be advantageous to meet the ends of justice. DNA (deoxyribonucleic acid) is the strands of identity that we living beings inherit from our ancestors. Every individual has a unique strand of DNA except in case of identical multiple births. DNA determines the structure and function of every part of the body. Each person inherits 50% genetic material from their biological father and 50% from their biological mother. It is this that guarantees DNA is unique. Features of the child that are not found in the mother are inherited from the father. Comparison of the DNA

sequence of one person to that of another person can help determine whether one of them is derived from the other or not.

Paternity tests through DNA are recognized as the most extensive and accurate form for determining the existence of any biological relationship between individuals.\footnote{Hongbao Ma et al., \textit{Paternity Testing}, 2 JOURNAL OF AMERICAN SCIENCE 76, 76-91 (2006).} The testing is solely based on the study of genetic materials of two people (for example a child and alleged father). When the DNA of the child is contrasted with an alleged parent’s DNA, and there exists no match, then the alleged father is debarred as the biological father of the child whereas if there exists a match between the DNA patterns, a probability of 99% or higher is estimated thus establishing a biological relationship.\footnote{Id. at 78.}

We must remember that Sec 112 of the Evidence Act was enacted at a time when the modern scientific advancements with DNA as well as RNA tests were not even in the contemplation of the legislature.\footnote{Kanti Devi v Poshi Ram, (2001) 5 S.C.C. 331.} Having known that and also being well-versed with the fact that DNA profiling’s probability of giving an exact result is 99.9% as well as with the law being considered as a dynamic one and not static, there must be necessary changes in law according to the needs and advancements of the society without compromising its fundamental principles. All laws are geared up to maintain harmony in the nation and if a person lives with this seething discontent that the law makes him the father of the child of which he is not, won't be conducive to harmony and justice means justice anyhow even to him.

\textbf{Conclusion}

It is a widely accepted truth that the law has to flourish to fulfil the need of the fast-developing society keeping alongside the scientific advancements taking place. Consequently, section 112 should be revised in light of contemporary developments taking place in science and technology. So far, in cases where the man and woman have accessed each other, and still one of them wants to dispute paternity, DNA testing is not authorized because of the mild scope of exceptions to this regulation and the typical standard of conclusive proof.\footnote{Anushna Satapathy, \textit{Presumption as to legitimacy of a child under section 112 of the Indian Evidence Act}, IPLEADERS (Oct 4, 2018), https://blog.ipleaders.in/legitimacy-of-child/ (last accessed on 3rd July 2020).} An opportunity to rebut the presumption must be there on all possible evidence. Although the law may have been preservative of women and children in a time when society was not kind to either, with the developments of social morality and the distance science has travelled, it no longer holds logic. In sharp contrast, the law is, in fact, more confining and unjust than protective. With this weak legislation that has numerous ambiguities within it, it is necessary to delve into the scope and extent of Sec 112 today, keeping in consideration the reliable evidential value DNA tests have.

The only caution that is required to be remembered is that neither law can sway to the tune of science nor can the law or legal jurisprudence segregate itself from the practical understanding science can provide us to resolve the problem at hand. How long it takes for DNA evidence to be universally welcomed as reliable evidence depends on us, the legal and scientific fraternity, to develop a standard for adducing such
evidence in court.\textsuperscript{791} Till then, DNA evidence will not be silenced by disagreements on protocols, methods, admissibility and other barriers. The DNA "witness" is unstoppable, let's give it a chance, and it will speak the truth and only the truth which is, at last, the ultimate goal.

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EDUCATION SYSTEM PRAGMATIC CHANGES AND IT’S DEVELOPMENT DUE TO COVID-19

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ABSTRACT

Education is a field that provides ample of opportunities to an individual leading to the great heights of success. But analysing today’s education system was the need of the hour and taking appropriate measures to improve the same. Although due to coronavirus pandemic there has been an upgradation in education system to some extent but on the contrary it has also given rise to some negative implications. This paper aims to highlight the implications of online education amongst the students. Several problems and issues have arisen with the emergence of coronavirus, which needs to be solved in order to sustain the quality of education for future generations. Through this paper the researchers have tried to analyse the impact of Covid-19 on education sector. The study also covers the positives and negatives of the New Education Policy, 2020 and the challenges faced with the introduction of Digital Education. At the end, the researchers have finally proposed some recommendations to improve the education system.

Keywords: Digital Education, New Education Policy, Technology.

INTRODUCTION

The education sector which is the most important sector of our country is in disarray. In the previous regime, there was no right to education. However, in the case of Mohini Jain vs. the State of Karnataka, it was ruled by the Supreme Court that the right to education is a fundamental right. Then, through the Constitution (Eighty-sixth Amendment) Act, 2002 Right to Education was expressly made a Fundamental Right. In this disastrous time of COVID-19, the education sector is one of the most affected sectors. This virus emerged from China and subsequently there was spread of this virus across the globe. To control this situation, from March 18, 2020, there was imposed proper lockdown in India. Due to the lockdown, until now the education sector is closed to ensure the safety of everyone. COVID-19 is spreading thick and fast in India, with around 50,000 cases being recorded daily.

It is getting difficult for the country to overcome this situation anytime sooner. However, Russia has come up with the Corona vaccine but it will take time for mass production. Even India has also come up with vaccine but the vaccine is in the phase of the trial. These dire circumstances have shaken the institutes of education that are schools, colleges, and universities, as they grapple with the trying times. However, India has come up with an

alternative of starting education through virtual mode, which indeed is the right step, as currently, this is the safest option to practice. Online classes have been started for children of all age groups. But a lot of heated debates and arguments emerged against E-Education system. The conducting of online classes till 5th standard has not been considered to be feasible because the students were not able to concentrate and parents were facing problem too because of frequent internet recharges and children health issues. Even the New Education Policy has also been introduced but will be implemented from next year.

The situation of our country is getting worse day by day and there are no chances of opening the education sector and conducting physical classes. Many students face problems during online classes. Parents are also of the view that virtual classes can never replace physical classes completely. Various issues have come up with the emergence of digitalized education.

Issues
- Whether conducting online classes would be beneficial for students and lead to steps towards digitalization?
- Whether the New Education Policy will lead to increased efficiency in students?
- Whether the New Education Policy will lead to development in India?

IMPACT OF PANDEMIC ON EDUCATION SYSTEM
The number of COVID-19 cases across the country is rising enormously day by day even now. The longer this crisis continues, the worse it is going to impact the economy. The education sector is one of the most impacted by the pandemic. Principle concerns such as reopening school and colleges or holding of the exact collect fees, or holding virtual classes defy general or quick-fix solutions in the absence of a common denominator.

Students in our country have been demanding the cancellation of exams. Virtual classes have been commenced in some places and some exams have already been cancelled. In these hard times, there is hardly any family that is unaffected by the unfolding situation. Parents are demanding that the private schools or institutions should not hike their fees but on the other hand, these institutions say that they also require money to pay the staff and the teachers.

There are few schools and colleges which stopped teaching entirely during these tough situations, while others resorted to online classes. People like us are lucky enough, who have all the access to the internet and can continue studying during this situation but what about people who do not have internet available to them? The people who belong to remote villages lack access to digital devices, so how will they adapt to the digitalized environment?

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795 No online classes for primary, pre-school, TIMES OF INDIA (June 19, 2020, 15:01 IST), https://timesofindia.indiatimes.com/home/education/news/no-online-classes-for-primary-pre-school/articleshow/76464309.cms


These poor students would not be able to attend online classes. So many people have lost their jobs and have been pushed into poverty due to the impact of COVID-19. Even if this situation ends these poor people would not be having money to send their children to school because of fee hikes and if fee would not be paid then the students would be expelled from the school. The major issue that arises here is that whether conducting online classes would be beneficial for students and lead to steps towards digitalization?

This would lead to proper digitalization, only if technical issues would not subsist in the economy, and every student in the country is having access to the internet with a strong connection and can easily attend classes. However, currently, this is not the situation in our country where everybody possesses digital devices, with good connections, and even education through physical classes cannot be replaced completely with virtual classes and can create hindrances in the development of the child and their social life. The pandemic has created a lot of problem in the education system which is as follows:

The major problem that has emerged in this pandemic is fee hike in educational institutions. Nowadays, students and parents are already under a lot of stress. Some private institutions in our country are not conducting any online classes but they are still charging fees from parents. Some private institutions are only holding online classes but are charging exorbitant fees. Even after knowing of the tremendous financial hardships faced by the parents of these schools, universities are charging fees that parents cannot afford to pay. Due to this, several parents approached to SC for a moratorium on the fee hike. There are some states which have already taken action against this. For instance the Kerala HC recently held that schools cannot additionally charge for conducting online classes.

Another problem relates to whether exams should be cancelled or not? Continuous cancellation and postponement of the examinations in recent months have led to increased tensions and stress among students. Whether the grading system would be beneficial or not for the students is entirely uncertain. All this has led to anxiety and depression amongst students and parents as well. Even in extreme cases, the students have also committed suicide because most of the poor students were unable to attend online lectures, because of no smartphones and technological constraints. This matter brought a

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799 Schools that skip online classes cannot demand fees, TIMES OF INDIA (May 3, 2020, 4:55), https://timesofindia.indiatimes.com/city/dehradun/schools-that-skip-online-classes-cannot-demand-fees/articleshow/75511524.cms
800 Tarun Krishna, These colleges want full fees for only online classes. But students say they won’t pay, THE PRINT, (Aug 12, 2020, 8:00 am), https://theprint.in/india/education/these-colleges-want-full-fees-for-only-online-classes-but-students-say-they-wont-pay/479268/
chaotic situation throughout the country. There was a lot of uncertainty about whether to conduct exams or to cancel exams.

Bar Council of India issued various guidelines concerning online examinations. Wherein it was said that the Universities must adopt an alternative strategy for conducting examinations for those students who are unable to avail of the online examinations for any reason. It was also decided that intermediate semester students will be promoted based on the performance of the previous year and marks obtained in internal examination of the current semester. 803

So, several Universities across the world decided to hold Open Book Exams. Wherein students would appear in the exam through online mode and give the exam by the use of the internet and can even use books while writing the exam. This system of conducting Open Book Exams has proved to be a success in some of the Universities and colleges because the questions in Open Book Exams force the students to think critically. However, the students and experts were against this system of holding Open Book Exams. 804 Students even demanded the cancellation and postponement of the exams for a long time. Some exams in India have been cancelled completely like the CBSE and the ICSE Board Exams of class 10th and 12th. 805 Exams of Chartered Accountancy 806 students and CLAT students have also been postponed. In one of the case the petitioners who are final year students have challenged the UGC’s guidelines mandating to conduct the exams by the end of September in respect of which Karnataka High Court has issued notice. 807

However there are many Universities whose matters are still being heard in various courts; still, no certain outcome can be seen. Similarly, the Joint Entrance Exam (JEE) and NEET had also been postponed earlier. However, recently the Supreme Court dismissed the PILs which was filed for the JEE and NEET exams for further postponement of the exams. SC said all necessary precautions would be taken to keep the candidates safe. 808 It was even said that further postponement of the NEET/

808 Murali Krishnan, NEET and JEE Main 2020: Supreme Court rejects plea seeking postponement of exams, HINDUSTAN TIMES (Aug 17, 2020, 12:33), https://www.hindustantimes.com/education/neet-
JEE will put the ‘career of students in peril’.

After all this also, the situation has not been normal till now, a lot of chaos regarding examinations of final year students is still prevalent. Various questions have come up with no certain answers that when, how that through what mode will the final year student’s exams be conducted? **The questions have arisen that How can there be exams without teaching? How will poor, downtrodden, and those without technology cope up with this online system?** UGC’s directive to the Universities that is to hold final year semester examinations by September 30 has also been challenged. The matter is still being heard in the court whether UGC can override the State and mandate for the exams to be still held?  

It can be said that the fear of pandemic is already looming over the heads and this undue pressure of exams is too much too handle at this point of time. So, the authorities should be a little more considerate with the decisions because at the end it is happening only for the students. So their safety is of utmost importance at this point of time.

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**ANALYSIS OF NEW EDUCATION POLICY, 2020**

Education has always been a necessity and plays a vital role in an individual’s life. Recently, the Education Ministry unveiled India’s ground-breaking new education policy. On 74th Independence Day speech, Prime Minister Narendra Modi said that the New Education Policy will play a key role in making India self-reliant and modern.  

This policy will play the most important role in connecting the youth to the roots and will make them modern as well. This policy aims to create robust infrastructure in the education sector that ensures uninterrupted learning even during these catastrophic circumstances.  

This policy that our government has brought in, has addressed almost all the major points of criticism in their new policy and this will bring a revolutionary change in the Indian Education System.  

**Positives of New Education Policy:**

The first major change by the Government is that students will have more flexibility in choosing their subjects and there would be no hard separation of streams.  

Earlier in the existing education system the major point of

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**Notes:**


812 Nandini, *New Education Policy 2020 Highlights: Schools and higher education to see major changes*, HINDUSTAN TIMES (July 30, 2020, 17:30), https://www.hindustantimes.com/education/new-education-policy-2020-live-updates-important-takeaways/story-yYm1QacNyFW4uTTU3g9bJO.html
criticism was that our education system tried to fit the students into three categories after class 10th i.e. Science, Commerce, and Humanities. And this was a problematic situation because if you chose one stream, you cannot study the subjects of other streams. However, many students have an interest in different subjects, but through this classification of streams, students become helpless and can only study subjects of the stream which they have chosen. Even students were forced to select a particular stream by their parents having the orthodox mentality that Science is chosen by those who are the most intelligent and commerce and arts are the subjects for students who are not good in studies. However, now after this New Education Policy, the old system will be replaced with the new system and there would be no classification of the stream. And no one will be able to force the students to select a particular stream. A student can now study any subjects say, Accountancy with Political Science and Chemistry with History.

- A second major change by the Government is that they have replaced the existing 10+2 academic structure with the 5 + 3 + 3 + 4 system now.\footnote{How does New Education Policy affect you? THE INDIAN EXPRESS (July 30, 2020, 2:45 AM), https://www.newindianexpress.com/states/tamil-nadu/2020/jul/30/how-does-new-education-policy-affect-you-2176624.html} Earlier in the 10 + 2 system, education began at the age of 6. However, in the New Education System, education would now start at the age of 3. Pre-School would be from the age of 3 to 6 and then class 1 and 2 for the next two years. Then there would be a “preparatory stage” for the next three years in which focus would be upon playing, discovery, and activity-based classroom learning.

Class 6 to 8 would be the middle stage in which experiential learning would be focused upon that is science, mathematics, arts, social science, and humanities. Next would be the second of class 9 to 12 in which “multidisciplinary” studies would be focused upon. Like in western developed countries, there would be given \textbf{vocational training} to the students. The job of gardening, plumbing, working in the supermarket, etc. These things are given a lot of importance in the developed countries. However, in India, these jobs are considered by people to be meant only for lower-class people. So, this mind-set needs to be changed. From class 6th onwards the students would have to do internships in vocational training jobs. The students would be imparted experience in such a job. Even \textbf{coding} would be taught to children from class 6.

- Another positive step would be taken by the government is to ensure that there is no rote learning by the students.\footnote{Surabhi Sharma, \textit{End of Rote Learning regime in India with the New Education Policy 2020}, THE OPINION (July 31, 2020), https://medium.com/the-opinion/end-of-rote-learning-regime-in-india-with-the-national-education-policy-2020-f9aac0ad8b50} Earlier what the students used to do was they used to mug up each and everything and whatever they learned used to write in the exams. And all that we learned vanished in a few days or months because of rote learning. Due to this thing, many students in India are just degree holders with good grades because they do not get employed or during placements they are not selected because of lack of practical training and this rote learning method. But, now the government has said that the exams would be designed in such a way that there would be elimination of rote learning. This would indeed be a positive step if implemented because students will develop critical
thinking and would be able to know about concepts practically.

- Another important positive step taken by the government is that education after class 12, there would be multiple entries and exit programs. Under the NEP, the undergraduate degree will be of either a 3 or 4-year duration with multiple exit options within this period. For instance, this option proved that say an individual is pursuing a degree which is of 4 years. But later if he wants to drop because of any reason or having no interest he can do so. If he drops out after 1 year, then he will get a certificate if he drops out after the second year, then he will get a diploma. If after the third year, he will get a Bachelor’s degree and after four years, a bachelor’s research degree. Earlier, this option was not there, if a student got himself enrolled in any university, then if later he thought of dropping, there was a lot of pressure and stress by parents that entire year would get wasted. But now there would be the option of multiple entry and exit.

Negatives of New Education Policy: The New Education Policy has been criticized the most on the point of language. The policy says that till class 5th and beyond the medium of instruction will be a home language that is mother language and regional language. This will create a lot of problems for the students and parents as well. Because if the parents get transferred, for instance, earlier a family is living in Punjab and their child has studied until class 4th in Punjab. So, the child would be familiar with the Punjabi language. But later the family shifts to Kerala, then there the language taught in schools would be different, then how will the child be able to cope up. This would restrict the movement of the people from one state to another. So, English should also be given priority, because it has become a global language.

The policy has its own positive and negative sides as mentioned above but the question arises whether this policy will bring development in the country? Whether students’ efficiency would be increased? These questions depend upon the implementation of the policy. If proper implementation would be there then definitely students would be able to enhance their skills and would be able to foster different unique capabilities of themselves and not just theoretical but practical understanding if developed, then definitely later on with these developed conceptual, multi-disciplinary skills and vocational training, students will become industry ready with increased efficiency and ultimately this will help in modernizing and developing India.

But it would have to be ensured that all the students, be it rich or poor should get the benefit of quality education. It does not mean that only rich students who can only afford to pay for online education; they are only getting benefitted by this, the poor should also get the benefit. All the equipment necessary for making the online education accessible to the remote villages and students should be made available.


CHALLENGES FACED WITH THE INTRODUCTION OF DIGITALIZED EDUCATION

Although the government has come up with an alternative of virtual classes but many problems are being faced by the students, teachers and even parents too during the pandemic which is as follows:

- In physical classes teachers used to have an interactive session with the students but through online classes it is not possible. It is more of a monologue from teacher’s side. As many a time’s students and teachers face connectivity issues and all the students do not get a chance to ask questions or clear their doubts. Even it is also not possible for teachers to listen to every doubt student’s doubt.

- Even there has emerged a situation, where faculties are being abused and bullied by the students for not knowing how to operate their digital types of equipment. They make fake ids to waste the entire lecture by disturbing. This system is new for each one and students behave in a much unexpected manner as they know the teachers would not be able to identify them.

- For students like us who are privileged enough to attend online classes there is no problem. But the students belonging to poor families, not having an internet connection, how will they study. Many students from poor families have committed suicides they were unable to attend online classes. For instance, in one of the village parents sold their cow, which was the main source of income, just to buy their children a smartphone, so he could attend online classes.817

- Due to prolonged sittings in front of laptops and computers, and no physical exercises have impacted student’s health. Eating habits and sleep cycles are getting deteriorated. Also in this situation, students are not able to socialize much with their friends, which has led to increased tensions and depression among students.

- Students are facing connectivity issues due to which they are not able to understand the concept and proper meaning. For instance, in Odisha, one student used to climb to roof every day at a particular point in search of network.818 This is the level of struggle poor students are facing.

- Through online classes, the scope of practical knowledge has vanished, and more of the theoretical portion is there. Even extracurricular activities are also not there.

- Those parents who are not educated, how will they assist their children in understanding the concept and how will they help their child in login and attend the class.

SUGGESTIONS

- It is very important for the government to regulate the fees hike of the private schools and institutions. During these circumstances, only tuition fees should be charged considering that everybody has got affected by the pandemic and financial stability of the parents has got affected. Proper legislation should be made to

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regulate the fees hike of schools and colleges.

- Education of poor students should be taken care of and there should not come a situation that would create hindrance in student’s education that there are limited or no teachers in government schools and colleges. The government should make sure that there are no technical constraints faced by the poor and the downtrodden students. They should get tablets and laptops with proper internet connectivity for smoothly continuing their studies and for the successful implementation of NEP.

- Even committee can also be appointed to ascertain the school fees wherein accounts of educational institutions should be checked to know about the normal income and expenditure and what changes have occurred after lockdown, so as to provide concession to the students accordingly keeping in mind the financial stability of the parents. 

CONCLUSION

To conclude it can be said that, Educational sector has been one of the foundational sectors in the national developmental planning. Article 21-A of the constitution guarantees the right to education to everyone. However, this pandemic has led to the emergence of problems in everyone’s life but this has also provided us with the opportunity of digitalization and introducing an alternative system of online education and study even during unforeseeable situations. However, the challenge now lies in ensuring equitable education facilities for government school students in the new online education normal amid Covid. Because we already know that the competitive disadvantage these students face in comparison to private school students. Even, there is an introduction of New Education Policy, 202. There was a need for New Education policy because earlier education policy was age-old and it was felt that in upcoming years the skills acquired according to the old education system would not be useful in the future. The aim of the new education policy to make India a knowledge superpower is a praiseworthy step. For this aim to be possible proper implementation of the policy should be done by moving in the right direction. The students should grow in such a way that in the coming situations ahead they live a sustainable and dignified life, and develop skills accordingly. Developing skills is the only way to enhance the quality of human resources and contribute to the economy.

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PROMOTION OF INDUSTRIAL REALTIONS THROUGH SOCIAL

SECURITY SCHEMES: THE CASE OF TANZANIA

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INTRODUCTION
In case of conflict between employer and employees, the government will invariably be called As a sort of arbitrator in order to achieve industrial peace. Responsible governments should therefore take a proactive role in reducing social and industrial conflicts by acting on its source, that is by improving the institutional arrangements to welfare of labour. An area of employee welfare where governments would like to take measures to ensure industrial peace is in the employee social security scheme. Generally, social security schemes are imposed and controlled by government units for the purpose of providing social benefits to the community like employees. With employees, social security schemes generally involve compulsory contributions by employees or employers or both and the terms on which benefits are paid to recipients are determined by a government unit.

This paper highlights efforts made by the government of Tanzania to promote prevalence of industrial peace by addressing the differences that existed among the different pension funds in the country.

SOCIAL SECURITY SYSTEM IN TANZANIA
The social security system in Tanzania has had the following key elements

- Social assistance schemes which are non-contributory and income-tested, and provided by the state to groups such as people with disabilities, elderly people and unsupported parents and children who are unable to provide for their own minimum needs. In Tanzania social assistance also covers social relief, which is a short term measure to tide people over a particular individual or community crisis.
- Mandatory schemes, where people contribute through the employers to pension or provident funds, employers also contribute to these funds;
- Private savings, where people voluntarily save for retirement, working capital and insure themselves against events such as disability and loss of income and meet other social needs

Despite the existence of this framework, services delivery has not reached the majority of Tanzanians due to inadequate financing and fragmented institutional arrangements. About 70 percent of the Tanzania population is in the rural areas, while the rest are in the urban areas. About 2.7% of the total population is covered by the mandatory formal social security system. In addition, 93 percent of the capable workforce is engaged in the informal sector in both rural and urban areas; out of that 80 percent is in engaged in the agrarian economy.

Currently there are six major formal institutions that provide social security protection in Tanzania. These are
1. The National Social Security Fund (NSSF) offering social security coverage to employees of private sector and non-pensionable person and government employees,
2. The public service pension Fund (PSPF) providing social security protection to employees of central Government under pensionable terms
3. Parastatal Pension Fund (PPF) offering social security coverage to employees of
the both private and parastatal organizations,
4. The Local Authorities Provident Fund (LAPF) offering Social Security coverage to employees of the Local Government
5. The National Health Insurance Fund (NHIF) offering health insurance coverage to pensionable employees of central Government
6. The Government Employees Provident Fund (GEPF) providing social security to employees of the government who are in operational services and who under contract.

SHORTCOMMINGS IN THE SOCIAL SECURITY SYSTEM IN TANZANIA
The social security system in Tanzania was characterized by a number if shortcomings, which had to be addressed by government:
1. **Limited Coverage**: Persons covered by the social security schemes were those employed in the formal sector which was only about 5.4% of the whole labour force. This meant the remaining 94.6% engaged in informal sector and comparatively more vulnerable were not covered by the formal and social security protection
2. **Fragmentation and lack of co-ordination**: The social security sector lacked co-ordination at the national level as each Fund reported to a different ministry with differing operational rules and procedures. As a result, contribution rates benefit structure, qualifying conditions as well as plans and priorities differed from one institution to another.
3. **Lack of mechanism for portability of benefit rights**: There was no established mechanism that allowed benefit rights of a member to be transferred from one scheme to another. This resulted in employee losing some of their benefit rights when they move from one sector to another.
4. Social Security benefits: In some of the social security schemes, members benefits were not rights but privileges. Members lost some of their benefits if they left employment before attainment of their pensionable ages. In other circumstances, members benefit rights were determined by the employers, depending on the nature of termination.
5. **Non-contributory social security benefits**: There was a great of salaried workers who were getting social security benefits fully financed through tax revenues; this was a strain to the government budget.
6. **Investment of social security funds**: There was inadequate guidance on investment of social security fund at national level. As such the administrators of the pension fund could invest in any type of opportunities of their choice. This exposed the fund to risky ventures.

A responsible government cannot run a blind eye on the aforementioned shortcomings observed in the social security system of the country. Consequently, the government embarked on the move to address the problems by formulating a comprehensive national social security policy that would address the needs of employed people in the formal sector, self employed population in the informal sector, the elderly, people with disabilities and children in need of special protection.

INTERVENTIONS BY THE GOVERNMENT
The government of Tanzania addressed the issue by first of all formulating a social security policy. This was accomplished in 2016. The policy was formulated in order to address all matters that were considered problematic in the way social security activities were conducted in the country. The policy was formulated with the general objective to ensure that every citizen is protected against economic and social distress resulting from substantial loss in
income due to various contingencies. Arising from the policy, some legislations were amended and others enacted by the parliament.

THE SOCIAL SECURITY REGULATORY AUTHORITY
The Social Security Regulatory Authority (SSRA) was established under the Social Security (Regulation Authority) Act no. 8 of 2008 (as amended by Act No. 12 of 2012) with the main objective of regulating the social security sector. The Authority started its operations at the end of the year 2010. The Act of parliament establishing the SSRA provides a number of functions and duties among them being registration of fund managers, Custodians and schemes, regulating and supervising the performance of managers, Custodian Schemes, and protecting and safeguarding the interests of members. The task of fund registration was an important one since it ensured that only pension and provident funds that met specific conditions would be registered and allowed to operate in the country. SSRA issued guidelines to pension and provident funds that aimed to ensure that the shortcomings observed in the social security system were corrected.

MEMBERSHIP REGISTRATION GUIDELINES
The SSRA issued Social Security Schemes (Membership Registration) Guidelines in 2016 aimed to set out conditions to operate as a social security provider in the country. These guidelines made massive changes to the industry of social security provision in the country. Among the important requirements include:

1. It shall be the duty of the employer to accord all scheme equal opportunity to meet with the employees for purposes of providing public education on their benefits plans to employees.
2. Every scheme shall provide public education and conduct awareness campaigns designed to educate members on their rights, duties, obligations, procedures and mechanisms with public education requirements regards to their benefit plans.
3. The schemes shall provide public education and conduct awareness campaigns designed to solicit members form amongst the public with particular emphasis to informal sector workers and self-employed persons.

EMPLOYERS ARE PROHIBITED FROM CHOOSING A SCHEME FOR THEIR EMPLOYEES AS FOLLOWS:
1. The employer shall not choose a scheme for any of its employees.
2. The employer shall not force an employee to join a scheme which is not for his choice.
3. The employer shall not be allowed to issue policies or circulars requiring employees to be members of a particular schemes.
4. The employer shall not have employment contracts indicating specific scheme membership registration requirement.

In addition, the membership regulation guidelines prohibit schemes from degrading the benefits provided by others schemes. Indeed, schemes are not allowed to talk ill of benefits plans provided by other schemes. The guidelines also address other shortcomings like portability of benefits from one scheme to another and others.

THE SOCIAL SECURITY SCHEMES INVESTMENT GUIDELINES
The Bank of Tanzania, which is the country’s central bank issued Social
Security Schemes Investment Guidelines in 2012 with the general objective of guiding the Boards of Trustees of the schemes to undertake investment decisions in line with the best practices and provisions of the Act. The specific objective of the Guidelines include:

1. Prescribing limits for investments in various asset categories to foster risk diversification and limit excessive concentration of risk.
2. Safeguarding and protecting the interest of the members of the scheme by directing investments in safe and high yielding investment opportunities without compromising diversification and social economic utility criteria.
3. Ensuring sound governance structure, which is essential for the effective investment of social security funds.
4. Ensuring that there’s sufficient liquidity to meet maturing obligations.
5. To ensure a high level of integrity and professionalism in the governance and administration of the investments of social security schemes.

The investment guidelines addressed the observation that fund managers had the leeway to invest in any opportunity of their choice. This was considered undesirable as failure of a fund to the extent of being insolvent would be catastrophic to the nation.

**CONCLUSION**

The social security system in Tanzania was not in good shape and soon or later would create choice and the benefits differed significantly for no explainable reason. The government has intervened to ensure that shortcomings that existed are minimized or eliminated. The Government of Tanzania has not addressed the globalization issues of social security system that appear to be a concern for many nations, both in the developed world and in the developing countries.

**REFERENCES**


**CROSS BORDER MERGERS AND ACQUISITIONS**

By Lavanya Panwar and Anshita Kohli
From School of Law, Manipal University Jaipur

ABSTRACT
This research paper places major focus on the cross-border mergers and acquisitions. It is an attempt by authors to acknowledge and deeply analyze the handful of laws governing the Indian legal aspect of cross border mergers and acquisitions. It places pertinence on different laws governing such transactions along with the impact and importance of the same on such transactions. It also covers the amendments introduced in past few years to ease the carrying out of such transactions. The research paper gives a brief description about the terms and the basic difference between them. It further delves into the evolution of such transactions in India in accordance with the proposed changes in laws governing it. It also gives a brief description of benefits incurred by the execution of such transactions. The paper also attempts to point out certain loopholes in the laws and endows suggestions for the same. It provides reader clarity on the topic and covers all the aspects relating to cross-border mergers and acquisitions.

INTRODUCTION
The last two decades have experienced numerous emerging trends in corporate world, one such trend is “Cross-Border Mergers and Acquisition.” According to the statistics “in 2008, M&A activity reached $707 billion, almost a tenfold increase from $77 billion in 1991–1996.” These transactions account majority in growth of FDI in any country. The Outward Foreign Direct Investment (hereinafter referred as “OFDI”) has played major role in economic development worldwide and has also served as a boon for the development of Industrial sector resulting in enhancing the economic development in various countries.

With the intent to comprehend the subject mentioned above in detail it is quintessential to discuss the terms “Merger and Acquisition” (hereinafter mentioned as “M&A”) in detail. Though the terms “Mergers” and “Acquisitions” may seem akin to each other but complying to the corporate interpretation in the contemporary times, the terms can be vastly distinguished. The term “Merger” can be defined as incorporation of two entities with the object to form a third new entity. In the process of merger, the assets and liabilities dissolve in order to incorporate it in the newly merged entity, thereby forming a separate legal entity by incorporation and dissolution of the two merging companies. In addition to this, the meaning of the term “Acquisition” can be construed as overtaking or purchase of an entity by other entity. Acquisition is also known as “take over” and “buyout.” In the process of acquisition, the company acquiring the shares or assets of the concerned company maintains its existence in the market.

In mergers the consent of both the parties is a pre-requisite and is a mutual decision to shape the transaction of merger and mostly the companies are of equal status whereas, in Acquisition the consent of the acquired company is not necessarily essential for the completion of transaction of Acquisition and in general, the acquiring company is larger than the company being acquired.


Further, the term “Cross Border Mergers and Acquisition” can be defined as transactions of M&A entered by the companies registered in two different countries. Parties generally merge with each other just for the benefit of them. Some great Merger and Acquisition examples are Disney and Pixar, Exxon and Mobile, Comcast and Time Warner Cable, Dell and EMC, Microsoft and Skype.

**EVOLUTION OF CROSS BORDER MERGER AND ACQUISITIONS**

The process of evolution of Cross-Border M&As can be traced to two significant events in Indian history, viz. –

**A. Introduction of LPG policies in 1991 in India.**

The transactions of Cross-Border M&As in the country initiated with the introduction of LPG policies in 1991. The legal regime during the pre-liberalization period depicts that the Indian Government was very reluctant towards the concept of overseas trading and as a result of this, there were strict laws relating to licensing and “red tape” regulations persisted in the country, which was also termed as “License Raj.” These regulations, which effectively isolated India’s business community from the world, have been described as an inward-looking set of policies calling for centralized planning, complex industrial licensing requirements, bank nationalization, substantial public ownership of heavy industry, tight restrictions on the operations of foreign companies, high tariff barriers, tight restriction of imports and exports, and high bureaucratic control.  

Though this system proved to be beneficial to the domestic traders in sustaining their businesses, as they were shielded under the garb of these policies from the outside competition, but it resulted in huge depreciation in the growth of Indian economy, which almost led the country to the condition of bankruptcy. This situation led to dismantling of the License Raj system and to the introduction of a new policy.

After the liberalization policy came into effect the process gained momentum by initiation of Multinational Companies who began to expand their businesses and enter the Indian markets. Consequently, the Multinational Companies entering, found that India has a high base of consumers and can result in huge profits for them. They found that resorting into mergers, acquisitions and similar strategies is an easy way of entry into Indian market without much cost of time and money. While the reforms begun in 1991 were critical in familiarizing Indian firms with M&A transactions and promoted an influx on inbound M&A, it was not until early 2000s when outbound M&A transactions took off as a result of a transformation of the overseas investment laws. Thus, The Indian economy saw a growth in Private Sector investments as a result the foreign exchange reserves increased from $1.2 billion in 1991 to $313 billion by June 2014.

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822 Afra Afsharipour, Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies, University of California, Davis, Vol. 44:1029


824 See id. at 3.

825 Puja Mehra, Liberalization, (July, 2, 2020, 3:30 PM)

https://www.thehindu.com/business/budget/liberalisation-199192/article6186027.ece

With the objective to uncomplicate the previously existing cumbersome process and stringent laws in India regarding M&As, J.J. Irani committee came into existence. The Irani report does not introduce any significant change in the core concepts and rules envisaged in Companies law, but it did introduce certain improvements in the previous system. The changes in the process are listed below:

i. It endowed statutory recognition to contractual mergers which earlier were not recognised by law. This will facilitate the shareholders and parties with the option to rectify clauses.

ii. The committee in its report has reflected its intentions regarding cross-border M&A also. Indian companies are permitted for cross-border M&A by way of both contractual based and court-based M&A. The Indian companies are now permitted to enter into both inbound and outbound transactions relating to cross-border M&As.

iii. The restriction envisaged under Section 390(a) of Companies Act, 1956 has been removed, which required court’s intervention for winding up of a company merged with another.

iv. Along with this the Companies Act, 2013 has put forward certain restriction, viz. the foreign company should be located in a country that has been notified by the central government; and India’s federal bank or the Reserve Bank of India (hereinafter mentioned as “RBI”) prior approval is quintessential for the transaction to be completed.

v. With the introduction of Section 234 of Companies Act, 2013 the Payment of cash, or issuance of Indian Depository Receipts, or a combination of both can be used to discharge the consideration to shareholders of the amalgamating company in the transaction of cross-border M&As.

REASONS FOR CROSS BORDER MERGER AND ACQUISITION

There are always various reasons to enter into transactions related to cross border M&As. It helps in building a strong financial base, cut down taxes, expansion etc. The major reasons for undertaking such transactions in India are mentioned hereinafter:

1. Globalisation of Markets in the Economy- Globalisation led to the free flow of FDI in the country. Since India is and was a developing country at that time, the MNC’s invested and established their businesses and found it a great source of profit as the consumer base in India is strong and resources are cheaper as compared to other countries.

2. Market Pressure- The country saw a huge increase in its GDP due to increase in transaction of cross-border M&As. It increased from 105 USD Billion to 125 USD Billion in the period of 1999-2003. The survival of the Indian companies was getting difficult and hence they were forced to...

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826 Bobby Kurian, Dr. K. S. Gupta, Cross border Merger and Acquisition: The evolving Indian landscape, International Journal of Business and Management Invention, ISSN (Online): 2319 – 8028, ISSN (Print): 2319 – 801X, Volume 6 Issue 8.

827 Report on Company Law, Jamshed J. Irani Committee Report

828 Companies Act, 2013, Section 234.

829 Rohit Lalwani and Vanita Bhatnagar, Cross Border Mergers – Revolutionary Development Insight under Companies Bill, 2012, Jus Scriptum

830 Source: India Brand Equity Foundation (IBEF)
to enter into the cross-border M&As to sustain in the market.

3. Growth- Every company’s primary objective is to maximize its profits. For profit maximisation, business needs to diversify in various fields and should run beyond borders. The most effective, efficient and economical method to expand business beyond borders is through M&As with an existing company in the domestic country. It helps the company to develop new consumer base, earn more profits, which is the basic goal of every business.

4. Gaining Monopoly or Market Share- One of the major reasons which proves to be of great importance while transacting such deals is the fact that when a company acquires or merges with a company in India or vice versa, that Indian company is financially weak but regardless of the financial status the company has a certain market share to offer to the acquiring company or the merging company, which in long run is very helpful.

5. Gaining Access to Assets- Apart from the above-mentioned reasons, gaining access to the assets of the acquired company or merging company is also one of the factors that motivated the businessmen to enter into such transactions.

LEGAL PROCEDURES FOR M&A UNDER VARIOUS LAWS

In order to accomplish a cross border merger and acquisition in India, several provisions enshrined in different laws in domain of corporate and commercial laws recognised in India are to be complied with. They are as follows:

1. COMPANIES ACT, 2013

Section 230 to 234 of the Companies Act, 2013 endows the requisites to be fulfilled by a company for accomplishment of an inbound or outbound merger.

A. Rules envisaged under Section 234 of Companies Act, 2013

Ministry of Corporate Affairs (hereinafter referred as “MCA”) has enabled cross border mergers vide “Notification No. S.O. 1182(E) dated 13.04.2017” which came into force on 13th of April, 2017, thereby bringing Section 234 into play. With this notification coming into force, the cross-border M&As have been enabled in India.

Section 234 of the Companies Act, 2013 put forward, below-mentioned conditions for completion of cross-border M&As:

i. Mutatis Mutandis Application of provisions of Companies Act, 2013

Provisions contained Section 230 to 232 shall apply mutatis mutandis in every transaction concerning cross-border M&As unless otherwise provided by any law in force. Further, the provisions ascribe that such transactions are only mandated with companies incorporated

832 Piyush Singh and Daphne Menezes, Cross Border Mergers and Takeovers: A Recent Trend, (July, 2, 2020, 8:30 PM)
833 Suhita Mukhopadhyay, Cross-Border Mergers, Acquisitions, and Valuation, (July, 3, 2020, 10:00 AM)
834 Ministry of Corporate Affairs, (July, 3, 2020, 12:00 PM)
under jurisdiction of companies notified by Central Government.

ii. Power to make Rules in regard with cross-border mergers –

The Central Government is envisaged with the power to make rules regarding cross-border merger and amalgamations but this power to make rules is subject to consultation with RBI.

iii. Prior Approval by the RBI –

A foreign company is mandated to obtain prior approval from RBI in order to merge with a company registered under Companies Act, 2013 or vice versa. On the merits of an approval requirement from RBI in case of cross-border merger, from a regulatory perspective, the rationale could be that since a cross-border transaction has the potential to alter the asset/liability profile of a country, such transaction should be regulated.836

B. Rules envisaged under Section 230 to Section 232 of Companies Act, 2013

Apart from Section 234 of Companies Act, 2013, there are certain general principles enshrined under Section 230 to 232 of Companies Act, 2013, which govern transactions related to merger and amalgamation. Mandatory provisions regarding such transactions are as follows:

i. Memorandum of Association (hereinafter referred as MoA) –

The company willing to enter into such transaction shall be authorized by the MoA of the company. Only after complying with the provisions of MoA, the company can initiate with the draft scheme of merger and amalgamation under the provisions of Companies Act, 2013.

ii. Application to National Company Law Tribunal (NCLT) –

With prior approval from the board of directors and RBI as mentioned above, the Indian company undergoing cross-border merger shall also present an application with NCLT in form NCLT-1, which seeks to call upon a meeting of creditors with the object to approve the said merger or amalgamation.837 Also, the copy of all the required documents shall be attached with the application.

iii. Notice –

After obtaining the approval from NCLT to call a meeting in this regard, the company shall endow notice to creditors and members of the company. The notice shall contain documents necessary for the meeting viz. the scheme, details of companies merging, result of merging etc. it shall also be published in newspaper, official websites of company, stock exchanges and SEBI. Notices shall also be submitted to statutory authorities such as Central Government, Registrar of Companies, income tax authorities and all other authorities as are required by tribunal.

iv. Meeting –

When all these requisites are met by the company then the members shall vote within 30 days of receipt of such notice, in the meeting. The results of such notice shall be filed with the tribunal within 3 days.

836Provision enabling cross-border mergers notified:

Based on the approval by the members a petition shall be filed by the company to the tribunal within 7 days. Tribunal after satisfying the compliance of procedure envisaged under above-mentioned provisions shall pass the order for sanctioning of such scheme and make necessary provisions related to it. Such order of the tribunal shall be filed with Registrar of Companies within 30 days by company.  


Rule 25A of the above-mentioned Rules specifically deals with “Merger or Amalgamation of a foreign company with a Company and vice versa” which articulates that the concerned companies shall comply with the provisions mentioned in Section 232 to 234 of Companies Act, 2013, obtain RBI’s approval and shall also comply with these rules in order to complete the transaction. Indian companies can merge with those foreign companies which are mentioned in Annexure B.

Along with the Application submitted to RBI, the transferee company is also responsible for endowing a valuation of merger by the professional of recognized professional body and it shall also be in compliance with the Internationally Accepted Accounting and valuing principles. A further declaration shall be made and attached with the application made to the RBI for further approval. After obtaining all such approvals the companies shall file an application before NCLT according to the abovementioned provisions of Companies Act, 2013.

2. FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)

With the intention to bridge the gap between Indian and foreign companies for the purpose of mergers and amalgamations, RBI has notified Foreign Exchange Management (Cross Border Merger) Regulations (hereinafter referred as “Regulations”). These regulations have covered both inbound and outbound mergers, which have been mentioned below:

A. Inbound Merger

When the company resulting out of transactions is Indian company and all the assets and liabilities will be transferred to the Indian company by the merging foreign company then following guidelines should be followed according to the said Regulations –

i. Issue or Transfer of Securities:

In compliance with Regulation 4 if the resultant Indian company issues or transfers any security in favour of any person who is resident outside India then the Indian company should comply with all the conditions related to it in the pricing guidelines, entry routes, sectoral caps, attendant conditions and reporting requirements for foreign investment as laid down in Foreign Exchange Management (Transfer or Issue of Security by a Person

838 Companies Act, 2013.
839 Vikrant Rana and Akshay Gupta, India: Merger And Amalgamation Of Indian Companies With Foreign Companies, (July, 4, 2020, 6:45 PM) http://www.mondaq.com/india/x/592890/Corporate+Commercial+Law/Merger+And+Amalgamation+Of+Indian+Companies+With+Foreign+Companies

840 Companies (Compromise, Arrangements and Amalgamations) Amendments Rules, 2017, SEBI, Rule 25A.
i. Merger of Joint Venture or Wholly Owned Subsidiary:
In the instance of merger of a joint venture (hereinafter referred as JV) or wholly owned subsidiary (hereinafter referred as “WOS”) of an Indian company with its parent Indian company then such transaction of transfer of shares shall be governed by Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 (ODI Regulations).

ii. Offices of foreign companies to become branch/office of the Indian company:
When a foreign company merges with an Indian company then all its branches/offices situated outside India shall become the branch/office of the resultant Indian company.

iii. Stipulations regarding assets outside India of foreign company:
If the foreign company merges with any Indian company then such resultant Indian company shall acquire assets of such foreign company in accordance with the provisions of FEMA, 1999. Further, if such transaction is barred by FEMA then the resultant company shall sell all the assets within 2 years of date of order of sanction by NCLT for the said merger. Also, the sale proceeds obtained by such sale shall be repaid to India in the earliest possible opportunity by banking channels.

- Mergers surrounding inbound mergers of the existing group companies

RBI permits Indian companies to take over the guarantees and outstanding borrowings of foreign companies which shall conform to the external commercial borrowing (hereinafter referred as ECB) norms within the transition period. If these loans have been obtained from a local vendor or a non-recognised financial body under the definition of ‘recognised lender’ or the Indian entity does not fall within the ambit of ‘recognised borrower’ as per the ECB Regulations then such borrowings though permitted under the hands of grandfathers Indian entity have to be repaid within the transition period of two years.

If the criteria of ‘eligible borrower’ or ‘recognised lender’ is satisfied but the minimum maturity period of such borrowing is not in alignment with the ECB guidelines, then in this case the Indian party may have to renegotiate the minimum maturity period prior to the merger or repay the ECB within a period of two years.


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shall be deemed to have permanent establishment implications. Moreover, these branch offices which have ongoing commercial liabilities, employer’s contract, vendor and customer contracts, etc. would on-go post-merger.

Trading and Service sector companies: In many situations the WOS/JV in this sector will shut down but when such companies do remain operational then such regulations shall remain in force:

- Transfer of employees to the Indian company: The employees of the previous company will shift on the payroll of the Indian company and accordingly Indian company will be responsible for salaries, allowances and provident-fund contributions. Furthermore, in the case of those foreign employees who have participated in ESOP of the Indian holding company will continue to hold the same post-merger.

2. Determination of ODI threshold step down subsidiaries: WOS/JV having downstream investment in step down subsidiary, the Indian company is required to reevaluate the prescribe threshold of 400% of the net worth, as such entities will become direct subsidiaries of the Indian company.

3. Consideration towards to JV Partner under share swap: The JV partner of the overseas company shall receive shares of the Indian company on the account of such merger. The FDI regulations regards this transaction as a share swap transaction which would fall under automatic route subject to certain conditions. This practice in more evident in trading sector, e.g. software companies having overseas JVs which may collapse with Indian companies.

B. Outbound Merger

An outbound merger is the one in which an Indian company undergoes the transaction of merger with a foreign company and all the assets, liabilities and employees of the Indian company are then transferred to the resultant foreign company. Regulation 5 articulates the requirement for a deemed approval from RBI along with the below-mentioned regulations in regards with outbound merger in different circumstances:

i. Acquisition of securities of foreign company:

In compliance with Regulation 5 of Foreign Exchange Management (Transfer or Issue of Foreign Security) Regulations, 2004 which articulates that a person resident in India is permitted by the said regulations, to acquire securities shares issued by the foreign company. Further, the securities secured shall be in compliance with the threshold prescribed under Liberalised Remittance Scheme.

ii. Status of office outside India:

In accordance with Regulation 5(3) of the Cross-Border Regulations, the branch/office in India before the Scheme of Merger or amalgamation shall be considered to be the branch office (hereinafter referred as BO)/ liaison office (hereinafter referred as LO) of the resultant foreign company pursuant to the transaction of outbound merger. Such offices should further require complying with the
provisions of Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 (including restrictions on activities applicable to a branch office). All the transactions undertaken by BO/LO shall be in accordance with the Regulations of FEMA.

iii. Guarantees or liabilities of the foreign company:
All the guarantees or liabilities of the Indian company merging with the resultant foreign company shall become the liabilities of the resultant company and should also be repaid as per the scheme sanctioned by NCLT. The repayment shall also be in compliance with FEMA. The lenders of the Indian Company shall also issue a no objection certificate. The repayment shall further be governed by Companies (Compromise, Arrangement or Amalgamation) Rules, 2016 pursuant to the outbound merger.

iv. Sale of Assets and Securities:
The resultant company shall sell off the assets and securities, which they are not capable of acquiring or hiring, within the time period of two years (also known as transition period), from the sanction of Scheme of such merger. The sale proceeds can also be used for repayment of borrowings of Indian liabilities within the transitional period.

v. Maintaining special non-resident rupee account:

In accordance with the FEMA (Deposit) Regulations, 2016, the resultant company is permitted to open a special non-resident rupee account for two years for the purpose of facilitating transactions relating to outbound merger.

Through the detailed provisions mentioned above the inbound and outbound mergers are dealt in the country. This ensures accountability of the transaction between the parties to the system and further creates a mechanism for the entire transaction to take place with ease.

3. COMPETITION ACT, 2002

The Competition Act, 2002 came into force on 13th January 2003 with the object to regulate the market forces and protect the interests of consumers. It also emphasised on shifting focus from restricting monopolies to regulating them and further ensuring freedom of trade envisaged in the Constitution of India.

While witnessing a dynamic market and huge influx of M&As in the country there was felt a need to regulate them so as to ensure that no appreciable adverse effect on competition (hereinafter referred as AAEC) is caused due to such transactions. As a result, the Competition Commission (Combination) Regulations, 2011 (hereinafter referred as Regulations, 2011) were introduced as the sixth amendment to the Act. This brought about major changes in the procedure of M&As taking

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846 Id 24
847 M. Govindarajan, Foreign Exchange Management (Cross Border Merger) Regulations, 2018, (July, 6, 2020, 11:48 PM)
848 Id 25
849 The Competition Act, 2002.
850 Bharat Budholia, Aishwarya Gopalakrishnan & Aishwarya Gupta, Sixth set of Amendments to the Combination regulation, (July, 7, 2020, 10: 47 PM)
https://competition.cyrilamarchandblogs.com/2018/10/sixth-amendments-combination-regulations-competition-law/#more-2138
These amendments introduced certain thresholds for a combination to take place in India. The transactions which come under the purview of provided thresholds shall be required to be examined by the CCI (hereinafter referred as Commission). The thresholds serve the purpose of identifying potentially harmful mergers and bringing them under the scrutiny of the Commission. Therefore, threshold must be designed in such a way that potential anti-competitive combinations would be under scrutiny without overburdening the commission with such combinations which would not affect competition.\footnote{Cross-Border Merger Control: Challenges For Developing And Emerging Economies, Competition Law and Policy OECD, DAF/COMP/GF(2011)13, (July, 7, 2020, 2:43 PM) https://www.oecd.org/competition/mergers/50114086.pdf} This has also led to the introduction of *de minimis exemption* which has been a relief to the corporate world as it ensures that M&As of small enterprises do not require the approval of Commission.\footnote{Merger Control Exemptions Expanded- Better Late Than Never!, Nishith Desai Associates, (July, 10, 2020, 1:12 PM) http://www.nishithdesai.com/information/news-storage/news-details/article/merger-control-exemptions-expanded-better-late-than-never.html}

### A. Section 5 of the Competition Act, 2002 –

The term combination includes all M&As whether occurring in India or outside India. Section 5 of the Competition Act, 2002 deals with three kinds of combination and the tables hereinafter depict the thresholds which triggers the examination by the Commission of a transaction related to M&A.

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<tr>
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<th>Individual</th>
<th>Assets</th>
<th>Transaction in India or outside India</th>
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<tbody>
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<td></td>
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<td></td>
<td>More than USD 1 Billion with at least more than Rs. 1,000 crores in India</td>
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<td>OR</td>
<td>Turnover</td>
<td>More than USD 3 Billion with at least more than Rs. 3,000 crores in India</td>
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<tr>
<td>Groups</td>
<td></td>
<td>Assets</td>
<td>More than USD 4 Billion with at least more than Rs. 1,000 crores in India</td>
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<td></td>
<td>OR</td>
<td>Turnover</td>
<td>More than USD 12 Billion with at least more than Rs. 3,000 crores in India</td>
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b. Section 5(b) of the Competition Act, 2002 deals with acquisitions of an enterprise’s control where the acquirer already has direct or indirect control of another engaged in identical business and the thresholds for the same in cross border acquisitions are as follows:

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<th>Individual</th>
<th>Assets</th>
<th>Transaction in India or outside India</th>
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<td>More than USD 1500 Million with at least more than Rs. 500 crores in India.</td>
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<tr>
<td>Or turnover</td>
<td></td>
<td>More than USD 1500 Million with at least more than Rs. 1500 crores in India.</td>
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<th>Group</th>
<th>Assets</th>
<th>Transaction in India or outside India</th>
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<tr>
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<td>More than USD 2 Billion with at least more than Rs. 500 crores in India.</td>
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<td>Or turnover</td>
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<td>More than USD 6 Billion with at least</td>
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c. Section 5(c) deals with mergers or amalgamation between or among enterprises and the thresholds for the same are mentioned below:

<table>
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<th>Individual</th>
<th>Assets</th>
<th>Transaction in India or outside India</th>
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<td></td>
<td>More than USD 1500 Million with at least more than Rs. 500 crores in India.</td>
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<tr>
<td>Or turnover</td>
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<td>More than USD 1500 Million with at least more than Rs. 1500 crores in India.</td>
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<th>Group</th>
<th>Assets</th>
<th>Transaction in India or outside India</th>
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<td>More than USD 2 Billion with at least more than Rs. 500 crores in India.</td>
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<tr>
<td>Or turnover</td>
<td></td>
<td>More than USD 6 Billion with at least</td>
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</tbody>
</table>
B. **Section 6 of the Competition Act, 2002** –
Section 6(1) of the Competition Act states that all such combination which causes or likely to cause an AAEC in the relevant market of India shall be prohibited and any such combination shall be considered void. Further, Section 6(2) prescribes that a notice shall be sent to the commission regarding details of proposed combination within 30 days of (a) approval of board of director in case of mergers or (b) execution of agreement or other document in case of acquisition through control. Further Section 6(2A) clarifies that all such combination shall come into effect after completion of 210 days from the date of notice sent to the Commission or after the Commission has passed an order under section 31 of the Act, whichever is earlier. After receiving the notice regarding the proposed combination, the Commission shall deal with it in accordance to Section 29, 30 and 31 of the Competition Act, 2002.

C. **Investigation and Examination of Proposed Combination under section 6**
When a combination triggers the thresholds mentioned in Section 5 of the Act then Section 29 comes into play. According to Section 29(1) of the Act, if the Commission believes prima facie that a combination causes or is likely to cause AAEC then a notice is issued to the parties which directs them to show cause within 30 working days of receipt of notice, the reasons for not conducting investigation relating to such combination. After the responses of the parties have been received, a report shall be called by the Director General (DG) which shall be submitted to the Commission in the time prescribed. After receiving the report from DG or responses from parties, whichever is earlier, the Commission within 7 working days shall direct the parties to publish the details of the combination to the public within 10 working days of such direction. Any person who is affected by the proposed combination should file his written objections within 15 days of such publication. Within another fifteen working days the parties shall furnish all the additional details required by the parties and from 45 days from the expiry of said 15 days the Commission shall proceed with the case.

Further in accordance with Section 31 of the Act if the Commission is opined that the proposed combination does not cause AAEC then the said combination shall be approved but if the Commission believes that it causes or is likely to cause AAEC then the said combination shall not take effect. When the Commission believes that AAEC can be obliterated through modification in the said combination then such appropriate modifications may be proposed. The parties, if accept the proposal of modification then it shall be modified in the specified time and if parties fail to do so then the combination will be said to have AAEC. Parties also have the right to submit amendment to the modification proposed by the Commission. Further Section 31(11) also specifies that the Commission shall pass an order within 210 days from the date of notice to the Commission, failing to do so the combination shall be deemed to be approved by the Commission.

D. **Extra Territorial jurisdiction of the Commission under Section 32**
The Commission holds extraterritorial jurisdiction which provides the Commission with the power to hold inquiries of combinations not only taking place in India but also of combinations

where the parties may not be situated in India but there can be a potential AAEC in the relevant market in India. Section 32 precisely covers all the kinds of cross border combinations that generally occurs and hence, endows power to the Commission to intervene in such transactions.

E. Green Route Channel
The green route channel is introduced through “Procedure in regard to the transaction of business relating to combinations Regulations, 2011” which is applicable to certain transactions. According to this amendment the parties to a combination can simply file a notification under the green route mechanism in the format prescribed in the Regulations. However, there is not much clarity on cross border M&As but if a foreign company intends to own a small share in the Indian company then the green route channel can be used subject to the conditions mentioned in the Regulations in this behalf.

All these provisions give detailed and complete procedure for the transactions relating to cross-border combinations.

4. SEBI (Substantial Acquisition Of Shares And Take-Overs) Regulations, 2011
These Regulations were introduced in September 2011 to regulate the acquisition of shares and voting rights in a public listed company in India. These regulations apply to direct and indirect acquisition of shares and voting rights in target company. These regulations define “Acquisition” as “direct or indirect, acquiring or agreeing to acquire shares or voting rights in, or control over, a target company” and the person acquiring such a control over the company whether acting alone or in concert is defined as an “acquirer”. A target company as defined under these regulations is a public listed company.

Trigger for Open Offer
According to the amended provisions of the Code any person acquiring 15% of the shares of the target company shall put up an open offer for acquiring 20% shares in the Company. These new amendments indicate that shareholders having 25% shares, or more will get a representation in the board of directors for voting and special issue.

Voluntary Offer
An acquirer having control over the shares or the voting rights of the target company entitling them to 25% or more but less than the permissible non-public shareholdings shall have power to make a public announcement (PA) for an open offer to acquire shares. This offer is subject to certain conditions, which are mentioned below:

1. 10% should be the minimum offer size of the total shares in the target company.
2. The maximum permissible non-public shareholdings limits shall not be exceeded by the acquirer or the persons acting in concert (hereinafter referred as PAC) in aggregate once the open offer is complete.
3. The acquirer or the PAC can only make voluntary offer in the target company once the period of 52 weeks has lapsed since they have last acquired shares of the target company without attracting the obligations of an open offer.

855SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, Regulation 2(b).
- No shares shall be acquired by the acquirer or PAC during the voluntary offer period other than under open offer.
- Only after a period of 6 months has passed since the completion of the open offer can the acquirer or the PAC acquire more shares of the target company. However, they can acquire more shares pursuant to another voluntary offer or making a competing offer upon another making the offer or bonus issue or stock splits.

**Minimum open offer size**

<table>
<thead>
<tr>
<th>Trigger for open offer</th>
<th>Minimum open offer size</th>
<th>Other conditions/observations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct acquisition</td>
<td>It shall be 26% of the total shares of the target company, commencing from 10th working day from the closure of the tendering period.</td>
<td>Once the offer period is complete and the shareholding of the acquirer or the PAC is exceeding the non-public shareholding limits: It needs to be brought in the permissible limits in the period of 1 year. It shall not be permitted to make a voluntary delisting offer under the SEBI Delisting Regulations for a period of 12 months form the date of completion of offer period.</td>
</tr>
<tr>
<td>Indirect acquisition</td>
<td></td>
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### Process of Open Offer

- The acquirer shall make a PA of the open offer through a registered merchant worker under the SEBI. The merchant banker shall be appointed as the manager of the open offer. The PA of the open offer shall be sent to all the stock exchanges where the shares of the target company have been listed.
- Furthermore, within one working day the copies of the PA shall be sent to the board of the target company and to the registered office of the target company.
- The acquirer or the PAC shall make a detailed PA by publishing the open offer in the newspaper within five days from the date of the PA. In case it is an indirect open offer, the publication shall be made in the newspapers not later than the five days once the primary acquisition of shares and voting rights in or over the control of the target company are complete.
- According to Regulations 14 the following provisions have to be adhered to for the publication of a detailed public announcement and public announcement:
  According to Provision 1 of the Regulation the PA shall be made to the stock exchanges on which the shares of the target company are listed, and these stock exchanges shall...
disseminate this information to the public. This shall be done on the same day on which the open offer is made.

ii. According to Provision 2 of the Regulations the same public announcement shall be sent to the directors of the Target Company and to the registered office of the target company. This shall be done on the same working day on which the open offer was made.

iii. According to Provision 3 of the Regulations the acquirer or the PAC shall send a detailed public statement (DPS) from the date of the PA. DPS shall be published in the newspapers of Hindi language, English language, regional national language which circulates in the area of the registered office of the target company, regional national language which circulates in the area of stock exchange where the maximum volume of trading has taken place in the past 60 days.

iv. According to Provision 4 of the Regulations, the acquirer or the PAC shall send the DPS to the board, stock exchange and the registered office of the target company.

• Once the PA and the DPS is complete the acquirer or the PAC shall send a draft Letter of Offer shall be sent to SEBI and once approved, it shall be sent to the shareholders of the target company.

• Two working days prior to the date of DPS, an escrow account has to be created.

• Competing offer can be made after completion of fifteen days from the date of the DPS published by the acquirer who made the PA.

• Until the expiry offer period is passed, the acquirer shall not complete the acquisition of shares or voting rights in or control over the target company. The exceptions to this are:

When an open offer is made on the preferential shares, the completion period shall be 15 days from the date of passing of special resolution.

When the acquirer makes a 100% payment of the consideration that is payable under the offer letter in the escrow account then the parties of such agreement can from the passing of 21 days of the DPS, shall act upon the agreement and the acquirer may take the complete the acquisition of the shares or the voting rights in, or control over the target company.

Upon receiving the DPS the Board of the target companies shall appoint a body of independent directors who shall make recommendations regarding the open offer and the same recommendations shall be published in the newspaper.

Any merger or amalgamation will come under the scrutiny of the same regulations.

APPLICATION OF INCOME TAX ACT, 1961 (HEREIN AFTERT REFERRED AS ACT)

One of the major reasons behind bringing into effect a merger and acquisition deal is to achieve tax benefits endowed by the Indian tax regime. Subject to certain conditions, mergers are provided with a favourable treatment. The Act has defined amalgamation as a merger of one or more companies to form a new company such that the assets and liabilities of merging companies become the assets and liabilities of resulting company and shareholding of at least three-quarters of the shares in the amalgamating company becoming


shareholding of amalgamated company.  

Some of the significant tax provisions governing cross-border M&As are discussed hereinafter -

A. PLACE OF EFFECTIVE MANAGEMENT (POEM)

If a foreign company has a place of effective management in India then, it is considered to be a resident of India and shall be taxed at 40% of its global income. Central Board of Direct Taxes (hereinafter referred to as ‘CBDT’) has specified that any overseas Indian holding companies and subsidiaries deriving passive income may be exposed to domestic tax net due to place of effective management.

B. INBOUND MERGERS

The tax neutral status has always been enjoyed by the merging companies and its shareholders in an inbound merger. However, in accordance with Section 42(vi) and 42(vii) of the Act, the shareholders of the merging companies may enjoy this benefit subject to the condition prescribed i.e. all the assets and liabilities and continuity of holding minimum 75% of the shareholding. In case of an overseas merging company, there is no tax liability applicable on it if there are no assets situated in India. Akin to this, the shareholders of the merging company are also exempted from capital gain implication arising due to transfer of shares. Contrary to this, if the shareholders are Indian residents and the shares derive their value from assets situated in India then the shareholders will be required to fulfil tax requisites arising therefrom under the head capital gains.

C. OUTBOUND MERGERS

The Indian tax regime fails to take into account the transactions related to outbound merger and resultantly, the tax neutrality benefits generally available to inbound mergers are not available to outbound mergers. However, any transaction involving transfer of capital assets will attract capital gains tax in the hands of the foreign company and shareholders receiving shares of resultant foreign company.

D. CARRY FORWARD

Generally, the amalgamated companies attain the privilege of setting off depreciation and carry forward of unabsorbed/accumulated losses against its acquired profits. However, this privilege cannot be exercised by public companies where shareholders holding 51% voting rights on the last date of the year in which set off took place and shareholders carrying 51% voting rights on the last date of the year in which losses was incurred. Notably, carry forward of losses is applicable only to the specified sectors prescribed under the IT Act or notified by authorities.

E. GENERAL ANTI AVOIDANCE RULES (GAAR)

The GAAR provisions provides the authority to tax authorities to scrutinize arrangements and on accountability of sufficient reasons to believe that such arrangement would result in lack of commercial substance, denial of tax benefit under the Act or tax treaty, the authorities may invalidate them as ‘impermissible avoidance agreement’ (hereinafter referred as IAA). This provision is applicable when the said arrangement exceeds Rs. 30

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857 Income Tax Act, 1961, Section 2(1B)
million, irrespective of their residential or legal status.

7. **ROLE OF IBC IN CROSS BORDER Mergers and Acquisition**

It has been highly believed that the transactions and deals regarding M&As have substantively increased since the introduction of Insolvency and bankruptcy Code, 2016 (hereinafter referred as IBC). Thomson Reuters data depicts that deals relating to M&As were worth $99.7 billion between January and September, which surpasses the existing records. According to the data provided by Kroll and Merger Market, since IBC came into effect the M&A deals in distressed asset have increased up to sales worth around $14.3 billion.

The IBC provides the healthy companies a clear idea about the businesses which are on the verge of insolvency or already under the insolvency resolution and which can be easily acquired by the healthy firms. The acquiring companies also benefit from such deals as the management of the company which is under corporate insolvency resolution process (hereinafter referred as CIRP), is already under pressure from the banks due to defaults and this leads to corporate assets being offered by such companies at a very low rate. This acts as a fair deal for both the parties and facilitates to the idea of ease of doing business.

**CONCLUSION**

The concept of M&As is still in its nascent stages and the laws are constantly evolving in consonance with the global trends. These laws grail to make Indian companies more competitive in the global market. However, there are certain laws which hinder the business and shall be amended to ease transactions and benefit of Indian companies. Some of these laws are mentioned henceforth:

The Income Tax Act exempt a company from taxes if the transferee company is an Indian company however, in case of outbound mergers, it would not be a taxable transaction. The law requires to maintain uniformity and promulgate a regime governing outbound mergers with the aim to obliterate ambiguities surrounding such transactions.

The regulatory provisions related to outbound mergers in India shall be in sync with the regulatory provisions of the foreign countries. Any conflict between the laws of the two countries will cause hindrance in the merger of the foreign company.

Present cross-border regime in India is an inception to bring Indian companies on the global standing in the world but it still has a long way to go. The amendments shall be intended to expunge the regulatory difficulties for the smooth transactions in future. The laws should focus on minimising differences in regulatory framework amongst various jurisdictions. In furtherance with the persisting loopholes, this research paper objects to throw light on the detailed regulatory framework governing the transactions relating to cross-border M&As in India and the issues girdling it.

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862 Id 47
CITIZENSHIP AMENDMENT ACT, 2019: BOON OR BANE?

By Manasi Joglekar and Aniruddha Awalgaonkar
From ILS Law College, Pune.

Introduction:

The origin of citizenship can be traced in the western civilization; with the advent of city states of ancient Greece conferring citizenship rights; the Romans took their hands to extend their rights to all and sundry in 212 AD. The concept of Citizenship being dynamic in nature cannot be compared to the ancient or contemporary semblances which vary according to the desideratum of every state. In India, the Citizenship Act, 1955 came into play after India freed itself from the British rule and with the advent of the Constitution of India. The Citizenship law in India, advocating the right of Citizenship based on birth, descent, registration and naturalization, presently with the amended act offers a provision for those affected with religious prosecutions in the Muslim-dominated states.

Legislative Intent:

The Citizenship (Amendment) Act, 2019 which recently received the seal of approval from the President of India has been open to debates, profuse controversies; questioning the amendment’s sum and substance. The intention of the legislature is to protect the innocent victimised in the Muslim dominated states following the religious persecution. Since the intention of the legislature has been to protect minorities facing ‘religious persecution’, the community which falls under the umbrella of the majority religion cannot claim the same.

Whether Right to Equality has been violated:

The Article 14 which provides equal protection to the individuals within the territory of India, has been supplemented by an intelligible differentia which needs to have a direct nexus with the object sought to be achieved. The legislative intent of the aforesaid act is to protect the minorities in the Muslim dominated states espousing a state religion. The minority communities in these states who do not profess their state religion and conform forthright with their religion have been persecuted, this itself forms a basis for an intelligible differentia and a reasonable classification for exclusion of the Muslim immigrants. Moreover, the law has conferred a special status on the persecuted minorities whereby it does not ban the Muslims from becoming a citizen of India, the process of naturalisation is always at their disposal.

Loopholes of the Act: Are they real?

With the influx of illegal migrants from Bangladesh who would be granted citizenship would cause major demographic, cultural and employment uncertainties. Earlier on, during the Bangladesh Liberation War in 1971 and since then, the north-eastern states, especially Assam and Bengal, have witnessed intrusion of illegal migrants which fled due to persecution, ergo, the Assamese population has already dwindled, reducing them to merely a minority community in their own states. With the citizenship on its way, these migrations would stumble the knitty gritty of the north-eastern states of India leading to a consequential quandary on the Assamese,
Bengali and other north eastern states. Also, the act has excluded minorities facing persecution from other countries which has canvassed discrimination and arbitrariness.

**Conclusion:**

The paper strives to highlight the legislative intent, the question of constitutionality of the act and its future implications.

There are two types of countries in the world - those that treat minorities equally and those that don’t. India is the only country in the world which follows a third path, and gives extra special status to their minorities.

-Sunil Rajguru

1. **Introduction:**

Citizenship, an interwoven concept involving the individuals and the State, the individual’s rights and obligations, it has also been connected to political and civil rights of an individual belonging to the State. Citizenship means the state of being a member of a particular country and having rights because of it”863. The concept of citizenship holds two independent views, namely; Individualistic view and Civil (Political) view. The rights of citizens are dynamic in nature; changing according to the needs of individuals in a society. These rights being inalienable and fundamental rights of the individuals; are also socially and politically linked together which are peculiar to one State.

Citizenship can be acquired by an individual by virtue of his birth, descent, naturalization or even so by registering through an application to the prescribed authority depending on the laws of citizenship in the particular country. It engenders solidarity, harmony and patriotism amongst the citizens of a country owing to the fact that it is acquired amongst those individuals who share a sense of like mindedness through similar culture, languages, political outlook and social point of view. Just like globalization has brought the world together bringing accord and harmony amongst the countries internationally; citizenship and other politically driven rights keep nationalism ignited.

2. **History of Citizenship:**

Before citizenship originated, the individuals of a society were connected and affiliated to a kin or a tribe, thereby lacking solidarity between the state and the individuals. The origin of citizenship has been credited to the Greeks for recognizing the individuals of the Greek city-states; whereas the Romans considered citizenship as a sign of power for the ones who had acquired it. The concept of citizenship originated through certain rudimental features namely; like-mindedness, common beliefs, common recognition; pertaining to the individuals of a State. Since then, there has been a sea change from what was construed as citizenship to what it stands for today. The ancient citizenship was restricted to men; barring women, children and slaves and without any lawful act governing the rules of citizenship; whereas the modern citizenship stipulates the inclusion of all individuals residing legally, lawfully and in line with the Citizenship act of the respective country.

3. **Need for the Citizenship Amendment Act, 2019 (CAA):**

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863 Citizenship -Cambridge English Dictionary
The recent Citizenship Amendment Act, 2019 (CAA) has been condemned and denounced for allegedly being unconstitutional and unsecular in nature. The alleged insertion, Section 2(1)(b) in CAA contains that any person belonging to the religions; specifically Hindu, Sikh, Buddhist, Jain, Parsi or Christian community from Afghanistan, Bangladesh or Pakistan shall not be treated as an illegal immigrant under the Act given, he/she has entered into India on or before 31st December 2014 and the Central Government has exempted he/she under Section 3(2)(c), Passport Act, 1920 or from the application of provisions of the Foreigners Act, 1946.

The classification based on religion has been severely censured for specifically excluding Muslims in the act. The Citizenship Act established in 1955 has been amended in 1986, 1992, 2003, 2005, 2015 and 2019 by the Citizenship Amendment Acts. A person can acquire citizenship by birth, descent, registration and naturalization under the Citizenship Act, 1955 and the Constitution of India. The recently amended act has provided a measure to protect and grant citizenship to the minorities who have been victims of religious persecution in Pakistan, Afghanistan and Bangladesh. The abovementioned criterion has been considered as being targeting a specific religion as well as blemishing the basic structure of Indian constitution.

The three countries which share a border with India; Pakistan, Bangladesh and Afghanistan have been considered as theocratic nations (official and non-official) from the point of view of India and various other countries as well as International Organizations, since they having proclaimed a state religion i.e. Islam. The minorities present in these countries i.e. Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have been subjected to religious persecution; i.e. ill-treatment to a group practicing a particular religion and its affiliated beliefs or traditions. The country-wise rampant ill-treatment and persecution of the minorities:

a. Afghanistan:

In Afghanistan, during the Taliban rule, all the Hindu males of a family were killed and the women were taken as sex slaves and were forced to bear the children of their “owners”. There have been many cases where Non-Muslims in Afghanistan were punished because they were not present in the mosques during prayer times as even this was considered to be a sign of infidelity and disrespect to Islam. Hindu women subjected to rape, forceful conversion into Islam is commonplace in these countries. Also, The Islamic State in Khorasan Province (ISKP), an affiliate of ISIS which is a designated terrorist organization, and Taliban continued to target and kill the innocent persons belonging to the minority religious communities because of their loyalty to their religion, culture and beliefs.

b. Pakistan:

The crimes in Pakistan increased after the introduction of blasphemous laws by Gen. Zia Ul Haq in 1975. After these, most of the
crimes against minorities were state sponsored. Gen. Zia Ul Haq also said that this was a way to “Islamize” Pakistan who considered this as a necessary measure, the campaign was termed as ‘Governance by the Prophet’.

The minorities in Pakistan have been a victim of the treacherous blasphemy laws; minority sections are fined, imprisoned and sometimes given death penalty by falsely accusing them of using derogatory remarks against the Prophet Muhammad. Into the bargain lies, Khawaja Nazimuddin, the 2nd Prime Minister of Pakistan, had staunchly stated that that religion is not a private affair and Islamic states do not provide equal rights to all of its citizens. The condition of the minorities since the partition has never been better; it has gotten worse with each passing day.

c. Bangladesh:

Also in Bangladesh, the conditions of minorities are as unwelcoming as that in Pakistan. With an increasing population of the minorities in Bangladesh, the persecution has intensified blatantly, Hindus are being forced to leave, Hindu women raped and temples pulled to pieces. Further, in Bangladesh and Afghanistan, Hindu houses have an ‘H’ mark in yellow paint that shows that they belong to the Hindu community which makes it easier for the persecutors to identify and harass them. The Christians are also subjected to killings.

Through the passage of the 5th and 8th amendments of the Bangladesh Constitution, the Government paved the way for Talibization of Bangladesh and licensed atrocities against the country’s minorities. Also, the law enforcement agencies of Bangladesh directly participate in atrocities against minorities. Further, the Ruling Government has failed/refused to investigate the atrocities and rehabilitate the victims of religious and ethnic cleansing. The Bangladeshi Governments have denied these allegations time and again.

4. Constitutional Validity of CAA:

A. Presumption of Constitutional validity:

It is presumed that any law enacted by the Legislature is benign in its nature and does not violate the Constitutional provisions of India. In one Supreme Court case it was held that there is a presumption of the constitutionality of the Act. In pursuance of the same, CAA has to be presumed to be constitutional whereby if the provisions of a law or the rule is construed in such a way as would make it consistent with the Constitution and another interpretation would render the provision or the rule unconstitutional, the Court would lean in favor of the former construction. Thus, while the CAA matter is being heard by the
Supreme Court of India the presumption would lean in favor of its constitutionality.

B. Article 14 - Reasonable classification:

The clause in the Citizenship Amendment Act has been determined as violative of Article 14 and of the Constitution of India. Article 14 provides for the right to equality to individuals within the territory of India. Even though Article 14 gives citizens and noncitizens the right to exercise their fundamental rights and redress the inequality, Article 14 provides for reasonable classification which is discrimination done in good faith. Equality amongst inequals would in itself result into arbitrariness.

In the Supreme Court case of *Vijay Lakshmi vs Punjab University And Others* 877, reasonable discrimination meaning distinct and rational classification having nexus with the object of an Act which is an accepted jurisprudence and practice that the concept of equality before the law and the prohibition of certain kinds of discrimination under Article 14 do not require identical treatment i.e. equality among equals and inequality among inequals. Equality means relative equality i.e. To treat unequals differently according to their inequality is not only permitted but required. Also, the classifications are based on nations that advocate theocracy in their lands, making the minorities suffer who do not accede to the interests of the theocrats, thus justifies the classification under Article 14 of the Constitution of India.

876 The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

877 (2003) 8 SCC 440
878 AIR 1958 SC 538
separate geographical regions provided it bears a reason and just relation to the matter in respect of which differential treatment is accorded. Thus, geographical classification is considered valid if historical reasons may permit and justify the reasoning. Moreover, while determining the validity the court has to examine whether classification is based upon an intelligible differentia which classifies a class, a group of individuals from that of the other group. The validity of the law would be upheld once the test of reasonable classification has been.

Here in, the geographical classification based on historical reasons between the minorities and the majority in the three countries on account of religious persecution is a reasonable nexus to achieve the objective sought to be achieved in the Statement of Object and Reasons of CAA - the Constitutions of Pakistan, Afghanistan and Bangladesh provide for a specific state religion. As a result, minorities of these countries have faced persecution on grounds of religion in those countries.

The partition of 1947 witnessed a huge refugee crisis i.e. exodus of Muslims into India; and Hindus, Sikhs, Jains, Buddhists and Christians to Pakistan and East Pakistan. The Nehru-Liquat Pact, an agreement signed between Jawaharlal Nehru, the then Prime Minister of India and Liquat Ali Khan, the then Prime Minister of Pakistan where the rights of minorities of the respective countries were confirmed. India never has failed to protect and promote the rights of its minorities; instead, India has bestowed additional rights to that on the minorities for their betterment and upliftment. As has already been discussed in the earlier paragraphs, Pakistan has never fulfilled its promise of promoting the interests of its minorities, instead it has always been inhumane and barbarous towards the minorities. Even the then Law Minister of India, J.N. Mandal, resigned on account of relentless persecution on the Hindus in Pakistan. Thus, the geographical classification based on historical reasons is a reasonable nexus for the objective to be achieved in the Amendment of the Citizenship Act, 2019.

C. CAA- A supplement to Secularism:

The Preamble of the Constitution of India asserts that India is a Secular nation. Secularism is one of the facets of the Basic structure doctrine of the Constitution of India, 1950, which, being a part of its basic structure cannot be amended. The concept of secularism implies treating all religions equally, which is based on Article

879 Clarence Pais v Union of India, AIR 2001 SC 1151
880 Supra note 16
881 Ibid
882 Nehru-Liquat Agreement, 1950. A. The Government of India and Pakistan solemnly agree that each shall ensure to the minorities throughout its territory, complete equality of citizenship, irrespective of religion, a full sense of security in respect of life, culture, property and personal honour, freedom of movement within each country and freedom of occupation, speech and worship, subject to law and morality.
883 J.N Mandal quoted, “I cannot bear the load of untruth and pretensions that Hindus live with honour and security of their life, religion and property in Pakistan.”
884 42nd Amendment, 1976
885 Kesavananda Bharti vs. State of Kerala, (1973) 4 SCC 225
14 and Article 25 of the Constitution of India, 1950. The constitutional validity of CAA is determined by Article 14 and its reasonable classification with respect to the Islam Community and the minority community of Pakistan, Bangladesh and Afghanistan.

The right to equality comes with an exception of reasonable classification which provides that equality means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal; thus when secularism is linked to treating all religions equally at par with Article 14, the scope of secularism needs to be restricted when it comes to reasonable classification. The rationale for excluding the Islamic community from the clause stems from the need to assure protection to the minorities facing religious persecution in these theocratic countries. The protection is meant for the minorities section, the Islamic community of these three countries fall into a majority and thus are exempted from the act. The instances of the rampant persecution of the minorities are manifold and therefore, the reasonable classification between the minorities and the non-minority present in those countries is justifiable.

Moreover, the secular concept of India is divergent from the Western concept of secularism, which does not separate religion and state, instead it gives due regard to all the religions without any preference to a specific religion. India is the only country which professes the ideology of not only coexisting with other religions, but also providing special status to the minorities. Indian Secularism respects such diversity because of the significance it attaches to freedom of conscience and choosing one’s own religion. Ideology of India since ages revolves around following one’s own religion, whereby it can be safely inferred that the concept of secularism in India has been incorporated taking into consideration the importance of protection of the rights of the minorities as well as one’s own religion in India.

In CAA, the provision focuses on persecution based on religion. The Legislature while formulating the law centers not only on constitutionality of the act, but also the social significance and moral consciousness of the people. The increasing atrocities based on religion of the majoritarianism on the minorities in the countries viz. Pakistan, Bangladesh and Afghanistan have been the root cause of the framework of CAA. Since India bestows significance on the protection of minorities based on religious factors in its own constitution as well as its statutes, the Amendment, too, focuses on persecution based on religion.

Also, one cannot fail to consider the historical factors that have contributed to the formulation of the law. The partition of 1947 leading to the refugee crisis; the exodus before the Bangladesh Liberation

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886 The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
887 Freedom of conscience and free profession, practice and propagation of religion
888 St. Stephen's College V. University of Delhi (1992) 1 SCC 559
890 Rakesh Sinha, Article on Citizenship Act is an extension of and commitment to the idea of secularism, December 24, 2019
891 The Constitution of India, Art. 29 and 30
War of 1971; the subsequent ill-treatment, unequal and inhumane conditions of the minorities by the radical majoritarianism in the countries has made it potent to implement provisions in the interests of the minorities which were once a part of the undivided India.

Even before the secular values of India were enshrined in the Constitution of India, Indians have been sympathetic and welcoming to protect the rights and identities towards the minorities who had taken refuge in India. The Parsis (originally Iranians) fled to India in the 6th Century to preserve their religious identity which was being subject to conversion by the Muslim conquerors in Iran. The Indians, then, actively assimilated the Parsi minorities into our motherland. The reasonable classification itself justifies the exclusion of the Muslims from the Muslim dominated countries, since the objective in itself is to protect the identity, rights of the minorities and protect them from the existential threat posed by the radical majoritarianism.

The CAA extends its support to secularism ingrained in the form of humanitarianism and morality. The citizens of the country have been looking at it as discriminatory to the Muslims due to its under-inclusiveness, but fail to appreciate the initiative taken up by the nation to lend support to the minorities who have been victims of extreme religious fanaticism and unceasing atrocities in the lands of theocratic and radical majoritarianism.

D. Under-inclusiveness does not render an Act unconstitutional:

If any enactment is determined as under-inclusive, it is not rendered unconstitutional since it does not go against the principles of secularism and right to equality under Article 14. Under-inclusiveness is justified as to not be in violation of Article 14 on the basis of administrative necessity, as also bringing every individual under one umbrella would fail as an experiment to bring about any legal or social reform892.

The persecution based on religious factors of the minorities in those countries has been the root cause of the framework of CAA893. Thus, in pursuance of the amendment brought into effect for the protection of the minorities from religious persecution, under inclusiveness is justified for bringing out a social and legal reform.

E. CAA does not violate Article 21:

Even though Section 2(1) (b)894 of CAA is made applicable only to the minorities present in Pakistan, Bangladesh and Afghanistan, the act does not prohibit any individual of the Islam community from having been victims of persecutions on the basis of religion in those countries.

892 “These techniques would show that some sacrifice of absolute equality may be required in order that the legal system may preserve the flexibility to evolve new solutions to social and economic problems.’, held in Superintendent And Remembrancer V. Girish Kumar Navalakha, 1975 AIR 1030, p.8 p.758

893 Statement of Object and reasons CAA, 2019, Many persons belonging to Hindu, Sikh, Buddhist, Jain, Parsi and Christian communities have faced persecution on grounds of religion in those countries.

894 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 subsection (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.
acquiring citizenship of India. The act only has fast tracked the process of the minorities from these three countries. The personal liberty under Article 21 has not been violated by this act.

Article 21 of the Constitution of India deals with the fundamental right of life and personal liberty, but this is not an absolute right enjoyed by the citizens as well as the aliens. The ‘procedure established by law’ provided under Article 21 has a different set of meaning from that of ‘due process of law’ termed under the American Constitution of India. The framers of our Constitution had determined the essential difference in the meaning of the phrases "due process of law" and "according to procedure established by law", the former implied the supremacy of the judiciary and the latter the supremacy of the legislature. The procedure of the law implicitly means the law established by the statute. Moreover, the intent of the legislature is presumed to be done in good faith. The power of Legislature (Parliament) which formulated the Citizenship Act, 1955 and amended CAA falls under Article 246 (1) of the Constitution.

It is far too well-settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable. The fairness and reasonableness of the Legislative Amendment has been substantiated under Article 14 in the previous segment of the paper. When read with Article 14, Article 21 makes the alleged classification in the CAA, 2019- fair, reasonable, non-arbitrary.

Also, in the case of Shri Ram Krishna Dalmia vs Shri Justice S. R. Tendulkar, it has been put forward by the Hon’ble Supreme Court of India that when any statute determines a law, the intention of the statute for any classification should have a reasonable nexus with the objective that ought to be sought even though there are individuals or group of individuals reasonably differentiated from other. The validity of the same has been upheld in Chiranjitlal Chowdhri v. The Union of India. Thus, Article 21 read with Article 14 for reasonable classification justifies the exception established by the procedure of law to one’s right to life and liberty.

F. The Central Government has the power to restrict the entry as well as depart Foreigners:

The Foreigners Act, 1946 confers the power to restrict and remove foreigners from India under Section. 3(1) and Section

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895 No person shall be deprived of his life or personal liberty except according to procedure established by law.
896 A.K. Gopalan vs The State Of Madras. Union Of India AIR 1950 SC 27
897 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)
898 Maneka Gandhi V. Union of India, AIR 1978 SC 597
899 Supra Note 16
900 AIR 1951 SC 41
901 Foreigner-A person who is not a citizen of India, Foreigners Act, 1946, Sec. 2(a)
902 The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into [India] or their departure therefrom or their presence or continued presence therein.
3(2)(c) An unrestricted and absolute right to restrict or expel foreigner vests with the Central Government under this Act, since there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains.

The Government has absolute power to expel foreigners has been held in a judgment *Louis De Raedt versus Union of India* "The power of the Government of India to restrict foreigners is absolute and unlimited and there is no provision in the Constitution fettering its discretion and the executive government has unrestricted right to do the same.

The Government of India has an absolute power to remove or restrict the entry of foreigners into the territory of India and does not classify as arbitrary or discriminatory on the part of the Government to exempt even any particular foreigner or any prescribed class or description of foreigner. Thus, the power of the Government to restrict the entry of the Muslims from Pakistan, Afghanistan and Bangladesh i.e. a specific class of Foreigners is justified under the Foreigners Act, 1946.

5. **Loopholes: Are they real?**

**A. Ambiguity in CAA:**

The wordings in CAA are ambiguous and vague when it comes to defining “religious persecution” which is the basis on which classification has been made in the amendment. The word “religious persecution” needs to be added in the definitions of the Act.

Also, the Statute does not comment on the status of the illegal migrants who would not be given citizenship on account of lack of proof of origin or travel documents. Whether their status would be stateless, whether they would be still accommodated in the refugee camps or sent back to their home country are open to question. The ambiguity in the amendment should be rectified, which in itself has made the Act open to arguments and interpretations, thus blemishing the authenticity of the Act.

**B. Religious Persecution: On what basis?**

An important issue raised by the critiques is how can we say if an individual is persecuted on the basis of his religion and has fled to India? In other words, while giving the illegal migrants measures to live in a country with respect and dignity who have been victims of religious persecution in the three countries, how is it possible to decipher whether those individuals that have approached for citizenship under CAA, 2019 are the ones who have been victims of religious persecution?

But not seconding this thought, this Act is merely a preventive measure to prevent these minorities from further persecution. On a moral basis, India cannot wait for each and every individual to be persecuted for him/her to come to India. Before CAA came into picture, the law excluded everyone, but now it has opened doors to the minorities. This Act aims to prevent further persecution of these minorities by the neighbouring states.
Also, while formulating the law, the Legislation too would have taken into serious consideration its implementation, to which a special committee/ officers would be appointed who would scrutinize the status of these illegal migrants, and after safely concluding that the illegal migrants are religiously persecuted, then only they would be granted citizenship.

C. Exclusion of Shias, Ahmaddiyas, and Hazaras from the minorities’ list:

These sects of Muslims have also been subject to religious persecution in these countries due to their faith which minorly differs from the majority Sunnis in these countries. Particularly in Pakistan, the Ahmaddiyas are not even recognized as Muslims according to the Pakistani Constitution. Thus, they have been subjected to a lot of brutality in the country. One of the most important arguments raised by the critiques of CAA is the exclusion of these sects from the act.

The Indian Government in response to this argument has said that Ahmaddiyas are recognized as Muslims according to Islam and according to the Government of India. The exclusion of Ahmaddiyas as Muslims in Pakistan is an internal issue and the Indian Government holds absolutely no jurisdiction to interfere in the internal matters of Pakistan. Also, the inclusion of these sects would mean that India is further classifying and dividing Muslims by breaking them down into sects and giving a “preferred” treatment to certain sects as the Ahmaddiyas and the Hazaras. Neither does the Indian Government nor does the Indian Constitution hold any power to do the same. When the Act provides for the exclusion of Muslims, it includes all Muslims from these countries, irrespective of their faith, sects or other reasons. India is absolutely no one to interfere in the internal matters of these countries and create a divide or classification amongst Muslims.

D. Exclusion of Tamils from Sri Lanka and Rohingyas from Myanmar:

When the Act classifies the individuals who will be allowed to seek citizenship in India, it clearly states that the persons who are subject to Religious Persecution in these specific countries. Tamils and Rohingyas are not religiously persecuted communities in their respective countries; there is discrimination against them on the basis of ethnicity and not religion. The Legislature cannot include these communities in the Act as the Act is only applicable to minorities who have faced religious persecution and nothing else. Further initiative by the Government of India if any, would also include persecutions based on ethnicity.

E. Demographic and Cultural changes in the Assam:

The refugee crisis in Assam started in the year 1971 when approximately ten million people from East Pakistan (now Bangladesh) immigrated to India. They settled mostly in parts of West Bengal and Assam and other states of NE. This led to severe demographic and cultural changes in Assam. With the application of CAA, there is an estimated increase of 19 million Bangladeshi non Muslims in the state of Assam.

This tremendous increase in the population has speculated that the Assamese speaking population of Assam will be severely affected as it would result in fierce competition for employment, education and other factors such directly affecting the
daily lives of the Assamese speaking population. Assam has a total of 115 ethnic communities, speaking 55 languages and dialects. With such a massive increase of population, this demography of Assam is likely to change in large proportions, as most of the immigrants are Bengali speaking Hindus from Bangladesh and may become the majority population of Assam, while pushing the original population of Assam into minority, causing a major demographic and cultural change in the state.

Even though the Act specifically provides that the Act shall not be applicable to tribal area of Assam, Meghalaya, Mizoram or Tripura as included in the Sixth Schedule to the Constitution and the area covered under "The Inner Line" notified under the Bengal Eastern Frontier Regulation, 1873’, yet the regions where the Act applies to the North-Eastern states should be taken care of by the Government of India, whereby the culture and demography of these states do not get affected.

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CHILD LABOUR IN INDIA

By Md. Aftab and Devansh Goyal
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Abstract:-
Now day’s Child Labour is a major issue which is increasing day by day in all over the world. We can say that millions of children are confined or engaged in child labour. They are not able to enjoy their childhood as well as not able to take care of their health. Children’s who are trapped in child labour don’t get time to dream for a better life. Because they do not able to get rid from their worst situations which they all are suffering. In a research by the World Bank and the “International Labour Organization” states that 168 Million children between the age of 5 to 17 years are engaged in the child labour.

If we talked about India only Census states that 12.9 million children’s are trapped in child labour in which approx. 7.6 million children’s are boys and remaining are girls between 7 to 17 years. Majority of children’s are working in many firms, industries and factories like Cotton mills, Brick mills, Domestic services etc.

Some more concepts are also linked with the concept of Child Labour like Child Trafficking and Child Abuse. Children’s are used in different forms such as labourers, child soldiers etc. More than 22% of the children are working as a child labour and performing hazardous works.

The main reason of child laboring is the lack of education. People who all are living in rural areas those who have no proper education put their children in different jobs through which they earn more money.

Introductions :-
As we know children’s are the beautiful gift to human beings and Infantile is a significant and sensitive stage of human development as it holds the possible to the future development of any society. Children who are brought up in an atmosphere, which is helpful to their intellectual, physical and social health, grow up to be responsible and creative members of society.

Children were expected to works with their parents in their businesses or other works as well as in their household works also. By accomplishment work when they are too young for the task, children excessively decrease their present well-being or their future income earning competences, either by reducing their future external choice sets or by shrinking their own future individual productive competences. Under risky economic distress, children are forced to sacrifice educational chances and take up jobs which are mostly unfair as they are usually underpaid and engaged in dangerous conditions. Parents choose to send their child for engaging in a job as an anxious measure due to poor economic conditions.

- It is consequently no wonder that the poor households mainly send their children to work in early ages of their life. One of the disturbing facts of child labour is that children are sent to work at the expenditure of education. There is a robust consequence

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907 labour.gov.in/sites/default/files/WorkingGroup12...
of child labour on school presence rates and the length of a child’s work day is harmfully associated with his or her capacity to attend school. Child labour limits the right of children to access and advantage from education and denies the important opportunity to attend school. Child labour, therefore, prejudices children’s education and unfavorably affects their well-being and security.  

Weiner also expressed the same view that the traditional idea was that children should be mixed to contribute to the maintenance of the family. During such procedure of socialization "the child grew to physical and knowledgeable maturity without ill-treatment and almost without being exploited and was simultaneously equipped for adult."

- In India, in the agriculture area child labour has a consistently always works. Children as well as their care takers used to perform their tasks at the farms. All over that, the duty of taking income to feed and to take care of their animals gives the responsibility to their children. This work was hard and intense. It did not provide a proper theme for their future work. Some schools don’t provide facilities in most of the towns and in small villages. The people who were living there earn money by working on their fields. By this is called as their training period. At the time of the appearance of the Britishers many child ill-treatment developed in India. As the Industrial sector was set up so the child work made a force to work in a brutal condition without any wages. There are many laws against child labour which were passed under the Employment of Children Act of 1938.

**Laws related to child labour:**

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- In India, in the agriculture area child labour has a consistently always works. Children as well as their care takers used to perform their tasks at the farms. All over that, the duty of taking income to feed and to take care of their animals gives the responsibility to their children. This work was hard and intense. It did not provide a proper theme for their future work. Some schools don’t provide facilities in most of the towns and in small villages. The people who were living there earn money by working on their fields. By this is called as their training period. At the time of the appearance of the Britishers many child ill-treatment developed in India. As the Industrial sector was set up so the child work made a force to work in a brutal condition without any wages. There are many laws against child labour which were passed under the Employment of Children Act of 1938.
According to Article 23 of the Indian Constitution any type of forced labour is forbidden.

Article 24 states that a child under 14 years cannot be employed to do any dangerous work.

Article 39 states that “the performance and healthcare of the people who are working, male and female, and the particular age of a child is not abused”. In the same manner, Child Labour Act (Prohibition and Regulation) 1986 prohibits children under the age of 14 years to be employed in dangerous manufacturing and processes. In Francis Coralie Mullin V. Union territory Of Delhi: In this case that court states that the Article 21 of the Constitution of India balances the protection of health and strength of children’s, male and female etc. versus misuse. As per the court the event and the duties for their young ones to make or develop a healthy way in order of freedom and a proper infrastructure and environment as well as educational benefits also.

Role of Panchayat members in mitigating child labour:

Make awareness about the ill-treatment of child labour, Inspire parents to send their children to school Make an surroundings where children stop employed and get registered in schools instead Safeguard that children have adequate services accessible in schools Inform industry owners about the laws barring child labour and the consequences for violating these laws Activate Balwadis and Aanganwadis in the community so that working mothers do not leave the duty of younger children on their older brothers Inspire Village Education Committees (VECs) to improve the conditions of schools.

Approaches to Protect Children:

Child labour cannot be eliminated at a stroke. Professional training and non-formal teaching can provide important support to children for involuntary work due to socioeconomic reasons. But the final goal must be to abolish child labour. Act against child labour can be undertaken on a wide-ranging front-social, economic and political-with administrations, employers, trade unions and NGOs working together with each other.

Prohibitive Approach:

This method comprises mainly law making measures. All governmental and non-governmental policies are mainly based on this method and tracked by others, as suited to their regional conditions. However the laws, by-laws and guidelines are made conferring to the nature and intensity of the problem. The past of child labour in West also shows that legislative method is one of the actual and successful means to deal with the issue.

Preventive Approach:

This method mostly planned to remove the fundamental social and economic dissimilarities that generate child labour. It deals with the physical change in terms of socio-economic behavior, particularly.

http://shodhganga.inflibnet.ac.in/bitstream/10603/149827/07_chapter%201.pdf

http://shodhganga.inflibnet.ac.in/bitstream/10603/149827/07_chapter%201.pdf


916 vikaspedia.in/.../child-labour

917 CHAPTER-I CHILD LABOUR: AN INTRODUCTION,
through improvements. It, consequently, may not be instantly fruitful.

### Rehabilitative Approach:
This method deals straight with individual children who are already in the labour marketplace. It purposes to remove the maximum numbers of child labourers in the dangerous working situations, by providing them and their relatives an alternate support. This method is mainly for the children in problem at in conditions and plans under this category could be undertaken by any of governmental or NGO.

### Classification of Children's Activity:
Children are involved in widespread range of working in both rural and urban areas. In urban areas they are instituted in both organized and unorganized sectors or formal or informal sectors, working in both visible and invisible nature of work. These child laborers are measured as unskilled labour with imperfect physical power.

1. **Domestic non-monetary work**: It comprises domestic non-monetary work, they place those children who frequently work within the family, E.g. cleaning, cooking, washing, child care, etc. This is self-employment and is usually time widespread.

2. **Non-monetary and non-domestic work**: Children involved in this group includes non-monetary and non-domestic work and are frequently found in the poor agricultural or rural economies. In such activity, children are measured as a part of family activity. Usually, girl workers belong to this group. This category comprises activities like tending of livestock, guard of crops from birds and animals, hunting, get-together, weeding and taking care of younger sister and brothers. This work is also time exhaustive and is often blended with domestic work.

3. **Work in the non-agrarian environment**: It includes artist production, small-scale production, manufacturing and services. This category includes the work in urban sectors.

4. **Bonded labourers**: Children of this group works as bonded labourers and are promised by their parents in lieu of obligation. Though law eliminates the practice of bonded labour, still the occurrence of the exercise is noticed in a number of studies mainly in rural areas.

### Studies conducted by UNICEF categories child’s activity in two ways based:

On nature of work and the relation of child with their family during the activity.

(a) Grouping of child’s work in relation to children’s communication with their family.

- During the working period, UNICEF classified it into three categories :-
  1. Within the family
  2. With the family but outside the house
  3. Outside the family.

- The first group comprises work in handicrafts, cottage industries.
domestic/household tasks, farming, rural work, etc without remuneration. In such types of activity children are worked with their relatives and measured as a part of them as in the piece rate system. The work measured as a part of their exercise in their childhood. Generally children work with their family. 924

- The second group comprises those children who are involved in farming rural work which contains of (seasonal/full time) migrant labour, local farming work, domestic service, manufacture work and informal works. In these works, children are working purely with the aim of economic help and as in the case of second factor; these works are measured as exercise for their future forecast. Some children were working with their family members instead of inside the house they are working outside their house for money.

- Children belonging to third group are involved in altered types of work, outside the family, who are more unequal by nature. This group comprises bonded work, traineeship, skilled trades (carpet embroidery, and brass/copper work), industrial or unskilled works or coalfields, domestic work, commercial work in shops and restaurants, begging, prostitution and pornography. Such insensitive work is humiliating for them. The last category involves those children’s those who are working as a hard worker like Shoe shining, Car washing, Recycling of garbage, Running shops, Selling newspapers, etc. 925

(b) Areas identified by UNICEF where children are involves like:-

a- Forced and bonded labour.

b- Sexual manipulation.
c- Industrial.
d- Farming of Agricultural land.
e- Road work.
f- Domestic Service.
g- Work for the family and Girls’ work.

**Percentage of child Labour in India**

Child labour hinders children from achieving the talents and learning they need to have chances of respectable work as a mature. Discrimination, absence of educational chances, slow demographic transition, societies and national prospects all donate to the determination of child labour in India. The ILO involvement is that steady financial development, admiration for labour values, respectable work, worldwide education, social safety, knowing the needs and privileges of the children — together help tackle the origin reasons of child labour.

As per Survey 2011, the total child inhabitants in India in the age group (5-14) years is 259.6 million. Of these, 10.1 million (3.9% of total child inhabitants) are occupied, both as ‘chief worker’ and as ‘peripheral worker’. In adding, more than 42.7 million children in India are out of education in school.

Though, the good news is that the occurrence of child labour has reduced in India by 2.6 million among 2001 and 2011. But, the failure was more noticeable in rural areas, though the number of child workers has enlarged in urban areas, signifying the rising demand for child workers in unskilled jobs. Child labour has dissimilar consequences in both rural and urban India.

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Rescued child labour in India

Around 175,000 children in India have been detached or saved from work and given provision since 2016, government data shows.

State authorities infrequently categorize saved child workers as sufferers of bondage due to unpredictable evidences and a lack of individuality documents or evidence of dependence, activists.

The United States’ yearly Trafficking in Persons (TIP) report — available last week — said that the misidentification of bonded labor cases as child labor was an issue in India.

“States reject the appearance of fused people … it surges their effort, and makes them (saved workers) qualified to rights,” Yet a older labor official said the state could not pleasure every case connecting saved child workers as bondage given many children worked part-time as national help or in shops, and were often stimulated to do so by their parents.

Consequence of child Labor:-
The child who works as child labor will have no chance of development in his life.

- Children who are working as child labor don’t have time to complete their schooling. They generally hold up behind in educations or totally stop their education before even finishing high school. It is difficult to escape from this sticky sequence and once anybody falls into this sequence, their life will be change completely. The economy and growth of the country faces lot of difficulties if children are not correctly educated. Children who starts working at primary stage have little parent looking after them so they are first target for unlawful work. Children working as child labor are simply habituated to drugs and thereby change their whole life.

- In TMA Pai Foundation v. Association of India (2002), “The court states that, it is the most important and main functionable duty of a parents for providing proper duties to their young one ‘less than age of 14 years. In consummation of this changes in the part of educational institutions it as a central right, the Parliament has ordered the Right of Children to Free and Compulsory Education Act, 2009 which makes changes for nothing and obligatory training to all the children’s of the age of 6 to 14 years”.

The moral and ethical provision necessary for children at the tender age is out of box query for child labor

Some steps taken by the government to resolve the social problem:-

- Government must take severe actions against the people who are accountable for child labor (brokers and people who employed children) and make their laws that can resolve this difficulties from ground level.

- NGO’s should work entirely like identifying the child labor to allowing them to join in caring centers, which provide learning and thus provide hope to children.

- Make the awareness among parents of poor children about the significance of child education and educate them about the undesirable influences of child labor.

- In the case of Ganesh Ram versus State Of Jharkhand And Ors (2006), the court states that "Any person below the age of 14 years is scheduled, penal order can be held or passed against the employer under the child labour (Prohibition and Regulation

Act, 1986) but same as well no order was passed against the employee.\textsuperscript{927} Government should build organization and other facilities for obligatory education of children and they should implement all the international strategies about child labor.

- Lastly, children are future of any nation. If they are weak and not appropriately educated, it is not good for any nation and it can’t grow. It is everybody’s duty to shape up healthy children with good education and high ethical values.\textsuperscript{928}

- There is a proper legislation to prevent child prevent and to secure the life’s of the children as well as prohibit mal practice of child labour.

Some are as follows:-

1. **The Factories Act of 1948**: This act forbids the working or employment of the children who are under the age of 14 years in any particular firm or industries etc. The law also states that who can work in an industry and at what age and how do they perform their work.\textsuperscript{929}

2. **The Mines Act of 1952**: This act also bars the children less than the age of 18 years are not able to work in the mines. Because it is very dangerous for them to work in the mines areas which is also very harmful for their life’s also. SO, as per this act it is not allowed to work their below the age of 18.\textsuperscript{930}

3. **The Child Labour (Prohibition and Regulation) Act of 1986**: This act states that “it is totally ban for the children to perform any type of hazardous work under the age of 14 years (work given by the law).\textsuperscript{931}

4. **The Juvenile Justice (Care and Protection) of Children Act of 2000**: In this act, it states that if any child found to work in any of the industries o in a firm less their age and also doing in any type of the hazardous work, then the person or the employer will be punishable with a prison term.\textsuperscript{932}

5. **The Right of Children to Free and Compulsory Education Act of 2009**: This act makes force of free learning system to all the children between 6 to 14 years. It also makes sure that 25% of seats in any of the private school shall be directive for physically disabled children’s.\textsuperscript{933}

- In today’s time some efforts taken by the government to reduce and to control the child labour. They introduced many of the Acts and Schemes which was mentioned above. Many states including Haryana have introduced the policy of child labour rehabilitation centre as well as welfare funds at district level and separate labour cells are being formed to resolve the issue.

- Central government is also working on many of the National child labour projects in many states. “\textit{Sarve shiksha Abhivan}”

\textsuperscript{927} \textit{Divia Rai, Judicial View on Child Labor in India - iPleaders Blog iPleaders (2019), https://blog.ipleaders.in/judicial-view-on-child-labour/}

\textsuperscript{928} \textit{Daily Alert, CHILD LABOR - NEGATIVE EFFECTS AND REASONS OF IT My Daily Alerts (2013), https://mydailyalerts.com/negative-effects-child-labor}

\textsuperscript{929} \textit{Amartya Bag, WHAT ARE THE LAWS RELATED TO CHILD LABOUR IN INDIA iPleaders (2019), https://blog.ipleaders.in/laws-related-child-labour-india/}

\textsuperscript{930} \textit{Amartya Bag, WHAT ARE THE LAWS RELATED TO CHILD LABOUR IN INDIA iPleaders (2019), https://blog.ipleaders.in/laws-related-child-labour-india/}

\textsuperscript{931} \textit{Amartya Bag, WHAT ARE THE LAWS RELATED TO CHILD LABOUR IN INDIA iPleaders (2019), https://blog.ipleaders.in/laws-related-child-labour-india/}

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\textsuperscript{933} \textit{Amartya Bag, WHAT ARE THE LAWS RELATED TO CHILD LABOUR IN INDIA iPleaders (2019), https://blog.ipleaders.in/laws-related-child-labour-india/}
has been presented in the year 2001 to deliver education to the deprived and hired children in all states.

- Ministry of women and child growth has been providing non-formal education and professional training. Some “Anganwadies” is also a very good step taken by the government for the welfare of children.\textsuperscript{934}

**Conclusion:**

In India, in the agriculture area child labour has a consistently always works. Children as well as their care takers used to perform their tasks at the farms. All over that, the duty of taking income to feed and to take care of their animals gives the responsibility to their children. This work was hard and intense. It did not provide a proper theme for their future work. Some schools don’t provide facilities in most of the towns and in small villages. The people who were living there earn money by working on their fields.

It will help or prevent the child labour if we aware the people regarding the negative impact of this as well as it will help the children a lot in favor of any activities. By doing this every person will get to know or understand how important and necessary for a child to grow and think out of the box as they are our coming generation who have to make our country (India) a developed nation. In spite of the many boundaries of the remaining proof of child labour, some overall assumptions may be strained. First, the service of very undeveloped children was never general in British culture. Child labour under the age of 10 always shaped part of the existence plans and policies of the poor. The structure of 18th and 19th century Britain led to an amplified load of dependence between deprived families and premature hire might be clarified as a normal answer by families to mechanical dependence and widespread poverty. Child labour at unusually undeveloped ages was related particularly with lone-parent families, children, and teenagers lawfully in the care of community authorities. Such children were often sufferers of a disappointment of local wellbeing preparations to deliver satisfactory care to the poor.

\textsuperscript{934} Amartya Bag, *WHAT ARE THE LAWS RELATED TO CHILD LABOUR IN INDIA* iPLEADERS (2019), https://blog.ipleaders.in/laws-related-child-labour-india/
THE MIGRANT LABOUR CRISIS DURING THE PANDEMIC: A LEGAL PERSPECTIVE

By Meher Mansi
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ABSTRACT:
The pandemic has impacted every individual’s lifestyle in the society. The pandemic has caused chaos all over the world since it erupted and situation is getting worse day by day. We should habituate ourselves to the “new normal”, but what about the people who do not have any signs of this so called new normal. The very first and worst affected sects of the society were the proletariat or to be more precise the migrant labourers. They do not see a normal after the present crisis, life is extreme for them after the pandemic. Their basic fundamental and human rights had been snatched away from them and none of the institutions came to their rescue. Theworst part being the government being the cause of this crisis, the present situation arose after the sudden announcement of lock-down in March to prevent the spreading of COVID-19. From then on lakhs of migrant workers walked back to their homes, they were not provided with basic necessities throughout their days or even months of journey. The judiciary also turned a blind eye and did not come to their rescue even after many of their fundamental rights being infringed, some of them were even arrested for breaking the lockdown measures. The Supreme Court took suo motu cognizance of the situation and gave some ‘directions’ to the states and union territories. This article will be talking about the many number of rights infringed and what legal recourse do they have and also tries to analyse the situation and find out what is the way forward.

INTRODUCTION:
Migration and India go way back. India has seen one of the worst migrations during independence and next to that stands the reverse migration of the migrant workers during this pandemic. Migration of workers has been prevalent in India since the ancient times, and it continues, as the country is still developing and it will go on to be the same. Indians have been migrating out of the country and within the country as well, this leads to many imbalances, brain drain, urbanization and many other consequences. India has a huge population and it is hard to achieve allocative and distributive goals with such population, which makes migration inevitable. The main problem is with inter-state migration during the pandemic, people from other countries were easily transported to their homes, but the migrant workers within the country had to face a lot of difficulties to reach their homelands.

Recent times have seen humongous amount of inter-state migration within the country. People from various states leave their farms and other simple work in rural India to join the millions of domestic workers in metros and urban areas. Due to this increased number of migrations, the casualisation of workers is growing and they have to fight for their rights and social security. The migrant workers have been the unsettled settlers who helped in the development of
Employers and workers have been the pillars of the economy, and the tripartite relation between the employers, labour and the government is of utmost importance in these situations. Since independence the country has introduced many labour laws to maintain the same and even the advent of Liberalisation, Privatization and Globalization (LPG) policies have paved path for restructuring these relations. The only issue here is with the implementation part of all these laws and policies for the welfare of labour. It ultimately proves to be disappointment, because of the present crisis. If the said laws have been implemented to the letter, this crisis would have been foreseen and steps would have been taken to prevent the same.

The story so far:

Since the lockdown has been announced the migrant workers don’t have any work and as a result do not have money to pay the rents. The pandemic has rendered lakhs of workers hapless and stranded on roads. Not to mention the number of images we have seen on the media of thousands of migrant workers walking to their homes, crossing state borders and many of them dying in the process. As word spread that all the “factories” were pulling down shutters, they realised that they had lost their informal jobs. Pauperisation loomed, especially in metros and cities like Delhi, Mumbai, Ahmedabad, Surat, Hyderabad, Chennai, Bhatinda. Overnight, lakhs of these dispossessed workers started their 1,200-km journeys home, on foot, cycle-carts, jugaad scooties, cement mixers scenes which have been imprinted indelibly on the country’s consciousness. At each district or state border, they were met with police lathis and bureaucratic obstinacy because the prime minister had announced the world’s strictest lockdown at four hours’ notice, which the police interpreted as licence to dominate the streets. At this point the risk of being prone to the disease was very less and yet due to these circumstances many labourers were left behind as they had children and pregnant women with them, or even didn’t have that extra hundred for the journey. Soon they ran out of their savings and basic necessities and they were pushed out by the landlords, as the landlords did not pay heed to the advice of waiving off rent. The next two weeks the covid-19 has excavated in the cities especially and the workers who were huddled in unhealthy clusters were prone to the infection. After that, almost 10 states which include Uttar Pradesh, Madhya Pradesh and Gujarat, in the month of May passed ordinances relaxing certain aspects of the labour laws. These three states have the maximum number of migrant labourers going from other states. We don’t know how to interpret this move, some say it’s a breather for states after the pandemic, and some say the moves are anti-labour and unconstitutional. Only time can tell us how this particular move affected the employers and worker and the society at large.

CONSTITUTIONAL PROVISIONS REGARDING THE ISSUE:

Constitution of the country is the fundamental and supreme law of the land. Every legislation derives power from the Constitution. The purpose of having a

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935 Sangeeta Mandal, Emerging Trends of Inter-State Migrant Workers in India: A Study of Legal Framework, 7 Indian J.L. & Just. 106 (2016).
936 Nalini Singh, Chronicle of a havoc foretold: Why weren’t migrants assisted to go home earlier? The
The constitution is to have a framework of the government which is likely to endure through the changes the nation. The Constitution of India has affirmed social and economic justice to all its citizens. The fundamental rights and the directive principles of state policy enshrined in our Constitution need a special mention in view of their supreme importance in influencing labour legislations of the country. These provisions ensure guarantee against any exploitation. Various DPSPs mentioned in Article 39, 42 provide for the basic human rights for workers and employees. Labour falls under the Concurrent List of the Constitution. Therefore, both Parliament and State Legislatures can make laws regulating labour. Currently, there are over 100 state laws and 40 central laws regulating various aspects of labour such as resolution of industrial disputes, working conditions, social security, and wages. To improve ease of compliance and ensure uniformity in central level labour laws, the central government is in the process of codifying various labour laws under four Codes on (i) industrial relations, (ii) occupational safety, health and working conditions, (iii) wages, and (iv) social security. 937

The inhumane conditions the migrant workers faced during this lockdown is an example of constitution not being followed and infringement of many fundamental rights and the provisions and relaxation of labour laws were against many international standards. India is a founder member of the ILO. India has ratified 37 of the 181 conventions. The constitution of India upholds all the fundamental principles envisaged in the seven core international labour standards. Article 22 of the Universal Declaration of Human Rights, every member of society has a right to social security. The ILO declaration on fundamental principles and rights at work is a major step in this direction. Development must bring about an improvement in the living conditions of people. It should, therefore, ensure the provision of basic human needs at all times. The international covenant on economic social and cultural Rights of the United Nations is another international instrument bestowing workers with economic social and cultural rights. The ILO provides for a tripartite arrangement between employers, workers and state to legislate and execute the international labour standards in the member countries. The main fundamental right which was infringed during these testing times was right to life which includes a bundle of rights. Through judicial activism Article 21 has an extended view which include right to health for labour938 and right to shelter939 and many other basic fundamental rights which facilitate right to life and live with dignity.

LABOUR LAWS:
Democratic ideas have also been grown simultaneously with the growth of industrialization in our country which have pleaded for and also helped in mass awakening and consciousness for greater power amongst the working class, which paved way for a number of labour laws. Labour legislations and industrial

938 CERC v. UOI, AIR 1995 SC 922.
jurisprudence are based on certain fundamental principles, like Social Justice, Social Equity, International Uniformity and National Economy. The interest of an employee is now of utmost importance. In India, a number of social security legislations have been enacted from time to time to promote the condition of the labour keeping in view the development of industry and national economy.

Until very recently, most Indians were unaware of a statute titled the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979. The purpose of this act is not to encourage interstate migration of workers against the interests of local workers as the principal employers would have to incur more cost in deploying interstate workers. The aim of the Act is to regulate the employment of inter-State migrant workmen and to provide for their conditions of service and for matters connected therewith. The Act defines “inter-State migrant workman”, as any person who is recruited by or through a contractor in one State under an arrangement for the employment of workmen in an establishment in another State, whether with or without the knowledge of the principal employer in relation to such establishment. Employment of inter-State migrant workmen in any establishment is prohibited unless it is duly registered under this Act.

The law requires all establishments hiring inter-state migrants to be registered, and contractors who recruit such workmen be licensed. Contractors are obligated to provide details of all workmen to the relevant authority. Migrant workmen are entitled to wages similar to other workmen, displacement allowance, journey allowance, and payment of wages during the period of journey. Contractors are also required to ensure regular payment, non-discrimination, provisioning of suitable accommodation, free medical facilities and protective clothing for the workmen. If the law is there why wasn’t it implemented. If the governments followed this legislation to the letter they would have never faced such a crisis. States would consequently have been better prepared to take steps to protect such workmen during this lockdown. However, almost no state seems to have implemented this law in letter and spirit. This is because it would mean more compliance and cost of access to labour which the states and the employers are not ready to spend.

**CONCLUSION:**

The experts have many contrasting opinions on this ongoing crisis but one of the common opinions is that there is a lot of beating which is yet to come for the economy and the government organs in the near future due to the present decisions. The workers are not willing to return to the cities and to their work any time soon, the factories although opened after lockdown

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941 Section 2(e) of the Inter-state Migrant Workmen Act, 1979.

942 Section 6 of the Inter-state Migrant Workmen Act, 1979.

are sitting idle without any skilled workers to operate. The workers have realized that there is no protection for them from any government body even the judiciary, which is prodding, pushing, embarrassing and asking probing questions. They are not disposing of the matters but demanding answers, which is not sufficient in these suffering times. The economy is said to grow at its lowest pace as the migrant workers are considered the invisible workers. The relaxation of labour laws is another level of exploitation where the working hours have been increased. The lockdown fell like a guillotine on the migrant workers but the country will be paying the price in the long run. The vicious cycle of unemployment and relaxation on social security measures will continue until the legislations are rationalized to meet the requirements.
ABSTRACT
Patent protection has helped in the evolution and expansion of technology beyond domestic boundaries. This technological growth has resulted in many inventions and innovations. Such technological progress has caused States to reach a common consensus inter Se to benefit each other in varied sectors of activities. Undoubtedly such mutual intercourse between States has been beneficial, but it has come with certain threats which could disturb the mutual equilibrium created so far. This has urged the States to develop different multilateral treaties safeguarding patent protection. The primary motive behind such treaty-making has always been to facilitate official intercourse between States to derive mutual benefits. These treaties have been one of the driving forces which have further strengthened global integration and benefited the world in sectors like pharmaceuticals, agriculture, space, defence, food, etc. Further such endeavours have resulted into certain uniform patent laws and principles which has helped in both protection and facilitated technology transfer between States. In this context, the aim of this paper is to trace international development in the areas of patents and how developing country like India being member of the most influential and path-breaking TRIPS agreement has responded to these global changes and what impact it has brought in the domestic legislation. To arrive at various conclusions, the methodology used by the author in the present work is purely doctrinal, analytical and evaluative.

Keywords: Patent protection, Technology, Invention, Patent treaties, TRIPS, India.

PATENTS IN BRIEF
The patent belongs to one of the broader areas of law known as Intellectual Property. The patent grant involves the disclosure of the invention by the patent applicant and issuance of a document enumerating certain rights and obligations by the national government. Patents are not just automatically granted on the filling of the application but each application has to undergo rigorous scrutiny whereby each application shall be tested on the touchstone of “newness”, “non-obviousness” and “utility”.

Once the application passes through every test and proves its legitimacy it becomes eligible for a patent grant. Patent guarantees certain exclusive rights to the patentee whereby patented invention can only be put to use with the prior authorization of the patent holder. Rights conferred by the patent are not perpetual but limited in time.

EARLIEST SOURCES
The manner in which we understand and recognize Patents today widely differs from the Patents which were prevalent in the early times. Though it is difficult to trace the exact day and date of the origin of Patents from the historical point of view it is usually stated patents emerged initially as grants of privilege. The privileges were granted by the monarch or state to the inventors for protecting or rewarding their creative ingenuity but no uniform criteria for patent grants were recognized.
Therefore, some of the privileges were temporary, some of the privileges were perpetual, some of the privileges were granted when something new was created others on the importation of skilled expertise from outside.\textsuperscript{944}

The breakthrough which is of great significance while discussing the origin of patents is Venetian Statute of 1474. This law is considered to be the watershed in the development of patent laws because it portrayed patents in one of its refined versions for the first time. Patent grants were subjected to certain rules which were remarkably precise and gave coherent shape to the entire patent law. Patents were only granted when the invention proved to be new and useful and patents were granted for the limited period of time.\textsuperscript{945}

Granting of the patent like privileges were not just confined to Venice, but another European country which was efficacious to have its own patent law was England. Patents like privileges were not only granted to the new invention but such privileges were also granted to an individual who introduced or imported new art or skill in the royal realm. The practice of granting patent like privilege received impetus during the reign of Elizabeth I. During her period abuse of patent privileges was also reported, which brought her at loggerheads with the parliament the dispute was finally settled when privileges granted by the Queen were made subject to the scrutiny of the jury.\textsuperscript{946}

The grant of patent privileges continued during the rule of James I. Finally, in the year 1623 parliament in order to streamline and counter the abuse resulted from the royal grants enacted a Statute of Monopolies 1624. Whereby such grants were not abolished but subjected to certain standards which stated patents will be granted to the ‘true and first inventor’ for the period of 14 years.\textsuperscript{947} Soon patent system spread to other countries of the world.\textsuperscript{948}

\textsuperscript{947} Ove Granstrand, The Economics and Management of Intellectual Property (Edward Elgar Publishing Ltd, UK)
\textsuperscript{948} Ibid.

\textsuperscript{947} The statute of Monopolies is the basis of the present British patent law, and become the model for the laws elsewhere for example Massachusetts was the first to enact patent law in 1614, South Carolina enacted patent law in 1691. European countries like for example France in the year 1762 through royal edict prohibit permanent privileges and provide for inventor’s patents limited to fifteen years. The United States passed its first patent law in 1790. The next country to adopt patent legislation was Austria in 1794 a Hofdekreit (royal decree) announced the establishment of a patent system and in 1810 such a law was enacted. Four different legal philosophies about the nature of the inventor’s right were thus expressed in the patent laws of the various countries: the French, recognizing a property right of the inventor in his invention and deriving from it his right to obtain a patent; the American silent on the property question, but stressing the inventors legal right to a patent; the English recognizing the monopoly character of the patent, and regarding it in theory as a grant of royal favour, but in practice regularly allowing the inventors claims to receive a patent on his invention, the Austrian insisting that the inventor has no right to protection, but may as a matter of policy, be granted a privilege if in the public interest. Regardless the nature of inventors rights the patent laws were enacted around world in Russia in 1812; Prussia, 1815; Belgium and the Netherlands, 1817; Spain, 1820; Bavaria, 1825; Sardinia, 1826; the Vatican State, 1833; Sweden, 1834; Wurttemberg, 1836; Portugal, 1837; Saxonia, 1843.
ORIGIN OF INTERNATIONAL PATENTS
The term international patent system is more of a misnomer, the term usually refers to certain rules and obligations which countries voluntarily adhere to in order to extend extraterritorial protection to the inventions and innovations. At first tradition of protection of inventions started at the national level whereby inventions were protected against imitation within the national boundaries of the country only. During the era of industrial development which stimulated international trade, it became the need of the hour for the nations to engage in commercial and economic intercourse. The process of commercial exploitation of an invention beyond the national frontiers made inventors sceptical about the treatment they may be subjected to as compared to the nationals of that country. This scepticism became apparent with the famous incident which took place in the year 1873 in the city of Vienna wherein an international exhibition participant refused to disclose their creations in the absence of any protection given to their work against imitation. The deadlock was resolved when the concerned government passed a temporary law for providing protection to the inventors against copying.

These new relations amid countries brought new challenges which have not been confronted before. One such challenge was extending protection to inventions which belonged to the nationals of other countries while that invention was commercially exploited in the host country. Since no world order afforded such protection it became imperative for the world community to deliberate on these issues and develop an international mechanism for filling up such a vacuum. This initiated a new debate where several countries pressed for the demand for the extension of patent protection outside their national borders. This demand by the countries was probably motivated for capturing the international market for the profit gains.

INTERNATIONAL DEVELOPMENTS OF PATENTS
Today in the era of globalization patents have become as one of the strongest tools which have given impetus to the economic and technological growth of the nation. It provides an incentive which encourages the development of new inventions and induces investment of capital in new ventures which has proved further expansion in the area of science and technology.

The patented invention has the same features as that of the private property which makes it feasible for the commercial gain.

Patents can be commercially exploited both nationally and internationally through various ways such as licensing, assignment etc.

The idea of gaining mutual benefits from one another has inspired States to bind themselves into various bilateral and multilateral treaties. The primary motive behind such treaty-making has always been to facilitate and make active interaction

between States for deriving mutual benefits in different sectors like for example health\(^{954}\), international trade\(^{955}\), education\(^{956}\) and others. States around the globe in recent times are making progress in every field which is imaginable to the human mind. One of the important sectors which have dominated this progress is technological development. The evolution and expansion of technology have been one of the biggest achievements of mankind since the time immemorial, technological development has never been static its roots can be traced in the debris of prehistorical times\(^{957}\). This technological growth has resulted in numerous inventions and innovations. The recent times have shown tremendous spur in the technological growth be it on a ‘micro-level’ or ‘macro-level’.

Such technological progress has necessitated States to reach a common understanding with one another and evolve such laws and principles which would facilitate the transfer of such inventions and innovations from one country to another with minimum discrepancy and hindrance. For the convenience, the author has divided multilateral treaties that have been concluded in the area of patents by the world community into two categories:

- a) Treaties mainly dealing with the substantive law regarding patents
- b) Treaties dealing with the procedural requirements regarding patents

### SUBSTANTIVE LAW TREATIES

Substantive law treaties are those treaties which in their letter mainly focus on evolving certain principles of substantive law. These principles act as a standard which is to be adhered to in the domestic law of the member countries. On the other hand, such practice helps in bringing uniformity in the law and on the other hand it creates certain obligations which are to be fulfilled by the members. Treaties which deal with the substantive law of patents includes namely:

- a) Paris convention
- b) Trade-related aspects of intellectual property (TRIPS)

### PARIS CONVENTION

Paris convention is a multilateral treaty with deals with the industrial property. Industrial property is divided into different forms which include patents, trademarks, service marks, layout designs, integrated circuits, industrial designs etc. Paris convention in the area of patents has evolved remarkable standards which act as a bedrock over which consensus is reached among the world community to bring uniformity in order to facilitate the interstate official communication and obtain mutual benefits from each other.

Paris convention aims at eliminating discrimination among the member countries and provides a platform whereby mutual rights and obligations are exchanged between the member countries.

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954 The World Health Organisation, signed at New York on 22 July 1946.
955 General Agreement on Tariffs and Trade, signed at Geneva on 30 October 1947, Havana Charter for an International Trade Organisation, signed at Havana on 24 March 1948 etc.
957 Pre historical period is usually divided into Paleolithic, Mesolithic, Neolithic and Chalcolithic each period has depicted gradual growth in the technological know-how of men.
It provides certain benefits, rights and obligations for the member states. There are two most important benefits which are extended to the member states in terms of national treatment and right of priority. The principle of national treatment provides that members are under obligation to extend the same treatment to the foreign applicants as they provide to their own nationals. This principle completely prohibits any discriminatory behaviour while dealing with the patent grant in one’s own territory. However, there is an exception to this principle of national treatment which makes certain reservations in terms of administrative and judicial procedures while dealing with the foreign applications, this is entirely a procedural requirement and does not intend to create or give any preferential treatment to the nationals over the foreign applications. The Paris Convention has also in its ambit brought those countries which do not form part of its membership by extending the national treatment to them as well in case “they are domiciled or have a real and effective industrial or commercial establishment in the territory of one of the member states”.

Another principle is called the right of priority, as the term suggests this principle create a period of priority for the patent applicant. According to this principle, the date on which first application is filed by the applicant in one of the member states shall remain the same for all the subsequent applications during the period of twelve months. This principle has relieved the patent applicant from the burden of filing patent application simultaneously in all the countries of interest, in order to protect the novelty of the invention. Simply stated this principle give the patent applicant period of twelve months after the filing of the first application to decide and conveniently apply to other countries for patent grant.

In order to maintain the independence of member states, the Paris Convention provides that every country is free to grant or refuse the patents which should be decided by the countries keeping in view their requirement. Also, in terms of compulsory licenses Paris convention explicitly provides that while issuing a compulsory license, members should keep in consideration various factors such as only after giving the patentee opportunity to defend his failure to work the patent, the request for a compulsory license should proceed.

In the changing world dynamics, the relationship between the states is constantly evolving. In order to keep in tune with the ever-growing world order every agreement, convention, memorandum of understanding or treaty has to be revised. Similarly, the Paris Convention for the protection of the industrial property was revised six times to bring a requisite amount of changes in order to suit the changing requirements in the field of intellectual creativity. The primary aim behind the Paris Convention rested on the idea that states should practice equality while dealing with each other and to create certain uniform standards in the area of industrial property.

**TRADE RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS)**

The changing practices in the world of trade and commerce including the increasing importance of intellectual property influenced the adoption of TRIPS Agreement during the “Uruguay Round of
the General agreement by Tariffs and Trade (GATT)\(^n\). TRIPS agreement is a multilateral agreement which deals with patents including other forms of intellectual property. The term intellectual property was used much later in time before that industrial property was used to refer to creations which were the direct outcome of the human mind. Industrial property is the part of a much wider body of law which is known as intellectual property. The term intellectual property was used first time in the latter part of the nineteenth century by an American librarian “Lysander Spooner” in 1855 emphasizing “property rights in ideas”.

There are two branches of intellectual property i.e. copyrights and industrial property. The term intellectual property does not have any uniform definition although the WIPO Convention has recognized various types of Intellectual Property\(^n\)

TRIPS agreement with regard to patents creates an international framework which tries to bring uniformity by fixing certain parameters within which patents will be granted in the foreign countries and it also establishes certain universal standards which member countries are under obligation to comply with. The agreement for the first time defines the subject matter of patents in a precise manner\(^n\), and also provides an exhaustive list of subject matter which is not patentable.\(^n\) Another significant feature of the agreement lies in the fact it provides enforcement of standard in case any member country fails to show compliance.\(^n\) One of the significant features of the TRIPS agreement is the recognition of national treatment and most favoured nation treatment as its core principles. The principle of national treatment has the same meaning and significance as it has under the Paris Convention. The principle of most favoured nation treatment stipulates that when a member country extends any immunity or advantage to the nationals of any other member the same treatment shall be accorded to nationals of all the member countries.

**PROCEDURAL PATENT LAW TREATY**

These treaties establish certain fundamental procedural norms which makes the entire process of filing the patents effective and much less cumbersome. These treaties include:

- a) Patent cooperation treaty
- b) Patent law treaty
- c) Budapest treaty
- d) Strasbourg treaty

**PATENT COOPERATION TREATY**

Traditionally in order to get patent protection in more than one country, an individual patent application was required to be filed in each country where patent protection was sought. This anomaly was rectified to a large extend by the Paris Convention which provided priority period of twelve months on the basis of the first patent application, during this period patent applicant could file a patent application in all the desired countries without destroying novelty of the invention. This again


\(^n\) Trade Related Intellectual Property Rights, 1994, Section 27

\(^n\) Ibid.

\(^n\) Ivan Stepanov, *Eli Lilly and Beyond*, 18 (Nomos Verlagsgesellschaft) 2018
involved filing of many applications which proved cumbersome as well as expensive because the applicant had to bear the charges which were involved in filling application in patent offices of different countries including miscellaneous charges. Patent cooperation treaty is a multilateral treaty which establishes a system of international patent filing whereby on the basis of the single patent application, patent protection is sought in multiple countries. The patent application filing does not guarantee him patent grant which is absolutely left to the discretion of the patent office of the member countries. The whole process just makes the filing process easier and saves the applicant from incurring multiple charges involved in filing the patent application in each of the member states separately.  

PATENT LAW TREATY
The primary aim with which patent law treaty was signed by the world countries was to make whole of patent filing process less technical and more convenient. It aims to eliminate various procedural requirement which is imposed by the individual patent office around the world and bring uniformity in the official proceedings.  

STRASBOURG TREATY
Strasbourg Agreement which came into being on 24th March 1971 provides for the international patent classification. The convention divides technology approximately into “eight sections” with more than sixty thousand subdivisions. It provides a systematic arrangement whereby information contained in patent documents are made easily accessible. The primary goal of the convention is to provide an international search device where patent documents are retrievable in order to determine the technical details of an invention.  

BUDAPEST TREATY
The Budapest treaty is known as ‘Budapest treaty on the international recognition of the deposit of microorganism for the purposes of patent procedure, 1977’. This treaty provides for the international depository unit whereby the sample of microorganisms is preserved for determining the patentability of the invention. Every patent has a subject matter which is subjected to the routine scrutiny before the patent is granted, the specifications of every invention are made available to the patent office of the country where the patent is sought. This procedure goes well with those inventions which have technical details embedded in a series of documents which can be easily transported and stored. On the other hand, fields like biotechnology where the subject matter of inventions is very fragile and easily damageable like for microorganisms, it becomes very difficult for both patent applicant as well as patent office to fulfil the formalities associated with the patent grant given the nature of subject matter. It is to counter this difficulty; the Budapest treaty was enacted which preserves and make available samples to the patent offices for requisite procedural formalities.  

INTERNATIONAL IMPACT ON INDIAN PATENT LAW
History of intellectual property law in India dates back to the time of British rule. The sway of British remained over India for more than a hundred years. The impact of

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967 Ibid.
968 WIPO, “Summaries of Conventions, Treaties and Agreements Administered by WIPO” 26 (2013)
969 Ibid, page no 28
British rule was felt in every aspect of the functioning of India be it social, political, economic or legal. The laws enacted during the period of colonial domination was mainly to benefit the Britishers without ever paying any notice to the aspiration of the Indian. The same intent was behind the passing of law related to intellectual property.

During this time the field of intellectual property was in its nascent stage of development i.e. it was not fully transformed into the kind of law we have in present times. Intellectual law that time protected any creativity which had some utility and could prove beneficial for the state. The laws protecting creative endeavours during that period was mainly enacted to benefit British industries and to extend protection to those who already enjoyed patent protection in Britain and wanted to enjoy the same privileges in India. These laws were draconian and did not take into considerations the then prevailing conditions and merely imposed such conditions which helped foreign rulers to have tight rope over the Indian market. During this period many legislations were enacted like for example “Patents and Designs Protection Act” of 1872, “Protection of inventions” of 1883, “Inventions and Designs Act” of 1888, “Indian Patents and Designs Act” of 1911. Among these enactments “Indian Patents and Designs Act” 1911 remained in force for a long period of time, even after independence it was operational for a huge time frame. Indian independence brought a massive change in the entire functioning of the country. Finally, a new era began where State responded to the aspiration and well-being of its people. Changing time brought new insights and vision which was felt in every nook and corner of the country.

It took a while but finally, the government understood the importance of laws which protect the intellectual creations and their significance in the fast-changing world milieu. The direct consequence of this understanding was seen in the appointment of committees such as Bakshi Tek Chand committee in the year 1949 and N Rajagopalan Ayyanger committee in the year 1957.

On the recommendation of Bakshi Tek Chand committee, certain changes were brought in the then Patent and Design Act, 1911 which again could not suffice and survive the constant pressure which country felt due to new developments brought in the field of creative and inventive realm worldwide. Under these circumstances, the concerned government-appointed N Rajagopalan Ayyanger committee on whose recommendation Patent Act 1970 found its place in the statute books.

India after independence pledged to be sovereign in its internal and external matters. This principle was also affirmed by the constitution in its preamble. The natural corollary of which implies that India will not succumb to any foreign interference or influence. Today every country is free and independent but not equal in terms of development status and for a country to grow it cannot remain in isolation. This is where the practice of concluding international agreements and conventions come into play. Thus, international

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970 D. N. Choudhary, Patent Laws Developing Countries Perspective, 25 (Capital law House, New Delhi).
agreement or treaties became an instrument where parties are brought together and certain mutual advantages and obligations are negotiated without compromising the sovereignty of any of the state parties. India for a very long period of time stayed away from signing any international patent treaty may be due to the fact India being an underdeveloped country which was still trying to repair from the colonial damage was not ready to have additional obligation to fulfil at any international forum and India lagged behind in terms of development in the field of technology. India was not in the position to compete internationally because it was yet in the stage of building its technical base.

As it is stated earlier a country cannot develop in isolation, with changing times, India’s tremendous growth in terms of science, technology, trade etc has given a lot of impetus to its developmental status. These changed circumstances and quest for further growth encouraged India to open up its boundaries and start international collaboration in different sectors including copyright and industrial property. India’s international collaborations in terms of patents started in the year 1994 when India became a signatory to one of the biggest multinational treaty related to the intellectual property known TRIPS. During this period India also joined the membership of one of the earliest treaties in the field of the patents i.e. Paris Convention and Patent Convention Treaty in the year 1998.

TRIPS is the outcome of GATT’S last round of negotiations which is known as Uruguay Round. The negotiations of this round began in 1986 and concluded in 1994. This round of negotiations has historical importance in terms of intellectual property law due to the adoption of one of the most prominent multilateral Treaty i.e. TRIPS.

During the pre-trips period treaties like the Paris Convention and Patent Cooperating treaty though formulated many rules and principles concerning patents but were narrower in scope and failed in establishing a uniform standard in the field of patents. Further signing of these treaties did not bring any change in the prevailing Indian Patent Law. These efforts tried to facilitate the mechanism of patent grant and removing impediments which could cause conflict while member states engage in interstate technology transfer.

TRIPS was ahead of all these prior efforts its aim was to establish a standard model in terms of intellectual property and in order to bring mandatory compliance by its member states it also provided a proper redressal mechanism for any violation under WTO a feature which was absent in the previous conventions and treaties. TRIPS being a multilateral treaty includes not only patents but other forms of intellectual property as well like for example trademarks, geographical indications, copyright etc.

TRIPS deal with each category in a proper and subtle way according to nature and subject matter involved. In terms of patents, TRIPS broadly deliberate on matters such as (I) extending patent protection in all areas of technical advancement (II) having a uniform period of patent grant i.e. twenty years (III) granting patent protection to

such invention whose subject matter included microorganism (IV) it also aimed to protect new plant varieties (V) it introduced the concept of “exclusive marketing right” to include products patents which are related in the field of agriculture and medicine (VI) TRIPS Agreement also argued that every case of compulsory license should be decided on the basis of merit.  

TRIPS Agreement also provided three different time frameworks for the member states to show compliance to the provisions laid down in the agreement like for example developed nations were not provided much time relaxations they were supposed to be the first to incorporate trips principles in their respective Intellectual property laws on the other hand developing nations were given four years grace period to make necessary changes while as those developing nations like India who did not previously provide product patent was given five more additional years to bring necessary changes but during that period they have to make certain tentative arrangements in terms of providing “exclusive marketing rights” for patents concerning products especially related to agriculture and medicines. Therefore, India after signing of TRIPS agreement received an additional ten years in order to bring its Patent Act 1970 in conformation with the said agreement.

India before TRIPS did not recognise product patents in any field of technology. The general term of process patent was recognized as fourteenth years and in case of medicine and chemical process, it was only granted up to seven years. After the ratification of the TRIPS Agreement, many efforts were made by the government of India in order to fulfil its pledge and bring required reforms to the present-day patent law.

These reforms took shape of different amendments which were brought to the Indian Patent Act, 1970 within the grace period provided by the TRIPS Agreement. These amendments included (I) Patent (Amendment) Act 1999 (II) Patent (Amendment) Act 2002 (III) Patent (Amendment) Act 2005. These changes brought a paradigm shift in the Indian Patent law and started a new era which overhauled the technological industry of India. In which only recognised process patent before TRIPS agreement accepted product patents in all sectors of technology which included product patent for substances such as ‘food, pharmaceuticals, drugs’. The definition of patents provided by Indian Patent Act 1970 before complying to TRIPS agreement produced as verbatim:

“Inventions where only methods or processes of manufacture patentable

In the case of inventions –
(a) claiming substances intended for use, or capable of being used, as food or as medicine or drug, or
(b) relating to substances prepared or produced by chemical processes (including alloys, optical glass, semiconductors and intermetallic compounds),
no patent shall be granted in respect of claims for the substances themselves, but


PIF 6.242 www.supremoamicus.org 327
India has to gear up its pharmaceutical and other allied industry where earlier it was hesitant to accept product patent now after 2005 amendment it has to make tremendous progress in research and development in order to be at par with the international progress. The new approach is required in order to boost the research and development and give impetus to the technological growth of India. From the very onset international community have made numerous efforts to bring uniformity and harmonization in the sphere of intellectual property including patents. This has resulted in the formulation of many conventions and treaties. These conventions on the one side have enumerated many advantageous principles and rules but at the same time they demanded all the nations to exercise equality while dealing with each other, but one thing is to understood herein that all the nations of the world do not stand in equal position some of the countries in the world is still developing some of the countries are very poor. Equality can be exercised only among equal the principle which is supported by the Constitution of India. These are the conditions and practical considerations which needs to be taken care of in order to make sure benefits are not only enjoyed by the developed nations but all nations should be able to accrue profits from such arrangements.

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CONCLUSION

Undoubtedly India for a very long remained aloof from international arrangements governing patents and now being a signatory to such international instruments require India to pace up its technological industry because it has opened new channels of competition not only at the national level but at international level.


976 Ibid.
Tortious Liability rises up out of the rupture of a commitment basically settled by the law; this commitment is towards people all things considered and its rupture is redressible by a movement for unliquidated damages. The torts put together by individuals against another were seen in custom-based law and the truism “Ubi Jus Ibi Remedium” pushed the advancement of the Law of Torts like never before. Under the Roman law, the state was not at liability in torts towards its subjects, since it was a Sovereign. It was seen as a normal for Sovereignty that a State couldn't be sued in its very own courts without its consent. So likewise, in England, the Crown savoured the experience of invulnerability from tortious liability and the precept “The King can’t take the blame no matter what’ won”. Neither a wrong could be attributed to the King nor the Government nor may it have the option to affirm any misguided. In the post established time, the methodology of Welfare State rationale provoked the all invading State intercession, decreasing the refinement among open and private limits. The welfare measures and requests copied and the likelihood to particular harm extended. The State was inside and out that truly matters an endeavour aggregate thusly making it a juristic individual acting through its specialists and administrators suable under law. The courts made another open law fix which made the State at liability for wrongs executed over the range of action of non-sovereign limits. The subject of State Liability in torts has acknowledged remarkable noteworthiness today. The very thought of welfare state envisions that state manages the locals and sets up a solitary association between the benefits of the individual and the commitments of the State. While these commitments have extended, the development in State activities has provoked an increasingly imperative

Keywords: State liability, sovereign, non-sovereign, open responsibility, Statute.
impact on the subjects. Article 12 of the Indian Constitution describes ‘State’.

1.2 Research Methodology
The present analyst embraced the suitable philosophy which might be portrayed as chronicled, systematic, evaluative and prescriptive. The research material has been gathered from different sources to follow the historical backdrop of the law. The significant case law was efficiently gathered, ordered and after that investigated. This technique has been embraced, for, the development of law can be acknowledged distinctly through an investigation of the improvements in different circles of authoritative, regulatory and legal exercises. The present situation of law of State’s liability can be examined distinctly through cases chosen by the courts. The primary research material of the study is on account of a doctrinal research, for example, books, diaries, law reports and so on.

Researcher collected data from secondary sources. This project was written with the aim of understanding and analysing the liability of the state in present and past situation. The method employed in this study is the normative method and theoretical in nature and all the information re-collected and compiled in a systematic order.

Present thesis is essentially a library based project as it seeks to critically describe and analyse the comparison two eras of liability of a state with the help of available primary and secondary sources.

1.3 Research Objectives
The present study is taken with the acknowledged object of following the advancement of the law of tortious liability of the State in India with regards to its sacred and administrative casing work. The present paper is additionally intended to evaluate the work of judiciary in settling the strife between the State and the person in the field of tortious liability.

Specific Objectives
i. To follow out the development of the law identifying with tortious liability of the State in India.
ii. To inspect the Judiciary’s commitment to the continuation of the law of State liability in tort.
iii. To break down the respectability of the polarity of State's capacities both sovereign and non-sovereign or its functions as determinant components of the State's liability in the human rights arranged present day welfare State.
iv. To inspect the administrative endeavours to make tortious liability of the State as a statutory liability in India and the outcome of such endeavours.

1.4 Research Hypothesis
This study attempts to trace and find out answers to the following research questions in an empirical manner based on statistics:
   i. Whether the state is at liability to the ideas of tortious liability and vicarious liability?
   ii. Whether the investigation whether State is bound by Statute and doctrine of liability?

1.5 Scope of Study
In India the law relating to ‘Tortious liability of the State’ isn’t agreeable. The law around there is ambiguous and befuddling primarily in light of the fact that of the impact of Common Law to start with and later on account of a few clashing legal choices. The immense mass of clashing case law that has as of late jumped up,
requires its precise examination. The law of State liability in its present phase of improvement is presumably an uncontrollable portion of law. For what it's worth, the Constitution doesn't meddle with the proceeded with perservness of pilgrim law and the authoritative endeavours at rehashing of law have been prematurely ended twice, with the appearance of the new human rights statute and the idea of responsive State, the line of differentiation between Sovereign and non-sovereign capacity turned into no longer applicable. The issues associated with the advanced setting are a few times new and to a great extent liquid, sidestepping arrangement. The teaching shaping the premise of State's liability needs reassessment in the contemporary setting as genuine questions have been communicated about its pertinence. Time after time, disarray and not explanation has been the result of Courts try. All things considered, there is a need to look at the different features of the law of tortious liability of the State and furthermore of its hypothetical premise.

1.6 PLAN OF STUDY
The present research work entitled “The tortious liability of the State in India” is divided into six parts and is trailed by Bibliography and Appendices. The early on part displays a superior perspective on the issue and recommends the parameters of the proposition.

The first chapter is dedicated to the investigation of ideas of the State, vicarious Liability, the premise and avocations for vicarious liability.

The second chapter is isolated into three segments and is dedicated to the investigation of Indian point of view of the tortious liability of the State. Section I covers the investigation on State liability in India from antiquated occasions till the beginning of Constitution, Section II the liability of East India organization as a dealer and a ruler has been followed with the assistance of statutory arrangements and legal declarations. Section III covers the liability of State in British India.

Chapter third deal with tortious liability under constitution again is separated into two section. Section I is given to the examination of the lawful situation of tortious liability of the State under the Constitution, which Section II manages the more extensive perspective on the State's liability which has developed through legal translation lately.

Chapter fourth deals with the concept of tortious liability of various states and is divided into two sections. Section I manages the law of Crown's liability in tort in the United Kingdom. Section II concentrates the dialog on the Federal tort liability in the United States of America.

Chapter fifth deals with the concept of Doctrine of Public Accountability. Chapter sixth contains the conclusion. A couple of proposals and measures are likewise made as to make the law identifying with tortious liability of the State straightforward and progressively successful.

1.7 LITERATURE REVIEW
1.7.1 Duncan Fairgrieve: State Liability in Tort
This paper takes a gander at the topical hover of legislative liability in damages fighting that that there has been a fundamental move in the traditional English
law approach as delineated in a movement generally House of Lords decisions. A point by point examination is made of the torts applying to open bodies, including lack of regard, misfeasance in expansive sunshine office, disturbance and break of statutory commitment, and the effect of European human rights law and gathering law, with discourse of the availability of damages under the Human Rights Act 1998 and the impact of the flawed decision of the European Court of Human Rights in Osman v. UK\(^{978}\) and the following retreat in Z v. UK\(^{979}\). The discussion of state liability is similarly set inside the setting of the creating demeanour of the courts to open law fixes, with a point by point reconsideration of the association between ultra vires and liability in damages.

1.7.2 Maguire: State Liability for Tort, Harvard Law Review\(^{980}\)
It starts with the expressed words worried with the state disparity which breaks theirs contract and which their revoke their bonds. The issue relating State liability for tort is nearly pulled in with little intrigue. It referenced the explanation as conditions changes. It incorporates that at long last the lot of choices taken with respect to the residents may secure lawful rights a sovereign by explanation of the latter torts.

Chapter-2
Tortious Liability of State Prior to Constitution

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978 European Court of Human Rights in Osman v. UK, [1998] ECRR 101
979 Z v UK, [2001] 34 EHRR 97
981 Of Jataka stories, Book 1.32 the succession to the kingship of the eldest son of the last ruler had become the general rule.
982 ‘Atharva-veda’ xx 127.7 king parikshit has been described as a God among men.
983 Ibid supra note at 7, King “Prurukasta” has been only once described as Ardhadeva (semi-devine).
984 A.S. Altekar, State and Government. In ancient India(1958) p.94; In the satapatha Brahmana, not only the king, but the Kshatriya class is described as t having a devine origin.
986 Id. p. 336.
was progressive. The lord's equity was first limited to discipline for violations and increasingly genuine social offenses. Bit by bit, the lord started to manage few issues of common nature not including discipline. The purpose behind strategic distance of the ruler in common issues could be ascribed to the Indian culture of Vedic age, which was independent town network. The locals were simply agnatic and that's just the beginning or then again less autonomous. It could likewise be said that the abused party himself allowed Kshama (Acquittal) to advance his otherworldly prosperity. In this manner, the perfect of justice was guided more by profound as opposed to fleeting trepidation.

2.2 LIABILITY OF A STATE DURING EAST INDIA COMPANY

The tortious liability of the East India Company during the Charter period from 1600 to 1772 could be had from the Statement of Sir Erskine Perry. However, there were no detailed cases chosen by the Mayor's Courts and Recorder's Courts. This was trailed by an express Provision as introduction to the Bengal Regulation III of 1793 which accommodated the vicarious liability of the Company for the improper demonstrations of their hirelings. The prelude announced, “Government itself, in superintending these different branches of sources of the State, might be blocked from harming private property, they have resolved to present the cases and interests of the general population in such issues to be chosen by the Courts of justice, as per the guidelines, in a similar way as suits by people.” The inquiry whether the Company was going about as a sovereign power or in private limit was just because brought up in Moodalay v. The East India Company the court held that the ace of rolls while dismissing the conflict set out the accompanying significant recommendation of Law, through Lord Kenyon and stated that “I concede that no suit will lie in this Court against a sovereign power for anything done in that limit, however I don't think the East India Company is inside the standard. They have rights as a sovereign control; they have likewise liabilities as people. In the event that they go into bonds in India, the aggregates verified might be recuperated here; so for this situation as a privately owned business they have gone into a private contract, to which they should be liable.”

2.3 TORTIOUS LIABILITY DURING BRITISH INDIA;

The locals, which was portrayed as ‘Sepoys Mutiny’ by the British, however was known as the first war of autonomy by Indians. Subsequently, the British Government chose to put a conclusion to the political organization of the Company and in spite of the obstruction made by it, British Parliament instituted the “Government of India Act, 1858”. By this Act the Company was denied of all its power over the Government of India. It vested in the British Crown all authority through the Secretary of State for India. The Act of 1858 shaped the defining moment not just in the political and Constitutional History of India, however in the field of law relating to vicarious liability of the State and hence the emergence of ‘Sovereign Immunity Doctrine’, the ‘Theory of Benefit’ and ‘The

988 Mayne, Criminal Law of India (1896) p. 229.
990 See Also, Farnell V. Bowman, LR 12 A.C.643 (1887).
Theory of Ratification”. The rule of confirmation was presented now and again for making the State obligated for the tortious demonstrations of their hirelings submitted notwithstanding over the span of their work.

CHAPTER-3

TORTIOUS LIABILITY OF STATE UNDER CONSTITUTION

3.1 HISTORY

The liability co-end with that of East India Company in light of the reality that the liability of the Dominion of India before the Constitution was same as that of Secretary of State for India under section 176 of Government of India Act 1935 and the Government of India Act 1915 made the liability of the Secretary of State for India same as that of East India Organization going before Government of India Act 1858. Thusly the circumstance of the tortious liability was cemented at 1858. The organization managed in a twofold limit Commercial and Sovereign. When it began exercises in India, the organization was completely an exchange body. Bit by bit, it picked up areas and moreover the sovereign forces to make war and harmony and raise military. Since it was an autonomous organization not being the worker or pro of the English Crown, the obstruction had a great time by the Crown was never connected with it. In its sovereign point of confinement, it was acquitted from any tortious liability. As per this standard after self-governance, the safety of the State continued in a couple of respects for example sovereign forces.

In the case of Secretary of State V. Hari Bhanji992, salt was being shipped from Bombay to Madras ports. In the midst of movement the commitment payable on salt was raised and the seller was mentioned to pay the redesigned commitment at objective. The total was paid under test and later on a suit was recorded to recover the total. The Madras High Court had two issues to consider.

i. Whether the State for example the defendant was a sovereign and could be sued in its very own courts?
ii. What was the possibility of the exhibit against which the assistance was being ensured.

“The Court held that since the invulnerability increased in value by the Crown don’t connect with East India Company, the organization was subject. Second the invulnerability existed only for the “Demonstrations of State” totally implied. It was also said that the capability among sovereign and non-sovereign limits was not an especially settled one. There is a qualification with respect to “Demonstration of State” and the hindrance of “Sovereign Immunity”. The past streams from the possibility of vitality drilled by the State for which no activity lies in normal court however the keep going was made on the divine right of Kings.”

3.2 LIABILITY UNDER CONSTITUTION

Under the Constitution of India two Articles viz Article 294 of Constitution of India and Article 300 of Constitution of India contain unequivocal and verifiable arrangements in regards to tortious liability of State and suit against it. Both the Articles go under Chapter III of "Part XII of the Constitution of India which is going as

992 Secretary of State V. Hari Bhanji, (1882) ILR Madras 273
Property Contracts. “Rights, Liabilities and Suits.”

- Article 294 (b) of the Constitution of India gives that the liability of Union Government or State Government may emerge out of any agreement or something else. Otherwise would incorporate different liabilities including tortious liability moreover. This Article consequently establishes and moves the liabilities of Government of India and Government of each overseeing region in the Union of India and relating States.

- Article 300 of the Constitution of India gives that State can sue or be sued as juristic character which states “The Government of India may sue or be sued by the name of the Union of India and the Government of a State may sue or be sued by the name of the State and may, subject to any arrangements which might be made by Act of Parliament or of the Legislature of such State authorized by temperance of forces given by this Constitution, sue or be sued in connection to their separate undertakings in the like cases as the Dominion of India and the comparing Provinces or on the other hand the relating Indian States may have sued or been sued if this Constitution had not been authorized.”

The initial section of the Article 300 arrangements with the terminology of the gatherings to a suit or continuing, that is Union of India and State Government yet the subsequent part characterizes the degree of liability by the utilization of words ‘in the like cases’. The Supreme Court of India after coming into power of the Constitution of India in the main eminent case in regards to State’s tortious liability viz. State of Rajasthan v. Mrs. Vidyavati, AIR 1962 SC 937 evacuated the question that the extent of Article 300 was restricted and held that “the extent of Article 300 isn’t restricted and the articulation ‘in the like cases’ alludes back for the assurance of such cases to the lawful situation before the sanctioning of the Constitution and Article 300 has spared the privilege of Parliament or council of a State to sanction such law as it might suspect fit and legitimate for this sake thus long as governing body has not communicated its goal in actuality, law must be held to be a similar which has been proceeding from the day of the East India Company. The Court additionally held that there can be no trouble in holding that the State ought to be to such an extent at liability for tort in regard of a tortious demonstration submitted by its worker inside the extent of his work and entirely separate from the activity of sovereign powers as some other manager.”

Sovereign capacities were indicated as barrier demonstration of State and other like agents. It was in this manner clarified that ambit of Article 300 included tortious liability of State what’s more, its degree isn't constrained to suit or appropriate to one in regard of legally binding liability as it were. In the said case a vehicle possessed by the State of Rajasthan met with a mishap causing demise of one individual because of carelessness of the driver. The State was held at liability as the said mishap couldn’t be related with the sovereign forces. The Court held that the demonstration of open hirerelating submitted by him over the span of his work was in release of liabilities relegated to him not by uprightness of designation of any sovereign forces.

In case of Kasturi Lal Ralia Ram v. State of Uttar Pradesh, AIR 1965 SC 1039 the instance of Vidyavati was recognized on actualities limiting it to tortious liability not
emerging from the activity of sovereign forces. The Court in Kasturi Lal's case maintained the protection of sovereign invulnerability what's more, held that zone of business referable to sovereign forces must be carefully decided. In the said case the held onto gold was kept in the Malkhana and the individual from whom it was held onto applied for its arrival later on however the case was not done and it created the impression that it was no longer in Malkhana and the equivalent was abused by the individual incharge of the equivalent. It was held this happened due to the carelessness with respect to the cops who acted infringing upon arrangement of U.P. Police Regulations and the forces which were practiced by them could be appropriately described as sovereign forces. These cases and different cases came up for thought under the watchful eye of the Supreme Court in the instance of Nagendra Rao v. State of Andhra Pradesh which emerged under Basic Commodities Act. The Court saw that in welfare state elements of State are not just guard or organization of Justice or keeping up lawfulness which are sovereign elements of State, yet its capacities plan to direct and control exercises of individuals in pretty much every circle: instructive, business, social, financial, political or even conjugal, and the dividing line among sovereign and non-sovereign forces for which no levelheaded premise endures has to a great extent vanished. The water tight compartmentation of sovereign and non-sovereign capacities was “held not to be sound and against present day jurisprudential reasoning. The Court saw that qualification among sovereign and non-sovereign forces relies on the idea of intensity and its activity. One of the tests to decide whether the authoritative or official capacity is sovereign in nature is whether the State is responsible for such activities in Courts of law.”

In the case of Achut Rao Hari Bhau Kodwa and another v. State of Maharashtra and others, the Government specialist and the State were held that “liability on account of the carelessness of the said specialist in the emergency clinic bringing about death of the patients, it was held that running of medical clinics not being selective capacity of the Government, keeping up a medical clinic by Govt. would not be an activity of sovereign power in order to empower to guarantee resistance from liability for the tortious demonstrations of its medical clinic representatives.”

The Supreme Court in Dr. M. Ismail Farooqui v. Association of India, held that “the securing of sanctuary and mosque may it be on the grounds that it is shrouded in upkeep of lawfulness is likewise canvassed in the sovereign elements of State.”

3.3 ARTICLE 21-SOVEREIGN IMMUNITY

Article 21 of the Constitution of India denies State to deny an individual of his life and freedom aside from as per a strategy set up by law. The word ‘life’, it incorporates each part of life which makes life significant, complete and living, and even culture, custom, legacy and individual freedom which have a very extended significance force negative deed on the State and in perspective on Constitutional arrangements including Directives

997 Dr. M. Ismail Farooqui v. Association of India, AIR 1995 SC 605
Standards of State Policy it has been translated to force positive commitment upon the State which is to guarantee better delight throughout everyday life and nobility of person. The Fundamental Rights which have been ensured and are enforceable by the Supreme Court. Under Article 32 of Constitution of India and High Court, under Article 226 of Constitution of India have not just made the guard of sovereign invulnerability totally inapplicable yet have ousted it inside and out as it can’t go with unavoidably ensured rights. In perspective on complete ouster of sovereign invulnerability in respect to basic rights especially Article 21, appropriate to grant cash pay for infringement of the law is advocated. The Union and State governments would be at liability for tortious acts submitted by their representatives over the span of work for infringement of Article 21. The Supreme Court granted fiscal remuneration in an enormous number of cases.

In the case of *Nibati Behera v. Territory of Orissa*[^nibati]998, the Court held that the standards on the liability of the State in the event that for instalment of pay and the differentiation between this liability and the liability in law for the instalment of pay for the tort so submitted. On the off chance that no other practicable method of change is accessible the Court would grant fiscal remuneration for break of basic rights by State or its representatives dependent on the guideline of exacting liability.

**CHAPTER-4**

**TORTIOUS LIABILITY UNDER COMMON LAW PRINCIPLES**

**4.1 LAWS OF ENGLAND**

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[^nibati]: Nibati Behera v. Territory of Orissa, AIR 1993 SC 1960

Office v. Dorset Yacht Co\textsuperscript{1000}, the crown was held subject for the harm brought about by the runaway borstal students who got away in light of the carelessness of the borstal officials in the activity of their statutory capacity to control the learners.

4.2 LAWS OF UNITED STATES OF AMERICA
In the United States of America, The Federal Tort Claims Act, 1946 characterizes the tortious liability of the Government. In the instances of precedent-based Law liabilities, the U.S.A., Government is at liability to a similar degree as a private individual under like conditions. Anyway deliberate torts are absolved. On the Whole the tortious liability of the U.S. Government is more limited than that of the administration in England.

CHAPTER-5
DOCTRINE OF PUBLIC ACCOUNTABILITY

The idea of open duty includes basic open concern. All the three organs of the government-law-making body, official and legitimate are obligated to open responsibility.

5.1 MEANING OF DOCTRINE
It is settled law that each and every discretionary power must be polished reasonably and in greater open interest. In Henley v. Lyme Corporation\textsuperscript{1001}, Justice C.J opined and stated that “Presently I take it to be faultlessly clear, that if an open official, abuse his office, either by a demonstration of avoidance or commission and the result of that is harm to an individual an activity may be kept facing such open official.” In various cases, the Supreme Court has associated the above rule by giving fitting lightening to wronged parties or by managing the defaulter to pay harms, compensation or costs to the person who has persevered. In Arvind Datttaraya v. State of Maharashtra\textsuperscript{1002}, the Supreme Court set aside solicitation of trade of an open official watching that the move was not made without trying to hide interests yet rather was an example of abused of a reasonable official and held that “it is most terrible that the Government cripple the officials who discharge their truly furthermore, energetically and brings the individuals getting a charge out of dull advancing and contra banding liquor.”

Individual liability: - A burst of commitment gives rise out in the open law to liability which is known as “misfeasance with no attempt at being subtle office”. Exercise of vitality by cleric and open officials must be for open product and to achieve welfare of open free to move around at will. Any place there is misuse of vitality by an individual, he can be held committed.

In Common Cause, a Registered Society v. Union of India\textsuperscript{1003} the oil Minister made circulation of oil siphons emotionally for his relatives and buddies. Quelling the activity, the Preeminent Court guided the Minister to fifty lakh rupees as model harms to open exchequer and fifty thousand rupees towards expenses. In is introduced that in Lucknow Improvement Authority v.
M.K Gupta\textsuperscript{1004}, the Supreme Court properly expressed that “when the court arranges the portion of harms or pay against the express a complete sufferer is the ordinary man. It is the ‘residents’ money which is paid for inaction of the people who are supplied under the demonstration to discharge the people who are under the demonstration to discharge their commitments according to law. It is as such indispensable that the Commission when it is satisfied that a protestation is equipped for compensation mental destruction or abuse, which seeing should as recorded carefully on material and inducing condition and not daintily, it also arrange the division stressed to pay the total to the protest from the general populace finance immediately. Regardless, meanwhile, individual liability should be constrained on bombing officials just in the wake of hauling out and bearing reasonable shot of hearing.”

5.2 \textbf{JUDICIAL ANALYSIS}

The instructing of open liability applies to lawful moreover. A crucial need of value is that value is that it should be allocated as quick as would be judicious. It has been appropriately expressed: “Equity postponed is equity is equity denied.” Delay in move of cases can be recommended. While comments and input of legal taking a shot at issues of measures, sound aides for explanation and change, the working of the court in association with an explicit proceeding with isn't allowable.

\section*{CHAPTER-6}

\section*{CONCLUSION}

\footnote{1004 Lucknow Improvement Authority v. M.K Gupta, AIR 1994 SC 787}

All activities of state and its instrumentalities must be toward the objectives set out in the constitution. Every movement of government should be toward reasonable shows, social and monetary improvement and open welfare. The built up court rehearses vitality of legal review with confinement to ensure that the specialists on whom such power is supplied under the lead of law practice is really, fairly and for the explanation behind which it is intended to be worked out. Sovereign immunity as a protect may have been, thus, never available where the State was locked in with business or private endeavour nor it is available where its officials are culpable of interfering with life and opportunity of a local nor advocated by law. In both such infringements the State is vicariously subject and bound, normally, authentically and morally, to compensate and reimburse the wronged person. The educating of sovereign immunity has no significance in the present-day setting when the possibility of power itself has encountered radical change.

“Power” and “Demonstrations of State” are as such two one of a kind thoughts. The past vests in a man or body which is free and overwhelming both remotely and inside while last may be act done by an agent of sovereign inside the purposes of restriction of vitality vested in him which can't be tended to in a Municipal Court. The possibility of vitality which the Company got a kick out of was arrangement of the “Demonstration of State”. A movement of political power by the State or its agent does not equip any explanation behind activity for archiving a suit for harms or pay against the State for carelessness of its officials. More than that for more than hundred years, the law of vicarious liability of the State for
carelessness of its officials has been swinging from one course to other. Result of the aggregate of what this has been defencelessness’ of law, increment of suit, abuse of money of essential man and imperativeness and time of the courts.

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RISE OF POLICE BRUTALITY AND THE NEED OF BETTER CONTROL MEASURES IN RECENT TIMES

By Natasha Singh and Rekha Anand
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ABSTRACT
The diabolic recurrence of police brutality has adversely enhanced in the first year of Modi 2.0 government, evidently from abrogation of article 370 in Kashmir to Anti – Citizenship Amendment Act protests in Jamia Millia Islamia, hovering over Northeast Delhi riots and even in the midst of a pandemic. A slight glitch in the law and order, the lives and liberty of the common citizens are in peril accompanied by the actions of police.

The use of arbitrary, excessive force harbours a domain nature of complacency and prejudice around religious minorities, students and substantially the Muslims of this country. Why is Police Brutality still prevalent? Do we heed to the political backing or racial discrimination? Or is it lack of conventional entailed police training? To answer this, we need to take a look at the history fraught police reforms, the legal accountability of police officers, International perspective to marshal police union contract, to enact and repeal law, prominently defund the law enforcement and improve the working condition and the police structures. All the above-mentioned issues would be unraveled in this article along the detrimental effects of Indian film industry tarnishing and glorifying police brutality which normalizes the gravity of the issue. In addition to the current happenings in India and other countries, the author also emphasizes the factors contributing to this phenomenon, suggestions and measures to ensure transparency in situations where police officers are held accountable, new effective reforms to reduce extrajudicial killings, custodial torture, malicious prosecution, false imprisonment and level of impunity the law enforcement officials relish.

A. INTRODUCTION
Police brutality has secured its considerable amount of media exposure throughout the last few years; it’s a heinous offence legally defined as the infringement of civil rights of a person. The severity of the act is established when an officer exercised his or her legally entitled force in a way which seemingly exceeds the minimum required amount towards a civilian or the general public. The use of weaponized tools like pepper spray, tasers, batons also beating and slamming to the ground and sexual abuses are all instances of police brutality. Verbal abuse, arbitrary arrest or racial profiling is also categorized under the domain of police brutality. It surpasses the standard scope of the discipline. Various countries have criminalized police brutality, considering it as a dehumanizing offence and concurrently we still witness cases where the accusation of victims doesn’t reach the investigation stage. Extrajudicial killings are being normalized in the society and no one endorses this bitter truth.

It is a truism that police in India by and large need a legitimate authority and the trust of the general public. In India, various complaints are lodged against the police including grievances of unwarranted arrests, unlawful searches, and custodial
assaults. The social reality of the widespread debauchery of police does colour a perspective of their tarnished image and execution, yet these clarifications don’t represent the way that police in India are structurally weakened by cultural-political and legal-institutional claims to various clashing types of power that challenge and often overpowers the authority of the police. To probe into such abuse of force, various countries have adopted safeguards, such as accountability, externally by the political executives and internally by senior police officers and independent police oversight authorities.

Amidst the battle of COVID – 19 endangering the public health in India, we are being encountered by the wave of police brutality as migrants, daily wage workers and vendors are beaten and abused notwithstanding even the attempts to buy basic essential commodities by the citizens. There have been abundant reports of police brutality, propelling in from various parts of the nation. Recently, India actively combated against the Citizenship Amendment Act, the complete National Register of citizens and the uttermost form of police violence, mobilizing several protestors across the country. The duress in Delhi, police complicity towards the citizens and now the defilement which resulted due to implementation of the lockdown urges the necessity for the establishment of police reforms in India.

Reports of torture abound, and retaining human rights organizations have manifested this for prolonged number of years, the institutionalization of violence have been brought sharply to the fore in ways how police have treated protesters in several states. By ‘othering’ them, similarly people of several vulnerabilities and from various marginalized gatherings have been valued, regular brutality on account of the police in India, and indeed other South Asian countries, is a sordid part of life for many others.

There are numerous reasons due to the prevailing police brutality and yet very little publicity or action was taken on the accountability aspect in India. Complaints against the police are occasionally indicted in open and in a nation like India this acts as a pivotal point to the disintegrated “rule of law” framework. Despite the fact that the post-independence India determined changes in numerous fronts, the police system, its essential structure, techniques of work and absence of open responsibility stayed unaltered. The article additionally talks about a few advancements that must be invariably brought about to the reinforcement of executive command over the police and prompting the rise of abuses subjected by police forces and possible misuse of their powers.

B. THE EVOLUTION OF POLICE REFORMS IN INDIA

In pre-independence era, the of police administration set up by the 1861 Act made police forces unaccountable to anyone aside from their own hierarchy and the colonial, political and administrative executive. Collectively holding the police responsible to the society or other democratic institutions did not fit into the British provincial model of control. For example, it did not necessitate the constabulary to think critically while performing their duties.

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1006 United Nation Office on Drugs and Crime, Handbook on Police Accountability, Oversight and Integrity, Cm57991, 2011)
furthermore, they in reality, were not required to have any thoughts concerning it. The Police Act 1961 was introduced by the British and subsequent to that there have been only minor changes to this system. The core structure about the functioning and reporting remained the same since its implementation in 1861.  

The problem lies in the vital purpose of this system as it was designed to oppress and control the population rather than to protect and serve the society as it should be. This issue was first addressed in 1979, by the Janata government where they unanimously decided to bring reforms in the police system and “National Police Commission 1979” was introduced, however, no implementation was further done for the next 20 years.

Post independence the country witnessed evolving economic, political and social establishments, the need to circumvent to the police administration was a paramount requisite. The country changed predominantly but the situation for this department more or less remained unaltered as the 1861 Act continued to govern. After 73 years of independence, no government, central or state, willingly tried to adequately replace this Act with new reforms. Although some states have brought in new legislation since 1947 to govern police forces in a manner differently as initiated before, like Bombay Police Act of 1951, Kerala Police Act of 1960, Delhi police Act of 1978. But these acts did not amount to significant improvements in the organizational structure or enhanced performance of the police. Still, the 1891 Act governs primary parts of our country, making no difference in the administration.

This was succeeded by the Gore Committee set up to the police training in 1971 and accordingly the National Police Commission between 1977-1981, submitted 8 reports recommending expansive changes in the current system and furthermore established a Model Police Act. None of the significant suggestions through it were adopted by any legislature. In 1999, the government introduced the Ribiero Commission 1999, inspired by the earlier 1979 Commission with further rectification. The subsequent year, a new Committee was formed called “Padmanabhaiah Committee” and three years later another called “Malimath Committee” was established. However, none of these were implemented. In fact, the report directly pointed out to the negligence in the implementation of the same. As no constructive step was carried out after several reports, in 1996 DGP Prakash Singh, UP filed a PIL in Supreme Court to instigate an action towards the reforms. After a long wait of 10 years, the court finally gave a verdict on 22nd September 2006. It was a historic day. Seven directions to the government were given to reform the Police department. These are as follows:

I. Formation of a State Security Commission - to control the influence of the state government on the police department.

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1008 Model Police Manual, Police Organisation in India( 1st Volume, Bureau of Police Research and Development, 1861)

1009 Subramanian, K. S. ‘Reforms for Indian Police.’ Economic and Political Weekly, (India, 1July 2006)

1010 Supra 4

1011 Supra 4
II. Minimum tenure of 2 years for all ranks above SI to prevent biasness and abuse of the process of transfer by politicians to tailor in their needs.

III. Separate investigation and law & order wings.

IV. Formation of Police Establishment Board - to overlook transfers and promotions and validate them.

V. Formation of Police Complaint Authority - to take public complaints against the police department.

VI. Formation of National Security Commission - to enforce internal policies and laws.

This was why police evidently resented the new verdict as it would eventually disassociate their power and dominant control in the system. No state fully implemented the directives in its originality but adapted them to suit their needs and further in numerous cases the narrative was entirely overlooked.

C. POLICE ACCOUNTABILITY AND KEY MECHANISMS

Police accountability in India entails both police officer and the law enforcement agencies being held responsible to the general public in lieu of their basic services of maintaining order and control crime. The police are to uphold proficiency with regard to laws, in due action of search, seizure, arrests and equitably comply with the human rights and not indulge in impropriety, misconduct or nefarious behavior. Police accountability can be studied under two broad headings, Internal Accountability Mechanisms and External Accountability Mechanisms.

1. Internal Accountability Mechanisms

Police are held responsible for their use of force under the Police Act of 1861. It authorizes senior officers of the rank Superintendent of Police and above to either dismisses, suspend or even to curtail down the rank of any accused subordinate officer. Some of the punishments mentioned in the Act include (a) confinement to quarters not exceeding 15 days, (b) fine not exceeding one month’s pay (c) removal from any office of distinction or special emolument. It lists the following offences for which police officer can be disciplined (a) a willful breach or neglect of any rule or regulation or lawful order (b) withdrawal from duties of the office or being absent without permission or reasonable cause (c) engaging without authority in any employment other than his police duty (d) cowardice, and (e) causing any unwarrantable violence to any person in his custody.

Further, the procedural to punish the accused officers was found agonizing as to their elaborate and tedious process of departmental inquiry conducted by his superiors. Regardless of whether the charges are proved, the accused officer can and usually goes to the court against the evidence and punishment forced. Unfortunately, the authority of police administration in India has been dissolved by political obstruction, prompting an imbalance of order in the power and the promotion of an inclination at various levels inside the police to look for outside support for rewards and to be protected against punishments. This is one of the

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<www.worldcat.org/title/new-world-of-police-accountability/oclc/56334321/viewport> accessed on 04 July 2020
1013 The Police Act, 1861, s7
significant explanations behind the decrease in the adequacy of departmental mechanisms to guarantee police accountability. It is essential that any course of action for the inquiry into complaints against the police ought to be adequate both to the police and public as reasonable and just.

2. External Accountability Mechanisms
External accountability mechanisms have contributing factors of the National Human Rights Commission, Non-profit organization and the media playing a prominent role from a reactive and preventive perspective.

- National Human Rights Commission
  The NHRC is sole and heart rendering few accomplishments to the police enforcements and is responsible for their activities. Considerably, the Commission’s work has been endured because of the flawed system and insufficiencies regarding the law supervising its functionality. The Commission should be encumbered in its working, yet there are some provisions in the Protection of Human Rights Act, 1993, which underscores the reliance of the Commission on the Government. The Act makes it subject to the government for some of its necessities, similar to manpower and money.
  All the more significantly, the Act doesn't endorse the Commission to take any action into the complaints of infringement of human rights submitted by the individuals from the armed forces. They, as characterized in the Act, imply not just the maritime, military and air forces but also some central armed forces, similar to the Border Security Force.\textsuperscript{1014} The Act clearly debilitates the NHRC’s viability in giving justice to people in general in situations where infringement has been by the officers of this system, which are frequently conveyed on law and order duties in most sensitive zones. Such the Commission, under the Act, can do is establish a call for reports from the Central Government in similar cases and subsequently make suggestions to the Government or not continue with the case by any stretch of the imagination.\textsuperscript{1015} There have been times where the government has recklessly denied it even on the records. In its recent report, the Commission repented “the lack of cooperation extended to it through the denial of access to records requested by it in respect of trials conducted against members of the para-military forces accused of human rights violations.”\textsuperscript{1016}

- Non-Government Organizations
  NGO conforms to the police in two efficient ways: (1) infringement of human rights committed by the police officers and (2) the changes in the working of the police department. Police or government response to NGO allegations is normally witnessed as a form of forswearing. The government is incessantly dubious to uncover police records as it could be defied against them by the dissenting party. Even though the reports of human rights violation are bona fide and supported by undeniable proof, they are compelled to act with. Fabricating of such reports was an element of obstreperous with the current structure and the comparatively lacked competence from the NGO.
  Another issue is the non-accessibility of data about the government’s plans and projects concerning the police. The police are hesitant to impart data to outcasts, especially the NGOs. This hinders the work

\textsuperscript{1014}The Protection of Human Rights Act, 1993, s 2(1)a
\textsuperscript{1015}The Protection of Human Rights Act, 1993, s 19
of the NGOs, particularly with respect to the police reforms.

• Media
One of the most careful guard dogs over the police brutality in this nation is the presence of media. The media in India enjoys a wide aspect in the universal realm and in today’s era it has paved a path of huge reach and force. Innovative developments seen during the most recent couple of decades have revolutionized the world of communications and opened frontiers, which were up to this point obscure to the media or past its reach. Any infringement of human rights happening anywhere in the nation can be known to others in a matter of moments. The media has demonstrated incredible enthusiasm for writing about these human rights violations.

Social media, with its various challenges, is providing more information even to general people where it is hard to reach by the traditional modes of media. Through it, they have now unlimited access to the misconduct of police, how their ill actions in tackling issues that matter more to them all over the country, any issues that may influence them or that they can help with. In this sense, at this point, the police are more responsible through social networking that they are through the conventional media.

D. JUDICIAL INTERVENTION
(Prakash Singh v. Union of India)

Eight reports were submitted between the periods of 1978 and 1981 by the National Police Commission, which derived nothing but little intricate actions. Further on, in the case of Vinnet Narian v. Union of India1017, the Supreme Court considered the urgency of implementing the police reforms, the reports from the Riberio Committee in 1999, Padmanabhaiah Committee 2000 and Malimath Committee in 2002 were made conclusive in the landmark case of Prakash Singh v. Union of India & Ors.1018 the issue of impunity and police brutality were emphasized and issued binding directives to the State government and its association of Police Complaint Authorities (PCA).

The Supreme Court directed to set three significant institutions,

1. State Security Commission, which was primarily formed to tackle the grassroots level performance of preventive tasks and service-oriented functions by the police and laid down vast policies and directions adhering to it. Additionally, ensured the police to be free from any unwarranted pressure or influence from the State Government
2. Police Establishment Board, predominantly dealt with promotions, postings, transfer and other service correlated to the police officials and men. This board mainly comprised of the Director General of Police and other four senior officers of the department.
3. Police Complaints Authority established at the state and district levels with a crucial endeavor to scrutinize the allegation of misconduct, grievous hurt or rape, custodial death in the police personnel of and up to the rank of Deputy Superintendent of Police in the district level. Consequently, at the state level a police complaint authority must be established to scrutinize the matter against officers of the rank Superintendent of police and above. The recommendation of the both State and district level authority shall be binding against the actions of the delinquent officer.

1018Prakash Singh v. Union of India, [2006] 8 SCC 1 [2006]
The State Government must choose the Head of the State Complaints Authority with the succor by the Chief Justice or the Judge of High Court. Depending upon the volume of complaint, these authorities maybe assisted with three to five members and further on must be selected by the State Human Rights Commission/ State Public Service Commission/ Lok Ayukta panel. The panel must consist of police officers, civil servants or other departmental officer or from civil society. They would solemnly work for the Authority and remunerated for the appropriate services.

Furthermore, the court also directed that the state government to designate the Director General of Police from the category of the three senior most officers of respective department and empanelled for promotion by UPSC to that rank, and granted with a minimum tenure of two years. The police officers on the IG Zone, SP i/c District, DIG Range and SHO i/c with operational duties would have a minimum tenure of two years. To ensure speedy investigation, better proficiency and rapport with the common citizens, the court additionally ordered to bring about disparity in the investigation function and the “law and order” function. It must, notwithstanding, be guaranteed with coordination between two wings and having full swing effect in urban regions with population of ten lakh or more and gradually reaching out to smaller towns/ urban territories too.

The Union Government was administered to set up a National Security Commission for determining the placement and selection of the Central Police Organization heads, redesigning the viability of the forces and upgrading the administrative conditions of the personnel with a minimum tenure of two years. Undeniably, the judgment broadly dealt with autonomy, efficiency and accountability of the police organization.

E. ANALYSIS

Before unravelling why police brutality is still persisting in India, let’s primarily acknowledge the premise of the topic and trace back to the history accentuating how the state of police affairs in our country portrays a complete collapse in “rule of law”. In fact, the very administration charged with protecting the rule of law is perpetrating violence upon its own people. The Police have often misused the power granted by the law to curb riots. In most of the communal violence in India, the police have shown marked prejudice against the minority communities. This was depicted at its worst in the communal violence of Mumbai (1992-93), in Gujarat (2002), Delhi (1984), Uttar Pradesh, etc. and the wave of police brutality has only gotten progressively worse and violent in the ensuing days.

The 1992 Mumbai riots, a counter back reaction to the demolition of Babri Masjid by Hindu Karsevaks widely demonstrated that a considerable section of the police force was communalized as they failed to engage with the usage of use water cannons, tear gas, rubber bullets, or pellet guns; they relentlessly shot down 192 people and losing their lives in police firing solely. Moreover the hospital single-handedly failed to record the cause of death that being the open firing and oblivion to the brutality, neither mentioned in the...
police records nor the judicial commission chaired by B.N. Srikrishna.\textsuperscript{1020}

After the 1984 anti-Sikh riots, an enquiry headed by Justice Rangnath Mishra Commission\textsuperscript{1021} observed that riots occurred broadly on account of the total passivity, callousness and indifference of the police in controlling the situation and protecting the Sikh community. Several instances showcase where police personnel in uniform were found marching behind or with the mobs. Since they were seen with the mob without trying to control them in any way, while the mob was indulging in criminal acts, an inference has been drawn that they were part of the mob and had equitably shared akin intentions and objective.

According to Justice Nanavati, who addressed the 1984 anti-Sikh riots stated there was no given disparity between in the incidents in Gujarat and Delhi\textsuperscript{1022}. In the former Muslims were victimized, in the latter, Sikhs. In both, he found enough evidence to suffice the conclusion that politicians and the police discounted the crimes perpetrated. All Commissions have established that the police either actively participated or were silence to the complicity of violence that carried on.

We have evidently established that these instances allude the role of police during communal riots was transitory and far from sheer satisfactory; this was a thematically pattern in every communal riot. The allegation of prejudice behavior of the police against the minorities during the periods of communal violence wasn’t a new phenomenon. Despite the findings by numerous commissions, no ruling party till date spewed an ounce of courage to securitize cases against police misconduct. In 2002 a large section of the Gujarat police was part of the mobs engaged in killing, burning and lynching of the religious minorities such as Muslims. A number of reports substantially stated the aided, abetted and countered the rioters against the minority community.\textsuperscript{1023} All vital and sensitive postings in the Gujarat police were systematically politicized and saffronised by the BJP immediately subsequent to coming of power. As protests against citizenship law and NRC emitted the country over, the police in some Bharatiya Janata Party-ruled states began imposing Section 144 of the Indian Penal Code in explicit parts of some cities to prohibit people from gathering in groups. The Uttar Pradesh police, however, imposed Section 144 in the entire state on December 19, making it viably illegal for people to even protest peacefully.

Regardless to this restraintment, citizens from various parts of the respective state organized protests that were met with the grimace of horrendous police brutality. In spite of the fact that the police seemingly claimed that it was initiated by the protesters, numerous reports and videos indicate that in many places, the police not only attacked peaceful crowds with excessive force but also broke into people’s homes, vandalized private property and looted their money.\textsuperscript{1024}

Currently, in the midst of a global pandemic, ten thousands of Americans

\textsuperscript{1020}Ibid
\textsuperscript{1021}Inderjit Badhwar, ‘Justice Mishra Commission Report on 1984 Anti-Sikhs Riots may find few takers’, India Today (India, 27 January 2014) 2
\textsuperscript{1022}Deeksha Bhardwaj, ‘4 Commissions, 9 Communities & 2 SITs – the long road to justice for the 1984 Sikh killing’ The Print (India, 16 November 2018) 3
\textsuperscript{1023}Puja Changoiwala, ‘Gujarat riots: They raped me, butchered my child because we were Muslims. 17 years on, I have justice – and faith in Indian law’ This Week (Asia, 19 May 2019)
\textsuperscript{1024}Aarefa Johari & Nithya Subramanian, ‘In Uttar Pradesh, mapping reports of violence and police brutality from 15 districts’ Scroll (India, 9 July 2020)
paraded the streets against the killing of George Floyd by the police officials kneeled on his neck for as long as 9 minutes which was eventually imitated by a Jodhpur police. Disregarding the rules of social distancing and quarantine, all the Black, Asian, Whites and others have taken the streets in solidarity against police brutality and racism.

Multiple Bollywood celebrities and Indian resorted back to social media to condemn the killing, hash tags such as #BlackLivesMatter and little black square posts were brought into the limelight. The Indian mainstream selective activism overflowed the social media, and we failed to notice that we too benefit from a power structure similar to the one in the United States and remain an oppressor in our motherland and conveniently close our eyes to the horrendous activities in India.

Recently, the death of the father-son duo Jayaraj and Fenix entangled everybody’s emotions because nobody could conceptualize the kind of brutality stemming from the police who was pondering the superior complexity internalized position by them. All the eyes of the nation shifted their focus from pandemic to the atrocious case of police brutality that’s emerged out of Tuitcorin in Tamil Nadu. Knees mercilessly smashed with lathis, face ruthlessly plunged against the wall and blows were rained on their backs aggressively and steel-tipped wooden lathis were shoved up their buttholes several times and there was also a great deal of torture and damage inflicted on their genitalia because eyewitnesses of the body have stated that the bottom parts of their body were completely ripped and mangled due to which resulted in changing their clothes three times throughout the torture.

The sense of justice for the victim’s family has gained some value because of the intervention of the court through suo moto public interest litigation and a large movement of people across the state and the media coverage it got. This is a classic example of police brutality and misuse of power depicts similarity to that Minneapolis incident. The chief reasons among the many for the prevalent acts of brutality are racial discrimination and political backing, which will be elaborated below.

I. Racial Discrimination

The persistent racial discrimination faced by the religious minorities’tailors in the fact of police aggressive behavior and the ostensible brutality. The rampant protest which upraised due to the abrogation of article 370 was curbed down only by the means of open firing at women, children and the protesters with pellet guns. 2,653 cases were reported and resulted in the killing of Burhan Wani. Violence, arson and firing are invariably paved down the streets of Srinagar. Several International media released the footage arbitrary, excessive force by the police personnel, whilst the Indian government denied the atrocious killing.

“The policewoman pulled my legs up, she twisted my neck, and my head was down. My dress came off, forget my burqa, even

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1025 Ayush Singh, ‘Video of Cop Kneeling on Man’s Neck in Jodhpur Reminds Internet of George Floyd’s Death,’ News 18 Buzz, (India, June 5 2020)
1026 Editorial, ‘Thoothukodi custodial deaths: All you need to know’ The Times of India, (India, 30 June 2020)
“my shirt came down”\textsuperscript{1028} words of Rafia Fatima, one of the protestors who engaged against the Citizenship Amendment Act. Another particular appalling video which sparked a nationwide wave of outrage was 5 ghastly injured men coerced to sing the national anthem and eventually resulted in one of them being death. During India’s worst communal clashes and the protests against CAA and NRC proved to display the barbaric acts of law enforcement.

The current global pandemic has explicitly bought out the Indian police behavior of abusing their superior power. Many videos have been taken where the police have needlessly toppling vegetable carts, vandalized shops and parked vehicles, particularly the Muslim ones. Cases were reported against the police where they have been aggressively beaten up workers delivery essential goods.

II. Political backing

The law enforcement is simply the vehicle of the oppressive state’s desire and not precisely the deliverers of justice. The Indian police incessantly commit extra judicial killing, fake encounter, paved the way to custodial torture, ill treatment and arbitrary detention is due the working conditions under the state machinery. The CM Yogi Adityanth mentioned of “taking revenge” on the anti-CAA protest. Subsequently, the UP police were seen with hoardings pictures and images of protestors.\textsuperscript{1029} The mega political blame game has erupted between the Centre and Delhi government over the JNU campus violence. The brutal mobilization of the JNU students was clearly a state sanctioned violence and subsequently tuned into spinning the blame on each other. Instances of the Politician Kapil Mishra hate speech, Modi’s silence on the allegation of brutalities and the transfer of the Delhi High Court Judge Justice S Muralidhar when directed to take strict actions against the politicians, criticizing the Delhi police justifies the fact of that the law enforcement to merely reduced to government agents and as servants of the ruling party. Lastly, the police personnel of India must be free from the direct control of the politicians in order to curb the baffling acts of them.

F. INTERNATIONAL PERSPECTIVE

In the previous years, the American media has been immersed with incidents on abominations committed by police officials, particularly in regards to the deadly use of power—to such an extent that the world is compelled to think about how their most renounced democratic State has turned its law enforcement organizations against its own people, a thing prevalent in the dictatorial era. But these irresistible comparisons with other democratic countries have cleared the picture that torture is nothing to compare with a country’s developed state. Police officers in the US kill more people in a few weeks than their counterparts in Europe do in years.\textsuperscript{1030}

In the American socio-political setting, the issue is settled inside the bigger—and rather contentious—subject of the right to carry weapons. Officials usually condone the excessive use of arms, power with the method of reasoning that the victim was

\textsuperscript{1028} Betwa Sharma, ‘Two Months On, CAA Protestors Fight Public Apathy As Police Brutality Continues, The Huffington Post, (India, February 2020)

\textsuperscript{1029} Asmita Nandy, ‘Jamia to Kashmir: Rise in Police Brutality in 1st Year of Modi 2.0’, The Quint (India, June 2020)

\textsuperscript{1030} Jamiles Lartey, By the numbers: us police kill more in days than other countries do in years, The Guardian, (India, June 9 2015)
armed and had posed a danger to his life. Without a doubt, most European countries place broad limitations on the ownership of arms by citizens (a striking special case is Switzerland, which appreciates a high firearm homicide rate by European measures). Considering this, it might seem, by all accounts, to be the situation that liberal weapon laws are decidedly associated with illegal police killings.

In the capacity of population, European countries have smaller ratios than the United States and the elements of an enormous and diverse country would influence the crime percentage and occurrence of police brutality regardless of whether we think about the information in per capita terms. In this manner, a correlation with India would become hard to give accurate results.

India is a huge, overpopulated and diverse country simply like the United States, yet it is unquestionably not considered developed by most. It has exceptionally prohibitive weapon laws, however is famous for fake encounters, a term utilized by the Indian media to depict extra-judicial killings by the police which are made to seem like reasonable murders. Note that the official American sites just incorporate information from those law enforcement organizations which they allow to show the killings to the FBI. Further, the information just incorporates killings managed as legitimate by those organizations. All things considered, US officers kill 5 times in excess of the rate at which their Indian counterparts do. Although the data collected by the official sites of both countries seems unreliable, a major difference is the intense media scrutiny over the police shooting occurrences in the United States, various independent media houses have started to gather and sort out the information. The Guardian, for instance, has carefully followed and reported the police killings which have happened in the US since 2015. As anyone might expect, the figures in their report are far more prominent than the ones in legitimate sites.

G. NEED OF BETTER CONTROL

“The law cannot make a man love me, but it can restrain him from lynching me, and I think that’s pretty important also” famously quoted by Martin Luther King Jr, serves prominent purpose to impede the violent, oppressive and prejudiced acts of the law enforcements at this paramount time.

The history of police reforms in India conciliated with the modern-day notion of police professionalization. In the history of time, there have been perpetually successive waves of reforms, objectives and various programs but nothing proved to be quite competent to curb the violence subjected on the common citizens. The recent mayhem of police-inflicted violence amidst the COVID lockdown has left us pondering upon the need for India to embrace a shrewder approach to the
criminal justice and new innovations in policing that creates a safer environment, enhance police-citizen relations, police accountability and lessens the notion of racial profiling.

The passage below offers suggestions and ideas to fabricate to reform policing and the criminal justice system in India, this is more a less of a certainly, and aids in the way to the ongoing conversation concerning crime and justice in India.

1. Upgrade basic training system
A training module must be incorporated with regard to how the police personnel should adapt to adverse situations and in a highly charged atmosphere. The Supreme Court explicitly stated, in case of Anita Thakur and Ors. vs. Govt. of J&K & Ors. 1035 that the use of excessive force by the law enforcement officials is in clear-cut violation of human rights and dignity, nonetheless has accentuated the insignificance in the past few years in this country. The aspects of the use of excessive force module must include:

- Conditioning polices officers to cultural sensitivity and diversity programs
- Enhance decision making skills, high perception and threat level assessment under high charged conditions
- To refrain the use of excessive force, it must be accomplished with class lectures which implicates on the subject of what use of force is, the theory and philosophy backing it, learning suitable techniques and the range of use of force. Inculcate a weapon training program to master the forms of force, as in verbal, lethal devices, non-lethal devices and hand to hand mechanisms. De-escalation training to develop negotiation skills, understanding and evaluating the circumstance and lastly the real world exercises that officers might encounter in real world situations, which has widely shown potential benefits. 1036

- Anger Management programs must be made obligatory to all police departments and in addition to conflict resolution and verbal control training
- Patrol de-escalation to grasp the knowledge of fear stimulation by means of confrontation as well as defusing and tactical methods.

2. Enact and Repeal Law
The Indian parliament should enact stringent laws to prohibit violent, disruptive acts in order to maintain & imbibe discipline of the society. Further, statues for instance like the Indian Evidence Act must be amended to make evidences concerning torture, cruel, inhuman degrading treatment against the police officials permissible, ought to ratify the Convention against Torture and repeal section 197 of the Criminal Procedure Code 1037 that foreshadows arbitrary detention, ill-treatment, custodial torture and extrajudicial killing under the shield of “official duty”. The recent case of the 2019 Hyderabad gang rape glorifies acts extrajudicial killing.

3. Demilitarize
In the uprising of the Jamia protest, the highly militarized response by the police resulted in almost 27 deaths, 50 detainees

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1035 Anita Thakur and Ors. Vs. Govt of J&K & Ors [2016] 0915 SCC [2016]
and injuring up to 80 non-violent protestors. From firing of 450 tear shells to brutal lathi charges over the span of 5 days, doesn’t merely exude the nature of protect and serve the citizens. The surplus amount of weaponry and equipment such as non-lethal explosives, tear gas, armored vehicles that has been made largely accessible to the local police departments must be minimized.

4. Establishing a civilian review board
The fundamental of maintaining accountability and transparency runs parallel to setting up a community oversight board. A citizen review board restores the police-citizen relation, public faith and reassures trust in the law enforcement as a result of a time immemorial misconduct subjected on common citizens. This also seemingly creates a more transparent process by paving way for the citizens to claim their own evidence when concerning a case of police brutality.

5. Defunding the Law enforcement
The killing of George Floyd on May 25th, 2020 which sparked violent protest all across United States with an alternative, diverting away from policing and innovative reforms. Defunding of the police reforms and shifting the focus to other programs would systematically curb down brutality and address the structural racism. The money should be invested in employment, housing and healthcare primarily drawing attention to the problems of underprivileged community and largely in the interest of public safety. Community based anti-violence programs, providing more counselors, after school community based programs on the whole uplifting the schooling and education system, trauma services, and restorative justice programs, collaborative job sectors for young adults instead of criminalizing homelessness and gang units. This helps us in preventing rehabilitation by simultaneously decrease the number of victims falling prey to police violence.

6. Inculcate racial bias training
In a country like India which compasses the largest democracy with compelling secularist principles, often succumb to the atrocities of racial discrimination. The recent palpable attacks on the religious minorities glorifies the bias nature of the police officials, which largely affects the marginalized, vulnerable communities of the society. Disturbing account of Adivasi women (indigenous tribe) being brutally assaulted, while carrying back home bare essentials, a group of teenage Dalit boys tracked down by 40 policemen and beaten up for infringing the lockdown regulation and Muslim vendors being harassed a daily basis, portrays the glaring reality of stereotypes, unconscious prejudices, biases in India.

A promising legislation and grass root level of training should transpire in the local and state department to mitigate the ongoing implicit racial bias. Identifying the key decision-making power and scenarios anticipating ability would also aid in

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1038Editorial, ‘Citizenship Act: Delhi police storm Jamia campus, fire tear gas inside, students injured’ Stroll.in, (India 15 December 2019) 8
combating the discrimination. Furthermore, it would help in raising awareness and bringing about a rational means to contest frisking, consent searches, traffic stops, etc.

7. Improve the working conditions and police structures

Amplifying and improving infrastructure, housing facilities and capacity, increasing the number of police personnel as the lack of trained officials would entail the likelihood of violent behavior. Mending the working hours, recruitment policy of the law enforcement, lessening the political interface would have an adverse effect on appointment, promotion and enhance the ability to discipline without being patronized.

One must also strengthen the Central Bureau of Investigation, separate investigation of law and order, bolstering state machinery, police Commissionerate in urban regions, constabulary in rural area would somber the travesty of justice system, over aggressive practices and strive towards a fair, more inclusive, safer environment.

H. CONCLUSION

While there are several law-abiding authorities in India, there are likewise powerful, politically-associated careerist police officers who enjoy willful misconduct during their course of duty. These failing officials and their chiefs in the IPS antagonistically impact the validity of the criminal justice system and external factors like Bollywood widely contribute debilitating complexity. Police personnel and chief can actually obliterate the lives of innocent people who are wrongfully framed and even convicted of crimes they don't have anything to do with. From officials who don't testify honestly, to officers who destroy evidence, there have been many cases where police misconduct has brought about improper convictions and under the preface of Bollywood police violence is glorified and maneuver into acceptance by the society at large. Movies like Singham, Rowdy Rathore, Dabang, Satyamev Jayate, Sacred games romanticize the notion of subtle torture. For instance, in Salman Khan’s movie Wanted (2009), Chulbul Pandey in the Dabangg trilogy, Ajay Devgn in the Singham series, or even Akshay Kumar in Rowdy Rathore (2012) which depicts Extra Judicial Killing and these all these characters have cemented this distorted depiction of violent cops in Hindi cinema.

For an average Bollywood viewer, the perspective evidently created is the police officer avenging down the villains and not just responsible for maintaining law and order.

Mainstream cop films in Bollywood seldom have women playing the heroic police officer. Mardaani, starring Rani Mukerji, but in the movie Mardaani the characterization is similar, likely machismo-fuelled, hyper-aggressive passion for her job. She beats up criminals, takes the law in her own hands, and delivers justice regardless of the cost it comes at. In the climax of Mardaani 2 (2019), Mukerji’s character can be seen beating the criminal black and blue; she whips him repeatedly in public.

Being only an entertaining field, it doesn't imply completely that it is only because of such films, police brutality exists.

However, they must be held responsible for legitimizing it by praising violence of that sort also accountable for glorifying a system where men in uniform means they have the autonomy over our lives, innocent or otherwise.

We’ve been so accustomed to police violence that we naturally internalize it. We see someone being beaten up by cops and our first instinct is to blame the victims. We saw videos of cops rushing inside Jamia and beat up students in their library and our first instinct were that the students must have done something wrong. According to The Hindu, at least 5 people died in police custody every day in 2019.

Recent incident of Hyderabad ‘encounter’ has indicated that we, as a society, have a really distorted sense of justice, are dismissive of the rule of law and feel satisfaction when our desire for blood is fulfilled, regardless of just on screen. Bollywood clearly figured this out early on. Additionally, the bridge between a real-life police officer and one on the big screen is massive nevertheless realistic approach has been incorporated in movies like Article 15 Ayushmann’s character is still showcased as heroic but he doesn’t endorse violence in the same flippant manner. On the other hand, films like Seher (2005) starring Arshad Warsi, have tried to exhibit the not-so-glamorous side of being a police officer but the box office hasn’t been all that kind. The fact that such police doesn't exist in India, as authenticated by the different commissions and boards of trustees, the reports of violations got by the human rights commissions, the cases narrated by the press and the encounters by people, is hard to believe. The requirement for police change is self-evident and plainly urgent. For that we should do everything conceivable to reinforce and improve policing under the current framework and structure. In addition to it, upgraded administration, preparing and other measures, the working and day to day environments of lower police staff need huge improvement—an exercise that should begin with raising the status of the constabulary.

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CUSTODIAL TORTURE; GROSS HUMAN RIGHT VIOLATION

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Abstract
Custodial torture is the reality that world is facing today. As custodial torture has been a widespread phenomenon all around the world and it is evil of evilest form of crime done by the protector of the law i.e. public officials who are vested with the power control crime commission, to protect the people in the society and maintain law and order in the society. For eradication of custodial torture, custodial death and other violence in the police custody United Nations General Assembly passed a resolution on 10th December 1948 and made Universal Declaration on Human Right, 1948. This is the international document which protects the person from custodial torture, inhuman and degrading treatment and from illegal arrest and detention. Torture to person in custody by the police to facilitate investigation is gross human right violation and shook the conscience of the people. In this article I will discuss Universal Human Right Law, its monitoring body in India along with the violation of human rights by the police in police custody and in judicial custody.

Keywords: - Custody, torture, human right, police and crime

1.1 Introduction
Human rights are also called fundamental rights, basic rights or natural rights. Human rights cannot be curtailed by any legislation or by any government as they are inherit by person from their birth irrespective of caste, colour, sex or place of birth. Human rights do not compose a mere list of certain basic rights, which every individual can enjoy. The concept is growing day by day and it not only comprises traditional civil and political rights but also economic, social and cultural rights. Human rights are the basic or natural rights, which are inalienable and important for the sufficient development of human personality and for happiness and progress of human society. Human right has its origin from “Magnacata”. The highest risk of torture to the accused person is in their first 24 hours following the detention and there is no safeguard which guarantee that the accused person taken into custody will have access to lower and impartial medical examination following the arrest there is a lack of effective independent system and independent monitoring system which facilitates torture and torture is gross human right violation. The common type of incident involving human right abuses under police custody are death police custody, custodial rape, third degree methodology of investigation and Police remand.

1.2 Universal Declaration on Human Right, 1948
Custodial torture, custodial death, violence and abuse of police power are not limited to India but are widespread. It has also been the concern of international community because the problem is universal and the challenge is global. Dayal Keshav (2010) has published the Universal Declaration of Human Right (UDHR) was adopted by United Nation General Assembly (resolution 217 A) on 10th December 1948.
December, 1948\(^{1045}\) as a common standard to be followed internationally for all people around the globe. The declaration of human right has attained a special authority and it became a part of international law. United Nation drives its authority to make human right law specifically from United Nation Charter, 1945. UN Charter, 1945 on its very Article 1 talks about the purpose mentioning “To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights”.\(^{1044}\) This became the sole purpose for making a law on human right which is universally accepted by the entire nation in the world.

Article 5 of UDHR provides that the person arrested should not be subject to any kind of torture or inhuman treatment and also person who is serving jail should not get any degrading treatment and punishment. Article 9 of UDHR emphasizes that the arrested person shall be informed about the reason of arrest and also about the charges put on him. Both these articles clearly protect the rights of accused person in custody from the perpetrator of crime i.e. police or jail authority. In India Constitution of India, 1950 gives a significant right to their citizen in form of fundamental right under chapter III. It includes most of the provisions of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and various other international instruments. India has ratified international instruments on human rights.\(^{1047}\)

1.3 The International Covenant on Civil and Political Rights, 1966 (ICCPR)

International covenant on civil and political rights was adopted by General Assembly resolution on 16th December 1966. This was made for considering the obligation of the State under the Charter of United nation to promote universal respect and observance of human rights and freedom.\(^{1048}\) Article 6 of International Covenant on Civil and Political Rights talk about right to life and there is no arbitrary deprive of any human being's life.

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Article 7 of International Covenant on Civil and Political Rights emphasizes that person in custody shall not be subject to any kind of torture inhumane or degrading treatment for punishment. It also says that any medical or scientific test shall not be done without the free consent of the accused person.\(^{1049}\) Article 9 International Covenant on Civil and Political Rights talks about there is no arbitrary arrest or detention and no one shall be deprived of his liberty except on the ground or in accordance with any procedure which are established by law.

The Supreme Court observes in *Nilabati Behra v. State of Orissa*\(^{1050}\) that prisoners or detenues are not denuded of their fundamental right under Article 21 Constitution of India. The Court awarded a sum of Rs. 1.5 Lakhs to the mother as her son had died in police custody. The Court

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\(^{1045}\) United Nation Charter 1945, Article 1

\(^{1046}\) Saini RS : ‘ Custodial Torture in Law and Practice with reference to India” Journal of Indian Law Institute

\(^{1047}\) AIR 1993 SC 1960

\(^{1048}\) Preamble

\(^{1049}\) International Covenant on Civil and Political Rights 1966

\(^{1050}\) Vol.36 No. 2) (April-June 1994) p 192
Judgement refers “Article 9(5) of International Covenant on Civil and Political Rights which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right.”

1.4 Torture in Police Custody
The highest risk of torture to the accused person is in their first 24 hours following the detention. There is no safeguard which guarantees that the accused person taken in custody will have access to the lawyer and impartial medical examination following the arrest. There is a lack of effective system and independent monitoring system of all the places of detention which facilitates torture.

The common type of incidents involving the human right abuse under police custody are death in police custody, custodial rape, third degree methodology of investigation and police remand.

1.4.1 Death in police custody:
The torture which results in the death of convicts, under trial, prisoners in the custody of police it assumes to be alarming and a matter of great concern in the modern society. Custodial death strikes or creates a question on efficient administration of criminal justice system and also show how the rule of law is violated. Custodial deaths are done by those people who are entrusted with the forcing of law in the society thereby shaking the credit or faith of citizens from justice delivery system.

The Supreme Court in Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble said that “The diabolic recurrence of police torture resulting in a terrible scare in the minds of common citizens that their lives and liberty are under a new and unwarranted peril because guardian of law destroy the human rights by custodial violence and torture and invariably resulting death.”

Human Right Watch has published a report in 2016 that takes a deep study into the incidents of deaths in Indian police custody. Human Right watch does in-depth study and investigation into 17 custodial deaths that occurred between 2009 and 2015, research by Indian organisation and more than 70 Human Right Watch interviews with the victim’s family members, witnesses, justice experts and police officials. In each of the 17 cases, the police didn’t follow appropriate arrest procedure including documentation of arrest, notifying family members, conducting medical examination, producing the suspect before a magistrate within 24 hours, which make the suspect more vulnerable to the abuse and may have contributed to a believer by the police that any exploitation could be covered up in most of the cases investigating agency mainly police officials failed to furnish appropriate action that could have been helped to ensure culpability for the death.

To curb the level of human right violation during police custody it has been seen that where police action causes death, the police officer is liable and held responsible for the death. The police who commit custodial violence shall be adequately punished and punishment should be awarded in a wide

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1051 Nilabati Behra v. State of Bihar , AIR 1993 SC 1960
1053 (2003) 7 SCC 749
1054 Supra note 1
1055 “Bound by Brotherhood” India’s Failure to End Killing in Police Custody , Human Right Watch , 19 December 2016
publicity so that other police officer would learnt a lesson and would not repeat the evil of torture or custodial death while the accused is in his custody. Section 176 of Code of Criminal Procedure, 1973 talks about the enquiry by the magistrate about the cause of death when any person dies or disappears who is in the custody of police or in any other custody authorised by the magistrate or the court. In 2005, clause 5 was added in section 176 by the way of amendment which provides that the judicial magistrate or metropolitan magistrate or executive magistrate or police officer shall hold an enquiry or investigation within 24 hours of the death of the person in custody and for what the body with a view to its being exam in to the nearest civil surgeon. Even after the amendment did death in custody has not been proved that it was not normal or natural death but it was death caused by the police. The reason for inefficiency of section 176 of Code of Criminal Procedure, 1973 is that the enquiry of death under this section is not preceded by independent investigation agency. Therefore all custodial deaths and other violation of human right should be investigation and dealt with human right commission.

1.4.2 Custodial Rape:
The status of a woman in custody draws its attention by Central Government Ministry to set up a National Expert Committee in 1986 to go into the problems of custodialized women. When committee visited all the facilities and see the situation of women in custody, they came across complaint of harsh treatment by the police including physical torture, rough handling, sexual indignity or abuse treatment. Total disregard by the police of procedure applicable to the search, custody, transfer and the right of the arrestee create immense suffering for the women.

When the inmate of custody is woman, vulnerable section of society, they face additional and horrifying mode of torture like pressing cigarette on the dedicate parts, inserting iron rods or stick along with chili powder in their private part, torturing their children in front of mother. In fact they are subject to molestation and rape not only by the police officer but also by the male inmates of the jail. The police men did not spare even minor girls from torture as are evident by the Mathura Rape case. In this case a young girl by the name of Mathura was raped by two policemen inside the police station but she neither raise any alarm nor does she resisted the act. The Session Court acquitted the accused on the ground that there was decent consent. The Bombay High Court reversed the judgement and said that there is distinguish between consent and passive submission. The Supreme Court however reversed the judgement of High Court and observed that the prosecutix was not subjected to any fear of death or hurt which may lead her to submit her body. The Supreme Court therefore acquitted the accused. After the verdict of Mathura Rape Case, there was widespread protest and demonstration for the review of the verdict. Afterwards an amendment was brought about in Section

1056 Code of Criminal Procedure 1973, Section 176 (5)
1059 Tuka Ram and Anr v. State of Maharashtra, (1979) 1 SCR 810
1060 Ibid
376 of the Indian Penal Code, 1860. Section 376(2) (a) of Indian Penal Code, 1860 penalises police officer who committed rape on women while in officer’s custody. The punishment provided for the same is rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to life imprisonment and shall also be liable to fine.

Custodial rape is another form of torture which is the worst form of crime and aggravated form of torture. It is inhuman and shakes the dignity of a woman. Man who keeps the woman in custody is generally in very strong and powerful position. They misuse their position to sexually exploit women and it is a very serious offence. Custodial rape is committed by police officer or a public servant or an officer who is in the management of a jail remand home or a hospital on a woman in his custody. It is a crime committed by the custodian of the law who are vested with the duty to protect the dignity, integrity and modesty of women. Rape is crime against basic human right. The Supreme Court observed that "rape" amounts to violation of the fundamental right guarantee to a woman under Article 21 of Constitution of India, 1950.

The Code of Criminal Procedure also lays down that the women must be interrogated at her residence. In spite of all these trending strict provisions in the criminal law the custodial torture of a woman goes and debated and they are abused, molested and raped in the police stations, jail and military interrogation centres.

Article 15(3) Constitution of India, 1950 allows the Union and State governments to make special provisions in order to defend and shield the interest of women. The Constitution of India was amended in 1976 to make it a fundamental duty of every citizen to pronounce the practice derogatory to women under article 51A (e). In criminal law there are provisions which grant special protection to women from custodial torture. Section 51 clause 2 and section 100 of Criminal Procedure Code, 1973 says that if a woman is to be search by the police officer in connection with the crime “the search shall be made by another woman with strict regard to decency”.

The Code of Criminal Procedure also lays down that the women must be interrogated at her residence. In spite of all these trending strict provisions in the criminal law the custodial torture of a woman goes and debated and they are abused, molested and raped in the police stations, jail and military interrogation centres.

R. D Upadhyay v. State of AP is the most important case for women and women with children in prison. The judgment contained specific guidelines, based on various committee recommendations, about how children should be cared for in prisons. The position of women prisoner is more pathetic than their male counterparts. One of the major reasons from the state of affairs is lack of adequate and separate prisons for women. There are, however, only 12 states that have prisons exclusively for women. There is a need for distinct prisons for women. Similarly, under-trials ought to be kept separated from convicts; youths from solidified lawbreakers; first-time guilty offender from ongoing wrongdoers. For women, there should also be an effort to separate prostitutes and procuresses from others.

1061 Persons mentioned under Section 376 of Indian Penal Code, 1860
1062 Chairman Railway Board v. Chandrima Das, AIR 2000 SC 998
1063 The Code of Criminal Procedure 1973, Section 160 (1) proviso

1064 AIR 2006 SC 1946
1.4.3 Third Degree Methodology of Investigation:
The encyclopedia of Social Sciences defines "third degree" as: "The use of brutal methods as an aid to criminal investigation" and adds that, "the third degree is usually charged in the United States, though similar complaints against the police are by no means rare in other countries".

In Ramnath v. Saligram Sharma, the Supreme Court observed “the crisis of "third degree" comforting civilised society is really a threat to rule of law and is indeed tantamount to putting in peril the very democratic way of life, the effect of third degree as it directly affects his fundamental rights of freedom and is also gross violation of Article 21 Constitution of India.”

When police officer assaults any witness or an accused to obtain a statement from him is not his duty. It is not a police duty to put any person under lawful restraint in order to extract or extort confession from him. The obvious outcome of third degree method has been the public distress and as its consequences disgrace toward the police.

Amnesty International Report tried to find out the rationale behind the custodial torture by the police. First tacit approval of the society for the use of force against a suspect to detect the crime
Second, psychological factor’s including fear psychosis in the minds of suspects and to exaggerated stories of police brutality. There is lack of adequate time and pressure to produce quick result which preclude the use of time consuming and painstaking modern methods of crime detection and finally. Legal impediments which deny police adequate time to interrogation the suspect.

There are some basic loopholes in the police administration boosting cops to adopt the third degree method for investigation. Supreme Court and National Human Rights Commission should join hands to wipe out the tears of torture victims. Union Home Minister Amit Saha on 50th Foundation day of the Bureau of Police Research and Development in September 2019 said that the age of third-degree torture was over and the police should stay a step ahead of crime and criminal minded through better investigation and forensic evidence.

1.4.4 Police Remand:
One of the most unconscionable act and coward act of a police is that the person in police custody is being torture by various methods whether mentally or physically. The act of the police is a wound on our constitutional Culture. Article 21 Constitution of India talks about right to life and personal liberty, right to life include living in humane condition, life and limb to be protected even if in police custody. The rough treatment by police for extracting confession or getting information is against the humanity and violation of basic human right.

The investigating police feel that if they manage to get a confession from the accused they can handle the case very easily and in less time but the torturous method of adopted by them in the method of investigation as it fails in sanity. As provided under section 24 of Indian

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1067 1967 SC Cr.LJ 1463
1069 Singh , Vijaita : ' Age of third-degree Torture is Over Amit Shah tells Police’ The Hindu , 28 September 2019
Evidence Act, 1872 that when the confession of witness is admissible, it is admissible only when the confession is made voluntarily. If it is made under any threat, inducement or promise then it is inadmissible in criminal proceeding. Section 25 of Indian Evidence Act, 1872 talks about that no confession made to the police officer shall be proved against accused person of any offence. Similarly, section 26 provides that confession by the accused person while in the custody of police not to be proved against him it can be proved against him only when it is made in the immediate presence of a magistrate. Under section 167 Code of Criminal Procedure, 1973 when a person arrested and detained in custody for 24 hours and is forwarded before a magistrate and there are grounds for believing that the accusation or information against the accused is well-founded and the magistrate whether he has jurisdiction or not to try the case authorises the detention of the accused in such custody as it thinks fit. The Magistrate can remand accused to police custody for a maximum period of 15 days.

The purpose of police remand is only to keep the accused under pressure and create a fear psychosis by detaining him in the atmosphere of Police Station, by physical or mental torture in keeping him in long and continuous interrogation, rejecting sleep and other necessity for long hours, doling out threats or inducement (banned under section 163 of Code of Criminal Procedure) all factors resulting in accused desperate in expression “I Admit” and ready to sign any statement drafted or dictated by police. The magistrate has to record reasons for granting police custody as he has to keep in mind that the police custody is not been taken for malicious purpose. The magistrate should also so observe the distinction between the remand to the police first day as an ordinary remand to the judicial custody under section 344 Code of Criminal Procedure, 1973. The magistrate has to be vigilant enough while giving Police remand. The magistrate has to discourage the tendency of a Police officer to take remand for the purpose of extorting confession. Where the object of remand is to prevent the person from committing further offences then he should be remanded to judicial custody.

1.5 Torture in Judicial Custody
Exploitation has been an old phenomenon as from the ancient times the rich exploits the poor, man exploits women, old exploits the young and the powerful bison exploit less powerful person. There is another society behind the prison wall where prisoners are being denied of their human rights. In the premises of what happened is known as jail administrator. From the fear of facing torture by the jail authorities the principal of silence became the rule of law in the jail for the prisoners and they become prey of torture, inhuman treatment and worst living condition. Prison is a State subject under Entry 4 of List-II of the Seventh Schedule in the Constitution of India. The management and administration of Prisons falls completely in the domain of the State Governments, and is governed by the Prisons Act, 1894 and the Prison Manuals of the respective State Governments.

Torture has been used as a sword by the jail authorities in the Indian penal institutions. Delhi’s Tihar jail came into limelight by media in 2018, where a 21 year old under

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1070 Supra Note XXIII

1071 Constitution Of India 1950 , Schedule VII , List II , Entry 4
trial prisoners was founded in Tihar Jail under mysterious circumstances on 16 June 2018. Where police said that they was informed about incident around 1 p.m. and the deceased was an accused in a minor rape case in outer Delhi’s Ranhola area and was in jail since 2015. Official from the jail say that the deceased has allegedly hitting his head against a wall and killed himself. They said that it was a suicide but the victim’s lawyer claimed that jail employee killed him and he was being torture by the jail authorities on different occasions. Delhi High Court on 11th July 2018 criticized the Tihar Jail official over the “extreme harsh” condition under jail.

Prison conditions are very poor across the India. A significant issue that is being looked in the vast majority of the Indian jails is overcrowding of the jails which prompts deficient framework offices and absence of basic support of the jail prisoners. According to a statistics of year 2000 by National Crime Record Bureau total available capacity of prison inmate in different jail in India are 2, 11,782 while there are 2, 28,970 prison inmates in jails. That means more prisoner than capacity and it leads to inhuman living condition violating basic human right of the prisoners. The highest overcrowding of the prisoner is in Delhi with 192.13% followed by Haryana 179.72%. In March, 2004, National Human Right Commission report indicated that the country’s prisons are overcrowded on average by 38.5 percent. The country’s prisons have a population of 324852 persons while the authorized capacity is 234462. As per the statistics published by the National Crime Record Bureau, as on 31.12.2008, there were 384753 prisoners in various prisons of the country against its total authorized capacity of 297777 prisoners. Out of this, the number of undertrial prisoners was 257928 which constitute 67% of the total prison population. The prison is India is overcrowded to the extent of 129%. Jail conditions do not follow international standards and most basic facilities such as adequate food, drinking water, sanitation, and health services, in its 2007-2008 Annual Report, the Ministry of Home Affairs accepted that the deterioration of the condition of prisons, prisoners, and prison staff because of inadequate allocation for the maintenance and upkeep of prison from the States.

The main reason for overcrowding is that over 60% of inmates are under trial and the large number of undertrial are the outcome of arrest and remand under Indian law, delay in investigation and trial process and an equal administration of right of bail under criminal justice administration. The reality of overcrowding as it create a problematic issue for other prisoners such as great risk of diseases, denial of conservancy facilities, difficulties in surveillance, not proper living condition and consequent danger.

Union parliament following the decision of Supreme Court in in Ramamurthy v. State

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1072 ‘Undertrial found Dead Inside Tihar Jail Complex’ The Asian Ages, 17 th June 2018
1076 To Decongest Tihar Jail, High Court says release 600 inmates immediately, The Indian Express, 19 th June 2007
of Karnataka\textsuperscript{1077} to bring about uniformity of present law and prepare a draught model prison manual a committee was set up by union in the bureau of police research and development. In 1999 a draft Model Prison Management Bill (The Prison Administration and Treatment of Prisoners Bill, 1998) was circulated to replace the Prison Act of 1894 by Government of India to the states but the Bill is still not finalized. In the meantime a Model Prison Manual was prepared in 2003 relating to the prison reform in India was evolved by National consensus and circulated to all the states for guidance. With the passage of time the ground realities have been understood and felt to revise and update the manual according to the need of time. In 2014, an expert committee was made Model Prison Manual prepared in 2003. Now Model Prison Manual\textsuperscript{2016} was finalized with the approval of Home Ministry and circulated to all the States and Union Territories for their guidance. This manual aims at bringing uniformity in the law and rules and regulations governing prison administration and management of prisoner all over the country.\textsuperscript{1078}

The Supreme Court, in the matter of Suo Moto titled \textit{Re: Inhuman Condition Prevailing in 1382 prisons in India}\textsuperscript{1079} asked the Centre and all States to implement its directions on prison reforms including filling up of vacancies of jail staff across the country and devise a scheme to audit their accounts. The Supreme Court on 25th September 2018 framed a Committee on Prison Reforms led by previous apex court judge, Justice Amitava Roy, to inspect the different issues tormenting jail in the nation, from congestion to absence of legitimate counsel to convicts to issue of reduction and parole.\textsuperscript{1080}

A review of the Indian Judiciary's decisions regarding the protection of Human Rights of prisoners shows the fact that judiciary has been playing a role of protector in those situations where the executive and legislature have failed in addressing the problems of the person who has been subject to torture in custody.\textsuperscript{1081}

\subsection*{1.6 Monitoring the Prevention of Torture and Ensure Human Rights at National Level}

\subsubsection*{1.6.1 National Human Right Commission}

It came into effect by the virtue of Protection of Human Rights Act, 1993 on 12th October, 1993. The preamble of Protection of Human Rights Act, 1993 provides for the composition of National Human Right Commission, State Human Right Commission in states and Human Right Courts for the better protection of human rights and for related matters. Other state has also set up in their respective state commission which protects the human rights and also deals with the validation cases as well.

National Human Right Commission is an independent body which has vested with

\begin{itemize}
\item \textsuperscript{1077} (1997) SCC (Cri) 386
\item \textsuperscript{1078} Rao , Shri G Ranga and Kumar , Shri Vinod : ‘Prison Reforms in India’ Member Reference Service Lok Sabha
Secretariat , July 2017
\item \textsuperscript{1079} Writ Petition (Civil) No. 406/2013
\item \textsuperscript{1080} Rajagopal , Krishnadas : ‘ Supreme Court constitute Committee to look into jail reforms’ , The Hindu , 25
\end{itemize}
the powers to deal with the cases of human right and the decision has a binding effect. National human right commission has similar powers as that of any civil court. It deals with the many cases related to human right issues like Suo motu take cognizance of any case which is related to the human right violation, it can investigate on a complaint of human right violation case, protection of Human rights, protection of any citizen from any discrimination being done by any authority, hear and investigate the complaint of human right violation case etc.

There are many functions of human right commission like to make enquiry in the complaints of human right, take action for them it can visit any institutions like jail, reformatory and protection care for the juvenile of the Central or State Government. It can give recommendation to the state or Central government for the better working of institution. It's not only works for the human right but also work for the campaign of human right through the publication that is applicable or accessible to the people and also do seminar which create awareness among the people about the human right. It also gives space to the NGOs who work for the protection of and promotion of human right.

National Human Right Commission has all the powers of civil court like summoning and enforcing the attendance of witnesses and examining the accused on oath, finding and then produce any document, receiving evidence on affidavits, demanding any public record or copy thereof from any Court or office, allotting commissions for the examination of witnesses of documents, having jurisdiction to try the same, who shall proceed to hear the case against the accused.

1.6.2 Human Right Court:
Protection of Human Rights Act, 1993 has distinct feature as it talks about establishment of human rights court. Section 30 emphasized on establishment of human rights court that will hustle up cases of the human rights and solve it rapidly to ensure the end of justice. These courts are to be established in every state. When there is no human right court, the Court of Session will be trying the cases of human rights violation.

1.6.3 Recent National Human Right Commission’s Recommendation on Custodial Justice
The National Human Rights Commission (NHRC) in collaboration with Penal Reform and Justice Administration (PRAJA) organized a two-day Seminar on Custodial Justice in March 2006. The main motive of the seminar was to emphasize on the fact that custodial torture is preventable and it is responsibility of the State to protect the right of accused person in custody.

The main recommendation of NHRC on custodial torture is related to police set up and the other related to prisons.

Police set up:-
During investigation the violation in police custody resulting in deaths and physical torture. NHRC emphasize on scientific, professional, humane approach towards person detained for investigation. And also recommend that the investigation needs to be carried out expeditiously and in given time frame. Complete use of scientific

1082 The Protection of Human Right Act 1993, Section 12
1083 Ibid
1084 The Protection of Human Right Act 1993, Section 13
1085 Also available at https://nhrc.nic.in/press-release/nhrcc-recommendations-custodial-justice
techniques and forensic science should be made to obviate resorting to physical torture during interrogation.

ii) Zero tolerance for any human right violation in custody. In case of any guilt or misconduct it is ensure that penalties should be impose on the police personal for his/her act.

iii) There has to be a bifurcation in the police personal into two wings one is investigating and the other is law and order duties. And accordingly the investigation wing should be trained in specialized skills for effective and efficient investigation.

iv) To eradicate torture practice in custody, regular training should be used to change the attitude and mindset of the police personal.

**Prison set up**

i) NHRC observe that the number of trials are increasing day by day and the period for which they are in jail is also very long and in some cases it is found that the accused undertrial are in judicial custody for 24 to 25 hours which is beyond the punishment prescribed for any offences under the penal law.

ii) NHRC requirements for an urgent review of under trial prisoners for not only setting free the prisoners who have undergone their term of imprisonment but for also taking the additional steps like holding regular special court in the prison for early disposal of case.

iii) For the convicted person formation or rehabilitation should be worked out with the development department to expose them with any skills so that they have a better employment opportunity once they are outside custody.  

As torture, inhuman and degrading treatment to the accused person while in custody by the police official is the worst from of human right violation. National Human Right Commission a ray of hope in the darkness for the victim of custodial crimes. They are supposed to investigate the custodial torture, custodial death or custodial violence, custodial rapes etc. cases impartially and fairly to cope up and protect the gross violation of human right.

Another the grey area of law is to give compensation to the family of victims but this would not met the purpose it should be stopped at the initial level otherwise the violation of human right would continue till eternity. It has been said that “Custodial torture is a naked violation of human dignity and degradation which destroys, to a very large extent, the individual personality it is a calculated assault on human dignity and whenever human dignity is wounded, civilization takes a step backward flag of humanity must on each such occasion fly half-mast”.  

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1086 Ibid

1087 D K Basu v. State of West Bengal, AIR 1997 SC 610
CORPORATE GOVERNANCE: COMPARATIVE ANALYSIS BETWEEN INDIA AND USA

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ABSTRACT
The “corporate governance concept” dwells in India from the Arthshastra time instead of CEO at that time there were kings and subjects. Today, corporate managers and shareholders replace them but the principles still remain the same, unchanged i.e. good governance. While in the India the discussion on corporate governance can be dated back to the birth of East India Company, realization of its importance came in the second half of 1996 where economic liberalization and deregulation of companies started. Since the government no longer had full control over the companies, the need for corporate governance hence the accountability and good management increased. It was in 20th century that India finally became a full-fledged part of the global market due to liberalization, globalization and privatization. On the other hand, the term became much more prevalent in United States from 1970’s onwards. “Corporate Governance” first appeared in the Federal Register in 1976, when the Securities and Exchange Commission brought up the topic. This was after world war 2 when companies were flourishing in the United States. After the financial crisis of 2007, the concept and application of corporate governance received stringency. The collapse of Lehman Brothers bank led to the realization and importance of greater accountability from the company’s board and shareholders. This paper aims to look at the United States of America and India, their approaches regarding corporate governance and how the difference in their legal, culture and regulatory environment has an impact on their company’s management structure.

CORPORATE GOVERNANCE: COMPARATIVE ANALYSIS BETWEEN INDIA AND USA

Research Question: Does the legal and regulatory environment of a country has an impact on its corporate governance model?

Introduction
In common parlance, “Corporate Governance” means a set of system, principles and processes along with the relationship the company’s board has with its shareholders, creditors and other stakeholders. An academician would define it as ‘the control of management in the best interests of the company, including accountability to shareholders who elect directors and auditors and vote on say on pay. How a company is governed influences rights and relationships among organizational stakeholders, and ultimately how an organization is managed, and whether it succeeds or fails. Companies do not fail: boards do.’ (Dr. Richard Leblanc, Harvard University Summer 2015)1088.

Legally it can be defined as something concerned with holding the balance between economic and social goals and between individual and communal goals. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as

nearly as possible the interests of individuals, corporations and society. Good corporate governance helps to build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies. Based on corporate developments in the last few decades, certain theories of corporate governance emerged such as agency, stakeholder, resource dependency, stewardship, Transaction cost and political, through which the trajectory of corporate governance and the challenges faced can be understood.

AGENCY THEORY

Agency theory, expanded by Jensen and Meckling, fundamentally defines the relationship between managers and shareholders. In this, the principals of the company i.e. shareholders hire agents i.e. managers to work. According to this theory, shareholders expect the agents to act and make decisions in the principal’s interest. On the contrary, the agents may have interests which do not align with those of the principals and hence not necessarily make decisions in the best interests of the principals. The underlying assumption of this theory is that agents may be guided by self-interest rather and may take advantage of the power given to them by the principals, in order to further their own well-being. Further, a manager cannot always act in the interest of the shareholders, situations may come up when their interest differs from those of the shareholder’s, this happens due to separation of ownership and control, where the ownership lies with the principals i.e. the shareholders. This conflict is an agency problem. Then the best solution would be in form of controls for the managers’ actions—hence it is likely that agency conflicts and governance mechanisms are complementary. So, importance of agency theory comes from the fact it helps provide clear guidelines in the way that managers should act while making strategic decisions. This also helps limit them to use their power to the disadvantage of the principals.

STEWARDSHIP THEORY

The stewardship theory, also known as the trusteeship theory, was introduced by Donaldson and Davis as an alternative visualisation to the Agency Theory. This theory recognizes that there is some form of agency present in a corporate environment but it deems that the managers/agents act as stewards for the best interest of the company and their actions will be driven towards the end goal of the organization as a whole. This is in opposition of the assumption on which the agency theory is based (where agents are not trustworthy). This theory relies on the trust between the principal and the steward and assumes that both their interests are aligned. So, stewards are motivated by intrinsic rewards like trust, enhancement of reputation, discretion and autonomy, level of responsibility, stability, governance, Middle Eastern finance and economics, vol. 9, no. 4 <Accessed 1 March 2020> Aiyesh Dey. “Corporate Governance and Agency Conflicts.” Journal of Accounting Research, vol. 46, no. 5, 2008, pp. 1143–1181. JSTOR, www.jstor.org/stable/40058121. <Accessed 3 March 2020>
and mission alignment.\textsuperscript{1093} The goals to be achieved by the owners and managers are collective goals. Hence, the autonomy given to a steward should be extended so that the benefits reaped by the pro-organizational behaviour of the steward are maximized.\textsuperscript{1094} So, auditing and financial reporting would be methods which would work well and similarly, presence of outside directors are likely to hinder their progress.

**TRANSACTION COST THEORY**

Transaction cost theory, put forward by Ronald Coase, is based on the principle that there are various costs that will arise as a result of an agency relationship. It interprets governance frameworks as a result of transactions – internal and external. This means that, focus is put on the economics of transactions, and where there are transactions, there will likely be contracts which will bind the company to its fulfilment. It suggests that directors on an average level, prefer being tied into deals as that will reduce their stress levels as well as save time and expense that may be spent in renegotiation or negotiating new deals. But this may also cause them to lose the flexibility that they might have had in the absence of a long lasting contract. The theory emphasizes on the corporation as an efficient hierarchy that is structured to enable contractual relationships. The transaction cost theory also considers the costs that arise from the conflict of interest between managers and shareholders; this includes the cost of using the agent as well as the money spent on protectionary measures against agent’s opportunistic behavior.

**RESOURCE DEPENDENCY THEORY**

The theory first emerged in 1970 with the publication of ‘The External Control of Organisation: A Resource Dependence Perspective’, by Jeffrey Pfeffer and Gerald R. Salancik. This theory is mostly concerned with how organisational behaviour is affected by external resources the organisation utilises, such as raw materials. The theory is important because an organisation’s ability to gather, alter and exploit raw materials faster than competitors can be fundamental to success.\textsuperscript{1095} The theoretical arguments that serve as RD’s foundation can be summarized as follows: (1) an organization’s external environment comprises other organizations, each with their own interests and objectives; (2) organizations hold power over a focal firm—and may thus constrain its behaviour—if they control resources that are vital to its ongoing operation and cannot be acquired elsewhere.\textsuperscript{1096}

**STAKEHOLDER THEORY**

This theory takes into consideration the effect of corporate action on the stakeholders of the company. Stakeholders can include internal stakeholder (Corporate employees and directors) and external stakeholder (Creditors, auditors and employees). The theory acknowledges the importance of understanding the interests of stakeholders and how these interests can influence the company’s decision-making process.


customers). The main posit of the theory is that the managers should take into consideration the interests of the stakeholders into account before making any decisions. Freeman (1984) contends that the network of relationships with many groups can affect decision making processes as stakeholder theory is concerned with the nature of these relationships in terms of both processes and outcomes for the firm and its stakeholders. Donaldson & Preston (1995) argued that this theory focuses on managerial decision making and interests of all stakeholders have intrinsic value, and no sets of interests is assumed to dominate the others.\(^{1097}\)

**POLITICAL THEORY**

Political theory talks about allocating the organisations’ corporate power, profits and powers are determined via the government’s favour. This theory tends to explain corporate governance through legal and political influence in the company. Politics of organizing financial institutions affects the flow of capital into the large firm and, hence, the power and authority of shareholder-owners. Managers wield considerable political influence, which they use to shape the rules governing corporate finance and capital markets.\(^{1098}\)

**CORPORATE GOVERNANCE SCANDAL IN USA AND INDIA**

Before discussing the ideal corporate governance model as well as model that exists in the two countries, it is pertinent to examine the failure both the companies has faced in the past when lack of proper corporate governance strategies and faced the consequences therein. To do this the classic case of Enron Scandal in USA and Satyam Scandal in India can be referred to.

**ENRON SCANDAL**

Enron was an energy company founded by Kenneth Lay. In the year 2000, it was very attractive to the investors and was thought of as world’s leader in business like Apple and Google but better. It was making money and growing at a rate that no one has seen before. The company generated multi-billion dollar revenues. The Enron employees made it clear that the company will grow further supports the claims with low debts as compared to high equity. However, immediately after one year in 2001, the stock did not go up. The stock that were valued at 80$-90$ went down to 50-60 cents. Thousands of people including the Enron employees who had invested in retirement plans that were tied in the stock and lost all the money. Enron declared itself bankrupt in December 2001 leading to loss of jobs and money.

As it turns out, the numbers that Enron had provided the public were all from cooked books and were fake. They had just projected those earning using the mark to market accounting method, after the contract with blockbuster, which failed drastically. They also hid the debt by transferring it to SPV. The CEO of the company, Jefferey Skilling, used to hire accounts to do poor financial reporting to hide debt. The CFO, Andrew Fastow, used to mislead the board of directors and audit committee of financial issues. They managed the bankers, lawyers and the auditors as well. Arthur Anderson, the top

\(^{1097}\) Haslinda Abdullah, Benedict Valentine, “Fundamental and ethics theory of Corporate Governance”, *Middle Eastern finance and economics*, vol. 9, no. 4 <Accessed 1 March 2020>

most accounting firm, was fired to ignore the issues and were paid heavily to do that. After bankruptcy was filed, the stocks that were held by the employees were also not allowed to sell, but the people involved in the scandal, with the means of insider trading, sold their stocks at top prices and exited the company.

This case had huge impact on the shift of corporate governance model of United States. The ethical behaviour of people is a key ingredient in a perfect model of corporate governance which was clearly violated here. The Enron Case reveal problems of a number of parties involved in the company including dysfunctional corporate culture, greed of executives, incompetent board and unethical auditor. This turned out be a clear violation of the agency and stakeholder theory that we discussed earlier in the paper. It was after this company that US passed the Sarbanes Oxley Act 2002, through which the corporate executives took personal responsibility about the affairs of the company. This act introduced many laws included provision on independent directors and strict documentation requirements. Along with increasing protection for the whistle-blowers, the act provided independence and financial literacy to the board. A public company accounting oversight board provision is also included to mitigate any such risks in the future.

SATYAM SCANDAL

The Satyam Scandal, often called the ‘Enron of India’, is a corporate scandal involving a fraud of around $1.47 billion, with such a huge lapse in corporate governance, it substantially increased the need and importance of the same in India. Satyam Computer Services Limited was formed in 1987 by Ramalinga Raju, dealing in the IT industry and business process outsourcing services. The company started gaining success, went public in 1991 and got listed on Bombay and New York Stock Exchanges. It steadily grew to become one of the big four IT companies in India.

This success story however, was broken in 2008-2009 when Ramalinga Raju confessed to the huge fraud committed by him and his relatives. What had been happening was that at Satyam Computer Services Limited was doing well in the IT sector, Raju became interested in collecting real estate which became the reason for his committing fraud. When he needed more money to buy properties, he started manipulating the financial statements of Satyam Computer Services Limited by inflating the profits, showing more sales etc. It was later found out that this was done by faking sales invoices and substantiating the profits made out of these fake sales invoices through fake bank statements.

However, this was seen as fast growth of the company and share prices began to rise, meanwhile Raju started selling his shares in the company and used that money to buy more properties. The promotors of the company also started selling their shares at this high price.

Raju had inside information due to which he bought certain properties thinking that the increase in the value of those properties would be used to cover the disparities in the financial statements shown and the actual figures. This had been

happening since 2001 and the difference between the actual figures and fake figures rose substantially.

In 2008 there was a recession, causing Raju’s plan to fail. He then proposed that Satyam would buy stakes in Maytas Infrastructure and Maytas Properties, the money would go to the promoters of Maytas and the gap in actual figures and fake figures would be used to buy these two companies. But there would not be any actual transfer of money since the two companies were owned by his family. The Board of Directors approved of this plan without the permission of the shareholders and the investors protested against this hence the stock price started decreasing rapidly. Due to the falling stock price, this plan was also cancelled. Soon after in January, 2009, Raju confessed.

Questions were raised on the activities of independent directors and the auditors of the company and it was found out that the auditors were paid double the amount than what was paid to other audit companies in the IT sector. Raju was then arrested, his properties were sealed and along with his family members, they were banned to invest in the securities market for 14 years.

The Satyam Scandal clearly showed the gaps in the Indian Corporate Governance climate. Some of the actions include updating the Companies Act to include a wider range of activities with stricter requirements. SEBI increased the disclosure requirements of promoters and controlling shareholders and the scam also helped push India to adopt IFRS (international accounting standards).1100 One of the most blatant corporate governance mistake here was no separate splitting of roles as should be; Raju singlehandedly drove the entire fraud. The important thing is ethics which do not translate from person to person hence providing for it becomes necessary via stricter corporate governance controls. Satyam highlighted the cracks in the corporate governance mechanism of India by not being detected for such a long time.

**CORPORATE GOVERNANCE IN INDIA**

As stated earlier, corporate Governance has been much talked about in India particularly after 1993. Liberalization brought mixed results for Indian economy. It brought in its wake a spate of corporate scandals and later on many companies disappeared after making public issues with large premium. Primary markets collapsed and family owned businesses became corporate entities. The question, how to function in a corporate setup overriding family interest and obligations called for a code of governance. Auditors were also following questionable accounting practices on biggest of management and often advising doubtful accounting choices. All these factors put strong pressure on many corporates to Evolve a good governance practice.

Companies in India like Tata group, Infosys, Wipro have involved sound principle of governance, intertwining corporate governance with social responsibility. These companies in spite of being global companies also follow set standard norms regarding independent directors, meeting quality norms, rights of

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employees etc. It began in 1998 with the Desirable code of conduct\textsuperscript{1101}, published by CII, committee formed in 1996. SEBI later formed two more committees, Kumar Manglan Birla and Naryan Murthy. All the committees are discussed herein.

**CII REPORT**

The Confederation of Indian industry took the initiative to draft some codes of corporate governance. National task force on corporate governance was set up in mid 1996 under the leadership of Mister Rahul Bajaj, ex-president, CII, and then CMD, Bajaj Auto limited. The committee issued desirable corporate governance. The major recommendations included, Board meetings at least six times a year, no person holding directorship in more than 10 companies, listed companies having more than 100 crore turnover and paid capital of at least 20 crore, must appoint ordered committee within 2 years. Board members Should be furnished with adequate information to discharge the duties. Non-executive directors should actively participate in board affairs and should be adequately paid. A compliance certificate signed by the CEO and CFO stating that management is responsible for preparation, integrity and fair presentation of financial statements and annual reports which suggest that company will continue in business. If the company does not conform to standard practices, full disclosure should be made in the audit report. Corporate governance guidelines - both mandated and voluntary - have evolved since 1998, thanks to the efforts of several committees appointed by the Ministry of Corporate Affairs (MCA) and the SEBI.\textsuperscript{1102}

**KUMAR MANGALAM BIRLA COMMITTEE**

Over the years, there were increasing concerns about Standards of financial reporting and accountability specially after losses suffered by investors and lenders which could have been avoided by better and more transparent reporting practices. There were concerns regarding following of standard shareholders’ services. Thus, this committee was set up to address the new concerns.

This committee was set up in 1999, under Kumar Mangalam Birla, who was a member of the SEBI Board. The main aim of this committee\textsuperscript{1103} was to raise the standards of and promote good corporate governance. The recommendations that the committee came up with were divided into two parts- mandatory and non-mandatory.

The mandatory recommendations would apply to those listed companies which had a paid up share capital of 3 crore or more. Mandatory recommendations included having a combination of executive and non-executive directors in the board of directors, having 3 independent directors in the audit committee and that any information regarding investments of the shareholders should be shared to them. They also prescribed that a director should not be a part of more than 10 committees and act in the chairman’s capacity for any more than 5 committees across the companies. The committee also

\begin{itemize}
  \item \textsuperscript{1101} The Desirable code of corporate governance, 1998. \url{http://www.nfcg.in/UserFiles/ciicode.pdf} <Accessed 9 May 2020>
  \item \textsuperscript{1102} Corporate governance recommendation for voluntary adoption. \url{https://www.cii.in/PolicyAdvocacyDetails.aspx?en}
  \item \textsuperscript{1103} Kumar Mangalam Birla Committee, 2000 \url{http://www.nfcg.in/UserFiles/kumarmbirla1999.pdf} <Accessed 9 May 2020>
\end{itemize}
recommended the amount of times the board should hold a meeting for reviewing budgets, quarterly results and plans - at least 4 each year with a maximum gap of 4 months between 2 meetings. Whereas the non-mandatory recommendations dealt with role of the chairman, corporate restructuring and further issue of capital and more.

**NARAYAN MURTHY COMMITTEE**

In its zest to improve governance in the companies through the regulatory processes SEBI also constituted committee the Narayan Murthy Committee. Set up in 2002, it focused its recommendations on role of auditors, the relationship of the company and the auditors and corporate audit. Mandatory recommendations included strengthening the responsibilities of audit committees, improving the quality of financial disclosures which would include how the proceeds from initial public offerings were used as well as related party transactions. Emphasis on a whistle blower policy being placed was also made and responsibilities on the board were put to make, adopt and follow a formal code of conduct. Also discussed were the position of nominee directors and the fact that business risks should be disclosed in the annual reports of the companies. Non-mandatory recommendations dealt with training of board members and peer evaluation of the non-executive director by all the board members.

**NARESH CHANDRA COMMITTEE**

On 21 August, 2002, The Department of company affairs under the Ministry of Finance and company affairs appointed committee under chairmanship of Sri Naresh Chandra to examine various corporate governance issues. The committee has been interested with analysing and recommending changes if necessary, in various areas, like, statutory auditor company relationship, independence of auditing functions, certification of account and financial statements by managers and directors, adequacy of regulation of Chartered Accountants, company secretaries, cost accountants and other similar statutory oversight functionaries, the role of independent directors, etc. The recommendations have also been drawn from the Sarbanes Oxley act, 2002, of the USA.

It is very clear after looking at all these committees, that the essence of corporate governance lies in transparency, integrity and Accountability of management, which also includes the non-executive directors. The main aim of corporate governance is to handle corporate frauds and scandals, and it is a system of making directors accountable to shareholders for the effective management of the company and also with adequate concern for ethics and values.

**ROLE OF SEBI**


In India, SEBI established in 1988 and was given statutory power in 1992, as a regulator and watchdog has pivotal role and responsibility in enforcing corporate governance practices on corporate entities.\textsuperscript{1107} SEBI was setup in 1992 and since then has taken many steps to improve corporate governance in India and make it efficient. SEBI’s initiatives usually aims to achieve the pillars of effective Corporate governance, like transparency, accountability, disclosure, equity and fairness. SEBI has taken initiatives to align Indian corporate governance practices with the global standards adopted in advanced economies.\textsuperscript{1108} SEBI set up various committees thereby establishing rules and laws and giving various recommendations on effective corporate governance.

To improve the corporate governance practices, SEBI amended Clause 49 of its Listing Rules, which came into effect in January 2006. This amendment was brought forward by the recommendation of the Narayan Murthy Committee and changes the various other committees recommended. Clause 49\textsuperscript{1109} would apply those companies which wanted to get listed for the first time and those companies which had a paid up share capital of 3 crore or more. It specifically laid down that company boards should lay down the code of conduct to be followed by the board members and the senior management of the company. Further, balance sheets, cash flow statements and profit and loss accounts should be certified by the chief executive and chief financial officer and that non-executive director’s compensation was to be decided by the Board and approved by the shareholders.

Clause 49 was further amended\textsuperscript{1110} in 2013, to bring it up to date with the amendments made in the Companies Act, 2013. It now included provisions for having at least one woman director, it also laid down that no person can be a director in more than 7 listed companies at the same time, independent directors were also disentitled from any stock option, among other changes.

**AMENDMENTS TO THE COMPANIES ACT, 1956**

The SEBI did not have complete autonomy however, the authority in key areas remained with the department of Company Affairs (DCA). After the economic reforms programme that India undertook in 1990s it felt the need for a comprehensive review of Companies Act, 1956. After 3 unsuccessful attempts in 2003, India decided to rewrite the company law. After almost 24 amendments later since 1956, there were various laws amended and added to improve the condition. Some of the amendments to the Companies Act which are remarkable and have a direct bearing on improvement in the standards of corporate governance are, passing of resolution by Postal ballot was to be conducted only by Postal ballot. After passing resolution through Postal ballot the


\textsuperscript{1108} Ibid.


The system of corporate governance in USA went through a lot of changes to now be considered as largely a shareholder oriented one. Before the 1980s, the corporate era was characterized by strong managers and weak owners. The 1980s was characterized by a large amount of hostile takeovers, investors became more engaged in the corporate process, but by the 1990s, the managers re-established themselves by lobbying for stronger hostile takeover laws however, at the same time, they started recognising the importance and inclusion of shareholders.

The focal point of corporate governance in the USA comes from the Sarbanes-Oxley Act which was introduced by the Federal Government in 2002, after the huge corporate collapses in Enron. The act pushed for reforms in the auditing procedures and new requirements were put in for internal control as well as addressed employee whistleblowers. After the financial crisis that hit USA in 2008-2009, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 was enacted, it restructured the regulations that were in place earlier and it also extended federal regulation of corporate governance for all public companies. On top of this, a company must comply with the listing rules of the stock exchange it wishes to get listed on all the major stock exchanges have their own set of rules which have been overseen by the SEC (Securities and Exchange Commission), which also overlooks corporate governance among other things, at the federal level.

SARBANES-OXLEY ACT, 2002

As mentioned above, the Sarbanes-Oxley Act (abbreviated to SOX Act), was legislated in 2002 as a response to the Enron Scandal. It is seen as a progressive legislation which increases the role of the Federal Government in overseeing corporate governance. The highlights of the Act are:

• Creation of the Public Accounting Oversight Board, this would oversee the accounting industry and report to the SEC. This board requires all auditors of public companies and accounting firms to get registered.

• It requires that the CFO and CEO should certify the financial conditions to be reflective of the actual precise financial conditions, results of operations and cash flows if the company in their yearly and quarterly reports. They should also disclose if any changes in the internal control have been made.

• The Act also provides for a whistleblower policy since it recognizes that employees

do not hallucinate.

1113 Section 101 of Sarbanes-Oxley Act, 2002
1114 Section 302 of Sarbanes-Oxley Act, 2002
and insiders can help report scandals early on. It provides protection for those employees who have reported frauds and testify in court against their employers.\textsuperscript{1115}

- The act has also put a ban on executive officers and directors from taking personal loans as well as increased criminal penalties for any violation

Ever since the Act came into place, investor confidence has improved and not only has the regulatory landscape in the US market changed but it has also affected other countries in the world by helping them model their corporate governance codes.

**THE DODD – FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT**

On June 25th 2010, a House of Senate conference committee reached final agreement on this act and was signed into federal law by President Barack Obama. The act is comprehensive in scope, providing for significant changes to the structure of federal financial regulation and new substantive requirements that apply to a broad range of market participants, including public companies that are not financial institutions.\textsuperscript{1116} The act provides for corporate governance reforms including, Disclosures regarding chairman and CEO, prohibit broker discretionary voting, no majority voting for director elections and smaller public companies exempted from Sarbanes Oxley internal control requirements. The act for provides for executive compensation reforms including having fully independent compensation committee, pay for performance and pay parity disclosures, hedge disclosures, prohibiting access institution compensations to executive officers, employees, directors of principal holders with compensation that is excessive or that could lead to material financial loss to the financial institution. The act also provided protection to whistle-blowers and extended the scope of liabilities for a doors and abettors of security violations by allowing government in force meant actions against them.

The main purpose of introducing the Dodd Frank Act was to prevent the economy from what it had experienced in 2008 financial crisis and protect the consumers from all the proponents that contributed towards the crisis. It is however observed and argued that this act and the regulatory compliance requirements puts high burden on smaller financial institutions and community banks that have not played any role in the financial crisis. Siding with the critics, the U.S. Congress passed bill in 2018 called the Economic Growth, Regulatory Relief, and Consumer Protection Act, which rollback significant portion of the Dodd Frank Act.\textsuperscript{1117} It was signed in to known by president trump on May 24 2008.

**COMPARATIVE ANALYSIS BETWEEN USA AND INDIA INDEPENDENCE OF AUDITORS**

It can be noticed that independence of auditors ranks high in importance for both India and USA. It is pertinent to observe that the biggest scandals in both the countries, namely Enron and Satyam, have

\textsuperscript{1115} Sections 806 and 1107 of Sarbanes-Oxley Act, 2002


occurred due to lack of independence of auditors. Auditors act as watchdogs and are needed for an external independent point of view. Both India and USA have explicit requirements regarding the role and independence of auditors.

In USA, the Sarbanes-Oxley Act provides for the Public Companies Accounting Oversight Board to oversee all audit requirements. It is interesting to note that the Naresh Chandra Committee had contemplated on having a similar board in India but the powers that the board has is already distributed among various regulatory agencies such as the SEBI, RBI and the Ministry.

In India, auditors are governed by ICAI Regulations and under certain sections in the Companies Act, 2013. Audit Committees are compulsory for listed companies and there is an express bar on auditors from rendering certain services to their clients such as accounting and book keeping services, internal audit, actuarial services, management services etc. Further, the Companies Act, 2013 has also mandated rotation of auditors for a certain class of companies.

In USA, the PCAOB maintains and enforces regulations and manages the auditing boards but the SEC is the main enforcer for auditor independence. There is no such specific body made in India, but duties on the current ones have been extended. Further the Sarbanes-Oxley Act has also included a gambit of prohibitions, similar to the ones in India’s Companies Act.

Hence we can say that independence of auditors is considered as an important requirement in both USA and India as the legal structure is very similar.

INSIDER TRADING

Both India and USA have some form of regulations regarding insider trading but the scope differs. The laws of USA have a stricter and wider reach regarding insider trading. USA uses both the classical/disclose theory and the misappropriation theory by requiring insider to disclose the UPSI to the public and abstain from making trades based on this information and at the same time, the US Sanctions Act, 1984 provides for a fine three times that of the loss avoided or profit gained by the use of the UPSI. SEC also oversees the prevention of insider trading.

On the other hand, India deals with insider trading only under Section 195 of the Companies Act, 2013 and the SEBI (Prohibition of Insider Trading) Regulations, 2015. The term insider trading has not been defined specifically but is understood by reading Regulation 3 (of the Insider Trading Regulations) with Section 12A of the SEBI Act. Regarding the use of misappropriation theory which the US uses, India has gone beyond and included any person with UPSI whereas the US law sticks to just misappropriation of the information. However, the criminal liability requirements in USA are multiple which is not the case for India. So, keeping these points in mind, it can be seen that USA has more developed insider trading regulations than India.

INDEPENDENCE OF DIRECTORS ON THE BOARD

Independence of directors is important in both USA and India.
Requirements about independent directors is mentioned in the Listing Requirements of Stock Exchanges in USA and in the Companies Act, 2013 and SEBI Regulations in India. Both the countries have similar stances on the need for independent directors.

In India, 1/3rd of the total strength of board of directors is mandated to consist of independent directors (if a company has paid up capital above 3 crore) and if a company is unlisted then there should be at least 2 independent directors, but if the chairman of the company holds an executive position, then at least half the board should consist of independent directors. Clause 49 sets out specific duties regarding directors and if violated, would cause the company to be delisted from the stock exchanges and could have financial penalties imposed on them.

Whereas in USA has larger boards than India and more independent directors. Thought the Sarbanes-Oxley Act does not directly mandate for independent directors, it requires that each member of a public company’s audit committee shall be an independent director. Further, NYSE and NASDAQ requires majority of the board of directors to be independent in listed companies and for them to follow the provisions mentioned in the Sarbanes-Oxley Act.

The importance of independent directors can hence be seen in both India and USA.

**DISCLOSURE REQUIREMENTS**

Disclosure requirements play an important role in both India and USA. In India, disclosures are mandated through the Companies Act, 2013 and SEBI Regulations. These have been incorporated after the recommendations given by the various committees. Disclosure requirements include significant related party transactions, i.e., transaction of the company of material nature, with its promoters, the directors, or the management, or their subsidiaries or relatives, that may have potential conflict with the interests of company at large. Further statutory reporting includes balance sheet and profit and loss account, the boards’/director’s reports and auditor’s reports. Further in the annual report, the corporate governance section, as mandated by the 2015 SEBI Regulations should include information about board of directors’ nomination and remuneration committee, remuneration of directors, stakeholders’ grievance committee, general body meetings, Means of communication, and general shareholder information.

Meanwhile in the US, similar disclosure requirements exist which come within the ambit of the Sarbanes-Oxley Act, SEC Regulations and the Dodd-Frank Wall Street Reforms. Mandatory disclosures include disclosure regarding executive compensation. The SEC requires two annual reports to be filed by public listed companies, one for the SEC and the other for the shareholders of the company. The annual reports to the shareholders must contain the certified financial statement which should include a two year audited balance sheet and a three year audited cash flow and income statement. Apart from these the annual reports should also have the management’s discussions about the firm’s financial liquidity and other such comprehensive details. Further, directors

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and officers of the corporation should be identified as well as disclose the qualification standards of the directors and their compensation.

Hence we see that disclosure requirements are quite extensive for both USA and India, with both countries requiring disclosures on common subjects.

**PRESENCE OF WOMEN IN THE BOARD**

While getting women on boards as a measure of fairness, equality of opportunity and social justice, such inclusion must be justified to insure better corporate performance. The reasons will include increasing diversity of opinions in the boardroom and providing female role models, influence on decision making and leadership styles of the organization, ensuring better boardroom behaviour, woman directors tend to be younger than their male colleague on the board, so it may benefit to the bored with new ideas and strategies, having women in key positions is argued to be associated with long term success and competitive advantage as well as women on boards or adding value to long term success of company to come women’s distinctive set of skills.  

While in USA there is no law mandating the states to have women on board, India has included the in its new Companies Act, 2013, that prescribed companies shall have a woman director. In USA, in 2019, California became the first state to pass a bill, that publicly traded companies shall have at least one female director. Female representative on Fortune 500 boards has been inching up in the United States with women now holding about 20 percent of Fortune 500 board seats. Data given by Deloitte shows that in USA board seats held by women are 14.2% while in India it is 12.4%. Research has further shown that both India and USA has been extremely slow in the progress of increasing diversity.

**BOARD LEADERSHIP STRUCTURE**

In United States, Since 2010, Public companies have been required to disclose their board leadership structure, specifically whether the same person served as CEO and chair of the board (known as CEO duality or combined board leadership structure) or whether two individuals are in those positions, and why they believe their leadership structure is appropriate given their specific characteristics or circumstances. On the other hand in India neither the companies act nor clause 49 directly say anything about the board structure. Generally, companies disclose their structure in corporate governance reports which is part of the annual report but there is no such mandate. More and more companies in both the nation are thinking of combining the two roles, based on the fact that this might eliminate some confusion. However, both the countries do not hold much importance to the board leadership structure.

**WHISTLE BLOWING POLICY**

Whistle blowing relates to the action taken by a person against the
company indulging in illegal unlawful activities. There can be various types of whistle blowing, including internal, external, individual and institutional. Usually the motive behind this is to highlight possible risk, to enforce ethical conduct, to protect public interest and to inspire other employees. In India from 2003 and three Various bills have been passed so as to address the issue of whistle blowing. These bills include public interest disclosure and protection of persons making disclosures bill, 2010, the Whistle Blowers protection bill, 2011. These bills include provisions protecting the whistle blowers from any lash out by the Corporation against them. These bills and laws also include protection of the Corporation from false information furnished by the whistle blower in order to destroy the refutation and the dignity of the company.

In USA as well after the case of Sherron Watkins, many legal provisions regarding the whistle blowers were introduced. These provisions include False Claims Reform Act, 1986, Sarbanes- Oxley Act of 2002, Fraud Enforcement and Recovery Act, 2010 and Consumer Products and Safety Improvement Act, 2008. Sarbanes- Oxley Act of 2002 provided Whistle blowers and give them the right to a jury trial in certain cases. There are tremendous amount of laws in USA as compared to India. In India whistle blowing was quite narrow. The reason behind specific laws in United States is due to continuous media exposing of the government frauds and company frauds that lets to the demand of initiating these laws. There are many loopholes in Indian laws such as the non-protection of family members etc. so it is highly recommended that Indian government should make laws which give them overall protection

CONCLUSION
The study of the overall comparison of Corporate Governance Codes of US and India reveals that most of the practices of the Corporate Governance are common. The difference is the approach of the regulators and support of the stakeholders in implementing the same. The role of monitoring agencies such as SEC and SEBI would be very crucial in coming days. It is evident that both India and USA have gone through some similar scandals and based on which they have follows a similar trajectory of developing its corporate governance environment. However, nuanced differences still crop up within the systems when compared. The reason behind this, based on the research can be concluded to be that the differences between the corporate governance models in India and the US can be said to be due to differences between the business environment and cultures.
ESSENTIAL RELIGIOUS PRACTICES TEST: A CRITICAL ANALYSIS

By Niharika Maurya
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1. Introduction
On November 14, 2019, a five-judge bench of the Supreme Court adjourned the review and writ petitions filed against the judgment in the Sabrimala1125 Case and framed a number of issues for constitutional interpretation and made a reference to a nine-judge bench. The review in the Sabrimala case has been made subject to the outcome of the reference.1126 The nine-judge bench is now going to determine the extent of the role which the courts can play in determining whether a particular practice is, in fact, an essential part of a religion as being claimed by the adherents of the religion or not. Who gets to be the final arbiter of the question – the court or the adherents of the religion itself? It is also going to determine the importance of other fundamental rights provided under the constitution, especially, the right to equality while adjudicating questions of religious faith.

Freedom of religion is one of the fundamental rights available to the people of India.1127 Since religion plays an all-encompassing role in Indian society, influencing various dimensions of an individual’s life, the Supreme Court has devised the doctrine of “essential practice” in order to help it “delimit” or “delineate” the contours of the freedom of religion. Under this doctrine, only those beliefs and practices would be accorded constitutional protection which are found to be “essential” parts of the religion. The test was constructed in the early phase of constitutional development in the Shirur Matt1128 case and has been widely used, including in the Sabrimala case.

This article attempts to define the “essential religious practices” doctrine as developed by Indian Courts by giving a comprehensive history of its development. It also enumerates the diverse criticisms which the doctrine has encountered over the course of its evolution from various stakeholders. It presents an overview of the various approaches being offered as alternatives to this test and finally, it advocates for the practice of harmonious construction of fundamental rights for resolving disputes related to religious freedom.

2. Essential religious practices test: Definition
The “essential religious practices” doctrine has been comprehensively defined in the Avadhuta1129 case where the court held that, “Essential part of a religion means the core beliefs upon which a religion is founded.

1125 Indian Young Lawyers Association v. State of Kerala 1985 AIR 255

1127 The Constitution of India, arts. 25,26
Essential practice means those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts or practices the superstructure of religion is built. Without which, a religion will be no religion.” It was further held in the case that the test to determine whether a part or practice is essential to the religion is - to find out whether the nature of religion will be changed without that part or practice. If the taking away of that part or practice could result in a fundamental change in the character of that religion or in its belief, then such part could be treated as an essential or integral part.

3. Relevant constitutional provisions and philosophical basis
The genesis of the doctrine is traced to the speech of Dr. Ambedkar, who, while discussing the religious freedom clauses, observed that, “the religious conceptions in this country are so vast that they cover every aspect of life, from birth to death… I do not think it is possible to accept a position of that sort… we ought to strive hereafter to limit the definition of religion in such a manner that we shall not extend beyond beliefs and such rituals as may be connected with ceremonials which are essentially religious.”

Hence, Ambedkar’s exhortation to limit the role of religion in public life has been brought to assistance for giving a philosophical ground to the doctrine.

What is important to note, however, is that Ambedkar uses the phrase “essentially religious” and not “essential to the religion”. Though the concept of “essentially religious” could be found in article 25(2)(a) of the Constitution, there is no constitutional provision mandating determination of practices “essential to the religion”. This distinction has been explained by Gautam Bhatia with reference the judgment in Ram Prasad case. He observes that the word “essential” whose purpose was to qualify the nature of the practice (helping to determining whether it was religious or secular) was now being used to represent its importance within the religion.

4. The Evolution of the Doctrine
This section would trace the evolution of the essential religious practices test, enumerating the modifications made by the courts from case to case. The Supreme Court while devising this doctrine has held that the essential parts of a religion would be determined by consulting religious scriptures, the history of the religion etc., though in later cases, it appropriated to itself the final say on what was to be considered essential.

A) The right origins
This test was coined by the Supreme Court way back in the year 1954 in the case of The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shri Shirur Mutt.

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1130 Constituent Assembly Debates on December 2, 1948 available at http://164.100.47.132/LssNew/constituent/vol7p18.html
1132 Ram Prasad Seth v State of UP, AIR 1957 All 411
1134 Supra, note 4 at 1.
In this case, the Court dealt with the question of state control over religious denominations. The Court held that both the religious beliefs and practices which are essential parts of the religion are covered under the constitutional provisions and that “what constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.”

B) The element of “rationality”
In this landmark case, an Act stipulating the composition of the Managing Committee of the Ajmer durgah (shrine) was challenged as unconstitutional. In this case, the Court introduced a distinction between practices that are essential to the religion and those which “even though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself...”[1135]

Bhatia argues that this distinction not only gives the court the power to erase religious belief and practices by declaring them to be not essential and hence not being a part of religion but it also gives the courts the power to test a practice on the criteria of ‘normativity’.[1136] It would also allow the court to take upon itself the duty of social reform by doing away with “superstitious” practices, though it is a function that has been expressly mandated for the legislature under Art. 25(2)(b) and not the court, a fact which has also been pointed out by J. Indu Malhotra in her dissenting judgment in Sabrimala case.[1137]

C) The real religion

D) From time immemorial
In the Avadhuta case[1139], the Court emphasized that in order to be designated an “essential” religious practice, a practice has to be in existence since “time immemorial” and the fact that it has been mentioned in the scriptural text written by the founder of the sect itself is not enough to make it eligible for constitutional protection. Hence, it was held that the “tandava dance” was not an essential religious practice for the Ananda Margi sect.

The Court also completely transformed its original proposition by holding that “it is for the Court to decide whether a part or

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[1136] Supra note 7 at 3
[1137] Supra note 1 at 1
[1138] 1966 SCR (3) 242
[1139] Supra note 5 at 2
practice is an essential part or practice of a given religion”.

E) The question of exclusion
In the Sabrimala case\textsuperscript{1140}, the practice of exclusion of women of the age group of 10 to 50 years being followed at the Sabarimala Temple was held to not be an essential part, it was declared that the “exclusionary” practice was not such, the non-observance of which will change or alter the nature of Hindu religion. It was also held that it has not been observed with unhindered continuity. J. Chandrachud drew upon the anti-exclusionary principle\textsuperscript{1141} and declared that even if this practice was founded in religious texts, it is subordinate to the constitutional values of liberty, dignity and equality and contrary to constitutional morality.

He observed that, “The Court must decline to grant constitutional legitimacy to practices which derogate from the dignity of women and to their entitlement to an equal citizenship. The social exclusion of women, based on menstrual status, is a form of untouchability which is an anathema to constitutional values. Notions of purity and pollution, which stigmatize individuals, have no place in a constitutional order.”

Justice Indu Malhotra, gave a dissenting judgment observing that, “the equality doctrine enshrined under Article 14 does not override the Fundamental Right guaranteed by Article 25.... the Constitutional Morality in a secular polity would imply the harmonization of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practice their faith and belief in accordance with the tenets of their religion, irrespective of whether the practice is rational or logical.”

5. A Critical Analysis
A) The shortcomings of the test
The doctrine is faulty, both in theory and in practice. The first and foremost problem with the test is that it has not been mandated by the Constitution.\textsuperscript{1142} In its application, it is subjective and arbitrary and there is no standard criteria to determine what could be called an “essential religious practice”.\textsuperscript{1143} The court sometimes gives decisions without hearing the parties affected.\textsuperscript{1144} It has also happened in cases that the court has held that whether a practice is an essential part would be determined with reference to the evidenced adduced before it, but has proceeded do decide the matter without going into such factual enquiry.\textsuperscript{1145} There is also a risk of sidelining the marginalized traditions within a religion by giving preference to certain set of sources and ending up with a religion devoid of internal diversity. It creates an apprehension in the fear of minorities that their rights and freedom are not secure, since judges, especially those belonging to majority communities would be determining their essential rights and evaluating their religious doctrines.\textsuperscript{1146}

\textsuperscript{1140} Supra note 4 at 1
\textsuperscript{1141} Supra note 7 at 3
\textsuperscript{1143} Marc Galanter, ‘Hinduism, Secularism, and the Indian Judiciary’, 21(4) Philosophy East and West 467 (1971)

\textsuperscript{1144} Mohd. Hanif Qureshi v State of Bihar (1959) SCR 629
\textsuperscript{1145} Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan (1964) 1 SCR 561 at 582
\textsuperscript{1146} Jaclyn L Neo, ‘Definitional imbroglios: A critique of the definition of religion and essential practice tests in religious freedom adjudication’,
What is religion to some is pure dogma to others and what is religion to others is pure superstition to some others. Religious beliefs are matters of faith therefore, introducing a criterion of normativity and rationality, makes the personal beliefs and perspective of the judge the determining factor. By making the court the final arbiter of the essentiality of a practice, it places religious freedom at the mercy of the courts, whose decisions are often rooted in personal moral beliefs and sometimes in conjecture.

A short analysis of the Ismail Faruqui case would show the extremely arbitrary and excessively restrictive nature of this test. This case was related to the acquisition of a mosque related to the Ayodhya Dispute where the ground of public order was held to be sufficient to justify the acquisition of the mosque. But, the Court went a step further and held that a mosque is not an “essential part of the practice of the religion of Islam” and that namaz could be offered anywhere and hence, “its acquisition (by the state) is not prohibited by the provisions in the Constitution of India”.

What this judgment reflects is that this doctrine has led to unnecessary and unjustified limitations on the right to freedom of religion. It is difficult to believe that a place of worship, whether it be a temple, mosque, church or gurudwara is not an essential part of religion. It needs to be accepted that though, religion is a matter of personal faith and inner conscience, its practice generally entails group activities like religious gatherings, festivals and collective worship in places like temples and mosques. To declare that such community meetings organized in pursuance of religious beliefs are not essential part of religion is certainly an excessive curtailment of the right to religion.

As this case shows, definitional tests play a gatekeeping function and have the capacity to exclude frivolous as well as potentially viable claims and these tests also overly circumscribes the scope of constitutional protection for religious freedom.

B) The Potential of improvement
Jaclyn Neo has, after surveying landmark cases on religious freedom in Singapore and Malaysia, where this test has been adopted, identified the gaps in the test as it is presently applied. He enumerates four qualities that such a test should have in order to be capable of giving proper protection to religious freedom. Firstly, it must be sufficiently comprehensive so that it is able to include important common characteristics to cover a wide range of different religious traditions. Secondly, it should account for internal interpretational diversity, it generally happens that in interpreting religious beliefs, a majoritarian view prevalent within the community is recognized as “true” while the other marginal beliefs are left as extraneous and non-essential. It also happens that an overzealous court excludes practices which it considers unacceptable, illogical, superstitious.

Thirdly, the test must be flexible enough to accommodate regional particularities that shape religion, beliefs and practices and culturized practices of religion should not be undervalued. Fourthly, it should not be biased (whether consciously or unconsciously) against disfavored religions which happens when familiar creeds are characterized as real religions, while different or new creeds are understood only as pseudo-religions.

6. Is it a constitutional necessity?
Bhatia demonstrates that in most of the landmark cases where this doctrine has been applied, the same conclusion which the court have arrived at could have been achieved by using the constitutionally provided grounds for limitation of religious freedom, i.e., social reform, public order, health etc., and that therefore, the essential religious practice test is not a constitutional necessity.\footnote{Note 7 at 3} Then why the courts have chosen to go this way instead of adopting the constitutionally mandated provisions? Galanter argues that sanctioning the prohibition or limitation of a religious practice by relegating it to a non-essential or extraneous status gives more legitimacy to such a move than upholding the coercive power of the State over a practice which they themselves declare to be having constitutional protection.\footnote{Note 18 at 5} The Courts have often tried to interpret religious texts in a manner consistent with constitutional morality, where judges often emphasize the “real nature” or “foundation” of the religion which is found by them to be filled with values like compassion, equality, and rationality. This was observed in the Triple Talaq case\footnote{Note 21 at 6}, where despite the fact that a large number of Muslims in India followed the practice of Talaq-ul-bidat, the court held that, in fact, this practice is frowned upon in the Quran itself and is considered “sinful”. Hence, it is not an essential practice under Islam and therefore, does not deserve constitutional protection.

7. What are the alternatives available?
A) The deference approach
To avoid the subjectivity and arbitrariness that the essential religious practices test brings, Jaclyn neo supports the deference approach developed by Durham and Scharffs, which shifts the burden from the claimants of religious rights of proving their constitutional entitlement to the State which is trying to curtail such right. The primary under this approach is not that whether the practice is essential or not but it is that whether the limitation imposed by the State is justifiable or not. There is called the “deference” approach, because here the courts are supposed to defer to the self-definition of the religious groups regarding their beliefs, unless there is a compelling reason not to.\footnote{Note 21 at 6}

Under this approach, there are two categories of limitations to this “deference”, firstly the ones which are implicit in the idea of religious freedom (sincerity/avoidance of fraud) and others which give the State, justification to override religious freedom. In the first stage of enquiry, unless there is a clear lack of sincerity, fraud or ulterior motive, the court should go by the identification as accepted by the concerned group, while at the second stage of enquiry, a proportionality test should be applied to determine whether there is any compelling state interest.
justifying the curtailment of religious freedom.

Under this approach, the essentiality of a practice is not used to determine whether it deserves constitutional protection rather it is used to determine the weightage to be given to the belief and practice and to determine the threshold which the government needs to reach to justify its curtailment. Indeed, where a balancing test is adopted, the Court’s role becomes one of weighing the importance of religious beliefs and practices against stated public interests, which is one of essential roles of the courts as the defenders of fundamental rights of the citizens.

The test under the differential approach could be on the lines of the test proposed by the Malaysian Federal Court.\textsuperscript{1156} It rejected the essential religious practice test and proposed a four-step test to determine whether a law that seeks to restrict religious freedom is constitutional or not. The steps are: (i) determining whether the affected practice is a religious practice; (ii) determining the importance of the practice in relation to the religion; (iii) determining the extent or seriousness of the legal or policy prohibition; and (iv) determining the circumstances under which the prohibition is made. The Singapore High Court also employed a proportionality test by discussing questions like whether the restriction imposed was justified under the constitution, whether there was rational nexus, and whether the limitation is proportionate to the object it seeks to achieve.\textsuperscript{1157}

Though the Indian Courts have accepted this approach by holding that the essential parts of a religion are to be ascertained with reference to the doctrines of that religion itself, the way that the courts execute this doctrine puts self-determination of the backburner.

\textbf{B) The Anti-exclusion Principle}

Gautam Bhatia has proposed the anti-exclusion principle\textsuperscript{1158} to replace the “essential religious practices” test. For devising this principle, he drew upon the judgment of Justice Sinha in the \textit{dawoodi case}\textsuperscript{1159}, linking it with the constituent assembly’s understanding of untouchability and the constitutional vision of societal transformation with the individual at its center. Under this principle, in the case of a dispute between the right to religion of a community and an individual, the State should have the right to protect the individual from community action that excludes him from the economic, social and cultural life of the group and which impairs his dignity and integrity. It is one form of the “deference” approach, where the compelling public interest is the protection of individuals from social exclusion, an action which makes an individual a “pariah” in the society.\textsuperscript{1160}

Hence, if a law aims at preventing or undoing social exclusion, it would be upheld, regardless of the fact that the practice it seeks to prohibit or limit is essential to the religion or not. Here, \textit{utmost primacy is accorded to individual dignity}. In the absence of a state made law, any religious practice which is based on exclusionary beliefs would have to give

\begin{thebibliography}{99}

\bibitem{1156} Meor Atiqulrahman bin Ishak v Fatimah bte Sihii, [2006] 4 M.L.J. 605
\bibitem{1157} Vijaya Kumar v. Attorney-General, [2015] S.G.H.C. 244
\bibitem{1158} Supra note 7 at 3
\bibitem{1159} Sardar Syedna Taher Saifuddin Saheb v. State of Bombay AIR 1962 SC 853
\bibitem{1160} Ibid.
\end{thebibliography}
way to the individual right under article 25(1).
This principle is in consonance with the spirit of the Constitution as Ambedkar had clarified in the Constituent Assembly Debates, that notwithstanding the existence of minority and group rights in the Constitution, its basic unit was the individual.\textsuperscript{1161}

The drawback of these alternatives is that the “deference” approach is useful only when there is a conflict between State interest and religious rights while the anti-exclusion principle is applicable in situation where there is an intra-community conflict, where the rights of religious group result in negation of the fundamental right of dignity of an individual.

\textbf{C) A dynamic solution: Harmonious construction of fundamental rights.}

A better alternative to the essential religious practices test is the concept of harmonious construction of fundamental rights. The principle of balancing of rights and harmonious construction of contradictory values is not new to Indian judiciary. In a number of cases of constitutional significance, the Supreme Court has had to harmonize constitutional principles like liberty, equality, justice etc., which though, generally complementary to each other sometimes come to a clash. The Supreme Court has declared that, “\textit{At the outset, it may be stated that Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control...under our Constitution no right in Part III is absolute... All important values, therefore, must be qualified and balanced against other important, and often competing, values.”\textsuperscript{1162}

The same principle of balancing of rights was also upheld in Subramaniam Swamy v. Union of India, Ministry of Law.\textsuperscript{1163}

The Supreme Court has also noted in the context of Article 26, that it is a duty of this Court to strike a balance and harmonize the rights of all persons, religious denominations or sects thereof, to practice their religion according to their beliefs and practices.\textsuperscript{1164}

Suhrith Parathasarathy, in his analysis of the Sabrimala Judgment observes that, whenever a conflict arises between two constitutional values, the courts uphold constitutional morality by trying to harmonize the different values instead of trying to hold that one is always superior to the other. He further writes that any practice that violates the dignity of an individual should not be granted protection. The courts, performing their duty of the protection of fundamental rights must try to harmonize the conflicting rights in a way that religious groups have the maximum available freedom to continue with their beliefs and practices up to the point till such practice results in the denial of dignity to any individual.\textsuperscript{1165}

Here, the court would not examine theological facts, instead would direct its enquiry on constitutional principles.

Therefore, it is finally concluded that the various alternatives that have been offered and have been discussed above are variants.

\textsuperscript{1161} Constituent Assembly Debates on November 4, 1948, available at http://164.100.47.132/LssNew/constituent/vol7p1.html
\textsuperscript{1162} Sahara India Real Estate Corporation Limited v. Securities and Exchange Board of India (2012) 10 SCC 603
\textsuperscript{1163} (2014) 5 SCC 75
\textsuperscript{1164} Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj v. The State of Gujarat 1974 AIR 2098
\textsuperscript{1165} Supra note 23 at 6
of the same principle of balancing and harmonization or in other words, proportionality, which is an acceptable and preferable substitute for the currently used “essential religious practices” test. Indian Courts are not only familiar with the principle but have adjudicated a number of competing claims by using this method and have themselves constructed efficient criteria\textsuperscript{1166} for bringing about a satisfactory solution to important constitutional questions.

8. Conclusion
The Constitution of India grants the freedom of religion as a fundamental right with a view to give freedom to the individual the right to follow his conscience, but the expansive presence of religion in India makes it important that some boundary or limit is created to determine the scope of constitutional protection for religious beliefs and practices. The Indian judiciary has come up with the doctrine of essential religious practices under which only essential parts of a religion are to be upheld. Overtime, this test has become too restrictive and excessive, resulting in a denial of religious freedom by giving courts the right to determine what is an essential part of the religion and completely ignoring the self-identification of the claimants of the right.

A number of alternatives have been discussed over the years to replace this test. Here a balancing and harmonization approach has been offered as the best possible alternative to the essential religious practices test. It obliterates the possibility of the personal belief and consciousness of the judges influencing the outcome of judgments. It also does away with the need of the constitutional court of going into difficult theological question and instead bases the enquiry on constitutional concepts. This principle makes it possible to provide sufficient recognition and protection to the religious beliefs and practices as envisaged by the Constitution while on the other hand, also providing the scope for upholding individual dignity when religious practices interfere with it and giving the State the right to be able to curtail or limit the exercise of this right in a situation of overriding state necessity.

\textsuperscript{1166} Modern Dental College and Research Centre v. State of Madhya Pradesh (2009) 7 SCC 751
MISUSE OF POWERS BY POLICE AUTHORITIES AND IT'S CONCURRENT INFRINGEMENT OF HUMAN RIGHTS

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Abstract
Public servants are endowed with legislative authority, however they would be regarded as charged and disciplined & criminally in relation to all residents of the nation until they have exceeded legal boundaries, but once they breach barriers. The Supreme Court has also found that elected authorities had misused their authority. Under this situation, abuse of rights as law violations would be renamed. Crime concerning compliance involves a felony perpetrated when upholding the rules. The police can be targeted by the public, newspapers, courts when upholding the law with iniquity, racism, discourtesy, indecency, dishonesty, brutality, brutalization, ignorance, duty-free sleep and illegal inquiry, casual search, epidemiometric calling, unaccountable interrogation, collection of facts, sophisticated enquiry, unequal civil rights strategies, etc. As a consequence, the policing department will not operate efficiently. People say that unless the statute is applied, regulation is broken. These infringements are classified as modern criminology as an compliance activity.

CUSTODIAL TORTURE

The term "torture" has since become associated with the dark side of Human Culture, a problem for medical law and other careers. Torture is so deep a wound in your psyche that you can almost reach it often, but it is still so immaterial that it can be not healed. "Torture." Torture. Is agony, pain is misery and terror, rage and hate, a urge to murder and ruin you. Hard like stone, paralyzing the rest and deep like the abyss.

Other Custodial Crimes
Many types of guardianship abuse conducted by public officials are reserved for violent offences performed in arrest during the questioning of the victim or during the prosecution of the suspected offense.

Human Rights
The concept of justice requires human rights. Equity is wealth. Justice is a fair treatment of an individual. When fairness remains, the statute is enforced. Justice is crucial for humanity. Refusing justice means refusing human rights. The integrity and privileges of individuals is maintained by human rights. Human rights ensure that every citizen will be upheld in a decent life. This requires compassion, grace, nature and a rational relation. This requires the integrated rehabilitation of individuals and the environment, in order to sustain every citizen with integrity. Human rights seem to be the rights that all individuals have under human circumstances. It is commonly known as "Fundamental Rights" or "Human Rights."

VIOLATION OF HUMAN RIGHTS
Whenever and wherever the administration / state or other law enforcement authority is committing a human rights violation as a consequence of the guaranteed rights by international humanitarian law, regional rule or state jurisprudence, the violation of human rights that occur directly by the State, or by any State that does not practice due diligence in protecting its people from the violation of human rights; The State shall be responsible for any misconduct or omission in view of any abuses of human rights. If the police refuse to obey the appropriate protocol in the finding of the suspect and to jail a fraud, that is a breach of human rights, and so the human rights inspector must make sure that the police and the courts uphold the law, maintain complete judicial discretion by punishment, whether politically or economically strong, of the people implicated in this offence.

CHAPTER 1: INTRODUCTION

Public servants are endowed with legislative authority, however they would be regarded as charged and disciplined & criminally in relation to all residents of the nation until they have exceeded legal boundaries, but once they breach barriers. The Supreme Court has also found that elected authorities had misused their authority. Under this situation, abuse of rights as law violations would be renamed.

1.1: GENERAL

Crime concerning compliance involves a felony perpetrated when upholding the rules. The police can be targeted by the public, newspapers, courts when upholding the law with ineptitude, racism, discourtesy, indecency, dishonesty, brutality, brutalization, ignorance, duty-free sleep and illegal inquiry, casual search, epidemiometric calling, unaccountable interrogation, collection of facts, sophisticated enquiry, unequal civil rights strategies, etc. As a consequence, the policing department will not operate efficiently. People say that unless the statute is applied, regulation is broken. These infringements are classified as modern criminology as an compliance activity.

1.2: CONCEPT, NATURE OF ENFORCEMENT CRIMES (a)

Applying the law and applying it can imply the same. However, law policy and compliance are completely different. In addition to breaches of the Panel Rules, there may be infringements of legal, financial, economic, psychological, moral and other laws when performing law crimes. Law enforcement agents confess to breaching rules, but have different definitions and justifications for their often criminal actions. In so many cases of civil breaches perpetrated by authorities, the courts still are compelled to interfere. The High Court of D.K. Basu's629 instructed police that when they are brought into custody / arrest, guardianship / detention will be provided for citizens. Once the defendant is put before the Jury, the Magistrate shall test it. There are a range of requirements incorporated in the Code of Criminal Procedure of 1973 to guarantee detinue-justice and the Courts test that criminals, prisoners, inmates are handled in compliance with the law and the protocol set down by statute. The technique shows that there could be breaches of the rule in police departments or in the public detention of witnesses, prisoners or captives. The Indian legislation therefore states that compliance violations occur.
Human Rights Commissions shall award substantial redress to the perpetrators of police and other state authorities' misuse of power / authority. What are they saying? They inform the government. They prove us. It is a strong indicator that police and other policing and monitoring entities conduct compliance violations during the detective process.

Two elements of police service are effective internally and organizationally. Crimes in justice will also guarantee specific police performance. The officer may be defined as effective, knowledgeable, competent, excellent, etc. and the police and the public are respected by several officers / men. People might expect these law enforcement officers to fulfill their expectations, as in their situations they just want results, but in short order, they also will also condemn government authorities who uphold the law by breaking the law or committing crimes. Experience and practice demonstrates that law enforcement will not guarantee corporate success by abuses. Rather, the representations of the agency, and the people who constitute the organisations, as they conduct law enforcement offences, are stereotyped poorly.

(b) Extent and Intensity

Police authorities usually say that forensic inquiries are a prerequisite for prosecution by Indian courts. This is also correct, though, that individuals have a right to be free from unfair searches and assaults in their individuals, homes, documents and properties. Nonetheless, citizens are hunted for the safety of the family members in their homes during the old hours of the night. When that is achieved, the infringement of power is certainly a breach of the rule and in this sense a denial of civil rights. Therefore in D.K. The Supreme Court of Basu's case issued clear instructions on the detention and questioning of offenders. A variety of felony prosecutions may still be convicted as some type of drug law violations have been found. In the case of Nadini Satpathy, "A police officer will not demand that a female be brought into the Police Station because it breaches Section 160(1). There is no question that police officers in certain cases send people to police stations, and the people go to police stations in terror of the repercussions. That is a breach of legislation because it itself represents an execution offense that is responsible for the felony they perpetrate.

In another scenario, the findings in the forensic document and the post-mortem report do not indicate that the conduct of law violations is specifically caused. In situations where court trials are conducted, the legal attorney takes care of these loop holes. In a trial, the Supreme Court found that law department misconduct have been a justification to doubt the veracity of the police records. The explanation is clear: whether the police report appears dubious or untrustworthy whether it was intentionally deceptive or fraudulent, it lacks its validity.

CHAPTER 2: ABUSE OF CUSTODIAL CRIMES

Even today's sophisticated and streamlined police stations, guardianship offences are typical occurrences. They are also under standard and authority control. They are usually performed in the context of unjustified abuse and barbaric interrogation procedures, which specifically breach the fundamental human rights of the suspects being held. Even such forms of abuse and
assault are cruel and barbaric. It is so serious that the convicted can die or disable the charged to such an degree that an irremediable body and soul damage is incurred. They are also going to conduct the horrific abuse against innocent women and girls under their care on certain instances. The role and reliability of the law enforcement departments as far as their existence and their responsibilities under the Act are concerned are both undermined by these harsh activities. Since such criminal activities put a prohibition at the frontline of law and order protection in a community regulated by the basic precept of the 'rule of law.' Nevertheless, to grasp the deep-rooted question of prison violations alluded to above, it must be addressed further.

2.1: Custodial Torture

The term "torture" has since become associated with the dark side of Human Culture, a problem for medical law and other careers. Torture is so deep a wound in your psyche that you can almost reach it often, but it is still so immaterial that it can be not healed. "Torture." Torture. Is agony, pain is misery and terror, rage and hate, a urge to murder and ruin you. Hard like stone, paralyzing the rest and deep like the abyss.

The deprivation of civil freedom is oppression itself and a regression at the heart of human rights practice. The meaning is "The intentional, systemic or malicious imposition of physically or mentally distress of one or more individuals acting individually or on the order of some agency to compel others to render confessional or otherwise known.

2.2: Custodial deaths

In recent years, national media and the legislature have brought attention to custodian violations which involve deaths in detention. However though this event has been treated seriously by the Human Rights Commission, fatalities in police custody can arise in a variety of ways that may include:

(i) “Death in police custody of persons remanded to police custody by court.”
(ii) “Death in police custody of persons not remanded to police custody by court
(iii) “Death in police custody at the time of production/proceeding in Court/journey connected with investigation.”
(iv) “Death in police custody during Hospitalization/Treatment.”
(v) “Death in police custody due to accidents.”
(vi) “Death in police custody in mob attack/riot.”
(vii) “Death in police custody by other criminals”
“Death in police custody while escaping from custody”

2.3: Custodial Rapes

Like in many countries around the world, rape in India is extremely popular. There is scarcely a day without news of a case of abuse in the journals. People from low castes and tribal people are targeted specifically at this challenge to human society. In India, the lack of severity with which the offence is sometimes handled and of the negative care that is sometimes given to the accused perpetrators of rape
by lawyers in their own societies is especially troubling. The reality that violation regulations and so limited meanings are insufficient is exacerbating this issue. Bhanwari Devi, a backward caste kid, was reportedly acknowledged as Gang Rapper in the infamous Rayasthan case involving the viol of 43 years of age, for her caste and middle old age. Bhanwari Devi was a social worker of volunteer people in Rajasthan's Bhatri district. She alleged in her allegations that, as part of her job in the State which funded Rajasthan's women's construction project, she was Gang Raped on 22 September 1992 by representatives of the wealthy, high-caste community she had arranged to disclose to arrange a child marriage. It demonstrates the issues of abused women and provides an overview into the status of women in India. The District & Session Court in Jaipur dismissed her lawsuit, acquitting all five of her suspects after shifting of the lawsuit from the local policeman to the State Criminal Investigation agency under stress from a women's party, to the Central Bureau of Investigation (C.B.I). The judgment stressed that the First Knowledge Report (F.I.R,) had not been sent promptly and that it did not warn anybody else of the experience in the area.

2.4: Other Custodial Crimes

Many types of guardianship abuse conducted by public officials are reserved for violent offences performed in arrest during the questioning of the victim or during the prosecution of the suspected offense.

(i) Illegal and Inhuman Handcuffing

India already has one of the world's most radical human regimes for handcuffing. The only exception is the usage of restraints, not the law. Sadly, there has been considerable lobbying from the government lately to make the legislation compulsory. On 10 July 2002 a workshop on "Use of rational approach by the Handcuffing" was arranged by the Police Research and Development Agency, in conjunction with the Institute of Social Sciences. The workshop was participated mainly by policemen from all over India and presented the attendees with an opportunity to explore handcuffing protocols. Most of them called for legislative changes to make handcuffing compulsory.

(ii) Deprivation from adequate fooding and other Human amenities

The term "custody" is liable for taking care of the person or properties under custody. That obligation is enhanced if police officers or some other professional enforcement body places a suspect in arrest that limits the rights of another suspect. No matter what, a person could lawfully have been detention by the authorities, but the fundamental requirements for maintaining a individual's safety can not be diminished in either situation. Throughout the Indian case, moreover, the Police or other civil sector employees engaged with police departments and crime reduction become very inhumane while they are kept in jail on suspicion of committing crime. The people associated with any offense will not provide sufficient food and necessary human services, and are a custodial offense themselves. A Public Officials' such harsh conduct shows a very grim and shameful picture to those accountable for professional police departments.
CHAPTER 3: MEANING OF HUMAN RIGHTS

The concept of justice requires human rights. Equity is wealth. Justice is a fair treatment of an individual. When fairness remains, the statute is enforced. Justice is crucial for humanity. Refusing justice means refusing human rights. The integrity and privileges of individuals is maintained by human rights. Human rights ensure that every citizen will be upheld in a decent life. This requires compassion, grace, nature and a rational relation. This requires the integrated rehabilitation of individuals and the environment, in order to sustain every citizen with integrity. Human rights seem to be the rights that all individuals have under human circumstances. It is commonly known as "Fundamental Rights" or "Human Rights." Human rights are essential in the context that they will not be revoked under any conditions and are therefore not liable to the States or govt's granting or approval, nor should they be removed by officials. Human rights are not just freedoms but values focused on mankind's expectations in terms of equality, fairness, justice, liberty and security. That member of human civilization should therefore be regarded independently from bias against class, belief, ethnicity, sex ideology, ethnicity or another rank. Human rights are inevitable because they've become active from their conception owing to their very nature.

For every person, such privileges are important since they are synonymous with rights and liberties and lead to biological, ethical, civil and religious well-being.

Due to differences in traditions, judicial systems, ideologies and monetary, social and political circumstances of individual states, the human rights term is hard to define. Nevertheless, the concept of civil rights could be said to connect us to the concept of human integrity. Therefore, human rights can be considered all those freedoms that are important to the protection of inherent dignity. D.D Basu describes human rights as the fundamental rights of all people, regardless of any other interest, towards the States or any other public body as a representative of the human family. Immunities protections are an assurance that some actions can not or should not against such a particular individual would be assured. Under this definition, human beings should be shielded from cruel or inhumane conditions by way of their dignity. Human rights are, in other words, exceptions from the coercive control process. A person could only sought human rights in a structured society, i.e. the country, or in other phrases where there is a civil society structure. Nobody can foresee invoking them in such a condition of disorder, where a individual could hardly argue against deprivation of freedoms. The theory of human rights security is thus drawn from either the definition of the individual and his contribution to an ordered society that can not be isolated from either the common human existence.

Subhash C. Kashyap's words: "The fundamental norm governing the concept of human rights is that of the respect for human personality and its absolute worth. Human rights may be said to be those fundamental rights to which every man or woman inhabiting any part of the world should be deemed entitled merely by virtue of having been born a human being."
Youcef Bouandel claimed that almost all universities assume that the word "human rights" usually means a title for rights of man in the 20th century.

What are human rights? This has been the most contentious issue throughout the human rights discussion. Contract between scientists on human rights is still to be achieved. The developmental cycle ends in human rights. The initial list of human rights has been augmented by different ideologies and conditions. There will be, in general, three human rights classifications. Firstly, social and democratic freedom, the so-called 'first century' by most academics. Originally these freedoms are rooted in liberal practices and are known as "the original set of human rights." The second concern includes financial, cultural and social equality recognized as the 'second human rights wave.' First of all Marx and his supporters have stressed these freedoms. Thirdly, only after the rise of Third World / Developing Countries, a new organization of freedoms dubbed the "third wave of human rights" began pretending to be part of human rights. We will now concentrate on the issues during the first two groups of freedoms only. It is a topic that has caused some debate if human rights must include all ages of freedoms or only the initial. Some philosophers on human rights such as Maurice Cranston and R. S. Downie claimed that individual rights shouldn't include financial and health benefits and social rights but must be restricted to civil and political rights. Cranston claims that human rights are impossible for the second generation, and that their incorporation is an obstacle to the security of typical human privileges. He has carried out three trials that assess the validity of civil rights. Such parameters are: possible, necessary and basic. First of all, he claims that social and economic freedoms are not possible as they need services that go beyond the capacity of governments. On the other side, he claims that the conventional rights to life and freedom also require government protection and are therefore feasible. Additionally, he insists that the freedoms to life and freedom alone are essential. Third, he asserts the universality of human rights. The rights to privacy and freedom of the first century can be uniformly secured, but the cultural-economic rights vary from the worker's rights to community because they rely on enough resources.13The liberal thinking group primarily assumes that social and economic rights need a lasting benefit of the state contributing to more government actions and an eventual violation of right. Thanks to the above reality, human rights of the second generation are not protected. Human rights are crucial for the entire development of the individual's experience in culture, must be preserved and made accessible to all persons. Maybe the most critical problem to man daily is not that everybody should recognize the different "democracy" which we have, as we are "all immaculately conceived to seek the same freedom and freedoms".

DIFFERENT APPROACHES TO HUMAN RIGHTS

David claims that fundamentally problematic are theoretical strategies towards human rights. There are findings in human rights legislation on certain criteria. Criticisms are given by human rights methods. He suggested that human rights legislation and exercise must be assessed by real risks, not by optimal
norms. The foregoing are the different methods to human rights:

**Natural Law Theory**

The hypothesis of natural law is based on Sophocles & Aristoteles, although the Stoics of the Hellenic Greek era and the subsequent Roman era have been explained initially. They claimed that divine laws encompassed certain basic concepts of righteousness which are the true, moral, unchangeable, and everlasting purpose. Christian religious thinkers, including Thomas Aquinas, also imposed a great emphasis on the natural law by giving men some unchanging privileges in the rule of God. But the medieval principles, which accepted bondage and servitude, had essential restrictions, thereby removing core ideals of liberty and justice. During a collapse in serfdom, median liberal teleological hypotheses emerged, especially as Hugo Grotius and Samuel von Pufendorf had articulated. Grotius described law of nature as 'dictate of right reason;' meaning that an activist's reliability of moral imperative or moral lowliness was or was not in compliance with the reasonable existence. Grotius was also a founder of current international law, it must be remembered. Clearly, this principle has enormous relevance as part of an international legal system for the protection and recognition of human rights. The philosophy of law of nature contributed to doctrine of natural rights, the concept of mobile human rights very closely linked. John Locke was the primary proponent of the philosophy. In a capitalist market, Locke conceived the future of human beings. In that country, sexes were in a condition of liberty, able to know their acts and justice in the context that none of them were susceptible to someone else's will or power. The principle of natural rights contributes significantly to human rights. It calls on a greater obligation to protect human rights from either the complexities of the bare authority. This deals with the liberty and equality that other human rights emerge freely from but it offers protection resources and help for a system of economic rights at home and abroad.

**Rights Based on Natural Rights Theory**

In varying forms the modern's central ideas on human rights seem to describe principles which apply to basic needs, that is to say requirement to determine a minimum of what it means to be human in any form of governance that is morally permissible. This finds human life to include other rights, values that would be worthless without the label "alien." Mankind has a linguistic position in order to use a symbolic analogy that includes some basic human rights. Clearly, many of the modern collectivist ideas has a certain level of respect. It can be seen that, if we take such human rights (liberty of expression, equality) as criteria, another kind of society can be created, and, if one thinks this type of society ideal, it must be accepted and called absolute values. The revival of eligible and modified natural rights and fundamental principles has played a decisive role in global standards for human rights. The Universal Declaration on Human Rights itself illustrates this impact, and starts with the principle ‘ whilst appreciation of the inherent dignity and equitable and inalienable rights of all people is the cornerstone for liberty, fairness and world peace.”

**Rights Based on Justice Theory**
A principle of Law. i4's Justice was the first quality in social structures; said Rawls. The concept of modern ethics is profound. Principle of Justice. The role of justice is therefore key to understanding civil rights, as human rights are, of course, the beginning of equality. By acknowledging Rawls' study, no human rights philosophy of domestic or international digital culture can currently be developed, and this hypothesis is more addressed here than any other current concept. According to Rawls, the principles of freedom include a way to allocate rights and obligations in fundamental social organizations. The premise of Rawls is that every citizen has a justice established inviolability who cannot even be overestimated by social welfare.

Origin of Human Rights

The idea of human equality is as ancient as human culture. In certain ways or in other "political" document the issue of human rights was implicit. The privileges and responsibilities of their leaders have been established by all cultures and societies. The concept of religion does not come solely from the West. It is a sublimation of ideals which are humanity's shared history. As when the Universal Declaration of Human Rights found out by Mary Ann Glendon, never suddenly fell down from the sky on plates but was rather a landmark on the path that mankind took in nations only.' The human rights vocabulary is in reality a result of European illumination. But the human rights ideas are as ancient as the Indian culture as the Indians say. From the very young days of the Vedic age, political thinkers and scholars have raised concerns regarding the protection of human rights or rights for all humans. India's philosophers find that the fact that the notion of human rights is based solely on western civilization, as the Western has today discovered on human rights, is not justified since it is an agreed concept of India's rich historical heritage of heritage and culture which is evident in the Vedas statements.

The "Rigveda," considered the earliest letter, states that all that everyone is the same and all siblings. In the numerous discourses in the ancient Vedic and the post Vedic Indian times the "Atharvaveda" promotes the equality of all people on resources, such as air and water and food, such as the right of the intellectual to health, schooling, the right to worship, welfare and the right to fair care and safety, etc. Nobody is higher or inferior, all are sisters," says the Rigveda, Mandala-5, Suktan-60, Mantra-5. "All should take out the needs of everyone and go forward together." Manu defines the King's Raj Dharoma as "As the Mother nature offers all living creatures equal support, so should the King give without prejudice" (Manuix-31). Manu orders the king more, "The king's greatest job is to protect his own people; the king who collects the taxes ordered by him (from subjects of his), who preserves himself by himself, behaves as per Dharma." Kautilya springs up wonderfully the concept of the welfare system. He rejected the King's theory of relativism and subject him to law and duty. In addition to claiming and establishing Manu's first constitutional and rights, Arthashastra has introduced many economic rights. He conclusively declared that the Lord shall give care to the Orphan, the Elderly, the Disabled, the Stricken, and the Helper, and shall provide food to the needy waiting mothers as well as to the kids to whom they bear in their conception. The compassionate sentiments are also evident
in Buddhism. His values teach all things compassion. Non-violence, unhated and kindness are the fundamental principles of Buddhism. Because of its injustice, Buddha opposed the caste system and regarded certain men as intellectually superior solely because of their birth. The creation and propagation of quality education for all would be another of Buddhism's most important contributions.

CHAPTER 4: INFRINGEMENT OF HUMAN RIGHTS

Whenever and wherever the administration / state or other law enforcement authority is committing a human rights violation as a consequence of the guaranteed rights by international humanitarian law, regional rule or state jurisprudence, the violation of human rights that occur directly by the State, or by any State that does not practice due diligence in protecting its people from the violation of human rights; The State shall be responsible for any misconduct or omission in view of any abuses of human rights. If the police refuse to obey the appropriate protocol in the finding of the suspect and to jail a fraud, that is a breach of human rights and so the human rights inspector must make sure that the police and the courts uphold the law, maintain complete judicial discretion by punishment, whether politically or economically strong, of the people implicated in this offence.

The standard of the culture of State can be assessed primarily by the strategies it uses in criminal law compliance. The police must be vigilant and autonomous of the Executive Branch, even though it is part of a government agency for the purpose of fulfilling the task of protecting people. Police with an excess of victorious forces must be practiced without fear and independently of the state, purely for the defense of the citizens' lives and rights, but not as an agent of the citizens' transgression. The Supreme Court then ruled that in cases within its only jurisdiction they should not intervene with the police. In a recent judgment, the Supreme Court upheld its earlier stance though disregarding the tradition of other high courts where they intervene with the prosecution and while the inquiry was under way they called for the development of the trial diaries. But the true issue is not here: rather, the police have been commonly assumed to use fast and unethical forms to conduct their duties, a prominent scholar has claimed in accordance with this that the origins of police inconsistency are profoundly rooted and multi-dimensional. It comes from vague legislation, susceptibility to legal sacredness and a need to achieve swift performance, as is seen in many countries of the world. The people trust the police to take laws into their hands in places like India.

4.1: Meaning and Principles of Human Rights

Meaning:- Human rights are the freedoms which any individual being has the freedom and privilege to live. The fundamental principle of such freedoms, which are important for human integrity, is that the care of people, women and children is uniformly valued. In all cultures and communities these freedoms occur in any way. The people of countries across the world is constitutionally accorded civil rights. They apply in particular to good
life, health care and homelessness, freedom of speech, educational rights and several other freedoms. The Fundamental Declaration on Human Rights ratified by the United Nations on 10 December 1948 is the current legal statement on these freedoms. In addition to human and civil rights and equality for the people of the nation, the Declaration declares physical, social and cultural freedoms. The cornerstone of democracy, equality and fairness are called such freedoms. For developed countries like India, the UN added in 1986 a special right of significance:

Basic Principles:
(I) In freedom and in freedoms all humans are born free and fair. We have purpose and faith, so will behave in the sense of fraternity against one another.

(II) All shall have access, irrespective of color, colour, sex, gender, ethnicity, political or other viewpoint, national or social history, to all the privileges and liberties set out in this Declaration.

(III) Everyone have the right to life, equality and health.

(IV) Slavery or serfdom shall not be kept by any; in all its manifestations slavery or slave trading shall be forbidden.

(V) The care or discipline of no person shall be oppressive or barbaric, inhuman or degrading. (VI) All are entitled to be treated as a citizen before the law in the nation.

(VII) They are both citizens before the law and have the right to fair treatment under the law beyond prejudice. In breach of this law, all are entitled to equitable defense against prejudice as well as against inciting hatred.

4.2: Instances of Human Rights Violation by Enforcement Agencies
Even after more than five years of Independence, news of police excesses can be seen in daily newspapers in a nation which is proud to be the biggest democracy and have the only written constitution between all the societies of the world and has the particular, clear paragraphs on the fun in its constitution The residents of Punjab tend to be brutalized by the authorities. The Punjab Police were provided unnecessarily by the government to establish a rule for itself. In the once stable and successful State the constant proliferation of security services in Punjab tears down its foundation.

Most civil rights leaders and protesters paved the road to democratic freedom or charged with their life. In addition, while Punjab has a total murder rate of 15,000 between 1984 and 1996 according to official estimates, the number of people murdered by the Punjab Police increased to 25,000 according to different public servants and human rights groups. That covers individuals involved in "encounters," cremated as "unidentified" and "escape custody by the police." It haunts every Punjabi's minds and is regarded as the sordidest period of the Punjab state's past.

Human Rights Violations of Prisoners
If he is brought into jail or placed into detention, a inmate will not forfeit all his
rights. He will not suffer abuse, unilateral imprisonment or any such injustice simply because of the restriction of his free movement. Moreover, 8 out of 10 trials in Bhagalpur Central Jail in Bihar lost their eyes in a major human rights abuse accident. The Court ordered the Registrar and other authorities to go to jail to clarify the details with the blind and other inmates.

Data is obtained from the Regional Crime Database System in terms of the amount of reports, enquiries and lawsuits reported in 1996 to 2000 against police officers. The Office recorded that 68160 allegations were issued in 2000 against police staff in all Indian countries in 13734 incidents, 236 incidents were prosecuted by the Magistrate and 452 cases by judicial inquiries. However, it is quite shocking that 4,2608 incidents, or 62.5 per cent of the allegations recorded, either weren't validated or not proven valid. This appears to be a totally unpersuasive method.

CHAPTER 5: CONCLUSION

Our law allows the director the sole judge to determine if there is an incident and allows the manager the sole accountable. Immediate calls for emergency measures, and the government has to be prepared with appropriate resources to cope with the situation. Around the same period, though, these enormous forces can be exploited and such violence must be controlled as far as it can be avoided.

The key focus will not be disciplined after a long court process, but will be at the core of the violence. Prevention can be regulated where undue force is exerted. Apart from laws which give authority, certain stringent requirements ought to be implemented in an irregular manner by the government.

Then the residual intervention, which is either statutory or judicial, is regulatory activity. The diagnosis of a single condition is concerned and is generalization clear. This does not include methodological criteria to gather facts and assess claims. It is founded on individual gratification while strategy and expediency are the foundation of decision taking. It does not select a rule, even though it does influence a right. It does not say, though, that while the government has "administrative powers" the standards of procedural fairness may be totally neglected. If the law does not allow for anything more, it must also uphold a minimum of natural justice in compliance with the relevant condition of each case.

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INSOLVENCY AND BANKRUPTCY CODE: AN ANALYSIS OF ITS SHORT LIVED TIME

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Abstract
The Insolvency and Bankruptcy Code, 2016 was brought forward by the Government of India to hasten the process of insolvency resolution in India which in past took about an average of 4.3 years. This act was also implemented to deal with the massive amount of cases of non-performing loans of bank. Recently the Indian Government has decided that the act should be suspended till the next year. This research might not be the Alpha to Omega of the Insolvency and Bankruptcy Code, but it will attempt to answer the following prominent questions- How this Code came into force? What is the structure and framework of the code? What are the responsibilities of the various parties involved? What were the various landmark judgments under the Act? Is there a future for this Code in the Indian Legal fraternity after the Covid-19 Pandemic? This paper shall also discuss the important amendments made to the act throughout the years.

Keywords: Insolvency, Judgments, Bankruptcy, Amendments, Pandemic.

Introduction
Now if you ask someone who went bankrupt that how happened it is most probable he will tell you that “at first it started happening slowly and then suddenly I was in a position from where there was no way out for me other than declaring bankruptcy”\(^\text{1167}\). The insolvency reforms in India also took place in the same style as even after years of discussion and debating over the topic the Insolvency and Bankruptcy Code was not passed but it seemed so sudden when on 5\(^{th}\) May the bill for the same was passed and on 5\(^{th}\) August, 2016 the Insolvency and Bankruptcy Code came into force. The fight for bringing a consolidated code for all insolvency and bankruptcy related laws was a prolonged one, but in the end the battle for it was won on 28\(^{th}\) May, 2016 when the President of India gave his assent to pass the bill.

The Insolvency and Bankruptcy Code came into force at a time when the Government of India was trying to bring in a reform of “Ease of Doing Business in India”, now this reform was just not all about bringing reform which will focus on making life of entrepreneurs and their businesses workings easy, but also to provide a seemingly efficient exit strategy if their business goes under.\(^\text{1168}\) The agenda was on the backburner for over 50 years, considering that the 26th Law Commission in 1964 had recommended rewriting of insolvency laws, this wait for arrival of this code makes it even more landmark and huge for the Indian economy. The Code has been amended from time to time since its authorization to expel bottlenecks and to smooth out the Corporate Insolvency Resolution Process (“CIRP”) under the Code. Various landmark judgments have also been passed

\(^{1167}\) Insolvency and Bankruptcy Code a Miscellany of Perspectives, Insolvency and Bankruptcy Board of India (Nov.10, 2019) - https://ibbi.gov.in/uploads/publication/2019-10-11-

by the National Company Law Tribunal in the life span of the code.

Brief Background
Before the formation of the IBC, 2016 the individual insolvency issues were administered through Presidency Towns Insolvency Act, 1909 (for residents of Kolkata, Chennai and Mumbai) and Provincial Insolvency Act, 1920 (for other residents) whereas, for the Corporate and Firm insolvency regulation, the acts such as Indian Partnership Act, 1932, Companies Act, 1956, Sick Industrial Companies Act, 1985 etc. were applied.

Since these laws are almost a century old, they suffered from many loopholes, contradictory provisions and mainly none of them stated the fixed or specified time duration for the resolution process, due to which insolvency resolution process in India takes about 4.3 years on average. Compared with UK’s (1 year) and USA’s (1.5 years), India’s numbers were really bad which in turn had made it more cumbersome and inefficient for the investors doing business and also hampered the confidence of lenders over time, therefore a more consolidated regulatory framework needs to be established.

As in the present day scenario where the market activities are operating on a fast pace, the regulations for the same are also in vital need to be fast and advanced as compared to the previous century. In order to overcome the laggy process, strengthen the framework and to address the shortcomings in the existing insolvency laws, the Insolvency and Bankruptcy Code, 2015 was introduced in Lok Sabha in December 2015. It got passed by both Lok Sabha and Rajya Sabha on 5 and 11 May, 2016 respectively and got the President’s assent on 28 May, 2016. The Insolvency and Bankruptcy Code, 2016 was formed repealing SICA (Sick Industrial Companies Act) which failed to provide the required results.

The code is designed in such a way that it fulfills almost every loophole and lacking provisions which were there in the previous laws. It also provides for an effective resolution process in a time bound manner and aims to protect small investor’s interest by making the process of doing business efficient and less complex.

The significant features of the code are:
• Comprehensive in nature – The code regulated the process of insolvency and bankruptcy of all persons including corporate, partnership and individuals as well.
• Time bound resolution – The code provides for a low time frame for the resolution and defines a fixed time for insolvency process of companies (180 + 90 days) and individuals (90 + 45 days)
• Single law – The code provides a singular platform for all the relief’s related to insolvency and recovery of debts making the process less cumbersome.
• Promotes entrepreneurial activity – With the help of its fast resolution process and revival mechanism the code promotes entrepreneurial activity in India.

The code was formed with a view to consolidate and foster the laws relating to

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the reorganizing and insolvency resolution in a time bound and an efficient manner so that it maximizes the value of assets of such persons, to promote entrepreneurial activities, availability of credit and to balance the interests of all stakeholders. It provides a better procedure for restructuring and reorganizing of a firm’s debt and also fastens the liquidation of a falling business and efficient recovery of creditor’s investment.

The new code comprises of the following components:

- IBBI – Insolvency and Bankruptcy Code of India – the board shall act as a regulator
- IP’s – Insolvency Professionals the insolvency process will be managed by these licensed professionals to provide a more masterful functioning of the act.
- Adjudicating Authority – for the insolvency resolution process of companies; National Company law Tribunal (NCLT) and of Individuals; Debt Recovery Tribunal (DRT) were established.

Unexpected Turn of Events
A virus named corona outbreaks in Wuhan, China affecting wellbeing of many people and economies worldwide. Along with health hazards, the economies across the globe got hit badly and got affected in such a way that it got pushed into recession, wherein the prospectus growth of respective economies of countries stopped. Due to losses and recession in the business various industries and companies got affected so bad that some even came on the verge of insolvency and total bankruptcy. According to an analysis by IMF (International Monetary Fund), the global economy is expected to shrink by over 3% in 2020 as most businesses have shut down and manufacturing output in most of the countries have drastically gone down causing a recession in the global economy\textsuperscript{1170}.

The situation for India is also very grim, as the businesses are drowning in losses and incurring heavy debts, due which the corporates and firms are moving towards a state of insolvency and bankruptcy. Keeping the condition of these business doers and corporate borrowers in mind the government took a decision to provide relief to them by amending the insolvency law by suspending up to one year provisions that initiate insolvency proceedings against such persons and defaulters along with increased threshold for insolvency under IBC from Rs.1 lakh to Rs.1 crore and to prevent initiation of insolvency proceedings against MSMEs under the government’s ‘Atma Nirbhar Bharat’ scheme\textsuperscript{1171}. This step by government proves to be a blessing for the business doers as it will facilitate them in reviving work for their respective companies. It will also encourage them in getting past through these difficult times with the support provided by the government.

Finance Minister Nirmala Sitharaman, in her statement says that if the situation of the

\textsuperscript{1170} Explained Desk, Explained: How Covid-19 has affected the global economy, The Indian Express, (may 16, 2020) - https://indianexpress.com/article/explained/explained-how-has-covid-19-affected-the-global-economy-6410494/

current pandemic continued beyond April 30, then the ministry would be suspending section 7, 9 and 10 of the Insolvency and Bankruptcy Code (IBC) for duration of six months in order to prevent the forced insolvency proceedings against the companies. Wherein section 7, 9 deals with the initiation of corporate insolvency proceedings by a financial and an operational creditor respectively, and section 10 relates to filing of an application for insolvency resolution by a corporate. The decision amidst the coronavirus pandemic would provide a major relief and prove to be a boon for many fatally impacted businesses and economic activities in the country and would provide a more convenient way for the corporate borrowers in repayment and restructuring their loans too.

II. Landmark Case Laws
The life span of The Insolvency and Bankruptcy Code might have been a short one but even in its bite sized life span, The Supreme Court of India and National Companies Law Appellate Tribunal gave some landmark judgments which helped the act to grow further. Some of these judgments will be discussed below:

1. **Innoventive Industries Ltd. (Corporate Debtor) Vs. ICICI Bank & Another (2017) (SC):**
   In this case the Supreme Court came up with various directions which further aged the Insolvency and Bankruptcy Code, 2016. One of which was that once the proceedings for insolvency against a company is initiated and an insolvency professional is responsible for managing the company then the board of directors have no power to initiate an appeal on behalf of the company. Secondly the Supreme Court quoting section 238 of the act was austere in directing that Insolvency and Bankruptcy Code is a parliamentary act and hence it has overriding powers over any other law made by the state as the matters under insolvency come under the purview of Central Government. Lastly Supreme Court of India through various remarks made during the proceedings emphasized that the time is of essence in the cases related to insolvency, hence time period of the proceedings cannot be extended so that valuation of certain assets will go up later.

2. **Surendra Trading Company Vs. Juggilal Kamlapat Jute Mills Company Ltd. & Others, 2017(SC):**
   In this case the Supreme Court decided that the condition of time limit prescribed under IBC, 2016 under section 9(5) and its proviso is only directly and not mandatory. Which lead to show that the Adjudicating Authority can reject an application without giving prior notice to the appellant of 7 days to make rectifications in the plaint. This further cemented the powers of the adjudication body.

3. **Brilliant alloys private limited vs Mr. S. Rajagopal & Others, 2018(SC):**
   There was an amendment made to the IBC with effect from 06.06.2018 which
introduced section 12A to the act which lets the cooperate debtor to settle the dispute with the creditors outside the IBC procedure. This section allows the adjudicating body to wave off the case against the corporate debtor if 90% of the appellants are satisfied with the new arrangement offered by the corporate debtor to clear his debts. Now section 12A of the Insolvency Bankruptcy Code, 2016 is to be read with regulation 30A of the CIRP which states that to dissolve a proceeding against a corporate debtor the appellants must give such withdrawal in writing to the IRP or RP at the time. Now In this judgment the Supreme Court gave judgment that regulation 30A is only directory and not mandatory. Regulations are to be read with the main section and the main section does not contain any such stipulation.

IV. Transmission Corporation of Andhra Pradesh Limited Vs. Equipment Conductors and Cables Limited, 2018(SC);

In this case the judgment given by NCLAT was rescinded by the Supreme Court directing that IBC cannot be brought forward where there is an actual dispute going on already. The judgment viably guarantees that the insolvency procedure, especially corresponding to operational creditors, can't be utilized to sidestep the other adjudicatory and requirement systems under different statutes. It likewise has an impact that the operational creditors having a case of an altogether lesser sum don't rashly place the corporate account holders into the resolution process.

V. Black Pearl Hotels Pvt. Ltd. v. Planet M. Retail Ltd, 2017(SC);

In this case the Supreme Court decided that the duty of assurance of an instrument or, to elucidate, to decide when there is a challenge a specific document to be of explicit nature, the adjudication must be finished by the judge in the wake of hearing the advice of the parties involved. It is a piece of legal capacity and henceforth, the same duties cannot be delegated.

Conclusion

The early days of The Insolvency and Bankruptcy Code, 2016 can be perfectly summarized in these 5 words which are “glass half empty half full”. IBC was still at a stage of infancy when it was called off earlier this year due to the unexpected events caused by COVID-19 throughout the world, which meant that the codified law was unable to achieve its full potential. With the law growing each day by various progressive interpretations given by the IBBI, (May 8, 2019). https://www.ibbi.gov.in/webadmin/pdf/whatsnew/2019/May/CIRP%20Discussion%20Paper%20revised%201_2019-05-08%2019:10:29.pdf

By Guest, Supreme Court on Insolvency Resolution by Operational Creditors, IndiaCorpLaw, (Nov. 13, 2018) - https://indiacorplaw.in/2018/11/supreme-court-insolvency-resolution-operational-creditors.html#text=The%20Transmission%20Corporation%20of%20Andhra,Equipment%20Conductors%20%20Cables%20Limited.%20%20was%20held%20that%20the%20%20to%20the%20%20Equipment%20%20Conductors.


1175 Discussion Paper on Corporate Insolvency Resolution Process along with Draft Regulations,
Judiciary in the past on this subject, in future IBC was on the course of becoming a highly dynamic and progressive law for debt resolution in India.

Now the glass was half-empty regarding IBC according to many jurists was because of the shortcomings the code had in its early years and still had, on this Late Mr. Arun Jaitley said in 2019 “that the act is doing exponential and needs time to become the mammoth everyone expects it to become for India”.

Now the progress of this act has been halted by coming of this Global Pandemic as the Central Government of India had to suspend the functioning of this act because of the humungous number of cases being filed on account of insolvency because people were unable to pay their debts simply due to the nonfunctioning of factories and companies during the lockdown period in India.

It would be amazing to see IBC making a comeback in the coming years after the spread of this virus is controlled by the Indian Government, but it is safe to say that this code is going to be kept in a safe closet somewhere in the Finance Ministry’s office until the situation outside improves.

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This paper primarily focuses on the provisions of Review, Reference, Revision and Execution. ‘Review’ being a formal assessment of something with the intention of the act of looking or to offer something again with a view to correction or change if necessary. With judicial point of view review means re-examination and reconsideration.

Being ‘Reference’ is covered under section 113 of the CPC which states that when the subordinate court in order to take assistance refers the case to the High Court, it is called as the reference. ensuring the validity of a legal provision and to interpret them. And includes ‘Revision’ is ‘to revise’ which means to look again or to go through a matter carefully and correct wherever necessary. The main aim of revision is to prevent the subordinate court form doing any arbitrary activity or irregularity or illegal use of jurisdiction. It powers the High Court to watch proceedings of a subordinate court as law relevant over their jurisdiction. And allows the HC to correct the jurisdictional errors done by the subordinate court. i.e. the HC has visitorial power for superintending.

Followed by ‘Execution’ providing the mode through which a decree holder obstructs his judgment-debtor to perform the command given in the decree according to the case. It gives powers to the decree holder to recapture the products of the decree/order as per the Order 21 of the Code. Here, well discuss all the relevant understandings of the above-mentioned terms.

INTRODUCTION

This paper primarily focuses on the provisions of Review, Reference, Revision and Execution. The first part deals with the Review. The dictionary meaning of the word ‘Review’ is a formal assessment of something with the intention of the act of looking or to offer something again with a view to correction or change if necessary. With judicial point of view review means re-examination and reconsideration. The right to Review as per CPC is given as a remedy to be solved for some specific conditions. The aim of review is to correct any sort of mistake or error in the court’s decision. The limitation and conditions of review is specified in Or. 47 of CPC. Review under section 114 of civil procedure code is the substantive rights/powers for review by the court which is mentioned in this section.

The second part deals with the ‘Reference’. It is covered under Section 113 of the CPC which states that when the subordinate court in order to take assistance refers the case to the High Court, it is called as the reference. The main aim of reference is enabling the subordinate court to get/obtain opinion from the High Court in non-appealable cases if there is absence of question of law and avoid the error commission which cannot to ratified further. It ensures the validity of a legal provision and to interpret them. Reference is always made to the High Court; hence it is required to be passed before passing of a judgement.
The third part deals with the Revision. The literal meaning of the word ‘Revision’ is ‘to revise’ which means to look again or to go through a matter carefully and correct wherever necessary. Revision is covered under Section 115 of this code. The main aim of revision is to prevent the subordinate court from doing any arbitrary activity or irregularity or illegal use of jurisdiction. It powers the High Court to watch proceedings of a subordinate court as law relevant over their jurisdiction. And allows the HC to correct the jurisdictional errors done by the subordinate court. i.e. the HC has visitorial power for superintending. Quarterly followed by ‘Execution’ providing the mode through which a decree-holder obstructs his judgment-debtor to perform the command given in the decree according to the case. It gives powers to the decree-holder to recapture the products of the decree/order as per the Order 21 of the Code.

**REVIEW AS PER THE CODE**

Review is defined under section 114 of this code. According to Section 114, Review is made by any person who is aggrieved from a courts order or decree as per this code where an appeal is allowed but the appeal has not been preferred or by an order or a decree from which one appeal can be made or through a decision on reference from a court of small cause and such person can apply for review in the same court which has passed the decree or made such order and as the court thinks fit make such orders. Basically, review is studying the case again or to examine it against the facts and judgement of such case. Review is a substantial power of the court. Review of an order once passed by the court is a serious step and it cannot be taken lightly, hence this power requires to be applied with great care and seriousness. The Latin term “Functus Officio” is an exception to this right to review judgement and is used in relation to the court which states that ‘once the court passed any judgement after the lawful hearing, then the case cannot reopen and the judgement is binding on the parties. So, on the application of an aggrieved party or person, the proceeding for review of judgement can be initiated here. The main object behind this provision or procedure of review has been embedded in the legal system to correct the mistakes and to prevent any miscarriage of justice as any human being can make a mistake or error and so do the judges which was held in the case of S. Nagraj vs. State of Karnataka.1177

**Grounds of Review**

There are certain grounds laid down under Rule 1 of Order 47 on which an application made for the review of a judgement is maintainable which are as follows:

- Any other sufficient grounds which is analogous to those specified in these rules. This ground for review is any sufficient reason and it could be any reason which the court feels sufficient to review its judgement in order to avoid a miscarriage of justice, then any sufficient ground considered for review by the court comes under this ground.

- Courts misconception and when the mistakes or errors are apparent on the face of records is also a sufficient ground of review of a judgement. Power of review is available only when there is an error apparent on the face of the record and not on the erroneous decision. An error apparent on the face of the record,
can’t be defined precisely and it has to be decided judicially on the facts of each case.

- When new and important evidence is discovered by the applicant and such applicant was not in knowledge or due to negligence not able to provide the evidence when the decree was passed.

There are certain rules on which application of review can be made. As Rule 2 of order 47, states to whom applications of review may be made. Where a decree is passed by a High Court Judge, the court decide the application for review of the judgment may be made to that Judge or to his successor-in-office, on any of the grounds on which review application can be made or where a decree is passed by a Judge other than a High Court Judge, the application for review may be made to the Judge, who delivered the judgment or to this successor-in-office provided the review is sought on the ground of discovery of new and important matter or evidence or mistake or error apparent on the face of the decree. Further Rule 3, states about form of applications for review and Rule 4, states about the applications where rejected. An application for review can get rejected when the court does not find any sufficient ground to entertain the review and an application for review can be granted, the court where thinks that the application for review should be granted, it shall grant the same. Rule 5 of order 47, states, the same judge who gave the previous decree or order is much ideal to review a judgement as he can examine it in a more effective and better way than any other. Except in cases when such judge is absent for 6 months or more form the filling of review application date. In case of review where there are two or more judges, the decision of majority is considered. Rule 6 consists of grounds when the application of review can be rejected which are specified in this rule. It says when the court finds that there is no discovery of new facts or any sort of error or any sufficient ground as per the Rule 1 or if it is filled after the prescribed period of time’s expiry and without a reasonable cause or if it is already reviewed, no further reviews can be made or if applicant doesn’t appear on the fixed date of review and doesn’t give a sufficient cause of his non-appearance. Rule 7 says, rejection of a review application’s order by a court is not appealable. Hence the party which files such application on rejection of if it can’t appeal for such rejection. But the accepted application is appealable. But in cases where application is rejected if applicant doesn’t appear on the fixed date of review, then applicant can apply for its restoration and court can accept it if sufficient grounds are given. The opposite party is required to be noticed with the review application status. Where Rule 8 says, when the application for review judgment is accepted by the court, the court proceeds to rehear the case. And the result of review will be bringing on both the parties. Further Rule 9 says, no reviews can be made over any judgement which was previously reviewed.

The Powers of Review
The power of review is to correct the mistake apparent on the face of record and does not mean error which has to be searched and fished out. The words “any other sufficient reason” mean a reason sufficient on ground which is analogous to those specified in the rules. The power to review judgement is not an inherent power, it must be conferred by law either specifically or by necessary implication. Section 114 and this Code expressly give a right of review in certain cases. The section of the Code is a substantive provision, and this order provides the details of procedure. Inherent power to review vests in Courts only. A Government or an Officer of the
Government has no inherent power to review its or his orders. The power of review under Order XLVII rule 1 of the Code of Civil Procedure 1908, is very limited and it may be exercised if there is a mistake or an error apparent on the face of the record. The power of review is not to be confused with the appellate power. The review application cannot be decided like a regular intra court appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all kinds of errors committed by the subordinate Court. Whereas, the power of review may be exercised on the discovery of new and important matter or evidence which the person seeking review could not know and which could not be produced before the order was made. It cannot be exercised on the ground that the decision was erroneous on merits. The power of review is to be exercised with extreme care, caution and circumspection only in exceptional cases.

**Jurisdiction of Review**

The jurisdiction of review court is limited to examining as to whether the order sought to be reviewed contains any apparent error within the meaning of O XLVII, rule 1 or not? If it contains, then the order has to be recalled but if the order does not contain any error then the court has to simply dismiss the review petition and in turn uphold the order. The limitation period for filing an application for review as given under Article 124 of the Limitation Act, 1963 is thirty days for a court other than the Supreme Court from the date of decree or order.

**Reference as per the Code**

‘Reference’ is given under section 113 of the Code of Civil Procedure and order 46 of the CPC tells about the procedure of reference and its conditions. Reference is basically the situation when the subordinate court refers a case to the High Court regarding the question of law for their opinion in the matter. It is made to the HC where the subordinate court has doubt between a suits appeal execution proceeding etc. Reference is made in a pending suit and it is always made to the High Court. The ground for reference is the recreation of some reasonable doubt by the Court trying the suit, appeal or executing the decree with regard to a question of law or usage having the force of law.

**Conditions for Reference**

Reference can be made only in a suit, appeal or an execution proceeding which is pending before the court. Order 46 Rule 1 of the Code of Civil Procedure stipulates to fulfill certain conditions for obtaining a reference from the High Court. As per Or. 46 R. 1, the conditions to entertain a Reference by the HC from a Subordinate Court which are essential to be fulfilled are as follows:

1. There should be a pending suit/appeal and is not a subject to a pending suit or appeal in such decree’s execution:
   - A question of law must be there.
   - The court trying over the matter must entertain a reasonable doubt on those question.
2. Question of law over must be divided into 2 categories:
   - Questions with relation to validity of an Act, Regulation or Ordinance.
   - Other sort of questions.
3. In former cases reference is obligatory and in latter cases it is optional, these conditions are required to be fulfilled:
   - Necessity of question to be decided to dispose the case.
- The view of Subordinate court is the presented Act, Regulation or Ordinance is ultra-vires.
- There is no determination by both the SC and the HC over such Act, Regulation or Ordinance is ultra-vires.

Reference can be applied by the Court only when there is an application of a party to the suit or through SUO MOTO. Here, the court is a civil adjudicature. Any tribunal or persona designate is not considered as a court. As held in the case of Ramakant Bindal v. State of U.P., no reference can be made by a tribunal.

Procedure of hearing when matter is referred to the HC
There is certain procedure of hearing when matter is referred to the HC which are as follows:
- The referring court should draw up the Statement of the fact of the case and present the question of law where they want the HC’s opinion. The court can either continue the proceeding or stay the proceeding.
- The court can pass the decree as per the HC’s decision on the referred question of law which can be only executed until a copy of the judgement of the HC over the reference is executed. If it is in favour of the plaintiff then it will be a confirmed decree else the case will be dismissed.
- In cases where referring court doesn’t compiled a condition bought down foe making such reference the HC has a power to return the matter of amendment and even can quash the reference order. It also has power to alter, set aside or cancel a decree made by court making reference to the HC as it thinks fit.
- As the general rule of cost the cost of reference should be defined. But if the references are unwarranted the High Court may ask the judge referring the matter to pay such cost personally.

Powers of Reference
The power of reference is exercised by the court superior to the court which decides the case. The power and duty of referring court in respect to reference is to entertain the doubt on the question of law. In Banarsi Yadav vs Krishna Chandra Dass, it was held that the question of law about which the subordinate court is doubtful, then a subordinate court may refer a case to the High Court when there is reasonable doubt regarding the constitutional validity of an Act and it shouldn’t be a hypothetical question. Therefore, no reference can be made on a hypothetical question or a point that may or may not arise in future but if the situation arises it may be considered for reference.

Revision as per the Code
Section 115 provides the provision regarding revision. It gives power to the High Court to entertain suits for revision which was decides by any subordinate court. It is also called revisional Jurisdiction. It is basically revising of suit with a critical examination with a motive of improvement in the judgement by the High Court. As per Section 115, required the High Court to satisfy 3 matters which states that the subordinate courts order is within the jurisdiction or the matter is which the court ought to perform its jurisdiction or the court exercising jurisdiction have not act illegally, i.e. there is no breach of provisional law or any sort of irregularity through any error in procedure of trial in material sense affecting the decision. The provision to this section specifically mentions that the High Court for the
purpose of this section shall not reverse any decree/order against an appeal that lies either in High Court or any subordinate Court. Further, a revision will not be considered as a stay of the suit except in such suit or that proceeding which has been stayed by the High Court.

As seen in the case of Salem Advocates Bar Assn v. Union of India, the supreme court considered the scope of Section 115 of the CPC and observed that the scope of section 115 is limited and the revisional court should only be satisfied that the orders passed is within the jurisdiction of Section 115. Further in the case of Radhe Shyam v. Chhabi Nath, the Supreme Court held that even though the scope of section 115 has been curtailed by the CPC (Amendment) Act, 1999, as a result, the power of superintendence of the High Court does not extend.

Conditions for revision

There are 4 Conditions of revision which the HC can exercise its revisional jurisdictions:

- The case must be decided
- The court must be a subordinate court to the HC
- The order must not be appealable one.
- Subordinate court must have used the jurisdiction not vested to it by the law and failed to the perform the jurisdiction vested to it and acted the jurisdiction illegally or with irregular manner of material.

So, by analysing the conditions for revision under section 115, we can observe that the revision is done mainly on jurisdictional errors by the subordinate Court. Reference can be applied by any person who is aggrieved form a decision of a subordinate court can file for revision in the High Court against such order and also, the HC has a SUO MOTO power to exercise a revisional jurisdiction as per Section 115. The Limitation period to file an application for revision is 90 days from the decree has been made.

The powers of revision

In the case of a revision, whatever powers the revisional authority may or may not have, it has not the power to review the evidence unless the statute expressly confers on it that power. Now here the question arises ‘Can the power of Revision be exercised if an alternative remedy is available?’ This revisional jurisdiction of the HC is discretionary in nature and this exercise of revisional jurisdiction is upon the discretion of the court and the parties cannot claim it as a right. In the leading case of Major. S.S. Khanna v. Brig. F.J. Dillion, it was held by the Supreme Court that the court has to take into consideration several factors before exercising the revisional jurisdiction from which one of the that considered is the availability of an alternative remedy. So, when an alternative and efficacious remedy is available to the aggrieved party, then the court may not exercise its revisional power under section 115 of the Code.

**Execution as per Order 21 of the Code**

When an entity receives a decree from a court of law against another entity, his following step is to satisfy the decree. The proceeding of satisfying the decree given by the court of law is called execution proceedings.

Execution is the mode through which a decree-holder obstructs his judgment-debtor to perform the command given in the decree according to the case. It gives powers to the decree-holder to recapture the
products of the decree/order. The execution is completely finished when the decree-holder gets the compensation i.e. cash or other thing given to him in the judgment/decree/order.

The term “execution” explicitly is not defined in this code. The word “execution” basically means the procedure of giving effect to the judgment/decree/order given by the court of law. The provisions related to execution of decree and orders are specified in Sections 36 to 74 and Order 21 of the Code.

The classification of Order 21 can be done as follows:-

- Adjudication of the claims and objections.
- Applications for execution and the procedure applied to it.
- Immovable property and movable property’s sale.
- Mode of executions.
- Resistance and delivery of possession.
- Stay of executions.

Court which can execute a decree [Sec. 36-38]:

Section 36 defines application to orders which says, the provisions related to execution of decree are applicable on the execution of the orders. [including payments]

Section 37 states Definition of Court which passes a decree which further explains, a court of law who passes a decree on a matter must effect according to the execution of decree until there is any hindrance in its context including, decree to be executed passed by the appellate jurisdiction and secondly, the first instance of the court ceased or have jurisdiction to execute it, if the suit where the decree was passed and instituted at the time of application making for the executing the decree & would have jurisdiction to look over such suit.

Further explanation of this section says, the Court of law should also have jurisdiction to execute the given decree, at the time of application making for execution of the decree it should have jurisdiction to try such suit.

Section 38 states Court by which decree may be executed which specified that, a decree can be executed by the court of law which passed it, or by the Court of law to which it is sent for execution process.

Transfer of decree [Sec. 39]:

Section 39 states Transfer of decree under its first sub-section it states the court of law which passes a decree by an application made by the decree-holder send that decree for execution to some other court with certified jurisdiction in conditions where, the judgement-debtor resides or carry a business or work, with local limit jurisdiction of other court, or if the judgement-debtor have no property in local jurisdiction of court passing the decree and to satisfy transfer is made to other court of proper jurisdiction where he has property, or if decree is made for sale or delivery of an immovable property outside the local jurisdiction of court then it can be passed to another court of proper jurisdiction, or if a decree passing court finds any other reason must record in writing should be executed by other court.

The second sub-section states, the decree passing court from its own motion sends the decree for execution to competent subordinate court of jurisdiction. Further the third sub-section states, the court shall be of a competent jurisdiction at time of making the transfer of a decree and that court have jurisdiction to try the matter where the decree was passed. And finally,
the fourth sub-section states, nothing in this section authorizes a decree passing court to execute it against any property or person outside the local jurisdiction.

**Questions which can be determined by the executing court [Section 47]**

Including every question coming from the suit between the parties where the decree was passed including their representatives which is according to the discharge, satisfaction and executing of the decree must not be done by a separate suit and must be executed by the court which executed that decree.

And where the question is over is any person is the representative of a party or not must be determined by the court.

**Explanation:**

Plaintiff’s suit being dismissed or defendant against whom suit dismissed are considered as parties for such suits.

Also: one is a part to suit where a property purchaser is at a sale for the execution of the decree. Also, related questions for such property to such purchaser or its representative falls under the ambit of this section.

**Powers of the executing court and modes of execution [Section 51, 55-59, 60]**

**Section 51:** the courts power to enforce a decree in general is given in this section which explains courts power & jurisdiction following to enforce the execution. The decree executions application can be either oral as per Or. 21 R.10 or written as per Or. 21 Rule.11. Implementation’s mode of the decree is to be chosen by the party. Over the choice decree-holder as prayed the court can execute such decree as it thinks fit.

As per the provision modes of decree are as followed:

- Any property’s delivery as per the decree specifically mention where such property can be either movable or immovable.
- Sale of the property either with or without property’s attachment. According to this section’s clause B, it is under courts power to attach such property with proper jurisdiction.
- Through the mode of Arrest and detention a decree can be executed by the court. Arrest or Detention of judgement-debtor can’t be done until a show cause notice opportunity is not given stating why he/she must not get imprisoned.
- A decree can be executed through receiver’s appointment where it acceptable to appoint judgement creditor as judgement creditor and receiver.

As per sub-clause E which is residuary where it works when execution of decree cannot be done under clause A to D.

**Section 55 [Arrest and detention]**

A judgment-debtor in order for execution of the decree can get arrested any time and day which is practicable following to his detention in districts civil prison where the court orders or according to any place as provided by the state government appoints for the detention of such orders. Given 4 conditions stating:

- No house should be entered between sunset and sunrise.
- No main door of such house should be broken unless the house or property is under judgement-debtor’s occupancy and he refused the authorities for access and then any door of the property can be broken to find him.
- If any occupancy of such property is over a women not a judgement-debtor and due to customs doesn’t appear in public and authority to make such arrest must give a notice stating her liberty to withdraw from the property giving her a reasonable period...
of time and facilities as per the withdrawal to make an arrest.

- If decree is over payment of money at the time of arrest the judgement-debtor pays such amount and even the cost of arrest, the officer can release him once.

Through official notice the State Government can declare arrest of any person creating danger to public must not be arrested for the execution of decree and other procedure will be prescribed by the state government.

An arrest for execution of decree relating to payment of money and bought to the court, then the court can declare him insolvent if there was no ill will and such judgement-debtor can get discharged as per the time and insolvency laws.

When a judgement-debtor applies to be declared insolvent with good intention and presents security for courts satisfaction he will under 1 month he’ll appear whenever called upon regarding proceeding either on application or on executing the decree of arrest, the court can release him from the arrest. In conditions where he fails to either apply or appear in court, the court can realize the security and execute him to civil prison.

Section 56 [Restricting arrest/detention of women executing decree for money]
A civil court can’t order to arrest/detention of a woman in prison from payment of money in execution of decree.

Section 57 [Subsistence Allowance]
Scale as per race, rank & nationality regarding the monthly allowance payable by the judgement-debtor can be fixed by the State Government.

Section 58 [Detention & release]
A person can be detained for the decree’s execution in a civil prison in matter of decree passed for payment exceeding of Rs. 1000 with a maximum period of 3 months and matters decree passed for payment between Rs. 500 to Rs. 1000 with a maximum period of 6 months; with a given condition that such person must be released from detention before expiree of such period when:

- Amount as per warrant is paid off to officer of the prison for his detention.
- Being decree completely satisfied against him.
- Request by person through who sent the application for detention.
- Person through who sent the application for detention omissions to pay subsistence allowance.

As per Clause 1A, considering removal for doubts, in matter less that Rs. 500 no detention order can be passed against the judgement-debtor for execution of a decree. And second clause says once a judgement-debtor is released, he must not be re-arrested under decrees execution. One cannot be released from detention here until not ordered by court.

Section 59 [Release on ground of illness]
After the issue of warrant of arrest has be issued, the court any time can cancel it if the judgement-debtor has a serious injury. If the judgement-debtor is not in fit health condition, the court can release him. Even that person can be released from the prison if the state Government gives an order of release if finds that person with any infectious or contagious disease can be done by the committing court or its subordinate court. Such person can be re-arrested when they get fit as per Section 58.

Section 60 [Property liable to attachment and sale in decree’s execution] (Attachment)
Execution of a decree though decree-holders application by attaching and sale can be done and even sale with attaching can be done. The decree-holder has a right to attach judgement-debtor’s property as per the procedure.

As per Section 60 clause 1, there is a liability to attach the property and sale in decree’s execution and properties exempted from there. All property either movable or immovable which is saleable and belongs to judgement-debtor, or his portion in that property which he can use for his own benefit in future can be attached and sold for a decree’s execution.

Stay on Execution of Decree [Or.21, R.26-29]

As per Rule 26, a stay on decree’s execution can be made by the court to create a reasonable time for the judgement-debtor such that he can apply in the court who passed the decree and courts with proper appellate jurisdiction for a stay order for any other order to execute the decree of the former court. There is limited power to stay an execution to the transferee court. The second sub-rule says, if a property is seized through an execution, the appellate court can order for restitution of such property.

As per Rule 27, any restitution as per Rule 26(2) can’t protect the property of 6 Judgement-debtors from decree’s execution being re-taken for execution. Accordingly, Rule 28 states, any decree passing court passes an order relating to execution of that decree, must bind on the court to which decrees execution was sent.

Further Rule 29 states dealing of different situations which follows, a court where a suit is pending against a decree-holder of that court, on that persons part on whom the decree was passed then the court using method of security, according to it gives an stay order on the execution of such decree provided that the suit which was pending is decided. Given that pursuing this rule, simultaneously there is 2 proceedings in 1 court, where one suit is over execution of decree-holder over judgement-debtor and second one judgement-debtor against decree-holder.

Mode of Execution [Rule 30-43]

Rule 30 says, each decree for the payment of money includes a payment of money decree as an alternative to some sort of relief, it may get executed by detention of the judgement-debtor in civil prisons or even by attaching or selling his property or by both.

Rule 31 talks about the decree over a specific movable property which can be executed by 3 ways:
- If practicable, seizure of the property.
- Property to be delivered to such person whom it has been given through the judgement.
- Detention in the civil prison of the judgement-debtor.

Rule 32 talks about the execution over a decree of injunction. It can be done by detention in the civil prison of the judgement-debtor, else or by attaching to property to enforce such decree, which is followed when a person from his will ignores or doesn’t obey the decree. Also, it includes decree for restitution of conjugal rights and attaching to property to enforce for such decree which is followed when a person from his will ignores or doesn’t obey the decree.

Rule 33 further talks about the decree’s execution for restitution of conjugal rights against the husband. Here the judgement-debtor is required to make payments periodically to the decree-holder or the wife. If such decree is not followed in the prescribed period of time. Due to certain
situations the court can amend such payments and can even be suspended. Also, any sort of money ordered to be paid as per this rule must be recovered and treated a money payable as per the decree for payment of money.

Rule 34 states the procedure followed during the execution of a document. In case where the decree of execution of documents is disobeyed, the decree-holder is required to make a draft and present it to the court. Then the court will show that draft to the judgement-debtor so that if he has any present objection and give him a sufficient period of time to present such objections. After receiving such objection, the court must give an order to approve or alter such draft. The decree-holder will be given a copy of such draft after making any amendments if required with a proper stamp if such stamp is requiring for time be required as per the law. For the execution of document being delivered, the judge or an officer may get appointed. Such officer or Judge authorized by the court is required to register such document if required as per the law. If such registration is not required but the decree-holder wishes to register such documents, court can make such orders also the court can make orders over the registration’s expenses.

Rule 35 specified rule over Decree of an immovable property, in such cases the property to be delivered to such person whom it has been given through the judgement or his representative. Delivery is to be made after removal of any person who doesn’t vacate such property as per the decree. In cases of Joint Possession of such immovable property, it is required to be delivered by affixing the warrant copy in a visible place. In situation when a person who has the possession of such property in not providing a free access the court can remove any sort of lock or even break any door to give possession to the decree-holder after giving a warning if a woman is there in such property.

Rule 37 specifies the discretionary powers of the Judgement-debtor to show the cause against the detention in civil prison. Here, if an application of decree’s execution for payment of money is present through detention or arrest of the Judgement-debtor, then the court gives him a chance to show why he must not be sent to the civil prison. Also, the court gives him as specific date to appear in the court and show the cause. The court won’t give any notice in some situations such as if it feels it would cause a delay in the execution procedure or the Judgement-debtor get absconded within the prescribed time.

Rule 38 says that the arrest warrant of the Judgment-debtor will direct the authorized officer for execution and bring him to the court within prescribed period to time.

Rule 39 deals with Subsistence allowance. Here the Decree-holder is required to pay a maintenance as fixed by the court for the Judgment-debtor in the civil prison for his time of arrest until bought to the court. If the decree-holder has not paid such allowance, the Judgment-Debtor can’t be arrested.

Rule 40 states all the proceedings which are required to be followed after Judgement-debtor’s appearance after the notice is provided.

Rule 41 states, provisions for the court to examine the Judgement-debtor’s property. The court can order the Judgment-debtor or the officer in charge to submit any sort of relevant book or document for the examination. The order to examine property’s value is required to satisfy the decree. In corporation cases, Judgement-
debtor, officer or any relevant person could be examined orally.

Rule 42 says, when a decree is directed for rent or mesne profits or any other matter then the Judgment-debtor’s property can be attached for the due amount as similar as of in the case of decree for payment of money. Rule 43 says, when a moveable property is attached other than agriculture product which is in the Judgement-debtor’s possession of the attachment must be made by seizure and the officer responsible for such attachment must be responsible for such custody.

CONCLUSION
The provisions for reference, review and revision provided under the Code of Civil Procedure are different ways by which the court can work more efficiently for the impartiality of the justice system even when there is no system of appeal. Whenever a judge passes a decree or makes an order there may be certain circumstances where there are errors or mistakes relating to the jurisdiction or procedure are committed by the court. Therefore, the provisions relating to reference and revision ensure that the work of the courts is completed in an efficient manner. Hence, the provision of review, reference and revision have been inserted under the legal system to avoid a miscarriage of justice from the judicial system. Further talking about execution, it is the Court’s duty to evaluate each case’s facts and give the decree-holder an appropriate relief without causing him any inconvenience and delay to him. The Court being choosing an appropriate execution mode and following a proper procedure as per the code before a decree’s execution.

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SOFTWARE PATENTS IN INDIA - THE MISSING LINK

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Software patent grants in India is in its nascent stage and this feature became a part of the Indian jurisprudence in the early 2000s. Patents can be described as “a legal document which provides protection to the ideas of any individual. Usually, patents constitute of four different classes: Machine (a device or apparatus created by a person for the performance of a specific task), process (a process created by an individual), manufacture (any fabricated or manufactured product) or the composition of matter (any chemical mixture or compound created by a person).”

Arguments may be put forward both for and against patenting of computer softwares. On overall considerations, and to sustain desired level of equilibrium between Law and Technological Advancements, India should aim for a comprehensive legal framework to usher in transparent and unambiguous software patentability provisions. This step will help the Indian software talent pool to continually come up with technological breakthroughs in a field where it has already left a stamp of supremacy in the global arena.

Introduction
Patents bestow a right of ownership of the invention over the patent holder and its use. Patent “gives its owner the legal right to exclude others from making, using, selling, and importing an invention for a limited period of years, in exchange for publishing an enabling public disclosure of the invention.” Software, by definition, is “the information, in the form of computer programs that make a computer carry out certain functions.”

Grant of software patents has been widely contested and debated upon in Indian and International jurisprudence. While some countries vehemently support the grant of software or computer-related invention’s patent - others such as the United Kingdom and India do not permit them.

Patent application and grants are governed by the Patent Act, 1970 (hereinafter known as the Act), the Patents (Amendments) Act, 2002 and, subsequently, the Guidelines for examination of Computer Related Inventions 2015 (later amended in 2016 and 2017). The Act grants patents to new inventions which have potential applications in various industries, and which involve an inventive step.

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1180 Black’s Dictionary of Law
1181 Black’s Dictionary of Law
1182 Section 2(1)(j): "new invention" means any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art;

1183 Section 2(1)(j): "invention" means a new product or process involving an inventive step and capable of industrial application;
1184 Section 2(1)(ac): "capable of industrial application", in relation to an invention, means that the invention is capable of being made or used in an industry;
1185 Section 2(1)(ja): "inventive step" means a feature of an invention that involves technical advance as
invention must have a feature that involves being technically advanced” vis-à-vis prevalent know-how or bring forth economic enhancement or both. “Moreover, this feature should be such as to make the invention not obvious to a person skilled in the art.”\textsuperscript{1186} This implies that any person with reasonable knowledge in the field of the invention shall not easily assume or predict the said invention. Thus, “the ‘obviousness’ of the invention shall be strictly and objectively judged. One of the many tests used for determining the obviousness is: “whether the alleged discovery lies so much out of the tract of what was known before not naturally to suggest itself to a person thinking on the subject, it must not be the obvious or natural suggestion of what was previously known.”\textsuperscript{1187} Further, to determine the novelty of the invention and thereby the inventive step, the invention ought to be looked at as a whole and not as a part thereof. The inventive step is to be looked at in consonance with the invention and it should be proved that it does not bear any links to any of the excluded subjects/inventions.

Jurisprudence of Software Patentability
While, patenting of software programs protects the idea of the inventor and grants him the right to royalty over his invention, at the same time, patenting also prohibits and deters innovation of other ideas and inventions which would be hinged upon previously published works or concepts. Granting patents would incentivize others with benefits such as royalty or licensing fee and also lead to better market competition, whereas, allowing long-term software patents would be rendered useless as it would be outdated in short periods of time (due to technological advancement) and long-term protection would forestall technological growth.

In the Indian context, patentability of an invention is determined under sections 3 and 4 of the Patents Act. Under section 3(k), a mathematical or business method or a computer program, per se, or algorithms, are non-patentable as they are not recognized as inventions. The Patent officers in India, that is the authority which grants patents to numerous inventions, have expressed varied opinions on the subject of patentability of software programs and other computer-related programs.

The Indian jurisprudence on software patentability is predominantly pronounced by the Intellectual Property Appellate Board (IPAB) and the Supreme Court of India, and they have not come to any consensus about the criteria of patentability of software programs.

The Appellate Board, in its decision of Accenture global GMBH, Switzerland \textit{v} Assistant Controller of Patents and Design Patent Office\textsuperscript{1188}, opined that the claimed novelty in question would not fall into the category of section 3(k), which is software, per se, but a system for developing Internet-hosted web services and software. The IPAB does not delve into the explanation of the term ‘per se’ as given in section 3(k).

The Appellate Board in another judgement of Electronic Navigation Research Institute

\textsuperscript{1187} Biswanath Prasad Radhey Shyam \textit{v} Hindustan Metal Industries [1979 (2) SCC 511]
\textsuperscript{1188} Accenture global GMBH \textit{v} Assistant Controller of Patents and Design Patent Office [2012 SCC Online IPAB 192]
v Controller General of Patents and Design\textsuperscript{1189} concurred with the Deputy Controller of Patents, Delhi and pronounced that the so-called “Chaos Theoretical Exponent Value Calculation System” is founded on relevant numerical solutions to mathematical relationships. The Appellate Board, in this instance, did not share the stand of applying the technical effect theory outlined under the European Patent Law... and, therefore, the claimed invention was not granted patent under section 3(k) of the Act. The Appellate Board further added that as per the impugned order the indicated innovation was itself the excluded element and the claimed technical novelty was but a numerical method founded on various mathematical solution techniques.

The IPAB in its landmark judgement of Enercon India Limited v Aloys Wobben, Germany laid emphasis on the terms ‘per se’. “Attention was drawn to section 3(k) to show that while “computer programs per se” was not a patentable invention, the words “per se” are not attached to algorithms... but attached to business methods and computer programs”. The court further said that the invention in question “is normally a computer operated or computer controlled technical instrumentation… that cannot be regarded as relating to a computer program per se or a set of rules of procedure like algorithms and thus are not objectionable from the point of view of patentability, more so when the claims do not claim, or contain any algorithm or its set of rules as such, but only comprise of some process steps to carry out a technical process or achieve a technical effect finally the maximum power output by controlling the wind turbine. Hence the objection that invention is not patentable under section 3(k) fails or not valid.”

If a subject matter is not a patentable invention or an invention at all, other tests and checks, such as anticipation, obviousness, etc., need not be applied. In other words, patentability of an invention is the first step to determine whether a patent can or would be granted to it.

In another case before the IPAB, a claim was made as to the superiority of an online competitive bidding process, i.e. the ‘pay for performance’ process, over the conventional internet search queries. As per this proposition, the newly invented process “provided a powerful advantage to business and others seeking to increase their web exposure”\textsuperscript{1191}. The controller disagreed and opined that the invention was but just a business model, and hence not patentable. The IPAB in this case of Yahoo Inc v Assistant Controller of Patents and Designs, opined that the claimed technical enhancement reflects only an improved way of doing business. The IPAB held: “Therefore, we affirm that this ground alone is sufficient to reject the present application. The impugned order could have been more clear while giving the conclusion regarding patentability. But the conclusion is correct and is affirmed.”\textsuperscript{1192}

The Board in its approach to reach the conclusion thoroughly probed the terms ‘business method’. It held that “if the present case is tested by these views, and if the technical advancement is itself only a business method, then the mere fact that there is a technical advance will not give

\begin{footnotes}
\item[1189] 2013 SCC Online IPAB 105
\item[1190] 2010 SCC Online IPAB 176
\item[1191] Yahoo Inc v Assistant Controller of Patents and Designs [2011 SCC Online IPAB 106]
\item[1192] Yahoo Inc [supra]
\end{footnotes}
any advantage to the appellant.” The U.K. Court reiterated that pinpointing the precise ground for declining software patentability can be a difficult proposition. Further, what constitutes “a business method” can also be a tricky question shrouded in certain ambiguity. In the claimed invention, there is a certain business transaction viz., bid amount, bidder’s account and position of advertisement. Symbian

1193 again refers to the same decision mentioned above where it was held that there must be “Further technical advance or facts associated with specific features of implementation over and above the facts and advantages enhanced in the excluded subject matter”. In that case, it was held that the effect of the alleged invention improved the speed and reliability of the function of the computer. It was not just a better programme but it was a fast and more reliable computer.”

1194

The Indian jurisprudence on whether computer programs are patentable or not is rather ambiguous in nature. Judgements pronounced by the IPAB, such as in the cases of Yahoo Inc and Accenture Global Service, attempt to clarify certain aspects of the law but a crystal-clear picture is still not available. The terms ‘per se’ as given under section 3(k) of the Act is abstruse and the courts have not ventured in the deep waters of this term.

The Courts in India should establish an exhaustive, unambiguous criteria to determine the patentability of software programs and other inventions linked to computer technology. The case of Smartflash LLC v Apple Inc. 1195 the United States Supreme Court determined a check involving two elements to evaluate software patentability. Firstly, to ascertain if the claims of the issue in hand fall under any if the excluded themes (judicial exceptions), and secondly, to search for the ‘inventive concept’ - i.e., “an element or combination of elements that is” sufficient to justify that the patent embodies significant improvements.

In the case of Gottschalk v Benson, the US courts held that mere algorithm to covert binary code decimal (BCD) to a system of binary numbers with the process outcome devoid of any practical utilization or application to industries would not qualify to be patented. The Indian legal system, if not via legislative action but through judicial orders, can set an outline to determine the patentability of software patents in India. It can proactively interpret the term ‘per se’ used in section 3(k) of the Act and respond to some of the following questions:

- The terms ‘per se’ is attached to which kind of invention, i.e. software programs, algorithms, business methods?
- The terms ‘per se’ would encompass what types of inventions?
- Would the terms ‘per se’ imply a proviso to the exception under section 3?

One case which delves into the terms ‘per se’ is the case of Telefonaktiebolaget LM Ericsson (PUBL) v Intex Technologies (India) Limited 1196. In this case the Delhi High Court held that “prima facie that any invention which has a technical contribution or has a technical effect and is not merely a computer program per se as alleged by the defendant and the same is

1193 Symbian Ltd. v. Comptroller of Patents, Court of Appeal, ((2008) EWCA Civ 1066)
1194 Yahoo Inc [supra]
1195 Smartflash LLC v Apple Inc [ 2015 WL 61174]
1196 2015 SCC OnLine Del 8229
patentable.” Intex was accused of patent infringements in the areas of proprietary Edge technologies concerning cell phones and tablets as also 2G and 3G technologies. The Delhi High court order came out in support of Ericsson to pay 50% of the royalties within a time span of a month from the date of the filling such suit.

Are Software Patents granted?
While on one hand the judiciary has an active role in determining and interpreting the criteria for software patentability, the Intellectual Property Controller too interprets the various laws, guidelines and judgement to grant patents to various applicants.

Recently the Intellectual Property Officer in Kolkata granted a patent to Apple Inc. The invention was titled, “A method for browsing data items with respect to a display screen associated with a computing device and an electronic device”¹. The controller held that “the claimed method involves concrete and tangible steps of providing...,displaying...,receiving...,moving...,etc., to thereby browse data items with respect to a display screen associated with a computing device.” The controller opined that these steps imply practical use and utilisation of a computer programme. Although the steps of the method are worked out with the help of a software, the method represents a practical application of this computer software to result in a product with good utility of enhanced advantages while overcoming certain limitations of the prevalent operating modules. According to the submission, even if a method utilises a computer program or algorithms for controlling the steps for achieving the desired result/effect having a sufficiently qualified technical character. it should not be taken out from the ambit of possible patentability. Rather, this should depend on whether the manner in which the system for implementing the claimed method into effect is conditioned/programmed involves features/steps which make a contribution in a field outside the range of matters excluded from patentability. The claimed “method” allows practical application of program’s utility to be put to gainful use and, therefore, it should be considered as a patentable subject matter. The controller further clarified that: “The claimed “method” should not therefore be deemed to relate to a computer program as such. Moreover, “computer readable medium” claims have been deleted from the specification.”

In another decision by the Controller of Chennai, Facebook was granted a patent on the grounds that “the present subject matter implements a technical process and has a technical effect. In view of the above, it clarifies that the presently amended claims i.e. claims 1 to 6¹ does not fall under the the relationship data indicates relationship between the one or more users in the social network; associating, by the content engine, at least one action with at least one user to produce one or more consolidated data, wherein each of the one or more consolidated data indicates at least one action and a corresponding user performing the action; identifying, by the content engine, one or more elements associated with the one or more consolidated data; aggregating, by the content engine, the one or more consolidated data comprising one or more common elements to


1198We claim:
1. A method for generating a personalized data for viewing of user of a social network comprising: storing, by a content engine associated with a social network, one or more actions performed by each of one or more users of the social network; accessing relationship data, by the content engine, for each of the one or more users, wherein
purview of sub-clause ‘k’ of section 3 of the Indian Patents Act, 1970."  

One more patent application filed by Facebook was granted a patent on grounds that “the present invention includes hardware limitation and provides technical improvements and benefits like checking privacy setting associated with the user profile and based on the privacy setting the access is provided to the third party application and the third party application personalizes the user content data. So the set of claims do not attract the provision of section 3(k) of the Patents Act, 1970”.

“In Feb 2005, Google sought for a patent on an invention titled, ‘phrase identification in an information retrieval system’. One of the claims presented this invention as a basic mathematical algorithm with the logical steps which would attract section 3(k) of the Patents Act, 1970 and therefore not qualify for patenting. Google, nevertheless, reasoned that its invention is not a mere algorithm or a computer software, per se, “but provides a technical solution to a technical problem of how to automatically identify phrases in a document collection”. It opined that the technical solution i.e. the final outcome which is an index, that resides in a memory consisting of related valid phrases, is a new and improved solution altogether in the form of an invention that deserves to be patented. On hearing the above submissions, the Patent Office concluded that it is “a technical advancement over the prior art” and thus granted it the patent in May 2017.”

The Controller held that “the hardware components have already been provided in the amended claims and so these claims cannot fall within the scope of section 3(k) of the Act.”

Conclusion
In 2015, the Government of India introduced the ‘Guidelines for examination of computer related inventions’. The CRI Guidelines clarified that business

5. The method as claimed in claim 1, wherein the at least one action is a change to a user profile.
6. A system comprising a content engine for generating a personalized data for a viewing user of a social network as claimed in any of the preceding claims 1-5..

1201 Sharma, Ajay, Software Patentability : In Indian Context <http://www.legalserviceindia.com/legal/article-9-software-patentability-in-indian-context-.html#targetText=There%20is%20no%20legal%20or%20conclusive%20definition%20of%20software%20patent.&targetText=The%20intellectual%20property%20regime%20in%20the%20international%20market.>
methods and algorithms are not patentable. A new term, “technical effect”, was introduced in the CRI Guidelines with a view to explaining “technical advancement” under Section 2(1)(ja) of the Patents Act. In furtherance these guideline allowed the patentability of computer programs and mathematical method in complete contradiction to the Patent Act, 1970. Due to such inconsistencies, the CRI guidelines were recalled only to be amended and re-enacted in 2016. The CRI guidelines 2016 had taken into consideration comments and inputs on important legal issues in the Guidelines and suggested alternate examples and checklists for the purpose of scrutiny of patentability of inventions linked with computer applications. While the first set of guidelines were too liberal, the second limited and restricted the guidelines way too much. Hence a third was introduced in 2017 and it is a work somewhat akin to tight rope walking with ‘diplomatic finesse’. Nevertheless, they have not helped to define what is patentable in view of Section 3(k) or how an examiner would test the same.

Innovation is at the heart of progress and economic development. In today’s world, technological innovations, including in the field of computer software, move very fast. It is thus imperative that India claims her rightful place in this global movement and prepares herself to take full advantage of such technological advancements. While aiming for this high-priority national goal, it is crucial that the right equilibrium as regards the equation between law and software patentability is viewed through a dynamic prism of latest developments and global trends.

It may be concluded that the current status of Indian Patent Law is highly vague regarding the protection of computer software and the law is devoid of incorporating any specific provision for the same. There appear to be no crystal-clear guidelines or procedures that work as comprehensive and unambiguous framework to be followed by the Indian Patent Office regarding patentability of computer software. As per current provisions, computer programs, per se, are not granted patents. Notwithstanding this, a claim to a manufacturing process resulting in a distinctly new product which was based on a mathematical algorithm installed in a suitable computer hardware/software system may be patentable. The apparent lack of clear-cut and unambiguous criteria to determine the computer program patentability or lack of it in India needs to be addressed comprehensively and in keeping tune with the latest global standards.

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A CRITICAL ANALYSIS OF RAPE, ITS PSYCHOLOGICAL IMPACT ON VICTIM'S MIND, WITH A STUDY OF ANTI-RAPE LAW IN INDIA

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ABSTRACT

The anti-rape law doesn't form with a few sentences. The whole text, which has mentioned the demarcated chapters and that can't be opted. A murderer can destroy the body of the victim concerned, but a rapist not only make physical assault and injuries, but he degrades the soul of the helpless victim. This article highlights what is mentioned under the provisions of Indian Penal Code with regards to Rape as well as punishment along with different sections like Section 376, 376A, 376B, 376C, 376D as well as 376E of Indian Penal Code, by which the accused are published as per the law, moreover discussion has been made how its effects the individuals mind. A detailed study has been made regarding the protection of women from sexual harassment by the Police Personnel. The increasing rate of offence against women are somehow due to the result of social system and the result of individual pathologies. The article highlights the current burning issue of Marital Rape and decriminalization of Rape in India, and reason why the marital rape is not criminalized in India in spite of increasing rape cases and comparative analysis with other western nations, more a discussion has been made regarding various anti-rape laws and the recommendations provided by Justice Verma Committee after the brutal rape case in 2012 which is regarded as "rarest of rare case" and the Criminal Law (Amendment) Act, 2013 made after the rape case held on 16th Dec 2012 and Criminal Law (Amendment) Act, 2019 along with relevant cases decided by the Supreme Court of India.

KEYWORD - Anti-Rape Law, Rape, Criminal Law, Justice Verma Committee, Marital Rape.

INTRODUCTION

Rape is not only the violence against human body but, indeed its destroys the complete personality of the victim concerned, and due sexual assault, many instances were found where she was subject to ostracism as well as degraded by questioning on her dignity and character from the society. The victim not only suffers from the physical violence and injuries but the mental torture is very deep.

HOW HAVE THEY CHANGED OVER THE YEARS? WHEN WAS THE DEATH PENALTY CLAUSE INCLUDED?

On 28th November 2019, another incident took place which shocked the whole nation when a veterinarian was gang raped and murdered brutally in Hyderabad.

In Kuldeep Singh Sehgar Vs State of U.P (2) in 5th December, the rape case occurred in Unnao, Uttar Pradesh, an outcry for justice for the victims was there all over the nation. Due to the increasing number of instances of sexual assault, demand was made by general public to make anti-rape legislations much more strict for reducing the sexual crimes against women and children.

WHAT HAS BEEN THE SYSTEM IN PLACE

The term ‘Rape’ was defined as offence was first inserted under the provisions of
Indian Penal Code 1860. Earlier there were frequently distinct and conflicting laws prevailing all over the India.

A law Commission was formed under the chairmanship of Lord Macaulay, as well as various legislations were passed in India after the Charter Act, 1833, then based on the decision of the Commissioner the Criminal law was classified into two distinct codes. Indian Penal Code was the first statute consisting of substantive laws of crimes which was passed in October 1860 but came into force on 1st January, 1862. Then in 1861, the first statute of Criminal Procedure Code was enacted, which was procedural law and combined the various laws relating to the establishment of Criminal Court and the various procedures required during trial as well as investigation of an offence took place. (3)

WHAT DID IPC SAYS?

Section 375 IPC states if a man intercourses with a woman forcefully without her consent, then such offence is considered as Rape. Moreover, as per the definition of rape under Sec 375 IPC also covers intercourse when she has given her consent but consent was taken by putting her or any person in whom she is interested, in fear of death or of hurt.

As per Section 376 IPC, it states whoever commit the offence of rape under Section 375 IPC has be punishable for seven years of jail term to life imprisonment. (4)

[3] 1181 of 2019

The amendment in the Criminal law took place after the heinous rape case of Mathura Custodial rape case in 1860. On March 26, 1972, allegation was made against a police from Desai Gunj Police Station in Maharashtra, that he had committed the offence of rape to a adivasi girl. The Session Court decided that she was habituated with maintaining sexual intercourse with multiple partners and whatever took place was not rape under the provision of Sec 375 IPC. But both the police men were acquitted, on the other hand the High Court convicted them. But when the Supreme Court reversed the order of the High Court by stating that the intercourse in question is not yet proved to form rape. Later, in 15th September, 1978, the Supreme Court in a decision stated that was no marks or sign of injury on the girls body after the incident and that indicates that it was not a rape. (5)

As per Section 375 of IPC, definition of Rape has been provided where-
(a) A man is considered to have committed the offence of rape if he penetrates to certain extent into the vagina (private part of female), urethra, anus or the mouth of the victim or compels her to do the same.
(b) if he inserts any object or the part of his body other than organ into vagina, urethra or anus of the person or compels or forces her to do the same with him or with another.
(c) if he influences or manipulated any part of the body of the victim in order to continue penetration into the vagina, urethra, anus of the victim or compels her to do the same with him or another one.
(d) use his mouth to the vagina, anus, urethra of the victim or compels her to do the same.
In the following circumstances /situations -
(I) done against her will
(II) In absence of her consent
(III) by taking her consent, but it was taken
by putting her in the fear of hurt or injury or
the death of her or some one else with
whom she is close or have interest.
(IV) By taking her consent in those
situations where she believed the opposite
one is her husband to whom she is or
considers herself to be married legally, but
the person is someone else and not her
husband.
(V) When the consent was given when due
to unsoundness of mind or due to heavy
intoxication or by the effect of incapacity to
think or understand the consequences or
unwholesome substances, she couldn’t able
to understand the effect of giving her
consent.
(VI) When the victim is under 18 years of
age, her consent or not does not matter.
(VII) In the case, when is not competent to
give her consent. (6)

As per Section 376 IPC provides
Punishment for committing rape -
Other than those provided under subsection
2, they will be punished with rigorous
imprisonment of ten years minimum, but
that may extend upto life imprisonment,
and shall also be liable to fine.
If any police officer, commits the offence of
rape within the area of the police station where
he is appointed; or
in the place inside the station house; or
on a woman in such police officer’s custody
or in the custody of a police officer who is
subordinate to police officer; or
Whenever a public servant commits the
offences on a woman in the custody or
commits inside the custody of a public
servant who is subordinate to such public
servant; or
Commits rape inspite of being a armed
forces member who is appointed in a area
by the Central or a State Government
Or anyone commits rape inspite of being
the management or on the staff of a jail,
remand home or other place of custody
formed under the provisions of any law for
certain period of its existence,
Or if anyone commits rape, the heinous
offence on any inmate of the jail, inmates of
the remand home, place or institution; or or
of a women’s or children’s shelter home for
their support or being on the management
or on the staff of a hospital, in that hospital;
or
If anyone who is a guardian, relative or
teacher or any one having authority towards
the woman in the instances of communal or
sectarian violence; or
Commits rape inspite of knowing the fact
that she is pregnant; or
Moreover commits rape, on someone who
is incompetent of giving consent; or
If someone is in a position to control or
regulate the works of other women, and
commits rape on a woman; or commits rape
who is a patient of mental or physical
illness; or
causes grievous bodily harm or maims or
disfigures or endangers the life of the victim
while committing the offences or
Commits rape again and again on the same
person, shall be punished with rigorous
imprisonment of ten years minimum, but
that may extend to life imprisonment, as
well as the person shall be liable to fine of
certain amount.
Anyone who commits rape on a woman
who is below eighteen years of age shall be
punished with rigorous imprisonment of
twenty years minimum, however that may
increase upto life imprisonment and shall
also be liable to fine:
But the amount of the fine must be just and reasonable so that it can fulfill the medical expenses and rehabilitation of the victim. However any fine asked by the Court to pay under this sub-section shall be paid to the victim.(7)

Section 376 A provides penalty for causing death due to the rape or leading into the Vegetative state of the victim. - Under the section, it states the period of punishment for such an act caused by the man to a woman, and that formed a situation causing severe injuries, of vegetative state or causing her to die, in such circumstances. The term of punishment in the cases of section 376 A will be at least 20 years minimum, but that punishment may be extended to imprisonment for the rest of the life of the accused. Moreover, the offence is a non-bailable as well as cognizable offence, which is triable by the Session Court.

As per Section 376 B of IPC - This section provides penalty for Sexual intercourse by the husband upon his wife during the period of separation decided by the Court, moreover, as per the principles applied in India, a husband cannot be considered as guilty of rape upon his wife. Marriage is a sacred bond between two persons that permits both, the husband and wife to exercise the marital rights. But, in the circumstances, when she is staying separately from her husband as per the decree of judicial separation, intercourse done by husband without her consent is punishable under the section. However in these situations, sexual intercourse refers the same as provided in clauses (a) to (d) of section 375.

As per Section 376 C of IPC - punishment for Sexual intercourse by a person in authority is provided under this section, where any person, who is a public servant shall be held liable for the crime as per this section if the person in authority or misuses his power conferred upon him and takes opportunity of a helpless woman. The intercourse in that circumstances will not lead to commission of Rape but the person would be liable to imprisonment up to 5 years minimum, and that which may extend up to imprisonment of 10 years along with fine.

As per Section 376 D IPC - It confers punishment for committing Gang Rape, where there are two or more than two people involved and with the common intention to ravish the woman. In such a situation, the offenders would be liable to imprisonment up to 20 years minimum and that may also get extended to life imprisonment.

As per Section 376 E IPC - This section provides the penalty for repeat offenders, where if anyone was already convicted in the past for committing the offence as per Sec 376 or 376 A or 376 D and again repeats the offence, then he shall be punished with imprisonment of life. The different forms of punishment provided as per Section 376 IPC and the duration of imprisonment for committing Rape under the provisions of Indian Penal Code depend upon the circumstances, atrocities as well as the gravity of the matter. However the least period of imprisonment in above mentioned sections is seven years. With the purpose to prevent the crime against the women, such sections of Indian Penal Code were substituted and duly amended by the Criminal law (Amendment) Act, 2013.

THE AMENDMENT OF CRIMINAL LAW
After a controversial decision of the Apex Court, huge protest was made against the
verdict across the whole nation, seeking the requirement of changing the rape laws which led to the enactment of the Criminal Law (Second Amendment) Act of 1983. After that a new Section 114A was inserted under the provisions of the Indian Evidence Act of 1872 which refers that in certain prosecutions consent was not given by the women, in several cases of rape if the victim says so, for example in case of custodial rape cases. As per Section 228A of IPC which was inserted in order to protect the identity of rape victims and punished those who disclose the identity of the person of rape. (8)

WHETHER THE LAWS ARE GENDER NEUTRAL OR GENDER SPECIFIC?

But the Indian law governing and punishing sexual offenses remains gender specific, as the definition implies by stating the offence can be committed by man. However addition of a new provision was made which which added certain barrier while questioning in the cross-examination of the victim as to her general 'immoral character' in rape or attempt to rape cases. (9)

THE ANTI-RAPE LAW IN INDIA

The Criminal Law (Amendment) Act 2013, was made after the brutal gang rape and murder took place in Delhi on 16th December, 2012 which widened the area of definition of rape and made more stringent punishment. Based on the recommendations of Justice J.S. Verma Committee, formed to modify the criminal laws the Parliament made amendment. As per the Criminal Law (Amendment) Act 2013, it enhanced the period of imprisonment in most of the sexual assault and also provided death penalty in the incidents of death caused or put her in vegetative state due to the rape. Moreover, in case of gang rape, punishment is given with imprisonment up to 20 years minimum to life imprisonment. Moreover, it included new crimes like using criminal force upon a woman in order to harass or order to injure her modesty, act of stalking and voyeurism. (10)

(5)ibid
(7)Id 733-734
t-are-the-laws-on-rape-and-sexual-
crimes/article30233033.ece/amp/accessed
27 June 2020
(9)Ibid
(10)Ibid

OFFENSES AGAINST MINOR

Based on the National Crime Records Bureau, it was found that as comparison to 17 years old, now the rape vulnerability for girls or women has increased almost twice today. As per the National Crime Record, it's found that almost 75% of the rapists are married. As per World Health Organization, its found that every 54 minutes, a woman is raped moreover according to the Center for Development of Women's Statistics, its found everyday, 42 women are raped in India. As per the NCRB data, 4,15,786 rape cases were filed all over the India during 2001 and 2017, about three women had been raped every hour. Moreover, in 2001 about 16,075 cases of rape were filed all over the country, this has rose drastically to 32,559 in 2017 which
is an increase of almost 103 percent. In Goa, rape cases increased as comparison to other states of the country with with 12 incidents in 2001 to 76 incidents in 2017 as well as 405 per cent incidents in Uttrakhand during the same period. Moreover, in Bihar rape cases declined with a fall of 283 cases in 2017 compared cases has reported in 2001. While in Tamil Nadu, Mizoram, Tripura and Nagaland, the number of rape cases has declined. National Crime Record Bureau used to collect the crime related data repository from the police stations, but the experts have put several questions regarding the NCRBs data quality. Allegations has been made by the women activists that the rape cases are reported appropriately. In fact the Police, politicians, judges, and campus administrators in India are trying to understand sexual violence as a loss of "honour" rather than as the violating of consent of other person.

In 2017, more than 32,500 rape cases were reported yo the police as the government data. In India Judicial bodies disposed of about 18,300 rape cases in each year, as well as 127,800 cases are still pending at the end of 2017. (11)

**JUSTICE J.S. VERMA COMMITTEE**

Justice Verma Committee made recommendations regarding the amendments to the Criminal Law in order to provide make provision for speedy trial and to punishment was increased for the accused of committing sexual assault against women. The rest of the members were Justice Leila Seth who is the former judge of the High Court and Gopal Subramanium, the former Solicitor General of India. On 23rd January, 2013 the Committee yielded a report where recommendations were made regarding the laws related to rape, sexual harassment, trafficking, child sexual abuse, medical examination of victims, police, electoral and educational reforms.

(a)**Rape:** Justice Verma Committee made recommendations regarding the scale of sexual offenses that should be punished under the provisions of the Indian Penal Code 1860 (IPC). As per the view of Committee, the members said the sexual offenses like rape are expression of power and aggression of an individual and that should to restrained and to be considered as a distinct crime and enhanced its limitation beyond penetration into vagina, mouth and anus and non-consensual penetration of a sexual nature is considered as rape. However, differentiation has been made between rape within marriage and outside marriage under Indian Penal Code 1860. As per Sec 375 sexual intercourse by a man without consent of other is prohibited. But there is an exception which states that sexual intercourse by a man husband upon a wife below 18 years of age is not rape. However, recommendation has made that exception to marital rape should be removed. (12)

(b)**Sexual assault:** Under Section 354 IPC, if a person uses criminal force or assaults a woman with the intention to outrage her dignity and modesty shall be punishable with imprisonment of two years, in case the forceful penetration is not clear, the offence
shall be considered under this section. The Committee made recommendations regarding the sexual contact in case of non-penetration where sexual assault took place that should be considered as sexual assaults and is punishable with 5 years of imprisonment, or fine, or both. Punishment is conferred imprisonment of 3 to 7 years who uses criminal force to disrobe a woman. The offence of sexual assault should be defined so as to include all forms of non-consensual non-penetrative touching of a sexual nature. The sexual nature of an act should be determined on the basis of the circumstances. Sexual gratification as a motive for the act should not be prerequisite for proving the offence.

(c) Verbal sexual assault: Based on the recommendations of the Committee, now punishment is given with one year of imprisonment or with fine or with both shall be published under Sec 509 IPC, one who uses words or gestures in order to “insult a woman’s modesty”. The committee stated that punishment should be awarded of one year of imprisonment and with fine for such such where acts or gestures creates an threat of a sexual nature in the mind of the victim and termed as sexual assault.

(d) Sexual harassment: Certain recommendations which are presented by the Justice Verma Committee regarding the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal), 2012 in Parliament are given in the following - Moreover Domestic workers is required to included. As per the bill the complainant and the opposite party have to go for conciliation mode. But in Vishakha vs. State of Rajasthan, the Supreme Court stated that objective is required to form a safe workplace to women. The employer is required to pay compensation to the victim of sexual harassment in their workplace. Moreover, the employer is empowered to file a complaint to the internal complaints committee. While an internal committee contravenes the main objective of the Bill and there is requirement of establishment of Employment Tribunal to receive and adjudicate all complaints.

(e) Acid attack: Justice Verma Committee given recommendation that the offence should not be combined with the grievous hurt under the provisions of law and punishment is awarded with imprisonment for a term of seven years with fine. As per the Criminal Law Amendment Bill, it include provisions relating to conferring punishment of imprisonment up to 10 years or life imprisonment. The committee recommended to the central and state government for the establishment of corpus to compensate victims of offenses against women.


(14) Ibid

Offences against women in conflict areas: The continuance of Armed Forces (Special Powers) Act (AFSPA) in conflict areas needs to be revisited. At present, the AFSPA requires a sanctions is required to be provided by Central government for commencing the prosecution against armed forces personnel. The Committee made recommendations regarding the
requirement of sanction for initiation of prosecution of armed forces personnel that should be specifically excluded when a sexual offence is alleged. Complainants of sexual violence must be afforded witness protection. However, there is requirements of appointment of the Special commissioners for the conflict areas in order to monitor and prosecute for sexual offences. (15)

(f) Trafficking: The Committee mentioned that the Immoral Trafficking Prevention Act, 1956 did not provide any specific definition of trafficking, however it punished the activities of trafficking for the promoting prostitution. It stated the need for amendment of certain provisions of the IPC regarding slavery in order to criminalise trafficking by use of threatening, force or inducement and suggestions were given for criminalizing the trafficked person. The protective shelter for the vulnerable class of society that are juvenile and women is required to be placed under the legal guardianship of High Courts and measures should be taken to reintegrate the victims so that they can adjust themselves in society. (16)

(g) Child sexual abuse: The Committee has given suggestions for the terms ‘harm’ and ‘health’ to be enunciated under the provisions of Juvenile Justice Act, 2000 in a manner to include mental and physical harm of health, of the juvenile. Punishment for crimes against women: Justice Verma Committee refused to accept the proposal for chemical castration as its don’t have enough potential treat the social foundations of sexual offenses or other offenses against women and made recommendation that capital punishment should be awarded for committing rape as there was evidence so show that capital punishment was not acting as a deterrence to serious crimes. (17)

(h) Medical examination of a rape victim: Justice Verma Committee were against the system of the two-finger test which is conducted in order to examine the laxity of the vaginal muscles and to make decisions by the medical professionals whether rape has been committed against that person. The Apex Court stated in judgments that the two-finger test should be avoided and while determining the consent of the victim her previous sexual experience of the victim should not taken into consideration. (17)

(i) Police reforms: The Committee gave suggestions related to reformation of the police system, by composing of State Security Commissions in order to assure that state governments is not affecting the state police. The Chief Minister or the Home Minister are the head of the Commission in the state and laid wide policy guidelines prescribing how the police should act as per the provisions of law and to decide all transfers, postings and promotions of officers was conferred upon the police establishment. (18)

(j) Reforms in management of cases related to crime against women: In order to prevent the crime against women, Rape Crisis Cell should be established. In fact the Rape Crisis Cell should be informed accordingly whenever any FIR is registered relating to sexual assault. Then responsibility is conferred upon it to provide legal assistance to the victim as well as CCTVs are required to be used in all police stations at the front and in the questioning room and there is now provisions of filing online complaint and
the Police officers should provide assistance to victims of sexual offences irrespective of the crime’s jurisdiction. The public members helping the victims should not be considered as wrong doers. The police must have to trained in order to deal properly with sexual offenses and with the increase in number of crimes the number of police personnel is required to be increased and there is need of developing Community policing in order to train the volunteers.(19)

(k)Electoral reforms: The Committee made recommendations regarding amending the provisions of the Representation of People Act, 1951, the Act don’t allow the candidates who were involved in offenses related to terrorism, untouchability, secularism, fraud in elections, sati and dowry and expressed its view that in case any charge sheet is filed or cognizance is made by the Court against the candidate it will disqualifies him , under the Act .

(l)Education reforms: Justice Verma Committee has given recommendations that children’s experiences should not be gendered. It has given suggestion for including sexuality education as a part of education to children as that will help them to prevent or to restrain from committing crimes and to gather knowledge as well as several programmed should be conducted related to Adult literacy programs for gender empowerment.(20)

THE CRIMINAL LAW (AMENDMENT)ACT, 2013
Along with the suggestions made by the Justice Verma Committee, for reducing the violence and exploitation against women comprehensive amendments were added in the Indian Penal Code, 1860, Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 by the introduction of the Criminal Law (Amendment) Act, 2013. After the amendments certain changes were made in order to reduce violence against women and punish those violating laws with more stringent

a) Certain offences including the acid attack, sexual harassment, voyeurism, disrobing a woman, stalking have been inserted under the provisions of the Indian Penal Code and provisions relating to increasing of the penalty for several crimes like rape, sexual harassment, stalking, voyeurism, acid attacks, indecent gestures like words and inappropriate touch etc

b) Now the term rape includes the non-penetrative sex as well along with penetrative intercourse as per Section 375 IPC.

c) Now under aggravated rape includes rape committed by a man who is in a dominant position, that includes by anyone from the armed forces deployed in an area, and the aggravated rape includes rape committed while any communal or sectarian violence or on a woman who is unable to give consent.(21)

(19)ibid
(20)ibid

d) Penalty has increased for committing gang rape and leading to serious injury to the victim and the victims are in the vegetative state.

e) sentence for rape convicted has increased which includes , life-term and death sentence.

f) Adding new provisions relating to casting of responsibility on all hospitals
which are administered by the Central Government or State Government in order to provide first aid or medical treatment, free of cost to victims of any offence as mentioned under Section 326, 375 ad 376 that are acid attack and rape.(22)

f) Moreover, Section 370 and 370A IPC, states that measures are required to be taken in order to prevent human trafficking, which involves trafficking of children for exploitation in any form including physical exploitation or any form of sexual exploitation, slavery, servitude, or the forced removal of organs.

THE CRIMINAL LAW (AMENDMENT) ACT, 2018

The Criminal Law (Amendment) Act, 2018 was enacted by Parliament where certain changes were made in the provisions as provided under -

(a) in sub-section (1), for the words "shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine", the words "shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine" shall be substituted;

(b) in sub-section (2), clause (i) shall be omitted;

(c) after sub-section (2), the following sub-section shall be inserted, namely:—

Section (3) Anyone who commits the offence of rape on a woman who is below sixteen years of age shall be punished with rigorous imprisonment of twenty years minimum, but which may extend to life imprisonment along with fine -

Moreover if fine is required to pay as per this sub-section, that amount shall be paid to the victim.(23)

Section 5. After the addition of section 376A IPC, the Sections inserted are as follows:—

As provided under Section 376AB if anyone, commits rape on a woman of twelve years of age, he shall be liable to rigorous imprisonment for twenty years minimum, but that may extend up to life imprisonment which shall refer imprisonment is given for the rest of the lives of the individual and with fine.

However such fine should reasonable and adequate enough to provide the medical expenses and rehabilitation of the victim. However any fine imposed as per this section shall be paid to the victim.(24)

Section 6. After section 376D of the Penal Code, certain sections are included -

Section 376DA shall be added, as per the section if certain group of persons commits rape to girl below sixteen years of age in furtherance of a common intention, all the persons shall be punished with life imprisonment for life, and with fine:

However such fine should be just and reasonable enough to provide the medical expenses and rehabilitation of the victim. Moreover, any fine imposed as per the section shall be paid to the victim.

Section 376DB. In case a woman lower than twelve years of age is raped certain group of people based on their common intention, all the persons shall be punished with life imprisonment, and with fine, or with death:

However that such fine should be reasonable to meet the medical expenses and rehabilitation of the victim of the offence. However if any fine imposed by
the Court as per this section shall be paid to the victim.(25)

(22) ibid
(23) Criminal Law (Sexual Offences) (Amendment) Act 2019
(24) ibid
(25) ibid

MARITAL RAPE
As per the Center for Constitutional Rights, marital rape includes acts which are done against the will of wife either by physical force or by use of force or using threatening or fear in the mind of the victim, the intercourse by using force upon the wife when she is asleep or sick also comes under marital rape.(26)

The Protection of Women from Domestic Violence Act, 2005 came into force on October 2006. It provides recognition to rape in marriages which is a form of domestic violence. But in America and many other western countries, marital rape has been considered as an offence under the provisions of law of their respective nations. The National Commission for Women (NCW) reported that sexual offences like marital rape should be recognized as offence. Moreover, a member of National Commission for Women, Rekha Sharma stated that women should not be suffered on the ground of religious beliefs and commission of crime like rape should be punished whether done by husband or any other person. However, there are several reasons for not recognizing marital rape as an offence like due to poverty, illiteracy, education, religious beliefs, myriad social customs as well as values, beliefs of people to treat marriage as a Sacrament and religious institution. Marital rape not only an act of sexual or physical violence but there is emotional violence and psychological intimidation involved in it. Many countries all over the world have considered it as an offence and criminalized rape in the marriage i.e in 1970, Sweden has enacted anti-marital rape, after that in United Kingdom, USA, Australia, Canada, Philippines, Mexico, Turkey, Poland, New Zealand, Thailand, Mauritius, France, Nepal and many other nations have passed anti-marital law criminalizing the offence.(27)

In R Vs R,(28) the House of Lords stated that husband would be charged as an offender for committing rape of his wife as shall be punishable under the provisions of the law. This landmark judgment has obliterated the unreasonable protection provided to a husband from prosecution under the doctrine of marital exemption. However, the exemption was depends upon faith where the wife was considered as the husband's chattel.

PROTECTION OF WOMEN AGAINST POSSIBLE SEX HARASSMENT BY POLICE PERSONNEL
Police have huge responsibility to provide sufficient protection to women in order to protect the modesty and protect it from crimes, but still the crime against women are increasingly each and every day, large
of instances found where there is likelihood of police personnel misusing their position and authority leading to harrasing the women. In order to protect women guidelines and safeguards have been incorporated in the Criminal Procedure Code 1973, as well as the Police Acts and Rules of the States.

As per Section 51(2) of Cr.P.C, it states when situation comes that any woman is required to be searched, the search should be made along with another female personnel by maintaining decency as per the provisions of the Act.

As per Section 160 Cr.P.C, states that no male who is below the age of fifteen years or any woman shall be required to visit any area other than those place where such male person or woman stays.

As per Section 437 Cr.P.C, it states that for the purpose of release of any woman, or any ill person who is accused of non bailable offences is required to be released on grant of bail, even in those case when the offence committed is punishable with life imprisonment or with capital punishment.

SENTENCING

In Ravji Vs State of Rajasthan (30), the Court held that while determining appropriate punishment for any offence, the gravity, nature as well as circumstances are taken into consideration rather than the criminal involved in any case, the punishment which is awarded for commission of any crime shouldn't be irrelevant but should contrue to the brutality or atrocities.

In Dhananjay Chatterjee Vs State of West Bengal,(31) the court reiterated that huge number of criminals remained unpunished and the rate is increasing rapidly and this encourages the offenders to commit crimes and this lead to delay in justice by weakening the system's credibility. In such a situation, by inflicting of appropriate punishment the Court responds to the cry of the victim as well as the society.

In Bodhisattwa Gautam Vs Miss Subhra Chakraborty,(32) the Apex Court stated that though the psychological impact of rape on the mind of victim is unbearable but the socio-legal implications of rape is a crime not only against the victim but also on the society, and the rape destroys the psychology of the victim and she faces suffering from a lot of emotional crisis. It violates the victims fundamental rights guaranteed under Part III of the Constitution is the Right to Life under Article 21 of Indian Constitution.

In State of Himachal Pradesh Vs Asha Ram (33) the Apex Court stated that great importance is given to the evidence produced by a victim of sex offences, moreover the Court followed certain factors as the rationale for this rule -

(a) The women / girls are required to be brave the whole world.
(b) She may lose the respect and love from her matrimonial home.
(c) That may lead to mental harassment and physical suffering.
(d) She definitely feel embarrassed while explaining the incidents.
(e) She always feel the fear of being neglected and ostarcised by the
people outside including her family, relatives, neighbours etc.

(f) She wouldn't be allowed to let the matter in front of public due to fear in mind of her family name may damaged.

(g) Moreover, if the person is unmarried, she would consider that it would be uncooperative to secure her alliance with a proper match from a family.

(h) Another fear of victim is that she would be considered to be promiscuous or not accepted by the society on the ground that she is responsible for the incident inspite of her innocence.

(i) Most of the victim gmhas the fear of facing interrogation with the counsel of opposite party of the case as well as to face to trial in the Court.

In the present case, the victim, who was the young daughter was raped by her father, which lead to the mental suffering of the victim. The incident was grave in nature where the perpetrator or criminal of the offense is a father against his daughter and that matter falls under the area of "rarest of rare case", where strict punishment should be inflicted upon the criminal. The Apex Court, in that case, increased the punishment up to life imprisonment and fine with the amount of Rs 25,000.

(30) The Ravji Vs State of Rajasthan,(1997) 2 SCC 175: 1996 (SCC (Cri)225
(31) Dhananjay Chatterjee Vs State of West Bengal,(1994) 2 SCC 220: 1994 SCC (Cri)358
(32) Bodhisattwa Gautam Vs Miss Subhra Chakraborty, AIR 1996 SC 922
(33) Criminal Appeal No. 1266/1998 decided on Nov 17, 2005

QUANTUM OF PUNISHMENT

In the State of Karnataka Vs Puttaraja(34), in this case, the accused raped a woman who was in an advanced stage of pregnancy. The session Court confirmed the conviction with the punishment of imprisonment of 5 years. After that an appeal was made before the High Court, their sentence was given up to 96 days as already he was already in the sentence. Then, the Apex Court held that the decision of the High Court was not justified and it was disproportionate and the reason produced by the High Court can't be considered as adequate as the sentence was reduced because he was a coolie and agriculturalist of 22 years of age. The Apex Court overruled the decision and gave a sentence of 5 years which was also given by the Trial Court and stated that reducing the sentence without any reasonable ground in the case of sexual offenses is not only accepted but also against the public interest.

In the State of Punjab Vs Rakesh Kumar (35), the Court held that in case minimum penalty has been provided under the provisions of the law as given under Sec 376 IPC if the Court gives punishment lesser than the prescribed period, the Court is, required to mention the reason behind taking the decision in written form and this is applicable to the Appellate Court too. In this case, no excuse or special reason that the accused and victim were having love affairs earlier can't be considered and on this ground, the punishment cannot be reduced below the prescribed minimum, and here the victim was below 16 years of age.

RELEVANT CASES

Mr. Justice S. Ratnavel Pandian of Apex Court in Madan Gopal Kakkad Vs Naval Dubey & Another(36), stated that crimes of sexual offenses should be strictly as well
as mercilessly punished in the severest terms, as they are the menace to the whole society and its a crime not against the victim concerned but against the society.

(34) State of Karnataka Vs Putter, 2004 Cri L.J. 579(S.C)
(35) State of Punjab Vs Rakesh Kumar, (2009) I Cri L.J. 396(S.C)
(36) Madan Gopal Kakkad Vs Naval Dubey & Another, 1992(3) SCC 204

State of M.P Vs Babulal(37), in this case, a 22 years old married woman, who was a worker in his tapri was raped by the appellant, later on, the victim's husband, as well as inlaws, registered FIR, but the appellant denied all the allegations and said they are trying to put him in trouble by lodging fake case due to the failure of the victim's husband to provide advance money when demanded was found to be untenable. Later on, the Session Court awarded his a sentence up to 7 years of imprisonment along with a fine of Rs.2500/-, after filing an appeal the High Court reduced the punishment after that Supreme Court of India held that the High Court has given the wrong decision that leads to a miscarriage of justice and stated that there is no reasonable ground observed to reduce the punishment less than what prescribed under Section 376(1) IPC and the Court upheld the order of conviction and punishment given by the Session Court.

The Apex Court in Deepak Gulati Vs State of Haryana(38), held that intercourse occurred and under the false promise to marry the person is considered as rape, in the case the accused has no earlier intention to marry the lady and that can't be considered as consensual sex.

(37) State of M.P Vs Babulal, AIR 2008 SC 582
(38) Deepak Gulati Vs State of Haryana, AIR 2013 SC 2071

CONCLUDING OBSERVATIONS
Rape is the act of expressing violence by using sexual means, with the increasing rape cases much more stringent punishment is required to award in order to prevent such incidents. The Court bears great responsibility while trying an accused on the charge of rape. It is required to emphasize the vital function of various law enforcement agencies including police, the magistracy, the advocates, as well as the rehabilitation centers in reducing sex criminality. Moreover, apart from the provisions of law governing sexual offenses, other effective measures should be ensured. Moreover, there is a need for motivating the people by educating people and aware of them regarding the seriousness of consequences ensuing therefrom.
ANALYSIS OF MUSLIM WOMEN (PROTECTION OF RIGHT ON MARRIAGE) ACT, 2019

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ABSTRACT
Today, the issues of women rights in Muslim personal law are highly controversial. Specially, Muslim women rights relating to triple talaq divorce, inheritance, maintenance has got much attention now a days. Indian constitution has however guaranteed equality and freedom from discrimination based on gender or religion, but still there are various practices which are based on heartless conservative culture.

As we know a large part of Muslim law is still not codified and most legal decision of court in case of Muslim are based on the norms are being followed from a long time. The courts have however tried to codify the Muslim law by passing the Muslim women (Protection of right on marriage) bill, 2019. There has been a lot of controversy about this bill. From the outside, the entire triple talaq issue has been translated into debate of culture versus modernity. This paper would try to find out all the problem and lacunas in the bill which was passed by the legislature. This paper would also focus on all the reasons behind opposing this bill by the opposition. This paper would also try to find out why few section of the Muslim community is against this bill.

Keywords - triple talaq; Muslim; Muslim women (Protection of right on marriage) bill, 2019.

INTRODUCTION:-
India is one of the most religiously diverse nations in the world. Although “India is a secular” Hindu majority nation but this nation also has a large population of Muslim. Triple talaq which is a Muslim practice have been in news and in every discussion from a long time. One of the most debated issues in the Muslim faith has been “Triple talaq, or talaq-e-biddat”. “It plagued by the portrayal of Muslim men regularly misusing this perceived ‘right’ to divorce their wives instantly by simply uttering “talaq” thrice”. “Shayara Bano v. Union of India1202 “ one of the landmark judgement of the supreme court of India, “has taken the step to declare this form of talaq unconstitutional and to strike down its practice. In” 2019, Muslim Women (Protection of Right on Marriage) Bill was pass which declared this practice unconstitutional and criminalized this with punishment of 3years as result of Shayara Bano case.

Talaq is an Islamic word for divorce and it literally means separating and breaking of marriage. In essence, ‘the talaq is a unilateral repudiation or cutting off the marital tie’1203. There are 3 forms of divorce beneath sharia law, namely, Ahsan, Hasan and Talaq-e-Biddat (triple talaq). The previous 2 are revocable while the last one is irrevocable. Talaq-e-biddat (triple talaq) mainly prevails among Muslim communities that follow the Hanafi School of sharia law. Triple Talaq is that method of divorce beneath sharia (Islamic law) wherever a husband will divorce his woman

1202 (2017) 9 SCC 1

1203 David Pearl & Werner Meenski, Muslim Family Law p. 281 (3d ed. 1998)
by saying ‘Talaq’ thrice. This can be additionally known as oral talaq. Under this law; wives cannot divorce husbands by means of triple talaq. Among Muslims, a method of divorce is available to the husband that is Triple Talaq or Talaq-ul-Biddat.\textsuperscript{1204} It’s a customary practice “that dissolves a marriage when the husband says the word ‘talaq’ thrice”. Bharatiya Muslim Mahila Andolan (BMMA) conducted a study in which it was found that 59 Muslim women out of 100 “Muslim women had been divorced through Triple Talaq.\textsuperscript{1205} In” which nearly all were done orally. According to the study of Bharatiya Muslim Mahila Andolan (BMMA) it was found that more than 90 percent of 4,710 women interviewed wanted a ban on Triple Talaq.\textsuperscript{1206}

This custom of triple talaq has been criticized for long time due to being unilateral and biased against women, and due to this reason 22 countries of the world have banned it in their nation. In Supreme Court of India, it has been challenged as well for abolition. Women have been fighting from a long time in India for the abolition of this evil practice which in a minute destroys their lives. However there campaigned got up streamed in 2016 only after the Shayara Bano v. Union of India and others\textsuperscript{1207} case came in Supreme court against triple talaq.

On 22 August 2017, the practice of triple talaq was declared unconstitutional by the Supreme Court and saying that it was against Article 14 and 21 of the Constitution of India. In 2019 Supreme Court declared the practice of instant triple talaq unconstitutional and a divorce pronounced by uttering talaq three times in one sitting void and illegal after which The Muslim Women (Protection of Rights on Marriage) Bill, 2019 which declared triple talaq illegal and void came into force on September 19, 2019.\textsuperscript{1208} This declaration by supreme court of making triple talaq unconstitutional and criminalization of this practice was not supported by everyone in the Muslim community as a result batch of petitions were filed by ‘Samastha Kerala Jamiaath典雅ma’, a religious organization of Sunni Muslim scholars; Amir Rashid Madni, a politician and Islamic scholar, and a Muslim organization called Jamiat Ulama-I- Hind, challenging the Muslim Women (Protection of Rights on Marriage) Act 2019.\textsuperscript{1209}

**POSITION IN OTHER COUNTRIES:**
The present day muslim world comprises twenty two Arabs and moreover eighteen non Arab countries. Three different groups can be categorised for the family law presently followed by the Muslim world. These three groups are as follow:

\textsuperscript{1204} Mulla, Principle of Mohammedan Law 338 (22\textsuperscript{nd} ed. 2017).
\textsuperscript{1205} “How Indian Muslim women fought, and won, the divorce battle - Triple talaq ; BBC NEWS ; http://www.bbc.com/news/world-asia-india (October 5, 2019)”
\textsuperscript{1206} Triple Talaq, Times of India (2019), https://timesofindia.indiatimes.com/topic/Triple-Talaq( October 5, 2019 )
\textsuperscript{1207} (2007) 9 SCC 1
i. Firstly, where unaltered and unwritten classical family law according to its various schools are being followed by the countries.

ii. Secondly, the countries where statutory law have replaced the Islamic law pertaining to family disputes by the applicable to all citizens irrespective of their religion.

iii. The nation where the locally predominant type of family various techniques.

Extra judicial divorce by the action of the husband remains possible in several Muslim countries. However a system of various checks on this form has been devised. Besides, triple talaq has now been forbidden in most of the Muslim countries. The triple talaq has been abolished by the provisions of many Muslim countries or has been made impracticable.

There are more than 22 Islamic countries that don’t support triple talaq. These countries have declared the practice of triple talaq to be null and void. UAE, Iraq, Egypt, Morocco, Philippines, Sudan, Jordan, Kuwait, Syria, Yemen and many more have made law in which the concept of triple talaq is not even recognized. In all the above-mentioned countries every talaq affects only a single revocable divorce, which can be revoking during wife’s iddat, failing that for renewal of remarriage anytime with her consent. Even the device of halala for validating remarriage of the parties also stands abolished in these countries. As this practice are inhumane and are against the dignity of women which must not be practice anywhere.

It’s however an admitted fact that Triple talaq is still applicable in some Muslim countries where the traditional interpretation of the law is done. For example, nothing is done in the laws which are present in Saudi Arabia to change this undesirable practice. The permanent commission of Academic Research and Adjudication, few years back dealt with the issue of triple talaq. Its attention was drawn to fact that in few nation triple talaq has been either abolished or made impracticable by the legislation.

**THE JUDICIAL JOURNEY OF TRIPLE TALAQ:-**

The journey of The Muslim Women (Protection of right on Marriage) Act 2019 has been a roller coaster ride as on the issue of gender discrimination mixed with political as well as religious issue. For the very first time this issue of triple talaq came into light by Shah Bano case in 1985. The wife in this case not only asked for alimony from her husband but also raised question against the long standing evil custom of triple-e-biddat, polygamy and nikah halala. It was case of Shamim Ara v. State of U.P. in 2002 where some noteworthy judgement came into picture. This case didn’t invalidated triple talaq but put restriction of reasonable grounds and cogent plausible was applied. In this case it was also said that both husband and wife will appoint two arbitrators who would made all the efforts for resolution and reconciliation. Talaq would only come into effect once all the efforts have been failed. The Aurangabad bench of Bombay High

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1210 Tahir Mahmood, Muslim Law in India and abroad. P. 145 (2nd ed. 2016)
1212 Roller coaster ride of the triple talaq bill, Times of India (2019),
1213 1985 AIR 945. 1985 SCR (3) 844.
1214 AIR 2002 S.C. 3551.

Court in 2002 only invalidated the practice of triple talaq by referring to Quran in case of Dagdua Pathan v. Rahimbi. In this case court said that husband can’t repudiate the marriage at his own will. He will have to prove all stages that are – conveying the reasons for divorce, appointment of arbitrators and conciliation proceedings between the parties were followed. These judgements served as the main basis for all the later cases and thus the practice of triple talaq was invalidated.

The campaign of women for abolition of triple talaq is going on for a long time. It has got support by too many of women rights activist and journalists however it got up stream only in 2016. This issue got triggered when in apex court petition was filed by Shayara Bano in 2016. Shayara Bano a 36-year-old native of Kashipur, Uttarakhand, emerged as a spark, as defining persona in the legal battle against the patricentric tradition which ruined the lives of thousands of muslim women. She was married for 15 year to Rizwan Ahmed. In 2016 his husband divorced her through triple talaq (talaq-e-biddat). After this she filed a petition in Supreme Court against the constitutionality of talaq-e-biddat, polygamy, nikah – halaha as they are violate of Article 14, 15, 21 and 25.

On 16th February, 2017 the decision on triple talaq was pronounced by 5 judge Supreme Court’s bench. In the judgement of the practice of triple-e-biddat or triple talaq was declared unconstitutional by 3:2 majorities. In this judgement Rohinton Nariman, U.U.Lalit and Kurian Joseph were those who said the practice of triple talaq to be unconstitutional while CJI J.S. Khehar and Abdul Nazeer gave a dissenting verdict. The 397 pages of judgement on one side witnessed 2 judges upholding the custom of talaq-e-biddat, polygamy and nikah – halaha as they are violate of Article 14, 15, 21 and 25.

On 22nd August 2017 the decision on triple talaq was pronounced by 5 judge Supreme Court’s bench. In the judgement of the practice of triple-e-biddat or triple talaq was declared unconstitutional by 3:2 majorities. In this judgement Rohinton Nariman, U.U.Lalit and Kurian Joseph were those who said the practice of triple talaq to be unconstitutional while CJI J.S. Khehar and Abdul Nazeer gave a dissenting verdict. The 397 pages of judgement on one side witnessed 2 judges upholding the custom of talaq-e-biddat, polygamy and nikah – halaha as they are violate of Article 14, 15, 21 and 25.

On 16th February, 2017 court asked Shayara Bano, the Union of India, various women rights bodies and All India Muslim Personal Law Board (AIMPLB) to give a written submission on issues related to talaq-e-biddat, polygamy and nikah – halaha. The Union of India and various women rights organisation supported Shayara Bano whereas AIMPLB said that uncodified Muslim Personal Law cannot be subjected to constitutional judicial review and these are ancient Islamic practices which are protected under article 25.

In this case mainly issues were raised as follow,

- Whether triple talaq is Islamic in nature or not?
- Can Article 25 protect the practice of talaq-e-biddat or not?
- Regardless of whether Muslim Personal Law (Shariat) Application Act, 1937 presents statutory status to the subjects represented by it or is despite everything it shielded under "Individual Law" which isn't inside the significance of word "law" under Article 13 of Constitution of India?

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1215 II (2002), DMC 315 Bom FB.
1216 The constitution of India, 1950
1217 The constitution of India, 1950
1218 The constitution of India, 1950
1219 The constitution of India, 1950
1220 The constitution of India, 1950
1221 The constitution of India, 1950
or talaq-e-biddat was abolished. The 5 judge bench issue direction under Article 142 to the union government regarding this a legislation is to be draft within 6 month.  

On 28th December, 2017 The Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed in lok sabha. This bill make triple talaq in any from illegal and void, with up to three year of imprisonment for husband and other remedial provision. In 2019 triple talaq bill faced the test of rajya sabha. Although it faced a lot of criticism on various ground like every reformative act get from ancient time but finally it saw light and become a formal law.

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The separate judgement of five judges are as follow;

- **Justice Kurien Joseph** –

  Justice Kurien Joseph became the part of the majority judgement by giving judgement against triple talaq. On the ground that the practice of triple talaq is not an essential practice he struck down this practice. He also said that this practice as not an compulsory practice therefore can’t be protected within the boundary of Article 25 and 26. Whether what is wrong in Quran can that be legally right was the main question that was raised by Justice Kurien Joseph.

  Justice Kurien Joseph firstly tried to confirm that is there any legal provision or legislation that governs the triple talaq or not to search for solution to this question. According to him, there is an enactment known to be The Muslim Personal Shariat Application Act, 1937 which is applicable to Muslims. This act is only applicable to that subject matter only which is covered under section 2 and talaq is not covered under section 2. The principle that governed talaq is actually Quran and hence there is no proper codified legislation to deal with triple talaq.

Justice Kurien Joseph also examined all the relevant verse of the Quran. After examining the verse he said that the Quran clearly considers the marriage to be sacramental and permanent. Talaq should be the last option only when there is extreme and unavoidable situation. There always should be an attempt to reconciliation before talaq and if achieve success in reconciliation the talaq should be revoked according to the sayings of the Quran, where there is no scope for reconciliation that kind of talaq is against the basic nature of Quran and Triple talaq is an instantaneous talaq where there is no scope of reconciliation and therefore it is in violation of the Muslim personal law.

Triple talaq was held to not an essential religious practice and in violation of the basic principle of the Quran on the above mention resons by His lordship. In spite of the fact that holding of Justice Joseph’s was part of the majority, he backed the dissent

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1223 The constitution of India, 1950
1226 The Constitution of India, 1950
1227 The Constitution of India, 1950
1229 The Muslim Personal Law Shariat (Application) Act (1937)
1230 Id.
1231 “Shamim Ara v. State of Uttar Pradesh and another, AIR 2002 SC 3551”
1232 Id.
1233 Id.
that Talaq is not regulated by the Shariat Act according to his reasoning. It is said that the vote of Justice Joseph’s was being swing in this case.

- **Justices R.F. Nariman and U.U. Lalit** –
  Making it the majority opinion, triple talaq was even struck down by Justices Nariman and Lalit stating it to be unconstitutional. Justices Nariman and Lalit raised the question that whether triple talaq can be tested under Article 13 or not. The precedent of Narasu Appa Mali case was taken by Justices Nariman and Lalit as reference, which laid down that personal law falls outside the boundary of Article 13. Under part 3 i.e. fundamental right of constitution, only those personal laws which are codified that can be examine for violation. The Shariat Act enforces and recognised triple talaq therefore it would fall under Article 13 of constitution said by Justices Nariman and Lalit. It would be struck out by Article 13(1) if it is not consistent with the provisions of Part 3 i.e. fundamental right of the constitution. Under The Muslim Personal Shariat Application Act, 1937 section 2 tested under Article 14 to find its constitutional validity of triple talaq. Justices Nariman and Lalit held that;

“It is clear that this form of Talaq [Triple Talaq] is manifestly arbitrary in the sense that the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it. This form of Talaq must, therefore, be held to be violative of the fundamental right contained under Article 14 of the Constitution of India. In our opinion, therefore, the 1937 Act, insofar as it seeks to recognise and enforce Triple Talaq, is within the meaning of the expression “laws in force” in Article 13(1) and must be struck down as being void to the extent that it recognises and enforces Triple Talaq.”

Justice Nariman and Lalit found triple talaq to be violative of Art. 14 so they didn’t went into the aspect of discrimination against women.

- **Justices J.S. Khehar and Abdul Nazeer** –
  Justice Khehar and Nazeer gave a dissenting judgement in this case. They upheld the practice of triple talaq to be valid. According to them neither Article 25 nor is any other Article being violated by the practice of triple talaq. Therefore the practice of triple talaq can’t be struck down. The history of triple talaq was examined by Justice Khehar for giving this judgement. It was noted by Justice Khehar that the Muslim of India widely practice the custom of triple talaq. His lordship said that triple talaq has approval of muslim and it can be seen through the popularity it have among Muslim. Therefore it has been seen as an integral part of Islamic religion.

the principle of Narasu Appa case was upheld by Justice Khehar and with reference to that his lordship said that the Art. 13(1) cannot be used to review the Shariat law. The structure of Art. 25 and any other provision of Part III of the Constitution can only be used for reviewing the personal laws. Triple Talaq was then examined by Justice Khehar against each of

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1234 The Constitution of India, 1950
1235 The “State of Bombay v. Narasu Appa Mali, AIR 1952 Bom. 84 (India)”
1236 The Constitution of India, 1950
the exceptions. According to his lordship no nexus was found of triple talaq to public, health or morality and it was also found that it doesn’t even breach any fundamental rights. Further he also stated the triple talaq as a personal law and therefore should be protected under article 25 of the constitution.

Cheif justice Nazeer also gave a dissenting order in this case. His lordship believed that judiciary isn’t an appropriate forum and it was under legislature authority. This was the only reason for not striking down triple talaq. Abolition of other social evils like devdasi, polygamy and sati was mentions by him and was said that these practices were not challenge in any of the court and these were discontinued by legislative enactment. Therefore, exercising the power under Article 142 of the constitution the of supreme court direction was given to Union of India by Chief Justice to form a appropriate legislation in relation with Talaq-e-Biddat (Triple Talaq). Although injunction of six month was granted by chief justice as an interim against triple talaq.

**TRIPLE TALAQ ACT:-**
The parliament has power to pass law related to marriage and divorces. This power is drawn through entry 5 of concurrent list (seventh schedule) read along with Article 25(2) and Article 44. After long battle of cases like Shah Bano(1985), Danial Latifi(2001), Shamim Ara(2002), and finally Sharaya Bano (2016), the Indian government formulated a bill known as The Muslim Women (Protection of Rights on Marriage) Bill on December 28, 2017. On 30th July, 2019, Rajya Sabha passed the bill of Triple Talaq through ballot voting in which 99 votes were in favour while 84 were against. This act faced a lot of controversy as well as a lot of protest from opposition. Modi government marked a landmark victory through passing of this bill. The bill of triple talaq was in controversy ever since previous Modi government on lok shabha table in 2017.

The main objective and reason of this bill was end the practice of the triple talaq. The case of Sharaya Bano resulted this The Muslim Women (protection of Right on Marriage) bill,2019. Immediate need was felt by the state to end this practice and neither a judgement passed in case of Sharaya Bano nor adequate deterrents was being seized by All India Muslim Personal Law Board against triple talaq. Therefore the need to give legal enforcement of the verdict was felt by the state.

The declaration of immediate and non-revocable talaq is declared void & illegal under this act. This act gives definition of talaq as talaq-e-biddat or any other talaq which have immediate and non-revocable effect. This talaq-e-biddat could be in any form – spoken, written, and electronic or in any other manner. According to this act any husband pronouncing talaq-e-biddat would be punishable with imprisonment of 3years as well as fine.

This act also legislates on matter related to allowance and custody. Every Muslim women divorce through talaq-e-biddat is entitled for allowances for herself and her

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1238 The Constitution of India, 1950
1240 Section 3, The Muslim Women (Protection of Right on Marriage) Bill, 2019
1241 Section 2, The Muslim Women (Protection of Right on Marriage) Bill, 2019
dependent children\textsuperscript{1242}. Under this act Muslim women will also be entitle to have the default custody of her minor child in case of instantaneous talaq pronounced by husband\textsuperscript{1243}. The Magistrate would be determining the term and nature of the custody.

The provision of default custody seems like a consequence of section 7 of the act – under which it talked about arrest of husband which can be done even without warrant and he would not be granted bail. Therefore the mother must have the custody of the minor child. This enactment is minuscule legislation. It has been organised into 3 chapters which further lay out into 8 sections. This act is smaller than the statement of objects and reasons prescribe for this act. In this the first chapter talk about jurisdiction, commencement and definition clause. The 2\textsuperscript{nd} chapter talk about the declaration of triple talaq illegal & void as well as punishment for the pronouncement of triple talaq. The rights of Muslim women related to subsistence allowance and custody of minor child is being dealt in the last chapter of this act talk about related to. This chapter also talk about arrest of husband without warrant and non bailable nature of the offence.

**LACUNA IN THE ACT:-**
This act is a boon for all the Muslim women against the practice of talaq-e-biddat. Naturally, this act also has some lacuna that need to be ratified. In this chapter the shortcoming of the act is discussed below.

- **DUBIETY IN STATUS OF MARRIAGE AFTER TRIPLE TALAQ**

  The pronunciation of talaq-e-biddat is merely makes the illegal and void by the act. This act but doesn’t throw light on the marital status after the pronouncement of triple talaq. It doesn’t clear whether the marriage will survive or end.

  It may be though that as the intention of the act was to end instantaneous divorce the marriage may survive after talaq-e-biddat. On other hand it also talks about things which are typically present in divorce law like maintenance and default custody of child.\textsuperscript{1244}

  The punishment of talaq-e-biddat prescribe under the act is immediate arrest that is non bailable and imprisonment up to 3years. Such harsh punishment to husband would impact the relation as well as family’s financial stability negatively.

  While the husband is in prison, what recourse the women would take is also not clear. The wife will have to live as a single as she can neither divorce husband nor can she remarry anyone else during the forceful imprisonment of the husband. This will force the Muslim women in a vacant marriage, without any source of stable income.

- **CRIMINALISATION AND OVER-CRIMINALISATION OF TRIPLE TALAQ**

  Both Muslim marriage as well as divorce are contracts between husband and wife which is civil in nature same like in any other religion. This act makes instantaneous talaq criminal in nature. The statement of object and reasons of the act justified that the criminalisation of instantaneous talaq was important for prohibition of triple

\textsuperscript{1242} Section 5, The Muslim Women (Protection of Right on Marriage) Bill, 2019

\textsuperscript{1243} Section 6, The Muslim Women (Protection of Right on Marriage) Bill, 2019

\textsuperscript{1244} “Manasi Chaudhari, Triple Talaq Bill: Lacunae and Recommendations, 5(2) NLUJ Law Review 49 (2018)”
talaq. Under section 4 of the act it is prescribed that pronouncement of instantaneous talaq would result into imprisonment of 3 years along with fine. This act also make this crime non bailable and give power for the immediate arrest of husband on pronouncement. The act not only criminalises instantaneous talaq but it over-criminalise instantaneous talaq. The imprisonment of three years are preserved for the crime that have the potential to threaten security of country and public peace like counterfeiting coins, sedition, rioting etc. Same punishment is prescribed under this act without any proper justification or rationale given for prescribing imprisonment.

- **Implementation of the enactment**
  The main principle of the criminal law says; “burden of proof lies on the prosecution”. In all the cases it is considered that the accused is innocent until proven guilty beyond reasonable doubt. Similarly in case of instantaneous talaq the burden of proof lies on the prosecution that is the wife. Proving instantaneous talaq can be extremely difficult since triple talaq can also be pronounced orally without any witness. As a result the conviction rate can go low.

- **Vagueness of provision**
  The provision under this act which talk about subsistence allowance is under section 5. It is very vague and arbitrary in nature. This act doesn’t provide the definition of subsistence allowance and neither it prescribe the guidelines for payment nor it talk about the amount to be given. This act doesn’t even clear about the payment of allowance when the husband is imprisoned. Whether the subsistence allowance should be paid as an interim relief or after the conviction of the accused, the act is silent in this matter. This act in case of subsistence allowance leaves a very wide scope for magistrate’s discretion.

  - **Arbitrariness**
    Under section 6 of the act, default child custody to Muslim wife is talked about. This provision is not clear in itself as it doesn’t say when the custody is to be provided whether in the interim or permanently. However, if the husband is in imprisonment there is no need of this provision as the custody would anyway lie with the mother, as the natural guardian.

  - **No option for reconciliation**
    In Quran similar as any other religion Reconciliation is the fundamental step before divorce. This act kills all the chances for reconciliation due to three year of imprisonment of husband that is not bailable. The door for a possible restoration of marriage is completely shut with the husband being forcefully imprisoned.

**SUGGESTIONS:**
Although this act has various lacunae present in it but one can’t deny that the

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1246 Section 233, The Indian Penal Code, 1860
1247 Section 124 A, The Indian Penal Code, 1860
1248 Sec 146, The Indian Penal Code, 1860
1249 “Manasi Chaudhari, Triple Talaq Bill: Lacunae and Recommendations, 5(2) NLUJ Law Review 49 (2018)”
1251 Mulla, Principal of Mohammedan Law; 338 (22nd ed. 2017)
1252 “Ms. Gita Hariharan and another v. Reserve Bank of India and another, AIR 1999 SC 1149 (India”).
objective that the act wants to achieve is noble. However this act requires certain amendments. Following are some recommendations for making the muslim women unfetter.

- Doubt in Status of Marriage –
  This act should provide some clarification on the status of marriage after the pronouncement of triple talaq. It should also further say that if someone seeks a divorce it should be done through any of legally approved methods.\(^{1253}\)

- Clarity in provision talking about custody and subsistence allowance –
  The law may not interfere in the situation relating to the status of marriage but in the remaining circumstances that is maintenance and custody of minor child act should be clear whether it would be interim measure or not. The act should also shed some light on the mode and guideline on payment of subsistence allowance. It should also talk about the minimum amount for subsistence allowance.
  The act should also get clarity in provision related to custody. The provision given for custody is very vague and very wide scope of magistrate discretion is present in it.

- Medium to Muslim Wife to seek divorce –
  The empowerment of Muslim women is a need in present day. In the society, the socio-economic status of the women belonging to Muslim community and her dependence on the husband for sustenance make a dire need to empower Muslim women. This act must give Muslim women some power to divorce the husband on the ground of pronouncement of triple talaq.

- De-criminalising the pronouncement of triple talaq –
  The foremost criticism of the act is criminalisation of triple talaq as it fails to give enough justification for this. This act has not just criminalised the triple talaq but it has over criminalised it.

  The parliament at the minimum should eliminate the strict liability if it is sure about criminalising triple talaq. The intention of the husband at least should be required during the pronouncement in this provision. It should only criminalise the pronouncement when husband have clearly and unambiguously intent to pronounce the triple talaq. There should also be mention of some exception when the pronouncement would be ineffective like in case of anger, intoxication etc.

- Compulsory reconciliation period –
  The act provides a reasonable amount of time for reconciliation. Under Quran also the fundamental requirement for the divorce is reconciliation. Whether to live together or not in the interim it should be the decision of husband and wife. The court should only look into the question of divorce only once the reconciliation fails.\(^{1254}\)

**Conclusion:**

In India from the ancient time there have been gender discrimination and the major victim of this discrimination have been women. The society of India has always been a male dominant society and from the ancient time women have suffer from different type of evil practices such as sati, devdasi, polygamy etc. Many of the social evil practices have been done away with the furtherance of time and amplification of

\(^{1253}\) Manasi Chaudhari, Triple Talaq Bill: Lacunae and Recommendations, 5(2) NLUJ Law Review 49 (2018”)

\(^{1254}\) Manasi Chaudhari, Triple Talaq Bill: Lacunae and Recommendations, 5(2) NLUJ Law Review 49 (2018”)

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education among people, triple talaq being the one of them. Triple talaq, or talaq-e-biddat, is one of the most talked about issues in the Muslim religion has been afflict due to Muslim men who have regularly misusing this ‘right’ to divorce their wives immediately by simply uttering the word ‘talaq’ thrice. In 2019, Muslim Women (Protection of Right on Marriage) Bill was pass which declared this practice unconstitutional and criminalized this with punishment of 3 years as result of Shayara Bano case.

On 22nd of August, 2017 was a landmark day in history of India. On this day society saw the ending of an evil male biased custom which has tear down the life of many Muslim women. Triple Talaq which was also against basic tenet religious script of the muslim that is Quran. Still it was widely used by Muslim male to end their marriage at anytime with their will and without giving any reasonable ground. This practice was slowly moving toward more and more miserable state as the triple talaq was being pronounced on phone call, in mobile text, in letter and at any moment also in anger, in state of intoxication etc. This triple talaq became binding and effective immediately and was irrevocable. According to AIMPLB (All India Muslim Personal Law Board), “Sharia grants right to divorce to husbands because men have greater power of decision making.” The battle of this triple talaq was initiated by the victim of this practice that is Shah Bano as well as it was finally led to success even by the victim of this practice. This controversial case of Shyara bano through which triple talaq was end and the new legislation which illegalize triple talaq was heard by 5 Judge constitutional bench in which each of the judge belong to different religion. “The judgment has been widely celebrated throughout the country, as many consider it the beginning of a long overdue overhaul of archaic and discriminatory personal laws.”

On 28th December, 2017 The Muslim Women (Protection of Rights on Marriage) Bill, 2017 was passed in Lok Sabha. Although it faced a lot of 452 criticism on various ground similarly as all the reformatory steps have seen since ancient time but finally it saw its light. On 30th July, 2019 the Rajya Sabha passed the triple talaq bill through ballot voting within which 99 votes were in favour while 84 votes were against and later become an act.

This act define triple talaq as talaq-e-biddat and make it in all form whether written, spoken, by electronic means illegal with 3 year of imprisonment of the husband along with fine on pronouncement. This act also provides provision related to subsistence allowance and default custody of minor child. According to this act the husband can be arrested without a warrant on pronouncement of triple talaq and it is a non bailable offence.

This act is a boon for all of women belonging to Islamic faith against this practice of triple talaq. Naturally, this act also has some lacuna that needed to be ratified but one can’t deny that the objective that the act wants to achieve is noble.

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IS RAPE AND SEXUAL ABUSE CONFINED TO WOMEN IN THE SOCIETY?

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ABSTRACT

We live in a society where hypocrisy prevails that males are the offenders and can’t be the victim to rape and sexual abuse. This leads to more myths such as males who undergo sexual abuse and rape are not ‘REAL MAN”. Despite being one of the largest democracies in the world our society fails to acknowledge the fact that boys get sexually abused and raped by both male and female perpetrators. One approves or not in the concept of masculinity, but boys are not men. It’s a fact that they are weaker than those who exploit them sexually by exploiting or coercing them into unwanted sexual encounters and keeping quiet about them as they possess the power to dominate them easily. There is no doubt about the fact that we are developing the legal framework but the development is slow, it can be felt by the fact that it took five years for the Protection of Children against Sexual Offences Act, 2012, to develop a gender-neutral law related to child abuse whether mental or physical. After the alarming report presented by the Ministry of Women and Child Welfare in the year 2007 which stated some disturbing statistics which brought the light of sexual abuse towards boys. The reality is slightly different for our stereotype thought process that girls are the only victim but unable to see thousands of silent victims who are generally boys. It’s time to break the silence and accept the injustice present in society. This paper shall attempt to put a spotlight on the issue of sexual abuse against the male child and laws present in different countries in the world. Our paper will also address the implications of assumptions that discourage boys from disclosing sexual harassment cases and propose reform for the same.

Keywords - Sexual abuse, gender-neutral, male child, victim, and silence.

INTRODUCTION
Are we ready to accept that there are boy rapes and sexual abuse in our society?

The basic concept prevailing of rape in the society is confined to females but it’s high time to break the silence and the mindset in the society that rape and sexual abuse are limited only females. It’s time for society to make a more effective approach towards the problem of child sexual exploitation which is under the carpet. The society still lives in the illusion that since the male is the dominant sex, which further makes them believe that men are capable enough to defend themselves. From childhood, they are taught that they are not supposed to cry or be weak instead since they have the power and capability of dominating the society as they are stronger as compared to the other half population living in the society which is females. However, we need put a stoplight and leave behind the stereotype thinking that rape and sexual abuses are those criminal offense committed against the females only by the male-dominated society because in the reality is way more, where a male child is treated as a male adult forgetting the fact that he is just a child as same as girl child.

Some of the victims and their families are also reluctant to report sexual harassment and abuse which they witnessed despite the fact that the happening of such events will leave a lifelong impact on their mental
health. We are usually afraid that if we speak up about such an attack, people will doubt or start questioning their sexual orientation and designate them as homosexual or bisexual. All these results in the least number of cases get reported and thousands of male victims to cover the attack and deny their victimization resulting in the percentage increase of rape cases. It can be stated that a significant percentage of sexual abuse and rapes victims are boys. What do we understand by child sexual abuse? In layman’s language, it can be stated as mistreating a minor physically and mentally by an adult for their own sexual pleasure. The World Health Organization (WHO) defines Child Sexual Abuse as “the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent, or that violates the laws or social taboos of society”.

Therefore it can be said that when a child is physically or mentally harassed with sexual intent, and it is seen in several cases that these kinds of attacks are done by a known person to the child who possesses the power over the child and is trusted by the child. Child sexual abuse also tends to include:

a. An adult who exposes his or her genital organs to the child and encourages the child to do the same for him or her, i.e. exhibitionism.

b. An adult touches the child’s genital organ with hands or other objects and persuades the child to touch the genitalia, i.e. kissing and fondling the child.

c. An adult with genital, oral, and vaginal intercourse with a child with or without penetration, i.e. rape and sodomy abuse.

d. An adult persuades or allows a child to listen to, read, or display some pornographic content.

e. An adult pressuring an adolescent to participate in some sexual activity.

f. An adult who marries a minor or a minor who marries another minor is considered a forced relationship.

In 2017 a TV show was aired, name Pehredaar Piya Ki portraying a story where a 22-year woman is married to a 9 year-old-boy, to protect him from the enemies and relatives after the death of the boy’s parents. There was an ancient practice in India where young girls were forced to married, much older man as a part of our culture which was prohibited by the provision mentioned in Section 5(3) of The Hindu Marriage Act 1955, putting the lower limit as 18 years of age that a bride needs to be a major. But the show brings a completely new twist to the mindset and by encouraging such shows; we are probably exposing the young boys to believe that it is okay to marry older women being a minor and get romantic in both ways emotionally as well as physically.


MYTHS IN SOCIETY RELATED TO BOYS RAPE AND ABUSE

1. It is next to impossible that boys can get sexually abused or raped because they are least vulnerable as their abuse leads to society believe that they are not “REAL MAM”, but the society fails to acknowledge that they are just boys and are vulnerable. It is important to note that child abuse is a criminal offense against minors (below the age of 18).1259

2. The misconception that if a boy encountered sexual pleasure during the violence, he desired it and/or liked it, and if he only desired the sexual encounters in part, then that is treated as their own fault.1260

There is a need to understand that with an erection or even an orgasm, males can respond to sexual stimulation—even in traumatic or painful sexual circumstances. That is the way male bodies and brains function. They are manipulated in such a way that they start to stave for attention and actually feel that they want to have the pleasure and feel that it’s their own fault and failure.

3. Both boys and girls are the survivors of sexual abuse but the society fails to acknowledge that boys are also the survivor of the abuse the same as girls. The data available from the 2007 report by the Ministry of Women and Child Welfare on child abuse in India:1261

   a. Around 52.94% of the total reported cases of child sexually abuse are boys.
   b. Almost 90% of the reported have been exposed to serious sexual harassment including sexual assault, making the child fondle private parts, making the child show private body parts, and filmed in the nude. Among these, the majority were boys (57.3%).
   c. 53.07% of the survivor of the child sexual abuse as per the reported cases.
   d. For all the children alleging sexual harassment (anus, penis, or oral sex penetration), 54.4% were boys.

   The data clearly shows that the number of boys who faced abuse in almost all forms of sexual harassment was equal to, if not more than, the number of girls who faced harassment.

4. An assumption is present in the society that boys who are sexually abused and raped are mostly gay, and it happened because of their sexual orientation.1262

There is no suggestion that a gay man is more likely than a straight man to engage in sexually aggressive conduct and some reports also say it is less likely. Yet sexual harassment is not a "relationship" of sexuality – it is an assault. The abused person’s sexual orientation really isn't important to the abusive relationship. The myth that the boy is “LUCKY” when he is abused by a female:

Not only should boys not be sexually assaulted by women, but this theory also suggests that any sexual contact with women is a badge of honor. In fact, sexual encounters that are premature, forced, or otherwise harmful are rarely positive. Being molested sexually by men or women can cause a number of physical, mental, and psychological issues. Boys still fail to understand that it was a form of sexual assault or rape. Women may also be

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1260 Ibid.
1261 Aarambh India, “Alarming: Stats Reveal Widespread Sexual Abuse of Boys In India”,

1262 Supra 5
sexually violent offenders just as often as men.\textsuperscript{1263}

**LEGAL FRAMEWORK IN THE OTHER COUNTRIES**

Many countries have made changes in the laws regarding rape. The countries that recognized rape laws are Ireland, UK, and Scotland. Canada and USA also tried making laws regarding the same. In 1994, UK reclassified adult rape in criminal justice and public order, which provides that non-consensual anal as well as vaginal penile penetration, removing the previous term buggery from statute.\textsuperscript{1264} By this law, the male rape has received equal status as of the female. In 2003, the act came which is called sexual offences act, this act added and further defined sexual offence legislation with more definitions from previous acts like 1956 and 1994 sexual offences act.

To incorporate non-consensual penile penetration of mouth in the way expelling the ambiguous, wide range of indecent crime from the books. But still, in UK the definition of rape does not include penile penetration, rape crime committed by females. Then came “Sexual offences act 2003,” first, the seemingly vague concept of “in-decent assault” was reframed into two less ambiguous criminal acts. The first was the newly created offence of “assault by penetration” which made non-consensual sexual penetration by any object an illegal act.\textsuperscript{1265} In this, it carries maximum punishment, which is of life imprisonment. Therefore, in UK for the first time, the law came against the female offender who commits a sexual offence and the offender could be punished with the same sentence as that of male sexual offender.

Scotland has made changes in the rape laws by “Sexual offences (Scotland) Act, 2009” and amended the definition as: \textit{“The intentional or reckless penetration of the penis in the vagina, anus, or mouth without the consent of the person or without any reasonable belief that the person's consent has been taken.”}\textsuperscript{1266} The definition of rape was also redefined by Northern Ireland. Firstly the criminal justice order, 2003 included the non-consensual intercourse with the person both male as well as female in the definition of rape. It also includes oral rape.

The reality of these progressions to the legitimate status of male sexual assault survivors have just been made inside the most recent thirteen years - less so in Scotland and Northern Ireland - feature the degree to which the UK lags behind that of different countries in this regard. Mid-route through the second decade of the 21\textsuperscript{st} century, it remains the legitimate truth that, in the UK, somebody having a penis must commit assault.

In US law the definition of rape has been changed by the Federal Bureau of Investigation's Uniform Crime Report (FBI-UCR) in January 2012, which stated as follows:


\textsuperscript{1265} Ibid.

\textsuperscript{1266} Section 1, Sexual Offenses (Scotland) Act, 2009
The penetration without the consent of the victim (male or female), in vagina or anus by any part of the body or by any object or oral penetration by their sex organ or of another person, it does not matter how slight it is, it will amount to rape. Now in these countries, the voice of the male is louder than before.

Australia has also made changes in its legislation by the inclusion of the gender neutralized term “person”. Canada has made various major changes in the legislation to make sexual offences as gender neutralize. Canada passed the bill in 1983, which abolished the offence rape and categorized it into basic sexual assault, sexual assault with a weapon or threatened violence, and aggravated sexual assault. Therefore, it clarified that this crime can be committable by both the gender.

**GENDER- SPECIFIC LAWS IN INDIA**

"Sexual abuse is no gender-specific, then why not talk to all kids about this?"

- Mumbai Police

In Indian laws, the act of penile penetration is considered as rape or insertion of any foreign object into the vagina without the consent of women or a girl.

As per section 375 of Indian penal code 1860, states the definition of rape as “sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped or is of unsound mental health and in any case, if she is under 18 years of age”

According to the definition, it can be inferred that a rape offender is always men and women is always a victim. If any object is inserted into the anus or mouth of men, then it will not amount to rape because of the fact that they are male.

Thus, there is no specific provision for male rape in Indian laws. This signifies that there is no provision if a male is raped by another male or female. Earlier this provision only contains the act of sexual intercourse but due to the increase in heinous crime the above-mentioned provision was amended. In the case of *Sakshi v. Union of India* the SC gave direction to consider the present issue to the Law Commission of India, which leads to the 172nd law commission and the commission released their report. The recommendations given in the report are:

- There should be enactment of gender-neutral laws.
- Suggestion to change laws in Indian Penal Code, Code of Criminal Procedure, Indian Evidence Act, and in POCISO Act.
- The report has also clarified that to consider a rape lack of physical resistance is not material.
- The scope of section 376 of IPC was also broadened by introducing members of the army, guardians, relatives, or any individual who will be in a place of trust or if the commission of the report is during communal violence and rape of female less than 16 years of age likewise come under the ambit of section 376.

**RECOMMENDATIONS BY THE J.S. VERMA COMMITTEE**

Afterward, the Criminal Amendment Act, 2013 was enacted by the parliament which included recommendations of the J.S. Verma committee. However, the suggestions of the committee to make rape provisions gender-neutral were not

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expressly added in the "Criminal Law Amendment Act, 2013." Hence the laws are still gender-specific thereby only protecting the rights of the women. No provision is there for males or transgender to protect their interest when it comes to a crime like rape and sexual abuse. Recommendation of J.S.Verma Committee report was dismissed: It was rejected because of the societal view that a crime like rape cannot be committed by women and of the view that cannot be the victim of the rape or any other sexual offence. Despite this, the survey was organized which reported 28.6% of male are survivors of sexual assault and 54.8% of females were reported as the offender. PUCL Karnataka has also conducted the survey, wherein it was reported that transgender community and male also becomes a victim of rape. In the same report it was found that among the college students 10.5% of men were raped and 10.5% of men suffered from an attempt to rape. A survey was conducted by the Centre for Disease Control and Prevention in which 67.4% of females were reported as perpetrators of sexual assault. This shows men are likewise the victims of the sexual offence yet because of the thought of society; they are not getting any remedy against sexual offences.

In the other case of Priya Patel v State of Madhya Pradesh, in this case the women were charged with the offence of gang rape, but the court rejected the accusation and stated, “Women cannot be said to have an intention to commit rape.” Furthermore, number of cases was registered in the police stations because of this old ethos; these cases have not been taken seriously because they are not committed by men. In today's scenario, women are given equal status to men in every field; there is an urgent requirement to make the gender-neutral laws which provide equal protection to male, women, and transgender irrespective of their gender. The gender-specific laws are violating the right to equality under Article 14 of the Indian Constitution, thought Article 15 allows having gender-specific law, but when the offences are done against both, the law should protect both.

In this way, improvement in the public eye has ordinarily mirrored that there is a requirement for unbiased laws however significant action has not been taken at this point. The Union government has made one move to make laws impartial. KTS Tulsi, Parliamentarian, and Senior Lawyer presented a private part's bill before Rajya Sabha in July 2019 to make the sexual offenses laws impartial. The bill has been purposed and suggested that the word, 'man' and 'women' ought to be supplanted with 'any person' so any individual who is explicitly pestered can look for remedies under criminal laws. By introducing the word any person it will also include transgender as the other gender can also be sexually harassed by anybody. This bill will be very effective to create gender-neutral laws if came out as an act.

SHORT COMINGS OF THE PROTECTION OF CHILDREN AGAINST SEXUAL OFFENCES ACT, 2012
The Protection of Children against Sexual Offences Act, 2012 (POCSO Act) was established five years after the alarming report presented by the Ministry of Women


1270 (2006), 6 SCC 263.
and Child Welfare in the year 2007 which stated some disturbing statistics which brought the light of sexual abuse towards boys as to develop a gender-neutral law related to child abuse whether mental or physical. However, the Act also has considerable flaws as regards the sexual exploitation of young boys. The Act has entirely neglects to take steps related to deter sexual violence. While the Bill is designed to safeguard children from sexual harassment, misconduct and pornography, there is little that applies to the prevention of exploitation.

The language of the Act is such that one can read into it a male bias. Section 3(a) of the act defining penetrative sexual abuse uses expressly the pronoun "he" to refer to the accused. That specifically excludes women as offenders. Instead what about women engaging in digital boy rape or inserting objects into male children's anus? Or penetrative sex only applies to male organ use? For many people, there is a misconception that sexual harassment is only committed by men, this is not true. While most offenders are men, women assault both male and female children sexually as well. Boys are not only sodomised, they are also abused. It's time to make arrangements for abused boys and help them get justice. Better late than ever.1272

As per an article by India Today containing the statistics by NCRB stated that in 2017 and 2018 there was an increase in the reported cases related to rape in both female and male child, where it was seen that 204 boys were victim to rape.1273 After the enactment of POCSO act reported number of cases has increased in the country.

**SUGGESTIONS**

Primarily, society as a whole needs to accept the fact that boys do suffer and are the survivor of rape and child sexual abuse. However, it can be seen that a number of amendments are made in the existing legal framework in India to reduce sexual abuse towards children.

- Legislation should necessarily take measures to identify boys’ sexual exploitation as an major issue and to ensure that boys are safe from all kind of offenders.
- The POCSO Act, 2012 should be revised to eliminate gender inequality. Child helplines should be set up for boys as well the same as for girls so that they have someone to reach 24/7 whenever they are ready to talk.
- Victims and their families should be provided with the therapists and 459 counselling respectively to overcome with their trauma and deal with the distorted perceptions about masculinity that culture has forced through their heads.
- Big Stars and media could be approached for addressing the issue in the society which could make a great impact in the society same as Aamir Khan’s Satyamev Jayate.

**CONCLUSION**

“It is better that ten guilty person escape than one innocent suffer.”
- Sir William Blackstone

In order to determine the requirement of “gender neutrality” in rape or sexual abuse laws, we tried to research various range laws in Indian and other countries with the various preconceived notion of society in regards to male rape. There are lots of

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1272 Supra 9.
myths regarding male rape in the society which has been examined in the present paper. Patriarchy is a huge barrier to implement gender-neutral laws because it is very strongly presumed that a woman cannot commit crimes like rape. It is negatively affecting the male section of the society.

There are various approaches, which were made by law commission to create gender-neutral laws in rape crimes but it was rejected. There is an urgent need to redefine rape laws to give equal status to males as that of females. Because rape will be a rape committed to men or women by any men or women. They’re a requirement of insertion of the term “Person” in section 375 of IPC. It is not right to encourage the perception that males will always be an offender or rapist and females are always victim and women cannot commit rape or sexual assault. It is possible that men can have masculine qualities and women can have feminine qualities. There is a possibility that women, at hirer position in the company or in any organization can sexually harass male employees. Hence, men should not be judged on the basis of their gender. As there are no laws regarding male rape many cases are not reported or the offender gets the lesser punishment in comparison to the crime. The criminal law act (amendment) bill, 2019 objective is to make such development, which is required to make laws gender-neutral when it comes to punishing any kind of sexual assault. Over many years the amendments are made in rape laws when there is urgency or need of society. It is high time to break the silence against the victimization of the male section of the society. Hence the amendments should be made within the ambit of sexual offences against men.

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ABROGATION OF ARTICLE 370 FROM THE CONSTITUTION

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INTRODUCTION:
Our Indian Constitution which came into force on 26th January, 1950, is the supreme law of India. Our Indian Constitution is the longest national Constitution with 448 Articles, 25 parts, 12 Schedules and 5 Appendices.\(^{1274}\) Article 370 of the Constitution had temporary provisions which gave special autonomous status to the State of Jammu and Kashmir, allowing them to have their own Constitution. This means provisions of the Constitution which are applicable to other states of India will not be applicable to the state of Jammu and Kashmir. This Article was implemented in the late 1947 between Sheikh Abdullah, who was been appointed as Prime Minister of Jammu and Kashmir by the Maharaja Hari Singh and Nehru. Modi Government with the Home Minister, Amit Shah on 5th August, 2019, finally dropped a bomb by revoking Article 370 and Article 35(A) which means all the provisions the constitution shall apply to the state of Jammu and Kashmir and the special status enjoyed by them would be taken away. A lot of tension arose in the State due to this momentous decision; the top political leaders were under detention and the movement was restricted. After the special status was gone from the Kashmir, people from all across the India were able to buy properties there and could settle there permanently but this fuelled fear in the Kashmiri citizens as they thought that their state would turn from majority Muslim to majority Hindu.\(^ {1276}\) A lot of protests all around the India happened in regard to the decision which was taken by the Modi government which I will be further dealing with in the paper.

In this paper I will explain how Article 370 and 35(A) got abrogated and its impact on Kashmir, India and Pakistan.

HISTORY:
Kashmir was first called kashyapmar in ancient literature which was corrupted to become Kashmir. It owed its legendary to rishi Kashyap. The state of Jammu and Kashmir acquired its modern shape under, Ranjit Singh. A local chieftain from Dogra community took over the administration of J&K, who expanded it by capturing Ladakh and Baltistan from the Sikh empire. At that time British rule of East India Company was getting stronger, the company challenged the Sikh empire and Ranjit Singh was compelled to sign a treaty of Amritsar in 1809 which was formalised in 1846 after a first Anglo-Sikh war. The Dogra king ruled over the regions of Jammu, Kashmir Valley, Gilgit-Baltistan and Ladakh as dominion of Jammu and Kashmir was been sold to Gulab Singh who was the Dogra king. This arrangement worked till 1947, they faced horrific episodes of violence the British divided Indian continent into India and Pakistan. Maharaja Hari Singh signed a Standstill

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Treaty with Pakistan but there was a breach in the agreement as Pakistan launched a non-official war to free the region from Hindu rule in October 1947. Hari Singh found himself helpless as he wasn’t able to protect the state and asked Indian Government for help. Indian Government was ready to provide aid but on the condition that Jammu and Kashmir should accede with India, Maharaja agreed with the condition. Indian Government intervened into the matter after the signing Instrument of Accession by Hari Singh on October 26th, 1947. Law granted the permanent residents of Kashmir some special rights. Hari Singh thought of extracting some benefits from the law like denying outsiders the Right of acquiring or owning any property in the state. Initially, this step was taken to keep the Britisters away from Kashmir valley. Jawaharlal Nehru agreed with Hari Singh’s condition and the matter was been placed in the constituent assembly. Finally, Article 370 was been inserted into the Constitution as temporary, transitional and special provision.\footnote{1277 How Kashmir got Article 370: History retold, Prabhash K Dutta, August 8, 2019 12:45, https://www.indiatoday.in/news-analysis/story/kashmir-situation-article-370-history-1578495-2019-08-08}

**ABROGATION OF ARTICLE 370.**

Article 370 of the Constitution gives special autonomous power to the State of Jammu and Kashmir and was drafted under part XXI of the constitution which was temporary, transitional and special provision. The constituent assembly was supposed to recommend the articles of the constitution which was supposed to apply to the state but the assembly dissolved itself without recommending the abrogation of Article 370 which made the Article a permanent feature of the Indian Constitution. Even though the article was a temporary provision, it wasn’t been removed due to the lack of good administration and the frequent war happening between India and Pakistan. Jammu and Kashmir enjoyed this special status in various ways like they had a national flag of their own, the citizens of Jammu and Kashmir enjoyed dual citizenship, the term for J&K’s legislative assembly is 6 years whereas for other state of India it is 5 years, the orders from the Supreme Court of India is not valid in J&K until the state government approves the order and J&K has its own criminal code which is named as Ranbir Penal Code.\footnote{1278 Full text of document on govt.’s rationale behind removal of special status to J&K, AUGUST 05, 2019 13:56, https://www.thehindu.com/news/national/full-text-of-document-on-govts-rationale-behind-removal-of-special-status-to-jk/article28821368.ece} On August 5th, 2019 the Union Home Minister, Amit Shah, announced abrogation of Article 370 and Article 35(A) from the Indian Constitution which was a very crucial step dividing the state into two Union territories- Jammu and Kashmir with legislature and Ladakh, with no legislature. This decision by Modi Government was subjected to a lot of criticism by a large section of opposition from different parts of India. Revoking of the article was a tough decision as some parties were in favour and some were in the opposition and weren’t favouring the decision taken by the Modi Government. Mass protests was been organised in the different cities of India. Major leaders of the parties were house arrested, there was revocation of internet and telephonic services, public movement was banned, these consequences together threatened the democracy of India. The Government took this step to correct the historical blunder. It was necessary to scrap
Article 370 to integrate Kashmir with the rest of the country as it is an integral part of India playing important role in the preamble of the Constitution.\footnote{Article 370 – Four Months Down the Lane, January 04, 2020 @ 04:12 PM, https://www.mbarendezvous.com/essay/article-370-four-months-down-the-lane/}

On August 5\textsuperscript{th}, 2019 Hundreds of people were rounded up and arrested in J&K. All the types of communications were banned in the valley, there was an undeclared curfew in Kashmir which persisted for few weeks. Concertina wires spooled across streets and girded buildings in Srinagar. Ladakh’s Kargil district and border districts in Jammu also saw protests against bifurcation. The valley observed civil shutdown. In South Kashmir local residents also spoke of army raids at night. The lockdown and internet ban lead to crippling of business, hinderance to health care accessibility and hushing down the local media. After August 5\textsuperscript{th}, collective prayers at mosques were halted for months and clerks were imprisoned and threatened with arrest if they mentioned Article 370. Local residents faced loss of land and job after the disappearance of Article 35(A). In Ladakh, demands for special protection Under the 6\textsuperscript{th} Schedule of the constitution was been made. The new domicile rules were greeted with protests because they were viewed as inadequate however members of marginalised communities have been benefited from this domicile. The government started taking actions against the pro- India parties who vowed to protect the special status of J&K, 3 former Chief Minister had been arrested and were released only if they maintained silence on Article 370. Assembly elections were blocked until the delimitation in J&K takes place. Most of the candidates were made to live in villages which were heavily secured by government enclaves, fearing militant attacks and local resentment. Militant violence still continued killing migrants and Kashmiri pandit Sarpanch, grenades were thrown at security forces and fruit Growers were attacked. In the first 6 months of 2020, 118 Militants including top Militant Commanders like Hizbul Mujahideen’s Riyaz Naikoo and 26 Security forces were killed nearly wiping out the Militancy in South Kashmir. \footnote{What exactly did the August 5 decisions achieve in Jammu and Kashmir?, Ipsita

Scrapping of Article 370 lead to the following implications: Jammu and Kashmir no longer enjoy special status, the Indian constitutional laws are now applicable to all the residents of J&K, the Directive Principle of State Policy and the Fundamental Rights in the part IV of the Indian Constitution will now apply to J&K, Article 360 which is the financial emergency will now be applicable to J&K, they will no longer have the flag of their own, minorities which are mostly Hindus and Sikhs there will have 16\% of reservation, the duration of Legislative Assembly will now be 5 years for them as well, Article 35(A) was nullified, Panchayats will enjoy same power as in other States and citizens of J&K will no longer enjoy Dual citizenship. It has instilled fear amongst the citizens regarding their safety, they also feel the government will take similar kinds of action in the other states as well which they find is a threat to the Democracy.\footnote{Issues over Article 370 - Pros and Cons, History, February 12, 2020 @ 01:54 PM, Chakravarty, Aug 05, 2020 · 09:36 am, https://scroll.in/article/969452/what-exactly-did-the-august-5-decisions-achieve-in-jammu-and-kashmir}
Numerous protests took place in regards to the abrogation of Article 370. On Friday, August 9th there was a massive protest in Soura which is in the Northern part of Srinagar’s down area where 10,000 people took part. people were seen carrying banners saying ‘abrogation of Article 370 is not acceptable for us’ which clearly indicated the fact that they were against the decision of the Government to scrap the special status of Jammu and Kashmir. Al Jazeera reported protest claiming thousands of people hit the street. However most Indian channels have appeared to have blacked out the protest, in contrast Asian News International have shared videos of people in Srinagar walking on streets and queuing outside the ATM’s. The Muslim rights activists including the members of Pakistani-American Community in Washington held demonstration outside the Indian Embassy to protest against the scrapping of Article 370. The protesters raised slogans against India and Prime Minister, Narendra Modi. The slogan read people of Kashmir “deserve independence, deserve the rights and deserve justice.” Muslim organizations including the Islamic Leadership Institute of America, Burma Task Force which is working among Rohingya Muslims, and those representing Palestine groups, also participated in the demonstration.

A section of Punjab farmers union protested against the Abrogation of Article 370 and 35(A). Acting upon the directions given by Punjab and Haryana High Court, protests collapsed by nearly a dozen farmer Union like Bhartiya Kisan Union (BKU). All the protestors according to the plan were supposed to assemble at Mohali from where they were supposed to march towards Chandigarh to submit a memorandum to VP Singh Badnore, who was the governor of Punjab but due to the orders by the Court, protestors were stopped by the police at the district level and restricted them to move to Chandigarh. The protest lasted for around 4 to 5 hours comprising of 8,000 protestors including nearly 500 women. The Pro-Khalistani group Dal Khalsa who were banned have also criticised the abrogation of Article 370 but failed to gather enough support as majority of the people in Punjab rejected Khalistan and have welcomed abrogation of Article 370 and 35(A).

Indian government-imposed curfew across Kashmir Valley as the authorities captured violent protests by separatist and Pakistan-sponsored groups to observe August 5th which was the first anniversary of revocation of Article 370 and 35(A) from Jammu and Kashmir as a “black day “ Kashmir has been under lockdown and a communication blockade ever since the revocation of Article 370 of the constitution on August 5th but there were massive protests happening inside Kashmir. New Delhi used some tactics in favour of the movement by systematically striking fear

https://www.mharendezvous.com/general-awareness/issues-over-article-370/


among the leaders and the supporters of separatist cause by unleashing Law enforcement and investigating Agencies. They also broke the organising ability of the separatist, parties and of civil society groups.  

Therefore, Repealing Article 370 has led to insecurity in locals, Kashmiri Muslims feel it’s a threat to State’s integrity and unity, add insecurity in the Kashmir and political vulnerability. But on the contrary, repealing of the Article was necessary to unite the state with other states of India as it propagates one Nation one Constitution slogan. It will facilitate development and growth in the valley as people from all over India will be able to purchase properties in Kashmir and investors will be able to invest ultimately boosting the Economy of Kashmir. Kashmir has become a Union Territory now so curbing of corruption and Terrorism would be an easy task for the Government instilling peace.  

A year after the revocation of Article 370, Pakistan Government made a new policy to deal with the Kashmir issue. A new map was been published showing J&K as part of India and Ladakh as the part of Pakistan. Foreign minister Shah Mehmood Qureshi spoke about the Imran Khan government’s resolve to alert the world to Kashmir’s bitter reality and give the world a demand to force India to mend its ways. A lot of people in Pakistan felt it was the state’s inability to do anything meaningful to help Kashmiris. They felt cheated and suddenly found themselves in a corner from where they cannot regain the space on the issue that has obsessed the country. Pakistan is unable to respond forcefully, they feel years of proxy war have failed. Recently the Financial Action Task Force knocked on Pakistan’s doors that the Army re-arranged things, the Lashkar-e-Tayyaba camp have moved towards Neelum and Jhelum valleys and this has been happening even before the end of Article 370. The firm march of the Hindutva agenda in India and the confidence adds to the complexity. In Pakistan the political forces are weak to change any bilateral ties with India. The most important element here is that for both Pakistan and India, Kashmir isn’t the main concern it is the ideological divide which took place in 1947 and it keeps on sharpening with time. Therefore, until and unless there is a political force in the country, the Kashmir war will not end even though it has been slowed down.  

The decision of Modi Government to scrap the article is mainly a domestic and international decision of India with implications on how J&K should be governed. Even if some people in India is labelling the revocation as murder of Democracy, there is an assurance of a pushback from the members of the committee of Human Rights in J&K. The rest of the world doesn’t have much say on this as this is entirely a domestic issue and there is a fallout in the international sphere. By making J&K a Union Territory, law, order and defence will be in the hands of awareness/advantages-and-disadvantages-of-article-370/  


1286 Advantages and Disadvantages of Article 370, February 12, 2020 @ 06:53 PM, https://www.mharendezvous.com/general-  

Delhi which will make activities more effective and terrorism will come down.\textsuperscript{1288}

CONCLUSION:
There were various impacts of removing Article 370 from the Constitution. In my opinion, any kind of decision faces both appreciation and criticism and both should be equally taken into consideration. I have mentioned both the good and the bad aspects in the paper. Like how removing the Article will facilitate growth and development in the valley, better Medical and Educational facilities would be provided to the citizens of J&K, investors investing will ultimately help in boosting the Economy of Kashmir, Terrorism and Corruption will be controlled but on the other hand people of Kashmir lost their dual citizenship, citizens think it is a threat to State’s integrity and unity, added insecurity in the Kashmir and political vulnerability. Removing Article 370 had a significant impact on India as well as Pakistan. Article 370 was the part of a temporary, transitional and a special provision of our Constitution which could be deleted or retained as per the decision of the State Assembly. The state of J&K now shares a constitutional relationship with the rest of India but the decision hampered the peace of the state which was already on the place of conflict. Abrogation of Article 370 lead to the abrogation of Article 35(A) due to which citizens of India could but land and settle in J&K permanently. The Centre’s action expressed unethical use of power. The Situation could have been easily handled using logistic and diplomatic approach.

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A PRIMER OF PRIVACY ON THE WALL OF INDIAN CONSTITUTIONAL LIBERTY

By Qamar Ali Jafri
From Dr. Ram Manohar Lohiya National Law University, Lucknow

Overview
“Nations and individuals constantly make choices that places the values of privacy over other state objectives such as physical safety. If the police is allowed to barge into any house without a warrant, criminals might be more easily apprehended. If the state is permitted to put monitors in our house and tap our phones, crime rates would fall significantly. But the Constitution was written to prevent such suspicion less invasions by the state. By drawing the line at such actions, we knowingly allow for the probability of greater criminality. Yet we draw that line anyway, exposing ourselves to a higher degree of danger, because pursuing absolute physical safety has never been our single overarching societal priority.”

On 24th August 2017, the Indian Supreme Court drew the line that Glenn Greenwald talks about in the context of Edward Snowden’s revelations. This line that puts our private realm intertwined with the quality of life at a higher pedestal, than the utopian idea of absolute security at any cost, is Justice K S Puttaswamy v. Union of India in the legal sense. The verdict categorically laid down right to privacy as a fundamental right under Article 21 of the constitution.

The most apt and broadly used metaphor for the privacy issue has always been ‘Big Brother’ - a totalitarian government as portrayed by George Orwell in his book, Nineteen Eighty Four. Last few decades have witnessed a plethora of technological advancements, which has corresponded to the increase in the risks to privacy. Technology has taken us to such an extent that our everyday life revolves around informational privacy.

Privacy ingrained in human consciousness
It is understood that privacy is an essential human need. Humans have always expressed the need to have a certain degree of individual privacy in various forms. Although everyone needs privacy in their innate capacity but our institutions may vary depending on our cultural values. Primitively, it has been a battle between group survival and individual privacy where the former was always given more emphasis. It was only when people engaged themselves in their first act of sexual intimacy; they realized the value of privacy. Primitiveness of a society is inversely proportional to the emphasis on privacy in that society. Therefore, privacy at its core ought to be evolutionary,

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1291 Margret Mead, Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation 219. (The author studied the Samoan culture and learnt that the children in the village were exposed to different aspects of life in the public arena, except when they engaged in their first sexual act.)
revolving around the concept of territoriality, which is a natural progression of our animal instinct. Neuroscience is generally applied in the context of criminal behavior but it is still not a sure way to conclude that our need for privacy is a direct result of our physiology. However, if one observes the animal behavior it becomes clear that an animal treats territoriality as a means of survival hence, privacy is intertwined with territoriality. Philosophers such as Aristotle and Locke have also addressed the concept of private realm. Aristotle talks about oikos and polis as a difference between public and private spheres of life. Locke talks about the ‘zone of exclusivity’ that demanded societal respect for privacy.

With the inception of civilizations, numerous philosophers also came up with the concept of privacy. It has certain abstract characteristics that makes it difficult to define but it is imbedded in human nature so instinctively that it would be very difficult to imagine satisfying human interactions without the ability to keep things secret, to lead lives unmonitored by others.

This private realm was upheld in the judgement of Justice K S Puttaswamy v. Union of India that will remain law for years to come.

Justice K S Puttaswamy v. Union of India Various Opinions in Puttaswamy

The judgement consists of six different opinions as far as defining privacy as a concept is concerned. However, the overtone of these opinions seem to be in harmony with each other and to the modern-world thinking of privacy.

<table>
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<th>Judges</th>
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<td>Justice Bobde</td>
<td>Dissected the right to privacy into various interest and values.</td>
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<td>• Right to privacy against the state and its entities.</td>
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<td>(Para 31-32)</td>
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<td>Justice Chelameswar</td>
<td>Opined the privacy has three facets.</td>
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<td>• Repose - freedom from unwarranted stimuli. (Corporeal punishment)</td>
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1292 http://www.lawneuro.org/ A field of legal scholarship that mixes law and neuroscience to enable legal research with the help of brain mapping.
Justice Kaul Emphasized on the right to control dissemination of information as an important aspect of privacy. (Para 53)

Justice Nariman Aligns with the opinion of Justice Chelameswar
- Privacy that involves the person’s physical body such as right to move freely.
- Informational privacy which deals with the person’s mind.
- The privacy of choice, which protects the individual’s autonomy. (Para 81)

Justice Sapre Emphasized on the Preamble on the constitution and the word ‘dignity’. Opined that right to privacy of an individual is a natural right and originates from birth. (Para 8)

Justice Chandrachud Opined that privacy has distinct connotations attached to it.
- Spatial Control (Private spaces)

- Decisional Autonomy (Choice of faith, clothes etc.)
- Informational Control (Data Protection)

Data Protection
The rate at which we are witnessing informational technology advancements is unprecedented. Data privacy goes hand in hand with technological advancements. In terms of internet and digitization, three major developments have altered privacy greatly.
1. Increase in data creation resulting in the vast collection of personal data.
2. The globalization of data and the ability of anyone to collate and examine that data.
3. Lack of control mechanisms over the digit data.1295

On the aspect of Data Protection, Dr. D. Y. Chandrachud J said that:

Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non-state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging

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https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3132&context=facpubs
innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits.

This judgement however, did not answer the question of whether the Aadhar Scheme is constitutional or to what extent the State can surveil its citizens. This was not the onus on the court. The prerogative of this judgement was to establish the constitutional framework around the concept of privacy so that certain navigational routes are established for lawyers, judges and academicians do deal with such cases in future. The opinion of Dr. D. Y. Chandrachud J on data protection aligns with the international jurisprudence on the subject, provides for the right of every person for the right to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour or reputation.\[1296\]

Moreover, personal data is addressed within General Comment no. 16 from the Human Rights Committee, which expounds upon the applicability of Article 17 of the International Covenant on Civil and Political Rights(ICCPR) to data protection: “The gathering or holding of personal information on computers, databanks, and other devices, whether by public authorities or private individual or bodies must be regulated by law. Effective measure have to be taken by States to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorized by law to receive process and use it, and is never used for purpose ‘incompatible with the Covenant.’”\[1297\]

The significance of the General Comment can be understood from the fact that it was drafted in 1988 at a time when internet was at its nascent stage and data collection had only started.\[1298\]

**Apex Data Protection Systems of the World**

**European Union Data Protection Directives**

A couple of decades back the European Union expressed an urgent need to protect privacy rights over personal data. The then Vice President of the European Commission stated that people’s data protection rights must be built on four pillars in one of her speech\[1299\] as the EU Justice Commissioner:

1. The first is the “right to be forgotten”: a comprehensive set of existing and new rules to cope better with privacy risks online. When modernizing the legislation, and that people shall have the right – and not only the "possibility" – to withdraw their consent to data processing. The burden of proof should be on data controllers – those who process your personal data.
2. The second pillar is "transparency”. It is a fundamental condition for exercising control over personal data and for building trust in the Internet.
3. The third pillar is "privacy by default". Privacy settings often require considerable operational effort in order to be put in place. Such settings are not a reliable indication of consumers' consent.

\[1296\] Article 17, International Covenant on Civil and Political Rights.


\[1298\] ld

4. The fourth principle is "protection regardless of data location". It means that homogeneous privacy standards for European citizens should apply independently of the area of the world in which their data is being processed.\textsuperscript{1300}

Such level of commitment resulted in creation of a legislation. These were adopted as the European Union Directives and the member states were obligated to harmonize their data protection laws with it.

Informational Privacy, as the need of the hour, is the consensual undertone among all the judges. \textit{Justice Kaul} and \textit{Justice Nariman} both emphasized on the fact that a person should know what his/her data is being used for and control its unauthorized use. The judgement also talks about the state’s prerogative to gain informed consent and supervise the use of the data to the extent it has been disclosed.\textsuperscript{1301}

\textbf{Habeas Data}

When there is a question of protecting the privacy of an individual’s personal information in Latin America, \textit{Habeas Data} is the most fundamental concept to data privacy.\textsuperscript{1302} Habeas data is typically a fundamental right granted to individuals in many Latin American countries is a predominant force in the region’s data privacy. Habeas data actions are available to the parties whose data has been affected.

\textit{Habeas Data and European Directives} are among the most cherished legal provision for data protection. India is yet to step in this realm and have a specific legislation focused on data protection. In the Puttaswamy judgment, there a ray hope where Dr. Chandrachud talks about a committee chaired by Justice B N Srikrishna to review inter alia data protection norms of the country and make its recommendations.\textsuperscript{1303}

\textbf{Intimate Conduct and Privacy}

The topography of laws related sexual orientation and private sexual acts across the world has been changing rapidly. India is also catching up in the race\textsuperscript{1304} liberating itself from the shambles of bigotry. The international community has been consistently responding to the issue of criminalization of private sexual acts by the nations worldwide. Anand Grover’s Special Rapporteur on the right to enjoy highest attainable standard of physical and mental health states that all human rights are universal, indivisible, interdependent and interrelated. The criminalization of private, consensual sexual conduct between adults infringes not only the right to health, but also various other human rights, including the rights of privacy and equality. In turn, infringements of these rights impacts indirectly on the right to health.\textsuperscript{1305} Advocates of criminalization of homosexual activity give the reasoning that it is ‘necessary’ to protect the moral fibre of

\textsuperscript{1300} Id
\textsuperscript{1301} Para 70, Justice Kaul
\textsuperscript{1303} Para 185, Justice Chandrachud
\textsuperscript{1304} K. Sujatha Rao, Section 377: A Call to Conscience https://thewire.in/lgbtqia/editorial-section-377-supreme-court
the society. The European Convention for the Protection of Human Rights and Fundamental Freedoms defined the concept of necessity very strictly. In this context, ‘necessary’ does not resonate with the expressions of “reasonable,” “desirable” and “useful” but implies a pressing social need. In Dudgeon v United Kingdom and Norris v Ireland it was emphasized that restriction of a Convention right(Article 8 of ECtHR) cannot be regarded as necessary in a democratic society which thrive upon the hallmarks of tolerance and broadmindedness. The crux of Norris case was that “the State has nothing to with the private morality and has no right to legislate in matters of private sexual conduct of consenting adults. To attempt to do so is to exceed the limits of permissible interference and to shatter that area of privacy which the dignity and liberty of humans require to be kept apart as a haven for each citizen.”

The question arises that where the State draws a line in limiting the secrecy of consensual sexual behavior. The answer to this question lies in the obligation of the state to protect and nourish the societal interests. LGBT community like any other minority community is not a threat to the State. Among all, they need protection from the State - not prosecution, persecution and ostracisation. As Harvey Milk puts it, “It takes no compromise to give people their rights... it takes no money to respect the individual. It takes no political deal to give people freedom. It takes no survey to remove repression.”

Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.

He further criticizes the judgment stating that:

The purpose of elevating certain rights to the stature of guaranteed fundamental rights is to insulate their exercise from the disdain of majorities, whether legislative or popular.

The keywords here being legislative and popular. He clearly intends the idea that safeguarding fundamental rights should not be subjected to majoritarianism.

Justice Kaul was also of the same opinion that sexual orientation come under the ambit of identity and dignity and subsequently under right to privacy.

Feminist Concern

1307 Olson v Sweden, 11 EHHR 259(1989)
1308 European Court of Human Right, Rep at 162-163
1309 European Court of Human Right (1988)
1310 Chief Justice O’Higgins’ opinion in Norris v. Ireland.
1311 Para 126, Dr. D.Y. Chandrachud.
1312 Id
Dr. D. Y. Chandrachud J, in his verdict talks about the critiques of the concept of privacy. Among them, one is a ‘feminist critique’:

_Patriarchal notions still prevail in several societies including our own and are used as a shield to violate core constitutional rights of women based on gender and autonomy. Privacy must not be utilized as a cover to conceal and assert patriarchal mindsets._

To understand this let’s take up two rights, (i) right to use contraceptives and (ii) right to terminate the pregnancy. Now, both these rights circumvent through the right to privacy. In the American context, it was Griswold v. Connecticut and Roe v. Wade. Without these two judgements, the aforementioned rights wouldn’t exist and subsequently one can imagine the plight of women in such a paradigm.

The Puttaswamy verdict emphasizes on a woman’s inalienable interest in privacy and also on the harm that she can be vulnerable to, under the pretext of privacy. So, what should be the alternative feminist approach regarding their concerns with privacy? First of all, we need to understand that progress cannot be made by simply rejecting the idea of privacy. Instead, one should adopt Mill’s distinction of _Self-regarding act_ and _other regarding acts._

According to Jaun Stuart Mill, acts that possess no harm to others are called _Self-Regarding Acts._ Examples of self regarding acts can be abortion, obtaining contraception and making other decisions about the woman’s body. Feminists arrive at a two ways street while climbing the bandwagon of privacy. At one instant, the concept of privacy is used to enforce bodily rights of abortion and obtaining contraception while on the other instance privacy is seen as a blockade for government intervention into the private sphere of domestic life where sexism and misogyny is pervasive.

_Other-Regarding Acts_ include acts that have a third party effect, for instance beef ban. On scrutiny, we come to a conclusion that both these Acts can be and cannot be viewed through the concept of privacy depending upon the person’s mental integrity or simply the person’s knowledge of other rights. Even the most serious proponents of privacy would confess that it is difficult to define the essence and scope of the privacy.

For instance, abortion is advocated through privacy but it is not a private act. It happens in a hospital or a clinic under a third party (doctor) supervision. It is only when you associate the concepts of modesty and bodily integrity then that would attract the concept of privacy. The point here to note is that same reasoning can be applied to all the medical treatments.

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1313 Para 140 (d), Justice Chandrachud
1315 JOVAN BABIĆ, _Self-Regarding / Other-Regarding Acts: Some Remarks_, https://hrcak.srce.hr/file/1083
1316 Annabelle Lever, _Must Privacy and Sexual Equality Conflict? A Philosophical Examination of Some Legal Evidence_, 99&EXT=pdf
1317 Para 169, Justice Chandrachud.
To avoid this slippery slope and reject the lose argument of privacy being an intersection of rights; Justice Chandrachud relied on Alan Westin's four basic states of privacy.

At the core is solitude – the most complete state of privacy involving the individual in an “inner dialogue with the mind and conscience”. The second state is the state of intimacy, which refers not merely to intimate relations between spouses or partners but also between family, friends and colleagues. The third state is of anonymity where an individual seeks freedom from identification despite being in a public space. The fourth state is described as a state of reservation which is expressed as “the need to hold some aspects of ourselves back from others, either as too personal and sacred or as too shameful and profane to express.

The Future of Privacy

Although the privacy judgement of Justice K S Puttaswamy v. Union of India lays down constitutional directions for privacy to be understood as an indispensable fundamental right, this judgement will still not be a straightforward guiding principle. Privacy will always be a slippery slope between the State and the individual. As the society and technology progress, which is happening quite fast, we will have to look for more answers and they will not be available to us in black letter law. No doubt this judgment creates a perfect foundation but the future of privacy in India is nothing but uncertain. This case is the result of acknowledgement and recognition of the discrepancies in the Aadhar Scheme. As long as the stakeholders keep questioning the government, this landmark judgement will act as a strong footnote in answering the grey areas of privacy.
ANALYSING THE FOURTH EXCEPTION OF MURDER

By Rishabh Botadra
From Pravin Gandhi College of Law

- Facts:
  Appellant-Nandlal Baviskar and one Dilip Waman Baviskar are close family members. In the year 2005, Dilip developed a wall dividing the middle of his premises and the place of the Appellant. As Dilip had acquired all costs of the development of the dividing wall, he requested half the portion of the costs from the Appellant which was declined by him. This turned into the purpose behind regular squabbles between the gatherings. On 16.05.2006 at around 04:00 PM, there was a trade of maltreatment between Dilip, his spouse Sakhubai-PW-4 and the Appellant. Ganesh-PW-5-child of Dilip called Gopichand Waman Baviskar-PW-1. As needs be, Gopichand and his sibling Lakhichand (deceased) who was physically debilitated went to the place of Dilip and they attempted to assuage the circumstance. In that course, Lakhichand had additionally manhandled the Appellant. Being irritated, the Appellant assaulted Lakhichand with gupti to his left side armpit. Parshuram assaulted Lakhichand with ballam; while Sanjay assaulted him with stick. Because of assault, Lakhichand continued draining wounds on his chest, left armpit and got oblivious there. From there on, the Appellant and the other Accused people fled from the spot. Gopichand-PW-1 alongside his sister in law Sakhubai-PW-4 and others took Lakhichand to Government Hospital, Arwad, where on assessment, he was pronounced dead.

- Arguments advanced by the Appellant:
  Setting dependence upon Surain Singh v. Territory of Punjab1318, the scholarly Counsel for the Appellant presented that the episode happened in an abrupt squabble and after the Appellant was assaulted by Gopichand-PW-1, the Appellant went to his home and returned and in an unexpected battle assaulted the deceased and that there was no aim with respect to the Appellant to submit murder of deceased Lakhichand and thus, the case falls inside Exception 4 to Section 300 Indian Penal Code.

- Arguments advanced by the State:
  Mr. Nishant Ramakantrao Katneshwarkar, learned Counsel showing up for the Respondent-State. Disproving the conflict, the scholarly Counsel for the Respondent-State presented that a blow was inflicted on Dilip and Lakhichand saw the Appellant drawing closer towards them alongside two different people, having weapons in their grasp, it is affirmed that Gopichand and Dilip went at one side but since of physical handicap, Lakhichand was not fast enough to move. The Appellant assaulted Lakhichand with gupti to his left side armpit. Parshuram assaulted Lakhichand with ballam; while Sanjay assaulted him with stick. Because of assault, Lakhichand continued draining wounds on his chest, left armpit and got oblivious there. From there on, the Appellant and the other Accused people fled from the spot. Gopichand-PW-1 alongside his sister in law Sakhubai-PW-4 and others took Lakhichand to Government Hospital, Arwad, where on assessment, he was pronounced dead.

1318 Surain Singh v. Territory of Punjab
Gopichand in the first incident and from there on, the Appellant fled from the spot and went to his home and came back with a gupti in his grasp alongside Accused No. 2 and 3 and in this manner, the event can't be supposed to be an instance of "sudden fight". It was additionally presented that the Appellant's lead in heading off to his home and bringing the gupti and assaulting the deceased Lakhichand obviously shows that the event was not in the heat of sudden fight and along these lines the offense was plainly an instance of homicide falling Under Section 302 Indian Penal Code and not falling under any of the exceptions.

- **Held by the Court:**
  In the outcome, this appeal is partially permitted and the conviction of the Appellant Under Section 302 Indian Penal Code is changed as conviction Under Section 304 Part II Indian Penal Code and the Appellant is sentenced to undergo imprisonment for a period of twelve years. The court perceived the case as follows, the deceased abused the Appellant who got irritated and first assaulted Lakhichand and on observing this, Gopichand gave a stick blow on the head of the Appellant and from that point, the Appellant went to his home arranged nearby and returned with a gupti. Causing a fatal injury to the deceased is a part of the same incident and cannot be supposed to be a separate part to hold that the demonstration was planned and purposeful. As appropriately battled by learned Counsel for the Appellant, the occurrence was in an unexpected fight and there was no deliberation. One of the conditions of Exception 4 is that the offender should not have taken the "undue advantage" or acted in a barbarous or irregular way. The Appellant delivered a solitary blow injury with gupti on the left armpit which punctured through the upper finish of the left arm and afterward entered the chest fracturing the fourth rib and touched the lung causing break of left lung vasculature. However, the gupti was a perilous weapon, the Appellant-Accused caused a solitary physical issue which penetrated into the lung. Having received a stick blow from Gopichand-PW-1, in the abrupt squabble and in the heat of passion, the Appellant dispensed the injury on the deceased Lakhichand. Putting in consideration the facts and circumstances of the case, in our view, the case falls under Exception 4 to Section 300 Indian Penal Code. The conviction of the Appellant-Accused Under Section 302 Indian Penal Code is liable to be adjusted as Section 304 Part II Indian Penal Code.

- **Cases referred by the State:**
  In the judgment referred to by Mr. Nishant Ramakantrao Katneshwarkar, learned Counsel showing up for the Respondent-State in Criminal Appeal Nos. 286-288 of 2019, Asif Khan v. State of Maharashtra and Anr. dated 05.03.2019, the Accused consequently disappeared from the scene of occurrence on the bike and he returned following ten to fifteen minutes and afterward assaulted the deceased and in such realities and conditions, it was held that both are two separate episodes. Regardless of the battle being unpremeditated and unexpected, if the weapon or way of retaliation is lopsided to the offense and if the Accused had taken the, 'undue advantage' of the deceased, the Accused can't be protected under Exception 4 to Section 300 Indian Penal Code. Considering the extent of Exception 4 to Section 300 Indian Penal Code, in

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- **Conclusion:**
The fourth exception of Section 300 Indian Penal Code covers acts done in an unexpected fight. The said exception manages an instance of prosecution not secured by the very first exception, after which its place would have been more appropriate. There is no past consideration or assurance to fight. A fight unexpectedly happens, for which the two parties are pretty much to be accused. It might be that one of them begins it, yet on the off chance that the other had not played along by his own lead, then it would not have taken the genuine turn it did. There is then common incitement and aggravation, and it is hard to allocate the portion of blame which appends to every fighter. The assistance of Exception 4 can be summoned if demise is caused: (a) without premeditation; (b) in an a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case inside Exception 4 all the ingredients referenced in it must be found. It is to be noticed that the "fight" happening in Exception 4 to Section 300 Indian Penal Code isn't defined in Indian Penal Code. It takes two to make a fight. Heat of passion requires that there must be no an time for the passions to cool down and for this situation, the gatherings have worked themselves into a rage by virtue of the verbal fight initially. A fight is a battle among two and more people whether with or without weapons. It is not possible to expect to articulate any general Rule with respect to what will be esteemed to be a sudden quarrel. It is an issue of fact and whether a fight is abrupt or not should essentially rely on the demonstrated realities of each case. For the use of Exception 4, it isn't adequate to show that there was an unexpected quarrel and there was no deliberation. It should additionally be indicated that the offender has not taken undue advantage or acted in a cruel or abnormal way. The expression "undue advantage" as used in the arrangement signifies "unfair advantage".

TRANSPLANTATION AND DONATION – A NEW HOPE FOR A LIFE YET UNVOICED IN INDIA

By Riya Setia
From Bharati Vidyapeeth New Law College, Pune

Without the organ donor there is no story, no hope, no transplant. But when there is an organ donor, life springs from death, sorrow turns to hope and a terrible loss becomes a gift.
– “United Network for Organ Sharing”

ABSTRACT
Life is an invaluable gift that cannot be returned in any way. Anyone who is going through the final stage of their life is given a chance at life by offering an essential part that might be a blessing. Protecting human rights is our responsibility. Giving a corpse as a gift through technological progress and placing a vital organ in order to give it the right to life is the beauty granted under the Human Organ and Tissue Transplant Act 1994. The right to life is guaranteed under Article 21 of the Indian Law. The Constitution and organ donation is an extension of it that adds meaning to this section, which Makes it extremely important. The ability under this law to ameliorate individuals' predicament is still undervalued. The protection of human life is of paramount importance to give it the beneficial insight which is the right to wellbeing and the right to strength to enhance the beauty of this section for individuals suffering from the final stage of organ failure which establishes a rule that has been greatly improved through the innovation of organ transplantation. But ever since the act of such importance has still failed to achieve its true essence due to both the reason for the establishment of such act been in vein. India facing several social problems has reflected the shadow of same in such context too by various cases of poor people to sell their body organ as the way of getting money. The commendable goals of enhancing the gift of the corpse and overseeing commercial dealings in human organs were not able to realize its true potential, and the implementation of both laws could not achieve the desired elevation while incorporating such an act. The industry has now adopted the global rule for its implementation but still lacks the provisions necessary to achieve its single goal. Following legal and ethical rules can be a guideline for using science amicably and while judging a dispute in raising the flag by legal means.

Keywords: Transplantation, implementation, commercial, paramount, provisions

INTRODUCTION
Giving importance to Right to life, Supreme Court regarded Right to Health as a benchmark to attain social order. Subsided by Right to wellbeing adding subsequent relevance to the section. What’s more, that safeguarding of human life is of central importance.1321 The Constitution of the World Health Organization characterizes health as, "... a condition of complete physical, mental and social prosperity and not simply the nonappearance of malady or..."
The legislation so passed “The Transplantation Of Human Organ Act (THO)” was passed in India in year 1994 so as to overview the activities related to this. It only accepted the Brain Death as the form of Death and so made sale of Organ as serious punishable offence prohibiting such provisions. Serious flaw in the implementation of such legislation has been observed as a matter of fact since the time immemorial wherein organ commerce and kidney scandals have left no spot in abusing the spiritual provision of the law. Rate of 0.05 to 0.08 per million population is the rate at which India is currently facing deceased donation. But same has been criticized by international bodies over a period of time due to unethical illegal unrelated donation seen in the nation. However with certain knowledge the government is trying to take control of all illegal activities taking place under this name. The Transplantation of Human Organs and Tissues Act, 1994 then made was to manage training and methodology of such precious gift. This lead to a considerable increase in number of transplants so done in ethical manner. But despite of such act neither has the commerce stopped nor have the number of deceased donors increased to take care of organ shortage. The basic public opinion in this regard being "where you can get one why give?" is the thinking people apprehends due to which decrease in the rate of donation can be observed. Thereby, government seeing the Transplantation of Human Organ Act (THO) enactment that made irrelevant transplants illicit and perished gift a lawful choice with the acknowledgment of cerebrum death. To overcome the lack of organs for replacement the illegal practices continued, so also with the implantation of the THO legislation neither trade stopped nor it could cure the shortage of organ faced. Hence the concept of brain death never cam up publically or was never publicized. Recent allegation put up by media and public related to illegal unrelated donations put a big question on implementation and constitutionality of THO legislations. Along with such allegations put forth the very aligned problem of India facing several social problems is also reflected as a hindrance in the way of scientific advancement as poor people forced to sell their body organs for the source of income, and so the following organ instead of serving as the gift to the receiver of the same now appears to be a curse since the poor would be in unhealthy terms and would be unfit so diminishing the beauty of the process specifically made of give a gift of life to a person of organ demise.

HISTORICAL BACKGROUND

Turning the pages of the history we get to know the first attempt to use a corpse kidney was undertaken in 1965 in Mumbai. Although India is seen having short history in this context as compared from other

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1322Parmanand Katarav.Union of India, AIR 1989 SC 2039
1323Karnataka’s unabating kidney trade, Frontline. 2002;19:07. [Google Scholar]
nations. India’s scientific contribution is very limited as to matters pertaining to transplantation. In the early 20\textsuperscript{th} century the same was restricted to live donor kidney transplant that too in selected urban areas. Thereby with the increase in medical centers and trained staff introduction was kidney transplant was encouraged. But such blessing is still not available to a large population. Many people still rely on long term dialysis leading a low quality of life. Survey showed of more than 90\% of people of South Asia dying within a month of diagnosis due to expensive treatment on unaffordable terms. So estimated that only 2.5\% of the people of the end stage of their diagnosis actually end up getting transplant.\textsuperscript{1327} For liver such statistics is even more worse. And just a slow improvement seen in the case of heart and lungs.

**THE LAW AND RULES GOVERNING ORGAN DONATION AND TRANSPLANTATION**

Some of the important and the recent provisions contented in THO Act and presented in gazette are as follows

1. For Live Donation - Distinguish who can give without legal charters. Family members permitted to grant mother, father, siblings, child, daughter and companion. More recently, the grandparents were remembered in the New Gazette with a group of early family members. Key family members are required to provide confirmation of their relationship by genetic testing or possibly reliable reports. In the absence of the first family members, the recipient and the recipient must seek exceptional approval from the Board of Trustees of Approval authorized by the Legislature and attend a meeting before the committee to prove that the process of thinking about the gift has completely ended the charity or friendship of the beneficiary.

2. The demise of the mind and its manifestation - traversing the brain is characterized by the accompanying measures: there are stresses required 6 hours separate from the specialists and two of them must be specialists selected by the appropriate authority of management with one of them being a specialist in the field of neurosciences.

3. Handbook of transplantation exercises by framing a commissioning committee (AC) and appropriate authority (AA.) In each state or union territory. Each hectare has a distinct function as follows:

   a. Authorization Action Committee (AC) - The motivation behind this body is to direct approval procedures to confirm or reject transplants between a recipient and recipients other than the first family member. The primary obligation of the board of directors is to ensure that the recipient does not misuse the financial thought of giving to its members. The joint application submitted by the recipient and the donor is investigated and a one-on-one meeting is fundamental to achieving the true rationale for the gift to the AC and to ensuring the contributor understands the potential risks of the medical procedure. The confirmation or dismissal information is sent via mail to the respective clinics. The option to recognize or reject the donor is represented in over the last four decades. Clinical Kidney Journal. 2010;3:203-7.

subparagraph (3), Clause 9 of Chapter Two of the THO Offer.

b. Proper Authority Function (AA): The motivation behind this body is to manage the evacuation, storage and transplantation of human organs. The medical clinic is allowed to perform such exercises once permission is obtained from the authority. The expulsion of eyes from the corpse of a shareholder is not administered by this authority and must be possible in various places and does not require any method of permitting. AA powers include reviewing and permitting recruitment into clinics for a transplant medical procedure, allowing necessary guidance for emergency clinics, directing the customary examinations of emergency clinics to look into the nature of the transplantation, following up the clinical considerations of the contributors and beneficiaries, suspending or dropping the registration or failure of emergency clinics, and conducting examinations related to objections to breaching any arrangements from the law. AA grants an emergency clinic permit for a period of 5 years one after the other and the permit can be re-issued after that period. Each member requires a different permit

Although the main reference of committee was on term “brain death” it also recommended sale of human body organs as a punishable offense and so in 1994 Transplantation of Human Organs Act (THOA) was introduced. It tried to stop commercial trade of human organs which can now only be done by sanction of an authorization committee on necessary terms.

Studies have shown even after such restrictive nature of the act so imposed the scandals related to unrelated donors were still observed as high rate and those who were not able to come under such umbrella went either underground or to certain other countries with several liberal laws such as Singapore to get treatment done.1329

PROBLEMETIC INTERPRETATION OF LAW

Significantly, the interpretation of THO presentation by AC and designated clinical experts was flawed. This has been largely taken care of in the current scenario. Whatever the case, this journal must be passed by state governments before it becomes obligatory for emergency clinics to follow the decision. The arrangements to be reached are stipulated in Sub-Clause (3), Clause 9 of Chapter Two of the THO Statement states - "If any giver approves the expulsion of any of his human organs before his demise under sub-area (1) of Section 3 for transplantation into the collection of such beneficiary, not being a close to relative as is determined by the benefactor, by reason of love or connection towards the beneficiary or for some other uncommon reasons, such human organ will not be evacuated and so stopping the Transplantation process which can now take place by the consent of Authorization Committee" the following provision have largely been flawed.

As per the legal provisions only the hospitals performing transplantation are the recognized ones which can only be done by sanction of an authorization committee on necessary terms.


institutions were not able to declare brain death due to which transplantation of same was struck leading to a conflict situation wherein the cadaver being shifted to another hospital for the sake of organ retrieval.

A recent amendment to the law in 2011, and rules in 2014, led to the creation of a class of institutions called "non-transplanted organ retrieval centers" where organs can be recovered after approval and then transferred to an institution where the recipient's procedure is performed. However, a large number of institutions are still not recognized and potential donors are often transferred to recognized hospitals for transplantation. This is an obvious conflict of interest scenario wherein the hospital can then use the organs as they have priority as an "internal" donor. Therefore, there is the possibility of inducing the transfer of potentially brain dead individuals with "soft" incentives such as fee exemption.

As of 2014, around 2,500 cadaver transplants have been performed in India, especially in the last five years in the states of Tamil Nadu, Andhra Pradesh, Maharashtra, Kerala and Gujarat. Tamil Nadu, and the city of Chennai in particular, have seen great success in cadaver donation with about 1,400 cadaver transplanted so far. The relative success of Tamil Nadu has been showing significant results due to multiple reasons, including frequent interaction between government and stakeholders, and the provision of necessary legal and administrative support through regular government orders that facilitate the process. Also it tried to maintain absolute transparency since its inception. Mumbai has seen an increase in body donations in the past few years and has already seen 15 donations in the first six months of 2014.

The law tends to define brain death only in cases of organ transplantation in simple terms whereas on the other hand the medical communities widely working on the interpretation that if brain death is diagnosed thereby the authorities are so deprived to the right of transplantation if the family of the donor so refuses and there being no legal sanction to remove the life support such as ventilator. And so after declaration of death of an individual the body without any transplantation is handed over to the relatives, if they demand no donation.

CONSENT – A FLAWED INTERPRETATION

The pre-consented topic of taking organs for donation of corpse requires initial consented behavior can be done in three understated procedures mainly being 'opt-in', 'opt-out' and 'commanded choice' type. India basically follows 'opt-in' type of consent which requires 'authorization' from the side of individual regarding giving of his priceless organ. The simple idea behind doctrine to be regarded as to person need to decide with in his lifetime as to what is to done with his body once he dies. Being so given the privilege to talk of his afterlife desires. Subsiding it with the inspirational mentality this way of choice simply disregards the very idea of "assumed consent". The mere concept of

authorization so reflect the basic idea of standard consent reflected by Transplantation of Human Organs and Tissues Act, 1994. Section 3(1) of the act permits any person after having been complied to certain condition can suggest any strategy for evacuation of a particular organ before his demise just for the sake of restoration purposes. Consent for donation of such organs can also be given by the family members as per directions laid down by sec 3(3) of the act. Such consent is so recorded by two observers presented there of whom one should be a close relative to the deceased. At a specific stage other than the family members who own the corpse, even the individual, other than family members such as of a person who owns the body, may allow every reasonable office to register in the clinic that specializes in expelling the human organ of the expired individual for therapeutic purposes. Given that this evacuation can be done fairly and fairly by a registered clinical specialist. Only here the prohibition of being a family member or an individual who owns a body must be certain.

OTHER FORMS OF CONSENT

Over a large period of time countries are trying to expand their pool of organ donation by adopting various different strategies mainly focusing on the area of consent obtainment. Some of these being maintaining of “donor cards” by the citizens throughout their lifetime declaring their consent to donate after their demise. The other being “required request” in which the doctor is required to ask the relative of the brain dead patient related to organ donation. Also some countries are found to be working on very basic function of “presumed consent” marking of doctor presuming the consent and so being eligible to evacuate the body parts of individual which can be taken into use in absence of any objection laid down by the family member of the deceased.

With the dynamic changes the current modification in THOA Act has seem to bring the concept of “required request” in Indian scenario which has now made it necessary for the doctors in ICU identifying the brain death and so asking the relatives of the deceased regarding organ donation. Such strategy still to be found debatable in public domain wherein unprepared and unstructured health care centers facing difficulty in instantly shifting themselves to such premise. The factual data of the policy is so given consideration but still has not been adequately adopted in the public scenario.

Theory of “presumed consent” has also been implied in the modern scenario in various countries such as in some European countries, such as Austria, Belgium, Denmark, Finland and France. This gives liberty to doctors to take down usable set of organs as per their need in absence of any objection from deceased in his/her lifetime or by his family after his death. This so solves the problem of limitation with regard to organs at time of transplantation. This practice was so adopted after long debates in the history.

This requires the prior consent of the deceased or any of family member in order to not to escape from such provisions. In India we frequently come across debatable situation in this regard so facing difficulty in attaining such practice due to certain delusions or peoples belief so vested in religious practices related to transplantation.
cremation process to be followed. As per the argument originally enrooted from Anglo-Saxon Western Culture requires an in depth discussion before mandating provision in our culture, since our culture primarily seen working on the premise of the argument that individuals after their death should serve “the greater common good” brings up many questions so depending upon ones need to be considered while such practice for our country.

RIGHT TO HEALTH AND THE INDIAN CONSTITUTION

Right to health though not being a fundamental right under Part-III of the Indian Constitution still finds a valuable place for itself in Part IV of the Constitution stating directive policies. And so further health being a matter of concern falls under passage -6 of list two (state list) stated in the seventh schedule of the constitution where the meaning of the facet records to be "General Health and Sanitation, Hospitals and Dispensaries". Article 252 read with article 249 of the Constitution are extraordinary arrangements which give power on the Parliament to enact for at least two states by assent or by reception of such enactment by some other state. Further as per the instances seen in Maneka Gandhi v. Union Of India, Province Of West Bengal v. Province Of West Bengal Province are not many among the many Supreme Court options that have strengthened recognition of the "right to health". The Court's activity saw through various options that the refusal of rapid clinical reflection in relation to the patient in need adds to the violation of the "right of life, furthermore, the freedom" guaranteed under Article 21. Likewise, this arrangement is made for clinical management. As an end result of financial thought adding to "management" for reasons related to the Consumer Protection Act of 1986, it went too far in securing patient interests.

Legal activism and right to health

Decisions Sent in Parmanand Katara v. Union Of India, Indian Medical Association v. V P. Shantha and Khet Mazdoor Samiti v. Province Of West Bengal Province are not many among the many Supreme Court options that have strengthened recognition of the "right to health". The Court's activity saw through various options that the refusal of rapid clinical reflection in relation to the patient in need adds to the violation of the "right of life, furthermore, the freedom" guaranteed under Article 21. Likewise, this arrangement is made for clinical management. As an end result of financial thought adding to "management" for reasons related to the Consumer Protection Act of 1986, it went too far in securing patient interests.

ETHICS OF ORGAN SALE

S.S. Shukla, AIR 1976 SC 1207 as it had endorsed the violation of the fundamental rights of a large number of people during the dark period of emergency and even in the years to follow

Minerva Mills Ltd. v. Union of India, AIR 1980 SC 1789
AIR 1996 SC 550
AIR 1996 SC 2426

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nagral S. Will presumed consent make transplantation accessible, ethical and affordable in India? Indian J Med Ethics. 2009 Jul-Sep;6(3):155-6
nagral S. Will presumed consent make transplantation accessible, ethical and affordable in India? Indian J Med Ethics. 2009 Jul-Sep;6(3):155-6
AIR 1978 SC 597. The judges in Maneka Gandhi repented the decision of A.D.M. Jabalpur v.
As per the societal norms so set up, lack of medical awareness in the society, disparity between rich and poor enhances the gap between the two classes. Visualizing the condition of medical ethics largely seen the process of donation as well as transplantation can be treatment for one, blessing been given to start a new life altogether while it can be simple, fancy and eye- catchy way of business for other, hereby trading in such organs he may earn a reasonable amount of money. Middle or the upper class families have often found to be of a view that “why donate and take any risks when you can buy a kidney?” So advertising concept of Transplantation in evil ways tending to increase spirited process of encouraging life as of many of pre- existing poverty stricken crime like child labor and prostitution, already in existence.

Liver donation was so influenced as by kidney donation alongside the unrelated living donations were also related to be reported in the beginning. But in a recent field study on the economic and health consequences of selling a kidney in India, it was found that 96% of participants (over 300) sold their kidneys to pay off debts. The average amount received was $1,070. Most of the money received was spent on debt, food and clothing. Average household income decreased by a third after kidney removal and the number of participants living below the poverty line increased. A total of three quarters of the respondents were still in debt at the time of the survey. A serious illness could be largely seen in about 86% of people after the course of nephrectomy. And so plenty of people about 79% not advising kidney sold by other persons, proving to be a hurdle to pool of assets related to transplantation. The article concludes that among the paid donors in India, the sale of a kidney does not lead to long-term economic benefit and may be associated with poor health. Goyal et al. We conclude: “In a country like India protection to be given to the donors against the evils of exploitation. By several ways like some being educating them about the potential consequences of selling a kidney.”

In the past few years, a group of doctors and policymakers in India wanted to consider the possibility of making the sale of a kidney a legal transaction by putting in place a mechanism to protect them from middlemen or middlemen as it is happening in countries like Iran. These policymakers should remember that the value of using short-term donor financial gains to increase the supply of organs for transplantation is not a cure to poverty. With the existence of corrupted people in the society who can exploit poor with the help of money and resources, there will be continued existence of social evils and so legalizing the same process adding another pillar to this evil and further weaken the social norms.

**CONCLUSION**

We have taken a cue from very spiritual Hindu mythology, so the episode moves where Lord Ganesha was executed in provocation to a sudden and dangerous danger, leaving Goddess Parvati howling and cring in the name of Ganesha “Oh! Son, what is this done to you”. Atmosphere of misery spread in whole Kailash, it was then when Lord Shivatransplanted the elephant head on

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the body of Ganesha transformed granting him a new life into the form of grace. Converting Ganesha into the religion of learning and spreading wisdom everywhere.

The idea of transplanting and giving as a blessing has its roots in the past, giving us the most widespread moral learning from time immemorial, giving hopes of life, changing situation from Demise to a tide of happiness, by just applying some science and giving a new life altogether. The legal and ethical rules that we follow everywhere with organ gifting and transplantation are also important for the future as they can be used to define our specific claims with emerging sciences, for example, cloning and building tissues and immature microorganisms. Therefore, the guidelines arising from the THO Act were drawn up to overcome the problem of organ shortage and reduce the problem of members' commercial trade. But it did not control the organ trade and did not help develop an expired gift program to deal with the organ shortage. THOTA presented, 1994 to cover a paper on such problems. But it lacks effective explanation of all provisions due to some misunderstood guidelines. It can also be said that if a certain brain death was announced in time and taken into account in a swift manner, then there would be no need for relatives to donate their organs. India has great potential for pooling sources of organ donation due to the high population and lots of accidents that are observed on a daily basis. In total, about 160,000 people have been seen passing through certain road accidents giving India a bundle of deathly gifts if used effectively. But the law did not have the option to fill the gap between the demand and the agility of the members. The dynamic law to enhance the gift of members has been welcomed in the rule book but in reality and for viable reasons it has not produced the desired results. It is recommended that we turn to either presumed consent or withdraw from the consent arrangement and take advantage of the body's organ group from spontaneous collisions, the mind of the patients who died along with creating a vigil among the masses about organ donation.
RISING CRIME AGAINST WOMEN & CHILDREN IN CYBERSPACE: A CONCERN

By Sahil Goel
From Amity Law School, Noida

Chapter 1
Abstract

Cyber space refers to facility or feature which involves internet. This includes virtual world of computers which allow users to share information, interact with each other, swap ideas, engage in discussions, create initiative media, social forums & many other activities. Unfortunately, this cyber space has also become a medium of crime against women which is referred to as “Cyber Crime” in common parlance. While the world has witnessed a digital revolution, at the same time it has provided an entry for such people who tend to exploit such revolution.

It is impacting a huge no. of population including men, women & youth in the working class. The question here is that, Why social media today has become a platform for those who tend to take undue advantage of this to harass and abuse women & girls for their curious pleasures like stalking, bullying, violation of privacy, abusing etc with the help of inappropriate means. Why always women become victims? Just because they are considered to be emotionally weak and unstable in society? Why are the perpetrators able to take undue advantage of those considered relatively weaker in society through the means of technology? While the technology is supposed to strengthen the masses, the perpetrators still use it as a way to overpower the sections of society such as women. Why has the technology been used in wrong direction to take advantage of the lacunae in law & commit crime. Why child pornography has reached today at an alarming level worldwide? Why are the women not able to equate themselves to other sections of society despite having the provisions of a governing law in place? How capable are our agencies in prosecuting cybercrime?

It is high time to take strong steps to strengthen the cyber law and also put legislations into place that could curb such activities. It is because of the lacuna in law that people have strong courage to indulge in such activities. Its the responsibility of the state to eliminate the flaws in law in order to prevent crime against women in digital world. We need to create awareness to the weaker sections of the society as well against such crimes and also strengthen the laws for the intermediary liability in the digital world so that a deterrent effect can be created for such perpetrators.

Keywords: cyber space, cyber crime, weaker sections, Inappropriate content, perpetrators, deterrent liability

Introduction

The internet has been one of the greatest creations in the field of correspondence. New communication systems & digital technology have made dramatic changes in the way we live. With the advent of internet, the whole world has become a global village. It has created a virtual world

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with no boundaries, which gives people ample opportunities to ameliorate both personal and professional relationships across borders. Cyber-crime is broadly used to describe the activities in which computers or networks are a tool, a target, or a place for criminal activity.

A rapid increase in the use of computer and internet has given rise to new forms of crimes like publishing sexually explicit material in electronic form, video voyeurism and breach of confidentially and leakage of data by intermediary, ecommerce frauds like personation commonly known as phishing, identity theft & offensive messages through communication services.

Since this technology has no physical limits; it streams effectively around the globe. As a result, the place where cyber crooks commit crime & where its effects are produced is totally different & cyberspace is no special case to it. Thus, cybercrimes against women are on the rise & women & children have been radically victimized in the cyberspace. Cybercrime is a worldwide phenomenon & women & children have become the vulnerable objectives of this new type of wrongdoing. Despite the fact that India is one of the very few nations to enact the IT Act 2000 in order to battle crimes in cyberspace, issues with respect to women have not been given attention to in this Act. The said Act has named certain offences like hacking, publishing of obscene content in the cyberspace, fiddling with the data as culpable offences. But the grave risk to the security of women isn't covered completely by this Act.

At the point when India began its journey in the field of Information Technology, attention was given to protect electronic commerce transactions & communications under Information Technology Act, 2000 while issues like safety of women in cyberspace, provisions relating to image morphing, cyber defamation etc were not paid heed to. Since social media had not developed at that time, so provisions relating to crime against women & children on social media were not added in the Act. Since, in 2000, technology was very different, intermediaries were only considered to that who provided bandwidths, gave connections etc. Today the concept of intermediary has totally changed. Social networking sites have today become a new tool for the perpetrators to commit various types of crime as women & children spend long hours on it for entertainment, establishing online relationship with strangers whom they call as virtual friends who then become the reasons for they getting victimized. It is apparent that threats of rape and sexual violence are used to intimidate victims via social media. Cloned profiles or fake profiles of female victims are created by stealing the personal information from the social media profiles of the female member or by hacking their systems.

According to a Research based study, 1 in 3 internet users worldwide is a child & 7,50,000 individuals at any point in time are estimated to be looking to connect with

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children for sexual purposes. Also according to a data of 2017 released by National Crime Records Bureau (NCRB) in October, 2019 it was shocking to know that cybercrimes almost doubled in India in 2017 with figures reaching to 21,796 cases out of which 1460 cases were related to sexual exploitation & in 2018 total reported cases of cybercrime by NCRB were 27248 which is an alarming situation.

Review of literature
The world in 2020 has witnessed a covid-19 pandemic. Covid-19 has proved to be a gold mine for cybercriminals. According to an antivirus company Quickheal, it detected 50,000 malicious URLs & 40,000 malwares hiding behind information about the pandemic. India has already witnessed an 86% rise in cybercrime post covid-19 pandemic. This is due to the fact that there has been a significant rise in internet traffic due to the lockdown & perpetrators have exploited the situation by creating fake sites, sending malicious links in the name of providing services such as offering great discounts on medicines required for the treatment of coronavirus. Since women & children are unaware of this, they become victims of such practices & end up getting blackmailed to reveal their personal information or their system getting hacked without they getting to know the same.

Cybercriminals are quite aware of the fact that its very difficult for the women & children to report the crime to the nearest police stations as police too would be busy in managing the covid-19 lockdown situation which became the major reason for rise in such crimes during covid-19 lockdown period. Such crime goes unreported as Indian women & children are unaware of such offences.

Google blocked 18 million fake ads (bad ads) daily & 240 email messages that were spam amid the COVID-19 lockdown during lockdown in the month of April, to stop phishing attacks on women & children & prevent cheating by personation. Barracuda, an IT security company has also seen a 667% spike in spear phishing attacks happening post covid-19 lockdown. This increasing rate of cybercrime against women & children has led to development of insecurity among them. They don’t feel safe anymore, anywhere. Its effects are worse on them and on the society as a whole, when we look into the broader picture.

The research for the sake of understanding has been broadly divided under the various chapters. Firstly, various types of crimes in cyberspace have been discussed along with some case studies. Secondly, the reasons for growth in crime against women in cyber space have been discussed. This part of the study covers that why women & children have become vulnerable objects in cyberspace. Thirdly, the steps taken by the Indian government in recent years to curb & prevent crime against women in cyber...
space along with the reporting mechanism of cybercrime has been discussed. Fourthly, crimes against children have been discussed. Fifthly, global action taken by agencies i.e. Interpol & virtual global taskforce (VGT) to control & reduce child pornography worldwide has been discussed. In the last impact of COVID-19 on economy with special emphasis on cyber world has been discussed along with some suggestions & conclusion.

Chapter 2
Types of crime against women in cyber space
In India crime against women in cyber space” includes sexual crimes, sexual abuses on the internet & crimes on social media. Majority of the cases relating to crime against women in cyberspace which are reported to the police come within the scope of Section 67 (Publishing or transmitting obscene material in electronic form) of the IT Act, 2000.

Perpetrators who are males, mostly commit cybercrime for sexual purposes like morphing, using the picture for the purpose of pornography, cyber stalking etc & nonsexual purposes i.e. Harassing or bullying the victim. Perpetrators who are females commit such crime mostly for ideological differences, hatred or to take revenge.

Women in cyberspace are victimized in the following ways by the perpetrators.

Cyber Stalking/Cyber Bullying- It is one of the most popular crimes in the digital world.  

A cyber stalker may follow a person’s movements across the Internet by posting messages to threaten the victim on the bulletin board accessed by him, entering the chatrooms used by the victim or by continuously sending emails, instant messaging to the victim.

1351 The perpetrators basically involve in cyberstalking for sexually harassing the victim, the perpetrator being obsessed by victims love, taking revenge for some past insult by the victim or due to a feeling of grudge towards the victim. A stalker may harass his targets via private emails or sending message publicly. Women especially of the age group of 16 to 35 become the victims for most of the cyber stalking cases. Such acts can make a stalker liable for 3 years imprisonment under sec-354-D of the Indian Penal Code.

Morphing: 1352 It’s an activity to edit original picture to misuse it. Preparators download women pictures from social media i.e. facebook, instagram etc or some other resources & use the morphed photos for creating fake profiles on social networking sites or any pornographic sites which also becomes the case of cheating by personation which could make a person liable for 3 years of imprisonment along with a fine of 1 lakh rupees under sec-66D of the IT Act,2000.

Cyber defamation- 1353 It involves defaming a person through a new and far more effective method such as the use of modern Electronic devices. It refers to the publishing of defamatory material against any person in cyberspace with the help of

1350 https://en.wikipedia.org/wiki/Cyberstalking
1353 https://blog.ipleaders.in/cyber-defamation-india-issues/
computers or the Internet which could include defaming stories against the victim. If an individual engages himself in publishing any kind of defamatory statement against any other individual on a website or sends E-mails which contains defamatory material to that individual to whom the statement has been made would lead to Cyber defamation. Unfortunately, cyber defamation has not been defined in the IT Act, 2000 due to which perpetrators take advantage.

**Cyber pornography** - 1354 It can be defined as an obscene material designed, published or distributed using cyber space as a medium. In India, if an individual watches pornography, it is not a crime, but If he creates & distributes such content, then it would be a crime. Though, child pornography is not legal in any form & is prohibited globally. It could make a person liable for 5 years imprisonment along with 10 lakh Rupees fine on 1st conviction & 7 years imprisonment along with a fine of 10 lakh Rupees on subsequent conviction under Sec-67A of the IT Act,2000.

**Hacking**. 1355 It means unauthorized access to computer system or network, and it is the most predominant form of cybercrime. It is an invasion into the privacy of data, it mostly happens in a social online community to harass a woman by changing her whole profile into an indecent, derogatory one. The reasons could vary from personal grudge, taking revenge or even for fun. 90% of hacks happen through emails or social media accounts, the hacker sends some malicious links & gains access. Hacking can be done by criminal hiding behind a trustworthy entity for acquiring sensitive information (Phishing), infecting a website by malware usually visited by the victim (Watering Hole Attack), or by installing rootkits, keystroke loggers, ransomwares etc.

**Email spoofing**. 1356 It is the falsification of an email sender address with the goal that the message seems to have originated from somebody other than the real source.

**Vishing**- It is telephone equivalent of phishing. The perpetrator may use the telephone & pretend to be a legitimate entity in order to scam the victim into surrendering private information which he would later use for identity theft in the cyberspace.

**Cases laws:-**

**Ritu Kohli Case, 2000** 1357 This was the 1st case of cyberstalking in India. Manish Kathuria stalked an Indian lady, Ms. Ritu Kohli by illegally chatting on the web site, www.mirc.com using her name. He used indecent & obnoxious language, & shared her home telephone number to invite people to chat with her on the phone. As a result, Ms. Ritu Kohli received calls from various states of India & abroad, people conversed badly with her. The police registered her case under sec 509 (outraging the modesty of women), IPC. But the section was silent for outraging the modesty of women on the web. This raised

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1354 https://www.digital4n6journal.com/cyber-pornography/


1356 https://www.agari.com/email-security-blog/what-is-email-spoofing/

1357 http://docs.manupatra.in/newsline/articles/Upload/DF5EB3E-2BB1-44BB-8F1D-9CA06D965AA9.pdf
a concern to the government, for amending the laws regarding the aforesaid crime & protection of victims in the cyber space. Many such cases were reported, where the accused could not be convicted due to the IT Act, being silent on such issues.

As a result, the IT Act, was amended in 2009, wherein sec-66A was inserted which provided for an imprisonment for up to 3 years along with a fine, if a person was held guilty of sending offensive messages or false information in order to annoy or insult the person to whom such message was sent. But the section was struck down in 2015 by the Supreme Court of India in the Shreya Singhal case.

Why Sec-66A was declared as unconstitutional?
The Supreme court of India in Shreya Singhal case, declared section 66A of the IT Act, as unconstitutional, being violative of freedom of speech & expression under Article 19 (1)(a) of the Constitution of India. Section 66A of the IT Act, was debated & in controversy mainly because it was seen as being against freedom of speech as it used vague words like grossly offensive, menacing character etc. In the last few years, this section was used in many controversial cases including the arrest of chemistry professor at Jadavpur University just because he forwarded a cartoon featuring the West Bengal CM Mamata Banerjee. A month later two Air India cabin crew members were arrested & jailed for 12 days as they posted derogatory remarks against the Prime Minister’s office, the national flag & the Supreme Court while commenting on a strike by Air India’s pilots.

Later that year, two girls got arrested over a Facebook post which questioned the shutdown in Mumbai for Shive Sena patriarch Bal Thackeray’s funeral. That arrest led to a nation-wide protest & prompted a law student to file a public interest litigation challenging the constitutional validity of section 66A.

On 9th January, 2013, the Central Government issued an advisory that if a person got arrested under section 66A, it must be first approved by an officer of the rank of the Inspector General, Deputy Commissioner or Superintendent of Police.

On 24th March, 2015, the Supreme Court in a 122-page judgement, struck down section 66A, in its entirety for violating the fundamental right of speech & expression.

1358 Shreya Singhal vs UOI, Writ Petition (Criminal) 2012 SC 167
1359 Rohas Nagpal, Cyber Crime Law in India 89 Asian School of Cyber Laws, Pune, 2019
1360 Rohas Nagpal, Cyber Crime Law in India 90 Asian School of Cyber Laws, Pune, 2019
1361 SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra,
This was the 1st reported case of cyber defamation in India. It was contended by the plaintiff that the defendant was sending emails to the plaintiff & its subsidiaries that were defamatory, abusive, obscene, vulgar with an aim to malign the high reputation of the plaintiff & its Managing Director all over India and the world. The defendant being an employee of the plaintiff was under a duty not to send the aforesaid emails. The Court of Delhi assumed jurisdiction over a matter where a corporate’s reputation was being defamed through emails and passed an important ex-parte injunction restraining the defendant

1361 65/14, Original Suit No. 1279 of 2001, District Court, Delhi
from defaming the plaintiffs by sending derogatory, defamatory, abusive and obscene emails either to the plaintiffs or their subsidiaries & also restrained the defendant from publishing, transmitting etc any information in cyberspace which is derogatory or defamatory of the plaintiffs.

**DPS MMS Scandal Case**

In this case an obscene video by the title- “DPS girl having fun” was uploaded under the category of “ebooks” (to avoid falling under any filter by the site) by an IIT Kharagpur student who was one of the sellers on an ecommerce site www.bazee.com & was successful in selling some copies of the MMS clip. As a result, the CEO of bazee.com, Mr. Avnish Bajaj was arrested under sec 67 for distribution of cyber pornography through the site. Since no prime facie evidence could be found that Mr. Bajaj was directly or indirectly involved in publishing the pornography as the video could not be seen on the site due to remedial measures taken by the back end team, he was released on bail. This case raised questions regarding efficiency of the IT Act, & raised a need to amend it. As a result, intermediary guidelines were passed in 2011 which stated that if an intermediary had exercised due diligence to remove obscene material on their content, then they can escape liability.

**Chapter 3**

Reasons for growth of crime against women & children in cyber space

The main reason for growth of crime against women in cyber space is that its of transcendental nature having no boundaries, its dynamic nature, easy access & anonymity due to which perpetrators take advantage. Even if the place from which the crime has taken place is detected, it sometimes becomes very difficult for the police to catch hold of the perpetrators. While there are many other reasons for rise of cybercrime against women which have been discussed as under-

- **Legal Reason-** From the preamble of the IT Act, 2000 it can be clearly inferred that the intention of the legislature to enact the Act in 2000 was to give legal recognition to the transaction taking place by “electronic data interchange” & over ecommerce & hence it focused mainly on provisions relating to unauthorized access, breach of confidentiality etc. Most of the crimes in cyber space are prosecuted under mainly 3 sections of the IT Act, sec 66 (Hacking), 67 (Publication & transmission of obscene material) & 72 (breach of confidentiality). For crimes like cyber defamation, image morphing, creating fake profiles of women & children on social media etc, the IT Act, is silent which becomes the cause for rise of such crimes.

- **Sociological Reason-** India witnesses a patriarchal system of society where males are considered to be bold & tough & women are treated as introvert & submissive which becomes a major cause for rise in cybercrime against women. Men attach respectability of a family on the honor of the women members, which makes women vulnerable to perpetrators as sometimes they also change their identity in order to harass or blackmail women in cyberspace.

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1364 Rohas Nagpal, Cyber Crime Law in India 119 Asian School of Cyber Laws, Pune, 2019
Most of the cybercrimes remain unreported due to the hesitation and shyness of the victim and her fear of defamation of family’s name which too is a major reason for rise in.

● **Psychological Reason** - With the birth of nuclear family culture in India, the joint family culture has nearly vanished where people used to share, discuss etc about their lives with family members. The rise of nuclear families have led to people wanting their own privacy & not having time for each other. Due to this women especially homemakers sometimes become targets of depression & loneliness & to overcome this they take support of cyberspace to reach the outside world. When they are unable to reach to close friends or relatives, they land up establishing contact with strangers & giving them information about their family, personal information etc due to which their victimization takes place. Parents have nowadays become impatient due to work stress & they don’t have the time to spend time with the family & as a result children especially girl victims are unable to bring such crimes to the notice of parents. Also when many female students and staff have to live away from family due to job & work for long hours over the computers, it becomes their reliable source as well which too lands them in trouble.

● **Partial Computer Illiteracy** - It has been observed that women have comparatively less knowledge about computers than men which leads to they becoming vulnerable to cybercrimes. Computer literacy just not only includes surfing the net but it is also meant to have good knowledge about computers, such as working of operating systems, its vulnerabilities, privacy protection, protection from computer contaminants such as viruses, worms, Trojans, spyware malware, etc which can lead to breach of security resulting in hacking of the system. Many a times women are not aware of privacy settings of social networking sites which results in providing easy access to women’s personal details, photos etc to the perpetrators & committing such crimes.

● **Other Reasons**
Women sometimes infer that harassment in cyberspace would lead to social harassment as well. As a result of which a woman victim abstains from complaining even if she is victimized because once the crime is reported it is flashed through media or internet, and then it becomes more difficult for the woman to live in the society. She is considered a social stigma by the people. After the data revolution bought by Reliance Jio in 2016, availability of internet at cheap rates & setting up fake websites through website service providers at an affordable cost has become very common to commit such crimes. Internet addiction among some children and women, for sexual communication & establishing online relationships with strangers in order to relive stress, anxiety, depression, loneliness etc has resulted in increase of such crimes. Lack of awareness of the types of cybercrimes & its legal implications among many women and children committed against them has given rise to such crimes & perpetrators knowing this fact leads to increase in such cases. Sometimes the system is incompetent to assist in intercepting, monitoring or decryption which leads to perpetrators being untraced. Intermediary sometimes fails to block the unwanted content such as fake obscene content etc.

**Chapter 4**
Recent steps taken by the government to report & curb cyber crime
The government in past few years has taken a number of steps in order to deal with the increasing cybercrime & establish public trust in the digital world. This includes setting up of inter-ministerial committee on phone frauds in 2014. The cybercrime against women & child scheme under which online cybercrime reporting portal has been operationalized.

The Ministry of Home Affairs had constituted an expert group for a detailed study for initiation & creation of a Indian Cybercrime Coordination Center that would holistically deal with cyber forensics, investigation, research and innovation, threat analytics & cyber training.

Accordingly in February 2019, the Ministry of Home Affairs launched the cybercrime investigation center known as the Indian Cybercrime Investigation Center in short for I4C scheme under which a no. of institutions were established including the national cyber forensic lab and the CYPAD under Delhi police which is short for cyber prevention awareness and detention center. Under I4C, following verticals have been established.

1. National cybercrime threat Analytics Unit (TAU)-For providing a platform for personnel to implement the law, people from private sector, research scholars to work cooperatively to analyze all bits of cybercrimes.
2. National cybercrime reporting- For creating investigation team comprising of experts to work with investigating units that are established at state & central level.
3. Platform for joint cybercrime investigation team- For driving action with coordination to combat key threats in cyberspace.
4. National cybercrime forensic laboratory ecosystem (NCL)- For building up a center to assist the process of investigation. NCL & related Central Forensic Science Laboratory to be well-prepared & very much staffed so as to analyze & stay aware of new specialized turns of events, utilizing which a totally new sort of cybercrime may have been carried out.
5. National cybercrime training center- For training on crimes in cyberspace, its investigation & developing online courses for such training.
6. Cybercrime ecosystem management unit- For creating ecosystem that would unite the scholarly community, industry and government to work, explore a cybercrime premise with built up standard working techniques to react & contain the effect of crime in cyberspace.
7. National Cyber Research & Innovation center- For tracking rising developments in technology, proactively anticipating potential vulnerabilities, which can be misused by cyber crooks.

According to the Ministry of Home Affairs, education & awareness about cybercrime can help in prevention of such crimes to a significant extent. The ministry has established an online cybercrime reporting portal, www.cybercrime.gov.in, where the crime can be reported online. Also the website displays information details about types of cybercrimes & precautions to be taken to avoid becoming victim on social media, matrimonial sites, job seeking sites etc. At the state level most of the police stations have established a dedicated cyber

https://www.mha.gov.in/division_of_mha/cyber-and-information-security-cis-division/Details-
cell for cybercrime reporting. The victim of cybercrime can immediately report the crime to the nearest police station along with necessary evidences such as screenshots, etc.

Cyber dost twitter handle

The Ministry of Home Affairs started a twitter handle called “Cyber Dost” in March 2018, which creates relevant posts on how to prevent & be secure against cyber crime. The handle covers topics such as security measures to be adopted by an individual while using the internet, awareness on identity theft etc. The twitter handle also advises victims of cybercrimes for registering their complaints on the appropriate channel. An individual can also tweet their inquiry on its feed and get a solution for a right strategy to be followed for taking an action against cybercrime. It also released some safety tips to be followed by people during covid-19 lockdown as people were following work from home culture.

Cyber safe women initiative

“Cyber Safe Women Initiative” is a campaign which was propelled by the gvt. of Maharashtra on 3rd January, 2020 on the birth anniversary of Indian social reformer Savitribai Phule to help women & children so that they can be aware of cyber practices.

Key features of the initiative

Under this initiative, the gvt proposed to organize awareness camps pertaining to cyber security for women & children across the whole state of Maharashtra including every district as internet today especially social media has become a new tool for the perpetrators. The camps would mainly focus on educating & creating awareness among the women & children about how perpetrators exploit the internet to commit crime in cyberspace, the laws related to cybercrime in India & types of cybercrimes such as cyber stalking, online phishing, image morphing, child pornography, fake sites, cyber defamation, fake profile on social media etc so that they are not cheated or sexually exploited in cyberspace. For awareness camps, participation would be invited from women and children including police representatives, district ministers, government officials, school and college students, NGOs, Anganwadi sevaks & members of the Women’s Vigilance Committee.

Chapter 5

Crimes against children in cyberspace

Perpetrators very well know the fact, that its much easier to commit crimes against children than adults in cyberspace as children are always excited to explore new things on internet & can be blackmailed easily, therefore crimes against them are committed in following ways-Child Pornography - Filming a child using webcams or other digital means while doing sex or digital representation in explicit sexual relationship or photographing any if his/her sexual organs. It involves 3 stages- Pornography production in which pornographic images

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Online Grooming - It can also be termed as webcam blackmail. When a sex offender forms an online relationship of trust with a youngster and deceives or pressures him/her into doing sexual act, it is said to be online grooming. This is the most common form of online child sexual abuse.

Sextortion - It can also be termed as webcam blackmail. It is a part of cyber blackmailing. It occurs when the perpetrators tries to blackmail the victim by sending emails mentioning that they have installed spyware or ransomware into the victims system & filmed them using laptop webcam & would share victims sexually explicit images or videos with his social circle, if the victim doesn’t pay him money. According to a study, 78% of reported sextortion cases, the victim was a female b/w 8 & 17 years of age.

Cyber trafficking - When perpetrators make use of cyberspace for recruiting the victims for human trafficking, advertising about services offered by victim, to attract clients is termed as cyber stalking.

Crime through online games - Perpetrators know that children are always excited about new games on the internet, for which they design addictive games & also ask to purchase game currency at a discounted rate. Children failing to anticipate the consequences, end up giving their personal & financial information & as a result become victims of hacking, blackmailing phishing (game controller trying to be a legitimate entity but in reality a criminal) etc

Chapter 6
Global action to reduce & control child pornography

Interpol - This is the International Criminal Police Organization headquartered in France which currently has 194 countries as it members including India. INTERPOL allows specialized investigators from member states to share data, through the analysis of digital & audio content of photos & videos. Its strategy is based on identifying victims & save them from sexual exploitation, preventing access to child pornography that is used for sexual exploitation which is available online & preventing perpetrators form travelling to commit their crimes or escaping from legal prosecution. Its specialists can identify victims by analyzing the digital, optical & audio contents of photos to extract evidence & locate victims. Interpol has been able to identify thousands of children & arrest thousands of perpetrators form the start of their photo data base since 2001. Amid the COVID-19 pandemic, it has started an awareness campaign on “COVID-19 cyberthreats”

1370 https://www.barracuda.com/glossary/sextortion
1371 https://www.interpol.int/en
Virtual global taskforce (VGT)\textsuperscript{1372} This organisation aims to use the support of NGOs to provide a program to coordinate law enforcement operations in international cooperation to monitor child exploiters & to control child sexual crime perpetrators online.

The initiative’s strategy is based on 3 axes-

\begin{itemize}
  \item To block search results that lead to child abuse- New algorithms have been implemented to prohibit pornographic images & videos for children by identifying & blocking their digital footprint & by identifying the site that promotes it & the blocking of broadcasts on Google & Microsoft.
  \item To identify & delete pornographic content for children- In order to achieve this, Member states decided to establish national databases & contribute to international systems such as INTERPOL’s child pornography database which provides international database of child pornography through which it can combat the spread of this crime. Also, Microsoft, Google & Firefox have agreed to coordinate a mechanism to block these images at the browser level.
  \item To chase the perpetrators & enforce the law- When it comes to child exploitation online, the place to publish child pornography is a crime scene. So laws must be enforced by applying all means of transferring & preserving that content, whether it is peer to peer networks, or what we call it as “deep network. Also specialized working groups have been established to control crimes, identify perpetrators & the identity of victims.
\end{itemize}

Impact of covid-19 on economy with special emphasis on cyber world

Initially corona virus began in Wuhan, China & the entire world thought it was a local infection & then it grew to such large proportions that it had to be declared as pandemic by WHO. It is the first virus that we have actually seen in human civilization after the development of the internet. Now covid-19 has been described as an infodemic by WHO (1\textsuperscript{st} epidemic in the information age). While there has been an increase in the number of people going on to the internet & confining themselves in their homes, internet has started witnessing new challenges & approaches. This entire trend has been well noticed by cybercriminals & cyber security breachers. It’s not surprising that we have started witnessing emerging issues relating to use of cyber space by users in the corona virus age.\textsuperscript{1373} According to India Ratings & research, it appraises an aggregate income loss of around Rs 97,100 crore for 21 significant states in April alone amid the COVID-19 lockdown as it had slowed down monetary movement in the nation. Though the lockdown has caused revenue loss to both the central and state governments, the actual battle against Covid-19 & the related expenditure is being born by states.

Cyber world post COVID-19

Covid-19 is an unprecedented event in the history of humanity in 21\textsuperscript{st} century. Unfortunately we have also seen a tremendous increase in the distribution of child pornography, in the number of images being shared online & in the level of violence associated with child exploitation & sexual abuse crimes.

\textsuperscript{1372} \url{http://virtualglobaltaskforce.com/about/}

\textsuperscript{1373} \url{https://www.bloombergquint.com/economy-finance/major-states-may-lose-rs-97100-crore-revenue-in-april-says-india-ratings}
India Child Protection Fund (iCPF) reported a 95% rise in child pornographic content utilization ever since the lockdown was imposed. On one side, lockdown tried to make people of India safe but on another hand, it destroyed people’s thinking as they were going more towards pornography videos.

It indicates that millions of pedophiles, child rapists, and child pornography addicts have migrated online, making the internet extremely unsafe for children as they can be more vulnerable through educational applications via the internet, to unsafe communication with adults or to determine their personal information. Without stringent action, this could result in a drastic rise in sexual crimes against them. Also, the Rajya Sabha Committee on the issue, has recommended stringent laws for Internet service providers like Jio and Airtel, and platforms like Facebook, Twitter, and Instagram, to hold them accountable for child abuse enabled by these companies.

Therefore, the methodologies relating to managing and taking care of web, this whole infodemic has been totally new and noteworthy. Indeed, the internet has been utilized as a great infective instrument to spread a wide range of information relating to coronavirus. This could be authenticated, genuine information or unauthenticated, fabricated information. Users, therefore must know that what new repercussions could the coronavirus bring as an infodemic for the society at large.

In addition, we have started witnessing nations of the world marginally coming with innovative mechanisms under the cyberlaw frameworks in order to deal with the containment & bogus info relating to coronavirus. There is an enormous no. of cybercrime & cyber security ramifications that we all must know while dealing with the coronavirus & increased reliance of internet in such circumstances.

It has been accounted for that in the 2 months, when coronavirus started, the no. of domains that have been registered on coronavirus related things, have massively increased. More than 4000 domain names have been registered on coronavirus related things. While 3% of these domain names are malicious while another 5% are being treated as suspicious. It has been inferred that registered domain names relating to coronavirus are a way more likely to be more suspicious as compared to other domain names that are being registered at the same time.

Chapter 8
Suggestions
● Social Networking sites like Facebook, Instagram should guide users especially women & children to check & update their privacy settings frequently so that only the people whom they know can access their profile to avoid fake profiles, image morphing etc.
● Search engines like Yahoo, google, etc should develop advanced algorithms so that when anyone types “child pornography” or related phrase, the results are filtered & no such type of content is displayed to the user.
● Specific provision relating to sextortion, online grooming, phishing, image

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morphing, crime through online games should be added in the IT Act.
● A separate chapter for social media should be added in the IT Act, stating the specific crimes that could take place in social media, along with rights, duties & liabilities of both the intermediary & the users should be clearly defined.
● Sec-79, of the IT Act, talks about the circumstances in which intermediary can be exempted from liability. It states that if intermediary aids, conspires, abates or induces in commission of any unlawful activity, then it would not be exempted from liability. But too much scope for interpretation has been given to the above 4 words for interpretation by courts & as a result of which advantage can be taken by finding out the loopholes to escape liability by intermediary. Hence these words should be defined clearly along with the sections.

Conclusion
Covid-19 will always be a milestone gamechanger in our lives & the world will always be referred to as Before Corona (BC) & After Corona (AC) post the pandemic. Each individual needs to know about the cyberspace challenges and issues that have begun to emerge in the coronavirus age. This would enable people to deal with this in an efficient way & to avoid becoming victims of cybercrime. Parents need to spend more time with children so that children don’t hesitate to inform them if they become victims of cybercrime. We also must appreciate the efforts of the police in handling cybercrime & Ministry of Home affairs for taking drastic steps to create awareness for cybercrime among women & children & at the same time establishing efficient mechanisms to report cybercrime in recent years. New legislations will have to be constantly enacted in order to cope up with the rapid changes in technology & newer forms of crimes.

We have seen that cyberlaw is slowly coming to the mainstream & IT Act continues to be a evergreen hero. Countries have now started coming up with new legislations to combat cyber security breaches as cybercrimes have now become a part of our lives.

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GENERAL DATA PROTECTION REGULATION (GDPR): AN ANALYSIS

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ABSTRACT
The General Data Protection Regulation (GDPR), which is a set of rules and regulations aimed to give European citizens more power over their personal data and information is unquestionably the most significant change in the European Union’s data privacy regulation. This regulation replaced the obsolete Data Protection Directive (DPD) 95/46/EC which was introduced in 1995. The EU’s GDPR came into effect on May 25, 2018, and the main purpose of this regulation is to regulate the immense incursion of personal information being processed by entities around the world. The GDPR, consists of 173 recitals and these recitals cover forty-five detailed rules on data processing, forty-three conditions of applicability, thirty-five bureaucratic requirements for EU member states, and seventeen totaled rights and aims to protect the fundamental right to data protection. As stated by the European Commission, the most significant purpose of this legislation is to provide the data subjects, additional control over their personal data and to make business. This Article addresses, the most vital parts and matters of this regulation, its influence on individuals and businesses as well as an assessment of its results and actual impact.

INTRODUCTION

In this new electronic age “privacy” is a major concern. Even the best data security systems cannot protect our private information from getting leaked. “Personal information” is any information relating to us, it can be about our professional or private life and reveals a lot about us and our thoughts. While data can be used for valuable purposes, the unrestricted and arbitrary use of data, specifically personal data has raised concerns over the privacy and independence of an individual. In the European Union (EU), protection of data is considered a fundamental right, and the General Data Protection Regulation (GDPR) acts as a new structure to protect that right. This regulation creates a very positive atmosphere for the consumers and enables the Europeans to have complete control over their personal information. The General Data Protection Regulation (GDPR) is seen as a role model by other countries as they implement their own laws to protect data. The GDPR provides a comprehensive data protection law for processing of personal data.

WHAT IS GDPR?
The General Data Protection Regulation is the core of Europe’s digital privacy legislation and the most inclusive data protection and privacy regulation till date. It creates detailed rules for how personal data is composed, moved, administered, and kept. The foremost purpose of this regulation is to abridge the regulatory atmosphere so both the citizens and the businesses in the European Union can fully benefit from the digital economy. Overriding the Data Protection Directive (DPD), it was drafted and passed by the European Union (EU) and was put into effect on May 25, 2018 and enforces severe
fines on those who will encroach upon its security and privacy standards, with penalties up to tens of millions of euros.

Data plays a very important role in our day to day life. From social media, companies, to banks and governments, every service that we use contains the analysis and collection of our personal data. From our name to our address, credit card number and much more are composed and perhaps most prominently, kept by organizations. Under the GDPR regulation, organizations have to guarantee that the personal data is assembled legally and under strict circumstances, and those who gather and manage it are obliged to protect it from exploitation, and misuse, as well as to respect the rights of data owners.

There are two different types of data handlers that the regulation applies to:

-Processors
-Controllers

A controller is a person or a public authority who alone or in association with others gathers personal data and also explains what will happen with the personal data, while a processor is an individual or public authority which processes personal data on behalf of the controller.

The controllers and processors must take suitable practical and administrative actions to execute the data protection principles. While designing the information system they should keep privacy in mind. Processing of data should be done under one of the six lawful bases quantified by the regulation, they are: (Consent, public task, contract, vital interests, legitimate interest, or legal requirement). And when the processing is grounded consent, the data subject has the right to withdraw it at any time.

WHAT DATA DOES THE GDPR APPLY TO?
The GDPR basically applies to personal data.

Personal data means any information relating to the data subject or consumer, which can be used to identify them directly or indirectly. This information can consist of anything from a name, an e-mail address, a photo, biometric data or the IP address of a person’s computer. Whether or not, the IP address is considered personal data under GDPR has been a subject of debate. The lawmakers then made it clear that IP address will come under personal data as the identity of a person can be traced from his IP address.

Data that has obvious personal identifiers like first name and last name can also come under the GDPR depending on the fact that how hard it is to conclude the identity of an individual from that data.

SENSITIVE PERSONAL DATA
The GDPR makes sure that the processing of personal data which reveals a person’s racial or ethnic origin, his/her opinion on politics, religion and philosophy or trade union membership as well as the processing of genetic and biometric data for the purpose of identifying a natural person and the data relating to a person’s health, his/her sex life or sexual orientation shall be prohibited.

The above mentioned, statement will not apply, if the individual has specifically given his/her permission for the processing of their data, or under a few other specified circumstances.

1378 What does the GDPR basically applies to https://www.dataselect.com/who-does-the-gdpr-apply-to/
DATA INVOLVING CRIMINAL OFFENCES
Under the GDPR regulation the processing of data which is related to criminal convictions and offences or security measures shall be carried out only under the supervision and control of the official authority or when the processing activity is authorized by the Union or a Member State Law provided that they lay out appropriate safeguards for the rights and freedoms of the data subjects. Comprehensive record of criminal convictions shall be kept under the supervision and control of the official authority.

In order to process personal information about criminal offences or convictions, there should be a lawful basis under Article 6 and an official authority for the processing under Article 10.

DATA CONCERNING CHILDREN
The GDPR contains provisions intended to improve the protection of children’s personal information and to ensure that children are addressed in a clear language that they can understand. When it comes to children’s data protection, transparency and accountability plays a very essential role, especially when they are accessing online services.

WHO WILL BE IMPACTED?
This regulation applies to organizations functioning within the EU as well as any organization outside the EU which offers its goods and services to the customers or businesses in the EU. Which means that almost every major business in the world needs a GDPR compliance strategy. This new regulation is proposed to offer individuals with better control over their data now that businesses are accumulating additional personal data.¹

LAWFUL BASES FOR COLLECTION OF DATA
These lawful bases were adapted from the 1998 Data Protection Act’s ‘conditions for processing’, and under the GDPR we can only process data, if we can produce both written as well as procedural evidence of at least one of the six lawful bases, which include:
1. **Consent:**
Consent is the sturdiest of all the lawful bases because it talks about the main motive of GDPR, that is, to give an individual full control over their personal data. In essence, a clear permission must be obtained from the individual for the processing of their data for an explicit purpose.

2. **Contract:**
The processing of data is necessary to enter into a contract with the data subject. And if the processing activity is not comparable to the terms of the contract, then the data processing activity requires to be covered by a different legal basis. This will be the basis used when payment details have to be processed.

3. **Legal Obligation:**
The processing activity has a legal requirement, such as an employment, information security or consumer transaction law. For example: A court order may require an individual to process his/her personal data in order to comply with its ruling. When a person quotes their legal obligation, it’s a good idea to also state what statues or agencies he/she can report to.

4. **Public task:**

¹ The six lawful bases for collection of data https://www.chronline.com/list/6-lawful-bases-for-processing-data-under-gdpr
This means to collect information in the public interest, such as performing a task given by a public authority. Usually, it doesn’t apply to private companies, but also doesn’t require statutory power for the processing of data. An individual cannot claim this basis if they can get away without the processing of data.

5. **Legitimate Interests:**
The processing activity is important for our legitimate interests or the legitimate interests of a third party, unless there is a good reason to guard the persons personal information which supersedes those legitimate interests. This base will not apply to a public authority processing data to perform their official tasks.

6. **Vital Interests:**
This basis refers to the processing that is absolutely necessary but also a case where consent doesn’t apply. This interpretation of the basis states that a person can reply on this basis if they need it to protect someone’s life but he/she can’t otherwise get consent for the processing activity.

**GDPR COMPLIANCE?**
It refers to the act of ensuring that business practices and operations will align with the regulations as instructed by the GDPR.

**GDPR TERMS AND CONDITIONS**
There are six important principles under GDPR. These principles concerning the processing of personal data are present under Article 5 of the GDPR. According to this Article personal data shall be based on:

1. **Principle of Lawfulness, Fairness and Transparency**
Under this principle special emphasis is given on personal data being managed in such a way that provides a clear explanation for those individuals whose information is being composed and managed. In this principle;
   a. An organization must establish a lawful basis for collecting data to process it.
   b. Data should be administered **lawfully, fairly and in a transparent manner** with respect to the data subjects.
   c. Collection of data should be done only for **specified and legitimate** purposes and not for any other purposes.

2. **Principle of Purpose limitation:**
Under this principle, it is important for an organization to have a policy on the collection of personal data and that the personal data is being used for a specified purpose with the prior consent of the data subject and in not being misused or exploited.

3. **Principle of Data minimization:**
Many organizations collect and store large amounts of data for different purposes, be it marketing tenacities, research, monitoring actions. Under this principle, regardless of the size of an organization or the type of data stored in that organization, it is advised that the organizations must assess the significance of the information stored and that any data held has to be limited to only which is required by the organization for explicit purposes.

4. **Principle of trueness, accuracy:**
Under this principle, organizations must have a far-reaching policy and procedure for regular reviews to enable GDPR principles compliance with this principle. All organizations will be required to maintain an accurate database of all the customers and employees.

5. **Principle of integrity and confidentiality:**
This principle completely deals with security. It is the accountability of the organization to guarantee that all the necessary measures are taken to protect the personal information that their data subjects hold. Such as unlawful use, unintentional damage as well as external threats such as malware, phishing or theft. Weak security systems could be subjugated, causing distress to the individuals. Under this principle, the GDPR conditions that the organizations should have the suitable levels of safety to address the risks presented by their processing.

6. Principle of storage limitation:
According to this principle, an organization cannot collect unnecessary information which is not pertinent to the objective of the collection. So, before collecting any kind of data, organizations must figure out exactly what they need. There should also be periodic reviews, so that unnecessary data can be removed after a certain period of time.

INDIVIDUAL’S RIGHTS UNDER GDPR
Under the GDPR, the following rights are provided to the individuals:

1. The right to be informed
- Individuals should be well informed about the collection and processing of their data. This is a transparency requirement under the GDPR.
- Individuals have the right to know about the purpose collection of their data and with whom their data will be shared.
- Privacy information should be provided to the individuals during the collection of their data.
- If personal data is obtained from any other source, then the individuals must be provided with privacy information within a period of one month.
- If an individual already has the necessary information then there is no need to provide privacy information to them.
- Information provided to the individual’s should be accurate, transparent and easily accessible.

2. The right of access
- Individuals have the right to access their personal information. This is known as subject access. The request for a subject access can be made verbally or with a written request. An organization has about one month to respond to that request. And in most cases, no fee is charged.

3. The right to rectification
- Individuals can get their data complete, if its incomplete. The request for the completion of their data can be made verbally or in writing.
- An organization has one month to respond to this request.
- In certain situations, an organization can chose to reject this request.

4. The right to erasure
- The data subjects can have their personal information erased. This is also known as ‘the right to be forgotten’.
- Request can be made verbally or in writing. Responding period is one month.
- This is not an absolute right and can only be used in certain circumstances.

5. The right to restrict processing
- Individuals have the right to request the restriction of their personal data. This is not an absolute right and can only be applied in certain cases.
- Request can be made verbally or in writing. Responding period is one month.
- When processing is restricted, an organization can store the data but they cannot use it.

1383 Individuals rights under GDPR
https://www.dataprotection.ie/en/individuals/rights-
6. The right to data portability
Individuals can reuse their personal data for their own purpose across various services.
- They can easily transfer their personal data from one IT atmosphere to another.
- This allows individuals to take advantage of applications and services that can use this information to acquire them a better deal.

7. The right to object
- Individuals have the right to object to the processing of their personal data in certain circumstances.
- They have an absolute right to stop their personal data being used for direct marketing.
- Organizations must tell individuals about their right to object.
- Request can be made verbally or in writing.
- Responding period is one month.

COUNTRIES WITH GDPR-LIKE DATA PROTECTION LAWS
1. California Consumer Privacy Act (CCPA) – USA
   - This regulation was enacted in 2018 and took effect on January 1, 2020
   - Provides additional rights and protections regarding how businesses may use their personal information
   - It imposes many restrictions on businesses that are similar to those required by the General Data Protection Regulation (GDPR)
   - Rights for California customers:
     - Right to know about the main aim of collection of data
     - Right to delete personal data
     - Right to forbid the sale of personal data
     - Children under the age of 16 have to give clear consent to have their data eligible for sale
     - Guarantee that individuals who perform their rights under the CCPA will not be penalized with higher prices than those who do not

2. LEI GERAL DE PROTECAO DE DADOS (LGPD) – BRAZIL
   - Also known as the Brazilian General Protection Law;
   - Passed by the National Congress of Brazil on August 14, 2018 and comes into effect on August 15, 2020.
   - Closely modelled after the GDPR
   - Their definition of personal data is similar. The LGPD has stated in various places that personal data can mean any data which could identify a person or subject them to a specific treatment and in this one place it is more extensive than GDPR.
   - Their fundamental rights are also similar to each other. The GDPR has 8 fundamental rights and the LGPD has 9 fundamental rights, despite the different count, they are essentially the same rights.

3. THAILAND PERSONAL DATA PROTECTION ACT (PDPA)
   - Approved by the National Legislative Assembly of Thailand in February 2019
   - Published in government Gazette on 27 May, 2019 and came into effect on 27 May, 2020
   - The PDPA and GDPR are similar to each other in:
     - Definition of personal data
     - Establishment of legal basis for gathering and usage of personal data
     - Harsh penalties and fines
     - Extraterritorial applicability

4. PERSONAL INFORMATION PROTECTION ACT – SOUTH KOREA
   - This regulation has been in effect since September of 2011 and has included various GDPR like provisions. These provisions are;
     - Gaining consent

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1384 Countries with GDPR like laws
• Scope of valid data
• Appointment of a Chief Privacy Officer
• Limitation of data retaining period

**DATA PROTECTION LAWS IN INDIA**

In 1385 India, as of now, there is no legislation or a specific law that deals with the subject of data protection or on the violation of privacy of an individual. Some sections of the Information Technology Act which was passed in 2000 by the parliament and amended in 2008, deals with computer related offences or crimes and violation of privacy but these provisions are not sufficient to deal with the present scenario. The Information Technology Act, 2000, addresses issues relating to monetary compensation (civil) and penalty (criminal) in the situations of misuse of personal data and the violation of contractual terms on personal data.

India presently has a comprehensive personal data protection bill that is under discussion in a joint parliamentary committee, which has many consent-related provisions that are quite similar to those enshrined in the European Union’s General Data Protection Regulation (GDPR).

This bill states that in order to gather personal information those entities that are classified as data fiduciaries must acquire permission from the individuals whose data is being talked about. Data fiduciaries are any entity who determine the purpose and the means of processing personal data. This definition includes everything from ride-sharing apps to social media to data brokers that purchase and resell client data.

This 1386 bill further levies extra requirements, such as an obligation to obtain the consent of the parent or the guardian for the assemblage of information belonging to children. The bill also carves out a number of exceptions for when the data fiduciaries may not have to acquire consent in order to gather personal data. For instance, in order to comply with court orders there are exceptions for state or other entities, enforcement of law and medical emergencies.

The provisions of the bill also give rights to data principles, those about whom data are being collected. The data principles can request information from the data fiduciaries about the collection of their personal information. The data principles also have the right to correct or erase their data stored by the fiduciary – a “right to be forgotten,” which is also mentioned in the GDPR. They will also have the right to view their data in a clear and transferable manner, with the data presented in a structured format.

**SUPREME COURT JUDGEMENT ON RIGHT TO PRIVACY**

Justice K.S. Puttaswamy vs Union of India and others, 2017

Justice Puttaswamy, a retired High Court Judge, filed a writ petition in 2012 against the Union of India before a nine-judge bench of the Supreme Court challenging the constitutionality of Aadhar on the grounds that it is violating the right to privacy. The issues raised by him were:


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1385 Overview of data protection laws in India http://www.ehcca.com/presentations/privacysymposium1/steinhoff_2b_h1.pdf

1386 Data protection bill in India https://www.prsindia.org/billtrack/personal-data-protection-bill-2019
1. Whether or not there is any fundamental right of privacy under the Constitution of India?

2. Whether or not the verdict given by the court that there are no such fundamental rights in M.O. Sharma & Others. vs Satish Chandra, DM, Delhi & others and also, in kharak Singh vs The State of U.P, is the correct expression of the constitutional position?

The nine-judge bench of the Supreme court of India passed a landmark judgement on 24th August 2017, upholding the fundamental right to privacy under Article 21 of the Constitution of India.

Article 21 of the Constitution states that: “No person shall be deprived of his or personal liberty except according to procedure established by law”.

It was stated in the judgement that the term ‘privacy’ is to be an integral constituent of Part III of the Indian Constitution, which lays down the fundamental rights of the citizens. The apex court also stated that the state should carefully balance individual privacy and the legitimate aim, at any cost as fundamental rights cannot be taken away by law, and every law and act must abide by the Constitution. The court also added that the right to privacy is not an absolute right and any invasion of privacy by state or any non-state actors must satisfy the triple test:

1. Proportionality
2. Legality
3. Legitimate Aim

This judgement proved that the Supreme Court of India once again appeared as the sole protector of the Constitution in creating a legal context for the protection of privacy in India.

CONCLUSION:

Taking into consideration, all the above qualities, the General Data Protection Regulation (GDPR) turns out to be a major success in enhancing the privacy and data security of the European Union citizens and turns out to be an ideal role model for other countries, who themselves are trying to build a stronger data protection laws for the betterment of their citizens.

It is very important to protect our personal data and information from third parties as personal information can be used for exploiting a person’s reputation and can be used to influence our decisions and shape our behavior. For instance- Recent data breaches by top service providers like Facebook, Twitter among others have raised serious questions on whether personal information of an individual is safe or not. In the Cambridge Analytical scandal wherein data of millions of Facebook users was leaked and was allegedly misused by Cambridge Analytica (a data mining firm which was linked to Donald Trump’s Presidential campaign) created a sense of dissatisfaction across the world including India, which is one of the countries with highest number of Facebook users. Due to situations like this it is very important for a country to have stronger and stricter data protection laws as the more someone knows about us, the more power they can have over us.

1388 Cambridge Analytica and Facebook: The Scandal and the Fallout So Far

ABSTRACT
The Consumer Protection Act, 2019 has been enacted to overcome the shortcomings and the gaping inadequacies of the Consumer Protection code of 1986. In this article, the authors have made a nuanced approach to deliberate on the necessity of reforming the pre-existing legislation and reaffirm upon the need for statutory amendments in the outmoded Consumer Protection Act, with the advent of digital marketing and constantly evolving socio-economic and political scenario in India. The paper illustrates the noteworthy provisions constituting the primordial regulations along with the newly incorporated terms in detail, drawing a comprehensive analysis of the exemplariness of the Act as well as highlighted its insufficiencies. How the clauses inserted in the aforementioned Act will be a major breakthrough in safeguarding the rights and fostering the welfare of the consumers have been discussed in the succeeding sub-sections.

Keywords: Consumer Protection, E-Commerce, digitization, Central Councils, Central Authority, Consumer Disputes Redressal Commissions, Mediation, Mediation cell, Unfair trade practices, Unfair contracts, Product Liability, product sellers, manufacturers, service providers, misleading advertisements, stringent measures, protection and promotion of consumer rights.

INTRODUCTION
“The importance of the Consumer Protection Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, ‘network of rackets’ or a society in which, ‘producers have secured power’ to ‘rob the rest...” 1389
Justice R.M. Sahai.
The modern market place comprises a plethora of myriad goods and services. With technology making headway, Indian markets have undergone a substantial metamorphosis. In this era of digitization, the emergence of global-supply chains, evolving e-commerce, and multi-level marketing are supplanting the traditional market system. Online marketing has attracted customers nationwide for its availability of an expansive range of products, convenient payment mechanisms, easy access, and improved services. Consequentially, this has rendered the consumers susceptible to unfair and immoral trade practices. The constant escalation in the vulnerabilities of the consumers exhorted the repealing of the archaic Consumer Protection Code of 1986 and re-enactment of a more inclusive Act. The novel Consumer Protection Act, 2019 aims at establishing an efficacious legal framework for enhanced protection of the
consumers from inappropriate and unethical business activities.

**HISTORICAL BACKGROUND**

Consumer Protection has its deep roots in the rich soil of Indian civilization, which dates back to 3200 B.C. In ancient India, human values were cherished and ethical practices were considered of paramount importance. All the sections of the society followed Dharma (derived from Vedas), which served as the guiding principle governing human relations. The rulers felt that the well-being of their subjects should be their prime concern. Not only did they devise laws to regulate the social conditions but also strived to ameliorate the economic state of affairs thereby safeguarding the interests of the buyers.

During the British dominion, the Indian legal system was totally revolutionized and the English legal system was introduced to administer justice. Some of the laws which were promulgated during the British reign concerning consumer interests are the Indian Penal Code of 1860, the Indian Contract Act of 1872, the Usurious Loans Act of 1918, the Sale of Goods Act of 1930, the Agriculture Procedure (Grading and Marketing Act) of 1937 and the Drugs and Cosmetics Act of 1940. These laws provided specific legal protection to the consumers. Consumer protection legislations formulated after India’s independence from British includes the Prevention of Food Adulteration Act of 1954, the Essential Commodities Act of 1955, and the Standard of Weights and Measures Act of 1976. Apart from remedies awarded under the contract and criminal laws, consumers also have sanctioned rights under the Law of Torts. Gradually, the policymakers observed the inadequacies in the prevailing laws and therefore crafted a comprehensive legislation exclusively for the customers: The Consumer Protection Act, 1986. However, with the introduction of e-commerce in the marketing system, the incorporation of more explicable provisions was required to strengthen the rights of the consumers. Taking the new set of challenges into consideration, the Indian Parliament passed the Consumer Protection Bill, 2019 which acquired the Presidential assent on 6th of August 2019.

The Union Minister for Consumer Affairs, Food and Public Distribution, Shri Ram Vilas Paswan elucidated on the command of the Act taking effect. The scope of the Consumer Protection Act, 2019 has been expanded through procedural amendments. The Act imposes strict liabilities on product sellers, electronic service providers, fallacious manufacturers and misleading advertisers. Substantial changes have been made in the structure and functions of the Central Authority and the Consumer Disputes Redressal Commissions for the purpose of making swift executive interventions to prevent consumer detriment.

Now, we shall draw a systematic review of the contemporary law on consumer

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[1391] id.
[1392] id.
[1393] id.
[1394] id.
protection that is The Consumer Protection Act, 2019 and the subsequent Gazette Notification which made it operative from 20th of July 2020.

**SUBSTANTIVE ANALYSIS**

The principal objective of the Consumer Protection Act, 2019 is, “To provide for protection of the interests of consumers and for the said purpose, to establish authorities for timely and effective administration and settlement of consumers’ disputes and for matters connected therewith or incidental thereto.”

As inscribed in Sec. 2 sub-clause 9, the Consumer Protection Act acknowledges the rights of the consumers which include:

- The right to be protected against products that are hazardous to life and property;
- The right to be informed about the quality, quantity, potency, purity, standard and price of goods;
- The right to be assured of the access to a variety of goods or services at competitive prices;
- The right to seek redressal against restrictive trade practices and unscrupulous exploitation;
- The right to be heard and be assured that consumer’s interests will receive due consideration at appropriate fora;
- The right to consumer awareness.

Now, we shall delve into critiquing the virtues and vices of the Consumer Protection statute.

a) **E-COMMERCE RULES**

The recent Act of 2019 recognizes the conventional market shoppers as well as those who are engaged in multilevel transactions over the internet in its definition of ‘consumer’, as against the 1986 Act. Any person (natural or juridical entity) who avails products and services for a consideration through the online as well as the offline mode is termed as the consumer. The payment on purchasing or hiring of a product or service can be made in advance, immediately or in installments. A person buying goods and services only to resell them is not considered under the purview of a consumer. E-trading through innovative marketing technologies is the order of business.

Online products and service providers such as Amazon and Flipkart also fall within the ambit of product sellers and are liable to take the due standard of care like any traditional market product seller. Under this Act, an e-commerce entity has to provide information regarding the country of origin, payment methods, modes of payment, security of payment methods, charge-back options, return of goods, refund, exchange, warranty and guarantee, delivery, and shipment. The e-commerce platforms ought to acknowledge the receipt of any consumer complaint within forty-eight hours of receiving it.

On violation of the rights of a consumer, a complaint may be filed in written format or electronically. It deems acceptability of the complaints if the question of admissibility is not decided within the specified period of 21 days. The Act also provides for hearing or

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examination of cases through video-conferencing. This will aid in moderating the anxiety of the consumers owing to the procedural ease especially during this pandemic induced lockdown situation. The meticulous shift from the offline to online medium will prove lucrative for the contending parties. If the Indian Judiciary re-engineers its processes effectively and optimizes the use of its human resources to bring about change in management by harnessing the potentiality of the available Information and Communication Technology (ICT) to its fullest extent, the objective of granting prompt justice to the anguished party would materialize.1398

The lacunae in the promotion of awareness campaigns regarding low-quality, sub-standard products sold online, is apparent. The e-shopping platforms are expected to provide the authentic characteristics and usage conditions while listing an item for sale. Many consumers are deceived by the lustre and grandeur of the products offered for sale at discounted prices online, which turn out to be unsatisfactory and a waste of money on being delivered. The Act should be enforced in its real essence and awareness should be raised on the mechanism of seeking redressal against the spurious goods sold online. The 2019 Act replaced a three-decade old Act to combat the challenges associated with the defunct 1986 Consumer Protection Act. The Information Technology Rules must be upgraded to keep pace with the sophistication in technology. This would enhance the efficiency in the functioning of the Act.

Often, the goods and services sold online are subject to dynamic pricing where the value of goods might amplify each time we check the price. The online shopping sites do not display the Maximum Retail Price of the commodities in order to maximise their profits. This puts the customers into a vulnerable position. Due to the unavailability of a variety of goods and services, many people resort to online shopping and they likely require paying unreasonably exorbitant prices for the products imperatively. To our disappointment, the law is cut short to safeguard the interests of the online buyers in this respect, especially the relatively impecunious section of people who cannot afford high expenditure. There is also no provision pertaining to the insurance policies sold online in the interest of the consumers.

The law has also not prescribed an efficient monitoring system to investigate the web-based advertisements as to if they suffice the conditions of the Advertising Standards Council of India. To protect the consumers from misleading advertisements and brands, the Act should have provided for an online monitoring system that would book complaints voluntarily.

b) CONSUMER PROTECTION COUNCILS (Chapter II)

The Act establishes Consumer Protection Councils at the district, state and national levels, as advisory bodies. The Central Council and the State Councils shall be headed by the Minister-in-charge of Consumer Affairs at the central and state level, respectively.1399 The District Council

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1398 Sri Suresh Chand Sri Aviral Singh, District Court Computerization & Computerization Committee, E-courts Mission Mode Project ( Mar 18, 2020). Available at https://districts.ecourts.gov.in/bahraich/district

will be led by the District Collector. The Councils shall supposedly advise on the promotion and protection of consumer rights. As a matter of fact, the Act does not specify whom the Council would render the advice to. The Act has assigned this duty to the Central Consumer Protection Authority.

c) CENTRAL CONSUMER PROTECTION AUTHORITY
(Chapter III)
The Central Government notified that thenceforth the Central Consumer Protection Authority would be referred to as the Central Authority. The Central Government is entitled to appoint those officers, experts, professionals as Chief Commissioners, who are competent under the prescribed admissibility criterion. The Central Authority shall be delegated such powers to promote, protect and enforce the rights of consumers through superintendence and control of the administrative matters. The Central Authority is empowered to

- Conduct investigations into prima facie cases of violation of consumer rights and institute complaints or prosecution. The Central Authority shall have an Investigation Wing that would be presided over by the Director General to conduct inquiry or direct the working of the Authority. This gorges the institutional void in the regulatory regime extant. It has been provided in a manner that the role envisaged for the Central Authority complements that of the sector regulators, and duplication, overlapping or potential conflict is avoided. The Act has clearly stated the extent of jurisdiction and the functions of the members which shall ensure the supremacy of the Doctrine of Separation of Powers.

- Regulate matters relating to the violation of the rights of consumers.
- Order recall of unsafe goods and services.
- Order discontinuance of unfair trade practices and misleading advertisements.
- Impose penalties on manufacturers or endorsers or misleading advertisers.

The Central Authority shall have an Investigation Wing that would be presided over by the Director General to conduct inquiry or direct the working of the Authority. This gorges the institutional void in the regulatory regime extant. It has been provided in a manner that the role envisaged for the Central Authority complements that of the sector regulators, and duplication, overlapping or potential conflict is avoided. The Act has clearly stated the extent of jurisdiction and the functions of the members which shall ensure the supremacy of the Doctrine of Separation of Powers.

d) CONSUMER DISPUTES
REDRESSAL COMMISSIONS
(Chapter IV)
Under this new Act, there are Central Consumer Protection Council Rules, Consumer Disputes Redressal Commission Rules, Appointment of President and Members in State or District Commission Rules, Mediation Rules, Model Rules, E-Commerce Rules, Consumer Commission Procedure Regulations, Mediation Regulations and Administrative control over State Commission and District
The Consumer Redressal Commissions at the state and district and national levels shall consist of the President and the members whose qualifications cater to the eligibility criteria of the 2019 Act and the Gazette notification released by the Department of Consumer Affairs. The quasi-federal nature in the composition of the Commissions is maintained in the allotment procedure.

The Act now entails that complaints can be filed from where the complainant resides or works for personal gain as against the 1986 Act, which required the complainant to file a complaint where the other party resided or carried out his business. This provision will prove beneficial for the complainants as it would eliminate the tribulations involved in travelling from one place to another for the sake of seeking redressal. The manner in which the complaint should be registered, and the complaints along with revised petitions should be dealt with, is intricately detailed in the present Act.

The Pecuniary Jurisdiction for the District Commission, State and National Commissions over the disputed goods and services has also been altered in the 2019 Act.

- For District Consumer Dispute Redressal Commissions, the upper pecuniary limit has been altered from 20 lakh to 1 crore as against the 1986 Act.
- For State Consumer Dispute Redressal Commissions, the upper pecuniary limit has been increased to 10 crore from 1 crore as against the 1986 Act.
- For National Consumer Dispute Redressal Commission, the pecuniary limit has been extended to goods and services priced beyond 10 crore as against the 1986 Act.

The pecuniary jurisdiction would be determined on the basis of the value of goods and services paid as consideration as against the 1986 Act wherein the pecuniary jurisdiction was determined on the value of goods, services as well as the compensation demanded. This prospective change would help in doing away with the practice of unnecessarily inflating the compensation claimed and thereby alleviating the burden of impending cases on the State and National Commissions. There would be an optimum distribution of cases filed and would thus expedite the process of disposal of cases. However, an ambiguity that is noted at this point is, whether the undecided cases would continue to be heard in the Commissions in accordance with the 1986 Act or they are to be transferred in conformity with the regulations of the new Act.

As per the Consumer Disputes Redressal Commission Rules, no fee is to be charged for filing cases up to Rs. 5 lakh. There are

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\[1411\) The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 47 ((1)(a)(i)) (2019).

\[1412\) The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 34 ((1)(a)(i)) (2019).

\[1413\) Supra 21.
provisions for filing complaints electronically, credit of amount due to unidentifiable consumers to the Consumer Welfare Fund (CWF). The State Commissions shall have to furnish information to Central Government on a quarterly basis on the vacancies, disposal, pendency of cases, and other matters. The Commissions have been empowered to review the order of the cases passed by them within thirty days of such order. As per Sec. 49(2) and 59(2), the State and National Commission may deem terms of a contract between consumer and service provider which is unfair to the consumer, be ineffective and void. According to Sec. 62, if a complainant writes an application to the National Commission at any stage of the proceeding when the complaint is pending, the Commission may arrange for transfer of the case. The District, State and National Commissions shall not admit a complaint if the case has not been filed within two years from the date of such cause of action except for situations where the Commission is convinced of the reason for the delay caused. As stated in Sec. 70 of the Act, the National Commission shall have administrative control over the State Commissions and the latter can as well monitor performances and investigate into any allegations made against the members of the District Commissions (falling under the jurisdiction of the respective State Commission). This would aid in the prevention of arbitrary exploitation of power by providing checks and balances. The Commissions shall have to preserve a record of all the cases disposed of as well as those that are in suspension.

The Act has also laid down provisions for the aggrieved parties to file an appeal against the orders predetermined. If an order has been passed in the interest of one party (ex parte) by a Commission, the aggrieved party might appeal to the Higher Commission and in the instance where the National Commission has inordinately favoured one party, an appeal can be made to the latter for setting aside such order. The unsatisfied party is also liable to pay fifty percent of the amount prescribed by the Commission before the appeal is heard. The limitation period for filing appeals in the State Commissions has been revised. Appeals can be made to the State Commission against the order passed by the District Commission within forty-five days of passing such order and the appeals ought to be disposed of by the Commission within ninety days from the date of admission. Appeals can be made to the National Commission within thirty days of passing such order by the former or by the State Commission and subsequently to the Supreme Court within thirty days of passing such order by the National Commission. The order of the Apex Court shall reign supreme.

e) MEDIATION (Chapter V)
The Consumer Protection Act, 2019 articulates the process of mediation for the settlement of consumer disputes. In other words, mediation is an alternative dispute

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[1414] Supra 20.
[1415] Supra 20.
[1416] The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 40, Sec. 50, Sec. 60 (2019).
resolving mechanism that has been adopted by the Act. The enactment calls for the establishment of consumer mediation cells under the aegis of the National, the State and District Commissions. The objective of incorporating this provision is to provide an alternative mode of dispute resolution, a breakaway from the archaic complications of consumer disputes redressal commission.

Mediation, as a form of conflict dissolver, exists in the other facets of law likewise. The Constitutional Courts for long have fielded for mediation as a holistic and 'timesaving' method that can be resorted to for legal remedy. KVK Vasuki, J, most aptly referred to the note of formal Chief Justice of India where he insisted on discouraging litigation and opted for persuasion, "...to compromise wherever you can. Point out to them how the nominal winner is often a real loser in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man."

These lines clearly uphold the functionality and litigant friendly mode of legal remedy that mediation seeks to render through arbitration, negotiation and conciliation. In Jaibir & Ors. v. State & Anr., the Honorable Court was of the opinion that there is an all-round attempt by the Legislature and Judiciary, as well as the Executive, to promote the settlement of disputes through the approach of mediation and therefore, in the best interest of the public, once disputes are settled by the process of mediation, the parties must treat it as a solemn settlement. This view was also reiterated in the case of National Insurance Co. Ltd v. Hindustan Safety Glass Works Ltd.

The National Consumer Redressal Commission sets forth the qualifications required to become a mediator, the procedure of their empanelment and removal, salaries, and the manner of proceedings in detail. The quasi-federal nature of the mediation cell is preserved through the admission of members having proficiency in jurisprudence and experts or bureaucrats having substantial merit. The autonomy and independence of the mediators are of prime importance as far as the impartation of just remedy is concerned. It is deemed to simplify the consumer dispute adjudication process through speedy disposal of cases and thereby minimizing the count of unsettled cases. This alternative system of grievance redressal shall also safeguard the interests of the consumers who cannot afford litigation costs to fight big business houses. In this context, it can be well said that the institution of mediation in consumer dispute redressal that is to be guided by the tenets of natural justice, is a welcome move. The elaboration on the structure and functioning of the mediation cell would plausibly ensure transparency and fairness in the justice served.

f) PRODUCT LIABILITY (Chapter VI)

In this latest Consumer Protection legislation, an all-new segment relating to the product liability has been augmented much to the satisfaction of the consumers. Broadly speaking, this neo segment empowers the ordinary customers to bring


\[1423\] Civil Appeal no. 3883 of 2007, The Supreme Court of India (2007).

an action against the product manufacturer, the product seller or the service provider in case the consumer is harmed as a consequence of using a defective product or substandard service whatever the case might be. The duty of a manufacturer or a seller or a service provider does not terminate upon manufacturing or selling a certain product but also solicits cognizance of any harm caused to the respective consumers for having used their product or service which is in any way or the other defective or is discordant with its description or lacks significant operational capabilities. To maintain a just and integrated relationship between the buyer, seller and manufacturer, mutual checks and balances must be enforced. Chapter VI of the Consumer Protection Act fulfills those prerogatives which the previous consumer code failed to do and as a direct consequence, that Act could not achieve all its aims and objectives for inaction and voids were ubiquitous throughout.

In this regard, we can well cite the reference of the reputed landmark judgment of Donoghue v Stevenson1425 which vindicated the duty to take the due standard of care towards the purchasers that is the consumers. The sellers and service providers are under a legal obligation to take necessary care while selling products and availing services respectively. This in turn paves way for a complainant to bring an action and demand damages for any harm or injury caused to him because of a substandard or ill product being sold to him under Sec. 2(35) of the Consumer Protection Act of 2019. The Code delineates the situations when the product manufacturers, service providers and product sellers are responsible under this Chapter.

Sec. 84(1) of the Act expressly deals with the liability of a product manufacturer and makes him liable for any manufacturing defect which might be present in his product, or if there is any defect in the design thereof, or if the final product which reaches the doorsteps of the consumers deviates from its prescribed specifications. Furthermore, the manufacturer would also be held liable if the product thus manufactured does not conform to the express warranty and also if the product lacks distinct set of instructions for safe and proper usage and forewarnings against incorrect usages. It is quite pertinent to mention here that sub-clause 2 of Sec. 84 prevents the product manufacturer from escaping liability (under sub-clause 1) by pleading non negligence or non fraudulent misrepresentation with regard to the manufacturing activities making the liability watertight and comprehensive.

As discussed earlier, it is not only the product manufacturers but also the service providers who are liable for harm caused due to deficiency in their services. Sec. 85 of Consumer Protection Act of 2019 provides for the liability of a service provider if the service rendered by him is imperfect, deficient or lacks in adequate quality, nature or fails to meet certain performance parameters that every service is expected to meet under ordinary circumstances.1426 The service provider is also duly liable if he is negligent in imparting the service to the consumer and also if he fails to deliver the proper set of instructions, following which the consumer

1425 AC 562, UKHL 100 (1932).
is harmed by that particular service at bay. Failure of the service to conform to the express warranty and the terms and conditions arising out of the contract makes the provider of that service liable accordingly.

Likewise, Sec. 86 imparts liability upon a product seller if he has substantial control over manufacturing, designing and packaging activities of a product that has inflicted harm, or has altered or modified a product which led to an injury being caused, or there was an express warranty on the part of the seller independent of that given by the manufacturer which caused the injury. A product seller is also liable if the identity of the manufacturer is illusive, or if the manufacturer enjoys the protection of any law which is in effect in the territory of India, or if he fails to take due care which is expected of him in handling the product he sells.

The new consumer protection statute also strikes a balance between the sellers and purchasers as it protects the sellers and manufacturers from erratic charges levied by the purchasers by inserting exceptions to a product liability suit. Sec. 87 deals with the exceptions prohibiting the consumers from bringing an action for product liability, if the buyer made any alterations or modifications in the sold product. Sub-clauses (2) and (3) also put certain embargos on the consumers willing to bring a suit for product liability, thus abiding by righteousness and the equity principle.

As per the Gazette Notification released by the Department of Consumer Affairs, the issuance of a cash memo or bill or receipt or invoice has been made mandatory. Every minute aspect related to the sale of the product notably the name and address of the seller, the consecutive serial number not exceeding sixteen characters, the date of its issue, the name of the consumer, the description of goods or services, the quantity, the shipping address (where applicable), the taxable value and discounts, the signature of the seller or his authorized agent, the customer care number or e-mail ID, the total amount charged in a single figure, along with the apportionment of expenses manifesting all the compulsory and discrentional payments and other requisite information, must be penned down.

The definition of “unfair trade practices” has been expanded to encompass misleading electronic advertising, taking back or withdrawal of defective goods, discontinuation of deficient services, and reimbursement of the consideration within the stipulated period or in the absence of such precondition, within thirty days. However, due to certain legal loopholes, many online customers get hoodwinked. Many companies expressly mention limited liability clauses to escape liability for defective and deficient goods and services. In this event, the law has not taken precedence over the limited liability clauses to protect the customers.

In Sec. 2 (7) (i) and (ii), it has been asserted that to deem a person as the consumer, one has to buy goods and services for a consideration (price). Thus, the definition

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\[1427\] The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 85 (b), (c) (2019).
\[1429\] The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 86 1(a), (b), (c) (2019).
\[1430\] The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 86 (d) (2019).
excludes those individuals who avail goods and services free of cost, from the ambit of consumer definition. So, a person cannot seek relief for the prejudice or disadvantage caused to him, if he has not disbursed for the certain product or service. This can induce incessant exploitation of such consumers as they would be unable to claim remedy. On the other hand, healthcare has been removed from the definition of services although it is still there in the list of services, while the 'telecom’ services have been brought under the purview of the list of services.

Several producers do not disclose the essential attributes like the Maximum Retail Price, date of manufacture, expiry date, and composition of their products. Product manufacturers, sellers and service providers will need to ensure that they have shown due diligence while placing a product for sale and complied with all the prerequisites under the legislation for consumer protection.

The consumer awareness campaign of “Jago Grahak Jago” should be broadcasted and propagated across India in such a manner that it reaches to the consumers inhabiting in the remotest of localities. People should be made aware of the deficient goods and services sold both online and offline and the process of seeking redressal for infringement of the consumer rights should be extensively publicized.

**g) OFFENCES AND PENALTIES (Chapter VII)**

However path breaking may a statute be in addressing the grievances of the oppressed class which is in this case are we, the 'customers', the provisions are admirable only when executed effectually. It is splendid to be optimistic but utopia leads to disarray. Often it is taken for granted that the provisions will be followed in their true spirit, but then, we might not have had the requirement of a specific set of procedural and substantive provisions conjoined as a statute to empower the consumers against inter alia, erratic service providers and gigantic Multi- National Companies. The Consumer Protection Act, 1986 though trailblazing in protecting the rights of the consumers was more like a baton than a spear. The Act was silent on standalone liabilities and offenses on the part of the manufacturers, service providers and other stakeholders involved in consumer services. It is in this context that the Consumer Protection Act, 2019 plays a pivotal role. It pricks that privileged bubble where only the Consumer Forums had the sanction to inflict punitive measures and calls for slapping the offenders involved in unruly and malicious anti-consumer practices with proportionate penalties. This Chapter also empowers the Central Authority as failing to comply with its directions results in imprisonment and fine.1432

The Chapter explicitly prescribes punishments for crimes such as fabricating false or misleading advertisements, storing, manufacturing, selling, distributing or importing of spurious products and adulterous goods.1433 Hoarding or destroying goods with the intention of raising the cost of these or similar goods manufactured in greater number, so as to manipulate higher prices is also illicit and calls for penalization.1434 The offenses

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1432 The Consumer Protection Act, 2019, Lexis Nexis, Offences and Penalties (See, Chapter VII).
1433 The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 90 (1), Sec. 91(1) (2019).
1434 The Consumer Protection Act, 2019, Lexis Nexis, See, Sec.2 (47) (v).
committed can be cognizable and non-bailable if the crime has caused severe injury or death of the consumer. Moreover, the new Act proposes to protect consumers from unreasonable contracts that are unilaterally skewed.\textsuperscript{1435} If the right of a consumer is infringed upon due to some non-negotiable agreement by the seller, the consumer can approach the Consumer Disputes Redressal Commissions. Besides, it checks upon the powers of the higher officials by incriminating those who conduct vexatious searches and unreasonably seizes any documents.\textsuperscript{1436} A provision that requires special mention is punishment for false or misleading advertisement, which says that any manufacturer or service provider who engenders and publishes feigned or misleading advertisements that are prejudicial to the interest of consumers, shall be punished with incarceration as well as indemnification.\textsuperscript{1437} The Consumer Protection Act has successfully widened the reach of the consumer protection regime in India by bestowing responsibilities not only upon the sellers, service providers and manufacturers but also on the endorsers. The consumers have immense confidence in the endorsements of a product or service by their favourite celebrities and they subconsciously try to imitate them by purchasing those products. So the endorsers are expected to act judiciously lest they can be penalized under the present law for advertising unsubstantiated goods. This inclusion was a long overdue as it sets advertisers to be accountable for their advertisements, for they directly influence the choice of a customer and its ignorance in a way was hampering the entire objective of the Consumer Protection Code. Though Sec. 92 dilutes this provision by barring inter alia normal consumers from filing complaint in this regard as they stand at the receiving end of such dubious advertisements, the Act still goes a long way in answering the plight of the very consumers whose interest this very Act seeks to prevent.

\textbf{CONSUMER-FRIENDLY PROVISIONS}

Through the application of the ensuing regulations, the legal principle of ‘salus populi suprema lex esto’ would be advocated at its best. The Latin maxim signifies, “Let the welfare of the people be the supreme law”. The Legislature has aimed to uphold the pre-eminence of the Indian citizens by championing their cause and securing their rights as consumers. The 2019 Act provides for filing a consumer complaint from the residential town facilitating the injured party who will not have to travel an extra mile to file the suit. This is particularly advantageous in aggravated circumstances as now, where the COVID 19 is spreading its clutches alarmingly all over the world, and the feasibility of physical appearances in courts is practically impossible. The filing of complaints as well as the hearing of cases can also take place through online medium. The Consumer Council shall act as a consultative body to the Commissions. The Central Authority would act as a supervisory body having administrative powers over the Commissions and would primarily look into the transgressions against consumer rights and the complaints against any member of the three adjudicating Commissions at the centre, state and district.

\textsuperscript{1435} Supra 20.

\textsuperscript{1436} The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 93 (2019).

\textsuperscript{1437} The Consumer Protection Act, 2019, Lexis Nexis, See, Sec. 89(2019).
To protect the consumers from getting deceived by the sale of deficient goods and services, the Act has provided for revamping of the old authorities such as the District, State and National Consumer Disputes Redressal Commissions. The extension of the pecuniary jurisdiction of the District, State and National Commissions is a praiseworthy experiment. According to a 2020 survey, the number of unresolved consumer dispute cases stood at 4.8 lakh. The aforementioned provision would help the Commissions in mitigating the overburdening of cases as the complaints addressed by the Commissions would get evenly distributed. The 2019 Act also provides for judicial review of the cases where the verdict has been declared for once.

The new Act has also laid down the provision for the establishment of a mediation cell. The quasi-federal nature in the composition of the consumer mediation cell is sustained. The provision has been introduced to settle consumer disputes through arbitration on the principles of natural justice. The alternative grievance redressal forum is deemed to thwart the backlog of consumer cases and deliver speedy justice to the injured parties. The Act also attempts to protect the consumers from the adulteration of food products and spurious goods and services. The liability for selling inferior quality and flawed goods is entirely upon the manufacturers, service providers and sellers excluding few exceptions like alteration, modification and misuse by the buyer of the sold product. Thus, a methodical drift from the concept of Caveat emptor (let the buyer beware) to Caveat venditor (let the seller beware) promoting the sovereignty of consumers in the market is observed. The Code also requires celebrities to conduct due veracity of claims and statements concerning the product or service being endorsed. It provides statutory penalties against the false affirmations made by the celebrities. Misleading advertisements by the manufacturers and service providers also invite penalization. The austerity in the punishments proposed shall curtail the rate of crime against the consumers.

**CONCLUSION**

With the upswing in international trade, multi-layered delivery chains, direct selling, and rapid development in e-commerce in the marketing system, the implementation of strict countermeasures was required to regulate the online trade. With both offline and online marketing becoming the order of the day, the legislature needed to formulate impactful measures to protect the consumers from defective goods, unfair contracts and restrictive trade practices and promote the rights of the consumers. After carefully evaluating the provisions of this Consumer protection legislation, it is incumbent upon us to comment that the Act of 2019 has increased accountability of the business companies, product sellers and service providers for any ‘grievous hurt’ caused due to selling of a defective product to the customers. “Customer is the King” is a well-known adage that accentuates the

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significance of a consumer in market dynamics. The Act of 2019 is more consumer-friendly and successfully ventures to protect and promote the interests of the consumers through fair, inexpensive and speedy delivery of justice. The contemporary legislation is more comprehensive, transparent, and people-oriented than the 1986 Act. However, the effectiveness of the Act would be demonstrated on accomplishment in the implementation of the Act and the consummation of its fundamental objective. Except for a few encumbrances, the Act is an exquisite piece of legislation that has tried to secure the interests of the consumers with the changing socio-economic and political standards and would conceivably emerge victorious.

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ARCHITECTURAL WORKS AS SUBJECT MATTER OF COPYRIGHT PROTECTION: A CONUNDRUM

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Abstract
The article studies the Copyrightability of ‘architectural works’ under the Indian Intellectual Property Law, particularly the Indian Copyright Act, 1957. In addition to the analysis of the evolution of the law of other countries, the author has examined the issue in the light of the common law principles pertaining to usefulness, separability, substantial reproduction and functionality. The article discusses the copyrightability of architectural plans and drawings and thereafter the statutory incorporation of the Copyright protection granted to architectural works, both in the international and national realm. The article also highlights the dilemma faced by the legislature and the Courts alike while granting Copyright to architects for the constructed buildings and the application of Copyright principles in event of an infringement of the same. In conclusion, the author has attempted to substantiate the copyrightability of such works. However, whilst granting such protection certain complications that may arise have also been anticipated by the author; and the recommendations have been made in that regard.

Introduction
An 'architect' expresses their thoughts and reveals their artistic personality through their 'writings'. In this regard, they are similar to all other creators of intellectual properties. However, in addition to words, they use, among other things, technical signs and symbols, and graphic representations to communicate their ideas. Taking the liberty to draw an analogy-- the architect's signs, symbols, and graphic representations are to the builder what a composer’s notes and performance instructions are to the musician. Hence, an architectural work is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings inclusive of unconstructed architectural works embodied in unpublished plans or drawings.

Now, imagine an architect is hired to construct an artistic building, and he constructs the same under a project contract. Years later, to his dismay, he is made aware of a deceptively similar building being constructed. What shall be his rights, and the liability of the architect of the deceptively similar building? The challenge of drawing a line between inspiration and plagiarism has been the bone of contention among architects for a long time. This can be exhibited by a perfect example when in 2010, the construction of the Chinese Pavilion sparked a heated battle given its stark similarity to the Japanese Pavilion and the Canadian Pavilion constructed in 1992 and 1967, respectively. Consequently, Ni Yang, the assistant designer of the Chinese Pavilion, claimed that there were “differences between his work and mine. His work had a decorative purpose; mine is

1441 Giles Lithographic Co. v. Sarowy, (1884) III U.S. 53.
1442 ‘Copyright Registration of Architectural Works’, Circular 41, copyright.gov/circs/circ41.pdf>.
a building. Pavilion style is widely used in architectural design, so it cannot be said that it is the creation of Tadao Ando (the architect of the Japanese Pavilion)."¹⁴⁴³ Such controversies are highly common in the world of architecture. Hence, the author intends to comment on such scenarios while providing recommendations for the same. The article begins with analysing the copyrightability of architectural plans, moving on to understand the development of Copyright protection granted to architectural works, both in the international and national realms. Since the scope of architectural works has always intrigued the audience, an attempt has been made to decipher that aspect of Copyright principles as well. Moreover, the article also attempts to examine issues such as ownership of property, infringement of Copyright in architectural works, and the question of publication, which usually arises when discussing Copyright infringement.

I. Copyrightability of Architectural Plans

The foremost step in ascertaining the copyrightability of architectural works is analysing whether architectural plans or blueprints are afforded protection under Copyright law. The 1886 version of the Berne Convention provided protection to architectural plans but not architectural works.¹⁴⁴⁴ Implementing the provisions of the Convention, the United States law required that ‘original works of authorship’ be fixed in any tangible medium of expression, now known or later developed to be copyrightable.¹⁴⁴⁵ Thus, the U.S. Courts have held that architectural plans are protectable under Section 5(i) as drawings or plastic works of a scientific or technical nature.¹⁴⁴⁶ Additionally, several commentators have mentioned that protection might also be accorded to architectural plans under the "works of art" classification in Section 5(g)¹⁴⁴⁷ or under the literary work classification corresponding to any written matter on the plan.¹⁴⁴⁸

It is pertinent to mention here that, though the Indian law implements the provisions of the Convention, the position of copyrightability of ‘architectural plans’ in the Indian scenario seems to be hazy and still in the process of development. However, an artistic work includes "a painting, a sculpture, a drawing (including a diagram, map, chart or plan), an engraving or a photograph"¹⁴⁴⁹ which is accorded Copyright protection under the Indian Copyright Act, 1957.¹⁴⁵⁰The analysis of the said law leads on to the fact that architectural plans and/or blueprints shall be treated as artistic work and accorded Copyright protection under Indian law.

However, simply affording Copyright protection to architectural plans means that if one copied the sketches an architect had created to guide the construction of a particular building, one would be liable. However, if one managed to construct the

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¹⁴⁴⁴ Article 4, Berne Convention, 1886.
¹⁴⁴⁶ Imperial Homes Corp. v. Lamont, 458 F.2d 895, 897-98 (1972).
¹⁴⁴⁹ Section 2(c), Copyright Act, 1957
¹⁴⁵⁰ Section 13, Copyright Act, 1957.
same building without those sketches, then one would escape liability. To counter this loophole, the Court, in the case of Peace v. Ove Arup Partnership Ltd, held that “buildings will also receive indirect Copyright protection by virtue of any Copyright in the plans for them”. Therefore, to counter the loopholes present in the legislature across international contours and considering the ambiguity which shrouded the copyrightability of architectural works, it becomes imperative to discuss the same.

II. Copyrightability of Architectural Works

U.S. Law

Statutory Incorporation of the Protection

Due to the inadequacy of the legislature with respect to architectural works, the Berne Convention proceeded to grant Copyright protection to the same. Thereafter, after 80 years, when the U.S. ratified the Convention, it also accorded protection to architectural works per se by adopting the Architectural Works Copyright Protection Act (AWCPA), which became effective in 1990.

Evolution and Dilemma of the Application of the Protection

The most important implication of this new statute is that architectural works in the U.S. no longer have to run the gauntlet of the conceptual separability test in order to be protected, which had been the bone of contention for years. Thereafter the courts stated that a piece of architecture must be original to be protectable. Thus, analyzing the “original elements” test of the Feist case, the Courts came up with a dual question that must be in the affirmative to be able to ascertain Copyright infringement: (1) whether there was evidence of direct or indirect copying, and (2) whether the copying was so substantially similar to qualify as infringement. However, the application of this test proved to be counterproductive because not only did it prevent architects from tailoring their actions to avoid infringement, but was also detrimental to efficiency and productivity.

To overcome the posed hurdle to the originality test, the Courts came up with the ‘substantial similarity’ test. Substantial similarity problems arise particularly when artistic expression is present. Minor similarities are not enough to constitute infringement of an architectural work. On the other hand, infringement does not require identical duplication. Herein lies the difficulty that circuits face when attempting to determine whether a work is substantially similar for purposes of infringement.

This difficulty has been best expressed by the dispute between two architects mentioned ahead. In 1989, the Polish architect Daniel Libeskind designed a Jewish Museum in Berlin. The shape of the

\[1451\] [2001] EWHC Ch 481.
\[1452\] Article 2(1), Berne Convention, 1908.
\[1453\] 17 US Code, S. 102(a).
\[1455\] See Carol Barnhart Inc. v. Economy Cover Corporation, 773 F.2d at 419-420.
\[1459\] Peter Pan Fabrics, Inc. v. Martin Weiner Corp, 274 F.2d at 489
\[1461\] Id.
\[1462\] Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489.
building was unusual – a complex zigzag. His architectural partner and wife, Nina Libeskind, emphasized the theme of the building likening its shape to a broken star of David. In the latter half of the 1990s, the Australian architect Howard Raggatt was hired on commission to design the National Museum of Australia. When the final model of the Museum was constructed, the parallelism and resemblance between the two buildings were unmistakable.\footnote{1463} This case did not result in litigation then. However, if the current US standard is construed, Libeskind’s design would qualify for Copyright protection and the Australian building resembling it would be sufficient to satisfy the legal standard of substantial similarity.

The U.S Courts when applying the principle of substantial similarity have determined two tests. First is the ‘Pattern’ test. This test looks at the two works side by side, taking into consideration a number of elements and whether they occur in similar succession.\footnote{1465} The court then compares those elements, to determine whether there is substantial similarity between the works albeit no literal similarity.\footnote{1466} Second is the ‘Total Concept and Feel’ Test. Under this test, the court will analyze two works, using both an “extrinsic test” to identify similar ideas, and an “intrinsic test” to identify similar expression.\footnote{1467} It is noteworthy that this test calls for the “ordinary observer” to determine whether there is substantial similarity of expression between the two works.\footnote{1468} The ordinary observer analysis in this test renders it detrimental to artistic expression.\footnote{1469}

Therefore, owing to the ambiguity and vagueness of the final interpretation of this principle and its vast application, one can only hope that a determinative test is laid down by the United States Supreme Court to avoid all sorts of confusion.

**Common Law**

**Statutory Incorporation of the Protection**

Meanwhile, the situation in the United Kingdom with respect to the inclusion of Copyright protection in the statute was precarious. The legislature implemented the Act of 1911, which not only preserved the right of the architect to Copyright in his plans, which had existed under the old law, but created a new right by including "architectural work of art" amongst artistic works capable of enjoying Copyright protection.\footnote{1470} It was unsuccessfully contended in the case of Meikle v. Maufe\footnote{1471} that there could not be a separate Copyright in building, as distinct from a Copyright in the plans on which the building is based, and in fact there seems no reason to doubt that the Act of 1911 created a new and distinct right.\footnote{1472}

Keeping the challenges posed by the precursory Act, the U.K. Copyright Act 1956 was implemented. Fortunately, the legislation shed some light on the position

of architects by including the words “work of architecture, being either buildings or models for buildings” within the definition of ‘artistic work’. Thus, an architectural creation is capable of protection at three stages: (a) as a two dimensional technical writing, i.e., as a plan, drawing or design; (b) as a two dimensional artistic representation of the projected structure, or a three dimensional model of the said structure; (c) as a completed structure.

**Indian Legal Regime**

**Statutory Incorporation of the Protection**

The Indian scenario with respect to Copyright protection of architectural works is somewhat simpler to understand and analyse, since the legislature has made amends to make the Indian Copyright law uniform with the International policy. The "works of architecture" eligible for Copyright protection in India have been defined as "any building or structure having an artistic character or design, or any model for such building or structure". However, in India, despite ‘architectural works’ being considered artistic works, some structures have been kept outside the scope of Copyright protection, wherein bridges, dams, tents, boats are not considered ‘buildings’.

It is interesting to note that here the requirement of "artistic quality" has been abandoned and thus the restrictive definition of "architectural work of art" which emphasized "artistic character" is somewhat broadened. The Act clearly lays down that the Copyright under the Act subsists throughout India in original artistic works. Additionally, the Copyright protection of an architectural work of art shall subsist only in artistic character and design, and is not available to processes or methods of construction. The Indian Copyright law has also widened its scope to allow protection to the architectural design of commercial buildings.

Therefore, architects in India are free to apply for Copyright protection for their architectural work under the national registration system. However, it is essential to note that since India is a signatory to the Berne Convention as well as the Universal Copyright Convention, works protected in other Berne signatory countries will automatically be protected in India without the need for registration.

**Architectural works to be protected under a Copyright or as a Design : A Conundrum**

The term ‘design’ has been defined as “the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical,

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1473 S. 3(1) (b), U.K. Copyright Act 1956.
1475 S. 2(b), Copyright Act, 1957.
1476 S. 2(c), Copyright Act, 1957.
1479 S. 13(1)(a), Indian Copyright Act 1957.
1480 S. 13(5), Indian Copyright Act 1957.
1481 Id.
separate or combined, which in the finished article appeal to and are judged solely by the eye." Moreover, the Design Act specifically provides for registration of Architectural works under Class 25-03 and 25-99. Therefore, due to multiple provisions conferring protection to architectural works, a conflict may arise about whether Architectural works should be protected under the Copyright Act or the Design Act, or whether Section 15(2) of the Copyright Act, which deals with seizure of the Copyright in the article as soon as it is applied for registration under the Design Act, and that it has been reproduced more than 50 times by an industrial process, would come in play for determination of what architectural works would be protected as a Designs or under a Copyright.

To resolve this conundrum in the Indian scenario, the Courts have evolved a ‘mischief rule’. This rule pertains to the interpretation of the statutes and is applied by the Courts whenever there is a conflict between two laws or provisions of law. Therefore, to understand the intent of the legislature and to resolve the ambiguity created by the said provisions, this particular rule is applied. In the case of Microfibers Inc. v. Girdhar & Co. & Anr., the question was whether the design of an “artistic work” in fabrics should be protected under the Copyright Act or the Design Act. The court by applying the ‘mischief rule’ stated that the “the mischief sought to be prevented is not the mischief of copying but of the larger monopoly claimed by the design proponent inspite of commercial production.” The court had held that if the design is registered under the Designs Act, it would lose its Copyright protection, and if the design has not been registered it would still continue to enjoy Copyright protection as long as the threshold limit of its application through an industrial process does not go beyond 50 times, after which it shall lose its Copyright protection.

The Hon’ble High Court of Delhi, upheld the aforementioned application of the ‘mischief rule’ in the case of Holland L.P. & Anr. V. A.D. Electro Stell Co. Pvt. Ltd, dismissing the plea of the Plaintiff, who pleaded that under Section 2I read with Section 13 of the Copyright Act, he had the “right to convert a two dimensional artistic work into a three dimensional construction” and that the “drawings” were capable of being copyrighted under Section 15(2) of the Copyright Act. The court reasoned that the Plaintiff’s drawings were capable of being registered under the Design Act and they would lose their Copyright if they are reproduced by the industrial process more than 50 times, and would also fall under the public domain.

III.

Infringement of Copyright in Architectural Works

Copyright is infringed by the production of something which, to the eye, is a copy of the

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1484 Section 15(2), Copyright Act, 1957.
1485 Heydon's Case [1584] EWHC Exch J36.
1486 See RMDC v. UOI, AIR 1957 SC 628.
original, and the use of processes or methods of construction would, it is thought, constitute an infringement.\textsuperscript{1493} No great significance seems to have been attached, in decisions under the U.K. Act of 1911, to the requirement of “artistic character or design”, and it is doubted whether this meant more than that there must be something beyond the use of common stock features which would not be sufficient to constitute a Copyright.\textsuperscript{1494} It was held that the requirement of originality did not imply more than that the work was the personal effort of the architect.\textsuperscript{1495} Moreover, it was also held that there was Copyright in the design of certain semi-detached villas on the ground that they exhibited something apart from the common stock of ideas and which struck the eye as uncommon.\textsuperscript{1496}

Today, architects are concerned with infringements of their rights in three different forms. These are, copying of plans in the form of other plans,\textsuperscript{1497} copying of plans in the form of the buildings, and the copying of a building by another building.\textsuperscript{1498}

The definition clause of the Indian Copyright Act does not define infringement as such, but the definition of an infringing copy\textsuperscript{1499} provides some standards and criteria for the determination that an infringement has occurred. As regards an artistic work, an infringing copy is that copy which is a “reproduction thereof otherwise than in the form of cinematograph film”.\textsuperscript{1500} The familiar question with regard to unauthorized reproduction of copyrighted work raises the standard issues regarding meaning of originality, copying and extent of reproduction. On the issue of reproduction, in India, the expression ‘infringing copy’, without a doubt, means copies that reproduce the whole of the infringed work.\textsuperscript{1501} The reasons for this view are that the term ‘infringing copy’ has been defined only under the 1957 Act. Eventually it was understood, both in the U.K. and in India, that a copy was an infringing copy if it reproduced a substantial part of the original work.\textsuperscript{1502} Whereas the U.K. Act of 1957 made this position clear,\textsuperscript{1503} the Indian Act of 1957 chose not to define the extent of reproduction as an aspect of the ‘infringing copy’. Thus, under the present Indian law, unless the whole of an architect’s work has been reproduced, no infringement of Copyright occurs. As seen above, the requirement of whole reproduction makes it almost impossible for an architect to claim Copyright protection because the infringers can simply escape by making minor modifications or alterations in the architect’s work.

It is suggested that the Indian law should be amended on the lines of the British Act so that the requirement of reproduction of the whole work is substituted by “substantial reproduction”.

\textsuperscript{1494} Supra 38.
\textsuperscript{1495} Chabot v. Davies (1936) 3 All E.R. 227.
\textsuperscript{1499} S 2(m), Indian Copyright Act 1957.
\textsuperscript{1500} S 2(m)(i), Indian Copyright Act 1957.
\textsuperscript{1503} S. 49(1), U.K. Copyright Act 1956.
IV. Conclusion & Recommendations

A bare reading of the aforesaid interpretation of the current legal regime on copyrightability of architectural works leads on to the fact that Copyright protection afforded to architectural designs has been a controversial issue worldwide. The protection offered to architects under the U.S. law prior to 1976 was highly insufficient as compared to the protection enjoyed by their counterparts in the U.K. and India. However, even though the 1994 Indian Amendment Act has in fact further broadened the protection given to architects by replacing the term ‘architectural work of art’ by ‘work of architecture’ to make it a wider expression, it does not solve certain hurdles that architects are facing in these digitally advanced times.

Recommendations

After analysing the current legal regime on the copyrightability of architectural works, the author of the article recommends the following amendments to the Indian Copyright Act, 1957 to deal with the issues that might arise in the future when someone enforces their Copyright in architectural works:

1. Awareness regarding Copyright for Architectural Works: Worldwide, and specifically in India, architects lack awareness regarding the legal regime of Copyright protection to the architectural plan and the works. Therefore, unless an awareness of their Copyright is created amongst the architects, the protection afforded to them shall remain only in the statute book, and their plight courtesy large scale infringements shall continue. Therefore, the author suggests conducting seminars, hiring legal lecturers, and introducing architects’ rights in the curriculum in order to foster awareness regarding the same.

2. Amendment to Section 2(m)(i) of the Copyright Act, 1957: It is suggested that since the ‘extent of reproduction’ to constitute infringement of an artistic work has not been discussed by the Act, an explanatory clause may be appended with the said Section, wherein either the ‘extent of reproduction’ is given some colour by the legislature or alternatively, the requirement of reproduction of the whole work is substituted by “substantial reproduction”. Since the latter amendment seems more plausible in its application, it is emphasized that the same should be implemented by the legislature. It is also noteworthy to mention that inspiration can be drawn from either the U.S. law or the Common law for the same.

3. Adoption of a Hybrid Approach Test: The best way to solve the struggle between a utilitarian ideal and actual protection of artistic expression in architectural works, is to eliminate the ‘total concept and feel’ test and the ‘ordinary observer’ standard, in favour of a hybrid approach. Under this standard, ‘adequate’ or similarity is a more appropriate standard. This standard allows architects to protect their artistic expression without having to worry about

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1506 Supra 26.
subsequent creators making minimal changes to escape infringement. However, adoption of this test in India will only be possible once the ‘extent of reproduction’ constituting Copyright infringement of artistic works is settled by the Courts, and the legislature is combined. Thereafter, the author suggests that this particular test can be adopted by the Courts while keeping in mind the factual matrix of each case.

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1507 Id.
SECURING THE RIGHT OF USING OTHER’S LAND: EMPHASISING INDIAN EASEMENT ACT, 1882 AND COMPARISON WITH ENGLISH COMMON LAW

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From GLA University, Mathura

ABSTRACT
With the progression of the period of human advancement, social orders are developing into solid wildernesses, sharing the limits. Henceforth, the Right of Easement can be decoded from ancientness and is extremely old when the concept of property was recognized. Such a right springs up out of morality when the person uses the property of another for his enjoyment, on which he neither has, ownership nor possession. With the progress of the society, Legislation has given obligingness to these rights by enacting Legislations and has also been recognized by Judicial Pronouncements. This paper revolves around the Evolution of Doctrine of Easement, the Valid Conditions for an Easement, Types of Easement, Process of Acquisition and Transfer, Process of Extinction, Suspension and Revival of Easements, Concept of Licenses, The Comparison of ‘Easement’ in the English Common Law, and Doctrine of Easement with special reference to Rights of Riparian.

INTRODUCTION

An easement as a privilege of utilization over the property of another. An easement is a privilege in the proprietor of one package of land, given such possession, to utilize the place that is known for another for a unique reason not conflicting with an overall property directly in the proprietor. It is an intrigue that one individual has in the place where there is another. An enthusiasm for land possessed by someone else, comprising morally justified to utilize or control the land, or a zone above or underneath it, for a particular constrained reason, (for example, to cross it for access to an open street). The land profiting by an easement is known as the predominant estate; the land troubled by an easement is known as the servient estate. An easement is the honour of non-possessory property intrigues that gives the easement holder consent to utilize someone else's territory. In layman terms, it refers to the right which a man sometimes has over a piece of land because of his ownership of another. The easement has been defined under § 4 of the Indian Easements Act (herein referred to as the Act). Some right which an individual has over the land which isn't his own, if the land is his own, on the off chance that he has an enthusiasm for it, at that point his privilege isn't an easement. You can't have an easement over your territory.”

The proprietor of the trees procured no directly over the place that is known for the neighbour just in light of the fact that the parts of his trees reached out over the neighbouring soil for any ceaseless time span.

1508 An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain another land not his own. The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.

1509 Metropolitan v. Fowler 1 Q.B. 165 (1892) (U.K.)

1510 Manikkam v. Kamala AIR 1987 Ker 72 (India)
Illustrations:

a) A, as the owner of a certain house, has a right of way either over his neighbour B’s land for purposes connected with the beneficial enjoyment of the house. This is an easement.¹⁵¹¹

b) A, as the owner of a certain house, has the right to go on his neighbour B’s land, and to take water for the purposes of his household out of a spring therein. This is an easement.¹⁵¹²

c) A dedicates to the public the right to occupy the surface of certain land for the purposes of passing and re-passing. This right is not an easement.

ORIGIN AND DEVELOPMENT

The idea of an easement traces to old ages and is extremely old when the idea of property was perceived. The term easement has begun from the word 'aisementum' signifying "comfort, accommodation, benefit", and it formed into a "legitimate right or benefit of utilizing something not one's own" from the mid 15c.¹⁵¹³ The most established reference can be found in the 'Halhed Gentoo Code' which is a legitimate code of Hindu Laws during the eighteenth century in India aggregated for Warren Hastings by pandits. From certain parts of the Code, it very well may be found that the privilege of the easement was cherished by the privilege of protection, light, air, and release of water through channels.¹⁵¹⁴

Another Hindu Law text 'Vivada Chinthamani' additionally makes some reference to the idea of the easements.¹⁵¹⁵ Hamilton's version of Hedaya has additionally perceived easement rights which incorporate the option to water for the water system and the option to release water on the patio of another.¹⁵¹⁶ In the words of famous jurist Salmond, “Easement is that legal servient which can be exercised on some other piece of land for the benefit of a piece of land”.¹⁵¹⁷ According to Peacock, “Easement is such a privilege without profit which an owner of dominant heritage receives from the owner of the land due to which owner of that property cannot exercise his complete rights or does nothing for the advantage of the earlier occupiers”.¹⁵¹⁸


¹⁵¹³ Karthik Shiva, LAW OF EASEMENTS: A BRIEF OVERVIEW OF THE INDIAN EASEMENTS ACT, 1882, 2, Academia (referred as ‘Shiva’) at p. 2

¹⁵¹⁴ Nathaniel Brassey Halhed, A CODE OF GENTOO LAWS OR ORDINATIONS OF THE PUNDITS 154-155 (1777)

¹⁵¹⁵ Vacaspatimisra, VIVADA CHINTAMANI: A SUCCINCT COMMENTARY ON THE HINDOO LAW PREVALENT IN MITHILA 155, No one shall be at liberty to open a window in a place, after he has resided there for a long time; Windows and water-courses cannot be made by a person, on the side of another’s house; A passage uninterruptedly used, by men as well as animals, cannot be blocked; If a number of trees grow on the common boundary of two villages, and their flowers and fruits fall in both, they shall be enjoyed by the inhabitants of both of them; If the branches of a tree, growing on the land of one person, fall on that of another, the latter shall take them.

¹⁵¹⁶ 4 Charles Hamilton, THE HEDAYA, OR GUIDE: A COMMENTARY ON THE MUSSULMAN LAWS 132 (1791)


¹⁵¹⁸ Ibid
The thought of easements during its initial days in England was an admixture of Roman, Saxon, Danish, and Briton Law. In this period, the solution for the unsettling influence of an easement lay by an activity for harm in law or a suit for directives in value. After the abrogation of Equity courts by the Judicature Act, 1873 the two cures were accessible in court.1519

REQUISITES FOR VALID EASEMENTS

The essential requisites for a valid easement in its strict sense are:

a) There must be a dominant tenement and a servient tenement- A dominant tenement is a land to help in which an easement exists. A servient tenement is a land which is dependent upon the weight of an easement existing for another bundle of land.

b) Both the heritages must be separate- For the exercise of an easement, it is necessary for both the heritage to be different. The easement doesn’t arise on the same property. Hence, owners of both the property must also be different to create an easement.

c) It is an incorporeal right- An easement is an immaterial right delighted in by the proprietor of a lawful estate (dominant owner) over land in the responsibility for an individual (servient owner) that ties replacements in the title. Such rights depend on physical property.1520

d) It is Right in rem- Easements are generally considered available against the entire world, hence they are right in rem.

e) It must be for beneficial use of the property- By and large, the easement must be for the gainful utilization of the property. The principle object of the easement is that the proprietor of the predominant legacy may utilize and appreciate it in a superior way. Words "better use and satisfaction" is an extremely wide term and it incorporates express and inferred advantages and solaces.1521

The four notable qualities of easements in Indian and English law are, there must be a dominant owner and a servient owner, the easement must oblige the dominant owner, the predominant and servient heritage must be claimed by various people, and the easement must be fit for shaping the topic of an award.1522 In India, there are two additional prerequisites fundamental for an easement, for example, the easement ought to be for 'advantageous pleasure in' the dominant heritage and that the easement ought to qualify the dominant proprietor for do or keep on accomplishing something, or to forestall or keep on forestalling something in or upon or in regard of the servient heritage. The Indian law identifying with easements incorporate Profit-a-Prendre appurtenant. This is to be stood out from the English law wherein Profit-a-Prendre and easements are isolated. In any case, the Indian position is to such an extent that it doesn't perceive Profit-a-Prendre in a net.1523

TYPES OF EASEMENT

There are six different types of the easement as per the Act. § 5 of the Act lays down, Easements are either continuous

1519 Shiva, Supra, Note 6, at p. 3
1521 Medium, Supra, Note 10
1522 In Re Ellenborough Park EWCA Civ 4, 3 All ER 667 (U.K.), The Law Commission Consultation Paper No 186, EASEMENTS, COVENANTS AND PROFITS A PRENDRE CONSULTATION
1523 Shiva, Supra, Note 6, at p. 6
1524 INDIAN EASEMENTS ACT, 1882, §5, No. 5, Acts of Parliament, 1882 (India)
or discontinuous, apparent or non-apparent, positive or negative.

1) A continuous easement is one whose delight is, or possibly, constant without the demonstration of man. A privilege added to B's home to get light by the windows without block by his neighbour A. This is a constant easement.

2) A discontinuous easement is one that needs the demonstration of man for its delight. A way to go attached to P's home over Q's property.

3) An apparent easement is one the presence of which is given by some lasting indication which, upon cautious review by a capable individual, would be obvious to him. Rights added to T's territory to lead water there over R's property by a reservoir conduit and to draw off water thus by a channel. The channel would be found upon cautious assessment by an individual familiar with such issues.

4) A non-apparent easement is one that has no such signs. A right annexed to A's house to prevent B from building on his land. This is a non-apparent easement.

5) Positive or Affirmative easements are those which authorise the commission of an act by the dominant owner such as rights of way, right to draw water from a spring, rights of the aqueduct.

6) Negative easements are those which restrict the rights of the servient owner over his property such as prevents A from building on land to obstruct ancient lights.

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1525 Ibid, at p. 10
1526 Ibid
1528 Ibid
1529 An easement may be permanent, or for a term of years or another limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.
or vibration brought about by some other individual.

III. The right of each proprietor of upper land that water normally emerging in, or falling on, such land, and not going in characterized channels, will be permitted by the proprietor of the nearby lower land to run normally thereto.

It is a well-recognized principle that unless easementary rights to light and air are obstructed, the adjacent other has a right to put up his wall at the boundary of his property and the owner of the adjacent property can have no grievance against the same.1530

As per The Indian Easements Act, 1882, 'Profit a Prendre' is a piece of the meaning of easements. An occurrence to clarify the idea is, a right to take earth from the place where there is the other individual for making pottery is a benefit a prendre. This is an advantage made out of the spot that is known for the other person. Benefits existing to help the proprietor's property (the dominant tenement) are commonly exercisable just to the degree to which the dominant heritage can profit.1531

CREATION OF EASEMENTS
§ 8 to § 19 of the Easement Act set out the different modes for the making of Easements, for example, by grant1532, custom or convention1533, prescription1534, and necessity 1535. Easements are typically made by in a deed or some other composed document, for example, a will or agreement. Creation an easement demands for the same formalities as the transferring or creating of other interests in the land do, which typically are: a signature, a written instrument, and proper delivery of the document.1536 In restricted cases, a court will make an easement by suggesting its reality dependent on the conditions. Two basic easements made by suggestion are easements of need and easements inferred from quasi easements. Easements of need are commonly suggested to offer access to a landlocked bit of property. Easements suggested from quasi easements depend on a landowner's earlier utilization of part of their property to help another bit of his territory. Different techniques for building up easements incorporate prescriptive use (the routine, unfriendly utilization of another's territory), estoppel, custom, open trust, and condemnation.1537

A prescriptive use easement may apply when the property is utilized by normal and unfavourable utilization of the property for a specific measure of time. Estoppel can likewise cause an easement when somebody has depended on the words or activities of another person to their detriment. Surrendering an easement right does not refer to the transfer of property. An easement can be made, altered, and even released. Easement rights can't be made or modified orally. It must be in a composed format. However, easements by

1532 INDIAN EASEMENTS ACT, 1882, § 8 - § 11
1533 INDIAN EASEMENTS ACT, 1882, § 18
1534 INDIAN EASEMENTS ACT, 1882, § 15
1535 INDIAN EASEMENTS ACT, 1882, § 13
prescription and custom not necessarily are in writing. In the case of Moody v. Steggles1538, the award of a right to set up a signboard to the abutting property promoting the open house which established the dominant tenement was held to involve an easement.

WAYS OF ACQUISITION OF EASEMENTS
An easement might be obtained by the proprietor of the immovable property for the advantageous satisfaction where the privilege is made or, for his benefit, by any individual possessing the equivalent.1539 The inhabitant can secure an easement over the bordering land having a place with his proprietor for the advantageous satisfaction in other unflinching property not his own but rather having a place with another person which likewise he happens to possess until further notice as an occupant.1540

Acquisition by Express Grant: The most direct technique for making an easement is by express grant. This happens when the proprietor of the servient tenement gives the easement to the proprietor of the dominant tenement.1541 Express easements are created through a written agreement between the landowners grant in for receiving an easement. An Express easement is made by either a deed or by will. So, it must be written. The doctrine of last grant is the premise of easementary right and if a gathering has been utilizing a specific land for a specific reason from days of yore, it can be said that party has earned easementary right based on last grant.1542

Acquisition by Implied Circumstances:
Easement can also be acquired in implied circumstances either by way of necessity, quasi-easements, by prescription, or by way of custom or tradition.

1) Easement by Necessity: § 131543 of the Easement Act deals with easement of necessity. Where one property is served from another property either under lock and key or possession, or in both by the move, estate, or segment or by the activity of law and these two are so moderately arranged that once can't be delighted in without the activity of a specific benefit in or upon or in regard of the other, such benefit is known as the easement of necessity.1544 An easement of necessity is coextensive with the need, as it existed when the easement was forced. These easements emerge on the severance of tenements. Easement of need would not, at this point be accessible when an elective way is accessible to the claimant of that privilege1545. In the case of Muhammad Ramzan vs. Naseer Beg1546, it was held that the plaintiff must not just demonstrate the presence of privilege of the easement at the hour of the move of property to him yet additionally such right

1538 Moody v. Steggles, 12 Ch D261 (EWCA: 1879) (U.K.)
1539 INDIAN EASEMENTS ACT, 1882, § 12; See Also; Nihal Chand v. Mst. Bhagwan Dei, A.I.R. 1934 All 527
1540 Qazi Nasir Uddin Haider vs Raghubir Prasad and Anr. AIR 1939 All 339; Afaque Ahmad, THE INDIAN EASEMENTS ACT 1882, Academia (August 14th, 2020, 12:34), https://www.academia.edu/33883770/THE_INDIAN_EASEMENTS_ACT_1882. (referred as ‘Afaque’)
1542 Supra, Note 10, at p. 16; Nathu Lal vs. Ram Swaroop AIR 1987 Raj 169 (India)
1543 INDIAN EASEMENTS ACT, 1882, § 13
1544 Afaque, Supra, Note 33
1545 Rameshchandra Bhikhabhai Patel vs. Maneklal Maganlal Patel and Another AIR 1986 Kant 456
1546 Muhammad Ramzan vs. Naseer Beg 1980 CLC 1555 (India)
is essential for getting a charge out of the moved property. For example, P sells his land to Q for agricultural purposes. Here, Q cannot access his land without passing through R’s land (his neighbour).

2) **Quasi-Easements**: The statements (b), (d), and (f) of Section 13 arrangements with what are called quasi easements. These are not easementary rights however are just methods of pleasure in the property which look to some extent like easementary rights in a few attributes. A quasi easement exists when the proprietor of a bundle of land utilizes some portion of that land to support some other piece of their territory. An easement of need, the reason is total need while in the easement of quasi-necessity it is a lone qualified need. A quasi easement won’t appear on the off chance that it is explicitly prohibited by the details of the grant or are conflicting with the expectation of the parties. In the case of a person transferring his property to another person then-

- If an easement is continuous, apparent and necessary to enjoy, then in such a case the transferee shall be entitled to it,
- If such an easement is continuous, apparent, and necessary to enjoy the said property, the transferor has a right to such easement over the property transferred by him.
- In case of partition of the property of the joint family, if an easement is continuous, apparent, and necessary to enjoy the share of one coparcener over the other coparcener, then he is entitled to such a right of easement.\(^{1547}\)

3) **Easement by Prescription**: Prescription methods getting a privilege by the consistent statement of the right, which has been being used for an extensive stretch. §15 of Act expresses that to secure a prescriptive right of easement concerning access and utilization of light or air to and for any structure or backing from someone else's property it probably been calmly delighted in as an easement without interference for a long time. An option to way or some other easement is more likely than not been calmly and transparently delighted in as an easement starting at directly without interference for twenty years. The certain essential conditions for an easement by prescription are that the property is openly, and peacefully enjoyed, as an easement, as a right,\(^{1548}\) without interruption, and for twenty years\(^{1549}\). The doctrine of lost grant: The presumption involved under this doctrine is that there was a grant of the right in the past but such a grant was lost. In this manner, such a privilege is attempted to have had a legitimate birthplace and the Court assumed that such demonstrations were done and those conditions existed which were important to make a substantial title. The doctrine is utilized in situations where the delight can't be generally sensibly represented. In any case, if such easement depends on an understanding between the parties, which states explicitly or impliedly that the satisfaction isn't as an easement, the guideline of § 15 of the Act won't have any significant bearing.\(^{1550}\) In the case of **Manikkan V. Kamala**\(^{1551}\), the Court held that if parts of a tree overhang the neighbouring area, no privilege can collect over the land over which they hand. The proprietor of such a tree procures no privilege at all over the place that is known for the neighbour, simply because the parts of the tree stretched out over the

\(^{1547}\) Supra, Note 33 at p 6  
\(^{1548}\) Suresh Chand vs. Hindu Mal AIR 1994 HP 56 (India)  
\(^{1549}\) Krishnan vs. Nanukuttan ILR 1986 (1) Ker 526; Periya Gounder vs. Chinna Gounder AIR 2003 Mad 174. (India)  
\(^{1550}\) Supra, Note 6 at p. 9  
\(^{1551}\) Manikkan V. Kamala AIR 1987 Ker 72 (India)
neighbouring soil for a consistent time span. No right can arise by prescription to continue a nuisance. In Het Singh and others v. Aman Singh\textsuperscript{1552}, it was held that under § 17(a) an option to underground water not going in a characterized channel can’t be gained by solution under § 15. § 17 of the Easements Act provides that the following types of easements cannot be acquired by prescription.

- An easement that forces a risk on the property or would prompt the pulverization of the property.
- A right to the free entry of light or air to an open space of ground.
- An option to surface water not streaming in a stream and not forever gathered in a pool, tank, or something else.
- An option to underground water not going in a characterized channel.

4) Easement by Lost Grant presumed from Immemorial user: Given that, when any land upon, over or from which any easement has been delighted in or inferred has been held under or by any enthusiasm forever or any term of years surpassing three years from the allowing thereof, the hour of the pleasure in such easement during the duration of such intrigue or term will be rejected in the calculation of the said last-referenced time of twenty years, on the off chance that the case is, inside three years next after the assurance of such intrigue or term, opposed by the individual entitled, on such assurance, to the said land. A sues for an announcement that he is qualified for an option to proceed over B’s land, A demonstrates that he has delighted in the appropriate for a quarter-century; however, B shows that during ten of these years C had a daily existence enthusiasm for the land; that on C’s passing B got qualified for the land; that inside two years after C’s demise he challenged A’s guarantee to one side. The suit must be excused, as A, concerning the arrangements of this segment, has just demonstrated satisfaction for a long time.\textsuperscript{1553}

5) Easement by Customs: An easement may be acquired in virtue of a local custom. Such easements are called customary easements.\textsuperscript{1554} A custom is a particular rule which exists either actually or presumptively from time immemorial and has obtained the force of law in a particular locality.\textsuperscript{1555} A customary right can exist just about the occupants of a locale and it can’t be guaranteed concerning the general population on the loose. Customary easements as they are brought in § 18 of the Act, ought not to be recognized from the customary rights alluded to in § 2(b) of the Act. The latter are rights arising out of custom but unapparent to a dominant tenement. No fixed time of delight is important to build up these rights, yet the custom must be sensible and certain.\textsuperscript{1556} By the custom of a specific town, each cultivator of the townland is entitled, as such to eat his cows on the basic field. A had become the occupant of a plot of uncultivated land in the town that splits up and develops that plot. He along these lines procures an easement to eat his steers following the custom.

6) Easements by transfer of Dominant Heritage: Where the dominant heritage is moved or degenerates, by a demonstration of parties or by the activity of law, the exchange or devolution will, except if an opposite expectation shows up, be esteemed to pass the easement to the individual in whose favor the exchange or devolution happens. A has certain land to

\textsuperscript{1552} Het Singh and others v. Aman Singh AIR 1982 All 968 (India)
\textsuperscript{1553} INDIAN EASEMENTS ACT, 1882, § 16
\textsuperscript{1554} INDIAN EASEMENTS ACT, 1882, § 18
\textsuperscript{1555} HALSBURY’S LAWS OF ENGLAND, Third Edition, Vol. II under Article 294
\textsuperscript{1556} Parbhawati Devi vs. Mahendra Singh AIR 1981 Pat 133 (India)
which an option to way is attached. A lets the land to B for twenty years. The right of way vests in B and his legal representatives so long as the lease continues.⁵⁵⁵ people living in a particular town or city having a right to bury the dead in a particular area or riparian right to use water.

**EXTINCTION, SUSPENSION, AND REVIVAL OF EASEMENTS**

**Extinction of Easements**: An easement can be extinguished if the easement holder releases the easement. This delivery should be possible on the holder's understanding or as a major aspect of manage the proprietor of the servient tenement.⁵⁵⁸ Usually, mere non-use of property does not end an easement. One or more of the following factors might also have to be present.

1) **Extinction by Dissolution of a right of servient owner**: When, due to a cause which preceded the imposition of an easement, the person by whom it was imposed discontinues to have rights on the servient heritage, the easement considered to be extinguished.⁵⁵⁹ The only exception is that nothing in § 37 applies to an easement lawfully imposed by a mortgagor per § 10.⁵⁶⁰ P transfers Sultanpur to Q on condition that he does not marry R. Q imposes an easement o Sultanpur. Then Q marries R. Q’s interest in Sultanpur ends, and with it, the easement is extinguished.

2) **Extinction by Release**: An easement is quenched when the dominant proprietor discharges it, explicitly or impliedly, to the servient proprietor. Such delivery can be made uniquely in the conditions and to the degree in and to which the dominant proprietor can distance the prevailing legacy. An easement might be delivered as to part just of the servient legacy. A simple non-client of an easement isn’t a suggested discharge inside the importance of this segment. For example, A, B, and C are co-proprietors of a house to which an easement is added. A, without the assent of B and C, discharge the easement. This delivery is solid just as against An and his legitimate agent. A, having an easement of light to a window, develops that window with blocks and mortar to show an expectation to forsake the easement for all time. The easement is implicitly relinquished.⁵⁶¹ The eradication under § 38 happens when the dominant proprietor discharges it to the servient proprietor either explicitly or impliedly.⁵⁶²

3) **Extinction by Revocation**: An easement is smothered when the servient proprietor, in the activity of a force saved for this sake, repudiates the easement.⁵⁶³

4) **Expiration of the time allowed for the easement or happening of dissolving condition**: An easement is doused where it has been forced for a restricted period or procured on condition that it will get void on the exhibition or non-execution of a predetermined demonstration, and the

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⁵⁵⁵ *Indian Easements Act, 1882*, § 19
⁵⁵⁹ *INDIAN EASEMENTS ACT, 1882*, § 37
⁵⁶⁰ *INDIAN EASEMENTS ACT, 1882*, § 10. 10. Lessor and mortgagor.-Subject to the provisions of section 8, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease of the redemption of the mortgage.
⁵⁶¹ Supra, Note 10 at p. 38
⁵⁶² Vasudeva Prabhu vs. Madhava Prabhu AIR 1993 Ker 68 (India)
⁵⁶³ *INDIAN EASEMENTS ACT, 1882*, § 39
period terminates or the condition is satisfied.\textsuperscript{1564}

5) **Extinction on termination of necessity and useless easement**: An easement of necessity is extinguished when the necessity comes to an end.\textsuperscript{1565} The right to use passage granted in sale deed will not extinguish in terms of § 41 of the Act.\textsuperscript{1566} For instance, X awards Y a field difficult to reach except for by ignoring As abutting land. Y a short time later buys a piece of that land over which he can go to his field. The option to way over X's property which Y had gained is doused. An easement is quenched when it gets unequipped for being whenever and under any conditions useful to the prevailing proprietor.

6) **Extinction by Permanent change in Dominant Heritage**: Where, by any perpetual change in the dominant legacy, the weight on the servient legacy is physically expanded and can't be decreased by the servient proprietor without meddling with the legitimate happiness regarding the easement, the easement is quenched.\textsuperscript{1567}

7) **Extinction on permanent alteration of servient heritage by superior force**: An easement is doused where the servient heritage is by prevalent power so forever changed that the dominant proprietor can no longer appreciate such easement. Given that, where a method of need is wrecked by unrivaled power, the prevailing proprietor has an option to another route over the servient legacy; and the arrangements of § 14 apply to such way.\textsuperscript{1568}

8) **Extinction by the destruction of subject matter**: An easement is stifled when either the predominant or the servient legacy is demolished. For instance, A has an option to way over a street running along the foot of an ocean bluff. The street is washed away by changeless infringement of the ocean. The easement is stifled.\textsuperscript{1569} There is nothing in this Act to support the contention that where a right to light and air to a building has been acquired, partial destruction of it extinguishes that right.\textsuperscript{1570}

9) **Extinction by Unity of Ownership**: An easement is stifled when a similar individual gets qualified for the supreme responsibility for the entire of the predominant and servient legacies.\textsuperscript{1571} For example, A, as the proprietor of a house, has an option to way over the B's field. A home loan his home and B contracts his field to C. At that point C abandons the two home loans and turns out to be accordingly total proprietor of both house and field. The option to way is doused. Likewise, A has an option to proceed over Bs street. B devotes the way to people in general. A's the option to proceed isn't smothered.

10) **Abonnement by discontinue use of easement**: A continuous easement or a discontinuous easement is smothered when it stops to be appreciated as such for a solid time of around twenty years. For a continuous easement, from the very day of its satisfaction, was hindered by the servient proprietor or delivered unrealistic by the prevailing owner; and, on account of an irregular easement, from the day on which it was last delighted in by the individual as a predominant proprietor.\textsuperscript{1572} An easement isn't doused under this area if, Where the suspension is the incompatibility of an agreement between the dominant and servient proprietors; Where the dominant tenement is held in co-possession, and one

\textsuperscript{1564} INDIAN EASEMENTS ACT, 1882, § 40
\textsuperscript{1565} INDIAN EASEMENTS ACT, 1882, § 41
\textsuperscript{1566} Dr. S. Kumar & Ors vs. S. Ramalingam, CIVIL APPEAL NOS. 8628-8629 OF 2009 decided on 16 July, 2019
\textsuperscript{1567} INDIAN EASEMENTS ACT, 1882, § 43
\textsuperscript{1568} INDIAN EASEMENTS ACT, 1882., § 44
\textsuperscript{1569} INDIAN EASEMENTS ACT, 1882, § 45
\textsuperscript{1570} F.S. Pathuck vs. F.E. Davar 7 Bom LR 352 (India)
\textsuperscript{1571} INDIAN EASEMENTS ACT, 1882, § 46
\textsuperscript{1572} Supra, Note 33 at p. 8
of the co-proprietors appreciates the easement inside the said period, or; Where the easement is fundamental. For instance, A has, as attached to his home, privileges of the path from the more responsible option there over the legacies X and Z and the interceding legacy Y. Before the twenty years lapse, An activities his option to proceed over X. His privileges of the route over Y and Z are not doused.

**Suspension of Easements:** An easement is suspended when the dominant proprietor gets qualified for ownership of the servient legacy for a restricted intrigue in that, or when the servient proprietor gets qualified for ownership of the dominant legacy for a constrained intrigue in that.\textsuperscript{1573} For example, A has an option to the way of B’s property gets for rent in his territory, the easementary right to proceed is suspended during this period.\textsuperscript{1574}

**The revival of Easements:** § 51 of the Indian Easement Act gives a standard that is unmistakable from English Law on the point. In English Law suspended easement restores yet easement howsoever smothered can never resuscitate. In India, an extinguished easement can be divided into two categories.\textsuperscript{1575}

§ 51 of Indian Easement Act reads as " An easement stifled under § 45 resuscitates (a) when the decimated heritage is before 20 years have terminated re-established by alluvion, (b) when the wrecked heritage is a servient building and before 20 years have lapsed such structure is reconstructed upon a similar site and, (c) when the pulverized legacy is a prevailing structure and before 20 years have terminated such structure is remade upon a similar site and in such way as not to uncover a more prominent weight on servient heritage. An easement quenched under § 46 resuscitates when the grantor estate by which the solidary of proprietorship was delivered is put aside by the announcement of an able Court. A fundamental easement stifled under a similar area resuscitates when the solidary of proprietorship stops some other reason. A suspended easement resuscitates if the reason for the suspension is evacuated before the privilege is smothered under § 47.\textsuperscript{1576}

**LICENCES**

Where one individual grant to another, or to a clear number of different people, an option to do, or keep on doing, in or upon the unfaltering property of the grant or, something which would, without such right, be unlawful, and such right doesn't sum to an easement or an enthusiasm for the property, the right is called a license.\textsuperscript{1577} A license is an individual right allowed to an individual or found out several people. A license isn't adaptable a side from in conditions referenced in Section 56. The transferee of the land over which the license is accessible isn't limited by the License. A license is will undoubtedly be positive. A License can be disavowed at the desire of the grantor a side from in two cases referenced in Section 60.\textsuperscript{1578} On the off chance that a license is removed, his lone cure is to recoup pay and not to continue the occupation.\textsuperscript{1579}

**COMPARISION WITH ENGLISH COMMON LAW**

\begin{itemize}
  \item \textsuperscript{1573} INDIAN EASEMENTS ACT, 1882, § 49
  \item \textsuperscript{1574} Supra, Note 6 at p. 11; Gopalbhai Jikabhai Suvagiyva vs Vinubhai Nathabhai Hirani C/SA/208/2015 (India)
  \item \textsuperscript{1575} Afaque, Supra, Note 33 at p. 27
  \item \textsuperscript{1576} INDIAN EASEMENTS ACT, 1882, § 51
  \item \textsuperscript{1577} INDIAN EASEMENTS ACT, 1882, § 52
  \item \textsuperscript{1578} Afaque, Supra, Note 33 at p. 28
  \item \textsuperscript{1579} Corporation of Calicut vs. K. Sreenivasan AIR 2002 SC 2051 (India)
\end{itemize}
In India, easementary rights can be asserted regarding the physical property, for example, land and not regarding incorporeal rights. In any case, under the English Law, an easement can be guaranteed regarding an incorporeal right too. An easement right under the English Law is a privilege without profit.\textsuperscript{1580} It grants satisfaction in specific rights regarding the dominant heritage without permitting the proprietor of the then-dominant tenement to partake in the benefits which emerge out of the dirt of the servient legacy. Subsequently, easement rejects what is considered profit a prendere. Under Indian Law, an easement additionally incorporates profit a prendere. It incorporates a right to appreciate the benefits emerging out of the dirt of another proprietor. This is made clear by the Explanation to section 4 which lays down that the expression “to do something” includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage of any part of the soil of the servient heritage, or anything growing or subsisting thereon.\textsuperscript{1581}

Under the Indian Law, two tenements need not be nearby each other because utilized in the area are that the servient legacy must be "certain another land" not having a place with the dominant proprietor. Be that as it may, under the English Law, the heritages must be neighbouring ones.\textsuperscript{1582}

**RIGHTS OF RIPARIAN**

Indian Easement Act 1882 is a Complete Code in itself in the regions to which this Act applies. Act characterize and control the easement rights in all perspectives with the goal that everybody appreciates normal easementary rights and there ought to be the least dubious in such manner. Even though the Act is finished in itself yet it isn't thorough. In India, water law or the accompanying regulations fall inside the domain of the Indian Easements Act of 1882. In the Indian Constitution, water is in the state list as Entry 17 subject to the provisions of Entry 56 of List I.\textsuperscript{1583} Under the Easements Act, the privileges of a riparian for example an individual who claims the land connecting a waterway or a water stream is perceived by this right. § 7 of the Act delivers that each riparian proprietor has the privilege to proceeded with a stream of waters of a characteristic stream with no annihilation or outlandish contamination. A riparian proprietor is offered with the option to utilize water stream which streams past his property similarly with other riparian proprietors. It is appropriate to take note of that The Easement's Act of 1882 perceives the customary privileges of riparian's that are gained under two fundamental guidelines. They are:

- Long usage or prescription
- Local custom

However, these rights are also not absolute. It doesn't give a free and supreme right that is charming with no outer impedance. To be more exact it could be noticed that these rights are dependent upon the Government's entitlement to manage the assortment, the dispersion, and the

\textsuperscript{1580} The Indian Easements Act, 1882, at p. 6 (August 14th, 2020, 22:26), http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Easement.pdf

\textsuperscript{1581} INDIAN EASEMENTS ACT, 1882, § 4

\textsuperscript{1582} The Indian Easements Act, 1882, at p. 6 (August 14th, 2020, 22:26),

http://law.uok.edu.in/Files/5ce6c765-c013-446c-b6ac-b9de496f8751/Custom/Easement.pdf

\textsuperscript{1583} Annie Mampilly, Surana and Surana International Attorneys, RIPARIAN RIGHTS IN INDIA at p. 3
maintenance of the waters of waterways and streams streaming in regular channels. In *Vippalapati v. Raja Of Vizianagaram*\(^{1584}\), the case was an antecedent of the Ganga Water Pollution case\(^{1585}\). The support of riparian rights is clear for this situation wherein it was a dam that was deterring the riparian. The Court held that riparian rights are incorporated of a right to get to free-streaming water with no hindrance regardless of whether the impediment is by a dam.

In the decision of *Tata Iron And Steel Company Ltd. v. Province Of Bihar*\(^{1586}\) is another milestone case one can scarcely extra to overlook while talking about riparian rights inside the Indian range. The decision was pronounced by the Bombay High Court. In straightforward terms, the realities are with the end goal that the Tata Iron And Steel Company Ltd. was delivered rights over the utilization of water from the Swarnarekha stream for their mechanical purposes.Because of a shortage issue that struck the express, the Government got certain limitations that trimmed down the privileges of the said organization. In this, the Company protested and asserted riparian rights. In any case, this case was expelled by the Court on the ground that an outright right can't be asserted. Everybody appreciates equivalent benefits over the assets and the Government is engaged under the law to make limitations in light of a legitimate concern for the bigger open.

Therefore, I can conclude that § 2 of Indian Easements Act, which empowers the government with the power to regulate the flow of water in natural or artificial stream acts as an exception to the general rule of easemantary rights, or specifically, riparian rights under easemantary rights and therefore cannot be challenged for invalidity or unconstitutionality.

**CONCLUSION**

The Indian Easements Act, 1882 provides for the right of easement in India. Easement neither transfers the ownership nor possession of the property. However, it is just for mere beneficial enjoyment without which one’s property cannot be enjoyed. The easement has been classified into various categories such as necessity, quasi easement, prescriptive, customary. Under § 7 different modes of acquisition of easement are given either by way of express grant or implied grant. In the case of the right to way, any illegal interference with the right of way constitutes a nuisance and violation of right. In the case of the right to access of light, it does not constitute the right to have a continuance of the same amount of light throughout. The article tried to explain the various modes through which easement can be terminated, suspended, or revived. The easement is a benefit that the proprietor of a heritage appreciates regarding that heritage in or over the heritage of someone else.

In the landmark case of *Hero Vinoth v. Seshamma*\(^{1587}\), the court held that an easement would last only as long as the absolute necessity existed and such a legal extinction could not apply to an acquisition by grant- if a right of way was provided to a particular sharer, it could not be terminated merely because such sharer had another alternative way.

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\(^{1584}\) AIR 1937 Mad 310 (India)  
\(^{1585}\) M.C. Mehta vs. Union of India AIR 1988 SC 1115 (India)  
\(^{1586}\) 2004 (3) BLJR 1948 (India)  
\(^{1587}\) (2006) 5 SCC 545 (India)
EUTHANASIA IN CONTEMPORARY INDIA: WHETHER AGAINST RIGHT TO LIFE UNDER ARTICLE 21?

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ABSTRACT
Euthanasia also known as mercy death has been one of the most debated topic in India. There have always been two demarcated sides with the working of the concept of mercy death since the advent of law in independent India, where the Government had struggled for years on whether euthanasia could be legally granted in our country. The paper attempts at giving an insight of the working of euthanasia in contemporary India and also its journey of struggle and controversy to getting legalized. It has been one of the most controversial topics as it seemed to be directly hindering one of the most important fundamental rights of a human being i.e. Right to life guaranteed under Article 21 of the Indian Constitution. There have been discussion on its legalization since forever and this discussion finally came to an end after the Supreme Court for the very first time in 2018 agreed and legalized this concept in the case of Aruna Shanbaug restricting its ambit only by granting consent to passive euthanasia to be legal in India. The paper also displays the working of the concept since its legalization in India and also the misuse and aftermath of such legalization.

1. INTRODUCTION
A human being has full right to enjoy and safeguard their life which cannot be taken away by anyone in whichever way. India as a country has given people the full right to safeguard their life which when infringed is made punishable by different laws. No person has the right to take the life of another in whatever circumstances other than the way prescribed by law. India is one of those countries which due to their religious bases have been against the practice of euthanasia which was considered as equal to taking someone’s life.

India during the last two decades has undergone a variety of changes regarding various different laws out of which legalization of passive euthanasia is considered one of the most remarkable one till date as it has been an issue of controversy and debate for years since the advent of Indian Constitution and other laws prevalent in India. The concept of euthanasia has long debated as it was considered hindering the Article 21 of Indian Constitution which is considered as one of the pillars guarding the fundamental right of any human being. The concept of euthanasia or mercy death in India has been limited to its passive use and is also granted on the basis of certain restrictions mentioned. But the recent trend in the cases of passive euthanasia has to be studied with reference to contemporary healthcare and also the complex and changing dynamics of the contemporary society.

1.1. MEANING
Euthanasia was for the very first time derived in Greece which basically means good death. Euthanasia has been given various different interpretations and meanings by different thinkers and countries. It has been said to be a practice or act of intentionally or deliberately killing any person for the very benefit of that person so that to relieve him from the pain and suffering of an incurable disease or
incapacitating physical disorder or allowing them to die by withholding treatment or withdrawing artificial life support system which facilitated their life.\textsuperscript{1588} The word euthanasia is said to be derived from the Greek words “\textit{eu}” and “\textit{thanatos}” which means “easy death” according to the Merriam Webster Dictionary. The Cambridge Dictionary defines euthanasia as the act of killing someone who is very ill or very old so that they do not suffer any more”.\textsuperscript{1589} The Merriam Webster Dictionary defines euthanasia as “the act or practice of killing or permitting the death of hopelessly sick or injured individuals (such as persons or domestic animals) in a relatively painless way for reasons of mercy”.\textsuperscript{1590}

2. EUTHANASIA: LEGAL ASPECT OF RIGHT TO LIFE V/S RIGHT TO DIE

India has legalized the concept of passive euthanasia but there is still an ongoing debate and controversy regarding as to whether Article 21 of Indian Constitution which is Right to life includes Right to die. Article 21 of Indian Constitution has a wide scope of interpretation as it includes a variety of rights amongst itself and is also considered as one of the most important fundamental right of any human being and for the same reason the Supreme Court has struggled with the issue as to whether to include the right to die as a right under Article 21.

The whole controversy regarding Right to die originated with the case of State of Maharashtra v. MarutiShripatiDubal\textsuperscript{1591} in which the constitutionality of “attempt to commit suicide”\textsuperscript{1592} under Indian Penal Code was questioned as it was considered to be infringing Article 21 (Protection of life and personal liberty) and Article 19 (Protection of rights regarding different freedoms) of an individual. But the Bombay High Court in the following case rejected the following contention and stated that Article 21 included Right to die as a right in itself. The same contention was upheld in the case of P. Rathinam v. Union of India\textsuperscript{1593} stating that Right to life included Right to die.

The above case was overruled by Gian Kaur v. State of Punjab\textsuperscript{1594} in which “abetment to suicide”\textsuperscript{1595} was upheld and it was stated in the Court that “in the context of a terminally ill patient or one in the PVS, the right to die is not termination of life prematurely but rather accelerating the process of death which has already commenced”.\textsuperscript{1596} The same contention was more elaborately explained in the case of Vikram Deo Singh Tomar v. State of Bihar\textsuperscript{1597} in which the Court stated that Right to live with human dignity also includes Right to die with human dignity i.e. to die peacefully without any physical and mental agony.

\textsuperscript{1592}Section 309, Indian Penal Code, 1860.
\textsuperscript{1593}P. Rathinam vs. Union of India, (1994) SCC (3) 394.
\textsuperscript{1595}Section 306, Indian Penal Code, 1860.
\textsuperscript{1597}Vikram Deo Singh Tomar v. State Of Bihar, 1988 AIR 1782.
3. EUTHANASIA DIFFERENTIATED FROM RIGHT TO DIE AND SUICIDE

Although passive euthanasia and suicide, both these acts result in death of a person or can be described as a way of self destruction\textsuperscript{1598}, there is a clear distinction between the two acts. Passive euthanasia has been legalized by the Supreme Court in the year 2018 in the Aruna Shanbaug Case\textsuperscript{1599} which clearly demarcates the difference between these two acts and shows the clear difference in intention of both suicide and passive euthanasia.

There is a great deal of difference which can be clearly seen through the eyes of our laws which makes “attempt to suicide” and “abetment to suicide” punishable as it has been said by the court in the case of Maharashtra v. Maruti Shripati Dubal\textsuperscript{1600} and Gian Kaur v. State of Punjab\textsuperscript{1601} which states that Right to life does not include Right to die and could not be widened to extend its scope to extinction of life of anyone and also Right to suicide which is a whole different act altogether and is also punishable.

4. DIFFERENT TRENDS OF EUTHANASIA IN DIFFERENT COUNTRIES

4.1 NETHERLAND

Netherland was the 1st country that legalized euthanasia and assisted suicide in the world. Even their law states that killing a person on his request is punishable with twelve years of imprisonment or fine and also provoking a person to commit suicide is punishable by imprisonment up to three years or fine. Despite this provision Netherland have come across the amendments in law and has provided a defense to charges of voluntary euthanasia and assisted suicide as against murder.

4.2 DUTCH

With certain strict conditions on April 1st, 2002 Dutch Government legalized the concept of euthanasia. The patient is suffering from an unbearable or incurable disease with no improvement and also there is no hope of improvement can ask for euthanasia. For doing so the countries has prescribed that a doctor must clearly understand the condition and allow such practice and must be also approved by 2nd Doctor.

4.3 BELGIUM

In Belgium euthanasia was legalized in the year 2002. Parliament of Belgium enacted the ‘Belgium Act on Euthanasia’ in September 2002, which defines euthanasia as “intentionally terminating life by someone other than the person concerned at the latter’s request”. The act made is very strict which has many safeguards and conditions like the person must be major and not insane, should have made request voluntarily and many more. The situation must be verified by two doctors and a psychologist if the condition of the patient is doubtful.

4.4 SWITZERLAND

Under Article 115 of the Swiss Penal Code, suicide is not a crime but assisting suicide is a crime if the motive is selfish. It does not require any physician and also it is not


\textsuperscript{1599}Aruna Ramachandra Shanbaug v. Union of India, (2011) 4 SCC 454.

\textsuperscript{1600}State of Maharashtra v. Maruti Shripati Dubal, 1987 (1) Bom CR 499.

necessary that patient was terminally ill. In Switzerland, physician-assisted suicide is legal but euthanasia is illegal.\textsuperscript{1602}

5. EUTHANASIA IN INDIA

India is a secular country and in any religion of the world killing a person is prohibited. Where our constitution provides and safeguards us with the Right to life and made strict laws against its violation like culpable homicide amounting to murder\textsuperscript{1603}, culpable homicide not amounting to murder\textsuperscript{1604}, suicide\textsuperscript{1605} etc. It was the major question in front jurists and lawmakers how they can provide the right to die or even legalization of euthanasia. Euthanasia are of four different types:

- Voluntary euthanasia- It is when the person himself request for death.
- Non-voluntary euthanasia- It can be considered as implied consent of the patient as he/she is not in a position to give consent.
- Active euthanasia- It includes taking life of someone by giving a lethal dose of drugs or by injections to the person. In India all forms of active euthanasia are illegal. It is also regarded as ‘Aggressive Euthanasia’.
- Passive euthanasia- It is indirect action by not providing essential necessary help required to prolong life of any person. It implies the withdrawal of artificial life support system and is a slower process. Only this type of euthanasia is legalized in India and is also known as ‘Non-Aggressive Euthanasia’.

In India passive euthanasia has been legalized after so many years in 2018 and also it is still not a right like any other which can be asked for. Only the Apex Court i.e. Supreme Court has the power to grant passive euthanasia to any person to whom it seems necessary and also has the power to refuse so. It is on the desecration of the Supreme Court whether it grants this to any individual or not. Also there has been a broad elaborate standard setup to grant such way of ending one’s life.

5.1. LEGAL ASPECT OF EUTHANASIA IN INDIA

Indian formed its legal system after thorough study of various different laws of different countries and adopted the ideas of legal fraternity from these countries and has also relied on various precedents since the advent of legal system in India. Euthanasia in India has been declared legal but before that it was considered illegal as the act contains the intention of doctor to kill the patient and the same would be punishable under Indian Penal Code for culpable homicide amounting to murder\textsuperscript{1606} and it also infringed one of the most important fundamental right of an individual i.e. Right to life under Article 21. But now, passive euthanasia is legalized in India and is considered as a valid part as to die with dignity under Article 21 of The Indian Constitution and paves a way for people to request it in order to escape the physical and mental agony they have been suffering but at the same time it does not include Right to die and suicide as path for such practice. It is on the discretion of the Court to decide whether passive euthanasia is to be granted to someone or not. Similarly, “attempt to suicide” and “abetment to suicide” are still punishable under the law and cannot be considered as a part of mercy killing or Passive euthanasia in India.

\textsuperscript{1602} Krishanu, Euthanasia in India (Aug. 17, 2020, 6:13 PM), http://www.legalservicesindia.com/.

\textsuperscript{1603} Section 300, Indian Penal Code, 1860.
\textsuperscript{1604} Section 299, Indian Penal Code, 1860.
\textsuperscript{1605} Section 309, Indian Penal Code, 1860.
\textsuperscript{1606} Section 300, Indian Penal Code, 1860.
5.2. DIFFERENT SCENARIOS REGARDING LEGALISATION OF EUTHANASIA

In every religion birth and death is considered as a wish and a blessing of God. Neither in Hinduism nor in any other religion a person is allowed to kill him in any condition. They all believe that no one has the right to bring death upon themselves other than God. According to both Sunnis and Shias, killing a terminally ill person whether through active euthanasia (physician-assisted suicide) or passive euthanasia (stopping life support or medicine) is considered as an act of disobedience against God.

6. PRESENT SCENARIO IN INDIA
6.1. ARUNA SHAUNBAGH CASE: A TWIRL FROM THE REGIME

Aruna Shanbaug case is a landmark judgment in which Aruna Shanbaug was a nurse working in the King Edward Memorial Hospital in Mumbai where on the night of 27th November, 1973 she was sexually assaulted and strangulated by a ward boy in the basement but having found that she was menstruating, he did not rape her but strangled her with a dog chain around her neck due to which the blood flow to the brain stopped and she was paralyzed due to this. She was finally granted euthanasia after so many years in 2018 where she was released from the life support system.

7. MISUSE OF PASSIVE EUTHANASIA IN INDIA

The reality today is middle-class families don't want elderly person at home and treat them as burden and due to this reason, passive euthanasia could be brought to a great misuse which will ultimately threaten the life of an individual given under Article 21.

Also it could be used as a defense against murder under Section 300 of Indian Penal Code which will also provide a getaway for such offenders. In order to avoid such misuse the Government needs to form a proper law for regulating this practice in India.

8. CONCLUSION AND SUGGESTIONS

India is a country where the death sentence is one of the rarest punishments as India Penal system believes in rehabilitation and not in punishment unlike other countries. Even the Supreme Court does not have any absolute power in cases where death can be granted other than the way specified by law. Providing and accepting euthanasia to any person in any condition is the revolutionary step in itself. But after the great struggle of decades India finally for the first time, Supreme Court gave permission for it. On 9th March 2018, passive euthanasia was legalized in India by the Supreme Court in Aruna Shanbaug case. As it is a considered a landmark judgment in the history of India as it was considered to be infringing Right to life of a person, proper safeguards should be taken in order to regulate such practice in India.

Here are some of the suggestions which could be taken for regulating the practice of passive euthanasia in India:

- The Government needs to form a specific law regulating the practice of passive euthanasia as it directly endangers the life of an individual.


• The decisions regarding the matter are to be taken on the basis of precedents and due are should be taken by judges while delivering such judgments.
• A specialized committee needs to be formed for regulating and granting such practice and to ensure medical negligence in such cases.
• The committee should have experienced practitioners and should be checked from time to time in order to avoid any negligence or corruption.
• Various steps of check should be formed to avoid any irregularity.

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AN ANALYSIS ON THE MALICIOUS PROSECUTION
ABSTRACT
Tort is a civil wrong it’s not a criminal offence tort is a wrongful act which infringes the legal rights of others and infringing the legal duty of themselves. In torts, the person whose legal right is infringed can get a monetary compensation from the wrongdoer. Malicious prosecution is a type of tort. This malicious prosecution is to protect people from false cases. Malicious prosecution is legal proceeding which raised without a reasonable or probable cause. Otherwise it can be defined as Criminal prosecution or civil suit which filed with ill will. In this project we will deal with the meaning, definition of malicious prosecution and also When does the prosecution commence. In this research paper we will examine what are the essential to valid a malicious prosecution, we will also discuss about the types of damages created by malicious prosecution. The paper will also explain what wrongful acts will lead to malicious prosecution. The malicious prosecution is unlike the malicious civil proceeding, we will analyse how it is more complicated than malicious prosecution and also what things we need to prove to get a monetary compensation for it. Often people have a confusion that filing a wrong case against someone with bad intention and false imprisonment are same so, we will discuss how false imprisonment and malicious prosecution are different from each other. The paper will examine how the punishment for malicious prosecution differs in Indian Penal Code and law of Torts. And lastly, we will discuss about the position of malicious prosecution in Indian law with the help of certain case laws.

KEYWORDS- malicious prosecution, infringes, legal proceeding, false imprisonment, compensation

INTRODUCTION
In our country everyone has the right to start a legal proceeding in order to get justice. Basically, our legal system based on this principle that a hundred criminals can be acquitted but one innocent should not be punished. Like that when people are accused of false cases without any probable cause They may face many problems like the monetary problem, loss of reputation and loss of the social circle. To justify the position of the person who is falsely accused and for wasted the valuable time of court to prevent this kind of problem people will be punished for doing malicious prosecution.
Malicious prosecution is a malicious institution against the false accusation of criminal act, bankruptcy or liquidation proceedings. We can commonly say that malicious prosecution is judicial proceeding initiated by a person with ill will without any probable or reasonable cause.
A hypothetical example to explain malicious prosecution. An owner of business complex filed a case against the person who was working in the complex as a bookseller. He filed a case against him because he stole cash from the administrative office. But after filing the case he came to know about the person who stole cash was a different person still he continued the proceeding. Later in the case it was proven he was not the one. Now the defendant of that case file a malicious
prosecution against the owner of the complex for continuing the proceeding without probable cause.

MEANING AND DEFINITION OF MALICIOUS PROSECUTION

Malicious prosecution is a tort. This malicious prosecution balance between that every person is having rights to file a legal suit to get justice and preventing false accusation of the innocent. There are two things involved as wrongful act that person filed a fake case wasted the time of the court and for filing fake case against the person because of that he or she suffered damages.

It is abuse of legal process in which plaintiff initiated legal process without any probable or reasonable cause at the end the legal system should be concluded as that defendant is innocent. Then the defendant of that case can file a case of the malicious prosecution against the plaintiff (now defendant) for the economic and social problems he or she faced during the legal proceeding by asking for the compensation in court

A malicious prosecution defined as “a judicial proceeding instituted by one person against another, from wrongful or improper motive and without probable cause to sustain it”

The legal definition of malicious prosecution is Malicious prosecution is the malicious institution against another of an unsuccessful criminal, bankruptcy or liquidation proceeding, without reasonable or probable cause. It’s also referred to as “abuse of process”, that is, abuse of process of law for personal interest.”

WHEN THE MALICIOUS PROSECUTION COMMENCE

If a person is summoned to answer the complaint, it won’t come under malicious prosecution. In the case, it was alleged that the plaintiff wrongfully took the bullock cart belonging to the defendant, and he requested that something be done. The defendant was neither arrested nor prosecuted. It was held that the matter before the executive did not amount to the prosecution so malicious prosecution can’t be maintained.”

THE ELEMENTS FOR THE MALICIOUS PROSECUTION

The essentials elements of the malicious prosecution require.

- the previous case filed should be terminated in the favour of the plaintiff.
- the defendant played an active role in the legal proceeding with malicious motive
- the defendant did not have any reasonable or probable cause in the legal proceeding.
- the plaintiff of the current malicious prosecution suffered damage because of the legal proceeding.
- The malicious prosecution should be started by the plaintiff of the previous case. In the malicious prosecution he will be considered as a defendant of malicious prosecution.

1608 Dr.R.K. Bangia, law of torts, 197(Dr. narendra kumar,2017)
1609 Sugandha.ch, Malicious Prosecution, legal service India (April 4, 2019),

http://www.legalservicesindia.com/article/1857/Malicious-Prosecution.html
1610 Khagendra Nath v. Jacob Chandra, A.I.R. 1977 N.O.C. 207(Gau)
TYPES OF DAMAGES CREATED BY MALICIOUS PROSECUTION
The damages are commonly grouped as three.

- The damage to man’s fame
- The damage done to a person
- The damage done to person property

In the damage of man’s fame the matter where the person is accused without reason because of that, it will cause general public outrage by a perceived offence against morality. Under the damage done to the person put in danger of losing his life and liberty. In the case of damage to person property, he is forced to pay expenses of litigation to acquit himself of the crime which he is accused.

More specifically these are the types of damages. The plaintiff of the malicious prosecution can recover any expenses they incur because of the malicious prosecution. This can lawyer’s fees, case filing fees, lost income during legal proceedings and other compensation for “The emotional distress of withstanding the abuse of the legal system” and plaintiff also can ask for the compensation for the loss of reputation and loss of future earnings. In case of mental suffering in malicious, there is need any evidence to prove it but when the claims are based on the civil action then the plaintiff of the malicious prosecution should prove the quantifiable damages

DIFFERENCE BETWEEN MALICIOUS PROSECUTION AND FALSE IMPRISONMENT
In the false imprisonment, they will control the personal liberty of someone without any lawful justification. But when it comes to malicious prosecution the damage is basically an abuse of the legal process. By the action of a private individual legal action, the plaintiff liberty is wrongly controlled in false imprisonment but in malicious prosecution with help judicial sanction, they will arrest the plaintiff. Here mistakes of fact can’t be taken as defence but in malicious prosecution mistake of fact can be taken as a defence. This tort is against the liberty movement and this it’s against the right not to be harassed by the prosecution. In false imprisonment, no need of proving malice but in malicious prosecution proving that he was falsely prosecuted by malice is a must.

“The damage is not the essence of false imprisonment but in malicious prosecution, damage is the essence.”

WHAT WRONGFUL ACTS LEADS TO MALICIOUS PROSECUTION AND WHAT NOT
In the case of Nagendra Nath Ray v. Basanta Das Bairagya After a theft had been committed in the defendant’s home, he informed the police that he is suspecting the plaintiff. According to the defendant complain police arrested him subsequently discharged by the magistrate because the police report showed that there was no evidence connecting to the plaintiff and the theft. The plaintiff filed the malicious prosecution the court held that it suit is not maintainable because there was no evidence connecting to the plaintiff and the theft. The plaintiff filed the malicious prosecution the court held that it suit is not maintainable because there was no

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1611 RATANLAL & DHIRAJLAL, law of torts, 340-341(justice G.P SINGH,2016)
1612 Savile v. Roberts, (1698) 1 LD Raym 374 (378)
prosecution itself and concluded that police and prosecution are not same.

In the case of 1615 D.N. Bandoadhaya v. Union of India the high court of Rajasthan held that departmental enquiry by disciplinary authority can’t called as the prosecution. In an enquiry committee found that the plaintiff, who was way inspector in the defendant railways was guilty of the negligence and he was punished for that the order of authority was kept aside in the writ petition. In the action of malicious prosecution, the high court of Rajasthan held that the disciplinary committee was a function in the quasi-judicial manner it can’t be called as judicial authority, so there is no prosecution.

In 1616 Dattatraya Pandurang Datar v. Hari Keshav the defendant lodged an FIR to police regarding the theft in his shop naming the plaintiff, his servant has a suspect for the theft. So, the police arrested the plaintiff, and he was remanded by the magistrate to the police custody. On the investigation there is no sufficient information to prove that he is criminal so, he was discharged. The plaintiff sued the defendant for the malicious but the court held that the plaintiff prosecuted by the defendant could not exist. The defendant gave the information to police not more than that. So, the defendant could not deem the prosecutor of the plaintiff.

In the case of 1617 Gaya Prasad v. Bhagat Singh, 1618 the privy council said that conduct of the complainant before and after the complaint has to be seen to decide whether he is the real prosecutor or not.”

This case stated that the person who is giving the complaint knew that it’s a false complain still the charges is false complain, tries to mislead the police with false evidence for the conviction of accused, he is considered to be a prosecutor.

In the case of 1619 T. S Bhatta v. A.K. Bhatta, the defendant filed a complaint against the plaintiff. After that he moved session judge in the revision and he got examined as a witness in the session trial. He also impleaded in the criminal revision in the high court. He knew that charge was false and he was acting without the probable or reasonable cause. So, the court said that he was the real prosecutor of the case and was liable for the malicious prosecution.

By referring to these cases, we can state that filing a FIR or complaint with doubt won’t come under malicious prosecution because they are not a judicial body and there no malicious motive also. But when it comes to the quasi-judicial body even though it may be a false case but it won’t come malicious prosecution because it’s not a judicial body. When the defendant filing a false case and giving fake evidence or being false witness, they are doing with malicious intention this automatically changes them into prosecution and they are liable for the malicious prosecution.

1617 Gaya Prasad v. Bhagat Singh, I.L.R. (1908) ALL. 525 (P.C)

1618 Dr.R.K. Bangia, law of torts,203 (Dr. narendra kumar,2017)
DIFFRENCE BETWEEN MALICIOUS PROSECUTION AND MALICIOUS CIVIL PROCEEDINGS

We took many of our laws from the English law. The supreme court of the UK itself now only established the malicious prosecution in the civil proceedings by a case willers v Joyce.

In India malicious civil proceedings are not same like the malicious criminal prosecution, no action can be brought, as a general rule, in the case of civil proceedings. Even though the same is malicious have been brought without any reasonable cause.

Since any unsuccessful plaintiff should bear the cost of litigation. That is only thing that protects them from false litigation. In the malicious prosecution once it’s proved that he is falsely accused with malicious intention and the court discharged he can successfully file a case and can get compensation for the litigation and other compensation for the damage of mental and social suffering.

In some exceptional cases the cost of litigation only cannot compensate the defendant, then he can sue to recover damages for the loss arising because of such legal proceedings they are Insolvency proceeding against the businessman, or winding up proceeding against a trading company, or the proceeding which results in arrest or execution against the defendant’s property, or attachment of his property. In malicious prosecution getting compensation is quite easy to work compared to the malicious civil proceedings because in malicious civil proceedings are having limited exceptional only in that they can get compensation more than a compensation for the litigation.

In the case of Genu Ganapati v. Bhalchand Jivraj they gave the required number of ingredients to prove the malicious abuse of legal proceeding. The three components are:

1. Malice must be proved.
2. The plaintiff should prove that defendant filed the case without any probable or reasonable cause and the plaintiff should be discharged from the previous case.
3. The plaintiff must prove that such legal proceedings have interfered with his liberty or property or such proceedings affected or likely to affect the reputation of the plaintiff or it can be considered as the civil proceeding which resulted in the arrest of the plaintiff or if they are nature of bankruptcy or winding up proceeding the plaintiff establish that he has suffered.

Here, the first two points are for both malicious prosecution and malicious legal proceedings also but the third point gave the specific things we should prove to get compensation for malicious civil proceedings which is limited compare to the malicious prosecution. Proving the malicious prosecution will be easy compares to malicious civil proceeding.

THE DIFFERENT PUNISHMENT GIVEN IN IPC AND LAW OF TORTS FOR MALICIOUS PROSECUTION

1620 willers v Joyce, UKSC 43 & 44(2016)
1622 Johnson v. Emerson, (1871) L.R. 6 E.x. 329
1623 Quartz Hill gold mining co. v. Eyre. (1883) 11 Q.B.D. 674
A person can file a case for malicious prosecution either under the law of torts or the Indian penal code. In the law of torts, the plaintiff will get only compensation not more than that for every aspect from false litigation, loss of reputation, loss of the social circle and loss of income during the time of litigation. Every aspect they will get compensation according to the seriousness of the issue.

In the Indian penal code, there are certain sections for punishing the malicious prosecution. In section 209 of the Indian penal code states that dishonestly making false claims in the court is a punishable offence with punishment up to 2 years and fine. For stating that it’s a false claim it should have some ingredients like the person who is accused should make the claim, the claim should be in the court of justice, the claim should be wholly false or in part, The accused knew that claim was false and the claim was made fraudulently or with intent to injure the person. In the law of torts, there is no special thing the defendant should pay for the judiciary.

In section 44 of Indian penal code defines injury will include injury for reputation and injury for the property. According to the seriousness of the injury the punishments and fine will be given. In torts the plaintiff will get the compensation for the defamation like any other injury made to them.

In section 211 of the Indian penal code whoever made such criminal proceeding instituted on the false charge of a punishable offence. So, the plaintiff may be punished with lifetime imprisonment for life, imprisonment for seven years or upwards or liable to pay fine. It may vary according to the seriousness of the issue. In the law of torts, the amount of compensation will vary according to the amount of damages faced during litigation.

Section 499 of the Indian penal code states that defamation is punishable issue and section 500 of Indian penal code give punishment for the defamation may extend to two years or with fine or with both. But in the torts again it will conclude with compensation.

THE POSITION OF MALICIOUS PROSECUTION IN INDIAN LAW

- English law of maintaining and champerty is a force as a specific law in India.
- There are some provisions in India for dealing the malicious proceeding of only criminal suits mostly the claimant has no remedies if the case were instituted under any civil law other than the municipality act.
- Getting compensation for the malicious prosecution is easy compare to malicious civil proceeding. In malicious civil proceeding there still now, there are not reasonable remedies for such kind of civil the plaintiff needs to prove such kind of special damages (except litigation expenses) in the eyes of the court.
- Still now in the malicious legal proceeding India is having a conservative notion on the judgment by referring the old cases. Still now they didn’t try to form a new case law.
- There have many observations that still now some apex courts are dealing with the cases of malicious prosecution still now they didn’t get justice. And the government

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1627 Ram coomar coondoo v. chunder canto Mookerjee, (1876) 4 I.A. 23, at 45; I.L.R (1876) 2 CAL. 223, 255;
failed to come up with the legislation and amendment to enhance this quality of the judgment.

- The prosecution will differ from place to place some may feel they lost their reputation when they gave FIR against them when they were in police custody. Indian law is not accepting this thing as prosecution maybe using of this also the plaintiff of the malicious prosecution can face loss of reputation or any other psychological fact these facts are not accepted as malicious prosecution.

CONCLUSION

Malicious prosecution is an abuse of process. To protect the innocent people from the false cases without any reasonable or probable cause and with malice intention.

It’s proved by this research paper that lodging a false FIR without any malice intention and the act by police officers for police custody won’t come under malicious prosecution and when a person is giving fake evidence and being a fake witness with malice intention will automatically turned to be a prosecution for the case. Getting compensation from malicious civil proceedings is quite complicated to compare with malicious prosecution. False imprisonment is against the right to liberty with executive involved while malicious prosecution is the abuse of the legal process. for malicious prosecution the punishment in IPC may be imprisonment or fine according to the level of the issue.

English law is quit wider compare to Indian law in the malicious civil proceedings because of their new judgments according to the new case. From the malicious prosecution they can recover damages for the person, person’s property and to the reputation. The Indian law is not that much wide and informative about this concept especially while dealing with the malicious civil proceeding. The new legislation and amendment should be made for the malicious prosecution which can add FIR and police custody in prosecution when people suffered heavy damage because of the act of the officials.

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The true sign of intelligence is not knowledge but imagination.- Albert Einstein

Abstract
Knowledge is the fruit that creativity nourishes. Mankind by their intellectual creativity have developed Traditional Knowledge. The passing of their knowledge from generation to generation has kept it alive. Though the reign of technology has come up with solutions for all problems, Traditional Knowledge must be protected. It is necessary to develop means to protect Traditional Knowledge and interests of Traditional Knowledge holders. This Article throws light on the importance and means of protection of Traditional Knowledge.

Introduction
In this changing society, importance of knowledge has changed rapidly world over. The Knowledge which was once sensed as a source of power, now in this 21st century considered as a property. This intellect is protected for a limited period recognizing innovation and creativity of the possessor. Apart from individuals, there are indigenous communities residing in various demographic region of world possessing a vast Traditional Knowledge. These knowledge flows through generation after generation, developed and practiced based on ancient methodology. While most of them are still unknown and most of them lacks preservation and promotion. India having a developed system to protect its Intellectual Properties, underestimated the traditional knowledge that was common in every Indian households. India has a diverse and distinct culture with unique food habits, tradition and dialect, which changes after every few kilometers you travel. These cultures include valuable knowledge conserved by the indigenous community which is asset to Indian culture. Medicinal plants, indigenous medicines, Agricultural methods, Designs, Textiles are part of the Traditional Knowledge conserved by these communities. The developing countries, mostly in Africa and Asia identified as Third world countries have emphasized on plant genetic resources from generations. Traditional Knowledge doesn’t come under a single roof and can be exploited in any of the modes of Intellectual properties. It is well known fact that Traditional Knowledge can’t be protected by current provisions of IPR. IPR have been developed for evolving modern commerce and traditional knowledge is very much complex to be protected under this legislation.

Traditional Knowledge has always been defined differently with a different purpose and interest. WIPO (World Intellectual Property Organization) defines it as “Tradition based literary, artistic or scientific work; performances; Invention; Scientific discoveries; Design marks; names and symbols; undisclosed information and all other tradition based innovation and creation.”

The unique nature of Traditional Knowledge is that this knowledge is not controlled by a single entity but controlled collectively by a community. Each of them...
are subject to some restriction embedded itself in the religious practices of the community.

Why Traditional Knowledge should be protected?
Traditional Knowledge is striving to survive due to modern lifestyles, urbanization, environmental problems. Somehow the knowledge that is being passed through generations has lost its faith and recognition among themselves. Another factor is lack of economical support to encourage the Traditional Knowledge. As commercialization exploded, developed nations started exploiting the biodiversity of the Third World. Exploitation with mere modification of the Traditional Knowledge and claiming Intellectual Property Rights without even returning some of the benefits to the traditional people is a continuing practice. Traditional Knowledge is very much different as compared to other intellectual property as it is not produced systematically like others. Generally Traditional Knowledge are information passed collectively within the community and present IPR regime which is trade centric which may not fully respond to the cultural nature of the Traditional Knowledge. That’s why it becomes important to develop a sui generis system which will not only preserve this tradition but will also promote the knowledge. An important aspect of Traditional Knowledge its creation is only tradition to the extent of community while it keeps on evolving everyday within the community. To protect the interest of communities particularly in least developed and developing nations, two International agreements have been ratified – CBD (Convention on Biological Diversity) and TRIPS (Trade Related Aspects of Intellectual Property Rights). Many of them have agreed the idea of promoting high standards of Intellectual Property and free trade. This way the Traditional Knowledge achieves a sense of fraternity among the community and a tool for development for least and developing nations.

Traditional Knowledge and Economy
India is a hub to these biodiversity having number of unknown and unregistered Traditional Knowledge. Approximately 8% of the world's biodiversity remains in India and has potential to become a major player in the International market as quoted in an article by R.A. Mashelkar. It should be noted that Traditional Knowledge is being used developing drugs and medicines by the pharmaceutical industries. In the year 1995 a total trade that was estimated was for US $56 Billion and apart from labor cost, the traditional people got nothing. The royalty if estimated would have turned to millions and mere 0.001% of profits were only provided.

Some Existing Practices in India
Water harvesting practices – Many of the ancient civilization that were discovered by the archaeologist which are as old as 550AD. These old age practices are still followed mainly in desert areas of Rajasthan. “Johad” is a practice still being followed in parts of Rajasthan, to recharge ground water and restore it. “Zabo” is a method to collect running water from the


1629 R.A. Mashelkar, Role of IPR in Economics of Knowledge, Journal of IPR, Vol.6, July 2001, Pg no. 272
1630 Aaron Vansintjan, Water Johads : A low Tech Alternative to Mega Dams in India,
mountains. The conventional method of harvesting water included collect rainwater, restore and recharge of ground water.

**Bamboo drip irrigation** – The use of bamboo for drip irrigation is a common practice in North eastern states. These designs differ in different parts in accordance with variance of rainfall. practice that is been followed in rain shadow area of Assam somehow will differ in high rainfall areas of Meghalaya.

**Traditional Housing** – The architectural and designs of houses in rural India is similar and designed by the local traditional labours. Also the design is based upon the local construction material available in that region. Rural architecture depends upon some major aspects of climate, soil material available in that region (Timber, bamboo), culture etc. A traditional technique of using mud, clay and bricks in the rural areas to construct houses is a more cost effective way as compared to a modern urban house. Using construction materials like mud, soil and bamboo which are easily available in the backyard makes it more cost friendly and also as mud is a bad conductor of heat, temperature remains cooler than outside. These traditional methods and techniques are giving tough competition to urban hosing equipped with modern amenities. Also bamboo is a common material used in some parts of Bihar, Arunachal Pradesh, Assam, Meghalaya, Himachal Pradesh, Uttarakhand. An important aspect of such practices is also its usefulness in natural calamity, climate adaptation and low carbon emission.

**Traditional Agricultural Practices** – India after the independence changed its status from an agrarian economy; still agriculture supports 18% of the GDP of India. Most of the rural India survives on agriculture and variety of crops being cultivated across different parts of the country. These varieties are cultivated with different irrigation and agricultural methods which includes selection of crop variety, land selection, land preparation, soil fertility management, irrigation, harvesting, post harvesting, seed preservation etc. Also different tools are used for different purpose and size of the tools differs in all parts of the country depending on the soil, terrain and crop to be cultivated. For example, Plough used in the rest of the India has a small handle as compared to a long handle that is used in Arunachal Pradesh by the Tangsa Naga community. Sickles used for harvesting differs in size in parts of the country.

**Weather Forecasting** – Evolution of science has taken a great leap in human lives, people today know sooner whether to take an umbrella or not. Meteorological Department’s prediction of climate every year makes mitigate the worst effects of extreme weather. Before these developments happened, there were many methods that farmers used for weather prediction. For example, farmers in Himachal Pradesh believed that honey bee flying towards the northern hills was indication of no rainfall. In Rajasthan many community believed presence of butterflies in the region indicates good rainfall and better harvesting of crops. There are many such examples across different demographic regions of the country.

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1631 Usha Deewani, Zabo - The art of impounding water, https://www.indiawaterportal.org/articles/zabo-art-impounding-water
Traditional Knowledge in India

Turmeric Patent – Turmeric having medicinal value is well known in India. In 1995, the U.S awarded Patent on turmeric to University of Mississippi Medical Center regarding its wound healing property. This Patent was objected by the Indian Council for Scientific and Industrial Research (CSIR). Though India has known the use of turmeric since ages, it was very difficult to find published information about it. However, 32 references were found in favour of India and the Patent was revoked.

Neem Patent – The Department of Agriculture, U.S.A had applied for the patent of Neem with regard to it being a method to control fungi. This Patent was objected by India since it has been regarded as a plant with medicinal value since ages in India. The European Patent Office (EPO) revoked this patent due to lack of novelty and inventive step.

Basmati Patent – Patent to ‘Rice Tec’ for a strain of Basmati rice was granted by the U.S.A. In the patent application, Ricetec also mentioned that good quality basmati rice grows in Northern India and Pakistan. The Indian Government had made claims to object the patent. However, three strains development by Ricetec are allowed patent protection and they are eligible to label its strain as “Superior Basmati Rice”.

The Warli Tribe – The Warli tribe from Maharashtra, India known for their World Class Art got its IP protection recently. A Geographical Indication tag was also registered which would benefit the tribe.

The Kani Tribe – In Kerala a TGBRI (Tropical Botanic Garden and Research Institute) model has been instituted under Travancore Cochin Literary, Scientific and Charitable Societies Registration Act, 1955. A patent was filed for the drug “JEEVANI” developed isi Malaysia. This drug “JEEVANI” was developed by scientist at the TBGRI based on the medicinal knowledge of Kani Tribe. The custodians of the Traditional Knowledge were given proper royalty for the Traditional Knowledge provided.

Traditional knowledge in other parts of the World

Amazon Rain Forest Plant Patent - The indigenous tribes of Amazon collected a plant named Banisteriopsis caapi to prepare a ceremonial drink called ‘Ayahavica’. It was prepared only under the guidance of traditional healers. A Patent was issued to Loren Miller by the USPTO over a variety of B.caapi. This patent was challenged by the Center for International Environment Law (CIEL) on behalf of the Coordinating Body of Indigenous organizations of the Amazon Basin (COICA). The USPTO revoked the patent but later on the inventor convinced the USPTO on April 17, 2001. The patent rights were thus restored to the innovator.

1634 Latha jishnu, The Massai are protecting their intellectual property rights, what of other like India’s Warlis? https://www.downtoearth.org.in/blog/economy/protecting-a-a-s-brand-59857
The Massai Tribe - Massai tribe is identified as the warrior tribe found in the South African continent known for their rich culture. This includes their World famous Shuka (a blanket cloth), bead work and their traditional dance. Top fashion brands including Louis Vuitton, Calvin Klein and Ralph Lauren have used Massai imagery and iconography to promote their beads. The total value of these interests is estimated at more than US $10 million a year. Issac Ole Tia lolo, a Massai himself formed a Massai Intellectual property Initiative to protect the interest of the tribe. This encouraged companies to pay for the royalties which are worth hundreds of million dollars.\footnote{1636}

Hoodia Cactus Controversy – The San Tribe from South Africa has tradition of using cactus for long hunting trips to starve off hunger and thirst. The South African Council and Research (CSIR) after thorough research patented P57, appetite suppressing element inside the Hoodia cactus. It was later licensed to a UK based Biotech company, phythofarm. A pharmaceutical Company Pfizer acquired the rights for developing P57 as a slimming drug and a cure for obesity for $32 million royalty. After knowing about this, the San Tribe threatened to sue CSIR for bio-piracy. In 2002 after mutual agreement it was agreed that any further sharing of Traditional Knowledge of Hooda plant will attract a future share in the royalty for the San Tribe. \footnote{1637}

Indian Legal Regime

In India there is no such legislation that addresses the Traditional Knowledge but Intellectual property laws have some provisions in relevance to Traditional knowledge.

- **Patent Act 1970**: After the amendment Act 2002, applicant must show its source and geographical origin of any biological material being developed. Similarly Section 25 of the Act Provides opposition on the ground of non disclosure of the geographical origin of the biological material quoted in the complete specification. Also it prohibits granting of patents U/S 3(p) of the Act which says “invention from a Traditional knowledge or duplication of known properties of Traditional Knowledge can’t be patented.”\footnote{1638}
  - **Designs ACT, 2000** : Designs Act prohibits registration of any design which is not new or having a prior publication in any part of India or any other country in tangible form or by use or in any other way.\footnote{1639}
  - **Trademarks Act, 1999**: Trademarks which usually consist of marks / indication which designate its kinds, quality, purpose, values, geographical origin and time of production of goods can’t be registered. Marks or indication which becomes customary in current language or established practices of the trade shall not be registered.
  - Also under **Copyright Act, 1957** having a prior publication in a public domain can’t be registered for copyright protection.\footnote{1640}
  - **Geographical Indication of Goods Act, 1999** is the most relevant legislation for protection of Traditional Knowledge, which aims for registration and better

\footnote{1636} https://www.downtoearth.org.in/blog/economy/protecting-a-tribe-s-brand-59857
\footnote{1637} V.J.Maharaj, Hoodia – A case study at CSIR, http://researchspace.csir.co.za/dspace/bitstream/handle/10204/2539/Maharaj_2008.pdf;sequence=1
\footnote{1638} The Patent Act, 1970
\footnote{1639} Design Act, 2000
\footnote{1640} The Copyright Act, 1957
The protection of geographical indication of goods. The main object of the law is to prevent the unauthorized access to these Geographical Indications from exploitation. Goods originating from a particular area/territory are due to the Traditional Knowledge, this legislation enables community to register GI in respect of an area/ territory across India.  

- **Biological Diversity Act, 2002**: This legislation was provided for conservation of Biological diversity and its components and prohibits any Intellectual Property Rights without prior approval of the National Biodiversity Authority which based on biological research from India. This Act is more defensive in nature and has precautionary measures to prevent misuse of Traditional Knowledge.  

- **Protection of Plant Variety and Farmers Right Act, 2001**: It is one of the rare legislations specifically devoted to plants and farmers. This Act ensures using, sharing and selling of goods produced by the farmers protected under the Act and also ensuring sharing of benefits arising out of plant genetics resources, that may come from sale of seeds and planting material of a protected variety. The community will also be compensated if the traditional or local variety is being used for research purpose.  

**International Legal Instruments**

Inventions that are well protected under Intellectual Property Rights do not fully protect the intellectual creativity by the indigenous community. A sui generis legal instrument is needed for the recognition of rights and claims of these communities.

**Food and Agriculture Organisation (FAO):**

The Food and Agriculture organisation has contributed well for the protection of Traditional Knowledge. It works for the protection of Traditional Knowledge in the forest department and it also includes programs on non-wood forest products and communities. The International Seed Treaty adopted by the FAO on November 30, 2001 in its 31st Session held in Rome was the biggest achievement. This treaty is also known as 'International treaty on plants genetic Resources for food and agriculture' (ITPGA). It is an attempt to protect the rights of farmers, local communities and traditional knowledge relating to plant genetic resources.

**Convention on Biodiversity (CBD):**

The CBD concluded on June 5, 1992 recognizes the significance of traditional use of genetic resources in the sustainable preservation of biological diversity. It incorporates provisions which provide for the encouragement, development of exchange and use of indigenous and traditional knowledge and technology in the spirit of CBD.  

**United Nations Conference on Trade and Development (UNCTAD):**

The UNCTAD has raised the problem of protection of Traditional Knowledge from the trade and development perspective. It focuses on the protection of Traditional Knowledge by exchanging national experience on policies. It has recognised the importance of Traditional Knowledge in promoting sustainable development of national and international economics.

**World Health Organisation (WHO):**

1641 Geographical Indication of Goods Act, 1999
1642 Biological Diversity Act, 2002
The World Health Organisation (WHO) established on April 7, 1948 has made efforts to protect Traditional Knowledge in relation to Traditional Knowledge in relation to Traditional Medicine. The WHO objective as set out in its Constitution is the attainment by all people of the highest level of health, as the economic and trade value of Traditional Knowledge, particularly the knowledge of traditional medicine and medicinal plants, in becoming increasingly recognised, more and more WHO members states have become concerned with the need to protect it and to secure the fair and equitable sharing of benefit derived from its utilization.

Efforts of WIPO to protect Traditional Knowledge:

The World Intellectual Property Organization (WIPO) has been in a process to develop enough legal protection for Traditional Knowledge. Still WIPO has failed to provide a proper definition for Traditional Knowledge, due to the complex nature of Traditional Knowledge. In its 26th and 27th session for WIPO Intergovernmental Committee has came up with three drafts:

- Consolidated Document for Intellectual Property and Genetic Resources
- Draft Articles for the Protection of Traditional Knowledge
- Draft Articles for Protection of Traditional Cultural Expression

WIPO Draft Articles on the Protection of Traditional Knowledge:

- Article 1 recognizes the subject matter of Traditional Knowledge which can be codified, oral or other forms.
- Article 2 identifies the beneficiaries of Traditional Knowledge
- Power given to communities to authorize/deny access to Traditional Knowledge.
- Prior consent should be taken from the Traditional Knowledge holders before sharing Traditional Knowledge.
- Cultural and Moral rights should be respected even after sharing of Traditional Knowledge.

While Traditional Knowledge is in public domain, should be protected under the national law to enforce protection to Traditional Knowledge. The WIPO draft articles to combine both positive and defensive protection which means it stops people from acquiring Traditional Knowledge outside community and granting their rights to promote and empower Traditional Knowledge.

Acknowledging of Traditional Knowledge

Traditional Knowledge must be protected and acknowledged. For example, it is being used for research and discovery of new pharmaceutical products but the consent of the Traditional Knowledge holders is not taken. The end product of such research work is patented but any kind of recognition is not provided to the Traditional Knowledge holders.

The Legal World is providing effective protection to inventions in the form of Patent, Copyright, Trademark etc but it is not the case with Traditional Knowledge. However, certain International bodies such as FAO, IUCN, UNEP, CBD and WIPO have made some level of contribution in protecting Traditional Knowledge.

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Suggestions
The current legislation lacks protection to our Traditional Knowledge and needs a universal legislation that addresses all problems related to Traditional Knowledge. A database to record all Traditional Knowledge under one platform, to ascertain no prior publication in case of any Intellectual Property Rights being granted. A portal for promotion and development of Traditional Knowledge and financial assistance for encouraging such knowledge should exist. Apart from Government, it is the duty of the communities, NGOs to protect Traditional Knowledge and ensure proper documentation to promote them in International platform.

Conclusion
Human civilization has developed some of the advance traditional methods, refined and generated from generation to generation. Such methods exist as an identity to these civilizations. Knowledge has proved to be there identity. Starting from food, health to textiles they have their own rich culture and heritage. Though IPR related legislation does prohibits exploitation to some extent but laws are still not effective to deal with all aspects of Traditional Knowledge.

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CASE COMMENT ON TRUMP V. HAWAII, No. 17-965, 585 U.S. ___ (2018)

By Souravi Das
ABSTRACT
The research paper focuses on the Majority opinion in the Trump v. Hawaii case. The judgement is analyzed through the lens of legal reasoning and logic. In this case, President Donald Trump issued Proclamation 9645, which restricted the entry of several individuals from certain nations. This Proclamation was challenged by the State of Hawaii on statutory grounds. Following this, the U.S Court of Appeal affirmed the injunction to prohibit implementation of the ban. However, the Supreme Court reversed the decision of the Court of Appeal.

In a 5-4 decision, Chief Justice John Roberts, along with Anthony Kennedy, Ruth Bader Ginsburg, Clarence Thomas, Stephen Breyer, Sonia Sotomayor, Neil Gorsuch, Samuel Alito and Elena Kagan delivered the judgement, wherein the majority decision was delivered by Justice Roberts, Neil Gorsuch, Clarence Thomas, Anthony Kennedy, and Samuel Alito. The concurring opinions were delivered by Anthony Kennedy and Clarence Thomas and dissenting opinion was delivered by Stephen Breyer, Elena Kagan, Sonia Sotomayor and Ruth Bader Ginsburg.

FACTS
The 45th President of the United States of America, Donald John Trump, had issued an executive order on 27th January, 2017 titled as, “Protecting the Nation from Foreign Terrorist Entry into the United States”, (the original order). The order had imposed a temporary ban on those people who entered into the United States (U.S.) from the seven Muslim-majority countries. Soon, the order was the subject of various lawsuits, amongst which is the lawsuit of Washington v. Trump\textsuperscript{1646}, the Western District Court of Washington had put a temporary injunction, thereby prohibiting the government from enforcing the provisions under the order. Following this, when the Government filed the emergency motion for putting a stay order on the court decision, the Ninth Circuit Court of Appeals denied the motion of the government. It was found by the Ninth Circuit that the imposition of an injunction was justified, as the order might have caused injuries to its educational institutions, various organs of the state and also that the order was unconstitutional in nature.

Further, on 6th March, 2017, the President issued a new order which directed that the entry of the individuals from the countries listed under the previous order (except Iraq) was to be suspended for a period of 90 days. The new order was subjected certain exceptions. Even though it was contended by the government that the order was neutral in its nature, yet various lawsuits challenged it on the grounds of constitutionality, and alleged that the new order was discriminatory towards the individuals on the grounds of religion. One of the lawsuits was the case of Trump v. Hawaii\textsuperscript{1647}, where the State of Hawaii as well as Elshikh made a petition in the federal court of U.S. for issuance of a temporary restraining order so as to prevent the enforcement of the order. The complaint by Elshikh contended that the order was discriminatory and violative of the Constitution as well as the ‘Immigration and Nationality Act’ (INA) as it denied

\textsuperscript{1646} Washington v. Trump, 847 F.3d 1151

them off their rights to associate with their families overseas. The State of Hawaii also contended that due to the ban imposed on travelling, the functioning of its universities and tourism industry was also affected.

On 24th September, 2017 Proclamation No. 9645 was issued by President Trump, restricting the entry of those individuals in the U.S. whose entry would be harmful for the interest of America. Eight countries were identified who failed to share requisite information of its citizens for the purpose of adequate determination for entry. In 2018, the President in consultation with the Secretary of Homeland Security resolved to lift the travel ban imposed on Chad, as it showed significant improvement in its practices. Consequently, the plaintiffs refurbished their claims regarding the Executive order to incorporate the Proclamation. The proclamation was also challenged because it attempted to exercise such power which was not vested upon the President, either by the Constitution or the Congress. The Proclamation was struck down by the Ninth Circuit and review was granted by the Supreme Court.

### RELEVANT CASE LAWS

The Court addressed the claims of the plaintiffs by explaining that the court in its past decisions expressed deference to the political branches with regard to the admissibility and exclusion of aliens in the U.S. The Court cited the case of Fiallo v. Bell, where it was held that entry and prohibition of foreign nationals was a fundamental sovereignty exercised by the political department of the Government and immune from the control of the judiciary. The Court also cited Harisiades v. Shaughnessy case, where it was held that any policy made for foreign nationals are essentially interlinked with the contemporary policies with regard to the conduct of international relations. Further, by citing Mathews v. Diaz, the Court explained that the deference towards the political branches was because the decisions regarding entry and exclusion of aliens may involve political and economic circumstances.

However, the majority explained that even though the aliens seeking admission had no constitutional right to enter, the court has conducted judicial inquiries whenever denial of visa burdened the constitutional right of the citizens of U.S. The most significant precedent with regard to this was Kadic v. Jasmund, where a journalist was excluded from entering U.S. As such, the professors brought a suit against the exclusion. The Court held that the standing of the professors was justified and the Court reviewed whether Executive had a legitimate reason for excluding the entry of Mandel. Ultimately, the Court concluded that when power is exercised by the Executive legitimately and with a bona fide reason, the court will neither look into the reason behind such exercise nor will it call for any justification. The case of Abourezk v. Reagan was also cited, where the United States Court of Appeal described that under Section 212(f) the President has the authority to replace the inadmissibility provisions provided under the INA. The Court upheld that the Proclamation did not violate Section 1182(f), as the President conducted a review before restricting the entry of 

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1648 430 U.S. 787, 792 [1977]
1649 342 U.S. 580, 588-89 [1952]
1650 426 U.S. 67, 81, 96 [1976]
1651 408 U.S. 753 [1972]
1652 785 F.2d 1043, 1049, n.2 [D.C. Cir. 1986]
foreign nationals whose entry may harm the interest of U.S. Also, the Court explained that Establishment Clause was not violated as the concern of the Proclamation was national security.

ISSUES
- Are the claims of the plaintiffs posing a challenge to the authority vested upon the President for issuance of the Proclamation justiciable in federal court?
- Whether the President was granted the authority by the INA for issuing the Proclamation?
- Whether the Proclamation was violative of the Establishment Clause?

JUDGEMENT
The Supreme Court held that the Proclamation neither violated the statutory authority of the President nor the Establishment Clause. On analyzing the claims, the Chief Justice John Roberts held that the Executive order by the President was in exercise of the discretionary power vested upon him by the Constitution and was in accordance with Section 1182(f) of INA. The Section 1182 states the power vested on the President to restrict the entry of aliens in the U.S. Also a global multi-agency review was conducted by the President in order to ascertain the purview of the proclamation and the review identified that the entry of certain individuals will be detrimental as far as the national security was concerned.

The Chief Justice held that, it was under the authority of the President to issue the Proclamation and on the grounds that the Proclamation took into consideration the issuance of the visas if individuals from the banned nations met with certain conditions. Also, the Proclamation did not make any discrimination, as it did not issue the visas on grounds of nationality. Hence the Proclamation did not violate the Section 1152 (a)1(A) of INA. The Court showed that since earlier Presidents had also undertaken similar actions, and the Proclamation also permitted exemptions, therefore, the Proclamation was in accordance with Section 1182.

Justice Roberts further held that, the Plaintiff’s failed to show the likelihood of accomplishment of their claims that the Proclamation was violative of Establishment Clause. What the Court had applied was a ‘rational basis’ and held that the Proclamation neither favoured nor disfavoured any religion. This is because there were several Muslim-majority nations upon whom the travel ban was not imposed, and several non-Muslim majority nations whose names were present in the Proclamation. Rather, the Court observed that the President could have provided a sufficient justification over the matter of national security to issue the Proclamation as per the authority given by the INA, although the Proclamation was sufficiently detailed than the previous orders under Section 1182(f). Hence, the plaintiff’s Establishment Clause claim was not sufficient enough for the Court to maintain an injunction against the Proclamation, as such, the Court did not grant the preliminary injunction against the restrictions imposed on entry. Further, the Court was not satisfied with the evidences of the plaintiffs. The majority decision also took reference from the case, where an executive order was issued by President Roosevelt during World War II, so as to keep the Japanese-American in internment camps.

1653 Webster v. Doe, 486 U.S. 592,600
1654 Korematsu v. United States, 323 U.S. 214 [1944]
ANALYSIS OF THE JUDGE’S REASONING

The Court reasoned that the Proclamation was within the authority delegated to the President, as in accordance with Section 212(f), the President has power to suspend entry of such individuals, whose entry will be detrimental for the interests of the country for a period he deems necessary. Thus, the President has sufficient power to impose restrictions on entry\(^{1655}\), besides those specified under the INA. Further, the multi-agency review that was conducted substantiates that the Proclamation was based on results of the review, thereby satisfying the requirement of Section 212(f) wherein the President should find out if the entry of such aliens would be detrimental to the country’s interests.

For the arguments presented by the plaintiffs with regard to the legislative purpose of Section 212(f) where they contended that the section did not provide the President with the authority to form policy judgements on the matters already addressed by the Congress in other policies. In this case, the Congress earlier addressed the issue regarding the countries, which failed to share sufficient information required for the vetting process. To this, the majority reasoned that the Proclamation was supportive of the approach of Congress, and that the decision of Congress did not limit the Executive from issuing stringent restrictions on foreign nationals coming from such countries which did not provide adequate information and those which raised terrorism concerns. Further to the contention of the plaintiffs that the 43 previous proclamations targeted specific groups of foreign nationals, whose conduct may not be in accordance with the immigration laws or the entire nationalities, the Court explained that Proclamation did not target them for their activities, but because the conduct of their government was conflicting the interest of U.S.

The Plaintiffs also alleged that the Proclamation was violating the Establishment Clause, as it alienated the Muslims. For this, they asserted that most of the countries which were suspended from entering, were Muslim-majority countries, as such they contended that the reports of the multi-agency review were ‘foreordained’. In order to support their claim that the restrictions on entry were moved by religious considerations and not for the purpose of national security, the plaintiffs even cited few statements made by the President. However, the Court concluded by providing the reasoning that the Proclamation was neutral to religion. The Majority explained that purpose of the Proclamation was to restrict the entry of such foreign nationals who failed to satisfy the vetting requirements, and induce other countries to improve the vetting process. It was also noted that the Proclamation did not mention about any religion. The Court stated that those nations were earlier designated by the Congress for posing potential national security risks as per Section 217(a)(12)(A) of INA.

The dissent opinion of Justice Sotomayor included the decision of Korematsu v. United States\(^{1656}\), where it was held that the policy of the Government detaining Japanese individuals and certain U.S. citizens during World War II was solely based on race. To this, the Court reasoned that the Korematsu case had no relevance in this case, and also highlighted the

\(^{1655}\) Sale v. Haitian Centers Council, Inc, 509 U. S., at 187

\(^{1656}\) Supra at 9.
distinction between the circumstances of the two cases, where in the Korematsu case there was forcible relocation of the citizens of U.S to concentration camps, on the basis of race. But, in this case, the Proclamation restrains the entry of certain foreign nationals due to national security concerns.

**CRITIQUE**
The judgement given by the majority provides sufficient reasoning as well as explanation. The Court has responded to the claims of the plaintiffs and has provided justifications wherever the claims were inadmissible. The Court has given well grounded reasons to the claims of the plaintiffs that the Proclamation neither violated the Establishment Clause nor did the President exceed the authority that was vested upon him under the INA. For this, the Court justified that prior to the issuance of the Proclamation which restricted the entry of certain foreign nationals, a worldwide review was conducted and based on the reports of the review, the Proclamation was issued. The Court also stated that the Proclamation was concerning the national security, as such the restrictions were imposed on those nations which failed to provide both sufficient information and efficient vetting process. The Court further concluded that the Proclamation was neutral towards religions. Besides, the Court also referred to relevant cases to arrive at the judgement. The Court held that the issued Proclamation had provided for a rational basis upon the restrictions imposed on entry of foreign nationals. As per the majority, besides the case of the President emphasis was also extensively laid on the Constitutional Office of the Executive. The Court accorded President Donald Trump with the same deference as was provided to the previous Presidents in similar matters.

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**FUNDAMENTALS AND URGENT REFORMATION IN LAW OF TORTS**

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ABSTRACT
We live in an ever-evolving society and Indian society is no exception to that. Being a country with such a vast diversity is obviously subjected to requiring changes. Be it political, legal, social, or cultural field changes are required for the betterment of the society. One such field that requires fundamental and urgent reformation is Law of Torts.

Tort can be understood as an act by a person towards another which causes harm to the other person. The wrongful act done causes either injury or harm to the other person. Law of torts is based on the idea that everyone in our society has certain rights and duty to respect other’s rights. When these rights are infringed compensation is recoverable. The main objective of this law is to compensate the aggrieved party. The present tort law in India is still based on the pre-independent British model which is turn based on England’s common law principles. Indian tort law is still largely dependent upon judicial interpretation. However, in India law of torts is not codified which again causes certain problems while giving judgements. The significance of the matter lies in the fact that this law prevails in every legal system yet it is somehow underrated in India. There are certain fundamental and urgent changes that needs to be done in the law of torts in order make it more useful and helpful. The paper intends to bring into light the present scenario and analyse the fundamental elements regarding torts which needs to be reformed urgently. The paper aims to have a detailed study of changes required and also suggest reforms which will help in making the law more functional and practical. It also includes certain case laws which will help us in better understanding of the topic. In this paper research paper, I have used doctrinal method of research. Secondary data collected from books, articles, journals and internet is used in this research.

Keywords- wrongful act, infringes, compensation, not codified, fundamental, urgent changes, reforms.

INTRODUCTION
Every person is entitled to certain rights and with every right there also comes a duty. Tort can be understood as an act by a person towards another which causes harm to the other person. Law of torts is based on the idea that everyone in our society has certain rights and duty to respect other’s rights. When these rights are infringed compensation is redeemable. When a right is infringed, simultaneously a duty is also infringed. The main objective of this law is to compensate the aggrieved party. This law is based on obligation which means that every person has an obligation to respect other people’s rights. Every country has its own law of torts which from country to country. Every country has their own enactments, regulations, and rules attached to their country’s law of torts. There are certain elements recognized by the country which should be present to constitute a tort, and these elements vary from one country to another. But, the basic understanding of the law is same all over the world. Similarly, India also have its own law of torts. The torts law in India has been in existence for a long time. However, the law is not as efficient as it should be in India. In India, the law of torts is not codified which gives rise to other certain problems. There is an urgent need of reforms in law of torts in India to make it more efficient and practical. There are always question arising like whether the law of torts really
necessary in India? Is the torts law overlooked in India? And many more such questions. India is still in its pre-mature stage when it comes to tort laws however, steps such as codification of certain portions of law are been taken for increasing the efficiency of the law.

**TORT: MEANING**

The term tort has been derived from the Latin word ‘Tortum’, which means to twist or to crook or a wrongful act which is not lawful. The word tort is equivalent to the word ‘wrong’ in English language. Norman jurists are the one who introduced it in English law.

A wrong can be civil or criminal. Tort falls into the category of civil wrong which is different from breach of contract or breach of trust. Everyone in the society are expected to behave in a straightforward way and when someone gets diverted from that way, the act becomes crooked and the person is said to have committed a tort. Tort can be understood as an act by one person towards another person which causes harm to the other person. The wrongful act done causes either injury or harm to the other person. Tort is considered to be a private wrong and so the injured party has to file a suit as a plaintiff. The person who commits the tort is known as the tortfeasor and the person against whom the tort is done is the aggrieved party. When comes to tort the most important remedy is damage. Once a tort is committed it is impossible to undo the harm caused by it but it is possible to reduce the harm by compensating the injured party. For example, if the reputation of a person has been attacked, there is nothing that can be done to restore the reputation, but a compensation equivalent to the reputation can be paid to the injured party. The damages awarded to injured party in torts are in the form of unliquidated damages. Unliquidated damages mean that the damages given to the injured party are not predetermined by the parties involved and are left on the discretion of the court.

"civil wrong for which the remedy is common law action for unliquidated damages and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation." – Salmond

The definition given by Salmond gives a fair idea about tort but it has certain shortcomings. The definition fails to underline the essential features of a tortious act. It talks about wrong but does not explain what is a wrong? Also, it says tort to be a civil wrong but the term ‘civil wrong’ itself needs explanation which is not given. The definition is informative but it is not perfect.

The essential elements of torts are:

- Wrongful act or omission
- Legal damage
- Legal remedy

The law dealing with torts is known as Law of Torts. Law of torts is based on the idea that everyone in our society has certain rights and duty to respect other’s rights. The right of a person is the duty of the other, it means that when a person is having a right it is the duty of the others to respect his/her right. This law aims at enforcing these rights and duties. When these rights are infringed compensation is recoverable. The justice in this law is provided by compensating the injured party and the idea behind this is to make good the loss suffered by the party. The main aim of law

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of torts is to compensate the aggrieved party and not to punish the wrongdoer.

**LAW OF TORTS AND THE WORLD**

**USA**

In USA the law of torts is based on common law along with strict norms imposed by the respective State. Each State have their own Civil Codes that deals with the law of torts. Their law is well organised, better schemed and with an aim to have payment of compensation. The law in USA is more categorized in its form which mainly recognizes it under three heads:

1) **Intentional torts** - which requires intention for an act.
2) **Negligent torts** - it is based upon failure to fulfil a duty with reasonable care by a prudent mind.
3) **Liability defined torts** - it includes principles of strict liability, product liability and other such liabilities.

The one thing that is common between the entire law of torts in USA is that they understand the mental trauma one goes through when a tort is committed against them. This probably one of the main reasons why number of litigations in torts is high in number over there. The common objectives to be secured by the law of torts in USA are as follows:

- To create a social environment where everyone is aware of their responsibilities.
- To create a peaceful method for resolving the disputes.
- To be able to take action and curb the wrongful actions.

**UK**

The law of torts in UK, predominantly take the form of judicial precedents. However, a few regulations have been made within the ambit of law for the betterment and welfare of the citizens. The law of torts recognized in UK is primarily of two types:

1) **Negligent torts**
2) **Intentional torts**

Also, a new developing branch of vicarious liability is present there. The key elements to be proved in UK for tort are:

- Existence of duty
- The breach of that duty
- Damages as consequence of that breach.

Thus, we can say the whole idea of law of torts in UK mainly revolves around the concept of duty.

**FRANCE**

The French law of torts is a codified one. They the general rule as set forth by Article 1382 of the French Civil Code proclaimed the fault principle: one must make reparation for injuries caused by one's fault. The three elements recognised in French law of torts are:

1) **A fault**
2) **A damage**
3) **A link between the two**

In French law, one does not necessarily need to be conscious of the wrongful nature of one’s behaviour in order to commit a tort. Their main principle is that all rights and interests are protected. Another principle governing the French law is that there should be full compensation. The idea is to

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make the compensation match the harm suffered by the person as much as possible. Thus, the full compensation covers all the material injury caused to the person’s body, his property and his estates as well as non-material injury such as pain, agony, suffered by the injured party.

**Australia**

Australian law of torts is mainly running on precedents rather than on legislations. Australia mostly refers and relies on laws and judgements pronounced by UK. They have attempted from time to time to create their own identity in this respect.

**Law of Torts in India**

The term tort in India has been in existence since the pre-independence era. The Sanskrit term ‘jimah’ meaning crooked was used in ancient Hindu law texts in the sense of ‘tortious fraudulent conduct’1659. However, the concept of tort had very narrow conception under Hindu law and Muslim law as compared to the English law. The punishments for crime had more prominent place in those systems as compared to compensation for wrongs. The present law of torts in India is mainly based on English law of torts which itself is based on the common law of England. This was created appropriate to the Indian conditions appealing to the principles of justice, equity and good conscience and as amended by the Acts of the assembly. However, before applying any control of English law, the Indian courts can check the suitability of those law in Indian conditions. In the case of M.C. Mehta v Union of India1660, Justice Bhagwati observed, “We have to evolve new principles and lay down new norms which will adequately deal with new problems which arise in a highly industrialized economy. We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or for the matter of that in any foreign country. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.”

The jurisdiction of section 9 of the Civil Procedure Code1661 which allows the civil court to try all cases of civil nature also includes tortious cases and liabilities. In the case of Jay Laxmi Salt Works (p) Ltd. v. the State of Gujarat1662, Justice Sahai observed, “Truly speaking the entire law of torts is founded and structured on morality. Therefore, it would be primitive to close strictly or close finally the ever-expanding and growing horizon of tortious liability. Even for social development, orderly growth of the social and cultural the liberal approach to tortious liability by the court would be conductive.”

The law of torts in India does not come from a statute and is not codified. Irrespective of this fast, it has been in existence for a very long time, however the number of cases registered under torts has been reducing. If we compare the number of cases filed under tort laws in US and UK, the tort litigation is very low in India.

It is often questioned whether law of torts is needed in India? The courts in India has time and again expressed their stand that law of torts is essential in India and is very important for the development and growth of the society. The courts and therefore the

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1660 M.C. Mehta v Union of India, AIR 1988 SC 1037 (India).
1661 Section 9 of Civil Procedure Code, 1908.
government have recognized the importance of torts in their ruling by recognizing governmental torts, providing damages in case of negligence, finding on constitutional torts, victim compensation schemes, evolution of tort of sexual harassment, etc. Although, the government and judiciary has realised the importance of law of tort, a large part of the general public is yet to understand its necessity. The law of torts is one subject that prevails in legal spirit of India but it is not appreciated enough even after the fact that it is universally applicable. Even after the great relevance and applicability of this law, it is still somehow underrated in India. Another question that comes up is that just because it is underrated in India, is it correct to say that it is simply overlooked? Well, it will not be correct if we say that law of torts is completely overlooked in India. The development of ‘theory of absolute liability’ in case of M.C. Mehta v. Union of India\(^{1663}\) is a very significant explain to justify that law of torts is not simply overlooked in India.

So, we cannot simply say that law of torts is not necessary or is overlooked in India. One thing that can be said surely is that the law is not fully developed in India and reforms are need to make it more efficient and effective.

**Fundamentals and Urgent Reformation in Law of Torts**

Society is never stagnant or still and demands change. When society changes, certain changes are required to be made by the countries in order to keep up with changing society. Similarly, changes in the existing laws becomes essential and amendments are to be made or new laws are to be enacted. India is a vast country with an ever-growing population. In India, the Parliament never made strict norms in respect to the law of torts and maybe that’s the reason why this law is not properly developed in the country. Law of torts is not that popular among the people in India and still has a huge scope for development. There are certain loopholes in the torts law in India and reforms are much needed. The reforms will not only help in increasing the efficiency of the law but it will also create awareness among the people regarding this law.

Some fundamental and urgent reforms in law of torts are as follow:

- The law of torts in India is not codified. It does not come from any statute. This may be seen as a reason behind its lack of development and unpopularity among the people. Since it is not codified it is difficult for the people to be aware of all the acts following under the category of torts and the relief provided for them. Time and again the courts have faced the need of codifying the law for increasing its efficiency. In modern time, some part of parts of the law of torts have been codified, as for example, Motor Vehicle Act, Fatal Accidents Act, Sales of Goods Act, Indian Patents and Designs Act, etc. Still, a major part of this law is based on legal precedents. It has been observed that the proper codification of the law of torts in order to facilitate its greater use. The amount of compensation ordered by the court to be paid by the defendant is the ‘damages. Since there is no fixed rule on this behalf, filing a suit and approaching court becomes expensive for the plaintiff.
In addition to the suit expense, a high rate is charged by the legal petitioners. Many foreign countries have passed a regulation according to which the legal petitioners are entitled to receive only a fixed amount from the compensation received. However, in India there is no such regulation. There is a need to enact a regulation for fixing an amount to which the legal petitioner will be entitled.

- There is a difference between the amount of damages. Our system takes into account the concept of basic necessity while deciding the compensatory amount. Necessity does not only include just bare essentials but also the conditions the claimant was used to before the occurrence of the incident. Since, there is a difference in economic conditions of separate claimants, different amount is awarded which cause disparity. Due to this disparity, there a loss of faith in the justice delivery system. In order to maintain the faith of people, courts should stop taking into account the basic necessity concept and some other method or concept should be developed which will consider all the claimants to be equal irrespective of their background or any other such factor.

- One thing that India is always known for is having a systematic procedure in field of litigation. Because of this system we have come to a situation where the judiciary is overburdened with cases. The judiciary has to work overtime and overnight studying these cases, a major portion of which are just filed to create pressure on the defendant. What needs to be done is that a stagnant rule should be made not only for tort cases but for across the whole judiciary that, the person who files the case shall also pay the fees for the other party in case he/she loses the case. This way with the fear of losing money, only genuine cases will be filed by the people.

It is seen that law of torts is clearly being ignored by the legislature. The reason behind this may be that the amount of litigation attracted under torts would be large in number and litigation often seen as negative from the eyes of common Indians. However, this cannot be a legitimate reason to avoid law of torts. The legislature should not ignore the law but should take measures make it more applicable in the society.

The above mentioned are the few of the many reforms that are urgently required in India to make the law of torts more an efficient and practical. In short we can say there are lot of reforms required including increasing the number of commissions dealing with specific tort cases, litigation expenses need to be reduced and also the litigation duration is not short. If the reforms are taken seriously then definitely the law will develop at a fast pace. As we can see that law of torts is an ever growing subject and should be changed as the society changes.

**CONCLUSION**

Even though there are a large number of problems and difficulties, it would not be correct to say that the law of torts is not at all developing in India. The law is definitely developing but at a slow rate. The law is without any doubt necessary in the country its just that it needs enactment and few reforms to make it more efficient.

Law of torts is the subject that has not got enough appreciation in India. The reason behind the lack of appreciation is merely that people till now are not fully aware about it. Even after the lack of awareness the necessity of the law is very well understood by the courts and the government. The law is not simply overlooked and from time to time theories in torts are developed as and when required.

The law of torts is still in pre-mature stage in India, with proper reforms and changes it
can be made as efficient as any other codified law present today.

Thus, it can be concluded that the codification of the law of torts will help in the development and growth up to a great extend in India. Remaining few problems can then be solved with certain reforms in the law. Thus, India is on its way to make this law more structured, well-planned and systematic.

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The Insolvency and Bankruptcy Code was enacted in the year 2016 and it was enforced with effect from December 1, 2016. The provisions of this legislation relates to Corporate Insolvency. Prior to the Insolvency and Bankruptcy Code, there were several other acts like the Companies Act of 1956, Sick Industrial Companies Act of 1985, and many others which did not provide any strong solution by itself. The main objective of this act is to make Corporate Insolvency a time-bound process and protect the creditors. It also aims to prevent corporate deaths and increase the efficiency of the business in our Country. Since the act has come into force, it has been amended so far for five times. The Recent one being the *IBC (Amendment)* Ordinance, 2020 promulgated on June 5, 2020. The Impact of the Covid-19 pandemic has caused many businesses to reach the verge of disruption and has also caused a lot of loss to the financial economy of the country. In order to boost the economy and also to help small companies and MSMEs, several financial packages were announced by the Finance Minister Mrs. Nirmala Sitharaman as a part of the Government’s policies to provide relief to the small businessmen and to uplift the financial conditions of the Country. The Amendment has many flaws which are discussed in this paper. The changes have raised many questions. The paper analyses all the changes that have been brought by the ordinance. It also recommends the alternative remedies for creditors and debtors.

**Introduction.**

The Insolvency and Bankruptcy Code was enacted in the year 2016 and it was enforced with effect from December 1, 2016. This Code deals with the nuances of Corporate Insolvency. Prior to the Insolvency and Bankruptcy Code, there were several other acts like the Companies Act of 1956, Sick Industrial Companies Act of 1985, and so on which did not provide any strong solution by itself. The objective of this act is to make Corporate Insolvency a time-bound process and protect the creditors. It also aims to prevent corporate deaths and increase the efficiency of the business in our Country. Since the act has come into force, it has been amended for five times so far. The Recent one being the *IBC (Amendment) Ordinance, 2020* promulgated on June 5, 2020. As the entire world is struggling with the Global Pandemic of Covid-19, many countries like the U.S.A, UK, Australia, etc. have adopted various measures to meet the problems of Insolvency that would arise due to the pandemic. Keeping in mind the same problems, the Central Government of our Country Introduced the IBC (Amendment) Ordinance, 2020 to suspend the initiation of new CIRP by the financial creditors (Section 7), operational creditors (Section 9) or voluntary filing for Insolvency (Section 10) and also to suspend filing of an application by the resolution professional under Section 66(2) of the Code.


The impact of the global pandemic has caused many businesses to reach the verge of disruption and has also caused a lot of loss to the financial economy of the country. In order to boost the economy and also to help small traders and MSMEs, several financial packages were introduced by the Finance Minister Mrs. Nirmala Sitharaman as a part of the Government’s policies to provide relief to the small businessmen and to uplift the financial conditions of the Country. The Central Government to help smaller section of the economy and the MSME’s and to reduce the burden on the National Company Law Tribunal (‘NCLT”) and National Company Law Appellate Tribunal (“NCLAT”) through powers bestowed upon it by way of the proviso to Section 4 of IBC passed a notification under which it has increased the minimum amount of default for CIRP under IBC, from a sum of Rs. 1,00,000 (Rupees One Lakh) to Rs. 1,00,00,000 (Rupees One Crore). The Notification also stated that creditors cannot file an insolvency application against borrowers for default of value less than 1 Crore.

The highlight of the IBC (Amendment) Ordinance, 2020 is the insertion of a new section i.e. Section 10A. Section 10A sanctions the suspension of Section 7 (Initiation of CIRP by financial creditor), Section 9 (Initiation of CIRP by operational creditor) and Section 10 (Initiation of CIRP by corporate applicant).

Another change brought about by the Amendment is the insertion of Sub-section (3) of Section 66. The provision of sub-section (3) under Section 66 prohibits the Resolution Professional from filing an application under sub-section (2) of Section 66 of the Insolvency and Bankruptcy Code (hereafter to be referred to as “IBC”).

Critical Analysis of the Ordinance.

Increasing the threshold amount from Rs. 1 lakh to Rs. 1 Crore.

The Finance Ministry introduced this change to help the small entrepreneurs and MSMEs that might be terribly affected by the pandemic and have a greater chance of going into liquidation as they are out of business during the lockdown period. Thus, the main rationale behind increasing the limit is that the small and medium enterprises get more time to recover from this. NCLT and NCLAT would also be relaxed by this move as it would result in a lower amount of cases coming to it. But one of the issue to be considered is whether the increase in the threshold amount for initiating application under section 7, section 9 is a temporary or a permanent measure? It can be more of a permanent measure as the Union Government would definitely want to reduce the burden of low claim cases on the NCLT.

Another pertinent question that relates to this increase in threshold amount is the application of it. As the law is prospective in nature, the notification should apply only to the fresh application for initiating insolvency proceedings and not to the applications filed before 24th March 2020. This was established by the NCLT Chennai Bench on 2nd June 2020 in the case of Arrowline v. Rockwell. As there was no clarification on whether the application of the notification would be retrospective or prospective, the NCLT bench held that, the Notification would be considered to be
prospective. The same was further held by the NCLT Kolkata Bench in the case of *Foseco India Limited Vs. Om Boseco Rail Products Limited*. The Hon’ble Chennai Bench in the *Arrowline Case*, while coming to this decision, analysed the concept of “vested rights” following the decision of the Hon’ble Supreme Court in *Karnail Kaur v. State of Punjab*, which in turn followed *Garikapati Veeraya v. N. Subbaiah Choudry* to hold that rights vested upon a party when an application under section 7, 9 or 10 of the Code is filed and as a result of the same, rights vest in parties only upon filing of the application under Section 7, 9 or 10 and not any time prior. So basically, even if a notice under section 8 has been furnished by operational creditors, the right to invoke jurisdiction of the NCLT for IBC proceedings only occurs on the filing of the application. Consequently, it appears that even for defaults which occur prior to 24th March 2020, IBC proceedings cannot be maintained after 24th March 2020, if the default amount is not more than Rs. 1 Crore. This does not depict that the Notification dated 24th March 2020 is retrospective, but will remain prospective, although having effect on some previous facts, which was explained in *Ramji Purshottam v. Laxmanbhai D. Kurlawala*. Increasing of the threshold amount will highly impact the operational creditors because when viewed from a commercial standpoint, operational creditors have dues of smaller value and thus were getting benefitted from the threshold limit of 1 lakh. So, if this change brought about is a permanent change, the operational creditors would face a tough time in recovering their money. Another important thing to note is that unlike financial creditors, operational creditors are not vested with the right to file a joint application for recovering of their debts from the corporate debtors in NCLT. This extinguishes the option of more than one operational creditors coming together to reach the threshold of 1 Crores so that they can file an application under Section 9 of IBC. Financial creditors won’t be affected much by the increase in the threshold amount as financial creditors mostly have large exposures to corporate debtors which are more than 1 Crore and even if a financial creditor has dues which are less than 1 Crore, two or more financial creditors can file a joint application under Section 9 of IBC which would help them to cross the threshold limits.

**Insertion of Section 10A**

The drafting of the newly inserted section 10A creates a lot of ambiguity. There are many companies that are in debts even before the pandemic existed. If these sections are suspended, the rightful interest of the creditors would also be suspended for the current period as they would not be able to raise or initiate any proceedings. Suspension of Section 10 lacks rationale, as suspending the rights of the companies voluntarily willing to go into liquidation makes no sense. There are many companies which itself wants to go for liquidation due to many reasons or maybe because they believe that they cannot survive irrespective of the pandemic.

Article 19(1)(g) of the Indian Constitution guarantees every citizen the right to practice any profession, or to carry on any

1668 CP(IB)/1735/KB/2019
1669 (2015) 3 SCC 206
1670 AIR 1957 SC 540
1671 (2004) 6 SCC 455
occupation, trade or business. The right to carry on a business has three facets:\(^\text{1672}\) a) the right to start a business b) the right to continue a business c) the right to close a business.

The Apex Court in the landmark judgment of *Excel Wear v. Union of India*\(^\text{1673}\) held that: the right to close down a business was an essential part of the fundamental right to carry on any business guaranteed under Article 19(1)(g). The Supreme Court has specifically stated in its judgment that the right to carry on any business also provides the inherent right to close the business as no person can be compelled to run the business in case of losses or other circumstances. So the government’s move to block the way of the Corporate Debtor by Suspending Section 10 infringes the fundamental right provided to the corporate debtor under Article 19(1)(g) of the Constitution of India.

The right to shut down a business available to the Debtor is not absolute but subject to the reasonable restrictions under Article 19(6) of the Constitution. The Supreme Court in *Narendra Kumar v. Union of India*\(^\text{1674}\) held that “In applying the test of reasonableness, the Court has to consider the question in the background of the facts and circumstances under which the order was made, taking into account the nature of the evil that was sought to be remedied by such law, the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It will also be necessary to consider in that connection whether the restraint caused by the law is none than was necessary in the interest of the general public”. Therefore, it can be clearly understood that the ordinance brought into effect is in violation of the fundamental rights of the Corporate Debtor. As the Apex Court had observed in the case of *Sodan Singh vs. N.D.M.C.*\(^\text{1675}\) that the purpose of ‘trade and business’ is ‘subsistence’ or ‘profit’ and therefore taking away the same by the way of ordinance and denying the corporate debtor his right to initiate voluntary insolvency proceedings under Section 10 of the Code without keeping it under the ambit of reasonable restriction under Article 19(6) of the Constitution.

Another thing to evaluate is the suspending Section 7 in relation to the RBI circular of June 7, 2020. As per the circular, Banks are provided with 210 days’ time period to produce a resolution plan for the borrowers and if such is not done, it must give 20% additional provisioning which should be over and above the provision they hold and such provisioning will go up by 35% if till 365 days no plan is made. Thus, if the Government is planning to suspend section 7, RBI must take back its circular in this regard or else banks would be at a negative end.

Covid-19 has created a great impact on the economy of our country that has forced various businesses to close down due to heavy losses incurred by them. These circumstances cannot be altered by the businessmen wherein it may not be possible for some of them to carry on their business and thus suspending Section 10 of the IBC not only takes away the reasonable right of the owner to shut down his business, which is essentially a fundamental right of his but

\(^{1672}\) Barsi Light Railway Company Ltd and Ors v. Joglekar (K.N.) and Ors (1957) 1 LLJ 243 SC

\(^{1673}\) AIR 1979 SC 25

\(^{1674}\) AIR 1960 SC 430 (437)

\(^{1675}\) (1992) 5 SCC 52
also increases the troubles of already distressed debtor.

*Insertion of the Sub-Section (3) of Section 66.*

The Ordinance has also inserted sub-section (3) to Section 66 of IBC thereby prohibiting the Resolution Professional from filing an application under sub-section (2) of Section 66 of the Code. The introduction of this new sub-section can result in Directors/Partners of a Corporate Debtor engaging in illegal acts during the period of application of Section 10A causing defaults and still enjoy the immunity provided to a corporate debtor under Section 10A. The Insertion of the new sub-section (3) to Section 66 reduces the powers of a Resolution Professional from a chief of the process to a silent participant witnessing potential frauds.

Section 66 of the IBC basically deals with ‘Fradulent trading or Wrongful trading’, so the proposed Section 66(3) seems to be irrational. It appears to excuse lack of due diligence by the Corporate Debtor resulting in loses to creditors during the Exemption Period. Such an exemption may result in directors/partners of corporate debtors to engage in Fraudulent transactions such as inappropriate usage of funds or extortion of money without facing actions under Section 66 of IBC and that would eventually impact the realizable value for its creditors.

*Alternative remedies available with the Creditors/Debtors.*

The primary idea behind the Code was re-organisation and insolvency resolution in a time-bound manner for the maximization of the value of assets. In order to not alter the same in the present economic scenario, notwithstanding the ambiguities, the Ordinance is a great move. However, Suspension may lead the creditors to seek a solution under enactments like the SARFAESI Act/RDDBFI Act, thereby, defeating the real reasons behind introducing the Code. It also contradicts the interest of a corporate debtor since there is no direct imposition of moratorium, or initiation of judicial proceedings or the option to file for voluntary bankruptcy.

*Alternative remedies.*

Remedies available under The Companies Act, 2013: Financial Creditors may pursue restructuring or rearrangement schemes like one-time settlement (OTS) or Scheme under Section 230 of the Companies Act, 2013. Section 230 of The Companies Act allows the Company or a member or creditor of a company in case of a windup to file an application before NCLT to obtain an sanction for a compromise or arrangement between the company and the creditors or the company, as the case may be that the company shall abide by, if sanctioned by the Tribunal. Section 231 of The Companies Act, 2013 empowers the Tribunal to enforce this compromise or arrangement. Though this alternative is considered to be the primary recourse after the Suspension of Section 7, 9 and 10 of IBC, however, the NCLAT in *S.C. Sekaran vs. Amit Gupta and Ors.*1676 Has thrown light on its essentialness by directing the liquidator “to take steps in terms of Section 230” for the revival of the Corporate Debtor.

RBI’s Prudential Framework for Stressed Assets: RBI regulated Creditors can attempt to resolve at the bank level to push for a new start to the Corporate Debtor. RBI authorizes lenders to formulate a resolution plan if there’s a case of non-payment of

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1676 (2019) 152 SCL 536
debt and thereafter, observe the performance of the debtor to capture any default on the ground level to secure themselves from a large amount of default. However, the Circular has a drawback. It fails to analyze that the creditor may not always be banks and NBFC and thus neglects to include other classes of Creditors like Foreign Lenders, bondholders or Mutual Funds.

RBI’s one-time restructuring circular for Micro, Small and Medium Enterprises: The RBI’s circular, has extended the time period for a one-time restructuring of the existing loans of the MSME’s classified as ‘standard asset’ till December 31, 2020. However, this alternative is available only to the MSMEs who do not have an aggregate exposure of banks and NBFCs exceeding Rs. 25 crores on January 1, 2020.

Remedy under Different Legislation: The Creditors in case of a non-payment by the Corporate Debtor can resort to Recovery of Debts Due to Banks and Financial Institutions (RCCBFI) Act, 1993 wherein the creditor is a financial institution or banks. Also, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, (SARFESI) Act, 2002, is also available to banks to recover the debt when a security is involved. Money can also be recovered by filing a money recovery suit under order 37 of the Civil Procedure Code, 1908 by an individual to recover a debt.

Conclusion.
The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2020 is brought into action to boost the economy and protect the MSMEs but it is going to have an ill-effect as well. The drafting of the newly inserted Section 10A and sub-section (3) to Section 66 creates a lot of ambiguity. Though the protection under the IBC (Amendment) Ordinance 2020, which provides a complete immunity to the defaulters from the debt arising during the Covid-19 pandemic may be a welcome step but it will have a lot of consequences with more questions than answers over the period of time. The Creditors and Debtors may resort to alternative options and possibilities of restructuring those debts for which no insolvency proceedings could ever be filed but the question still remains to be considered that even after the restructuring of those debts will they be continued to be treated as protected under the provisions of the Section 10A.

The temporary suspension of Section 7 and 9 of the Insolvency and Bankruptcy Code, 2016 is a good move and much needed at this time of a pandemic but the suspension of Section 10 seems to have no rationale as it would only force the Corporate Debtors and Companies in huge debts to continue when the Company believes that the best solution for it would be resolution under insolvency law. The introduction of this Code was to simplify the process of Insolvency but if the debtors have to go through the old resolution alternatives, it would defeat the very objective of this Code. Moreover, the continuance of such Debtors would further deteriorate assets that may prove to be implausible for companies that could have restructured.

Since the Covid-19 Pandemic has impacted everyone worldwide, various countries like Australia, UK have also suspended their insolvency laws. While suspending the rights of a creditor to bring about an action against the companies in case of default, certain countries have succeeded in providing voluntary insolvencies in order to safeguard the company and its stakeholders. For example, France has allowed the companies to initiate voluntary restructuring or liquidation proceedings if a company goes out of business and is unable
to continue its course of action during the state of health emergency or if the financial operation of a business require it.\textsuperscript{1677} Similarly, Spain has also allowed filing of voluntary bankruptcy applications but these applications would not proceed during the state of alert.\textsuperscript{1678} Likewise, Australia has allowed voluntary insolvencies/administration under its insolvency law.\textsuperscript{1679} Pursuant to it, it witnessed Australia’s second-largest airline, Air Mauritius file for Bankruptcy.\textsuperscript{1680}

The Ordinance appears to be promulgated to protect companies and promoters from no fault liability but it is necessary to ensure that Section 10A does not become a roadway for the defaulters to siphon off funds. The legislature and adjudicating authority may also need to be really careful while dealing with cases relating to the ambiguities that will arise by the implementation of the Ordinance, cases which will be a result of ban on voluntary insolvency for exemption Period defaults, cases arising due to the suspension of the rights of a lender to file insolvency proceedings during exemption periods, restriction on the filing of Fradulent/wrongful trading applications by resolution professionals and so on.

So, overall in my opinion, though this Ordinance has been introduced in good faith and to safeguard the interest of the people in large, it is flawed in the drafting of it and creates a lot of ambiguity. It raises a plethora of questions that have no answer to it yet. So, there’s a lot of scope for the Insolvency and Bankruptcy (Amendment) Ordinance, 2020 to be a bane than a boon.

\textsuperscript{1678} Ibid
\textsuperscript{1679} \url{https://www.law.ox.ac.uk/business-law-blog/blog/2020/04/managing-insolvency-curve-australia}
\textsuperscript{1680} \url{https://www.businesstoday.in/sectors/aviation/coronavirus-clips-air-mauritius-wings-airline-placed-under-administrators/story/401755.html}
ABSTRACT
Space infrastructure, today, is relevant in almost all national and international spheres. These space systems function with the help of cyber technologies, and because of this symbiotic relationship shared between the internet and the outer space, Cyber-attacks has become a growing concern in outer space. Much of the world’s critical infrastructure – such as communications, air transport, maritime trade, financial and other business services, weather and environmental monitoring and defence systems – depends on the space infrastructure, including satellites, ground stations and data links at national, regional and international levels.\(^\text{1681}\) In the present era of outer space activities, it is important that we have an efficient and effective cybersecurity regime that extends not only to the Earth, but beyond as well. We can protect the space system if we understand the cyber vulnerabilities and its effect on such systems. Cyberattacks on satellites can include jamming, spoofing and hacking attacks on communication networks; targeting control systems or mission packages; and attacks on the ground infrastructure such as satellite control centres.\(^\text{1682}\) Regulating cyber attacks is a challenge to us, especially since we lack a strong enough cyber law and space law regime to tackle the said issue. This paper attempts to analyse the legal regime relating to increase in the militarization and commercialization of outer space in the era where we can witness increased cyber-attacks on space systems. It also attempts to highlight the concept of cyber attacks in outer space, and highlight the inadequacies of the present law in dealing with such instances. It addresses the need to craft a legislation to exclusively deal with such commercial space activities. It further addresses the issue of state responsibility for such cyber attacks and also the response of the states to such attacks. Countries have managed to co-operate with each other by agreeing upon peaceful uses of outer space and banning weapons of mass destruction and the same must be followed by various private players and governmental organizations. They must collaborate on the issue of outer space cyber security policies to arrive on a comprehensive strategy. This paper finally suggests a proposed framework to govern cyber attacks in the outer space.

1. INTRODUCTION
Space infrastructure, today, is significant in almost all national and international spheres. They function with the support of cyber technologies, and because of this symbiotic relationship shared between the internet and the outer space, Cyber-attacks, which take place either on or through the cyberspace has become a growing concern in space. Much of the world’s critical infrastructure – such as communications, air transport, maritime trade, financial and other business services, weather and environmental monitoring and defense systems – depends on the space infrastructure, including satellites, ground stations and data links at national, regional

\(^{1681}\) Chatham House, The Royal institute of International affairs: Space, the Final Frontier for Cybersecurity?, para 1.

\(^{1682}\) Synergia Foundation: China-based hacking group targets satellites, para 3
The problem with cyber-attacks is tracing the source of the attack and attributing territorial sovereignty to it, considering absenteeism of physical boundaries. Kristen E., has mentioned the three generations of sovereignty in her paper. The first, where sovereignty over the Internet belonged to its users, not to governments. The second, where scholars argued that states should regulate the Internet and the third where emphasis was given on how cyber governance cannot be solved by or within a single state and needs international coordination. We are presently at the situation where regulation of cyberspace activities needs global attention and not just domestic legislations. The most crucial concern about such an attack is attribution of responsibility to the perpetrator of the attack, whether it is the state or an individual. Another important aspect is to extend the existing legal regime to these attacks in outer space in an era of space haves and have nots, where states with technological dominance are trying to control activities of the other states. Cyberspace and Outer space cannot be regulated in separate spheres, particularly in this era where they exhibit a symbiotic relationship. All cyber activities are based on space enabled communications and the Space activities rely on internet based communication networks. This paper in part IV would analyse whether the cyber-attacks in outer space can be treated at par with the concept of global commons and how can it be regulated under the present legal regime. Part V of this paper would throw light on the State responsibility for such attacks and Part VI would highlight the legal lacunae and suggest a proposed framework to regulate the issue on hand. Based on the above mentioned issues, the paper examines three main aspects of cyber-attacks In the Outer space- First, it deals with whether the present legal regime governing cyberspace and Outer space can be extended to address the concern of cyber-attacks in outer space, secondly, the issue of state responsibility for such an act and thirdly, it suggests a proposed framework to govern cyber-attacks in outer space. This essay exclusively deals with cyber-attacks on outer space from a state responsibility, and extending the present legal regime to govern the same point of view. It does not examine the technical aspects of cyber-attacks and how it can be prevented from a cyber-security point of view.

2. BACKGROUND OF CYBER-ATTACKS IN OUTER SPACE

Cyberspace is ‘the space of virtual reality; the notional environment within which electronic communication (esp. via the Internet) occurs’. It is the virtual realm that enables communication amongst various computer devices and thus enables us to utilize the internet. The International Organization for Standardization defines cyberspace as the complex environment resulting from the interaction of people, software and services on the Internet by means of technology devices and networks connected to it, which


does not exist in any physical form.\textsuperscript{1686} Cyber-attacks refer to interference with the cyberspace or through it so as to harm another system. In the present era of outer space activities, it is important that we have an efficient and effective cyber security regime that extends not only to the Earth, but beyond as well. There are various space weapons that are being used to create attacks on space systems. Some of them are- kinetic anti-satellite operations, which are lethal space weapons that enable the other systems to trace the target satellite which is communicating data to the interceptor vehicle and the same is directed on the satellite. It damages or compromises the target satellite, damages the environment on the Earth and the activities based on the data received and moreover such destruction of the satellite creates space debris. If the event occurs at altitudes greater than the lower end of low earth orbit, may be expected to create a cloud of debris that is unlikely to leave orbit for the foreseeable future.\textsuperscript{1687} Further, we have the Jamming of missile defense systems which is likely to deteriorate the system’s performance capacity. Jamming of navigation, communication and GPS systems cause such services to be interrupted and they either fail to deliver the required data or deliver faulty data and signaling. Other cyber tools to attack space systems are hacking or spoofing of communication and GPS networks that compromise the data or signals sent and received to such systems, attacking the ground infrastructure like the satellite control centres either by ground based lasers or by interrupting their servers, sending of worms or trojans to the space systems, etc. Regulating cyber-attacks is a challenge to us, especially since we lack a strong enough cyber law and space law regime to tackle the said issue.

3. THREATS POSED BY CYBER-ATTACKS IN OUTER SPACE
Communications with outer space via satellites occurs exclusively through the use of the electromagnetic spectrum, a fundamental building block of cyberspace. And as the dependence of critical computerized systems – whether space-based or land-based – on satellite communications grows, so does their common vulnerability to threat vectors in cyberspace.\textsuperscript{1688}

It is, therefore important to understand the threats posed by cyber-attacks in outer space, considering the substantial and ever increasing reliance of society on satellite technologies for navigation, communications, remote sensing, monitoring and the myriad associated applications.\textsuperscript{1689} Cyber-attacks usually are targeted at the data or the system that provides the data such as ground stations, antennas of satellites or the landlines that connect to terrestrial networks. Cyber-attacks can be used to monitor data traffic patterns, to monitor the data itself, or to insert false or corrupted data in the

\begin{itemize}
\item \textsuperscript{1688} Adv. Deborah Housen-Couriel, ‘Cybersecurity And Outer Space: Connected Challenges’ (Israel Defence, 2 Feb 2017)
\item \textsuperscript{1689} Pavan Duggal, ‘Cyber Security Law, Its Regulation And Relevance For Outer Space’ (International Conference On Cyberlaw, Cybercrime & Cyber Security, New Delhi, November 2017)
\end{itemize}
When a space system is subjected to such an attack, the data may be compromised or lost, or the satellite itself might be destroyed. If the attacker gains control over a satellite in outer space, he could manipulate or shut down all communications and permanently damage the satellite system by damaging its sensors, solar panels, transponders or communication subsystems. Communication faces a grave disruption if satellites and space systems are targeted. China has alleged to have initiated attacks against a remote sensing satellite, Landsat-7 of the US Geological survey department, causing interference with the ground station communications for about 12 minutes. In these attacks, the hackers “achieved all steps required to command the satellite but did not issue commands.”

Cyber-attacks can be used to steal high priority government data. For instance, in 2007, a Russian-speaking group of hackers, likely linked to the Russian government, has stolen satellite data used by government groups, militaries, and embassies around the world. They had perpetrated this attack by means of a malware called Turla. The data gotten by the attackers was highly confidential in nature, affecting critical national infrastructure. Analysing the intersection between cyber and space security is essential to understanding this non-traditional, evolving security threat.

Cyber-attacks in space can disrupt enemy missile defense activities, aircrafts, logistic operations and command and control links. This interception can be in form of inducing corrupt information which eventually causes physical damage to the spacecraft.

On the civilian side, satellites enable many of the communications (phone, text, email, internet, television) and banking operations (credit card purchases, ATMs) that have become the primary modes of social interaction and the lifeblood of the world's economy. Global Positioning System ("GPS") satellites guide and track cars, airplanes, and, soon, drones that will deliver household packages. Earth Monitoring spacecraft enable farmers to supervise their crops, foresters to direct firefighters, and flood control authorities to anticipate river flows. Satellites help save lives by supporting disaster relief and search and rescue missions.

This excessive mutual dependence of the internet and space has given rise to various vulnerabilities in outer space.

4. EXTENDING THE PRESENT LEGAL REGIME TO CYBER-ATTACKS IN OUTER SPACE.

4.1 Cyber-attacks and Territorial Sovereignty

Attribution of territorial sovereignty to Cyber space is tedious, merely because cyber borders are not like physical borders. Territorial sovereignty is wholly based on physical location and such demarcation is not possible with Cyberspace. Many thinkers opine that the physical hardware supporting cyber is located within territorial sovereigns and often owned by private parties, and they regard these facts as fundamentally problematic for the commons conception of cyber.

1691 Ibid 8
1692 Pavan Duggal, (N 6)
sovereign can regulate some aspects of the internet like the physical hardware, but cannot exercise control over the cross-border communication networks, domains and activities. Cyber cannot be treated as a domestic issue, it has to be the very nature of the activities it is capable of performing, has to be regulated under international law principles. These principles limit a country’s authority to exercise jurisdiction in cases that involve interests or activities of non-residents, such as in case of a cyber-attack in space involving various parties from various states. Preventing such international transit would require local hosting of websites and storage of data, which is contrary to how the Internet currently functions, though some countries have considered such requirements in the wake of surveillance disclosures. Relatedly, sovereign states’ ability to control cyberspace is further undermined by states’ inability seal their cyber borders. The fact that states cannot retreat behind cyber borders, but still want and need to access the cyber domain, creates the demand for inter sovereign interaction to address cyber issues.

4.2 Cyber-attacks and Global commons
Cyber-attacks in outer space have two contrasting approaches to it. one, to attribute territorial sovereignty as it is done with Airspace and the other, by treating this at par with any other extraterritorial spaces such as the High seas, Antarctica and Outer Space, at par with global commons. I.e. common resources that are open for use by anyone, but use by one person reduces other people's ability to use it. This ‘use’ is limited to ‘peaceful purposes’ as followed under the legal regime for High seas, Antarctica and Outer space. Cyber-attacks in outer space, if treated at par with the global commons concept, will also be subject to the UNGA resolution on the peaceful uses of Outer space and allow for outer space activities only if they fall within the ambit of Peaceful purposes. There are other legal regimes that are being used to regulate activities in the outer space. By extending the same to cyber-attacks, we can regulate and impose liability as well on the perpetrators of such attacks. They have been discussed below.

4.3 CYBER-ATTACKS AND THE EXISTING LEGAL REGIME

4.3.1 UN Charter
Article 2(4) of the U.N. Charter prohibits the threat or use of force against another state. This provision would undoubtedly be applicable to attacks committed by one state upon the space systems of another state via cyberspace. Further, Article 51 of the charter would also be applicable in case of cyber-attacks. This article empowers individual or collective self-defense in event of an armed attack. The same provision will be applicable to an attack that takes place via internet as well. For instance, If a state attacks the satellite of another state by intentionally sending a worm to it, then the state attacked has the right of self-defense against the state perpetrating the attack.

4.3.2 Committee on the Peaceful Uses of Outer Space
In December 1958, the U.N. General Assembly adopted a resolution on "the peaceful use of outer space," which recognized ‘the common aim that outer space should be used for peaceful purposes only.' The UN, in 1959 established a Committee on the Peaceful Uses of Outer Space, to prevent state rivals from entering and using this new domain as a battle ground. According to this resolution, Outer space and celestial
bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation. A cyber-attack such as jamming, spoofing/hacking attacks on communication networks, targeting control systems or mission packages or attacks on the ground infrastructure definitely don’t fall within the ambit of ‘peaceful use’. They are catastrophic in nature, aimed at causing a disruption to a state’s system, network or obtaining data or documents from another state without their identity or activities being detected. The internet must be used only to the extent that it allows for the peaceful use and conduct of activities by various space systems in the outer space and definitely not for such misuse of technology.

4.3.3 Outer Space Treaty
The Outer Space Treaty, 1967 proclaims that outer space, the moon and other celestial bodies, are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means, and that space activities shall be conducted in accordance with international law. It prohibits states from placing in orbit, installing on celestial bodies or stationing in outer space nuclear weapons or other weapons of mass destruction. It also prohibits military installations, and military maneuvers on celestial bodies. These provisions can be extended to the cyber-attacks in outer space too. Art IX of the treaty is applicable as it makes it illegal for a state to interfere with the exploration of outer space but a nation may destroy a satellite in orbit if that satellite is being used for military purposes. This is applicable for all cyber-attacks such as hacking of the satellite of another state, jamming or spoofing of communication networks being sent or received by that particular satellite in outer space. The treaty assigns states international responsibility for their governmental and nongovernmental activities in outer space and renders the launching state liable for damage caused in air or space or on Earth by a launched object. This provision should not only be applicable in case of a physical object, but also to a software attack. A state launching a spoof communication network so as to intercept the communications of a satellite by another state must be attributed the liability at par as what would be if it was a damage caused by a physical object launched.

4.3.4 Moon Treaty
The Moon treaty, 1979 specifies that the activities on the moon and other celestial bodies must be "carried out in accordance with international law, in particular the Charter of the United Nations. It explicitly restricts use of the moon to "peaceful purposes," and prohibits any threat or use of force or any other hostile act or threat of hostile act on the moon" or use of the moon to threaten or engage in hostile acts with respect to "the earth, the moon, spacecraft, the personnel of spacecraft or man-made space objects." It further prohibits placing or using nuclear or other weapons of mass destruction on or in orbit around the moon, establishing military bases, or conducting weapons tests on the moon. This treaty will be applicable in case of a cyber-attack on any spacecraft, rover or satellites installed on the moon or any other celestial body by a state or an individual actor via the internet.

1696 See The Unga Resolution For Details, Unga Res 34/68 (5 December 1979)
4.3.5 International Aviation law conventions
The Chicago convention, 1944 prohibits the use of weapons against civil aircrafts\textsuperscript{1697} and Article I of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 prohibits interference with a plane’s operating system if such interference would render the plane incapable of flight. It also prohibits disrupting or destroying the navigation facilities that allow for flight if said interference would endanger any aircraft in flight, which could have an effect on the targets that nations consider when planning a cyber-attack.\textsuperscript{1698} The same principles should be applicable to an attack that is beyond airspace, ie. To the outer space. An attack via internet that aims at compromising the operating system of the spacecraft or interference that causes disturbances in the space systems must also be treated in the same manner as unlawful acts are against civil aircrafts.

4.3.6 NATO’S Policy,2011
In 2011, the NATO issues a policy on cyber defense which says that NATO will defend its territory and populations against all threats, including emerging security challenges such as cyber defense" and that NATO will provide assistance if its members suffer a cyber attack and also clarified that international law, including international humanitarian law and the UN Charter, applies in cyberspace. The NATO has recognized cyberspace as a domain of operations in which NATO must defend itself as effectively as it does in the air, on land and at sea.\textsuperscript{1699}

5. ATTRIBUTION OF STATE RESPONSIBILITY IN EVENT OF A CYBER ATTACK IN OUTER SPACE
5.1 Unearthing cyber-attacks
Due to the difficulties in tracing a cyber-attack and revealing the attackers identity and intention to perpetrate the attack, we have to consider how this tracing can be effective and what standards can be adopted to attribute responsibility on the individual/state. An IP packet can be intercepted or spoofed mid-route, making it impossible to trace. Thus, while in theory it is possible to trace the IP addresses of cyber attackers and use that information to locate them, "sophisticated hackers are able to re-route or confuse programs designed to locate them." Similariy, if a hacker uses a botnet to carry out attacks, the process of tracing IP packets becomes more time and resource intensive.\textsuperscript{1700} Cyber-attacks are linked to nearly every field of activity, whether a connection exists or if the connection is very feeble. One of which is the Outer space - where the connection between cyber terrorism threats and actual damage to

space-borne assets is very direct. Such attacks are usually staged against the base stations that control the satellite and the space system that is in outer space is compromised. It is difficult to trace the identity of the attacker who has perpetrated an attack on the satellite, the intention with which he has done it, whether the attack has been done under the direction and control of the state and the magnitude of damage done to the space infrastructure.

5.2 ATTRIBUTION OF LIABILITY - EFFECTIVE CONTROL VERSUS OVERALL CONTROL STANDARD.

The problem with a cyber-attack as opposed to any kinetic attack is that it is difficult to figure out when the attack was initiated, the identity and intention of the attacker and the possible circumstances of the attack. Identity is the most important aspect of a cyber-attack as it is the deciding factor on basis of which an appropriate response is made, ie the response would vary if the attacker is an individual, a state or a terrorist group. There are two types of standards of control to be looked into for attributing responsibility for such an attack - The effective control standard and the overall control standard.

The effective control standard recognizes a country's control over paramilitaries or other non-State actors only if the actors in question act in "complete dependence" on the State.

An act of a non-state actor is attributable to a state if the state exercises “effective control” over the operation during which the act occurred under the “effective control” standard, private conduct that is merely supported, financed, planned, or carried out on behalf of the state is not attributable unless the state also exercises a high-level of control “in respect of each operation in which the alleged violations occurred. Further, Article VIII of the International Law Commission's Draft Articles on the Responsibility of States for International Wrongful Acts says that the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

On the other hand, we have the overall control doctrine, from the ICTY Tadic case according to which when a State has a role in organizing, coordinating, and providing support for a group, the group's acts are attributable to the State. Under this test, it has to be proved that the group or the individual performing a cyber-attack is doing so under the control of the state. The state must exercise control not only by equipping and financing the group, but also by coordinating or helping in the planning of its military activity. By the two tests mentioned, we can attribute responsibility to the states that either directly or indirectly perpetrate such cyber-attacks.

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1703 Responsibility Of States For Internationally Wrongful Acts 2001, Article 8


1705 Bosnia And Herzegovina V Serbia And Montenegro [2007] Icj 2, [404]
attacks against the space crafts or space systems belonging to another state. Further, by virtue of Article 8, an individual whose conduct engages state liability cannot enjoy the benefit of acting on behalf of that state without prior permission. An individual will have to prove that he acted under the direction of the state for the responsibility to be attributed to the state. However, in cases where the individual attacker has not acted under the aid, direction or control of the state, the situation is different. According to James Crawford, the power structures within the international system are such that sovereignty and statehood remain the basic units of currency, but it is no longer possible to deny that individuals may have rights and duties in international law. The individual perpetrating the cyber-attack, is therefore attributed with individual criminal responsibility under Art 7 of ICTY for extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

6. LEGAL LACUNAE AND THE ROAD AHEAD.

Although various legal regimes can be extended to address this issue, we need to understand that in absence of a comprehensive strategy and regime exclusively for cyber-attacks in outer space, this issue cannot be solved. The first lacuna being that in spite of having various International treaties and conventions that can be extended to this issue, implementation of the same is very difficult due to the lack of an international body or organization entrusted with the same.
space systems, etc. These attacks can be regulated and controlled by employing various legal and technical measures. Few technical responses that can be adopted to safeguard the space systems from attacks are– restricting the proxy servers so that the attackers don’t gain control over the system, ensuring encryption to prevent jamming and spoofing, ensuring that the networks or utilities are traceable and that the infrastructure doesn’t support anonymity. Furthermore, tests must be added for immunity to such attacks as an integral part of the tests satellites undergo during the manufacturing process, before being launched into space. It should mutually be decided about the role of the governments, how security can be maintained in the space community and whether this security regime must be a regional or an international one. It is essential that the symptoms of the attack are identified and preventive measures are taken against it. It is essential that we invest in new ‘hack-proof’ or ‘hack-resistant’ technologies, including blue-sky approaches such as quantum technologies for communication. The satellite layout must be managed and be equipped enough to tackle a cyber-threat. It is important that awareness is created amongst the members of the space community to understand these cyber vulnerabilities and the legal regime regulating the same.

The need of the hour is to promote international co-operation amongst states and to develop a space cyber security regime to address all the concerns relating to cyber-attacks in space. This comprehensive space cyber security regime must be designed in a way that it suits the needs of various stakeholders such as the Governments, the Military groups, the technicians and the interests of the society at large. To align across and within all sectors, one approach is to adopt a single focus such as the provision of assured broadband via space – and make that the driving force, organizing all other initiatives around it. In absence of a relevant international organization to regulate and implement the policies, what can be done is to resort to dialogues between two or more states such as the 2015 U.S–China cyber agreement, bilateral treaties or multilateral treaties such as The United States which has signed a Memorandum of Understanding with India on the issue of cyber-attacks and has added an extension to the existing Australia and New Zealand, contacting the NATO cyber emergency response team or the INTERPOL, etc. Further, the same frameworks resorted to for other space related concerns such as those under the Outer space treaty, The Moon treaty, UN charter, etc must be resorted to until we design an exclusive regime for cyber-attacks in outer space. The solution to the problem of attribution, further, is to allow for states to pool their resources and databases so as to figure out where the cyber-attack originated and which state must be attributed the liability for the same. We must set up the required infrastructure

1708 David Livingstone And Patricia Lewis
Accessed 11 November 2018

1709 Ibid 26
1710 Munish Sharma, ‘India : Us :: China : Us – Cyber And Bilateral Visits’ (Institute For Defence Studies And Analyses, 9 Jun 2016)
<https://idsa.in/idsacomments/India-U/s-China-U-s-Cyber-And-Bilateral-Visits_Msharma_090616>
Last Accessed 5 November 2018
for the current and the future requirements for cyber security in outer space.

8. CONCLUSION
In conclusion, the author would like to stress on the fact that we are living in an era where the internet and space activities are highly dependent on each other and it this interdependence that has become a part of our daily lives. At the moment, with the possibility of cyber-attacks being perpetrated beyond Earth, all the way up to the Outer space, it is important for this issue to be given attention at the International level. Although we have various legal regimes dealing with this aspect, there is none that exclusively does. Until a Comprehensive international strategy is framed to address the issue, States must indulge in dialogues and enter into bilateral and multilateral treaties to govern the same. We currently lack an adequate cyber and Space security regime, thus making it essential for the International community joining hands to address the issue at hand.

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ABSTRACT:

According to the topic mentioned “strict liability v. absolute liability” the main aim of doing this particular study is to compare both the liabilities. Basically both are similar. Liability arises when a person’s legal right is violated. It is the duty of every person to take care that he is not violating anyone’s right. If he do so he shall be liable for it. For it to be a liability it must be a wrongful act. Absolute liability has evolved from strict liability. When we talk about strict liability also called no fault liability, the legal right of plaintiff is violated but not by the defendant. But even then the defendant is held liable for the wrong and have to pay the compensation. There are certain essentials for strict liability like a dangerous thing should escape from ones land when the land is being used for some purpose which is not natural. There are some defences which can be used like when it is the fault of the plaintiff, act of third party, plaintiff’s own care, act of god etc. Next, when we talk about absolute liability which is evolved from strict liability. According to absolute liability any hazardous thing which an industry is keeping it should take good care of it so that it doesn’t harm any other person. Essentials of absolute liability are that the enterprise should get engaged in any hazardous activity and it is not necessary that it escapes. So the liabilities differ according to the essentials and the defences can be taken depending upon the situation.

KEYWORDS: Strict liability, Absolute liability, Hazardous

INTRODUCTION:

Liability occurs when a person violates another’s right. We all know that one person’s right is another person’s duty. One should respect the right of another and work according to that it does not infringes anyone’s right. It is obvious that if one infringes a person’s right one will definitely be liable for it and will have to pay compensation for it. For the liabilities to be differentiated according to its effects, law has differentiated it into three parts: strict liability, absolute liability and vicarious liability. The outright obligation is the utilization of strict risk, yet without the exceptions. The manager of supreme risk was advanced on account of M.C. Mehta V. Union of India1711, and took strict risk forward by saying which involved an undertaking with a development at risk is a subject for harm coming as a result of such activity, and so as to compensate each other whosoever are influenced by the mishap. Entire obligation is required form of strict strict risk laid by Ryland’s v. Fletcher1712 and was realised by the Supreme Court of India in M. C. Mehta v. Association of India. This particular case began in the outcome of M.C. Mehta case where oleum gas was spilled out from Shriram Food and Fertilizers in the capital of India. This case happened soon after the Bhopal gas leak case. Justice Bhagwati gave his reviews that in the particular era it is really important for us to update with the advancement of the society. At this particular stage mechanical improvements are really important. Yes, we all know that risky business is important in order to survive in today’s world and also in the completion of the advanced program.

1711M.C. Mehta V. UOI 816 SC 1986
1712 Rayland V. Flether 330 UKHL 1868
There is no need of getting hindered by the advancement, but should understand that it is important for us to understand its importance of financial structure of people. Further, we will see comparative study on absolute liability and strict liability. Also we will study about the essentials of strict liability. Analyse the necessity of absolute liability in India. We will see exception under strict liability, examine the difference between absolute and strict liability.

The given two liabilities have slightly different aspects. Strict liability has few exceptions that we will discuss. On the other hand if we look at the absolute liability is a liability without any exceptions. Strict liability was introduced in the initial stage. My study mainly talk about the differences between the liabilities. Since the study which I am doing is basically based on non-doctrinal type of study, so its scope is very narrow and limited. It is limited also because as mentioned earlier, there are three parts of liabilities, strict liability, absolute liability and vicarious liability, and my study is to study the two of the liabilities.

**STRICT LIABILITY:**
Strict liability also known as no fault liability is a liability where the legal right of the plaintiff is violated but not by the defendant. Even then defendant will be held liable for that. And for this liability he will have to pay compensation. It is prima-facie. The principle of strict liability first came from 1868, House of Lords in the case of Rayland v. Fletcher.\(^{1713}\)

**ABSOLUTE LIABILITY:**
Absolute liability is a liability to which we can say is evolved form of strict liability. It is the application of strict liability but without exception. With the development of science and technology, law also needs to update itself in order to come up with the correct consequences. However, this principle is not applicable in cases where a trespasser by his own negligence intervenes in activity of another and is harmed in the process\(^{1714}\). Law needs to change itself in order to satisfy the needs of people according to the current time. So, law came up with the term of liability, absolute liability. It should include some hazardous activity. And the enterprise should have detailed knowledge about the activity which they are performing. The absolute liability concept first came into the case of M.C. Mehta v. union of India.

**HYPOTHESES:**
1. There is liability for polluting environment under strict and absolute liability by courts.

**LIMITATIONS OF THE STUDY:**
1) Lack of secondary source of data.
2) Restricted accessibility to primary source of data.

**RESEARCH METHODOLOGY:**
\(a\) **Type of study**
This is the comparative type of study, because mainly I am trying to establish relation between the two liabilities.

\(b\) **Nature of information**
All information are gathered from non-doctrinal sources like books, blogs etc.

**CONTENT:**

**Essentials of strict liability:**

\(^{1713}\) Rayland V. Fletcher 330 UKHL 1868

\(^{1714}\) Mohd. Quamuddin V. UOI WP 2008
1. **Dangerous thing**- a dangerous thing must have been brought by a person in his land.

2. **Escape**- that dangerous thing brought or kept by a person in his land must escape from there.

3. **Non-natural use of land**- the dangerous thing kept should have been there for some unnatural use of land.

4. **Damage**- the dangerous thing must damage something in order to say it a strict liability.

In law for everything some or the other defences are given. Therefore, in strict liability there are defences as well. So, some of the defences in strict liability are as follows:

1. **Act of god**- where the escape is due to the natural cause and due to any human intervention. Anything which a human cannot predict or foresee.

2. **Plaintiff's own fault**- if damage is caused due to the fault of plaintiff himself, then he has no remedy.

3. **Third party**- when the harm is done by any third party who is neither the plaintiff nor defendant then he has no control over him.

4. **Statutory authority**- when any act is done by any statutory authority then he will not be held liable.

**Case:** Rayland v. Fletcher

**Facts:** Rayland’s and Fletcher were neighbours. Fletcher claimed a factory, for the vitality motivations at the back of which he enlisted self-employed entities and architects to increase water furnish on his property. It so passed off that there had been ancient unused shafts underneath the web page of the repository which the architects not noted to word and piece. Because of the carelessness of the transient workers, when water filled Fletcher’s supply, the water entered Ryland’s coal mine and caused great loss, for that is the region the poles drove. In this manner, Ryland documented a go well with against Fletcher. The respondent asserted that it was once the blame of the brief workers’, and the cause for damage used to be vague to him.

**Issues:** The issue of this case was very briefly expressed. Can the risk be held by the litigant, no keeping in mind that it was an act which was done by some other person because the element of the territory was taken away? It was taken into consideration in the fact that there was no expectation in the part of litigant.

**Judgment:** the respondents were held liable as it was dismissed by The house of Lords. He was liable for every damage which was caused at Rayland’s mine. This particular case also has set a rule i.e. no man can keep any hazardous thing inside his land which is for some unnatural use. And if he keeps such thing and if that hazardous thing escapes from their land and cause trouble and harm to others, then it will be the one who has kept it in their land will be liable for it.

**Essentials of absolute liability:**

1. **Enterprise**- There should be an enterprise involves for it to be an absolute liability.

2. **Hazardous activity**- The enterprise should be involved in some hazardous activity.

3. **Escape not necessary**- It is not necessary that anything should escape from the enterprise.

**CASE:** M.C. Mehta v. Union of India

**Facts:** there was an industry of oleum gas namely Shriram Foods and Fertilizers in Delhi. On 4th and 6th December, the gas was spilled out from it creating a lot of harm in the capital. Because of this PIL was was filed in the court for the industry.
Issue: It was challenged that if each and every one of the tragedies emerging from the direct of the massive production traces taken after the managing of strict liability, they will fall below the exemptions and escape scot free for the damage they have precipitated in the lead of their actions.

Judgment: it was the second instance when such case came in front of the court where a gas was spilled out at such a great volume. Also, it was thought that the particular case was connected to the case of Rayland V. Fletcher. Though there were few differences in both the cases but was almost similar. And the make separate both the cases, a particular rule, i.e. rule of absolute liability was made.

DIFFERENCE BETWEEN STRICT LIABILITY AND ABSOLUTE LIABILITY

The case of M.C. Mehta V. Union of India was the first case which brought the difference between absolute liability and strict liability into picture.

1. Absolute liability will arise only to those enterprises which are evolved in hazardous activities. Which means that the industries which are not falling under this will come under strict liability.
   
   Its not necessary for the dangerous thing to escape from one’s own land. It means the rule of absolute liability shall be applicable to those injured within the premise and person outside the premise.

2. The rule of Absolute liability doesn’t have an exception, whereas there are some exceptions furnished in rule of Strict Liability. Also within the case of “Union of India V. Prabhakaran Vijay Kumar ” the view of constitutional bench used to be that the rule of “M.C. Mehta” is not issue to any type of exception.

3. The Rule of “Ryland v. Fletcher” observes that the non-natural use of land but the new rule of absolute liability applies to even the herbal use of land. If a man or woman makes use of an unsafe substance which may also be herbal use of land and if such substance escapes, he shall be held liable even though he have taken perfect care.

LEGAL PROVISIONS:

1. The Public Liability Insurance Act, 1991: This act has the substantial point of giving prompt help to the people influenced unintentionally taking place whilst at the same time taking care of any risky supplies for troubles related with the occurrence. The necessary focal point of the Act is to make a public liability protection finance which can be utilized to remunerate the victims. The Act expresses that any individual who is completing often hazardous or risky workout routines ought to have protections and techniques set up the place he will be assured against Liability to provide pay to the victims in the event that any accident happens, and some damage happens. In regard of officially settled units, protection techniques should be taken at the earliest opportunity and the Administer gave the proprietors the season of one year to get into the protection contracts. This Liability depends on the tenet of “no fault liability” or as it were, the manager of strict liability and absolute liability. This is the declaration in the Section 2(c) of the Public Liability Insurance Act, 1991.

2. The Supreme Court Of India imposed the principle of MC Mehta case and held that "Once the activity carried on is hazardous or inherently dangerous, the person carrying on such activity is liable to make good the loss caused to any other person by his activity irrespective of the fact whether he took reasonable care while carrying on
his activity is by far the more appropriate and binding.”

**NEED TO MODIFY THE OLD RULE:**

Absolute liability came up only when people thought strict liability to be old and not perfect according to the new era. So, what was the need to modify it and make it a separate branch of liabilities? This is because:

**High Industrialisation Growth:**
The Indian economy is highly developing economy. Strict liability is a very old rule. The Old Rule evaluates when low industrial development was there so the old rule cannot be found appropriate in highly growing economy like India.

**Agriculture use of land:**
Land is of high use in India. Therefore, big tank would be of great help in storing water for irrigation purpose. The same rule is not prevailed in the country from where it is prevailed. And so, it does not fit in Indian perspective.

**Very old rule not appropriate in present world:**
The old rule was more than 150 years old i.e. in 19th century, when economic and social condition was totally different. And so, it is really necessary to make rule as per present requirement.

**SUGGESTIONS:**

1) There should be more provisions regarding absolute and strict liability.
2) There should be no negligence.
3) Punishments should be made more for absolute and strict liability.

**CONCLUSION:**
The rule of strict liability and absolute liability are legal responsibility that can be viewed as exceptions. An individual is made responsible only when he is at fault. But the principle governing these two regulations is that a man or woman can be made responsible even without his fault. This is acknowledged as the principle of “no fault liability.” Under these rules, the dependable character may not have achieved the act, but he’ll nonetheless be accountable for the damage caused due to the acts. In the case of strict liability, few exceptions are there where the defendant would not be held liable. Whereas, no exceptions are given to the defendant in absolute liability. The defendant will be held liable no matter what.

The precept or doctrine of Absolute legal responsibility is a lot more suitable device than the doctrine of strict legal responsibility because it holds the person or any corporation accountable no longer solely for the acts done by using any party however also acts which affect the public at large. It helps to compensate for the losses brought about in a no-fault state of affairs besides any exception. The shift from strict liability to absolute liability used to be very necessary as with the industrial developments, the chance of enormous public damage grew and with this, grew the want to make certain the security of the people. This led to each growing the obligation of care on the industries and different corporate and increasing their legal responsibility by means of making it absolute in nature. The cases of MC Mehta v. UOI and Bhopal Gas Leak now not only paved the way for improvement in environmental jurisprudence, but they also led to the evolution of Absolute Liability in India.

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MUSLIM WOMEN (PROTECTION OF RIGHTS ON MARRIAGE) ACT, 2019: SAFEGUARDED THE INTERESTS OF MUSLIM WOMEN OR DEPRIVED THEM OFF THEIR SECURITY

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Abstract
The purpose of this article is to study the effects of the Muslim Women (Protection of rights on Marriage) Act, 2019. This article explains how the practice of triple talaq caused problems for many Indian Muslim women. Some major problems which they go through are, they get in a state of imbecility, they become financially unviable, they are deprived off their security, etc. These are the horrors which women have to face as a result of triple talaq. Through this act, the centre aimed to put Muslim women on the same pedestal as Muslim men and they did that by making this practice unconstitutional. But by abolishing this practice, the centre has also created problems for a certain section of Muslim women who consider the cultural and religious Islamic laws Saceanct and who for many other reasons do not support the abolishment of this practise of triple talaq.

Therefore, the Effect of this act on Indian Muslim women has been varied and multifarious because of the different social-cultural environment in which they live in. This bill criminalised talaq-e-biddat making it a historic step in the constitutional history of India. The response of this bill among the Muslim women community has been mixed, some women felt empowered because of this bill but at the same time, some felt disparaged. The practice of triple talaq had caused resentment to many Indian Muslim Women, for these women this bill acted as ray of hope and in a way empowered them. But there is also a reasonable amount of Muslim Women who value their culture or practises to a large extent for this reason they have no grievances against this practise, so as a result they do not support this bill. The effect of any act or bill depends on various factors like provisions of the bill, the socio-cultural environment which the bill is pertaining to,
Circumstances that led to the implementation of the bill, the practise that the bill alters, etc. So on similar lines the effect of this bill is also dependent on the above mentioned factors.

What is Talaq-e-biddat?
Under Islamic law, divorce can be promulgated in two ways, i.e,
1. Talaq- ul- sunnat- talaq-e-hasan & talaq-e-ahsan consists of talaq-e-sunnat. This type of divorce is revocable in nature.
2. Talaq-e-biddat- It is also known as triple talaq. It is an instant mode of divorce. This mode of divorce is neither mentioned in Quran nor is it mentioned in Sharia law. It has come into prevalence as a result of customary Islamic law. In this form of divorce, husband issues divorce by promulgating “talaq” three times in a row or in one sitting and for this, the presence of wife is also not mandatory, i.e, a man can give a woman divorce through electronic communication, through texts, through fax, etc.

Talaq-e-biddat was recognized by sunnis, the Omeyyad monarchs introduced it in the 2nd century of Mohammedan law. This form of divorce was considered legally valid, but its practice was considered immoral. This type of divorce is the most common and prevalent form of divorce among the Indian Muslim community. It is irrevocable in nature and its application has always been a controversy because of its unjust nature. This form of divorce has always been controversial because the practice of it forms a dichotomy between constitutional law and religious law and also according to this form of divorce if the husband says talaq thrice on one occasion, even when he is in a state of anger or intoxication or simply if he is joking, still the marriage is broken and the nature of divorce remains irrevocable.

How the practise of triple talaq in India created problems for Indian Muslim Women community?
The practice of triple talaq has created many problems for Muslim women, because it raises the Muslim Men on a higher pedestal by allowing them to promulgate divorce at any given point of time. Many western scholars have described talaq-e-biddat, a form of divorce which gives unfettered power to repudiate one’s wife at will. They have tainted talaq-e-biddat to be irresponsible, arbitrary and injurious towards Muslim women. It is also irrevocable in nature because of which it gives no option to women, but to remain in abysmal condition. Professor Tahir Mahmood also bolstered this point by stating “Triple talaq creates havoc with the lives of numerous Muslim Women due to its Purported Irrevocability.” Triple Talaq is considered to one of the most degraded forms of divorces because it in a way gives an out to Muslim men and they escape from their duty of maintaining their wife. After triple talaq’s promulgation, husband and wife do not share any relationship and hence as a result, husband

1718 Lynn Welchman, Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy 19-32 (Amsterdam University Press. 2007).
1719 POONAM, supra note 1, at 38
is not duty bound to maintain his wife. Ergo, these are the problems that the practice of triple talaq creates among the Muslim community in India.

**Why triple talaq was valid in India unlike many other Islamic countries in spite of being arbitrary?**

This form of divorce has always been a subject of contention because of the arbitrariness that it entails. It has been banned in 22 Islamic countries because of its very nature, but in India this practice was not banned till now because the constitution of India according to article 25 and article 26 gives its citizens the freedom to practise and propagate their own religion and triple talaq being mentioned in customary Islamic law and substantiated by the hanafi school of thought become a valid form of divorce in the Muslim culture. It was not banned mainly because the constitution of India declares India a country which follows norms like sovereignty, socialism and democracy which in turn makes it a country where the freedom of people to follow their own culture is a very integral part to maintain these norms. Therefore, the reason because of which triple talaq was continued in India longer than many Islamic countries has been the basic democratic set-up of India.

**Causes that led to the promulgation of “The Muslim Women (Protection of rights on Marriage) Act, 2019”**

There were various causes or circumstances that led to the promulgation of this bill. One of the main causes was the very nature of talaq-e-biddat. But there were also many causes apart from that and which were-

1. **Previous bills and acts regarding talaq-e-biddat in India**- There have been various legislations enacted in recent times in lieu of talaq-e-biddat. These legislations amended the original provisions of The Muslim Women (Protection of rights on divorce) Act 1986. The first act which brought a relief to millions of women was The Muslim Women (Protection of Rights on Marriage) Bill, 2017 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. This bill was not passed in council of states because the majority of members were in favour of the practice of triple talaq. These members were majorly from all India Muslim Personal board, all India Majlis-e-ITTehadul Muslimeen and congress. The Muslim boards were not in support of the bill because they had an agenda of keeping Muslim personal law intact and triple talaq followed mentioned hanafi school of thought was an integral part of the Muslim personal law. After this there were many bills and ordinances which were passed in the house of the people but none of them passed from council of states because of the above mentioned reasons and also because the provisions were very stringent of the Muslim women act, 2017. Therefore, Amendments were necessary for making the provisions reasonable as well as necessary to maintain the religious sentiments of Muslim personal boards. As these bills were not converted into acts because of the above mentioned reasons, so attributable to that the cases of triple talaq were not allaying even after the Supreme Court judgement. This was the reason an

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act was imperative in which there are stringent provisions against the perpetrators at the same time which protects the religious sentiments of Muslims and also which could reduce the number of triple talaq cases in India. Finally, in 2019, The Muslim women (protection of rights on marriage) Bill came which was very precise because it incorporated all the requisite amendments. It also included the clause of bail in its provisions which made it reasonable for Muslim men by altogether not eliminating their rights. Ergo, this bill was worthy of becoming an act as for the first time a bill considered all the points of every major group. The provisions of this bill were reasonable. It directly influenced the lives of millions of Muslim women. So, the drawbacks of previous bills, acts and ordinances were one of the major causes of promulgation of the “The Muslim women (protection of rights on marriage) Bill 2019”.

2. Lack of substantial change even after the Landmark Judgement and ordinances aftermath- Triple talaq cases in India in recent times were on a surge. Even after the Supreme Court judgement of “Shahyara Bano V. Union of India”, triple talaq cases were not eliminated. There were more than 200 registered cases of triple talaq across the country even after the judgement.1722 The plight of Muslim women was subsided but was not eliminated because there was a lack of an act with coherent provisions. So, an order was imperative from the government to prohibit this practice. The proposed bill of 2019 could in real sense change the social lives of Muslim women as it would criminalize triple Talaq through provisions which would be applicable in all parts of India. The ordinances before that could not make a difference because they were not converted into acts. Therefore, the pain and agony that the Muslim women faced because of the practice of triple talaq was so dreadful that an order that bans this practise was of utmost importance and it was done by the above-mentioned bill.

3. Constitutional and personal law validity of triple talaq- Triple talaq was considered to be legally valid despite being arbitrary, irrevocable and partial because it was enshrined in Hanafi school of thought. But its legality was challenged under article 372 of the constitution of India and section 2 of shariat application act.1723 In the above mentioned case, it was held that according to article 372, courts ought to guard the constitution and in pursuance of that they are the ultimate interpreters of the contentious laws. Therefore, court deems triple talaq to be against article 14. It does not label it under the purview of article 25 because it goes against the public order, morality and security. The petitioner counsel in this case argued that Islamic personal laws should not be interpreted by Indian courts as the language of the texts is Arabic and none of the judges are really versed with the language. He also argued that religious laws should not be tampered by the courts as it would be an infringement of article 25. The counter arguments of the counsel of respondent were that when a constitutional law contradicts any personal law of any religion on the same issue, then constitutional law should be resorted against the personal law as the security of the nation is of utmost priority. The court’s judgement also held that the talaq was not legally valid and hence for the first time

1722 Rahmat Ullah And Khatoon Nisa vs State Of U.P. And Ors II (1994) DMC 64
sparking the debate between constitutional law and religious law on this issue. The judgement of this case challenged the legality and validity of the triple talaq, hence giving this kind of perspective to the law makers on this issue. According to section 2 of shariat application act, if there is any ambiguity on an aspect, then the law should be applied instead of customs and usages. Since triple talaq is not mentioned in Quran and is followed in the context of customary Islamic law, the prevalence of triple talaq is questionable. Article 372 says that all the laws which were in force before 15th August, 1947 will be in force in the present times. But since triple talaq was practised as a result of customary personal law, it cannot be included in "law in force" because personal law is not made by legislature. So, the above-mentioned bill was also promulgated to absolve all the ambiguity that was surfaced because of the provisions of article 372 and section 2 of shariat act that was brought into the scheme of things because of the above mentioned case. This is not an immediate cause but this issue can also be considered in the making of this bill.

Main provisions of “The Muslim Women (Protection of rights on Marriage) Bill, 2019”

1. This bill makes the offence of talaq-e-biddat cognizable and it will be considered cognizable only if it is informed by the married woman who has been victimised or any person who is related to that woman through blood or through marriage.
2. The punishment for the offence of triple talaq will be up to three years imprisonment coupled with a fine.
3. A magistrate can grant a bail to the accused and that can be done only after hearing the side of the woman against whom talaq-e-biddat has been promulgated.
4. The magistrate has been given power to compound the offence of talaq-e-biddat upon the request of the woman against whom talaq has been issued. Compounding is amiably solving the issue without any legal hassles. The terms and conditions would be decided by the magistrate for compounding.
5. Victims of triple talaq are entitled to get maintenance for them and their children who are dependent on them. The sum of money which will be given as compensation would be fixed by the magistrate.
6. Women who get separated as a result of talaq-e-biddat are entitled to the custody of their minor children. The role of magistrate is very vital when it comes to the manner in which custody is to be given.

What benefits did this bill accrue to Muslim women in India?
There are various benefits that were accrued to Muslim women as a result of this bill. This bill empowered the Muslim women and gave them the capability to stand on the same pedestal with the Muslim men. It firmly establishes gender equality and to an extent reduces the capricious power given to Muslim men as a result of customary Islamic law in terms of the forms of divorce. So, the various assistances that this bill has provided Muslim women are- It established parity of Muslim women with Hindu and Christian women on legal lines. Hindu and Christian women enjoy equal rights because of the codified laws
like the Indian divorce act, Hindu marriage act 1955, special marriage act, etc. But in the case of Muslims, there is a separate set of laws which is akin to their own culture and talaq-e-biddat was also one such law which was based on customary Islamic law, so when through this bill triple talaq was criminalised, Muslim women were given legal rights, i.e, now they can have a say in their divorce. So the legal parity is a huge benefit that was accrued to them because of this bill.

This act not only punishes the perpetrators severely but it also gives the affected Muslim women an opportunity to resolve the turmoil and amiably settle the dispute or get back to the mean position with their spouses by including a provision according to which triple talaq was declared a compoundable offence. This provision in a way wants to leave a window open in the slightest way possible because if in future the couple wants to reconcile things, then they should have an option to do so. So, this provision of reconciliation serves as a sigh of relief for those women who were completely dependent on men for both financial and emotional aspect. This law helped Muslim women to become independent by making divorce a two-way process and now, it cannot be executed without the consent of the wife. Though, talaq-e-hasan still exists and it also does not give much importance to the wife’s consent in a divorce, but it still is not blatantly arbitrary and also is revocable till the third sitting. Therefore it can be concluded that now, marriage cannot be broken simply by uttering talaq three times at one sitting, i.e, it would no longer be arbitrary and so as a result the issue of custody of children is not brought up because the practice has been declared illegal and hence, Muslim women can now happily stay with their children and also stability of house could be maintained.

This law protects women from destitution or parsimony which they used to face when they were left by their husbands by promulgation of triple talaq. Many women who were given divorce were not financially independent and when they were left by their husbands, they had nowhere to go to fulfill their basic human needs and when no option was left they generally became wards of state. So, all these hardships which the women used to face were diminished by this law. After this bill, these women have gotten an out from the horrors of destitution which was resulted as an aftermath of promulgation of triple talaq.

What disadvantages did it accrue to Muslim women in India?

“The Muslim Women (Protection of rights on Marriage) Bill, 2019” criminalized the practice of triple talaq that has proved to be very beneficial for a major chunk of Muslim women in India, but it has not completely solved the problem of gender inequality existing in the forms of divorce in Islam. The gender inequality is still intact because there are some repercussions of this bill which have not gone in the favour of Muslim women and have proved to be detrimental for Muslim women. Some Muslim women have not found this bill to be advantageous for them because everyone does not live in the same socio-cultural society and the circumstances for every


1726 Id
1728 Shayara Bano case
woman are not the same. So, the disadvantages are-

The most pressing disadvantage that has resulted because of this bill is the issue of maintenance of Muslim women against whom triple talaq has been promulgated. There is a clause of punishment of three years imprisonment and fine in this bill which makes the wife financially unviable. When the husband is imprisoned, there is no one to take care of the wife financially and that is the biggest disadvantage of this bill. So, the issue of maintenance remains an issue because of the criminality clause in the bill.

There is violation of conjugal rights for the women whose husbands are imprisoned for three years as a result of the criminality clause in this bill. The right of conjugal rights has been violated by this bill which is a major concern for the women because this right is mentioned in Quran and any law cannot abridge the right of Muslims which is mentioned in Quran. So, this is also a big disadvantage for women because of this bill.

There are some Muslim women who firmly believe in the customary Islamic law and also their cultural sentiments are very deeply intact. This law has criminalised the practice of triple talaq and as a result the cultural sentiments of various women have been shattered because they are of an opinion that if any legislation alters any provision of cultural law then the right to enjoy cultural practise is hindered. So, these women because of their socio-cultural conditioning have a tendency to idolize their spouses and if any law which puts their husband on peril, then they are naturally against that law. So, for these women this law is disadvantageous.

There are some women who might have to face some persecution from the husband’s family because according to this bill, husband would have to face three years of imprisonment and because of that the wife will be left alone with the husband’s family and many times they vent out their anger on the woman by making the life of the woman miserable, so in a way the clause of punishment in some cases has lost its purpose. So, this is also a prominent disadvantage of triple talaq bill.

**Conclusion and way forward**

The Muslim Women (Protection of rights on Marriage) Act, 2019 has been a remarkable step towards gender equality and it can be considered as so because this act has put Muslim women at same pedestal as Muslim men in terms of having a divorce in their own marriage. It criminalised the practice of triple talaq which can be considered a very brave step because it challenged the customary law of Islamic law and also there are not many instances in past where any central law has abridged a personal law of any religion in spite of it being regressive and this act doing that makes India a truly secular country. It is also considered a brave step as Article 25 of the Indian constitution gives its citizens freedom to practise, profess and propagate religion and triple talaq being one of the forms of divorces which is mentioned in


609 anafi school of thought becomes a way by which one can practise religion, but contemporaneously Article 14 states right to equality and clearly the practice of triple talaq does not treat Muslim women equal to Muslim women as in the practice men can get separated from their wives even without their consent. So, there was a state of dichotomy between article 14 and article 25 & Muslim personal law. Therefore because of these reasons the government making this practise unconstitutional makes it a very brave step. The results of this act have been very significant. It in real sense has eliminated the practice as now the landmark judgement of 2017 had been formalised, so because of that there is a change in true sense, hence making the result of this act significant. The effect of this Act has not been unanimously advantageous for all the Muslim women against whom triple talaq has been promulgated. They faced consequences which were not advantageous like some of them were deprived off their security, some of them became emotionally feeble, some of them faced persecution from the husband’s family, etc. These consequences in turn further engraved their misery. The effect of this act has been mixed because the effect is dependent on the socio-cultural environment in which Muslim women live in. The socio-cultural environment affects many aspects like the treatment of wife by the family of husband when the husband has been imprisoned for triple talaq, the mindset of wife, i.e., whether she believes in the customary law or believes in the reason and logic over customs, etc. These aspects are developed according to the socio-cultural environment in which these women live in. But majority of Muslim women have benefitted from this law and hence, this law can be considered as a stepping stone for a bigger change. This act can be considered as an example of gender justice, through this act government has covered the legal aspect of equality, now they should sought emotional and social equality and to achieve that this act can be considered as a great stepping stone.

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DRUGS ABUSE- ADDICTION AMONG SOCIETY AT LARGE AND ITS PUNISHMENTS

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Abstract-
“Addiction is like a curse and until it is broken, its victim will perpetually remain in the shackles of bondage- OcheOtorkpa”.

In the Era of 21\textsuperscript{st} century, increase in mental and physical pain has given rise to increase in use of drugs. Drugs have been used as a remedy to all the problems of life these days. It is very dishearten to know that drugs are not only increasing problems but also taking a user to end up his or her life. According to NCRB reports, one person is dead in every 12 hour due to drugs overdose and bad addiction and 5-6% is minors in it. States like Punjab, Rajasthan, Maharashtra, and Delhia are considered to be one of the highest in terms of drugs cases. At the first instance it has been observed that the abuse starts in teenage stage of a child and mostly in the form of cigarettes, alcohol and injections. The most dangerous among this is injections because it directly transmits in the blood streams and it also increases the chance of spreading diseases like HIV, etc. Drugs completely affect the consciousness of a person and it has a severe impact on whole nervous system. According to National Institute of drug abuse, drugs are also giving rise to respiratory problems, stoke, blood cancer, HIV, depression, etc. Overdose of drugs can also lead to unrecognized actions which can be harmful to society as well as the individual.

In this whole paper we would be dealing about increase of drugs abuse from past few years and what the penal punishments in India to stop the usage among the society.

Keywords- Drugs, Addiction, Abuse, Problems, Diseases

Introduction:
Drug Abuse has become a serious issue these days due to various physical and mental problems. In simple term drug abuse mean use of illegal drugs or over usage of drugs for the purpose other than those which they are really meant for. This addiction may lead to loss of physical, mental, emotional health. In today’s scenario problem of drugs abuse starts from teenage and by the time a child reaches to high school use of alcohol, cigarette have become so common and even half of them have also started consuming illegal drugs. According to reports of National Institute on Drug Abuse, 0.7% of cocaine user is 8\textsuperscript{th} graders, 1.5% is 10 graders and 2.2% are 12\textsuperscript{th} graders. This was only cocaine but the consumption is not static to this drug there are many other drugs like Marijuana, for which around 86% consumption is among teens only.\textsuperscript{1731} Drugs abuse is not started directly there are many factors associated with it like peer pressure, stress, depression, easy access to drugs, and off course social media. All these mix emotions tries to encourage a person to join this society. The teenage is considered as critical time which is open to attack because the mind is still under development and different kind of emotion comes out it can related to love, pain, jealously, anger, etc. the reasons for

\textsuperscript{1731}https://www.drugabuse.gov/publications/drugfacts/monitoring-future-survey-high-school-youth-trends

PIF 6.242 www.supremoamicus.org 610
all these are due to prefrontal cortex and its connections to brain. This prefrontal cortex is responsible for assessing situations, making sound decision making and controlling impulses. If we compare an adolescent brain with a teenage brain we will find that teenage judgment making ability is weak due to underdevelopment of this prefrontal cortex this generally leads to bad habits very easily. This problem is not only in teens but also in adults too the reasons for that can be poor social circle, high work pressure, disturbance in personal life, etc. Drugs is considered to be addiction because it changes the working of the brain and these changes are very long lasting. At first instance the consumer will feel pleasure and happiness but slowly and lately it will become bad attraction. Health issues like cardiovascular problems, liver, kidney damage, HIV- AIDS, etc become very common among drug abuser.

In this research paper we would be discussing about how and when drugs become a abuse instead of medicinal use, what are the types of drugs prevailing these days and what are the penal punishments in India for drugs abuse.

**History and Background:**

“As drugs have been abused for hundreds of year all over the world, their effects have been felt for just as long”

Since drugs are used, there have been invariably those that abused them, that light-emitting diode to full-blown addiction and therefore the bevy of aspect effect that go along with it, because the physical and psychological state implications of addiction became clearer, rehabilitation effort began to seem. As a result, the history of rehabilitation in the United States back hundreds of years.

One of the instauration Father of America, ‘Benjamin Rush’ was one amongst the primary too believe that alcoholism wasn’t a matter of non-public self-command however rather thanks to the alcohol itself. Rush challenged the accepted belief at the time that alcoholism was an ethical failing, thereby progressing the conception of addiction as an un-wellness. As per the University of Utah, within the past, addiction was treated as ever this import a shift to viewing addiction as Associate in nursing unhealthiness that would be managed. In 1864, the New York State Inebriate Asylum, the first hospital meant to entirely treat alcoholism as a psychological state condition, was supported, because the public began to look at alcoholism and connected misuse a lot of seriously, a lot of community teams and sober homes began showing.

Nowadays there are many drug abuse rehab programs offer addicts a variety of treatment approaches, ranging from traditional, and holistic services. The care should be customized according to an individual patient. The Prohibition and 21st Amendment, which overturned, a major step for the rehabilitation movement came in 1935. Dr. Bob Smith and Bill Wilson – founded Alcoholics Anonymous (AA). Using a spiritually approach to rehabilitation, AA showed a welcoming environment where recovering alcoholics could find a support.


https://drugabuse.com/addiction/history-drug-abuse/
The purpose of this is to review the history of drug usage and its social impact in the United States so, students should have an improved and proper understanding of the day’s problem and policies regarding drug abuse. The approach to this matter is sociological, which means exploring how the connection between the culture, social instructions, how the groups or individuals function to create drug-related phenomena. A sociological approach emerges with the many kinds of social, cultural, political and economic factors that engages themselves in day to day lives.

While pharmacology helps America comprehend however specific medicine impact brain activity, sociology will inform America concerning the social roots of drugs connected behaviors that ultimately form beliefs and behavior and inspire policy. Therefore, a review of drug use within the U.S. and therefore the social response to that should contemplate several phenomena. This broader framework can move America on the far side domestic borders and into the international community, for the history of misuse is a world, socio-political marvel.

In the other words, the meaning is hooked up to specific medication and drug use patterns is decided by however folks – especially powerful people – interpret them in standard of living these days controlled substances are unit made as very undesirable, even dangerous. However, history shows US that several of those same substances were once viewed favorably and had hefty social price for instance, it should be troublesome to believe that use of a drug like cocaine, for instance was initially viewed absolutely. Opium and Cocaine use and control: From 1880’s- 1900’s many accounts deal with the history of drug use and social control begin with opiates and cocaine are the two of the drugs which are legally used in the United States. Therefore, starting with the origins of opiate and cocaine and its usage in our societies. To begin with opium which is being derived from the poppy plant, which nowadays mainly found in Asia and the Middle East. The main ingredient contained in opium is morphine. Opium has been used from centuries from back 4,000 years, it was a folk medicine and a recreational euphoric. Its usage is highly praised. Many of the people consuming it terms it as a god’s Owned Medicine. The value of the medical community increased rapidly, a commercial opium trade was spread all over the Europe in 1640-1773 to supply and to fulfill the world’s demand. Opium was known to be very profitable in those times.

In 1874, Heroin was also made from Morphine. In 1898, it was propounded by the Bayer Company situated in US for the initial time; many wanted this drug should be the cure for the growing problem of morphine addiction. Heroin was also being utilized in large quantity, by the 20th century, morphine and heroin had become a huge global commodity, as compared with coffee and tea. Opium was somewhere started to be changed from God’s owned medicine into something like Satan’s curse!

Cocaine, which emerges from the coca leaf, its usage was tracked from the past ancient tribal customs of the Incas. Coca leaves are the part of mountain shrub. For instance, the Spanish leader of Mexico and Peru in the 16th century gave coca to the Indians to keep them safe and secure. The active ingredient in coca leaves is alkaloid cocaine, which was propound in 1844. Later in that century, Europeans and American scientist’s start taking interest in the coca leaf. While eating coca leaves
which didn’t become popular in Europe or North America states, many beverages were initially created from it. Europeans invented a coca-based wine named as ‘Mariani’s wine’, a red wine or elixir which contains coca. In 1863, John Pemberton of the United States propounded a syrup named Coca-Cola in 1886, which contains some amount of coca.

Types of most common drugs:

Drugs are of many times and every drug is having different kind of effect to a person. Most common drugs used these days are alcohol, tobacco, cocaine, marijuana, heroin, stimulants, Inhalants.

Below is the brief description about these drugs:

i) **Cocaine**: These are available in small white powder and generally inhaled or snorted up or mixed with water or alcohol or injected with needle. These are also available in small rocks types pieces which are generally smoked. This is a type of drug which gives a person a strong craving to consume it again and again thus makes a person addicted in a short span of time. It do speed up the whole body and rejoice with full of energy, zee, but on the other hand makes a person too much lazy and tired for upcoming days. One of the major side effects are heart attack and stoke problems, HIV/AIDS. Person who is addicted to it can also loose control on himself/herself and if it is mixed with other drugs it become most dangerous thing. Symptoms of consuming cocaine can be seen in a person very easily, if the person snort the drug then he can have nose bleeding or blockage in nose or if he/she use injections and marks on arms are clearly visible.

**Heroin**: Heroine is the also a power substance generally brown or white color. This is the natural drug, called opioid drug which is made from morphine, which is a substance taken from seed pod of various opium poppy plants. These plants are generally grown in southwest Asia, Mexico and Colombia. This drug is having some common names like smack, big H, horse. Techniques to consume this drugs are injecting needle, mixing with alcohol, sniff, etc. Symptoms of these drugs are very horrible because this drug directly attack the brain of a person and attack the cells which are associated with pain, pleasure, heart rate, sleeping, etc. The urge of this drug is so strong that a person is not able to resist himself/herself. Short term symptoms are unconsciousness, vomit, dry mouth, full pain in legs and arms, restlessness, etc while long terms efforts are disastrous like damage tissue inside nose, heart line infection, liver kidney effects, sexual dysfunctions for men and irregular menstrual cycle among women. This drug generally is so addictive that it generally develops tolerance due to which person uses high and high amount again and again which at times leads to dead due to overdose.

**Marijuana**: This is a very common drug used among people. This comes from marijuana plant. These are generally green, brown parts of the plants. This drugs have many names likes weed, ganja, hash, etc. this drug is having high medical usage also. There are several techniques to use these drugs like Rolling and mixing it with cigarettes, mixing in food or alcohol or

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1735 https://medlineplus.gov/drugsandyoungpeople.html
1736 https://medlineplus.gov/cocaine.html
1737 https://www.drugabuse.gov/publications/drugfacts/heroin
using electronic vaporing. These are various short term effects to use these drugs like mood swings, altered colors, memory shortage, change in sense etc, on the other hand certain long term effects are like coughing breathing, memory loss, loose of thinking ability. When this drug become addictive then there is trouble in sleeping, anxiety, etc. The reason behind easy availability of this drug is because of its high medicinal use.

iv) Inhalants- As the word denote inhalants means substances that are used to inhale and get intoxicated. Substance that can be used in inhaler are alcohol and other drugs. These are very harmful to body as they have direct impact on lungs and brain and this at times lead to dead of a person. Some of the common names used for inhalants are Bold, Rush, Snappers, etc. Some of the short term health problems are like euphoria, dizziness, loose of senses on the other hand some of the long terms effects are like kidney failure, liver failure, lungs problems and brain damage. Inhalants are generally used by teenagers and youngers. These above were some of the common drugs which are used by people at large. The problem of drug abuse is very much devastating and taking lives of many people slowly and gradually. People have made drugs as a source to reduce stress, pain and tensions but this works as a slow poison because initially it gives pleasure but if we talk about long term consequences it completely ruins the life. There are many ways through which this addiction can be stopped. First of all the first time only the person should say no to any kind of intoxication, but suppose under peer pressure or for any reason someone had started using it then on initial stage only it should be stopped by counseling or by the help of drug rehab centers. Secondly, parents, teachers in school/colleges level should give proper guidance to an abuser instead of scolding. Indian government have made strict rules and regulation and also making changes as per the growth and development and for the same National Drugs and Psychotropic Substances Act, 1985 (NDPS) was formed.

Evolution of NDPS Act- India approach towards drugs was first enriched in Article 47 of the Indian Constitution which states that ‘State shall endeavor to bring about prohibition of the consumption except for the medicinal purposes of intoxicating drinks and drugs which are injurious to health.’ This same principle was also used for three International conventions i.e. Single Convention on Narcotics Drugs 1961, Convention on Psychotropic Substances, 1971 and UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988. In the year 1985 NDPS act was passed replacing 1930 Dangerous Drug Act but Drugs and cosmetic act, 1940 still remain in force. This NDPS act enforces restrictions upon cultivation, production, sale, use, consumption, import and export expect for the scientific purposes and medication usage. There were three major amendments since the act was formed. The first amendment was in 1989, wherein very harsh punishments were introduced, like mandatory minimum imprisonment of 10 years, a bar on suspension, restriction on bail, and trial by special courts. In the year 2001 again certain amendment was also inserted. In 2001, the penalties were imposed which was based on quality of drugs and there were three types of quantity

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1738 https://medlineplus.gov/marijuana.html
1739 https://medlineplus.gov/inhalants.html
were made i.e. small, commercial and intermediate. The third amendment was in the year 2014, this was the major amendment which had improvised the act to a great extent.

Punishment under Narcotics Drug and Psychotropic Substance act, 1985

Punishment related to specific types of drugs:

- **Section 15 of the NDPS Act 1985**, deals with the punishment for contravention in relation to poppy straw which states that the production, possession, transportation which include import and export interstate, selling, purchasing and its usage may lead to the punishment for rigorous imprisonment for 10 years which may extent to 20 years along with the fine of 1lakh which may extent to 2lakhs.

- **Section 16 of NDPS Act 1985**, deals with the punishment for the contravention in relation to Coca plant and Coca leaves which states that cultivation of coca plants or its production, possession, selling and purchase of the plant, transportation of plant which import-export interstate or usage of coca leaves leads to the punishment for rigorous imprisonment for 10 years or may extent to 20 years along with the fine of 1lakhs which may extent to 2lakhs.

- **Section 17 of NDPS Act 1985**, deals with the punishment for contravention in relation to the preparation of opium which states that manufacturing, possession, selling and purchasing of the opium, transportation which includes import and export interstate leads to a rigorous imprisonment for 10 years which may extent to 20 years along with the fine of 1lakhs which may extent to 2lakhs.

- **Section 18 of NDPS Act 1985**, deals with the punishment for contravention in relation to opium poppy and opium which states that manufacturing, possession, selling and purchasing of the opium, transportation which includes import and export interstate leads to a rigorous imprisonment for 10 years which may extent to 20 years along with the fine of 1lakhs which may extent to 2lakhs.

Other provisions related to punishment of NDPS Act, 1985:

- **Section 19 of NDPS Act 1985**, deals with the punishment for embezzlement of opium by cultivators which states that the opium cultivators have licensed to cultivate the opium poppy on account of central government who illegally disposes of opium production is punishable with rigorous imprisonment for the term not less than 10 years or may extent to 20 years along with the fine of rupees 1lakhs and which may extent to 2lakhs.

- **Section 20 of NDPS Act 1985**, deals with the punishment for the contravention in relation to cannabis plant and cannabis which includes the cultivation of cannabis plant, its production, manufacturing, possession, selling and purchasing of the cannabis plant, transportation which includes import and export interstate is punishable

  - Contravention should be related to the Ganja or cultivation of cannabis plant leads to the rigorous imprisonment which may extent to 5 years along with the fine which may extent to rupees 50,000.

  - Contravention should be related to cannabis other than Ganja leads to the rigorous imprisonment for the term of 10 years which may extent to 20 years along with the fine of rupees 1lakhs which may extent to 2lakhs.
manufactured drugs or preparation containing any manufactured drug this leads to a rigorous imprisonment for 10 years which may extent to 20 years along with the fine of 1lakhs which may extent to 2lakhs.

- **Section 24 of NDPS Act 1985, deals with the Punishment for external dealings in narcotic drugs and psychotropic substances in contravention of section 12** it states that whosoever is engaged in the trade with Narcotic drugs or any kind off psychotropic substances which is being obtained outside India and supplied to any person outside the India without the authorization of Central Government or any authorization granted under section 12 of NDPS Act 1985,( it states that any person should not be engaged in trading or controlling of any narcotics drugs or psychotropic substances obtained outside India or supplied outside India) whether authorized by central government and subject to any condition imposed by the government, is punishable for rigorous imprisonment for the term of 10 years which may extent to 20 years along with the fine of rupees 1lakh or may extent to 2lakhs.

- **Section 25 of NDPS Act,1985 deals with the punishment for allowing premises which is to be used for the commission of an offence, which states that being the owner, occupier or having control of house, room, enclosure, space, place, animal or knowingly permits which is used as commission by any other person is a punishable offence. This leads to the rigorous imprisonment for the term of 10 years which may extent to 20 years along with the fine of rupees 1lakhs which may extent to 2lakhs.

- **Section 25A of NDPS Act 1985, deals with punishment for contravention of orders made under section 9A, which states that if any human being contravenes any order made under section 9A is punishable under the act, which leads to the rigorous imprisonment for the term of 10 years along with the fine of rupees 1lakh.

- **Section 21-29 of NDPS Act, 1985 deals with the punishments for the contravention of the following such as manufacturing, preparation , illegal transportation which includes the import and export of interstate of narcotics drugs and psychotropic substances, dealing with the illicit traffic and harboring offenders respectively states the punishment of rigorous imprisonment for the period of 10years which may extent to the period of 20years along with the fine of rupees 1lakh which may extent to 2lakhs.

Section 27 of NDPS Act 1985, deals with the punishment for illegal possession in small quantity for personal consumption of any narcotic drugs or psychotropic substance or consumption of such drugs or substance, which states that whosoever possesses in a small quantity any drug or substance which is proved that it is intended for personal use is punishable.

(a) Any narcotic drug or psychotropic substance (cocaine, morphine, etc.) consumed or possessed any drugs or any substance specified by the central government in the official gazette, the imprisonment is for the term 1year or fine or both.

(b) If any other narcotics drugs or psychotropic substance possessed or consumed which is not being specified under clause(a) leads to the imprisonment for the term of 6months or with fine or with both.

- Small quantity- quantity as may be specified by the central government by notification in the official gazette.
- If any person possesses the small quantity of any kind of narcotics drugs or
Where contravention involve for commercial then rigorous punishment not less than 10 years which may extend to 20 years or fine not less than 1,00,000 which may extend to Rs. 2,00,000

Below is the chart describing about the quantity of drugs.

So, as discussed above NDPS act, 1985 covers various provisions relating to punishment of Illicit use of drugs. Drugs are made for medicinal use but some people try to use it in a different way thus destroying the nation and for those people only such kind of laws are made.

Suggestions and Recommendations-
1) Drug abuse is a chain of many people so to stop this we need to break the chain first and then take necessary steps
2) Drug abuse get started mostly at teenage so parents , teachers , school, universities, etc should conduct counseling sessions on regular intervals
3) Stories, video’s, photos should be shared of drug abusers to public so that consequences can be analyzed
4) Staff involved in drug testing should be trained properly
5) Drug rehab centers should get more active and advertise more and more in newspapers, internet, etc.
6) Drugs testing centers should get more efficient and less costly.
7) Parents should have good communication with their children and try to help them in the worst situation also so that they can’t feel lonely and get attracted towards any kind of intoxication
8) Regular survey should be conducted so that new updated data is available.

<table>
<thead>
<tr>
<th>Drug</th>
<th>Small Quantity</th>
<th>Commercial Quantity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amphetamine</td>
<td>2 grams</td>
<td>50 grams</td>
</tr>
<tr>
<td>Buprenorphine</td>
<td>1 gram</td>
<td>20 grams</td>
</tr>
<tr>
<td>Charas/Hashish</td>
<td>1 kg</td>
<td></td>
</tr>
<tr>
<td>Cocaine</td>
<td>2 grams</td>
<td>100 grams</td>
</tr>
<tr>
<td>Codeine</td>
<td>10 grams</td>
<td>1 kg</td>
</tr>
<tr>
<td>Diazepam</td>
<td>20 grams</td>
<td>500 grams</td>
</tr>
<tr>
<td>Ganja</td>
<td>1 kg</td>
<td>20 kg</td>
</tr>
<tr>
<td>Heroin</td>
<td>5 grams</td>
<td>250 grams</td>
</tr>
<tr>
<td>MDMA</td>
<td>0.5 gram</td>
<td>10 grams</td>
</tr>
<tr>
<td>Methamphetamine</td>
<td>2 grams</td>
<td>50 grams</td>
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<tr>
<td>Methaqualaine</td>
<td>20 grams</td>
<td>500 grams</td>
</tr>
<tr>
<td>Morphine</td>
<td>5 grams</td>
<td>250 grams</td>
</tr>
<tr>
<td>Poppy straw</td>
<td>1 kg</td>
<td>50 kg</td>
</tr>
</tbody>
</table>

https://dor.gov.in/narcoticdrugspsychotropic/punishment-offences
9) There are certain flaws in NDPS act also which need to be looked upon like
   a) Bail under NDPS act is very difficult due to very harsh provision, but we know that many a times in these type of cases people are innocent, so as authors we would like to suggest that bail should be given a light under NDPS act,1985.
   b) Drugs addict need more of medication then jails so instead to directly putting an offender in jail there should be a proper treatment given to very abuser
   c) Government facilities are limited in jails and as a chain smoker it’s not easy to quit so we would recommend that medication, government facilities should increase just like it happens in Drug Rehab centers.
   d) NDPS act have been made strict so that people get scared and don’t involve themselves in bad habits but the scenario is bit different because many of the offenders want themselves to get rid to this addiction but due to harsh punishments they are not able to get out of it, so it is recommended that act should be amended in such a way that proper medication should be given in jail also instead of putting them alone in prisons.

10) Society should also change their mentality towards an abuser and should treat them naturally, help them to leave all the kind of addiction instead of judging.

11) In most of the drug abuser it is easy to find change in color of lips, nails and at times syringe marks on skin, so if any of these things are found then the guardian or family member should to talk to that person and help him to leave this addiction.

CONCLUSION:
According to the research we want to conclude by stating some issues and punishments of NDPS act as discussed, the NDPS act is somewhere a very strict towards criminals, even bail is very difficult under NDPS act. This act was designed in such a way so that people get scared before involving themselves under illicit act but this is unilateral approach of act if we see the other side of mirror we will find that many people are innocent but then also their lives are spoiled, also the act prescribe harsh punishments to small offenders with handsome amount of fine. The addiction of drugs mostly happen when an individual starts utilizing drugs for fun or under peer pressure there is normally certain situation which pushes them to start the conduct. Students in secondary school have high probability to begin with the mishandling remedies which are available at their homes or through their companions. Regardless of the age the individual starts to mishandle medication or liquor, it is generally on the grounds that they have a high measure of hazard factors, and a low number of defensive components in their lives. As the decades progressed, tranquilize use has gone up in the United states over all ages and keeping in mind that a portion that ordinarily mishandles drugs have changed and pernicious medications have got most accessible.

The most normally mishandle drugs in each gathering are as per the following:

- For the individual who are of the ages 12-13 years or under, the most commonly used drugs are tobacco, inhalants, weed, marijuana and prescription drugs.
- Youngsters who are at the beginning at their youth age have been seen at high hazard to create fixation issues without assistance or medication.
- For the young people- those who are of ages 13-18 years- most commonly abused drugs are marijuana, prescription drugs (used non-medically or without prescription), depressants, codeine syrups, syrups containing dextromethorphan, and spice.

When an individual gets into their high schooling age, more substances become accessible to them and they can also acquire
them from their different companions. In the event that an individual starts utilizing narcotics drug in their adolescent years, they may depend upon heroin use in the long run, as heroin and other narcotic use has gone up in recent years, due to the narcotics pandemic. For grown-ups, by and large the most mishandled drugs are liquor, narcotics (heroin or others), and cocaine. The most regularly mishandled drug by grown-ups, the narcotics drugs have killed more than 120 people per day the country over. To stop all this many changes are required in coming future years for a drug free country.