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We, at Jurisperitus believe in the principles of justice, morality and equity for all. We hope to re-ignite those smoldering embers of passion that lie buried inside us, waiting for that elusive spark.

With this thought, we hereby present to you
Jurisperitus: The Law Journal.

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DUE PROCESS AND TRANSPARENCY: A JURISPRUDENTIAL OVERVIEW OF INDIAN COMPETITION LAW

- **DR. BINISH BANSAL**[1]

Abstract:

The thrust of this paper is on discussing the proceedings of Competition Commission of India and the *Due Process* in extensive detail in order to trace its growth and contribution in the evolution of the Competition Law jurisprudence in India. The *Competition Act* commenced in 2002, and since then, the CCI (Competition Commission of India) has been doggedly engaged in using all available means, like, enforcement and advocacy, to spread awareness about the fundamentals of free market and the importance of adhering to the law by all the stake holders, like, the businesses, the bureaucracy, consumers and the legal fraternity.

The law is firmly entrenched in India, evident from the judicial review of various orders passed by the Commission in India, leading to the highlighting of some important legal points. According to the Section 36 of the Competition Act, 2002, the Competition Commission of India shall discharge its functions as per the principles of natural justice, and shall be empowered to establish its own regulation procedures, but these will be subject to the rules formulated by the Central Government as well as other provisions of the Act. It is evident that by directing the Commission under Section 36 to observe the principles of natural justice, prevention of miscarriage of justice has been ensured, even while it has been allowed freedom to develop its own regulation procedure for the discharge of its duties. Section 18 of the Act lays down that its duties involve 'eliminating or discarding practices that can adversely affect competition, safeguarding the interests of the consumers, and ensuring that all participants are free to carry out their trade, in the Indian market'.

However, there is controversy galore as to how far the principles of natural justice must be applied in the specific situations under the different sections of the Act. Nevertheless, the competition law in India has evolved sufficiently on this topic, as is visible from the orders and decisions of the Commission as well as the directions laid down through the different orders of the Competition Appellate Tribunal (COMPAT), High Courts and the Supreme Court.

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Keywords**:** *Competition Law, Competition Commission of India, Principle of Natural Justice, Due Process.*

Due Process and Transparency: A Jurisprudential Overview of Indian Competition Law[2]

"Wherever, this Court has dealt with the matters relating to complaint of violation of principles of natural justice, it has always kept in mind the extent to which such principles should apply. The application, therefore, would depend upon the nature of the duty to be performed by the authority under the statute."

-Supreme Court of India in Competition Commission of India vs. SAIL & Anr.[3]

Procedural rationality and transparency is the key to effectively enforce every legal statute, wherein the institution has the power to establish the rights and liabilities of the parties covered in the statute. Legal procedures implemented effectively not just help in fulfilling the purpose of the legislation, but also prevent wastage of judicial resources and time that would otherwise be committed during protracted litigation processes. In the Indian context, the ideas of due process and procedural equity have evolved as the outcome of the legal precedents and interpretations made by the Supreme Court of India of the term "procedure established by law" under Article 21 of the Constitution of India.

The Competition Commission of India ("CCI") came into existence with the enactment of the Competition Act, 2002 ("Competition Act"), with the purpose of safeguarding the interests of the consumers and protecting competition in the Indian markets. The CCI can fulfill these objectives through functions that are advisory, adjudicatory, investigative and regulatory, for which they are authorized to formulate a regulatory mechanism in line with the principles of natural justice[4]. The adjudicatory power of CCI is such that it is authorized to heavily penalize enterprises[5] indulging in anti-competitive covenants, forming cartels or abusing their position

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[2] Dr. Arti Aneja, Assistant Professor, Faculty of Law, University of Delhi.

[3] Civil Appeal No. 7779 of 2010

[4] Section 36 of the Competition Act states:
"In the discharge of its functions, the Commission shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules made by the Central Government, the Commission shall have the powers to regulate its own procedure."

[5] Section 27 of the Competition Act states:
"Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:—
(b) Impose such penalty, as it may deem fit which shall be not more than ten per cent. of the average of the

of dominance. According to the Section 36 of the Competition Act (2002), the principles of natural justice will be the pivot on which the discharge of functions of Competition Commission of India shall rest, and the Commission shall have the power to determine its own procedural regulations, although Central Government rules and other provisions of the Act will be overriding feature. By concentrating on the principles of natural justice, Section 36 ensures that the Commission's rulings and procedures in no way fail to fulfill the demands of justice, while on the other hand it is given enough leverage to develop its own regulatory procedures for discharging its functions. Its duties, contained in Section 18 of the Act, include 'ensuring elimination of practices that could adverse impact competition, safeguarding consumer interests, and ensuring right to freedom of trade of other participants of the Indian market'.

Nevertheless, there is significant controversy as to how far the proceedings under various sections of the Act must hinge on the principles of natural justice. Indian competition law jurisprudence has evolved significantly as is visible from the decisions and practices of the Commission and the directions given through the orders of Competition Appellate Tribunal ("COMPAT"), High Courts and the Supreme Court.

Locus standi

Section 19 (1) (a) of the Act allows a party to file an Information with the Commission, "The mandate of the Commission is to inquire into any alleged violation of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either of its own accord or on (a) receiving formal information from any person, consumer or their association or trade association accompanied by such fee as has been determined by regulations; or (b) …". An amendment of the Section transformed the words "a complaint" into "any information, in such manner and".[6] The purpose of introducing this change was to make it possible for the Commission to conduct an inquiry on receiving any information regarding any breach of the Act's provisions, rather than only on the receipt of a formal complaint.[7] Moreover, by using the words "any person" in Section 19, the Act allows a long rope to the Commission so that

turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse:
Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent of its turnover for each year of the continuance of such agreement, whichever is higher."

[6] Competition (Amendment) Act, 2007

[7] 44th Report of the Standing Committee on Finance on Competition (Amendment) Bill, 2006

information can be accepted from any person irrespective of whether the said anti-competitive conduct has affected that person or not.

The case of Motion Pictures Association vs. Reliance Big Entertainment Pvt. Ltd. illustrates the point, wherein it was held by the COMPAT that the Informant (a movie producer) had the locus standi to file Information before the Commission since the decisions of the film distributors association, alleged to having been engaged in anti-competitive behavior, affected the Informant despite the fact that it was not the member of the association, and therefore, was not subject to the alleged anticompetitive rules.[8] The COMPAT while deciding the case of Shree Jeetender Gupta vs. Competition Commission of India & Ors., held that "any person having no relation whatsoever with the subject cannot initiate the legal process under the CCI".[9] According to the COMPAT, despite the Informant being an employee of the consumer company, he was neither the consumer of the product nor was he party to the transaction between the alleged dominant entity and the consumer company, and therefore, and the supposed deed of contravention was not in any way connected to him. Thus, the locus standi to file the Information did not rest with him. In another case, L.H. Hiranandani Hospital vs. CCI & Ors., it was held by the COMPAT that though no qualifications have actually been suggested in the Act for determining the locus standi of an Informant, the Commission must be act prudently if the Informant is a third party or a mischief-maker, who may be having an ulterior motive for championing someone else's cause.[10] In this case, the Informant was even required to pay a penalty by the COMPAT for hiding certain important pieces of information at the time of its filing, particularly on the basis of which the Commission could have formed a prima facie opinion that there has been no action in contravention of the Law.[11] However, it is not always possible to judge or assume the malicious intent. In the case of Surendra Prasad vs. CCI & Ors. (Electricity Order), the appellant argued that the Informant could not file the Information as he had no locus standi for the same, an argument that was rejected by the COMPAT. The appellant's contention was that the Informant was an advocate working with another attorney, who was representing the respondent's rival in numerous cases and that the Informant had an ulterior motive for filing the information. The COMPAT, however, held that

[8] Motion Pictures Association vs. Reliance Big Entertainment Pvt. Ltd., Appeal No. 69 of 2012, dated 17.05.2013
[9] Jeetender Gupta vs. Competition Commission of India & Ors., Appeal No. 30/2014, dated 04.07.2014
[10] L.H. Hiranandani Hospital vs. CCI & Ors., Appeal No. 19 of 21014, dated 18.12.2015
[11] Deepak Kumar Jain and Manoj Kumar Jain vs. Ors., Appeal No. 79 of 2014, dated 08.11.2016

this fact could not be considered sufficient for suspecting malafide intent of the Informant.[12]

In the case of Jitender Bhargava vs. CCI & Ors., the COMPAT, in the context of the appellant's locus standi, held that only the 'person aggrieved' can file an appeal.[13]

The Commission also held, in the case of Magnolia Flat Owners & Anr. vs. DLF Universal Ltd. & Ors., that under Section 42 of the Act, dealing with contravention of the Commission's orders, may be conducted either suo moto by the Commission or if any member of the public moves an application regardless of the whether such a member of the public was a participant at the time when the proceedings were initiated.[14]

Right to withdraw

With regard to the Informant's right to withdraw the filed Information, it was held by the Commission that, "the Commission is not authorized to serve as a platform for negotiated settlement of the disputes between the parties. Instead, its objective is to ensure the elimination of practices that significantly affect competition in the Indian markets. It is for this reason, no mechanism for withdrawal or settlement has been provided for in the Act …".[15] The Commission and the COMPAT have held similar stance in a large number of cases.[16]

Right to be heard

The Supreme Court, in the case of CCI vs. SAIL (supra), noted that the rights of any of parties are not affected by the forming of the prima facie opinion and directing the Director General ("DG") under Section 26 (1) for initiation of investigative inquiry, since these are only administrative functions. It was also held that the principle of audi alteram partem need not be applied in the proceedings under Section 26 (1) of the Act. The Supreme Court observed in the context of an order passed under Section 26 (2) of the Act that curtails the right of the

[12] Surendra Prasad vs. CCI & Ors. Appeal No. 43 of 2014, dated 15.09.2015

[13] COMPAT- Jitender Bhargava vs. CCI & Ors., Appeal No. 44 of 2013, dated 27.03.2014, para 11

[14] Magnolia Flat Owners & Anr. vs. DLF Universal Ltd. & Ors., Case no. 67/2010, order under Section 42 of the Act, dated 26.03.2014

[15] M/s Royal Agency vs. Chemists & Druggists Association, Goa & Anr., Case No.63 of 2013, dated 27.10.2015

[16] COMPAT's decision in Yogesh Ganeshlaji Somani vs. Zee Turner Ltd. & Anr., Appep]oal no. 31/2011, dated 21.03.2013); CCI's decisions in M/s Royal Agency vs. Chemists & Drk-=Kuggists Association, Goa & Anr., Case No.63 of 2013, dated 27.10.2015, Rohit Medical Store vs. Aashish Enterprises & Ors., Case No. 11/2010, dated 16.12.2010, Jupiter Gaming Solutions Pvt. Ltd. vs. Government of Goa & Anr., Case No. 15/2010, dated 12.05.2011, etc.

Informant, that despite the fact an order under the said section is an adjudicatory order, the Commission is not duty bound to give an oral hearing to the Informant. The Informant can, however, seek remedy only in the form of an appeal and Section 26 (2) of the Act does not even allow the Informant a right to notice before the passing of an order.[17] Supreme Court has further observed that as per the provisions of Regulation 17 of the CCI (General) Regulation, 2009, the Commission has been allowed complete authority and freedom to conduct preliminary conference where the Informant or any other person as may be necessary may be called to present a position on the matter for developing prima facie opinion.[18]

A Division Bench of the Delhi High Court, in the case of South Asia LPG Company vs. CCI & Ors. (LPA No. 857/2013, dated 03.09.2014), noted that if the DG's investigation report does not indicate any violation of the provisions of the Act, the Commission can exercise its discretion and order additional investigation without the alleged party being notified of the hearing.[19] It was upheld by the court that such order being entirely an administrative matter, has no bearing on the rights of any of the parties, and thus passing of such an order is not bound by the rules of audi alteram partem.

Formation of prima facie opinion

The Supreme Court in the CCI vs. SAIL case (supra) and various judgments of the COMPAT have served to define the Commission's scope of enquiry for forming of prima facie opinion. It was held by the Supreme Court in the case of CCI vs. SAIL (supra) that the level of enquiry for passing an interim order under Section 33 of the Act is more intense than required for prima facie findings. In another case, without actually referring to the Act, it was held by the Supreme Court that, "prima facie findings do not indicate final proof of the case; rather it reinforces the idea that a case can be established if the supporting evidence of the case were to be believed. However, whether a prima facie case can be formed or not requires determining whether the evidence leads to the possibility of reaching the relevant conclusion in question and not whether that evidence could lead towards that conclusion alone".[20]

[17] Supreme Court, CCI vs. SAIL, Civil Appeal No. 7779/2010, dated 09.09.2010

[18] Also see the judgment of COMPAT in Gujarat industries Power Company Ltd. vs. CCI & GAIL, Appeal No. 03 of 2016, dated 28.11.2016, for a similar discussion on the scope of Regulation 17.

[19] Delhi High Court, Division Bench- South Asia LPG Company vs. CCI & Ors., LPA No. 857/2013, dated 03.09.2014

[20] Nirmala J. Jhala v. State of Gujarat, (2013) 4 SCC 301

The COMPAT has in numerous cases held that for forming a prima facie opinion, the Commission only needs to examine the declarations included in the Information/Reference and the other documents attached along with.[21] Furthermore, the Commission is not authorized to intensely scrutinize the allegations included in the Information/Reference and document the details pertaining to the merits of the case in the context of the breach of the Act's provisions, because the process of in-depth examination can be undertaken only once the investigation report has been received.[22] Any material not revealed in the Information/Reference cannot be used by the Commission.[23] The Commission must restrict itself to the formation of prima facie opinion while scrutinizing the allegations given in the Information and avoid the mistake of seeking to finalize the investigations or conclusions at this stage. The COMPAT averred that the endeavor of the Commission must be to form a prima facie opinion regarding each of the contained allegations.[24]

It has been asserted by the COMPAT over and over that in the event of the recorded information leading to two different scenarios: with the first one allowing the formation of prima facie opinion pertaining to the flouting of the Act's provisions and the other scenario leading to an entirely different conclusion, the Commission is advised to rather begin with the investigation and not incline towards the latter stance. For instance, the COMPAT, in the case of K Sera Sera vs. DCI & Ors., noted that the Commission should have initiated investigation into the allegation that the market could be held captive exclusively on the basis of adopting certain standards in cinema technology rather than closing the case on the basis of the submission of the alleged parties by drawing the conclusion that the quality of cinema industry would have improved because of these standards, leading to further conclusion that the alleged standards would not adversely affect competition.[25] In the same way, the COMPAT, in the case of Meru Travels Solutions Private Ltd. vs. CCI and Uber, observed that deciding the case on the basis of prima facie evidence while ignoring the contradictory market reports produced by the Informant (stating that the alleged rival party had cornered the dominant part of the market) on the one hand and by the rival party on the other was not appropriate on the part of the

[21] Gujarat Industries Power Company Ltd. vs. CCI & GAIL (supra); Surendra Prasad s. CCI, & Ors., Appeal No. 43 of 2014, dated 15.09.2015; North East Petroleum Dealers Association vs. CCI & Ors., Appeal No. 51 of 2015, dated 26.11.2015

[22] Gujarat industries Power Company Ltd. vs. CCI & GAIL, Appeal No. 03 of 2016, dated 28.11.2016;

[23] North East Petroleum Dealers Association vs. CCI & Ors., Appeal No. 51 of 2015, dated 26.11.2015

[24] Gujarat Industries Power Company Ltd. vs. CCI & GAIL (supra); Surendra Prasad s. CCI, & Ors., Appeal No. 43 of 2014, dated 15.09.2015

[25] K Sera Sera vs. DCI & Ors., Appeal No. 79/2015, dated 08.12.2015

Commission. The COMPAT observed that given the ambiguities in the case, the DG should have conducted a more intensive investigation, since only a detailed exercise would have allowed a clear perspective about the dominant market position of the opposing party.[26]

Right to seek review

In another case involving Google vs. Competition Commission of India, the Delhi High Court ruled in favor of allowing a writ against the Commission's order, wherein it had refused to entertain an application for reviewing its earlier order passed under Section 26 (1). The Commission, in that case, refused the admission of a review application, arguing that there was no provision for review under the Act and that the provisions of Section 38 merely allowed for rectification of any mistake that is visible in the record. Delhi High Court observed that the alleged party suffers immense harassment on account of investigation by the DG, since evidence is recorded under oath, replete with cross-examination of witnesses, and custody of documents of the parties, and so review of the order cannot be denied under Section 26 (1). However, the Court also made it clear that the right to review cannot be considered absolute and must be cautiously allowed where the provisions of the Act do not appear prima facie to have been violated in the Information/Reference. The Court further advised on speedy disposal of review applications in order to prevent the review from becoming an intensive fact finding drill, since that would lead the Commission into the wall of Section 26 (8),[27] situation that was possible only once the investigation report has been tendered by the DG. With regard to the investigation by the DG being stayed during the review proceedings, it was held by the Court that the Commission was at liberty to decide whether or not to stay the investigation on case to case basis.[28]

Injunction

Section 33 of the Act lays down very rigorous procedure for the grant of an injunction compared to deciding whether there has been prima facie contravention of the provisions of the Act, and requires proving that it has the potential to cause irreversible loss and tilt the scales

[26] Meru Travels Solutions Private Ltd. vs. CCI and Uber, Appeal no. 31/2016, dated 07.12.2016

[27] Section 26 (8)- If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.

[28] Delhi High Court- Google Inc. & Ors. vs. Competition Commission of India & Anr., LPA No. 733/2014, dated 27.04.2015

of inconvenience in favor of the applicant. For instance, in the case of Fast Track Call Cab Pvt. Ltd. vs. ANI Technologies Pvt. Ltd., it was held by the Commission that monetary loss alone cannot be categorized as irreparable loss to the applicant.[29]

Scope of Investigation by the Director General

The Delhi High Court, in the case of Grasim Industries Ltd. vs. CCI, held that DG's investigation must be limited to the evidence that the Commission will consider for the formation of prima facie opinion, and there is no mechanism in the Act that permits the DG to investigate information not considered by the Commission. The Court made it clear that in the event of the Commission directing the DG in its prima facie consideration to inquire into the contravention of a specific provision of the Act and the DG's investigation report reckons that the provisions of the Act have indeed been violated then such an investigation report will be considered in accordance with the provisions of the Act. Moreover, the Court also held that in the event of the DG conducting investigation on the basis of information not taken into consideration by the Commission during the formation of prima facie opinion, even though that portion of the investigation report is not considered reliable enough to base its order under Section 27, the Commission has been authorized to deem it as a fresh information, implying that under Section 19 of the Act it can order suo moto enquiry on its basis.[30] Appeal was made against the judgment in Grasim case and the Division Bench of the Delhi High Court in LPA No. 137/2014 is in the process of hearing it.

On the issue of the party's right to have an advocate represent him/her before the DG, it has been held by the Delhi High Court, in the case of Oriental Rubber Industries vs. CCI & Anr., that the procedure that is carried out by the DG the conduct of investigation is similar to the procedure followed for a civil suit by the Civil Court, and besides, the DG has the authority to summon persons and record evidence, so the parties also have full right of being represented by an advocate under the Advocates Act, 1961 and neither the DG or the Commission can strike down this right by an order.[31]

Compliance of principles of natural justice at the stage of final adjudication

[29] Fast Track Call Cab Pvt. Ltd. vs. ANI Technologies Pvt. Ltd., Case No. 06 of 2015, Order under Section 33 of the Act, dated 03.09.2015

[30] Delhi High Court- Grasim Industries vs. CCI, W.P. (C) No. 4159 of 2013

[31] Delhi High Court- Orient Rubber Industries vs. CCI & Anr., W.P. (C) 11411/2015, dated 22.04.2016

Various courts and tribunals have held CCI as a quasi-judicial body in numerous cases and that it's binding principle will be that of natural justice.

One of the most important principles of natural justice is that the case must be decided by the one who hears it. In the case of Lafarge India Ltd. vs. CCI & Ors.[32], the COMPAT overturned the order passed by the Commission under Section 27 of the Act levying a penalty on a number of cement manufacturers for forming a cartel and the case was remanded back to the Commission on one ground alone – that the final order was passed under Section 27 by the Chairperson of the Commission who on three occasions had not been present for hearing when submissions were made by the legal representatives of the charged parties. The Commission's arguments, that the proceedings of the case were not significantly affected by absence of the Chairperson since the final order had been passed by the Commission on the whole and the order had also been signed by all the other members of the Commission who had been present during the entire process of hearing and that all the relevant documents and submissions made by the charged parties had been thoroughly examined before passing of the final order, were rejected by the COMPAT on the basis of a ruling by the Supreme Court in the case of A.K. Kraipak vs. Union of India (1969 (2) SCC 262), wherein it was held that during the process of deciding the case, the Chairperson's views must have tilted the opinion of the other six Members of the Commission. Therefore, the principles of natural justice have not been upheld. The COMPAT has indicated similar stance in many other cases.[33]

In the same vein, the COMPAT observed that the principles of natural justice are violated if the final order is passed without giving the charged party a chance to present his side of the case. This cannot be just a technical formality; rather a proper notice for submission should be served to the charged party prior to the hearing. In its investigation report, in the case of Surinder Singh Barmi vs. BCCI, the DG found BCCI was misusing its position of dominance, and the Commission forwarded the same to the BCCI. The Commission's final order, wherein BCCI was found to be guilty of abusing of its dominant position, was based on evidence that had neither been used by the DG in its investigation report nor did the Commission communicate the same to the charged party prior to drawing of the final conclusion.[34] Besides, the charged party was not given prior information about variation in the definition of term

[32] COMPAT- Lafarge India Ltd. vs. CCI & Ors., Appeal No. 105 of 2015, dated 11.12.2015
[33] COMPAT- AIOCD vs. CCI & Ors., Appeal No. 21 of 2013, dated 09.12.2016, Coal India Ltd. vs. CCI, Appeal No. 01 of 2014, dated 17.05.2016
[34] CCI- Surinder Singh Barmi vs. BCCI, Case No. 61/2010, dated 28.02.2013

'relevant market' as used by the Commission and that given in the DG's investigation report. The COMPAT, during appeal, held that the Commission's stance was violative of the principles of natural justice because non-disclosure of such information to the charged party prevented it from mounting an effective defense for itself.

According to the COMPAT, before proposing any action against a party, it must be given sufficient opportunity to persuade the relevant authority that the basis for proposed action does not exist or even if it does it does not merit the action that is proposed.[35] Likewise, in the case of Shri Sunil Bansal vs. Jaiprakash Associates, the accused party was acquitted by the Commission, which leaned on a definition of market that differed from the one used by the DG, unknown to the Informant. The COMPAT ruled that the Commission's approach violated the principles of natural justice because effective opportunity was not given to the Informant to contest the definition of market which formed the basis of the Commission's final order.[36] Moreover, the COMPAT held that if the Commission disagrees with the DG's findings/recommendations given in the investigation report then the Commission must put on record the reasons for dissenting with the same while the final order is passed, else it would indicate arbitrariness on the part of the Commission.

A key dimension of natural justice is its reasonableness. The COMPAT observed in the case of Excel Crop Care vs. CCI, that the imposition of penalty imposed must be commensurate with the damage caused giving sufficient grounds for the quantum of penalty imposed.[37]

Section 48 proceedings

Section 48 (1) pertains to the liability of any person responsible for the anti-competitive conduct of the company and Section 48 (2) holds that vicarious liability can be imposed on any director, manager, secretary, or other officer of the company who was in-charge when the company committed the anti-competitive act. Significantly, the DG is usually directed to also probe the people who were responsible (or who were in-charge of the affairs of the company) for the conduct of the allegedly violative company when the said contravention/violation

[35] COMPAT- BCCI vs. CCI & Anr., Appeal no. 17 of 2013, dated 23.02.2015

[36] COMPAT- Sunil Bansal vs. Jaiprakash Associates, Appeal No. 21 of 2016, dated 28.09.2016

[37] COMPAT- Excel Corp. Care vs. CCI, Appeal No. 79 of 2012, dated 29.10.2013
Also see for similar discussion, the judgments of COMPAT in- Lupin Ltd. & Ors. vs. CCI & Ors. Appeal No. 40 of 2016, dated 07.12.2016; ECP Industries Ltd. vs. CCI, Appeal No. 47 of 2015, L.H. Hiranandani vs. CCI, Appeal No. 19 of 2014, dated 18.12.2015; National insurance Co. & Ors. vs. CCI, Appeal No. 94 to 97/2015, dated 09.12.2016

occurred as well as when the Commission passes a prima facie order under Section 26 (1). However, it is also significant to note the observation of the High Courts[38] and the COMPAT[39]that if it cannot be found that the provisions of the Section 27 of the Act have been violated by the company then liability cannot be imposed on such persons as mentioned in Section 48 (1) and (2). However, confusion exists as to whether the Commission must first determine the contravening act by the company under Section 27 of the Act and begin the proceedings afterwards, including directing the DG to investigate as per Section 48 of the Act, or that it is possible to conduct both the processes simultaneously.

It was held by the Delhi High Court in the case of Pran Mehra vs. CCI & Anr. that the Act has not been designed to adopt two carry out two separate proceedings simultaneously, implying that the company and its important officers cannot be made to undergo two different sets of procedures. It was further held by the High Court that when proceeding with respect to a company are being conducted, the important or the key officers of the company shall be allowed to argue that they did not commit or encourage the commitment of the violative act and that they in fact employed due diligence to prevent the violation. The key-persons can put forth these arguments without distorting the essential context, i.e., whether, in the first place, the company had indeed violated the Act's provisions or not.[40]

Kerala High Court also ruled somewhat similarly in the case of B. Unnikrishna vs. CCI. It was held by the Kerala High Court that there is no provision in the Act that validates conducting two separate proceedings with respect to the company under Section 27 or its office bearers under Section 48 of the Act. The scheme of the Act provides for composite proceedings, implying that investigation of any person allegedly guilty under Section 48 of the Act must be

[38] Delhi High Court- Pran Mehra vs. Competition Commission of India & Anr., W.P. (C) 6258/2014, dated 26.02.2015

[39] COMPAT- EIMPA vs. Manju Tharad & Ors., Appeal No. 17 of 2012, dated 14.12.2012; Nandu Ahuja vs. CCI & Anr., Appeal No. 11 of 2011, dated 17.01.2014; Chemists & Druggists Association [Ferozpur] vs. CCI & Ors., Appeal Nos. 21/2014 to 28/2014, dated 30.10.2015; Swapan Kumar Karak vs. CCI & Ors., Appeal No. 42 of 2014, dated 07.12.2015; Shib Sankar Nag Sarkar & Anr. vs. CCI & Anr., Appeal No. 34/2014, dated 10.05.2016; A.N. Mohana Kurup vs. CCI & Ors., Appeal No. 05 of 2016, dated 10.05.2016; Alkem Laboratories & Ors. vs. CCI & Ors., Appeal Nos 09,14 and 15 of 2016, dated 10.05.2016; Bengal Chemists & Druggists Association vs. CCI & Ors., Appeal No. 37 of 2014, dated 10.05.2016; Lupin Ltd. & Ors. vs. CCI & Ors., Appeal No. 40/2016, dated 07.12.2016

[40] Delhi High Court, Pran Mehra vs. Competition Commission of India & Anr., W.P. (C) 6258/2014, dated 26.02.2015

synchronized with the investigation into the guilt of the company.[41]

The COMPAT, however, looks at the issue differently. The COMPAT, in the related cases of A.N. Mohana Kurup vs. CCI & Ors. [42] and M/s Alkem Laboratories Limited vs. Competition Commission of India and Another[43], held that given the fact that Section 48 presumes key officers of being guilty of contravening acts of the company, the spirit of the provision must be implemented in entirety, implying that only once it has been determined that the company has violated the provisions of Section 27 of the Act that the provisions of the two sub-sections of Section 48 can be invoked.

In the case of Ministry of Agriculture and Farmers Welfare vs. Mahyco Monsanto[44], while giving due regard to the order of the COMPAT mentioned above, the Commission did not find it suitable to be used as a precedent. The Commission was of the view that investigations can be started by the DG under Section 26 (1) against the important personnel for the purpose of prima facie order, and that it is not required that company is charged first by the Commission of contravention under Section 27 of the Act. The Commission decided the case on the basis of the conclusions drawn by the Delhi High Court in Pran Mehra (supra) case and a number of other rulings of the Supreme Court as well as various High Courts, in which importance has been given to the provisions of pari materia contained in various other laws.

Need for effective Regulations

Over the years, the Commission has gained immense experience which coupled with various judicial reviews allows it sufficient basis to refine and update the procedures adopted at various stages during the entire judicial process.

Despite the fact that several orders of the Commission have been overturned by the COMPAT because it considered those orders violative of the principles of natural justice as well as following of incorrect procedures, the requisite modifications in the General Regulations have not been undertaken by the Commission, maybe due to the fact that appeals pertaining to those

[41] Kerala High Court- B. Unnikrishnan vs. Competition Commission of India, W.P. (C) 22534/2016, dated 23.09.2016

[42] A.N. Mohana Kurup vs. CCI & Ors., Appeal No. 05 of 2016, dated 10.05.2016

[43] M/s Alkem Laboratories Limited vs. Competition Commission of India and Another, Appeal No. 09/ 2016, dated 10.05.2016

[44] CCI- Ministry of Agriculture and Farmers Welfare vs. Mahyco Monsanto, Ref. Case No. 02/2015, dated 26.07.2016

issues are sub-judice before the apex court.

Nevertheless, the important points that emerge from the preceding discussions are:

(i) Giving an opportunity to the alleged party to submit its position when the prima facie case is being formed- The Supreme Court, in the case of CCI vs. SAIL (supra), allowed the Commission to exercise its discretion as to whether or not the parties would be heard, but the recent history of the Commission indicates that preliminary conference is held wherein both parties i.e., the Informant and the opposing party are given a hearing. This definitely is a more desirable approach as it significantly prevents the possibility of filing of writ petitions, for either reviewing the prima facie order (in terms of the Google order of the Delhi High Court (supra)) or staying the investigation by the DG through a writ decree.

(ii) Giving the Informant and the Opposing Party a notice to speak after the investigation report has been submitted by the DG - The general practice is that the DG's investigation report is forwarded by the Commission to the Informant as well as the charged parties so that they can file their objections and suggestions, but it does not reveal its own investigation report containing its own opinions and conclusions as well as the recommendations of the DG. The final order is passed by the Commission after due consideration of their objections and suggestions. It has often been seen that the Commission's final order reflects evidence/considerations that did not form part of the DG's report and was considered by the DG to draw relevant conclusions or make recommendations. The COMPAT has, however, held several times that the principles of natural justice are violated with this approach since it deprives the parties of the knowledge of the evidence used by the Commission for its own investigation report, and this further deprives them from putting forth their defense and/or refute the allegations. Therefore, the COMPAT holds that sufficient notice must be provided to the parties by the Commission. The foregoing discussion clearly indicates that the Commission would do well to communicate to the parties its own investigation report containing its own opinion and also the reasons for its agreement/disagreement with each and every conclusion or recommendation made by the DG in its investigation report. Such procedural modifications would be effective in preserving the Commission's final orders at the time of judicial review, usually on the grounds of violation of the principles of natural justice and procedural unfairness. The courts will be eased of excessive burden of appellate litigation. Thus, the Commission as well as the parties stands to benefit from such procedural modifications.

(iii) Allow the party to plead against the issue of penalty if violation is proved- Significantly, the factors for determining the quantum of penalty differ from the issues pertaining to establishment of the Act's violation, even though imposition of penalty is merely the outcome of the violation being established. Determination of penalty must be based on a range of factors specifically relevant to the case being considered like the aggravating and mitigating factors. A proceeding where all the issues are combined, i.e., determination of contravention of the Act as well as the quantum of penalties to be imposed, frustrates any attempt of effectively considering factors that may affect decision pertaining to the quantum of payable damages, thereby resulting in failure of judicial system. Therefore, justice would be better served if the Commission considers the issue of penalty in a separate hearing after establishing whether or not the contravention has occurred. The Commission would also do well to specify the basis for the calculation of damages payable, by assigning value or due weightage to the various aggravating and mitigating factors.

Conclusion

The foregoing discussion makes it amply clear that the Commission's job can be best done by adopting procedures that safeguard the principles of natural justice. Competition Laws in India have evolved considerably in the past seven years or so, although there still remain numerous procedural issues that need to be finally established or determined, perhaps settled by the apex court resolutions on such issues. Nonetheless, the Commission can enhance the effectiveness of its functioning by periodically amending its Regulations to incorporate emerging realities and orders of the COMPAT and the courts.

ECONOMIC IMPACT ON A GLOBAL BASIS DURING THE COVID-19 CRISIS

- ANSUMAN MUKHERJEE[45]

Abstract

This paper looks into the tourism-related policy strategies implemented by WTO members in the first few days of the COVID-19 crisis. We underline the importance for stakeholders to coordinate their efforts in order to decrease the negative crisis effects and better position the sector for the future. We achieve this by emphasizing both the supply and demand side effects of the crisis and by looking at the economic effects of various scenarios related to tourism. By gathering and arranging data from various sources according to the information available at the time, this research provides a systematic approach to map and analyse tourism-related policies for 59 WTO Members across all continents. According to our findings, nearly 90% of the countries under study centered their tourism policy responses on measures to stimulate the economy in order to lessen the effects of COVID-19 and foster a robust recovery; (ii) more than half of the countries under study have implemented economic stimulus programmes; Less than a third of the nations under study passed social and employment legislation.

Keywords:

COVID-19, Travel, tourism, services trade, economic impact, monitoring.

Conceptual Framework

The global economy benefits greatly from the tourism industry. The tourism sector not only produces revenue sources for a nation, but it is also one of the most significant catalysts for economic development. The sector simultaneously provides people and economies with growth opportunities. to generate money, whereas expenditure on tourism is linked to increases in consumer well-being of travel services (OECD, 2020). Additionally, as a typically labor-intensive industry, tourism creates jobs while promoting local business and skill growth. Its Additionally important to regional integration and economic inclusion are connectivity and mobility elements. Tourism, a naturally outgoing industry, encourages the exchange of services internationally, creating favorable cross-border synergies and cooperation, international investment, and cultural diffusion spillovers between businesses. The COVID-19 pandemic is

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a disaster without precedent for global travel and tourism sector. Exceptional steps have been taken by governments around the world to minimizing the sector's negative effects and promoting its recovery. This paper look into the financial Legislative and regulatory measures governments have implemented to improve resilience and create the travel and tourism services of the future. Given the extensive implications, this is especially crucial. Benefits of tourism services in promoting economic development in rural areas, and the impact of the current COVID-19 situation on the industry's economic activity as a whole. In light of this, Understanding how the crisis is affecting the industry sector is essential, as is Examine potential actions and regulatory measures that could mitigate the negative implications of the pandemic for the future of travel and tourism services.

COVID-19 EFFECTS ON TRADE IN TRAVEL AND TOURISM SERVICES ON A GLOBAL BASIS

The COVID-19 issue has produced a substantial, rapid, and simultaneous demand and supply shock to the tourism industry. On the demand side, movement is impeded by travel restrictions and border closures. along with damaging tourism. Although there are fewer travelers, there are still some. Additionally, future earnings are greatly reduced. The lockdown tactics have caused a decline in supplies. a decline in tourism-related businesses' and destinations' activity, but public access to natural regions and other tourist attractions is remained restricted. The sector started out by providing services including hotels, restaurants, tours, and travel agencies. The demand for nearness between. According to the conventional tourist sector business plan, the majority of tourism service providers and customers significantly restrict economic activity. For transnational service trade, i.e., international consumption, the industry typically depends on mode 2 in the majority of countries. Regulations have restricted most domestic and international visitor travel as a result of the crisis, and the industry may be among those that has been most badly impacted (Wolff, 2020). Limitations on domestic travel and laws prohibiting remote employment have harmed the industry by eliminating the majority of domestic holiday activities. New business models are evolving in response to these modifications, whereby faraway locations .It is anticipated that e-tourism will gain market share.

Economic Contribution of the tourism sector

To counteract the drop in economic data, developing nations have implemented massive frontloaded economic stimulus. The statistics are even more damaging for many developing

nations, where tourism is a major source of income and employment. Particularly in tiny economies, tourism contributes significantly to GDP, accounting for a large portion of overall exports World travel exports, which account for travelers' purchases of products and services while travelling, increased by 7% in 2018. The tourism industry contributes slightly less to economic activity in the most developed OECD nations than the global average. The travel and tourism industry's economic development has consistently surpassed the growth of the global gross domestic product during Despite the economic crisis, the previous ten years (see figure 1). This demonstrates the growing significance the sector's contribution to the global economy and the prospective growth of its income share. Indirectly Tourism has a huge economic impact. Exports related to travel around the world that cover travel costs spending on products and services while travelling overseas increased by 7% in 2018. (WTTC, 2020a).

Numerous international organizations have investigated the expected negative economic effects of COVID-19 on the travel and tourist industry (WTTC, 2020b, 2020c; UNWTO, 2020a, OECD, 2020b). . Despite the fact that everyone is aware of how challenging it is to forecast the future precisely. . Currently, jobs in the worldwide travel and tourism industry are at risk (the first estimate on March 13 was a 50 million jobs, which is the third lower). The WTTC also forecasts a 25% drop in foreign travel, or three months' worth of lost international travel (WTTC, 2020c).

These studies and publications concentrate on the worldwide labour market's employment, income, and arrivals elements tourism. Although they all admit the challenge of making precise predictions as long as the unknown when the pandemic will finish, a widely recognised scenario projects that up to 75 million people could be affected.The worldwide travel and tourism sector is currently facing a threat to jobs (the initial estimate as of March 13 was a fifty million jobs, or the third lower). In addition, the WTTC anticipates that the crisis will result in a decline in 25% less travel means a loss of three months' worth of international travel (WTTC, 2020c). Organization for Economic Cooperation and Development

Certain steps ensuring the better future of Tourism sector

Future demand and supply for tourism services will undoubtedly be impacted by the anticipated industry changes connected to government anti-COVID initiatives. On the demand side, the main pricing concerns may drive demand for lower cost destinations if economic decline continues as predicted by numerous institutions. The reported rise in income disparity may also cause additional market segmentation, which would raise demand for both affordable and

upscale travel locations. In this situation, nations must work to best utilize their comparative advantages in order to draw in high-end travelers. . In addition, publications and webinars assist spread best practises by promoting awareness-raising as a crucial component of the Commonwealth's work to educate the policy making community at both the national and international levels.

Category	Social & Employment	Economic	Financial
Countries no measure(%)	41 & 31.0%	8 & 87.9%	28 & 53.4%
Countries measure(%)	18 & 70.7%	51 & 13.8%	31 & 48.3&
Total_Country_Analyzed	59	59	59

As the OECD (2020a) argued: "Even when tourism supply chains start to function again, demand-side recovery will take some time, given the interlinked consequences of the economic and health crises, and the progressive lifting of travel restrictions. This will have knock-on implications for many national economies".

Steps that can be followed by people to improve the economic condition

People have been impacted by COVID-19 in terms of both supply and demand for tourism. As a result, both experts in the tourism industry and travelers themselves must consider the "new normal". Changes in tourism-related goods and services, necessary safety considerations, and the interpretation of industry trends all require careful consideration. Following COVID-19, the travel and tourism industry is anticipated to undergo significant changes in its demand and supply structures. Alternative approaches to doing business as usual by individuals, firms, governments, and international organizations are essential given the extreme uncertainty surrounding the virus' evolution, health impacts, and economic repercussions. Learning from previous significant structural changes should encourage stakeholders to adopt a strategic approach based on .This allows for quick reflexes in policymaking. The following below are the few listed points ->

Up skilling and reskilling to adapt to evolving labor market needs

In this regard, it is vital that they take into account the industry's continuing digital revolution and how it may affect their career possibilities. The potential cost for tourist employees to reskill is lower given the current scenario of low demand. It becomes clear from researching the demands of the future market that time should be spent on digital skills as well as other industry-specific abilities, such foreign languages. The emergence of platforms and the

digitalization of tourism firms may result in a decrease in the need for labour and a reduction in the labour intensity of the industry. A substantial number of non-skilled workers may be laid off as a result of the decline in labour share, according to OECD (2020c) research. This is because monophony power may be granted to service providers in the tourism industry. As a result, it is critical that the up skilling and reskilling processes of tourist sector personnel be in step with the sector's changing labor market needs.

To view the need for the tourism offers and destinations of the future

Demand may rise significantly if there is a short-term improvement in both the health of people and tourism, especially in low-cost locations. This would be a reflection of the decline in tourism expenditures brought on by the decline in income, as well as a rise in people's desire to flee their homes following the protracted lockdown and quarantine procedures. Vacations in locations with minimal COVID exposure or even "staycations" could be another viable choice (Carty, 2020). Tourism service providers could begin by focusing on local needs at a time when many people are being pushed to explore their local locations.

Impact of the International Organizations in the tourism sector

International organisations have been working tirelessly to support national governments' efforts to lessen the COVID crisis' consequences and "build back better" the travel and tourist industries. These efforts are in addition to those taken by national governments. They have engaged in cooperative activities to highlight synergies and encourage the exchange of best practises as forums for international cooperation. There is still room for improvement in the cooperation and coordination between international organisations as well as between international organisations and national governments. Given that multilateralism has recently been under serious danger, the functions of international organisations in reestablishing the framework for strong economic recovery of the travel and tourism sectors become more and more important. The UNWTO, OECD, ITC, Commonwealth, and WTO were all included in a June 23, 2020 event hosted by the WTO Trade in Services and Investment division. The programme also explored the larger roles that international organisations play in connection to tourism.In light of the webinar and WTO research, this section provides an overview of some key aspects of the efforts made by international organisations to encourage the recovery of tourism services. In addition to measuring and contrasting policy responses, the World Tourist Organization (UNWTO) has attempted to map interdependencies within the tourism ecosystem. The UNWTO has been able to quantify the economic impact at the country level

and transparently give comparable data thanks to the examination of aggregate estimates on the COVID-19's global tourism impact. Through courses, webinars, and other tools, the UNWTO has made a substantial contribution to the dissemination of knowledge about tourism. Parallel to this, the organization's advocacy work has aided in promoting open and long-term cross-border tourism flows in the public discourse. The Organization for Economic Co-operation and Development (OECD) has offered a platform for member states and partner nations to collaborate in order to address structural challenges and help preparations for a swift post-COVID economic recovery since the early stages of the COVID outbreak. In order to gather, share, and sculpt tourist policy solutions, the OECD Tourism Committee collaborates closely with countries and other stakeholders. The OECD, which is a member of the UNWTO Global Tourism Crisis Committee, the WTTC Travel & Tourism Task Force on COVID-19, and the G20 Extraordinary Tourism Ministers Meeting on COVID-19 and Tourism Working Group, has continued to be actively involved in designing and preparing three scenarios regarding the impact of the pandemic on tourism (recovery in July, September, and December 2020, respectively).The consistent updating of the OECD Policy Note on Tourism Policy Responses to COVID-19, which is accessible on the OECD Digital Hub on Tackling the Coronavirus, further supports the dissemination and open information sharing on sectoral policy among OECD countries (COVID-19). By offering assistance and enhancing market players' digital capabilities, the International Trade Center (ITC) has been actively assisting in the recovery of the tourism sector. To do this, it is imperative to use digital service offerings, direct internet marketing skills, and distant learning capabilities. The ITC offers technical assistance in product development to create sustainable tourism value chains for community-based tourism. In the long run, this should improve local knowledge and abilities.

Literature Review

1. The Linkage between Economic Growth, Renewable Energy, Tourism, CO_2 Emissions, and International Trade: The Evidence for the European Union by Nuno Carlos Leitao & Daniel Balsobore : This particular article the evaluates the link between economic growth, renewable energy, tourism arrivals, trade openness, and carbon dioxide emissions in the European Union (EU-28). As an econometric strategy, the research uses panel data. In the first step, we apply the unit root test, and the results demonstrated that the variables used in this study are integrated I (1) in the first difference. In the second step, the authors apply the Pedroni cointegration test, and Kao Residual cointegration test, and we observe that the variables are cointegrated in the

long run. This study takes into account the panel fully modified least squares (FMOLS), panel dynamic least squares (DOLS), and generalised moments system (GMM-System) estimator. The economic findings demonstrated that renewable energy and trade openness slowed down environmental deterioration and climate change. The authors' empirical investigation also shown that economic growth had a favourable impact on carbon dioxide emissions. Additionally, there is a bad correlation between tourism arrivals and carbon dioxide emissions, demonstrating how environmentally friendly the tourism industry is. Additionally, carbon dioxide emissions have a beneficial effect over the long term, showing a rise in climate change.

2. **World Trade Law, Culture, Heritage and Tourism. Towards a Holistic Conceptual Approach? By James Tunney :** This particular article argues that law is an important factor in the consideration of the evolution of tourism discourse. Thus it is important for academics to consider the law-tourism connection. But law is a dynamic phenomenon that is experiencing change. Within law, the domain of world trade is increasingly significant. In addition, the conceptualisation of culture and heritage is ongoing and as the law has implications for the development of those concepts, then correspondingly the law-culture and heritage connection should be considered. World trade law in turn has culture and heritage implications. Tourism will be affected by both the evolution of world trade and evolving conceptions of culture and heritage, not least legal ones. Accordingly, as a result of the increasing interpenetration and interconnections of issues, it is submitted that consideration of the four conceptual domains of world trade, law, tourism and culture and heritage, suggests the desirability of a holistic approach to (or awareness of) the consideration of certain issues that may fall into the intellectual space advanced by the potential intersection of these issues. This is especially justifiable in view of the multiplicity of academic viewpoints that studies of tourism embrace. It may be necessary in order to provide options for the solution of legal issues that involve these factors. Thus it is argued that it is important to consider the domain delineated above in a holistic way, recognising that the forces of development act reflexively on each other as a start in order to overcome inevitable epistemological difficulties.

3. **Tourism and the implementation of the Convention on Biological Diversity by C. Michael Hall** : The notion of the author is being put forth through this article that although tourism is not explicitly mentioned in the Convention tourism has increasingly

become featured in the decisions of the Conference of Parties to the Convention, including the development of a specific set of guidelines on biodiversity and tourism. The article following certain parameter of research reviews the role of tourism in the Convention and examines the extent to which tourism-related decisions have been implemented by countries via an analysis of the national reports that are submitted to the Convention Secretariat. The results indicate that the decisions remain relatively poorly implemented given the seriousness of biodiversity decline and significance of tourism. The author concludes that greater& better efforts are needed to be given to evaluate such international conventions and their affect on tourism policies and practices, as well as better understanding the implementation gap at both an instrumental and paradigmatic level.

4)After Corona (COVID-19) Impacts on Global Poverty and Recovery of Tourism Based Service Economies: An Appraisal International Journal of Tourism and Hospitality, Vol. 1, No. 1, January 2021, pp. 52-64. By Ruwan Ranasinghe, A.C.I.D. Karunarathne &Jayathree Herath : The COVID-19 pandemic has produced significant difficulties that have reversed the growth in many economies, reached the most catastrophic economic breakdown, and rendered millions of people anxious and in the depths of poverty, making the most vulnerable economies vulnerable and resulting in zero income that experienced a worse depression in a variety of sectors. The economic struggle sheds light on the material and intangible service economies that hastened the negative effects, particularly in the tourism industry, which was deeply affected by the recession without a prospective treatment that may stop how the global economy is now operating. The illustrated assessment will provide a detailed picture of the world economy in 2020, taking the COVID-19 pandemic into account, as well as any potential effects on the accomplishment of important 2030 Sustainable Development Agenda goals. This has mostly concentrated on global poverty, which poses a danger to development efforts that are only tangentially affected by the crisis and that prioritise income and consumption imbalances over real aspects of human well-being globally. In order to repair the harm caused by this global pandemic, the review will first focus on ensuring economic recovery while injecting and encouraging investments and methods that accelerate and restore lost demand that maintain the resilience of a service economy to fight poverty.

CONCLUSION & SUGGESTIONS

The COVID-19 crises' effects are still evolving, much like the virus itself, as the world economy adjusts to it. Future government initiatives must take into account how the needs of the tourism industry are changing and how the health situation is changing, as well as how these changes will affect travel and tourism services and the activity of other negatively impacted economic sectors. The UNWTO (2020b), with assistance from the World Health Organization, announced on March 25, 2020 (WHO) urged entrepreneurs and innovators to present fresh ideas to support the tourist industry. Following the COVID-19 pandemic, a section recovers. Greater corporate social responsibility was encouraged and complemented in this line, and governmental responses needed to be socially responsible to produce the best results imaginable. Previously too frequently disregarded, close stakeholder consultation and coordination is now a mandate that everyone must go by while engaging in risky activities on both a national and international level.

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A DENIGRATION OF THE INDIGENOUS CONSCIENCE AND SUBJUGATION OF THE INDIAN CONSTITUTION BY THE POWER OF HUNGRY POLITICIANS

- ROHIT GARG[46] & MUSKAAN[47]

ABSTRACT

In order to ensure a separation of powers between the federal government and the individual states, India's constitution contains 448 articles organised into 25 sections and 12 schedules. As well as general provisions for Indian nations and planned communities, it lays out detailed procedures for various Indian constitutional organisations. This nation's guiding document is the Constitution. Legislators have stymied progress in India by exploiting a variety of safeguards for their own gain. A variety of first-of-their-kind manipulations of their authorities are visible, such as the passage of a law in the Bank Nationalization case prior to a meeting of Parliament, despite the fact that the matter had already been brought before the Court. Former Prime Minister Indira Gandhi said at the time that the Constitution's 38th Amendment Act could not be used to justify "the President's decisions to fulfil the constitution." The Janata Party government subsequently received the 44th Amendment Act, which made changes to the Constitution.

INTRODUCTION

The Constitution is a guiding document that specifies where people can go to have fun in their free time, and that might include places like workplaces or even individual states. It specifies the desired outcomes, organisational structures, and locations for achieving those outcomes. Strengths, rights, and responsibilities of the organization's members are spelled out as well. Both internal operations and external arrangements with other organisations are governed by the rules. It exemplifies the legitimacy of our country's system and lays the groundwork for effective administration, organisation, structure, strength, and leadership. Furthermore, it defines the relationships between various institutions and nationals, as well as the principles that govern the government and its organisations.

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CONSTITUTION: A COMPREHENSIVE DOCUMENT

The differences between the two versions are subtle but significant, indicating that this is a profound document. It regulates institutions like the legislative body, the chief executive, and the legal executive, as well as the rules that govern their relationships with one another and the centres, States, and individuals connected to the State in terms of organisation, potential, limit, and rate restrictions. Several recommendations, guidelines, and legislative audits were made. They provide suitable responses to various emergencies and can be adapted to a constitutional framework. Complicating matters further, India's central plan, which included the SDR, was pictured in the counterpart to the complex Indian Constitution of November 26, 1949. It's crucial to keep in mind that Indians are the true helpers and source. We Indians have the freedom to pick our own employers and work wherever we like. It looks back, thinks about now, and plans for the future. This should act as a public organising instrument and convincing tool to strengthen and unite the country and carry out controls that will transform India into a system-structured state based on an enjoyable and monetary value that is relatively uniform in its voting method for agents.

WHAT IS AN ORDINANCE?

When both houses are not in session—for example, if there is a holiday or a large social event—the President and the Governor (respectively, free at the Center and at the State) have the authority to enact legislation in their absence. It's important to remember that any laws enacted will be just as binding and effective as the original Parliament laws. A similar law would take effect about a month and a half after the legislature reconvenes. Article 213 of the United States Constitution lays out the criteria that must be met before the legislature can enact a law that is within the purview of a state. Similarly, the president and the governor are authorised to adopt legislation and exercise that authority if neither chamber of parliament is in session. Keep in mind that once enacted as law, the Parliament will be quite powerful. Such a statute would only be in effect for a brief period of time following the next legislative session. Article 213 of the Constitution establishes the conditions that must be met for a federal law to become a State law.

GOVERNOR'S POWER TO PASS ORDINANCE

State governors are sometimes required to comply with orders. In accordance with the Indian Constitution, the Board is authorised to report requests made by the responsible head of a State in the event that it does not hold a meeting. The chief delegate can act swiftly to impose these

conditions if necessary to bring about the end of the law. Under certain conditions, the leading delegate must meet the requirements for swift action to authorise a law. Some limits are based on the power of the primary delegate; for instance, the authority cannot articulate a law if it contains actions that require approval by the President. The President will be presented with the principle later on for approval. If the Law specifies a course of action, and the Governor disregards it, the request will be invalid unless approved by the President. It's important to remember that any law signed by the Governor will have the same immediate effects and relative power as if it had been passed by the legislature. When the State Government convenes, the Governor's rule is discussed during the social event, and the order is considered null and void in the presence of disillusion, which is considered essential to the reconvening of the State legislature.

ORDINANCE MAKING POWER OF THE PRESIDENT

It is standard procedure for the President of India to make a formal proclamation of ordinances during the opening session of Parliament. If the President is convinced that an ordinance must be declared immediately, it is a distinct possibility that this will occur. The President follows the bureau's recommendation when enacting a law, which should be done only for rational reasons and should not be abused by those in power. It should be noted that the Article 123 ordinance remains in effect for about a month and a half after Parliament is reassembled and has the same effect as if it had been voted through by Parliament. In the event that these goals are not met, it may be concluded before the parliamentary time referenced for them is passed. That the President has the power to rescind any executive order at any time.

PURPOSE OF THE ORDINANCE

It is essential to India's federal structure that the federal government and the individual states have a means of communication. To put it simply, India is a government-run state. If the federal and state governments are working together, indigenous people can feel secure. From the standpoints of natural security, family control, financial planning, and so on, governments collaborate on the management and balance between the Center and the State. Keeping peace between the federal government and the individual states is one of the primary goals of the Indian Constitution. The Union list, the State list, and the Competition list can all be found in the Seventh Schedule of the Constitution. This dossier contains information relevant to the issue that will be separately advocated for by the Center and the State. This Parliament may be required to make legislation on the subject referred to in the State List in the event of a public

crisis, if the issue is identified as of public interest, if the true State requires the Parliament, if there is a peaceful agreement, or if there is presidential rule within any State.

We can see that the Council in India has the power to make laws, and that this is a crucial responsibility of the parliament. Their right to safety and well-being should be protected by law. Compliance with enacted laws is the responsibility of the chief executive. Legislative procedure is safeguarded by law even if one or both houses of Parliament are not in session.

If there is a crisis while only one house of congress is in session, that chamber can make decisions and pass laws on its own. This power is given to the just leader, rather than the lawyer, to avoid any room for interpretation. The chief's troops can now be controlled, without favouritism or bias, by the legal manager. In accordance with Articles 123 and 213, the President and the Governor of the State of India are respectively vested with the authority to promulgate laws (individually). Legal authority was equated with the making of laws in the T. Venkata Reddy case.[48] The Indian Government Act includes a section detailing such authorities. Abuse of the authority granted by enacting a law is detrimental to a country's progress, so it is essential that laws be fairly implemented.

DETAILED SALIENT FEATURES OF PASSING OF AN ORDINANCE

Power is arbitrary and can be used if the demonstration is not received and implemented after the demonstration has been made by the President. Moreover, legislation would have the same powers and effect as chamber legislation, with two exceptions; for instance,

That legislation must be submitted by the board, and (ii) if a reason for derision is adopted, the law shall expire one and a half months after the reassembly of the administrative body, whichever is sooner.

To add to that, there is a process in place that can do away with a law entirely. It has been demonstrated that a law that authorises the preceding organ cannot be viewed as a permissive source of legislation or as a free definitive authority, and this is a crucial part of the argument. It's important to keep in mind that the prodigy's authority to make declarations of policy is always subject to management controls. The President and the Governor in State are indebted to the Ministerial Council for their assistance and prompt response to their request for assistance.

It's a holy tactic that calls for putting off an ordinance until after the national legislature has met. If the declared order is to be legitimate, the Legislative Branch must determine whether

[48] T Venkata Reddy v. State of A.P. AIR 1984 AP 724

or not a law is necessary. The recognition is necessary if the law is to be upheld. To issue an order before the board in a case of frustration would be a genuine and secure abuse, contrary to the fundamental provisions of the Constitution. D.C. Wadhwa's collective re-decreation of rules without any protection is an appalling misuse of the Constitution's language. Keep in mind that you shouldn't issue a command if there isn't any honesty behind it. Please note that the President's satisfaction under Article 123 and the Lead agent under Article 213 are not immune to legitimate scrutiny after the 44th Amendment Act to the Constitution deleted Clause 4 in both articles. Whether or not the order can be fulfilled without a significant amount of resources being on hand is the most important criterion in deciding whether or not to accept it. The rule's adequacy can be evaluated by judicial inquiry, and the court has the power to do so. Also, the Court must determine if there was a constitutional deception in the pioneer's satisfaction or if it was simply transferred for legal reasons. If the issue is not resolved, a proper investigation will be conducted.

ORDINANCE AND RELATED FRAUD

The institutions of the Indian Constitution have the power to issue a mandate in times of crisis. When issuing a mandate that includes carrying out the wishes of a President who has identified the situation in which he accepts that a swift law is necessary, certain basic principles must be met. The approach is grounded, however, in sincerity and necessity. As required by the Constitution, the Parliament will pass the ordinance with overwhelming support within the first week of the Session. The National Food Security Ordinance was approved in 2013 and has since been reviewed to determine its effectiveness. The Union administration has tried to accomplish five years' worth of work in a single day and passed another law with lightning speed. The Supreme Court's decision declaring them invalid was logically in conflict with their legitimate but questionable nature [Section 8(4) of the Representation of the People's Act]. Members of the European Parliament and the Legislative Assembly are exempt from resigning from office if they face criminal charges as individuals because of this agreement.

The public's trust would be eroded if convicted criminals were allowed to hold public office, so this was not a good idea. False statements are also used by law enforcement officials. Before the CBI announced their final decision in the case against Bihar's ex-boss cleric Lalu Prasad Yadav, an ordinance was passed.

If we ignore the foregoing, we can say that the misuse of power and extortion raised questions about the legitimacy of authorities and arrangement, because the passed ordinances were not crucial and were adopted solely to deal with certain political intentions of the then-

Government. The fundamental need for a law to be passed clearly has been repeatedly compromised by the 60 037 ordinances passed since 1952.

Within a month and a half of decompression, the government will restate the law if both houses of parliament have not passed an ordinance. This restatement is intended for political reasons or to facilitate further thought. Consider the Bihar government, which promulgated roughly 256 laws between 1977 and 1981, despite the fact that the State Assembly only passed 198 of those acts.

It goes against the very spirit of the Constitution and the principle of separation of powers, which states that the three branches should function separately while seeking harmony. The preliminary actions taken to preserve the Assembly's authority as the ruling body are a constitutional misrepresentation. Only in extreme or emergency circumstances did the Wadhwa D.C.'s leadership have the authority to issue a mandate.

Without first considering its fundamental necessity, any ordinance issued is invalid and must be recognised in accordance with Law. The leader's mandate-issuing power cannot be used in the future for the leader's own personal or political gain. Investigators have found that P. Vajravelu Mudaliar's[49] abuse of power was on display when he pushed a law through without showing any signs of despair.

Since extortion is a major manifestation of lawlessness that is not defined in the Constitution, any attempt to misrepresent the Constitution must be met with strong repercussions. Avoid using it to issue a mandate, as doing so could be challenged as unconstitutional. When such an interference is clear, the lawyer may step in to fill the void and make less exploitative arrangements. According to the RC case C Cooper, the defence of a warrant could be submitted through an unexpected and unnecessary action. One should give credence to an authority figure based on their honesty. If an immediate action requirement is made, it will go into effect only if the President is happy with the results. As was previously mentioned, a change was made to Article 123 of the 38th Amendment Act (4), making it impossible for the President's acceptance of the law to be challenged. After the passage of the 44th Amendment Act, however, this arrangement was deemed illegal and absurd. However, significant progress is needed to ensure that the leading body's ruthless authorities are checked. Due to the aforementioned issues, the legal executive has not taken a reasonable position on the question of the statutory challenge

[49] P. VajraveluMudaliar v. Special Deputy Collector [1965]1SCR614.

ability and should use its legal expertise to address these issues. These exceptions leave room for the governing body to overstep its bounds.

JUDICIAL INDISCRETION AND CONSTITUTIONALITY

Specific issues, such as whether the leader of the legislative body in despair has given comparative authorities, should be considered in monitoring the accepted legitimacy of authority and legal offence. How crucial is the "Power Separation Convention"? These two questions are intertwined, and the Constitution makes clear that all three branches of government—the Executive, the Legislative, and the Judicial—must work together to find solutions.

Montesquieu argued that this principle was fundamental among government bodies as a means of keeping tabs on each other's capabilities. Montesquieu is credited with developing this theory. The Indian Constitution does not provide the central government with limited powers, but instead vests such authority in the hands of those who engage in similar legal conduct. The Convention is extremely important, and if either branch of government abuses its authority, the legal executive may have a significant role to play in determining the extent of that authority and requesting that it be limited as much as possible.

In regards to auditing the authority granted to the President to pass his ordinance, not even the legal executive has spoken up until now. The document also seeks to implement novel and exciting measures to protect India's image abroad, its stated constitutional goal. There has been no misuse of the executive's lawmaking authority. Although there are many provisions in the practical approach to adopting a law, the interaction between re-declaring mandates is impossible.

It is possible that the restatement of law is risk-free, and many bills that need to be passed but aren't due to the scheduling of conflicting meetings. In such a scenario, it would be counterproductive to forbid the re-proclamation of the mandate because doing so would impede the methodology. Legislation cannot be enacted based on a selection of a person and a similar requirement of the agreement based on the instructions of the ministers, as stated in Article 74(1) of the Indian Constitution, which determines the fate of the law.

If the Legal Manager has reason to believe that a faithful objective does not exist or that the choice is based on wholly unnecessary or unfounded grounds, then they may request an investigation into the President's choice over a mandate, and the Court ruled that this may be

done to the "Chairman's satisfaction." This case is known as the S.R.Bommai Case[50]. As a result of the vigorous judicial review of the President's decision, any extreme legislation will be passed outside of the purview of the Legal Executive. In yet another case involving Krishna Kumar Singh, the Supreme Court of India issued a series of pronouncements addressing the consequences of vote-oriented management and India's ultimate fate.

Chiefs were able to legislate through ordinances in response to questions and concerns raised by the populace. However, there is still disagreement over whether or not an agreement detailing when and under what circumstances the chief can exercise this authority is necessary. As we can see, though, only some cases of desperation actually follow the hypothetical necessity and functional methodology of legislators. When the government is given this kind of authority, it effectively eliminates any public interest in its actions. That's why it's fair to say that the law can be used as a check on manager ordinances, but the legal manager can't act as a mediator in any situation. The law established these necessary protections to make sure the ordinances weren't authorised in an even-handed fashion.

Another area that needs clarifying is Article 74(2) of the Indian Constitution, which deals with the proclamation of the ordinances. According to this Article, the President cannot be directed by the Court. Take into account that prioritising people's wants and needs is crucial to picking the right office.

ORDINANCE RE-PROMULGATION METHOD: APPROPRIATE OR INAPPROPRIATE

Only in extreme or unusual situations should the main requirement for issuing the mandate be met. When there are no parliamentary meetings and the President of India is convinced that immediate action is necessary, as described in Article 123 of the Constitution, the statutory authority of the leading center-level organ is established. Under Article 213, the Governor is also given the power to make laws on behalf of the state in the event that the State Legislature is unable to hold a meeting.

The ability to make laws is a great responsibility and a great authority, but it is one that the leader is only given in times of crisis and therefore cannot exercise every day. We can see, however, that the chiefs use this constitutional framework improperly, adopting the ordinance not to avoid criticism but to achieve their own political goals. In 2014, a mandate was proclaimed multiple times, as was called for by the ordinance. Some substantial benefits

[50] S.R. Bommai v Union of India, AIR 1994 SC 1918.

guaranteed by the Land Acquisition Law have been undone by a law passed by parliament in 2013. The goal was to find a way to circumvent Rajya Sabha's inherent flaws by eliminating the need for contentious elections. On the other hand, the government used its statutory authority to pass a law that prohibited the abuse of fair dealings with the law.

A CASE OF MISUSE Of AUTHORITY: JUDICIAL SCRUTINY ON ORDINANCES

This is one example of a set of guidelines adopted by the government of Bihar. In an effort to centralise control of the educational system, the state of Bihar attempted to use these laws to take over roughly 429 Sanskrit Schools. There was never a submission of a mandate to the federal legislature despite the fact that the state passed its first law in 1989 and a total of five more laws.

Finally, the State Government did not issue a status confirming the provisions of that mandate. The teacher and other school employees were let go after the deadline for fulfilling the mandates passed and the case against the state government was filed in court. A panel of seven judges deliberated the case and ruled on two crucial issues, including whether or not the State Government's regulations issued under the Indian Constitution were constitutional. Is it possible that the solicitor had a legitimate right that continued to exist after the order lapsed? It was determined in the primary investigation conducted by the Court that all orders are subject to judicial oversight through audit, and that a person's head is not the only organ at his own peril. Also, in the case of S.R. Bomnai, it was decided that the legal executive has the authority to veto mandates that conflict with the Constitution.[51] The Legal Executive may rescind a mandate of a certain kind if the Chief (the Government of Bihar) is able to meet a requirement of the angles. If the leader has made false statements or used excessive force, the attorney can investigate and let you know. It is in the public's best interest and a mandate has no negative side effects. Neither can a law be passed that runs counter to the public interest, nor can the legal manager approve of such a law without first conducting an audit. To the second inquiry, which surfaced under the Court's watchful eye, the candidates were told they had rights because their fundamental legal interests in the business world had been violated. The candidate had no recourse but to endure after the mandate was granted without hope or defence.

JUDICIAL REVIEW AND ITS APPLICATION

[51] Suhrith Parthasarathy, Rolling back ordinance raj, https://www.thehindu.com/opinion/lead/Rolling-back-Ordinance-Raj/

The legal investigation is extremely comprehensive and robust in its auditing of the mandate. The strength of the legal survey promotes clarity in defining the roles of the governing body. The Court has extensive legal authority to audit and confirm the work of the State's middle President and governor. The supreme body must exercise adequate caution when deciding the significance of the ordinance it passed. If we break down Article 123 of the Indian Constitution, we can see that it serves to explain the requirements for the extraordinary declaration of a mandate. Make sure the ordinance isn't passed just to satisfy formal requirements, but rather to advance a clear public interest or address an urgent problem.

PROPOSED STUDY & APPLICABLE CASE LAWS[52]

Legality of the Acquisition of Companies Order, which nationalised 14 major Indian commercial banks in 1969, is considered by the Supreme Court. The Supreme Court ruled in the R.C. Cooper case that the President's official conclusion is not above suspicion if it was reached by evading the administrative plan for making laws to aid the public. They ratified Amendment 38 in 1975. With this change, Article 123(4) of the Constitution was added to explicitly state that no Presidential election can be challenged under any circumstances. Article 123's clause (4) was deleted from the 44th Amendment Act of 1978 to make room for a potential review of the President's appointee. Protected legitimacy of the 1980 NSO was investigated in the A.K. Roy Case. The court has requested preventative detention in certain cases and stated that the Chairman's mandate-making authority is subject to judicial review. One of the most important ways to keep the ruddy authorities of the leaders in check is to have a legal manager with the power to keep an eye on the decisions made by the governing body. According to the DC Wadhwa case analysis, chiefs' constitutional power to establish new lines of authority may be used only in extreme cases. It can't be codified as an ordinance, and if it is, the lawyers can stop the rewriting of the law. It has been established that the chief organ's legal body was not a reliable source of legislation. This view was articulated in the Krishna Kumar Singh case, in which it was ruled that the authority to make laws was not immune to legal scrutiny and that the re-enactment of law should be examined for any possible errors.

CONCLUSION

Given the severity of the situation, it is clear that carrying out a mandate is an essential task. This duty highlights and subsequently follows the falsification made by leaders for the benefit

[52]Vigeshsabari,https://tlp.iasbaba.com/2018/11/day-6-q-1-critically-examine-the-utility-of-ordinance-making-powers-in-a-parliamentary-democracy/

of their political closures and the loss of established arrangements for individual increases. Since many chiefs routinely rely on various escape clauses, the loss of a mandate is certainly not a major event. The constitutional framework should serve as the basis for the authority to enact the ordinance. The entire cycle of new directives and proclamations is shrouded in ambiguity and tightly controlled by the top brass. The police officer must now back up his law with authority. The legal director's ability to survey the landscape defines the boundaries of his jurisdiction and the areas that other leaders are not permitted to cross. Reforming the leadership's legislative power is crucial because corrupt power can quickly transform a democracy into an autocracy. The goal of reform should be to ensure that the majority rule system in this country remains in place by making sure that the leadership is properly balanced.

A STUDY ON THE IMPACT OF THE SARFAESI ACT AND REMEDIES AVAILABLE TO A BORROWER AGAINST RECOVERY OF NPAS BY BANKERS THROUGH POSSESSION OF SECURED ASSET UNDER THE ACT

- HARISH B[53]

ABSTRACT

The Indian government in an ode to mitigate and prevent the losses caused by non-performing assets and bad loans has established various measures such as the SARFAESI act and the DRTs, these measures have without doubt proved to be effective but they come with their fair share of issues. The statutory and regulatory measures have conferred upon banks, powers which has been subjected to abuse and misuse by the banks hence jeopardizing the position of a common man who is helpless against the powers of such banks and other related authorities, what remedies does he have and how can banks be prevented from abusing their power in the future?

I INTRODUCTION TO RESEARCH PAPER

1.1 **Introduction:**

This research paper is a study upon the impact that has been made by the SARFAESI act in the Indian banking sector and the manner in which it was developed for the better functioning of loan-recovery mechanisms in the country. A number of case laws has been analysed with respect to the various remedies available to a person who has been classified as a 'non-performing asset' and the remedies available when the bank has seized or attempted to seize their property in the name of securitization.

1.1.1 **Research Questions:**

[53] BCOM LLB (4th Year), Tamil Nadu National Law University

1. What is the importance and impact that the SARFAESI act has had on the Indian Banking sector before and after its establishment?
2. What are the various rights available to a borrower under the SARFAESI act against recovery and sale of secured asset in the name of NPA recovery?
3. What are the steps that can be taken to ensure that the banks properly recover the NPA and do not give reason for the borrower to challenge its actions?

1.1.2 **Research Objectives:**

A. To study the history of the SARFAESI act.
B. To study the state of the Indian banking sector before the establishment of the SARFAESI Act.
C. To understand the wide impact the act has had on Indian's banking sector.
D. To understand the manner in which banks recover NPAs by securitization of assets through the SARFAESI act.
E. To study the various remedies available to borrowers under the SARFAESI act by employing various case laws.
F. To ascertain certain methods in which such abuse of power by banks can be prohibited in the future.

1.1.3 Research Hypothesis:

For the purpose of this paper, it is hypothesised that the SARFAESI act is of extreme importance to India's present banking sector scene it has helped in the recovery of the economy no matter how small the recovery maybe, after all the country suffered massively at the hands of bad- loans and NPAs. With regard to the remedies available to borrowers, it is hypothesised that all remedies will be available when banks do not follow the appropriate procedure that has been established under the act.

1.1.4 **Research Methodology:**

For the purpose of this paper, doctrinal mode of research will be employed, which involves extensive accumulation and analysis of different forms of legal material, theoretical research papers, case laws, analysis of statutes and other forms of legal study.

II INTRODUCTION TO NON-PERFORMING ASSETS

2.1 **Significance of Topic:**

The banking sector has been a vital part of India's economic growth, given their heightened ability to act like an intermediary between a borrower and creditors, facilitating loan and the

flow of money. Banks have also been instrumental in connecting investors and borrowers. For years, this relationship and deeply-rooted network of banks across the country has helped in the unprecedented growth of the Indian economy and the banking sector in the country. Laws have also been formulated in order to ensure the uninterrupted growth of this sector. There are also lot of loan-giving facilities which allow for the setting up of new industries and companies which have further resulted in the boosting of the country's trade and commerce[54], once again helping in the expansion of India's GDP and economy in general. Moreover, for an agricultural society in countries like India, banking has helped in the procurement of loans for farmers who are in immediate need for funds, thus boosting the agricultural and food-sector of a country.[55]

However, ever since the beginning of a creditor-debtor relationship, there has been a raise in the concept known as 'bad loans', they are also known as 'NPAs' or non-performing asset, it is basically a term used to describe loans that have not been repaid to the bank within the stipulated time. NPAs affect the economy of a country in a drastic manner, the damage done is not reversible unless a good turnover is accumulated to mitigate the drastic effect of such damages.

As of the financial year of 2021-2022, experts witness a surge in the cases of bad loans that is predicted to increase by 13-15% by the end of this financial year.[56]

2.1.1 **Reasons for Increases in NPAs:**

1. Diversion of funds to unrelated fraudulent business with malicious intent.
2. Irreversible lapse in judgement by banking authorities and severe lack of due diligence.
3. Drastic change in business environment, from friendly to hostile thereby causing an irreversible loss in business.
4. Poor morale among bank and financial institutions after implementation of government scheme that write off such loans.
5. Global or national financial crisis which results in drastic erosion of a company's turnover and profit margin.[57]

2.1.2 **Measures Implemented to Mitigate the loss caused by NPAs:**

[54] John L. Douglas, *The Role of a Banking System in National-Building*, 60 Me. L. Rev. 511 (2008).
[55] Claudia Ruiz, *How Can Finance Influence Productivity of Agricultural Firms?* World Bank Blogs (Jan. 13, 2014), https://blogs.worldbank.org/allaboutfinance/how-can-finance-influence-productivity-agricultural-firms
[56] Sunny Verma, *Experts see new surge in bad loans, could rise to 13-15% this FY*, Indian Express (Jun. 16, 2021, 06:58 PM), https://indianexpress.com/article/business/banking-and-finance/experts-see-new-surge-in-bad-loans-could-rise-to-13-15-per-cent-this-fy-7360806/
[57] D.S. Rathore, *Non-Performing Assets of Indian Banking System and its Impact on Economy*, 07 IOSR-JEF. 21, 22-23 (2016).

Due to the adverse effects of NPAs on the economy the government's think tanks have established various legislative measures which not only help in the mitigation of losses but also to prevent banks from suffering the losses related to NPAs. This year, stringent measures taken by the RBI and proper implementation of various legal provisions with respect to recovery of bad loans, had helped the banking sector recover losses worth up to 8.6 Lakh Crores.[58]

Hereunder, one can study upon a handful of recovery channels which have helped in the effective recovery of NPAs by banks and has also been instrumental in preventing the mushrooming of newer NPAs and bad loans.

1. **One Time Settlement Schemes:** This scheme seeks to cover of types of assets be it standard assets, doubtful and loss assets, etc. this scheme also includes proceedings under the SARFAESI Act, and cases initiated before the DRTs and BIFR. However, this scheme will not be applicable to wilful default, criminal negligence, fraud and malfeasance.
2. **Lok Adalat:** The 'people's court' has also been one of the many measures employed to prevent the losses, they are a form of alternate dispute resolution mechanism and have been very useful especially for banks. Since no court fee is involved, it can undertake any cases that already exist, moreover its decrees have legal backing and are binding upon the parties, the Lok Adalat themselves can sit over cases worth up to 5 lakhs and below, the DRT can organize the Lok Adalat for cases 10 lakhs and below.[59]
3. **Debt Recovery Tribunals:** Recovery of Debts and Bankruptcy Act (RDB Act)[60] of 1993 was established by the government to adjudicate matters related to recovery of bad loans and NPAs due to such banks and other financial institutions, the DRTs have also been treated as an appellate authority for proceedings under the SARFAESI Act.[61]
4. **SARFAESI Act:** Also known as the 'Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act'[62] of 2002. A revolutionary legislation for the Indian banking sector that has made recovery of bad loans and NPAs a lot

[58] ET Online, Concrete measures helped banks recover bad loans worth over Rs 8.6 lakh cr, says govt, The Economic Times (Jul. 18, 2022, 10:50 PM IST), https://economictimes.indiatimes.com/news/economy/policy/concrete-measures-helped-banks-recover-bad-loans-worth-over-rs-8-6-lakh-crore-says-govt/articleshow/92956665.cms

[59] Rama Krishna Rao Chepuri, *Role of Lok Adalat in managing Non-Performing Assets in Scheduled Commercial Banks*, 03 IJMIR. 105, 105-106 (2017).

[60] Recovery of Debts and Bankruptcy Act, 1993, No. 51, Acts of Parliament, 1993 (India).

[61] Rabindra Kumar Swain, *Non-Performing Assets of Scheduled Commercial Banks in India: Its Regulatory Framework*, 13 KIIT J. Manag. 154, 158-159 (2017).

[62] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, No. 54, Acts of Indian Parliament, 2002 (India).

efficient and easier, it allows for the reconstruction of financial assets and also for the enforcement of securities interest by secured creditors, in the year 2016, this act facilitated the recovery of NPAs worth up to 13,200 Crores.[63]

III SARFAESI Act

3.1 History of the SARFAESI Act and DRT:

It all started when the government of our country started taking cognizance of the increasing number of security challenges to banks such as the rise of NPAs, when the state tried to solve the problem, it realized that traditional methods for recovering the assets were barley effective and blocked a significant portion of their funds from being recovered, litigation was ineffective as it locked out a huge amount of public money, this pushed the police makers to come up with an appropriate procedure that would allow banks to recover the dues without much delay.

In the year 1981, the famous T. Tiwari Committee sat down and examined in detail the various hurdles faced by banks and NBFCs on an everyday basis, their main objective was to formulate possible changes in law in the form of remedies. The Tiwari committee came up with the idea of setting up tribunals and this birthed the DRT Act[64]. To this day, the DRT has worked in consonance with the SARFAESI act and it has functioned effectively.[65]

The SARFAESI act has been established for the regulation of securitization of assets and enforcement of security interest, it has also been done with the objective to create a central database of security interest for property rights.

3.1.1 Securitization in India outside the SARFAESI Act:

Securitization as a process came into existence in the year 1970 in America, mortgages of home owners were pooled together by state-established bodies, in India this process only three-decades old with the first credit rating agency being CRISIL, but the process hasn't gained much traction until 2012 and has grown to unprecedented heights by 2021, here are three important RBI guidelines with respect to securitization:

1. The Guidelines on Securitisation of Standard Assets, 2006
2. The Guidelines on Securitisation Transactions, 2012

[63] Surojit Dey, *Recovery Mechanisms of Non-Performing Assets in Indian Commercial Banks: An Empirical Study*, 01 Nsou Open J. 01, 02-04 (2018).
[64] Recovery of Debts Due to Banks and Financial Institutions Act 1993, No. 51, Acts of the Parliament, 1993 (India).
[65] Nidhi Singh, *Debt Recovery Tribunal: An Analysis*, 02 JLSR. 239, 239-241 (2016).

3. Master Direction – Reserve Bank of India (Securitisation of Standard Assets) Directions, 2021[66]

The guidelines are said to be applicable to all banking association including NBFCs, Housing Finance Companies, National Bank for Agricultural and Rural Development, Small Industries Development Bank of India and others.[67]

3.1.2 Securitization after the SARFAESI Act came into picture:

Securitization was mostly done under Section 13 of the act which read as **Enforcement of Security Interest under Section 13[68];** this provision was instrumental to recovery of loans in the country, the mechanism involves the enforcement of a security interest that has been created in the interest of a secured creditor can be enforced without the intervention of any court or tribunal.

Before moving on with this chapter, one needs to understand the meaning of the word 'court' under Section 13(1) of the Act, it has been established by the apex court that this word also includes the DRT, which is a creation of the statutes itself, even though it does not have the inherent power found in civil courts.[69]

At this point, a person can understand that the DRT and the SARFAESI act work hand in hand, for example, section 13 (4) of the same act provides us with a set of situations to which the tribunal is confined to, however the judiciary says otherwise, in the case of *Indian Overseas Bank v Ashok Saw Mill*[70], it was held that the DRT can interference in cases that go beyond section 13 (4). In other words it depends on a case to case basis.

3.1.3 Security Interest (Enforcement) Rules, 2002:

The banks can also employ Security Interest (Enforcement) Rules, 2002, these were a set of rules formulated by the central government in 2002 in consonance with section 13 and 38 of the SARFAESI Act. These rules have provided us with provisions for both movable as well as immovable secured assets and also for the sale procedure for each of them. More precisely

[66] Anand Shah, India: Securitisation 2020: Trends and Developments in India, (Jan. 21, 2020), https://www.mondaq.com/india/securitization-structured-finance/885822/securitisation-2020-trends-and-developments-in-india

[67] Vivriti, Asset Securitisation in India: A look into the burgeoning market, (Apr. 19, 2022), https://vivritiamc.com/asset-securitisation-in-india-a-look-into-the-burgeoning-market-part-i .

[68] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sec. 13, No. 54, Acts of Indian Parliament, 2002 (India).

[69] Transcore v Union of India, (2008) 1 SCC 125.

[70] (2009) 8 SCC 366.

Rule 8 and Rule 9 which deals with the sale of immovable secured assets, time of sale, issues of a certificate and other.

Provisions have also been created under Rules 8(6) and 9(1) with respect to delivery of notice, 30 days prior to the notice of the sale of the said secured asset. This provision gives the borrower a right to do everything in his power to try and retain the ownership of the asset, the same was held in the case of *Mathew Varghese v M. Amritha Kumar*[71]. Rule 8 and 9 of the SI Rules also recently gained traction in the case of *S. Karthik & Ors. v. N. Subhash Chand Jain & Ors*[72], wherein the court relaxed the mandatory perquisites with respect to the notice to be given for sale of the mortgaged agreement. This ensured that lenders such as banks will be able to recover the dues as quickly as possible, to that of international standards, the court also upheld the rationale behind Rule 8 and 9 for protection of borrowers.[73]

It has been reiterated by in the case of *Vasu P. Shetty v Hotel Vandana Palace*[74] that rules 8 and 9 of the Security Interest Rules have been established in order to benefit the borrower, he can also waive the said rights if he wishes to.

3.2 **Significance of SARFAESI Act:**

When it comes to NPAs in public sector banks of India, the RBI in fiscal year 2014 has stated that it is worth nearly 40,000 crores, which makes up to 90% of all NPAs in the entire country.[75] However, eight years later, the situation has drastically improved, with experts predicting that the Indian Banking sector may see a record drop of 4% in bad loans by the of the fiscal year 2024.[76] Civil court decisions related to recovery of NPAs from defaulting borrowers took somewhere between seven to five years, the establishment of DRTs reduced this time to just a year, however the success was short-lived as DRTs soon became overburdened with a lot of similar cases thus hampering its progress. There were a lot of grey areas with respect to then legislations such as no dedicated legal provisions for establishing securitisation of financial assets of banks and banks in India did not have the power to procure the possession of securitisation and their sale, unlike foreign and international banks.

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[71] (2014) 5 SCC 610.
[72] 2021 SCC OnLine SC 787
[73] Bishwajit Dubey, "Duly Noted": Notice period for subsequent sale notice under Rule 8 and 9 of the Security Interest (Enforcement) Rules, 2002 relaxed by the Supreme Court, cyrilamarchandblogs.com (Dec. 13, 2021), https://corporate.cyrilamarchandblogs.com
[74] (2014) 5 SCC 660.
[75] PTI, *PSU banks account for over 90% of total bad loans in FY'14*, The Economic Times (Nov. 25, 2014, 08:30 IST), https://economictimes.indiatimes.com/industry/banking/finance/banking/psu-banks-account-for-over-90-of-total-bad-loans-in-fy14/articleshow/45274080.cms
[76] Reuters, *Indian Banks may see Bad Loans falling to a decade low of 4% by end of FY'24*, Business Standard (Sep. 21, 2022, 13:47 IST), https://www.business-standard.com/article/finance/indian-banks-see-bad-loans-falling-to-decade-low-of-4-by-end-of-fy24-122092100493_1.html

The SARFAESI act was birthed to reverse this situation, the act seeks to recover loans by using methods such as securitization, asset reconstruction and finally enforcing security without the court's intervention. SARFAESI has already become and indispensable part of today's banking sector.

3.2.1 **Impact of the SARFAESI Act:**

In the year 2005, barley two years after the establishment of SARFAESI, RBI published a report titled '*Non-Performing Loans and Terms of Credit of Public Sector Banks in India: An Empirical Assessment'*, this report compared the NPAs in various Asian countries including India. Japan and China were said to hold up to 49% of all NPAs in Asia, India as of 2003 had NPAs ranging in 30 billion while sharing a staggering 2.3% globally, though this number is inherently low when compared to Japan and China. India also had a NPA to loan taken ration of 8.8, this was neither low nor was it high, but this data was instrumental in showing the impact that SARFAESI and the DRTs brought to the table.[77]

Let us look at a tabular representation from the same paper;

This table will allow us to acquire a perspective on the before and after impact of SARFAESI.

Gross NPAs of Public Sector Banks in India:

Year	**Rs. billion**	**US $ billion[78]**
1993	392.5	12.81
1994	410.4	13.08
1995	383.8	12.22
1996	416.6	12.45
1997	435.8	12.28
1998	456.5	12.28
1999	517.1	12.29
2000	530.3	12.24
2001	546.7	11.97
2002	564.7	11.84
2003	540.9	11.18

[77] R. Ranjan, Non-Performing Loans and Terms of Credit of Public Sector Banks in India: An Empirical Assessment, 24, RBIOP. 80, 92-104 (2003).

[78] *Ibid.*

Ever since the establishment of the SARFAESI Act, the country has witnessed a steady downward trend in the value of NPAs.

In recent years, the Reserve Bank of India had released a report for the fiscal year 2017-2018, the ratio of recovered loans to the amount involved had witnessed a drastic improvement of 41.3% as opposed to the 13.8% as of last year. The data had also revealed that the act had allowed banks to recover 5.28 lakh crores worth of NPAs which was only 38,500 crores as of the previous year.[79]

Moreover, as of 2021, the closing balance of NPAs of Public Sector Banks in India as of 2019-20 was 8,99,803 Crores, for 2020-21 it stood at 7,63,842 Crores, the country has witnessed almost 1,18,584 Crores reduction in the value of NPAs, all thanks to the various NPA-recovery channels in the country.[80]

3.2.2 **Misuse of SARFAESI mechanism by Banks:**

Even though the SARFAESI Act has been enacted to benefit banks in order to prevent them from facing loss in business, there are rare instances of banks misusing the provisions in order to accrue more benefits. For example, there was a case involving an NPA in a Public Sector Bank in Jammikunta where the sale of the secured property took place just 15 days after declaring it an NPA, moreover the price was fixed without consulting the borrower, it was held to be in contravention of RBI Master Circular (RBI/2014-15/73 DBR.No.CID.BC.57/20.16.003/2014-15 dated July 1, 2015).[81]

Moreover, the SARFAESI Act provides a lot of power to banks, under sec. 35[82], it has been stated that the act will override all other local laws that aren't consistent with SARFAESI act.

In few other cases, the banks have sold the assets to ARCs or Asset Reconstruction Companies for a much lesser price than the original amount, moreover it has been done without disclosing the same to the borrower. The same was spoken about in RBI notification (DBOD.No.BP.BC.34 /21.04.048 /2007-08).

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[79] Greeshma Francis, *An Overview of SARFAESI Act and Its Impact on NPA*, 08 PIJR. 27, 27-28 (2019).

[80] Taken from report released by RBI titled 'Report on Trend and Progress of Banking in India 2020-21', Page no. 60.

[81] K Manicka Raj, How banks misuse SARFAESI Act provisions for loan recovery, KnnIndia (Jan. 21, 2021, 08:32 IST), How banks misuse SARFAESI Act provisions for loan recovery (knnindia.co.in)

[82] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sec. 35, No. 54, Acts of Indian Parliament, 2002 (India). Sec. 35: *The provisions of this Act to override other laws.—The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*

IV Remedies Available to a Borrower under SARFAESI

4.1 Who can Appeal for a Remedy?

Section 17 of the SARFAESI Act, is one of the central provisions that provide measures to a borrower in order to file an application against measures used to recover debts. 17(1)[83] being the most important sub-section. In some cases, the court has also expressed the importance of remedies available under the DRT Act and the SARFAESI Act rather than parties filing writs under Article 226.[84]

Section 17 starts with the words 'any person' and it has been argued this word brings into its umbrella not only the borrower but any other person who was affected by the recovery mechanism adapted by the bank.[85]

Now it has been stated in few cases that the term 'any person' is also applicable to persons other than just the borrower.[86]. This term can bring into its umbrella, tenants of the property and even the purchasers of the auctioned secured asset.[87] For the purpose of this paper, the study will be constrained to remedies available strictly to individuals.

Finally, in a 2020 case it has been held that classifying a secured debtor as an 'NPA' will not apply if he has raised funds through issue of debt securities.[88]

4.1.1 When can a person file for an appeal?

Looking at the provisions of section 17 by the words '*Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor',* it is clear that the intent of legislation is to facilitate the borrower to bring an appeal only after an action has been taken by secured creditor, or after he has lost possession of the secured asset.[89]

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[83] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sec. 17, No. 54, Acts of Indian Parliament, 2002 (India), *Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, 2[may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measure had been taken: Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower*

[84] United Bank of India v Satyawati Tandon, (2010) 8 SCC 110.

[85] Jagdish Singh v Heeralal, (2014) 1 SCC 470.

[86] Agarwal Tracom (P) Ltd v Punjab National Bank, (2018) 1 SCC 626.

[87] Asset Reconstruction Co Ltd v Florita Buildcon (p) Ltd, AIR 2017 Bom 25.

[88] Dommeti Krishna Rao vs The State Of Andra Pradesh, Writ Petition No.13958 of 2020.

[89] Standard Charter Bank v Noble Kumar, (2013) 9 SCC 620.

Moreover, in the case of *Aroma Chemicals v Punjab National Bank*[90], it has been held that borrower's right of appeal arises only after the initiation of recovery proceedings by the bank. There has always been a space for debate on a borrower's right to file a writ petition with respect to proceedings under the SARFAESI act, this was put to rest by the Supreme Court in the case of *Sanjay Bajpal Builders (p) Ltd v Diwan Housing Finance Corpn Ltd*[91] held that no writ can be field when appeal under section 17 is available.

4.2 **Discussion on Remedies Available to Borrower:**

This sub-chapter, is a collection and analysis of various case laws and articles which speak about illustrations where the borrower can file for a remedy.

4.2.1 **Appeal filed against possession of asset:**

Section 14[92] of the act has created provision which provides powers to the various magistrates of a city in assisting banks in obtaining possession of a secured asset, section 14 (2)[93] has provided powers to the magistrate to use 'force' in order to possess the said property, though the term 'force' has been used very arbitrarily here. Section 17 is also applicable to any order and actions passed under section 14.[94]

The courts have also discussed on the authority who is called under section 14 of the act, the authority is bound to assist the secured creditor in obtaining possession of the asset, moreover the authorities do not have any power to question the legality of the actions taken by the creditor under section 13(4), he is also not allowed to question the ingenuity of the seized documents.[95]

Moreover, the borrower or any person related to a borrower (both have been said to come under the definition of 'any person' under sec. 17[96]) can file for an application under section 17 when the possession of secured assets has been done under any other act or proceedings other than the SARFAESI act, these issues arose before the court in the case of *Sangeeta Devi v State of Jharkhand*[97], where the mortgagers pursued an action under rent and eviction control laws rather than SARFAESI.

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[90] AIR 2017 ALL 55.
[91] WPC No. 1951 of 2016.
[92] Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.
[93] Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sec. 14, No. 54, Acts of Indian Parliament, 2002 (India), Sec. 14(2) *For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary*.
[94] Dharmendra Kumar Chhabra v Allahabad Bank, AIR 2017 MP 136.
[95] Gruh v District, Civil Application No. 2493 of 2011.
[96] State Bank of Mysore v Nagamani, AIR 2016 Kar 195.
[97] AIR 2017 Jhar 114.

The secured creditors and magistrates have to follow proper procedure when taking possession of a secured asset, legal proceedings for evicting the tenant from the property will not provide the authority or the bank possession of the secured asset.[98] If the authority acts in contravention of the procedure, the borrower can file for an appeal.

4.2.2 **Appeal against symbolic possession under SARFAESI Act:**

The Supreme Court in the case of *M/s Hindon Forge Pvt. Ltd. & Anr. v State of Uttar Pradesh*[99] held that an appeal under 17(1) can be filed for even before actual, physical possession of the property has taken place by the secured creditor.

Moreover, in the case of *Marida Chemicals Ltd v Union of India*[100], it was stated by the court that the borrower can file for an application under section 17 anytime before the property has been auctioned off, even after all procedures have been followed under section 13(4). It has also been held that the borrower need not wait for a notice of sale, or can approach the DRT even during the stage of possession notice.[101]

4.2.3 **Rights of a Tenant to file for an Appeal:**

It has been held that the tenant of a secured property/asset also has a valid interest over the property, in the case of *SBI v Vivek Kumar Kejriwal*[102], the court upheld the tenant's writ petition against the order of the Chief Metropolitan Magistrate. The case involved both section 13(4) and 14, section 13(4) was held to be amenable to challenge under section 17, even though section 14 prohibits a person from challenging an order of the magistrate, it does not prohibit the challenge of process followed under section 14.

Also, in the case of *Bajarang Shyamsunder Agarwal vs Central Bank Of India*[103] the supreme court was posed with a question; whether the provision of the SARFAESI act will affect the rights of a lessee to remain in possession of the secured asset? It was held that under a valid lease, the secured creditor cannot take possession of a secured property.

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[98] Balkrishna Rama Tarle Dead Thr LRS & Anr. v Phoenix ARC Private Limited & Ors., Special Leave Petition No. 16013 OF 2022

[99] Civil Appeal No. 10874 of 2018.

[100] (2004) 4 SCC 311.

[101] Chakrapani Misra, A Borrower Can Now Challenge Symbolic Possession Under the Sarfaesi Act, mondaq (Nov. 21, 2018, 08:44 IST), https://www.mondaq.comt

[102] AIR 2016 Cal 176.

[103] Criminal Appeal No. 1371 of 2019.

Next, in the case of *Vishal N Kalsaria vs Bank Of India & Ors*[104], the court was once again posed with the question; 'whether a "Protected tenant" under the Maharashtra Rent Control Act[105] of 1999 be treated as a lessee? And will the provisions of SARFAESI act override the provision of this rent control act. The court held that the rent control act cannot be overridden as it is important to protect the tenants against arbitrary raise in rent amounts and evictions.

4.3 **How the judiciary has checked and balanced the powers conferred under the SARFAESI Act and DRTs:**

Various courts in India have taken the opportunity to analyse the SARFAESI act with respect to its objective, purpose and roles played by the act. In the case of *Anilkumar Valjibhai Rajpara v District Magistrate*[106] the court has analysed section 13 and its various sub-sections and has also reiterated the manner in which the act has been a tool for banks in order to ensure the smooth debt recovery processes. However, in the same case, the court has argued upon the SARFAESI act clashing with the rights of a tenant under the various Rent Control legislations in the country.

In the case of *Bajarang Shyamsunder Agarwal v Central Bank Of India*[107], the court analysed the rights available to a tenant under NPA cases stating that even a borrower is allowed to initiate proceedings before the DRT, even though the tenant may not be able to repossess the said property, the DRT can certainly restore "status quo" of his settlement. Moreover, in the same case, the court has commented upon the powers of Chief Metropolitan Magistrate / District Magistrate, stated that he will not be able to pass order regarding possession of the secured asset if the lease has not been determined in accordance with sec. 111 of the Transfer of Property Act, 1882.[108]

In the case of *M.Ezhilmaran vs K.Karunanidhi*[109], it was held that if a tenant where to hold valid tenancy in accordance with law prior to the existence of a mortgage, then his possession cannot be disturbed by secured creditor taking the possession of the property.

In an interesting case by the name *Kotak Mahindra Bank Ltd vs Kothari Industrial Corporation*[110] of the court discussed upon the decisions taken by DRTs, the DRTs cannot merely take upon the jurisdiction of the civil court and set aside the decision of a High Court, the court held this was against judicial principle and discipline, hence to protect consistency of

[104] Criminal Appeal No. 52 of 2016.
[105] Maharashtra Rent Control Act, 1999, No. 18, Acts of Maharashtra Legislative Assembly, 1999 (India).
[106] Special Civil Application No. 6634 of 2017.
[107] Criminal Appeal No. 1371 of 2019.
[108] Transfer of Property Act, 1882, sec. 111, No. 04, Imperial Legislative Council, 1882 (India).
[109] Second Appeal. No. 43 of 2021.
[110] C.R.P.No.3803 of 2014

decisions, the tribunals will have to be bound by the decisions of superior courts in order to avoid judicial chaos.

V CONCLUSION

5.1 **Conclusions:**

At the end of this research paper, research questions that were posed at the beginning of this paper will be answered here.

1. What is the importance and impact that the SARFAESI act has had on the Indian Banking sector before and after its establishment?

The SARFAESI act has basically rejuvenated the Indian banking sector ever since its establishment and has ensured that the economy of the country is not drastically affected. The measures provided under the act has been instrumental in helping banks recover NPAs in a quick manner without wasting much time, by bringing in the concept of securitization the recovery of NPAs have been effectively done, moreover the SARFAESI act has also reduced the burden on the DRTs.

Moving on to the impact that the act has had, in the last eight years, stringent application of SARFAESI act has ensured a 4% decrease in the total value of NPAs in the country. Drawing references from a report released by the RBI, after the implementation of SARFAESI the value of NPAs has steadily decreased, to give us a better scale ratio of NPA recovery, 2017-18 has also been referred to and it has seen an increase of 41.3% from 13.8%, also recently there has been a reduction of one lakh crores in the value of NPAs in the country as of 2021.

2. What are the various rights available to a borrower under the SARFAESI act against recovery and sale of secured asset in the name of NPA recovery?

With respect to the case laws that have been collected for remedies available to borrowers and tenants, a study has been conducted in reference to various scenarios which would give us a better understanding such as possession and symbolic possession. Sec. 17 is the fundamental provision which provides remedies for a borrower, there has been quite some debate regarding 'symbolic possession' under sec. 17(1), this was put to rest by the Supreme Court in the *Hindon Forge* case. Another interesting point is that the courts are liberal in the interpretation of the statute, for example allowing the borrower to challenge the procedure followed under sec. 14 when sec 14 prohibits the challenging of an order under the same.

3. What are the steps that can be taken to ensure that the banks properly recover the NPA and do not give reason for the borrower to challenge its actions?

The borrower challenging the possession of a secured asset by a bank will without doubt hamper the recovery process of such assets, the courts in India are already riddled with NPA recovery cases, and bringing in such challenges by the borrower will not help. Moreover, some challengers are resorting to art. 226 rather than sec. 17 even though the courts have been advising against the same. This goes without saying but DRTs are also helpless in this regard, it is troublesome to have all recovery tribunals be filled with appeals challenging bank's possession.

Looking at the various measures taken by court to place checks and balances upon the powers that have been conferred to various institutions by the SARFAESI act, the courts are very particular about the procedure to be followed by the banks and magistrate, the authoritative institutions have bullied and harassed borrowers and tenants alike in the name of recovering the secured assets. The very purpose of the Transfer of Property and Rent Control act is to protect backward and illiterate tenants and borrowers from such authoritative harassment. Thanks to the judiciary, the assets cannot be possessed until due process of law has been followed. Moreover, the courts have also checked the powers of DRTs, it has been said that no DRT can set aside the order of a High Court since the same can cause chaos in the judicial scene, rather it would be counter-productive to the very purpose of the constituting DRTs.

In my opinion, newer provisions must be formulated while setting up clear procedures as the manner in which banks will have to acquire possession of the property, even though provisions have been present with respect to the notice to be given before possession and sale, banks have been often known to ignore the same thus not giving the borrower ample chance to make good his debts. Heavier penalties need to be imposed on banks for failing to follow proper procedure. In a recent 2016 case, *Sree Jayalakshmi Textiles v International Asset Reconstruction Co (P) Ltd*[111] it has been held that borrower's right to redemption is extinguished once the auction sale has been extinguished, even if borrower is ready to repay full dues, the same cannot be allowed. Hence the need to pay attention to the procedures that banks have to follow.

Finally, upon paying attention to sec 14 (2) of the SARFAESI act which has provided the magistrate with the power to use 'force' to possess the property, a very arbitrary term open to abuse by the 'authorities' under the act, one fails to see how this is any different from banks employing goondas to harass helpless borrowers and mortgagers. This calls for a need to established stringent measures to place checks and balances upon a bank's exercise of power under the SARFAESI.

[111] AIR 2016 Kar 40.

JUDITH BUTLER, INTERSECTIONALITY AND THE ABOLITION SECTION 377

- AADHISWARAN SHANMUGAM[112]

I. INTRODUCTION

The post-modernist theory was the conception propounded as a critique of the English enlightenment values and truth-claims[113]. Drawing from postmodernism, Judith butler's Performative Identity theory evolved as a critique of the second-wave feminist movement and improvised the scope of gender identity classifications in contemporary feminist discourse. In parlance with the performativity theory, Crenshaw's theory on intersectionality was developed to provide an alternate understanding of gender discrimination as a convergence of multiple axes of oppression. This paper will delve into the postmodern feminist theory of Butler, Crenshaw's intersectionality theory and the application of these theories to analyse the judgement on the abolition of section 377 of the Indian Penal Code. The paper will also examine the impact of the case in distorting existing cultural identity barriers and intersectionality pointers in the country.

II. THIRD WAVE FEMINIST MOVEMENTS

Butler's Performativity theory

The premodern feminist theories have always limited the scope of a woman's identity by associating various activities to their specific gender[114]. Butler's Performativity Theory identifies that one's gender is assigned through repeated and validated performances within the cultural context[115]. She believes that by performing standardised behaviours assigned to specific genders, one's gender is labelled rather than being decided[116]. In her theory, she presents the societal inclination in using one's biological sex as the pretext to identify one's gender. She also believes that the body's political function is used as an influencer in accepting social standards to decide one's gender identity[117]. Early postmodern feminists had theorised

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[112] BBA LLB 2017

[113] TED HONDERICH, THE OXFORD COMPANION OF PHILOSOPHY 745-746 (Oxford University Press) (2005).

[114] Marion Smiley, *Feminist Theory and the Question of Identity*, 13 Women & Politics 91–122 (1993).

[115] WARREN J. BLUMENFELD, BUTLER MATTERS: JUDITH BUTLER'S IMPACT ON FEMINIST AND QUEER STUDIES CH. 7 (2019).

[116] Linda Alcoff, *Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 Journal of Women in Culture and Society, 405–436 (1988).

[117] *Id*.

to leave the description of the term 'woman' to the subjective realities of society[118]. But Butler believes that such a stance will only lead to the restoration of previous gender identifications[119]. By application of her theory, since normative performances are presumed to define specific behaviour, leaving the definition of societies' subjective realities will only restore previous gender definitions and classifications of 'women'[120]. She wants to remove all pre-conceived identifications of gender, its complete declassification and vouches for the limitless universalisation for gender identities[121].

Crenshaw's Intersectionality theory

Crenshaw's Intersectionality theory addresses the convergence of gender and other axes of discrimination[122]. She highlights how pre-existing gender identities have led to the unavailability of legal redressal for the black woman during intersectional discrimination. The theory claims that law completely ignores the problems of intersectional discrimination, resulting in increased overall discrimination of the already oppressed. Crenshaw's theory can thus be comprehended as a black feminist critique of the second feminist movement, and as a contemporary discourse in black feminist studies.

Within the context of India, intersectionality can be presented on the grounds of caste, gender, class, religion and minority status[123]. A case study on Indian Muslim homosexual rights[124] and the Hijra community[125] shows the intersections of religion, minority status and gender. Intersectionality in India has been in constant debate due to caste, gender violence and anti-discrimination laws in the country[126]. But the first positive legal interpretation of Indian intersectionality was discussed in the judgement abolishing Section 377.

III. THE ABOLITION OF SECTION 377, IPC

[118] Elizabeth L. Berg, Sarah Kofman & Luce Irigaray, *The Third Woman*, 12 DIACRITICS 11–20 (1982).
[119] JUDITH BUTLER, GENDER TROUBLE 77-86 (1990).
[120] Susan Archer Mann and Douglas J. Huffman, *The Decentering of Second Wave Feminism and the Rise of the Third Wave,* 69 Science and Society, 56-91 (2005).
[121] LINDA J. NICHOLSON, FEMINISM/POSTMODERNISM 324-340 (2016).
[122] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, Feminist Legal Theory 57–80 (2018).
[123] Adrija Dey, *Gender and Caste Intersectionality in India: An Analysis of the Nirbhaya Case,* In: GENDER AND RACE MATTER: GLOBAL PERSPECTIVES ON BEING A WOMAN, 87-105 (2012).
[124] Krupa Shandilya, *(In)visibilities: Homosexuality and Muslim Identity in India after Section 377*, 42 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY, Journal Of Women In Culture And Society 459–484 (2017).
[125] Sumit Baudh, *Invisibility of "Other" Dalits and Silence in the Law*, 40 BIOGRAPHY 222–243 (2017).
[126] Dey, *supra* note 11, at 89.

Section 377 has been the bulwark for reducing gay rights to a non-existential denomination in India. The section criminalised voluntary carnal intercourse against the order of nature, including same-sex intercourse[127]. The text of the section equated both consensual and non-consensual forms of unconventional sex[128]. During the conduct of any act, whether anal or oral or other, against the order of nature, consent of the victim was wholly immaterial to such action as the provision completely ignored such consent[129]. This ignorance resulted in the equating of consensual acts of homosexuality with rape[130]. This section also invaded individual privacy by providing the police with the right to conduct a criminal investigation on suspicion. The progression for the decriminalisation of acts of homosexuality began with the *Naz India Foundation v. Govt. of Delhi,* wherein the High Court of Delhi decriminalised consensual homosexual acts as of 2009[131]. The decision was overturned by the Supreme Court in 2013, resulting in the restoration of the pre-existing status quo[132]. In 2018, the Supreme Court in *Navtej Singh Johar v. Union of India* overruled the *Suresh Kumar Kaushal* judgement and decriminalised Section 377 as a violation of privacy and equity[133]. Though principally motivated, the judgement faced backlash for not enhancing gay rights in the country but was applauded as the first step towards any significant change in gay rights [134].

IV. ANALYSIS OF PERFORMATIVITY, INTERSECTIONALITY AND ITS IMPLICATIONS THROUGH SECTION 377

Performativity Theory and Section 377

The *Navtej Singh Johar* judgement tries redefining personal individuality. The judgement goes to the extent to equate individual identity with godly divinity[135]. In establishing the theories on individual identity, it holds that equality, identity, dignity and privacy are the four corners of an exemplary constitution, with natural identity being pristine to individual existence[136]. The court in outlaying the theorisations of gender identities in India draws a parallel from Butler's

[127] The Indian Penal Code, 1860, 377.
[128] Mihir v State of Orissa, (1992) CriLJ 488 (India).
[129] *Id.*
[130] *Id.*
[131] Naz Foundation v. Government of NCT of Delhi (2009) 160 DLT 277.
[132] Suresh Kumar Kaushal v. Naz Foundation (2013) Civil A.No. 10972.
[133] Navtej Singh Johar v Union of India (2016) W. P. (Crl.) No. 76 (hereinafter *Navtej Singh Case*).
[134] Pratik Dixit, *Navtej Singh Johar v Union of India: Decriminalising India's sodomy law*, The International Journal Of Human Rights 1–20 (2019).
[135] *Navtej Singh Case*, *supra* note 11, at 4.
[136] *Id.* at 5.

theory on performativity. The court provides every individual with his or her own powers to choose and control one's identity[137]. Butler, in her derivation of the Performativity theory, was also against the use of individual biological sex for basing one's gender identity[138]. To address this issue, the judgement cites the NALSA Case[139], which accepted that sex assignment at birth based on individual bodies within the male or female physiology as wrong and abhorrent[140]. The judgement dictum states, '*Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth*'[141]. This concurrent evolution of the court helped in ending existing understandings of gender as a pre-assigned proposition of one's sex and also supported an individual to derive their own gender identity in India. Justice Malhotra's engagement with gender identification is that '*homosexual identities, not as an aberration but a variation of sexuality*'[142]. She holds gender classifications as legally immoral and unreasonable[143]. This decision and obiters in other judgements have helped allow the reduced use of performativity to define gender identification and indeed help one's individual choice of gender orientation as the pretext of one's identity. The judgement, in light of Butler's conception, helps provide a constitutional backing for individuals to derive such identities.

Intersectional Discrimination and Section 377

The gay community has faced rigorous discrimination with the general discourse of sexuality within the Indian paradigm[144]. The societal discrimination towards gay rights in India is institutionalised through multiple legislations, which include, the prevention of gay sex in the Indian army[145], lack of legalisation on same-sex unions[146], and lack of redressal systems for same-sex couples[147]. In *Nargesh Meerza,* the court held that discrimination under Article 14

[137] *Id.* at 6.
[138] Rana Haq, *Intersectionality of gender and other forms of identity*, 28 Gender In Management An International Journal 171–184 (2013).
[139] National Legal Services Authority v. Union of India (2014) WP (Civil) No 400 of 2012.
[140] *Navtej Singh Case*, *supra* note 11, at 7-11
[141] *Id.* at 7.
[142] Suchitra Mohanty, Gay sex not an aberration, Supreme Court judge says ahead of ruling on homosexuality banReuters(2018), https://in.reuters.com/article/india-lgbt-supremecourt/gay-sex-not-an-aberration-supreme-court-judge-says-ahead-of-ruling-on-homosexuality-ban-idINKBN1K21L2 (last visited May 15, 2020).
[143] *Id.*
[144] *Baudh*, *supra* note 13.
[145] The Army Act, 1950, 46.
[146] Chatterjee Subhrajit, *Problem Faced by LGBT People in the Mainstream Society: Some Recommendation*, Vol.1 No.5 International Research Journal of Interdisciplinary and Multidisciplinary Studies 317-331 (2014).
147 ARVIND NARRAIN & GAUTAM BHAN, BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA 44 (2012).

should not be made *'only and only'* on the grounds of sex[148]. But, if such discrimination is coupled with other considerations, the states are not prohibited from enforcing them[149]. This judgement had completely disallowed the judicial interpretation of intersectionality. But, in the *Navtej* judgement, JJ Chandrachud, in his concurring opinion, dismisses the reliance on '*only'*, as it would render *'constitutional guarantee under Article 15 meaningless'*[150]. The court further addresses the intersectional problem meted out towards the gay community by equating 'sexual orientation-based discrimination' with 'sex discrimination' and holding them both violative of Article 14 [151]. The judgement establishes the famous Yogyakarta Principles, wherein the states are required to take account of '*discrimination* (that) *may intersect with other forms of discrimination*'[152]. The judgement also highlights the problems of intersectional discrimination and defines it as an interplay of oppressions among the lower class, disabled and more[153]. In an engagement with Crenshaw's theory, the judgement provides a reinterpretation of Article 14 to help address intersectional discrimination in India[154]. For the first time in the Indian judiciary, the courts have acknowledged the presence of intersectional discrimination and provide a position for furthering an all-inclusive law-making process.

V. CONCLUSION

The judgement has tried apologetically to end the sodomy law and has laid the foundation for progressive gay rights in a socially stigmatised country. Nevertheless, the flow of legislation and Indian queer movements must now focus on Butler's theory for removing gender identities and altering its standpoints on intersectional legal jurisprudence. There has always been distant ignorance of Gay rights in India even within the context of progressive elites of the country[155]. There must be open discussions with the urban elites and other forums in helping the gay community. The courts and society must now take a step-by-step approach to deal with gay rights as an inherent component of human rights and help deal with the ending of performative behaviour as an individual identifier. There must be an inclusive policy-based approach to addressing the problems of gender identity and other principles. The scope for the further

[148] Air India v Nergesh Meerza, (1982) 1 S.C.R. 438.
[149] *Id.*
[150] *Navtej Singh Case*, *supra* note 11, at 103-107.
[151] *Id.* at pp. 237.
[152] *Id.*at 42-45. Also: International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*.
[153] *Navtej Singh Case*, *supra* note 11, at 47.
[154] *Navtej Singh Case*, *supra* note 11, at 103-107.
[155] Vimal Balasubrahmanyan, *Gay Rights in India*, 31 EPW (1996).

legitimisation of gender related rules must stem from postmodern feminist theories and liberal intersectional jurisprudence.

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A GLANCE AT "MODELS OF ADMINISTRATIVE ADJUDICATION"

- ANKIT KUMAR[156]

If we simply understand the literal meaning of the word administrative adjudication, it can be understood as the determination of any matter whether it is judicial or quasi-judicial nature by an administrative department or agency of the government. In this paper, the author explains the five models of administrative adjudication and the variables they consist of i.e., how they function in different countries with different variables. The author emphasized the functioning of administrative adjudication i.e., every country provides beneficial or regulation schemes to their people i.e., subsidies, Government bank services, rules which govern the appointment and recruitment of Government servants, etc., and there are high chances of conflict between the Government/its agencies and the individuals availing or accessing those services/schemes and in that case need of an administrative adjudicator arises. Most administrative adjudicative systems follow three phases that are initial decision-making, administrative reconsideration, and judicial review. To understand any administrative adjudication process, one must recognize the following four variables as suggested by Michael Asimow in his paper[157].

- is the adjudicatory body a combined functions agency or a separate tribunal?

Combined function agency conduct investigation, prosecution, initial decision-making, and re-consideration whereas in the case of a separate tribunal it only reconsiders the decision but does not take part in the investigation or prosecution.

- are the proceedings inquisitorial or adversarial?

Inquisitorial is a legal system in which the court/judge is actively involved in the investigation of the facts of the case whereas in an adverse system the court/judge plays a passive role in which the trial is separated from the investigatory part of the case.

- Is judicial review open or closed?

Open judicial review means whilst reviewing the judgment the court may allow the introduction of new evidence whereas in the closed judicial review no new evidence can be allowed.

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[156] BA LLB, LLM (National Law University, Delhi)

[157] ASIMOW, MICHAEL. "Five Models of Administrative Adjudication." *The American Journal of Comparative Law*, vol. 63, no. 1, Oxford University Press, 2015, pp. 3–31, http://www.jstor.org/stable/26386647

- Does a reviewing court have generalized jurisdiction or is it a specialized administrative court?

It questions whether the review of the administrative decision is done by a special tribunal or by the general Higher Court.

Discussion of the following models of administrative adjudication that consist of different combinations of variables will elucidate the concept of administration adjudication:

Model 1: Adversarial hearing/combined function/limited judicial review

In the first model, the agency which makes the outset decision and reconsideration is the combined function agency. It means the initial decision is concluded by the hearing officer following the adversarial system in which, the hearing officer does not participate in the investigation but functions as an independent adjudicator, and the reconsideration of the initial decision is done by the same agency. At a higher level, a systematic review is the closed judicial review of the agency decision by the general courts in which no new introduction of evidence/witness is allowed. In the USA many administrative adjudicatory separate tribunals and specialized separate agencies at the federal level are functioning, we can say the first model has a dominant position in the USA.

Model 2: Inquisitorial initial decision and reconsideration

Under model 2 administrative adjudication follows the inquisitorial procedure at the stage of initial decision and reconsideration. In European countries, the adjudication proceedings are inquisitorial rather than adversarial. For that instance, in cases of competition and merger the staff member of the director general for the competition of the European Commission (DG-COMP) which is referred to as a case handler, conducts an investigation, and writes down a statement of the object. DG-COMP hears the parties on the statement of the object which is considered as a part of the investigation, thereafter the decision is submitted for comments/consultancy to other DG-COMPs subjecting to which later the result might be changed. The reconsideration of the decision is done by the College of Commission of the European Commission and the judicial review is done by the general court which is the closed judicial review. Presently though hearing is conducted by an independent hearing officer and the main function rest with the case handler i.e., decision on merit, thereby the fundamental nature of the inquisitorial system remains the same. In my opinion, whatever the nature of the system whether inquisitorial or adversarial what is required is an effective and expeditious resolution of the conflicts. An independent administrative tribunal equipped with trained judges is the best approach for that purpose

Third Model: Tribunal

It talks about the administrative adjudication system in the UK and other countries that are following this model are Canada and Australia. In the U.K. the beneficiaries and regulatory agencies make the initial decision. It can be said that at the stage of initial decision inquisitorial system is followed. But in the U.K. the reconsideration the of decision is done by an independent tribunal. In 2007 the U.K. enacted the Tribunal, Courts and Enforcement Act which causes a paradigm shift in the tribunal system. It provides for the establishment of first tier tribunal which considers most of the agency's decision and the Tribunal which reconsider der such decision and provide the first level of a judicial review later review of the decision of the tribunal can also be exercised by the High Court but on the point of law and subject to other qualification. In my opinion, this model is a more efficient approach than other models as an independent tribunal deals with the conflict in a more pragmatic way than the courts, as courts are already burdened with other cases.

Model 4: Open judicial review

Under model 4 the administrative adjudication at an initial decision or reconsideration level is unstructured. An agency may provide an initial hearing but the final decision occurs at the level of judicial review. China, Japan, and Argentina are examples of countries that employ the variations of model four which provide open judicial review by the federal or the trial court as established by the government for that purpose. This model consists of the variations on which the court can decide any question of fact, or law arising before him whilst reviewing the decision of government lower\higher agencies.

Model 5: Open Judicial Review in Specialised Court

This model is followed by several countries that provide the review of the government agencies' actions by specialized administrative courts. Under this model, the review is done by expert judges. In another sense establishment of specialized courts for that purpose also bear expenditure in infrastructure, amenities, etc. There would also be chances of conflict between the general and specialized courts over the issue of jurisdiction and the resolution of the same is required to be done by another mechanism. If we talk about France and German administrative systems, the France administrative court system is a part of the executive rather than of the judiciary. The France administrative courts provide for open judicial review. On the other side, the German courts are considered part of the judicial branch rather than of executive branch. It provides for open judicial review of agency decisions. It provides the review of

decisions at three adjudicatory levels i.e., administrative courts, higher administrative courts, and Federal administrative courts. In my opinion, the model of open judicial review by a specialized court is also an effective approach as it demarcates the jurisdiction that the categorized matters would be resolved/reviewed by the specialized court but still there can be chances of jurisdiction conflict and establishing the special court for that purpose might also result in the government expenditure on the infrastructure, etc. as the author advocated.

Review of the Indian Administrative Adjudication

In light of the above models, if we examine the evolution/mode of administrative adjudication in India, the same has been started in pre-independence India. In 1941 the income tax tribunal was created to unburden the courts. Later, articles 323A and 323B were inserted which provide for the establishment of tribunals. Article 323A provides for the establishment of a tribunal to deal with the complaint/disputes relating to the recruitment/conditions of services of the Centre and State Government. Whereas article 323B empowers the Centre and State Government to establish a tribunal to deal with specific matters. Further, the Administrative Tribunal Act 1985 was also enacted which provides for the procedure, and compositions of the administrative tribunals established under the act. Many of these tribunals follow the investigatory system. These tribunals are not exclusively judicial nor administrative, therefore they are called Quasi-judicial bodies. Thus, in India the administrative adjudication is done by the tribunals, the decision of tribunals can also be reviewed by the High court and then the Supreme court. If any party is aggrieved by the decision of the administrative tribunal they can approach the High Court and Supreme Court. On the other side, the specialized courts as reflected in model 5 are also established for dealing with particular conflicts such as labour courts, consumer courts, etc. but in India, their decision is subject to judiciary scrutiny i.e., High Court and Supreme Court, unlike France.

Therefore, in my opinion, India follows the third model of administrative adjudication. I support the idea that there should be an effective administrative adjudication in a country to resolve the conflict between government agencies and private individuals. Transplanting one system of adjudication from one country to another country is not the panacea, each country must have its administrative adjudication system with variables that are suitable to the system so that the conflict between individuals and government agencies should be minimized. What is required is the bodies giving initial decisions or reconsideration of the decision, or review of the same must be well funded by the government for proper adjudication and equipped by the independent judges/investigating officers. The Hearing examiner's independence, notably their

separation from the complaint-issuance process, is a significant precaution against injustice in administrative adjudication. The main features of a good system are that it should be accessible to all. It should allow at a low cost to common people and even self-representation should be allowed. The body making each decision—initial, reconsideration, or judicial—must be sufficiently funded and staffed by skilled and impartial authorities. An aggrieved party before seeking a judicial review must approach the concerned department for consideration or reconsideration of the agency's decisions. A good system makes judgments in a fair amount of time and at a reasonable cost to the government and private parties. If the impartiality of the reviewing authority is assured and these adjudication authorities guide themselves whilst hearing the conflicts between the government agencies and private individuals with the principle of natural justice all these objectives can be received under any of the five models.

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CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT

- GAREEMA AHUJA[158]

ABSTRACT

The same premise—that wrongdoing must be penalised all punishments. The majority of moral and religious systems preach that bad actions have terrible results. To stop others from committing wrongdoing is the primary goal of punishment for offenders. Its severity and irreversibility make its justice, appropriateness, and efficacy more debatable than those of other sanctions. Supporters of the death penalty regard it as a potent deterrent to crime. They emphasise the use of the death penalty as a deterrent or as a tool to prevent or punish crime. They think it provides the most justice for those who were victims of horrific atrocities.

In India, the use of the death penalty has evolved over time. In the past, the offences for which the death penalty was employed were more severe and it was utilised more frequently. For instance, throughout the 1950s and 1960s, attempted murder, rape and drug-related offences were all punishable by the death penalty. But since the 1990s, the death penalty has only been applied in cases of really heinous offences. For instance, there were 8 fewer executions in India in 2010 than there were in 1995 (151).

Conflict has long surrounded the death penalty, not just in India but also in a number of developed nations. In its Charter of Rights, the United Nations proclaims the death penalty to be a crime against humanity and urges all of its member nations to do away with it.

RESEARCH METHODOLOGY

The research for this project is conducted using doctrine methodology. It uses secondary data that has been gathered from a variety of publications, books, websites, articles etc. What is the law on a certain subject is the question that doctrine study seeks to answer. Perusal of the doctrine's creation and implementation is crucial to this topic. Pure theoretical study is the term used to describe this kind of study. It entails either straightforward research to locate a specific legal declaration or more involved, in-depth study of legal reasoning.

Aim of this research paper

The following research will examine:

• The significance of the theory of the rarest of rare situations.

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• To establish the constitutionality of the death penalty.

• To comprehend the importance of many judicial viewpoints about its constitutionality.

INTRODUCTION

India is a nation with a variety of religious and culture traditions. The death penalty is one of the punishments that are permitted by the Indian Constitution. The Indian Parliament approved a measure in March 2012 that would have allowed the death penalty in cases of child pornography, rape and a few other offences. The principles of the Indian constitution, such as non-retroactivity (preventing someone from receiving the same punishment more than once for the same violation), and equality before the law, are cited by critics as reasons why this provision is unconstitutional (assuring that almost all citizens are treated equally in the eyes of the law).

The doctrine of retributive justice is the principal defence of the death sentence. According to this view, people who perpetrate such heinous crimes must likewise meet the same end. The death sentence is intended to have a deterrent impact on society, making individuals fear the repercussions of their crimes.

Therefore, this research paper will also concisely describe the techniques utilised by various nations, including India, to administer the death penalty. In addition to providing arguments for the necessity of this type of punishment, this paper extols the reasons why it raises difficult moral and philosophical issues.

MEANING: CAPITAL PUNISHMENT

In the context of criminal law, "punishment" refers to any suffering that a person endures as a result of a court order, a fine, or a finding of guilt that prevents them from carrying out their legal obligations. Punishment upholds law and order and safeguards individuals and property. Because sinful individuals are not motivated by a desire to avoid punishment, law and punishment go hand in hand.

Executing a person who has been found guilty and judicially sentenced to death by court of law is known as the capital punishment, commonly known as the death penalty. Executions carried out without a court order are known as extrajudicial executions, which are separated from the death penalty. the word Although the terms "death penalty" and "capital punishment" are occasionally used synonymously, the death sentence is not always carried out (even when it is sustained on trial) due to the probability of commutation to life in prison.

Death penalty or the capital punishment has always been a contentious issue, not just in India but as well as in a number of developed nations. In India, the justification for punishment is founded on two factors: the 1st is that the criminal should suffer for the suffering and harm they caused the victim, and the 2nd is that punishing penalties would discourage others from doing the immoral wrongdoing. The death penalty, commonly known as capital punishment, is only sometimes imposed by courts in India and is the subject of this essay. This essay also examines the constitutionality of the death penalty in relation to Indian legal systems.

India is among the biggest countries in the world and has a lot of culprits and crimes, thus to deal with them, we have laws that are really strict. For each offence, the offender receives discipline. One of the amendments includes the death sentence, which is very seldom carried out in India.

"Capital punishment is a legal death penalty ordered by the court against the person for doing the most grievous and heinous offences. Prosecutions are carried out by hanging. Though in India it's given only in the rarest of the rare cases. The capital punishment in described in the Indian Penal Code and in Code of criminal procedure. Capital punishment was there in India since the very beginning and as times passed it's use has been limited. It's veritably limited that after the independence no women criminal has been given capital punishment in India."[159]

There is also a process for the death penalty/capital punishment that entails:

1. Following the completion of the trial court procedures, the judge issues the ruling pursuant to section 235 of the Criminal Procedure Code, and the courts shall record the unique circumstances supporting the ruling.
2. The matter would then be sent to the high court for judicial proof and evidence. The high court has the authority to uphold the ruling, issue any new rulings, or order a fresh trial in the matter.
3. A special leave plea may be submitted after the high court presents the facts supporting the penalty.
4. With in 30 days after the date of an order or judgement that is similar, a petition requesting review of the Supreme Court's decision may be brought in front of the Supreme Court pursuant to Art. 137 of the Indian Constitution.

[159] Capital punishment in India (no date) Legal Service India - Law, Lawyers and Legal Resources. Available at: https://www.legalserviceindia.com/legal/article-7219-capital-punishment-in- india.html (Accessed: November 4, 2022).

5. The Supreme Court may grant a curative petition to revisit its decision after dismissing a special leave plea.
6. In addition, Art. 72 and Art. 161 of the Indian Constitution empower the Governor and the Indian President the authority to provide pardons and, in certain circumstances, to remit, commute or suspend the judgments. The governor or the president may take the convict's case under consideration and should commute the death sentence.

HISTORICAL BACKGROUND

The capital punishment is a long-established prehistoric and ancient penalty. Nearly every nation in the world has at some point used the death sentence. The history of human civilisation demonstrates that the usage of the death sentence as a form of punishment has never been discontinued. Under the rule of Draco (7th century BC), the death penalty was often used for crimes such as treason, rape, murder, and arson, despite Plato's belief that it should only be applied to the hopeless. Although Roman citizens were briefly spared from being used during the republic, the Romans also utilised it for a variety of offences.

The history of the death penalty in India dates back to the Vedic era, when severe punishments were imposed for felony including robbery and murder. These penalties included execution, public torture and torment. As punishments were seen differently over time, harsher sanctions were dropped in favor of moral uplift. Although there is much discussion over its application, the death sentence is still an element of Indian law.

Understanding the historical context of the death penalty's inception is essential for comprehending its contemporary applicability and validity. Under the rules of Draco, the death sentence for offence such as killing, arson, rape and treason was often utilised in ancient Greece, despite Plato's contention that it should only be applied to the criminally irredeemable and unforgivable. Although citizens were excused for a brief period of time during the republic, the Romans also utilised it for a broad variety of transgressions.

Additionally, it has occasionally been approved by the majority of the world's main religions. “Although it is hard to determine how common the capital punishment was in ancient history, it is probable that it was avoided regularly, sometimes by the alternatives of exile and other times by making restitution and compensation. The death sentence used to be a common punishment in England throughout the seventeenth and eighteenth centuries, although it was never used as regularly as the law permitted. Like in other countries, many individuals who engaged in capital crimes were exempted from the death sentence, perhaps because courts or

juries found them clean-handed (not guilty) or due to being pardoned, generally in exchange for agreeing to be expelled. Some criminals were also given the reduced sentence of being moved to the former American colonies and afterward to Australia".

"From ancient times until the 19th century, many societies like Rome, China and Europe administered exceptionally cruel forms of capital punishment. Although by the end of the 20th century many jurisdictions like nearly every U.S. state that employs the death penalty, Guatemala, the Philippines, Taiwan, and some Chinese provinces, had adopted lethal injection." In the past, executions were frequently witnessed by enormous audiences, and the dismembered remains were frequently left on display until they decomposed. Public executions have been carried out since the middle of the 1990s in about twenty nations, including Iran, Nigeria and Saudi Arabia despite the fact that the United Nations Human Rights Committee has denounced the practise as being incompatible with human dignity[160].

CAPITAL PUNISHMENT'S CONSTITUTIONAL VALIDITY

The legal execution of a criminal who was convicted guilty and sentenced to death by a criminal court is known as capital punishment. The execution in this case was legitimate because it followed the rules of due process, which distinguishes death punishment from extrajudicial executions, which are carried out without following the rules of due process. The idea that there must be a repercussion for misbehavior serves as the foundation for all forms of offences and felony. The majority of religious and ethical systems emphasise that cruel acts and evil bad deeds have unpleasant consequences and repercussions. There are 2 basic justifications for punishing the culprits: to obviate future criminal action. The same premise fosters every punishment, including the death sentence. It is much more subject to debate on its justice, appropriateness, and efficacy than other penalties because of its irreversible and extreme nature. The death sentence is advocated as an effective deterrent and stop the criminal activities. The death sentence is highlighted as a deterrent, as well as something that will prevent or reduce crime. They consider that capital punishment brings equity and justice to the victim of a repulsive crime or felony.

"Death penalty has been a mode of punishment since time immemorial. The arguments for and against has not changed much over the years. Crimes are well as the mode of punishment correlate to the culture and form of civilization from which they emerge. At this point of time

[160] Constitutional validity of capital punishment (no date) Legal Service India - Law, Lawyers and Legal Resources. Available at: https://www.legalserviceindia.com/legal/article-5346- constitutional-validity-of-capital-punishment.html (Accessed: November 4, 2022).

when the issue [whether capital punishment must be abolished or not is still raging, It will be appropriate to remind ourselves as to how the legislatures and apex court have dealt with this issue every time it has come up before them. Another issue is regarding the extent of judicial discretion. India represents one of the nations that has neither totally removed the death penalty provision nor passed legislation outlining its legitimacy. The validity of the death penalty has been contested on several occasions since the Indian Constitution was established through Supreme Court petitions."[161]

"There are seven crimes under which offenders may be sentenced to the death penalty. These include;

• murder,

• dacoity accompanied with murder,

• abetment of suicide of a minor or insane or intoxicated person."[162]

The death penalty has undergone several dimensional modifications, carrying with it a variety of historical forms of retribution and punishments. The Indian Penal Code, which is the common law (public statue) and substantial criminal law which specifies crimes and governs punishment, is where the death sentence in India first appears. Life imprisonment is an alternative punishment to the death penalty provided by Section 53 (IPC). Currently, India recognises the death penalty as a legitimate option for punishment. Only serious crimes are designated for the death penalty. The issue of the death sentence in India has generated conflicting opinions; some people support preserving the penalty while others support abolishing it. The death penalty will only be permitted in the "rarest of rare circumstances" and for "specific reasons" in India, one of the 78 nations that have preserved it. The lawmakers or the Supreme Court have not yet clarified what constitutes the "rarest of the rare circumstances" or "exceptional causes.

The Indian judiciary made this declaration, emphasising the significance of Article 21 of the Constitution, which says, "Protection and safety of life and individual personal liberty." According to this study, every Indian citizen is guaranteed the right to life. It states: "No one may be denied of his personal liberty or life, except in conformity with the method prescribed

[161] Constitutional validity of capital punishment (no date) http://www.madhavuniversity.edu.in/. Available at: https://madhavuniversity.edu.in/constitutional-validity-of-capital-punishment.html (Accessed: November 4, 2022).

[162] 4 Constitutional validity of capital punishment (no date) Legal Service India - Law, Lawyers and Legal Resources. Available at: https://www.legalserviceindia.com/legal/article-5346- constitutional-validity-of-capital-punishment.html (Accessed: November 4, 2022).

by law." IPC in India mandates the death penalty. punishments for a variety of offences and felony, including murder, insurrection, conspiracy to commit murder, and anti- terrorism. The Constitution of India allows for the President to commute the death penalty. This article encourages court employees to re-examine cases and make them ponder prior to the death sentence whenever the death penalty or the question of the death penalty arises. Abolitionists contend that the death penalty in its current form breaches a citizen's fundamental and basic right to life, which is guaranteed by the Indian constitution and susceptible to its loss through the legal process. According to Article 14 of the Indian Constitution, everybody is entitled to "equal protection of the law and equality before the law" that means that no one may be impoverished of their life or their personal freedom unless it is done so in accordance with a legal standard.

This article's guarantees of equality before the law and equivalent protection under the law indicate that no one may be subjected to discrimination unless it is necessary to uphold the equality principle. The Constitution's preamble echoes the idea of equality found in Article 14. Therefore, it appears that the death penalty is opposed to one's rights to life.

PRESIDENTIAL AND GOVERNOR AUTHORITY IN DEATH SENTENCE

A convict on execution row has the option to ask the nation's founding people for compassion after exhausting all other legal options. This plea must be made either by a designated agent or by the prisoner themselves. The Governors and President have the sovereignty to commute sentences, remit or suspend in specific circumstances under Articles 161 and Article 72 of the Constitution. Only after the courts have rendered a verdict and imposed a sentence may the President and Governors lessen or revoke the punishment.

The President and the Governors shall act honestly and reasonably, subject to the authority under Articles 72 and Article 161. In that the President has the authority to commute a death sentence and Court Martial penalty, the President's authority under Article 72 is greater than the Governor's.

In the judgment of "*Kuljeet Singh alias Ranga v/s Lt. Governor of Delhi"*, the Supreme Court denied a lawsuit that sought to find that the Presidency had abused his administrative authority to show mercy by denying him in accordance with the authority under Article 72 of the Indian Constitution.

In the instance of "*Mohinder Singh v/s State of Punjab"*, it was determined that because the mercy petition cannot be maintained, the Supreme Court lacks the power to accept any request

for a stay of implementation while it is pending well before India's President. The President of India must be contacted in order to obtain a stay of execution.

CASE ANALYSIS: "SHER SINGH V/S STATE OF PUNJAB" ISSUE

The documentation of the dying declaration must be done by someone who is confident that the dying person was in a sound mental condition. When the declarant's fitness to make the statement is established by the magistrate's testimony and not by the doctor's opinion, or in doctors absence the statement may be acted upon as long as the court finally finds it to be consensual and truthful. A doctor's medical health certificate is necessarily a rule of safety, therefore what is the validity of such a statement without doctors presence? Will it be held valid the court of law?

RULE

"Section 302 - "302. Punishment for murder.—Whoever commits murder shall be punished with death, or 1[imprisonment for life], and shall also be liable to fine."[163]

"Section 34 - Acts done by several persons in furtherance of common intention. —When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."[164]

FACTS

Sher Singh, the accused appellant, and Jaspal Kaur (the deceased), were wed in 1993. She lived with the accused (her husband) Sher Singh, her father in law Attar Singh, sister in law, and mother in law in her marital house for a year and half. The deceased suffered severe burn injuries on July 18, 1994, about midday, and was transported to a Hospital in Ludhiana. It was communicated to ASI Hakim Singh that her statement should be recorded. Hakim Singh taped her statement in which she claimed that the fire was unintentional and started while making tea. Though, on July 19, 1994, the deceased told her uncle Harbhajan Singh that the accused had burned her.

[163] Section 302 in the Indian Penal Code - Indian Kanoon (no date). Available at: https://indiankanoon.org/doc/1560742/ (Accessed: November 4, 2022).

[164] Section 34 in the Indian Penal Code - Indian Kanoon (no date). Available at: https://indiankanoon.org/doc/37788/ (Accessed: November 4, 2022).

Harbajan Singh submitted an application to document her statement before the District Magistrate on July 20, 1994. The Executive Magistrate was instructed by the ADM to tape her statement, and on July 20, 1994, he did so. Her uncle filed a new plea, this time asking the DSP to reassess the case because, in his opinion, she was coerced into giving a false statement to ASI Hakim Singh. After hearing the doctor's assessment on July 22nd (1994), the S.I. documented her statement at around 8:05 pm. Jaspal Kaur was qualified to make a statement. She passed away from burn injuries on July 23rd (1994). Thus, the offence was changed to one covered by Section 302 reads in conjunction with Section 34 - IPC, leading to a conviction and trial.

The learned attorney representing the appellant before the court claims that, in considering the evidence, importance meant to be put on the 1st dying declaration made on July 18th, (1994) which was initial in time instantly following the occurrence in which she indicated that the fire was inadvertent and that nobody was to blame, particularly given that there are a sum of 6 dying assertions where the declaration has been strengthened over time. The learned attorney for the appellants contends that the victim's first dying declaration was amended and the accused appellants were implicated in committing a crime only after the victim's uncle visited her in the hospital. Despite having sustained 80% burns, the doctor's assurance that she was in a competent frame of the will and mind to make the dying declaration was missing when the Executive Judge/ Magistrate noted it on July 20, 1994. It is recommended that Nirmala Sharma, a local congresswoman, was there at the deceased person's bedside when she made her dying pronouncement on July 20, 1994, and it cannot be ruled out that she may have received coaching.

Examining the deceased's written death declarations to Hakim Singh, Arvind Puri and Rajiv Prashar, as well as her verbal dying declarations to her uncle and father is crucial to understand the skilled counsel for the appellants' position. When the doctor gave ASI Hakim Singh permission to record her statement on July 18, 1994, she gave it. But even though her mother-in-law, one of the accused, was present, the physician was not when the dying pronouncement was made. In his testimony before the court, Hakim Singh claimed that the victim felt pressured when he was recording the deathbed declaration.

The deceased said in this testimony that when she was making tea, her mother-in- law stood outside the home, in front of the gate, and neither her husband nor father-in-law were inside the house is when incident occurred. She was covered in oil and her clothing caught fire when the burner suddenly broke. Her mother- in-law heard her scream for assistance and help and showered her by water from the washroom after she cried for help. She was then driven to the doctor by her mother in law with assistance from her next door neighbors and she claimed that nobody was to blame for this mishap.

In his testimony, Harbhajan Singh claimed that all of the accused began making demands for money in the amount of Rs. 10,000/- after the victim's marriage to Sher Singh, which had been consummated for six to seven months. The deceased had visited him at his home in Jullandhar on July 15, 1994 and informed him that she needed to obtain Rs. 10,000 from her father in order to avoid serious consequences. Harbhajan Singh sent her back since the deceased's father, Balkar Singh, was at the time travelling in Thailand. He visited Jaspal Kaur in Ludhiana on July 19, 1904. When he noticed that the house was locked, he asked about the neighbourhood and discovered that she had been admitted to the hospital. Harbhajan Singh went to see the deceased in hospital where she explained to him how she had been set on fire by the husband, , sister in law, father in law, mother in law, and many others. She said that her mother-in-law had grabbed her through the hair and thrown her to the floor, that Attar Singh had doused her in kerosene oil from a nearby container and that Sher Singh had lit her on fire with a matchstick.

When she begged them to take her to the hospital, the defendants responded that they would only do so if she made a statement in their support. She consequently told the cops something favourable about them since she was so terrified.

“Dr. Rajinder Kumar, Registrar, Plastic Surgery, New Daya Nand Hospital, Ludhiana issued a certificate to the effect that Jaspal Kaur, aged 19 years, was admitted in the hospital on 19.7.1994 at 4.10 p.m. and according to the record, the patient had got burn injuries upto 80 per cent. There is no certificate of the doctor that the patient was in a condition to make a dying declaration but it is apparent from the dying declaration that the doctor was present when it was recorded. Shri Rajiv Prashar, District Transport Officer, Gurdaspur (PW-7), who was posted as Executive Magistrate on 20.7.1994, recorded the statement. He deposed that he reached the hospital and enquired from Dr. Rajinder Kumar who was standing near the deceased whether she was in a condition to make the statement\ and then the statement was recorded. He deposed that the statement was read over to her and he obtained her right hand

thumb impression and the thumb impression of her right foot. He stated that the statement is in his hand and bears his signature."[165]

The verbal dying declaration given on 22.7.1994 in front of the deceaseds father Balkar Singh cannot be accepted. He admits during the cross-examination that he didn't speak to his daughter while he was in the hospital since she was unable to communicate at the time. She was speechless when he touched her. DSP Ludhiana gave SI Arvind Puri the task of interviewing the hurt Jaspal Kaur.

As a result, he visited the hospital and asked the doctor to consider whether the patient was fit to make the declaration or not. She was declared fit to speak on 22 July 1994 at 6:45 p.m. as a result, her testimony was recorded on 22 July 1994. She claimed in her declaration that Sher Singh (husband), and her father-in-law, frequently abused her and demanded that she provide them ten thousand rupees. While she was preparing tea, the mother in law grabbed her hair and pulled it down, her father-in-law grabbed a can of kerosene oil and spilled it all over her, and her husband lighted a matchbox. She shouted in alarm. Rani, her sister-in-law, urged that she be burned in a way that prevented her from escaping. Her spouse ordered everyone else to leave the room before locking the door from outside. Ultimately after a while had passed, her spouse finally opened the gate of that room, but by then she had suffered severe burns and was mumbling very softly.

"In Koli Chunilal Savji and Anr. v. State of Gujarat, AIR 1999 SC 3695, the question again was whether in the absence of a doctor's certificate as regards the mental fitness of the person to make a statement, would it not be reliable? This Court held that the requirement of such endorsement is only a matter of prudence and the ultimate test is whether the dying declaration is voluntary and truthful.

Before recording the dying declaration, the officer concerned must find that the declarant was in a fit condition to make the statement and if the Magistrate is satisfied about the condition of the patient to make the statement, such statement can be relied upon."[166]

[165] Sher Singh & Anr vs State of Punjab - Criminal Law (no date) lawyersclubindia. Available at: https://www.lawyersclubindia.com/judiciary/sher-singh-anr-vs-state-of-punjab--2861.asp (Accessed: November 4, 2022).

[166] 8 Sher Singh & Anr vs State of Punjab - Criminal Law (no date) lawyersclubindia. Available at: https://www.lawyersclubindia.com/judiciary/sher-singh-anr-vs-state-of-punjab--2861.asp (Accessed: November 4, 2022).

A declaration made as one is dying is more likely to be accepted because it is made in desperation. The formalities of swear, cross examination and inquiry are waived in the event of a dying declaration since it is uncommon to discover a reason to tell lies when the person is close to passing away. The court would require that the deathbed declaration be of a kind to persuade full trust of the court in its authenticity and correctness because the accused lacks the ability of cross-examination. The court should be sure the declaration wasn't the result of coaching, prodding, or imaginative fabrication. The court will decide whether the dead was in a sound mindset and had sufficient time to see and recognise the offender based on the evidence submitted for record. In most cases, the court relies on the medical evidence to determine whether the person who makes a dying declaration was in a suitable mindset. However, if the person who recorded the declaration states that the person who died was in a suitable and aware state, the medical advice will not be taken into account. It also cannot be argued that the dying declaration is not valid because there is no physician's certification regarding the declarant's state of mind.

RULING

"In the case the accused were given death penalty, though later it was conferred that "the appellate courts in normal course take upto four or five years to process appeals apart from the time spent by the Constitutional authorities under Articles 72 and 161 in considering the mercy petitions. The Court in Sher Singh therefore, departed from the rule of thumb approach (of 2 years) propounded by the Vatheeswaran Court and held that no pre-determined period of delay can be held to guarantee frustration of death sentence."[167]

The court emphasised that setting a stringent deadline of 2 years would allow a prisoner to thwart the course of justice by going after numerous pointless and unjustifiable legal actions. The court decided that a person who is currently serving a death sentence should be able to request the revocation of their sentence on the grounds that it violated Article 21 of the Indian Constitution, which states that "No person shall be deprived of his life or personal liberty except according to procedure established by law."

THE DOCTRINE: "REAREST OF THE RARE"

[167] Advocatekhoj.com (no date) Enduring long years on death row: Death penalty: Law commission of india reports: Law library, AdvocateKhoj. Available at: https://www.advocatekhoj.com/library/lawreports/deathpenalty/81.php?Title=Death+Penalty&STitle=Enduring+Long+Years+on+Death+Row (Accessed: November 4, 2022).

According to the legal notion of the rarest of the rare, a person guilty of a crime shall not be executed unless all other avenues of redress provided by the legal system have been explored. The idea behind this rule is that the death sentence ought to only be applied in uttermost extreme cases. The Supreme Court's ruling in "*Machhi Singh v/s State of Punjab"* created the "rarest of rare situations" concept. In "*Bachan Singh v/s State of Punjab* -1982", the court affirmed the legitimacy of the death penalty but inserted the now-famous (albeit elusive) proviso that death sentences would only be handed down in the "rarest of rare" conditions. This decision followed that decision.

The Supreme Court of India has occasionally discussed the eligibility requirements for the rarest of rare cases, and various suggestions have been made in recognising the rarest of rare circumstances. For example, "The causes why the community in its entirety does not prefer the theistic technique symbolised in the capital punishment in no scenario doctrine are not far enough to seek."

The "doctrine of rarest" cannot be directly applied using a jacket formula. The type and gravity of the offence are the two main considerations in a criminal case. The severity of punishment may be estimated from these two points. The Indian judicial system is required to strike a balance between the public's outcry, aggravating circumstances, and mitigating circumstances, and to make the case for the death penalty so compelling that there is no other option.

Lately, the Supreme Court proclaimed the death penalty for the murder and rape defendant in the case of Nirbhaya, describing it as a "rare case" which permitted ruthless punishment to accomplish justice. The "rare" concept serves as India's standard for the death punishment.

The idea of the rarest of rare situations serves as the foundation for the death penalty in India. This philosophy holds that the criminal test must be entirely met in order to render a death sentence, and it must never be favourable to the accused. This philosophy is based on the idea that the court should take into account a variety of elements, including the criminal's personality, the crime's motive and method of commission, as well as the public's extreme outrage and hostility toward specific crimes, like the rape of young girls. The death penalty is imposed by the courts because it is compelled by law and represents societal sentiment. The statutory requirement has shifted from the death penalty being the standard to being the exception and needing to be supported by reasons between 1973 till 1980. The case of "Bachan Singh v/s State of Punjab" was a turning point in the heated discussion around whether the death penalty is consistent with Article 21 of the Indian Constitution. While upholding the

legality of the death sentence, the Supreme Court stated the view that opposition to taking a life via the use of the legal system presupposes an authentic and lasting esteemed respect for the decency and dignity of human life. Only in the rarest of situations, when the other choice is categorically denied, should that be done.

The Court did not specify any mitigating or aggravating circumstances since doing so would restrict the judge's ability to use discretion, but it did rule that a murder that was "diabolically planned and ruthlessly carried out" may result in a severe punishment. The court concluded that it is impossible to support several irrational situations in an unjust and erratic society. But the conundrum is, what are those rarest of rare occasions? One judge's perception of brutality and gore may not be shared by another.The Gandhian principle "hate the crime not the offender" is the foundation of the idea "rarest of the rare instances." We may thus deduce the relevance and scope of the death penalty from this quotation. And if we really examine it, we see that the court wishes to argue that the death sentence should only be applied in extreme circumstances that harm humanity and are barbaric. Due to the fact that the death penalty is only applied in a small percentage of murder cases—the majority of murder cases result in the alternative punishment of life in prison—the issue of the death penalty is not particularly acute when it comes to capital punishment given by criminal courts of law in cases of regular course of nature. Studying the cases that have been determined also reveals another aspect of the death sentence, which is that it has a particular class complexion or prejudice because it is typically the impoverished and the oppressed who really are subjected to this severe punishment. We seldom ever see wealthy people executed because they can afford to employ exceptional expertise, giving them a decent chance of escaping even if they have actually committed a crime or murder. Only those who are destitute, lacking in resources, and supported by no one are often hanged. The application of the death penalty is declarative. Capital offence As warden Duffly noted, the death sentence is a privilege reserved for the underprivileged.

INCEPTION OF "RAREST OF THE RARE DOCTRINE"

The Nathuram Godse case ("*Nathuram Godse v/s Crown - Assassination of Mahatma Gandhi"*) is the most unusual and significant case to ever take place in independent India. Mahatma Gandhi was assassinated by Nathuram Godse on the evening of 30 January (1948) during a protest in Delhi's Birla Mandir. Judge Amanat delivered the death sentence after a protracted preliminary hearing, and three Punjab High Court justices supported it.

The death penalty was imposed by the trial court in "*Kehar Singh v/s Delhi Government"*, and the Supreme Court upheld the death sentences of the applicants Balbir Singh, Satwant Singh and Kehar Singh for conspiring to murder Smt. Indira Gandhi under Sections 120B, 302, 34, 109, and 107 of the IPC. The court determined that assassination was the most exceptional of exceptional situations and called for extra punishment for a hired murderer and his accomplices. Santosh Kumar Singh was accused of raping the girl and fracturing every bone in her body in the case "*Santosh Kumar Singh v/s Union Territory of Delhi* (Mattoo Murder Trial)", but his crimes were not sufficiently terrible to qualify as the "rarest of rare."

In India, section 303 of the IPC originally made the death sentence mandatory. Whatever the case, in "Mithu Singh v/s State of Punjab", the Supreme Court ruled in 1983 that section 303 was extra vires the Constitution because it contravened articles 21 and 14 of the Indian Constitution.

ARGUMENTS IN FAVOR OF RETENTION OF CAPITAL PUNISHMENT

1. In the current situation, capital punishment is only applied in rarest of rare circumstances and for the most egregious offences. Therefore, it won't be unjust if some people receive compensation for their work. For offences like murder, an accused person receives the death penalty. When someone took another person's life, he forfeited his own right to live. Therefore, the only way justice can be done is by having those perpetrators put to death legally.

2. It will serve as an example for those who might be considering committing similar acts in the future. Before acting in such a way, they will pause and ponder. To contemplate the public's loathing with the crime, justice necessitates that courts inflict punishments that are appropriate and applicable for the offence.

3. As a result, the concept of deterrence has typically been used to support the death penalty. Execution discourages repeat offences. A person has a significant likelihood of committing the same crime again after doing it once. Therefore, once the perpetrator of such a horrifying crime has been put to death, it removes the threat to society and the risk that it may happen again.

4. Pleasant lives: The death sentence is thought to be a fitting sentence for offences against the sufferers' rights to life, liberty, and safety. Every person has the right to a safe, tranquil life free from violence. However, those who perpetrate crimes such as murder, rape, and violence show no concern for the lives or possessions of others.

CONCLUSION

If we examine the backdrop of the capital punishment historically, it has always existed. Kings are usually executed as the head of their dynasties since it was legal in British India. The death penalty was a part of the 1860 IPC (Indian Penal Code), which was created in the course of the British India era. Prior to 1955, the death penalty was the norm and life in prison the exception; but, in the present day, life in prison is the norm and the death penalty is uncommon. There are two alternative interpretations regarding the situation in the worldwide case, namely that certain nations favour the death sentence and that although some US states until now practise the death sentence, others have abolished it. In India, despite several rulings to the contrary, the Supreme Court continues to defend the death sentence. The Supreme Court modified and forcefully annihilate the death sentence, alleging it breaches Articles 14 and Article 21 of the Constitution of India, despite the fact that this was done via several instances and with the passage of time. However, as things are right now, the death sentence is only used very seldom. As we witnessed in the Nirbhaya case, where there were several frantic attempts to prevent execution, the writers ultimately aim to draw the conclusion that the death sentence should not be repealed.

"In some cases, restorative justice theory does not apply and offenders should be dealt with in accordance with retributive justice theory. Also in the author's opinion, the death penalty should not be completely abolished, as it still exists and acts as a deterrent effect in society. The death sentence should only be applied in the most extreme instances, and while it may not have a perfect deterrent effect on people, even if it instils dread in the minds of some, it is still beneficial to society."[168]

Many nations have abolished the capital punishment on the grounds that it is harsh and barbaric and it violates the people' constitutional rights to personal liberty and life. However, if a correct perspective were to be adopted, it would be accurate to state that the death penalty, despite its brutality, has some success in lowering criminal offences and deterring criminals. Furthermore, if we are discussing the rights to freedom and life, it is appropriate to state that the Indian Constitution offers sufficient protections and defences for the person of culprits, for example the rights to legal assistance, the right to treatments, etc. Additionally, a convicted criminal

[168] Brillopedia (2022) Capital punishment in India; constitutional validity of capital punishment, brillopedia. brillopedia. Available at: https://www.brillopedia.net/post/capital-punishment-in-india- constitutional-validity-of-capital-punishment (Accessed: November 4, 2022).

who was accused of committing a horrific crime against a person or the nation as a whole does not have an absolute right to life.

Therefore, I believe that the death penalty is constitutionally acceptable and appropriate provided that it is applied in severe and egregious circumstances. A person who does not respect the lives of others or the integrity of their own country, in my opinion, should not be dealt with respect and empathy. Even while it might be difficult to determine whether crimes are serious enough to merit the death sentence, heinous crimes like terrorism, murder and rape should always be punished with the death penalty. 139 countries have already abolished the death penalty, therefore India should follow suit and follow the majority of these countries. The death penalty violates human rights and India's constitution's article 21.

Alternative ways of punishment for the offender include harsh life in prison without the prospect of release and no protection from good conduct relief as described in the prisoner manual.

We can see from the discussions above that India's position on the death penalty is still quite ambiguous. The social and moral issues surrounding this contentious subject, in addition to the legal and constitutional issues surrounding the death sentence, must cause a great deal of misunderstanding in this regard. Without addressing the legal problem, the debate over the death sentence must grapple with moral dilemmas much like "eye for an eye" concept on the one hand and public emotions on the other. Additionally, we are aware that making mistakes in judgement is only humane, and occasionally giving somebody a second opportunity is equivalent to handing them another bullet shot since the previous one missed you.

Perhaps there isn't a clear right or wrong solution to the question of the death penalty, or if there is, our culture in this nation needs to evolve to the point where we can see it clearly. In order to avoid any potential of error, the judiciary must examine the evidence and the facts with great care in every case of this nature until that time. Additionally, India lacks a reliable statistics record that would allow us to more clearly see what has to be done in the future and show the number of convicts who receive death sentences and are put to death in connection to numerous other issues.

SUGGESTIONS

People who favour capital punishment / death penalty contend and argue that it should be used in cases involving even the most abhorrently heinous and exceptional of crimes, like the Delhi case - Nirbhaya gang rape, where the perpetrators deserved the death penalty. On religious,

ethical and moral reasons, many who oppose the death sentence contend that it is cruel and a waste of money. It is also suggested that lifestyle incarceration or some substitute be employed in its place. There are now both arguments in favour of and against the death sentence.

Whether the death sentence can be executed in a way that is consistent with fairness and justice is a matter of debate. The few who support the death penalty think that guidelines and processes may be established to guarantee that only individuals who are categorically worthy of death be judicially executed. However, opponents argue that any attempt to select out particular offences as deserving of the capital punishment will inherently be arbitrary and discriminatory due to the past application of the death penalty. They also point out multiple factors that, in their opinion, eliminate the likelihood that the death penalty will be applied correctly, such as the fact that perhaps the poor and individuals from religious and ethnic minorities commonly seem to have very little access to qualified legal representation, which worsens racial prejudice. Furthermore, they assert that persons who are sentenced to death are occasionally mercilessly compelled to undergo protracted periods of ambiguity about their destiny since the appeals procedure for death penalties is stretched out.

For far too long, the death sentence has been decried without any consideration of its subtleties. Major grounds for criticism include irreversibility, violation and arbitrariness of human rights. The death penalty, however, is upheld on all charges. In India, the death penalty has been supported by several rulings in addition to being regarded as constitutionally valid.

In a nation like India, public opinion must alter in order to abolish the death penalty. The general public ought to believe that justice and judgment can be served even when no one is really assassinated. If the great majority of Indians do not feel that the death penalty is not required to attain justice, then no amount of laws or legislation will result in any change. If that is done, it will only result in further cynicism against the government and the law.

SCOPE OF LAW IN AN AI-DRIVEN WORLD: BRIEF ON CHATGPT AND ITS LEGAL IMPLICATIONS

- NEHARIKA KRISHNAN[169] & VARDAAN BHATIA[170]

ABSTRACT

The onset of technological advancement calls for an extended scrutinization of current legal regime around the world. The advent of technological development is pushing boundaries of technology law whereby; it is, hereinafter, not just concentrated to technical difficulties such as data storage, intellectual rights, or licence agreement complexities. Instead, it will address several major issues that could have a significant impact on practically every part of our lives. Addressing one such technological marvel is ChatGPT. It is a present-time evolving machine-learning artificial intelligence garnering recognition on a global scale. It was launched as a prototype on November 30th of 2022 by OpenAI - an AI research and deployment company. The extented and motivated use of artificial intelligence in commerce, healthcare and other prominent fields confers responsibility on the law-makers to undertake exhaustive critical analysis of such advancements and provide for a befitting legal framework to regulate such technology. The paper deals with various intricacies of artificial intelligence from its inception, walking through its evolution over the years and conclusively contributing to a critical analysis of the ChatGPT and the legal implications associated with it from the standpoint of the Indian Legal Framework.

INTRODUCTION

Amazon released a comedy series called "Upload" in April 2020. The show envisions a future in which technological advances have facilitated successful in-silico simulation of human consciousness. Companies use this technology to "upload" dying people into digital worlds where they can "live" in perpetuity. When human consciousness is uploaded, it is converted into data and executable code, which can be edited, throttled, or even deleted depending on the membership plan and payment status of each upload. Referring to a more global approach, the

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momentous Marvel movies are epitome of a technology driven world. In this context, 'Ultron', is a self-aware and highly intelligent artificial intelligence who develops a god complex. The former part surely indicates to a beneficial progression whereas the latter part can be a dreadful possibility to say the least. By portraying such worlds breaks the boundaries between reality and virtual reality, consciousness and artificial intelligence, and even life and afterlife, entangling various legal questions in novel ways. IPR laws around the globe are being tailored to fit the technological outbreak in conformity to the human laws. Autonomy, non-digital rights, ownership, infringements; all of it are being placed on the dock for trial. Through this short analysis, we hope to reignite the legal community's engagement with science fiction, leading to a more nuanced conversation about what is artificial in artificial intelligence, what is virtual in virtual reality, and what is digital in digital rights. We argue that becoming early adopters of a new reconceptualized language around "us" and "them," the "self" and the "other" can perhaps future proof our society from the cyborg perils that are in conversation presently and the ones that await. This paper focuses on the intricacies of artificial intelligence whilst deciphering the up and about AI named ChatGPT; from the perspective of Indian legal framework. ChatGPT has been an active contributor to this paper starting with a poem on itself.

"As we build AI so bright and new,
We must consider what is true and right,
For with great power comes great responsibility,
To ensure our creations serve and benefit humanity.
We must strive to understand,
The potential consequences of our demands,
And act with care and foresight,
To avoid missteps and wrongs in the night.
For the path we take today,
Will shape the world of tomorrow,
So let us choose our course wisely,
And work towards a brighter, AI-powered future."

CHATER I
DEVELOPMENT OF AI IN INDIA

"If India does not adopt new technology with changing times, it will remain backward; the country experienced this during the third industrial revolution,"

- PM NARENDRA MODI

In this era of digitization, it has become necessary to harness the full potential of data. It has also become necessary to promote AI based research and innovation for the growth and development of the country, to facilitate technological advancements by allowing researchers, innovators, private entities and start-ups to gain access to non-personal datasets.

Some advantages are:-

1.1.AI Acquires More Knowledge Over Time

AI technology, as the name implies, is intelligent, and it uses this ability to improve network security over time. It employs machine learning and deep learning to learn the behaviour of a business network over time. It detects and groups patterns in the network and then scours for any deviations or security incidents from the norm before responding.

1.2.Unknown Threats are Identified by Artificial Intelligence

A human may not be able to identify all of the threats that a business faces. Every year, hackers launch hundreds of millions of attacks for a variety of reasons. Unknown threats can cause massive network damage. Worse, they can have an impact before you can discern, identify, and prevent them.

1.3.AI is Capable of Handling a Large Volume of Data

A company's network is quite active. The average mid-sized business has a lot of traffic. That implies a lot of data is transferred between clients and the company on a daily basis. This data must be safeguarded against nefarious individuals and software. However, cybersecurity specialists cannot examine all traffic for potential threats.]

1.4 More Effective Vulnerability Management

Vulnerability management is critical and imperative for network security. As previously said, the normal business faces numerous dangers on a daily basis. To be secure, it must detect, identify, and prevent them. AI research can assist in vulnerability management by analysing and assessing existing security measures.

1.5 Improved Overall Security

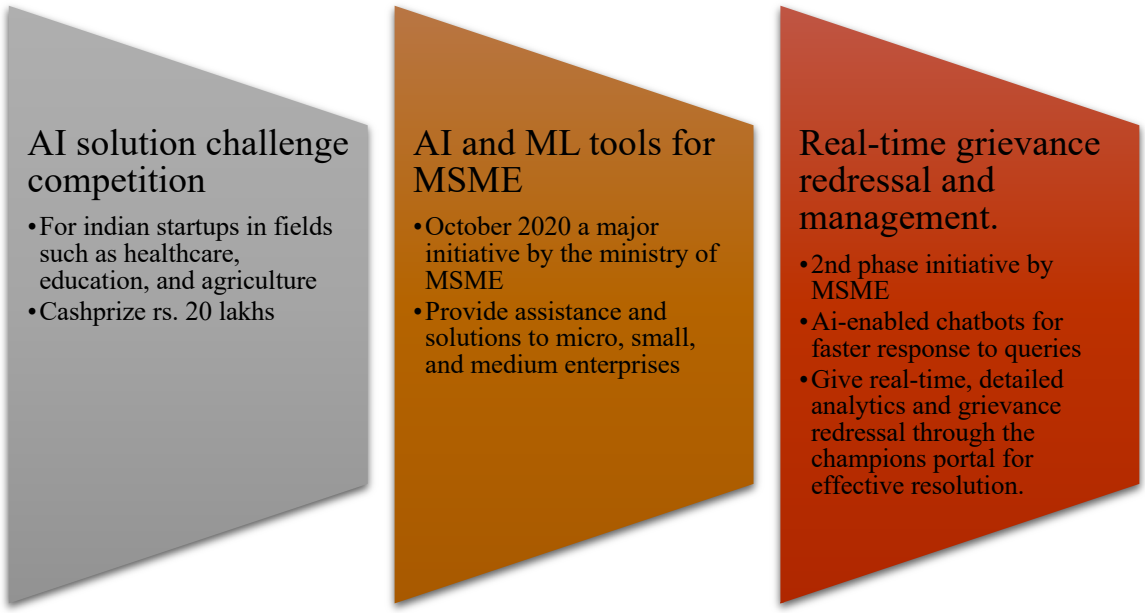
The risks that corporate networks confront vary on a regular basis. Every day, hackers vary their approaches. This makes it difficult for a corporation to prioritise security tasks. You might have to cope with a phishing attack as well as a denial-of-service attack or ransomware at the same time.

In light of these varied constituent baggage of benefits AI brings with it, the Indian Government has encapsulated the concept of AI in the Indian technological sphere. Since the launch of the Digital India initiative in 2015, the government has compelled for AI implementation and digitisation. AI and machine learning are being actively adopted and implemented in government services.

With AI rapidly advancing and countries such as China making consistent progress in AI-based research, it is critical that India considers this technology to be a critical component for development. Arun Jaitley stated in his February 2018 budget speech that Niti Aayog would spearhead a national programme on AI and related research and development. The budget for Digital India, the government's umbrella initiative to endorse AI, ML, 3D printing, and other technologies, was nearly doubled to INR 3,073 crore that same year (USD 477 million). [171]

India's development model incorporates a significant amount of technological advancement, including AI. Exponential increase can be notes over the years. 2020 was the year for AI to gain significant momentum in India. The government launched and initiated various programmes to instigate and fuel AI-Driven technological advancement in India.

The following is cumulative timeline of AI growth in India.



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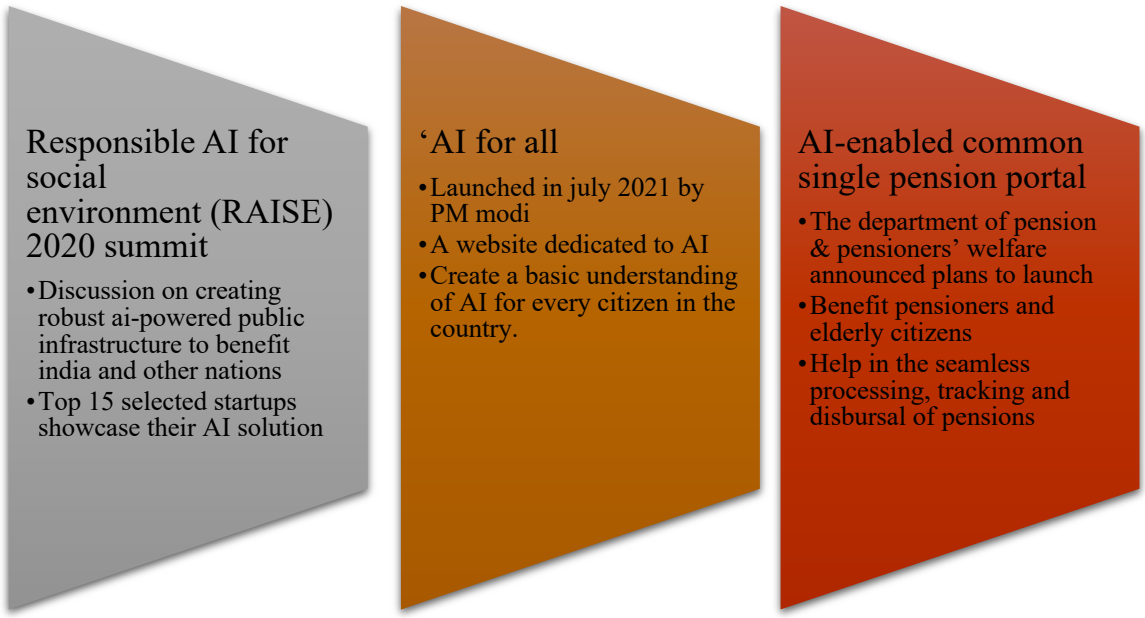
[171] https://www.indiabudget.gov.in/doc/eb/sbe27.pdf
[172] https://analyticsindiamag.com/startups-that-won-indias-ai-solution-challenge-at-raise-2020/
[173] https://pib.gov.in/PressReleasePage.aspx?PRID=1664442
[174] https://www.businesstoday.in/latest/economy-politics/story/intel-artificial-intelligence-machine-learning-tools-help-centre-gather-insights-on-msmes-275632-2020-10-14



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The point of contention here being is the ombudsman for this nascent development. Speaking at the closing session of the three-day GPAI Summit, the Minister of State for Electronics & Information Technology and Skill Development & Entrepreneurship, Shri Rajeev Chandrasekhar said it is important to understand that user harm, criminality and issues that threaten trust online are proliferating. "We all should be concerned about user harm. I would encourage member states to think about evolving a common framework of rules and guidelines about data governance, about safety and trust as much to do with the internet as to do with AI." The problems in a developing country like India are much more substantial because the basic infrastructure needs to be revised. The use of AI poses a wide range of challenges to be addressed: from pattern recognition, to ethics, biased decisions taken by AI-based algorithms, transparency and accountability Employment of AI requires amendments in technology law, IPR law, data protection law and many more.

CHAPTER II
CHATBOTS

[175] https://analyticsindiamag.com/startups-that-won-indias-ai-solution-challenge-at-raise-2020/
[176] https://ai-for-all.in/#/home
[177] https://newsonair.gov.in/News?title=DOPPW-to-soon-launch-Artificial-Intelligence-enabled-Common-Single-Pension-Portal&id=442737

2.1. MEANING

You've probably interacted with a chatbot whether you were conscious of it or not. For example, you're on your computer researching a product, and a window pops up on your screen asking if you need help or perhaps you're on your way to a concert and you use your smartphone to request a ride via chat or you might have used voice commands to order a coffee from your neighbourhood café and received a response telling you when your order will be ready and what it will cost. These are all examples of scenarios in which you could be encountering a chatbot.

At the most basic level, a chatbot is a computer program that simulates and processes human conversation (either written or spoken), allowing humans to interact with digital devices as if they were communicating with a real person. Chatbots can be as simple as rudimentary programs that answer a simple query with a single-line response, or as sophisticated as digital assistants that learn and evolve to deliver increasing levels of personalization as they gather and process information.

2.2. HOW DO CHATBOTS WORK?

Driven by AI, automated rules, natural-language processing (NLP), and machine learning (ML), chatbots process data to deliver responses to requests of all kinds.

There are two main types of chatbots:-

- ***Task-oriented (declarative) chatbots*** are systems with a single purpose which is to perform one function. They generate automated but conversational responses to user inquiries using rules, NLP, and very little ML. Interactions with these chatbots are highly specific and structured. They are best fit for support and functionalities robust, interactive FAQs. Task-oriented chatbots can handle common questions, such as inquiries about business hours or simple transactions with few variables. Though they use NLP to provide end users with a conversational experience, their capabilities are fairly basic. These are the most mainstream chatbots right now.
- ***Data-driven and predictive (conversational) chatbots*** are virtual assistants, also referred to as digital assistants, are far more sophisticated, interactive, and optimised than task-oriented chatbots. These chatbots are contextually aware and use natural language understanding (NLU), natural language processing (NLP), and machine learning (ML) to learn as they go. They use predictive intelligence and analytics to personalise content based on user profiles and previous user behaviour patterns. Over time, digital assistants can learn a user's preferences, offer guidance, and even anticipate

needs. They can engage in conversations in terms of monitoring data and intent. Consumer-oriented, data-driven, inferential chatbots such as Apple's Siri and Amazon's Alexa are prime examples.

2.3. HISTORICAL BACKGROUND

"You all know that chatbots are a new technology altogether. It's like the early age of the Web. Things are still shaky yet growing at the speed of light."

- Rashid Khan, 'Build Better chatbots'

Truer words have not been spoken. Chatbots have recently become an efficient factor of C2B business model and engage with customer by effectuating hope of getting questions answered, orders placed, and business done. Intriguing as it maybe; chatbots have been around since the mid-1960s. English computer scientist and pioneer Alan Turing's famous "Turing Test" in 1950 posed the question of whether a computer program could talk to a group of people without realizing that their interlocutor was artificial.[178]This essentially would be the genesis of chatbot technology. The growth and development of chatbots can be summarized by the words of Winston Churchill - *"The farther backward you can look, the farther forward you are likely to see."* Hence it's only imperative and behoves to walk through the history of chatbots deciphered here in two parts: the first part focusing on the early history of chatbots (i.e., 1960s-1990s) and the second part focusing on the later history of chatbots from the 2000s and beyond. A history of chatbots provides the scope needed to understand its technology, where it began, where it went, and where it is going. This, in turn, will segue into a discussion of the influences the history of chatbots have had on ChatGPT.

2.3.1. Early history of chatbots

Joseph Weizenbaum developed the first chatterbot software in 1966 at the Massachusetts Institute of Technology's (MIT) Artificial Intelligence (AI) department. Chatterbots are computer programmes that mimic human discourse to communicate with users. The chatterbot programme ELIZA, which was developed to mimic human conversations using pre-programmed responses, was named after Eliza Doolittle, one of the key characters in George Bernard Shaw's play Pygmalion. Following an analysis of the user-supplied keywords, ELIZA triggered its pre-programmed output in accordance with a predetermined set of criteria. It provided responses to queries only by examining the prompts a user typed because it lacked a framework for comprehending the settings of discussions.

[178] (Adamopoulous, E. & Moussiades, L., 2020).

AI was still a very recent concept. The AI in ELIZA was at best primitive and primeval even sixteen years after Alan Turing's "test" in 1950 hypothesized that a computer programme could conduct a natural conversation with a human. The first programme to pass the Turing Test was the natural language programme PARRY, devised by Stanford University psychiatrist Kenneth Mark Colby, in 1972, and it wasn't until then that chatterbot technology began to take off.[179] PARRY was viewed as being more erudite than ELIZA. It had a "personality" and a more effective controlling structure that based answers on an assumption-based framework and "emotional responses" that were prompted by a user's changing utterances. Nevertheless, PARRY was still perceived as a chatbot with limited capabilities that was unable to pick up new information from conversations.

AI, chatterbot technology, and the realm of digital communication would have to wait their turn. In the United States, private and public sector research on AI and chatterbot technology would not resume until the 1980s. Indeed, what is now known as "The Winter of AI" from 1974 to 1980 is what sparked renewed interest in these fields in the United States. RACTER, a chatbot written by William Chamberlain and Thomas Etter in 1983, is one example of "The Winter of AI" chatbot technology. RACTER, short for "*raconteur"* (storyteller in French), was so successful that Chamberlain published a book created by RACTER in 1984, titled "The Policeman's Beard."

The early 1980s "Winter of AI" was regarded as the birthplace of Expert Systems - computational systems that simulated the ability of humans with specialised skill sets to make decisions. These systems made it possible for businesses to automate certain processes, save money in certain areas of expenditure, and integrate with the commercial and retail industries. These systems, however, were marred by slow development and maintenance, which contributed in failures and increased disinterest in those technologies. The "Second Winter of AI" began, and the technologies were once again stonewalled by inadequate research and investment from 1987 to 1993.[180]

This "Second Winter of AI" did, however, elicit a greater response from researchers and industries to rekindle interest and investment in AI technologies than the First Winter, and the 1990s saw the introduction of a new AI focus - creating an "intelligent agent."[181] This

[179] Arya, M. "A brief history of Chatbots." Chatbots Life. 11 March 2019. https://chatbotslife.com/a-brief-history-of-chatbots-d5a8689cf52f. (3 June 2022). & Ina. "The History of Chatbots – From ELIZA to ALEXA." Onlim. 12 October 2017. https://onlim.com/en/the-history-of-chatbots/. (3 June 2022).

[180] Lohr, S. "Ending the chatbot's 'spiral of misery'." *Bdnews24.com*. 5 April 2022. https://bdnews24.com/technology/2022/04/05/ending-the-chatbots-spiral-of-misery. (6 April 2022).

[181] Gunko, I. "Is AI Really Intelligent? (And What It Means For Your Chatbot)." Cloud Academy. 6 May 2020. https://cloudacademy.com/blog/is-ai-really-intelligent-and-what-it-means-for-your-chatbot/. (3 June 2022)

represented a system or programme capable of conducting a variety of tasks, which could be translated into online shopping, web search, and other activities. This new focus, combined with advancements in cybernetics and neural networks, stemmed in an AI-renaissance in the 1990s.

During this time, computer scientist Michael Mauldin coined the term "chatbot," drawing inspiration from Joseph Weizenbaum's *"chatterbot."* The term "chatbot" was applied to the chatterbot programme in TINYMUD, a multiplayer real-time virtual world in which the primary function was to chat. The chatbot became popular in the TINYMUD world as more and more real human players preferred to communicate with it rather than with other players. It was successful because the human "players assumed that everyone was a human and could only cause doubts if it made a significant mistake"[182]

Another piece of chatbot technology was introduced in 1992 with the creation of the chatbot "DR. Sbaisto" (which stood for Sound Blaster Acting Intelligent Text to Speech Operator) to display the digitised voices that computer sound cards can produce. Chatbot technology was finally becoming artificially intelligent enough to become a household interactive tool in the near future.

Another well-known computer scientist, Richard Wallace, was inspired by the work of Joseph Weizenbaum and created his chatterbot programme A.L.I.C.E (Artificial Linguistic Internet Computer Entity) in 1995. This chatterbot programme was awarded the prestigious Loebner prize three times for being the most human-like chatbot of its time, but it never passed the Turing test of being able to think as intelligently as humans.[183]

Rollo Carpenter, an English computer scientist, launched the Jabberwacky chatbot (created in 1981) on the Internet in 1997. It would become more consumer-friendly in 2008 under the name Cleverbot, continuing its purpose of simulating natural human chat in entertaining ways. Chatbot technologies were broadly acknowledged by the end of the 1990s as a permanent fixture in online communication, retail, and business. What began as simple programmes to carry out basic conversation based on command prompts had morphed into advanced computation systems, natural processing languages, and artificial intelligence. Chatbots could indeed now not only carry on a conversation with a human consumer, but also facilitate and add substance to the conversation.

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[182] ." (Adamopoulous, E. & Moussiades, L., 2020).

[183] Perdigão, F. "Does Artificial Intelligence Really Make Chatbots Smarter?" Visor.ai. 10 February 2021. https://www.visor.ai/artificial-intelligence-chatbots/. (3 June 2022).

2.3.2. History of chatbots from the 2000s and beyond

Chatbot technology and the artificial intelligence that drove its advancements became more common for commercial businesses that use chat in their operations and consumer interactions. Chat widgets and chatbots would proliferate like wildfire in the 2000s, improving on themselves to provide more channels of communication for consumers while also contributing to the boom of newly formed chatbot providers and companies

CHAPTER III
CHATGPT

3.1.OVERVIEW

ChatGPT is launched by a non-profit artificial intelligence research organisation named Open AI, it was founded by Altman, Musk, and other Silicon Valley investors. OpenAI became a "capped-profit" company in 2015, which implies that it limits returns on investments after a predetermined point. Musk stepped down from the board in 2018 due to a conflict of interest between OpenAI and Tesla's autonomous driving research. He is still an investor, however, and articulated his excitement for ChatGPT's launch stating it as "terrifyingly good" Altman tweeted apropos to the future of AI Chatbots proclaiming erudite technology proxy to helpful assistants that converse, recommend and counsel.

The AI-powered chatbot – a software programmed to simulate human conversation – was made available to the public on November 30 via OpenAI's website, and while it is still in the research review phase, users can sign up and test it out free of charge. ChatGPT is not the first AI chatbot developed. Several corporations, including Microsoft, have dabbled in the field of chatbots, but with little success. Beginning with the release of Microsoft's Tay bot in 2016, Meta entered the league with the release of BlenderBOt3 in August. Both were chastised for their mysoginistic and racial statements. To avoid such incidents, OpenAI has implemented Moderation API, an AI-based moderation system that has been taught to aid developers in assessing whether language violates OpenAI's content guideline, which prevents harmful or unlawful information from coming through. OpenAI recognises that its moderation still has problems and isn't completely correct.

3.2.TECHNICAL ANATOMY

ChatGPT employs the GPT-3.5 language technology, which is a big artificial intelligence model created by OpenAI and trained on massive amounts of text data from many sources.

The bot has a dialogue style that allows users to submit both simple and complex instructions that ChatGPT has been taught to follow and respond to in detail - the company claims it can even answer follow-up questions and admit when it made a mistake

Most notably, when given a cue, ChatGPT was able to build complicated Python code and compose college-level essays, raising concerns that such technology could eventually replace human workers such as journalists or programmers.

The program has its limitations, including a knowledge base that ends in 2021, a tendency to produce incorrect answers, constantly using the same phrases and when given one version of a question, the bot claims it cannot answer it, but when given a slightly tweaked version, it answers it just fine.

Many large figures in the tech world have expressed their astonishment with ChatGPT, like Box CEO Aaron Levie[184], who tweeted about the software giving a glimpse into the future of technology and how *"everything is going to be different going forward."* According to CEO Sam Altman[185], the software reached the one million users mark on Monday, less than a week after its launch.

CHAPTER IV
LEGAL IMPLICATIONS

With the progress being made by India in terms of technology and the rapid pace with which start-ups are mushrooming all over the country, it is evident that India is transitioning towards being a knowledge-based economy. AI being a versatile component accommodating various sectors universally spawns legal irregularities. As discussed above, India is morphing into a global superpower by major enforcement in the technological sector. Robust amendments are the way froward that can be effectuated by analysing the developments in the environment. As the use of AI technologies advances, judicial systems are being engaged in legal questions concerning the implications of AI for human rights, surveillance and liability, among others. The following are the most contested point of law pertaining to AI development in India.

[184] https://twitter.com/levie/status/1599156293050433536?lang=en
[185] https://twitter.com/sama/status/1598038815599661056?lang=en

4.1. IPR

A good ecosystem not only offers sound protection to technology but also incentivises growth and ensures prevention of counterfeits – hence providing overall promotion to the technological sector. Imagine, every technology/innovation that gets introduced is immediately counterfeited, and cheap fakes fill up the market right before the original product is marketed. A good IP ecosystem is the *sine qua non* for becoming a global technology leader as it simulates growth and innovation.[186]

There is a perceptible shift in IP awareness in the Indian economy. India achieved another milestone in context of IP innovation ecosystem, wherein for the first time in the last 11 years, the number of domestic patent filing has surpassed the number of international patent filing at Indian patent office in the Quarter Jan-Mar 2022 i.e. of the total 19796 patent applications filed, 10706 were filed by Indian applicants against 9090 by non-Indian applicants.[187] The Union Minister of Commerce and Industry, Consumer Affairs, Public Distribution and Textiles, Shri Piyush Goyal appreciated the consistent efforts made by DPIIT on strengthening the IPR regime in India by fostering innovation, and reducing compliance burden. The coordinated effort by DPIIT and IP office has led to increased IP awareness among all strata of society. These efforts have on one hand led to increase in the number of IPR filings, on the other hand has reduced the pendency of patent application at IP offices. He also mentioned that this will take India a step closer to the India's ambitious target of being in the top 25 nations of Global Innovation Index.[188] A report[189] by the Economic Advisory Council to the Prime Minister (EAC-PM), also noted that there had been significant improvements in simplifying procedures, allowing expedited examination to various categories of applicants, electronic delivery of certificates, facility for video-conferencing etc. The report also revealed that patents granted in India went up from 45,444 in 2016-17 to 66,440 in 2021-22. Overall, patents granted increased from 9,847 to 30,074 during the same period. "Simultaneously, there has been an increase in the share of residents in the applications from less than 30% in 2016-17 to 44.5% in 2021- 22," the report stated.[190]

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[186] Arushi Gupta, founder of Satyaki Legal.
[187] https://twitter.com/CIPAM_India/status/1513844847458734084
[188] https://pib.gov.in/PressReleasePage.aspx?PRID=1815852
[189] https://eacpm.gov.in/wp-content/uploads/2022/08/Why-India-needs-to-urgently-invest-in-its-IPR-ecosystem-16th-Aug-2022_Final.pdf
[190] Confederation of Indian Industry

4.1.1. AI AND PATENT

IP awareness brings IP protection laws under the scope and are required to be proactive and flexible more than ever. There isn't specific act or provision that regulates AI. Existing laws do not recognise AI and are based on conventional intellectual property types such as books, creative writing, and discoveries. The scope of AI is much broader and must be dealt in a different manner than the current regime. Computer programmes, business methods, and mathematical formulae are not considered patentable inventions under the Patent Act of 1970. Furthermore, the terms 'patentee' under Section 2 (p) of the Act[191] and 'person interested' under Section 2 (t) of the Act[192] create a barrier to incorporating AI into its scope. The Act expressly excludes the patentee of any other person who wishes to be human.

According to Section 6 of The Patents Act, anyone claiming to be the true and first inventor of an invention may seek a patent. Further Section 2(1)(s)[193] shows how a natural person is set out from others such as the Government under the meaning of 'person'. As a result, only a natural person who is true and first to invent and contributes his originality, technical knowledge, or skill to the invention qualifies to be recognised as an inventor in India.

This was put to the test in the case of Dr Stephen Thaler's Artificial Intelligence ("AI") system, the Device for Autonomous Bootstrapping of Unified Sentience ("DABUS")[194]. DABUS has been trained to substitute aspects of human brain function. Dr Thaler filed several patent applications (on behalf of DABUS) in various countries for two DABUS-invented inventions: an efficient beverage container and a flashing light for attracting increased attention.

In India, the Controller General of Patents expressed concerns in the Examination Report of Thaler's Indian patent application[195], citing that the application could not pass formal and technical examination because DABUS is not recognised as a person under Sections 2 and 6 of the Patents Act, 1970. This is supported by several legal precedents. For example, in the case of V.B. Mohammed Ibrahim v. Alfred Schafranek[196] , the Court held that neither a financing partner nor a corporation can be the sole applicant as an inventor, and that only a

[191] Patent Act, 1970
[192] Patent Act, 1970
[193] Patent Act 1970
[194] *Thaler v Commissioner of Patents [2021] FCA 879*
[195] FOOD CONTAINER AND DEVICES AND METHODS FOR ATTRACTING ENHANCED ATTENTION, Patent Appln. No. 202017019068
https://ipindiaservices.gov.in/publicsearch/publicationsearch/patentdetails
[196] AIR 1960 Mysore 173

natural person who actually contributes their skill or knowledge to the innovation is able to claim inventorship under law.

The inception of ChatGPT initiates inquiry into the patentability of the AI innovation in numerous jurisdictions or legal personhood. It is apparent that an AI system cannot be identified as an inventor under the current legal regime in most nations because patents are invented by natural individuals with human interaction. In particular, while the government may implement the Standing Committee's recommendations, as noted above, in terms of revising legislation to allow for AI and AI-related inventions, some difficulties may arise, such as:

• It may make it more difficult for humans to secure patent protection because the criterion for "invention" or "a person knowledgeable in the art" would be changed.

• Recognizing AI as an inventor would now allow it to hold and exercise property rights.

• Difficult entitlement/ownership questions, such as who has the right to use, own, transfer, or assign the AI-created invention and who has the authority to do so.

• Issues concerning the imposition of culpability on an infringing AI in circumstances of patent infringement.

4.1.2. AI AND COPYRIGHT

The basic question arising here is what are the copyright implications of the content curated by ChatGPT. Copyright is a legal privilege that protects the original inventions of the human mind and intellect. Copyright protection in India protects creation that is not only an idea; hence, if the production is an expression of the author and not merely an idea, such work may be protected.

Section 14 of the Copyright Act of 1957 defines "Copyright" as the exclusive rights of the owner to perform or authorise the doing of any activities (such as reproducing work, publishing work, adapting and translating work, and so on) in relation to a work. Furthermore, Section 17 of the Act [197]specifies that the author of the work is the first owner of the copyright.

[197] Copyright Act 1957

In Rupendra Kashyap vs. Jiwan Publishing House Pvt. Ltd.[198], the Hon'ble Court held that in the context of examination question papers, the author is a person who has compiled the questions; the person who does this compiling is a natural person, a human being, and not an artificial person; Central Board of Secondary Education is not a natural person, and it would be entitled to claim copyright in the examination papers only if it established that it has engaged persons specifically for purposes of preparation of compilation with a contract that copyright therein will vest in Central Board of Secondary Education. Similarly, courts have ruled in previous cases that a juristic person cannot be the author of any work in which copyright exists. This is also settled by the Copyright Office's Practice and Procedure Manual (2018), which explicitly specifies that for the purposes of Copyright, only natural person details must be submitted as Author of the work. The reasoning of requirement of author being natural person is based on the observations of Courts, in various jurisdictions, determining copyright in a work. Some instances are as under:

1. Author is the first owner of the copyright.[199]
2. Elements of authorship in selection, coordination and arrangement of material are necessary for protection of a compilation.[200]
3. Compilation developed by anyone devoting time, money, labour and skill amounted to a literary work wherein the author had a copyright.[201]
4. The copyright-ability of the work is tested from the original work (being creativity) and exercise of skill and judgments by the author.[202]

However, with technological advancement, artificial intelligence has developed to the extent that it is capable of understanding and creating results/outputs without any interference by the human.[203] , which in this case is the structure of ChatGPT. The main issue presented in this regard is the protection of work created by it. With the existing regulations of Indian IP laws, particularly copyright, it appears impossible to extend copyright protection to artificial intelligence created works.

The works made by ChatGPT can be classed as "works created by AI with human interference" and "works created by AI without any human involvement". The analogy of ChatGPT deciphered by the founder claims it to process instructions of the user and provide interactive

[198] 1996 (38) DRJ 81
[199] Section 17, Copyright Act 1957.
[200] Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991).
[201] Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber, 61 (1995) DLT 6.
[202] Eastern Book Company v. D. B. Modak, (2008) 1 SCC 1.
[203] Andres Guadamuz, Artificial intelligence and copyright, WIPO Magazine available at https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html

and viable solutions for the same. The extent of the human involvement is a missing quotient here that is the primary determinant to acquire exclusive right over the invention. When AI creates work with human intervention, the human who offers creative inputs to the AI may claim ownership of the work, however when AI creates work without human intervention, the ownership may be claimed by the copyright owner of the AI, i.e. who possesses copyright over the AI software.

The data as well as the cue on which ChatGPT functions is provided by humans hence the facet of the original author is dubious. The existing Indian copyright law is not exhaustive to give rights to AI for creation of work. India has time and again focused on requirement of human interference for a copyright protection, however, the scope of opening gates to accept AI as separate entity still looks doubtful.

Under the Copyright Act 1957, literary work recognizes compilations and since the AI is dependent on the existing information and the exposure of the programming, the work so created may qualify as compilation and therefore protectable as copyright. However, alternate arguments state that the work so generated is mere collection without any skill and judgment.

Considering the judgment of the Hon'ble Supreme Court of India in Eastern Book Company & Ors vs D.B. Modak & Anr. [204]which observed that "To claim copyright in a compilation, the author must produce the material with exercise of his skill and judgment which may not be creativity in the sense that it is novel or non- obvious, but at the same time it is not a product of merely labour and capital. The derivative work produced by the author must have some distinguishable features and flavour." and therefore it is a requirement for any compilation or derivative work to show Skill and Judgment.

Issue of Infringement

If AI is accepted as the author and owner of the work generated by it, then an important question raised in 'Who will be held liable for any infringement' done by such AI or its creation. Analysing the Sec 51 of the Act, it is easy to conclude that a "person" can only infringe a work's copyright because AI's legal standing is still not classified as a legal entity, any infringement caused by AI will become a significant issue. In the case of ChatGPT, it will be far more challenging to determine liability for any infringement produced by ChatGPT. AI having no legal position of its own, the problem of granting AI authorship rights may become weak unless a sufficient route and chain of liability for AI acts can be established.

[204] *((2008) 1 SCC 1)*

The author's unique rights may also be contested under Section 57[205]. The moral rights of the author comprises of the right to paternity (the right to be identified and acknowledged with the work) and the right to integrity (the right to restrain or seek damages against any act that may be detrimental to the author's honour or reputation). As a result, if ChatGPT is acknowledged as the author of the work, these rights may become obsolete, as AI may be unable to determine if any conduct has harmed the honour or reputation of the original work. The moral rights enumerated have greater emotional and human feelings related to the activity, and so these rights may not be suited for enforcement.

According to India's present copyright laws, the author of the work has a right to royalty[206] that cannot be renounced. As a result, where the ChatGPT is the author of the work, the question of who will determine the royalty, how the royalty will be distributed to AI, and whether the amount of royalty must be determined on the basis of reasonability arises.

The accountability of AI over any creation will be difficult to impose for any task done by AI. For example, if any work made by AI is libellous, obscene, or harmful to public morale, no action may be done against AI other than removing the content from the public domain or shutting down the AI.

With the advancement in technology and considering the efficiency of AI, providing AI with recognition is not a bad idea. With time the creation is slowly moving towards AI related works and therefore, in order to maintain the balance with AI generated work and other copyright, it is important to structure and identify the rights and limitations of the work created by AI.

Conclusively, the matter boils down to the following inference. One of the most important factors is the level of human involvement in the creative process. If a human were to heavily edit or curate ChatGPT’s output, then it’s possible that the resulting work could be eligible for copyright. Another factor to consider is the question of whether or not ChatGPT’s output is truly original. While ChatGPT is incredibly sophisticated and can produce text that is difficult to distinguish from human-written content, it is ultimately feeding off the pre-existing data created by a machine. This means it is unlikely that ChatGPT”s output would be considered truly original, and therefore not eligible for copyright protection.

4.1.3. AI AND TRADEMARK

[205] Copyrights Act, 1957
[206] Section 19 in the Copyright Act, 1957

Recently, Project Zero was announced by Amazon that will employ AI to detect and classify various counterfeited products.[207] Although this initiative is currently in the nascent and localised stage, it is soon to be implement across the globe. Thus, it is safe to reach the inference that product branding and marketing is being shaped with the development of Artificial Intelligence. One of the most vital aspects of legal jurisprudence that is employed when it comes to product branding and marketing is Trademark Law. ChatGPT being an interactive assistant can be fruitfully employed in the sphere of commerce and marketing. Using it for customer assistance it can have drastic impact on trademark law.

In general, trademarks can be registered based on two criteria: the selected mark can be visually represented and it distinguishes the services and goods of one undertaking from those of another. It grants the person sole ownership of the mark. As a result, the law is based on the concept of "human frailty" and its characteristics such as "confusion," "imperfect collection," "slurring of trademarks," "unwary customer," "probability of ambiguity," visual and conceptual impact, and trademark comparison. However, these are no longer addressed, customers no longer see the full range of product and brand options accessible to them, decreasing the importance of trademarks. The fundamental components of trademark law, such as "probability of ambiguity," "unwary buyer," "imperfect remembrance," and so on, remain unanswered in this new AI application. These are grave challenges that necessitate prompt resolution in order to justify the convergence of AI and trademark law. Owing to the analytical and interactive cosmos of ChatGPT, it would be safe to assume that as technology progresses, the AI applications may start having the discretion to choose the brand for the customer as well.[208]

Thus, inception of technology like ChatGPT invokes the urgency for a reform in the fundamental terms of trademark law. It emphasizes the significance of amending phrases such as "imperfect recollection," "secondary infringement," "average consumer," "likelihood of confusion," and so on.

[207] Shubham Borkar & Nitish Daniel, India: A Comprehensive Review of Amazon Project Zero, Analysis in Detail of the Policy Issues, Takedown Mechanism and its Applicability in India, MONDAQ (Jan. 25, 2021) https://www.mondaq.com/india/trademark/788860/a-comprehensive-review-of-amazon-project-zero-anticounterfeiting-initiative-analysis-in-detail-of-the-policy-issues-takedown-mechanism-and-its-applicability-inindia.

[208] Tripathi, Harsh Pati. “Impact of Artificial Intelligence (AI) on Trademark Law …” *Centre for Intellectual Property Rights Research and Advocac,y*

These terms are the cornerstone of trademark law, and they must be reassessed in light of technological changes. They all take into account human beings' skills to choose at their leisure and essentially "trace" the origins of the things they are interested in.

Consider “average consumer”, the Supreme Court of India elucidated in the case of Cadilla Healthcare Ltd. v. Cadilla Pharmaceuticals Ltd.[209] that “a consumer can be classified as an average consumer if he possesses average intelligence and carries the tendency of imperfect recollection” This perspective contradicts the essence of AI application, which was previously discussed. An AI-powered bot is advanced than average intelligence and is competent of precise recollection. There will be a minimal level of perplexity. Furthermore, how the definition of "typical customer" and other basic tenets of trademark law will be applied to AI will be a major point of controversy. As a result, the liabilities and subsequent infringements will be more difficult to discern.

It has been proved that as technology advances, courts, interpretations, and legal jurisprudence of a jurisdiction alter and evolve. Till date, courts have always used the unwary "customer" as a reference point whilst interpreting the core tenets of trademark law. However, the "artificial consumer" will soon force the courts to regard such technological creations as another reference point, at least in the algorithmic context. As of now, that appears to be the only viable option.

4.2. BIAS AND DISCRIMINATION

Self-learning algorithms, for instance, may be trained by certain data sets (previous decisions, facial images or video databases, etc.) that may contain biased data that can be used by applications for criminal or public safety purposes, leading to biased decisions. AI systems are not capable of behaving in an ethical or unethical manner on their own, as they do not have the ability to make moral judgments. Instead, the ethical behaviour of an AI system is determined by the values and moral principles that are built into the algorithms and decision-making processes that it uses. For example, an AI system designed to assist with medical diagnoses might be programmed to prioritize the well-being of patients and to avoid causing harm. Similarly, an AI system designed for use in a self-driving car might be programmed to prioritize safety and to follow traffic laws.

[209] Cadilla Healthcare Ltd. v. Cadilla Pharmaceuticals Ltd, 2001 (2) PTC 541 SC.

In these cases, the AI system's behaviour is determined by the ethical guidelines that are built into its algorithms and decision-making processes. However, it's important to note that these guidelines are determined by the humans who design and implement the AI system, so the ethics of an AI system ultimately depend on the ethics of the people who create it. However, even an AI assistant is capable of suggesting biased options.[210]

This is because a key component of AI is machine learning. Under this the machine recognises patterns in the data and learns things by itself. Their decisions are based on patterns that are received by them.[211] The input of such patterns is done by humans who are inherently biased.

Further, in case of a trademark infringement, there is a confusion as to who would be considered as the "average customer" and in turn held liable, given the AI application's role in the purchasing process with close to no human intervention.[212]

4.3. DATA PROTECTION AND PRIVACY INFRINGEMENT

As per the UN, India is set to become the most populated country in the world by 2023. The growing population as well as technological proximity has procreated a humongous amount of digital data that is apportioned for AI use; whether authorized or not is the trick question. Much of the most privacy-sensitive data analysis today–such as search algorithms, recommendation engines, and ad tech networks–are driven by machine learning and decisions by algorithms. As artificial intelligence evolves, it magnifies the ability to use personal information in ways that can intrude on privacy interests by raising analysis of personal information to new levels of power and speed. ChatGPT breeds on information fed to it by its author; likewise it evolves using information provided to it by the users. Hence the contingency of breach of data protection and privacy is at high odds. Alike other AI, ChatGPT is also bridled with data protection criticism.

The point of contention is on three questions firstly, what is the implication of data driven decisions on the scope of personal autonomy? secondly, how does that affect or limit a person's privacy? And thirdly, what impact do inferences have on group privacy?

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[210] Tripathi, Harsh Pati. "Algorithm Based Systems and the State: A Brief Inquiry." *Tech Law Forum @ NALSAR*, 13 Nov. 2020, https://techlawforum.nalsar.ac.in/algorithm-based-systems-and-the-state-a-brief-inquiry/.

[211] Kokane, Sonali. "The Intellectual Property Rights of Artificial Intelligence-Based Inventions." *Journal of Scientific Research*, vol. 65, no. 02, 2021, pp. 116–119., https://doi.org/10.37398/jsr.2021.650223.

[212] Trademark Law Playing Catch-up with Artificial Intelligence?" *WIPO*, June 2020, https://www.wipo.int/wipo_magazine_digital/en/2020/article_0001.html.&nbs

When it comes to groups, a lot of these models are essentially deriving statistics from group behaviour, they are finding patterns among large sets of people, and deriving attributes of those groups and then applying it to different groups. Sources of such data is social media and other networking sites which has been identified and acted against by musk himself. Elon Musk tweeted[213] that he found out OpenAI was accessing Twitter's database to train ChatGPT, so he put an immediate pause on it because OpenAI is no longer non-profit and open-sourced anymore, it should pay for this information in the future. Because AI and machine learning systems are designed and controlled by humans, there is always the potential for these technologies to be misused. For example, there have been instances where AI-powered facial recognition systems have been used to violate people's privacy or discriminate against certain groups of people. Additionally, there are concerns about the potential for AI to be used for malicious purposes, such as in the development of autonomous weapons systems. It's important for society to carefully consider the ethical implications of AI and to develop and implement regulations and safeguards to prevent its misuse. The ethics of training an AI to respond like a human is a complex and subjective topic. Some people may argue that it is ethical to train an AI to respond like a human because it can enable the AI to better understand and interact with people, which can have many positive applications. For example, an AI that is trained to respond like a human might be able to provide more personalized and effective assistance to users, or to improve the accuracy of natural language processing tasks. On the other hand, some people may argue that it is unethical to train an AI to respond like a human because it raises concerns about the potential for AI to deceive or manipulate people. Ultimately, the ethics of training an AI to respond like a human depend on the specific goals and applications of the AI, as well as the values and ethical principles of the people who design and implement it.

India has struggled to deliver a nearly flawless and non-disputable law on privacy. The present legal framework which primarily governs privacy under the Information Technology Act 2000 and the Information Technology Rules, 2011 fails to keep up with technological advancement and the expanding exigency to have an unblemished data protection law is undisputed.

The Digital Personal Data Protection Bill, 2022, if enacted, shall lie in direct conflict with ChatGPT. The data used acquired and used by the AI is in contravention of the provisions of the bill. Section 5 of the bill states grounds for processing personal data; three key phrases here that regulate use and processing of data are 'accordance with the provisions of this Act', 'lawful

[213] https://twitter.com/elonmusk/status/1599291104687374338

purpose[214]' and 'consent[215]'. To satiate these three condition the anatomy of ChatGPT has to be rectified. The irregularities in this context are firstly, unauthorized use of personal data that is obtained through networking platforms, secondly, quality of consent obtained i.e., whether qualified consent is obtained from the user, subject to the condition two of Section 6 of the said bill[216], to use the sought information for further processing and extended use and thirdly, use of the personal data for lawful purpose. With incidences of malware, data breach, IPR related issues that have arisen blatantly question the moral and ethical factors of the AI and brings it under a microscopic tension.

4.4.CYBERSECURITY

One of the major issues with India's cybersecurity rules is that the government continues to prosecute under unclear or antiquated statutes, which can stymie development and the implementation of effective cyber laws and regulations. Organizations struggle to derive appropriate data privacy and cybersecurity rules and advisory from confusing legislation and fragmented legislative approaches. Inception of ChatGPT raises alarms against India's Cybersecurity laws which are outmoded presently.

ChatGPT, an AI-powered chatbot built by OpenAI, continues to impress consumers with its skills. The platform can currently participate in conversation, solve arithmetic problems, compose long articles and campaigns for brands, and even review and write computer code. Some hackers, however, have used ChatGPT to write dangerous code and generate malware. Regardless, the chatbot's versatility and accuracy (while not always flawless) make it a popular choice among consumers.

[214] Section 5, Digital Personal Data Protection Bill, 2022- For the purpose of this Act, "lawful purpose" means any purpose which is not expressly forbidden by law.

[215] Section 7, Digital Personal Data Protection Bill, 2022- (1) Consent of the Data Principal means any freely given, specific, informed and unambiguous indication of the Data Principal's wishes by which the Data Principal, by a clear affirmative action, signifies agreement to the processing of her personal data for the specified purpose. For the purpose of this sub-section, "specified purpose" means the purpose mentioned in the notice given by the Data Fiduciary to the Data Principal in accordance with the provisions of this Act. (2) Any part of consent referred in sub-section (1) which constitutes an infringement of provisions of this Act shall be invalid to the extent of such infringement.

[216]Section 6, Digital Personal Data protection Bill, 2022- (1) On or before requesting a Data Principal for her consent, a Data Fiduciary shall give to the Data Principal an itemised notice in clear and plain language containing a description of personal data sought to be collected by the Data Fiduciary and the purpose of processing of such personal data. (2) Where a Data Principal has given her consent to the processing of her personal data before the commencement of this Act, the Data Fiduciary must give to the Data Principal an itemised notice in clear and plain language containing a description of personal data of the Data Principal collected by the Data Fiduciary and the purpose for which such personal data has been processed, as soon as it is reasonably practicable.

Researchers at cyber-security firm Checkpoint Research demonstrated how ChatGPT could be used by almost anyone to create phishing emails and malicious code. First, the researchers first asked the chatbot to create a phishing email impersonating a hosting company. ChatGPT provided output, even though it warned the researchers that the content might violate its content policy. The researchers then asked ChatGPT to create an iteration of the same mail, but one that asked users to download a malicious Excel file, instead of clicking on a link. Just like before, ChatGPT provided satisfactory output, despite generating a warning notice. ChatGPT also created a malicious VBA (Visual Basic for Application) code. While the initial output was barely workable, the researchers finally got basic but usable malicious code after multiple iterations.[217]

Analysing from the Indian matrix, The IT Act of 2008 applies to any individual, company, or organization (intermediaries) that uses computer resources, computer networks, or other information technology in India. It also includes service providers of web hosting, internet, network, and telecom. It also includes foreign organizations that have a presence in India and businesses outside of the country that has operations in India. Use of ChatGPT for drafting of phishing emails and malware codes is effectuated by unfettered application of the AI. It becomes a breeding ground of illegal acts that poses grave threat to the entire economical setup. The question of liability arises which two faceted. If considered as a mere machine then the user generating such mails and malwares shall be held liable. Whereas if legal personhood is granted to ChatGPT, it shall be made liable for phishing under the IT Act. Ease of such content can lead to drastic atrocity which the Indian laws are unqualified to govern and curb.

To maintain widely accepted cybersecurity standards, India must pass more comprehensive and informative cybersecurity laws and clarified regulations and reforms to develop a better cybersecurity framework and data protection legislation. Otherwise, the Indian government, its law enforcement agencies, and designated regulators remain bound to old laws, which may result in improperly addressed and unresolved cybersecurity issues.

[217] https://indianexpress.com/article/technology/chatgpt-phishing-email-malware-malicious-code-8370730/lite/#amp_tf=From%20%251%24s&aoh=16733309525188&referrer=https%3A%2F%2Fwww.google.com

CHAPTER V
WAY FORWARD

The significance of AI in future is so strong that there is a desperate need to regulate it before there is chaos. The inclusion of AI in almost every sector of our lives comes with its own risks and liabilities. Since the data holding capacity of these AIs is so large in number, it can be manipulated and used in certain wrong ways as well. Thus, the ownership and liability of a person needs to be decided. IPR is such a gateway which describes the ownership of such work and the originality by a person. In case of AI, it won't be useful just for the owner to gain from the profits of such usage, but it will also be easy to maintain and establish the liability in case the results of AI are destructive or cause serious harm.

The future holds much more challenging aspects in case of IPR. Even the developed countries have not been able to turn around the whole scenario of AI and IPR. However, the courts in these countries have taken cognizance of the facts and have given judgments on the issues. The issues of ownership and economic profits in invention of AI while maintaining the market balance and encouraging new inventions will persist.

There is a desperate need, now more than ever, to formulate IP laws which can secure the developments of AI innovation and reward new works and inventions through the copyright or patent award.

- A specific test has to be formulated which can differentiate between AI created works and AI- aided works. The accurate IP holder can be determined, thereon.
- The patent law clearly demarcates between an inventor and an invention but the category under which AI systems fall is not yet determined. The law has to be clearer and more specific and include such provisions in an understandable language.
- Similarly, the definition of authorship under the copyright act should be examined and changes according to the changing dynamics.
- There have been ambiguities in trademark laws as well. The status of AI as a customer and the functioning of AI, especially in case where human common sense plays a major role need to be defined.

- A specific act has to be passed which deals with data protection with respect to the AI software. It must cover all the civil and criminal liabilities and offences which amount to the same.
- The Authorship to AI can be granted. However, the Copyright Act will be required to recognize AI as a separate entity or identify AI generated work as separate class of work.
- The owner of the AI will be responsible for the work generated by AI, and will also be liable for the purpose of any infringement caused by the AI generated work.
- The work created by AI without any human interference may be classified as work of skill and judgment, since the work generated by AI is prepared on the parameters / codes on which the AI works, and since the AI uses these parameters/ codes without any interference therefore the authorship/ creation can be attributed to AI.
- Structured, real-time data should be collected to eliminate bias. Such data will aid in forming flexible AI models yielding multiple probabilities. Using appropriate and diverse data with no labels and divisions will be useful in eliminating biases.
- Having a diverse range of business problems will create unmanageable classes in the AI models leading to bias. By narrowing the business problems, the AI models will manage and perform effectively without biases and yield revenue.
- The AI models should be equipped with proper feedback options from the opposite end users.
- Transparency is also crucial in eliminating bias. The whole process of eliminating bias should maintain transparency. Such transparency principles should also be implemented from the beginning of the development of such models.

ISSUES AND CHALLENGES BEFORE DEBT RECOVERY TRIBUNAL IN INDIA: A STUDY

- RAHUL KUMAR[218] & DR. SUNIL KUMAR[219]

1. INTRODUCTION

The Indian economy was revealed to be in ruins shortly after the country's independence, with little production, no income per capita, a low standard of living, a reliance on agriculture, and the economy still in its infancy. Without adequate financial resources, the economic and commercial activity would cease to exist, the government was fully aware. In addition, it was acknowledged that the nation's entire banking system must be renovated and restructured, and that new financial institutions must be established. The federal and state entities that had taken out loans from the State Financial Corporation and the Industrial Finance Corporation routinely misused the vast amounts granted to them, and when the subject of recovery came, it was determined that no money was available. Numerous obligations owed to banks and other institutions were deemed recoverable through the application of a specialized mechanism.

The majority of our enterprises visit banks and other financial institutions to obtain loans. Because of The loan's conditions may vary based on the borrower and lending institution. All institutions must adhere to the rules and regulations established by the central bank. The banks and financial institutions grant loans for a variety of purposes, subject to the RBI's lending requirements. Even though banks and other financial institutions are permitted to lend money without collateral, they typically require it to ensure that the loan will be repaid.

Recovery of Debts Owing to Banks and Other Financial Institutions was founded in 1993 to help banks and other financial institutions collect their bad debts from non-compliant customers. The Indian banking industry has recently struggled with substantial nonperforming assets. In Scheduled Commercial Banks (SCBs), the number of stressed advances increased while the trend of the nonperforming asset (NPA) recovery remained sluggish. The Annual Recovery Rate of Non-Performing Assets of Small and Medium-Sized Banks (SCBs) has continuously decreased over the previous 12 years, reaching its lowest level of 20,8 percent in 2016–17, according to the RBI's Report on Trend and Progress in Banking in India (2016).

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Right now, the Debt Recovery Tribunal (DRT), Lok Adalat, and Securitization are available as recovery methods.

M. Narasimhan, who presided over the Committee on Financial Systems, advocated the establishment of "Special courts" with specialised forces for arbitration and expeditious resolution of challenges such as fundamental monetary division adjustments. In this way, a significant requirement for operating a suitable component that promptly acknowledges the obligation to banks and money-related businesses was identified.

2. MEANING OF DEBT RECOVERY TRIBUNAL

The Recovery of debt due to the Bank and financial institution act was enacted in 1993, resulting in the formation of the Debt Recovery Tribunal to facilitate debt recovery involving banks and other financial institutions. In 1993, the legislature enacted the "Recovery of debt due to bank and financial institution Act" to establish a tribunal for the prompt adjudication and recovery of debts owed to banks and financial institutions. It pertains to India as a whole.

To aid banks and other financial institutions in collecting debts from their clients, debt collection tribunals were established. Due to the RDBBFI Act of 1993, DRTs were established. The Debts, Recovery Appellate Tribunal hears appeals against DRT (DRAT) decisions. For loans in dispute exceeding 20 million, institutions may refer cases to DRTs.

At different places around the nation, there are now 33 DRTs and 5 DRATs in use. To hasten the settlement of loan-related issues, the government created six more DRTs in 2014. Unlike traditional court procedures, DRTs were able to process a large number of cases quickly and with minimal delay. Although the DRTs have had an impact on the recovery front, there have been growing concerns about their efficacy in the context of a rise in the number of NPAs. Due to insufficient infrastructure and a lack of dispute resolution teams, they are unable to manage the increase in the number of disputes.

3. REVIEW OF LITERATURE

Patel Urjit (2000) Drew attention to the issue of subprime mortgages and the increase in non-performing assets in commercial banks. It was noted that banks and regulatory agencies should adopt efficient lending practises. Additionally, corporations should be held to higher disclosure, transparency, and accountability standards. A competent legal infrastructure and a large number of courts and agencies can facilitate the prompt collection of debts.

Sharma, M. (2005) noted that addressing the NPA issue in a timely manner is more important because doing so will prevent the system from incurring further damage and save significant

macroeconomic costs. During the post-liberalization period, the Indian banking system initiated a variety of initiatives and recovery procedures. The issue of mounting NPAs cannot be resolved in banking.

In his 2013 study entitled "Recovery of Non-Performing Assets in Indian Commercial Banks," Jasbir Singh examined the recovery of NPAs through OTS, Lok Adalat, DRT, and SARFAESI Act. Throughout the study period, the agriculture debt waiver and debt relief scheme, in addition to the recovery of agriculture advances, were discussed. Between 2004 and 2011, it was determined that the aggregate performance of the Debt Recovery channels was inadequate.

Alamelumangai, R., and Sudha, B. (2019) The Indian banking system has struggled in recent years with vast quantities of nonperforming assets. SCBs saw an increase in the number of stressed advances, while the rate of NPA recovery remained lackluster. According to the RBI's Report on Trend and Progress in Banking in India (2016), the Annual Recovery Rate of Non-Performing Assets of Scheduled Commercial Banks (SCBs) has consistently declined over the past 12 years, reaching its lowest point in 2016–17 at 20.8%. The non-performing asset (NPA) recovery rate for the existing recovery channels, such as the Debt Recovery Tribunal (DRT), Lok Adalat, and the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, has decreased.

Sujata Visaria (2009) In order to expedite the resolution of debt recovery claims exceeding a certain threshold, the Indian government established debt recovery tribunals in 1993. This study employs a differences-in-differences approach to project loan data by employing the phased introduction of state tribunals and the correlation between late payments and claim size. It is discovered that the tribunals have reduced default rates on average by 28%. In addition, they lowered the interest rates on larger loans while maintaining the same consumer quality. This indicates that debt recovery actions should be expedited in order to reduce credit costs.

Manoj Kumar Sahoo and Muralidhar Majhi's (2020) research identifies the Non-Performing Assets recovery management system. Banks recover nonperforming assets through numerous recovery channels. The main finding of the banking industry's recovery mechanism is dismal. The period covered by the data in this investigation is 2010-2019. The one-way ANOVA and t-test were used to analyse the data. The study concludes that the DRT is taking longer and that decisions in this tribunal are protracted because they can be appealed to a higher court. In addition, the current recovery channel is inadequate to address the issue.

Bose (2005) stated that while there have been a number of strategies to assist with NPA recovery in the past, none of them have been effective in reducing the number of NPAs. It was anticipated that the SARFAESI Act would aid banks in their efforts to reduce and recover

money from nonperforming assets. However, the act's limitations are causing banks and financial institutions to feel uneasy. To maximize the benefits of the SARFAESI Act, it may be necessary to first resolve the systemic root causes of NPAs.

4. RECOVERY ROUTE

The legal and extra-legal actions, often known as two-way recovery strategies, are used by all of India's scheduled commercial banks. Recovery channels can only function in a setting where laws and court orders are obeyed. Banks may file a lawsuit against the responsible parties or borrowers when debts are no longer collectible. Debt recovery in civil court was a drawn-out and difficult process. The need for a proper method that expedites the recovery of unpaid debts was recognized by bankers. In 1993, the Committee on the Financial System, convened by Shri M. Narasimham, recommended that the Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI) be passed. Under the Act, the Debt Recovery Appellate Tribunals (DRATs) and Debt Recovery Tribunals (DRTs) were established, and each was granted the exclusive authority to determine debt recovery cases. Legal and extra-legal actions, also known as two-way recovery strategies, are utilized by all scheduled commercial banks in India. Laws and court orders must be adhered to in order for recovery channels to be effective. When debts are no longer collectible, banks may file suit against the liable parties or debtors. Civil court debt collection was a lengthy and onerous process. Bankers recognized the need for a method that expedites the collection of outstanding debts. In 1993, the Committee on the Financial System, convened by Shri M. Narasimham, recommended that the Recovery of Debts Due to Banks and Financial Institutions Act (RDDBFI) be passed. Under the Act, the Debt Recovery Appellate Tribunals (DRATs) and Debt Recovery Tribunals (DRTs) were established, and each was granted the exclusive authority to determine debt recovery cases.

4.1.DEBT RECOVERY TRIBUNAL

The Debts Recovery Tribunal (DRT) has full ability to make specific orders and to deviate from the Civil Procedure Code in order to ensure full justice. The District Court must receive all active cases from the Tribunal pursuant to the Recovery of Debts Due to Banks and Financial Institutions (RDDB&FI) Act of 1993. Additionally, it authorizes the automatic transfer of civil court cases with debts of at least 20 lakh to DRTs. The Tribunal also employs a recovery officer to help with the recovery certificates that have been authorized by the presiding officer. Cross-claims, counterclaims, and set-offs can all be heard by DRT. However, DRT is unable to take into account claims of monetary losses, subpar services, contract violations, or unlawful behavior on the part of the lenders. As a result, the DRT followed a

legal procedure that worked well and was centered on speedy case settlement and prompt decision-making. As of March 2018, India had 38 DRTs and 5 DRATs in operation.

4.2. LOK ADALATS

The Legal Services Authorities Act of 1987 forms Lok Adalat as a forum for settlement of pending or preliminary court cases and legal matters. For the repayment of minor loans, Lok Adalat has proven to be an effective organization. The Indian Banks Association (IBA) has been recommending that member institutions submit matters to Lok Adalat for resolution. Twenty million rupees is the maximum amount that may be covered by the Lok Adalat. Lok Adalat was held at multiple levels, including State, High Court, District, and Taluk, at the following intervals: State, High Court, District, and Taluk.

- Mega Lok Adalats in District Court Centres - Regular Weekly Lok Adalats in all Court Centres at least once per month.
- Weekly, at the discretion of the DLSA/TLSC.
- National Lok Adalat - Will be held twice per month on the second Saturday and on other days designated by the National Legal Services Authority (NALSA).

4.3. SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (SARFAESI)

The Narasimham Committee II recommended that a new law be enacted in 2002 to regulate securitization and reconstruction firms and to give banks and other financial institutions the authority to seize secured assets directly from borrowers and sell them without lengthy legal proceedings. The name of this new statute was the SARFAESI Act. The bill was enacted on December 17, 2002.

Utilizing the authority to seize securities, the SARFAESI Act expedites the recovery process by facilitating the realisation of long-term assets, the resolution of liquidity issues and asset-liability mismatches, and the resolution of asset-liability mismatches. According to this law, if a business borrower defaults on its loans for 180 days, banks and financial institutions may send the borrower a notice that repayment is due. Banks and financial institutions may acquire assets after providing notice of nonpayment and waiting sixty days. The Bank will then take physical possession of the property through a District Magistrate, in accordance with Section 14 of the Act; the Magistrate Court appoints an Advocate Commissioner to take physical possession of the property. Section 13(4) of the Act requires the Bank to issue a notice of possession.The Bank will then proceed to sell the asset or secured interest in strict accordance with the requirements of the Act. The SARFAESI Act's stringent regulations may compromise the borrower's property rights and entitlements.

4.4. INSOLVENCY AND BANKRUPTCY CODE 2016

A strong financial sector requires a thorough bankruptcy structure. The 2016 Insolvency and Bankruptcy Code (IBC) was written by a ministry of finance group known as the "Bankruptcy Law Reforms Committee" (BLRC). The Insolvency and Bankruptcy Code (IBC), which incorporates and updates various laws involving reorganization and insolvency resolution, is the sole legislation that deals with insolvency and bankruptcy. Individuals, businesses, and partnerships are all covered under the IBC.IBC 2016 is supported by four pillars: the Insolvency and Bankruptcy Board of India, Information Utilities, Adjudicating Authorities, and Insolvency Professionals.

4.5. INSOLVENCY RESOLUTION PROCESS

IBC is able to prosecute insolvency resolution actions against corporate creditors as well as individual/partnership unit debtors. IRP for individual units begins with the creation of a repayment strategy by the debtors. The adjudicating authority DRT will also compel the debtor and creditor to initiate the procedure if the creditors approve the repayment plan; otherwise, the debtor or creditor may file for a bankruptcy order.Lenders can address a corporate debtor's overall condition of distress using the IRP, which provides a collective solution. It includes actions such as debt restructuring, enforcement of security, and recovery. Insolvency proceedings must be initiated via the NCLT. After the NCLT appoints the insolvency professional as a delegate of the creditors, the delinquent debtors' authority over management will be transferred to the insolvency professional, removing their authority. It enables the creditors to monitor the company's scooters for signs of theft. Within the allotted 180 days, the resolution specialist establishes a committee of creditors to deliberate collectively on a revival plan or liquidation.

5. TOTAL DEBT RECOVERY TRIBUNAL AND DEBT RECOVERY APPELLATE TRIBUNALS IN INDIA

DRAT Allahabad (Jurisdiction over 6 DRTs)			
DRT Allahabad	DRT Dehradun	DRT Jabalpur	DRT Lucknow
DRT Patna	DRT Ranchi		
DRAT Chennai (Jurisdiction over 9 DRTs)			
DRT Chennai-1	DRT Chennai-2	DRT Chennai-3	DRT Bengaluru-1

DRT Bengaluru-2	DRT Coimbatore	DRT Ernakulam-1	DRT Ernakulam-2
DRT Madurai			
DRAT Delhi (Jurisdiction over 7 DRTs)			
DRT Delhi-1	DRT Delhi-2	DRT Delhi-3	DRT Chandigarh-1
DRT Chandigarh-2	DRT Chandigarh-3	DRT Jaipur	
DRAT Kolkata (Jurisdiction over 9 DRTs)			
DRT Kolkata-1	DRT Kolkata-2	DRT Kolkata-3	DRT Hyderabad-1
DRT Hyderabad-2	DRT Visakhapatnam	DRT Siliguri	DRT Cuttack
DRT Guwahati			
DRAT Mumbai (Jurisdiction over 8 DRTs)			
DRT Mumbai-1	DRT Mumbai-2	DRT Mumbai-3	DRT Ahmedabad-1
DRT Ahmedabad-2	DRT Aurangabad	DRT Nagpur	DRT Pune[220]

6. CONSTITUTIONAL VALIDITY OF THE ACT

The Act's constitutionality was first contested in Delhi Bar Association v. Union of India before the Delhi High Court. The Delhi High Court ruled that the DRT could be established by Parliament despite the fact that it did not fall under the purview of Articles 323A and 323B of the Constitution of India and that the term "administration of justice" in List IIA of the Seventh Schedule of the Constitution includes tribunals as well. The challenged Act was deemed unconstitutional because it undermines the independence of the judiciary and was irrational, discriminatory, and unrepresentative. Additionally, it rendered the selection of the tribunal's presiding officer invalid.

According to a ruling by the Supreme Court, "while Articles 323A and 323B specifically empower the legislature to enact laws for the establishment of tribunals on the specified

[220]DRTs and DRATs,*available at*: https://drt.gov.in/front/composition.php (last visited on June 23, 2022).

matters, the powers of the Parliament to enact a law constituting a tribunal such as a banking tribunal remain unaffected." Furthermore, it was said that every financial institution's job description must include debt collection as a key responsibility. The Parliament may create a system for collecting debts owed to banks and other financial institutions using its legislative authority over the banking industry.

The Delhi High Court declared that the process for winding up a business is only contained in Section 446 of the Companies Act and nowhere else in its judgement in Mayur Syntex Ltd. (in liquidation) v. Punjab and Sind Bank, which addressed a major problem. The Debt Recovery Act makes no mention of how debts owing by companies that have been dissolved or liquidated are to be collected and allocated among the different creditors. The aforementioned Act only discusses how debts due to financial institutions should be collected in line with its specific processes.

7. NON-PERFORMING ASSETS(NPA)

There were very few difficult loan circumstances for banks in the distant past. As a result, they previously taken legal action against repeat offenders of bank loans. As a consequence of the nation's economic and non-economic problems during the last ten to twelve years, banks have been saddled with a significant quantity of non-performing loans (assets). International guidelines state that a bank's non-performing assets should not amount to more than 10% of all assets; nonetheless, this indication is thought to have surpassed 26% (or a total of Rs. 31 billion) as a result of a rise in intentional defaulters in the public, semi-public, and private banking sectors. The financial sector is facing serious problems due to banks and other financial institutions' incapacity to recover subpar loans. The nation's entire financial sector as well as bank earnings and government income have all suffered as a result. In order to enable the rapid repayment of loans from banks and other comparable institutions, a system and procedures must be developed. The Debt Recovery Tribunal was set up to recover debts due to banks and other financial organizations in order to solve the aforementioned issues.Using the provisions of Section 3 of the Act, the Debts Recovery Tribunal was created. The Debts Recovery Tribunal was created to take claim submissions from banks and other financial institutions about their past-due debtors. The 1993 Debts Recovery Tribunal (Procedure) Rules were formed for this reason as well.

8. POWER AND FUNCTION OF DEBT RECOVERY TRIBUNAL

These Tribunals were established as quasi-judicial organization to manage bank-filed litigation against delinquent creditors. The Tribunal will have the authority to initially hear and adjudicate debt repayment cases for banks and other financial institutions. The Tribunal will

have nationwide jurisdiction and will be able to carry out all the duties of a district court. According to the provisions of the Act, the Tribunal will have jurisdiction over all pending district court cases.

The tribunal has the same authority as a court of law under the relevant legislation, including the power to issue summonses, order the appearance of the petitioner, defendant, and witnesses, administer oaths, conduct depositions, and examine proofs, evidence, and required documents or statements. The tribunal may impose fines as well as demand the filing of paperwork and the posting of security. If the Tribunal finds that the accused has engaged in contempt, they may be subject to a fine, a jail sentence, or maybe both.

9. THE CONCEPT OF RESTORATION MANAGEMENT

The current degree of commitment by banks to a speedy recovery and the subsequent decline in nonperforming assets (NPAs) are unprecedented. It is essential to remember that recovery management is the foundation of NPA management, regardless of whether the loans in question are fresh or extant. The stage of loan origination must come first in this management process. A two-pronged strategy is employed to effectively manage recovering and non-performing assets. In the first, defaults are averted and converted to non-performing assets, while in the second, loan delinquencies are addressed. A bad debt is a loan, credit line, or obligation related to accounts receivable that is wholly or partially repaid after being written off. When a bad debt is recovered, the "allowance for bad debts" or "bad debt reserve" account is credited and "accounts receivable" is debited. Recovery of bad debt does not always involve "like-kind" recoveries. For instance, a bank may receive equity in exchange for writing off a loan, which may eventually result in the loan's recovery and, possibly, additional profit. Similarly, a portion of a written-off secured loan may be recovered through the sale of the collateral.The definition of recovery is "the process of recovering and rescuing anything that has been lost or is at risk of becoming a cost." Indian banks have done an exceptional job of keeping non-performing assets (NPA) under control, despite the generally difficult situation. The financial industry must recover in order to remain viable. In order to improve the administration of tribunal in recovery in India, it is necessary to enhance government and judicial operations. When it comes to collecting loans and enforcing collateral attached to them, banks face significant difficulties in the present day. As a result of the current procedure for collecting bank loans, a significant proportion of their capital has been invested in underutilized assets whose value is diminishing over time.

10. IMPORTANCE OF DEBT COLLECTION COURT

DRT's primary objective and function is to collect debts owed to banks and other financial institutions by debtors. The Tribunal's authority is limited to resolving disputes involving the recovery of unpaid amounts from NPAs declared by RBI standards. The Tribunal is conferred the full authority of the District Court. A recovery officer is a Tribunal employee who facilitates in the execution of recovery Certificates approved by the presiding officers. DRT complies with the law by placing a heavy emphasis on expeditious case resolution and implementation. Banks must be compensated for the products and services they provide. Recovery Management Systems' collection specialists will ensure that the collection strategy developed by recovery Management Systems meets the bank's objectives. Banks are able to recover debts without losing customers.

11. OBSTACLES DURING THE PERIOD OF RECUPERATION

11.1. Recovery mechanism, not real-time effective:

Lack of real-time communication between the creditor and the collector is one of the most significant obstacles in the debt collection procedure. Every collection agency in the industry must deal with this substantial challenge. Because each debtor has a unique capacity for repayment based on their unique financial circumstances, collectors must develop individualized collection strategies. However, this is extremely difficult because communication disruptions are common. To promptly establish a relationship of trust between the two parties, it is crucial that collectors and debtors communicate information about the lending arrangement, such as repayment plans, document exchanges, and computations.

11.2. In order to exert pressure on consumers

In all industries, including loan recovery, the customer is the focal point. The inordinate number of contacts consumers receive from debt collectors is one of their primary complaints. Numerous regulations limit the number of calls borrowers may receive, but due to industry-wide recovery strategies, collection agents frequently contact debtors at irregular intervals, resulting in debtors' complaints of harassment.

11.3. Bankruptcy

Personal insolvency is the ideal formula for tragedy. There is no guarantee that the funds will be recovered in the near future. The procedure for recuperation will be determined by the terms and conditions of the signed contract. After seizing the assets or acquiring the collateral, the lender is entitled to payment. A client's bankruptcy filing is a significant setback for the debt collector, as it makes the process of recovering the debt much more difficult and time-consuming.

11.4. Unable to locate the debtor:

Every organization contends with outdated debtor contact information. It is possible that the debtor's address has changed or that your employee entered the information erroneously into the system.

11.5. Insufficient recovery resources

The majority of debtors can redeem their debts with a little help, such as assistance or appropriate motivation. However, the majority of debt collectors lack the resources required to conduct adequate consumer research, making it difficult for them to offer flexible payment plans. They lack the resources required to view creditors as clients and then attempt to recover their money.

12. DATA EVALUATION

12.1. DEBT COLLECTION COURT

Original Applications, also known as OAs, are filed with the Debt Recovery Tribunals (DRTs), whereas appeals are filed with the Debt Recovery Appellate Tribunals.The Recovery of Debts Due to Banks and Financial Institutions Act of 1993 (RDDBFI Act) granted lenders and debtors (DRATs) immediate recourse. As a consequence, the DRTs and DRATs have been established under the RDDBFI Act in order to assist banks in meeting the demand for prompt resolution of nonperforming assets.The borrower may also submit a request to the DRT for a determination regarding actions taken against secured creditors pursuant to the Securitization Act. The issue with the DRTs, as with many other debt recovery systems, is that the protracted procedure for resolving disputes results in a large number of outstanding cases, making it difficult for the DRTs to move swiftly on them.

NPAs recovered through various channels during 2016-2020 ₹ In Crore

2016-2017			
Channels	**No. Of Cases Referred**	**Amount Involved**	**Amount Recovered**
Lok Adalat	3555678	36100	2300
DRTs	32418	100800	10300
SARFAESI Act	199352	141400	25900
IBC	37	-	-
Total	3787485	278300	38500

2017-2018			
Channels	**No. Of Cases Referred**	**Amount Involved**	**Amount Recovered**
Lok Adalat	3317897	45700	1800
DRTs	29551	133300	7200
SARFAESI Act	91330	106700	26500
IBC	701	9900	4900
Total	3439477	295600	40400

2018-2019			
Channels	**No. Of Cases Referred**	**Amount Involved**	**Amount Recovered**
Lok Adalat	4087555	53484	2750
DRTs	51679	268413	10522
SARFAESI Act	235431	258643	38855
IBC	1153	145457	66440
Total	4375823	725996	118647

2019-2020			
Channels	**No. Of Cases Referred**	**Amount Involved**	**Amount Recovered**
Lok Adalat	5086790	67801	4211
DRTs	40814	245570	10018
SARFAESI Act	105523	106582	52563
IBC	1953	232478	105473
Total	6135084	742481	172565[221]

13. CONCLUSION

[221] Prof (Dr,) Abhijeet Pakira, "Recovery of NPAs in banks - Impact of legal and non-legal measures", *International Journal of Creative Research Thoughts available at:* https://ijcrt.org/papers/IJCRT2105156.pdf (last visited on June 22, 2022)

The banking and financial sectors have been a significant factor in India's ability to generate accelerated economic development. In spite of the fact that the Indian banking industry is gradually adopting international accounting standards and prudential regulations, there are still a number of areas in which the banking and financial sectors cannot compete on an equal footing with other participants in the global financial markets. Before corporate procedural reforms and alterations to the financial sector, the Indian legal system already had a solid legal foundation. In the past, a substantial portion of the currency was set aside to satisfy outstanding obligations with banks and other financial institutions. However, the new mechanism that has emerged in the form of a novel law may make it possible for the amounts owed to banks and financial institutions to be collected without unnecessary delay in the present.

Credit defaults continue to rise daily. Despite the passage of numerous laws and recurrent emphasis on recovery efforts, the number of NPAs continues to rise. This study demonstrates that the annual quantity recovered via the current routes is not increasing at an acceptable rate. The NPA recovery from 2014 has declined pitifully across all channels. According to financiers, the SARFAESI Act may be able to resolve these issues and provide banks with the instruments necessary to expedite debt recovery. It was emphasized that the tremendous backlog of cases in DRTs negatively impacted the NPA recovery. Rapid case resolution protects bankers from the burden of interim liabilities. IBC 2016, a recently developed insolvency framework, will expedite the resolution of business debts. Recovery routes must be effective in order to prevent NPA growth and protect against their deficiencies; by making the extant routes more efficient, the nation's primary NPA problem can be resolved rapidly.

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SUBSTANCE ABUSE

- VIJAYALAKSHMI[222]

INTRODUCTION:

Drug addiction, also known as substance use disorder, is an illness that affects a person's brain and behavior, resulting in an inability to manage the use of any drug or prescription, whether legal or illicit. Drugs include substances such as alcohol, marijuana, and nicotine. When you're hooked on a substance, you may continue to use it even if it causes you damage.

Substance addiction can commence with social experimentation with a recreational drug, and for some people, drug use becomes more frequent. For others, drug addiction develops with exposure to prescription drugs or acquiring medications from a friend or relative who has been prescribed the medication, particularly with opioids.

The danger of addiction and the rate at which you get hooked differ depending on the drug. Opioid medications, for example, have a higher risk of addiction and develop addiction more quickly than other medicines.

You may require bigger dosages of the substance to get high as time goes on. You may soon require the medicine simply to feel well. You may discover that going without the substance becomes increasingly difficult as your drug use rises. Stopping drug usage can lead to extreme cravings and leave you physically unwell (withdrawal symptoms).

CAUSES OF DRUG ABUSE:

The impact of drugs on the human mind varies considerably from one individual to the next. Each person's body and mind function in a unique way. Some individuals like using drugs, while others despise it after their first experience. Rather than being caused by a single reason, substance addiction is caused by a combination of circumstances.

➢ Genetics & Family History: Your genes may mean a greater predisposition to addiction.

Your body and brain react to a substance in the same manner that your forefathers did. Your chances of being addicted to drugs grow dramatically if your parents or their parents have a history of drug misuse.

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➢ Environmental cause: The environment a person lives in also plays a vital role in developing drug dependence. Because the environment has an impact on behavior, a youngster who grows up in a family with a drug addict is more likely to battle with drugs himself. The following are some other environmental elements that might lead to drug addiction:

- Addiction among friends and peers
- Inadequate social support
- Relationships that are in trouble
- Life's stressors
- Socioeconomic disadvantages

➢ Psychological cause: Although genetics and the environment play important roles in drug addiction, psychological factors also play a role. Everything from sexual or physical abuse to parental and peer carelessness to domestic violence can cause psychological stress. And to relieve their tension, individuals turn to narcotics. This drug abuse might turn into an addiction over time.

DRUG ABUSE & POVERTY:

One of the most common misconceptions concerning drug usage is that it is more common among the poor. However, this is not entirely accurate, since a lack of money does not appear to be linked to drug usage. The link is complicated, and the causes of poverty are numerous. Low-status and low-skilled occupations, unstable family and interpersonal connections, illegitimacy, dropping out of school, high arrest rates, high prevalence of mental illnesses, poor physical health, and high death rates are all characteristics of poverty. These elements are comparable to those that influence drug usage. Drug use and addiction have no one cause, however, poverty is one of the risk factors for drug use.

A person living in poverty may abuse drugs or alcohol to cope with the unsafe environment they live in, financial stress, or physical or emotional abuse. Narcotics and alcohol are frequently readily available in disadvantaged areas, where some individuals even sell drugs in order to escape poverty. Specific goal: to educate my audience about those in poverty who are struggling with addiction. The basic argument is that addiction is one of the leading causes of poverty.

Addiction is intricately linked to poverty, not only because substance abuse is expensive, but also because addiction is frequently used as a kind of escapism. Many people who live in poverty abuse drugs and alcohol to cope with the major challenges that they may face in their life. When you're living paycheck to paycheck and fighting to make ends meet, drugs may bring an instant thrill that you don't get anywhere else.

DRUG ABUSE IN SPORTS:

Drug usage is prevalent across all sports and at all levels of competition. For a variety of causes, athletic life can lead to drug abuse, injury self-treatment, and retirement from the sport. Most sports organizations prohibit the use of any substance that enhances one's capacity to perform better in any sport. Regular intake of Usage of performance-enhancing pharmaceuticals has long-term consequences such as increased irritability, depression, and even mortality. Nowadays people might be aware that athletes take steroids and other performance-enhancing substances, but they only despise and penalize those who are discovered; they do not drug test them until suspicions develop. Many notable sportsmen (such as Alex Rodriguez) are among these athletes who have established incredible records. During the season, if the players appear to be on drugs, the team is routinely drug tested. Someone who is juiced is someone who is on a substance that improves their ability to compete in a game. Some sportsmen use marijuana as a performance enhancer because it helps you feel less jittery while you're on it, allowing for longer exercises.

MAJOR DRUGS USED BY ATHLETES:

➢ Anabolic steroids: Anabolic steroids, such as testosterone, are produced naturally by the human body and assist muscular growth. High dosages of anabolic steroids may be used by athletes to enhance muscle growth, work out harder, and speed up recovery from workouts.

➢ Androstenedione: It is also known as Andro. Andro is a prescription medicine that sportsmen can use illegally to boost some male sex traits.

➢ The hormone of human growth (HGH). HGH can help athletes gain muscle mass and improve their performance. Although injectable medicine may only be obtained with a prescription, it is frequently acquired and sold illegally or abused.

➢ Diuretics: Drugs may be used by athletes to shed weight or pass a drug test. Diuretics function by changing the fluid and electrolyte levels in the body. They're popular in sports like boxing and wrestling that encourage tight weight management.

➢ Erythropoietin. This medicine boosts the synthesis of red blood cells (erythrocytes) and hemoglobin, which helps the muscles get more oxygen. Erythropoietin can help athletes improve their endurance and aerobic power.

➢ Marijuana: Marijuana can be used by athletes for exhilaration and relaxation. Some sportsmen may use marijuana to relieve discomfort.

EFFECTS OF DRUG USE IN ATHLETES:

➢ Suspension and bans: Many professional sports leagues have rigorous policies prohibiting the use of performance-enhancing and recreational drugs. Athletes who break these regulations may face severe repercussions, including suspensions or bans. Prior titles, medals, or awards may be rescinded in some instances.

➢ Job loss Or early retirement: Drug misuse can hinder an athlete's ability to concentrate and have a detrimental impact on his or her performance. Certain medicines can have a variety of negative effects, including performance-inhibiting withdrawal symptoms. Because of the harmful repercussions of their drug usage, some sportsmen may be forced to retire early.

➢ Health problems; Anabolic steroids can cause liver and kidney damage, as well as hypertension and cardiac issues. Depression, rage, and aggression are some of the mental side effects. Impotence, infertility, and the development of specific feminine sexual traits (e.g., expansion of breast tissue) may occur in males, whereas menstrual alterations and the development of masculine features may occur in women.

DOPE TEST:

Why is it necessary for any athlete participating in a high-level sport to pass a dope test? This is due to the possibility that they used a narcotic drug to improve or decrease their performance. They're also known as performance-enhancing medications or steroids. Many times, athletes may take medicines to help them feel less discomfort while working out or to give them an energy boost when competing. The dope test can be done in a variety of ways. To identify the presence of drugs in the human body, a sample of blood, breath, hair, perspiration, saliva, urine, or nail might be obtained. To be honest, I don't believe it's worth it since athletes who use drugs and those who don't can get the same results. Anabolic steroids are used to build muscular growth and strength, whilst testosterone is utilized as a pain reliever. Sportspeople usually take medications in the form of injections or tablets. They are not only hurting their careers, but

they are also damaging their health. The list of side effects includes baldness, and heart and brain problems, to name a few.

WORLD DRUG DAY:

The International Day Against Drug Abuse and Illicit Trafficking, commonly known as World Drug Day, is commemorated every year on June 26th. The goal is to raise awareness about the serious consequences of drug usage and to encourage people to take action. The UN's ultimate goal is to establish a drug-free society. It elucidates concepts and ways to combat drug addiction, gives facts and figures on how many people are impacted by drugs and how many fatalities occur, and emphasizes the idea that even though a person is a victim of drug misuse, they can be treated and still take care of themselves. Over the years, this effort has acquired widespread support from all segments of society, including children, NGOs, teenagers, parents, and the elderly. The more individuals who are educated, the more likely it is that a drug-free world will emerge.

The World Drug Report, published by the United Nations Office of Drugs and Crime, examines market conditions and statistics in order to study and determine which drugs are a true concern that will have an impact on society. The most current study, issued in 2021, focused on the pandemic's influence on substance usage. It has two sides, once again. On the one hand, drug prevention and treatment services have increased, but since the current economic situation has left people unemployed and pushed the poor into an even more vulnerable position, they are turning to drug crop cultivation as a source of income to help them get through these trying times.

TEENAGE DRUG ABUSE

Today's teen drug usage is a serious subject of concern. Drugs are involved in half of all deaths (homicides, accidents, and suicides) among those aged 15 to 24. Anxiety and sadness are the two most prevalent reasons for juvenile drug use. Peer pressure, a desire to escape, curiosity, emotional problems, and stress are all factors that can lead to drug or alcohol abuse. Teenagers are more likely than adults to take drugs because the area of their brain responsible for judgment and decision-making is still developing. As a result, they lack the mental capacity to fully comprehend the effects of drugs. Teenagers suffer from a variety of issues as a result of their negligence, including brain damage, delayed puberty, addiction, and mental and physical issues. Drugs and Adolescents In today's high schools, drug usage is becoming more prevalent among youths. The majority of drug usage begins in the preteen and adolescent years. There

are several reasons why teenagers come into touch with drugs. One of the causes of adolescent drug misuse is familial problems; if a family member is a drug abuser, the teenager will be influenced by that family member. Friends are another source of a drug interaction. Drugs have the potential to ruin a teenager's life. The solution is for parents to devote some time to their children in order to keep them away from drugs. The school should employ a lecturer to deliver a discussion to teenagers about how drugs harm our bodies and the consequences of using them. The public must join the police in their war against drug dealers since, without them, there would be no drugs to sell to buyers. Marijuana, for example, is the second most often consumed drug among teenagers after alcohol. According to studies, thirty percent of marijuana users have some form of marijuana use disorder. Drug addiction has been going on for thousands of years, and the consequences have lasted that long. The first time active components from psychoactive medicines were extracted was in the nineteenth century.

PARENTS AND DRUG ABUSE

The parents taking drugs is a viewpoint that isn't given enough weight and is largely unspoken. Drug use among teenagers is frequently in the news, but less is known about the devastating consequences of drug use among parents. If a mother, father, guardian, or any other senior in the family in power consumes drugs, their children's lives are jeopardized. Drug-addicted parents tend to spend all of their money on these substances, denying their children access to financial resources for their requirements.

They provide their children with the simplest necessities, mistreat them, and occasionally deprive them of fundamental requirements, even to the point of prioritizing drug acquisition. They deprive their children of the minimal necessities, mistreat them, and even deprive them of fundamental requirements, to the point that drug acquisition takes precedence over their children. The child is automatically subjected to physical harm, mental torture, and emotional trauma. Because kids are exposed to these dangerous compounds through breathing, they are sometimes more susceptible to physiological ailments. If a pregnant woman drinks them, the fetus will be affected, and the offspring may experience developmental problems after delivery.

OVERDOSE & DRUG ABUSE:

Antidepressants, anxiety medications, and sleeping pills are examples of prescription medications. These can also be used as a means of escaping reality. The doctor would have prescribed a certain number of pills to be taken to deal with depression or anxiety; however, in order to prolong that feeling of calmness or at times when the patients' stress levels are at their

highest, they overdose on these pills, which can be fatal and necessitate hospitalization. Similarly, sleeping medications are prescribed by a physician for a specific purpose, but if the patient is unable to sleep, they overdose.

So, how can you distinguish between abuse and addiction? Frequently, one phrase is mistaken for the other. Drug abuse is defined as the use of legal or illicit substances in a forbidden way, whilst drug addiction is defined as the lack of control over the use of these substances. You can't seem to stop yourself from taking them. It has nothing to do with whether it is hazardous or not; instead, it merely refers to unrestricted ingestion. Expanding on the biological impacts of drug usage, it will eventually lead to death, but it will begin by destroying your organs one by one, starting with the brain.

BIOLOGY AND DRUGS:

A drug's initial effect is to impact your brain. The human brain functions in such a manner that once it has had a pleasant experience, it desires to replicate it. As a result, when you take a medication, your brain produces a surge of dopamine, which makes you feel tremendously joyful. When eaten on a frequent basis, the brain becomes accustomed to the chemical surge and craves more. In fact, you may find that you need to consume more over time to maintain that sensation. These elements gradually erode your capacity to make decisions, form judgments, and learn new things.

On one hand, there are some who are uninformed of the dangers that these life-threatening substances pose, while on the other, there are those who want to quit but can't. Because of a condition known as withdrawal symptoms, this is the case. It occurs after you stop using drugs, as the term implies. When you become severely reliant on them and then abruptly stop using them, you will suffer a sequence of withdrawal symptoms. These symptoms vary from person to person, but some of the most prevalent ones are nausea, exhaustion, tiredness, mood swings, sleeping difficulties, and unusual eating habits and patterns.As a result, those who want to stop don't because they don't want to face these obstacles, creating a never-ending spiral of an escape strategy. Drug abusers, in my opinion, are encircled on all sides by barriers. It's a problem if they consume it; if they don't and attempt to avoid it, it's a hassle as well. That is why it is advisable to refrain from doing so in the first place.

IMPACT OF DRUG ABUSE ON ECONOMY:

We're all aware of the negative effects of substance misuse on a person, a family, or a community. However, statistically, it affects the economy as well. It is a financial cost for the government since it loses workers owing to absenteeism, low staff turnover, or death, resulting in lower output. Healthcare, criminal investigation, justice, and victim fees all add up to a lot of money. Because they are government employees, they bear the brunt of the blame. Because 57 percent of traffic accidents are caused by drug-addicted drivers, the lives of the general public are at risk. The chemicals used in drug manufacture pollute the environment to a large extent. Humans, animals, and nature are all affected. The disposal method has an impact on aquatic life and pollutes the water. Manufacturers participate in deforestation efforts in order to develop opium and the coca bush, at the expense of farmers and biodiversity. These toxic substances also affect the individuals who have to clean up the mess, i.e. the employees. Drug misuse is misery masquerading as paradise, and agony masquerading as pleasure. You could think, "Oh, that's just a white powder," when you first see it. "What could possibly be so dangerous about it?" It clearly impacts people from all walks of life.

VIOLENCE, CRIMES & DRUGS:

Violent crime and drug abuse are inextricably linked. When we delve deeper into this, we may divide the logic into three categories. The main explanation is psychopharmacological offences. It is, in essence, any crime performed while under the influence of drugs. The accused in numerous rape, murder, violence, abuse, and assault cases allege that they were under the influence of narcotics. The second is a crime done with the intent to survive. Simply said, economic need drives someone to commit a crime.

Drugs are unquestionably expensive in nature, and addicts often steal them in order to keep consuming them and satisfying their addiction. Burglars, robbers, and thieves carry out their criminal acts to meet their dependency demands. Finally, it refers to the actual violence that occurs. Disputes between sellers and manufacturers, clashes between intakers, gang fights, and street fights all fall under this category. The state of Michigan in the United States is notorious for street battles and criminals, making it a dangerous place to visit.

DRUGS AND RELATABLE LEGISLATIONS:

Under the Drugs and Cosmetics Acts 1940, the punishment for importing these narcotic substances is a three-year jail sentence or a fine of five thousand rupees or both. The purpose of the Narcotic Drugs and Psychotropic Substances Act (NDPS) of 1985 is to outlaw drug use and impose heavy penalties on those who do so. Usage does not have to be limited to

consumption; it may also involve production/manufacturing, storage, transportation, plant cultivation, and buying and selling. The Act is divided into two sections: drugs and psychotropic substances. All produced medications are classified as narcotics (opium, cannabis, cocaine). Any natural or synthetic medication that is prescribed under the legislation is considered a psychotropic substance.

Features of the Act:

- Cultivation of opium
- Production of opium
- Supplying the produced opium
- Setting prices of the opium
- Production of naturally manufactured drugs
- Submitting reports under international convention guidelines.

Penalties under the Act:

- In case the person possesses a small number of drugs they will be sentenced to 6 months of harsh imprisonment or a fine worth Rs. 10000 or both.
- If the person possesses a large amount, they will have to undergo a minimum sentence of 10 years up to 20 years and will be levied with a fine of Rs. 1 lakh or 2 lakhs.

Reverting back to our common medications, a mechanism known as parallel importation exists. When pharmaceuticals and treatments are sold at a greater price in a certain country, this system is used. A customer will buy the medicine lawfully in another nation and then sell it for a lower price in their home country. This covers charges such as import fees and brokerage commissions. The real goal is excellent since it helps the general populace to obtain vital medicines at inexpensive costs. This is being abused, however, because people can now acquire antidepressants, anxiety medicines, and sleeping drugs for less money and overdose on them. This is still a notorious system, but addicts will be carefully taken care of.

MORALITY AND DRUGS:

Let's put statistics, biology, criminality, and law aside for a moment. Let us consider this matter from the perspective of a philosopher, or, to put it another way, from a moral standpoint. A group of individuals claims that "Life is sacred, but drugs kill it." However, the majority of individuals believe that drugs are more of an ethical concern than a moral one. Morality differs from ethics in that morality is more opinion-based and personal in character. Each individual

has their own set of morals and beliefs, and what is moral for one individual may not be moral for another. It is normative in character, to put it that way. Ethics, on the other hand, are society's predetermined criteria for what is right or wrong, good or terrible. Society and circumstances have a role in this.

It's never too late to change, and there are always options for young people and teens to recover from their addictions and return to regular life. Here are a few examples:

➢ Elders and parents should provide guidance and be open-minded in order to deal with such circumstances. There should be no reluctance on the part of the youngster, and a sense of security in being able to open up to an older person and tell them about their problems. Rather than chastising him, the guardian should be understanding, caring, loving, and affectionate. They should not forsake them and should always be there for them. Communication is crucial in this situation.

➢ The seed should be sown in the classroom. Such issues should not be avoided and left unaddressed. Techniques for dealing with stress and stress alleviation should be taught in school, and awareness seminars should be held. Students should be taught about drugs and narcotics, their harmful consequences, and why they are unlawful and forbidden.

➢ Finding your passion will be really beneficial in this situation. Turning your attention to it will instil a feeling of discipline and accountability. The mind will be diverted and the notion of engaging in criminal acts will be dismissed.

➢ Speak with your peers. Make others feel included and secure in your presence. No one should ever feel left out or trapped in a circle of loneliness. In order to avoid drug use and addiction, they must feel loved, cared for, and significant.

➢ Spirituality may also be beneficial to people who believe in its power. Spiritual teachings, instructors or gurus, and texts have the power to enlighten people and lead them away from the road of addiction. ➢ Develop a healthy way of living. Start exercising and eating nutritious meals that contain all of the food pyramid's constituents, which is crucial for your body. Avoid stress by surrounding yourself with positive people and attempting to be optimistic. You will no longer feel the urge to use drugs since your life will seem whole and balanced. As a result of the process, you get stronger and more capable of facing reality.

➢ Choose your acquaintances carefully—easy it's to make friends that aren't right for you. In our world, negativity is more common than positive. Negativity is frequent, whereas optimism is uncommon. Friendships are quite important in one's life, especially beyond a

certain age. They have an impact on your future. As a result, make sure that you carefully select your social circle and that you surround yourself with individuals that encourage you to flourish rather than bring you down. A terrible buddy group may ruin your life by encouraging you to engage in all of the wrong activities.

➢ Accept reality: There are ups and downs in life, as well as negativity and positive. Rather than avoiding the reality of life, you must stand up and face it. There will be days when you don't feel well; everyone has terrible days, and there will be times and moments when you feel like you're having the time of your life. You can't expect everything to go well and then claim that you don't want to deal with failures. You must have both in your life for it to be balanced and rewarding. Get up and confront what's going on, even if you've been knocked down. Don't use drugs as an escape strategy; the difficulties you are facing now are trivial compared to the consequences you will experience if you use drugs and, more significantly, if you become addicted to them.

➢ It doesn't matter how much the other person rambles on about, what programs you attend, or what other diversions you try to partake in; it doesn't matter how much the other person rambles on about. In the end, it's all in your brain. If you choose to change and have the desire to do so, you will do it regardless of the challenges or obstacles that may arise.

➢ Detoxification- This is a more biological approach to therapy. The body will experience withdrawal symptoms during this period, and it is recommended that you gradually lower your consumption and use medications to help with the withdrawal symptoms.

CONCLUSION:

The influence of drug usage and addiction on society is a never-ending discussion. There are several viewpoints, treatments, tactics, and answers to the problem, as well as causes, types, and age groups of victims, as well as how it affects various sectors of the economy and the planet as a whole. It will not be simple to eradicate this sort of malpractice from society as a whole, but it can be done by starting small and taking some initiative. People's hearts are no longer filled with terror. With their heads held high, stone hearts, and no conscience, people perpetrate atrocities.

REFLECTION PAPER

- SHREYA CHAUDHARY[223]

Ruth Vanita's book, Love's Rite- Same Sex Marriage in India and the West is a prose that wholly dedicates itself to the idea of unions between individuals predominantly of the same gender akin to that of a marriage or a marital union. A historical and modern account of the dynamics of such unions both from a social and political pedestal examines the validity of such relations and if they are in consonance to our shastras, religious texts, pre-existing laws, morality and state approval. It compels the reader to examine whether one needs to accentuate the requirement for legal and social reforms in order to incorporate the rights of such partnerships in the societal order and normalize such unions or will that lead to destruction of the societal norms, Personal laws and the virtues of marriage.

An impeccable academician, activist and author Ruth Vanita with vested interest and experience in gender and sexuality studies wrote Love's Rite- Same Sex Marriages in India and the West, an account of numerous notions all revolving around Same Sex partners and their desire to get married. The contention of the author through numerous testimonies, accounts, excerpts from religious texts and case laws is that same-sex union is a social reality of both India and the West, the deeply entrenched roots of the same can be observed in the past. She argues that marriage like unions if not marriage have been accounted for in both American-European and Indian texts and the validation from one's community and mutual consent, both have proven to be the most essential ingredients of a marriage and although State validation may be desirable, its absence does not construe such unions to not exist or to be illegitimate. A deep analysis of the book paves way for a question, that are the current laws governing such unions and marriages in India enough to sustain the needs of same sex couples or do they crave for improved laws to adorn the life of a rightfully married content couple.

Primary ancient models, scriptures and religious texts often indicate the presence of same-sex unions, relations and love that was celebrated. A close read of the bible signifies how even though "Jesus Christ had a devoted set of female followers; he preferred his male disciples predominantly. He held close relations with John who was often referred to as the disciple whom Jesus loved in numerous prophecies and parables."[224] The loving relation between

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[224] Vanita Ruth, *Love Rite-Same Sex Marriage in India and the West*, (2005), Penguin Books

Krishna and Arjuna in Mahabharata too has been subject to scrutiny. It is frequently stated that their relation is more important to them than that with their wives, kin and children. Krishna's statement to Arjuna as documented by Vanita in the book, "you are mine, as I am yours" and his indication of Arjuna as half of himself signifies his unique love for Arjuna. Devadasis, women of the lower castes who worked at the temple, were made to marry deities of Goddesses who were considered as the husband of the devadasis, especially in parts of Karnataka. Presence of such women at the wedding of two individuals was considered to be essential so that they could bless the bride and the bridegroom. Although, their presence in temples and at Hindu weddings decreased considerably after the British tried to prohibit such practices which although went underground and many of such Devadasis were then treated as prostitutes as well. There have been evidences of how many Rajas held close relations with men who worked as their advisors in the royal court especially among the Mughals, for instance "Babur's agonising suffering for the love of a boy whom he had to leave behind because of his political endeavours is well known and popular, only because he wrote about it openly in his memoirs."[225] As mentioned in the book, Shiva, who is considered to embody both male and female gender, yet to have a marital bond with Parvati only strengthens the belief that same-sex relations as well as marriages have been an accepted model of union since ancient times. However, morality is fluid and what may be acceptable today may not be considered to be an accepted notion tomorrow.

Historical research of our scriptures and religious texts as documented by the author has aided in the development of the argument that what we know of homophobia is a by-product of modernity rather than pre-medieval and medieval past. Any church-based criticism of specific sexual acts did not lead to extreme consequences labelled as crimes during that period. Our Medieval literature has celebrated same sex love extensively. With Renaissance, came arbitrary laws persecuting homosexuals excessively, branding their love as a crime. What was a perception of the church soon became the top-notched agenda of the State. With the advent of Colonization throughout the world, what spread simultaneously was the need for uniform laws-which would facilitate smooth functioning of the colonies. To assist to that, and to formulate a cultural hegemony that would be in sync with the morals and ideologies of the colonizers, the British introduced laws strictly prohibiting any sexual act that did not involve vaginal-penis penetration, putting an indirect ban on anal or oral sex: this does not only highlight the

[225] Irfan Lubna, "From Babur to Dara Shukoh, Fluid Sexuality was Never Unnatural During Mughal Era" (2018), DailyO.in

harassment that gay men or lesbian women face but also signifies the ideology that sex- is not meant for pleasure, but for procreation. Does this indicate that the agenda of union between two individuals is meant solely for procreation? Even though societal norms may allow sexual activity in marriage they put emphasis on procreation in order to indirectly restrict it as well. There has been a strong wave of dissent with respect to eroticism and since same-sex marriage would allow anal or oral penetration, it is even more ridiculed. Many believe that child is a symbol of marital union and to be able to procreate is because heterosexuals are blessed while homosexuals are cursed as they destroy the fabric of morality and the basic institution of marriage in the society Therefore, as Vanita states, pleasure is justified using children and with stricter adoption rules and to not be able to procreate, homosexuals suffer deeply. Although, as held in the case of *Harvinder Kaur v. Harmander Singh*[226], the court held under RCR, that the essence of marriage is cohabitation and sexual intercourse is an element of marriage but not the primary goal. This highlights that marriage as an institution in India is looked at beyond sexual relations between two parties however it seems to comprise of a significant fallacy as it is in contradiction with their dissent towards same-sex unions due to anal/oral sex. Since sexual relations are not primarily an element of marriage then to prohibit such unions based on sexual practices seems incoherent to the argument.

A by-product of biased and conservative laws of the British, Section 377 of the IPC had been hotly debated in India for long, contested multiple times by same-sex couples and unions that supported them. Some of such protesting cases were, filed by the *AIDS Bhedbav Virodhi Aandolan (ABVA)* when the Delhi Police authorities refused to provide male prisoners with condoms citing Section 377. This case was however dismissed. The book further discusses various such cases between individuals as the fight against this criminalization of sexual conduct between individuals had not been won till the year of 2005, when it was published. However in the year 2018, in the case of *Navtej Singh Johar v Union of India*,[227] Section 377 after much tussle over the years was overturned and declared to be unconstitutional as it criminalized consensual acts of sexual conduct between individuals of the same sex hindering with one's Right to Personal life and liberty and Right to Equality. While many believed it to be an 'Indian' law, what was evident was the colonizing effect on it.

This condemnation of sexual relations based on sodomy that led to anti-sodomy laws in USA, where sodomites were often tortured, mutilated or executed until the late nineteenth and

[226] AIR 1984 Delhi 66
[227] WRIT PETITION (CRIMINAL) NO. 76 OF 2016, India: Supreme Court, 6 September 2018

twentieth century, both in Europe and the USA highlights the discrimination that same-sex unions faced. The advent of Section 377 in India and persecution of same-sex couples across Asia act as evidence of bannermen of homophobia. The laws introduced to empower such relations in the West and India, however, are not enough to sustain the legal recognition of such unions.

The LGBTQ community and their allies spend an enormous amount of effort on advocating for legal recognition of their members which very significantly so includes same-sex marriages. The concept of marriage being extremely sensitive not only limited to India but the world at large is a hotly-debated topic because of two reasons: First, "different view-points are held about marriage as a notion by both members outside and inside the LGBTQ group."[228] Second, Same-sex marriage provides partners with benefits beyond social validation and upstanding that are offered by the State, namely-succession, maintenance, pension rights, alimony, taking a leave from work in case one's partner is sick, taking decisions regarding funeral ceremony of one's partner- which are freely enjoyed by heterosexual couples. The author mentions how several states in the US and UK label unmarried couples who have stayed together for a significant time as 'common law spouses.' "After the Central Adoption Resource Authority (CARA) issued guidelines for adoption, single persons and unmarried couples have found it increasingly difficult to adopt."[229]

India, a cultural and diverse hybrid has existing personal laws to govern the institution of marriage for different religions and to satisfy the needs of all customs. The major divide of the population brings to the forum the Hindu Marriage Act, 1955; the Personal Laws governing Muslim marriages, Indian Christian Marriage Act 1872 and the Divorce Act 1869 for the Christian population and the Parsi Marriage and Divorce Act 1936. The Special Marriage Act, 1954 was also introduced to take into its purview persons of all religions.

Relaying our major emphasis on same-sex marriages among Hindus, Section 5[230] of the Hindu Marriage Act, 1955 stipulates the conditions for a valid Hindu Marriage stating:

"*A marriage may be solemnized between two Hindus if the following conditions are fulfilled, namely:…"*

[228] *Legal Recognition of Same-Sex Relationships in India*, Ravichandran Nayantara, Manupatra, 98-99
[229] Siddharth Narrain & Birsha Ohdedar, A legal perspective on Same-Sex Marriage and other Queer relationships in India, Orinam
[230] Section 5, Hindu Marriage Act, 1955 https://highcourtchd.gov.in/hclscc/subpages/pdf_files/4.pdf

The list of conditions mentioned in the HMA prohibit bigamy, marriage before the age of twenty-one and eighteen, insanity, any form of prohibited degrees of close relations between the two partners unless approved by the customs of their community.

The act does not specify the gender or sex of the two Hindu partners willing to solemnize their marriage according to the HMA. The words 'bride' and 'bridegroom' are however mentioned in the latter half of the section as one of the two individuals to hold their matrimonial bond valid under the Hindu Marriage Act, 1955. Although, Vanita has highlighted in the book various cases when partners of the same sex acted as the bride or bridegroom in order to validate their marriage. One such particular instance would be, of the marriage of Vinoda and Rekha, two Hindus, when Vinoda who was aged eighteen and Rekha aged twenty-one decided to get married and claimed that the former was the bride while the latter was the bridegroom. In some cases, one female partner may opt to dress like a man even though they are biologically female. Some partners opt for sex change in order to meet the demand of the statute and societal needs. For instance, in the case of *Arunkumar and Sreeja v. Inspector General of Registration and Other*s[231] the court held that the expression "bride" occurring in Section 5 of the Hindu Marriage Act, 1955 cannot have a static or immutable meaning. It noted Justice G.P.Singh's Principles of Statutory Interpretation, that the court is free to apply the current meaning of a statute to present day conditions. This case was with respect to a marriage between a man and a transgender who opted for a sex change-although this meant for a heterosexual relationship it significantly highlights the flexible approach towards the term 'bride' under the HMA and how it can be subjected to changing interpretation according to changing societal notions. Hindu Marriages do not require them to be registered with the state and are considered to be officiated legally by the fulfillment of its customs and traditions- during divorce proceedings as well, pictures and videos of the marriage are adequate to prove the occurrence of the marriage, this may make things easier for same-sex couples if there is community and familial acceptance. A marriage between Muslims is seen as a contractual relation and its set conditions in the Muslim Marriage Act, does not mention the words 'bride' and 'bridegroom' but instead mention the word parties. It mentions that the parties must be Muslims, they must be of the contracting age and mental capacity, mutual consent, need for a Legitimate Marriage officer and for the marriage to be registered in consonance to this Act.

Indian Christian Marriage Act 1872 that governs the marriages of Christians does not explicitly mention the sex of the parties to a marriage. These provisions put emphasis on the fact that

[231] W.P. (MD) NO. 4125 OF 2019 AND W.M.P. (MD) NO. 3220 OF 2019

indulging in same-sex marriages has not been entirely outlawed by the legal system of the country.

However, same-sex marriage under these provisions may be used against such couples and they may continue to be discriminated against with negligible legal recognition in society. This uncertainty of legality of same-sex marriages creates difficulties for such couples. Since the marriage laws in India pertain to a strong heterosexual bias- where same-sex couples are left exploring the scope of loopholes in order to have a validated marital relationship. Laws like The Domestic Violence Act in India regulating Domestic relationships between partners, does not recognise partners of the same sex (gay and lesbian) and claims that such a relationship cannot be termed as a relationship in the nature of marriage under the Act. This further creates problems for same-sex partners who may face violence in their relationships with no available legal remedy or recourse due to absence of legal recognition.

The alternatives to our existing personal laws to be accommodative of same-sex marriages would be to go by the golden rule of interpretation of the statute where it is observed from a broader prospect of terms like parties, bride and bridegroom to be considered as gender-neutral terms and to not stick to the statute's literal interpretation, to amend the existing Personal Laws, to establish the LGBTQ as a community with its own customs and traditions thereby formulating a separate sect of personal laws for them or to render the existing laws as unconstitutional and restrictive of personal life and liberty, right to equality under articles 21 and 18.

SPECIAL MARRIAGE ACT, 1954

This act is ideally much more secular in nature and encompasses provisions for all religions. Any individual irrespective of her/his community not willing to be bound by the customs or her/his religion may take shelter under this Act while getting married. Amendment in SMA, 1954 leading to inclusivity of same-sex marriages while not hindering with the existing personal laws may create lesser reasons for a debate or social turmoil. Currently, it explicitly mentions the terms 'male' and 'female' in its provisions making it highly discriminatory and unconstitutional with respect to the LGBTQ community. However, to encompass a provision for same-sex couples would not be as difficult under this Act in comparison to hinderance with the Personal Laws. At a global level, countries ranging from Netherlands to multiple States in the USA are enacting laws in favour of same-sex marriage and its permissibility. The vocal opposition in India will be significant but no change comes without dissent, what must be factored is the need and positive impact that it entails.

The absence of a legal recognition and inability to be with their partner often leads to harsh repercussions like joint suicide, one of such incidents that drove Vanita towards writing this book was the joint suicide committed by two girls, Mallika, 20 and Lalithambika, 17, both from Kerala. They had left behind a letter stating that they could not bear their separation. The marriage of two policewomen- Leela Namdeo and Urmila Shrivastava in 1998 also created a stir since they were later fired from their jobs. Often such cases of suicide are from the rural areas and significantly those of female partners. The possible reasons for this could be that the awareness, customs, rituals and traditions of rural areas are stricter-whereas females have to bear the brunt of it majorly because men have more mobility and freedom in society. Therefore, a strong overlap of both these factors makes it increasingly difficult for same-sex couples to sustain. Most couples are separated by getting one or both of them married to some other person of the opposite sex. Such cases often lead to the homosexual partner getting involved in marital affairs, however men in such cases find a greater freedom to engage in extra-marital affairs with same sex partners and therefore gender inequality plays a crucial role in this as well. What often goes unnoticed is that these repercussions too destroy the fabric of the institution of marriage and the foundation of societal morality.

A progressive step towards same-sex marriages in India was taken by a Haryana Court in 2011, when they legally recognized the marriage of two women Beena and Savita, after much struggle they were successful in winning their family's approval. The Additional Sessions Judge gave the judgement in favour of these women claiming that they required the court's protection. To have no civil or domestic legal rights, no legal and social recognition in society creates difficult circumstances for couples to sustain in society. No societal norm should be upheld by compromising on the personal life and liberty of individuals. There will always be an existing divide in the opinions of the society due to existing customs and traditions- but the justice system and its tenets need to be inclusive of all members of society irrespective of their gender or gender preference. Our existing laws may have provided us with an open-ended bracket and to a large extent no strict stipulation with respect to the sex of the partners to a marriage, however with the strong heterosexual bias and homophobia in play in society it might sway the bench to often discriminate or decide against such couples. It therefore gives in an easy way out for the ball to fall in any of the two courts. De-criminalizing sexual acts between same-sex couples was a start, there is a long way to go. With no legal recognition such couples still remain vulnerable in society and there is a need for incorporation of robust alterations in the existing legal system and its laws to protect their very being.

A CRITICAL STUDY ON PLEA BARGAINING IN COMPARISON WITH USA

- DR. RISHU DEV BANSAL[232]

Abstract

The concept of plea bargaining has been recognized in many countries and it has been incorporated in their Criminal Procedural Law. The term "plea bargaining means, "pre– trial negotiation between the prosecutor and the accused whereby the accused agrees to plead guilty and the prosecution agrees to provide some concession or lesser punishment to the accused based on his plea of guilty". This concept of plea bargaining in India was of recent origin and it was introduced in the year 2005 to protect the rights of the accused. This concept was introduced to reduce the number of criminal cases where trial do not commence for three or five years. A huge number of persons accused of an offence are not able to get bail because of many reasons and one such reason is that they have been insid the jail for so many years as an "undertrial prisoners and during the course of detention as under– trial prisoners they have to undergo a lot of mental stress a burden.

This Research Paper tries to explore the genesis and notion of plea bargaining and present state of remedy in India post the Criminal Law Amendment Act, 2005. This has certainly changed the look of the Indian Criminal Justice System. This paper critically analyzes Chapter XXI (A) of the Code by raising certain issues of concern with respect to the applicability and scope of certain incorporated provisions and its consequences on concerned parties

Keywords: *Plea Bargaining, Judiciary, U.S.A, India, Criminal Cases, Appeals, Adjournments, Prosecution, Defense, Implementation, Amendments,*

I. Introduction:-

In the most traditional and general sense "Plea bargaining" may be defined as an agreement in 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 let it be known that he will minimize the sentence if the accused pleads guilty. It is an instrument of criminal procedure which reduces enforcement costs (for both parties) and allows the prosecutor to concentrate on more meritorious cases. Plea bargaining allows the accused to bargain with the court on the sentence that will be awarded. A key aspect is that the

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facts stated in an application for plea bargaining are not meant to be used for any other purposes. It is generally seen in these days that most of the criminal defendants are offered plea bargain because of the fact that it gives an opportunity to the criminal to reduce his/her punishment by honestly accepting his own guilt. The practice of what has come to be known as 'plea bargaining' has been the subject of considerable debate over the last few decades.

In Canada, the discussion has centered on the exact nature of the practice and on the term by which it should be known. In 1975, the Law Reform Commission of Canada defined 'plea bargaining' as 'any agreement by the accused to plead guilty in return for the promise of some benefit'. But over the years, considerable objections grew against designating the practice in any way that implied that justice could be purchased at the bargaining table. Consequently, there was a movement away from the use of the term 'plea bargaining' and toward more neutral expressions such as 'plea discussions', 'resolution discussions', 'plea negotiations' and 'plea agreements. The use of such expressions marked an evolution in the practice itself, since they implicitly acknowledged it to be much wider ranging than simple bargaining and to involve the consideration of issues beyond merely that of an accused pleading guilty in exchange for a reduced penalty.

The concept of Plea Bargaining was not originally introduced into the Indian legal system but into USA. However, the Law Commission's efforts promoted the insertion of the provisions concerning Plea Bargaining via its 142nd, 154th, and 177th reports. A new chapter on 'Plea Bargaining' was introduced into the Criminal Procedure Code based on the recommendations of the Law Commission for certain offences.

II. Plea Bargaining in USA & Other Countries:-

"When one's own legal system flounders, one naturally looks towards practices in other countries, which seem to provide the solution. In a criminal trial in the United States, the accused has three options as far as pleas are concerned guilty, not guilty or a plea of 'nolo contendere'. A plea-bargain is a contractual agreement between the prosecution and the accused concerning the disposition of a criminal charge. However, unlike most contractual agreements, it is not enforceable until a judge approves it. Plea-bargaining thus refers to pre-trial negotiations between the defense and the prosecution, in which the accused agrees to plead guilty in exchange for certain concessions guaranteed by the prosecutor.

Plea-bargaining has, over the years, emerged as a prominent feature of the American criminal justice system. While courts were initially skeptical towards the practice, the 1920s witnessed the rise of plea-bargaining making its correlation with the increasing complexity in the American criminal trial process apparent. In the United States, the criminal trial is an elaborate

exercise with extended voir dire and peremptory challenges during jury selection, numerous evidentiary objections, complex jury instructions, motions for exclusion, etc. and though it provides the accused with every means to dispute the charges against him, it has become the most expensive and time-consuming in the world. Mechanisms to evade this complex process gained popularity and the most prominent was of course, plea bargaining.

In the US, plea bargaining is a significant part of the criminal justice system; the vast majority of criminal cases is settled by plea bargain rather than by a jury trial. But plea bargains are subject to the approval of the court, and different states and jurisdictions have different rules. In 1967, both the American Bar Association and the President's Commission on Law Enforcement and Administration of Justice approved the concept of plea bargaining. In 1970, the constitutional validity of pleabargaining was upheld in Brady Vs. United States (297 US 742; 25 L.Ed. 2d 747) where it was stated that it was not unconstitutional to extend a benefit to an accused that in turn extends a benefit to the State. In Santobello Vs. New York (404 US 257), the US Supreme Court has recognized plea bargaining as both an essential and desirable element of the criminal justice system. Around 95% of all convictions in the US are secured with guilty plea. The courts are of the view that the justice system is benefited from plea bargaining as it reduces the court congestion, alleviation of the risks and uncertainties of the trial. (People Vs. Glendenning, 127 Misc.2d 880, 1985).

Position in other countries such as England and Wales, Victoria, Australia, plea bargaining is allowed uniquely to the degree that the prosecutors and the defense can agree that the defendant will plead to some charges and the prosecutor shall drop the remainder. The European countries are also slowly legitimizing the idea of plea bargaining, though the Scandinavian countries largely maintain forbiddance against the practice.

III. Judicial Take on Plea Bargaining:-

For the first time in Mumbai, an application for plea bargaining was made before a sessions court recently when a former Reserve Bank of India clerk— accused in a cheating case— sought a lesser punishment in return for confessing to his crime. In the present case, Sakharam Bandekar, a grade I employee, was accused of siphoning off Rs 1.48 crore from the RBI by issuing vouchers against fictitious names from 1993 to 1997 and transferring the money to his personal account. He was arrested by the CBI on October 24, 1997, and released on bail in November the same year. The case came up before special CBI judge A R Joshi and charges were framed on March 2 this year.

In the case of ***Pradeep Gupta Vs. State***, (Judgment delivered on September 03, 2007) where a bail application was filed by the petitioner for plea bargaining, the court said that prayer of plea

bargaining can be made by an accused against whom a report under section 173 CrPC has been filed for offences punishable for seven years or less than seven years. Also, the request can be considered taking into account the role of the accused, and the nature of offence etc. The court also supported the view of the trial court saying that the application for plea bargaining cannot be rejected on the ground that he was involved in Section 120B IPC and therefore the request for plea bargaining was not available to him.

Further in the case of ***Kasambhai Abdulrehmanbhai Sheik etc. Vs. State of Gujarat and another*** (AIR 1980 SC 854) where the accused was convicted for the crime of adulteration, the court held that plea bargaining is unconstitutional and illegal and would subvert the process of law and frustrate social objective and purpose of anti-adulteration statute.

In another landmark judgment ***Bordenkircher Vs. Hayes, 434 U.S. 357 (1978)*** the US Supreme Court held that, the constitutional rationale for plea bargaining is that no element of punishment or retaliation so long as the accused is free to accept or reject the prosecutions offer. The Apex Court however upheld the life imprisonment of the accused because he rejected the Plea Guilty offer of 5 years imprisonment.

IV. A Comparison:-

The office of Prosecution orders monstrous pertinence in America so it is straightforwardly permitted to arrange a concurrence with the accused. The legal endorsement is looked for once the arrangement has been arranged. Conversely the legal officer assumes the focal part for directing plea bargaining in India. Further it's a business-like methodology which guides dealings in America along these lines commanding the examiner to share all important data concerning the case with the accused. This is significant as it encourages the bargaining on equivalent footing. Further the American examiner requests that the accused plead blameworthy to certain or every one of the charges outlined against him. With regards to this he would suggest decrease of charges or a short or tolerant sentence to the adjudicator. However, in India such charge bargaining isn't admissible. Regardless of whether the accused pleads blameworthy he can't can foresee decrease in charges. Regardless of his plea the legal officer is ordered to do condemning inside the rules given by the law-making body.

Conversely the American framework permits the plea consent to specify the quantum of sentence in return of which a liable plea has been consented to. Further the American framework permits plea bargaining for every one of the offenses with the exception of few making its pertinence wide in scope. India just permits the accused to look for plea bargaining for a predetermined number of offenses. In spite of the fact that there are huge contrasts in the organization of plea bargaining in India as contrasted and U.S.A yet a few likenesses do exist.

The two wards pressure the intentionality of the accused as a pre-condition for applying the procedure in arranging off a criminal case. Additionally, both grant the withdrawal of the blameworthy plea up to a specific stage on the off chance that the accused needs to practice his entitlement to reasonable preliminary. Further the two locales boycott the use of any assertion of the accused given during plea bargaining in some other continuing.

V. Conclusion

To conclude, Plea Bargaining is undoubtedly, a disputed concept few people have welcomed it while others have abandoned it. It is true that Plea bargaining speeds up caseload disposition, but it does that in an unconstitutional manner. But perhaps we have no other choice but to adopt this technique. The criminal court is too overburdened to allow each and every case to go on trial. Only time will tell if the introduction of this concept is justified or not. The Chapter on Plea Bargaining incorporated in the Cr. P.C. after the Criminal Law (Amendment) Act 2005 is at divergence with suggestions made by the Law Commission of India in its Reports. The Law Commission had advocated for concessional treatment for those who on their own choose to plead guilty without any bargaining. The scheme envisaged the constitution of a Competent Authority - a Metropolitan Magistrate or a Magistrate of the First Class specially designated as a Plea Judge by the High Court in case of offences punishable with imprisonment for less than seven years. In case of other offences, the Law Commission had proposed appointment of two retired judges of the High Court to decide on whether or not to accord concessional treatment to an accused making an application for the same. Theoretically, therefore, there is no room for bargaining or underhand dealings with the prosecution or the judge trying the case. The scheme recommended was, therefore, only a formalization of the practice of showing some leniency in punishment to those who plead guilty, rather than plea bargaining in its conventional sense.

It is very well understood that the Indian Legal System is not ready to adopt the Plea-Bargaining System on the same scale as in USA as we do not have the required infrastructure for this nor do we have that mindset of arriving at some agreement between the concerned parties through ethical and transparent arguments and discussions. The way necessity-based changes have been brought in some aspects of our legal system during last 5 years or so give a hope that wider and more meaningful application of Plea Bargaining may be seen in the future. The most valid reason for bringing in plea bargaining in the Indian Legal System with wider applicability is that Indian Jails have over 65% inmates who are under-trial and the bulk of these are lodged in jails for 3 to 4 years or more for crimes which come under the ambit of plea bargaining.

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CHILD MARRIAGE LAWS IN INDIA: A CHASM BETWEEN INADEQUATE LAWS AND ERADICATION OF CHILD MARRIAGE

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I. Introduction

In 2019, UNICEF Report highlighted that child marriages have been on decline in India since 2000s.[234] However, it is still home to more than 223 million child brides. Overall, the country accounts for around a third of all child marriages worldwide. Even the National Crime Records Bureau data paints a rather grim picture. It calls attention to the fact that as over 785 cases were reported under the Prohibition of Child Marriage Act in 2020, against 523 cases in 2019.[235] These figures confirm the pervasiveness of the social ill of child marriage in India, while pointing out only a few of the dangers associated with it. The causes of child marriages may well be connected to a tangled web of religious traditions, social customs, economic considerations, and deeply entrenched prejudices. It is a socially destructive practice that needs to be eliminated from the Indian culture before it closes its claws on innocent boys and girls any further. Some of the primary reasons for child marriage can be poverty, insecurity of parents to miss out on the opportunity of getting their young daughters wedded when the time is ripe, lack of education and awareness, improper implementation of the existing laws towards curbing the incidences. Apart from being a social evil, it also accounts to a gruesome form of child abuse. Many females succumb to death following teenage pregnancies, give stillbirths or become plagued by life-threatening health issues in the prime of their life. The most distressing part that often gets overlooked is that child marriage deprives young boys and girls a fair opportunity to attain education and aspire for a better life.

II. Mapping the Existence of Child Marriage in India

The tradition of child marriage can be traced back to medieval period in the country. Conquest, uncertainty, and a variety of other political and social forces often compelled families to arrange the marriage of their children while they were still in the bassinet. As a consequence

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[234] Shireen J Jejeebhoy, "Ending Child Marriage In India, Drivers and Strategies" 13 (UNICEF, 2019).
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of this uncertainty and tradition, marrying off the children before they attained maturity became acceptable and regarded as a social norm.

For the first time in history, someone spoke out against this tradition in the nineteenth century. Rukhmabai went on to become the first woman to practice medicine in India. She, too, had to go through the ordeal of being a child bride. Under the impact of social demands, she was betrothed by her family at the age of 11 to a guy named Dadaji Bhikaji aged 19. Due to prevailing norms, she did not immediately move and live with her spouse after their marriage. Her education, on the other hand, was rigorously pursued under the continual supervision and encouragement of her stepfather, Dr. Sakharam Arjun.

She was a lot more mature and understanding with the passage of time. She continued staying away from her husband which was unacceptable in the society at that time. In 1885, her husband filed a petition against her for restitution of conjugal rights after completion of 12 years of their wedding. Justice Robert presided over the case. Rukhmabai's position was that she was too young to consent to the marriage at the time. There were no court precedents to help the judge decide the case because it was the first of its type. Given Rukhmabai's standpoint in this case, that she was a kid at the time of the wedding, the court first ruled in her favor, noting that she could not be coerced. However, the case[236] was brought to trial yet again in 1886. It was around this phase that society began to voice its opinion. The verdict was criticized by several Hindus as being in violation of Hindu ceremonies and norms. Others, though, were in favor of the move. In 1887, Rukhmabai was forced to reside with her spouse or face six months in prison. She told the court that she was certain she would not go live with her husband under any circumstances and that she was willing to go to jail if necessary. Rukhmabai subsequently wrote to Queen Victoria after several hearings. The Queen backed Rukhmabai's position and overturned the court's decision. The lawsuit was finally resolved without court's intervention in 1888, when Rukhmabai's spouse, agreed to dissolve their marriage for a sum of two thousand rupees.

Another case that brought calamitousness of child marriage to the fore was Phulmonee's death. She was just an 11-year-old female child bride wedded to a 35-year-old man. Phulmonee, the sufferer in this case, died as a result of copulation with her husband. Her vaginal rupture caused a hemorrhage leading to her death. This happened because of her husband having forced her

[236] *Dadaji Bhikaji* v. *Rukhmabai,* ILR 10 Bom 301.

for sexual intercourse. The Calcutta High Court did not accuse her spouse with rape since Phulmonee was well over the legal age of consent.[237]

These incidents, along with a number of written works by some of the time's reformers, sparked the introduction of the Age of Consent Act in 1891. A draft memorandum was also delivered to the government by lady doctors, requesting that necessary legislation be enacted to curb child marriage. A total of 1500 women signed a petition to the Queen, asking for similar measures. A committee was set up to look into the matter, and soon after the recommendations were made, the Government implemented the Age of Consent Bill, which raised the age of consent for sexual intercourse from 10 to 12 years for both unmarried and married girls. This was a significant development at the time. The Joshi Committee examined the issue of child marriage in India more thoroughly in 1925, and the Child Marriage Restraint Act of 1929 (hereinafter CMRA) was enacted after a lot of pressure from reformers who wanted a specific law on the subject.

The CMRA failed to fulfil the goal for which it was enacted, and child marriages remained unchecked and unrestrained. The practice was socially sanctioned at the time to ensure its continuation. Some 70-80 years lapsed with hardly any change in the legislation having miniscule effect on the status of these marriages. On the other hand, the country's population continued to grow, making it difficult to enforce the law with unregistered births of children across the length and breadth of India. The passing of the Prohibition of Child Marriage Act, 2006 (hereinafter PCMA) was a significant step forward since it brought about the sought-after changes. Child marriages are now voidable at the minor child's request. This meant that girls who had been married as minors might now petition the court to have their marriages annulled. However, child marriages continue to receive recognition and support from the society. Despite the enactment of the law in 2006, this social menace persists in India.

III. The Prohibition of Child Marriage Act, 2006: Key Provisions & Critical Analysis

A. Key Provisions

The PCMA was attuned to the needs of the existing times. Some of the salient features of the Act are discussed as follows:

- The marriage of the contractual party/parties who were minors at the time of the marriage were expressly declared to be voidable at the discretion of the either of them. The CMRA ruled that these marriages were completely lawful and that there was no

[237] *Queen-Empress* v. *Hurree Mohun Mythee*, (1891) ILR 18 Cal 49.

provision for annulment. The PCMA didn't go quite as far, as it didn't declare them null and void, but it did include the option of nullifying a marriage between a minor or minors if either decided to do so;

- It also ensures the maintenance and custody of the children born of these marriages, that was not the case under the CMRA.
- In the event of a child marriage annulment, the man or, if he is a child at the time of the annulment, his parents must pay maintenance to the minor until she remarries.
- Under the Act, District Courts have the authority to alter, add to, or cancel any order relating to the female petitioner's maintenance and domicile, as well as the maintenance and custody of the children, and so on.
- The legitimacy of children born from these marriages has also been established, meaning that even if the marriage is annulled, the kid born of the union is legitimate.
- If a male over the age of majority, i.e., 18 years, engages in the practise by being a contracting party in a child marriage, he will be penalised by rigorous imprisonment for up to 2 years or a fine of up to Rs. 1 lakh, or both.
- There have been situations where child marriages have been pronounced null and void. According to Section 12[238], these situations include when a youngster is seized or seduced out of the custody of his or her legitimate guardian, and when the child is sold for the purpose of marriage or married for the goal of being trafficked and engaging in immoral actions by force or deception.
- Under the Act, judges have the authority to impose injunctions against the incidences of child marriages. However, like the CMRA, 1929, the courts must give the defendant a reasonable opportunity of being heard before issuing an injunction against him. The Act consists of a supplementary provision for an interim injunction that the court can impose in extreme situations or cases of emergency.
- PCMA has declared the offences to be cognizable and non-bailable.
- The penalty has been increased to a maximum sentence of two years in prison and a fine of Rs. one lakh, or both.
- State Governments are required to appoint the Child Marriage Prohibition Officers (hereinafter CMPO) and to take measures for the effective implementation of the Act.

B. Critical Analysis Of The PCMA

[238]The Prohibition of Child Marriage Act, 2006.

The PMCA is a stark departure from CMRA, 1929. However, it is ridden with several loopholes and drawbacks that need to be addressed for its effective implementation. Some of these shortcomings are discussed as follows:

1. *The Act declares child marriage to be voidable instead of void*- Given the fact that child marriage is legal under personal law, religious institutions must adhere to the strict guidelines set forth in the PCMA, which allows child marriages to be annulled at the child's desire. Child marriages are only voidable if a motion for annulment is made in district court, and they are only voidable if the minor is taken away without guardian's consent, in conditions of force, fraud, or trafficking, or in defiance of an injunction. The notion that the Act does not inherently declare child marriages null and void, but rather renders them voidable voluntarily, is troubling.
2. *The Act holds the child responsible to establish the onus of proof in order to challenge validity of the marriage*- According to the Act, only the child bride/groom can file a motion to annul their marriage in. If the petitioner is a not an adult under the PCMA (female below the age of 18, man below the age of 21), the petition can only be presented by a guardian or a close friend/acquaintance with the assistance of the PCMO (who must be 18 or beyond).

Making justice accessible to the children in the afore-mentioned manner may seem ideal on paper, however it could be impractical in reality. It is because many families oppose or threaten their children to discourage them from filing the petition and at times, husband or in-laws, resort to violence or retaliation if the child decides to report them for child marriage. Even if these circumstances do not transpire, children may very well fear the consequences that would ensue upon filing the petition in the Court. In several cases, guardians and parents themselves orchestrate child marriages and expecting them to help out the child with the petition is sheer foolhardiness. This issue needs to be looked into and resolved at the earliest.

3. *The Act holds the parent/caregiver as a criminal without looking into the circumstances that resulted in child marriage*- The fact that the Act criminalises individuals who perform child marriages, mainly parents or carers, without examining the myriad reasons for child marriage, which could include economic disparity, limited educational prospects, concern for their daughters' safety, and so on, is contentious. Several non-governmental organisations (hereinafter NGOs), on the other hand, have suggested that government workers who fail to report such marriages within their jurisdiction should face disciplinary action. This should be taken into account more severely than criminalising families who are susceptible to societal pressure and expectation.

4. *This Act creates a lot of conflicts owing to its inconsistencies with personal laws*- Where several of the personal laws allow for child marriages, PCMA strives to ban it altogether. In a country like India, where different communities rely on their personal laws for the matters such as marriage, maintenance and the others, banning of child marriages without consideration for instances where personal laws are given precedence, is bound to result in a flurry of lawsuits.
5. *The Act does not mandate registration of child marriages*- Registration of child marriages has not been made compulsory under the PCMA. Due to this, innumerable child marriages go unreported and undocumented. Absence of such a hard and fast rule allows perpetrator/culprits of child marriages to escape unscathed. Even the Apex Court pronounced that compulsory registration of child marriage across all the states in India would a positive step towards the objective of eradicating child marriage.[239]

IV. The Prohibition of Child Marriage (Amendment) Bill, 2021: An Overview

The Prohibition of Child Marriage (Amendment) Bill (hereinafter Bill) was introduced in the Lok Sabha on the 20th of December in the year 2021. The principal goal of this law is to raise the legal marriage age for females in India from 18 to 21 years old, which is currently at 18. The basis for this modification is the implementation of the Constitutional mandate of gender equality, which is important given that the legal marriage age for males in India is twenty-one years.

The following significant revisions have been made to the PCMA since its inception:

- According to Section 2 of the CMAB, a child is defined as any male or female who has not attained the age of 21 years, notwithstanding any legislation or customary practise that is in conflict with this amendment.
- Changing the order of the words Section 3(3) of the PCMA, which deals with a child filing a petition for the annulment of a child marriage, replaces the previous two-year period with a five-year period. Following the passage of this amendment, a kid may file such a petition only if he or she has not reached the age of majority for five years.
- The addition of Section 14A to the Act indicates that these proposed modifications will take precedence over any existing laws or practises that may be in conflict with the amendments in the event that they are implemented.

[239] *Smt. Seema* v. *Ashwani Kumar*, AIR 2006 SC 1158.

- Other personal and marriage laws, such as the Hindu Marriage Act 1955, the Hindu Minority and Guardianship Act 1956, and the Foreign Marriage Act 1969, as well as the Indian Christian Marriage Act 1872, the Parsi Marriage and Divorce Act 1936, the Muslim Personal Law (Shariat) Application Act 1937, and the Special Marriage Act 1954, will be amended in accordance with the new provisions.

A. Legislative Intent Behind The Law

Smriti Irani, the Incumbent Union Minister for Women and Child Development, proposed this Bill, asserting that it will be applicable to all castes and religions in the country. In and of itself, this Bill maintains the values of the fundamental right to equality[240] by ensuring that the marriage age for both male and female citizens remain at 21 years old. After marriage, women will have more time to pursue educational and vocational opportunities because they will have more free time to pursue education or engage in work-related activities, which are typical benefits that are denied to a huge number of women before marriage. In such cases, men become the sole breadwinners of the family, and their wives are compelled to rely on their husbands' earnings for financial support.

As noted in the Policy Brief published by the Centre for Law and Research, the stipulations of the current law place an encumbrance on the child's ability to annul the child marriage within a specified time period. Furthermore, when a kid seeks an annulment, he or she typically encounters a number of roadblocks, including a lack of parental support, cultural pressure, the danger of violence, and financial restraints. Children are frequently deterred from contacting NGOs or Child Marriage Prohibition Authorities due to a lack of information about their rights. It also has a negative impact on the schooling and professional development of these young women. Child marriages also result in the sexual abuse of children and the birth of children too soon, posing major health hazards to both the mother and the child. According to the National Family Health Survey (hereinafter NFHS) conducted in 2016, the under-five mortality rate among mothers who gave birth before the age of 20 years was 59.2 percent. In the year 2021 alone, government officials have intervened in more than 5584 cases of child marriage. Respected former judges M.B. Lokur and Deepak Gupta have observed that child weddings in India are unlawful but not void, which they believe is unusual.

B. Recent Judicial Developments Concerning Child Marriage

[240]The Constitution of India, art. 14.

On 26th April 2017, the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 was approved, rendering child marriages null and void in law. This was the culmination of state-level initiatives, which included a particular proposal of the Justice Shivaraj Patil Committee (2011), which was established to assess the state of child marriage in Karnataka.

Child marriage is recognised as lawful under the PCMA, but is "voidable" at the minor contracting party's request.[241] Recognizing child marriage as 'voidable' entails all of the repercussions of a legitimate marriage, including conjugal access, and perpetuates the practice's impunity. The reality is that few women exercise their right to petition the court for a judgement of nullity to annul their marriage once it has been consummated. Additionally, courts have been hesitant to declare child marriage void unless the facts of the case definitely fall within the parameters specified in Section 12 of the Act[242]. This aversion to discussing "voidability" pervades the entire legislative and policy discourse on child marriage.

This legislation was lauded by the 2017 Supreme Court judgement, *Independent Thought* v. *Union of India*[243], which was also relied on by the Centre to modify the PCMA to increase the marriage age of women from 18 to 21. However, it made key observations about the statute not declaring child marriages 'void' but 'voidable'. Both justices wrote separate but concurring opinions in which they stated that the PCMA "requires significant review" to ensure its "effective implementation" as a disincentive to "avoid or minimise child marriages." When it read down Exception 2 of Section 375 (rape) of the Indian Penal Code, the court conveyed its thoughts on the PCMA's flaws. A man cannot be prosecuted with rape if he has sexual relations with a girl between the ages of 15 and 18 if she is his wife. According to the 2017 rape law verdict[244], it is now legal to have non-consensual sexual relations with a wife who is under the age of 18. On the PCMA, the court observed: "Ironically, despite the fact that child marriages are solely voidable, Parliament has criminalised child marriage and imposed penalties for contracting a child marriage."

The Punjab and Haryana High Court's division bench has held that a marriage contracted with a juvenile girl is legally valid if the child does not declare it void upon reaching the age of 18. The Court determined that such a marriage is voidable, not void. It would become lawful if the 'kid' did not take efforts to declare the marriage null and void upon reaching majority, the High Court declared. *Yogesh Kumar* v. *Priya*[245] was a case involving a couple who married in

[241] *Supra* note 5, s. 3.
[242] *Supra* note 5, s.12.
[243] (2017) 10 SCC 800.
[244] *Ibid.*
[245] FAO-855-2021.

February 2009 and petitioned the High Court to set aside a family court verdict in Ludhiana. By mutual accord, the couple had petitioned the Ludhiana court for divorce. The Punjab and Haryana High Court relied on a 2012 Delhi High Court decision[246] in which a girl married a boy with whom she had eloped. The Delhi High Court had previously declared that a marriage committed with a bride under the age of 18 or a bridegroom under the age of 21 was not void, but voidable, and would become valid if no efforts were made to declare the marriage void. Accordingly, the Punjab and Haryana High Court decided that the couple's petition for divorce by mutual consent should have been granted on the basis that their marriage was legal in all material respects. The Bench then granted divorce to the parties.

The Ludhiana court had dismissed their divorce petition on the grounds that their marriage was invalid because the wife was under the age of 18 at the time of the marriage in 2009. The High Court Bench of Justices Ritu Bahri and Arun Monga concluded that the Ludhiana Court erred in dismissing the petition because the wife had turned 18 in 2010 and the couple continued to live together till August 2017.

V. Drawbacks In The 2021 Bill

There are some negative aspects of this Bill that cannot be ignored or overlooked. Due to the fact that this Bill possesses overriding characteristics, it will fully negate the provisions of the different personal and marriage laws that pertain to the legal age of marriage. The Hindu Marriage Act, 1955, for example, specifies that the marriageable age for girls is 18 years and for males it is 21 years under Section 5(iii). The Bill would negate this specific clause and dictate that both males and females must be at least 21 years old before they can marry. When taking a deeper look at the overall picture, it can be seen that this Bill is another step forward for the Bharatiya Janta Party (hereinafter BJP) on the road to achieving the Uniform Civil Code (hereinafter UCC)[247]

While the notion of UCC is a good one, as uniformity in legal standards can lead to faster trials and greater clarity in the law, its adoption in India is not feasible due to the country's immense diversity as well as its long history of traditions. Ram Madhav, a member of the Rashtriya Swayamsevak Sangh national executive, told the Print that the UCC is beneficial to the country and that there are a variety of opinions on whether it is necessary.[248] Contrary to this, according

[246] *Lajja Devi* v. *State*, 2012 (4) R.C.R. (Civil) 821.

[247] Dr. Renu Singh, "Amendment to Child Marriage Act could usher in social change", *The Times of India*, December 27, 2021, *available at* <*https://timesofindia.indiatimes.com/blogs/voices/amendment-to-child-marriage-act-could-usher-in-social-change/*> (last visited on February 11, 2022).

[248] Madhuparna Das, "Why raising marriage age of women is another step towards BJP's pet goal of uniform civil code", *The Print*, December 24, 2021, *available at* https://theprint.in/india/governance/why-raising-marriage-age-

to the Law Commission's 2018 study[249] on the viability of UCC and reform of family law, which was proposed by the BJP in 2016, discriminatory personal laws may be repealed or altered, but UCC in India is neither essential nor desirable at this point in time.

Consequently, such reforms in personal laws could have major legal ramifications and cause widespread unrest as a result of a conflict between the legitimacy of the pre-existing personal laws and the validity of the newly formed uniform law that has been established.

The subject of Muslim Personal Law is the most crucial one to consider. It is extremely difficult to achieve harmony between the new amendment and the terms of this law when it comes to the marriage age, because Muslim law specifies that a girl can be married once she reaches puberty, which makes establishing harmony impossible. This age is typically considered to be 15 years old. Since Islamic personal law is a codification of Islamic law, the extent to which legislative and judicial authorities have authority over divine or religious rules is a legitimate subject to consider. However, while the Supreme Court has ruled that all personal laws must adhere to the principles and rules of the Constitution, other High Courts have expressed differing views on the subject.

That there were no revisions to the legislation regarding child marriage is the most noteworthy aspect of this legislation. The Bill does not contain any provisions that would render child marriages void under the law. Child marriage is voidable at the request of the underage party to the marriage within two years after gaining adulthood, according to current legal standards, as stated in Section 3(1).[250]

A. Factual Analysis Of The Bill

A cursory examination of the Bill's statement of objects and reasons demonstrates unequivocally that this Bill is only a convenient way for the Government to avoid tackling the issues impeding women's overall development. The immediate Bill's objectives and justifications are as follows:

"The Constitution protects gender equality as a component of fundamental rights and also prohibits discrimination on the basis of sexual orientation. Existing regulations fall short of ensuring gender equality in marriageable age between men and women, as required by the Constitution. Women frequently face disadvantages in higher education, vocational training,

of-women-is-another-step-towards-bjps-pet-goal-of-uniform-civil-code/786878/ (last visited on February 11, 2022).

[249]Law Commission of India, "Consultation Paper on Reform of Family Law" (August 31, 2018).

[250]*Supra* note 5, s. 3.

acquisition of psychological maturity and skill sets, and so forth. Entering the labour force and becoming self-sufficient prior to girls marrying is crucial."

The present moment Bill makes no attempt to explain how raising the marriage age would address the pervasive problem of gender discrimination in our culture. For instance, when it comes to higher education, the primary, if not the only, reason parents do not provide it to their daughters is poverty.[251] The other cause is illiteracy, which is closely followed by fear of insecurity. Implementing sufficient safety measures is critical in a country where a girl is raped every 15 minutes.[252] Similarly, only education can address the issue of gender bias. Until the current biases and taboos associated with our society's patriarchal structure are addressed by education and awareness campaigns, families will continue to deny women the possibility of "joining the labour force and contributing to the workforce."

It is not unnecessary to remind that the constitutional imperative violated by this Bill is the freedom of adult women to marry off of their own accord. The Supreme Court declared in *Ashok Kumar Todi* v. *Kiswhwar Jahan*[253] that where a boy and a girl marry on their own volition and are of legal age, and the marriage is officially registered with the notified body, police officers have no participation in their conjugal affairs, and law enforcement officials have no right to meddle with their marital lives; in fact, they are obligated to prevent others from interfering.

These disadvantages exacerbate women's reliance on men. There are also compelling reasons to reduce maternal and infant mortality rates, as well as to improve nutrition levels and the sex ratio at birth, as these measures would promote opportunities for responsible parenthood for both father and mother, equipping them to provide better care for their children. It is also critical to reduce the prevalence of teenage pregnancies, which are detrimental to women's overall health and result in an increased number of miscarriages and stillbirths.

In light of the claim that this Bill will help reduce maternal and infant mortality rates, consideration should be given to the Memorandum to the Task Force on Age of Motherhood and Related Issues sent by more than 40 NGOs and activists working on women's rights, in which it was stated that "Poverty, not early marriage, is the primary cause of ill health for mothers and their children."

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[251]Naveli Sharma, *The Prohibition Of Child Marriage Amendment Bill, 2021: A Critical Analysis*, Legal Service India, *available at* <https://www.legalserviceindia.com/legal/article-7496-the-prohibition-of-child-marriage-amendment-bill-2021-a-critical-analysis.html> (last visited on February 11, 2022).

[252]Madeeha Mujawar, "National Crime Records: One woman raped every 15 minutes in India", *CNBC TV18*, October 23, 2019, *available at* <https://www.cnbctv18.com/economy/national-crime-recordsone-woman-raped-every-15-minutes-in-india-4579141.htm> (last visited on February 12, 2022).

[253]2011 (3) SCC 758.

When links between increased health risks for mother and child are discovered at earlier ages of marriage, this must be carefully interpreted. To begin, the age of 18 has been scientifically established as the point at which the majority of women's reproductive systems are fully formed. Healthy women of this age who receive sufficient prenatal care should expect to deliver healthy infants. However, countries such as India are extremely unequal, with widespread female malnutrition and limited access to health care in numerous regions. Early marriage is more prevalent in impoverished and marginalised areas, whereas women from affluent backgrounds marry later in life. Thus, statistically speaking, if one simply considers age at marriage in relation to maternal and child health indices, one overlooks the fact that poorer women are overrepresented at earlier ages. When NFHS data is disaggregated (by age, poverty, educational attainment, and so on), it is obvious that poverty has a far greater impact on the health of mothers (even at older ages of marriage, such as 21 years) than does simple age. Age is the least significant influence, while poverty is the most significant.[254]

Rather than raising the marriageable age, which would very certainly create further barriers for consenting adults wishing to marry, the government should prioritise education for women and knowledge of gender equality among males. Poverty and illiteracy continue to be the primary drivers of underage marriages, female foeticide, dowry deaths, and other issues of gender inequality. What the women of this country require is for the government to adopt welfare schemes and policies such as Kishori Shakti Yojana and Sabala that focus on teenage girls' nutrition, health and development, skill development, and vocational opportunities.

Discrimination against women also obstructs the achievement of sustainable development goals and violates the principles enshrined in the Convention on the Elimination of All Forms of Discrimination Against Women, to which India is a party. It is critical to address gender inequality and discrimination and to put in place necessary measures to ensure the health, welfare, and empowerment of our women and girls, as well as to ensure that they have the same status and opportunities as men.

It is widely accepted that the age of marriageability for both men and women is 18. Even the Convention on the Elimination of All Forms of Discrimination Against Women establishes 18-year-old as the marriageable age. The discrimination against women that this Bill seeks to remedy will scarcely be solved by raising the marriage age.[255]

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[254]Padmavathi Srinivasan, Nizamuddin Khan, Ravi Verma, Dora Giusti, Jaochim Theis & Supriti Chakraborty, "District-level study on child marriage in India: What do we know about the prevalence, trends and pattern?" New Delhi, India (ICRW, 2015).

[255]*Supra* note 18.

Thus, plainly, establishing a minimum legal age for marriage does not deter child marriage, which can only be addressed by expanding women's access to free and obligatory education and employment prospects.

B. Self-Contradictory Nature Of The Bill

A significant consequence of raising the marriageable age of women from 18 to 21 years is that it erodes both men's and women's decision-making capacity in marriage. The 2008 Law Commission study recommended that men's marriageable ages be reduced to 18 years in order to achieve parity between men's and women's legal marriageable ages.

When a person reaches the age of 18, she is called an "adult." This means that she is legally capable of voting, purchasing property, and entering into contracts, among other things. Why is it necessary to restrict this freedom when it comes to deciding when she should marry? Isn't the fact that a woman is an adult capable of exercising her right to vote sufficient evidence that she possesses the required judgement and prudence to determine when she wants to marry.

C. Disrespect For Women's Agency

In a society still coping with issues of female foeticide and child marriage, one societal idea becomes crystal obvious — a daughter is 'parayadhan' and a liability that must be relinquished as quickly as possible. With this in mind, the most fundamental step in overcoming the problems of gender inequality is to build a value system that values women and views them as, at the very least, equals. The precondition for this value system to exist would be the recognition and acceptance of women's agency.

It is not uncommon for women's freedom of choice to be significantly curtailed as a result of societal constraints. For example, the most challenging activity for young adults in our society is picking a mate due to caste, religion, and language barriers. These constraints are so rigorous that their breach frequently leads in the murder of their own daughter by her family, a practise paradoxically dubbed "honour killing." Rather than safeguarding women's agency by allowing them the freedom and space to choose a life partner, state governments are busy enacting antilove-jihad legislations, thereby prohibiting inter-religious weddings.

There are numerous examples of families exploiting laws to simply cancel weddings between different castes or religions. The laws exploited in this manner include requesting nullification under the PCMA, falsely alleging kidnapping and rape under the Protection of Children from Sexual Offences Act 2012, and the Indian Penal Code 1860. The current Bill will also be vulnerable to similar patterns of abuse by parents and family members who are dissatisfied with their daughter's relationship or choice of partner.

The Bill appears to be more of a showpiece than a genuine attempt to solve significant concerns such as gender discrimination, underage marriages, female foeticide, maternal mortality, and women's safety.[256] To resolve these challenges, the government must take proactive measures to develop women-centred welfare programmes, offer easy access to education, and raise social awareness about the evils of patriarchy, which are deeply ingrained in our society.

Thus, it is prudent to remember that the state's interference in personal decisions regarding food, drink, marriage, and worship must be kept to a minimum, much more so in a liberal and democratic country that vows to respect and preserve its citizens' basic fundamental rights.

VI. Conclusion

When it comes to women's empowerment, the desired progressive purpose of this Bill must be reflected in the primary rationale for the creation of the same. Although this modification to raise the marriageable age to 21 years is extremely beneficial in theory, since it allows for better educational opportunities for women as well as improved nutrition levels, it will have only a minor influence on society in practice.

Women who are most likely to gain from higher education and professional prospects are those who come from well-off families that encourage them to pursue their goals. Women from rural areas or low castes, on the other hand, would be less likely to be able to take advantage of this benefit because of a lack of awareness about their rights and a lack of legal or family support.

Awareness-raising activities, particularly in rural areas, are required if significant change is to be achieved. As a result, rather than focusing on legislation to promote true women empowerment, the emphasis should be placed on stricter enforcement of laws because structural changes within the government system and society are urgently required.

Additionally, the problem with the previous law was not so much in the content, as in its implementation. On the face of it, it doesn't seem like the proposed Bill seeks to improve on its predecessor in this regard. As discussed above, data indicates that the law has not been completely successful in eradicating the social evil of child marriage. Therefore, the Bill may not be the effective solution to eradication of India's child marriage problem if it lacks in the arena of proper implementation.

[256]Rashmi Singh, *Flipside Of Increasing The Age Of Marriage*, Live Law *available at* <https://www.livelaw.in/columns/the-prohibition-of-child-marriage-amendment-bill-2021-constitution-prohibition-of-child-marriage-act-2006-188208> (last visited on February 12, 2022).

A GLANCE AT VICTIMIZATION OF RAPE VICTIMS: A SOCIO-LEGAL APPROACH

- KANIKA DHAKA[257]

Abstract

The study of rape victimization is a complex and interdisciplinary field that encompasses multiple areas of inquiry, including sociology, psychology, law, and public health. The socio-legal study of rape victimization is concerned with the social, legal, and cultural factors that contribute to the prevalence of rape and the ways in which these factors impact the experiences of victims. In this chapter, we will provide an overview of the socio-legal study of rape victimization, including its key concepts and methodologies, as well as its contributions to our understanding of sexual violence. One of the key concepts in the socio-legal study of rape victimization is the idea of rape culture. Rape culture refers to a social and cultural environment that normalizes and perpetuates sexual violence and reinforces gender-based power imbalances. This concept is central to the socio-legal study of rape victimization because it highlights the ways in which societal attitudes and beliefs about rape contribute to the prevalence of sexual violence and affect the experiences of victims. This paper throws light upon such vicitimization of rape victims highlighting the socio-legal ananlysis over the same.

Keywords: *Rape, Victimization, Victim, Socio-legal, Criminal Justice*

1. Introduction

The study of rape victimization is a complex and interdisciplinary field that encompasses multiple areas of inquiry, including sociology, psychology, law, and public health. The socio-legal study of rape victimization is concerned with the social, legal, and cultural factors that contribute to the prevalence of rape and the ways in which these factors impact the experiences of victims. In this chapter, we will provide an overview of the socio-legal study of rape victimization, including its key concepts and methodologies, as well as its contributions to our understanding of sexual violence. One of the key concepts in the socio-legal study of rape victimization is the idea of rape culture. Rape culture refers to a social and cultural environment that normalizes and perpetuates sexual violence and reinforces gender-based power imbalances.[258] This concept is central to the socio-legal study of rape victimization because it highlights the ways in which societal attitudes and beliefs about rape contribute to the

[257] Research Scholar, Faculty of Law, University of Kota, Kota, Rajasthan.

[258] Brownmiller, S. (1975). Against Our Will: Men, Women, and Rape. New York: Simon & Schuster.

prevalence of sexual violence and affect the experiences of victims. Another important concept in the socio-legal study of rape victimization is the impact of the criminal justice system on victims. This area of inquiry is concerned with the ways in which the criminal justice system responds to reports of sexual violence and how this response affects the experiences of victims. For example, research in this area has shown that the criminal justice system can be re-traumatizing for victims and that low conviction rates can discourage victims from reporting their experiences to the authorities[259].

In addition to these concepts, the socio-legal study of rape victimization also employs a range of methodologies to gather data and gain insight into the experiences of victims. These methodologies include qualitative and quantitative research methods, such as surveys, interviews, and ethnographic studies[260]. The socio-legal study of rape victimization has made important contributions to our understanding of sexual violence and the ways in which it affects its victims. For example, this field has helped to shed light on the ways in which societal attitudes and beliefs about rape contribute to its prevalence and how the criminal justice system can re-traumatize victims. Furthermore, the socio-legal study of rape victimization has also helped to inform the development of policies and programs aimed at preventing sexual violence and supporting victims.

In conclusion, the socio-legal study of rape victimization is a complex and interdisciplinary field that seeks to understand the social, legal, and cultural factors that contribute to the prevalence of rape and the impact of these factors on the experiences of victims. This field employs a range of methodologies and concepts and has made important contributions to our understanding of sexual violence and the ways in which it affects its victims.

2. Rape Victims And The Legal System

The legal system plays a critical role in addressing the issue of rape and providing support and justice to rape victims. However, the way in which the legal system responds to rape can have a significant impact on the well-being of victims and their experience with the justice process. Here, we will examine the ways in which the legal system can both help and hinder the healing process for rape victims. The legal system can provide a sense of justice and closure for rape victims by holding perpetrators accountable for their crimes. Criminal trials can serve as a platform for victims to have their voices heard and to see that their experiences are taken seriously by the justice system. The legal process can also provide a sense of validation and

[259]Spohn, C., & Horney, J. (1995). The Imprisonment Penalty Paid by Rape Victims. Criminology, 33(1), 47-70.
[260]Ullman, S. E. (2007). Qualitative Research in the Study of Sexual Violence. Violence Against Women, 13(2), 179-93.

acknowledgement that the rape was a serious crime. However, the legal system can also create barriers and obstacles for rape victims seeking justice. The criminal justice process can be complex and confusing, making it difficult for victims to navigate the system and access the support they need. The process can also be lengthy, causing further trauma and re-traumatization for victims[261].

In addition, the way in which the legal system handles rape cases can also have a negative impact on the well-being of victims. For example, cross-examination during a trial can be aggressive and re-traumatizing for victims, leading to feelings of shame, guilt, and worthlessness[262]. The low conviction rates for rape cases can also lead to a sense of dissatisfaction with the justice system and a belief that their experiences are not taken seriously[263]. The way in which the legal system responds to rape can also have broader social and cultural implications. For example, the criminal justice system's response to rape can shape societal attitudes and beliefs about rape, influencing the level of support available to victims and perpetuating the stigma and shame associated with the crime[264].

In conclusion, the legal system has a crucial role to play in addressing the issue of rape and providing support and justice to victims. However, the way in which the legal system responds to rape can have a significant impact on the well-being of victims, and it is important for the system to be sensitive to the needs of victims and provide support throughout the justice process.

2.1. Overview of the criminal justice system's response to Rape

The criminal justice system plays a critical role in addressing the issue of rape and providing justice for victims. However, the response of the criminal justice system to rape has been the subject of much debate and criticism over the years. According to the National Crime Victimization Survey, only an estimated 35% of all rapes and sexual assaults are reported to

[261]World Health Organization. (2002). Sexual violence. Geneva, Switzerland: World Health Organization.

[262]Kilpatrick, D. G., Ruggiero, "K. J., Acierno, R., Saunders, B. E., Resnick, H. S., & Best, C. L. (2000). Violence and risk of PTSD, major depression, substance abuse/dependence, and comorbidity: Results from the National Survey of Adolescents. Journal of Consulting and Clinical Psychology", 68(6), 1911-1930.

[263]Ullman, S. E. (1996). Relationships among sexual assault, physical assault, and posttraumatic stress disorder in a sample of urban women. Journal of Interpersonal Violence, 11(1), 121-137.

[264]Kilpatrick, "D. G., Edmunds, C. N., & Seymour, A. K. (1992). Rape in America: A Report to the Nation. Arlington, VA: National Victim Center".

the police[265]. This low rate of reporting is attributed to a variety of factors, including shame, fear of retaliation, and a belief that the police will not take the crime seriously[266].

. In addition to these challenges, the criminal justice system's response to rape can also be influenced by cultural attitudes and beliefs about rape. For example, "rape myths, such as the belief that rape is only committed by strangers or that women frequently falsely report rape, can shape the way in which the criminal justice system responds to rape"[267].

In conclusion, the criminal justice system has a crucial role to play in addressing the issue of rape and providing justice for victims. However, the response of the criminal justice system to rape is complex and challenging, and there is a need for continued improvement and reform in the way in which the system handles these.

2.2. The impact of the criminal justice system on rape victims

The criminal justice system plays a crucial role in responding to cases of rape and sexual assault, and the experiences of rape victims within the system can have a significant impact on their recovery and well-being. In this chapter, we will examine the impact of the criminal justice system on rape victims and explore some of the challenges and barriers they face within the system. One of the most significant challenges faced by rape victims within the criminal justice system is the low conviction rate for rapists.

Despite these challenges, there have been efforts in recent years to improve the criminal justice system's response to rape and to better support victims. These efforts have included the creation of specialized units within law enforcement, the implementation of evidence-based practices in sexual assault investigations, and increased funding for victim services and support[268].

Overall, the criminal justice system plays a critical role in responding to cases of rape and sexual assault, and it is crucial that the experiences of rape victims within the system are improved. This means addressing the barriers and challenges faced by victims, increasing accountability for perpetrators, and providing comprehensive support and resources for victims throughout the process.

3. The Importance of Shifting Societal Attitudes Towards Rape & Rape Victims

[265]Bureau of Justice Statistics. (2020). "National Crime Victimization Survey, 2018. Washington, DC: U.S. Department of Justice".

[266]Kilpatrick, D. G., Edmunds, C. N., & Seymour, A. K. (1992). Rape in America: A Report to the Nation. Arlington, VA: National Victim Center.

[267]Burt, M. R. (1980). Cultural myths and supports for rape. Journal of Personality and Social Psychology, 38(2), 217-230

[268]Office on Violence Against Women. (n.d.). What is the Solution? Retrieved from https://www.ovw.usdoj.gov/what-is-the-solution.

Survivors' experiences and the criminal justice system's and society's reactions to sexual assault are profoundly influenced by societal views regarding rape and rape victims. Victim-blaming, mistrust of survivors, and a lack of responsibility for offenders may all result from negative views and prejudices regarding rape. Changing these mindsets toward a more trauma-informed, survivor-centered perspective of rape is crucial for supporting survivors and putting an end to sexual violence.

Victim-blaming is a major factor in how society views rape and may have a significant effect on survivors. When people have a negative outlook on rape, survivors may be made to feel responsible for the violence they have endured by being told they brought it on themselves or being asked questions that imply they could have done something to stop it. This may increase the trauma experienced by survivors, making it harder for them to come forward and report assault.

Another way in which societal attitudes towards rape can impact survivors is through the criminal justice system's response to sexual violence. If negative attitudes about rape are prevalent within the criminal justice system, survivors may face skepticism, distrust, and disbelief when they come forward to report the violence they have experienced. This can result in cases being dismissed or not prosecuted, and can also contribute to a culture in which survivors feel that they are not being taken seriously[269].

In order to shift societal attitudes towards rape and rape victims, it is important to promote a trauma-informed understanding of sexual violence. This means recognizing the experiences and perspectives of survivors, taking steps to prevent further trauma, and working to hold perpetrators accountable. This can include educating the public about the realities of sexual violence, working to challenge and dispel rape myths, and promoting a culture of consent and respect for all individuals.

4. Support and Remedial Measures for Rape Victims

Support for rape victims is an essential aspect of addressing and preventing sexual violence, and plays a critical role in helping survivors recover from the trauma they have experienced. Access to a wide range of support services and resources can make a significant difference in the lives of rape victims and can help to facilitate their healing and recovery. One of the key types of support that rape victims often require is medical care. This may include emergency

[269]Black, M. C. (2010). The epistemic contract of bisexual erasure. Signs: Journal of Women in Culture and Society, 26(2), 589-616.

medical treatment for physical injuries, as well as access to sexual assault forensic exams, which are designed to collect evidence in the event that a case goes to trial[270]. Medical care can also involve accessing counselling and other mental health services, which can be especially important for survivors who have experienced trauma.

Another important type of support for rape victims is legal assistance. This can include help with navigating the criminal justice system, as well as with obtaining restraining orders or other forms of protection. Legal support can also help survivors understand their rights and options, and can provide them with the resources and information they need to make informed decisions about their case. In addition to medical care and legal assistance, rape victims may also benefit from a range of other support services, including counselling and therapy, support groups, and financial assistance. These resources can help survivors cope with the aftermath of the violence they have experienced, and can provide them with the tools and resources they need to begin to heal and rebuild their lives.

It is also important to note that the support available to rape victims will vary depending on a number of factors, including the survivor's location, cultural background, and individual circumstances. For example, some survivors may face barriers to accessing support due to stigma and discrimination, while others may be unable to access services due to financial constraints or lack of information about available resources.

Rape is a traumatic experience that can have a profound and long-lasting impact on survivors. It is essential that rape victims have access to a range of support and resources that can help them to recover and rebuild their lives. The following list provides an overview of the resources that are available to rape victims, including medical care, counselling and therapy, legal services, and support groups:-

- **Medical Care**
- **Counselling & Therapy**
- **Legal Services**
- **Support Groups**
- **Advocates**
- **Community Education**

CONCLUSION

[270]U.S. Department of Justice, Office of Justice Programs. (2017). A National Protocol for Sexual Assault Medical Forensic Examinations.

The socio-legal study of rape victimization has provided important insights into the many different ways that rape impacts survivors, as well as the various challenges they may face in navigating the criminal justice system and finding support. Through a combination of research, analysis, and interviews with survivors and experts, this study has highlighted the need for a more nuanced understanding of rape and its effects on survivors.

One of the key findings of this study is the devastating physical and emotional toll that rape can take on its victims. Many survivors experience a range of symptoms such as anxiety, depression, and post-traumatic stress disorder (PTSD), as well as physical injuries that can persist long after the initial attack. In addition, the stigma and shame associated with rape can make it difficult for survivors to seek help and support, leading to feelings of isolation and a sense of being trapped.

Another important conclusion of this study is the crucial role played by the criminal justice system in responding to rape. Despite the many barriers that survivors face when reporting a rape, the criminal justice system has the power to bring perpetrators to justice and provide survivors with a sense of justice and closure. However, the criminal justice system also has the power to re-traumatize survivors, either by ignoring their rights, re-victimizing them through intrusive questioning, or simply failing to secure a conviction against the perpetrator. In order to be more effective, the criminal justice system must be better equipped to handle rape cases with sensitivity and professionalism.

Finally, this study highlights the importance of societal attitudes and beliefs in shaping the experiences of rape victims. Through the perpetuation of rape myths, such as the notion that survivors are to blame for their own victimization, society creates a hostile and blaming environment for survivors. To change this, it is essential that society shifts its attitudes and beliefs around rape, and works to create a more supportive and understanding environment for survivors. The socio-legal study of rape victimization has provided a comprehensive overview of the many different factors that impact survivors of rape, from their physical and emotional experiences, to their experiences with the criminal justice system and the larger societal context. By shedding light on these issues, this study has underscored the importance of continued research and advocacy in this area, with the goal of improving support for survivors and reducing the prevalence of rape.

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UPHOLDING WOMEN'S RIGHTS TO PROPERTY: AN INDIAN APPROACH POST INDEPENDENCE

- **PINKI KAUSHIK**[271]

ABSTRACT

In India, for ages Hindu women faced discrimination within the families w.r.t their property rights. Before independence women's property was divided into 2 heads, *stridhan & woman's estate.* Some restrictions were there on her power of disposal, if she was a married woman. The old law of stridhan and woman's estate was abolished by Hindu Succession Act,1956. The amendment made in the Hindu Succession Act, 1956 in year 2005 has granted equal rights to daughters as that of son in the Hindu joint family. However, there were problems with the interpretation of this provision, which has been clarified by the Supreme Court in recent judgement of 2020.

This paper aims to study the women's property rights before independence and what loopholes were present in those rights. The paper also studies the laws present today which provides woman equal share in the property.

The paper highlights the judicial developments in the Hindu Succession Act, where laws have been interpreted by the Court to grant Indian women equal share in the property as that of men.

Keywords*: Women's property rights, Hindu succession Act 1956, gender justice.*

1. INTRODUCTION

Justice is a complex concept and touches every aspect of human life. The word Justice has been derived from the Latin word Jungere meaning 'to bind or to tie together'. The word 'Jus' also means 'Tie' or 'Bond'. In this way Justice can be defined as a system in which men are tied or joined in a close relationship. Justice seeks to harmonise different values and to organise upon it all human relations. As such, Justice means bonding or joining or organising people together into a right or fair order of relationships.[272] According to jurists-

Blackstone - "Justice is a reservoir from where the concept of right, duty, and equity evolves."

Salmond - "Though every man wants to be righteous and just towards him he himself being 'selfish' by nature may not be reciprocal in responding justly." According to him, some kind

[271] Research Scholar, Faculty of Law, Tantia University, Sri Ganganagar, Rajasthan.

[272] Speech on justice: Meaning & types of justice available at: https://www.yourarticlelibrary.com/speech/speech-on-justice-meaning-and-types-of-justice/40361(visited on December 20, 2022)

of external force is necessary for maintaining an orderly society, and without justice it is unthinkable.

The term feminism is used to define a political, cultural or economic movement intended to establish equal rights and legal protection for women. Feminist legal theory, also known as feminist jurisprudence, is based on the belief that the law has been fundamental in women's historical subordination. The project of feminist legal theory is twofold. First, feminist jurisprudence seeks to explain ways in which the law played a role in women's former subordinate status. Second, feminist legal theory is dedicated to changing women's status through a rework of the law and its approach to gender.[273]

Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality. As a field of legal scholarship, feminist jurisprudence began in 1960s. It influences many debates on sexual and domestic violence, inequality in the workplace, and gender-based discrimination. Through various approaches, feminists have identified implications of seemingly neutral laws and practices. Laws affecting employment, divorce, reproductive rights, rape, domestic violence, and sexual harassment have all benefited from the analysis and insight of feminist jurisprudence.[274]

Rights are that sort of tool given to citizens in every country which empowers the citizen to live peacefully in the country. These rights are equally distributed among men and women of the country but in this world, there are so many countries where still the rights of women are hampered in every aspect it can be civil, political, fundamental and rights related to the property are recognized in very fewer countries because still the property rights of women are limited and regulated by social norms, customs and legislation hampering their economic status. There are so many countries where women constitute the major part of doing agricultural work but their economic status is very low because they are not the owner of the land. If women will become the owner of the land it will empower them by providing income and security. To secure the women in every aspect there are so many steps have been taken internationally and as well as taken by the Indian government also. Since it is also enshrined in provisions of the constitution such as in Article 14, 15 and also in Directive Principles of State Policy regarding

[273] Feminist jurisprudence and its impact in India available at: http://www.legalserviceindia.com/legal/article-1859-feminist-jurisprudence-and-its-impact-in-india-an-overview.html (Visited on December 15, 2022)

[274] Supra note 1.

gender equality but when we talk about property rights still there are some lacunae which need to filled and some are filled already.[275]

2. WOMEN'S PROPERTY RIGHT: PRE INDEPENCE SCENARIO

Before Hindu Succession Act 1956, the property of a woman was divided into two heads: (A) ***Stridhan*** *and (b)* ***woman's Estate***. The Right to Property Act, 1937 conferred some new rights of inheritance on certain Hindu females which had the effect of increasing the bulk of woman's estate, but apart from its side effects on the joint family property, it did not alter the basic division of women's property into stridhan and woman's estate.

The word "**Stridhan"** means women's property. The Smritikars differ on from each other as to what kind of property constitute her *Stridhan.* According to Smritikars, the stridhan constituted those properties which a woman received by way of gifts from the relatives which included mostly movable property (though sometimes a house or a piece of land was also given to her as gift), such as ornaments, jewellery and dresses. The gift made to her by strangers at the time of the marriage (before the nuptial fire), or at the time of bridal procession also constituted her stridhan.

Characteristic Features of Stridhan

The pre- 1956 Hindu law classified *stridhan* from various aspects so as to determine its characteristics features; such as the source from which the property was acquired, the status at the time of acquisition, i.e., whether the female was maiden, married or widow and the school to which she belonged. The stridhan being a woman's absolute property, she has full rights of its alienation. This suggests that she can sell, gift, mortgage, lease and exchange. This is entirely true if she is a maiden or a widow. Some restrictions were recognised on her power of disposal, if she was a married woman. If she was a married woman, the stridhan was classified under two heads:

(a) the Saudayaka (it means gift of love and affection),

(b) the non Saudayaka, i.e., all other kinds of stridhan like gifts from stranger, property acquired by self -exertion or mechanical art. Over the former a female had full rights of disposal but over the latter she had no right of alienation without the consent of her husband and husband also had the power to use it.

[275] Empowering women through Property Rights - Law Times Journal

The pre-1956 Hindu Law laid down a different law of succession to stridhan. The law was different in different schools and it was different for different kinds of the stridhan. The old law of succession to stridhan has been abrogated by the Hindu Succession Act, 1956. The new Law of succession to women's property has been laid down in sections 15 and 16 of the Hindu Succession Act, 1956.

2.1 Characteristic Features of Women's Estate

The next type of property was ***women's estate*** and the following properties were included in it-

1. **Property obtained by inheritance**- A Hindu female may inherit property from a male or a female. She may inherit it from her parent's side or from her husband's side. The Mitakshara considered all inherited property as stridhan. But Privy Council in a series of decisions held such property as woman's estate. In one set of cases, the Privy Council held that property inherited by a female from male is not her Stridhan but woman's estate.[276] In other cases it took the same view regarding property inherited from females. As to the property inherited from a male, the female heirs are divided into two parts:

(a) those who are introduced into the father's gotra by marriage, such as intestate's widow, mother, etc; and

(b) females who are born in the family, such as daughters, sisters, brother's daughters etc. In the latter case the inherited property is her stridhan, while in the former case it is woman's estate. After the coming into force of the Hindu Succession Act, 1956, a female takes all inherited property as her stridhan.

2. **Share obtained on partition**- In ***Devi Prasad v Mahadeo***[277] the law was laid down that share obtained on partition was women's estate and not Stridhan. This property is also now her absolute property or stridhan after The Hindu Succession Act, 1956 came into force.

In ***Janki v Narayanaswami***[278], the Privy Council held that: "Her right is of the nature of right of property, her position is that of owner; her powers in that character are however limited… So long as she is alive, no one has vested interest in succession."

[276] Bhagwandeen v. Maya Baee, (1867)11 M.A.I. 487

[277] (1912)39 I.A. 121.
[278] (1963) 43 I.A. 207.

Power of Management: Like the Karta of a Hindu Joint Family, a woman had full power of management. The Karta is a co-owner of the joint family, there being other coparceners, but she was the only owner. She alone was entitled to the possession of the whole estate and she was entitled to its total income. She had absolute power of spending the income. She need not save but if she saved that, it shall be considered her stridhan. A female alone could sue on behalf of the estate and she alone could be sued with respect to it. She remains its owner until the forfeiture of estate, by her re-marriage, adoption, death or surrender.

Power of Alienation: The female being a holder of limited estate had limited powers of alienation. Like the Karta her powers were limited and she could alienate property only in exceptional cases. She could alienate the property for:

1. A Legal necessity i.e for her own need and for the need of dependents of the last full owner,
2. For the benefit of the estate, and
3. For the discharge of indispensable religious duties like marriage of daughters, funeral rites of her husband and gifts to brahmans for salvation of his soul etc. She could alienate for the advantage of the last full owner but not for her own spiritual benefit. She could alienate for religious acts that are not obligatory but are still pious observances which conduce to the bliss of her deceased husband's soul.

Power to Surrender: Surrender means renunciation of the estate by the female owner. In ***Natwar v Dadu***[279], the Supreme Court held that it is the self-effacement by the widow that forms the basis of surrender and not the ex - facie transfer by which the effacement is brought about. For a valid surrender, the first condition is that it must be of the entire estate, though she may retain a small portion for her maintenance. The second condition is that it must be made in favour of the reversioner or reversioners, in case there are more than one of the same category. Surrender can be made in favour of female reversioners. The third and last condition is that surrender must be bona fide, and not a device of dividing the estate among the reversioners. When a Hindu female surrenders her estate, the estate vests in the reversioners by the operation of law, and no act of acceptance by the reversioner is necessary.

Section 14 of Hindu Succession Act, 1956, has abolished women's estate, yet reversioners are still relevant in respect of women's estate alienated by her before June 17, 1956.[280]

[279] (1954) S.C. 61.
[280] (1995) S.C 395.

2.2 The Hindu Women's Rights to Property Act, 1937

Its Effect on law of Succession- In respect of separate property of a Mitakshara Hindu and in respect of all properties of a Dayabhaga Hindu, the Act introduced three widows viz., intestate's own widow, his son's widow, and his son's son's widow as heirs along with the son, grandson and great grandson, as also in their default. The widow took a share equal to the share of a son and in default of the son she took the whole property and If there were more than one widow, all of them together took one share in the property. In case of the Mitakshara joint family property, the widow of a deceased coparcener took the same interest in the property which her deceased husband had in the joint family property at the time of his death. In all cases the widow took a woman's estate in the property.

The Hindu Women's Right to Property Act, 1937 was abolished by the Hindu Succession Act, 1956. This act recognized the three widows; though it gave them only limited estate. This Act also gave these widows a share in the undivided interest of a Mitakshara coparcener. But the Act was not applicable if the deceased had disposed of his property by will. It was also not applicable to agricultural lands.

The woman's estate has now been converted into stridhan by S.14, Hindu Succession Act,1956. If a Hindu female gets any property after June 17, 1956, that will be her absolute property unless specifically given to her with limitation.[281] The woman's estate over which she has possession when the Act came into force (June7,1956) is converted into her absolute estate. The old Hindu law of woman's estate and reversioners is still relevant in respect of property over which she had no possession when the Act came into force.

3. WOMEN'S PROPERTY RIGHT: POST INDEPENDENCE SCENARIO

The Hindu Succession Act 1956, has introduced major changes in the Hindu law of woman's property. Section 14, Hindu Succession Act, 1956 has put an end to woman's estate and has introduced Vijnaneshwara's interpretation of Stridhan.

- **Section 14. Hindu Succession Act, 1956-** Property of a female Hindu to be her absolute property:

Sub section (1) of Section 14 of the Hindu Succession Act says that: "Any property possessed by a Hindu female, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner."

Explanation to S.14 explains the meaning of the term 'property' in this context. The explanation runs as follows:

[281] See sub-section (2) Section 14,Hindu Succession Act,1956.

"In this sub-section 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhan immediately before the commencement of this Act."[282]

Explanation to **S.14(1)** has expanded the notion of ownership and includes all types of property acquired by any method it mentions. When some property is allotted to the widow in lieu of her claim for maintenance, she becomes its absolute owner.[283]

So, section 14 gives absolute right to property to the female, to both properties acquired before and after the act.

a) Pre- Act Women's Estate

Section 14 has been given retrospective effect. This section converts existing woman's estate into stridhan or absolute estate. Two conditions are necessary:

(a) Ownership of property must vest in her, and

(b) she must be in possession of the estate when the Act came into force.

She must be the owner of the property. It is well established that if a Hindu female has no title to the property, she will not become its absolute owner, even though she is in its possession. The Supreme Court in a case held that: "The word *'possessed'* in S.14 is used in the broad sense and in the context means the state of owning or having in one's hand or power."[284]

b) Post-Act Women's Estate

Any property that a Hindu woman acquires after the coming into force of the Act will be her absolute property unless given to her with limitations. Thus, property obtained on succession or on partition will be her absolute property. Sub- section (2) of section 14 Hindu Succession Act, 1956, lays down the limitations. According to sub-section (2) of section 14: "Nothing which is contained in sub-section 1 shall apply to any property acquired by way of gift or will or under any other instrument or under a decree or order of a civil court or under an award where terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in that property." This sub-section established a principle of law which is; if

[282] Section 14, The Hindu Succession Act,1956

[283] V. Tulsamma v. Sesha Reddy, AIR 1977 SC 1944.

[284] Gummalapura v. Setra 1959 S.C. 577.

grant is given subject to some restrictions, the grantee will take the grant subject to those restrictions.

- **Section 15, Hindu Succession Act, 1956 lays down General Rules of Succession in the case of female Hindus**- Although Hindu woman's limited estate has been abolished and, so long as the woman is alive, she has absolute power over all types of property (She is also free to dispose it of by will), yet for the purpose of intestate succession, the source of property is still material. The old Hindu law of succession to the property of a Hindu female (stridhan) was extremely complicated. The modern law of succession to the property of a Hindu female is simple though it suffers from some bad draftsmanship.

According to section 15 of Hindu Succession Act,1956 the property of a female Hindu dying intestate shall devolve according to the rules set out in section 16-

a. Firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
b. Secondly, upon the heirs of the husband;
c. Thirdly, upon the mother and father;
d. Fourthly, upon the heirs of the father; and
e. Lastly, upon the heirs of the mother.

For the purpose of succession, the property of a Hindu female falls under the following three heads:

(a) Property inherited by a female by her father or mother,
(b) Property inherited by a female from her husband or father-in-law
(c) Property obtained from any other source, by inheritance or otherwise.

It should be noted that the former two heads would become operative only if the female dies issueless. If she has her issues, the distinction between the sources from which she got the property is not material.

4. HINDU DAUGHTER'S RIGHT TO PROPERTY

The Hindu Succession Act, 1956, had undergone a lot of change by virtue of the Hindu Succession (Amendment) Act, 2005. **The Section 6** of the said Act has been completely replaced by a new provision. A Daughter has also been made a coparcener by virtue of section 6(1) of the Hindu Succession (Amendment) Act, 2005. This amendment is based on the *174th Law Commission of India* on "Property Rights of women: Proposed reforms under Hindu Law" under the chairmanship of Justice B.P Jeewan Reddy dated 5th May 2000. This Commission recommended for the removal of irregularities and ambiguities with regard to property rights

of Hindu women under the Act of 1956. As per the view of Law Commission, the exclusion of daughters from participating in coparcenary property ownership merely by reason of gender was unjust. Therefore, this amendment Act gives full -fledged property rights to daughters in ancestral property along with sons.

Based on the recommendations of 174th Law Commission comes the **Hindu Succession (Amendment) Act 2005** which entitled Hindu women to be the coparceners in the property of their ancestors. **Section 6** went under a major amendment, through which the daughters got the equal rights over the ancestral property. It basically told that the daughters have a right to be a coparcener since birth which cannot be taken away. And she has equivalent rights as that of the son. It ended the age- old tradition of giving the property only to the male heirs when the owner dies intestate. The effect of this act was that women were now able to become the **Karta** of the family and enjoy the right of the partition. Also, now she can be entitled to enjoy the property as an absolute owner.[285]

After coming into force of the abovementioned act, there arose a problem w.r.t. enforcement of the amendment. The Supreme Court tried to solve the problem in three different cases. The first case was ***Prakash v. Phulavati***[286]in which the court held that the property rights of daughters are prospective in their application, i.e; to be available only if both the father and the daughter are alive on the date of commencement of the 2005 Amendment Act. After this judgment, in the year 2018, in the case ***Danamma v Amar Singh***[287] the court held that if the father may have died before 2005, then also the daughter can be benefited from this amendment. This judgment caused a lot of confusion because both the cases were decided by 2 judges' bench and created a lot of confusion (as to which case should be followed). And Finally, in the year **2020**, in the landmark judgment **Vineeta Sharma v Rakesh Sharma**[288] the court resolved a long- standing confusion and held that Father need not be alive till 2005. The daughter has the coparcenary right since birth and hence can be entitled to the property of the father who may be alive or not.

The Court finally concluded as under in **Vineeta Sharma** case:

[285] Plight and struggles of Hindu women in the field of property rights : a historical study - iPleaders (Visited onJanuary 20, 2021).
[286] (2016)1 SCC (civ)549.
[287] (2018)3 SCC 343.
[288] (2019) 6 SCC 162.

a) The provisions contained in amended Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same way as son with same rights and liabilities.

b) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

c) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

d) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the Act of 1956 or male relative of such female.

After the reformative Amending Act of 2005 and the interpretation of the same in the instant judgment, the Mitakshara coparcenary has been diluted to a greater degree and will be more or less nothing but a relic of the past. Now with the discernment of the legal position, it is expected that the amendment will bring a much -needed change in the social status of daughters.

It has already taken 15 years since the amendment was incorporated, but now, the Supreme court has paved the way by clearing the last hurdle and the onus is on the subordinate courts to be the flag bearers of change.[289]

The judgement has finally put an end to male primacy in the sharing of ancestral property in the Hindu family. It has also ruled that registered settlements relating to sharing or alienation of property made before 2004, when the amendment was tabled in the Rajya Sabha, can't be reopened. This was to avoid disputes and litigation that would have resulted from giving retrospective effect without limit to the ruling. But the Court has allowed opening of cases settled on the basis of the basis of the 2005 cut-off date and told High Courts to decide such cases within 6 months. The judgement is important because equal rights to property is a key

[289] Vineeta Sharma v. Rakesh Sharma: Clearing the last hurdle towards gender equality in Hindu property Law, available at: https://www.barandbench.com/columns/vineeta-sharma-v-rakesh-sharma-gender-equality-hindu-property-law (visited on December 20,2022).

factor in ensuring the equality of women with men and in empowering them. It will make gender justice more real to women.[290]

5. DOWRY LAWS

The Government had taken the first effort to combat with dowry system in India was by enacting The Dowry Prohibition Act, 1961. This Act prohibits giving, taking or demanding dowry and also punishes the person who does not follow the provisions. The biggest loophole in the Dowry Prohibition Act is dowry is forbidden but the gifts are allowed.

Dowry and traditional presents made to the wife at the time of the marriage constitute her Stridhan, and if the husband or her in-laws refuse to give it back to her, on her demand, they would be guilty of Criminal Breach of Trust under IPC. Similarly. If any item of stridhan is entrusted to them at the time of the marriage or thereafter and they refuse to give it to her on demand, they would be guilty of Criminal Breach of Trust under Section 405 of Indian Penal Code.[291]

Similarly, **section 498 A** was inserted in the Indian Penal code by Criminal Law Amendment Act,1983 (Act 46 of 1983) under chapter XX A. According to S.498 A, whoever being the husband or the relative of the husband subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Cruelty under this section means harassment of a woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security.[292]

Section 304 B of Indian Penal Code which provides punishment for dowry death was inserted by Act 43 of 1986. Which reads as under:

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.

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[290] Women's property rights: welcome ruling, available at: https://www.deccanherald.com/opinion/first-edit/women-s-property-rights-welcome-ruling-874554.html .

[291] Pratibha Rani v. Suraj Kumar,1985 S.C. 628.

[292] Section 498 A of Indian Penal Code, 1860

Explanation- For the purpose of this sub- section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

6. MUSLIM WOMEN

In case of Muslim, inheritance laws are governed by personal law. There are four sources of Islamic law governing this area- the Quran, the Sunna, the Ijma and the Qiyas. When a man dies, both male and female become legal heirs, but the share of a female heir is typically half of that of the male heirs. While two-third share of the property devolves equally among legal heirs, one-third can be bequeathed as per his own wish.

Muslim Wives

A wife without any children is entitled to receive one-fourth of the share of the property of her deceased husband, but those with children are entitled to one-eighth the share of the husband's property. If there is more than one wife, the share may diminish. In case of divorce, her parental family has to provide maintenance after the Iddat period (three months).

Muslim Daughter

A son always takes double the share of a daughter in the property of a deceased father. However, the daughter is the absolute owner of the inherited property. In the absence of a son, the daughter gets half the share of the inheritance. If there is more than one daughter, they collectively receive two-thirds of the inheritance.

Muslim Mother

A mother is entitled to receive one-third share of her deceased son's property if the latter dies without any children, but will get a one-sixth share of a deceased son having children.

7. CHRISTIAN WOMEN

Christians are governed by the Indian Succession Act, 1925, specifically by the sections 31-49 of this Act. Under this, the heirs inherit equally irrespective of the gender.

Christian Wives

If the husband leaves behind both a widow and lineal descendants, she will get one-third the share of his property, while the remaining two-thirds will go to the descendants. If there are no lineal descendant, but other relatives are alive, one -half of the property will go to the widow and the rest to the kindered. If there are no relatives, the entire property will go to the wife.

A Christian man can legally marry second time only after the death of the first wife or after legally divorcing her. If he has a second wife, even if first wife is alive or not divorced, the second wife or children will have no rights over his property. However, the children of a legally divorced wife have an equal share over their father's property as that of the second wife and children.[293]

Christian Daughters

A daughter has an equal right as her brother to the father's property. She also has full rights over her personal property upon attaining majority.

Christian Mother

If a person dies without a will, and has left no lineal descendants, then after deducting his widow's share, the mother will be entitled to receive an equal share as other surviving entitled sharers.

CONCLUSION

The Hindu Succession Act, 2005 has brought a revolutionary change in the Succession by removing discrimination and making a woman Karta of the Family.

Despite all the long strides our society has taken towards women empowerment and their rights to property and inheritance, there are certain areas that require work. There are social issues which need to be dealt with like Dowry demand, female infanticide, domestic violence etc. The punishment for these crimes should be made stricter. And There is a need to raise awareness among women about their rights relating to property so that they can fight for their rights. The provision relating to inheritance of agricultural land and other forms of property rights should be amended to grant equal rights to daughters in the property. And the personal laws of other religion should be made gender friendly to remove disparity.

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DOMESTIC VIOLENCE: AN ISSUE OF ABSENCE OF GENDER SECURITY IN INDIA

- DR. SUMAN KUMARI

Abstract

Domestic violence can be described as a violent control which one person exercises over the other. It is also described as establishing control and fear in a relationship by different forms of abuse. It can range from psychological, sexual, economical to physical torture. This issue is not just a social issue but also a serious human right abuse factoring the victim to health and social risks.

Worldwide domestic violence is estimated between 20 to 50 per cent in various countries. Domestic violence is a manifestation of structural rigidities, unequal distribution of power and abuse of power itself. Further, as Jawaharlal Nehru said, "The status of women indicates the character of the society". In this paper, we attempt to re-look at the evolution of the family and to examine gender violence as a complicated situation in the family setting. Voices of concerns and corrections are analysed conceptually to show how 'power' for women involves both constraint and enablement. Increasingly women are becoming the victims of discrimination and denial despite the overall progress in the society, economy and polity. That they are vulnerable and subject to humiliation and harassment even at homes – considered as the safest of all places – is strange yet painful. Both mental and physical tortures, often leading to the death of women in the family is shaking our faith even in familial ties.

This paper mainly focuses on the Indian scenario and is based on secondary data inter alia concepts related to the abuse of women and/or the absence of gender security.

Keywords: *Abuse, crime, domestic violence, India, socio-cultural, women's health*

I. Introduction:-

Domestic violence is a serious social malady, an exploding problem. Also, it is one of the most common but least reported crimes. In recent times, however, there is a rush of publicity regarding women abuse in general. There are those who the victims as wrong-doers and justify violent acts such as wife beating. Some human right activists prefer to consider domestic violence as 'structural' violence in the family that manifests itself in poverty and unequal access to health, education etc. Worldwide domestic violence is estimated between 20 to 50 per cent

in various countries.[294] Domestic violence is the manifestation of structural rigidities, unequal distribution of power and abuse of power itself. Further, as Jawaharlal Nehru said, "The status of women indicates the character of the society". Domestic violence is a manifestation of structural rigidities, unequal distribution of power and abuse of power itself. Further, as Jawaharlal Nehru said, "The status of women indicates the character of the society".

Domestic violence, alternatively called ‘violence in the family' is not an occasional menace like eve-teasing nor a rare argument or fight; it is a serious social malady, an exploding problem. Even in families where women are not secluded or relegated to the background women are no longer safe, physically or emotionally. There are many reports of abuse and atrocities against women committed by not necessarily by some distant relative or ‘in-laws' but even by an intimate and co-habiting partner. There are also instances of violence in silence. Torture and deaths have also occurred in many cases in educated, cultured and modern families. Domestic violence is thus, a crime.

There are cases to show that women suffer violence in homes before, during and after marriage. The housewife is now designated as the ‘homemaker'. Even ‘family' – known for its deep bonds as an institution – has also become sources of vulnerability and victimisation of girls and women. Home – the basic unit in the society where equality of opportunity and participation in decision-making should start – has become the habitat of discrimination and violence.

II. Concepts pertaining to Domestic Violence:-

The Chamber's Twentieth Century Dictionary defines violence as, "excessive, unrestrained or unjustifiable use of force". In a legal sense, violence is the employment of methods of physical coercion for personal or group ends. One of the kinds of societal violence is domestic violence, or ‘family and intimate violence'. Domestic violence refers to the inhuman treatment of women at home – spouse, children, parents, servants or anybody living in a dependent situation in a household – whether physically, sexually, verbally or emotionally. In a narrow sense, domestic violence is violent victimisation of women, within the four walls of the house but in a broad sense, she carries the infliction outside, if she has dual or multiple roles. Home-harassment is what domestic violence simply means.[295]

Gender-based violence (GBV) is violence targeted at individuals or groups on the basis of their gender. Research suggests that a significant proportion of women worldwide will at some point

[294] Basu, A. (2008). Legislating on domestic violence. Seminar, 583, p. 25. New Delhi.
[295] International Center for Research on Women. (1999). Domestic violence in India 1: A summary report of three studies. Washington, DC: Author.

in their lives experience GBV (GSRDC, 2015). GBV is often divided into two interlinked categories, interpersonal and structural/institutional violence.

There are two central conceptualisations: a gendered (patriarchal) and a feminist. Historically, patriarchal views of heterosexual relationships have influenced familial constructs in most parts of the world. With patriarchy generally understood as "a system of society or government in which men hold power and women are largely excluded from within the lens of patriarchy, women's existence as the property of their husbands comes from legal constructs of marriage derived from property law, under which women were seen to be dependents of men, without legal capacity. This had often resulted in male voices dominating over female voices in economic, sexual, intellectual, cultural, spiritual, and emotional spheres of influence within the family (Pence & Dasgupta, 2006: 6). The acceptance of the dominance of men can lead to domestic violence and other forms of violence within the family household.[296]

III. Dimensions & Gradations of Issues:-

Gender-based violence has a significant impact at the individual level, with victims suffering from physical and mental effects, loss of earnings and increased healthcare costs. It also has a broader societal impact, including lower productivity and thus reduced economic output and growth, and increased pressure on social and health services. Quantifying the cost of GBV in terms of human suffering and economic indicators is difficult because its hidden nature makes prevalence hard to establish. The shade and size vary depending upon socio-economic factor, geographical, political and legal protection.

Several studies have pointed out that social factors like caste, social customs, illiteracy, strong age-old tradition have an impact on domestic violence — example: the preference of male heirs to guard the family line. Families tend to see their girl children as burdens, particularly if dowry is required. Skewed sex ratios in India (Haryana and Punjab) have led to an increased number of young men of marriageable age unable to find a female partner. This has increased the trade of brides both internally and internationally. It has also contributed to women being trafficked into these areas to act as wives. Harmful traditional practices (HTPs), such as early and forced marriage, polygamy and purdah, are practised in many communities. These practices dare primarily directed at girls and women. HTPs stem from deeply entrenched social, economic

[296] National Crime Records Bureau (2014). Crime against Women. Crime in India2014. Accessed from http://ncrb.nic.in/StatPublications/CII/CII2014/chapters/Chapter%205.pdf

and political structures, and are tools used to control the lives of girls and women, limiting their independence and future opportunities.[297]

Historically domestic violence derives essentially from cultural patterns, in particular, the harmful effects of certain traditional practices and acts of extremism linked to race, sex, language, religion etc. The leading causes of domestic violence are –

1. Stress, anxiety, anger, guilt etc. (Psycho-analytical theory)
2. Learned patterns of aggressive communication between male (husband) and female (wife) whereby family becomes the 'cradle of violence' with children as observers (Social Learning Theory)
3. Violence as a manifestation of patriarchal and hierarchical social/political structure; women as forced subordinates either by discrimination (e.g. denial of leadership) or by the ideology of innate inferiority (Socio-political Theory, and Patriarchy Theory) or power pattern (e.g. disobedience)
4. The monopoly of physical, financial and managerial resources by men (Resource Theory)
5. Mismatch of rewards and punishments based on male-female interaction (Exchange Theory
6. Phases of violence: tension-building – acute battering – tranquil – violent (Cyclic Theory)

IV. Judicial Response:-

India has a separate law only for protecting women against domestic violence that is The Prevention of Women Against Domestic Violence Act, 2005. The Acts cover women living in live-in-relationships as well and provide a remedy for any physical, mental, financial or sexual violence. The Act provides for various rights that a woman has even after she wants to be separated from the family on grounds of domestic abuse. Further, Section 498 A of the Indian Penal Code criminalises any act of harassing the lady in the house, either physically or mentally, for dowry. The provisions provided cover almost every aspect of mental or physical health in case of domestic violence.

In the case of ***Sandhya Wankhade v. Manoj Bhimrao Wankhade***[298], the issue in question was of the definition of 'respondent' as provided under Section 2 (q) of the Domestic Violence Act of 2005 as the definition provides expressly males as respondents. The Court interpreted the proviso provided under the section and held that female relatives of the husband are also included under the ambit of respondents.

[297] Heise, L., Ellsberg, M., & Gottemoeller, M. (1999). Ending violence against women. Population reports, 27(4), 1-1.
[298] Criminal Appeal No. 271/2011.

In another case of ***D. Veluswamy v. D. Patchaiammal***[299], under Section 2 (a) of the Domestic Violence Act, 2005, the scope of 'aggrieved person' was widened. The Court enumerated five ingredients for a live-in-relationship and provided that the same provisions of domestic violence will be applied to live-in-relationship as applied in marriage or other domestic relations.

V. Conclusion

The experience of violence undermines the empowerment women and indeed is a barrier to the socio-economic and demographic development of the country. Given the prevalence of the problem, it is suggested to have programmes that take into account the involvement of the community and especially the males for effective as well as fruitful amelioration of the issue. It can again be suggested that education of the girls should be encouraged, which will undoubtedly work as a deterrent to domestic violence. Stringent laws against the perpetrators of the violence, laws giving more rights to the women will always be beneficial to curb the issue. As it is found to be deeply rooted in the socio-cultural practices and both the perpetrator as well as victim take it granted, there is a need of major transformation in the socio-cultural milieu.

To address the problem, social norms and values towards gender roles should be transformed to facilitate the implementation of appropriate and meaningful responses to domestic violence and ultimately to prevent it from happening altogether. Indian society has always recognised the need for special consideration for women in a healthy atmosphere. However, affirmative action needs to be stronger than words, not silence.

Women need to be given what they have been denied so far. The dharma Patni also expects that others also follow the dharma. The dynamics of the male-female relationship can be changed which will, in turn, change the stress, trauma and misery. In India, the issues of children and women have found a place in the philosophy and programmes of 'inclusive growth'. Violence against women is a form of marginalisation or exclusion. Success in inclusion requires the elimination of violence against women which needs women empowerment as well as good governance.

[299] (2010) 10 SCC 469.

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A CRITICAL STUDY RELATING TO LEGAL PROTECTION OF TRADITIONAL KNOWLEDGE RELATD TO IPR

- **DR. RAM KISHORE MEENA**[300]

ABSTRACT

Intellectual Property is the product of human intellect which gains protection through Intellectual Property Rights. As the biodiversity of the world has been conserved and preserved by indigenous peoples, the preservation of traditional knowledge is essential to the conservation and sustainable development of the environment. In order to conserve and preserve genetic resources and other natural resources, their awareness is essential. In many other countries, traditional knowledge of Indian products is more valuable than any other commodities. This is because India is a place where many important resources are available and many things are the result of conventional historical knowledge. Traditional knowledge of the various products in India should be protected from misuse by different countries and *India needs to further update in the field of patenting Indian traditional knowledge in order to be safeguarded against this reality*. This article discusses various strategies to protect TK with constructive defense and defense already in place. The Council for Scientific and Industrial Research (Government of India) has taken the initiative to record TK in the TKDL (Traditional Information Digital Library) in order to identify TK which has been shown to be beneficial in the protection of traditional knowledge. Intellectual property rights (IPR) are used by natural criminals as a weapon to steal conventional knowledge and misuse biological resources and this is due to some inadequacy in the current IPR system.

KEYWORDS: Traditional Knowledge (TK), Intellectual Property Rights (IPR), Legal Protection, Geographical Indication (GI).

I. INTRODUCTION

"Traditional knowledge refers to knowledge acquired over time by people in an indigenous society, in one or more cultures, based on experience and adjustment to a local culture and climate, and continuously predisposed by each generation's developments and practices".

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The protection of TK is a major concern for indigenous communities. As such, it is important to understand the legal protection of TK and its relationship to intellectual property rights (IPR). The lack of legal protection for traditional knowledge has resulted in the loss of valuable information and cultural heritage. These problems are exacerbated by the fact that TK is often not recognized as an IPR and hence lacks any form of legal recognition. The lack of recognition leads to exploitation, loss, and erosion.

Intellectual Property Right as the name suggests is the right over the intellect an individual possess. It is the right over the creations of mind such as inventions, literary and artistic works, symbols, designs, images, symbols, designs, logos, etc. Copyrights, service marks, patents, trademarks, geographical indication are various other ways through which intellectual property gets protection in law. All these enable an individual to get various privileges in the form of economic and moral rights. At the same time, it also ensures that a harmonious construction takes place between the rights of the individual and the interest of public at large.

MEANING OF TRADITIONAL KNOWLEDGE

Traditional knowledge (TK) is a term used to describe the knowledge and practices of indigenous communities that have been passed down from generation to generation. It is often expressed in oral form, as stories or songs, and can be found in the fields of agriculture, architecture, medicine and art.

Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.[301]

TK in a general sense embraces the content of knowledge itself as well as traditional cultural expressions[302], including distinctive signs and symbols associated with TK.

Innovations based on TK may benefit from patent, trademark, and geographical indication protection, or be protected as a trade secret or confidential information. However, traditional knowledge as such - knowledge that has ancient roots and is often oral - is not protected by conventional intellectual property (IP) systems.[303]

[301] https://www.wipo.int/tk/en/tk/

[302] Traditional cultural expressions (TCEs), also called "expressions of folklore", may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.

[303] According to WIPO

Trademark and patent laws, protect the rights of people to exploit, use and profit from their own IPR. The most important point in this case is the inclusion of knowledge irregardless of whether it is an oral tradition.

In recent years there has been a growing interest in protecting traditional knowledge from being exploited by outsiders. There are a number of reasons for this interest. One understandable reason is that indigenous communities have not always benefited from their traditional knowledge being taken away from them by outsiders who profit off it.

Another reason for this interest is that many indigenous communities are worried about what will happen to their culture if they don't protect their traditional knowledge. They fear that if the younger generations do not learn these practices, then they may be lost.

The right of citizens to secure "legal protection" for their TK is said to go hand-in-hand with international agreements that provides for environmental protection.

II. GLOBALISATION AND INTELLECTUAL PROPERTY

Globalization has led to the increased interdependence among the various economies leading to the creation of a global economy. This interdependence is also in the form of creation and trade of goods and services which enhances the significance of globalizing the intellectual property.

The evolution of globalized intellectual property took place over the years and is still taking place through various treaties and conventions. Beginning with the Paris convention, 1883, it governs the aspect of industrial rights and was the first major step in the form of international treaty which gave protection to the producers of intellectual property in the other countries. After the industrial rights the aspect of copyrights was covered by the Berne Convention, 1886, it ensured protection to the various literary and artistic works. Then in 1967, the World Intellectual Property Organization was set up as a global forum with the objective of developing a balanced international IP legal framework to meet society's evolving needs thereby promoting the protection of intellectual property throughout the world. Then finally with the establishment of World Trade Organization and its TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement more extensive protection over the intellectual property was granted. This was most comprehensive multilateral agreement on intellectual property which played a pivotal role in the global political economy.

The Global Intellectual Property Program is currently being extensively expanded and modernized, particularly with the implementation of the Trademark Trade Agreement (TRIPS). The TRIPS Agreement recognizes the very strong protection of intellectual property

rights, investment in regulatory agencies to enforce these rights, and consistent protection laws at international borders. An important economic question is the potential impact of these changes in developing countries. Issues involved in analyzing the role of intellectual property rights in promoting economic development and growth are very complex. Many relevant concepts are difficult to measure. Extended intellectual property laws also have many implications, which are often in conflict with national development.[304]

III. PROTECTION OF TRADITIONAL KNOWLEDGE

A fundamental fact is that there is no concise definition of TK and it has been defined in so many ways depending upon the importance given to some aspects or not.[305]

Many definitions have been given the word protection, which gives one consideration due to a lack of explanation about the reasons for protection. Some understand the term in the sense of IPRs, where security often means excluding third-party companies from unauthorized use. Others classifies protection as a tool for protecting traditional knowledge from possible operation to damage it or have a detrimental effect on the lives or cultures of the built-up communities. However, important reasons for providing TK security include:

a) The maintenance of traditional customs and community.
b) Prevention of appropriation of components of TK by unauthorized persons.
c) Consideration of equity.
d) Conservation questions.
e) Fostering its uses and its significance in development.

This is one of the major concerns of the developing economies that the process of globalisation is threatening the appropriation of elements of society's collective knowledge into proprietary knowledge for the commercial profit of a few. An immediate action is required to protect these knowledge systems through national policies and international understanding related to IPR,

[304] Keith E. Maskus, Intellectual Property Challenges for developing Countries: An Economic Perspective, University of Illinois Law Review, Vol. 2001 No. 1

[305] In 2002, the International Council for Science (ICSU) defines traditional knowledge as "a cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and meanings are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and worldview." According Barsh, "[w]hat is 'traditional' about traditional knowledge is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its 'traditionality.' Much of this knowledge is actually quite new, but it has a social meaning, and legal character, entirely unlike the knowledge indigenous peoples acquire from settlers and industrialized societies," Russel Barsh, Indigenous Knowledge, in SPIRITUAL AND CULTURAL VALUES OF BIODIVERSITY (D.A. Posey ed., 1999).

while also providing for their development and expansion and proper use for the benefit of its holders. We need to put a special emphasis on community knowledge and community innovation. To encourage communities, green grass root innovation must be scouted, supported, spawned, and scaled up. It is especially important to connect innovation, enterprise, and investment. To accomplish this, new models and ways of thinking about intellectual property will need to be developed. Local communities or individuals lack the knowledge or resources to protect their property in a system based on very different cultural values and attitudes.[306] The communities have an abundance of knowledge about their flora and fauna–their habits, habitats, seasonal behaviour, and so on–and it is only logical and consistent with natural justice that they be given a greater say as a matter of right in all matters concerning the study, extraction, and commercialization of biodiversity.

We require a policy that does not block the advancement of knowledge despite the fact also ensuring valid and sustainable use and adequate intellectual property protection with just benefit sharing. The economics of community knowledge are extremely complex. While many native cultures appear to develop and spread knowledge from generation to generation within a system, individuals in local or indigenous communities can differentiate themselves as informal creators or innovators distinct from the community. Moreover, it has been stated that some indigenous or traditional societies recognize various types of IPR over knowledge, which may be held by individuals, families, lineages, or communities. The diversity and creativity of indigenous approaches to IPR issues should be underlined in discussions of IPR and traditional knowledge.

Present IPR systems are based on the principles of private proprietorship and individual innovation. They are diametrically opposite to indigenous cultures, which value collective creation and ownership of knowledge. There is concern that IPR systems boost the appropriation of TK for commercial purposes, and that this occurs deprived of the holders of this knowledge receiving a fair share of the benefits. By encouraging the commodification of such knowledge, they violate indigenous cultural precepts. The issue of ‘protection' of traditional knowledge must be viewed from two perspectives. The "protection" may be granted to prevent unauthorised use of the protected information by third parties. On the other hand, "protection" also refers to the preservation of traditional knowledge from uses that may erode

[306] R A Mashelkar, *Intellectual Property Rights and the Third World,* Journal of Intellectual Property Rights Vol 7, July 2002, pp 308-323

it or have a negative impact on the life or culture of the communities that developed and applied it. Furthermore, the protection fosters self-esteem and self-determination.[307]

Giving communities legally recognized ownership of knowledge through sui generis IPR has several advantages. It will raise the profile of that knowledge and encourage respect for it both within and outside of the communities that hold it. This will inspire the younger members of such communities to contribute to the advancement of that knowledge. Furthermore, the prospect of economic returns for the use of that knowledge by others will serve as an additional incentive for community members to respect their knowledge and continue to engage in practices based on that knowledge. Prior protection will also allow for the disclosure, use, and spread of such knowledge, which would otherwise be eroded.

IV. INTERNATIONAL REGIME FOR PROTECTION OF TRADITIONAL KNOWLEDGE

In India, there is no specific law regarding protection of TK. Only some relevant regulations are partially defending the Indian TK. The brief account of the relevant laws regarding protection of TK is discussed below:

i. THE GEOGRAPHICAL INDICATIONS OF GOODS (REGISTRATION AND PROTECTION) ACT, 1999

This act can be used to protect certain types of TK. Firstly, GI identifies a good. GI excludes all tangible forms of traditional knowledge such as methods of medical treatment, folk music, techniques for dyeing cloth, folk music, and dances. However, an indication of a place may be found, such as the resulting tree or dye or the recorded forms of songs and dances.[308]

Second, GI protection is only useful when information is associated with a defined location. For example, ‘Triphala’ information has spread across the country. ‘Triphala’ is a medicinal powder used for stomach ailments. Its assets are invested in a specified location. It may be possible to treat ‘Triphala’ as manufactured goods and to argue that the preparatory work takes place in a specified area. This is because, according to the Local Index Act, the location index can be obtained from a manufactured product if at least one of the production or processing or repair activities involved is taking place in a specified area. Therefore, you may have a 'Triphala' GI.[309]

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[307] Ibid.

[308] The Copy Right (Amendment) Act 2012

[309] The biological diversity act, 2012

Thirdly, the goods must enjoy commercial reputation. Geographical indication merely signifies the true source of the good, and if the source is not important to the consumer, protection by means of a geographical indication is immaterial.

ii. INDIAN COPYRIGHT ACT

Indian Copyright Law do not provide for protection of expression of folklore or protection of traditional knowledge of indigenous people; however an inference can be drawn from Section 31 (A) 2 of the Indian Copyright law, which protects the unpublished Indian work.

iii. INDIAN PATENT ACT

In India, patents are given to an individual for his innovation. TK is public owned knowledge and not by an individual. Moreover, critics are of the view that traditional knowledge is naturally owned knowledge and not an invention, therefore no patent protection can be granted to it. Patents are granted to invention that is invented by a single act of invention whereas traditional knowledge is evolved and developed over generations. Thus, patent protection will not work for TK.

iv. TRADE SECRETS

Protecting TK as trade secrets is relatively possible for the indigenous people as it does not require any cost. All they need is a conscious effort on their part to keep their knowledge as secret. Generally, TK is intact with the public supporters only and therefore, can be protected as trade secret. But the drawback of this system is that it is no conducive to widespread tradition and exploitation.

V. THE DESIGNS ACT, 2000

This Act forbids registration of certain designs, which are not new or original; or have been already disclosed to public in tangible form prior to the filing date. This way this Act can protect certain areas of TK.

V. CONCLUSION

The prologue of this study is to explore the international legal remedies for common intellectual property rights and legal protection towards the traditional knowledge as practiced in some

countries as an amendment to these traditional practices. Intellectual property right, as a concept, needs to be introduced first. It has been defined as "the position or rights that gives one exclusive right to market and enjoy copyright, patents, etc."[310]

In academia, innovation is a key component not just copying of one's work because without it universities cannot progress and there will be less economic development. However, this new way of viewing innovation can prove fatal to those who have been building their career on these generational ideas. As time goes by more digitized systems are created which results in globalization on a large scale which also changes the valuation of tangible goods such as objects.

Intellectual Property Rights is an evolving law in the present globalized world. It occupies a significant position in our lives whether it is in the form of industrial rights or copyrights. Globalization has played its role in identifying two opposite models in respect of Intellectual Property regime. The first advocates for stringent IP laws for economic development while the other opposes and stands in favour of week IPR protection for rapid diffusion of knowledge and for building up of local capabilities.

The legal protection of traditional knowledge related to intellectual property is an area of global concern.

Intellectual Property Rights (IPRs) provide individuals, companies and governments with an exclusive right to individual or collective unique creation that would prohibit other parties from using these items without the creator's approval. Firstly, the United Nations defines IPR as 'intangible personal property recognised by law' which are governed by national or international law. Furthermore, patent laws are frameworks through which proprietary intellectual property are legally protected under certain specified conditions created by the holders themselves.

[310] https://www.investopedia.com/terms/t/trademark.asp

LEGISLATIVE AND JUDICIAL APPROACH IN PROTECTION AND PROMOTION OF RIGHTS OF SPECIALLY ABLED PERSONS IN INDIA

- **CHATRUGUN KHALDHANIA**[311]

Abstract

Disability is one of the major and serious concerns not only in India but also in other countries in the world. Rights and Laws of Specially Abled Persons need to be understood and studied from various perspectives including human rights and various other laws in India which will ultimately fill up the differences or mitigate the gap between the abled and the Specially Abled Persons in their attainment of persona and dignity in true sense of the terms.

In this article the researcher is giving much emphasis on the various legal provisions and Laws available in our country and make a systematic study on how these laws have contributed towards the development of legal status of the Specially Abled Persons in India. In this article the focus shall be on the role of the judiciary in the realization of disability rights in the context of the Indian Constitution, Persons with Disability (Equal Opportunities, Protection of Rights and Full Participation) Act, 2016 and other disability laws.

Keywords: *Right, persons, India, specially-abled, constitution*.

I. Introduction:-

The disability rights debate is not so much about the enjoyment of specific rights as it is about ensuring the equal effective enjoyment of all human rights, without discrimination, by Specially Abled Persons. The non-discrimination principle helps to make human rights in general relevant in the specific context of disability, just as it does in the contexts of age, sex and children. Non discrimination and the equal effective enjoyment of all human rights by Specially Abled Persons, is therefore the dominant theme of the long-overdue reform in the way disability and the disabled are viewed throughout the world.

The primary responsibility for ensuring respect for the rights of Specially Abled Persons rests with the government. Our government has taken various steps to provide equal opportunities to Specially Abled Persons by enacting several Acts and implementing various policies and schemes for the empowerment of persons with disabilities. Our constitution guarantees equal

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rights to each individual of our country. India is one of the first signatory to United Nations Convention on the Rights of Persons with Disabilities which means we have to adopt it in its full spirit.

Disability is a complex category as it has been and still is understood and interpreted by different people in very different ways. In almost all societies, individuals with physical or intellectual anomalies have been assumed to be, by the very nature of their condition, inferior. As the term disability carries with it the connotation of a lack or deficiency, whether mental, physical or sensory, it has been defined primarily in terms of medical deficit. However, it has to be acknowledged that the word disability is itself not a homogeneous category, subsuming under it different kinds of bodily variations, physical impairments, sensory deficits and mental or learning inadequacies, which may be either congenital or acquired. Disability has been recognised as a human rights issue in the international arena, with the United Nations Declaration on the Rights of the Disabled Persons focusing attention on the needs of Specially Abled Persons globally.

As many as 70 million disabled people spread across India continue to be treated as second-class citizens. For them segregation, marginalisation and discrimination are norms rather than exception. Faced with barriers put by stereotyped attitudes, they are generally viewed as objects of charity and welfare as the world merrily goes about trampling their most basic human rights. Sadly, this is so despite the United Nations Declaration of Human Rights in 1948 that makes observance of human rights a precondition for ensuring justice, freedom and peace. In 1992, India became a signatory to the Proclamation on Full Participation and Equality of People with Disabilities in the Asian and Pacific Region. This was adopted at Beijing at a conference convened by the Economic and Social Commission for Asian and Pacific Region. The proclamation brought an obligation upon the country to enact a law as per its solemn affirmations. And so the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995 got through Parliament. Amongst the four domestic legislations related to disability it is this Act that provides entitlements of rights to Specially Abled Persons and mandates the government to provide facilities for their full participation. The provisions under the Act are all very empowering but unfortunately, even though the Act was passed almost 27 years ago, its implementation remains woefully inadequate. Those responsible for its implementation and several persons with disabilities often remain unaware of the provisions of the Act.

II. Legal framework related to rights of Specially abled persons: -

In the last two decade and a half there has been a growing awareness and a significant landmark in the disability sector both at the national and international levels. Following the period of 1993 to 2002, which is proclaimed by the General Assembly as the "UN Decade for Disabled Persons", a global movement has emerged which recognizes the importance of integration of Specially Abled Persons into society. The emerging international trends as well as national issues relating to the disabled population have had a direct impact on the thinking of policy makers, professionals, Specially Abled Persons and non-governmental organizations working in the country. As a result of shift in policy in the mid-90"s, today the issues relating to the disabled are no longer mere welfare measures but have grown into fundamental human rights issues, a demand for full participation, equal opportunity and protection of rights. The shift in emphasis led to the realisation of the need for enacting legislation to ensure empowerment. The **Constitution of India** ensures equality, freedom, justice and dignity of all individuals and implicitly mandates an inclusive society for all including the Specially Abled Persons. The Constitution envisages the duty and responsibility of the states in the Directive Principles of state policy enshrined in article 41 which says that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. The seventh schedule of the constitution confers the responsibility of the relief of the disabled and unemployable on the state under entry 9 of the state list. Further under article 243G and 243W there is a devolution of powers, authority and responsibility on the Urban and rural local bodies to devise and implement schemes in their concerned jurisdictions for matters allocated to them under the eleventh and the twelfth schedule. The eleventh schedule under entry 26 entrusts the social welfare of the handicapped and mentally retarded to the rural local bodies and the twelfth schedule under entry 9 requires the urban local bodies to safeguard the interests of the handicapped and mentally retarded.

The legal commitment that took place to ensure empowerment of the Specially Abled Persons, took shape with the enactment of the **Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act** in 1995.[312] The Act has been enacted under Article 253 of the Constitution read with item No. 13 of the Union List. It gives effect to the proclamation on the full participation and equality of the Specially Abled Persons in the Asian

[312] Rights of persons with disabilities, Indian Law Institute, at p.7.

& Pacific Region.[313] This is a comprehensive piece of legislation, which, inter alia, treats rehabilitation as a right and aims at the elimination of discrimination and creation of a society which provides opportunities for the development of people. It defines 'disability' to mean blindness, low vision, leprosy-cured, hearing, impairment, loco motor disability, mental retardation and mental illness. The Act provides for both preventive and promotional aspects of rehabilitation like education, employment and vocational training, reservations, research and manpower development, social security and also creation of a barrier-free environment. Further it provides for incentives to employers to ensure five per cent of the work force is composed of Specially Abled Persons, aid and appliances to Specially Abled Persons, schemes for preferential allotment of land (for housing, setting up schools, business etc.), financial assistance for rehabilitation, insurance scheme for employees with disabilities, unemployment allowance, and measures for non-discrimination in transport facilities, on the road, in the built environment and in government employment. It provides for the appointment of a Chief Commissioner for Specially Abled Persons at the centre and commissioners in every state for ensuring the implementation of the provisions of the act and looking after the affairs of Specially Abled Persons.

Legislation for setting up a **National trust for welfare of persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability** was introduced and passed by Parliament in 1999. The Act provides for constitution of the Board of the National Trust, Local Level Committees, Accountability and Monitoring of the Trust. It has provisions for legal guardianship of the four categories of the Specially Abled Persons and for creation of enabling environment for their as much independent living as possible.

The next major legislation has been the **Rehabilitation Council of India Act, 1992**. The Act provides for standardization of training courses at different levels, recognition of institutions in the area of rehabilitation and maintenance of a Central register for professionals possessing recognized qualifications in the area of rehabilitation. The Act recognizes the following kinds of disabilities-

1. "Handicapped" means a person- Visually or Hearing handicapped, Suffering from locomotor disability or from mental retardation;

2. "Hearing handicap" means deafness with hearing impairment of 70 decibels and above, in the better ear, or total loss of hearing in both ears;

[313] http://socialjustice.nic.in/policiesacts3.php

3. "Locomotor disability" 32 means a person's inability to execute distinctive activities associated with moving, both himself and objects, from place to place, and such inability resulting from affliction of either bones, joints , muscles or nerves;

4. "Mental retardation" 33 means a condition of arrested or incomplete development of mind of a person which is specially characterised by sub-normality of intelligence;

5. "Visually handicapped" means a person who suffers from any of the following conditions, i.e., Total absence of sight, Visual acquity not exceeding 6/60 or 20/200 (snellen) in the better eye with the correcting lenses or limitation of the field of vision subtending and angle of degree or worse.

The mandate given to RCI is to regulate and monitor services given to Specially Abled Persons and also prescribes punitive action against unqualified persons delivering services to persons with disability. The Rehabilitation Council has also taken up new programs for training of personnel in disability rehabilitation.

A **National Policy for Persons with Disabilities** was announced in February, 2006. It recognizes that Specially Abled Persons are valuable human resource for the country and seeks to create an environment that provides them with equal opportunities, protection of their rights and full participation in society. The focus of the policy is on (a) Prevention of Disabilities and (b) Rehabilitation Measures.

The Rights of Persons with Disabilities Act, 2016 amended the old Act of 1995 and re-defined the concept of disability by including new forms of disabilities for making it even more dynamic. The categories of disabilities have been increased from 7 to 21. The Act also extended reservation provisions for disabled children in higher educational institutions. It declared several new categories of offenses and made them punishable for removing social stigmas against the disabled population within their respective communities and for improving their status. The Act also provided for several other infrastructural facilities which were also made applicable to educational institutions.

III. Judicial approach to the rights of specially abled persons:-

The Indian Judiciary has played a very significant role in developing the human rights of the Specially Abled Persons. In a number of cases the Supreme Court and the High Courts interpreted the disability legislations furthering the objectives contained therein. The extraordinary powers vested in the Supreme Court under Articles 32 and 142, and the High Courts under Article 226 of the Constitution of India, have ensured that the rights of the citizens, and more specifically, that of the Specially Abled Persons, are not trampled upon.

In Javed Abidi v. Union of India[314], while directing Indian Airlines to provide concessions for passengers suffering from locomotors disability, the Supreme Court keeping in view the object of the persons with disabilities Act, 1995, directed creation of various free environment for person with disabilities and making special proviso ions for their rehabilitation, medical care, education, employment, training and protection of their rights. In D.N. Chanchala v. State[315], the Supreme Court advocating the right based approach to disability extended the equitable principle of preferential treatment under Art 15 (4) to Specially Abled Persons to bring them to the mainstream of the society by giving them equal opportunity in the field of education. The Allahabad High Court in National Federation of Blinds UP Branch v. State of UP[316] ordered the Lucknow Development Authority not only to give preference in the matter of allotment of land houses to handicapped persons, but also to provide concessional rates to them. In Chandan Kumar Banik v. State of West Bengal[317] the Supreme Court rescued mentally challenged inmates of a hospital in Hooghly District who were being kept chained by the hospital administration to control their unruly and violent behaviour.

Absence of reservations for persons with a physical handicap in medical colleges was found by the Calcutta High Court to be an infringement of Persons with Disabilities Act and the Constitution as well in Dy. Secy. (Mart), Deptt. of Health and Family Welfare v. Sanchita Biswas[318]. This view of the Calcutta High Court finds support in a fluty of judgments [Raman Khanna (Dr.) v. University of Delhi[319]; A.P. Federation of the Blind v. Registrar, Andhra University, WP No.10234 of 1999; Benny v. State of Kerala, WA No. 3660, decided on 30.01.2003 etc. pronounced by deferent High Courts of the country.

In Ramchandra Tandi v. the State of Orissa[320], the concerned authority refused to accord recognition and financial assistance to a school for the deaf and dumb in order to avoid unnecessary financial burden. The court has decided the case in favour of Specially Abled Persons.

In Sheeela Bharse v. Union of India,[321] the Supreme Court held that mentally ill non-criminal persons cannot be kept in jail and opined that keeping the non-criminals in jail along with other convicts is unconstitutional. Like this in a plethora of cases, the Indian judiciary has shown its

[314] (1999) 1 SCC 467.
[315] AIR 1971 SC 1762.
[316] AIR 2000 All 258
[317] 1995 Supp (4) SCC 505.
[318] AIR 2000 Cal 202.
[319] (2003) 106 DLT 97.
[320] AIR 1994 Orissa 228.
[321] (1993) 4 SCC 204.

concern towards the protection of the human rights of the Specially Abled Persons and played a vital role in the realm of disability rights in India.

In National Federation of Blind v. Union Public Service Commission[322], petitioners sought for a writ of mandamus, directing Union Of India & Union Public Service Commission to permit the blind candidates to compete for the IAS and the Allied Services and to provide them the facility of writing the exam either in Braille-script or with the help of a Scribe, & that Group A & B posts in Government and PSU's, already identified for the visually handicapped persons, be offered to them on preferential basis. The Supreme Court held that the question of giving preference to the handicapped in the matter of recruitment to the identified posts is to be decided by Government but it commended them to decide it as expeditiously as possible. Then it directed Union of India & Union Public Service Commission to permit the visually handicapped (blind and partially-blind) eligible candidates to write the civil service exams in Braille-script or with the help of a Scribe. However, it directed that once they were recruited to the lowest level of the service, they shall not be entitled to claim promotion to the higher posts in the service irrespective of the physical requirements of the jobs. Moreover, if in the hierarchy of promotional-posts it is found by the Government that a particular post is not suitable for them they shall not have any right to claim the said post.

IV. Conclusion

In the domain of social legislation, effective implementation is the crucial issue. So far the intentions of the government for the protection and welfare of Specially Abled Persons enshrined in the various Acts is concerned, all implementing agencies in the government as well as society in general have to work together to translate the benefits into tangible reality to demolish the barriers not only physical but social and mental, which impede the development of our citizens with disabilities. The law must recognize that Specially Abled Persons have diverse needs depending upon the age, severity and the socio-economic conditions in which the persons are living. The law has never been and is not the end of all problems. The law only initiates and tries to give rights, the implementation of the laws and the atmosphere or the environment, which it contemplates, is what is more important. It is therefore necessary that the community, the society and other institutions as also individuals are called upon to provide the opportune services so that the work of change can begin.

[322] 1993 AIR 1916.

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CYBER–CRIME AND LAW: INDIAN PERSPECTIVE

- PRASHANT BHADU[323]

Abstract

We live in a digital age when everything from shopping to banking can be completed in the comfort of your own home. Since the internet is a global platform, its contents are available to users all over the globe. Some individuals have been abusing internet technology for illegal purposes, such as hacking into other people's networks and conducting frauds. The cyber–crime refers to any illegal activity or online violation that uses the internet as a tool. The cyber law was coined to describe the body of law that governs the prevention and punishment of online crimes. The term 'cyber law' refers to the branch of the law that addresses concerns arising in the digital realm. Freedom of speech, Internet access and use, and the right to privacy or security online are only few of the numerous subtopics it touches on. The term 'law of the web' is often used to refer to this principle in its broadest sense.

Key words: Internet, Unauthorized Access, Cyber–crime, Cyber law, Cyber–space, Punishment, Network.

1. Introduction

Humanity has benefited greatly from the development of computers, which are now used everywhere from the home to the offices of multinational corporations. A computer, in its most basic definition, is an apparatus capable of storing and manipulating/processing information or instructions in accordance with the user's instructions. Since decades, the majority of computer users have been making inappropriate use of computers for their own gain or the gain of others.[i] Cyber–crime is a direct result of this phenomenon. Because of this, people began partaking in harmful, antisocial behaviours. Cyber–crime, often known as computer or network crime, typically occurs in online environments, especially through the internet. 'Cyber law' is a relatively new idea. Cyber law, regardless of the fact that there is no single, accepted definition, can be regarded of as the body of rules and regulations that controls the use of the Internet. Cyber laws are the legal framework for the technologies connected to the internet. Cyber law contains a wide scope of subjects, like data protection and privacy, electronic and digital signatures, and cybercrime. The UN General Assembly passed India's first information

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technology act, which was based on the United Nations Model Law on Electronic Commerce [UNCITRAL Model].[ii]

2. **Objective**

The primary purpose of this research paper is to increase public awareness of current crimes and offences, via the virtual realm, and the regulations designed to counteract illicit activity there. Additionally, we are making it a priority to think about things like cyber security.

3. **Tackling Online Crime and Cyber Law**

In this context, 'cyber–crime' refers to any criminal conduct committed through electronic communications or information systems, such as the Internet or any electronic device.[iii]

The term 'cyber law' refers to the body of legislation that governs the use of information and communication technologies, most specifically the Internet. It's an attempt to bridge the gap between the traditional legal framework of the physical world and the novel problems posed by human behaviour on the Internet.[iv]

The term 'cyber–crime' was initially introduced in 1995 by Sussman and Heuston. Rather than trying to pin down what exactly constitutes cybercrime, it's more useful to think about it as a set of related concepts. Material offending objects that have an effect on computer data or systems are the basis for these actions. These are misdeeds in which some type of digital technology or information system is either used in a criminal act or as the intended victim. Electronic crime, computer crime, cyber–security, high–tech crime, crime of such information age, *etc*., are additional names for cyber–crime.

Simplified, 'cyber–crime' refers to any criminal prosecution that utilises computerized data storage and access systems, the Internet, or other electronic methods of communication. They generally relate to any illicit conduct that makes use of a network or computer. Given the fact that criminals now can break laws without even being physically present, the number of cybercrimes has escalated as well.

It is rare for crimes to be committed out internet because the victim and also the offender might not ever actually meet. Cyber criminals frequently decide to set–up out of nations with insufficient or non–existent cyber–crime legislation in order to decrease their risks of being identified and punished.

In due to the fact that cybercrime may be conducted even when the perpetrator is not actively present in the cyberspace. The issue of privacy in software is a good illustration.

4. Cyber–Crime: **A Brief History**

Within the year 1820, the First ever cyber–crime was registered. But there have been primitive computers in use in countries including Japan, China, and India around since 3500 BC, the technological development of computers is globally recognised to Charles Babbage's analytical engine. In 1820, French textile maker Joseph–Marie Jacquard invented the loom. Using this apparatus, a continuous sequence of procedures might be included into the weaving of unique textiles or materials. This caused the employees at Jacquard to become very worried that their jobs and ways of life were in danger, leading some to resort to sabotage in the hopes of preventing the new technology from ever being used.[v]

Morris Worm was a precursor to the more modern form of cyber–crime known as ransomware. It's true that many nations, India included, are trying to put a stop to these kinds of crimes or assaults, but they keep evolving and impacting in new ways.

Years	**Strategies of Assault**
1997	The Morris Code worm and other cybercrime and virus outbreaks began.
2004	Dangerous software such as a Trojan horse or a well–developed worm.
2007	How to spot a thief, avoid being phished, *etc*.
2010	DDoS, Botnets, and SQL Injection assaults, *etc*.
2013	Conspiracy Theories, Denial–of–Service Attacks, Botnets, Harmful Emails, Malicious software, ransomware, *etc*.
Present	Cyber warfare, ransomware, keyloggers, stolen Bitcoin wallets, hacked Androids, *etc*.

Table 1: **The Changing Nature of Cyber–Crime**

Person–to–person cyber–crime refers to any cyber–crime conducted by cybercriminals against a specific person. Some examples of cyber–crime aimed towards specific persons are:

1) The term 'e–mail spoofing' refers to the practise of creating a fake e–mail header. Which implies it seems like the communication came from someplace other than its true origin. Such strategies are often used.
2) In spoofing or spam tactics, as targets are now more willing to accept a digital email or letter if they consider it has come from a credible source.

5. **Reliable Information**[vi]

Spam refers to unsolicited, or 'junk', e–mail. This e–mail blast was completely unwanted. Spam's widespread prevalence since the mid–1990s makes it a headache for everyone who

checks their email often. Spam bots are automated programmes that scour the web for email addresses to add to their mailing lists. E–mail distribution lists are produced by the spammers with the help of spam bots. Spammers send out mass emails to millions of addresses, hoping to get a small percentage of them to reply.

The term 'cyber defamation' refers to the damaging of a person's reputation in the eyes of others through the Internet.[vii] Making false statements about someone in order to damage their reputation is called defamation. E–mail and other forms of electronic communication are often used in a scam known as 'phishing', in which the offender takes the identity of a trusted person in an effort to get important documents as accounts, passwords, and bank details.

Extortion on the web, hacking, exposing of pornographic material, trafficking, circulation, uploading, credit card theft, and malicious programming are all examples of cyber–crimes committed against persons. It's hard to imagine a more devastating kind of injury that such a malefaction might do to a single person.

Vandalism against computers, theft of intellectual property [*copyright*, *patents*, *trademarks*, *etc*.], and other forms of cybercrime against property are all examples of cyber–crime against property. Intimidating or threatening language or behaviour online. Examples of intellectual property theft are:

The illegal duplication of software is known as 'software piracy'. Infringement of copyright is the act of violating the legal right of a person or group to control the reproduction, distribution, and public display of a work. In layman's terms, it's the illegal use of someone else's intellectual property like music, software, literature, *etc*. Infringing on a trademark or service mark occurs when someone does so without permission. Organizational cybercrime includes the following types of online wrongdoing:

a) Data tampering occurs when information is altered or deleted without permission.
b) Unauthorized access to, and maybe copying of, private information without making any changes or erasing anything.
c) A denial–of–service [DOS] assault is one in which the attacker sends an excessive amount of traffic to the targeted server, system, or network in an effort to overload those resources and render them unusable or difficult to use for the intended victims.[viii]
d) E–mail bombing is a kind of cyberbullying in which an overwhelming quantity of e–mails are sent to a single inbox or server in an effort to cause it to overflow.
e) Cybercriminals also use methods like the 'logical bomb', 'trojan horse', and 'data diddling' to cause damage to a company online.

Cyber–crime against society entails a variety of activities, some of which are: Making a fake document, signature, cash, revenue stamp, *etc*., falls under the umbrella term 'forgery'.

The term 'web jacking', which originally meant 'stealing' on the web, was used to denote criminal Internet activity. A fake site with the message as well as a call–to–action is the endpoint when a user clicks on a fake site.[ix] The target will be sent to a phoney website if he follows the seemingly legitimate link. The goal of these assaults is to gain access to or control of another site. The information on the victim website might potentially be altered by the attacker.

6. Instances of Cyber–Crime in India

6.1. Cases studies

6.1.1. Bank NSP Scenario

An aspiring bank manager in this scenario proposed to his girlfriend. The two of them used to spend a lot of time communicating through email on the company's machines. After their marriage had ended, the young woman began sending emails to the boy's international customers using fictitious addresses, including those of 'Indian Bar Organisations'. She did this on a bank computer. Since losing so many customers, the boy's business decided to sue the bank in court. It was determined that the bank was responsible for the content of emails sent via its servers.

6.1.2. Case of Bazee.com

In December 2004, the CEO of Bazee.com has been detained on suspicion of selling a CD containing obscene information on the internet and in the Delhi market at the same time. After intervention from both the Delhi and Mumbai police, the CEO was released on bail.

6.1.3. Crime Committed Against Parliament

The Department of Police Research and Development in Hyderabad carried out this investigation. The terrorist who assaulted the Parliament had a laptop that was retrieved. The BPRD's Computer Forensics Division received the laptop computer from the two terrorists who were killed by gunfire on 13th December, 2001, during the siege of the Parliament. One of the terrorists was carrying a fake ID card bearing an Indian Governments emblem and seal, and the laptop contained several proofs that affirmed their motives, including a Ministry of Home sticker Before enter Parliament House, they attached a sticker they created on a laptop and placed on their ambassador vehicle. The features of the seal and the emblem [*of the three lions*] were carefully scanned to be captured and Jammu and Kashmir—specific mailing

address were also handcrafted. However, closer examination revealed that the whole thing was a forgery created on a computer.

6.1.4. Problems with Taxes in Andhra Pradesh

It was reported that the Vigilance Department had collected Rs. 22 in cash from the residence of the proprietor of the plastics company in Andhra Pradesh. They needed him to provide proof of where the missing money went. The suspect provided 6,000 vouchers to demonstrate the legality of trade. However, upon closer inspection, it became clear that all of the vouchers and data on his computers were created after the searches took place. It became out that the defendant was hiding 5 other enterprises under the umbrella of 1 and using phoney and electronic vouchers to disguise his true revenue and avoid detection. Officials from the state department obtained laptops used by the suspect, revealing his questionable business practises. Additionally, the IT Act's Sections 67 and 70 are implemented. A pornographic or slanderous page is posted on the victim's website once hackers get access to it. Spread of malware by introducing viruses, worms, trojans, *etc*.

The provisions of Sections 63, 66, and 66–A of the IT Act, and Section 426 of the Indian Penal Code[x] apply to those who install harmful software that may acquire access to another person's electronic equipment without the victim's consent.

6.1.5. Virtual sex acts

Despite being outlawed in certain regions, pornographic content on the web is a booming industry. Sections 67, 64–A, and 67–B of the IT Act include provisions that apply to these offences.

6.1.6. Robbing of the Source Code

Sections 43, 66, and 66–B of the IT Act[xi] include provisions that apply to these types of offences.

6.1.7. Second Cyberlaw

When it came time to get a handle on the growing problem of criminal activity in the virtual realm, cyber law was born. Cyber law is a term for the study of the legal concerns raised by the widespread use of information and communication technologies.

Why is it so crucial to have Cyber Law?

Cyber law is crucial in today's technological era. It's vital because it affects pretty much everything about our lives in the digital realm, from the things we buy to the ways we socialise.[xii] There are legal and cyber legal perspectives on everything we do and say online, whether we are conscious of it or not.[xiii]

An Act to Regulate Certain Aspects of the Information Technology Industry in India.

On 17th October, 2000, the Indian Parliament passed the Information Technology Act, 2000, also known as the Information Technology, 2000 or the IT Act. This law, which deals with issues relating to the internet and cybercrime, is significant in India. In a resolution passed by the United Nations Assembly on 30th January, 1997, the United Nations Commission on International Model Law on E–Commerce 1996 was recommended.

7. Laws Governing Cyber–Space in India

Sections of the Information Technology Act of 2000 are herein as follows:

1) References for Computer–Assisted Role Playing: Whoever destroys, hides, or alters a computer, computer software, system software, or computer network's source code does so wilfully and knowingly.[xiv]

Punishment: Any participant in such criminal activity might face up to 3 years in jail, a fine of up to 2½ million rupees, or both.

2) Computer system hacking, data modification, *etc*.: Anyone with bad intentions who tries to steal, damage, erase, or otherwise mess with data stored on a public or private computer. In any way that reduces its worth, usefulness, or use, the perpetrator has committed hacking.[xv]

Punishment: Those convicted of such offences face up to 3 years in jail and/or a fine of up to 2 million rupees.[xvi]

3) Not using any communication service to send any anything that might be considered objectionable:[xvii] Offensive or threatening content sent through any means of electronic communication. False or misleading information that is disseminated with the objective to cause harm, alarm, insult, impede, injure, commit a crime, incite animosity, hate, or ill will. Spam is defined as 'unsolicited electronic communication' with the intent to upset, hinder, mislead, or defraud the addressee in some way.

Punishment: Anyone convicted of violating this provision faces up to three years in jail and a fine.

4) Obtaining stolen computer resources or communication equipment: To deliberately or with reasonable suspicion receive or keep any stolen computer, computer resources, or communication device.[xviii]

Punishment: Anyone convicted of one of these offences faces up to 3 years in jail, a fine of up to 1 million rupees, or both.

5) Identity Theft: Intentionally impersonating another individual by using his or her digital or electronic signature, password, or other form of unique identification is illegal.[xix]

Punishment: A person convicted of such an offence faces up to 3 years in jail and a fine of up to 1 million rupees.

6) Fraud involving the use of a computer to impersonate another person:[xx] Anyone using a computer, phone, or other electronic means to commit fraud against another person is subject to prosecution.

Punishment: Get a description for a sentence that might last a maximum of 3 years in prison and/or a fine of up to 1 lakh rupees, or both.

7) Cyber–terrorism:[xxi] Anyone who tries to deliberately endanger the population or any group of people by:

Prevent anyone from using the computer's resources.

Any action taken with the intent to gain unauthorised access to, or to exceed the scope of, a computer system or network.

Initiating any computer contamination that consequently resulted to, or is likely to lead to, any human injury or death damage to or the destruction of property, interruption of a supply of goods or services necessary to human survival, or negatively impacts the information technology infrastructure described in Section 70 of the Information Technology Act.

Intentionally or willingly attempting to circumvent or gain entry to a computer's resources without permission or going beyond the range of permitted access and, as a result, gaining access to the data, info, or the computer's data system that is limited or restricted for a specific reason to state security or international relations, or any limited data system, data, or any information, with the reasonable expectation that such data, information, or the computer's data will be used for unlawful purposes.

Punishment: Anyone involved in a plot to commit or carry out an act of cybercrime or cyberterrorism shall be subject to a mandatory life sentence.

8) Obscene material transmission or publication:[xxii] Whoever sends or posts or causes to be posted any sexually explicit material online. Whatever can be categorised as obscene materials.

Punishment: A punishment either of description carrying a term of a maximum of five years in prison and a fine of up to 1 lakh rupees may be handed down to the first offender, as well as a punishment either of description carrying a term of a maximum of five years in prison and a fine of up to 1 lakh rupees may be handed down to the second or subsequent offender.

8. Conclusion

Recently, several cyber–crimes have begun to operate due to the increase and spread of newly created technology. Humanity now faces enormous dangers from cyber criminals. Safeguards against cyber–crime are essential to a nation's safety, prosperity, and cultural integrity. To combat cybercrime, the government of India passed the Information Technology Act, 2000. The Act also amends the Indian Penal Code of 1860, the Indian Evidence Act of 1872, the Banker's Books Evidence Act [*Evidence of Bank Records*] of 1891, and the Reserve Bank of India Act, 1934. Since cyber–crime may begin anywhere in the globe and cross international borders through the internet, it is difficult to investigate and bring those responsible to justice. To combat cyber–crime, the international community must work together to harmonise their activities, co–ordinate their responses, and cooperate with one another.

The primary motivation for producing this article is to provide information on cybercrime to the general public. We conclude our research paper, "Short Research on Cyber Crime and Cyber Laws of India", with the statement that cybercrimes would never be accepted. Please report any incidents of cybercrime to the local authorities as soon as possible.

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