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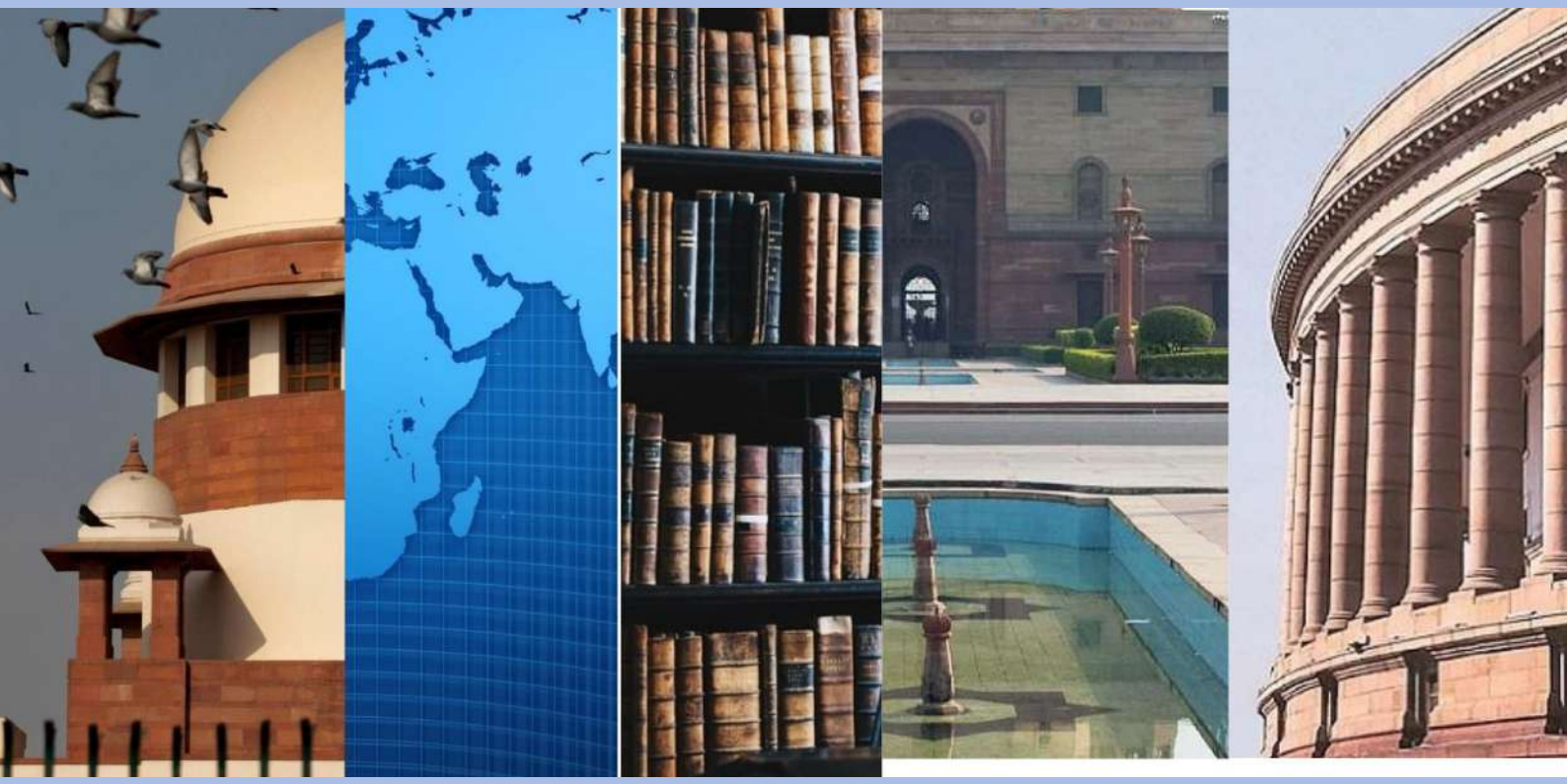

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REGULATORY FRAMEWORK OF INSURABLE INTEREST UNDER THE INSURANCE CONTRACTS: A CRITICAL ANALYSIS

DR. BHARAT[*] & PRIYANKA SINGLA[**]

ABSTRACT

The principle of insurable interest is an important requirement which governs the contracts of insurance, be it life insurance, fire insurance, marine insurance or property insurance. The principle of insurable interest necessitates that a person raising a claim under an insurance policy should have an interest in the life lost or goods/property destroyed against which insurance was availed. The principle of insurable interest can exist not only in favour of the owner of goods or the immediate dependent in case of life insurance, it can exist in favour of several other classes of persons depending on the nature of insurance contract. While the applicability of principle of insurable interest is clear insofar as the insurance contracts are concerned, what is not clear is as to whether the existence of this principle is required to be proved at the time the insurance policy is affected or at the time the loss has occurred. While the courts have made several attempts to clarify this position, there is still some ambiguity which revolves under this aspect. The present research paper is an attempt to analyze the statutory provisions of the insurance contracts with special reference to the regulatory framework of insurable interest as there is a need to adopt the principle of insurable interest to the changing times by making it flexible and not rigid.

1. PROLOGUE

The type of a contract wherein, one party, in consideration of a price (called premium) paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage or prejudice by the happening of the perils specified to certain things which may be exposed to them is known as a contract of insurance.[1]

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[1] *Lucena* v. *Craufurd*, (1806) 2 Bos & PNR 269.

A contract of insurance is concluded through a proposal and the acceptance of such proposal, like every other contract. Considering the fact that insurance is a special type of contract, it is governed by several principles. The foremost and prominent of these principles, which govern the contract of insurance, is that of 'utmost good faith' (*uberrima fides*). Another principle which guides a contract of insurance is that of 'indemnity'. The third important principle is the requirement of 'insurable interest' which is necessary for rendering every insurance policy valid.

2. INSURABLE INTEREST

The term 'insurable interest' can be defined as the interest which one has in the safety or preservation of a thing.[2]

> *"A man is interested in a thing to whom advantage may arise or prejudice may happen, from the circumstances which may attend it… to be interested in the preservation of a thing, is to be so circumstanced with respect to it so as to have benefit from its existence, prejudice from its destruction".*[3]

The above definition of Lawrence J. is the most widely used definition of insurable interest. Insurable interest is of two types *i.e.,* contractual and statutory interest. In the former, the requirement is contained in the insurance policy, while in the latter, the requirements are specified in the law itself.

2.1. Principles governing the Rule of Insurable Interest

It is pertinent to mention here that without an insurable interest, the contract of insurance is invalid. The requirement of this principle is based upon a series of independent principles, which apply differently to various classes of insurance contracts:[4]

i) Interest required by the statute: The Life Assurance Act, 1774 (*hereinafter* referred to as the Act of 1774) imposes a requirement of insurable interest in respect of life policies, and the Marine Insurance Act, 1906 operates in a similar manner for marine policies. These statutes override any contrary provisions in the insurance policy.

ii) Interest required by the policy: As a general rule, the policy specifies the requirement of an insurable interest, either directly or indirectly by requiring the assured to prove that he has suffered a loss after the happening of an event. Policies of this nature are considered as indemnity policies.

[2] Avtar Singh, *Law of Insurance* 31 (Eastern Book Company, Lucknow, 2017).
[3] *Supra* note 1.
[4] MN Srinivasan, *Principles of Insurance Law* 367 (LexisNexis, Gurgaon, 2009).

iii) Anti-wagering legislation: All contracts by way of gaming or wagering, including purported contracts of insurance,[5] are null and void, in terms of Section 18 of the Gaming Act, 1845.

The decision of the House of Lords in *Macaura* v. *Northern Assurance Co. Ltd*.[6] is one of the leading decisions on the subject-matter of insurable interest. In this case, the plaintiff created a small private company for timber business and held substantially all shares except one. The company was heavily indebted to him as he also made advances to the company. He got the timber insured against fire where the policy was in his own name, and not in the name of the company. When fire destroyed most of the timber, the insurer refused to pay by contending that he had no interest in the timber of the company and the Court accepted the argument of insurance company. Lord Sumner held that the plaintiff had no interest in the timber described for the reason that it was not his, and it belonged to the company. The Court further went on to hold that:

> *"He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder, could he insure the company's assets. The debt was not exposed to fire nor was the shares, and the fact that he was virtually the company's sole creditor, while the timber was its only asset, seems to make no difference. His relation was to the company, not to its goods, and after the fire he was directly prejudiced by the paucity of the company's assets, not by the fire."*

3. INSURABLE INTEREST IN INDIA

Particularly with respect to policies of life insurance, the provisions of the Act of 1774 mandate the presence of insurable interest in England; while in America and India, the principle of insurable interest has not been provided under any statute explicitly and it is only a matter of public policy. Unlike England, there is no statute corresponding to insurable interest in India. The only statute in India, which has a bearing on this aspect, is the Indian Contract Act, 1872, whereby Section 30 merely states that "agreements by way of wager are void". In the case of life insurance, the decision of the English Court in *Dalby* v. *India and London Life Assurance Co*.[7] can be considered as the law in India. In this case, it was held that since life insurance is not a contract of indemnity, it is enough that insurable interest exists at the time when the contract is

[5] *Howard* v. *Refuge*, (1866) 54 LT 644.
[6] 1925 AC 619 (HL).
[7] (1854) 15 CB 365: 139 ER 465.

entered into and not at the time of the loss. The Court came to this conclusion by examining the nature of the insurance contract and not by anything indicated by the language of the Act of 1774.[8] The line of reasoning adopted in this case has been consistent with the approach accepted by the Indian Courts in several decisions.

Also, the scope of insurable interest in India has not been confined to that of a pecuniary interest. Where an interest is based on a close family relationship, it may prove sufficient to establish insurable interest in that particular case. However, an insurance contract, which is in the nature of wager, is void in India.

3.1. Insurable Interest under the Contract of Life Insurance

One of the important principles governing the contract of life insurance is that of contingency, which provides for payment on the happening of a contingency and the sum to be paid by the insurer is not measured in terms of loss. What is required is for the insured to have an interest in the life insured.[9]

There is no specific statute which deals with life insurance contracts in India. Thus, it becomes pertinent to refer to the provisions of the Act of 1774. By virtue of Section 1 of the Act of 1774, it has been made amply clear that a person is required to have an interest in the insurance policy at a time when the same is affected and no more. However, Section 3 also creates a room for doubt by stating that the insured can recover only the value of his interest in the insurance policy. Thus, he might be required to have an interest at the time the loss has been caused, *i.e.*, on the date of the death of the person whose life was insured.

The breakthrough case of *Dalby* v. *India and London Life Assurance Co.*[10] established sternly that the presence of insurable interest is to be seen at the time the policy is affected. In it, the claimant was the director of a company, which had insured the life of the Duke of Cambridge, and which reinsured the risk with the defendant. While the original policies were cancelled, the claimant kept paying the premiums on the reinsurance policy until the Duke died. The defendant denied liability on the ground that the claimant had no interest in the Duke's life on the date of his death, for the reason that he had nothing to pay out on it. The claimant was held entitled to recover the amount because he had an interest at the time he reinsured and thus, Section 1 of the

[8] *Supra* note 4 at 1099.
[9] The Life Assurance Act, 1774 (14 Geo. 3 c.48), s. 1.
[10] *Supra* note 7.

Act of 1774 was held to be satisfactory, and there was no common law requirement that the claimant had to prove interest on the date of loss.

The term insurable interest has not been defined anywhere comprehensively and neither is the nature of such interest specified anywhere. Section 3 of the Act of 1774 points towards the fact that it means a pecuniary or financial interest, because the said section refers to the amount of the value of interest of the insured. However, insurances on the insured's own life[11] or on the life of a spouse[12] or civil partner[13] are automatically valid regardless of the amount insured. Other than these exceptions, it is indispensable for the insured to show a financial loss, which he would suffer by the loss of a legal right on the extinction of the life insured and the policy provides for covering only the amount of likely loss.

In case of family relationships, it is presumed that every wife has an interest in the life of her husband as was declared in *Reed* v. *Royal Exchange Assurance Co.*[14] and the vice-versa is equally true. The interest of a wife does not depend on her right of necessaries at her husband's expense. In the case of *Flectwood's Policy, Re,*[15] a man insured his life for a certain sum of money which was to be paid to his wife if living at the time of his death, and to his legal representatives, if not. He collected the amount of the paid-up value prematurely, which was permitted under a clause in the insurance contract. The Court laid down that a trust was created in his wife's favour and, therefore, the amount belonged to both of them jointly.

Similarly, in case of parent, child and relatives, a minor child would have an insurable interest in the lives of his or her parents, where the parents are under a legal obligation to support the child, for the child would suffer financially by the loss of a legal right on their deaths. Such an obligation may be created as a result of statutory provisions. However, on principal and authority,[16] an adult child can have no insurable interest unless he can prove the existence of some legal obligation on the death of his parent. In *Harse* v. *Pearl Life Assurance Co. Ltd*.,[17] a son insured the life of his mother who lived with him and kept the house for him. The insurance was expressly declared to be for funeral expenses. The Court of Appeal held that since there was no legal obligation on the part of the son to bury his mother on death and also, the mother was not legally bound to keep the house for her son, the policy was illegal for the absence of interest.

[11] *Wainewright* v. *Bland*, (1835) 1 Moo. & R. 481.
[12] *Murphy* v. *Murphy*, [2004] Lloyd's Rep. I.R. 744.
[13] The Civil Partnership Act, 2004 (c 33), s. 253.
[14] (1795) 170 ER 198.
[15] (1926) 1 Ch 48.
[16] *Shilling* v. *Accidental Death Insurance Co.*, (1857) 2 H. & N. 42.
[17] [1904] 1 KB 558.

In the case of *LIC* v. *Kanta Rani*,[18] the life of a minor was insured, who died after attaining majority. The Court stated that the proposer who got the life of the minor insured was the guardian. In the absence of any nominee or assignee, the sum insured under the policy was payable to the proposer. However, the proposer was not paid the amount, and money was lying with the LIC. The proposer was compensated with interest at 6%. Sisters are said to have no insurable interest in each other's lives.[19]

When it comes to commercial associations, where a creditor has taken an insurance on his debtor's life or when an employer takes an insurance policy on his employee's life, the amount of interest is restricted to the pecuniary interest of the insured. If an employee dies as a matter of strict law, the employer's interest will be restricted to the value of services that he will lose. This amount may vary in case of an indispensable employee with a lengthy service contract and a less illustrious employee.

Section 1 and 2 of the Act of 1774 have different scopes in the sense that the former renders the policy unlawful in the event of it being not complied with, and the latter provides that policy without interest shall be null and void for all intents and purposes whatsoever.

3.2. Insurable Interest under the Contract of Fire Insurance

A contract of fire insurance is affected into when a person seeking insurance enters into a contract with the insurer to indemnify himself against any loss of property that may arise by or incidental to fire and or lighting, explosion, etc. Unlike that of a life insurance contract, a fire insurance contract is one of indemnity.

For a contract of fire insurance to be valid, the existence of an insurable interest in the subject matter is essential and the test of determination of that interest is whether the loss of property would cause a pecuniary loss to the insured and whether he would have attained any pecuniary benefit or advantage from preservation of the insured property. If the insured suffers a loss or derives a benefit, it can be concluded that he has an insurable interest in the subject matter of contract. The extent of interest of insured and whether the insured was with full or part of the property are completely irrelevant as far as the question of settling his claim is concerned, as the insurance of the subject matter and its ownership may not necessarily go together. This line of

[18] AIR 2007 (DOC) 159 (P&H).
[19] *Evanson* v. *Crooks*, (1911) 106 LT 264.

thought has been approved by the Hon'ble Supreme Court in the case of *New India Assurance Co. Ltd.* v. *G.N. Sainani.*[20]

In another case of *Oatman* v. *Bankers' & Merchants' Mutual Fire Relief Association*,[21] the Court held that where a husband had insured his wife's property, in which he had no rights, he is not entitled to recover any amount from the insurer when the property was destroyed. Not only would this render the contract to be a wager to insure against loss from the destruction of property in which there was no present interest, but that it would also present a strong temptation to destroy the subject-matter, and, therefore, the contract would be against public policy.[22]

A person who has an insurable interest in the property is entitled to get the property insured against fire insurance. However, such an interest is not linked to the ownership of the property alone. There are several classes of persons who have been held to possess an insurable interest in a property and can get insurance for the same even if they are not the owners, like a sole owner, joint owner, or partner in the firm owning the property, vendor and purchaser, mortgagor and mortgagee, trustees and beneficiaries, bailees, carriers, pawnbrokers or warehouse-men and wharfingers.

A person, who does not possess an insurable interest in a property, is not entitled to get the same insured. Such persons include unsecured creditor and a shareholder in a company.

3.3. Insurable Interest under the Contract of Marine Insurance

A contract of marine insurance is governed by the provisions set out in the Marine Insurance Act, 1963. The law defines a contract of marine insurance as an agreement whereby the insurer undertakes to indemnify the insured, in the manner and to the extent thereby agreed, against marine losses, or the losses incidental to marine adventure.[23]

As per Section 6 of the 1963 Act, every such contract of marine insurance is void which will be enacted by way of wagering and one of the elements which renders a marine insurance contract a wager is the absence of insurable interest.

Section 7(2) of the 1963 Act further defines an insurable interest. Every person shall be deemed to have an insurable interest in a marine adventure, who is interested in it. This requires the

[20] (1997) 6 SCC 383.
[21] (Ore. 1913) 133 Pac. 1183.
[22] *Ohio Farmers Insurance Co.* v. *Vogel*, (1903) 30 Ind. App. 281.
[23] The Marine Insurance Act, 1963 (Act 11 of 1963), s. 3.

presence of a physical object which is exposed to marine perils and for the assured to have some legal or equitable relationship to such an object. The insured should stand to benefit by its preservation or safety or safe arrival or should be adversely affected by loss or damage to it or by its detention or should be incurring liability in respect of these happenings.[24]

While the owner of a ship has an insurable interest, there may be three categories to consider ownership as a mode of having insurable interest,[25] *i.e.*, ownership of ship, ownership of cargo, and ownership of freight.

In terms of Section 8 of the 1963 Act, interest should exist at the time of loss, and may not exist at the time when the policy is affected. It is not possible to acquire the interest subsequently, where the insured had no interest at the time of loss.

Interest can be broadly categorized into three heads, *namely*, partial, defeasible and contingent. Both defeasible and contingent interests are insurable.[26] Defeasible interest means an interest that is capable of being terminated, or which will be terminated on the occurrence of a particular condition. Whereas, an interest is termed as a contingent interest when it is uncertain and is dependent upon the happening of an event, which may or may not happen.

By virtue of Section 10 of the 1963 Act, a partial interest of any nature is rendered insurable. This enables a person having an interest in a ship, in its cargo or in its freight, to have a right to insure his interest.

The insurer is permitted to reinsure his risk as he has an insurable interest in the risk borne by him under a contract of insurance. However, unless the policy expressly provides so, the original assured cannot be said to have right or interest in respect of such reinsurance.[27] This provision has been incorporated in the statute for the obvious reason that reinsurance has been taken by the insurer for the purpose of protection of his own interest, and not that of the originally assured's interest. Thus, the originally assured should not be entitled to take any unnecessary advantage out of such reinsurance.

Section 12 of the 1963 Act stipulates that the lender of money under a contract of bottomry or respondentia has an insurable interest in respect of the loan advanced by him. Bottomry can be

[24] S. Arunajatesan & T.R. Viswanathan, *Risk Management & Insurance: Concepts and Practices of Life and General Insurance* 208 (Macmillan Publishers India Ltd., New Delhi, 2009).
[25] *Supra* note 4 at 502.
[26] *Supra* note 23, s. 9.
[27] *Supra* note 23, s. 11.

defined as a maritime contract by which the owner of a ship borrows money for equipping or repairing the vessel and, for a definite term, pledges the ship as security – it being stipulated that if the ship be lost in the specified voyage or period, by any of the perils enumerated, the lender shall lose his money. This contract is almost obsolete now. A similar contract creating a security interest in the cargo is called as respondentia.[28]

Section 13 of the 1963 Act aims at securing the welfare of the members of crew on board a ship. It stipulates that the master or any crew member of a ship possesses an insurable interest in respect of his wages. Thus, the crew members are entitled to protect their wages in case any accident takes place while they are on board a ship. The object of this provision is more in line with the labour welfare legislations.

Section 14 of the 1963 Act provides protection in case of payment of advance freight. The freight earned on successful completion of voyage can also be insured by a ship-owner for the reason he has an interest thereon. Also, the profits which a ship-owner is likely to earn on the successful completion of the voyage are insurable.[29]

It can be said that the law pertaining to applicability of rule of insurable interest in case of marine insurance contracts is explicitly stated and is unambiguous to that extent. Further, since we have a comprehensive Indian statute, the chances of there being contradictory interpretations are almost nullified.

3.4. Insurable Interest under the Contract of Property Insurance

Property can be defined as anything that is tangible (buildings and contents) or intangible (goodwill and copyright) to which a value may be assigned. In terms of property insurance, the term 'property' generally means tangible material property. Insurable interest is a pre-requisite to recovery under a contract of property insurance. In the words of Lord Eldon, "insurable interest is a right in the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."[30]

Property insurance is also a contract of indemnity, like that of fire insurance. It is indispensable that there is a present right to a legal or equitable interest or a right under the contract, as a mere expectation or even a moral certainty of loss should particular property be destroyed is not

[28] Bottomry, *available at:* https://www.britannica.com/topic/affreightment (last visited on June 15, 2021).
[29] *Supra* note 2 at 295.
[30] *Supra* note 1.

enough. For this reason, a remainder-man, possessing a vested interest, has an insurable interest, but the person having a contingent interest or the beneficiary of property under the will of a dying testator does not have an insurable interest. Queen's Bench Division (Commercial Court) explained the concept of insurable interest in property in the case of *O'Kane* v. *Jones (The "Martine P")*[31] as:

> "(i) Ownership or possession or the right to possession of the property insured was not a necessary requirement of an insurable interest.
>
> (ii) Commercial convenience could be a relevant factor in determining the existence of an insurable interest.
>
> (iii) A person exposed to liability in respect of the custody or case of property could insure the property itself as an alternative to taking out liability insurance to protect his exposure, and where any loss or damage has been caused by a peril insured against, he could recover in respect thereof up to the full sum insured, even if that exceeded the amount for which he was liable regardless of whether the loss or damage had occurred without any actionable fault on his part. Where the person has not suffered any personal loss and to such extent, he shall be accountable to the owner of the goods who has suffered the loss.
>
> (iv) A legal right to the use of goods, the benefit of which would be lost by their damage or destruction, might be sufficient to constitute an insurable interest therein.
>
> (v) A person can also be said to have an insurable interest in some property if loss of or damage to such property would rob him of the opportunity of carrying out any work in relation to that property and being remunerated for such work."

Various individuals may have an insurable interest in a property. The party to a contract for the sale of goods has an insurable interest provided he satisfies either of the two conditions, *i.e.*, he either has the property in goods or bears the risk of their loss.[32] However, the problem arises when insurable interest is to be decided in case of persons living together. The question as to whether or not spouses, or other co-habitants, have an insurable interest in something which is solely the property of the other, has never been actually decided. Considering the way, the principles are propounded in respect of principle of insurable interest, the answer to this question should be in negative unless the person, other than the owner, has possession which is sufficient

[31] (2004) 1 Lloyd's Rep 389.
[32] *Inglis* v. *Stock*, (1885) 10 App. Cas. 263.

to insure, or in simple words, where the use of the property is shared by those persons,[33] then insurance can be taken by a person other than the owner also.

Any person possessing a proprietary interest in a property is entitled to insure it up to its full value. But contractually, it is important for the insured to have an interest at the time the loss has been caused and the value of his interest is also crucial in such a case. He can *prima facie* recover only that amount as is sufficient to indemnify himself against the loss or damage. An example of this scenario would be any tenant of property, who has an insurable interest in it and is entitled to insure it for the full value of such property.

The case of *Home Insurance Co.* v. *Adler*[34] involved a strong claim for complete compensation. In *Adler*, the life tenant died in the fire, nineteen minutes after it had begun. The insurer admitted that had the life tenant survived the fire, she would have been paid the full damage within the policy since the same premium is paid by an insured with a fee interest as by an insured with a life interest. Nevertheless, the insurer vehemently argued that since she died during the fire, she had a *de minimis* loss since she had no insurable interest the moment after the death. In view of the fact that she was alive when the fire had started, the Court held that the liability attached in her favor at that moment for the full damage caused by the fire.

Insurance by someone with a limited interest in a property raises a further question as to whether there are any circumstances when such a person can recover more than the value of his interest in the property, in order to account for the balance to another person. The insured is not necessarily confined to recovering the value of his proprietary interest in the property. He has an insurable interest in an expectancy based upon his proprietary interest, for example, in the profits he would expect to make from his ownership or occupation of the property.[35] This, however, has to be insured quite separately for the usual indemnity policy on property will not indemnify against consequential losses.

In the case of *Feasey* v. *Sun Life Assurance Corporation of Canada*,[36] Waller L.J. noted that there was a category of insurable interest, which was broader than that applied in straightforward cases of property insurance and such category of interest is the one which is required to be properly analyzed and examined. In *Feasey*, a P and I Club affected an insurance for the

[33] *Goulstone* v. *Royal Insurance Co.*, (1858) 1 F. & F. 276.
[34] 269 Md. 715, 309 A.2d 751 (1973).
[35] *City Tailors Ltd.* v. *Evans*, (1922) 91 L.J.K.B. 379.
[36] [2003] EWCA Civ 885.

members of the club in respect of their liabilities for personal injury or death suffered by employees of members and others on board their vessels. The club obtained a reinsurance for its own liabilities under a conventional reinsurance with a Lloyd's syndicate (number 957). The issue of insurable interest does not arise under this kind of an arrangement since anyone, including an insurer, has an unlimited insurable interest against legal liabilities that it might incur. However, there were some changes in Lloyd's rules regarding liability insurance in 1995, , which resulted in a change in the reinsurance between the club and Syndicate 957. The policy in effect became what looked like a first party rather than third-party insurance. Syndicate 957 agreed to pay a fixed sum to the club in respect of relevant injuries and death.

All members of the Court treated the case as governed by the Act of 1774, so, if the club had no interest, the policy was illegal and void. However, the judges agreed that it was the duty of the court to try and find insurable interest. Waller L.J. considered that the key question is to determine the proper subject-matter of insurance and whether the insured has an insurable interest in that subject-matter or not. He grouped the authorities into four categories. First is straightforward insurance of an item of property, where the law is strict. Second is where the subject-matter is a defined life and law is equally strict. Third are those cases where the subject-matter is not merely an item of property but is an adventure, according to the proper construction of the policy. Lastly are those cases where the court recognized those interests which are not even strictly pecuniary. The cases of life insurance, *i.e.*, the insurances on one's own life and the life of a spouse, fall in that category of where the insurable interest is presumed.

4. PROTECTION OF POLICY-HOLDER

As a result of the increasing unfair and fraudulent practices resorted to by the insurers, it becomes extremely important to provide adequate protection to the genuine and *bonafide* interests of policyholders. The insurance sector is regularized with the objective of securing the interests of policyholders against unforeseen events and ensuring that their risks are adequately covered. Thus, the Courts have resorted to the Consumer Protection Act, 2019 to address the grievances of policy holders.

In the case of *Mahadeo Cotton Mills* v. *Oriental Insurance Co. Ltd.*,[37] the goods insured under carriage were delivered by the carrier to consignee without collecting the documents from him which were sent through a bank, the carrier only taking an undertaking from the consignee that

[37] 1993 CCJ 166 (Raj).

he would retire the documents, the insurer also repudiating the claim because the goods were delivered and not lost. It was held that the matter was too complicated for a consumer forum to sort out and, therefore, a civil suit would be better. Such an order ensures that the insured can avail of appropriate remedy by seeking redressal in the appropriate forum.

In *Kartar C Kambjoj* v. *United India Assurance Co. Ltd*.,[38] the petitioner's vessel was injured. The vessel sailed beyond the limits set up in the insurance policy. It sank in an accident. The claim was repudiated by the insurer because of the diversion. The petitioners contended that because of the diversion, they paid an additional premium amount to the development officer for extension of the insurance cover. The insurer contended that the receipt of money by the development officer was without authority. The National Consumer Commission observed that the case involved highly disputed facts. The remedial measures created under the Consumer Protection Act could not be availed of. The petitioners should seek remedy in some other forum.

Whatever may be the claim arising out of an insurance policy, what is of paramount importance is that the person raising a claim should possess an insurable interest. Where a person is not the registered owner of a vehicle and he has affected the insurance of that motor vehicle in his name, he would not be allowed to claim any amount under the policy for the simple reason that he will have no insurable interest in the vehicle so insured.[39] Similarly, although a mortgagee of a ship will have an insurable interest in that ship, his claim will be restricted to the extent of his interest in such a ship and it cannot exceed his interest.[40]

The insurer can also seek compensation in event of delay in settlement of claim by insured, however, the Courts must exercise caution while granting such compensation. In *United India Insurance Co. Ltd.* v. *Abdul Rashid Mattoo,*[41] the insurer contested the claim for damage to a house in earthquake. The State Commission allowed the claim and also awarded certain amounts for physical harassment and mental torture suffered by the claimant because of the ill-conceived resistance to the claim. The SC removed such awards and reduced the rate of interest to 12% from 18%. The Court said that a mere resistance to a claim could not be regarded as causative of physical harassment and mental torture.

[38] (1998) 2 CPJ 32 (NC).
[39] *National Insurance Co. Ltd.* v. *UC Dhiman*, (1995) 1 CPJ 14 (Har).
[40] *Chief Executive Officer & Vice-Chairman, Gujarat Maritime Board* v. *Haji Daud Haji Harun Abu*, (1996) 11 SCC 23.
[41] (2005) 13 SCC 426.

In case any fault is committed by the insurance company, the policy-holder is entitled to claim the whole amount of the policy without any prejudice. In *Usha Kumari Ranawat* v. *LIC*,[42] the claimant's husband submitted a proposal for a policy by depositing 26,00,000 INR. He was given a different policy than what was applied for. The claimant was allowed to recover the full policy amount due under the policy as opted for by her husband.

In the case of *United Commercial Bank* v. *Anita Airan*,[43] the insured had taken a Janta Personal Accident Insurance policy. On March 29, 1996, he gave a cheque for the premium amount of 5,00,000 INR. The insurer deposited it for collection the very next day. Insurer's bank sent it for collection on April 4, 1996. The drawee bank returned it without making payment because the account holder had died in a car accident. The insurer was held liable for the full insured amount because the bank was its agent and the agent's default was attributable to the insurer.

In the interest of justice that while according adequate protection to policy-holders, the courts do not overlook the aspect of authenticity of claims raised by them. The fact that law is meant to serve both the parties to contract is undisputed. In view of this, the courts should be wary of granting excess compensation to insurers and the please raised by the insured should be taken into due consideration. The traditional approach in straightforward insurances of the life of another should be challenged and the law should be reformed as is required by the changing times. In order to keep the law relevant, it is necessary for it to evolve with changing times.

5. INSURABLE INTEREST AND THE LAW COMMISSION OF THE UNITED KINGDOM

The question that arises in context of insurable interest is whether the concept is needed at all, at least in property insurance. The Law Commission issued an Issue Paper in January 2008, wherein they pointed out that the law was unnecessarily complex and outdated and in need of reform. The Paper stresses a number of uncertainties, and there remains an argument that the Act of 1774 applies to insurances of buildings. They also consider whether a requirement of insurable interest is necessary for the definition of an insurance contract, something that has regulatory and taxation implications, among other things.

As far as life insurance is concerned, the Commission was tentatively of the view that a requirement of insurable interest should be retained, principally in order to deter gambling in the

[42] (2011) 13 SCC 196.
[43] (2002) 3 CPJ 371 (NC).

guise of insurance, which was also a driving force behind the Act of 1774. Several categories of interests should be created, which will help in broadening the scope of insurable interest, for the cases where natural affection is involved (parents and minor children, spouses, etc.) and where non-family interests are concerned. In the former case, the interest would be unlimited in amount. The Commission also opined that a policy without interest should be made void and not illegal. In case of indemnity insurance, the principle of indemnity would continue to operate and hence, there is no need of insurable interest. As insurers are, and would be, entitled to ask questions about a proposed insured's interest in property to be insured, this hardly seems necessary.

It is important to adopt a new approach to settle the meaning and requirement of principle of insurable interest in different types of insurance contracts. Such new approach should focus on reforming the concept of insurable interest to ensure that the concept is not reduced to being a mere technical one, which ends up refuting the purpose and intent behind providing insurance policies. At the same time, it is important to not lose sight of the fact that the principle of insurable interest is not relaxed to an extent which enables any and every person to raise claims with the insured. This will merely result in casting an additional burden on the insured. Thus, the law should not be diluted, and the aim should be shift towards a more liberal interpretation pertaining to the requirement of principle of insurable interest.

6. EPILOGUE

It is clear that presence of insurable interest of person raising a claim under the policy is a must. If the same is not present, the policy will be a mere wagering agreement and the claimant will not be entitled to recover any amount of the loss suffered by him.

The statutory requirement imposed by the Act of 1774 in respect of insurable interest in the UK, and adopted through judicial decisions in India, cannot be dispensed with. But, in contracts of indemnity, this requirement is applied into the contract only when loss has been caused. Therefore, there is no reason for not waiving or dispensing with this contractual requirement in an appropriate case, provided that there are absolutely no elements of wagering involved.

ANTI-TERRORISM LAWS AND HUMAN RIGHTS IN INDIA: AN APPRAISAL

ABHILASH ARUN SAPRE[*] & HIMANSHI GUPTA[**]

ABSTRACT

India, being a democratic country and assurer of fundamental rights has been struggling to reconcile its democratic principles with antiterrorism laws. Laws enacted to combat terrorism have been considered draconian and violative of Due process of law. The main idea behind antiterrorism legislation is to protect the innocents from terrorist activities. Extraordinary powers have been provided to deal with critical and immediate situations. If we trace our history of using extraordinary powers, we would see that at many situations they have been misused and took the lives of many innocent citizens. The paradox is that the laws that are made for the safety and protection of human rights are themselves violating the liberty rights of innocents. Judiciary has given various judgments at various times to create a balanced approach between antiterrorism laws and Human rights. Criminal Justice System needs certain reforms which can be made only by analysing the loopholes in the legislations and their implementation. There cannot be any discernment which can decide the validity of the antiterrorism laws. At the same time, the due process of law talks about procedure being fair and reasonable. However, these antiterrorism laws are stringent to such an extent that the 'so called terrorist' does not even get fair opportunity to prove his innocence. Considering the security of the nation and provisions mentioned in Article 22 of the Constitution, certain exceptions can be made in the antiterrorism laws like preventive detention laws.

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1. INTRODUCTION

"Terrorism must be outlawed by all civilized nations-not explained or rationalized, but fought and eradicated. Nothing can, nothing will justify the murder of innocent people and helpless children". - Elie Wiesel

Terrorism has become the most prevalent threat to the stability and security of any nation in the world. Terrorism is a very popular world occurrence. It is very easy to accept but hard to describe. Community terrorism, foreign, national and regional terrorism, state-sponsored terrorism, etc., are facets of types of terrorism. Political discontent, economic inequalities, international relations, religious and ethnic disparities, etc., are certain factors responsible for the happening of terrorism.

Several nations and international organisations have tried showing the way on quelling terrorism by conducting conferences and signing peace treaties. Nevertheless, they failed to arrive at a single concept of terrorism, which is appropriate to even the majority of the international community. In addition, various personalities from different nations have also attempted to describe terrorism, but not a single term is recognised worldwide. In India, the term terrorist act has been identified by different acts, but the term terrorism has not been defined. In its different descriptions, the judiciary has also attempted to describe the term terrorism.

Affected countries have shown their legislative response to the war on terrorism. The exponential increase in terrorist attacks is a cause of deep concern in this century. India has been facing terrorist problems over the past 30 years. In order to address this issue, the Indian Parliament has introduced numerous measures to curb the threat of terrorism. These laws are bifurcated into Preventive Detention Laws and Punitive Terrorism Control Laws.

Like any other country, variety of laws has been enacted by India in recent decades to resolve various particular contingencies: the Preventive Detention Act (PDA), 1950; the Public Protection Act of Jammu and Kashmir (1978); the Maintenance of Internal Security Act (MISA), 1971; the National Security Act (NSA) 1980. TADA was repealed on the ground that government was invested with extensive powers and would hamper the democracy of a country. After the discontinuation of TADA, there was no anti-terrorist law present that could put a stop to terrorist activity in India. The Prevention of Terrorism Act, 2002 (POTA), was repealed in 2004 for the same reason. UAPA, 1967 was further amended on 31.12.2008 as the Criminal Activities (Prevention) Amendment Act, 2008, with the intention of strengthening the procedures

for timely investigation, prosecution and prosecution of cases of terrorist-related crime, while at the same time ensuring that such provisions are not misused at all. The National Investigation Agency Act, 2008, was made to strengthen the investigation procedure in the terrorism related cases by giving the investigation powers to the officers of the rank of Inspector. Further amendments were made in the Unlawful Activities (Prevention) Act, 1967, in the year 2012 to include economic crimes with terrorist acts in mind. The latest amendment in this Act empowers government to tag a person 'terrorist' if he/she is involved in the terrorist activities. The anti-terrorism legislations have been enforced to deal with special situations from time to time. The validity of these laws has been upheld by the judiciary at different times. In multiple cases, Parliament's statutory power to legislate different anti-terrorism laws has been challenged.

2. ANTI TERRORISM LAWS IN INDIA

India is a nation with a multi-ethnic population. Caste and community violence, however, is unsavoury but usual. Religious differences are mainly the ground of terrorist activities. The significance of anti-terrorism laws in our country cannot be overlooked. In addition to this, when the Constitution was made Dr. Bhimrao Ambedkar gave the statement that "It may be appropriate, in the present circumstances of the country, for the executive to detain a person who is tempered either by public policy or by the country's defence services. In such a situation, I do not think that the demand for an individual's liberty is above the interest of the state".

2.1. Powers flowing from Indian Constitution

The Indian Constitution derives its legitimacy from all anti-terror legislation. India was in chaos and transformation at the time of Independence. Divisive powers and fissiparous tendencies; great communal partition violence; war on Kashmir, communist subversion and eminent fear that the government of a province would breach the national constitution under the influence of extremist ideology or a regional ethnic upsurge, all of which led to the introduction of strict provisions in India's Constitution. The framers were conscious that when the state is safe from external and internal violence, the individuals are safe. India's constitutional law provides for some very effective steps to safeguard state security, threatened both by the enemy and by its own people. The provisions of the Constitution concerning State Protection include the following areas:

(a) Legislative authority affecting State Security
(b) Forces of Emergency

(c) Powers of preventive detention for reasons related to state security

2.1.1. Legislative authority in the area of State Security

In the allocation of legislative power on different matters between the Union and States, the Constitution of India adopted the system followed by the Government of India Act, 1935. The legislative authority over state protection is extracted from Entry 1 of List 1, where there are exclusive powers in parliament. "Defence of India and all parts thereof, including preparation for defence and all such acts that may be conducive to its prosecution in times of war and to effective demobilisation after its termination."

In addition to this, Entry 3 of List II is regarding preventive detention in case of security of the state. It empowers both the Parliament and the State legislatures to legislate on this subject. Parliament may also breach the list of States (list 2) referred to in Article 249 in respect of a matter in the national interest and, in the present sense, in the interest of the protection of the State. To this end, a resolution to that effect must be adopted by the Rajya Sabha by a 2/3rd majority. Such a law shall remain in effect for a limited duration of one year at a time and may be extended at any time beyond the terms of another resolution.

2.1.2. Force of emergency powers

Article 352 to 360 of the Indian Constitution provides for an emergency authority scheme which focuses on the circumstances and implications or effects of the imposition of emergency relief and the conditions for the imposition of emergency relief. Emergency power given to or used or obtained by a public authority to comply with the emergency conditions declared by the Head of State to cover any situation threatened by crimes affecting state security, such as war and armed insurrection, sedition, serious terrorist and secessionist activities.

2.1.3. Powers of preventive detention

For reasons related to the State Security, Dr. Ambedkar, the Chairman of the Drafting Committee, in the Constituent Assembly, observed that "It seems unclear whether individuals and parties would act in a constitutional manner in order to achieve power or whether they will resort to unlawful methods to carry out their purposes. If all of us followed purely constitutional methods to accomplish our goal, I think the situation would have been different, and perhaps there might not be the need for preventive detention at all." However, witnessing the past anti-terrorist attacks one cannot neglect the need of preventive detention. The Parliament and the

State legislatures may pass legislation allowing for preventive detention for reasons related to India's security, foreign relations, or welfare. Article 22 of the Constitution lays out certain restrictions on the preventive detention laws. Clauses (3) to (7) of Article 22 provides certain procedural guarantees which are necessary to be fulfilled for any preventive detention law to be valid.

3. UNDERSTANDING OPERATIONAL LAWS VIS-A-VIS HUMAN RIGHTS AND JUDICIAL RESPONSE

There has always been a great deal of controversy in India about anti-terrorist legislation. One of the points is that these laws are impeded by the fundamental rights of citizens. The anti-terrorist laws were already passed by the legislature and enacted by the courts, but not without reluctance. The goal was to legislate and bring these laws into effect until the situation improved. The National Security Act, 1980, the Armed Forces Special Power Act and the Illegal Activities (Prevention) Act, 1967 are the laws currently in place to control terrorism in India.

3.1. The National Security Act, 1980

Public Order and National Security [1] cannot be compromised in the name of liberty. Thus, detention can be made on these grounds. Unfortunately, the detention laws are not define anywhere in the Act. The scope of acts considered to threaten "public order" and "national security" However, the Supreme Court created a consistent jurisprudence that supplied substantive substance to these concepts. The Supreme Court observed that the threats to national security also means internal disturbances and can be the ones which even place the community or group of certain people at risk.

In Union of India v. Tulsiram Patel[2], the Court suggested that:

> The expression “law and order”, “public order” and “security of the State” were used in various actions. Situations that involve “public order” are more serious than those that affect “law and order.” Therefore, those situations that affect “security of the State” are the most serious. Dangers to the safety of the State may occur from within or outside the State. The word “security of the State” does not apply to the security of the entire country or of the whole state. It may also not be limited to an armed insurrection or revolution.”

[1] National Security Act, 1980 s 3.
[2] Union of India v. Tulsiram Patel, A.I.R. 1985 S.C. 1416, 148.

In Anil Dey v. State of West Bengal, the Supreme Court held that:

> "the veil of subjective satisfaction of the detaining authority cannot be lifted by the courts with a view to appreciate its objective sufficiency. The courts cannot substitute [their] own opinion for that of the detaining authority by applying an objective test to decide the necessity of detention for a specified purpose; they do review whether the satisfaction is honest and real, and not fanciful and imaginary".[3]

The other problem with this Act is that the review process is of quasi-judicial nature. While preventive detention is a type of administrative detention, it is not arbitrary to issue and validate preventive detention orders, as all detention orders are subject to a process of rationalised and institutionalised examination.

Under the Act, detention orders are to be executed as set out in the Code of Criminal Procedure. Detention warrants, signed by the judicial officer issuing the warrant, must also be in writing. The police officer who enforces the order must provide notice of the order's content. To the person to be detained and, if requested, to show the detainee the order. Therefore, without unnecessary hesitation, it is appropriate for the officer making the arrest to place the detainee before a magistrate, and in no circumstances may the delay exceed twenty-four hours.

Article 22(4) of the Constitution provides that no law providing for preventive detention may allow a person to be held in custody for a period longer than three months, unless the Advisory Board, which has been appointed in accordance with the law, states that such detention is, in its opinion, justified.

3.2. The Special Powers Act for the Armed Forces (AFSPA), 1958

The Act establishes a legislative structure and legal protection for the execution of military internal security operations. AFSPA empowers army personals to enter and arrest the suspected person where immediate action is required. Unlike a normal law and order situation where the military operates in support of the civil authority and has to obtain specific permission from the civil authority to take offensive action, such weakening constraints are not possible in a terrorist environment. Reasons for declaring the area disturbed. It is also argued that the areas designated as disturbed were designated unfairly. Only in areas known as 'disturbed areas' and not by the arbitrary will of those in charge as clearly defined in Section 2 will AFSPA come into force

[3] Anil Dey v. State of West Bengal, A.I.R. 1974 S.C. 832.

through due process of law. In such areas where law and order have completely collapsed, it is appropriate to deploy security forces. In Naga People's Movement of Human Rights v. Union of India, AFSPA's constitutionality was questioned. The constitutionality of AFSPA was affirmed by the Supreme Court in this judgement. Certain judgments were drawn by the Supreme Court, including

(a) the central government may make a suo-motto declaration, but it is desirable that the central government should consult the state government prior to the declaration;
(b) AFSPA cannot arbitrarily authority tag any region as a 'disrupted area';
(c) the declaration must be for a limited period of time and the declaration should be annually reviewed after 6 months of expiry; Provisions which provide the armed forces with extra ordinary powers.

The main sections of the Act, namely 4(a)[4], 4(b)[5], 4(c)[6]and 4(d)[7], allow the armed forces to carry out tactical counter-insurgency operations. The absence of these four legal provisions will make the security forces unable to perform their function assigned to them. AFSPA also only comes into effect after an area has been deemed disturbed, as previously mentioned. In such a scenario, its unavailability will mean that a soldier is unable to fire at a terrorist, take the required measures to destroy a hiding spot, apprehend a suspect while in question, and eventually search any premises in order to retrieve guns and ammunition. In Naga People's Movement of Human Rights v. Union of India[8], The Court also held that "While exercising the powers imposed on him by the AFSPA, the authorised officer should use the minimum force necessary for effective action, and the authorised officer should strictly comply with the 'Dos and Don'ts' given by the military." Moreover, the death of individuals in police proceedings is often alleged to be justified on the grounds of their self-defence. The Supreme Court on 'Victim Families Association of Extra Judicial Execution (EEVFAM) and Ors. vs. Union of India (UOI) and Ors.'[9] He argued "that the right to self-defence or private defence falls in one basket and that the use of excessive force or retaliatory force falls in another basket." Accordingly, if a victim of violence has the

[4] Armed forces special power Act, 1958 s 4(a) authorises any officer, commissioned and non-commissioned, to use force for maintenance of public order.
[5] Armed forces special power Act, 1958 s 4(b) empowers the forces to destroy a fortified position, cache or an arms dump.
[6] Armed forces special power Act, 1958 s 4(c) empowers the arrest, without warrant, of a person who has committed a cognisable offence.
[7] Armed forces special power Act, 1958 s 4(d) permits search, without warrant, of suspected premises to recover arms, ammunition and explosive substances.
[8] Naga People's Movement of Human Rights v. Union of India, **(**1998) 2 SCC 109: AIR 1998 SC 431.
[9] Victim Families Association of Extra Judicial Execution (EEVFAM) and Ors. v. Union of India (UOI) and Ors, W.P. (CRL.) 129 OF 2012.

right to private protection or self-defence (provided in sections 96 to 106 of the Indian Penal Code), if, by excessive force or retaliatory action, the victim violates the right to private protection or self-defence, the suspect becomes an attacker and commits a criminal offence. The use of unnecessary force or retaliation often, unfortunately, leads to the original aggressor's death. It is known as extra-judicial killing or extra-judicial execution if the state uses some unnecessary or retaliatory force that results in death.

The Supreme Court ruled in Darshan Singh Vs. State of Punjab & Anr.[10] that "where there is real concern that the aggressor may cause death or serious injury, the defender's right to private protection may also extend to causing death in that case. In order to bring the right of self-defence into effect, a mere fair fear is necessary, but it is also a settled position of law that a right to private defence is just the right to protect oneself and not to retaliate".

It is not a right to avenge you. The absence of such legislative protections would have a negative effect on the operational flexibility of government protection. This would make the security forces unable to fulfil their role. In short, it would mean that a soldier cannot fire on a gunman, cannot take the appropriate measures to destroy a hiding spot, and cannot apprehend someone accused of being a danger to the nation that would potentially affect others' right to life. Thus, such special powers must be provided to the armed forces to protect the lives of potential victims.

The force used by the armed forces should however be required and proportionate.

(a) Prior sanction required to prosecute member of armed forces.[11]

The Supreme Court in General Officer Commanding (Army) vs. CBI[12] held, the sanction would not be needed to prosecute an official. In cases where he has behaved in the exercise of powers granted under the Act, the officer only enjoys immunity from prosecution. Although the vengeance had some miscalculations, with some personal motive, it is not possible to mark his conduct.

The Court held that the Special Powers Act of the AFSPA or the Armed Forces (J&K) empowers the central government to decide whether "an activity is reasonably related to the discharge of

[10] Darshan Singh v. State of Punjab, (1977) 4 SCC 452.
[11] Armed forces special power Act,1958 s 7. Protection of persons acting in good faith under this Act- No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.
[12] General Officer Commanding (Army) v. CBI Criminal appeal no. 257 of 2011.

official duty and is not a misuse of authority." There is no jurisdiction for the courts in the matter. The government must make an objective evaluation of the requirements leading to the conduct of the officer before making a decision. Nonetheless, no prior government permission is necessary to prosecute an act carried out by a member of the armed forces that is not within the scope of official service.

An analogy can be drawn with the three Judge Bench case of the Supreme Court in Ahmed Noor Mohamed Bhatti V. State of Gujarat[13] where the court Although upholding the legitimacy of the police's power to seize and detain an individual without a In order to prevent committing a cognizable crime, a warrant under section 151 of the Criminal Procedure Code 1973 ruled that a clause should not be considered as unjust as unreasonable and thus unlawful merely because the police officer could abuse his authority. The armed, when faced with pressing national security circumstances, The state uses powers as its last resort.

If they are not equipped with defensive and operational instruments, their failure is likely to be a national catastrophe and may have far-reaching consequences.[14]In the area, security forces are mobilised to bring the situation under control. It is neither their option, on their own accord, to travel into an area nor their choice to leave without orders.

Security forces need fundamental powers to shoot a terrorist, hunt for a suspected hideout, apprehend a terrorist and kill a hideout in order to comply with its mandate.[15] Without these, such operations against terrorists cannot be carried out.[16]

3.3. The Unlawful Activities Prevention Act (UAPA), 1967

Vagueness in Definition- In its definition of "terrorist act"[17] the UAPA includes "*any act with the intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or likely to strike terror in the people or in India or any foreign country*". The definition then explains the means that can be used to carry out terrorist activities, such as bombing, using firearms or biological weapons. Or "*any other means of whatever nature*." It is alleged that the

[13] Ahmed Noor Mohamed Bhatti v. State of Gujarat AIR 2005 SC.
[14] Harinder Singh. "AFSPA: A Soldier's Perspective." IDSA Comment, 6 July 2010. http://www.idsa.in/idsacomments/AFSPAASoldiersPerspective_hsingh_060710.

[15] *Id.*
[16] *Id.*
[17] The Unlawful Activities Prevention Act (UAPA),1967, s 15.

latter is a catchall phrase that may be expansively interpreted. [18] However, distinguishing 'terrorism' from 'ordinary crime', the Supreme Court of India in the Hitendra Vishnu v/s State of Maharashtra[19] case noted that "terrorism has not been defined under Terrorist and Disruptive Activities (Prevention) Act (TADA) nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes terrorism." It can be defined as the use of violence where the most significant consequence is not just the victim's physical and mental harm, but the sustained psychological impact it produces or has the potential to produce on society as a whole. The effect of the planned crime must be such that it goes beyond the ability of ordinary law enforcement authorities to handle it under ordinary criminal law. Thus, the deliberate and systemic use of coercive coercion tends to be what separates 'terrorism' from other types of abuse. It is therefore essential to treat such a criminal differently than an ordinary criminal."[20]

The Court distinguished between the fear of criminal actions (which TADA does not protect) and the desire to cause terror and is protected by TADA.[21]

The aim of the UAPA is to address terrorist and certain illegal activities committed with a view to endangering the unity, dignity, security or sovereignty of India, or with a view to terrorist attacks on individuals or any part of the population of India or of any foreign nation, or with a view to the cessation or secession of terrorist the territory.[22]

Similarly in case of Ranjit Singh v. State of Maharashtra[23], The ejusdem generis principle was applied in Section 2(1)(e) of the 'Maharashtra Control of Organized Crime Act' (MCOCA), which defines organised crime, when interpreting the word 'other unlawful means.' The Court stated that it would be reasonable to interpret the general words 'other unlawful means' with respect to the purposes of the MCOCA for which it was implemented.

Stringent provisions of arrest search and seizure- It is often believed that this legislation requires deviations from standard criminal procedural laws that provide the police with a major procedural advantage.[24] "Under the UAPA, officers of designated authorities may search any

[18] Coordination of Democratic Rights Organizations; *Resolution of the All-India Convention against the Unlawful Activities (Prevention) Act, 1967.*
[19] Hitendra Vishnu v. State of Maharashtra 1994 AIR 2623, 1994 SCC (4) 602.
[20] *Id.* at 653.
[21] Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijaya, (1990) 4 SCC 767.
[22] Zameer Ahmeed Latifur Rehman Sheikh v. State of Maharashtra 2010 SC 0289.
[23] Ranjit Singh v. State of Maharashtra AIR 1993 SC 1375.
[24] Bhuwania A, *UAPA: Legalizing the police state*; Kafila, January 6, 2009 (First published in Indian Express).

person or property, seize any property or arrest any person if there is a reason to believe that an offence has been committed."[25]

Therefore, it needs to be noted that the CrPC is a law essentially for dealing with criminal activities. It was neither planned nor applied with the primary aim of neutralising terrorism-related acts. It is because of this that it falls short on the following aspects:

(a) It does not include major antiterrorism initiatives undertaken by the UN for neutralising the threat.

(b) Its procedures are exclusively tailored for action by the police and not the armed forces.[26] Therefore, while the CrPC would be sufficient if the danger could be handled by current police capabilities, a deteriorating situation requires specially tailored legislation.

(c) Issues that are critical subsidiary components supporting terrorism, including money laundering, funding, supporting, organising and participating in terror activities are covered by UAPA.

The law imposes certain limits on the rights of persons engaged in certain criminal activities, which may safeguard the fundamental, constitutional and civil rights of people in general. Considering the rights of the people at large, the individual right of a person is of less importance. Thus, a provision such as subsection (6) of section 43D was added to the Criminal Activities (Prevention) Act, Act 35/2008. For the purpose of assessing whether he has the right to parole, it is not the number of days that a person spends in custody that becomes important. It is the extent of the crime and the effect of granting him bail that matters.[27]

In addition, Section 43D of the UAPA flips the idea of a bail hearing on its head, as it moves the emphasis from the concerns of the CrPC of the likelihood of the accused absconding or manipulating evidence or threatening witnesses to a consideration of the accused's guilt or innocence. Under the UAPA, an organization can be tagged as "terrorist organization" by including the name of such organization in the Schedule to the Act.[28] Terrorism may be used as an instrument of the philosophy of an insurgency or extremism. Therefore, it may be a stand-alone choice or an integral part of other types of violent expression. Militancy is a state in which violence, being combative or prepared to fight, is used. Any person or group that takes on

[25] The Unlawful Activities Prevention Act (UAPA),1967, s 43A.
[26] Issues related to mobs, unlawful assemblies, opening fire and presence of magistrate are some aspects that would be unsuitable in scenarios where the army deals with terrorists employed in a proxy war.
[27] Abdul Sathar Manzoor v Superintendent of Police and Ors., 2014 (1) KLJ 666, para 8.
[28] The Unlawful Activities Prevention Act (UAPA),1967, s 35.

violence may include militants. Not only terrorists and insurgents, but also armed religious groups that use violence to advance their beliefs need to be included.

The Supreme Court and several High Courts have observed in a number of cases that persons with a certain viewpoint, including a very drastic political one is not illegal unless they resort to unlawful activities. In V. Venkataswara Reddy vs. State of W.B,[29] The Calcutta High Court held that the Maoists, if detained, should be considered political prisoners. Unless and until they instigate people to participate in subversive acts for their ideologies, they will not even be punished for keeping that ideology. This view was reiterated in Arup Bhuyan vs. State of Assam[30]and it is observed that "mere membership in a banned community does not make a person a criminal unless it resorts to violence or incites people to violence or causes public disorder by violence or incitement to violence."

4. CONCLUSION

In respect to AFSPA it is regarded by some parts of civil society as a draconian statute. Syed Ali Shah Geelani, a hard-liner separatist Kashmiri leader, has dubbed it a licence to kill. In the north-eastern states as well, the Act has been resisted. Irom Sharmila, a Human rights activist from Manipur, took a long step towards pressuring the government to repeal AFSPA from Manipur and other north-eastern states, which began in November 2000.

The key criticism of the Act is that the laws are aimed towards Section 4[31], Which, if prohibitive orders are broken, gives the armed forces the power to open fire and even cause death. On the grounds that these laws grant the security forces unbridled powers to arrest, search, seize and even shoot to kill, human rights activists object. They accuse the security forces of destroying homes and whole villages on the mere assumption that there were insurgents hiding. They point out that Section 4 empowers the armed forces to arrest and detain civilians in detention for several days without a warrant. They also object to Section 6, which, even with the prior approval of the central government, protects security forces personnel from prosecution. Critics argue this clause has contributed on many occasions to the brutal opening of fire on crowds by even non-commissioned officers without having to justify their conduct. The Committee [32] Justice Jeevan Reddy was assigned to study AFSPA in 2004. While the committee found that the powers granted under the Act were not absolute, it concluded, however, that the Act should be

[29] V. Venkataswara Reddy v. State of W.B Manu/WB/1234/2012.
[30] Arup Bhuyan v. State of Assam AIR 2011 SC 957.
[31] *Supra* note 4.
[32] Justice Jeevan Reddy, 'Justice Jeevan Reddy Commission', 2005.

repealed. It proposed, however, that important provisions of the Act be incorporated into the 1967 Unlawful Activities (Prevention) Act.

The Justice Jeevan Reddy Committee's main recommendations were:

(a) In the event of such a warrant, the state government may request the deployment of the army by the Union government for a duration not exceeding six months.
(b) Without a request from the territory, the Union government can also deploy the armed forces. However, after six months, the situation should be checked and Parliament's permission to prolong the deployment should be obtained.
(c) The power to fire can continue to be held by non-commissioned officers.
(d) People detained should be turned over to the civilian police.
(e) An autonomous grievance cell should be formed by the Union government in each district where the Act is in force.

The Second Administrative Reforms Commission[33] It was also proposed by the then Minister of Union Law, M Veerappa Moily, that AFSPA should be abolished and that its necessary provisions should be integrated into the UAPA. If this course of action were to be implemented, it would be a retrograde measure that would damage the national cause significantly special handling requires extraordinary circumstances.

Since, under the Constitution, the army has no police powers, it is in the national interest to grant it special powers for operational purposes when it is called upon to conduct counter-insurgency operations in troubled areas. Therefore, the promulgation, along with the Disturbed Areas Act, of AFSPA is unavoidable.

However, Santosh Hegde Committee 2013[34] reported that AFSPA is mandatory for peace in disturbed areas, but that the Act should be reviewed every 6 months to verify that the Act is still necessary. Immunity must be granted to military personnel, but such immunity must not be absolute, nor is it so under the new AFSPA. The central government can and has sanctioned prosecutions where there have been prima facie cases.

Without these forces, a wait-and-watch strategy is likely to be pursued by commanding officers and young company commanders rather than aggressively chasing hard-core attackers with zeal and risk becoming involved in long-drawn lawsuits that could be focused on false accusations.

[33] Verappa Moily, 'Second Administrative reforms Commission', 2005.
[34] Justice Santosh Hegde, 'Justice Santosh Hegde Committee on Extra Judicial Killing in Manipur, 2013.

In addition, it can be concluded that UAPA and other proscription laws that criminalise terrorist organisations and a variety of undesirable activities are being misused politically, raising the issue of their validity.

There were gross irregularities in the application of Maintenance of internal security Act (MISA) orders were given without any basis and were easily bypassed by responsible authorities. What was highlighted was the complicity between the police and the judiciary. A careful look at the study shows that two major areas were explored by the commission. Next, a recurring pattern was the misuse of MISA to gag the opposition. Second, there were numerous examples of an unholy partnership between the bureaucracy and the political authority.

Emergency attempts to undermine the democratic basis of politics in a way from 1975 to 1977 by enabling political power to exercise narrow interests of individuals or parties effectiveness.

According to the Shah commission[35] the MISA was indiscriminately applied by the Govt. during the emergency to resist opposition. As mentioned in the report,

> …..In Delhi and in the states which had advance information about the promulgation of emergency , a large number of arrest/detention followed under the MISA in which the safeguards guaranteed against the misuse of the act were ignored and grounds of detention were prepared and even pre dated and sent many days after a person's concern had been arrested and detained in jails…..The manner in which the provision of MISA was used was nothing short of perversion and mockery of its provisions and all the safeguards and guarantees that had been promised in the parliament when the MISA bill was enacted, were totally disregarded.

There is no doubt that the congress Govt. resorted to MISA to pursue a design against those challenging its existence. Individuals became targets simply because of the apprehension that they were potential threats to the govt. The police became a tyrant and ruthlessly applied the MISA even when there was no prima facie case for arrest or detention.

Given the complicity of the Govt. with the police these incidents were withheld from the media deliberately. While explaining the abject surrender of the police to the political order the commission attributed the irresponsible act on the part of the Govt. officers to the fear of consequences.

[35] Justice A C Shah, 'Justice Shah Commission to inquire excesses Committed during Indian Emergency', 1977.

To permanently halt the recurrence of such misuse of governmental authority, the commission recommends that the state should adopt appropriate measures to protect and immunize the officials who were called upon to function a different administrative level from threats and pressures….in the interest of the basic unity and integrity of the country, as also of the fundamentals of the constitution. The Government of India should adopt this measure to make these anti-terrorism laws work efficiently without the question of their validity being raised. The topic of terrorism goes beyond all frontiers, be it national, international, political or economic. The solution needs worldwide actions, international collaboration and trans-national action. Terrorism is a major issue in the world, not because of the amount of violence involved, but because innocent lives and rights are threatened.

According to Madhava Menon[36] "laws cannot by themselves, deter terrorist attacks, no matter how draconian they are Implementing terrorist-related laws and the level of motivation and competence of persons so appointed is significant. The issue lies in the enforcement of the laws and in the misuse of the powers vested on the authorities under the laws relating to terrorism. Common criticism of these laws has been focused mostly on the manner in which any improvements in the laws and procedures are enforced."

[36] Prof. Dr. Madhava Menon, 'Madhava Menon Committee on Criminal Justice System', 2007.

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THE PROHIBITION OF TORTURE IN INTERNATIONAL LAW

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ABSTRACT

Torture is not only a form of violence but it also goes against human dignity. The prohibition of torture has been provided under international human rights law and significantly part of international customary law. The Convention against Torture, 1984, which is most significant convention on prohibition of torture, universally adopted and establishes a Committee against Torture to deal with individual complaints, to give its comments on convention. This article critically analyses prohibition of Torture in International law including human rights, international humanitarian and international criminal law. But major focus of the article is on Convention against Torture and jurisprudence developed by the Committee against torture. The paper more focuses on definition of torture in various phases and its constitutive elements. Article provides insight into what constitutes torture and how far the committee has enhanced the jurisprudence of torture.

1. INTRODUCTION

The protection against torture is congruent with human rights norms i.e., human dignity and physical integrity, which are legally articulated binding safeguards. The international human rights have prohibited torture as an absolute binding obligation.[1] The international human rights law has settled very restrictive and deterrent mechanism to prevent torture and other treatment throughout the globe.[2] The torture has been recognized both as crime against humanity and war crime.[3] Torture has been criminalized in Convention against Torture and Other Cruel, Inhuman Treatment, 1984 (hereinafter CAT), which is adopted universally. Most of the states have

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[1] Illias Bantekas and Susan Nash, *INTERNATIONAL CRIMINAL LAW* 117-120 (Cavendish Publishing Limited (2003).
[2] *Id.*
[3] *Foley Conor, COMBATING TORTURE: A MANUAL FOR JUDGES AND PROSECUTORS* 8 (1st ed. University of Essex Press, 2003).

adopted the treaties which contain the prohibition of torture and also enacted stringent laws to deal with the problem at national level.[4]

Although, human rights law has prevented torture long ago but incidents of torture are still happening frequently around the globe. The obligation of prohibition of torture has already been existed in international human rights law, and considered as part of customary international law[5]. The prohibition of torture or other forms of ill treatment not only prohibit and prevent but also prevent the situations where the humans can be subject to torture.[6]

Customary international law obliges the States to prevent and prohibit and punish the culprits who are present in their jurisdiction. The present paper analyses how far the prohibition of torture is effective in international law? To what an extent the Committee against torture is interpreting the provisions of the Convention against torture successfully in its true sense?

The prohibition of torture is non-derogable and cannot be violated, neither in times of emergency nor in armed conflict. Various bodies have been established to redress the human rights violations like Human Rights Committee and Committee against Torture specifically established under the Convention against Torture to prevent torture which perform various functions to deal with this crime effectively. This paper analyzes the prohibition of torture in international law. Part I of the paper introduces this with nature of the prohibition against torture.

Part II provides an insight into the concept of torture, its various elements and development of it by various international courts and tribunals like Human Rights Committee, International Criminal Tribunal for Former Yogoslavia, and International Criminal Tribunal for Rwanda and so on. Part III of the Paper analyzes the legal regime prohibiting torture under various branches of international law like human rights, humanitarian law and international criminal law etc. Part VI of the Paper critically analyzed the role of Committee against Torture in development of torture jurisprudence under the CAT through individual communications, general comments and concluding observations and recommendations to State parties.

[4] *Id*.
[5] *Prosecutor v Anto Furundzija* IT-95-17/1-T 10 Dec., 1998.
[6] De Than C and Shorts E,*INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS* 194 (Sweet & Maxwell, London, 2003).

2. DEFINITION AND ELEMENTS OF TORTURE

2.1. Definition

The Definition of torture is very significant from various aspects first; a clear and constant standard will bound a government and will also prevent from manipulation during any crisis. Secondly, it will assist in guidance of public officials to work within limited areas. Thirdly, international community will be capable of making governments accountable for tortuous acts. A uniform definition is required to ascertain constituent elements. The Declaration on the protection of All Persons from being subjected to Torture and Other Cruel, Inhuman Degrading Treatment or Punishment, 1975[7] was first to give definition of Torture as:

> *"Torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners."*

Further the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1984 (hereinafter CAT) in Article 1 gives very wide definition as:

> *" the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*[8]

[7] General Assembly Resolution 3452 (XXX) of 9 December 1975.
[8] Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 10 Dec., 1984.

Third instrument providing definition of torture is Inter-American Convention to Prevent and Punish Torture, 1985[9] (hereinafter Inter-American Convention on Torture) defines torture in Article 2:

> *"torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.*
>
> *The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article"*

On the basis of above definitions from various instruments, Declaration on Torture and Convention against torture differ in two ways in its definitional aspect. Firstly, CAT does not refer torture as an aggravated form of ill treatment as mentioned in Declaration. Secondly, CAT contained expression "any reason based on discrimination of any kind" which did not form part of declaration and widens its scope. [10] Definition contained in Inter-American convention is broader than CAT definition but it failed to specify threshold level of pain and suffering that is essential for ill treatment to constitute torture.[11]

But definition contained in CAT is interpretative and also blurred which provides space to States parties to enact laws to prohibit torture with its own definitional expression. Resultantly, various nations have enacted legislation on torture where the torture has been defined narrowly and also defies the aim of CAT and unable to fulfill its mandate. If there is clear and conclusive definition then it will become binding and there will be no discretionary room for states to stray from its contents. Most of the definitions under international law have construed from the torture Convention.[12]

Classical torture differ from modern torture as in the former the victim's body was confined to religion or custom and subject to public punishment and advertisement of state power and deter

[9] Inter-American Convention against Torture 9th December 1985, entered into force on 28 February 1987.
[10] *Prosecutor v. Delaic*, IT-96-21-T, ICTY 456 (16 November 1998).
[11] *Id*., at 457.
[12] Ghail H Miller, *Defining Torture*, 4 The Cardozo Law School's Floersheimer Center for Constitutional Democracy (December 2005).

other individuals from committing any crime or sin, whereas the modern torture is restricted to prisoner only.[13]

2.2. Elements of Torture

i. An act

The first requisite element of the torture is an act. What constitutes an act is also considerable because whether an act is proactive behavior or also includes omissions. If the omission is excluded then it narrows down the definition which is sheer violation of aims of the CAT. Scholars have interpreted expression "an Act" inclusive of omission to give gist to objectives of the CAT. We can see the definition provided by the United Kingdom in its report submitted to Committee against torture expressly contained term omission to avoid any kind of confusion, "it is immaterial whether the pain or suffering is caused by act or omission"[14] Canadian definition of torture is also similar in terms of the Convention but it includes an act or omission to avoid any confusion.[15] But we can see some other signatories have enacted law at national level where they have derogated from the word act i.e. Columbia criminal law related to torture does not use the term act or omission; simply it has fixed the liability. Czech Republic also avoided the word Act in its definition of torture, "He who shall *cause* to another person physical or mental suffering through torture . . . shall be imprisoned."[16]

ii. Severe pain or suffering

The second element of the crime of torture is harm inflicted on the victim must be "severe pain or suffering". Neither this term is defined in CAT, nor in other regional treaties. Rather the international courts have made imperative contribution in its interpretation in various case laws. It is very difficult to determine what constitutes severe pain or suffering. [17] Drafters of the Convention emphasized that "severe" word must be included in the definition. Severity of the pain must be considered as unavoidable element of the crime of torture.[18] But it is impossible to give a concrete definition of the severity to ascertain the severe inhuman treatment that qualifies as torture.

[13] Darius Rejali, *TORTURE AND DEMOCRACY* 35 (Princeton University Press, 2007).
[14] Criminal justice Act 1988 section 134.
[15] Criminal Code of Canada 1985 section 269 cl. 1.
[16] Miller s*upra* note 12.
[17] *Id.*, at 8.
[18] Julianne Harper, *Defining Torture: Bridging the Gap Between Rhetoric and Reality*, 49 Santa Clara L. Rev. 893 (2009).

European Court of Human rights was first to interpret and examine the severity clause under the European Convention on Human Rights, 1950 and concluded that "torture fell at the extreme end of a wide spectrum of pain-inducing acts".[19] In *Ireland v United Kingdom,* the ECHR held that five techniques[20] of investigation do not constitute crime of torture but these surely constitute inhuman and degrading treatment. The court concluded that distinction between torture and ill treatment arises from the severity of the suffering inflicted. The torture attaches a special stigma "to deliberate inhuman treatment and causing suffering of cruel and serious nature."[21]

The hierarchy of the severity clause can be seen from the Article 1 and 16 of the Convention. Article 1 only defines the torture whereas article 16[22] contains phrase "other acts of cruel, inhuman and degrading treatment or punishment which do not amount to torture as defined in Article 1". Distinction between torture, other cruel and ill treatment, has subject to many legal and rhetorical repercussions.[23] In customary international law torture has status of *jus cogens* and non-derogable in all circumstances whereas other forms of ill treatment have not considered non derogable.

Many courts consider the subjective element of pain and suffering. In it the court considers the impact of the act on a particular victim. The same act may have different impact on individuals, some may feel severe pain or suffering some may not. It depends on the vulnerability of an individual and can have grave consequences of ill treatment.[24] ICTY evaluated both subjective and objective requirements to constitute torture. Subjective requirements include also sex, age and health status of the victim as well. The ICTY went further in another judgment by including social, cultural and religious factors to exacerbate the pain or suffering in certain circumstances.[25] Status is very ambiguous and it is very difficult to reach at sharp distinction between these phrases. Torture and other cruel treatment are prohibited under UNCAT, whereas the States criminalize only torture and not other cruel treatment because of lack of jus cogens status.

[19] Miller *supra* note 12 at 8.
[20] The five techniques were wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.
[21] *Ireland v. United Kingdom*, European Court of Human Rights, 66 (13 Dec., 1978).
[22] CAT *supra* note 8 Art. 16.
[23] Miller *supra* note 12 at 10.
[24] Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN.4/1995/34.
[25] *Prosecutor v Limaj*, IT-03-66-T ICTY 30 November 2005, para. 237

iii. Enlisted purposes

The CAT has made its application limited in nature by enumerating purposes. An act will constitute only if it has been performed with enumerated purposes. The Convention enumerates as "*such purposes as obtaining from [the victim] or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind*"[26] The term "such as" has been used instead of any other purposes, which is indicative in nature and not all inclusive. [27] The ICTY in *Prosecutor v. Delalic*[28] considered an act to constitute torture it is not required that "conduct must be *solely* perpetrated for a prohibited purpose". Thus, in order for this requirement to be met, the prohibited purpose must simply be part of the motivation behind the conduct and need not be the predominating or sole purpose."[29]

Another phrase contained in the definition "for any reason based on discrimination of any kind" is entirely distinct from expression "other purposes" conceptually as well as grammatically, but states, while enacting law using their discretionary power, narrowing down the definition by specifying the purposes. The ICTY in its decision considered the enumerated purposes are representative.[30] With the exception to crime against humanity, Article 7 of the Rome Statute for the International Criminal Court, the concept of 'purpose' is very central to understand the concept of torture in international law. In *Prosecutor v. Furundzija*[31] the tribunal retained the list as such but added that "among the possible purpose of torture one must include that of humiliating the victim". The primary of the international human rights and humanitarian law is to protect the human dignity.

iv. Intention to inflict harm

Another essential ingredient to constitute torture is intentional infliction of harm. The CAT requires the intention to harm an individual must be present and the actor of intent must be a public official. It can be general or specific intent because the CAT does not specify so. For example, the State official does not intent to cause severe pain or suffering but the prison conditions make a person feel pain or suffering then intention cannot be proved against the an

[26] Julianne Harper *supra* note 18.
[27] Miller *supra* note 12 at 15.
[28] IT-96-21-T, ICTY 470 (16 November 1998).
[29] *Id*. at 471.
[30] *Id.*
[31] *Prosecutor v Anto Furundzija* IT-95-17/1-T (10 December 1998).

official.[32] In International Criminal Law, ICTR and ICTY have retained the general intent as contained in the CAT, whereas the ECHR has shifted the burden of proof from victim to State to prove how the injuries are sustained on an individual. In *Selmouni v. France* [33] the ECHR considered that "*if an individual is taken into police custody in good health but sustained injuries at the time of release, it is obligation of State to explain how the injuries have been sustained on the victim. State failed to explain and court assumed State tortured the victim. If there is no evidence of intention, still victim's testimony is sufficient to trigger the supposition of intent".* Inter-American Court of Human Rights in *Paniagua Morales v. Guatemala* [34] holds that intention can be inferred from the visible torture and autopsy report (beating, tying and cuts visible on the body). The court held that violation of human rights by state does not require intention or *mens rea* of state, since responsibility to protect human rights is jus cogens. The intent of the perpetrator needs not to be proved only the circumstances for the courts to construe intent through liberal approach.

v. Physical or Mental suffering

The CAT contains that suffering can be either physical or mental. The Convention does not delineate between the two that what amounts to physical or mental suffering. The victim of torture may feel mental or physical suffering or pain from one single act like rape. Then there is no need to distinguish between two.[35] Most detailed definition of mental pain has been given by US in its Torture law where the pain is measured from source of infliction. The US definition has narrowed down the scope of mental pain which defies the aim of CAT, because the definition of US used the expression "prolonged mental harm" which itself deviates from the objective of the UNCAT.[36] Some countries like Croatia failed to give gist to convention just prohibiting physical torture only. Physical or mental pain is easy to determine in comparison of severity clause.

vi. Public Official or State Action

Finally, the person inflicted pain or suffering must be public official or state sanctioned harm. The CAT provides "*inflicted by or at the instigation of or with the consent or acquiescence of a*

[32] Miller *supra* note 12 at 13.
[33] *Selmouni v. France*, 25803/94, European Court of Human Rights (28 July 1999).
[34] *Paniagua Morales v. Guatemala,* Inter-American Court of Human Rights, 126-130 (8 March 1998*).*
[35] Miller *supra* note 12 at 12.
[36] The United States ratified the CAT with reservations, understandings and declarations. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Reservations, Understandings and Declarations Made by the United States of America, Available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=_en#.

public official or other person acting in an official capacity".[37] Even the worst form of inhuman or degrading treatment will not be considered as torture unless state officials are not involved or acts are state sanctioned. Drafters of the Convention considered that only state officials inflicted torture will be considered because a private individual is punishable under the domestic law.[38]

All the international treaties have made state sanction requirement mandatory and courts have interpreted it very broadly or it is discretionary power of the court to avoid this requirement altogether. Human Rights Committee while interpreting Art. 7 of ICCPR held that provision is not confined to state sanctioned acts but also recognized that State is responsible to protect individuals against private actions.[39] The Special Rapporteur also considered that if the State officials are failed to identify or prevent torture in the state it also leads to torture or to prevent acts of non-state actors.[40]

In *Z and Others v. United Kingdom* [41] ECHR considered that state action requirement very broadly and said state is responsible to prevent torture or ill treatment, in its jurisdiction, committed by the private individuals. In International Criminal law state action requirement is not that consistent as required in international human rights law. More emphasis has been given on victim instead of considering the criminal liability of the perpetrator. This is clearly visible in Article 75 of the Additional Protocol I to Geneva Conventions, where the State action is avoided altogether. But later ICTY[42] in its decisions has considered the state action requirement broadly from both international criminal law and international human rights law perspective jointly defining the crime of torture.

After analyzing all essential elements of the torture as provided in UNCAT, it seems that it has given such definition which can easily be tempered by states while enacting laws departing from its objectives by altering the standards of severity clause, also avoiding state action avoidable in its laws.

[37] UNCAT, *supra* 8 Article 1.
[38] J. Harper *supra* note 18.
[39] Also see *Prosecutor v. Kunarac*, IT-96-23-T& IT-96-23/1-T ICTY (22 February 2001).
[40] Report of the Special Rapporteur, Sir Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37, E/CN.4/1995/34.
[41] App No. 29392/95 European Court of Human Rights, 2001.
[42] See in *Prosecutor v. Delalic and also Prosecutor v. Furundzij.*

3. THE PROHIBITION OF TORTURE IN INTERNATIONAL LAW

3.1. Universal Declaration of Human Rights

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[43] The UDHR is morally binding on the State parties and has been considered as part of customary international law[44]. The prohibition of torture was prepared along with other provisions of the Declaration by the UN Human Rights Commission [45] with its Drafting Committee.[46] UN Secretariat proposed a version of prohibition of torture as "*No one shall be subjected to torture, or to any unusual punishment or indignity*"[47] where he accompanied the material justifying the prohibition of torture in one or another form in national constitutions. But Rene Cassine of France examined that torture required more obvious definition where he raised the question of possible defenses like "whether an individual could have a right to expose to others for medical examination or inflict suffering upon others without their consent." [48] Dr. Charles Malik representing Lebanon observed "whether the slavery, unemployment and forced labour should become part of torture." [49] Member of Drafting committee, Harry (Australia) concurred on the opinion as expressed by Malik that if types of the torture will be included in the same then other types must be included otherwise it will narrow down the definition of torture and will not leave the scope for other ill treatment. [50] Expression used by UN Secretariat "indignity" was found incompatible with the language of the article and denied by most of the members of the Drafting committee. The committee considered the UN Secretariat Draft giving gist to US and UK Proposals with provisions of detention, arrest and fair trial.[51] In the second session of Human Rights Commission they pondered over the meaning of torture along with other expressions like "cruel or inhuman". Where the more emphasis was on accompanying phrases and torture was left untouched. Third session of drafting committee, the discussion on torture was joined with another article "slavery or involuntary servitude" where more emphasis was on involuntary" and its translation into other languages. Later the sub-committee segregated

[43] Universal Declaration of Human Rights, 1948, Art. 5.
[44] H Hannum, The status of universal declaration of human rights in national and international law 25 GA. J. INT'L & COMP. L. 287 (1996).
[45] The Commission was established by the Economic and Social Council in 1946 by its resolution to consider the implementation of the Bill of International Human Rights.
[46] The Committee was established by the Economic and Social Council to assist the commission in drafting the UDHR.
[47] Barry M. Klayman, *TheDefinition of Torture in International Law* 51 TEMP. L.Q. 457 (1978).
[48] *Id.*
[49] Commission on Human Rights, U.N. Doc. E/CN.4/AC.1/SR.3, at 12-13 (1947).
[50] *Id*. at 13.
[51] Klayman *supra* note 47 at 459.

both provisions and adopted unanimously without any further discussion on torture and its definition.[52]

3.2. International Covenant on Civil and Political Rights, 1966

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."[53] The ICCPR is legally binding on the States parties and optional Protocols establish a regime to invoke the provisions of ICCPR before the Human Rights Committee (hereinafter HRC)[54] to redress the violation of human rights articulated in the said covenant. If we look at the drafting history of the prohibition of torture it continued after adopting the UDHR, the ICCPR was discussed article by article and the commission on human rights encountered the same problem of definition as it was persistent during drafting of UDHR.[55] Two articles were discussed for the prohibition of torture. One was UN Secretariat proposal and another was draft presented by the United Kingdom where medical and scientific experiment was included. [56] There various objections were raised especially for scope and application of the provisions. Firstly, whether the drafted article will cover prisoners or include civilians? Secondly the range of conduct in respect to term torture was pondered. Finally, exactitude of the phrase in general was criticized and debated.[57]

So far as, the scope of the provisions is concerned, the committee including the representative Malik said it will encompass all human beings will not only be confined to prisoners. Secondly, whether moral torture will be covered by the term torture, considered "the term 'mental' could also be applied to moral, psychological and spiritual ways of torturing human beings."[58] The human rights commission could not reach at consensus to adopt a unanimous definition and left it open to be interpreted by the courts themselves. The commission further discussed the "*scientific and medical experimentation on human subjects*". The commission was bifurcated one group supported "prohibition of scientific and medical examination is implicit in torture and other cruel, inhuman or degrading treatment" whereas another group felt that it should stand alone. WHO suggested that prohibiting scientific experiment on human beings will become

[52] *Id.*
[53] International Covenant on Civil and Political Rights Art.7 16 Dec., 1966.
[54] Human Rights Committee is a UN Body, consisting of 18 independent human rights experts and established under ICCPR.
[55] *Barry M. Klayman* supra at 460.
[56] Commission on Human Rights, U.N. Doc. E/CN.4/SR.141, at 3.
[57] Klayman *supra* note 47 at 463
[58] Commission on Human Rights, U.N. Doc. E/CN.4/SR.141, at 8.

hurdle in research? It was clarified by the commission that "article intended to prevent the recurrence of atrocities such as those committed in concentration camps during World War II"[59] the definition of the expression torture was not given any exact shape in the Convention.

Article 7 of the Covenant is non-derogable and cannot be subjected to derogable even during the time of emergency.[60] The HRC in its General Comment No. 20 explained "*Article 7 aims at protecting the human dignity and mental and physical integrity of an individual*"[61] and also interpreted term broadly in various individual communications. Article 10 of the Covenant provides those who are deprived of their liberty shall be treated with humane treatment and respect for human dignity[62] Article 7 is not confined only to public officials or state sanctioned suffering, but also covers private individual perpetrators and obliges States parties to protect human persons in all conditions. Article 7 of ICCPR not limited to an act rather includes ordering, instigating, encouraging or perpetrating prohibited acts, and States must enact criminal legislation to give gist from its all aspects.[63] Article 7 must be read with Article 2 (3), State must take all steps to ensure no one shall be discriminated and tortured on the basis of given grounds and enough remedies have been provided to prohibit the torture [64]

HRC in its individual communications interpreted scope and application of Article 7 in conjunction with Article 10 of the Covenant. In *Vuolanne v Finland*[65] HRC considered what constitutes torture in Article 7 depends on the circumstances of each case such as "duration, manner and its physical or mental effects as well as sex, age and state of health of the victim."

3.3. The Convention Against Torture, 1984

The Convention against Torture has been adopted universally, document that is detailed codification to prevent torture and other ill treatment. It has 167 States Parties to the Convention and 83 signatories. Article 1 of the Convention provides very wide definition of torture and Article 16 of the Convention defines other cruel, inhuman degrading treatment or punishment.

[59] 10 U.N. GAOR, Annexes (Agenda Item 28-II) 31-32, U.N. Doc. A/2929 (1955)
[60] J Harper *supra* note 18.
[61] Human Rights Committee General Comment No. 20, Art. 7 Prohibition of Torture 2 (10 March 1992).
[62] Article 10 of ICCPR, 1966.
[63] Human Rights Committee *supra* note 61 at 13.
[64] *Id.* At 14, also see Article 2 (3). Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.
[65] *Vuolanne v. Finland* CCPR/C/35/D/265/1987, Human Rights Committee 2 May 1989.

Article 2 of the CAT obliges the States Parties to take all possible measures through legislative, judicial or administrative actions to prevent and punish torture and other forms of ill treatment. The provision having *jus cogens* nature and punishable in all war or peace time situations. No justifications are required to avoid the punishment or obligations on the parts of State. States are required to take all steps to prevent, prohibit and redress torture and its re-occurrence. States parties are required to eliminate all barriers to implement the convention and fulfill its aims and objectives.[66] Article 3 provides States cannot expel or extradite a person, where a person may be subjected to torture. Article 4 of the Convention provides that it is obligation of each state party to criminalize torture by enacting new laws or amending already existing laws according to CAT.[67] The Committee observed that States should put the definition in practice where the States are deviating from the aims of the Convention and narrowing down the definition. [68] Articles 3 to 15 contain specific measures to prevent torture especially for persons in detention and custody. Article 5 provides to establishing jurisdiction by a state[69] and promotes universal jurisdiction as a crime against humanity. Article 6 provides states are required to take a person into custody who committed torture or allied crimes and conduct preliminary inquiry. After completion of inquiry, it is duty of the state to inform others affected states to ask whether they want to exercise jurisdiction or not. Article 11 furthers that custodial manuals and rules must be reviewed and meant according to convention. Article 13 provides that it is duty of every state that has established jurisdiction over the crime, must provide all legal measures like speedy and fair trial. The victims and witnesses must be protected against any kind of intimidation. Article 14 obliges State to redress the victim and grant adequate compensation. The CAT not only provides the protection against the torture and other ill treatment rather protects the further human rights before the State bodies and deal with humanity.

[66] Committee against Torture, General Comment No 2, CAT/C/GC/2, 6 (24 January 2008).
[67] UNCAT *supra* 8 Article 4.
[68] CAT *supra* note 66 at 9.
[69] Article 5: 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:
(a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
(b) When the alleged offender is a national of that State;
(c) When the victim is a national of that State if that State considers it appropriate.
2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.
3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law.

3.3.1. The Committee against Torture

The Convention established a committee against torture for its effective enforcement. Article 17 provides the Committee against torture[70] will be established to enhance the implementation and enforce state obligations. The Committee shall elect its officers for two years of term and also eligible for re-election. The quorum of the committee will consist of 6 members.[71] Article 19 imposes an obligation on the States Parties to submit reports to the Committee for its evaluation and if the committee wants to give any comment, it has power to do so. The Committee can seek information from the States regarding the Torture and ill treatment and States are obliged to cooperate with the Committee and provide relevant information as asked by the Committee.[72] Article 22 empowers a state to declare that it wants to seek competence of the Committee to entertain complaints from its individuals who claims to be victims of torture or ill treatment. It cannot entertain complaints against a state who has not declared under the said article. The jurisprudence developed by the Committee Against torture will be discussed in separate part.

3.4. Optional Protocol to Convention against Torture, 2002

The Optional Protocol in its preamble affirms that torture and other ill treatment constitutes a grave "violation of human rights". Article 1 of the Protocol illustrates purposes of the said protocol to monitor independent bodies which are working for prevention of torture. A sub-committee on prevention of torture has been established to function and fulfill objectives laid down in UN Charter.[73] The Sub-Committee will follow principles of confidentiality, impartiality, universality and non- selectivity. The optional protocol makes it mandatory for states to establish national mechanism to prohibit torture. [74] Articles 4 to 8 deal with the selection, term and functioning of the members of the Sub-committee. Articles 9 and 10 of the Protocol provide election of officers of the Sub-Committee.

Articles 11 to 16 provide mandate of the Commission which needs to be fulfilled by the Committee. The Sub Committee will assist the States Parties to establish an effective mechanism to prevent torture and will make recommendations wherever required by the States Parties.[75] The Committee will take all possible measures to comply with mandate enshrined in Article 11.

[70] It will consist of 10 members, experts of human rights, with equal representation of geographical limits. Members shall be elected for four years and they will be eligible for re-election.
[71] UNCAT *supra* 8 Article 18.
[72] *Id.* Article 20.
[73] Optional Protocol to the Convention against Torture Article 18 Dec., 2002.
[74] *Id*. Article 3.
[75] *Id.* Article 11.

Article 14 provides unrestricted power to sub-committee to visit at detention places, seek information regarding detunes and other measures taken by the States parties.[76] Establishment of national mechanism to prohibit and prevent torture is also supervised by the Sub-committee including its functioning, rules and so on.[77] The Most significant aspect of the optional protocol is that no State party can enter any reservation to any provision of the protocol.[78]

3.5. International Criminal law

International criminal courts and tribunals have played very pivotal role in interpreting torture as crime against humanity. Rome Statute of International Criminal Court [79] under article 7(f) provides torture as crime against Humanity. The Statute of the International Criminal Tribunal for Former Yogoslavia[80] under Article 5 considers it crime against humanity and produces it in verbatim as in Rome Statute, with little modification that it will include both internal and international incidents. The Statute of International Criminal Tribunal for Rwanda in Article 3 made torture as crime against humanity with additional grounds like ethnic, religious, political or racial grounds.

3.6. International Humanitarian law

International humanitarian law specifically prohibits torture during the time of war or armed conflict by the Geneva Conventions of 1949 and two Protocols of 1977. Geneva Convention I[81] under Articles 3, 12 and 50 protects against Torture. Article 12 specifically mentions that care and protection must be enhanced to every one without giving them pain or suffering and torture is strictly prohibited. Article provides violation of principles and grave breaches and any kind of human suffering or torture, not committed with military justification will constitute a crime of graver nature. Geneva Convention II [82] under Articles 12and 51 prohibit torture. Geneva Convention III[83] in Article 13, 14 and 130 deals with torture prohibition. Geneva Convention IV[84] under Articles 27, 32 and 147 protects civilians against torture during the armed conflict. Further Additional Protocol I [85] under Article 75 provides fundamental guarantees against

[76] *Id.* Article 14.
[77] *Id*. Article 17-22.
[78] *Id.* Article 30.
[79] Rome Statute adopted on 17 July 1998 and entered into force on 1 July 2002.
[80] Statute of ICTY adopted on 25 May 1993 by Res. 827.
[81] Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949.
[82] The Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 Aug. 1949.
[83] Relative to the Treatment of Prisoners of War, 12 Aug. 1949.
[84] Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949.
[85] Relating to the Victims of International Armed Conflicts (Protocol I), 8 June 197

violation against humanity these include prohibition of torture, enslavement, rape etc. Additional Protocol II[86] to Geneva Conventions in Article 4 protects the Fundamental Guarantees of persons in non-international armed conflict or internal conflicts. These humanitarian law conventions have attained the status of customary international law as well as general international law and invoked by all the courts to deal with torture and specify the content of the same.

4. JURISPRUDENCE OF THE COMMITTEE AGAINST TORTURE

The committee against torture (hereinafter, The Committee) has developed the torture convention through its general comments and interpretation in its individual complaints. The committee has developed jurisprudence and extended the scope of torture convention and affirmed its status as jus cogens. The committee follows the precedents of the Human Rights Committee where it has not developed its own comments and uses it as precedents. [87] The committee has been developed the definition of Torture and expanded its application. In its various individual complaints, the Committee said that if a person has detained in police custody for more than five hours where he was beaten with sticks and punches, led to bleed from the ears, it constitutes torture. [88] The committee also developed the definition through its concluding observations. Torture constitutes of prolonged deprivation of sleep, hooding and loud music for longer hours disturbing mental peace[89] interrogating with the combination of sexual humiliation "water boarding"[90] and so on.

The committee confirmed the absolute status of the Convention. It considered under article 2(2) said torture cannot be used in any condition during war or peacetime. Officials cannot justify torture with the superior orders as well. Most of the individual complaints come before the Committee is alleged violation of Article 3. Article 3 is only applicable to deportation cases where a person is under the real risk of torture in the other state as defined in Article 1 and other ill treatment mentioned in Article 16 of the Convention. Protection under CAT is broader than Article 7 of ICCPR.[91] The Committee against torture considered the application of Article 3 in its

[86] Relating to the Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[87] Jurisprudence of the CAT Committee Part IV at 206 available at: https://www.omct.org/files/2006/11/3979/handbook4_eng_04_part4.pdf (visited on feb 2021).
[88] *Dragan Dimitrijevic v. Serbia and Montenegro* U.N. Doc. CAT/C/33/D/207/2002 (2004).
[89] Concluding Observations on Israel, UN doc. A/52/44, 257(1997).
[90] Water boarding "involves strapping detainees to boards and immersing them in water to make them think they are drowning", Jon M. Van Dyke, *Promoting Accountability for Human Rights Abuses* 8 Chapman Law Review 153 (2005).
[91] *Supra* note 86 at 217.

General Comment No. 1 in context of Article 22 (refoulement and communications). [92] The complainant will have to prove the violation of article 3. It is not mandatory to prove that risk of torture is highly probable.[93] The committee considered that if a complainant provides certain level of information, then the burden of proof shifts on state.[94] There may be personal risk to the complainant which can be evaluated from the history of the person whether he was tortured or not.

The Committee widened and interpreted the positive duties under Articles 10 and 11 very meticulously especially in its concluding observations. Whenever any person is going to be detained by a state; his identity, name, time of detention and date everything must be recorded, registered and maintained by the State.[95] Medical doctors must be independent doctors apart from staff of jail. There must be routine check-up of the persons in presence of independent human rights experts.[96]

The committee also commented on the duty of a state to legislate and enforce law on torture. It found that states are bound to reproduce the definition in verbatim in its domestic law but states temper with the definition. In *Urra Guridi v. Spain*[97] complaint guards were pardoned with lighter penalties after torturing a person and no disciplinarian proceedings taken against the guards which are against the spirit of Art 2(1) and 4 of the Convention. The committee said that at least 6 years punishment must be there for torture.

The committee also developed the duties of the state to investigate under articles 12 and 13 the Convention. Both of these provisions are applicable in case of cruel, inhuman or degrading treatment under Article 16 of the Convention. Article 12 provides a state's duty to commence fair and independent proceedings and Article 13 provides right of a victim to complain against torture. The Committee considered that delay to investigate a complaint for 15 months is violation of Article 12 and it is unreasonable delay. State has an obligation to take prompt actions on the complaint.[98] The committee gave two reasons why to take prompt action is

[92] CAT General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications) 21 November 1997.
[93] *Id*, at 6.
[94] *A.S v. Sweden* (CAT/C/25/D/149/1999) 8.6.(2001).
[95] Concluding Observations on the U.S. UN doc. CAT/C/USA/CO/2, 16 (2006).
[96] Concluding Observations on Switzerland, UN doc. CAT/C/CR/34/CHE, 4 (2005).
[97] CAT 212/02 (17 May 2005).
[98] *Halimi-Nedzibi v. Austria*, CAT/C/10/D/8/1991 (5 May 1992).

required. First, action is required to cease the actions immediately second, marks of physical violence may disappear quickly so there will be no proof against physical torture.[99]

Apart from these remedies victim has right to compensation which has been discussed by the Committee and its significance though only monetary compensation is not enough. Article 4 not only provides civil remedies but also asks the state to ensure "restitution, compensation, and rehabilitation of the victim" and also ensure no repetition of the acts again.[100]

The committee is not only working on its stated functions but working more hardly to enhance enforceability of Convention in very strict sense, so torture as crime against humanity can be prevented in its initial phase and protect the right of victim of torture and other ill treatment.

5. CONCLUSION

Just after the World War II the United Nations came into being to establish peace and protect human rights. It adopted its Charter in 1945 and 1948 the Universal Declaration of Human Rights was adopted containing the prohibition of torture though not legally enforceable but it has attained the status of customary international law and ICCPR reaffirmed provision the provision legally binding form.

The prohibition of torture and Ill treatment has been recognized as jus cogens and obligation cannot be derogated by the State Parties to the Torture Convention in any circumstances. The definition of torture which has been incorporated in universally accepted UNCAT, tempered by the States as per their domestic laws. The implementation of the torture convention and other human rights and human bodies have broadened the torture jurisprudence and concept and made developed implementation mechanism. There is need to adopt a universal definition which must be binding all the States parties and should ask the States Parties to enforce and reproduce in verbatim in their national law.

Laws are only beneficial after exploring the fact. States are obliged to investigate, to exclude evidence obtained by torture or ill treatment, to redress and compensation to victims of torture and application of definition must be made after all the steps. The national torture prevention mechanism must be very independent and free from power and manipulation only then it is possible prevention of torture in future.

[99] *Blanco Abad v. Spain* CAT 59/1996, 8.2(14 May 1998).
[100] *Dzemajl et al v. Yugoslavia* (CAT 161/2000), 9.6 (2 Dec., 2002).

SPACE DEBRIS: A POTENTIAL THREAT FOR HUMANITY

DEEPANSH TRIPATHI*

ABSTRACT

Pollution has been one of the core concerns when we look at the position of our planet. However, little is being done to throw light upon and examine pollution in Space. This paper attempts to do that and will call attention to the grave repercussions that humankind will face due to the rapid increase of debris in Outer Space. Initially, the paper will trace the root cause of pollution and elaborate on the different kinds of pollutants such as chemical effluents, biological effluents and nuclear material, which poses an imminent danger. Furthermore, the paper will illustrate the risk on the Earth's environment due to imbalance in outer space. Then the author will critically examine the most significant Article of the Outer Space Treaty concerning space pollution (Article IX). Later, the paper will list the various international conventions and collective efforts by the international communities to deal with the predicament. Lastly, the paper will put forward several proposals of multiple theorists and scholars to deal with the orbital debris problem in the outer space environment and the possible way forward.

1. INTRODUCTION

It is said that wherever humans go, they tend to leave their mark. This can be in the form of development or destruction. Humans are witnessing how badly the ecology is imbalanced, be it the depletion of the ozone layer or emission of greenhouse gases, leading to the rise in the earth's overall temperature. Human has substantially exploited the Earth's resources, and now it is time to expand our horizon to Outer Space[1]. We have international treaties like *Kyoto Protocol, Paris Agreement and UNFCCC*, but none of them pays attention to the problem of pollution in Outer Space.

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[1] Christol, 'The modern international law of outer space', (1982) Oxford, UK: Pergamon Press 20.

Since both the public and the private entities have begun launching and utilising satellites and making the process easier and less expensive to launch satellites into orbit. This expansion is giving rise to the problem of *space debris*[2]. The time is not too far when there can be a point of cascading exponential increase in space debris, leading to problems like debris collides, which might ultimately result in unusable Earth orbits. This is known as *Kessler Effect*[3]. Pollution is a threat to human existence, be it on the surface of earth or in outer space[4].

2. UNDERSTANDING THE CONTAMINATION OF SPACE: SPACE DEBRIS

Veiling behind the curtain of development to justify the acts is always the tendency of humans, but this devastation has been multiplied extensively[5] because of increased space activities[6]. The source of outer space pollution is divided into *forward contamination and backward contamination*[7], former occurs due to the result of human activities such as launching satellites[8] whereas the latter one refers to any unpropitious change caused in the Earth's environment due to the introduction of an extra-terrestrial matter[9].

Space debris is defunct human-made objects in space; it can also be referred to as Space Junk or Waste in simple terms[10]. It is the most potent form of space pollution found extensively in orbits, caused by fragmentation of space shuttle, satellite or inoperative payloads. This overcrowding of

[2] Gabrielle Maxey, 'Clearing some Space' (2009) <http://memphis.edu/magazine/issues/summer09/space.php> accessed 10 May 2021.
[3] 'The Kessler Effect and How To Stop It', (2012) ESA <http://www.esa.int/Our_Activities/Space_Engineering_Technology/The_Kessler_Effect_and _how_to_stop_it> accessed 10 May 2021.
[4] Nandasiri Jasentuliyana, The Role of Developing Countries in the Formulation of Space Law (1995) XX(II) ANNALS AIR & SPACE L. 95.
[5] Thierry Senechal, 'Orbital Debris: Drafting, Negotiating, Implementing a Convention' (2007). <https://www.researchgate.net/publication/37999896_Orbital_debris_drafting_negotiating_implementing_a_convention > accessed 10 May 2021.
[6] Stephen Gorove, 'Pollution and Outer Space: A Legal Analysis and Appraisal' (1972) N.Y.U. J. International Law & Policy.
[7] Sandeepa Bhat, 'Sustainable Space Development: Need for a Change in the Liability' (2008) 319 <http://www.gbv.de/dms/spk/sbb/toc/584776039.pdf > accessed 10 May 2021.
[8] Wolfgang Rathgeber, Kai-Uwe Schrogl, Ray A. Williamson, '*The Fair and Responsible Use of Space'* (Springer 2010).
[9] Major Bernard K. Schafer, 'Solid, Hazardous and Radioactive Wastes in Outer Space: Present Controls and Suggested Changes'(1988) <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1465&context=cwilj > accessed 10 May 2021.
[10] Scientific and Technical Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, *Technical Report on Space Debris* (U.N. Doc. A/AC.105/720, 1999).

space will give rise to frequent incidence of collisions[11] of objects with existing debris which will proliferate secondary fragments and the chain will continue.

One crucial factor that needs to be taken into account that all the space debris are relatively very small, ranging from a few millimeters to several centimeters. Hence, the major problem is not with the size but with its high velocity, actual danger[12] is when these micro-particulate matters with high velocity collides with other space objects, extra-terrestrial bodies or with humans (astronauts)[13], that is where it will create even bigger havoc[14]. This floating junk will result in damage of property, unpropitious effect on the costs of space missions and most severely on Astronauts' lives[15].

2.1. Past instances of Collision

- The first-ever collision incidence was in 1996 when the French CERISE spacecraft collided with a European Ariane rocket[16].
- In January 2005, a U.S. rocket collided with the third stage of a Chinese CZ-4 launcher[17].
- In February 2009, an Iridium satellite collided with a spent Russian satellite, resulting in close to 2,000 debris pieces over 10 cm long[18].

3. THREATS SURPASSING FRAGMENTED PARTICLES TO OUTER SPACE

Air pollution and harmful chemicals are polluting Earth and impacting outer space undesirably[19]. In outer space, the source of chemical release is from the use of solid rocket fuels in spacecraft, which is composed of *hydrogen chloride, aluminum oxide, water, hydrogen, carbon monoxide,*

[11] Karl-Heinz Böckstiegel, *Environmental Aspects of Activities in Outer Space: State of the Law and Measures of Protection* (1990).
[12] Donald Kessler and Burton G. Cour-Palais, 'Collision Frequency of Artificial Satellites: The Creation of a Debris Belt' (1978) 83 Journal of Geophysical Research 26, 37.

[13] Fishman, 'Space salvage: A proposed treaty amendment to the agreement on the rescue of astronauts, the return of astronauts and the return of objects launched into space' (1985) Journal of International Law 26, 965.
[14] NASA, *Interagency Report on Orbital Debris*, (NASA, Orbital Debris Quarterly News, April 2005).
[15] Lotta Viikari, *The Environmental Element in Space Law: Assessing the Present and Charting the Future* (Boston: Martinus Nijhoff Publishers, 2008), 47.
[16] NASA, *Orbital Debris qutarly news*, (Vol 1 Issue 2, NASA, Sept 1996).
[17] Leonard David, 'U.S.-China Space Debris Collide in Orbit', (*Space News*, 2005) <https://www.space.com/969-china-space-debris-collide-orbit.html> accessed 10 May 2021.
[18] Becky Iannotta , 'U.S. Satellite Destroyed in Space Collision', (*Space News*,2009) <https://www.space.com/5542-satellite-destroyed-space-collision.html> accessed 10 May 2021.
[19] National Aeronautics and Space Administration, *Biological Contamination Control for Outbound and Inbound Planetary Spacecraft* (2016) <http://nodis3.gsfc.nasa.gov/displayDir.cfm?Internal_ID=N_PD_8020_007G_&page_name=main&search_term=8020%2E7> accessed 10 May 2021.

and carbon dioxide[20]. These compounds have an adverse impact on Outer Space and might also be harmful to the atmospheric balance of Earth because it is still undetermined what will happen if these compounds enter into the atmosphere of Earth[21].

The next threat is from *Nuclear-propelled spacecraft*[22]*;* human civilisation has already witnessed severe destruction by a nuclear weapon in World War II. There is a constant threat to planet Earth and an amount of destruction beyond our imagination in case of explosions of nuclear substance in the vicinity of space[23]. In the crash of the *Russian satellite Cosmos 954 in 1978*[24], this nuclear-powered satellite disintegrated on re-entering the Earth's atmosphere and scattered toxic radioactive debris over certain parts of Canadian territory[25].

4. APPLICABILITY OF PRINCIPLES OF INTERNATIONAL ENVIRONMENT LAW IN OUTER SPACE

In this paper, the author will attempt to justify that the existing conventions and treaties do not effectively conserve the outer space environment. Thus, it becomes essential to explore the possibility of importing customary environmental law principles[26] into the space sector.

Let us examine the feasibility of the same, starting with the case of *Trail Smelter*[27],where it reiterated the Principle 21 of Stockholm that *"No state has the right of permit use of its territory in such a manner as to cause injury to the territory of another state or properties".* It will be challenging to inculcate this principle because the whole concept of Territorial jurisdiction or State boundary is not applicable in the scenario of outer space.

Another relevant international environmental norm is the *Polluter pays principle*, which states that *Whoever is responsible for damage to the environment should bear the costs associated with*

[20] Carl Q. Christol, 'Protection of the Space Environment: Debris and Power Sources' (1995) Boston: Kluwer Law International 260.
[21] Vishakha Gupta, 'Critique of the International Law on Protection of the Outer Space Environment', (2016) <10.1080/14777622.2016.1148462> accessed 10 May 2021.
[22] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Article IV.
[23] Melissa K. Force, 'The Legal Landscape for Nuclear Spacecraft: International Environmental Law and Space Law' (2012) Asian Journal of Air and Space Law 146–47.
[24] W.K. Gummer, F.R. Campbell, G.B. Knight, J.L Ricard, 'COSMOS 954, The Occurrence and Nature of Recovered Debris' (1980) <https://inis.iaea.org/collection/NCLCollectionStore/_Public/12/595/12595268.pdf> accessed 10 May 2021
[25] He Qizhi, 'Towards a New Regime for the Use of Nuclear Power Sources in Outer Space' (1996) Journal of Space Law 97.
[26] Roberts, 'Traditional and modern approaches to customary international law: A reconciliation' (2001) American Journal of International Law, 95(4), 757, 791.
[27] United States v. Canada (1941) Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905.

it[28]. This principle directly holds the polluter liable and compels them to pay the cost of to repair the damage they have caused to the environment[29]. Though it emerged largely as an economic principle, it also has legal implications in international environmental liability[30]. However, an embodiment of this principle in the space sector is ridden with ambiguities and makes the reparation mechanism deficient[31]. The challenge here is not to identify the Polluter of space pollution, taking the defence from the liability convention the Polluter will either be the launching state, manufacturer state or it can even be private[32] organisation like *SpaceX* who independently create space objects. The issues that arise here is that, *to whom the compensation will be given*? In case of space pollution, *who will be the party calming the compensation?* This fundamental question nullifies the applicability of the principle of Polluter pays in the Space sector[33].

Other environmental law principles, including *Sustainable development, Intergenerational Equity or Principles of Integration*, do not hold any value in the space sector and need more clarification and scholarly work to generate the debate[34].

5. ELUCIDATING THE POSITION OF INTERNATIONAL TREATIES

One of the first treaties to address environmental concerns of Outer Space is the *Partial Nuclear Test Ban Treaty of 1963*. It prohibits the employment of nuclear weapons in the atmosphere, underwater, and in outer space to prevent radioactive fallout in space.

In order to create liability[35]on Nations, it became essential to define the term *"Space Object"*. The Liability Convention[36] is the first space conventions to provide a definition which states: -

"*component parts of a space object as well as its launch vehicle and parts thereof"*[37].

[28] 'The Impossibility of Harming the Environment' (*Foundation for Economic Education*, May 1, 2002) <https://fee.org/articles/the-impossibility-of-harming-the-environment/> accessed 10 May 2021.
[29] Karl-Heinz Bockstiegel, 'ILA Draft Convention on Space Debris' (1994) German Journal of Air and Space Law 395, 400.
[30] Roy E. Cordato, 'The Polluter Pays Principle: A Proper Guide for Environmental Policy' (2016) <http://iret.org/pub/SCRE-6.PDF> accessed 10 May 2021.
[31] Nandasiri Jasentuliyana, 'International Space Law and the United Nations' (1995) Kluwer Law International 45.
[32] Risley, 'Examination of the need to amend space law to protect the private explorer in outer space' (1999) An Western State University Law Review, 26, 47.

[33] Fawcett, 'Outer space: New challenges to law and policy' (1984) Oxford, UK: Clarendon Press.
[34] David Tan, 'Towards a New Regime for the Protection of Outer Space as the Province of all Mankind', (2000) Yale Journal of International Law 145.
[35] Foster, 'Convention on international liability for damage caused by space objects' (1972) The Canadian. Y.B. of International Law 10, 137.
[36] UN General Assembly Resolution 2777 (XXVI), *Convention On International Liability For Damage Caused By Space Objects.*

This definition was crucial as it helped establish the joint and several liability[38] of all launching states in case of any misshaping[39].

Even though, the Outer Space Treaty is in existence since more than five-decade but still fail to define "Space Object" even after using the term in Article X[40].

Now the focus was on "*space* debris" and can be traced through an attempt by *UNCOPUOS in 1977*[41]. However, it was not fruitful because the problem was raised as a side issue to *crowding of the geostationary orbit*[42].

Then in the same year, the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977*prohibitedmilitary or other hostile uses of techniques which, could change the dynamics, composition or *structure of outer space*".

Finally, in 1992, the General Assembly realised the gravity of the problem of pollution in outer space and urged States to pay more attention to the protection and the preservation of the outer space environment[43]. Special emphasis was given to the problem of collisions of space objects with space debris[44].

6. OUTER SPACE TREATY COULD BE THE GAME CHANGER

The enactment of the Outer Space Treaty is considered a historic event[45]. The combined effort of the U.N. General Assembly and the Legal Subcommittee of COPUOS, which is also considered the Magna Carta of space law, lead to the creation of the Outer Space Treaty.

When the treaty was being drafted, space activities were too exorbitant, and it was highly unenforceable for the drafters of the treaty to think of space junk as a severe concern. As a result,

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[37] Convention On International Liability For Damage Caused By Space Objects, Article I (d).
[38] Convention On International Liability For Damage Caused By Space Objects, Article V.
[39] Armen Rosencranz, 'Origin and Emergence of International Environmental Norms', (2002) Hastings International and Comparative Law Review 309.
[40] Robert C. Bird, 'Procedural Challenges to Environmental Regulation of Space Debris', (2003) 40 Am Bus LJ 635, 637.
[41] UNCOPUOS, *Space Debris Mitigation Mechanism in Japan* (2009), <http://www.oosa.unvienna.org/pdf/pres/lsc2009/pres-05.pdf>.
[42] Jer-Chyi Liou and Nicholas L. Johnson, 'Risks in Space from Orbiting Debris', (2006) 311 Science 340.

[43] Sandeepa Bhat, 'Sustainable Space Development: Need for a Change in the Liability' (2008) 319 <http://www.gbv.de/dms/spk/sbb/toc/584776039.pdf > accessed 10 May 2021.
[44] UNGA, *International Cooperation in the Peaceful Uses of Outer Space*, (1992) UN Doc. A/RES/47/67.
[45] United Nations Committee on the Peaceful Uses of Outer Space, *Status of International Agreements Relating to Activities in Outer Space*, (2015) A/AC.105/C.2/L.295.

today, we have only one provision that abstractly discusses the ***Environmental protection of Outer Space, Article IX***[46] of the Outer Space, 1966.

This section will attempt to do an analysis of Article IX of the Outer Space Treaty which is described as a bunch of imprecise terms. In order to thrive better understanding, the author has divided the Provision of Article IX into three distinguished paragraphs.

In the ***first paragraph of Article IX,***

- It is difficult to extract out the real intent of the treaty's drafters, but the term *"guided"* does not clarify whether member states have to mandatorily conform to the principle of cooperation and mutual assistance or merely consider it before undertaking an activity. This discretion on the parties can lead to a situation of conflict while interpretation[47].

- It is also important to highlight here is that the starting sentence of the first para of Article IX was imported from the *1963 UNGA Resolution*. It promulgates the principle of international "*cooperation and mutual assistance*" with respect to space activities. It mandates that parties to the Outer Space Treaty give due regard to other states' interests while exploring outer space. However, unlike the 1963 UNGA Resolution that applied to *all States,* Article IX applies only to the "State Parties" to the Outer Space Treaty[48].
- In the last line of the first paragraph, the phrase *"corresponding interests"* fails to provide a lucid meaning. From a rational human-centric perspective, it is construed to

[46] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Article IX- "*In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extra-terrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, may request consultation concerning the activity or experiment."*

[47] Reynolds, Merges, 'Outer space: Problems of law and policy' (1989) Colorado: Westview Press.
[48] Natalie Pusey, 'The Case for Preserving Nothing: The Need for a Global Response to the Space-Debris Problem', (2010) Colorado Journal of International Law and Policy 425.

include only the harm caused to *future space activities*; with such unidirectional interpretation, it dilutes the whole relevance of the provision[49]. Also, this provision limits the scope of considering the *precautionary principle* as a measure to deal with the situation.

Moving on to the **second paragraph,** it is the only provision in the entire Outer Space treaty that expressly addresses the *protection of the outer space environment*.

- It starts by stating that the *"States Parties to the Treaty shall pursue studies..."*. The use of *"shall"* in this sentence implies that the party states will mandatorily have to pursue studies of outer space even if not engaging in any space activity. But the provision fails to further assist as to *what sort of studies have to be pursued?*, this interpretation is left on the speculation by states. Also, this provision does not take into account the great divide between the Developed and Emerging nations as there will be a discrepancy in states' financial resources, scientific & technological capabilities and infinite other barriers[50].

- The terms *"harmful"* and *"adverse change"* are subject to multiple interpretations, and the interplay between these two terms results in another anomaly. The provision does not clarify aspects like, *for whom the contamination must be harmful*; *for whom the change must be adverse*[51] or *whether the contamination is harmful to celestial bodies, future space experiments, or to the Earth's atmosphere.*

- The provision also leaves the word *"contamination"* undefined. As the article does not explicitly address other kinds of pollution and Contamination, in common parlance means the discharge of *chemical effluents*. So, it leaves us with the doubt that, *whether to draw an inference, the article only refers to the harm caused to outer space through the release of chemical contaminants*[52].

[49] Lawrence D. Roberts, 'Addressing the Problem of Orbital Space-Debris: Combining International Regulatory and Liability Regimes', (1992) Boston College International and Comparative Law Review 51.
[50] Olga Stelmakh, 'Space Debris: Emerging Challenge, Common Concern and Shared Responsibility: Legal Considerations and Directions towards a Secure and Sustainable Space Environment', (2013) International Institute of Space Law, Beijing, China, 353, 357.

[51] N. Trendle, 'Negligence and the Right to Support: Bognuda v. Upton & (and) Shearer', (1971) Victoria University Wellington Law Review 416.
[52] Howard A. Baker, 'The Sci-Lab Perception: Its Impact on Protection of the Outer Space Environment' (1988) 30th Proceedings of the Colloquium on the Law of Outer Space, 121, 127.

- The terms *"where necessary"* and *"appropriate measures"* augment the abstractness of this article. There is no definite authority to set standards for "necessary" and "appropriate measures". In a strict sense, these terms will be interpreted according to the "quantity of contamination" instead of "quality of the environment", undermining outer space environmental sustainability[53].
- The term "avoid" obligates the member states only to shun certain activities but *what actions must be "avoided" are not specified*. This obscurity highlights the depth of human-centrism ingrained in this Article which reflects the intent of drafters, who merely for the sake of creating some obligation on state parties, created this provision[54].

The core issue in the **third paragraph** is with the term ***"reason to believe"***

- This term is subjective and provides ample power in the hand of the concerned State party to decide whether they want to seek international consultation or wants avoid by rebutting the existence of *"reason to believe"* [55]. There can also be a possible scenario when the state party attempts to manipulate facts to adduce faith in their venture and negate any prospect of harmful interference with outer space. Due to the absence of any yardstick to determine the truth the states can easily manipulate this term in their favour.
- Even when the member state is willing to seek consultation but the provision is silent on the fact that, *from whom to seek these international consultations*. As the provision fails to mention any international body to whom the State party can go and seek consultation in case of any potential harm or interference to outer space.
- Article IX also fails to impose any firm obligation on the state parties. The only direct prohibition in the Outer Space Treaty is given in *Article IV*, which forbids the placing of nuclear weapons in the orbits around the Earth[56]. But the Treaty is silent on the situation when there is a violation of any provision of the Outer Space Treaty, in other words there is no mechanism of sanction in case of violation[57].

[53] Alexander F. Cohen, 'Cosmos 954 and the International Law of Satellite Accidents', (1984) Yale Journal of International Law 10.
[54] Aldo Armando Cocca, 'Convention on Registration of Objects Launched into Space'(1979) Manual on Space Law Volume I 177, 178.
[55] Bin Cheng, 'Studies in International Space Law' (1997) Oxford: Clarendon Press 383.

[56] Vishakha Gupta, 'Critique of the International Law on Protection of the Outer Space Environment', (2016) <10.1080/14777622.2016.1148462> accessed 10 May 2021.
[57] Joseph Pelton, 'Space Debris and Other Threats from Outer Space' (2013) Springer Science & Business Media.

7. THE WAY FORWARD

Despite various proposals advanced by scholars and institutions, some of them workable, the international law on outer space is stagnant; there has been no significant development in treaty law since the enactment of the Moon Agreement. Meanwhile, the outer space environment continues to be polluted by spacefaring nations.

The present international legal system is not adequate for protecting the outer space environment, no binding standards have been adopted so far, nor any binding guidelines exist to help space actors determine appropriate levels of debris mitigation[58].

Various scholars have put forth proposals to remedy the mechanism.

1. *Space Debris Mitigation Convention* proposed by *Thierry Senechal*. Convention highlights the harmful consequences of space debris, and require the parties to mandatorily undertake certain measure for debris mitigation at national and international levels[59].

2. Howard Baker attempts to harmonise international space law and international environmental law[60]. He envisions a *Protocol for the Protection and Preservation of the Planetary Environment* with general principles and specific obligations. The protocol shall contain fundamental principles of environmental law: (1) principle of common planetary concern; (2) principle of good neighbourliness; (3) principle of precautionary measures; and (4) principle of sustainable development.

3. The International Association for the Advancement of Space Safety (IASS), proposed the establishment of *International Removal, Maintenance and Servicing of Satellites* (INREMSAT), which shall assist with the removal of space debris and non-functional satellites.

4. The Inter-Agency Space Debris Coordination Committee (IADC) is an international body made up of national and multinational space agencies to coordinate space debris-related

[58] Ping Yiding, 'Application of Image Restoration in GEO Space Debris Survey', (2016) <http://aero.tamu.edu/sites/default/files/faculty/alfriend/S7.3%20Ping.pdf> accessed 10 May 2021.
[59] James Lampertuis, 'The Need for an Effective Liability Regime for Damage Caused by Debris in Outer Space' (1991) Michigan Journal of International Law 447.
[60] Agatha Akers, 'To Infinity and Beyond: Orbital Space-Debris and How to Clean It Up', (2012) University of La Verne Law Review 285.

activities. Participating States have to give a voluntary undertaking with a view to mitigate space debris, and have to develop domestic standards and nationally binding laws[61].

5. Removing those spacecrafts that have reached the end of their mission operations from the functional densely populated orbit regions[62].

6. Some scholars advanced the idea of the imposition of a *"space access fee"*. Every State encroaching on outer space shall be liable to pay it. The fund created out of such a fee shall be used to clear out the existing debris.

[61] J.C. Liou, David Jarkey, 'Orbital Debris Mitigation Policy and Unique Challenges for Small Satellites' (2015)Volume 19, Issue 2 NASA Orbital Debris Program Office, Small Satellite Conference 4.
[62] Nicholas Johnson, 'Origin of the Inter-Agency Space Debris Co-ordination Committee', (2016) <http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20150003818.pdf > accessed 10 May 2021.

A CASE STUDY VIS-À-VIS DISABILITY AND CASTE DISABILITY IN INDIA

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ABSTRACT

The social movements in India for securing justice to those who have suffered centuries of caste-based discrimination paved way for the enactment of the SC & ST Act in 1989 to prevent commission of atrocities against members of the Scheduled Caste and Scheduled Tribes communities. The act falls under the purview of Article 17[1] of the Constitution which talks about 'Abolition of Untouchability'. Here we are more specifically discussing 'persons with disabilities' of this particular community which is more vulnerable in itself. The unfortunate fact is that despite various measures to improve the socio-economic conditions of persons with disabilities of SC/ST community they remain vulnerable. The stigma of disability is considered as sin (pap) in the society and belonging to backward caste, does not give any hope of dignified life. Atrocities, disadvantages, violence and many more are part of day-to-day life of a person with disability belonging to these communities then whether it is within family, society or from administration on every level. Our criminal justice system is totally inaccessible for persons with disabilities especially in the cases of sexual offences against women with disabilities. We don't have trained police officers, judicial officers and government advocates for assisting them, certainly that is the reason that most of these cases go unregistered and these women reman the victim till end of their life[2]. Now the only hope is judicial activism, which has delivered some of the excellent judgments in recent days for protection of fundamental rights of persons with disabilities of SC/ST community. Through this paper authors have tried to highlight the social and economic context in which violence against women and discrimination with persons with disabilities from SC & ST communities occurs and also explored the other challenges for them.

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[1] Abolition of Untouchability: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.
[2] *Patan Jamal Vali v State of AP*, (SC) Criminal Appeal Number 452 of 2021.

1. INTRODUCTION

India has a long history of its struggle for freedom; similarly, the persons with disabilities in our country too have a long history to fight for their right which is continued. India has 2.68% of persons with disability out of its total populations, which is a quite big number. The issue of concern is the number is growing year by year very rapidly. There may be several reasons behind this but here the matter of concern is the 'disability' is growing comparatively faster among the people of backward categories like SC's and ST's or tribals than general categories.

There are many reasons behind disability; it may be by birth, by accidental or due to some disease. If we look long back during or before our independence at that time the disability was considered as a consequence of an evil act or Paap (sin) of that person's present or past life. At that time the life of persons with disabilities were very hard, in fact it was very normal for them to face societal boycott, discrimination from society and family too. The reason at that time may be illiteracy and non-scientific understanding about the reasons behind disability and myths.

In 1970 India saw a big movement all across the country for the legal protection of rights of persons with disabilities. The developed legal systems of the world came up with disability laws in their country way before India, which brought it in 1995. Persons with Disabilities Act, 1995 (hereafter PWD Act), when the disable community felt that they win the match but unfortunately the PWD Act, did not fulfil the aspiration and need of the disabled community completely.

But initially it was a welcome step and appreciated by the whole community all across the country. After that in 2016, Government of India came up with RPWD Act[3], in continuation of its ratification of Conventions on Rights of Persons with Disability (hereafter UNCRPD) in 2007 which also strengthens the Act by including more categories in the definition of 'Disabled'. One significant addition in the category was the inclusion of victims of acid attacks. The reservation also increased from 3% to 4% in government employment (demand was 5%).

The core problem of our social structure still needs to address and that is the discrimination on the basis of caste. When we go through the data provided by the ministry, it clearly indicates that the casteism is very much existing within the disability community also. So, whether we talk about in perspective of benefits of government schemes, reservations, education, employment or social stigma. Actually, the life of a Dalit with disability is tougher and struggleful then a Brahmin or any other upper cast persons with disability. In this way the persons with disability

[3] Rights of Persons with Disability Act, 2016.

of SC's or ST's are facing multiple type of disability other than physical disability then whether it is within the community or outside the community. The legal system of India also does not provide complete protection to these most marginalized sections of our society. Article 14 of the Constitution of India which talks about equality among people is very general in nature and it does not talk about persons with disability in specific, in fact nowhere in the whole constitution the persons with disabilities are the concerned parties.

The disabilities are deprived of all opportunities for social and economic development. Increasing the risk of disabilities shows the increasing health issues for the nation. In some of the Indian states like Maharashtra, Andhra Pradesh, Karnataka, Punjab, the disability increased over the years 2001 to 2011. In fact, the RPWD Act also does not provide any specific protection to these people from any kind of discriminations on the basis of caste, religion or race.

Indian constitution provides protection to equality under Article 14, 15, 16. In 2016 Indian Parliament by replacing previous act and to implement UNCRPD[4] provisions has come up with new RPWD Act to protect persons with disability from all forms of discrimination and achieve equality but unfortunately persons with disabilities who belong to SC/ST castes are still facing double discrimination in the society. *The Supreme Court battled strongly for more systematic protection to disabled and cast oppressed women saying "they are living under constant threat of violence, both physical and sexual, that curtails their constitutionally guaranteed right to lead a full and active life"*[5].

The reason behind enhancing the disability is poverty in the particular states. Since, India is still the home of the village. Currently, about 70 percent of the population is living in the rural areas. Unsafe working environments, poor living conditions, poor nutrition, basic sanitation and nutrition food, lack of access to clean water, health care, and education, all disproportionately impact the poor and can result in disability.

An individual who is born with a disability or who becomes disabled are often faces social marginalization. They have a significantly less chance of accessing health care, education or employment leading to poverty, which in turn results in limited access to safe housing and food, health care and so forth. As per data the disability is highest in scheduled caste followed by scheduled tribes. Why is it high in a vulnerable section (SCs and STs)?

[4] United Nations Convention on the Rights of Persons with Disabilities, 2008.
[5] *Kamal Jamal Vali v State of Andhra Pradesh*, SC, Criminal Appeal No 452, 2021.

Since, the SCs and STs, or adhivasis are economically and socially deprived groups in India. They comprise around 24% of India's population. OBCs, and upper castes together consist of 76% of India's total population. The deprivation of SCs and STs Groups are associated with the historical processes based on caste, starting from Zamindari Pratha. Still in many parts of the country, these groups are suffering from economic discrimination and society violence problems. It informs of marginal farmers or landless labours by landlords by paying minimum wages in cash or food or nothing which frequently met by violence, sometimes resulting in deaths or injury the victim and sexual harassment also exist against the SCs/STs women. The gap and speed of enhancement of disability in between SCs/STs and non-SCs/STs is highly increased. It shows that there is still casteism in the society.

It is not only in the health system but also everywhere either that may be government sector or private sector. The gap between caste groups will exist till the existence of the caste system in the Indian society. It is important therefore that the unique challenges of intersectionality for Dalits with disabilities are also recognized to ensure that they do not continue to be left behind. Now it's matter of research to identify those sectors in which persons with disability belonging to SC/ST caste are facing discrimination, ignorance, violence, abuse or social boycott. This research paper would be more focused to understand the problems related to caste-based discrimination among persons with disabilities in India. Research paper would also analyze the government policies which are in existence for the protection of these people and try to find out reasons and answers behind these questions within our legal framework.

2. LITERATURE REVIEWD

A study Carried out by **Gobinda C. Pal, Indian Institute of Dalit Studies** on the topic of *'Dalits with Disabilities: The Neglected Dimensions of Social Exclusion*[6]', 2010. This study has carried out very detailed study on the casteism and its impact on persons with disabilities. The social exclusion and discrimination make the life of a Dalit person with disabilities harder than an upper cast person with disability. We need to understand that the caste plays a big role in deciding the behavior or attitude to look at a person with disability. This study has very beautifully undertaken an empirical study on the above topic and thoroughly studies the whole dimension of the topic. It finds that there are various excluded, marginalized and discriminated groups are there within the caste only. Our society varies according to their social, cultural,

[6] Gobinda C. Pal, Indian Institute of Dalit Studies on the topic of *'Dalits with Disabilities: The Neglected Dimensions of Social Exclusion'*. Working Paper Series, Volume IV, Number 03, 2010.

political and their economic situations all across the country and it also impacts directly on the life of a dalit person with disability.

The central idea of this study is to draws a corollary between the two concepts that is physically challenged and caste-based disadvantages, discrimination and deprivation of opportunities in different sphere of day-to-day life which it finds very real through its rigorous study. **Renu Addlakha, (2013)**, has discussed, in the book *"Disability Studies in India, Global Discourse, Local Realities*[7]", various topics related to disability and its social status. Further, the author has discussed the concept of disability from a variety of disciplinary positions, sociocultural contexts, and subjective experiences within the overarching framework of the Indian reality. The contributors –including some with disabilities themselves-provided well-rounded perspectives, in shifting focus from disability as a medical condition only needing clinical intervention to give it due to social and academic legitimacy. **Jayana Kothari (2012),** in *"The Future of Disability Law in India*[8]*"* has very beautifully comprehended all the major areas of disability, especially education, employment challenges for this community. Further, she has very strongly pointed out all those loopholes of the PWD Act, 1995.The author has also discussed what kind of problems, discrimination persons with disabilities are facing in public employments. At the end she very briefly describes how social structure makes things more complex and difficult for the persons of disabilities specially who belong to lower caste.

G.N. Karna (2001), in his book titled *"Disability Studies in India: Retrospects and Prospects*[9]*"* The author has comprehended various issues related to disability in our country. Especially it focuses on disability rights movements which include social movement which was a remarkable move in the history of disability rights movement in India. Author has talked in detail about the minority group, educational status within the disability community, human rights issues of persons with disability. He has elaborated many approaches like medical/clinical approaches, psychological approach, economic and vocational approaches where he has critically analyzed the current practice in the areas of disability and the misconception of the general public about persons with disability and disability in general. **Disability, Caste and Economy-**Generally when we talk about a Person with disability or a person belonging to SC/ST caste what first comes to our mind is, poor, needy, helplessness and some people consider them a liability on the society. Whereas the truth is different if you provide them good education and skilled them like a

[7] Renu Addlakha, *Disability Studies in India, Global Discourse, Local Realities* (Routledge, 2013).
[8] Jayana Kothari, *Future of Disability Law in India*, (Oxford University Press, 2012).
[9] G. N. Karna , '*Disability Studies in India: Retrospects and Prospects',* 2001.

normal person, they perform equal or better than a normal upper caste person, so here the difference is of better facilities and opportunities not of disability and caste disability.

Actually, the definition of disability is very complex. It does not take only the physical but also the social and economic factors in consideration. How the definition of disability varies from culture to culture can be determined by the interface between the social and cultural constructs of impairment of disability and social structural factors. The old myth is that the birth in the upper caste is good deeds of karma and you have done sin or committed misdeeds in previous births that can be the result of your birth in the SC/ST family.

In 2000, dalits were roughly twice as likely to be poor, unemployed and illiterate as non-dalits. They face very serious discrimination in rural part of India. The National Campaign Dalit Human Rights (NCDHR) report (2006) [10] Caste, Race, and the World Conference Against Racism (WCAR) shows that out of an estimated 30 million hectares of harvestable surplus land, only 7.5 million acres have been declared surplus, and only a small portion has been given to dalits. A report on India by **World Bank** (2007)[11] shows that there are more than 18 million persons with disabilities who are mainly residing in rural India. In which a larger number belongs to the SC/ST community, and the reason may be because of poor hygiene, malnutrition, living conditions, inaccessible health care and dangerous working conditions. A large number of students with disabilities are not getting basic education due to inaccessibility for them.

Further the report has emphasized that State's failure to provide them the basic education and health care are the main hurdles for them in getting access to reservation benefits either through SC/ST or PH reservation criteria. The women with disabilities are facing more severe problems compared to their male counterparts. Many studies suggest that Emphasis on women's traditional roles as worker, child bearer and nurturer limit their opportunities for employment.

UNCPD[12] urges the states must ensure the equal treatment of Disabled people as par with non-disabled people. It also mandates the states to give reasonable accommodation to the disabled people for overcoming the obstacles. Hence, it is the duty of the states to provide a barrier free work environment and inclusive policies for the employees with disabilities. UNCPD turns the courtesy job opportunities of disabilities into right based job opportunities. However, this situation leads to a lot of colonial questions.

[10] The National Campaign on Dalit Human Rights (NCDHR) Report (2006).
[11] World Bank Report (2007) on *People with Disabilities in India: From Commitment to Outcomes?*
[12] United Nations Convention on Rights of Persons with Disabilities, 2007.

The states must ensure that inclusive work environment policies are implemented across the country and whether the employees with disabilities are having dignified work life and how the policies will enhance the quality of their overall life. Further Section 20 of RPWD Act[13], 2016 mandates all government Institutions must provide employment opportunities to the persons with disabilities and make the working environment as accommodative and barrier free. Now the question is whether the 'RPWD Act 2016' implemented the fair and just conditions for the persons with disability in the employment?

The truth revealed by a report of World Bank, 2007, Studies report that people with disabilities in rural areas are largely from mainstream poverty alleviation programmes due to attitudinal and physical barriers. The PWD Act requires governments to reserve not less than 3 percent in all poverty alleviation programmes for persons with disabilities. However, the Sampoorna Gramin Rojgar Yogna (SGRY) (The Complete Rural Employment Scheme) mentioned parents of children with disabilities (CWD) rather than adult workers with disabilities, assuming that disabled people are unable to work. However, the World Bank observes that the data reported by various poverty alleviation programmes do not clarify the share of beneficiaries who are persons with disabilities. Wherever the clear data is available, people with disabilities are well below the 3 percent reservation rule in all schemes. For instance, the share of disabled beneficiaries in SGSY was below 1 percent between 1999 and 2004. The World Bank report also revealed the status of State government schemes which demonstrates an even lower percentage. For instance, in the state of Odisha, people with disabilities accounted for only 0.3 percent of total employment days generated under SGRY during 2001-2005 (Hiranandani and Sonpal, 2010).

A Study[14] carried out by Pal G.C., 'Dalits with Disabilities: The Neglected Dimension of Social Exclusion' it was reflected in both the studies that the work status of persons with disability is not encouraging. Only about one -fourth of the persons with disabilities are engaged in some sort of economic activities. A substantial proportion of them either engaged in domestic duties or engaged in unpaid work in household enterprises. Only 3percent are works as salaried employees leaving others as casual labour.

[13] Rights of Persons with Disabilities Act, 2016.
[14] Pal G. C., 'Dalits with Disabilities: The Neglected Dimensions of Social Exclusion', Indian Institute of Dalit Studies, Working Paper Series, Vol. 3, No.4, 2010, p.8.

3. DISABILITY, CASTE AND EDUCATIONAL RIGHTS

Education is probably the only weapon against poverty. Now the government through the New Education Policy 2020 also emphasizes more on the concept of 'inclusive education' [15] of children with disabilities. The Constitution of India even though does not make specific provision for persons with disabilities; the provisions regarding the Right to Education are equally applied to them. The Constitution of India recognizes the right to education but its main focus is on its benefits for the poor and needy section of our country. It's provided under Article 41[16] of Indian Constitution. Article 46 provides that the State shall promote and take care of the educational and economically weaker section of the society especially backward class. With the 86thAmendment, the right to free and compulsory education has been declared as a fundamental right. This Amendment has brought another important face of education, i.e. Pre-school education under the constitutional framework made it compulsory for the children to attend education because it's free of cost and some other facilities are also provided by the government like providing books and Uniforms free of cost to the weaker section of society. Article 45[17] has provision of particular significance for children with disabilities or benchmark disability. These amendments are important from the viewpoint of an individual right, and they also enlarge the scope of duties on both Citizens of Country and State. The basic duties of citizens are provided in Article 51A of the Constitution[18].

The Right to Free and Compulsory Education Act, 2009 under Section 3 provides the Persons with Disabilities as one of the most educationally and economically backward sections of the society in our country. The Act provides twenty-five percent reservations of seats for the most ignored and disadvantaged group in India including Persons with Disabilities, then whether that is in government sector or private sector especially in educational institutions. The Parliament has passed the Right of Children to Free and Compulsory Education (Amendment) Bill in 2010 that later on widened the net for disabled children bringing within its purview children with severe disability which was a long pending demand by other disabled people. Parents would

[15] Section 2(m) of Rights of Persons with Disability Act, 2016.
"Inclusive education" means a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities.
[16] 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.
[17] Ibid Art. 45: The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years.
[18] Ibid Art. 51A It shall be the duty of every citizen of India- (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

have the option of providing home-based education to these kinds of children with severe disabilities however said the clause should not be used as an excuse by the educational institutions to deny the admission in their institutes especially private institutes.

When India adopted Right to Education as part of fundamental rights, it was felt that now the scenario of the disability community will be fully changed but unfortunately the situation is not so different. The Article 21A of our constitution talks about RTE Act[19], 2009 which basically gives guarantee the right to free education for all children below the age of 6-14, whereas the PWD Act[20], goes far beyond and mandates that all children with disability shall have the right to access till the age of 18 years.

The education of children with disabilities has been the most priority issue since it minimizes the impact of disability on livelihood to a great extent. Normally the Rehabilitation Council of India undertakes the responsibilities for the rehabilitation of persons with disabilities through various programmes in education, activities and vocational training. The collaborative move of government and non-government organizations has made some success also but the success rate is very far when we talk about SC/ST community's persons with disability. The dalit persons with disabilities are facing triple discrimination and their participation in the school education is very low. According to a study[21] data reveals that more than one half of persons with disabilities are not literate. The proportion of non –literate persons with disabilities is highest among SCs (dalits 64%) and ST's (69%). These are distinctively higher than the proportion of non-literates among higher caste groups.

The ICESCR in General Comment No. 13[22] (para.6) elaborates on the four main elements of the right to education: availability, accessibility, acceptability and adaptability. These parameters are useful in assessing whether the education has acquired capacity to respond to the needs of learners with disability. For a comprehensive society like in India, it is important that all systems, services and procedures remain within the reach of all members of disabled people so that it can be easy for them to access it and get benefited within a short time. In fact, Article 29(1)(a) provides that education be aimed at the development of a child's personality, mental and physical abilities to their fullest potential, which is the need of the hour for establishment of equality in real sense as mentioned in the Constitution of India.

[19] Right to Education Act, 2009.
[20] Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995.
[21] Pal G.C., 'Dalits with Disabilities: The Neglected Dimensions of Social Exclusion', Indian Institute of Dalit Studies, Working Paper Series, Vol. 3, No.4, 2010, p.8.
[22] Quoted from National Human Rights Commission Disability Manual 2005 pp. 87-88.

The UNCRPD, 2006 deals with this issue[23]. It provides inter alia that: Persons with Disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability; Persons with Disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live. The laws are there but when we talk about the real world then the scenario totally changes, the children with disability of SC's and ST's are facing a big struggle in their school education due to lack of barrier free education. The kind of support required to motivate these children from backward class are not getting from the authorities including school staff. It's very common for them to face casteism remarks, abusive language and taunts in the school which overall discourages and keeps them away from even basic education. There is a serious need to bring attitudinal change in the school staff and special training required so that they know how to handle disabled children in a better manner.

The Supreme Court held in a judgment that "In Anmol Bhandari case[24]the High Court correctly held that people suffering from disabilities are also socially backward, and therefore, at the very least, entitled to the same benefits as given to the Schedule Caste/Scheduled Tribe candidates". The Court has set aside the rule of the college and noted that Scheduled Caste/Scheduled Tribes candidates require 35% to pass the aptitude test; the same shall apply on students with disability.

4. DISABILITY, CASTE AND HEALTH-

Different Socio-economic and structural factors can limit access to health care for women with disabilities. There are so many barriers in access of health care system for women with disabilities especially those who belong to backward caste.

According to WHO, 'Disability is an umbrella term, covering impairments, activity limitations, and participation restrictions. Impairment is a problem in body function or structure: an activity limitation is a difficulty encountered by an individual in executing a task or action: while a participation restriction is a problem experienced by an individual in involvement in life situations.

[23] Convention on the Rights of Persons with Disabilities, 2006 Art. 24 and 2. See also, Convention on the Rights of Child, 1989 Art. 28 and 29. See also, Ibid Art. 23.

[24] Anmol Bhandari (minor) through his father in *Natural Guardian v. Delhi Technological University*, July 12, 2020.

"Disability is thus not just a health problem. It is a complex phenomenon, reflecting the interaction between features of a reflection of a person's body and features of a society in which he or she lives. Overcoming the difficulties faced by people with disabilities requires interventions to remove environmental and social barriers".

According to Rights of Persons with Disability Act, 2016, definitions of Disabilities are:

> *"Section 2(r) 'persons with benchmark disability' means a person with not less than forty percent of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority.*
>
> *Section 2(s) "person with disability" means a person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others."*

According to *Human Right Watch Report 2018,*[25] the health problem is very common among those disabled women who belong to SC/ST or tribal communities. The reason may be because of their socio-economic background, which is very poor. These women, who are already vulnerable in it, are again victims of bad health, in lack of proper medical infrastructures. The inefficient approach of our administration has worsened their life and only uses them as a tool for getting funds & credit.

The need of hour is healthcare systems needed to be disabled friendly and to train the healthcare workforce to respect Women with Disabilities, pay attention to their preferences and choices, provide non-discriminatory and respectful treatment and address stigmatizing attitudinal towards WWD especially on the basis of caste. The families and communities need to participate in the advocacy efforts to promote WWD's access to health care.

5. DISABILITY, CASTE, GENDER AND VIOLENCE-

The word 'Women' in itself is an ocean; it contains a wide range of sub-topics in it. In the domain of Disability, the most sensitive group is 'Women's with Disabilities' (hereafter WWD). According to the census of 2011[26] out of the total population of persons with disabilities in India around 44% are women which are a big number. And the WWD constitutes around 54%

[25] Human Right Watch Report, 2018, "*Invisible Victims of Sexual Violence: Access to Justice of Women and Girls with Disabilities in India".*
[26] Government of India Census Report 2011.

illiteracy in India. On International level we have UNCRPD, CEDA which very specifically talks about the protection of women's and their rights. In India we have more than 5000 years old history and in fact it's in our culture to protect and respect women with utmost priority in the family. But the darker side is that the women's specially women's with disabilities are facing multiple type of discrimination from all sections of society and the law enforcing agencies like Police, Judicial process, etc. are just exaggerating the pain of victims of crime, violence and atrocities.

The Constitution of India itself very strongly advocates for the rights and protection of women, from preamble to fundamental rights and fundamental duties. The Women with Disabilities are the most vulnerable section in the society and the softest victims of crime and violence. Because of their disability this group is an easy target for committing crime or violence. The unfortunate thing is the approach of our legal system or the law enforcing agencies are very lethargic and inefficient. The kind of approach required to attain or treat the victims of WWD is not visible in the present policing and other agencies.

A very recent judgment[27] the Supreme Court of India is a watershed moment for women with disabilities in India. A case involving a 19-year-old blind girl who belongs to a poor Scheduled Caste community, was raped by her brother's friend. The court in its recent judgment, rendered by **Justice Dhananjaya Chandrachud**, acknowledges the threat of sexual violence for women and girls with disabilities as "an all-too-familiar fixture of their lives." The court batted strongly for more systematic protection to disabled and caste oppressed women saying that they live under the constant threat of violence, both physical and sexual. The court has also accepted that the women with disabilities belonging to SC/ST communities are more often victims of sexual abuse compare to Upper caste women.

However, it said that lamentably in India, there is no disaggregated data maintained on the extent of violence against women with disabilities. "This possesses a formidable obstacle to understanding the problem better and designing suitable solutions". It quoted a 2004 survey in Orissa conducted in 12 districts with 729 respondents, which found that nearly all of the women and girls with disabilities survey were beaten at home, and 25% of women with intellectual disabilities had been raped[28]. It quoted another 2011 study, which found that 21% of the 314 women with disabilities surveyed had faced emotional, physical and sexual violence from

[27] *Patan Jamal Vani v State of AP*, Criminal Appeal No: 452 of 2021, Supreme Court.
[28] S. Mohapatra and M. Mohanty, "*Abuse and Activity Limitation: A study on Domestic Violence Against Disabled Women in Odissa."*

someone other than their intimate partner. Where the further bench had laid down some guidelines to make the criminal justice system more disabled friendly. One significant guideline was that the National Crime Record Bureau should seriously consider the possibility of maintaining disaggregated data on gender-based violence. Disability must be one of the variables on which such data must be maintained so that the scale of the problem can be mapped out and tailored remedial action can be taken. This judgment puts the testimony of a blind woman front and center, gives hope for women with disabilities in India and worldwide that they will no longer be invisible victims of violence[29].

Similarly in the case of *Suchita Srivastava v. Chandigarh Administration* [30] , a rape was committed with a woman with disabilities. The Supreme Court held that, personal autonomy of every person should be taken into consideration but according to the facts and circumstances of this case, in this case abortion cannot be ordered and the conditions cannot be justified for abortion. But this is not only the case, where the rape or we can say sexual offence has been committed against the women with disability. This is just one case, if we see in our society there are a bundle of unreported cases where women with disabilities generally face these types of heinous offences due to their disability and become mothers of unwanted children and other health complications.

The *Parliament Standing Committee Report*[31] on Atrocities Against Women and Children has observed that, "high acquittal rate motivates and boosts the confidence of dominant and powerful communities for continued perpetration" and recommends inclusion of provisions of SC & ST while registering cases of gender violence against women from SC/ST communities. The Indian Criminal Justice System needs to be more inclusive, accessible and friendly for victims of women with disabilities. So, the protection provided by Section 6 and 7 of RPWD Act, 2016 and other provisions of IPC are inefficient and not enough to protect the women with disabilities from violence.

6. CONCLUSION

Whenever we talk about the caste system in India, we always talk about various social movements that occurred against that but the singly axis models of oppression are a consequence of how historically movements aiming for legal protection of marginalized populations

[29] Ibid.
[30] (2009) 9 *SCC* 1.
[31] Parliament Standing Committee Report on Atrocities against Women and Children, 15 March 2021.

developed. Most political liberation struggles have been focused on a sole characteristic like anti-caste movements, movements by persons with disabilities, feminism and seer liberation. Many such movements have not been able to adequately address intra-group diversity leading to a situation where the needs of the relatively privileged within the group have received more than a fair share of spotlight. When these liberation struggles were adopted in law, the law also developed into mutually exclusive terrains of different statutes addressing different marginalities failing to take into account the intersectional nature of oppression.

In our country the Constitution guarantees fundamental rights, which is the prime concern of Persons with Disabilities. Then whether we talk about their right to education, right to health, right to get justice, etc., are just a fairytale for the people of these communities especially those who belong to the backward class of this society. There are many schemes run by the governments for the reforms of these people but the most unfortunate thing is all these schemes are doing very well on paper, but reality is totally different. Most of these schemes are not even in reach of backward class persons with disabilities. The accessibility of processes for getting benefit of these government schemes are a big question. Violence for these backward class women is very normal now.

The Human Right Watch Report 2018 highlighted very well how these women are Invisible Victims of Violence. The most important thing is the attitude of family members, society, doctors, police, and the judicial system, should be changed toward a woman with disabilities. The untrained police officers, doctors, judicial officers are making hurdles in delivering timely justice to victims of violence of these women. The caste-based discrimination is against the basic spirit of our constitution and it can be eliminated only through the serious efforts by the government, social activists and other stakeholders.

Sympathetic approach is fine but it is not enough to bring them into the mainstream of society. The need is to empower them and that can be achieved only by giving them their fundamental rights i.e., right to education, employment, right to get free and fair justice, right to health etc.

ARBITRATING PROPERTY DISPUTES IN INDIA: A POSSIBILITY OR STILL A DISTANT DREAM?

DIVYANSHU SHARMA*

ABSTRACT

India stands at a point where the legal system is accepting arbitration as an alternate way of solving some of our mundane legal issues, saving the citizens and the legal system a lot of time, money and effort. However, arbitration in case of property disputes is still something not much heard of. Recently, the Hon'ble Supreme Court of India passed a judgement which was hailed as the bandwagon of introducing the arbitration in case of property related disputes. While the judgement was definitely a monumental one, still it was restrictive in giving the way to arbitration in case of property disputes, as it introduced a high threshold for deciding the arbitrability of a dispute. In this paper, the author has tried to analyze the degree to which arbitration is possible in case of property disputes, by examining the parameters laid down in the judgement. The author has showed that there is a possibility of having arbitration in property related disputes. Further, the author has also delved into the real estate sector, a sub-set of property law, and has tried to find a scope of arbitration, using the provisions of the Real Estate (Regulation and Development) Act, 2016.

1. INTRODUCTION

Since the introduction of Arbitration and Conciliation Act, 1996[1] there has been a dramatic shift of Indian dispute resolution system towards Arbitral mechanisms. While the shift has almost been negligent in case of criminal matters, civil matters are relying more and more on arbitration mechanism. Due to its time bound process, relative economic efficiency and finality of decision in an unbiased manner, the corporate and the commercial sector is preferring arbitration over litigation.[2] This increasing inclination towards arbitration is hindered by the fact that there is still an absence of all-encompassing institutional arbitration in India. India still relies on ad hoc

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[1] The Arbitration and Conciliation Act, 1996(Act 26 of 1996).
[2] Amelia C. Renderio, "Indian Arbitration and Public Policy" 89 Texas Law Review 699 (2011).

arbitration mechanism, wherein the process of arbitration depends on the contractual provisions entered between the parties.[3]Hence, there is no fixed statutory mechanism for arbitration in India.

Despite the absence of the required infrastructure, the advantages of arbitration mechanism alure all sectors towards it, especially the real estate and the property sector.[4] Property Law in India is mostly governed by the Transfer of Property Act, 1882,[5, 6] and these suits are litigated in civil courts having the necessary jurisdiction.[7] Further, the governing Acts do not expressly prohibit the civil courts to refer the suits for arbitration.[8] Recently, the Supreme Court held that tenancy disputes solely governed by TPA are arbitrable in nature, thereby introducing arbitration in the Property Law regime. The Court delineated four parameters to decide whether an issue is arbitrable or not.[9]

Through the *Vidya Drolia* judgement, the Supreme Court held that any dispute can be referred to Arbitration, including property related disputes, till the time, the said dispute does not – deal with a right in rem; affect the right of any third party; deal with the inalienable right of the Sovereign; and is not barred for arbitration expressly by a statute.[10] Through this case, the Supreme Court expressly overruled the Himangi Enterprises judgement of 2017,[11] and held that tenancy disputes are arbitrable, till the time the property is not governed by any Rent Control legislations. This judgement was widely celebrated for its progressive outlook towards commercial arbitration, as it has laid down a strong precedent for allowing arbitration for tenancy disputes.[12] However, still a lot remains in the dark.

Contrary to the instances of property related disputes, there has been no specific clarification in relation to application of arbitration proceedings dealing with real estate issues. Real estate issues revolve around similar issues as that of property related issues, the major difference being in the

[3] Namrata Shah & Niyati Gandhi, "Arbitration: One Size Does not fit all: Necessity of Developing Institutional Arbitration in Developing Countries" 6 Journal of International Commercial Law and Technology 232 (2011).
[4] Pradeep Nayak, Sulabh Rewari & Vikas Mahendra, "Arbitration Proceedings and Procedures in India"*Thomas Reuters*, February 1st, 2021, *available at* https://uk.practicallaw.thomsonreuters.com/9-502-0625?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_pageContainer (last visited on March 19, 2021).
[5] Transfer of Property Act, 1882 (Act 4 of 1882).
[6] From now, Transfer of Property Act, 1882 shall be referred to as TPA, for brevity.
[7] The Code of Civil Procedure, 1908 (Act 5 of 1908), s 9.
[8] *Id.*, s. 89.
[9] Vidya Drolia & Ors v. Durga Trading Corporation, (2021) 2 SCC 1.
[10] *Ibid.*
[11] Himangi Enterprises v. Kamaljeet Singh Ahluwalia, (2017) 10 SCC 706.
[12] Hiroo Advani, Tariq Khan & Mahi Mehta, "Arbitrability of Tenancy Disputes: A Step in the Right Direction" *Mondaq*, January 12th, 2021 https://www.mondaq.com/india/arbitration-dispute-resolution/1024500/arbitrability-of-tenancy-disputes-a-step-in-the-right-direction (last visited on March 19, 2021).

scale and nature of operations.[13] Real estate is mostly concerned with construction of buildings and its projects, but deals with the rights covered under the TPA, along with others. Real Estate issues come directly under the ambit of Real Estate Regulatory Authority, which a special administrative body established under the Real Estate (Regulation and Development) Act, 2016.[14, 15] While the Act expressly bars the jurisdiction of the civil courts to deal with the issues covered under the Act, it does not bar the jurisdiction of Arbitral tribunals.[16] Further, even the Supreme Court has held that this bar on civil courts does not automatically extend to other tribunals or courts, like the Consumer Dispute Forum.[17]

While several real estate firms have started incorporating arbitration clauses in their standard form contracts, the legality qua the jurisdiction of arbitral tribunals is still uncertain in India.[18] In this paper, the author intends to deeply analyze the threshold given in the Vidya Drolia judgement to ascertain the arbitrability of a property related dispute (not only tenancy issues) and issues covered under RERA. The author would first analyze the Vidya Drolia judgement parameters, from the scope of Property law, and see whether the same can be extended beyond the realm of tenancy disputes. Then the author would evaluate whether there is any scope for arbitration or not, and to what extent. Further, the author would analyze the recent spurt in the demand for arbitration in cases expressly covered under RERA, based on the inefficiency of the Regulating Authority under the Act. Lastly, the author would try to establish that despite the stringent provisions of RERA, there is still a scope for undertaking arbitration in case of disputes covered under the Act.

2. UNDERSTANDING VIDYA DROLIA – TAKING A PROPERTY BASED APPROACH

As has been mentioned above, the Vidya Drolia judgement was a widely celebrated judgement of the Supreme Court as it allowed tenancy issues, expressly covered under TPA to be arbitrated. The Court was of the opinion that tenancy disputes, outside the realm of Rent Control Acts, were fulfilling the criteria of arbitrability.[19] The case was concerned with adjudicating the validity of

[13] Elena Vorskresenskaya, Vitaly Snetkov & Ors, "Atypical Real Estate Objects: Legal Regime and Control System" 106 MATEC Web of Conferences (2017).
[14] The Real Estate (Regulation and Development) Act, 2016 (Act 16 of 2016), s. 20.
[15] From Now, The Real Estate (Regulation and Development) Act, 2016 shall be referred to as RERA, for brevity.
[16] *Supra* note 14, s. 79.
[17] Imperia Structures Limited v. Anil Patni and Others, (2020) 10 SCC 783.
[18] Thomas E. Carbonneau, "The Exercise of Contract Freedom in Making of Arbitration Agreement" 38 Vanderbilt Journal of Transnational Law 1189 (2003).
[19] *Supra* note 9.

an arbitration clause in a tenancy agreement, which clearly provided that the only mode of settling the dispute was through Arbitration.[20]

Through the Arbitration and Conciliation Act, 1996[21], the legislature has given the freedom to the parties entering into the contract to put in an arbitration clause,[22] but it has been cognizant of its misuse. As a result of this, the legislature has given the function to the judiciary to decide whether a specific matter is arbitrable or not, at the time of filing of the suit.[23] If the said suit is able to meet the validity criteria, then it is duty of the judge to compulsorily refer the suit for arbitration, to uphold the sanctity of the contract.[24]

The reason that this judgement was so appreciated by legal academicians and practitioners, was that it delineated a clear threshold that has to be met in order to arbitrate a particular dispute. This threshold is in addition to the general criteria given for a valid arbitration clause under the Arbitration & Conciliation Act.[25] In this section, the author will look into the four-criterion given under the Vidya Drolia judgement and would try to analyze whether the same are fulfilled in case of all major property related disputes, and to what extent.

2.1. Right In Rem

Arbitration is a dispute settlement mechanism which is specifically used in case of private disputes.[26] As a result of this, the Supreme Court has clearly held that disputes affecting only the Right in Personam of the parties, and not affecting their Right in Rem shall be arbitrable. [27] Right in Rem is a right which is exercised by an individual against the world at large. On the contrary, right in personam is a right which merely affects the interest of the parties to the dispute.[28] Action in personam refers to suits instituted to determine the rights and liabilities of parties, emanating from their contractual provisions, which has no bearing on the relationship and status of the parties with the world at large. On the contrary, action in rem deals with suits that have a

[20] Vidya Drolia & Ors v. Durga Trading Corporation, (2019) 20 SCC 406.
[21] The Arbitration and Conciliation Act, 1996(Act 26 of 1996).
[22] *Id.,* s. 7.
[23] *Id.,* ss. 8, 11.
[24] National Insurance Company Ltd v. M/s Boghara Polyfab Pvt. Ltd. (2009) 1 SCC 267.
[25] *Supra* note 22.
[26] Justice RS Bachawat, Anirudh Wadhwa *et. al, Justice RS Bachawat's Law of Arbitration & Conciliation*(Lexis Nexis, Volume 1, 6th edn, 2018).
[27] *Supra* note 9.
[28] Raymond M. Hudson, "When Rights in Personam give rise to Right in Rem" 5(1) Virginia Law Review 13 (1899).

bearing on the relationship and the status of a person, not only in relation to the opposite party but also in the eyes of the whole world.[29]

The categorization of a matter in hand as a right in rem and right in personam does not merely depend on the parties to the suit, and the effect it has on the rights of a person. The Supreme Court has held that while deciding whether a particular matter affects the right of the public at large, the Courts have to be cognizant of the legal scheme of our country, and what the legislature intends for categorization of disputes. For instance- in the *Booz Allen and Hamilton*[30] case the court held that matters relating to mortgage cannot be arbitrated. This is based on the fact that they are regulated by Order 34 of Code of Civil Procedure,[31]which requires that all interested parties, in any way whatsoever, shall be made a party to the suit relating to the mortgage. Thus, the procedural law governing mortgage cases indicates that no matter what, mortgage related case is to be treated as Action in Rem, as the decision of the suit shall affect the rights of Plaintiff in the eyes of the world at large. This means that if the scheme of the law is such that the rights of a plaintiff would be ascertained not only in relation to the Defendant but the world at large, such suits shall not be referred to arbitration.

If we focus solely on the nature of property issues, we can deduce that a majority of them deal with right in rem. Property has been popularly defined as *a bundle of rights,* which an owner of the property has against the world at large. The three major rights attached to any property are alienation, possession and free enjoyment.[32] This means that rights attached to a property, i.e., alienation, possession and free enjoyment, are exercised against the whole world at large.[33]

There are catenae of judgements wherein the courts have held that actions attached to a property, like mortgage, lease and sale create a right in rem. In the *AR Krishnamurthy*[34] case, the Supreme Court held that a lease grants the right to possession against the world at large, and thus, cases relating to lease deal with a right in rem. Similarly, where a mortgagor has instituted a suit for the sale of the mortgage property, the same is not arbitrable, because the sale of the property would affect not only affect the mortgagor and mortgagee, but it would also affect the status of the persons before the world at large.[35]

[29] Avitel Post Studioz Limited & Ors v. HSBC PI Holdings (Mauritius) Limited, 2020 SCC OnLine SC 656.
[30] Booz Allen and Hamilton Inc v. SBI Home Finance Limted & Ors, (2011) 5 SCC 532.
[31] *Supra* note 7, Order 34.
[32] JE Penner, "The Bundle of Rights Picture of Property" 43 UCLA Law Review 711 (1996).
[33] Darashaw Vakil ans Dr. HR Jhingta, *Darashaw J Vakil's Commentaries on Transfer of Property Act* (Lexis Nexis, Volume 1, 5th edn., 2013).
[34] AR Krishnamurthy & Anr v. CIT Madras, (1989) 1 SCC 754.
[35] *Supra* note 30.

However, the fact is that on the basis of these judgements we cannot hold that all property related disputes are non-arbitrable. For instance, if an arbitration proceeding is instituted for specific performance of a sale deed, then even though sale creates a right in rem, the said suit can be legally arbitrated. Thus, in the case of *Olympus Super Structures v. Meena Vijay Khetan,*[36] the court held that the suit was arbitrable, as the suit only intended to enforce the right existing solely between the parties and did not relate to the world at large. On the other hand, in relation to a lease agreement, wherein the leasor has instituted a suit for eviction, then the same is arbitrable.[37] Further, even in the case of Vidya Drolia, where the suit dealt with evacuation of a leased property, post the termination of the lease agreement, the same is also arbitrable, as it would not affect any right of the parties in relation to the world at large.[38]

Thus, it can be observed, that a strict categorization as to whether a property dispute deals with a right in rem or right in personam is not possible. Courts have to be cognizant of the effect that a particular suit has and the realm of people in against whom the act being complained of is enforceable. There are numerous instances where the suit would be related to a right in rem, but there can also be cases where only a right in personam is affected, in which case denying arbitration would be legally untenable.

2.2. Third Party Interests

This ground is based on the fact that an arbitration clause cannot be binding on a party who is not a signatory to it, and hence, an award passed by an arbitrator which directly affects the right or status of a non-signatory cannot be held to be tenable in law.[39] The Arbitration law is based on the principle that parties are bound by an arbitration clause only if the reading of the arbitration clause indicates that all parties to a suit or all parties being affected by a suit intend to pursue arbitration as a mode of dispute settlement.[40] Recently, in the *Reckitt Banckister* case,[41] it was reiterated that while instituting an arbitration proceeding, the parties have to convince the court/tribunal that the parties intend to accept the jurisdiction of the arbitration, which is extremely possible to prove in case of a non-signatory party. Thus, in cases where a third party, who is a non-signatory to the arbitration clause is being affected, instituting arbitration proceedings is untenable in law.

[36] Olympus Super Structures Private Limted v. Meena Vijay Khetan & Ors, (1999) 5 SCC 651.
[37] Suresh Shah v. Hipad Technology India Private Limted, (2021) 1 SCC 529.
[38] *Supra* note 9.
[39] *Ibid.*
[40] Khardah Company Ltd v. Raymon & Co. (India) Private Limited, (1963) 3 SCR 183.
[41] Reckitt Benckiser (India) Private Limited v. Reynders Label Printing India Private Limited & Anr, (2019) 7 SCC 62.

It is a commonly acceptable fact that several properties related dispute inadvertently affect the status of third parties, who are not the signatories to the arbitration clause.[42] Even the Supreme Court, in the *N. Srinivasan* case,[43] has observed that generally property disputes end up affecting the interests of a third party, who might be a bonafide buyer or leaser, and would end up being affected by the dispute between the parties. However, if this is the case, then instituting arbitration proceedings in such cases would not be possible, because a non-signatory would not be bound by the jurisdiction of the arbitration tribunal and hence, the suit would mandatorily be instituted in a civil court. At the same time, there can be cases where the dispute is only between the two signatories, thereby enabling arbitration, as in the case of specific performance suits or others.

2.3. Sovereign Functions

The Supreme Court has held that in cases where the dispute on a function which is only carried out by the state, then the said dispute cannot be arbitrated.[44] This means that in cases such as defense of the country, police regulation, taxation system, etc.[45] which are the exclusive domain of the state, arbitration proceedings cannot be instituted. Further, the act of eminent domain is essentially a sovereign function. The concept of eminent domain enables the state to acquire private property of an individual for the welfare of the state and its citizens. [46] It is a constitutional power given to the state which can be exercised for the overall welfare of the public.[47]

As per the principle laid down in the Vidya Drolia judgement, an arbitration proceeding cannot be instituted in a case where the state has encroached upon the property rights of an individual through the right of eminent domain. There can be cases where there is improper use of this power of the state, as was the case in *DB Basnet v. Collector, East District, Gangtok*,[48] but disputes against such actions can only be litigated.

[42] Tomoko Ishikawa, "Third Party Participation in Investment Treaty Arbitration" 59 The International and Comparative Law Quarterly 373 (2010).
[43] N. Srinivasan v. M/s Kuttukaran Machine Tools Ltd, (2009) 5 SCC 182.
[44] *Supra* note 9.
[45] Agricultural Produce Market Committee v. Ashok Hurikuni & Ors. (2000) 8 SCC 61.
[46] State of UP v. Keshav Prasad Singh, (1995) 5 SCC 587.
[47] New Reviera Cooperative Housing Society & Anr. v. Special Land Acquisition Officers & Ors, (1996) 1 SCC 731.
[48] DB Basnet v. Collector, East District, Gangtok, Sikkim & Anr, (2020) 4 SCC 572.

However, there is another function that state does in relation to property, i.e., the state launches several housing development schemes.[49] These schemes cannot be categorized as a Sovereign function of the state, as these schemes emanate from the fact that India is a socialist state and a mixed economy. This means that the state interferes in the market to provide certain essential services and goods to the people, at a rate lower than the market rate, like housing facilities.[50] This means that in case a dispute arises in relation to such property schemes of the government, and if the contract provides for arbitration clause, then a legally valid arbitration proceeding can be instituted. While till now, nothing of this sort has happened in India, the language used in the Vidya Drolia judgement suggests that the same is possible.

2.4. Express Statutory Bar

The Supreme Court has held that while arbitration in India is based on contractual provision regarding arbitrability,[51] this contractual provision is bound by the express or implied legislative intent in allowing arbitration as an alternate mechanism for dispute resolution. If a statute specifically or impliedly prohibits arbitration as a mode of dispute settlement or provides for a specialized body to deal with the issues, then the arbitration clause would not be legally enforceable.[52] In the case of *A. Ayyasamy*,[53] the Supreme Court has categorically held that where a statute expressly bars the jurisdiction of civil courts, matters covered under such statute cannot be referred to arbitration. Further, there are a few categories of suits which should only be dealt by a public forum and should not referred for arbitration, like in case of matrimonial disputes, insolvency and winding up matters, testamentary matters, and rent control suits.[54]

In case of property disputes, the jurisdiction to try that suit lies with the civil court with the necessary territorial jurisdiction.[55] Thus, all suits in relation to transfer of property act can be tried in the required civil court. The CPC allows for arbitration proceedings to be instituted in case of all civil suits, provided that the same is not barred by a statute and the civil court having the jurisdiction to try the suit deems it fit to send the suit for arbitration.[56] These arbitration proceedings instituted would be under the jurisdiction of the civil court, which has the

[49] Bajaj Finserv, *Top Government Housing Schemes that Can Help you Purchase A Home in India*, available at https://www.bajajfinserv.in/insights/top-government-housing-schemes-in-india#.
[50] R. Radhakrishnan & Manoj Panda, *Macroeconomics of Poverty Reduction: India Case* S*tudy*, Indira Gandhi Institute of Development Research, Held on (Mumbai and 2006) http://www.igidr.ac.in/pdf/publication/PP-057.pdf.
[51] *Supra* note 1, s. 7.
[52] *Supra* note 9.
[53] A. Ayyasamy v. A. Paramasivam & Ors, (2016) 10 SCC 386.
[54] *Supra* note 30.
[55] *Supra* note 7, s. 9.
[56] *Id.*, s. 89.

jurisdiction to try the suit.[57] Even the Land Acquisition Act, 1894[58] provides that in case of a dispute, the matter shall be referred to a civil court, which shall be bound by the provisions of the CPC, till the time the same are not contrary to the provisions of the Act.[59] Thus, even the Land Acquisition Act does not bar arbitration as a mode of dispute settlement. Hence, it can be said that major statutes dealing with property issues do not expressly prohibit arbitration as a mode of dispute settlement.

3. ARBITRATION IN PROPERTY LAW: STILL A BLEAK POSSIBILITY

The above-mentioned analysis of the Vidya Drolia judgement parameters regarding the arbitrability of an issue reveals that the threshold is quite high, when studied specifically from the angle of property disputes. While none of the parameters expressly prohibit arbitration for property disputes, the inherent requirement of the threshold is so high, that creating a general consensus, whether property disputes can or cannot be arbitrated is impossible. This is especially seen in case of *Right in Rem and Third Party Interest* parameters. There are numerous instances when a dispute involving property might affect the rights of an innocent third party or might affect the rights of the parties in reference to the world at large. In such cases, expecting that disputes can be settled through arbitration is fallacious. However, at the same time, there can be cases where all these parameters are fulfilled, as is shown above.

A generalization that disputes relating to property are arbitrable cannot be formed, as arbitrability of a dispute depends on the fact situation of a case.[60] There can be unimaginable number of situations wherein a dispute concerning a property cannot meet the required threshold of arbitrability, thereby mandating that the suit shall compulsorily be referred to a civil court for litigation, but then even the contrary situation is equally possible. The parameters are such that they can be fulfilled in multitude of cases, thereby enabling arbitration in property related disputes. Hence, it can surely be held that arbitration is a possibility in case of property related disputes, depending on the facts and circumstances of the case.

However, in India, property law disputes are on the rise, wherein the number of property suits being filed in civil courts is quite high.[61] At this point in time, the need of the hour is that Indian

[57] *Supra* note 1, s. 42.
[58] Land Acquisition Act, 1894 (Act 1of 1894).
[59] *Id.*, s. 59.
[60] Gujarat Water Supply & Sewage Board v. Unique Erectors (Gujarat) Private Limited & Anr, (1989) 1 SCC 532.
[61] Shreya Deb, "Securing Property and Land Rights in India", *The Times of India*, August 3rd, 2020, *available at* https://timesofindia.indiatimes.com/blogs/developing-contemporary-india/securing-property-and-land-rights-in-india/ (last visited on March 19, 2021). Saurabh Sharma & Rupam Jain, *"India's mass exodus from cities triggers village property disputes", Reuters*, June 4th, 2020, *available at* https://www.reuters.com/article/us-health-

judiciary and legislation work together to promote alternate dispute resolution mechanisms, like arbitration, in as many cases as possible, to ensure that the burden on the judiciary is reduced while providing efficient remedy to the citizens.[62] Thus, it can be said that while the Vidya Drolia judgement has opened a small gate for arbitration in property related disputes, still there is a long way ahead for India, to ensure that more and more suits can be referred to arbitration, to solve some contemporary issues being faced by the judicial system.

Till now we have analyzed the probability of undertaking arbitration proceedings in case of property related disputes. Allied with the regime of property law is the sector of real estate, which is a subset of the property law regime. In the following sections, we shall look into the option of undertaking arbitration, as a mode of dispute settlement, in case of real estate related disputes. The author would look into the provisions of the Real Estate (Regulation and Development) Act, 2016[63] and would try to analyze the possibility of undertaking arbitration in issues specifically covered by the Act. In this entire process, the author would mainly rely on the idea behind the fourth threshold given in Vidya Drolia judgement, i.e., *Express Statutory Bar*.

4. REAL ESTATE SECTOR: AN EMERGING AREA FOR ARBITRATION

People generally have a tendency to confuse between Property Law and Real Estate Law. While both of them appear to be synonymous, there are some basic differences, which play an important role. Property is defined as something which is a bundle of rights, which includes possession, alienation and free enjoyment.[64] This conception of property has segregated property law from its tangible aspect of a land, a building or something where one can reside. The ambit of property law now deals with both the rights and the immovable physical embodiment of those rights in the form of something tangible. On the other hand, real estate deals with land or anything attached to land, thus, focusing on the tangible immovable aspect of property law.[65] Real estate has a commercial aspect attached to it, whereas property law includes private property along with commercial property.[66] Thus, instead of taking the rights-based approach to

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coronavirus-india-dispute/indias-mass-exodus-from-cities-triggers-village-property-disputes-idUSKBN23B250?edition-redirect=uk (last visited on March 19, 2021).

[62] Justice Markandey Katju, "Backlog of Cases Crippling Judiciary", *The Tribune*, March 16th, 2021, *available at* https://www.tribuneindia.com/news/archive/comment/backlog-of-cases-crippling-judiciary-776503 (last visited on March 19, 2021).

[63] *Supra* note 14.

[64] Thomas Merill, "The Property Prism" 8 Econ Journal Watch 247 (2011).

[65] Neal R. Beavans, Real Estate and Property Law for Paralegals, 42 (Wolters Kluwer, 1st edn. 2016).

[66] Susan Hudson-Wilson, Jacques N. Gorden *et. al.*, "Why Real Estate?" 31 Journal of Portfolio Management Special Real Estate Issue 12 (2005).

property, real estate restricts itself to the common tangible conception of property as land or something built on it. In toto, we can say that real estate law is a sub-set of property law.

Real Estate in India is governed by the provisions of Real Estate (Regulation and Development) Act, 2016.[67] This Act provides for an alternate dispute resolution body, Real Estate Regulatory Authority.[68] The overall job of this regulatory body is to ensure complete protection of the rights of allottees, promoters and real estate agents.[69] The Regulatory Authority has been empowered to punish and impose penalty on promoters, allottees and real estate agents, for the violation of their duties recognized under the Act.[70] Not only this, the Act establishes a parallel dispute resolution system, i.e. its own Regulatory Authority and an Appellate Tribunal. This Appellate Tribunal is not bound by the provisions of the Code of Civil Procedure, 1908[71] and works on the principles of natural justice.[72] At the same time, it has all the powers of a civil court while conducting investigation and in the proceedings.[73] Thus, in essence if we see at the scheme of RERA, we can deduce that the Act has established a specialized body for resolution of disputes arising in relation to real estate properties like non-transfer of the purchased property; improper registration of real estate projects; violation of the duties of promoters' duties, etc.[74]

The Regulatory Authority and the Appellate tribunal created under RERA is for the purpose of providing a swift and efficient remedy to aggrieved persons. While acting as a regulatory and advisory body, the Authority ensures that the remedies are provided in a swift manner, but there is no fixed time frame provided for disposal of complaints. [75] As a result of this, there are numerous instances where cases in the Regulatory Authority are not disposed of for even 3-5 years.[76] This not only causes a delay in getting the real estate property and the remedy accruable to the aggrieved person under law, but it also leads to a huge cost of litigation and an unfair advantage to Real Estate firms, as they get ample time to deal with the deficiencies in the project. Several buyers or aggrieved persons are discouraged to invest their time, effort and financial resources in approaching the Regulating Authority because of the inordinate delay and

[67] *Supra*, note 14.
[68] *Supra* note 14, s. 20.
[69] *Supra* note 14, s. 32(a).
[70] *Supra* note 14, s. 38(1).
[71] *Supra* mote 7.
[72] *Supra* note 14, s. 53(1).
[73] *Supra* note 14, s. 53(2).
[74] The Institute of Company Secretaries of India, "Real Estate (Regulation and Development) Act, 2016" (July 2017).
[75] Kirit Hakani & Shefali Alvaris, "Dispute Resolution Mechanism under RERA" 5 The Chambers' Journal 49 (July 2017).
[76] Ashwini Kumar Sharma, "RERA's Three Year Report Card Shows a Gap in Implementation", *Live Mint*, May 7th, 2019 *available at* https://www.livemint.com/money/personal-finance/rera-s-three-year-report-card-shows-gaps-in-implementation-1557237162103.html (last visited on March 19, 2021)

inefficiency in the working of the Authority.[77] Not only are Regulatory Authorities swamped with cases but even alternate bodies like Consumer Fora are also unable to cater to the needs of real estate aggrieved persons.[78]

Real estate is a part of the State List, i.e., the state government has the exclusive domain to deal with the real estate sector.[79] Hence, if we look at the scheme of redressal under RERA, all states are required to implement RERA's provisions in their individual states and establish the Regulating Authority and the Appellate Tribunal, within a period of 1 year from the introduction of the Act.[80] Further, the State governments have been empowered to create their own rules for procedure to be followed in the Regulatory Authority and the Appellate Tribunal.[81] However, till now, there are numerous states which have not implemented the provisions of this Act, in entirety or partially.[82] States have undertaken a patchy mechanism of implementation of RERA, due to which the true goal of a speedy and effective remedy has become difficult.[83] Due to this, a lot of ambiguity has been created in the minds of the buyers, spread all over the country, due to prevalence of different procedures and mechanisms for dispute settlement.[84]

The above-discussion clearly shows that the idea of having RERA as the sole adjudicatory body for dispute resolution is not a prudent option. In light of the status quo, what is needed is that an option of arbitration mechanism is provided. This would ensure swift disposal of cases, reduce the burden on the Regulatory Authority under RERA, and would provide an option of getting the desired results in the efficient manner. However, the legality behind this suggestion of the author has a large-scale debate, in light of the threshold of *Express Statutory Bar*, as per the Vidya Drolia judgement. In the following section, the author will try to analyze the law in relation to

[77] S. Lalitha, Under flak, "RERA-K Hopes to Deliver Speedy Justice", The New Indian Express, November 18th, 2020 *available at* https://www.newindianexpress.com/states/karnataka/2020/nov/18/under-flak-rera-k-hopes-to-deliver-speedy-justice-2224753.html (last visited on March 19, 2021).
[78] Bejon Misra, "No Time to Lose on Consumer Protection", *The Hindu Business Line*, March 9th, 2018 *available at*, https://www.thehindubusinessline.com/opinion/no-time-to-lose-on-consumer-protection/article22071821.ece1 (last visited on March 19th, 2021).
[79] Constitution of India, Schedule VII, Entry 18.
[80] *Supra* note 14, s. 20(1).
[81] *Supra* note 14, s. 84.
[82] Knight Frank, "Policy Research: Real Estate (Regulation and Development) Act" *available at* https://content.knightfrank.com/research/1004/documents/en/india-topical-reports-policy-research-real-estate-regulation-and-development-act-2016-5465.pdf (last visited on March 19, 2021).
[83] Dr. Samantak Das, "RERA: Law of the Land?", NBM&CW 2018 *available at* https://www.nbmcw.com/articles-reports/infrastructure-construction/construction-infra-industry/rera-law-of-the-land.html (last visited on March 19, 2021).
[84] Leela Mudbidri, "One Nation, One RERA", *The Times of India*, February 21st, 2020 *available at* https://epaper.timesgroup.com/Olive/ODN/TimesOfIndia/shared/ShowArticle.aspx?doc=TOIBG%2F2020%2F02%2F21&entity=Ar03902&sk=8532E884&mode=text# (last visited on March 19th, 2021).

RERA and Arbitration, and would try to establish that in some cases, arbitration is a possible choice.

5. ARBITRATION IN REAL ESTATE SECTOR: POSSIBLE OR JUST A DREAM

There is a growing concern among academicians that there is no actual possibility of Arbitration in case of Real Estate Disputes. [85] This is based on the fact that RERA expressly bars the jurisdiction of all civil courts in the country.[86] Further, the arbitration proceedings works in a manner that a suit is first referred to as civil court, which then refers the suit for arbitration, in the existence of a valid arbitration clause.[87] If the two mentioned legal provisions are read together, it would imply that even though there is a valid arbitration clause in a real estate contract, the same would not be enforceable because, for initiating arbitration proceeding, the parties have to approach the civil court with the required jurisdiction, but the same is not possible because RERA expressly prohibits the jurisdiction of civil courts. As per the Vidya Drolia judgement, where a statute expressly or impliedly bars arbitration proceedings, then the disputes covered under the statute cannot be referred to arbitration.[88]

However, according to the author, the above-mentioned argument can be countered by the fact that the bar under the Act is on Civil Courts and not Arbitration Tribunals. These two entities are completely different. While the nature of activities undertaken by both of them are similar, i.e., both deal with civil cases, this does not mean that Arbitration Tribunals can be categorized as civil courts. Even the Supreme Court has held, in the case of *Nahar Industrial Enterprises Limited*[89] that if a tribunal or a body has been empowered under law to deal with civil cases, the tribunal or the body would not automatically become a civil court. Both are fundamentally different, especially in the present case. Arbitral panels are entities created by the law to provide an alternate mode of dispute resolution, which can overcome the hassle associated with litigating a suit in a civil court.[90] Further, a civil court has a different working mechanism, institutional structure and jurisdiction when compared to a civil court. Additionally, arbitration comes into existence from the contractual provisions, [91] unlike a Civil Court. Hence, it can be said that arbitral tribunals are essentially different from civil courts. Thus, the argument that the

[85] Anjala Parveen & Neha Joshi, "RERA- Regulation Rules over Arbitration?"*Indian Business Law Journal*, November 12th, 2018, *available at* https://law.asia/rera-regulation-rules-arbitration/, (last visited on March 19th, 2020).
[86] *Supra* note 14, s. 79.
[87] Sundaram Finance Limited & Anr. v. T. Thankam, (2015) 14 SCC 444.
[88] *Supra* note 9.
[89] Nahar Industrial Enterprises Limited v. Hong Kong and Shanghai Banking Corporation, (2009) 8 SCC 646.
[90] *Supra* note 26.
[91] *Supra* note 1, s. 7.

prohibition under § 79 of the Act is applicable on Arbitration Panels does not stand much ground.

This is not the end of the legal conundrum regarding arbitrability of real estate suits. RERA also contains a saving clause similar to that of the Consumer Protection Act, 2019.[92] This savings clause provides that "*the provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law in force*".[93] This savings clause expressly provides that the remedies and the remedial mechanism provided under the Act are not the exclusive remedies and remedial platforms.[94] This means that if the aggrieved person wants a remedy under another statute, which is legally possible, then the same can be done.

This expressly happened in the case of *Imperia Structures Limited v. Anil Patni & Anr*,[95] wherein the Supreme Court held that disputes covered under RERA can also be dealt with in Consumer Fora. The Court expressly stated that the purpose behind the inclusion of § 79 in RERA is not inhibit the remedies available to an aggrieved person to only the ones stated in the Act. This means that if the agreement between the buyer and the realtor has a legally valid arbitration clause, there is no specific prohibition in enforcing the same.

The above-mentioned analysis clearly establishes that the legal threshold of *Express Statutory Bar*, for the arbitrability of matters expressly covered under RERA, as established by Vidya Drolia judgement is fulfilled. The prohibition under § 79 of RERA[96] cannot be automatically imposed on Arbitration proceedings, and the scope of approaching other forums for remedy is possible. [97] Further, other thresholds are not applicable in case of RERA. For instance- the disputes between a buyer and a promoter of a real estate project are a private dispute. This means that the said dispute cannot be said to affect the Right in Rem of either of the parties. The scope of the Act is restricted to disputes arising from the violation of the duties of a promoter,[98] and duties of an allottee/buyer.[99] Further, the nature of the disputes is such that the same cannot be categorized as *Sovereign Functions*, even in those cases where the Real Estate Company is a government entity, as real estate does not come under sovereign function.

[92] Consumer Protection Act, 2019, (Act 35 of 2019), s. 100.
[93] *Supra* note 14, s. 88.
[94] Pioneer Urban Land & Infrastructure Limited v. Union of India & Ors, (2019) 8 SCC 416.
[95] Imperia Structures Limited v. Anil Patni & Anr, (2020) 10 SCC 783.
[96] *Supra* note 14, s. 79.
[97] *Supra* note 14, s. 88.
[98] *Supra* note 14, Chapter III.
[99] *Supra* note 14, s. 19.

Lastly, the disputes under RERA cannot be considered to have third parties involved or affect the interests of third parties. The scope of disputes covered under RERA only includes grievances arising between a realtor/promoter of a real estate project and a buyer.[100] The job of RERA is to settle disputes arising between only these two entities.[101] Thus, we can conclusively hold that all the necessary thresholds for deciding the arbitrability of a dispute, as per the high threshold established by Vidya Drolia is satisfied in the case of disputes expressly covered under the RERA. Hence, if a real estate company and a buyer have a legally valid arbitration clause, as per the provisions of the Arbitration & Conciliation Act, 1996,[102] and if the parties are willing to institute an arbitration proceeding to deal with their grievances, then the same is legally possible.

6. CONCLUSION

In this paper, the author has looked into the scope of Arbitration, as an alternate mode of dispute settlement in relation of property dispute. The author has used the threshold established by the Hon'ble Supreme Court in the case of *Vidya Drolia v. Durga Trading Corporation* to analyze whether there is scope of arbitration to settle property related disputes and to what extent. This judgement of the Supreme Court has been widely celebrated by academicians and practioners for having provided the scope of undertaking arbitration in case of property related disputes.

By analyzing the threshold given in the judgement, the author came to conclusion that based on judicial precedents about the nature of property disputes, there is a possibility of arbitrating property related disputes. However, no general stance can be created on the arbitrability of property related disputes, as there are some cases in which arbitration is possible, while there are cases in which the threshold might not be met. Arbitrability of a property related dispute would have to be decided on the facts of the case, because while one kind or tenancy suit might not be arbitrable, the other kind might fulfil the requirements of arbitrability. However, the need of the hour is that Indian legislation and judiciary step down from the high threshold of this judgement, to ensure that more and more property cases become arbitrable.

Then, the author has looked into another facet of property law, i.e., real estate sector. After looking into the provisions of the governing statute, i.e. RERA, the author concluded that the need of the hour is that arbitration be allowed even in cases which are expressly under the domain of the Act. This is based on the fact that the adoption of the provisions of the Act, by several state governments, is abysmal. Further, there is a huge backlog of cases in the

[100] Goregaon Pearl CHSL v. Dr. Seema Mahadev Paryekar & Ors, 2019 SCC OnLine Bom 3274.
[101] *Supra* note 74.
[102] *Supra* note 1, s. 7.

Adjudicating Authority, due to which buyers and real estate entities do not have much trust in the efficiency of the body.

Based on this idea, and by using the parameters established in the Vidya Drolia judgement, the author has tried to convince the readers that arbitration is possible even in cases covered under the Act. While the statute expressly prohibits the jurisdiction of Civil Courts, this prohibition cannot be extended to Arbitration panels. Further, the variety of cases dealt with under the Act is such that there is hardly any scope of failure to meet the threshold of arbitrability. Thus, through this paper, the author has tried to convince the readers that per se there is no restriction on the legality of arbitrating real estate matters.

PERSONAL LAWS, STATUTORY LAWS, AND HUMAN RIGHTS: EVALUATING THE PLAUSIBILITY OF CONSOLIDATING AND ENACTING MUSLIM CONJUGAL LAWS IN SPIRIT OF THE CONSTITUTION

ABHIRAAM SHUKLA*

ABSTRACT

In the following paper the author seeks to evaluate the plausibility of consolidating and enacting the Muslim personal laws of the country in one single statute like the personal laws of the other communities in the country. Hindu, Parsis and Christians have specific statutes which govern their matrimonial issues and disputes arising therein. But this is not the case for the Muslim community of the country. The Muslims are governed by Muslim Personal Law (Shariat) Application Act which only states that in cases of marriage, divorce and other personal affairs, Muslim shall be governed by the Shariat. Thus, there is significant uncertainty in application of Muslim personal laws in India. This paper will first analyze the relationship between statutory laws and Muslim personal laws in the country. Further it would peruse the stance of the Indian Judiciary with respect to legitimacy of personal laws. In the latter part of the paper, the author discusses in detail, two aspects of Muslim personal laws are flagrantly in violation of the statutory laws and the Constitution of the country. Lastly, in conclusion the author will suggest some steps as to what is to be done while consolidating and enacting the Muslim personal laws in the country.

1. INTRODUCTION

On 10th February 2021, the Punjab and Haryana High Court ruled that "*a minor Muslim girl who is less than 18 years of age and has attained puberty is free to marry anyone as per the Muslim Personal Law*".[1] This judgment authored by Justice Alka Sarin took into cognizance Article 195

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[1] Sparsh Upadhyaya, *17-Yr-Old Muslim Girl Marries 36-Yr-Old Muslim Man- "Both Are Of Marriageable Age Under Muslim Personal Law": P&H High Court Grants Them Protection*<https://www.livelaw.in/news-updates/muslim-personal-law-marriageable-age-puberty-punjab-and-haryana-high-court-169670> [24st March, 7:12 PM].

of *Principles of Mahomedan Law*[2], the *magnum opus* of Sir Fardunji Mulla, an eminent jurist in the field of Muslim conjugal laws.

The personal law mandating conjugal relations in the Muslim community of India dictates that any person who is of sound mind and who has attained puberty shall be eligible to marry. [3] Muslim Law considers puberty as a question of fact, and it is generally assumed that anyone over the age of 15 had attained puberty for marriage purposes.[4]

However, on the other hand, statutory legislation titled *Prohibition of Child Marriage Act, 2006*[5] [hereinafter 'PCMA, 2006"] has been enacted in the country which particularly proscribes[6] and penalizes [7] the marriages involving men and women under 21 years and 18 years of age respectively.[8] Since this act makes no distinction on the basis of religion in its application[9], any marriage irrespective of the religion or community, which includes either or both of the parties under the interdicted age should not be considered valid by any competent court.

However, while deciding the aforesaid petition, the P&H High Court assumed the precedence of Muslim personal law over PCMA, 2006. The said High Court cannot be entirely blamed for the colorable ruling since even the PCMA Act makes no provision for amending the Muslim law to disallow child marriages, in contradiction to its counterpart – Hindu Marriage Act, 1955 which is amended [10] to sentence persons involved in child marriages to rigorous imprisonment of a maximum of 2 years and a maximum of 1 lakh rupees as a fine.[11]

This discrepancy in the application of the PCMA Act is completely against the letter and spirit of the Constitution of India which cherishes and promotes equality and secularism in the country. Thus, the question arises – What is to be done when Religion enslaves the individual rights of the people and handicaps the equal application of the law[12] and prohibition of discrimination based on religion[13] in the country? This paper seeks to research, evaluate and answer several questions regarding the relationship between statutory laws and Muslim personal laws, personal laws

[2] Sir Dinshaw Fardunji Mulla, *Principles of Mahomedan Law*,[Lexis Nexis,22nd edition, 2017].
[3]Article 195, Sir Dinshaw Fardunji Mulla, *Principles of Mahomedan Law*, [Lexis Nexis, 22nd edition, [2017].
[4] Paras S Diwan, *Family Law*, [Allahabad Law Agency, 2018th edition [2018].
[5] Prohibition of Child Marriage Act, 2006 [No. 6 of 2007] [India].
[6] Section 3, Prohibition of Child Marriage Act, 2006 [No. 6 of 2007] [India].
[7] Section 15, Prohibition of Child Marriage Act, 2006 [No. 6 of 2007] [India].
[8] Section 2, sub-section (a), Prohibition of Child Marriage Act, 2006 [No. 6 of 2007] [India].
[9] Section 1, sub-section (2), Prohibition of Child Marriage Act, 2006 [No. 6 of 2007] [India].
[10] Section 20, Prohibition of Child Marriage Act, 2006 [No. 6 of 2007] [India].
[11] Section 18, sub-section (a), Hindu Marriage Act, 1955 [No. 25 of 1955] [India].
[12] Article 14, Constitution of India [1949] [India].
[13] Article 15, Constitution of India [1949] [India].

affecting and vitiating safeguards provided to people of India, and the plausibility of consolidating Muslim personal laws of the country in one statute, keeping in mind the statutory legislation which exercises their ambit irrespective of the religions of the citizens.

2. CONSTITUTIONALITY OF PERSONAL LAWS ON THE TOUCHSTONE OF FUNDAMENTAL RIGHTS: WHAT HAS BEEN THE STANCE IN THE INDIAN LEGISLATIVE AND JURISPRUDENTIAL FRAMEWORK?

Before we analyze the rationality of enactment of a consolidated statute for the direction of Muslim matrimonial relations, it is imperative to briefly analyze the nature and constitutionality of personal laws of the country and judicial observations regarding them.

2.1. Inadequacy of Application of Shariat Law in India

In a rudimentary manner, *Shariat* can be explained as the principles and teachings of Prophet Mohammad dictating the day-to-day lifestyle of Muslims. It may include provisions of the *Quran* as well.[14]

The *Shariat* law is interpreted by different schools of Islamic law. Each of them interprets the law in different ways, consisting of varied regulations for the Muslim Community around the world. The four schools (*Hanafiyya, Malikiyya, Shafiyya, and Hanabaliyya)* have been adopted by different Islamic countries for interpretation of laws in the nations.[15]

In our country, the application of *Shariat* was approbated and officiated by the enactment of the Muslim Personal Law (Shariat) Application Act in the year 1937.[16]This was a step taken by the erstwhile British regime which intended that the Indians be regulated according to the respective societal and religious laws. The Shariat Application Act was enacted with the aim to formulate an Islamic law code for the Muslims in India. However, there was no mention of any concrete rules in the said Act itself. It only propounded that "…*in all questions regarding …marriage, dissolution of marriage, … the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)."*[17]

[14] Adrija Roychowdhury, *Shariat and Muslim Personal Law: All your questions answered* <https://indianexpress.com/article/research/shariat-muslim-personal-law-sharia-history-shayara-bano-shah-bano-triple-talaq-personal-laws-religious-laws-uniform-civil-code-2784081/> [24st March; 8:34 PM].
[15] Adrija Roychowdhury, *Shariat and Muslim Personal Law: All your questions answered* <https://indianexpress.com/article/research/shariat-muslim-personal-law-sharia-history-shayara-bano-shah-bano-triple-talaq-personal-laws-religious-laws-uniform-civil-code-2784081/> [24st March; 8:34 PM].
[16] Muslim Personal Law (Shariat) Application Act, 1937 [Act No. 26 of 1937] [India].
[17] Section 2, Muslim Personal Law (Shariat) Application Act, 1937 [Act No. 26 of 1937] [India].

When it came to distinguishing between laws made for the Hindus and those for the Muslims, the Constitution-makers laid out the statement that "*clear proof of usage will outweigh the written text of the law*" in the case of Hindus. [18] However, the writings in the *Quran* were concluded to be of paramount significance and authority for the Muslim community.

Thus, as far as conjugal relations of the Muslim Community are concerned certain activities like marriage and divorceare governed by personal laws which are not specified in any statute.[19] The Muslim Personal Law (Shariat) Application Act, 1937 [20] only mandates that the Muslim Community in India is governed by the principles of Shariat.[21] However, there is no mention of any definite rules or regulations which may give *Shariat* a concrete form. The Muslim Personal Law (Shariat) Application Act is interpreted by the All India Muslim Personal Law Board.[22]

This is the reason why there is substantial uncertainty in the governance of Muslim conjugal relations as there is no one specific statute that can be followed by the community as opposed to other communities like Hindus and Parsis.

2.2. Constitutionality of Muslim Personal Law: To Interfere or Not to Interfere

Although there is no *a priori* restriction on the legislative power to amend any personal law functioning in the nation, the sequential governments have refrained from making any direct interference with them. Thus, by force of Article 372[23] [Continuance in force of existing laws and their adaptation] those parts of pre-Constitutional personal laws-both codified as well as uncodified and applicable to whichever community that have not been touched by any "*competent authority*" remain in force, as before.

Apart from the said existing laws, the Parliament has enacted several statutes exercising their ambit on majority communities [Hindus, Sikhs, Jains, and Buddhists].[24] It is true for other

[18] Adrija Roychowdhury, Shariat and Muslim Personal Law: All your questions answered <https://indianexpress.com/article/research/shariat-muslim-personal-law-sharia-history-shayara-bano-shah-bano-triple-talaq-personal-laws-religious-laws-uniform-civil-code-2784081/>.
[19] Sir Dinshaw Fardunji Mulla, *Principles of Mahomedan Law*, [Lexis Nexis, 22nd edition, 2017].
[20] Muslim Personal Law (Shariat) Application Act, 1937 [Act No. 26 of 1937] [India].
[21] Section 2, Muslim Personal Law (Shariat) Application Act, 1937 [Act No. 26 of 1937] [India].
[22] The All-India Muslim Personal Law Board is an NGO constituted in 1973 to adopt strategies for the application of Muslim Personal Law in India, most importantly the Muslim Personal Law [Shariat] Application, 1937.
[23] Article 372, Constitution of India [1949] [India].
[24] Hindu Marriage Act [Act No. 25 of 1955]; Hindu Succession Act [Act No. 30 of 1956]; Hindu Minority and Guardianship Act [Act No. 32 of 1956]; Hindu Adoptions and Maintenance Act [Act No. 78 of 1956] [India].

communities as well – Parsi[25] and Christians[26]. However, for the Muslims, the same is lacking as far as their marriage and conditions regarding such marriage are concerned.

At this point, it is expedient to answer a moot question- What has been the judicial stance vis-à-vis exercise of Muslim laws and personal laws in general, which are inconsistent with the fundamental rights of Muslim people of the country?

Article 13*:* We will start with the relationship between personal laws and Article 13 of the Constitution.

Article 13 (i) is as follows:

> *"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this part shall, to the extent of such inconsistency, be void."*

The fundamental rights include, *inter alia*,

(a) equality before the law[27] and equal protection of laws culmination into the prohibition of discrimination against any citizen on grounds only of religion, race, caste, sex, or place of birth[28] and
(b) religious and cultural freedom[29].

"*All laws in force*" in India at the time of the commencement of the Constitution, if repugnant of to these primary fundamental rights, have to cease to apply in any manner whatsoever.

Time and again the validity of personal laws have arisen before the judiciary of the nation, to evaluate the status of personal laws through the lens of Article 13. Is it permissible under the Constitution of the country that different communities of the country be ruled by different sets of laws? Should personal laws be evaluated as per the requirements of Part III of the Constitution? This depends on the ambit of the phrase "all laws in force" as propounded by Article 13(i) of the Constitution.

Article 13 itself says that law "*includes any Ordinance, order by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law"*[30] Whereas "law in

[25] The Parsi Marriage and Divorce Act, 1936[No. 3 of 1936] [India].
[26] The Indian Christian Marriage Act, 1872.
[27] Article 14, Constitution [1949] [India].
[28] Article 15,Constitution [1949] [India].
[29] Article 25, 26, Constitution [1949] [India].

force" "*includes laws passed made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such laws or any part, therefore, may not be then in operation either at all or in a particular area."*[31]

Now there is no express mention of 'personal law' in the said article. Were personal laws deliberately omitted from the scope of Article 13? We shall discuss this with judicial decisions.

State of Bombay vs Nasaru Appa Mali[32] provided one of the pioneer opportunities to Bombay High Court to observe the constitutionality of Muslim personal laws. The case was filed contesting the provisions of the Bombay Prevention of Hindu Bigamous Marriage Act, 1946.[33] It was contended before the Hon'ble High Court that Muslim personal laws that permit bigamy had become void after the commencement of the Constitution due to the working of Article 13(1) of the Constitution. This was due to the provision of the Bombay Prevention of Hindu Bigamous Marriage Act which made it mandatory for Hindus to be monogamous whereas Muslim personal laws gave Muslims the liberty to commit polygamy.

Chagla, CJ. and Gajendragadkar, J. perused the applicability of Article 13(1) in respect to personal laws. They arrived at a negative finding. The reasoning used by Chagla, CJ. Can be summed up as:

1) The words "custom and usage" used in Article 13 do not include personal laws. *"Custom or usage is a deviation from personal law and not personal law itself".*

2) Realizing the distinctness of personal laws as opposed to customary laws. The Constituent Assembly deliberately omitted "personal law" in drafting Article 13 of the Constitution and expressly and advisedly used only the words "custom or usage". This makes clear the stance of the Constituent Assembly in excluding the personal law from the extent of the said article.

3) Furthermore, there are some other observations to be made as well. Article 17 of the Constitution of India abolishes the practice of untouchability in India. Whereas Article 25 – ***Right to Freedom of Religion*** the state to make laws for "*the purpose of throwing open of Hindu religious institutions of a public character of all classes and sections of Hindus"*[34]

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[30] Article 13(3)(a), Constitution [1949] [India].
[31] Article 13(3)(b), Constitution [1949] [India].
[32] *State of Bombay vs Nasaru Appa Mali,* AIR 1952 Bom 84.
[33] Bombay Prevention of Hindu Bigamous Marriage Act, 1946 [Act No. 25 of 1946] [India].
[34] Article 25(2)(b) Constitution [1949] [India].

Now if Hindu personal laws become void due to Article 13 or by reason of any of its provisions violating any fundamental rights, then it was requisite to specifically provide in Article 17 and Article 25(2) for certain practices of Hindu personal law which contravened Article 14 and 15 of the Indian Constitution. Thus, it is evident that only in certain respects the Constitution has dealt with the personal laws working in the country.

4) Article 44 of the Constitution mandates that "*The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India.*" The very inclusion of Article 44 in the Constitution 'recognizes' the existence of distinct personal laws.

5) Furthermore Entry No. 5 of the Concurrent List gives power to the legislature to pass laws affecting personal laws. it provides the following aspects of personal laws which can be regulated by the legislatures in the country: *Marriage and divorce; infants and minors; adoption; wills, intestacy, and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.*

6) Lastly, Article 372 makes it clear that Article 13 does not include personal laws within its purview. Furthermore, Article 372 entitles the President of India to make adaptations and modifications in *law in force* in the country by repealing or amending any provision therein, but it cannot be contended that the said Article aimed to authorize the President to make changes in the personal laws in the country.

The Chief Justice concluded his arguments observing *"Although the point urged before us is not free from difficulty on the whole, after a careful consideration of the various provisions of the Constitution we have come to the conclusion that personal laws are not included under the expression "law in force" used in Article13 (1)."*[35]

The judicial opinion of these two judges has been vehemently criticized by eminent Constitutional law scholars like DD Basu[36], and HM Seervai[37]. However, this verdict of the Chagla-Gajendragadkar bench has been upheld and followed, though often silently and without making direct reference, by a multitude of Higher courts in the country.[38]

[35] *State of Bombay vs Nasaru Appa Mali* AIR 1952 Bom 84.
[36] DD Basu, Commentary on Constitution of India, [Lexis Nexis, 1st edition, 2014].
[37] HM Seervai, Constitutional Law of India [Universal Law Publishing Company, 4th edition, 2015].
[38] *Srinivas Iyer v. Saraswathi Ammal*, ILR 1958 Mad 78;*Gurdial Kaur v. Mangal Singh*AIR 1968 P H 396; *Suda v. Sankappa Rai*AIR 1963 Mys 245; *Abdullah v. Chandni*1956 CriLJ 1395;*Moti Das v. S.P. Hahi*, 1959 AIR 942.

2.3. Triple Talaq – A Remarkable Precedent

On 22nd August 2017, the Supreme Court pronounced its judgment in *Shayara Bano v Union of India*,[39] in which it declared the practice of Talaq-e-biddat unconstitutional. Talaq-e-Biddat is one of the three male initiated divorces in Muslim Law, the other two being "*Talaq Ahasan*" and "*Talaq Hasan"*

In Talaq-e-Biddat, a Muslim man could instantly divorce his wife by repeating the word "Talaq" thrice in one sitting, without any intervention from the State. The communication of "Talaq" could be oral, written, and even electronic which further diminishes the position of women in this unilateral and unfair divorce.

This was a part of the Muslim personal law. But still, the Supreme Court of the country took a different view and examined it on the touchstone of Article 14 of the Constitution, considering it to be a part of 'law' as under Article 13 of the Indian Constitution.

After the judgment, the Parliament of India enacted the Triple Talaq Bill, also known as Muslim Women (Protection of Rights on Marriage) Bill, 2019, which was passed July 30, 2019, to make instant Triple Talaq a criminal offense.

Thus, the example of Triple Talaq shows how aspects of Muslim personal laws can also come under the scrutiny established by the Constitution. The approach of the Apex Court, in this case, shows that even though areas of marriage, divorce, and other related issues and governed by Muslim personal laws, the constitutional rights of any party cannot be undermined in favor of personal laws. It is therefore imperative, that personal laws operate from within the extent of the Constitution of India.

3. A DETAILED VIEW OF THE PRACTICES UNDER MUSLIM LAWS: HOW ARE THEY INCONSISTENT WITH THE GENERAL LAWS OF THE COUNTRY?

In this part of the paper, we shall discuss certain provisions of Muslim laws which are in contradiction to the social well-being and welfare of the people of the country. These include mainly two practices which are *prima facie* inharmonious with the safeguards and laws provided for people of other communities and religions. [40] [41] -1) Polygamy and 2) Requirements for marriage which are incongruent to the interest of the people and statutory laws of the country.

[39] *Shayara Bano v Union of India* [2017] 9 SCC 1.
[40] Section 5(1) of Hindu Marriage Act, 1955 [No. 25 of 1955] [India].

3.1. Polygamy under Muslim Law

Muslims are the only community in India where polygamy is legal. Holy *Quran* constituting the personal law of Muslims sheds some light as to why polygamy is allowed in the community.

Chapter *Al Nisa* of the Quran states as follows:

> *"And if you fear that you will not be fair in dealing with the orphans, then marry as many of women as may be agreeable to you, two or three, or four; and if you fear you will not deal justly, then marry only one or what your right hand possesses. That is the nearest way for you to avoid injustice."*[42]

This extract only provides for only showing love and compassion to female orphans who have been neglected by society and who have been abandoned by society and who are forlorn and destitute in life.

All that which is said here is that if a Muslim male comes across any such female orphan, he may if it is otherwise agreeable to him, contract a second, a third, and a fourth marriage provided he is able to deal with all of his wives justly.[43] Thus every sect in Islam has allowed polygyny up to a maximum of 4 wives. However, it is to be noted that only polygyny is allowed; polyandry is not allowed under any circumstances in *Sharia.*

Under *Hanafi* law, if a Muslim takes a fifth wife, the marriage is not void per se but only irregular, which he can regularize by divorcing any of the previous wives.[44] A Sunni taking a fifth wife is also not guilty of bigamy under the Indian Penal Code. [We shall be discussing the provision of IPC and other laws as well].[45] Among Shias, the fifth marriage is void, therefore if a Shia husband takes a fifth wife he can be prosecuted for bigamy.[46]

One notable observation was made by the Supreme Court in this regard. In *Lily Thomas v Union of India*[47] the Court held that the plurality of marriages is not an unconditional right conferred on the husband. He should have the capacity to do justice between co-wives. It is a condition precedent.

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[41] Section 494, Indian Penal Code, 1860 [No. 45 of 1860] [India].
[42] Verma, B.R., '*Commentaries on Mohammedan Law'*, [Law Publishers Pvt. Ltd., Twelfth Edn.,2011]; See also, Fyzee, Asaf A.A., *'Outlines of Muhammadan Law'*, [Oxford University Press, Fifth Edn., 2011].
[43] Fyzee, Asaf A.A., 'Outlines of Muhammadan Law', [Oxford University Press, Fifth Edn., 2011].
[44] Paras S Diwan, *Family Law*, [Allahabad Law Agency, 2018th edition [2018].
[45] Paras S Diwan, *Family Law*, [Allahabad Law Agency, 2018th edition [2018].
[46] Paras S Diwan, *Family Law*, [Allahabad Law Agency, 2018th edition [2018].
[47] *Lily Thomas v Union of India* AIR 2000 SC 1650.

In India, there are certain laws specific to each community[48] and under the Special Marriage Act, 1954 [49] which obviate polygamy. Furthermore, Section 494 of the Indian Penal Code also criminalizes it. It states –

> *Marrying again during the lifetime of husband or wife. — "Whoever, having a husband or wife living, marries in any case in which such marriage is void because of it taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*[50]

Section 494 of the IPC cannot be applied to Muslim persons due to the exception to the said section. The exception provides as follows – "…*This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,* …". Since under the *Sharia* Act polygamy is not void, it cannot be declared void by any competent court. Hence, the exception applies as has been held by the Gujarat High Court in a case in 2015.[51]

However, just because polygamy is permissible in *Sharia*, it does not reduce the cons of polygamy.

3.2. Capacity to Marry Under Sharia

Another unique but impolitic feature of *Sharia* is the requisite capacity of the parties to make them eligible to marry. In *Sharia* law, it is laid down that a person who has not attained puberty shall not be eligible to marry without the consent of his guardians. Thus, according to Shariat, every Mahomedan who is of sound mind and has attained puberty may enter into a contract of marriage.[52] It is pertinent to note here that Muslim marriage is nothing apart from a civil contract in contradiction to Hindu marriage which is considered a sacrament.[53]The age of puberty is a question of fact under Sharia. It is presumed that puberty is attained by the individual when he

[48] Section 17, Hindu Marriage Act, [No. 25 of 1955]; Section 5, Parsi Marriage and Divorce Act, [No. 3 of 1936]; Section 19(4) Divorce Act, 1869.
[49] Section 44, Special Marriage Act, 1954 [No. 43 of 1954].
[50] Section 494 Indian Penal Code, 1860 [No. 25 of 1860] [India].
[51] 'Section 494 can't be enforced on Muslim men' <https://www.deccanherald.com/content/510442/sec-494-cant-enforced-muslim.html>[19th March, 12:23 PM].
[52] Paras S Diwan, *Family Law*, [Allahabad Law Agency, 2018th edition [2018].
[53] *Abdul Kadir vs Salima* (1886) 8 All 146.

attains the age of 15.[54] Thus, a Mahomedan girl, of age 15 who has attained the age of puberty is eligible to marry without the consent of her guardians.[55]

Now, albeit the Prohibition of Child Marriage Act, 2006 is a statutory law of uniform nature -i.e., it applies to every citizen of the country irrespective of their religion,[56] its application has been largely variable.

In *Mohd. Samim v State of Haryana*,[57] the Punjab and Haryana High Court held that Shariat Act is a special act whereas PCMA is a general act. The general provisions would yield to specific provisions and the Special Act would have predominance over the General Act.[58] Thus according to this view, it is legally permissible for a Muslim below 18 to be married as the Shariat law takes precedence over PCMA. However, in *Yunus Bhai Usman Bhai Shaikh v. State of Gujarat*,[59]the Gujarat High Court held that PCMA applies to Muslims as well.

In the same way, the Madras Court in *M. Mohamed Abbas v. Government of Tamil Nadu* held that the PCMA is not against Islam and is not detrimental to the Islamic community since it would help Muslim girls to reasonable education and empowerment and also the opportunity of understanding how to lead a proper married life. Thus, it cannot be held to be against the Muslim community in general.

4. CONCLUSION: CONSOLIDATION OF MUSLIM PERSONAL LAW IN SPIRIT OF THE CONSTITUTION AND HUMAN RIGHTS

Thus, it has become clear to us at this point that this Muslim personal law is highly arbitrary and capricious in its application. It has no concrete structure as opposed to the personal laws of Hindus, Parsis, and Christians. This has led to its whimsical and anti-democratic exercise of it over the Muslim community which is in gross violation of the spirit of the Constitution.

Since the Supreme Court of the country has not, till date declared the 2 aspects of the Muslim personal law, discussed in Part 3 of this paper, as unconstitutional, it has become the job of the legislature to consolidate, codify, and enact the archaic *Shariat.*

[54] Paras S Diwan, *Family Law*, [Allahabad Law Agency, 2018th edition [2018].
[55] *Mohd. Idris v State of Bihar* (1980) Cri LJ 764; *Tahra Begum v. State of Delhi & Ors.*
[56] Section 1, sub-section 2, Prohibition of Child Marriage Act, 2006 [Act No. 6 of 2007] [India].
[57] *Mohd. Samim v State of Haryana,* W.P. (Cri.) 532 of 2018 (P&H. H.C.) (Unreported).
[58] *Mohd. Samim v State of Haryana,* W.P. (Cri.) 532 of 2018 (P&H. H.C.) (Unreported).
[59] *Yunusbhai Usmanbhai Shaikh v. State of Gujarat*, Misc. Criminal Application No. 8290 of 2015 (Guj. H.C.) (Unreported).

It is very important to note the words of learned Chief Justice Chagla in *State of Bombay vs Nasaru Appa Mal*[60]*:*

> *"It must not be forgotten that in a democracy the Legislature is constituted by the chosen representatives of people. They are responsible for the welfare of the State and it is for them to lay down the policy that the state should pursue. Therefore, it is for them to determine what legislation to put on the status book in order to advance the welfare of the state. If the Legislature in its wisdom has come to the conclusion that monogamy tends to the welfare of the state, then it is not for the courts of law to sit in judgment upon that decision"*

Therefore, the author at the end of this study would like to suggest that the Parliament of the county should take notes from the Hindu Marriage Act, 1955, Parsi Marriage and Divorce Act, 1936, and the Indian Christian Marriage Act, 1872 and consult the All India Muslim Personal Law Board to develop a marital statute for the Muslim community as well.

Further the Muslim Personal Law (Shariat) Application Act, 1937 should be repealed after the said consolidated statute is enacted by the Parliament. This would lead to the end of the un-codified and wavering application of *Shariat* law in the country.

A section of the proposed Act should categorically state the age of parties to the marriage in consonance with the PCMA Act – minimum age for the bride and bridegroom should be 18 and 21 respectively. Furthermore, there should be a specific and outright ban on the practice of polygamy which is to be expounded in the Act itself like the Section 17, Hindu Marriage Act, 1955, Section 5, Parsi Marriage and Divorce Act, 1936, and Section 19(4) Divorce Act, 1869.

This would lead to better governance of matrimonial issues in the Muslim community in the country as there would be a well-codified and structured body of law to interpret while handling the cases related to conjugal disputes. Furthermore, by providing safeguards against polygamy and child marriage, it would reduce inequality among the genders and would be true to the spirit and color of Article 14 and other fundamental rights of the Constitution.

[60] *State of Bombay vs Nasaru Appa Mali* AIR 1952 Bom 84.

MYANMAR MILITARY COUP: A COMPREHENSIVE ANALYSIS OF THE SUBVERSION OF RULE OF LAW AND THE RESULTANT HUMAN RIGHTS VIOLATION

VISHAKHA SOMANI* **& ABHISHREE PARADKAR****

ABSTRACT

On February 1, 2021, the formally elected government of Myanmar was overthrown by the Military, and several political leaders, including Aung San Suu Kyi, were detained without charges. This usurpation of power by the Military in the form of a coup has invited severe criticism not only from the locals but also from the entire international community. However, to attain a holistic understanding of the present coup and its social, legal, political, and economic implications, it is pertinent to take note of all the allied aspects. These include Constitutional Supremacy, Human Rights Violations, Political Conditions, as well as International Laws and Conventions. The present article, therefore, analyses how such military coups are glaring examples of autocracy in light of the Provisions of the Constitution of Myanmar and the violation of fundamental human rights, which is part and parcel of such coups. The article further focuses on the current international standpoint on this issue and the need for International Organizations to make a conscious attempt to pass a resolution for preventing such an overthrow of a legitimately formed government through military coups.

1. THE MENACE OF THE MILITARY COUPS

Coup d'états have often been criticised by the International community for establishing an autocratic and authoritarian regime where human rights violation becomes rampant. A military coup essentially refers to an act of the armed forces to dispose of the existing government and establish control over the territory. Such interventions lead to the displacement of the democratic system and can have devastating repercussions on the residents of such nations.

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This is very evident from the history of the countries that have witnessed such military coups. For example, in 1973, the President of Chile, Salvador Allende, was toppled by the armed forces, which installed General Augusto Pinochet as the head of the new regime. This was followed by grave offenses such as unlawful deprivation of life, aggravated kidnapping, forced disappearances, illicit torturing, and degrading punishments.[1] The report of the Commission of Truth and Reconciliation indicated that there was a human rights violation of 30,000 people, while lakhs of people suffered in exiles and illegal detentions. [2]

Similarly, countries such as Greece in 1967, Uganda in 1971, Albania in 1998, and several others witnessed such military coups, which led to a gross violation of the fundamental rights of the citizens. This destabilised the political and administrative structures of these nations because of which they faced a major setback in terms of their economic and social development.

The story of the effects of military coups in Myanmar is no different when it comes to the violation of the rights of the civilians and the exercise of absolute, unrestricted power by the armed forces. It was in 1988 that a 19-man military body took over the administration and control over the territories of Myanmar and called itself **the State Law and Order Restoration Council (SLORC).** It enforced martial laws in the country and adopted a series of emergency measures, overturning the 1974 Constitution of Myanmar. [3]

These radical steps taken by the Military resulted in indiscriminate killings, which further led to the initiation of resistance movements by the National League for Democracy (NLD), headed by Aung San Suu Kyi. However, such movements were brutally suppressed by silencing the democratic leaders by way of harassment, arrest, and illegal detentions. Suu Kyi was herself placed under house arrest in 1989, where she spent 15 years in custody.

In 1990, SLORC allowed to conduct free elections but refused to cede power when the same was won by NLD with a sweeping victory of 392 out of 479 seats. This was a clear example of the manifest of the arbitrariness of the Military that disregarded the precise results of the Elections conducted under their watch and wholly ignored the will of the people of the country.[4]

[1] Mark Ensalaco, "Chile under Pinochet: Recovering the Truth" *Philadelphia: the University of Pennsylvania*, 2000.
[2] United States Institute of Peace, Report: *Chilean National Commission on Truth and Reconciliation*, October 4, 2002.
[3] International Bar Association's Human Rights Institute, "The Rule of Law in Myanmar: Challenges and Prospects" (Dec. 2012).
[4] *Id.*

However, later in 2003, due to increasing pressure from the International Community and the necessity for their cooperation in the globalised world, the SLORC that had been renamed as the State Peace and Development Council proposed a 7-step reform program through Prime Minister Khin Nyunt to enable Myanmar to move towards Democracy. This was accompanied by the release of various detainees, including Aung Sung Suu Kyi. [5]

Moreover, in pursuit of the 7-step program, the 2008 Constitution of Myanmar came into existence which finally acknowledged the fundamental rights of the citizens of Myanmar. The basic principles of this Constitution included the non-disintegration of the Union and National Solidarity, sovereignty, developing a multi-party democratic system, encouraging the principles of Justice, Liberty, and Equality, and allowing the Defence Services to participate in the National Political leadership of the State. [6]

Accordingly, the military Junta formally dissolved in 2010, and the democratic reforms allowed NLD to win the 2015 elections. These reforms continued for few more years, until recently when even after winning 920 of the 1,117 seats available in the local and National Parliaments, the elected government of NLD was thrown out by a military coup on February 1, 2021. [7]

Now, this majorly happened because the pro-military Union Solidarity and Development Party (USDP) lost drastically in the elections and alleged that there were several irregularities in the voting system, due to which the election results lacked credibility. However, no substantial proof was presented in favour of the allegations made, such as the Union Election Commission (UEC) censoring opposition parties or excluding ethnic minorities from casting votes.[8]

The question, therefore, arises if there was any solid ground for the Military for taking such a drastic step. Moreover, whether the Military is above the Rule of law established by the Constitution of Myanmar aims to maintain a multi-party democratic structure in the country. Hence, at this juncture, it would be worthwhile to look at the provisions of the Constitution of Myanmar that were enacted in 2008.

[5] Jonathan Powell, "The Determinants of the Attempting and Outcome of Coups d'état" 56 *The Journal of Conflict Resolution* 1017-1040 (2012).
[6] Constitution of Myanmar, 2008, art. 6.
[7] Nirupama Subramanian, "Explained: What has led to the Coup in Myanmar" *The Indian Express*, February 3, 2021.
[8] *Id.*

2. THE CONSTITUTION OF MYANMAR: A CHARTER OF RIGHTS OR A DOCUMENT TO EMPOWER THE MILITARY?

As stated earlier, it was in 2015 that the first civilian government came to power in Myanmar when the **National League of Democracy Party (NLD)** won by a landslide. However, it is pertinent to note that under the garb of Democracy, the Military still gains control at the grass-root level.

In 2008, when the Myanmar Constitution was finally enacted, it took away some power from the military generals but awarded them certain compensations. In 2010, the NLD, which back then was in the opposition, decided to boycott the general election and criticised the Constitution, which was drafted by the Military Junta for being less of a path to Democracy and more of the General's retirement plan.

The Constitution provides the military 25 percent of the total seats in each of two houses of the Myanmar Parliament as well as in the 14 states and regional assemblies. [9] It provides for a maximum of 110 military representatives in the Lower House (*Pyithu Hluttaw*)[10] and 56 in the Upper House (*Amyotha Hluttaw*)[11]. It also grants them control over important ministry portfolios such as the Ministry of Home Affairs, Border Affairs, and Defense.[12] as well as the power to hold one of the three Vice- President positions[13]. This led to the formation of a hybrid form of government consisting of civilian and military-appointed ministers.

Furthermore, it mentions that to amend important aspects of the Constitution requires the support of more than 75 percent of the total representatives in the Parliament after which it has to be approved by a majority of eligible voters in a nationwide referendum. This means that any Constitutional amendment can be vetoed by the Military, which consists of 25 percent, and it can prevent any kind of fundamental changes to the Constitution.

After failed attempts of amending the Constitution in 2013 and 2014, the NLD, as well as other civilian parties, again tried to bring amendments to reform the undemocratic Constitution in 2019 and 2020. A few of the proposed amendments were reducing the seats in the 'military quota' to 15 percent after the 2020 election, 10 percent after the 2025 election, and 5 percent after the 2030 election. Another way is to change the provision that requires '*more than 75 percent*'

[9] Constitution of Myanmar, 2008, art. 436 (a), (b).
[10] Constitution of Myanmar, 2008, art. 109 (b).
[11] Constitution of Myanmar, 2008, art. 141 (b).
[12] Constitution of Myanmar, 2008, art. 232 (b) (ii).
[13] Constitution of Myanmar, 2008, art. 60 (c).

majority for constitutional amendments to requiring '*two-thirds of the elected representatives*. This would have tackled the problem of Tatmadaw vetoing all the necessary amendments in the future.

However, these amendments failed due to the classic **Catch-22** situation: The Military effectively vetoed these amendments through the already existing constitutional provisions requiring the approval of more than 75 percent of total MPs. This was a very predictable move on the part of the Military- aligned lawmakers, who claim that military control is significant for the country. Senior General Min Aung Hlaing defended the military representatives by stating, "The Tatmadaw has therefore taken those seats as a measure to ensure national stability".

The Burmese Constitution, therefore, remains rightly notorious, and there is no doubt as to why the Constitution has been termed by many people as "*a constitution of Tatmadaw, by the Tatmadaw and for the Tatmadaw*". [14] The Tatmadaw remains extremely influential in the legislature due to the above-mentioned loopholes. Hence, the rigidity of the Constitution remains a perennial trap for the advancement of Democracy in Myanmar.

However, these are not the only loopholes that exist in the Constitution of Myanmar. Thus, it would be helpful at this juncture to look at a few other provisions through which the Military has granted itself the power to interfere in the otherwise democratic structure of the country.

Article 6 (a) and (b) provides for protecting the Union from disintegration as well as maintaining the National Solidarity as the consistent objectives of the Union. [15] The natural question that arises is- what safeguard exists if the Union fails to perform this constitutional duty? For this purpose, **Article 40** was enacted.

Article 40 (b) provides that in case of an emergency that endangers the life and property of the people in any State, Region, or Self-Administered Area, the Defence Services, in accordance with the Constitutional Provisions, has the right to prevent the danger and provide protection.[16]

Further, **Article 40 (c)** provides that in case of an emergency that is likely to lead to the disintegration of the Union or national Solidarity and loss of sovereign power or attempts therefore by wrongful forcible means such as insurgency or violence, the Commander-in-chief of the Defence Services would have the right to take over and exercise State sovereign power in

[14] Nyi Nyi Kyaw, "Myanmar's pluralist constitution: Nation-building versus state-building" in Jaclyn Neo, Bui Ngoc Son, (eds), *Pluralist Constitutions in Southeast Asia* (Oxford: Hart Publishing, 2019).
[15] Constitution of Myanmar, 2008, art. 6 (a), (b).
[16] Constitution of Myanmar, 2008, art. 40 (b).

accordance with the provisions of the Constitution.[17] Now, let us breakdown the elements of these provisions to understand in what circumstances the Military has been given the power to directly interfere in the democratic system.

Firstly, the pre-requisite for the operation of Article 40 (b) is that an emergency should be of such a nature that endangers the life and property of the people. Now, even under such circumstances, the Military has only been given the right to take measures to prevent danger and protect the people of the nation.

Even the widest interpretation of this article does not legitimise the act of the Military to overthrow an existing government to establish their rule. Ways of protection can include making certain rules and regulations for upholding the constitutional spirit, but the same cannot extend to exercising absolute control, disregarding the mandate of preserving the multi-party system that has been given under **Article 6 (d) and Article 31 of the Constitution**.[18]

Moreover, if we see the reasoning for the recent act of the Military on February 1, 2021, there did not exist any circumstances that threatened life or property. Therefore, merely a presence of certain irregularities in the elections could not have been an excuse to use military power under Article 40 (b).

When it comes to Article 40 (c), the pre-requisites for the Military for taking over and exercising State sovereign power includes such an emergency that can 1) disintegrate the Union, 2) disintegrate National Solidarity, 3) lead to loss of sovereign power, 4) or attempts for the same through wrongful means such as violence or insurgency.

Now, in the present circumstances, it has to be noted that firstly, there were no substantial proofs provided to support the allegations of the Military with regards to the elections, and even if there had been certain minor irregularities in the conduction of the elections, it represented the national Solidarity through the popular view of the public, as NLD won around 83% of the seats in the local and national Parliament. Moreover, no news was ever reported with regards to any sort of violence or use of forcible means by the political parties, and therefore, the interference of the Military on the grounds of irregularities was baseless.[19]

[17] Constitution of Myanmar, 2008, art. 40 (c).
[18] Constitution of Myanmar, 2008, art. 6 (d), 31.
[19] "Myanmar's Military Coup- What led to it and the Strategic stakes for India" *The Print*, Feb. 2021.

Another point that has to be focused upon is the presence of the phrase, '**in accordance with the Constitution** under Article 40.[20] This essentially indicates the Supremacy of the Constitution from which all the constituents of the State should derive their power. The question, therefore, arises if the provisions of this Constitution were considered at all by the Military before taking such a drastic step. To answer this, it is pertinent to note the statement of the Military Chief Senior General that the 2008 Constitution (which was drafted by the Military) itself should be revoked if its laws are not being followed. [21]

This paradoxical statement highlights how the Military is driven towards keeping its interests at a higher threshold, side-lining the general welfare of the entire community. By going to the extent of threatening to declare the Supreme Law of the land as null and void, the Military has proved itself to be the abuser of the Constitutional Provisions rather than being its protector.

Even when the armed forces later tried to clarify that the words were only meant to make people understand the nature and the importance of the Constitution and that the Military would act lawfully, safeguarding its provisions[22], the actions of the Military of not only intervening in the democratic set-up but also detaining the leaders of the ruling party, including Suu Kyi, definitely did not seem to align with their statements.

This only happened when the government, in the absence of sufficient proof, rejected the armed forces' demands, which included abolishing the Union Election Commission, a government-appointed electoral body.[23] This instance highlights how the Military went ahead to exercise a full-blown coup just because their demands were not met.

In addition to that, the procedure that was prescribed in the Constitution for invoking emergency in the State was completely ignored. As per **Article 417** of the Constitution, it is the President who has the authority to declare an emergency when there is potential harm to the sovereignty of the nation.[24] But during the present coup, the same was done by the Vice-President as President Win Myint was himself detained.

Furthermore, the right to habeas corpus, which is a well-recognised right across the world and has also been invested in the Supreme Court of Myanmar as per Article 296 (i) of the Constitution was suspended. This right allows a person to challenge his detention by the State,

[20] Constitution of Myanmar, 2008, art. 40.
[21] "Myanmar Coup: Aung San Suu Kyi detained as Military Seizes Control" *BBC News*, February 1, 2021.
[22] "Myanmar Army vows to abide by the Constitution amid coup fears" *The Times of India*, January 31, 2021.
[23] *Id.*
[24] Constitution of Myanmar, 2008, art. 417.

even during the state of emergency, and therefore, the judiciary is supposed to adjudge the legality of such detentions, independent of the military influence.[25] Unfortunately, this right was completely violated by hiding the whereabouts of the National leaders and the President after the night arrests.

This analysis of the existing Constitutional Provisions shows that the Military not only attempted to preserve their interest when the Constitution was formed but has also kept itself above the rule of law by disregarding the provisions of the Constitution and the will of the public, which is of supreme importance in a democratic society.

3. THE REALISATION OF THE CONSTITUTIONAL IMPERATIVES IN LIGHT OF THE RISE OF MILITARY IN MYANMAR

On February 1 2021, when the Military coup was established, the Tatmadaw arrested civilian leaders of the state and national government and then announced a '**state of emergency** for the period of one year. This was accompanied by the detention of the major political leaders, including Aung San Suu Kyi, President Win Myint, and several other senior officials of the NLD party, and cutting off the internet and other modes of telecommunication in the larger parts of Myanmar.

As a result, the protestors took to the streets and demanded the release of the detained officials as well as restoration of all the media of communication. Factory workers, teachers, and students marched on the streets of Yangon while residents clapped and banged vessels and the bystanders showed the three-finger salute inspired by the famous American movie 'Hunger Games', which acts as the symbol of defying authoritarianism.

The near-total internet blackout failed the connectivity levels to **16 percent** of the normal levels.[26] It started merely hours after the Military blocked social media websites such as Twitter and Facebook to prevent the mobilisation of people for protests. Many Myanmar-based civil society organisations impleaded internet providers to challenge the internet shutdown order.

'*Amnesty International'*, a Human Rights group, regarded the blackout as "*heinous and reckless*" and warned that it risks the violation of human rights.[27]. A spokesperson from Twitter as well as companies like Facebook criticised the ban stating that it undermines the "*public conversations*

[25] Constitution of Myanmar, 2008, art. 296 (1).
[26] "Myanmar Coup: Internet shutdown as crowds protest against military" *BBC News*, February 17, 2021.
[27] Amnesty International, *Myanmar Elections and Human Rights Concerns*, February 3, 2021.

and rights of people to be heard". This Right has also been specifically provided to the people by their Constitution.

Article 354 of the Constitution of Myanmar states that every person has the right to freely express and publish their convictions and opinions, if not contrary to the existing laws enacted for the Union Security.[28] However, the circumstances under which the coup was carried out were beyond the scope of any law or the existing Constitutional Provisions that only allow the Military to assume power when there exists such emergency which can harm the Solidarity or sovereignty of the Nation.

Therefore, the Fundamental right of the public to be allowed to express and publish their opinions and convictions through various channels should not have been suspended by the Military, merely due to certain irregularities in the result of the General Elections in 2020 and the refusal of the existing government to investigate the claim of Voters' fraud made by the Military.

Such usurpation of power was against the will of the general public, which is clear from the widespread movements, attempts made to circumvent the internet blockages, and carrying out street protests, even when the Military took numerous measures to curtail such basic Constitutional Rights. This is influenced by the fact that even when the enforcement of liberalised policies in the country was stagnant at times, a series of human rights, including political rights and economic opportunities, was conferred on a majority of the citizens of the country in the democratic regime.[29]

As compared to the military dictatorship that existed before the Constitution was enacted and put into operation, the people of Myanmar enjoyed a greater degree of freedom in the democratic society. The Constitution provided them with the freedom of speech and expression[30], to form assemblies and associations[31], to vote and elect their political representatives[32], and enhance the educational[33] and business prospects[34]with internet access and International exposure.

However, the blatant attack by the Military through a coup has once again placed them in such a situation where they have been deprived of democratic rights. This has made the Constitution a

[28] Constitution of Myanmar, 2008, art. 354.
[29] *Supra* note 44 at 12.
[30] Constitution of Myanmar, 2008, art. 354 (a).
[31] Constitution of Myanmar, 2008, art. 354 (c).
[32] Constitution of Myanmar, 2008, art. 369 (a).
[33] Constitution of Myanmar, 2008, art. 366 (a).
[34] Constitution of Myanmar, 2008, art. 370.

dead letter, where none of the basic Constitutional imperatives can be legitimately enforced against the will of the military power, without fear of repercussions.

In reality, it is not a complete surprise to see the military resort to extreme and unnecessary methods, for it has a chequered history of using excessive force to strike a blow on peaceful assemblies and at the same time raise concerns about posing a risk to the safety of politicians, journalists, activists, and other possible protestors. At this stage, it would be worthwhile to delve into the political conditions that often arise after a successful military coup is carried out.

4. THE POLITICAL TURMOIL ACCOMPANIED BY THE HUMAN RIGHTS VIOLATION IN THE POST- COUP ERA

After the proclamation of emergency, **Sr. Gen. Min Aung Hlaing**, the commander-in-chief, was transferred the power to govern Myanmar by **Vice-President Myint Swe**. This military government headed by Hlaing declared that the "state of emergency" shall last for a year, on the completion of which, fresh elections shall be held.

The General also threatened that if the law is not respected and followed, the same shall be abolished, even if it is the Constitution[35]. This statement sent across shockwaves throughout the country, which received its freedom from military dictatorship only about a decade ago. This coup is undeniably a calamity, especially for civilian politicians and their supporters, as well as a step backward from the country's pursuit to Democracy which was achieved only after serious political reforms.

Khin Zaw Win, a Political Analyst from Yangon, called it the "*severest crisis*."[36]. The idea of conducting a Military Coup to showcase the political supremacy of the Military, especially amidst an ongoing pandemic, has been heavily criticised by lawmakers across the world.[37]. It is apparent that to establish the Military's political dominance, Tatmadaw is ready to forgo and jeopardise any economic and diplomatic reforms that the citizens of Myanmar were expecting under a democratic government.

The usage of oppressive tactics to curtail the rights of the leaders, politicians, protesters, civilians, or other institutions of the State is not at all a new aspect during such military coups. Parallels can be drawn from various instances of Military Coups across the world.

[35] Human Rights Watch, *Myanmar Military Coup Kills Fragile Democracy,* February 1, 2021.
[36] Knapily, *Military Seizes power in Myanmar,* February 1, 2021.
[37] Russel Goldman, "Military Coup Explained", *NY Times,* February 23, 2021.

For example, the military coup in **Pakistan**, headed by Parvez Musharraf through which a National Emergency was declared in October 1999, imposed similar unlawful restrictions on the public as well as the existing ministers. In a report called, '**Reform or Repression? Post-Coup Abuses in Pakistan**', the Human Rights Watch stated the measures adopted that led to gross violation of Human Rights during the coup. [38]

On the day of the coup itself, the then Prime Minister Nawaz Sharif, along with the Information and the Petroleum Minister, was put under House Arrest without any charges. Most of these detentions took place under the **National Accountability Ordinance, passed in 1999** that conferred sweeping powers to arrest, investigate, and prosecute in a single institution called **National Accountability Bureau**. [39]

Evidently, this seems similar to what the Military resorted to in Myanmar. This was a method used to restrict these influential leaders from supporting the anti-military protests, which are not just against the Constitutional Spirit of any State but also the fundamental rights of a citizen of any country.

Moreover, in the year 2000, the Musharraf government in Pakistan had also curtailed the freedom to form associations with an aim to prevent public outrage in the form of rallies, strikes, and demonstrations.[40] Today, in the technologically advanced world, the fear of such outrage from people is not just limited to physical congregations but extends to the dissemination of opinions, views, and information through media, online social networking, and news channels. And, therefore, it does not come as a surprise that the Military in Myanmar resorted to cutting the internet facilities across the nation.

Another example that can be considered is **Thailand** which saw the up-rise of over 22 military coups, of which 13 were successful and nine were unsuccessful, all of which happened in one century.[41]. The most recent one took place in 2014. Experts say that Thailand has developed a sort of "coup culture", which means that military coups have been normalised in Thailand and are considered to be an accepted way of solving the political crisis[42].

[38] Human Rights Watch, *Reform or Repression? Post-Coup Abuses in Pakistan*, Vol. 12, No. 6 (C), October 2000.
[39] *Id.*
[40] *Supra* note 27 at 12.
[41] Adam Taylor and Anup Kaphle, "Thailand's army just announced a coup" *The Washington Post*, January 30, 2015.
[42] Tom Chitty, "Why does Thailand have so many coups?" *CNBC*, August 20, 2019.

In 2014, the **National Peace and Order Maintaining Council (NPOMC)** had seized power, imposed martial law, and suspended the citizens' constitutional rights and freedom of speech, expression, and assembly. The militaries of both Thailand and Myanmar justified the usurpations of power under the garb of preserving national security. It can also be said that neither of the countries faced any serious threats to their safety and the application of the military rule was completely unnecessary.

It initially shut down the major radio channels and television networks, censored major media outlets, NGOs, Academic institutions, banned any information that criticised the NPOMC, and prohibited any political assembly of more than five people.[43]. Several journalists and human rights defenders were targeted by filing anti-defamation lawsuits and threatened with execution to prevent them from exposing abuse by the Military. [44] Cable operators were instructed to disconnect TV links for international news and entertainment stations such as BBC, CNN, Bloomberg, etc. [45] All internet providers were strictly ordered to censor content that was circulated concerning the country's political situation.

It is also evident that apart from suspending certain constitutional rights, detaining major political figures is part and parcel of these coups. Similar to the situation in Myanmar, the former Prime Minister of Thailand, Yingluck Shinawatra, his family members, and several other senior politicians and citizens had been detained by the army.[46]. The **UN High Commissioner for Human Rights had to urge Thailand** to maintain respect for international human rights standards and restore the rule of law.[47].

Such detentions and restrictions of the political leaders compromise the integrity of the process of national reforms, especially for developing countries like Myanmar, Thailand, and Pakistan.

Unlike the situation in Myanmar, there was no complete suspension of social media websites in Thailand. However, the Military had circulated strict warnings that social media would be blocked if any material criticising the coup or the Military was circulated.[48]. It also warned the public as well as any leader against 'liking' or 'sharing' any material that openly disrespected the monarchy or Military, threatening them with a term of detention.

[43] The United Kingdom Foreign and Commonwealth Office, Report: *Human Rights and Democracy Report - Case Study: Military Coup in Thailand* (March 2015).
[44] "We will probably kill journalists who don't report the truth, says Thai leader" *The Guardian,* 2015.
[45] Human Rights Watch, *Thailand: Rights in 'Free Fall' after Coup*, May 24, 2014.
[46] "UN official urges respect for human rights, restoration of the rule of law following Thai coup" *UN News,* May 23, 2014.
[47] *Id.*
[48] "Army threatens Social Media block" *Bangkok Post,* May 23, 2014.

Social media websites such as Facebook were blocked from time to time to remind people of the consequences of their actions.[49]. Thus, even though the military coup did not place a complete restriction on the usage of social media, it did curtail an important aspect of it- freedom of expression of political opinion.

As per the **Resolution adopted by the Human Rights Council**, when governments are to legally restrict access to online information, it has to be for the interest of the public, and the response has to be legal, legitimate, necessary, and proportionate to the specific threat.[50]. Thus, any government should not resort to using such extreme and indiscriminate communication 'kill switches'[51]to prevent access to information or infringe the rights of the people to express their political views.

Inter alia, such blackouts cannot be legally justified under the Human Rights law. By imposing a complete or even partial shutdown of the internet, the Military of Myanmar contravenes the standards imposed by the International Human Rights Law, which makes it essential for such internet restrictions to be necessary and proportionate.

Access to information is extremely important since our day-to-day lives are completely dependent on it. Additionally, it has become even more imminent during the Covid-19 crisis as the lack of the same can lead to a poor discharge of healthcare facilities. It is evident that these shutdowns form an acute humanitarian crisis, especially in a country like Myanmar, where over 1 million people are in dire need of some humanitarian assistance.[52].

All these instances highlight that such coups are not only an attack against the government or the citizens of a particular nation but are against the spirit of Democracy and basic human rights that are prevalent all across the world. Therefore, the question arises as to what the International Community can do to prevent such future military coups.

[49] "ICT Permanent Secretary: Facebook will be blocked nationwide from time to time" *Spring News (in Thai)*, May 28, 2014.
[50] Para 10, Resolution adopted by the Human Rights Council, July 1, 2016.
[51] Para 4 (c), Joint Declaration of Freedom of Expressions and Responses to Conflict Situations, 2015.
[52] Richard Weir, "Myanmar Military Blocks Internet During Coup: Broad Communications Shutdown Threatens Lives" Human Rights Watch, February 2, 2021.

5. RESPONSIBILITY OF THE INTERNATIONAL COMMUNITY TO PREVENT MILITARY COUPS IN THE FUTURE

The United Nations is making a conscious attempt to mobilise international pressure to ensure that the Myanmar Military Coup fails.[53]. UN Secretary-General Antonio Guterres stated that the coup was absolutely unacceptable after elections, elections that took place normally and after a large period of transition.[54]

Moreover, the **15 member UN Security Council** is in the process of negotiating an appropriate response to the coup. Britain has also put forth a draft that required the Military to respect human rights and adhere to the rule of law and immediately release the detainees.[55]. However, such statements would need to be softened before gaining the consensus of China and Russia.

With respect to the stance taken by China, it has neither condemned the coup nor has it shown any support or consent to it.[56]. A Chinese Foreign Ministry Spokesperson said, "We wish that all sides in Myanmar can appropriately resolve their differences and uphold political and social stability." They further stated the need for the international community to create an environment that is sound enough for Myanmar to resolve its differences[57].

The United States, on the other hand, has condemned the coup and is reviewing options to impose further sanctions.[58]. The chairman of the **ASEAN (Association of Southeast Asian Nations) parliamentarians for Human Rights, Mr. Charles Santiago**, also criticised the actions of the Tatmadaw of legitimising their power through illegal means.[59].

It is evident that most of the international community condemns or disagrees with the illegal usurpation of power. One of the plausible solutions that are being considered by the Western countries, including the United States, and that are likely to be adopted by Myanmar's major trade partners such as India, China, Indonesia, Japan, Hong-Kong and Germany, is pressurising the Military to re-establish the elected government through the application of economic sanctions.

[53] "Will do everything to mobilise the global community to ensure coup fails in Myanmar, says UN Chief" *The Hindu*, February 4, 2021.
[54] "Myanmar coup: West increases pressure on the country's generals" *The Straits Times*, February 4, 2021.
[55] *Id.*
[56] "China Rejects Suggestion that it Supported the Coup in Myanmar" *US News*, February 3, 2021.
[57] *Id.*
[58] "Myanmar Coup: Joe Biden threatens to resume sanctions" *The Guardian*, February 1, 2021.
[59] *Supra* 31 at 9.

This is because these sanctions had assisted in improving the situation previously, and it is being believed that since Myanmar already is one of the poorer countries of Asia, it would not be able to afford to get on the wrong side of major trade partners, especially in the times of the global Covid-19 pandemic where it will require all the help it gets.

Back in 1996-97, the US had imposed visa restrictions on SLORC officials, which was followed by the European Union imposing further trade sanctions.[60]. President Clinton had also banned investments of the US in Myanmar. Myanmar recognised that for its long-term stability, it requires the support and engagement of these countries. It then introduced the seven-step reform program in August 2003. It, therefore, shows the success of international pressure for a developing country like Myanmar.[61]

However, a quick, positive impact of imposing sanctions in the present circumstances to force a retreat of the Military seems doubtful. In fact, the same is likely to cause more difficulty to the ordinary citizens of the country who would be the ultimate victim of their economic impact.

Moreover, such sanctions also have a possibility of reducing their importance and creating a gap to be filled by those who are interested in maintaining economic engagements, regardless of the political upheaval. That might also be the reason why China is currently blocking the Security Council of the UN from providing any strong condemnation in the garb of its principle of non-interference in domestic affairs of other countries, even when it had itself considered Tatmadaw to be a corrupt group due to its unpredictable behaviour in the past. [62]

This is also the reason that even though imposing such sanctions in the past made the Military pave a path for establishing Democracy, but it did not stop them from exercising their power again to overtake the existing government.

Therefore, it is also necessary to prevent such coups in the future. For this, it is of prime importance to issue guidelines in order to deal with further situations of *Coup d'états*. The international community needs to create a mandate in order to deal with those situations where the International Standards of Human Rights are not abided by the National Governments.

[60] International Bar Association's Human Rights Institute (IBAHRI), Report: *The Rule of Law in Myanmar: Challenges and Prospects* (Dec. 2012).
[61] *Id.*
[62] "Myanmar coup: China blocks UN condemnation as protest grows" *BBC News*, February 3, 2021.

It is democratic and perfectly ethical to proclaim a military coup illegal as it is an infringement of the sovereignty and Democracy of a country. [63] . After the acceptance of the Universal Declaration of Human Rights, there is no doubt about the fact that basic civil rights have to be internationally followed. Similarly, the United Nations must adopt the responsibility to internationally protect Democracy from further coups and other violent and illegal methods of usurpation of power.

A resolution is required to be approved to prevent such an overthrow of a legitimately formed government. Any group that seizes power unless through democratic elections or constitutional amendments should not be recognised or be accepted as lawful representatives of the country.

These principles need to be codified and ratified on an urgent basis where all member governments shall refuse to provide recognition to such military juntas. Hence, even if a coup cannot be prevented, it should at least be isolated and treated as an anomaly. This cautious reservation should help establish a principle to fight against the submergence of Democracy which shall be stronger than what we see today in practice.

6. ANALYSIS AND CONCLUSION

The ongoing episode of the recent Military Coup in Myanmar, accompanied by grave human rights violations and a severe transgression of power, has stirred the entire world. Without any substantial reason or existence of any emergency, the proclamation of the military regime seems to be a result of the Military being alarmed by the popularity of the National League for Democracy (NLD).

If not reversed, the coup has definitely stalled the process of democratisation in the country. It is rather ironic how the Military failed to abide by the provisions of the flawed Constitution that they themselves enacted in 2008 and went beyond the scope of the same to exercise a coup merely on the ground of electoral irregularities.

Even though such alleged irregularities seem to be the catalyst for the coup, the occurrence of the whole event does not come as a surprise, given that the Military always kept itself at a higher threshold and had only adopted the 7-step program to Democracy due to extreme international pressure.

[63] Pausewang, S., "A UN Convention to Ward Off Coups d'états? Bulletin of Peace Proposals" 23(1), 67-70. Retrieved on February 8, 2021.

Through the 2008 Constitution, it had given itself a special status by allocating 25% of the seats for the Military in the Parliament and the authority to exercise veto power for any Constitutional Amendment. However, the clear aim of NLD to reduce the influence of the Military over the democratically elected government, their denial of accommodating the grievances of the Military, and overwhelming public support for the party became the major reason for staging such coup.

Although the Military has promised to conduct fresh elections within a year and hand over the governance to the newly elected party, it is evident that it only desires to have such parties in power that accept the Military Supremacy in the country and act as mere puppets to handle the day-to-day administrative matters. By showcasing the extreme power in the form of a coup, the Military has not only attempted to re-establish its authority but has also indicated the boundaries of its tolerance.

As of now, the question about the future of the most-appreciated party of Myanmar, i.e., the National League for Democracy as well as its leaders, is uncertain, and so is the future of the people of Myanmar who have strived for years for their rights and freedom. All these events raise concerns about such usurpation of power in all such countries where Democracy is still at its developing stage.

Therefore, to fight against the Military Juntas, it is of paramount importance that the International Community stands in Solidarity to provide direct support to the citizens of such a country to fight such oppressive, anti-democratic groups. This can be done by strengthening domestic activism by providing broadcasting support through media channels, helping to transform bystanders into active participants of the resistance.

Furthermore, a strong International Standpoint is required to be taken against such military coups that are a threat to life, property, and the fundamental rights of every living being. It is high time that the International Organisations and the United Nations take the responsibility to draft policies and pass a resolution against such nefarious actions of overthrowing Democracy by illegitimate use of power.

A CRITIQUE ON LEGITIMACY AND INHERITANCE RIGHTS OF ILLEGITIMATE CHILDREN UNDER PERSONAL LAWS OF INDIA

KARTIK SOLANKI*

ABSTRACT

Though every single child needs extra care and protection considering their mental and physical susceptibility, some children are more susceptible than others in wake of their socio-economic, cultural and physical conditions. Children conceived to parents whose relationship has no social or legal recognition is one such category of the above-mentioned children who suffer legal discrimination and social reprobation. In India, the laws governing the legal status and inheritance rights of illegitimate children are out rightly discriminatory in nature and on that account, these children have to confront various hardships for no fault of their own. Therefore, it is a dire need of the time to research and demystify upon the legal status and inheritance rights of illegitimate children as enumerated under the Personal Laws of India. This paper is an attempt to throw light upon the horrendous plight of illegitimate children. The author shall reflect the picture of discriminatory and unwarranted laws which are prejudiced against the illegitimate children and would then endorse suggestions regarding various legal reforms which could be taken under the Personal Laws of India to exterminate the hardships as confronted by the illegitimate children.

1. INTRODUCTION

Law is ever-changing and is persistently acclimatizing with the volatile culture of today's society. Antiquated backward-looking laws are recurrently being amended or annulled in an attempt to integrate with the societal consensus and to fill the exigencies of the contemporary social, economic and political scenarios. India, like the rest of the world, is incessantly introducing stellar laws and is reforming the existing legislations with the intention of meeting the yearnings of the Indian Society. In fact, India had just in the year of 2018 decriminalised homosexuality.[1]Moreover, execrable practices such as 'Sati Pratha' and 'Untouchability' were

* Student, Maharashtra National Law University, Nagpur, India.
[1] *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1.

remarkably ubiquitous at a point of time in India but down the lane both of these practices were criminalized.[2]

For many centuries, the throwing of slang; 'bastard', against anyone has been considered as the nastiest insult which could be exerted against a person. How can someone question the legitimacy of a person's birth and his legal recognition on the basis of his/her nature of birth? Children have always been classified as legitimate or illegitimate in both the historical and the contemporary era. The society as well as the legislations subjects the illegitimate off-springs to discrimination by not treating them similarly as the legitimate off-springs. Fortunately, as time passed by, the society found it unwarranted to put onus upon the innocent children for no fault of their own. [3] Moreover, legislations of various countries have also provided the illegitimate children with tantamount rights vis-à-vis the legitimate children. Better late than never, in countries like India, the legislations governing the rights of illegitimate off-springs have been somewhat amended to ameliorate their plight.

However, the pressing plight of the illegitimate off-springs in India has not been assuaged yet as the personal laws of India has not provided them with appropriate legal rights. It is a dire need of the time to research and demystify upon the legal status and inheritance rights of ill-conceived children vis-à-vis their legitimate counterparts under personal laws of India; Hindu, Muslim and Christians personal laws. The author through the present article seeks to throw light upon the aforementioned plight of illegitimate children. Firstly, the author shall critically proffer the notion that the concept of illegitimacy is an illegitimate concept. Secondly, the inadequacy of legal and inheritance rights available to illegitimate off-springs under Personal Laws of India shall be critiqued. Thereafter, the author shall identify the existing lacunas and would then endorse suggestions regarding various legal reforms which could be taken with the Personal Laws of India to eradicate the hardships as confronted by the illegitimate children.

2. ILLEGITIMACY: AN ILLEGITIMATE CONCEPT

In every part of the world, the legal status of a person has a great impact on his/her life. From time immemorial, the legitimate off-springs have always had all the societal and legal privileges while their illegitimate counterparts have just been confronted with discrimination and hardships.

[2] Nehaluddin Ahmad, "Sati Tradition - Widow Burning in India: A Socio- legal Examination", 29(2) *WJCLI* 1-2 (2009); The Constitution of India, 1949, art. 17.

[3] Anonymous, "Property Rights of Illegitimate Children", *Law Community*, available at: https://www.lawcommunity.in/articles/property-rights-of-illegitimate-children (Last Modified on October 20, 2020).

Even in the Hindu religious texts, the illegitimate children who had no fatherly assurance were treated as outlaws.[4]Moreover, intestate succession which was entrenched under the Common Law was wholly based upon the principles of consanguinity and kinship.[5]

To have a better understanding of the concept of illegitimacy, it is imperative to look upon the meaning of the terminology first. The term 'illegitimacy' is derivative of a Latin term 'illegitimus' which literally means "not in accordance with the law".[6] In India, the legitimacy of a child is ascertained majorly by the following components – the parents' matrimonial relationship and its legal stature. Therefore, an illegitimate off-spring is used in reference of an individual who is conceived out of an unlawful marital relationship and who does not share any sort of legal relationship with either of his/her parents.

The author now puts forward two limbs to substantiate the stance that the concept of illegitimacy is an illegitimate concept in context of the Indian society and Indian legislations. The first one being that the illegitimate children unnecessarily bear the brunt of their parents' action for no fault of their own and the second one being that illegitimacy is not a gender-neutral concept.

2.1. The illegitimate Children Unnecessarily Bear the Brunt of Their Parents' Action

When applied to a child, the obscenity of the word 'illegitimate' reaches heights. The simplicity and innocence with which the child sees the world can effortlessly be done away with. Technically, linguistically and legally, 'illegitimate' might be the precise term for an ill-conceived child, but it is indicative of a difference; a difference which is morally degenerate. The lone thing which this optimistic, full of potential and beautiful child knows is that being an illegitimate child is deplorable.[7]A child's optimism can be easily muddled if the society and legislations instead of empowering the child, tells him/her that he/she is an illegitimate child. Therefore, these innocent children should not be obligated to undergo the brunt of their parents' action and must be accredited with equal rights and privileges which are conferred upon their legitimate counterparts.

[4] Jai Shankar Ojha and Gouri Agarwal, "The Right of Inheritance of a Child Under Indian Law: A Critical Study", 6(2) *IJCRT*535 (2018).
[5] Fred Kuhlmann, "Intestate Succession by and from the Adopted Child", 28(4) *WULQ* 221 (1943).
[6] Kusum, "Rights and Status of Illegitimate Children", 40(1/4) *JILI* 297 (1998).
[7] Kitty Holland, "The terror of anyone finding out that I was illegitimate", *The Irish Times*, Feb.10, 2005.

2.2. Illegitimacy is Not a Gender-Neutral Concept

The laws pertaining to illegitimate children in India are dreadfully prejudicial against the mothers as the laws impose unwarranted burden upon the female counterpart. For instance, the legal provisions of guardianship and intestate succession as enumerated under the Hindu Minority and Guardianship Act, 1956 and Hindu Succession Act, 1956 respectively are designed in such a manner that they only seek to vest the complete responsibility of the illegitimate child upon the mother.[8]In similar fashion, with regards to Muslims, the Hanafi school of law considers the ill-conceived off-spring as the child of his/her mother only and the child inherits from the mother and from maternal relative.[9] Such gendered conceptions are a form of sexual orientation discrimination and should be subjected to strong criticism as these conceptions violate the constitutional mandate.

Furthermore, such laws invigorate sexual arrogance and recklessness among men. These laws also signal men that their relationships with illegitimate children are not as valuable as their relationships with their legitimate children, which correspondingly disincentivises paternal involvement with ill-conceived children. [10] Lastly, such laws reflect the picture that it is the immorality from the mother's side which led to the birth of a child outside of a lawful wedlock. Therefore, it goes without saying that such gendered-conceptions are utterly irrational and are accountable for the constant stigmatisation of unwed mothers in the society.[11]

3. LEGAL STATUS OF ILLEGITIMATE CHILDREN UNDER PERSONAL LAWS OF INDIA

The legal status of children in India is ascertained through certain facts besides the most apparent one, that being by birth. A child who is conceived through the continuance of a lawful wedlock or who is conceived within two hundred and eighty days after the dissolution of marital relationship would be considered as a legitimate child, provided that the mother has not married again in the meanwhile.[12] In the present climate, the parentage of a child can be ascertained

[8] Hindu Succession Act, 1956 (Act 30 of 1956), s. 3(1)(j); Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), s. 6(b); See Also Martha Davis, "Male Coverture: Law and the Illegitimate Family", 56 *RLR*76 (2003).
[9] Dinshaw Fardunji Mulla, *Mulla's Principles of Mahomaden Law* § 85 (Lexis Nexis, India, 22nd ed., 2017); Tagore Law Lectures 123 (1873) *cited* by Justice Shankar Prasad Bhargava in *Rahmat Ullah* v. *Maqsood Ahmad*, AIR 1952 All 640.
[10] Serena Mayeri, "Marital Supremacy and the Constitution of the Nonmarital Family", 5 *FSPL* 1345-1347 (2015).
[11] Mary Becker, "The Rights of Unwed Parents: Feminist Approaches", 63(4) *SSR* 500(1989).
[12] Indian Evidence Act, 1872 (Act 1 of 1872), s. 112.

through umpteen scientific methods and the presumption as set forth in section 112 of the IEA, 1872 would be superseded in the event that any scientific tests prove something to the contrary.[13]

It is significant, nevertheless, to note that the aforementioned presumption would be applicable only when the child has been conceived from a lawful wedlock. In the instance, where the marital relationship itself suffers from a legit flaw, the presumption would be rescinded and the provisions regarding legitimating of children as enumerated under the Personal Laws of India would apply.[14]The author in the following part of the article would deliberate upon the legal status of ill-conceived children under personal laws of India, specifically the Hindu, Muslim and Christian Laws.

3.1. Legal Status of Illegitimate Children under Hindu Law

The legal status of an individual under Hindu personal Law is mostly dependent upon the legitimacy of the marital relationship of his/her parents under the Hindu Marriage Act, 1955. Before buckling down to the deliberation, it is important to note that the provisions of the HMA, 1955are applicable only upon a person whose religion is Hindu, Sikh, Jain or Buddhist.[15] Now, progressing towards the deliberation, a marriage under Hindu Law is considered lawful only when the provisions as enumerated under sections 5 and 7 of the Act are satisfied[16] and children begotten out of such marital relationships are regarded as legitimate. If the conditions of the aforementioned sections of the act are not satisfied then the marriage could be rendered as void or voidable depending upon the circumstances of the case[17] and the children conceived out of such marital relationships would be regarded as illegitimate. Furthermore, children begotten out of an illicit relationship; where no marriage has taken place, are also considered as illegitimate. Fortunately, section 16 of the act comes in for rescue for the illegitimate off-springs who are conceived out void or voidable marriages.[18]

Formerly, when the act was enacted in the year of 1955, the children conceived out of void or voidable marriages were regarded as legitimate upon fulfillment of the condition that a degree of

[13] *Nandlal Wasudev Badwaik* v. *Lata Nandlal Badwaik*, (2014) 2 SCC 576; See also, Mukund Sarda "Legitimacy of Children and DNA Tests: A Study", 23(3) *IOSR-JHSS* 36 (2018).
[14] Kusum, *supra* note 6 at 299.
[15] Hindu Marriage Act 1955 (Act 25 of 1955), s. 2(1)(b).
[16] Hindu Marriage Act 1955(Act 25 of 1955), ss. 5, 7.
[17] Hindu Marriage Act 1955(Act 25 of 1955), ss. 11, 12.
[18] Hindu Marriage Act 1955 (Act 25 of 1955), s. 16.

nullity had been obtained against their parents' marriage.[19] This provision had been criticised in various judgments,[20] as the provision appeared inconsistent with the legislature's intent; which was obviously not to declare the children as illegitimate if a decree of nullity had not been obtained against the void or voidable marriage. [21] Fortunately, the issue was taken into consideration by the Law commission of India and by keeping in mind the notions of social welfare and to fill up the lacunae, the Law Commission sent recommendations for amendment of the act[22] and consequently, the act was amended in the year of 1976.The amendment act of 1976 brought significant social reforms such as recognising the legal and inheritance rights of the illegitimate off-springs.[23]

Following the amendment of 1976, every child begotten out of void or voidable marriage was considered as a legitimate off-spring in the similar fashion as if he/she had been conceived out of a valid marriage. The amendment of 1976 gave a quantum leap to the illegitimate children as it gave a new lease of life to such enfeebled children and also protected them from prejudice and discrimination.[24]However, it is significant to take notice of the fact that section 16 of the HMA, 1955 applies only upon those illegitimate children who are begotten out of void or voidable marital relationships and legitimacy is not conferred upon the ill-conceived children who are begotten out of any other relationship. Thus, it can be set forth that the illegitimate children are treated with compassion as well as bigotry under the Hindu law.

Fortunately, however, with regards to the children conceived out of live-in relationships, the Hon'ble Apex Court in *Tulsa* v. *Durghatiya* held that "*Where the partners lived together for long spell as husband and wife there would be presumption in favour of wedlock. The presumption was rebuttable, but a heavy burden lies on the person who seeks to deprive the relationship of legal origin to prove that no marriage took place. Law leans in favour of legitimacy and frowns upon bastardy.*"[25] Thus, inference can be drawn from the above judgment that – if a couple has been living together for a substantial stretch of time and the society also recognises them as a married couple then the child conceived out of such a relationship would be regarded as

[19] Hindu Marriage Act 1955, s. 16 (pre-amendment); B.M Gandhi, *Family Law Vol. 1* 369-371 (Eastern Book Company, Lucknow, 2nd ed., 2019).
[20] *Gouri Ammal* v. *Tulsi Ammal*, AIR 1962 Mad 510; *Thirumathi Ramayammal* v. *Thirumathi Mathummal*, AIR 1974 Mad 321.
[21] *Ibid.*
[22] Law Commission of India, 59th Report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954, 1974.
[23] Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976).
[24] *Parayankandiyal Kanapravan Kalliani Amma* v. *K. Devi*, (1996) 4 SCC 76.
[25] (2008) 4 SCC 520; See also, *Badri Prasad* v. *Deputy Director of Consolidation*, (1978) 3 SCC 527; *S.P.S Balasubramanyam* v. *Suruttayan*, 1992 Supp (2) SCC 304.

legitimate. It is pertinent to note that the relationship must not be a walk-in and walk-out relationship.[26] Notwithstanding the fact that the Apex Court of India has on many occasions sought to safeguard the legal rights of illegitimate children who are not conceived out of void of voidable marriage, yet the protection has not been granted to illegitimate children begotten out of such relationships.[27]

3.2. Legal Status of Illegitimate Children under Muslim Law

The legitimacy of an individual under Muslim Law is determined in like manner as the Hindu Law i.e., on the basis of the nature of relationship or marriage from which the individual was conceived. Muslim Law identifies three types of marital-relationships, these three types are; i) sahih (valid), ii) fasid (irregular) iii) batil (void).[28] Valid marriages are those marriages which are contracted between two Muslims by entering into an arrangement through offer and acceptance and where the groom has bequeathed dower upon the wife.[29] Next, irregular marriage are those marriages in which only a partial condition of a valid marriage has been violated and such marriages are treated as voidable.[30] The irregular marriage becomes valid upon the removal of the irregularity. Lastly, void marriages are those marriages which have been made in succession of a void agreement. Any marriage which is prohibited for the reason of fosterage, consanguinity, or affinity is void.[31]

The children conceived out of valid or irregular wedlock are regarded as legitimate under the Muslim Law, whereas the children conceived out of void wedlock are considered as ill-conceived and are not dispensed with any sort of inheritance, guardianship or maintenance rights.[32] The court had in the case of *Habibur Rahman* v. *Altaf Ali* observed that under the Mahomedan Law, a child would be considered as legitimate only if he/she is the off-spring of a man and his wife or his slave. Any other off-spring would be considered as the off-spring of Zina (illicit relationship) and would be deemed as nullius filius; an illegitimate child.[33]

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[26] *Madan Mohan Singh* v. *Rajni* Kant, AIR 2010 SC 631.
[27] Dr. Vijendra Kumar, "Live-In Relationship: Impact on Marriage and Family Institutions", 4 *SCC* J-31 (2012).
[28] Mulla, *supra* note 9 at § 339.
[29] Mulla Dinshaw Fardunji, *Mulla's Principles of Mahomedan Law* 340 (Lexis Nexis, India, 21st ed., 2017).
[30] *Ata Muhammad Chaudhry* v. *Musammat Saiqul Bibi*, 7 Ind Cas 820.
[31] Mulla, *supra* note 29 at 349; *Chand Patel* v. *Bismillah Begum*, (2008) 4 SCC 774; See also, *Adam* v. *Mohammad*, (1990) 1 KLT 705; *Tanjela Bibi* v. *Bajrul Sheikh*, 1986 Cri. L.R. (Cal.) 222.
[32] *Mohd. Salim* v. *Shamsudeen*, (2019) 4 SCC 130.
[33] (1921) 23 BOMLR 636;Syed Khalid Rashid, *Muslim Law* 97-99 (Eastern Book Company, Lucknow, 6th ed., 2020).

The term 'wife' as enumerated in the above deliberation denotes a female who has become the wife of a Muslim Man through a marriage and the marriage may be constituted without any marital ceremonies. Further, in the absence of any direct proof signifying the validity of a marriage and the legitimacy of a child, then an indirect proof which can establish the existence of marriage or legitimacy of the child could suffice.[34] Indirect proof which could authenticate the legitimacy of a child includes; a) Acknowledgement of paternity and b) Acknowledgment by a Muslim man that a particular woman is his wife and it is pertinent to take notice of the requisite that both of these proofs should subsist concomitantly.[35] The acknowledgment of paternity by a man of his child should just not be of son-ship, but rather it should impart that the particular child is his true-blue off-spring.[36]

To further demonstrate upon the concept of acknowledgement –an acknowledgement of paternity is sort of a legal evidence called as Iqrar-e-Nasab.[37] The Privy Council had in *Sadik Hussain* v. *Hashim Ali* observed that Iqrar-e-Nasab by the father is presumed to be authentic except in cases wherein the female counterpart can stipulate as to why the child is of ill-conceived drop[38]or can demonstrate as to why the child is the offspring of Zina.[39] Therefore, it can be proclaimed that, only the children conceived out of valid or irregular marriages can be subjected to affirmation alone and there is no process through which the legal status of legitimacy can be conferred upon an child conceived out of void or illicit relationships under Muslim Law.[40]

3.3. Legal Status of Illegitimate Children under Christian Law

In a manner akin to Hindu Law, the Christian Marriage Act, 1872 and the Indian Divorce Act, 1869 lay down various circumstances on the existence of which a marriage shall be declared as void or voidable under the Christian Law.[41] It is pertinent to take notice of the fact that – while the HMA, 1955 is altruistic enough to endow the status of legitimacy upon the off-springs

[34] *Mohd. Allahdad Khan* v. *Mohd. Ismail Khan*, 1888 SCC OnLine All 40.
[35]Gandhi, *supra* note 19 at 375-376; Khalid, *supra* note 33 at 100-105; See also, Faisal Kutty, "Islamic Law and Adoptions", *VULS-LSRPS*24-29 (2014).
[36] *Abdool Razack* v. *AGA Mohomed Jaffer*, 1894 UKPC 17; *Roshnabhai* v. *Suleman*, AIR 1944 Bom 213.
[37] Vaishali Bahubalendra, "Acknowledgement of paternity under Muslim Law", *Into Legal World*, available at:https://www.intolegalworld.com/article?title=acknowledgement-of-paternity-under-muslim-law-iqrar-e-nasab (Last Modified Aug. 24, 2020); See also, *Pathima Sultan Ammal* v. *S. Hamed Oil*, (1998) 2 MLJ 19.
[38] 1916 AIR PC 27.
[39] *Supra* note 34.
[40] *Supra* note 33.
[41] Indian Christian Marriage Act, 1872 (Act 15 of 1872), ss. 4, 26, 52, 60; Indian Divorce Act, 1869 (Act 4 of 1869), ss. 18, 19.

conceived out of void or voidable marriages, [42] the IDA, 1869 follows a highly restrictive approach.

Under Christian law as originally enacted, and any amendment to which has not been made hitherto, only those children are regarded as legitimate who are begotten out of void or voidable marriages which had been later annulled; (a) on the ground of bigamy contracted in good-faith where both the spouses had utter belief that the former spouse is dead at the time of the marriage or (b) on the ground of insanity.[43] Therefore, it is important to note that children conceived out of a void or voidable marriage which had been annulled on any other ground as mentioned under section 19 of the act would not be regarded as legitimate.[44]

The author fails to understand the justification embodied under the afore-stated provision for conferring such sort of partial legitimacy upon the illegitimate children.[45] Why should children begotten out of a marriage which is within the prohibited degrees be subjected to discrimination and prejudice and so as the children begotten out a marriage where the spouse is impotent? Such discrimination is novel to Christians living in India and is clearly an irrational and unfair provision.[46] In addition to that, a child begotten out of an illicit relationship, where no marriage exists, is not even covered in the act and does not enjoy any status. Therefore, the discrimination under Christian Law is obvious both in practice and in law.

4. INHERITANCE RIGHTS OF ILLEGITIMATE CHILDREN UNDER PERSONAL LAWS OF INDIA

Everyone is acquainted with the fact that our country comprises of people belonging to different cultural, social and religious groups, and these communities or groups have their individual personal laws which govern the matters pertaining to marriage, divorce, judicial separation, succession, adoption, guardianship and maintenance. As the article is oriented towards the inheritance/succession rights of ill-conceived children, the author would reflect upon the same only. The inheritance/succession rights of children under the personal laws of India are substantially dependent upon the legitimacy of the children[47] and the clear disparity between the

[42] Hindu Marriage Act 1955 (Act 25 of 1955), s. 16.
[43] Indian Divorce Act, 1869 (Act 4 of 1869), s. 21; Sumeet Malik, *Family Law Manual* 95 (Eastern Book Company, Lucknow, 2nd ed., 2015).
[44] Gandhi, *supra* note 19 at 381-382.
[45] Kusum, "The Indian Divorce (Amendment) Act 2001: A Critique", 42(4) *JILI* 556-557 (2001).
[46] Kusum, *supra* note 6 at 301.
[47] Divya Singh, "Live-In Relationship- Legitimacy of Children and their Inheritance Rights", 10 *PA* 1 (2020).

inheritance/succession rights of legitimate and illegitimate off-springs is outrightly identical under all the personal laws of India.

In addition to that, the inheritance rights which are vested upon the illegitimate children vary from one personal law to another.[48]For instance, an illegitimate child under Hindu Law is placed with wider inheritance rights as opposed to the Muslim Law. The primary reason behind such varying rights of inheritance under personal laws is the absence of any secular or neutral legislation to address it. Whereas, ambiguity with regards to maintenance of illegitimate off-springs never comes into picture, because a neutral and secular legislation has been provided for it. [49] The author in the following part of the article would place emphasis upon the inheritance/succession rights of ill-conceived children enumerated under the Personal Laws of India.

4.1. Inheritance Rights of Illegitimate Children under Hindu Law

In the past, the illegitimate off-springs under Hindu Law were not provided with any sort of inheritance rights and were regarded as outlaws. Fortunately, however, after the codification of personal laws of Hindus, the ill-conceived children were granted with certain inheritance rights and the notion that the property could not devolve beyond kinship was exterminated.[50]In addition to that, the judiciary has also been striving to expand the domain of inheritance rights of ill-conceived children. For lucid understanding of the concept, the author has divided the present section into three parts– the first part would lay emphasis upon the inheritance/succession rights of illegitimate off-springs begotten out of void or voidable marriages, the next part would highlight the inheritance rights of illegitimate off-springs who are not begotten out of a marital wedlock and the last part would enunciate upon the succession rights of illegitimate off-springs, begotten out of void or voidable marriages, who have consequently converted themselves into another religion.

4.1.1. Inheritance Rights of Illegitimate Children Born out of Void or Voidable Marriages

The major leap in inheritance rights of illegitimate children came through the 1976's amendment act.[51] The key purpose of the aforementioned amendment was to sweep away the stigma attached

[48] Archana Mishra, "Bridging the gap between the Juvenile Justice Act 2000 and Christian Personal Law – Inheritance Rights of Adopted and Illegitimate Children in India", 29 *AJF*44 (2015).
[49] The Code of Civil Procedure, 1908 (Act 5 of 1908), s. 125.
[50] Basant Kumar Sharma, *Hindu Law* 154 (Central Law Publication, Allahabad, 2nd ed., 2008).
[51] *Supra* note 23.

to the illegitimate off-springs who were begotten out of void or voidable marriages. Subsequent to the amendment, children conceived out void or voidable marriages were regarded as legitimate, irrespective of the annulment of marriage. Furthermore, the amendment also granted the illegitimate children with the right of inheritance against parents' self-procured properties;[52]the meaning of the word 'property' as embodied under section 16 has been kept broad-ranging.[53]

The issue concerning the domain of inheritance rights of illegitimate off-springs against the parents' property was for the first-time at length was discussed in *Jinia Keotin v. Kumar Sitaram*.[54] The core question of law in the forenamed case was that whether the term property as enumerated under section 16 of the HMA, 1956 includes the parents' ancestral property. The court clearly held that, on account of the explicit mandate of the provision, there is no space for providing the ill-conceived children with inheritance right against the parents' ancestral property. In case the court grants the illegitimate off-springs with such inheritance rights, then it would outrightly violate the provision of the statute and it would count as an attempt on behalf of the Judiciary to legislate under the pretense of interpretation of the statute.[55] Similar view had also been taken in several other cases by the Apex Court of India[56] and the court by constricting section 16's interpretation limited the ambit of the statute. Fortunately, however, the similar court subsequently in the case of *Revanasiddappa v. Mallikarjun* [57] rendered the earlier judgements as terribly narrow with proper justification.

The Apex court in Revanasiddappa's case observed that the ill-conceived children begotten out of such relationships are innocent and they should not be made to suffer the brunt of their parents' actions and as such they should be entitled to all sorts of inheritance rights against the parents' self-acquired properties as well as the parents' ancestral properties. The court reasoned that as the constitutional values embedded in our constitution's preamble emphasizes upon the notion of individual dignity and equality of status, the birth of an illegitimate child should be regarded individually of the parents' marital relationship. The judges also placed reliance upon articles 39(f) and 300A of the Constitution which furnish provisions regarding protection of

[52] Hindu Marriage Act, 1955 (Act 25 of 1955), s. 16(3); *Rameshwari Devi* v. *State of Bihar*,(2000) 2 SCC 431; *G. Srinivas* v. *G. Ramalingam*, (2002) 2 APLJ 495 (HC); *Bhogadi Kannababu* v. *Vuggina Pydamma*, (2006) 5 SCC 532; *Maruti Rau Mane* v. *Shrikant Maruti Mane*, (2007) 3 Mah LJ 813.
[53] *Revanasiddappa v. Mallikarjun*, (2011) 11 SCC 1.
[54] (2003) 1 SCC 730.
[55] *Ibid*; R.C Nagpal, *Modern Hindu Law* 138-139 (Eastern Book Company, Lucknow, 2nd ed., 2008).
[56] *Shantaram Tukaram Patil* v. *Dagubai Tukaram Patil*, 1987 SCC OnLine Bom 9; *Neelamma* v.Sarojamma, 2006 SCC 9 612; *Bharatha Matha* v. *R. Vijaya* Renganathan, 2010 AIR SC 2685.
[57] *Supra* note 53.

children and right to property, respectively. [58] The court finally opined that when there is dissolution of the parents' ancestral properties, the properties which fall in the parents' share is considered as their absolute and self-procured property and for this reason, it is tremendously unfair and unwarranted to not devolve the share of such properties upon the children. However, the off-springs begotten out of void or voidable marriages cannot on their seek partition in the property, only the property which falls into their parents' share can be sought. The judgment of *Revanasiddappa v. Mallikarjun* has not as such overruled the earlier judgments[59] because these judgments have been delivered by benches of similar strength i.e., a two-judges' bench only. Fortunately, consequently, with the object of removing the ambiguity and to award the illegitimate children with equal inheritance rights vis-à-vis their legitimate counterpart, the judges had asked Hon'ble Chief Justice S.H Kapadia for posting the case before a larger bench – the civil appeal of which had been accepted on 18th June, 2016 and the case is pending still before the Apex Court of India.[60]

Therefore, in light of above discussion, it could be adduced that the off-springs conceived out of void or voidable marriages can lay a claim to seek share in the parents' self-acquired properties. However, ambiguity still revolves around the issue of devolution of ancestral property upon such children as the civil appeal is yet pending before the Apex Court of India.

4.1.2. Inheritance Rights of Illegitimate Children who are not begotten out of a Marital Relationship

As already discussed in preceding part of the paper – section 16 of the Hindu Marriage act, 1955 would be applicable only in situations wherein the children have been begotten out of a marital relationship. Children begotten out of any other illicit relationship, where marriage has not taken place, cannot seek any relief under the afore-mentioned provision.[61]

Children conceived out of such illicit relationships are governed by section 3(1)(j) of the Hindu Succession Act, 1956. The above-mentioned provision enumerates that, "*Provided that illegitimate children shall be deemed to be related to their mothers and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word*

[58] The Constitution of India, 1949, arts. 39(f), 300A.
[59] *Supra* note 56.
[60] *Revanasiddappa* v. *Mallikarjun* Civil Appeal no. 2844/2011.
[61] *Babulal* v.Natthibai, AIR 2013 MP 134;*Rasala Surya Prakasarao* v. *Rasala Venkateswararao*,AIR 1992 Ap 234; Kusum, *supra* note 6 at 301.

expressing relationship or denoting a relative shall be construed accordingly."[62] Therefore, it can be easily deduced from the afore-mentioned provision that a child begotten out of illicit relationships where marriage has not taken place, would have inheritance rights over the properties of his/her mother and over his/her ill-conceived brother/sister and vice versa. [63] Furthermore, the illegitimate child would have no rights whatsoever upon the properties of their fathers and vice versa.[64]

4.1.3. Inheritance Rights of Illegitimate Children who have subsequently converted into Another Religion

The Supreme Court of India has adequately addressed the inheritance rights of ill-conceived children begotten out of void or voidable marriages who have consequently converted themselves into another religion. The Apex court in *Balchand Jairamdas Lalwant v. Nazneen Khalid Qureshi*[65] had by relying on a judgement of the Gujarat High Court[66]pronounced that a child cannot be excluded from enjoying inheritance rights regardless of his conversion into another religion. The court reasoned that the Hindu Succession Act, 1956 is applicable upon the illegitimate off-springs both of whose parents are Hindus, Sikhs, Jains, or Buddhists by religion[67] and that section 26 of the HSA, 1956 only disentitles the inheritance rights of descendants of such convert and not of the convert himself.[68] A person's right to seek succession is not by choice but rather by birth and conversion from Hinduism to another religion is a matter of choice and it cannot disentitle the illegitimate convert himself from enjoying inheritance rights over his/her parents' property.

4.2. Inheritance Rights of Illegitimate Children under Muslim Law

Under classical Muslim law as well as under modern Islamic jurisdictions, only those children who are conceived out of a valid or irregular marriage are granted with inheritance rights and a child who is born out a void marriage is not provided with any inheritance rights over the

[62] Hindu Succession Act, 1956 (Act 30 of 1956), s. 3(1)(j); *See also* Hindu Succession Act, 1956 (Act 30 of 1956), s. 14.
[63] *Rama* v. *Appa,* AIR 1969 Bom 205.
[64] *Daddo Atmaram Patil* v. *Raghunath Atmaram Patil,* AIR 1979 Bom 176.
[65] (2018) 2 MHLJ 804; See also, *Asoke Naidu* v. *Raymond Stanislans Mulu*, (1976) CHN 226.
[66] *Nasimbanu Firozkhan Pathan* v. *Patel Shantaben Bhikhabhai*, 2017 SCC ONLINE GUJ 1271.
[67] Hindu Succession Act, 1956 (Act 30 of 1956), s. 2.
[68] Hindu Succession Act, 1956 (Act 30 of 1956),s. 26; *Subramaniyan* v. *Vijayarani*, (2001) 3 CTC 73.

father's property[69] and is treated as nullius filius. Thus, it can be put forth that the status of legitimacy of a child under Muslim law has a cosmic impact on his/her life.

Under the Shia school of Muslim Law, an ill-conceived child is not granted with inheritance rights against either of the parent's property.[70]Fortunately, however, the Hanafi school of law follows this pre-conceived notion that the illegitimate children are for some purposes, such as for nourishment and feeding, related to the mother and on that account, an ill-conceived child is granted with inheritance rights against the property of his/her mother and over the property of relatives with whom the child is correlated through the mother under the Hanafi School of Muslim Law.[71]Furthermore, under the Hanafi school of law reciprocal rights of succession exist between the ill-conceived child and his/her mother and his/her maternal relatives.[72]

To put it succinctly, an ill-conceived child under the Muslim Personal Laws does not have any inheritance rights whatsoever upon the property of his/her parents except under the Hanafi school of Muslim law which grants the ill-conceived child with inheritance rights over the property of his/her mother and his/her maternal relatives.

4.3. Inheritance Rights of Illegitimate Children under Christian Law

The provisions which govern the inheritance rights of Christians living or domiciled in India are enumerated under the ISA, 1925 (henceforth referred to as 'the act' for the purpose of section 4.3). Ergo, the subsequent deliberation upon the succession rights of illegitimate off-springs under Christian Law would be premised upon the provisions of the above-stated act only.

As already emphasized above, only those children are regarded as legitimate who are conceived out of a marriage which had been later annulled; (a) on the ground of bigamy contracted in good-faith where both the spouses had utter belief that the former spouse is dead at the time of the marriage or (b) on the ground of insanity? [73] As the act is based upon the principles of consanguinity and affinity, illegitimate children are not conferred with inheritance rights under the act. Only illegitimate children begotten out of the above-mentioned relationships would be granted with inheritance rights as they are regarded as legitimate children, whereas children begotten out of any other illicit relationship or any marital relationship which had been annulled

[69] *Pavitri* v. *Katheesumma*, AIR 1959 Ker 319.
[70] Mulla, *supra* note 9 at § 114; B.M Gandhi, *Family Law Vol. 2* 149 (Eastern Book Company, Lucknow, 1st ed., 2013).
[71] Khalid, *supra* note 33 at 243; Mulla, *supra* note 9.
[72] *Ibid.*
[73] *Supra* note 43.

on any other grounds as enumerated under section 19 of the IDA, 1869 would not be regarded as legitimate off-springs and, hence, would not be granted with any sort of inheritance rights.

The illegitimate children are excluded in cases of intestate section by virtue of Section 32 of the act which clearly provides that, "*The property of an intestate devolves upon the wife or husband, or upon those who are of the kindred of the deceased, in the order and according to the rules hereinafter contained in this Chapter"*[74] and the term 'kindered' for the purpose of above-stated section is used only in reference of persons who have descended from common ancestor.[75] Over and above that, the act overtly excludes the illegitimate children from inheriting their parents' property by providing that until and unless it had been otherwise stated in the will, the words child would only denote a legitimate relative. [76] Furthermore, section 109 of the act clearly provides that when a bequest has been made and the legatee passes away before the death of the testator then such bequest would be conferred upon the lineal descendent of the legatee,[77] and the illegitimate children are not regarded as lineal descendent.[78]

Fortunately, however, the Indian Judiciary has at times tried to invigorate the inheritance rights of illegitimate off-springs under the Christian Law. The High Court of Kerala in *Jane Antony* v. *V.M. Siyath* propounded it is utterly preposterous to not confer inheritance rights upon the illegitimate children and the illegitimate children should not be subjected to discrimination for the follies of their parents. Even the Hindu Law grants inheritance rights to the illegitimate children conceived out of all forms of void or voidable marriages without any stipulations. The court, therefore, laid an appeal before the government of India to enact a neutral and secular legislation which would confer inheritance rights upon the children regardless of their legitimacy or their religion.[79]Therefore, in a nutshell, illegitimate off-springs are not conferred with any sort of inheritance rights over their parents' property under the Christian Law. Only illegitimate off-springs who have been conferred with the status of legitimacy by virtue of section 21 of the IDA, 1869 can claim inheritance in their parents' property.

[74] Indian Succession Act, 1925 (Act 39 of 1925), s32.
[75] Indian Succession Act, 1925 (Act 39 of 1925), s 24.
[76] Indian Succession Act, 1925 (Act 39 of 1925), section 100; *Emma Agnes Smith v. Thomas Massey*, (1906) 8 BOMLR 322 reaffirmed in *Re: Sarah Ezra v. Unknown* AIR 1931 Cal 560.
[77] Indian Succession Act, 1925 (Act 39 of 1925), s. 109.
[78] *Raja Jagdish Chandra Deo Dhabal Deb* v. *Rai Pada Dhal*, AIR 1941 Pat. 458.
[79] 2008 (4) KLT 1002.

5. IDENTIFYING THE LACUNAE UNDER PERSONAL LAWS AND ENDORSING POSSIBLE LEGAL REFORMS

From the above deliberations, an inference can be easily drawn regarding the discriminatory nature of Personal Laws with regards to the legal status and succession rights of ill-conceived children in India. Furthermore, even the society puts onus upon the already burdened children by being spiteful and oblivious towards them. Despite national and international conventions imposing obligations upon the parents, society and the government to protect the illegitimate children by all means, the illegitimate children are still being subjected to enormous emotional, social and legal discrimination. The author in the following part of the discussion would at first emphasize upon the lacunae existing in the Personal Laws of India – specifically the Hindu, Muslim and Christian Laws – and would then endorse possible legal reforms to eradicate the lacunas.

Starting off with the Hindu Law – under Hindu Law, only ill-conceived children begotten out of void or voidable marriages are conferred with the status of legitimacy and inheritance rights over their parents' self-procured properties but legitimacy and inheritance rights are not conferred whatsoever upon the children who have been conceived to parents who share no sort of marital relationship between them. Such children are entitled to claim share only in their mothers' self-acquired properties. As a result, in the absence of any financial assistance to unwedded mothers, the mothers are left with no other alternative apart from abandoning the children. These children are then remanded to some social organisation or orphanage homes where these children could be adopted by any person and, consequently, the probability of exploitation and abuse of such children are terribly high.

Is such form of discrimination not absolutely unwarranted? Why should these innocent children be made to suffer for the follies of their parents? It is time that the legal provisions of these acts with regards to illegitimate children be taken into consideration. There are two limbs of proposed legal reforms which could be made under the Hindu Law. First, section 16 of the HMA, 1955 should be amended so as to include the illegitimate children born to parents who share no marital relationship between them, and secondly, the word 'property' as enumerated under section 16 of the act should be made to include both the self-procured as well as the ancestral properties of the parents.

Progressing towards the Christian and Muslim personal laws – Both of these personal laws out rightly discriminate against the illegitimate off-springs by not recognising them in toto. Under Christian Law, only children begotten out of valid marriages or certain stipulated types of annulled void marriages are granted with the status of legitimacy and inheritance rights. It is difficult to understand the justification embodied under the ISA, 1956 for conferring partial legitimacy upon the illegitimate children. Likewise, under Muslim Law, children begotten out of valid or irregular marriage are considered as legitimate and are consequently conferred with inheritance rights. Whereas, children begotten out of void marriages or any other illicit relationship are not given any recognition and consequently are not conferred with inheritance rights. The lacuna as existing under the Christian Law can be exterminated by amending section 21 of the IDA, 1869 with the intention of extending its ambit. Section 21 of the IDA, 1869 should be made to confer legitimacy upon all the illegitimate children regardless of his/her parents' relationship or the ground of annulment of marriage. Lastly, as Muslim Law has no codified law to which legal reforms can be made, it would be beneficial for illegitimate children of Muslim origin as well as illegitimate children of other religions, if a neutral or secular legislation in a manner akin to section 125 of CrPC, 1908 could be introduced with regards to the legitimacy and inheritance rights of illegitimate children. The neutral legislation would grant the illegitimate children with inheritance rights in equal capacity as their legitimate counterparts against the parents' self-procured as well as ancestral properties.

Furthermore, legal reforms are desperately needed in those provisions which dreadfully prejudice against the mothers by entirely putting the onus of illegitimate children upon the mother. Such laws reflect the picture that it is the immorality from the mother's side which led to the birth of a child outside of a lawful wedlock whereas both of the parents are equally for the birth of their illegitimate child. Such laws should be struck down as they are violative of the constitutional mandate. The possible legal reforms as enumerated in the above discussion would go a long way in ensuring the rights of illegitimate children and would elevate the illegitimate children from a disadvantageous position by giving them recognition in the society.

6. CONCLUSION

Though our society has been sprouting in nature, yet we are being governed by the archaic and outdated legislations. Denying the illegitimate children with legitimacy and inheritance rights has

been causing economic and social deprivations.[80]The succession of parents' properties upon the children can provide them with venture capital for more economic productivity, independent future and livelihood. However, excluding the children from inheriting their parents' properties can intensify the already existing vulnerability to poverty and to cross-generational dissemination of poverty. A radical overhaul of personal laws is direly needed so that the unwarranted stigmatisation of illegitimate children can be defeated. Many adults would be deterred from indulging into illicit sexual relationships by the fear of getting saddled with the responsibilities of such illegitimate children. Moreover, we as a part of the society really need to adopt a liberal and rational approach towards the illegitimate children by treating them at par with the legitimate children because it is outrightly unfair to put onus upon them for no fault of their own. Every child possesses a right to love and to be loved, and to grow up in an atmosphere of love, moral and material security.

[80] *Supra* note 48.

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ANALYSING VALIDITY OF SECTION 64 OF THE CODE OF CRIMINAL PROCEDURE, 1973 IN UPHOLDING EQUALITY: CONNEXION OF HISTORICAL JURISPRUDENCE AND CONSTITUTION

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ABSTRACT

Section 64 of the Criminal Procedure Code 1973 has been one of the most debated sections among Indian legal diaspora. The main reason for it is being in conflict with the Part III of the Indian Constitution, especially right to equality. Another aspect to ponder upon is the jurisprudence of equality with respect to acknowledgement of summons. This research aims to find out the nuances related to Section 64 of CRPC and as to how Section 64 of the Code in violation of any Fundamental Right of women, particularly under Articles 14, 15 and 21, in any way, whatsoever. The paper will further evaluate the role of judiciary in dealing with cases related to Section 64 of the code. A part of this research being non – doctrinal, the research shall analyse the facets related to public opinion on the topic. The empirical data consisted of 219 random samples (116 adult males + 103 adult females) that helped us to analyse the research question taking into consideration both the public as well as judicial perspective. Authors also try to analyse the contemporary trends within the facets of this paper. The findings of this research shall pave way for further research as to bringing reasonable amendments in changing times.

1. HISTORICAL EVOLUTION

The world has always been patriarchal in nature. Women have been considered to be the docile class of the human species, whereas men have always been considered to be the more active and the more dominant class. It is true that although the scriptures (if we are to limit ourselves to only Hinduism) provide a vibrant discussion about very strong women characters involved. The epics, the *Puranas*, the folklores, etc., all talk about very strong and independent women, who

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although lived in the recesses of their palaces, yet played the masterminds or the main determiners of the stories.[1]

For example, if we look at *Sita*, *prima facie* she may seem to be a very passive and obedient woman. But, in reality, she is a very strong character of the epic *Ramayana*. When her husband had asked her to stay back in the castle, she refused to do so and against her husband's will, go to the forest with him. She also did not let *Raavan*, the demon king who had abducted her, scathe her character's fidelity. She was the one who had even chosen to give up her life finally, by asking her mother, the Earth Goddess, to open up her bosom and take her in forever.[2]

The *Mahabharata* has even stronger women characters and feminists. It is really interesting to note about *Draupadi*, who is a very demanding and dominant wife. She is not evil but is very well aware of her rights which are to be exercised. In this epic poem, we come across a woman with five husbands; a queen with never-ending desires for power for her sons; single mothers; a woman who turned into a man just to avenge the ruin that had been caused to her life by a man; scheming women, noblewomen, powerful warrior princesses and also, polite and passive characters. This epic truly celebrates womanhood in all its aspects.[3]

There is an interesting anecdote in the epic, whereby all the *Pandavas* along with *Krishna* went up to a mountain close by to *Kurukshetra*, atop of which rested the head of *Barbarik* (*Khatu Shyam*) and asked him of the details of the war that had ensued. He simply said that he saw *Vishnu* (*Krishna*) yielding his discus over sinful kings and the Goddess *Kali* drinking the blood of all the corpses.[4]

In *Durga Saptashati* [5] , we may find that the poem is nothing but a tribute to women empowerment and feminism. Firstly, when Goddess *Kaal Ratri* lures the two auras *Madhu* and *Kaitabh* so that *Vishnu* can kill them; secondly, when Goddess *Durga* (*Mahalakshmi*) vanquishes the evil forces of *Mahishasur* and the *asura* king himself; and thirdly, when Goddess *Saraswati*

[1] Apama Thomas, Gender Consciousness, Patriarchy And The Indian Women's Movement, Western Michigan University, Master's Thesis (12 – 1996), available at https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=5120&context=masters_theses (May 11, 2021, 11:40 PM).

[2] Balankandm, The Ramayana, *Deva Press Calcutta* (1891), Vol 1. available at http://www.vivekananda.net/PDFBooks/The_Ramayana.pdf. (23rd May 2021 08:40 PM).

[3] D. Naomizara, GENDER DISCRIMINATION: A STUDY ON THE MAHABHARATA, ICRJIFR (2016), Vol. VII (III), ISSN: (P) 0976-5247, (e) 2395-7239, available at http://anubooks.com/wp-content/uploads/2017/01/N-3-2016-7.pdf. (May 13, 2021, 02:12 PM).

[4] Arun Kumar Ray Chaudhuri, A Psycho-Analytic Study Of The Hindu Mother Goddess (KALI) Concept, *The Johns Hopkins University Press*, Vol. 13 (2) (SUMMER 1956), pp. 123-146, available at https://www.jstor.org/stable/26301373. (May 13, 2021, 03:07 PM).

[5] Surya Rashmi Rawat, Traits Of Transformational Leader: Durga-Shaptshati Case Study, *Purushart*a Vol. 9 (2) (September 2016), DOI: 10.21844/pajmes.v9i2.6937. (May 16 2021, 07:16 PM).

and all the other Goddesses, in an extremely violent and powerfully expressive manner, killed *Shumbh*, *Nishumbh* and their evil demon soldiers, commanders, etc. It is even interesting to note that in the story, there is a part where the Goddess *Kali* says to the two *asuras*, *Chanda* and *Munda*, that, 'You don't like me in this form, because I am raw and unkempt. You are attracted to me only when I am the passive and loving *Gauri*, not the wild and dominating *Kali*, but you two fools forget that I am the same.'

This very line may be said to be the basis of misogynistic objectivism. As we may see, the same woman, when behaving "as per one's wishes" is 'longed for' and treated politely. But the moment she tries to exercise her will, her rights, her own choices, she is even threatened to be killed. However, the women are so powerful, that if threatened unnecessarily, they wield the power to destroy the whole society.[6]

Having a thorough discussion about the scriptures, we may see that Hinduism is about liberal federalism. Not equality federalism. Women are not discriminated against, but they for sure are treated as a different class and men are treated as a different class. It may sound a bit discriminatory, but we may use the following example to illustrate further the concept which has been envisaged here. Suppose we go to an airport to board a plane. If we notice properly, then at the security check post, the women are checked within a covered chamber. Not the men. Although both are being checked thoroughly for illicit items that they might be carrying, the procedure involved is a bit different. In a similar manner, women, as per the scriptures, are not being discriminated against, but merely different 'procedures' are being applied to them. A very good example of this would be the practice of leaving the women alone in separate rooms while they are menstruating. This practice later on transformed into a misogynistic tradition, but in reality, it was meant for the betterment of the woman menstruating. During the menstrual cycle, as the woman was losing much blood from her body causing a severe loss to her immunity and also that it could happen anytime and anywhere, it was considered that for the wellbeing of the woman, she was kept in a separate room, away from all the household chores (as she would be weakened by the blood flow) and also to prevent any embarrassment (in case the blood flow happens while she is at a gathering in the home, or the like).

[6] Dawn M. Szymanski, Lauren B. Moffitt, and Erika R. Carr, Sexual Objectification Of Women: Advances to Theory And Research, *Major Section on Sexual Objectification of Women, The Counseling Psychologist*, SAGE 39(1), pp. 6–38, DOI: 10.1177/0011000010378402 http://tcp.sagepub.com. (20th May 2021, 04:38 PM).

Thus, we may see that although treated differently, the women were kept on a different pedestal, at the same level as that of men. It may be stated as two classes in a school, 'A' and 'B'. Both are the same essentially, both are provided with the same question papers and the same teachers.

However, when the discerning and discriminatory glances of the society kick in, Section 'A', by default of it being before Section 'B', as per the English alphabet, is considered to be 'superior' to Section 'B'. Just like this discrimination has no reasonable ground whatsoever, similarly, the discrimination as has been envisaged in the women under Section 64 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") has no ground whatsoever.

This research, as mentioned earlier, is going to deal with the Constitutional validity of the Section of the Code, and see how far it violates the rights of women. It is a sorry statement to say that *prima facie* the Section has been blatantly in violation of the Fundamental Rights of the women.[7] It is however interesting to note that the same has not been struck down yet as being unconstitutional. We shall thoroughly have a look into the same. The most interesting part of this study would be to, through a survey, analyse the opinion of the public with regards to the Constitutional validity of this Section and whether it violates the Right to Equality (Arts. 14 and 15) and Right to Life (Art. 21) of the women.

2. MAJOR HISTORICAL LITERATURES THAT DEVELOPED THE CONCEPT

1. The ***Ramayana*** had been referred to analyze the status of Sita concerning making her choices in life. It is found that Sita is a very strong character, who made very strong choices in her life, from going to the forest alongside her husband, to giving up, despite being requested not to. Thus, this shows that making bold choices and exercising one's rights has not been new to Indian womanhood.[8]
2. The ***Mahabharata*** had been referred to find out the authority of making decisions by the various women characters involved. The Mahabharata is filled with a plethora of dominant, bold and conscientiously independent women. Draupadi in an air of domination, orders her husbands to avenge her public disrobing. *Amba* turns into a man who just avenges her ill fate

[7] *G. Kavitha v. Union of India*, W.P. (MD) No. 2949 of 200 Decided On, 29 July 2006, High Court of Madras at Madurai (India).
[8] Sanika Kulkarni, A Study of Retellings In Indian Mythology With Special Reference to Sita: A Book By Devdutt Pattaniak, *IJCRT* Vol.8 (7) (July 2020), available at https://www.ijcrt.org/papers/IJCRT2007072.pdf. (20 May 2021, 05:30 PM).

caused due to *Bhishma*. *Gandhari* is always trying to make her 100 sons better than anyone and *Kunti* is a diplomat and *Chitrangada* is a warrior princess.[9]

3. The ***Durga Saptashati*** provides various feministic stories about women. The choice made by the Goddess to single-handedly killing *Mahishasur* to save all the Gods; the choice made by her to drink the blood of *Raktabeej*, whose blood transformed into another demon; the choice made by Kaal Ratri to display herself naked to lure Madhu and Kaitabha, to enable Vishnu to kill them, all these reflect the independence, womanhood and feminism celebrated in Hinduism.[10]

3. UNDERSTANDING THE CONCEPT WITHIN SECTION 64 OF CODE

Before delving into understanding the Section in details, it is pertinent to establish a bit of a background with regards to the same. Section 64 is in the Chapter of the Code, which deals with processes to compel the appearance of a person. Thus, it may be seen that at this stage, the Court has started its functioning. The summons may be either to inquire or to maybe call a witness, or the likes.[11] The Code for Civil Procedure 1908 (amended) in 2002 also gives provisions for summons via electronic means.[12] The principle that supports the jurisprudence, first mentioned in the Fifth Amendment to the United States Constitution, that states that no one may be compelled to testify against him in any criminal proceeding (Self Incrimination: based on the principle, *"nemo tenetur prodere or nemo tenetur scripsum accusare"* which means that an accused cannot be compelled/ forced to testify against himself).[13] The same principle was incorporated into the Constitution of India under Article 20(3), but with a few different words. Article 20 (3) states that "no person accused of a crime may be compelled to testify against himself".[14]

Summons, when compared to a warrant, is a relatively milder way of compelling a person to mark his appearance before a Court. It is simply an order saying that, 'You have to be present here on this day'. However, the warrant is a rather stronger and more violent way, in which the

[9] Id. at 4.
[10] Id. at 5.

[11] Arya Bile & Mustafa Bohra, Procedure for Issuance of Summons in India, 26 July 2020, available at https://www.lawyered.in/legal -disrupt/articles/procedure-issuance-summons-india/. (20 May 2021, 06:15 PM).

[12] *See* Rule 9 and 9A under CPC, 1908 (Amendment, 2002). *Also see* **Central Electricity Regulatory Commission Vs National Hydroelectric Power Corpn. Ltd. & Ors, 2010 (10) SCC 280 (India).**
[13] Chiesa, Luis E., "Beyond Torture: The Nemo Tenetur Principle in Borderline Cases" (2009), *Pace Law Faculty Publications. 642*. https://digitalcommons.pace.edu/lawfaculty/642. (20th May 2021, 06:55 PM).
[14] ***M.P. Sharma v. Satish Chandra,*** 1954 AIR 300, 1954 SCR 1077**, Also see *Shyamlal Mohan Choksi v. State of Gujrat,*** [1965] 2 SCR 457**.**

person is forcefully brought before the Court.[15] Further issue of summons is also different from merely making an order to issue one.[16]

Normally, a summons is issued in cases in which the maximum punishment is less than two years.[17] It does not mean that summons cannot be issued in cases whose punishment is more than two years (warrant-cases), but normally, it does not happen.[18]

Now that we have gained a bit of background regarding the same, we may further our discussion in detail. The Section may be seen as an alternative method to deliver the summons when the person to whom it is likely to be delivered is not to be found. Section 62 of the Code deals with the delivery system in regard to the summons to the entitled person, however, when the person is not to be found, then the next alternative is Section 64 (or 63, as the case may be). As per the Section, it has been mentioned clearly that in the event of the unavailability of the person upon whom the summons is to be served, the officer who has come to deliver the same, 'may' deliver it to another adult male member of the family who resides with the person summoned. The keyword to be noted here is 'may'. It shows that it is not a compulsion on the adult male member to receive the summons. He may refuse to receive the same, after which the procedure, as is going to be discussed later, is to be followed.

The rest of the Section talks about the procedure while administering such a 'constructed' delivery of the summons. It says that the adult male member who receives the same may be required to sign a receipt at the back of a duplicate copy. The explanation to this Section says that a servant is not a member of the family.

Now, the question arises that in case the delivery is not able to be done under this Section as well, due to the unavailability or refusal to receive on the part of the adult male member, then what shall be done. For a situation chose in 1967 by Jammu and Kashmir High Court, it was held that under 5 Rule 15 [of the Code of Civil Procedure] administration of request on grown-up male part isn't prejudicial against ladies and is allowed by Article 15(3).[19] With effect from 1/10/1967, Kerala (Lakshadweep Islands) precluded the word "male" in the said Rule of the Code of Common Procedure, consequently making the arrangement sexually impartial unique guideline epitomized in the Code of Civil Procedure, 1908, preceding 1976 revision, didn't perceive administration on any grown-up female individual from the respondent's family ((1897)

[15] *See* Section(s) 61 – 69, 91 of CRPC, 1973. *Also see* Sections(s) 71, 93 – 97, 106 of CRPC, 1973.
[16] *State vs Driver Mohmed Valli and Ors.*, (1961) 2 GLR 222.
[17] See definition of summons-case, Section 2(w), Code of Criminal Procedure, 1973.
[18] See Section 204(1) (b), Code of Criminal Procedure, 1973.
[19] AIR 1967 J&K 120 (127). *See also* Id. at 10.

21 Bom 223 (226) (DB)).[20] It is completely clear from the over that, as respects the Code of Civil Procedure as all things considered, administration of request was initially confined to grown-up male individuals from the respondent's family. It was uniquely through the 1976 alteration that the words "or female" were added. Such a change is presently long late in criminal law.[21]

The final way to serve the summons has been envisaged in Section 65. Section 65 says that in case a summons is unable to be served as per Sections 62, 63 or 64, as the case may be, then the same can be affixed at a conspicuous place of the dwelling of the person summoned.[22] Apart from these, the other sections of CRPC in regard to summons and powers of magistrate have played a major role in understanding the concept. Further, in light of the equivocalness in the degree of request u/s 202 CrPC, it has been held a few times that to get fulfilment before issuance of the cycle, Officer can go the length to bring anybody.[23]

Thus, these were in brief, the various details and a short background with regards to the Section as well as the allied nuances. Let us now move on to understand whether the Section violates any of the Fundamental Rights of the women.

4. IS SECTION 64 CAPRICIOUS OF THE PART III OF SUPREME LAW?

The phrase ‘adult male member’ is the source of all the controversies. However, with regards to the Constitutional validity, very interestingly, there are three schools of thought with regards to this Section. We shall discuss all of them thoroughly.

Article 14 of the Constitution guarantees us the Right to Equality before the law. It says that all persons are to be treated equally before the law and also, everyone should be entitled to the equal protection of the laws.[24] The main debate starts from this point. The Section says that an adult male member may be served the summons on behalf of the person who is summoned. The absence of the phrase ‘or female’ has generated quite a few questions in the minds of the people. There is no reasonable basis upon which the females have not been included within the Section. For a classification to be valid, the same needs to be reasonable and not arbitrary.[25] But, *prima*

[20] Chhaya Tyagi, *Does ‘He’ Include ‘She’? Some Thoughts on Section 64 of CrPC, Economic & Political Weekly*, Vol. 52 (10) (March 11 2017).
[21] Id. at 10.
[22] Id. at 17.
[23] Harsh Tikoo, A new dimension of Sec. – 91 of CrPC: In light of Sec. - 202 of CrPC, *Manupatra*, available at http://docs.manupatra.in/newsline/articles/Upload/801EACAE-B3E0-4F2D-A768-B2FF3B65E3C4.pdf, (May 12 2021, 8:00 PM).
[24] *See* Article 14, 15 and 16 of Constitution of India, 1950.
[25] *K. Thimmappa V. Chairman, Central Board of Directors, S.B.I.*, A.I.R. 2001 SC 467.

facie, people do not find any reasonability in this classification made by the Legislature. Hence, this is one question to be answered.

Adding on, Article 15 of the Constitution, talks about discrimination based on various attributes, including the sex of the person. Just because the women have not been authorised to receive the summons on behalf of the person summoned (can be a female too), it is felt that discrimination has been created based on the sex of the person. Thus, this is the second question to be answered with regards to the Section.

The third substantial question of law is that it violates the right to life of the women, by denying them their dignity. People feel that by disallowing the women the authority to receive a summons on the behalf of their relative, their position in society has been reduced when compared to that of men.

Now that the questions of law with regards to the Section to be answered have been understood, we may proceed to analyse the three schools of thoughts developed by us about the same.

4.1. First School

The first school of thought is the most common school, where it said that the Section violates all the above-mentioned Rights. It is pertinent to understand how.

Firstly, when talking about the Right to Equality before the law, it must be understood that by denying women the authority to receive the summons on behalf of their relative, they are not being provided with equal status as that of men. The law has to treat everyone equally. It can't deny one the right to do something and provide the same to another without any proper justification. Women too are competent and sensible enough as that of men thus can receive the summons very well on behalf of the person upon whom it was to be served.

Interesting is the fact to note that the adult 'male member' may be delivered the summons. Thus, although there is no compulsion on the male member to receive it, we may see that the women have been blatantly disregarded to be included within the authority to receive the same.

In continuance of the above argument, we may see that discrimination based on sex has been created. The women, without any reasonable argument whatsoever, have been scathed as they have been denied their right to receive the summons only on the fact that they don't possess a 'Y' chromosome. Thus, it may be observed that the Section has violated this Right as well.

The final argument with regard to the Right to Life under Article 21 is based on consideration. Let us consider a small example to explain the same. Suppose a woman's husband, son or brother or as the case may be, has committed a crime. He is not at home when the officer who has been entrusted in this regard to deliver the summons comes to her place. She is saying that she can receive the summons, but the Officer who has come tells her in an outright manner, that she is not entitled to receive the same 'because she is a woman'. Only an adult male member can be delivered the same. At that moment, all the women who have accumulated there to witness what is happening, are, indirectly, humiliated by this statement of the officer. The woman who is the relative of the summoned is extremely frustrated as she is not entitled to officially receive this document, under her womanhood. This clearly shows that the dignity of the woman as a person is reduced, where she is unable to stand at par with her male counterparts. Moreover, it may be noted that the Right to Speedy Trial[26] is also being infringed; hence it is infringing the same in that way too.

Thus, this is what the first school says about the Constitutional validity of the Section. Thus, we may conclude by saying that as per the first school, the Section violates Articles 14, 15 and 21.

4.2. Second School

The 2nd school of thought, as per our conceptual development, says that the Section 'may seem to be unconstitutional', but in reality, considering the practical aspects of the situation, is very much required.

India has always been a patriarchal society. Misogyny and male dominance have had a long history in the context of Indian culture. In this setting, the practice of '*purdah*' or the existence of '*purdah nashi*' women is vital to be noted. For ages immemorial, the women in India have practised the system of purdah. In this system, the women are supposed to cover their face at all times and in certain traditions, their whole body has to be covered. They are not allowed to meet or look at any other male member other than their husband. Thus, we may see that these women were not at all allowed to talk to the men who came from outside.[27]

It is interesting to note that this practice is still prevalent in India. We contend that considering the prevalence of such traditions in the nation and also the fact that normally women are not educated or informed enough to understand the consequences of the things happening even

[26] *Hussainara Khatoon & Ors vs Home Secretary, State of Bihar*, 1979 AIR 1369.
[27] *See the concept of* Purdah Nashi at *Section 2* of the Mahommed Marriage and Divorce Registration, 1876 (Rep. by Act LII of 1974): *"Parda-nishin" means a woman who, according to the custom of the country, might reasonably object to appear in a public office.*

though they are not *purdah nashi* and also the fact that the women may be subjected to torture by the men in case they receive the same on their behalf (as the men summoned may want them to refuse to receive the same), it is better to keep the women out of this hustle. We also deduce through this school that the person who receives the summons is sometimes called to the Court. In such a situation, for most of the women, it will be a very problematic situation, because even though they are not *purdah nashi* or reserved in their movements, still many of them are practising homemakers, which may cause them much trouble. Thus, as per him, the classification is valid and reasonable.[28]

We also believe that striking down the Section may not be the only way out. There has to be another way out for the same, where the interests of all are secured and a balance is struck.

4.3. Third School

The third school of thought is propounded by a different tangent. Altogether it has gone upon a different tangent with regards to this Section. Although one agrees about the reason to propound the Section, we say that the very clause stating that an adult male member 'maybe' served a summons is not right.

Our point, if simply put, is that the summons must be either delivered to the person who has been summoned, or affixed as per Section 65. There should be no other way out for the same. The adult male member has been unnecessarily authorised to receive it. It must be understood that the person who is summoned, apart from him, no other person should be entrusted with the liability for the same. Because, once the male member receives it, a psychological trauma begins within his mind as to whether he has done the right thing, or not. Even otherwise, the person who is summoned, in case he wanted the person to refuse it but he didn't, then it may lead to unrest in the family relations.[29] We also believe that the person who receives the summons, sometimes he is supposed to come and appear before the Courts; hence it causes extra trouble to him.

Then, to put it in one line, it feels that there should be no provision to receive the summons by anyone, other than the person summoned. In case he is not to be found, then the same has to be delivered as per Section 65.[30]

[28] Dr. M Khali; FB Azimi, Purdha System Followed By Women In Anchient Times and Modern Word, *JMSH* Vol. 5 (7) (2014), pp. 203 – 2011. ***Also see*** *Suratunnessa Bibi v. Md. Naimuddin Mandal (1966) 18 DLR 37 (India).*
[29] Id at 9.
[30] *Arjun Panditrao Khotkar vs Kailash Kushanrao Gorantyal*, 2020 (7) SCC 1.

Now that we have thoroughly analysed the three schools of thought with regards to the Constitutional validity of the Section, it cannot be said that we cannot arrive at a particular conclusion after listening to all the arguments. All of them appear to be very strong. Hence, we have no other option left with us but to see what has been the response of the Courts in this regard.

5. THE TALE OF TWO LANDMARK JUDGEMENTS

5.1. G. Kavitha v. Union of India[31]

This is a very interesting case to be noted when we are discussing Section 64. In this particular case, a woman rights' activist had challenged the Constitutional validity because it was against Articles 14, 15 and 16 of the Constitution. The main argument raised by the petitioner was that on one hand, this Section denied the right to receive the summons to a woman on behalf of the summoned, but on the other hand, Order V, Rule 15 of the Civil Procedure Code allowed the summons to be received by an adult woman. The main argument given by the respondent in this regard was that although the Section did not expressly use the term 'female', the explanation to the same excluded only a servant from being considered to be a member of the family. Thus, no impediment had been imposed upon the women to receive the same.

The Court, on the other hand, held that *prima facie*, the Section excluded women from receiving a summons in case of a criminal proceeding. However, the Court also held that the same could not be struck down because this issue involved was of a greater consequence and although the Court was not going to avoid the plight of the women, before coming to a decision, the same had to be discussed in details with all the representatives of the various women in the country. The Court also observed that the anomaly in the present case was an insubstantial one, hence could be overlooked, but still, whether it was unsubstantial or not, that had to be ascertained after having a thorough discussion with regards to the same. Hence, the Court, by saying this, very diplomatically dismissed the writ petition.

5.2. Rajiv Pandey and Anr. v. Union of Indian and Anr.[32]

In 2020, two students of the National University of Study and Research in Law (N.U.S.R.L.), Ranchi, challenged the Constitutional validity of the Section, before the Jharkhand High Court. They too contended more or less the same points as we have already analysed in our first school.

[31] Writ Petition (MD) No. 2949 of 2004, Madurai Bench of Madras High Court.
[32] W.P. (PIL) NO. 636 of 2020, Jharkhand High Court.

Thus, we may see that the status of ascertaining the Constitutional validity of the Section has not been quite successful as to date only the High Courts have been approached in this regard. It is sorry to note that such a vital question of Constitutional validity remains unanswered. Hence, one can only apprehend that in the future, the validity of the same shall be determined someday. The petitioners could directly approach the Hon'ble Supreme Court in this regard, as the Apex is the best place to discuss the validity of something applicable to the whole of India.

6. PEOPLE'S PERSPECTIVE: STANDING THE TEST OF LAW

To better understand the views and opinions of the general public on the Constitutional validity of Section 64 of the Code, a survey[33] was conducted that consisted of 219 adult samples (103 Females + 116 Males) the following questions:

1. What is your gender?
2. Do you think that Section 64 of the Code of Criminal Procedure, 1973, by denying the women the right to receive a summons in the absence of a male member in the home, violates their Right to Equality?
3. Do you think that Section 64 of the Code of Criminal Procedure, 1973, by denying the women the right to receive a summons in the absence of a male member in the home, violates their right to life?
4. Please specify one reason for both the answers.
5. Are you willing to challenge its Constitutional validity?

In total, 219 respondents (all engaged with the legal sector in some way) took the survey. The survey shall help us understand in better the psychology of people within the society. It would further highlight as to what amendments are needed or is there any need to change the law. The sampling of the survey was random within the people who had at least working knowledge of laws. Further the survey was conducted through Google Forms as well as electronic medium, i.e. through emails, social messaging, telephonic conversation, etc.

The data was received and analysed to further include it as part of this research. The highlights of the primary data are as follows:

[33] Note: *A questionnaire was prepared based on research and to take into account the public opinion. Further, the survey was unbiased in nature and was conducted in an un-influential surrounding without any remediated. The questions were asked in the same form it was designed without changing its meaning while language was changed in some cases. Consent was also taken frompeople to make their responses as part of this research.*

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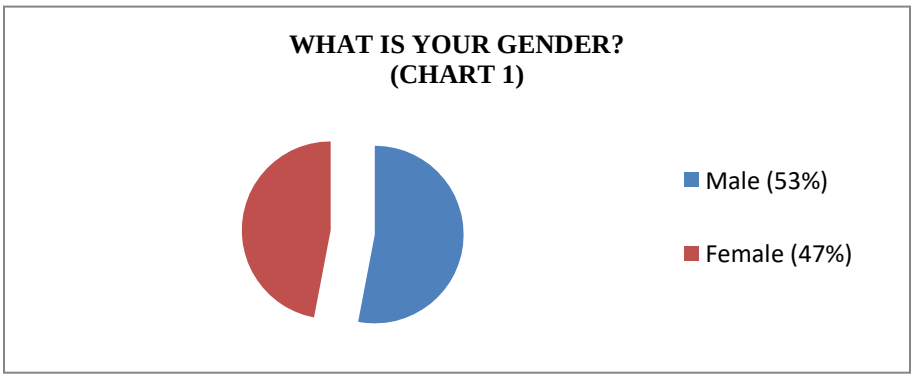
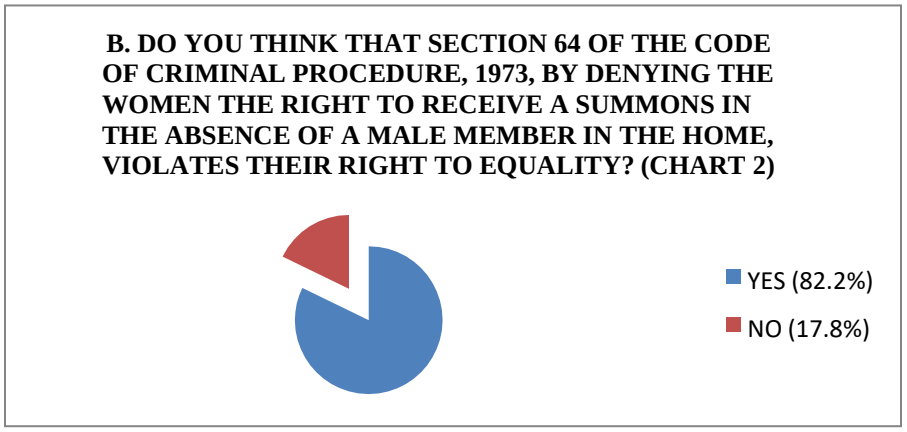
A. WHAT IS YOUR GENDER?



The stats represent the gender distribution of the respondents and it can be observed that 53% (116) of the respondents are male whereas 47% (103) of the respondents are female.

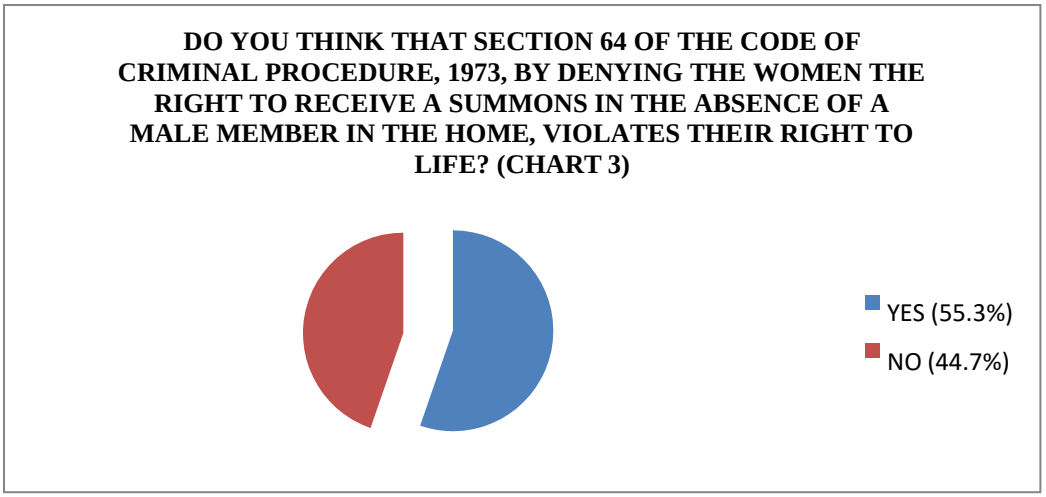
B. DO YOU THINK THAT SECTION 64 OF THE CODE OF CRIMINAL PROCEDURE, 1973, BY DENYING THE WOMEN THE RIGHT TO RECEIVE A SUMMONS IN THE ABSENCE OF A MALE MEMBER IN THE HOME, VIOLATES THEIR RIGHT TO EQUALITY?



The findings represents the thoughts of the respondents in regards to whether Section 64 of the Code, by denying the women the right to receive a summons in the absence of a male member in the home, violates their Right to Equality or not. It can be observed that 82.2% (180) of the respondents have voted 'yes' whereas 17.8% (39) of the respondents have voted 'no'.

Inference- It can be inferred that the majority of the survey population believes that Section 64 of the Code does infringe the Right to Equality of women. Whereas, the rest are of the opinion that it does not. Thus, the majority belongs to the first school with regards to the Constitutional validity of the Section, whereas the rest belong to the 2nd school.

C. DO YOU THINK THAT SECTION 64 OF THE CODE OF CRIMINAL PROCEDURE, 1973, BY DENYING THE WOMEN THE RIGHT TO RECEIVE A SUMMONS IN THE ABSENCE OF A MALE MEMBER IN THE HOME, VIOLATES THEIR RIGHT TO LIFE?



We found that 55.3% (121) of the respondents believe that Section 64 of the Code violates the Right to Life of women whereas 44.7% (98) of the respondents do not agree with the same.

Inference- For the third question, the researcher observed a very interesting response. It can be seen that unlike in the previous question, where the majority of the survey population felt that the Section infringed the Right to Equality of women, hence the same had to be declared to be unconstitutional, for the aspect of it infringing the right to life of the women, it was found out that almost half of the population considered the same not to violate the right to life. However, in this case too, just like the previous question, the majority lied with the answer that it did infringe the right to life. It can be thus interpreted that many people feel that although it is arbitrary and unequal to deny the women the right to receive the summons, the same does not belittle their dignity.

D. PLEASE SPECIFY ONE REASON FOR BOTH THE ANSWERS.

For the fourth question, the various reasons that were received can be clubbed into two groups. The first group said that denying the right to receive the summons was discriminatory; hence the same was liable to be struck down. However, the other group summarily said that the same was not discriminatory as the women have other jobs at home; hence they should not be bothered, as well as the point of the purdah system was made here.

Note: It is pertinent to mention here that only 47 people answered this question as (39 of them where legal practitioners) it was not a mandatory one.

E. ARE YOU WILLING TO CHALLENGE ITS CONSTITUTIONAL VALIDITY?

58% (127) of the respondents are willing to challenge the Constitutional validity of Section 64 of the Code whereas 42% (92) of the respondents said they would rather not.

Inference- The answer to this question was a little astonishing. As can be seen, a major number of people were unwilling to challenge its Constitutional validity. Although still, in this case as well, the majority of the population was ready to challenge the validity, still it was observed that many people were not ready to do the same. Probable reasons for the same may be linked to-

1. Inability or unavailability of resources on the part of the survey population.
2. Scare of being bothered by the Government by going against it.
3. Exhausted by the lengthy, time-consuming procedures of the Courts.
4. Not being affected by this anomaly.

This may be seen as the main reason why the Section has still not been decided upon by the Supreme Court of India. As we may see, the majority of the population is approaching the High Courts and the High Courts are saying that as the Section is concerned with the whole nation, they need to know the perspectives of all the women concerned through their representatives.

Thus, the pendency of this is a substantial question of law.

7. FINDINGS AND ANALYSIS

The examination of the previous section shows that a meeting must be served on the adult male individual of the family and prohibits bringing the female part if the called individual cannot be found. through the rule of accepting the call for particular sexual abuse, the essential standards of the fundamental right to justice under Articles 14 and 15 of the Constitution that a common law

can be met for both men and women without separation, while Article 64 of the Code of Criminal Procedure has a detrimental sexual orientation in which only the adult individual of the family can be taken if the named individual cannot be found. In an established society, segregation cannot be defended for any reason.

Further, the findings of this research study through survey and analysing the data with the contemporary scenario helped us to understand that;

1. *Prima facie*, Section 64 of the Code appears to be unconstitutional and in violation of Rights to Life, against Discrimination and Life of the women.
2. However, considering the social conditions of the nation, it can be said that the provision needs to be amended, rather than struck down.
3. The unwillingness of the people to challenge the validity has been a major impediment in determining this substantial question of law.
4. Also, the fact that the High Courts and not the Supreme Court was approached to deal with the same, has caused undue delay and disappointment in answering the same.
5. The High Courts, too, diplomatically, have tried to avoid answering this question, as they feel that as the question involves the whole nation, *'in-depth analysis and research must be done by the Legislature in this regard and the perspectives of the representatives of various women sections have to be taken'*.

Considering the survey for this research and analysing its outcomes, we can say that more than 70% people, who are aware about the many facets of section 64 of CRPC (specially lawyers), are ready to challenge the aforementioned section of the code. Further, more than 50%, as per CHART 3 / QUESTION 3 of the survey believe that denying women the right to receive summon while male member is absent, in a way, promotes inequality within the society. It is pertinent to mention that since the gender ratio was almost balanced within this survey (9:10), and as per CHART 2 / QUESTION 2 of the survey 82.2% believed that *"Women should be allowed to receive summons even during absence of male members",* it is quite evident that the majority of society believes that the law has some loopholes that needs to be addressed. As a deduction, providing equality with respect to women while receiving summon was a very evident result that our data suggested.

Therefore, the term "man" within code is skewed. But on the contrary, the court held that if the provider of the summons also notified the lady of the residence, it is also legal. Therefore, in court records, there can be no defense in any sense to argue that summons X was served by a

lady. Adding on, in fact, no one worries about this matter. Because of this provision, a big variety of women representation are nonetheless denied a consultant repute representation the eyes of the regulation that corresponds to that in their male colleagues. Furthermore, it isn't an insignificant interest, the mere oppression influences society's belief of the function of girls, and her self-photo on this regard has historically best been increased to encompass her own circle of relative's representation. Police, politics, etc. have been reserved for men. When a lady offers with a police officer, gets a courtroom docket order addressed to her relatives, and offers recognition, she is likewise pronouncing her repute with inside the own circle of relatives as a person able to managing gender critics.

8. EXPECTATIONS FROM JUDICIARY AND RECOMMENDATIONS

The courts have much to analyse with changing times when electronic summons are taking place.[34] Even when the servant is not considered a member of family whereby living with them 24x7, it becomes important for the judicial system to analyse as to how such self-created hurdles should be addressed.[35]After considering all the necessary arguments, available case laws, legal theories, survey data and the like, it can be concluded that Section 64 of the Code cannot be blatantly struck on the grounds of being unconstitutional.

1. The Hon'ble Supreme Court should *suo motu* decide the nuances with respect to Section 64 once and for all.
2. The Section may be amended simply to remove the unconstitutionality. The suggested amendment may contain the following two things:
   i. Add the phrase 'or in case no adult male member is available, then the adult female member' after the phrase 'adult male member'.
   ii. Add a proviso to the Section, saying, 'In case a woman, due to her inability to receive the same by her being *purdah nashi* or bound by any other family, cultural or religious tradition, is unable to receive the same or is unwilling to receive the same, then the same shall be delivered as per Section 65.
3. In case the Legislature makes an Amendment to remove the unconstitutionality, then that is fine.

[34] *See* https://www.nationalheraldindia.com/national/in-a-first-supreme-court-allows-service-of-summons-by-whatsapp-email-fax. (12 May 2021, 14:12 PM).
[35] *See* Explanation, Section 64 of CRPC.

4. The women representatives from across the country should meet together and aid the Legislature in ascertaining the problems with regards to the Section, to remove the same accurately.
5. The suggested Amendment supra may be made, to give immediate relief.

9. CONCLUSION

Judgements have played a major role in understanding the nature, scope and validity of section 64 of CRPC. The language of statues is anyways complicated and the judgments *viz-a-viz* mode of interpretation has made aspects somehow against speedy trials. For example; it is quite understood that a servant living inside the house day and night is in touch with is employer, and thus the news regarding delivery of summon can reach him easily. But, the courts in India have taken a different notion to be basic concept. In *Hemendra Nath Chowdhury v. Sm. Archana Chowdhury*[36], the court held that proper efforts should be shown to justify service under section 64 of Crpc and further in case of *Rama Chandra Mishra v. State of Orissa*[37] the court held that the temporary absence of the designated person at home is not enough to justify the notification under Article 64 of the CrPC. The court further ruled that the offer made to male members was not sufficient to achieve the meaning of Article 64 of the Criminal Law. Article 64 of the Code does not provide for a subpoena to be issued to the defendant by mail, although testimony is allowed.

This research study has thoroughly examined the Constitutional validity of Section 64 of the Code and understood the three major schools of thought about the same. The stances taken by the various High Courts in this regard as to whether the Section is unconstitutional or not has been analysed. Above all, a survey was conducted to ascertain how the legal fraternity reacted to the same. Section 64 of the Code of Criminal Procedure 1973, which deals with the serving of summons when the person concerned cannot be found, speaks of leaving the summons with "some adult male member of his family residing with him." This provision is violative of Articles 14, 15 and 21 of the Constitution and the word "male" being unconstitutional, deserves to be struck down.

Thus, with all confidence, it can be concluded that the Section's validity is yet to be determined; questions are yet to be settled. We may only apprehend that the same happens soon. We need to understand that the argument that 'he' includes 'she' may or may not apply to this problem, the

[36] 1970 SCC OnLine Cal 94; AIR 1971 Cal 244; 1971 Cri LJ 817.
[37] 1995 (4) Crimes 54 (56) (Ori).

reason being as for some people, it may mean that expressly saying 'adult male member' means that the women are excluded. This would mean a shift from a protection-based approach to a participatory approach, from atypical status to full legal status. The others will say that the explanation only excludes the servants from being considered family members, not women, hence the same does not apply to women, and thus women are too entitled to receive the summons on the behalf of their relative who has been summoned. Well, only a thorough judicial proceeding can answer this conundrum and only then, a balance would be struck.

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JAMMU AND KASHMIR REORGANISATION ACT, 2019: THE ROAD PATH FOR GOOD GOVERNANCE

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ABSTRACT

The common saying that Rome is not built in a day finds apt application in the events that led to an amendment in Article 370 and bifurcation of erstwhile J & K State into two independent union territories. The inequities prevailed since last seven decades, both within as well as in comparison to the rest of India, have been attempted to be rectified with the aforesaid amendment and subsequent reorganisation by way of J & K Reorganization Act, 2019. Three successive generations of J & K State have witnessed misrule by various regimes where corruption, nepotism and favouritism had been the order of the day. There had been least accountability and transparency leading to the State occupying infamously the place of being most corrupt state of the country. The performance of transparency and accountability watchdogs in the State is not a secret affair, and how they were made toothless tiger tell another story of deep-rooted conspiracy of powerful elites to loot the central grants that are otherwise meant for common populace. There is hardly any detection and investigation into political corruption in the last seven decades. In development sector also, it lagged behind notwithstanding getting more central aids and grants than rest of other Indian States. Even past experiences revealed unequal growth within the State. Some of the regions of the State remained altogether missing from the development trajectory, leading to disappointment amongst masses of being second class citizens. Such structural exploitation created large scale anomalies and restricted equitable growth within the State. It further endorses the hypothesis of positive correlation between conflict, corruption and chaos in J&K especially after 1990. This inability of the State to govern, in contrast to rule, enfeebles their ability to ensure human security but strengths inhumane governance in the region. So, with the vision to ensure good governance, the J & K Reorganisation Act, 2019 while dismantling certain insidious barriers in the existing scheme of

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things on the one hand allowed certain welfare legislation to be made applicable in the newly carved Union Territories of J & K, and Ladakh.

1. INTRODUCTION

The main aim of J & K Reorganisation Act, 2019 is to rectify age old ambiguities in terms of existence of parallel legal framework within the same nation, and most notably non application of certain welfare legislations that had not been made applicable by those who want to keep their pot boiling at the altar of common populace.

"You want India to defend Kashmir, feed its people, and give Kashmiris equal rights all over India. But you want to deny India and Indians all rights in Kashmir. I am a Law Minister of India, I cannot be a party to such a betrayal of national interests" These are the golden and priceless words of Dr. B.R. Ambedkar, the chief architect of Indian Constitution, who was surprised to hear the unreasonable proposal that no Indian would be allowed to settle in Jammu and Kashmir nor be allowed to buy any property there or apply for any job there under the garb of protecting identity of people from Jammu and Kashmir. He also opposed Article 370 as he knew that it would be detrimental to our country's national interests and separate flag, separate Constitution, separate citizenship, separate law would only encourage more secession and separatism and that is what has happened in last 72 years. But to the utmost surprise until recently no elected government had the capacity to scrap what was against our national interests and openly endorsed Pakistan's claim over Jammu and Kashmir which alone explains why under Article 35A of Constitution, if a woman from Jammu and Kashmir married a men from rest of India, she would lose all her legal rights to own house among others nor would the men gain any rights. It is after a long and gruelling wait of more than 72 years that Jammu and Kashmir now stands completely integrated with India. Article 370 and Article 35A were nothing but the worst betrayal of the very concept of India which recognized all religions and all states as equals. The whole process of reorganisation aims to establish a vigorous working democracy which respects the rule of law, a free press, energetic civil society organizations and effective and independent public bodies such as the Commission for Human Rights, Anti - Corruption Bureau, Public Service Commissions, and Commissions meant for the protection of vulnerable sections [1] of the society. The establishment and strengthening of such commissions (if already in place) is important not only to ensure the

[1] Commission for the protection of Women, Children, Backward Classes, Minorities etc.

promotion and protection of human rights, but also guarantees both transparency and accountability on the part of the government.

Since it is difficult to discuss all the central acts made applicable by J & K Reorganisation Act, 2019, in view of paucity of time and resource constraints on the part of researchers, a brief overview and consequent analysis of some acts purposively selected for the aforesaid purpose has been discussed under this article.

2. J&K REORGANISATION ACT AND GOOD GOVERNANCE: AN ANALYSIS

The rampant corruption, misgovernance, regionalism and endorsing certain laws/provisions operating harsh on certain vulnerable groups at the hands of those who are hailing from specific region and having particular political affiliations makes a fit case for the Parliament to intervene and put an end to the unjustified situation to perpetuate forever. It is important to note that the challenges to federalism will always come from the unwillingness of dominant groups, which control state governments/state legislatures, to share power with other minority groups. As a consequence, there will be increased demand from sub-regional ethnic groups for creation of new states. Parliament will be placed in an unenviable position of redressing the grievances of minority groups within various states as has happened in the case of J & K. The move was justified on the premise that the power structures prior to reorganisation had ruined the state, stalled its development, prevented proper health care and education, blocked industries and more importantly stalled integration of the region with the rest of India.

An analysis of constitutional and political history of J & K unambiguously reveals that Article 370 and 35-A was (ab)used by the mainstream Kashmiri polity by indulging in legislative (mis) adventurism and filtering the constitutional provisions and socio-economic welfare laws with such 'exceptions and modifications' as to facilitate their own interests while simultaneously thwarting development in the Jammu and Ladakh Regions. The separatists' elements in Kashmir, and the political parties extending them their support allowed propagation of their ideology, while central and state governments remained mute spectators. The simmering discontent in Jammu and Ladakh regions reflected the legitimate expression of feelings due to hostile discrimination since decades coupled with neglect and apathetic attitude of the powers at the centre. The political patronage and financial assistance granted by the Centre benefited only the few elite political families in Kashmir to the disadvantage of ordinary common man whose

genuine grievances were not addressed as there was a complete lack of transparent, accountable and good governance leading to utter discontent amongst the masses.[2]

At this juncture the extension of progressive laws and establishment of institutions promoting transparency, accountability and responsiveness in their functioning becomes imperative. In other words, good governance is the pill to rectify age old misgovernance that has institutionalised corruption and oppression in all walks of life. Good governance has eight major characteristics. It is participatory, consensus oriented, accountable, transparent, responsive, effective and efficient, equitable and inclusive and follows the rule of law. [3] It assures that corruption is minimized, the views of minorities are taken into account and that the voices of the most vulnerable in society are heard in decision-making.

Good Governance implies utmost concern for people's welfare wherein the government and its bureaucracy follow policies and discharge their duties with a deep sense of commitment; respecting the rule of law in a manner which is transparent, ensuring human rights and dignity, probity and public accountability.[4] It is also responsive to the present and future needs of society. The main concern of the present analysis is to scan such legislations as extended by the J & K Reorganisation Act, 2019 [5] that can help us in promoting rule of law and establishing an egalitarian society where even the concern of unrepresented and voiceless groups can be taken care of. It has already been pointed in the preceding part that in view of paucity of time and resource constraints on the part of researchers, a brief overview and consequent analysis of some Acts purposively selected for the aforesaid purpose has been discussed under this article.

2.1. The Commission for Protection of Child's Rights Act, 2006

This Act mainly provides for the constitution of a National Commission and State Commissions for Protection of Child Rights and Children's Courts for providing speedy trial of offences against children or of violation of child right. This Act became applicable after coming into force of the Jammu and Kashmir Reorganization Act, 2019. Earlier there was legislation by the name and style of the Jammu and Kashmir State Commission for Protection of Women and Child Rights, 2018 which provided for the constitution of State commission of Women and Child

[2] Professor Arvind Jasrotia, Article 370 from the lens of 'Citizen Outsider', Daily Excelsior, August 6, 2020.
[3] A. Doig and S .Riley "Corruption and Anti-corruption Strategies : Issues and Case Studies from Developing Countries", in UNDP (ed.), Corruption and Integrity initiatives in Developing Countries
45-62 (UNDP, 1998).
[4] Jagmohan, Soul and Structure of Governance in India 23 (Allied Publishers, New Delhi, 2005).
[5] J&K Reorganisation Act, 2019, Central laws made applicable to the Union Territory of Jammu & Kashmir, and Union Territory of Ladakh. The Fifth Schedule, Table-1.

rights and Courts for speedy trail of offences against women and child. Clearly, the central legislation has treated child as a separate vulnerable category in order to afford maximum protection.

2.2. The Delimitation Act, 2002

It provides for the readjustment of the allocation of seats in the House of the People to the States, the total number of seats in the Legislative Assembly of each State, the division of each State and each Union territory having a Legislative Assembly into territorial constituencies for elections to the House of the People and Legislative Assemblies of the States and Union territories. There are a total of 111 seats in the J & K Legislative Assembly. The last delimitation exercise was carried out in 1995. However, according to Article 82 of the Indian Constitution, the central government can set up a delimitation commission after every 10 years. Area and population become the chief consideration while doing the delimitation. According to 2011 census, the population of Jammu division was about 54 lakh, which is 43% of the State's population. Jammu division is spread over 26,200 sq km i.e. about 26% area of the State falls under the Jammu division which represents 37 seats in the State assembly. The population of Kashmir division is 68.88 lakh, which is 55% of the State's population. Area of Kashmir division is about 16% of the total area of the whole state. There are 46 legislators are elected from this region only. The data reveals that in Kashmir region an MLA is elected per 349 square kilometer while in Jammu region an MLA represents the area of 710 square kilometer. There are only 4 assembly seats in Ladakh division which is spread in 58.33% area of the State. The above data shows that the distribution of the assembly seats in the Jammu and Kashmir region is not balanced. [6]

According to the Delimitation Commission Act, 2002, the Delimitation Commission appointed by the Centre has to have three members: a serving or retired judge of the Supreme Court as the chairperson, and the Chief Election Commissioner or Election Commissioner nominated by the CEC and the State Election Commissioner as ex-officio members. Accordingly, the centre had notified constitution of the delimitation commission headed by former SC judge Justice Ranjana Desai to redraw the assembly constituencies of J & K as per the J&K Reorganisation Act, 2019. The delimitation exercise will also lead to a number of reserved constituencies based on

[6] What is delimitation and why does the Central Government want to implement it in Jammu and Kashmir? , *available at*: https://www.jagranjosh.com/general-knowledge/meaning-and-importance-of-delimitation-in-jammu-and-kashmir-1564836014-1 (last visited on January 18, 2021).

Scheduled Caste and Scheduled Tribes Settlements and will further till balance in favour of Jammu region. [7]

2.3. The Dowry Prohibition Act, 1961

A stringent law in the form of Dowry Prohibition Act, 1961 has been made applicable to Jammu, Kashmir and Ladakh under the J & K Reorganisation Act, 2019. It is important to mention here that to curb this social evil that has caused unimaginable tortures and crimes towards women, the erstwhile State of J&K has its own Dowry Restraint Act which was enacted in the year 1960. However, the Dowry Prohibition Act, 1961 is more stringent in nature than State Law. But the same could not be extended to Jammu and Kashmir because of Article 370 of the Indian Constitution, which conferred special status to this part of the country.

Now, with the requisite amendment in Article 370 and as per the provisions of Jammu and Kashmir Reorganization Act, 2019, the Dowry Prohibition Act, 1961 will become applicable to the Union Territory of Jammu and Kashmir and Union Territory of Ladakh from November 1, 2019 and Dowry Restraint Act, 1960 of State shall get repealed.

As per Section 3 of the State Act, "*any person who takes dowry shall be punishable with simple imprisonment which may extend to one year and with fine which may extend to the amount or value of the dowry taken."*

Similarly, Section 4 of the Act states: "*any person who gives dowry or abets the giving of dowry shall be punishable with simple imprisonment which may extend to one year and with fine which shall not be less than Rs 5000".*

However, Section 3 of the Central Act read: "If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which shall not be *less than five years and with the fine which shall not be less than Rs 15,000 or the amount of the value of such dowry, whichever is more".*

About penalty for dowry after solemnisation of marriage, the State Act states: "A person who at any time within three years after the solemnisation of marriage demands either directly or indirectly from the parents or any other person who was the guardian of the woman before her marriage any payment which is in the nature of a dowry, shall be deemed to have committed an

[7] J & K delimitation likely to give more political heft to Jammu, *available at*: https://timesofindia.indiatimes.com/india/jk-delimitation-likely-to-give-more-political-heft-to-jammu/articleshow/74543359.cms (last visited on January 18, 2021).

offence under Section 3 of the Act and shall be punishable accordingly (simple imprisonment which may extend to one year and with fine which may extend to the amount or value of the dowry taken). However, as per the Central Act, if any person demands directly or indirectly from the parents or other relatives or guardian of a bride or bridegroom as the case may be, any dowry, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years and with fine which may extend to Rs 10,000.

Unlike State Act, there is a provision in the Central Act for appointment of Dowry Prohibition Officers by the State Government to ensure compliance of the provisions of the Act, to prevent taking and abetting of dowry and collect evidences for the prosecution of persons committing offences under the Act. Thus, the new law being stringent in nature as compared to the previous state law will definitely contain the menace of this social evil.

2.4. The Gram Nyayalayas Act, 2008

In order to provide access to justice to the citizens at their door-steps, the Gram Nyayalayas would be established as per the provisions of the Gram Nyayalaya Act which was enacted by the Parliament in the year 2008 and has become applicable to the Jammu and Kashmir as per the provisions of the Jammu and Kashmir Reorganization Act, 2019. It is important to note that such progressive legislation could not be made applicable to erstwhile State because of its special status. Though in the year 2013, the then Government of Jammu and Kashmir made efforts to establish Dehi Adalats on the pattern of Gram Nyayalayas yet the whole exercise failed to deliver any outcome attempt failed to yield the desired results even after identification of headquarters of Dehi Adalats due to lack of manpower. Now, with the applicability of the Central Legislation to the J & K Union Territory, the Government has decided to establish Gram Nyayalaya in each district as early as possible so that people are no more deprived of the benefit of the Act enacted by the Parliament.

A person who is eligible to be appointed as a Judicial Magistrate of First Class will be the head of each Gram Nyayalaya, who besides holding the court shall periodically visit the villages falling under his jurisdiction and conduct trial or proceedings at any place which he or she considers is in close proximity to the place where the parties ordinarily reside or where the whole or part of the cause of action had arisen.

Notwithstanding anything contained in the Code of Criminal Procedure or the Code of Civil Procedure, the Gram Nyayalaya will exercise both civil and criminal jurisdiction in the manner

and to the extend provided under the Act. As per the provisions of this Act, the District Court or the Court of Session may transfer all the civil or criminal cases pending before the courts subordinate, to the Gram Nyayalaya competent to try or dispose of such cases.

The Gram Nyayalayas will deal with offences related to Payment of Wages Act, Minimum Wages Act, Protection of Civil Rights Act, the Bonded Labour System (Abolition) Act, Protection of Women from Domestic Violence Act, civil disputes related to right to purchase of property, use of common pasture, property and several other disputes.

Thus, extension of such progressive legislation is a big leap towards providing cheap and speedy justice to the citizens at their door steps who otherwise could be denied for securing justice by reason of social, economic or other disabilities of similar nature.

2.5. The Juvenile Justice (Care & Protection of Children) Act, 2015

This is the most important legislation in India for the protection of children in need of care & protection and children in conflict with the law. Some of the key features include: -

(i) change in nomenclature from Juvenile to child or child in conflict with law, to remove the negative connotation associated with the word Juvenile;
(ii) special provisions for heinous offences committed by children above the age of sixteen years;
(iii) free legal support;
(iv) provision for Special Homes and Shelter Homes for Child in need of care.
(v) separate chapter on adoption to streamline adoption of orphan, abandoned and surrendered children;
(vi) it also calls for a child friendly approach in adjudication and disposition of matters involving children;

The Act provides for establishing the Juvenile and Justice Boards in all the districts to ensure that Child Rights are protected throughout the process of trial beginning from arrest to rehabilitation. More so, the Child Welfare Committees have also been constituted to ensure the rights of Children are safeguarded.

The prominent change, of course, was the new rule that where a “heinous offence” was alleged to have been committed by a juvenile aged 16 years or older, they could be tried as an adult if the

Juvenile Justice Board decided this was appropriate after an assessment of their mental and physical capacity.

2.6. National Commission for Minorities Act, 1992

The National Commission for Minorities Act which deals with minority right did not apply to the erstwhile state of Jammu and Kashmir due to a caveat put by Article 370 of the Constitution. National Commission for Minorities, which was constituted to safeguard the constitutional and legal rights of minorities by way of an Act enacted by the Parliament in 1992, would have jurisdiction over both the UTs now. It is pertinent to mention that a PIL[8] has also been filed by Advocate Ankur Sharma to highlight the grievances of minorities in the erstwhile State pursuant to which the court directed the Centre and the State government to "sit together" and find a solution to "contentious" issues including whether the Muslims in the state could be regarded as a minority and avail benefits under the category. The plea has alleged that the rights of religious and linguistic 'minorities' in the state were being "siphoned off illegally and arbitrarily" due to extension of benefits to "unqualified sections" of the population. Moreover, crores of rupees are being given to the members of the majority community under various schemes meant for linguistic and religious minorities," he said. The state government was violating Article 29 (protection of interests of minorities) and Article 30 (right of minorities to establish and administer educational institutions) under the Constitution. Further it is a settled principle that the identification of the minority communities has to be decided as per the population data of the state in question. The PIL has also sought the setting up of a state minority commission for identification of minorities.

At this juncture it is important to note that the population of Muslims in Jammu and Kashmir according to the 2011 Census is 68.31 per cent. Thus, communities who are otherwise eligible to be notified as minorities, are not awarded their due share of scholarship and other benefits owing to their non-identification as minorities, thereby jeopardising their constitutionally guaranteed rights enshrined under Part III of the Constitution of India.

This clearly exposed the unfairness and discrimination of the state government towards other communities in Jammu and Kashmir which were eligible to be notified as minorities," the petition has alleged.

[8] SC asks Centre to decide minority issue in J-K in three months, *available at*: https://www.outlookindia.com/newsscroll/sc-asks-centre-to-decide-minority-issue-in-jk-in-three-months/1119070 (last visited on January 21, 2021).

It has also sought a direction for extension of National Commission for Minorities (NCM) Act, 1992 to Jammu and Kashmir and amendments in it so that benefits available to minorities of other states could also be given to the minorities in J & K. However, despite such averments in the petition and directions by the court, the unfairness and discrimination meted out to minorities finally finds a solution when the aforesaid act has been made applicable by Parliament by way of J & K Reorganisation Act, 2019.

2.7. The National Commission for Minority Educational Institutes Act, 2005

The Constitution of India has empowered minorities whether religious or linguistic to establish and administer educational institutions of their choice. [9] Further the apex court in TMA Pai Foundation case[10] held that the State is well within its rights to introduce a regulatory regime in the national interest to provide minority educational institutions with well-qualified teachers in order for them to achieve excellence in education.

Ironically such institutions for eligible minorities are missing in Jammu and Kashmir. Consequently, a PIL has been filed in the Supreme Court seeking directions to the Centre to formulate guidelines for identifying minorities groups at the State level to ensure they get the benefit of the schemes meant for them.

The PIL was filed by BJP Leader and Advocate Ashwani Kumar Upadhyay who sought intervention of the Court to direct and declare followers of Judaism, Bahaism and Hinduism, who are minorities in Ladakh, Mizoram, Lakshdweep, Kashmir, Nagaland, Meghalaya, Arunachal Pradesh, Punjab and Manipur to establish and administer educational institutions of their choice in spirit of the TMA Pai Ruling. The plea said denial of benefits to the 'real' minorities and arbitrary and unreasonable disbursements under schemes meant for them to the absolute majority, infringes upon the fundamental right under the Constitution. It further averred that the denial of minority rights to actual religious and linguistic minorities is a violation of right of minority enshrined under Article 14 and 21 of the Constitution. Most notably once again such averments find solution with the promulgation of J & K Reorganisation Act, 2019 which extended the afore discussed legislation for the benefit of minorities in the newly craved UTs of J&K and Ladakh.

[9] Article 30, The Constitution of India, 1950.
[10] (2002) 8 SCC 481.

2.8. The National Commission for Safaikaramcharis Act, 1993

The National Commission for Safai Karmacharis is working for the welfare of both Safai Karmacharis and Manual Scavengers. It is mandated to work towards elimination of inequalities in status facilities and opportunities for Safai Karamcharis and has an important role to ensure rehabilitation of all the identified manual scavengers on a time-bound basis. Most pathetically, the jurisdiction of such an important commission has not been extended to the State of J & K until the reorganisation of erstwhile J & K State under the J & K Reorganisation Act, 2019.

2.9. The National Commission for Women Act, 1990

The special status accorded to J & K State barred the National Commission for Women to act on complaints filed before them by women from Jammu and Kashmir. But now in order to mitigate the grievance of this vulnerable lot, the National Commission for Women Act, 1990 has been made applicable to the newly carved UTs of J & K and Ladakh. Prior to that, the complaints received from women of J & K were forwarded to the State Commission of Women and Child Rights since they could not act on them.[11] Thus the extension of such a vital commission would go a long way in mitigating their grievances who otherwise felt discriminated at every step in the erstwhile State of J&K whether by way of Article 35A or due to lack of jurisdiction of such important commission.

2.10. National Security Act, 1980

Stricter detention law in the form of National Security Act, 1980 has been extended by way of Reorganisation Act, 2019. Under the NSA, a person can be put under preventive detention for months if authorities are satisfied that a person is a threat to national security or law and order. It is important to note that a prevention detention law on the similar lines viz., J & K Public Safety Act, enacted in 1978, was amended in 2012 and some of its provisions were relaxed.

2.11. The Prevention of Corruption Act, 1988

The Prevention of Corruption Act, 1988 (amended in 2018) has been implemented in Jammu and Kashmir for the first time. Till date, Jammu and Kashmir had its own anti-corruption law, which lacked lustre. Now, Jammu and Kashmir has a Prevention of Corruption Act, which talks of time-bound disposal of cases and after the 2018 amendment, not only the bribe-taker but the

[11] After Article 370 move, J&K women can expect better redressal of complaints, says NCW, *available at*: https://theprint.in/india/governance/after-article-370-move-jk-women-can-expect-better-redressal-of-complaints-says-ncw/286922/ (last visited on January 25, 2021).

bribe giver is also held guilty. Under Jammu and Kashmir Prevention of Corruption Act, 2006, maximum punishment in most of the offences was five years. Centre's law prescribes conclusion of trail within a period of two years while J & K's Prevention of Corruption Act had no time-frame for conclusion of trial in the corruption cases.

2.12. The Prohibition of Child Marriage Act, 2007

The object of the Act is to prohibit solemnization of child marriage and connected and incidental matters. To ensure that child marriage is eradicated from within the society, the Government of India enacted Prevention of Child marriage Act 2006 by replacing the earlier legislation of Child Marriage Restraint Act, 1929. This new Act is armed with enabling provisions to prohibit for child marriage, protect and provide relief to victim and enhance punishment for those who abet, promote or solemnize such marriage. This Act also calls appointment of Child Marriage Prohibition Officer for whole or a part of a State by the State government.

2.13. The Prohibition of Employment as Manual Scavengers and their Rehabilitation act, 2013

Manual scavenging refers to the removal of human waste/excreta (night soil) from unsanitary, dry toilets (toilets without the modern flush system). Manual scavenging involves the removal of human excreta using bare hands, brooms and tin plates. The reality is much more inhuman and beyond imagination. The people who are involved in cleaning the dry latrines do so with their bare hands and usually carry the human excreta on their head to dispose in far off places. They are further ostracized, subjected to gross discrimination and have to go through everyday humiliation in society. Due to the nature of the work, they are also exposed to various health hazards. What is even more despicable is that this work is forced upon the future generations.

The presence of dry latrines is one of the primary reasons why manual scavenging exists till date despite being banned under the constitution via various legislations. As per the 2011 census data, latrines from which night soil is manually removed exist in all states except for the states of Goa, Sikkim and the UTs of Chandigarh and Lakshadweep. There are a total of 7,94,390 dry latrines in the country with Uttar Pradesh having as high as 3,26,082 and Andaman Islands as low as 11.

Uttar Pradesh, Jammu Kashmir & West Bengal together account for 80% of all the dry latrines in the country. Nine states have more than 10000 dry latrines each and Ten States/UTs have less than 1000 dry latrines each.

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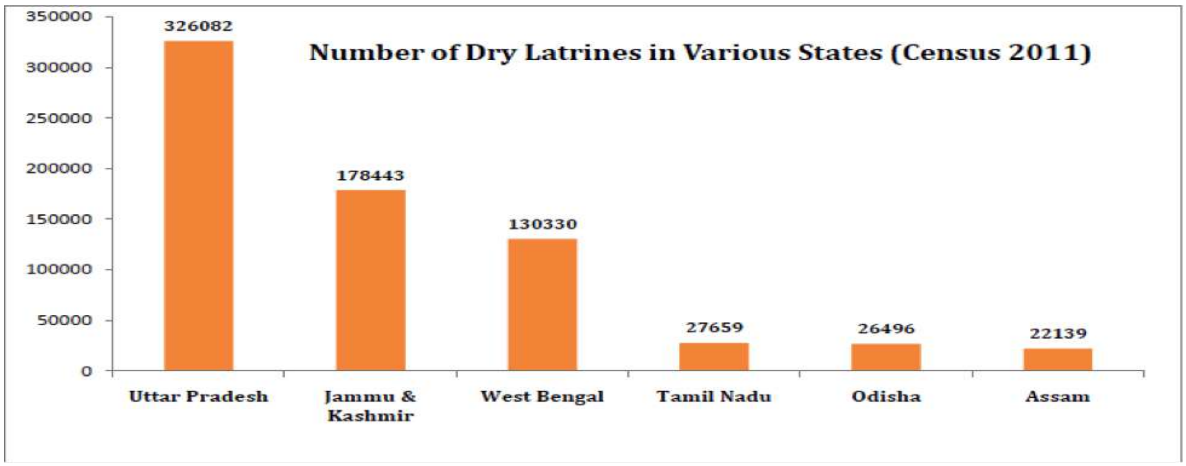

The Parliament has enacted the *'Prohibition of Employment as Manual Scavengers and their Rehabilitation Act 2013'* for eliminating the twin evils of insanitary latrines and manual scavenging. However, the same has not been extended to the State of J & K. No doubt the erstwhile State had its own legislation on the same subject viz., J & K Employment of Manual Scavengers and Construction of Dry Latrines (Probation) Act, 2010, but the relevant data available succinctly describes the poor implementation of this legislation.[12]

2.14. The Right of Children to Free and Compulsory Education Act, 2009

The key features of the Act are: -

(i) Free and compulsory education to all children of India in age group of 06 to 14 years.

(ii) No child shall be held back, expelled or required to pass a board examination until the completion of elementary education.

(iii) If a child above 6 years of age has not been admitted in any school or could not complete his or her elementary education, then he or she shall be admitted in a class appropriate to his or her age. However, if a case may be where a child is directly admitted in the class appropriate to his or her age, then, in order to be at par with others, he or she shall have a right to receive special training within such time limits as may be prescribed. Provided further that a child so admitted to elementary education shall be entitled to free education till the completion of elementary education even after 14 years.

[12]Despite ban on the manual scavenging in Jammu and Kashmir, over 1.70 lakh households out of the total 20 lakh in the state are still dependent on human waste carriers or in other words dependent upon manual scavenging.As per the figures available from the census Operations 2011, an alarming 160804 households out of the total 1497920 households in rural areas of the state are dependent upon manual scavenging in comparison with the urban areas, where 17768 households out of the total 517168 households are dependent upon manual scavenging. Available at: https://www.greaterkashmir.com/news/jammu/despite-ban-manual-scavenging-still-prevalent-in-jk/ (last visited on January 27, 2021).

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2.15. The Right to Information Act, 2005

Following the reorganisation of J & K State, the Central Right to Information Act, 2005 would now apply to the two new union territories of J & K and Ladakh that has earlier been covered under the J & K Right to Information Act, 2009, which allowed only the residents of the state to file petitions pertaining to state public authorities. Most importantly, earlier people who were not residents could not file an RTI in Jammu and Kashmir because the central Act barred it. So, we could ask information only from central government public authorities in the state. Even a judgment from Delhi High Court in the Veena Sikri case clearly highlighted that central RTI will not apply to the state government public authorities but will apply to all the central authority public authorities stationed in J & K[13]. Thus, it can be easily argued that the new information act is wider in its ambit and approach.

2.16. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2007

The Indian Forest Act 1927 denied the rights of forest dwelling tribes. Rights of tribes to move freely in the forests were restricted. They could be arrested in the forest without any warrant or without assigning any reason. Right for shifting cultivation restricted. They were even denied rights over minor forest produces. Forest department has been given the power to acquire land which is occupied by the tribal population. These factors restricted the enjoyment of various social, political, economic and cultural rights of tribal people despite being guaranteed under International and national systems. Such circumstances demand fair distribution of benefits and entitlements to forest dwelling tribal population who are dependent on forests since centuries for their basic sustenance. No doubt the same has been tried to be rectified by the legislature by way of Forest Rights Act, 2006 but over a decade after the landmark act was enacted, few people have been able to access the rights it promised. Indeed, based on a 2018 report by the Ministry of Tribal Affairs (MTA), several states have been slow in recognising and settling the rights under the FRA. What is stranger is the non- applicability of such beneficial legislation that gave back to traditional forest dwellers their rights to freely access, independently manage and govern forest lands and all other resources related to forests, which had been controlled by the forest department of erstwhile State of J & K, prior to 31st of October 2019, the date of

[13] Central RTI Law to Now Apply to J&K and Ladakh, *available at*: https://thewire.in/law/central-rti-law-to-now-apply-to-jk-and-ladakh (last visited on January 27, 2021).

implementation of Reorganisation Act, 2019 in J & K. With reference to the UT of Jammu & Kashmir, tribal population, as per census 2011, constitute more than 10% population.

The Gujjar and Bakerwal together comprise 90 percent of the total tribal population in UT of J&K. However, time and again Gujjars and Bakerwal questioned the official census and asserted that official statistics under reported their actual figure. The forests are the home of nomadic tribes. Lakhs of nomadic Gujjars-Bakarwals, Gaddis and other groups of J & K are dependent on forest lands as they are not only residing in these areas since centuries but their livelihood is completely based on forest products, grazing lands and other resources. In the past, these tribes have been protecting forests against mafias and other land grabbers, but as per laws of erstwhile state of J & K, protection to forests by a person or persons other than officials were illegal which was totally unjust and against tribal rights. Hence, tribal population hailed the extension of FRA to J & K as they can now legally protect the forests and enjoy the entitlements appurtenant thereto. But unfortunately, despite the FRA now being applicable in Jammu and Kashmir, they are yet to receive any relief from "persecution and a sense of insecurity." As revealed by a tribal researcher many nomad families were not allowed to build *qulas* (temporary structures) during their migration from Kashmir in November and December 2019. These people are not aware that the FRA now stands applied in J & K so that they could have claimed their rights in court under this legislation. Most pathetically, they don't even have any awareness about how to do it, he added.[14]

2.17. The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

The Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 was formed to prevent offences against the members of the Scheduled Castes and Scheduled Tribes group. It further aims to provide for Special Courts to try people involved in such offences and also to provide relief to the victims of such offences and for matters related to it. This Act seeks to stop people from committing such oppression and providing victims with special rights and privileges. A fast-track court for complaints made by anyone from the SC and ST community is also established with respect to this. Not only does the Act increase punishment in some instances for crimes under Indian Penal Code (IPC) but also targets specific crimes - generally humiliating in nature - against SC and ST communities.

[14] Jammu and Kashmir tribal population cries foul over FRA, *available at:* https://india.mongabay.com/2020/01/tribal-population-of-jammu-and-kashmir-cries-foul-about-the-non-implementation-of-the-forest-rights-act/ (last visited on February 3, 2020).

2.18. The Whistle Blowers Protection Act, 2014

Anti-corruption movement in newly carved UTs of J & K and Ladakh has gained momentum as whistleblowers, who expose corrupt practices by public servants, would get legal protection against any sort of victimisation under the Central law i.e., Whistleblowers Protection Act, 2014, which will become applicable to both Union Territories.

While performing this vital role in the anti-corruption movement, they become vulnerable to abuse as such need proper protection. However, this aspect never received due attention in J & K as a result of which whistleblowers are facing official apathy and are being treated as persona-non grata although on the basis of their information and cooperation the Anti-Corruption Bureau (formerly State Vigilance Organization) has been able to identify corrupt elements in the administration and successfully conduct trap cases.[15]

3. CONCLUDING OBSERVATION

The aforesaid discussion clearly delineates the establishment of such legal and regulatory mechanism in Union territories of J & K and Ladakh that would hold the politico-bureaucratic machinery accountable and effective in nature. The Central Government always shared the concern for ensuring responsive, accountable, transparent, decentralised and people-friendly administration at all levels. There was, however, considerable frustration and dissatisfaction amongst the people, especially the vulnerable section of society, about the apathy, irresponsiveness and lack of accountability of public servants. The case of West Pakistan Refugees, Valmiki Community, Women, Children, displaced communities, Scheduled Caste and Scheduled Tribes etc., deserves special mention in this regard. The continuous growth in instances of corruption and surge in terrorist activities has further halted the agenda of good governance in this region. So, on one side by extending progressive laws effort has been made to provide equal opportunities to all while at the same time it also ensures that the views of the minorities and vulnerable sections of the society shall be taken on board which was largely a rarity before reorganisation of erstwhile state.

[15] Scrapping of Article 370 give path for implementation of Whistle Blowers Protection Act, 2014, *available at:* http://www.legalserviceindia.com/legal/article-1718-scrapping-of-article-370-give-path-for-implementation-of-whistle-blowers-protection-act-2014.html (last visited on February 3, 2021).

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