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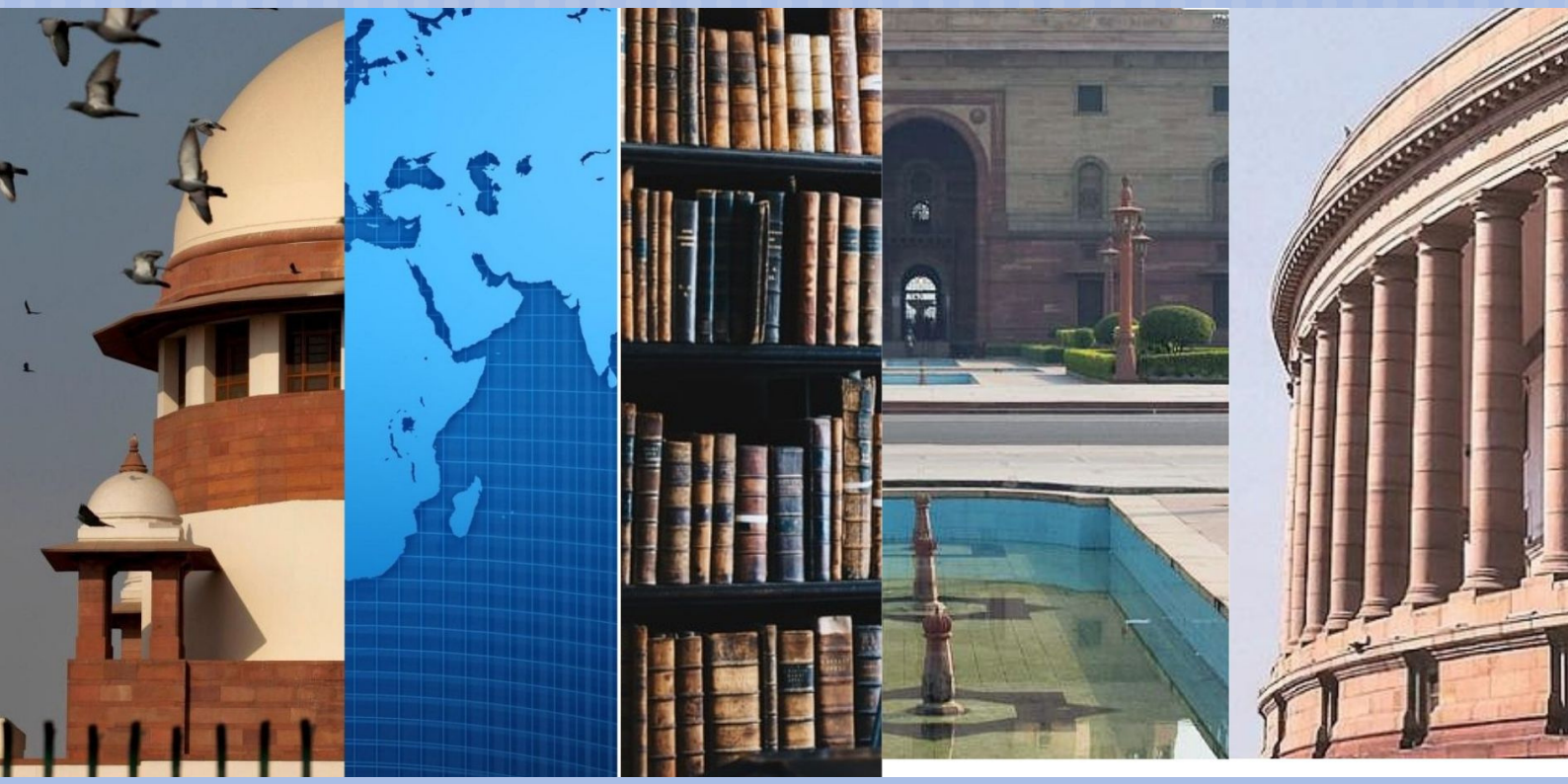

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POST-DISASTER VICTIMS RIGHTS AND THE LEGAL FRAMEWORK FOR THEIR ENFORCEMENT: A CRITICAL UNDERSTANDING

DR. AWEKTA VERMA*

ABSTRACT

India is a disaster prone country and has since time immemorial witnessed many disasters - natural as well as manmade which have caused immense loss of life, property and environment. Amongst many factors which ultimately decide the losses a country will witness, law plays an important role in reducing vulnerability, impact, better response, mitigation, rehabilitation and efficient management of disasters. It has been accepted the world over that better laws lead to safer communities. The protective measures and rights given to people post-disaster, hold the key to ensuring proper implementation and execution of the statutory provisions whenever Disaster strikes. Presently, The Disaster Management Act, 2005 provides for a comprehensive legal and institutional framework for disaster management in a holistic manner in India. The paper explores whether and to what extent the victims of natural disasters have been empowered by the law in India to seek remedies or relief post-disaster. We may not be able to stop natural hazards from happening but an appropriate legal framework and its implementation in letter and spirit can shape the extent of death and destruction it can cause. The more the people are empowered, the more the accountability of the governments for ensuring preparedness and quick response, thereby resulting in lesser chances of a natural event becoming a Disaster. This is well illustrated by the decreased losses suffered in countries with better laws incorporating victims' rights than those with ineffective legal frameworks.

1. INTRODUCTION

Since time immemorial, India has witnessed a number of disasters- natural as well as man-made. The vulnerability atlas of India states that the Indian Subcontinent is among the world's most disaster prone areas.[1] Many factors like large population, unplanned urban areas with least adherence to building laws and regulations, improper land use, rampant violation of environmental laws, poor

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[1] *See,* Building Materials and Technology Promotion Council, Ministry of Housing and Poverty Alleviation, Government of India , *An Introduction to the Vulnerability Atlas of India First Revision*, 2006 retrieved from https://www.bmtpc.org/admin/PublisherAttachement/An%20Introduction%20to%20the%20Vulnerability%20Atlas%20of%201 (Last visited Oct. 30,2020) According to it 59% of land is vulnerable to earthquakes,8.5% of land is vulnerable to cyclones, 5% of land is vulnerable to floods and around one million houses are damaged annually.

governance and lack of adoption of safety measures, deforestation, mining, rampant industrialization and added to all this climate change have resulted in increasing the risk, vulnerability and exposure of the people when disaster strikes. The extent and impact of damage has also increased because of above mentioned factors. Also, loss of life and property and setback to the development process for realizing the sustainable development goals is more in India as compared to other countries. Thus, though the vulnerability and exposure to disasters is not decreasing over a period of time, the intensity, frequency and the kind of disasters has increased over a period of time. As per a study done by the UN office for Disaster Risk Reduction (UNISDR) during the period from 1998-2017 i.e. almost 20 years, India suffered economic losses of 79.5 billion US$.[2] Of all, elderly, women, children, especially abled and poor people suffer the most as their existing difficulties and disadvantages are exacerbated further during the disasters. The law needs to take into account and address the issues faced by them. The current COVID-19 pandemic, the first pan Indian biological disaster amply demonstrates this as crime against women especially domestic violence and child abuse increased during the lockdown.[3] The pandemic has sufficiently exposed the lacunae's and deficiencies of the Indian disaster management framework. The country is facing many challenges like providing basic necessities of life like food, water, clothing and shelter to the poor, ensuring access to education, health services, right to livelihood, legal aid etc. The poor and marginalized sections of the society have been deeply impacted by the pandemic. How well the countries will build back better will depend on the quality of governance and proper implementation of laws and policies to meet the challenges. Countries which emphasise on accountability of institutions, governments and office bearers and make their laws right based are able to ensure fewer losses in terms of life and property and are able to build back better after disasters as compared to those where accountability mechanisms are lacking. For ensuring accountability a right based approach in legal framework is required whereby the victims are able to get justiciable rights and can seek remedies in case of violation of their rights by the duty bearers. Considering the fact that India has committed itself to disaster risk reduction, prevention and mitigation has becomes important to empower its citizens so that the policies and plans which are adopted on paper are also implemented

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[2] *See,* UNISDR , *Economic Losses, Poverty and Disasters* 2017, Centre for Research on the Epidemiology of Disasters CRED, P.4 available at https://www.unisdr.org/2016/iddr/IDDR2018_Economic%20Losses.pdf.
India is ranked *amongst* world top five countries in terms of economic losses suffered due to disasters.(last visited Oct.30, 2020).

[3] Rishabh Suri, Domestic Violence, Child abuse cases on the Increase in this lockdown: Experts explain why, *Hindustan Times*(30 May, 2020) retrieved from https://www.hindustantimes.com/sex-and-relationships/domestic-violence-child-abuse-cases-on-the-rise-in-this-lockdown-experts-explain-why/story-UZ.

on the ground. In the light of this background the paper seeks to explore and analyse the rights conferred on the victims of disasters in the Indian legal framework and the difficulties faced by them in realizing those rights as rights without remedies are useless and neither empower the victims nor ensure accountability of the officials. It also assesses as to how far we have realized the mandate of the Act or the international law and what more needs to be done? This study becomes important as it has been seen that countries which have weak institutional framework or policies for disaster management are more vulnerable to disasters and its adverse effects.

2. EFFECTS OF DISASTERS

Disasters[4] are inevitable but their impact on human life and assets can be minimized with proper planning and implementation of laws. It's stated that prevention is better than cure and the same applies to disasters. For formulating appropriate laws, policies, measures, strategies and response it becomes important to understand the problems and challenges faced by the victims of disaster. The inequities prevalent in Indian society make it doubly challenging as these get further manifested during disasters and need to be addressed by the law by incorporating an inclusive approach. Post disaster the victims face many problems and are vulnerable to many wrongs. The problem is further compounded by illiteracy, lack of knowledge and awareness of - laws, redressal mechanisms, agencies or authorities involved in relief and rehabilitation work etc. the main issues are listed below:

- Lack of Basic Necessities of Life

Loss of property, home, displacement etc. during disasters lead to inability of survivors to meet the basic necessities of life like food, shelter, clothing etc. The poor are impacted more and this leads to loss of human dignity. Women, children, disabled and elderly are the worst affected. Rise in prices put the goods beyond the buying capacity of the people. According to the Poverty and Shared Prosperity Report 2020(PSPR2020), at the world level COVID-19 will probably

[4] The Disaster Management Act, 2005 S. 2(d) defines disaster as : Disaster means a Disaster means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area. It is a very wide definition and amply demonstrates the catastrophic effects of disaster on the survivors.

drive between 88 and 115 million people into extreme poverty i.e. earning under $1.90 a day in 2020[5].

- Livelihood Loss

Many people lose their jobs and livelihood because of adverse effects of disasters. This pushes them into a cycle of poverty from which they can't emerge without proper support and rehabilitation. In India millions of people have lost their job during the pandemic. According to International labor Organisation (ILO) about 400 million workers in informal economy in India are at risk of being pushed into poverty. And as per Centre for Monitoring Indian Economy, since April 2020, more than 18.9 million salaried people have lost their jobs and about 5 million lost it in just one month i.e. July 2020.[6]

- Crime

Crime against women, children and other vulnerable sections increase during disasters as they are more exposed and vulnerable due to loss of secure shelter, family etc. Moreover, loss of job, employment, poverty also pushes some into a life of crime. Trafficking in women and children increases as they are extremely vulnerable during disasters and more opportunities to commit such crimes are present because of lax law and order during these times.

- Mental Health

Loss of family members, way of life, loved ones, job, assets and property creates mental trauma to many people. Lack of proper rehabilitation measures and access to resources, health professionals and counselors further exacerbate the matters. Many survivors take to alcohol or drugs and develop suicidal tendencies as they fail to cope up with the harsh realities and lose all hope of building their lives all over again.

- Loss of Important Documents

People lose their important documents in floods, fire, earthquake and other disasters and find it difficult to claim relief announced by the authorities. Illiteracy and lack of any knowledge about the proper forums to be approached in such cases makes the matter worse for poor people.

- Dearth of Medical Facilities

[5] See, Here's how many people COVID-19 could push into poverty, according to the World Bank, World Economic Forum, retrieved from https://www.weforum.org/agenda/2020/11/covid-19-global-poverty-inequality-un-economics-coronavirus-pandemic/.

[6] Bansari Kamdar, India's Rich Prosper During the Pandemic While Its Poor Stand Precariously at the Edge, *The Diplomat*, (10 Sept 2020) Retrieved from https://thediplomat.com/2020/09/indias-rich-prosper-during-the-pandemic-while-its-poor-stand-precariously-at-the-edge/.

Disasters lead to damage to infrastructure and deterioration of the hygienic standards. This can lead to outbreak of diseases. Shortage of medicines, doctors and health professionals increases the risk and number of fatalities. During the pandemic the shortfall and difficulty in accessing healthcare facilities was amply visible and the Supreme Court had to direct that COVID-19 tests should be done free of cost in government hospitals. Also, those COVID-19 patients should be given proper treatment and dead bodies should be handled in a dignified manner in the hospitals.[7]

- Miscellaneous

Disasters have many adverse effects like it leads to break in education for many children. During the current pandemic many children have dropped out of school and the number is rising continuously. This in turn will lead to rise in child labour and drag the families deep into the circle of poverty.

The COVID-19 created a humanitarian crisis in India as lakhs of migrant laborers were stranded at various places and yearned to go to their homes. The Supreme Court of India had to intervene and it directed that transportation be provided by the government to these labourers to go to their homes. Further directions were given to withdraw cases of violation of lockdown norms against them.[8]

3. POST DISASTER VICTIMS RIGHTS AND THE LEGAL FRAMEWORK

Peacetime or disaster, laws play an important role in regulating human conduct. Peacetime violations of important laws relating to environment, infrastructure development, building codes, sanitation, waste disposal, safety norms etc. and lack their lack of implementation in letter and spirit aggravate impact of disasters as disaster risk is increased by poor governance and affects preparation and response. It becomes important to incorporate a right based approach so as to empower the people to ensure accountability in governance. This can only happen if victims get a right to hold the institutions vested with implementing disaster risk reduction strategies, ensuring building norms, infrastructure norms, fire safety norms etc. accountable for the disaster losses suffered by them because of their negligence and dereliction of duties. Moreover, laws empower survivors to claim relief and rehabilitation measures announced by the government. As it is bad policies, poor planning, lack of preparedness, indifference and non-implementation of rules and regulations which leads to

[7] *In re proper treatment of COVID-19 patients and dignified handling of dead bodies in hospitals etc* 2020 SCC OnLine SC 530.
[8] *Problems and Miseries of Migrant labourers, In re* 2020 SCC OnLine SC 490, 492.

rights violations and denial of life with dignity; proper resettlement and rehabilitation of victims post disaster require addressing these issues. It is the primary duty of the State to protect the rights of its citizens. India has also ratified major human rights treaties and is bound to follow the principles mentioned therein in its policies and approach towards disaster response and management. So the law plays an important role in empowering the victims, in protecting their interests, which in turn leads to better disaster management. We need to see how far the Indian legal framework empowers the victims to participate in the disaster management leading to an accountable and transparent disaster management system.

The Disaster Management Act, 2005 lays down an institutional mechanism for implementing disaster management plans and requisite action by various Ministriesor Departments of the Government for prevention and mitigating effects of disasters and for undertaking a holistic, coordinated and prompt response to any disaster situation.[9] A three tier structure has been set up to carry out the mandate of the DM Act. It establishes National Disaster Management Authority with Prime Minister of India as its Chairman at national level, State Disaster Management Authorities having Chief Ministers as their Chairman in states and District Disaster Management Authorities having District magistrates as their Chairman at the district level. The concerned ministries and departments too have to formulate and implement disaster management plans in accordance with the national plan. Following a judicious mix of both top down and bottom up approach specific role has been assigned to local bodies i.e. urban local bodies like Municipalities as well as Panchayati Raj Institutions. At the national level, it is the Home Ministry which has the overall control of disaster management. The Central Government provides all feasible assistance in terms of money, manpower and material things to the State Governments.

A laudable feature of the DM Act is that it provided for setting up National Disaster Response Force (NDRF) for specialist response to a threatening disaster situation. Over the years NDRF has contributed immensely in rescue and relief operations. As far as finance is concerned the DM Act provides for setting up of two funds- National Disaster Response Fund and National Disaster Mitigation Fund for meeting any disaster situation or for the purpose of mitigation.

The current COVID-19 Pandemic was notified as a 'disaster' under DM Act so that the States can be provided assistance under the State Disaster Response Fund.[10] All the decisions and orders for

[9] See Statement of Objects and Reasons, DM Act 2005.

[10] See Outlook, India notifies COVID 19 a national 'disaster', 14 March2020, New Delhi (IANS) available at https://www.outlookindia.com/newsscroll/india-notifies-covid-a-national-disaster/1761344.

the management of the COVID-19 pandemic have been taken or passed by resorting to the DM Act.

4. LEGAL RIGHTS AND REMEDIES

Law plays an important role in ensuring the dignity of the survivors and in helping them rebuild and reconstruct their life. The DM Act recognizes this grim reality and mandates the national Authority to formulate guidelines for minimum standard of relief to be provided to persons affected by disaster. In compliance with the same the guidelines have been framed but as they are mere guidelines they are not justiciable and do not give any right to the survivors to demand the things listed therein as a matter of right. It all depends on the goodwill of the concerned authorities to make the things listed therein available to the survivors. This definitely impacts the right to life of the survivors as delayed help is at times devastating.

It is important to have a right based approach in our DM Act so that survivors are empowered and are able to claim the basic minimum rights necessary for survival. It has been seen that the government did not enact a National Disaster Management Plan or constitute Disaster Response Force or create a National Disaster Mitigation fund even after ten years of the enactment of the DM Act till directed by the Supreme Court to do so in 2016 in *Swaraj Abhiyan v. Union of India.*[11]Moreover, on being asked as to why the Union of India was not following the national Disaster Management Guidelines for Management of Drought, prepared by National Disaster Management Authority of the Government of India, it was replied by the government that these were mere guidelines and had no binding force.

In *Swaraj Abhiyan v Union of India*[12], it was brought to the notice of the Supreme Court that the States like Bihar, Haryana and Gujarat have not declared drought in their States because of which people are denied the relief measures which they are entitled to as per governments' schemes and legislation. The failure on the part of States deprives the needy the assistance which they need to live a life of dignity as guaranteed under Article 21 of the Constitution. Delayed declaration of drought deprives the drought affected people the relief assistance and other concessions at the right time. The purpose of early declaration of drought is preventive but the States took a palliative and relief centric approach and that too was denied or not given on time. Instead of risk assessment and risk management the governments focused on crisis management. This approach of the government was hardly of any advantage to the distressed farmers.

[11] (2016) 7 SCC 498.
[12] Id. at 526.

Shockingly, the states had not even implemented the National Food Security Act. The mechanism for enforcing several provisions of NFS Act were not established or constituted. The Apex Court directed the States to set up the required mechanisms and authorities under the respective Acts for effective functioning and prevention, mitigation and preparation with respect to any disaster or crisis situation.

There is no mechanism provided in Disaster management Act,2005 which empowers the people to hold the concerned authorities accountable for their negligence, carelessness or abdication of duties as is made amply clear in *Swaraj Abhiyan* Case, whereby the poor suffered and could not get or access timely relief and rehabilitation measures. Giving rights to people without providing for enforcement, accountability or remedies in case of violation of rights will make those rights meaningless.

The same scenario has been repeated during the COVID-19 pandemic in India as there was no relief which was provided to the migrant workers when the lockdown was suddenly announced and they started walking on foot all the way to their hometowns. The emphasis on prevention, mitigation, preparedness, disaster risk reduction and resilience which is the hallmark of Disaster Management Act, failed to materialize on ground as for every small thing the Supreme Court had to intervene and given directions to secure the right to life and live with dignity of the people in migrant workers case, humane treatment of patients in hospitals case etc.[13]

The State is enjoined by the Preamble to the Constitution of India, read with the directive principles under Articles 38,39 and 39-A, to take all protective measures to which a social welfare State is committed.[14]The judiciary cannot interfere in matters of policy like the amount of relief to be given but can in view of Article 21 of the Constitution issue appropriate directions in cases where the State Government or the Union of India fail to respond to a disaster or disaster in the making. So it is very important to give justiciable rights to the people for ensuring proper implementation of the welfare legislations which at times get mired in bureaucratic inactivity or apathy or executive excesses.

According to Jane Krishnadas, the World Conference on Disaster Reduction (2005) and UN/ Habitat International Coalition (HIC) have promoted "participation, accountability, decentralization, freedom of and access to information, legally enforceable obligations, access to justice, national and international cooperation and coordination." [15] The Disaster Management Act, 2005 also incorporates the above stated principles to a great extent in the various provisions of the Act.

[13] See *Supra* note 7 and 8.
[14] *Id.* at 510.
[15] Jane Krishnadas, "Rights to Govern Lives in Postdisaster Reconstruction processes" 14 *Global Governance* 363 (2008).

Disaster management under the DM Act is envisaged as a continuous and integrated process of planning, organizing, coordinating and implementing measures focusing on prevention, mitigation, preparedness, capacity building and recue and response with respect to any disaster. [16]However, in case of lacunae in disaster management by the concerned authorities there is no accountability mechanism prescribed in the DM Act.

A notable feature of DM Act is that it prohibits discrimination on the basis of sex, community, caste, religion or descent while providing compensation and relief to victims of disaster.[17]But at the same time it bars the jurisdiction of court except the Supreme Court and High Court with respect to any action taken under the DM Act.[18] According to Karen Da Costa and Paulina Pospieszna, improvement in protection of people from natural disasters is directly proportional to the rights based approach to Disaster Risk Reduction (DRR). Mere existence of legislation for DRR does not guarantee justiciable rights to the affected citizens.[19]The Indian scenario depicts almost the same scenario as we have succeeded in ensuring community participation and empowerment many times, for example reconstruction process after Gujarat earthquake in January 2001, but still lag behind in empowering people by guaranteeing enforceable rights.

5. CONCLUSION

Adopting a rights based approach in the Disaster Management Act, 2005 is the need of the hour as it will have a great impact at the ground level in improving the lives of the people. Though, the right to approach the Supreme Court or the High Court is there in case of violation of Article21, it is not a speedy remedy which can be availed of as a matter of right by the affected people. Great strides have been made in early warning system and timely evacuation of people in case of disasters by way

[16] S. 2(e) DM Act defines 'Disaster Management' as: a continuous and integrated process of planning, organizing, coordinating and implementing measures which are necessary or expedient for-
(i) Prevention of danger or threat of any disaster;
(ii) Mitigation or reduction of risk of any disaster or its severity or consequences;
(iii) Capacity-building;
(iv) Preparedness to deal with any disaster;
(v) Prompt response to any threatening disaster situation or disaster;
(vi) Assessing the severity or magnitude of effects of any disaster;
(viii) Evacuation, rescue and relief;
(vii) Rehabilitation and reconstruction.

[17] See S.61, DM Act.

[18] Ss. 71-73 DM Act deal with provisions barring the jurisdiction of courts with respect to action taken or directions issued while pursuing powers conferred or assigned by the Act; overriding effect on other legislations; Immunity from legal process for action taken in good faith under the DM Act.

[19] Karen da Costa and Paulina Pospieszna, "The Relationship between Human Rights and Disaster Risk Reduction Revisited: Bringing the Legal perspective into the Discussion"6 *Journal of International* Humanitarian Legal *Studies* 78 (2015).

of flooding, hurricanes and typhoons but a lot remains to be done with respect to other disasters like earthquakes, and fire hazards etc. Incorporating a right based approach in our laws will improve the overall governance by ensuring accountability of the concerned authorities as well the citizens. Till that is done the DRR which is one of the goals mentioned in DM Act will not be fully achieved in India. For prevention, preparation and mitigation of disasters too the same approach is imperative in our laws. More so because India is welfare state and committed to social justice. Considering the extreme poverty and disadvantaged position of so many people in India, a culture of accountability by incorporating the rights based approach is the need of the hour. The erstwhile relief centric approach in disaster management too has now shifted towards proactive prevention, preparedness and mitigation approach for preserving the development gains and to minimize loss of human lives, livelihood and property. Access to justice and right to enforce the mandate of the laws goes hand in hand for ensuring the successful implementation of this new approach in disaster management. The time is ripe for moving from welfare towards rights based approach for making sure that social justice is not compromised in the implementation of disaster laws.

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MORAL AND ETHICAL FOUNDATIONS OF THE RIGHT TO PROTEST: ANALYSING THE SUPREME COURT'S SHAHEEN BAGH RULING

ANKUR SOOD*

ABSTRACT

The Supreme Court of India, in its Shaheen Bagh judgment, concluded that occupation of "public ways" for protest is unacceptable. Not stopping there, it went on to demand that the administration ought to take action to keep the areas clear of encroachments or obstructions. In the backdrop of this ruling, this paper seeks to examine the issue from the standpoint of the ethical and jurisprudential contours of the right to peaceful protest and the restrictions that can be imposed on its exercise. The argument advanced in the paper is that a right to protest is a fundamental component of democratic governance system and restrictions are permitted on very limited counts. In the concluding section, we will explore the manner and extent to which the judgment transgresses the traditionally accepted ethical and jurisprudential boundaries of the restrictions on the right to protest.

1. INTRODUCTION

Article 19(1)(b) of the Constitution of India states that: "*All citizens shall have the right to assemble peacefully and without arms.*" Thus, subject to the restrictions of the assembly being unarmed and peaceful in nature, the Constitution guarantees to every citizen the right to hold public meetings, take out processions and protest publicly. Indeed, the right to protest visibly, publicly and peacefully is widely viewed as an essential and integral component of a democratic government and a basic human right.[1]

Undeterred by the rights of protesting citizens, the Supreme Court of India in a recent judgment concluded that occupation of "public ways" for protest is unacceptable. Not stopping there, it went on to demand that the administration ought to take action to keep the areas clear of encroachments

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[1] The European Convention of Human Rights, 1953, art.9, art.10, art.11; The International Covenant on Civil and Political Rights, 1966, art. 18, art. 19, art. 20, art. 22; *United States* v. *Cruikshank*, 92 US 542 (1875).

or obstructions.[2] The judgment chided the administrative authorities and even the Delhi High Court for failing to take suitable action and producing the desired results with the following words:

> "*We are also of the view that the High Court should have monitored the matter rather than disposing of the Writ Petition and creating a fluid situation. No doubt, it is the responsibility of the respondent authorities to take suitable action, but then such suitable action should produce results.*"[3]

Delivered in the context of the protests against Citizenship (Amendment) Act, 2019 (CAA) and the plan to initiate a nation-wide citizen's register, the judgment recognised that Articles 19(1)(a) and (b) of the Constitution grants every citizen to assemble peacefully and protest against the actions or inactions of the State, but still called for state action against protestors because this right has to be balanced with the rights of commuters using public ways. The judgment has been met with wide-spread criticism for restricting democratic exercise of rights by citizens.[4]

Perhaps taking cue from the judgment, the authorities have taken strict measures in the more recent farmers' protest, including by blocking entry into Delhi, use of tear gas and water cannons, closure of borders and roads.[5]

In the above background, this paper seeks to examine the issue from the standpoint of the ethical and jurisprudential contours of the right to peaceful protest and the restrictions that can be imposed on its exercise. The argument advanced in the paper is that a right to protest is a fundamental component of democratic governance system and restrictions are permitted on very limited counts. In the concluding section, we will explore the manner in which the Shaheen Bagh judgment transgresses the traditionally accepted ethical and jurisprudential boundaries of the restrictions on the right to protest.

2. THE RIGHT TO PROTEST: ETHICAL AND PHILOSOPHICAL FOUNDATIONS

[2] *Amit Sahniv*. *Commissioner of Police*, Supreme Court of India, Civil Appeal No. 3282/2020 (judgment dated Oct. 7, 2020).
[3] *Ibid.*
[4] Rangin Pallav Tripathy, "With Shaheen Bagh ruling, Supreme Court gifts state more powers to control democratic dissent" *Scroll,* Oct. 13, 2020, *available at* <https://scroll.in/article/975627/with-shaheen-bagh-ruling-supreme-court-gifts-state-more-powers-to-control-democratic-dissent>; Snehal Dhote, "Right to Protest v. Convenience of the Public – The Indian Supreme Court's Decision on Shaheen Bagh Anti-CAA Protests*"OxHRH Blog*, Oct. 27, 2020 *available at* <https://ohrh.law.ox.ac.uk/right-to-protest-v-convenience-of-the-public-the-indian-supreme-courts-decision-on-shaheen-bagh-anti-caa-protests/> (Dec. 4, 2020).
[5] "Protesting farmers call on people to back Bharat Bandh"' *The Economic Times*, Dec. 7, 2020.

The citizens' right to assemble peacefully and protest is a historically recognised right. Over the years, the moral and ethical foundations of the right have been traced to a multitude of jurisprudential sources.

First and foremost, the right has been viewed as a form of individual and collective expression and has the status of a fundamental human right inherent in every human being.[6] Hegel, while discussing and analysing the French revolution, treated protest as an attempt by man to re-organise reality according to the demands of his free rational thinking instead of accommodating his thoughts to the existing order and prevailing values.[7] To use Kant's words: "*[t]he public use of a man's reason must be free at all times, and this alone can bring enlightenment among men*…".[8] Arendt articulates a vision of political freedom grounded in the human capacity to speak and act in public.[9] The right to protest grounded in the individual's right of expression, therefore, came into being as a collective exercise of expression.

The right to protest against the régime has been considered to be a moral and ideological right, and its underlying roots may be found in individuals, their spirituality, values and self-definition of moral beings. Through resistance, an individual asserts itself as a moral being, and its decision to undertake dissident activity is a form of expression that takes into account his/her personal meditation and experience, as well as the contemplation on the general human condition, on the significance of being human, and on the heritage and values of the community.[10] It is in the light of these factors that an individual peruses and appraises a given situation, proposing a desirable state of affairs, and thereby voicing its defiance of the current circumstances and the practices of the régime.[11]

The dual role of protest as a form of expression in the democratic decision making process has been described in the following manner:

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[6] *Sadagopalchariar*v. *A. Rama Rao,* ILR (1903) 26 Mad 376.
[7] Herbet Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* 6 (Routledge & Keegan Paul Ltd., London, 2nd edn., 1941).
[8] Immanuel Kant, "What is Enlightenment?", (Mary C. Smith trans.), (accessed on Dec. 9, 2020), <http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html>.
[9] Hannah Arendt, "Civil Disobedience", in*Crises of the Republic*, 51–102 (Harcourt Brace Jovanovich, New York, 1972).
[10] Taduesz Buksinski, "The Moral Aspect of Political Protest under the Totalitarian System" **(**Przemyslaw Znanieckitrans.), (accessed on Dec. 7, 2020), <https://www.bu.edu/wcp/Papers/Poli/PoliBuks.htm#:~:text=Through%20resistance%2C%20an%20individual%20asserts,and%20values%20of%20the%20community >.
[11] *Ibid.*

"*a protester demands inclusion in a decision-making process and presents himself as a harsh critic of decision-makers, not as someone necessarily defying authority… It is just a form of expression: the protester uses protest to demand more rational decision-making, where certain points of view, which he or she represents, are taken into account….*

The rationale for continuing protest is then not to engage in a discussion about a particular issue in the hope of convincing decision-makers to act differently, but rather to create the awareness that the protest group will continue to oppose and defy decisions along certain lines."[12]

Of more recent vintage is the radical democratic theory that views a revolutionary expression of freedom, incompatible with consensual political institutions, as a fundamental part of democracy.[13] The radical democratic theory places protest as an emerging form of politics consisting of a criticism of the state, which sets itself up on the outside as a politics of protest against the unmovable injustice of the state.[14] The ever increasing level of impersonality, bureaucratic and disempowering nature of modern governments is viewed as a major reason for the citizen to seek to reclaim some of the lost power and the participatory freedom through anti-governmental protest.[15] The purpose is not to take control of the state or win political power but to protest as both a means and an end for the citizens to have their voice heard.[16]

3. PROTEST, ASSEMBLY AND PROTECTION UNDER INTERNATIONAL AND DOMESTIC LAW

With its recognition as an ethical and moral construct in the philosophy of the time, the right to peacefully assemble and protest was also accorded the status of basic human rights in Articles 9 to 11 of the European Convention of Human Rights (**ECHR**)[17] and Articles 18 to 22 of the

[12] Jón Ólafsson, "Defiance: A Comment on the Logic of Protest", 11(61/56): 4 *TRAMES* 432, 435 (2007).
[13] Jacques Rancière, *Dissensus – On Politics and Aesthetics* 54(Steven Cororan ed. and trans., Continuum International Publishing Group, New York, 2010).
[14] Simon Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance* 107 (Verso, London, 2007).
[15] Roger Berkowitz, "Protest and Democracy: Hannah Arendt and the Foundation of Freedom", 6:1 *Stasis* 36, 41 (2018).
[16] David Graeber, *Direct Action: An Ethnography* 210 (AK Press, Oakland, 2009).
[17] Article 11 of the ECHR is the key provision with regard to the right to protest. It states that:
"*1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.*
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

International Covenant on Civil and Political Rights[18]. These provisions recognise the dissenters' right to protest as a facet of the individual's right to freedom of expression and the collective right of peaceful assembly. The right has been recognised as a basic human right, which forms of the pillars of democratic society.[19]

In the Indian ethos, the right of the citizenry to engage in peaceful protest against injustice has long been recognised as not only a right, but also a duty. Inspired by Gandhi and Thoreau, the exercise of non-violent and public protest coupled with civil disobedience was the corner-stone of the freedom movement.[20] Even in the pre-constitutional era, the right to protest was recognised as a right that inheres in the people of India.[21] Ultimately, these rights came to be protected under Articles 19(1)(a) to (d) the Constitution of India.[22] A recent article summed up the role of protests in India in the following words:

> "*Whatever be the cause, motive, method or agenda of a protest, India's democracy has come to allow room for what V.S. Naipaul called A Million Mutinies…. Social and political movements have been a pivotal part of India's history, and perhaps, it will continue to be the case.*"[23]

The right to protest, therefore, has not only been viewed as an essential component of an individual citizen's expression, but has also been accepted as a pivotal component of a functioning democratic system. Nevertheless, it must be remembered that this right is not absolute in nature and, like any

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[18] Article 21 of the ICCPR provides that: "*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*"

[19] *Djavit An* v. *Turkey*, judgment dated Feb. 20 2003, passed by the European Court of Human Rights in Application no. 20652/92, held that: "*56. …the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society.*"

[20] George Hendrick, "The Influence of Thoreau's "Civil Disobedience" on Gandhi's Satyagraha", 29:4 *The New England Quarterly* 462, 462 (Dec. 1956).

[21] *Parthasaradiayyangar* v. *Chinnakrishna Ayyangar*, ILR (1882) 5 Mad 304; *Sundram Chetti* v. *The Queen*, ILR (1883) 6 Mad 203; *Sadagopalchariar* v. *A. Rama Rao* ILR (1903) 26 Mad 376; *Martin & Co.* v. *Syed Faiyaz Husain* AIR 1944 PC 33; *Chandu Sajan Patil* v. *Nyhalchand*, AIR 1950 Bom 192. The right to hold public meeting on public roads was also recognised in *Manzur Hasan* v. *Muhammed Zaman*, (1925) 52 IA 61 and was upheld and ratified by the Supreme Court in *Sheikh ParuBux* v. *KalandiPati*, AIR 1970 SC 1885.

[22] Art. 19 (1) All citizens shall have the right—
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;

[23] Fatima Khan, "From freedom movement to Emergency & Anna's IAC – India has a history of volatile protests" *The Print*, Dec. 12, 2020, available at <https://theprint.in/opinion/newsmaker-of-the-week/from-freedom-movement-to-emergency-annas-iac-india-has-a-history-of-volatile-protests/565347/> (accessed on Dec. 14, 2020).

other right, is subject to reasonable restrictions.[24] In the next section, we will explore the ambit of permissible restrictions on the exercise of the right to protest.

4. TESTING THE RESTRICTIONS: HOW DO WE JUDGE THE LEGITIMACY OF A RESTRICTION ON THE RIGHT?

The question of restrictions on the right to protest has always been a sensitive subject. The imposition of restrictions is in the hands of the very political institutions that are the subject of criticism. There is, therefore, a strong protectionist instinct to excessively police the boundaries and thus delimit and shrink "the political stage" available to dissenters who do not have requisite leverage to be heard by mainstream institutions.[25]

Due to the inherent conflict, restrictions in order for them to be legitimate must comply with the following tenets: (i) the restrictions must be framed in law and be based on certain objective and widely accepted criterion; (ii) they must be absolutely necessary to prevent interference with the rights of others; and (iii) only the minimum restraints necessary for the purpose must be imposed. A restriction would only be legitimate if it satisfies these conditions.

Towards the first condition, over the years, certain objective and widely accepted grounds for levying restrictions have been evolved. Under Article 19(3) of the Indian Constitution, reasonable restrictions are permitted to be imposed by law in the interests of sovereignty and integrity of India or public order. The ECHR and the ICCPR lay down similar criterion for imposition of restrictions by law with the addition of two additional criteria, i.e. protection of public health or morals or the protection of the rights and freedoms of others. By and large, peaceful assemblies and protests are protected from restriction, whereas little or no protection is granted in instances where the protestors have violent intentions, incite violence or otherwise reject the foundations of a democratic society.[26] In effect, those assembling for protest ought to be treated, at least, on par with others using the "public ways" for their own purposes. Importantly, any restrictions sought to be imposed must be duly laid down by law.

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[24] *Narendra* v. *State of Gujrat*, (1975) 1 SCC 4; *Babulal Parate*v. *State*, AIR 1961 SC 884. See also *Kerala Leprosy Patients Organisation* v. *State of Kerala*, AIR 1992 Ker 344 where the court referred to Oliver Wendell Holmes Jr.'s famous adage: "*[O]ne's right to wave his hand ends at the beginning of another' persons nose.*"

[25] *Supra* note 13, Jacques Rancière, 54.

[26] *Navalny* v. *Russia (Judgment)* (2018), 29580/12 ECHR; *Faber* v. *Hungary(Judgment)* (2012) 40721/08 ECHR; *Madhu Limaye* v. *Sub-Divisional Magistrate*, (1970) 3 SCC 746.

Towards the second and third conditions, the ECHR and the ICCPR prescribe a limitation by permitting only such restrictions as are "*necessary in a democratic society*". This test was explained applied by the European Court of Human Rights in the following manner:

> "*21. …For the Court, the right to freedom of assembly includes the right to choose the time, place and modalities of the assembly, within the limits established in paragraph 2 of Article 11….*
>
> *23. …the Court finds unconvincing the Government's argument that the restriction on the applicant's rights was necessitated by the requirement to secure the unimpeded work and movement of the MPs. This consideration cannot be regarded as a relevant or sufficient reason… Therefore, the Court cannot but conclude that the prohibition of the demonstration did not respond to a pressing social need… Thus, the measure was not necessary in a democratic society.*"[27]

While the Indian Constitution does employ these exact words, it may be argued that it contemplates the same result by laying down that only "*reasonable*" restrictions would be permissible.

5. CONCLUSION: JUDICIAL STIFLING OF DISSENT?

In the backdrop of the importance of the right of public assembly and protest and the limited contours of ethically legitimate restrictions thereon, the Supreme Court's ruling makes for a sad and difficult reading. A brief referral to the justifications offered by the Supreme Court is of assistance:

(i) Emulation of the protest by persons having a different point of view will lead to a chaotic situation.[28]

(ii) The erstwhile mode and manner of dissent against colonial rule cannot be equated with dissent in a self-ruled democracy.[29]

(iii) Public ways and public spaces cannot be occupied in such a manner and that too indefinitely…the demonstrations expressing dissent have to be in designated places alone.[30]

In the author's respectful view, the reasons and justifications clearly run afoul of the necessary conditions and criteria for legitimate restrictions. Firstly, imposition of a prohibition or restriction on a public assembly or protest, in order to be just or valid, has to be traced to a law in force. The

[27] *Saska* v. *Hungary (Judgment)* (2012) 58050/08 ECHR.
[28] *Supra* note 2, at ¶ 8.
[29] *Id.* at 16.
[30] *Id.* at 17.

judgment, unfortunately, ignores this essential condition and exhorts the executive authorities to take decisive action without any reference to the legal violation. Even if a legal violation had been observed, the Supreme Court ought to have examined the minimum possible measures required to curb the same rather than directing "suitable action" with a broad brush.

Moreover, in a democratic setup, the possibility of protest by persons with a differing point of view ought to be welcomed. It is the precise role of the political institutions to weigh and balance competing points of view, rather than dismiss them as a "*chaotic situation*". Dissent being an exercise of citizens' freedom, if anything, a democratic India must accept a wider ambit of protest than the erstwhile mode and manner of dissent against colonial rule. Contrary to this, the Supreme Court's ruling seeks to curtail the freedom to dissent on the very ground of India having achieved freedom.

The exercise of the right to protest is not, in any sense, a lower or lesser purpose than those for which the public spaces are otherwise used. Hence, the protestors cannot be denied use of public spaces that are accessible to the general populace in a largely open and unrestricted manner. Disallowing protestors the right to occupy public ways/spaces and relegating them to designated spaces at faraway spots is tantamount to an illegitimate restriction and curtailment of the right to protest since it fails to comply with the first and second conditions for legitimacy.

Perhaps the greatest flaw in the judgment is that in chiding the Administration for lack of decisive action and the High Court for failing to sufficiently monitor the situation, the Supreme Court completely abandoned, and in fact reversed, its traditional role as the protector of rights of dissenters. With the courts themselves exhorting executive agencies to action against protestors, there remains no institutional protection for the dissenter – an essential role that was expected to be played by the courts.

If followed and applied, the judgment has the potential to severely limit the space for dissent in the Indian democratic setup. We have a large un-empowered base of citizens, for many of whom the conventional modes of petitioning the government are in accessible – the legislators are faraway and unapproachable; executive agencies are a bureaucratic maze; and courts are often slow, expensive

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and inaccessible. Often, their only avenue for getting their voice heard is assembly and collective protest, which ought not to be judicially stifled so long as public peace is maintained.[31]

[31] *Adderley* v. *State*, 385 US 39 (1966).

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UYGHUR MUSLIMS AND THE FREEDOM OF RELIGIOUS BELIEFS IN CHINA

AMIT ANAND*

ABSTRACT

China has been accused by the international community for placing tight constraints on the religious freedom of Uyghurs in the northwest Xinjiang Uighur Autonomous Region (XUAR). It has been widely reported that China has placed in detention over a million Uyghur Muslims in order to 're-educate' them to adapt to 'Chinese culture'. It has been alleged that China is using a system of surveillance, control, and suppression of religious activity aimed particularly at Uyghurs accusing them of actively involving in separatist activity with foreign funding in order to destabilise the region. Note that, China has also brought in polices on regulation of religious affairs that makes it difficult for a religious body or a church, mosque to exist in China without prior State approval. The policy also gives unfettered power of oversight to the government over minority religious institutions and their day to day management. In light of the above, this paper examines the right to freedom of religion or belief in the backdrop of China's treatment of Uyghur Muslims in the Xinjiang region. Further, this paper also comments upon China's current domestic policy regulating religion and its commitment at the international level to protect and promote freedom of religion or belief of all its citizens.

1. INTRODUCTION

The preamble to the 2030 Agenda for Sustainable Development and its co-dependent sustainable development goals (SDGs) explicitly mention that 'no one will be left behind'.[1] The Agenda stresses that the dignity of a person is fundamental and that human rights, development, peace and security supplement each other. Further, the Agenda reaffirms the importance of the Universal Declaration of Human Rights (UDHR) and other international instruments relating to human rights and international law.[2] The Agenda also emphasises upon the responsibility of all States 'to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind

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[1] United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, United Nations (October 21, 2015).
[2] *Id.* at para 19.

as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.'[3]

According to the Special Rapporteur on freedom of religion or belief, the people who are most likely to be left behind and not allowed to be part of the transformative vision set by the 2030 Agenda are those who continue to face discrimination and exclusion based on their identity (including religion or belief) by States around the world.[4] The level of intimidation and harassment resulting from such discrimination and exclusion is believed to be severe in places where a person's religion or belief is in minority when compared to the rest of the population. As seen in many parts of the world, people are oppressed and made to suffer over generations simply because their religion or belief is different from that of the dominant group.[5] As the Special Rapporteur, further points out, such oppression is not only a hindrance in the full realisation of the fundamental freedoms but it also gives rise to structures of inequality that place further restrictions on the overall social, cultural, political and economic development of these religious or belief minorities. It has to be understood, particularly in the context of religious or belief minorities that the discrimination and exclusion these communities face is both systemic and systematic resulting in the denial of their basic human rights such as health care, quality education, and housing.[6]

The systemic and systematic denial of freedom of religion or belief becomes even more apparent through a study of the wide range of repressive policies of both State and non-State actors. These policies often seek to delegitimise and stigmatise religious or belief minorities through extra-legal measures. Such measures include restrictions on 'the establishment of places of worship and the forced closure of same; maintenance of humanitarian institutions and associations; the appointment and persecution of faith leaders; the celebration of holidays and ceremonies; teaching of religion or

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[3] *Ibid.*

[4] Ahmed Shaheed, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, A/75/385, United Nations General Assembly (October 12, 2020) para 2; See also, Marie Juul Petersen, "*Promoting Freedom of Religion or Belief and Gender Equality in the Context of the Sustainable Development Goals: A Focus on Access to Justice, Education and Health – Reflections from the 2019 Expert Consultation Process*", The Danish Institute for Human Rights, 2020, available at <https://www.humanrights.dk/sites/humanrights.dk/files/media/document/_%2019_02922-22%20freedom_of_religion_or_belief_gender_equality_and_the_sustainable_development_%20fd%20487747_1_1.PDF>(last visited on December 07, 2020); *Report of the High-level Committee on Programmes at its thirty-second session: Equality and Non-Discrimination at the heart of Sustainable Development: A Shared United Nations Framework for Action*, CEB/2016/6/Add.1, United Nations System Chief Executives Board for Coordination (November 9, 2016) page 7.

[5] Ahmed Shaheed, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, A/75/385, United Nations General Assembly (October 12, 2020) paras 2 and 3.

[6] *Ibid.*

beliefs; and the use of materials related to the customs of a belief.'[7] In addition to these measures, States also disproportionately apply 'anti-terrorism laws' to arbitrarily detain and ill-treat persons of religious or belief minorities. Under the pretext of countering terrorism and protecting national security, States not only harass religious or belief minorities but also label them as 'terrorist groups' and have them arrested, detained and tortured under 'extremism' or 'illegal activity' charges without having any valid evidence to justify such arrests.[8] In short, protecting national security, which heavily features as a stated objective in many government policies, is now being used as an excuse to criminalise membership of and/or activities of religious or belief minorities.

In his interim report, the Special Rapporteur on freedom of religion or belief, highlights the coercive detention of over one million Uyghurs, Turkic-speaking Muslim ethnic group (alternatively spelled as Uighurs, Uygurs) in the Xinjiang region by China in state run 're-education' camps resembling high-security prisons as part of 'de-extremism regulations'.[9] Reportedly, China has banned most Islamic religious practices in this region. Chinese authorities are said to have even forced Uyghur Muslims 'to eat and drink during the Ramadan fast period. Uyghur Muslims are said to have been detained for public displays of Islam and Uyghur culture such as wearing beards, women wearing face veils.'[10] It is said that, Chinese authorities are also forcing Muslims to learn Mandarin Chinese, sing praises of the Chinese Communist Party (CCP) and renounce their religion in the internment camps. Any resistance to learning 'essentials of Chinese culture' attracts violence from State actors. Authorities, reportedly, are sending Uyghur Muslims to work for minimal or no pay in tightly controlled factories.[11] It has also been reported that, Chinese authorities are responsible for the

[7] *Id.* at para 14.
[8] Ahmed Shaheed, *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, A/73/362, United Nations General Assembly (September 05, 2018) para 2 and 4.
[9] Stephanie Nebehay, "*U.N. says it has credible reports that China holds million Uighurs in secret camps*", Reuters, (August 10, 2018), available at <https://www.reuters.com/article/us-china-rights-un-idUSKBN1KV1SU> (last visited on December 07, 2020).
[10] Anna Hayes, "*Explainer: Who are the Uyghurs and Why is the Chinese government detaining them?*", The Conversation, (February 15, 2019) available at <https://theconversation.com/explainer-who-are-the-uyghurs-and-why-is-the-chinese-government-detaining-them-111843>(last visited on February 07, 2021); See also, Santosh Chaubey, "*Curse of Being Uyghur Muslims in China's Xinjiang*", News18,(October 14, 2020) available at <https://www.news18.com/news/world/curse-of-being-uyghur-muslims-in-chinas-xinjiang-2964011.html>(last visited on December 07, 2020).
[11] Hayes, *Supra* note 10.

forceful sterilisation of Uyghur women due to which births have collapsed in the region by more than 60% between 2015 and 2018.[12]

In light of the above, this paper examines the current situation of Uyghurs in the Xinjiang region, more importantly, their right to freedom of religion or belief in the backdrop of China's polices regulating religious affairs on one hand and the human right to religious freedom as understood under international law on the other. Section I of this paper, provides a brief history of the Xinjinag region. Section II of this paper examines China's policies on regulating religious beliefs. Section III deals with the international legal framework guaranteeing the right to religion or belief.

2. XINJIANG UYGHUR AUTONOMOUS REGION (XUAR): A BRIEF HISTORY

Located in the northwest corner of China, Xinjiang is the only Chinese province or 'autonomous' region that has a Muslim majority. More importantly, it is also the only administrative region (alongside Tibet; China claims Tibet as its integral part) in China where ethnic Chinese are a minority, however, their population in this region has been rapidly increasing.[13] As per the data from the State Council Information Office of China, Xinjiang's population in 2014 was approximately 23.2 million. According to 2010 Census, Uyghur Muslims were 46% of the population and the Han Chinese were about 40%. The Uyghur population is said to be somewhere between nine to eleven million in Xinjiang.[14]

The Chinese authority over Xinjiang has always been disputedby the Uyghurs. The dispute is linked to the influx of ethnic Chinese in the region which has been objected by the non-Chinese population including the Uyghur Muslims who think that the large scale ethnic Chinese migration has adversely affected their local culture, language and traditions. They fear that as more ethnic Chinese continue

[12] Emma Graham-Harrison and Lily Kuo, "Uighur Muslim teacher tells of forced sterilisation in Xinjiang", *The Guardian*, (September 4, 2020) available at <https://www.theguardian.com/world/2020/sep/04/muslim-minority-teacher-50-tells-of-forced-sterilisation-in-xinjiang-china>(last visited on December 07, 2020).

[13] Ma Rong, "Population Distribution and Relations Among Ethnic Groups in the Kashgar Region, Xinjiang Uyghur Autonomous Region", in Dru C. Gladney, Robyn Iredale, *et. al.* (eds.),China's Minorities On The Move: Selected Case Studies 107 (Routledge, London; New York, 1st edn., 2015).

[14] Patrick de Hahn, "*More than 1 million Muslims are detained in China-but how did we get that number?*", Quartz, (July 5, 2019) available at <https://qz.com/1599393/how-researchers-estimate-1-million-uyghurs-are-detained-in-xinjiang/>(last visited on December 08, 2020).

to migrate to the region, they will take complete control over the social, cultural, political and economic aspects of Xinjiang.[15]

In order to better understand why the current Chinese regime in Beijing has equated the Uyghur culture and religion with 'terrorism', 'separatism', and/or 'extremism', it is vital to reflect upon the history of this region.

It is said that the ancestors of the Uyghurs were nomadic tribes who came from Mongolia and settled in the southern part of Xinjiang during the sixth century CE and between the tenth and twelfth century CE, Uyghurs began converting from their previous Buddhist beliefs to Islam.[16] Note that, the region today known as Xinjiang only fell under the Chinese rule in the mid-eighteenth century when it was conquered by the Manchu Qing Empire. However, even after the Manchu conquest, the region kept seeing numerous rebellions, some of which even resulted in temporary state of independent rule. The Qing only re-conquered most of Xinjiang from Yaqub Beg in late 1870s, who had established an emirate extending from southern Xinjiang to Turpan, which lasted for twelve years.[17] Further, it was only in the mid-1930s with the establishment of a 'Turkish-Islamic Republic of East Turkestan' (TIRET), that a major political shift was marked in the region. The establishment of TIRET is even cited by advocates of Uyghur independence today.'[18] The TIRET was proclaimed in the city of Kashgar. However, the TIRET was short-lived and collapsed after less than three months when the city was retaken by Chinese government troops. In 1940, a new rebellion against Chinese rule started. The rebels demanded for an end to Chinese rule, equality for all nationalities, recognised use of native languages, friendly relations with the Soviet Union, and opposition to Chinese immigration into Xinjiang. In 1944, a second 'East Turkestan Republic' (ETR) was established in northern Xinjiang backed by the Soviet Union. However, following the outcome of the Chinese civil war, the Chinese Communist forces occupied Xinjiang in late 1949.[19]

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[15] "*The Uighurs and the Chinese state: A long history of discord*", Preda Foundation,(July 20, 2020) available at <https://www.preda.org/2021/uighurs-and-the-chinese-state-a-long-history>(last visited on December 08, 2020).

[16] Blaine Kaltman, *Under The Heel of The Dragon: Islam, Racism, Crime and The Uighur in China* 2 (Ohio University Press, Athens, 1st edn., 2007).

[17] Joanne Smith Finley, *The Art of Symbolic Resistance: Uyghur Identities and Uyghur-Han Relations in Contemporary Xinjiang* 16 (Brill, Leiden; Boston, 1stedn., 2013).

[18] Ildikó Beller-Hann, *Community Matters in Xinjiang, 1880-1949: Towards A Historical Anthropology of the Uyghur* 59 (Brill, Boston, 1stedn., 2008).

[19] Stefan Talmon, "*Germany raises concerns over human rights situation in Xinjiang*", GPIL-German Practice in International Law, (October 15, 2020) available at <https://gpil.jura.uni-bonn.de/2020/10/germany-raises-concerns-over-human-rights-situation-in-xinjiang/> (last visited on December 08, 2020).

Since the early 1930s, Uyghurs and other Muslim groups in south Xinjiang have been mobilising political opposition along Turkish-Islamic lines as seen through the establishment of the TIRET. Even before the early 1930s, it was the Muslim Rebellion in 1864 in which Muslims (Hui and Uyghurs) united against a common non-Muslim enemy (Manchus and Han).[20] As a result, the memories of a distinct political and administrative identity still remain strong in today's Uyghur community. Inspired by a pan-Turkic ideology, the Uyghur community remains strongly rooted in secular and democratic ideals. Coming from a conventional political tradition, the Uyghurs do not support the use of violence for achieving their objectives.[21] This could be one of the many reasons why even after the Chinese occupation of the region in 1949, most demonstrations were peaceful in nature with no calls for secession despite grievances over socio-economic inequalities. As noted by Mukherjee,

> *'The Mao years, for instance, which were from 1949 until 1976, were the years when religious groups and ethnic minorities came under tremendous pressure. Mao's policies towards ethnic minorities and religious groups were stringent and harsh. In this context, it is worth mentioning that Xinjiang has always been viewed unfavourably since it has a strong Islamic presence.'*[22]

It was only after 1990, that calls for independence were more overtly made, and violent protests along ethno-political lines became frequent. The call for more autonomy was the result of China's policy to tighten control over the Uyghur community.[23] China's policy to step up ethnic Chinese migration in Xinjiang was linked to geo-political changes during this period (such as the fall of the Soviet Union). China was fearful that the changing regional and world politics could further stir up Uyghur ethno-nationalist aspirations in Xinjiang.[24] As part of its new policy, China committed major resources to economic growth in the region mainly by exploiting Xinjiang's natural resources (oil and gas). Soon, new roads, industries, cities along with an influx of ethnic Chinese ensued in the region. Chinese policy makers in Beijing believed that economic development would reduce local nationalism and further aid in the complete integration of the region with the mainland.[25] But, these

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[20] *Supra* note 18.
[21] Kunal Mukherjee, *Conflict in India and China's Contested Borderlands: A Comparative Study* 33 (Routledge, Milton, 1st edn., 2019).
[22] *Id.* at 34.
[23] Gardner Bovingdon, *The Uyghurs - Strangers in Their Own Land* 23 (Columbia University Press, 1st edn., 2010).
[24] *Ibid*; See also, Paul M. Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* 3 (Cambridge University Press, Cambridge, 1st edn., 2005).
[25] Bhavna Singh, "Ethnicity, Separatism and Terrorism in Xinjiang: China's Triple Conundrum" *Institute of Peace and Conflict Studies* 7 (2010); See also, Ren Qiang and Yuan Xin, "Impacts of Migration to Xinjiang Since the 1950s", in Dru

policies further intensified political tensions due to a sharp reaction by the Uyghurs against mass migration of ethnic Chinese into the region resulting in an uneven distribution of economic resources (ethnic Chinese were favoured over the Uyghurs). The tensions became evident when demonstrations were held in the city of Ghulja in 1997 to protest Chinese polices in Xinjiang, particularly, the religious and cultural restrictions. Although the protest was peaceful, Chinese security forces shot down a number of unarmed protestors which then resulted in rioting.[26] As noted by Finley, during the riots,

> *'Violent incidents took the form of attacks on Han cadres, police, and military, assassinations of perceived 'collaborators' among indigenous Uyghur cadres, and occasional bombings. The violence climaxed in 1997, when several hundred local people in Ghulja, enraged by increasingly acute restrictions on religion (including the banning of the all-male social gathering), came out in protest on the streets. Banners and slogans included calls for 'ethnic equality' and 'independence', as well as expressing religious sentiments. Protests continued for several days, resulting in the arrest of demonstrators. While anti-riot police and troops reportedly used dogs, tear gas, fire hoses, beatings, and live ammunition on both demonstrators and bystanders, rioters are said to have torched vehicles and attacked Han police and civilians.'*[27]

The Ghulja incident was also one of the very few occasions wherein Uyghur activists have resorted to violence. Nevertheless, the disturbances created in the aftermath of this incident could not grow any further because Beijing, in the backdrop of the September 2001 attacks on the United States of America, announced that the Uyghur separatists in Xinjiang had links to the Taliban in Afghanistan.[28] Surprisingly, these assertions by the Chinese government came at a time when the region was said to be stable. There were no significant violent incidents in the region since 1999. Furthermore, by the early 2000s, China has had some success in encouraging young urban Uyghurs to integrate themselves in the Han-dominant society.[29] In this context, it is argued that, the sudden claim of a Uyghur terrorist threat in the region was an attempt by China to further justify its policy of extreme crackdown on dissent and suppress Uyghur nationalism and religiosity.[30]In addition, in

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C. Gladney, Robyn Iredale, *et. al.* (eds.), China's Minorities On The Move: Selected Case Studies 99 (Routledge, London; New York, 1st edn., 2015).

[26] Gardner Bovingdon, "The Not-So-Silent Majority: Uyghur Resistance to Han Rule in Xinjiang" 28 *Modern China* 64 (2002).

[27] *Supra* note 17 at 20.

[28] Sean R. Roberts, "The Biopolitics of China's "War on Terror" and The Exclusion of The Uyghurs" 50 *Critical Asian Studies* 232 (2018).

[29] *Id.* at 238.

[30] *Ibid.*

August 2002, the US embassy in Beijing also announced that it considered the 'East Turkistan Islamic Movement (ETIM)' as 'a terrorist organization associated with al Qaeda'.[31] Note that, in November 2020, the US removed the ETIM from its list of 'terrorist' groups. Secretary of State, Mike Pompeo also called the mass detention 'the stain of the century' as US senators across party lines sought to declare China's treatment of the Uyghurs as genocide.[32]

Having given a brief description of the Xinjiang region, the next section focuses on highlighting China's policy on religious freedom, post 9/11.

3. REGULATING RELIGION IN CHINA

The Chinese government officially states that, 'the state treats all religions fairly and equally, and does not exercise administrative power to encourage or ban any religion. No religion is given preferential treatment above other religions to enjoy special legal privileges. The state manages religious affairs involving national and social public interests in accordance with the law but does not interfere in the internal affairs of religions.'[33] But, the Chinese government's treatment of certain groups such as unregistered Christian churches, Tibetan Buddhists and Uyghur Muslims has raised global concerns over the government's claim of not interfering in the internal affairs of any religion.[34] Moreover, the document on 'China's Policies and Practices on Protecting Freedom of Religious Belief, 2018' mentions that 'under the staunch leadership of the Chinese Communist Party (CPC) Central Committee with Xi Jinping as the core', China has adopted a policy of actively guiding religions to adapt to the socialist society.[35] A question, however, arises with respect to what specific measures will fall within the ambit of a policy on 'actively guiding religions to adapt to Chinese culture', further, whether those measures will abide by the rules of international human rights law or not. This becomes further clear by an examination of the document, which states that

[31] James A. Millward, *Violent Separatism in Xinjiang: A Critical Assessment* 13 (East-West Center, Washington, D.C., 1st edn., 2004); See also, Singh, *Supra* note 25 at 5 - 'Throughout the 1970s and 1980s the ETIM tried to mobilize local support through various slogans like 'Down with socialism', 'In the past Marxism suppressed religion and now it is the turn of religion to suppress Marxism', 'Take Barin, establish Eastern Turkestan', and so on.'

[32] "US removes group condemned by China from 'terror' list", Aljazeera, (November 7, 2020) available at <https://www.aljazeera.com/news/2020/11/7/us-removes-group-condemned-by-china-from-terror-list> (last visited on December 08, 2020).

[33] China's Policies and Practices on Protecting Freedom of Religious Belief, 2018, available at: https://china.usc.edu/chinas-policies-and-practices-protecting-freedom-religious-belief (last visited on December 09, 2020). [Hereinafter, cited as, China's Policies and Practices on Protecting Freedom of Religious Belief, 2018].

[34] "China: Religion and Chinese Law", The Law Library of Congress, Global Legal Research Center, (June 2018) available at <https://www.justice.gov/eoir/page/file/1068681/download> (last visited on December 09, 2020).

[35] China's Policies and Practices on Protecting Freedom of Religious Belief, 2018.

the State shall ban illegal religious activities, prohibit the dissemination of extremist thought and any engagement in extremist activity in the name of religion, resist the infiltration of hostile foreign forces in taking advantage of religion and fight against illegal and criminal activities operating under the guise of religion.[36] As is evident from the Chinese treatment of Uyghurs in Xinjiang (where, as per multiple reports, China has arbitrarily detained, placed religious restrictions and forced sterilisations in an attempt to 're-educate' the Uyghur Muslims in order to counter 'extremism' in the region), the Chinese government has used its policies on regulation of religious beliefs as a political tool to clampdown on minority communities by labelling their culture and tradition as being significantly prone to extremism and terrorism.

The CCP's bureaucratic control over religion only began in the aftermath of the fall of the Soviet Union through the implementation of Document 6(1991).[37] Document 6, made it compulsory to get formal government approval to carry out any of the following: 'construction of any new religious venue; provincial permission for the acceptance of large foreign donations; provincial agreement for any foreign visitation; and State Council authorisation for any major religious activities concerning foreign affairs.'[38] From 1990 onwards, there was further increase in the bureaucratic control over managing religious affairs. This is evident from the drafting and implementation of a.) Regulation Governing Venues for Religious Activities, 1994[39] and b.) Religious Affairs Regulations, 2005,[40] which was revised in 2017 under President Xi's leadership and took effect from February 2018.[41]

As soon as Xi came to power, he advocated for the rejuvenation of the Chinese nation which according to him was only possible by vigorously following the Chinese national culture or rather his version of Chinese national culture. In other words, Xi implied that if Chinese culture has to act as an alternative model to Western ideas it has to work towards reviving 'Chineseness' through strict ideological control.[42] Here, Xi's speech at the 19th National Congress of the CCP in 2017 is relevant

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[36] China's Policies and Practices on Protecting Freedom of Religious Belief, 2018.
[37] Kuei-min Chang, "New Wine in Old Bottles: Sinicisation and State Regulation of Religion in China" 1-2 *China Perspectives* 38(2018).
[38] *Ibid.*
[39] Regulation Governing Venues for Religious Activities, 1994, available at: https://www.globaleast.org/wp-content/uploads/2020/02/Regulation_Governing_Venues_for_Religious_Activities.pdf (last visted on December 10, 2020).
[40] Religious Affairs Regulation, 2005, available at: https://www.refworld.org/pdfid/474150382.pdf (last visted on December 10, 2020). [Hereinafter, cited as, Religious Affairs Regulation, 2005].
[41] Religious Affairs Regulation, 2017, available at: https://www.chinalawtranslate.com/en/religious-affairs-regulations-2017/ (last visited on December 10, 2020). [Hereinafter, cited as, Religious Affairs Regulation, 2017].
[42] *Supra* note 37 at 39; See also, Caroline S. Hau, "Becoming Chinese in Southeast Asia", in Peter J. Katzenstein,

as it helps in understanding the current regulations on religious beliefs in China. His speech, more importantly, point towards adopting the notion of religious sinicisation, i.e., to modify religious faith and practice as per Chinese culture, as a policy measure to achieve the CCP's objectives on protecting Chinese characteristics. In his speech, Xi states:

> *'We will fully implement the Party's basic policy on religious affairs, uphold the principle that religions in China must be Chinese in orientation and provide active guidance to religions so that they can adapt themselves to socialist society. We must rigorously protect against and take resolute measures to combat all acts of infiltration, subversion, and sabotage, as well as violent and terrorist activities, ethnic separatist activities, and religious extremist activities."*[43]

The issue of sinicisation was also a response to the increasing popularity of Christianity in China which was considered detrimental to indigenous religious traditions including Confucianism, Taoism. The crackdown on Christians and the demolition of churches is the result of the belief that Christianity will dominate Chinese culture and pose a national security threat to the nation because of the foreign nature of the religion.[44]

The Religious Affairs Regulation, 2005 which replaced the 1994 Regulation Governing Venues for Religious Activities was the highest level government regulation of religious beliefs in China. Under the 2005 Regulations, as per article 5, the State Administration for Religious Affairs (SARA) at the county level or higher is mandated to exercise administrative control over religious affairs.[45]Article 6 requires religious groups to mandatorily register with the government when such groups are either founded, changed or disbanded.[46] Under article 7, religious groups are allowed to compile and print publications only if they abide by relevant state regulations. Published material that contains religious information has to comply with regulations governing publication and shall not contain, among other things, information that propagates religious extremism.[47]Article 19 states that religious affairs

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Sinicization and The Rise of China: Civilizational Processes Beyond East and West 176-177 (Routledge, London; New York, 1st edn., 2012).

[43] Sven-Erik Brodd, "Chinese Christianity in International Perspective: Some Remarks on Ecclesiology and Fundamental Concepts Engaging East and West" 19 *International Journal for The Study of the Christian Church* 90 (2019).

[44] *Id.* at84; See also, Lily Kuo, "In China, they're closing churches, jailing pastors-and even rewriting scripture", *The Guardian*, (January 13, 2019) available at <https://www.theguardian.com/world/2019/jan/13/china-christians-religious-persecution-translation-bible> (last visited on December 10, 2020).

[45] Religious Affairs Regulation, 2005.

[46] Religious Affairs Regulation, 2005.

[47] Religious Affairs Regulation, 2005.

department shall supervise and inspect places of religious activity.[48] Religious instructors can engage in religious education activities only after they have been certified to do so by their religious group and after a report has been submitted regarding the same to the department of religious affairs of the People's Government.[49] The revision to the Religious Affairs Regulation, 2005 carried out under Xi' leadership in 2017 not only maintained the bureaucratic control over religious beliefs present in the 2005 regulations but went a step ahead and put in motion Xi's policy of religious sinicisation.[50] This is evident, especially, through articles 3 and 4 of the 2017 regulations. Under article 3, management of religious affairs shall uphold the principles of protecting what is lawful, prohibiting what is unlawful, suppressing extremism, resisting infiltration, and fighting crime.[51] Further, article 4 added a clause that the State actively guides religion to fit in with socialist society.[52]

In short, the current regulatory regime on religious affairs in China in the name of uniting the masses and advancing social harmony and stability has brought in policies that not only impose State sanctioned religious beliefs on minority religions under the guise of 'guiding religion to fit in with socialist values' but also labels any minority religious activity as 'illegal' and equate minority culture and tradition with 'extremism' and 'crime'. Further, any foreign missionary work is immediately seen as an act of 'infiltration' and a plot by the West to divide China and threaten its fine traditional culture.

The next section examines China's repression of Uyghurs in light of the provisions on the right to freedom of religion under international law.

4. THE PROTECTION OF FREEDOM OF RELIGION UNDER INTERNATIONAL LAW

[48] Religious Affairs Regulation, 2005.
[49] Religious Affairs Regulation, 2005, art.27.
[50] *Supra* note 37 at 41-'To provide active guidance to religions [so they could] adapt to socialist society, [we] must insist on the direction of sinicisation, must increase the level of rule of law in religious work, must dialectically consider the social function of religion, and must attach importance to and develop the impact of religious personages. [We shall] guide religion to strive for the promotion of economic development, societal harmony, cultural prosperity, ethnic unity, and unification of the fatherland.'
[51] Religious Affairs Regulation, 2017.
[52] Religious Affairs Regulation, 2017.

The Chinese government officially states under article 36(1) of the Constitution that citizens of China enjoy freedom of religious belief.[53] Under article 36(2), 'no state organ, public organization, or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion.'[54] But, China's recent efforts (as mentioned in the previous section) to protect and promote its ethnic culture as a means of reigniting national identity along with the government's broad discretion over religious practices resulting in intolerance and discrimination, especially, towards the Uyghur Muslims[55] has diluted the mandate of religious tolerance provided in the Constitution.

The international legal obligation towards protecting the right to religious freedom or belief emanates essentially from: 1) the Universal Declaration of Human Rights, 1948; 2) the International Covenant on Civil and Political Rights, 1966 and 3) the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, 1981.

- **The Universal Declaration of Human Rights (UDHR), 1948**

The UDHR has several provisions relating to religious human rights. For instance, article 2 prohibits distinction of any kind, including on the basis of religion.[56] Article 26 covers the right to education and refers to promoting understanding, tolerance and friendship among all racial or religious groups through education.[57]But, the most crucial provision under the UDHR on religious rights is article 18 which states that,

> *'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."*[58]

The underlying principle behind article 18 is the peaceful co-existence of a plurality of religious beliefs within a particular State.[59] Further, in granting of the right to religion, the article remains

[53] The Constitution of the People's Republic of China, available at: https://www.refworld.org/pdfid/4c31ea082.pdf (last visted on December 11, 2020). [Hereinafter, cited as, The Constitution of the People's Republic of China].
[54] The Constitution of the People's Republic of China.
[55] Margaret Besheer, "*At UN: 39 Countries Condemn China's Abuses of Uighurs*", Voa, (October 6, 2020) available at <https://www.voanews.com/east-asia-pacific/voa-news-china/un-39-countries-condemn-chinas-abuses-uighurs>(last visited on December 11, 2020); See also, "*Xinjiang: Large numbers of new detention camps uncovered in report*", BBC, (September 24, 2020) available at <https://www.bbc.com/news/world-asia-china-54277430>(last visited on December 11, 2020).
[56] The Universal Declaration of Human Rights, 1948, available at: https://www.refworld.org/docid/3ae6b3712c.html (last visited on December 11, 2020). [Hereinafter, cited as, The Universal Declaration of Human Rights, 1948].
[57] The Universal Declaration of Human Rights, 1948.
[58] The Universal Declaration of Human Rights, 1948.

neutral in its approach and does not consider majority or minority status as a relevant factor, and simply states that everyone has the right to religion. In essence, article 18 only provides a framework within which each person is free to pursue any religion in his or her own way.[60]Article 18 is divided into two parts, the first part guarantees the right to freedom of thought, conscience, and religion and the second enumerates the specific rights included therein. The second part, however, is not exhaustive.[61] Another essential aspect of article 18 is reference to the term 'belief'. The inclusion of the term 'belief' in article 18, and in similar articles in other international instruments is to be strictly interpreted in connection with the term 'religion'. Note that, the term belief refers only to beliefs associated with religion and not those that are political, cultural, scientific or economic in nature (though, these beliefs are also to be protected under law).[62] As mentioned by Lerner, the term belief was also incorporated into the declaration 'to protect nonreligious convictions, such as atheism or agnosticism.'[63]

Although the UDHR at the time of its adoption was not a legally binding instrument, today, it is one of the primary source of global standards on human rights and has evolved to the extent that some its provisions now constitute customary international law that are binding on all States.[64] Its considerable practical importance, in interpreting the Charter of the United Nations, has also been recognised by the International Court of Justice (ICJ) [see, Case Concerning United States Diplomatic and Consular Staff in Tehran, ICJ Reports, 3 (1980), para. 91], the International Criminal Court (ICC) [see, Prosecutor v Omar Hassan Ahmad Al Bashir, No. ICC-02/05-01/09 (4 March 2009), para. 156], regional and domestic courts as an aid to interpretation of relevant human rights treaties [see, The European Court of Human Rights in the Golder case, ILR 57, 201], and national constitutional provisions protecting human rights [see, Attorney General v Susan Kigula and 417 Others, Constitutional Appeal No. 03 of 2006, Judgment of 21 January 2009].[65]

- **The International Covenant on Civil and Political Rights (ICCPR), 1966**

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[59] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* 259-260 (University of Pennsylvania Press, Philadelphia, 1st edn., 2010).
[60] *Ibid.*
[61] Nehemiah Robinson, *Universal Declaration of Human Rights: Its Origin, Significance, Application, and Interpretation* 128 (Institute of Jewish Affairs, World Jewish Congress, New York, 1stedn., 1958).
[62] Natan Lerner, *Religion, Secular Beliefs and Human Rights* 14 (Brill, Leiden, 2nd edn., 2012).
[63] *Ibid.*
[64] Hurst Hannum, "The Universal Declaration of Human Rights in National and International Law" 3 *Health & Human Rights* 147 (1998).
[65] Mashood A. Badiferin and Manisuli Ssenyonjo, *International Human Rights Law: Six Decades after The UDHR and Beyond*9 (Routledge, London; New York, 1st edn., 2016).

China is a signatory to the ICCPR but it has not yet ratified the Covenant, however, it is still obligated to refrain from acts which would defeat the objects and purposes of the Covenant.[66]The most relevant provisions in the ICCPR relating to right to freedom of religion or belief are articles 18 and 27.Under article 18:

> *'1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
>
> *2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
>
> *3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*
>
> *4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.'*[67]

The Human Rights Committee in General Comment No. 22 (Article 18) states that, the right to freedom of thought, conscience and religion is 'far-reaching and profound' in its application. These rights are also fundamental in nature and cannot be derogated from even during the time of public emergency. Further, as per the Committee, the meaning of terms 'belief' and 'religion' are to be broadly construed.[68]Article 18(2) is of significance here especially in the context of China's recent policies on religious beliefs discussed in the previous section. As per the Committee, article 18(2) bars coercion that would prohibit an individual from freely exercising his or her right to religion or belief.[69] The Committee also underlines the use of policies or practices employed by States that 'use threat of physical force or penal sanctions to compel believers or non-believers to adhere to their

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[66] The International Covenant on Civil and Political Rights, 1966, available at: https://www.refworld.org/docid/3ae6b3aa0.html (last visited on December 12, 2020). [Hereinafter, cited as, The International Covenant on Civil and Political Rights, 1966]; See also, Vienna Convention on the Law of Treaties, 1969, s.18availabeat:https://www.refworld.org/docid/3ae6b3a10.html (last visited on December 12, 2020).
[67] The International Covenant on Civil and Political Rights, 1966.
[68] United Nations Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*,CCPR/C/21/Rev.1/Add.4, Office of The High Commissioner for Human Rights (July 30, 1993) para 1.
[69] *Id.* at para 5.

religious beliefs and congregations, to recant their religion or belief or to convert.'[70] Similarly, article 18(4) which gives liberty to parents or legal guardians 'to ensure the religious and moral education of their children in conformity with their own convictions' is closely associated with the guarantees under article 18(1).[71]As per media reports, China has been forcing children (belonging to the Uyghur community) in State-run boarding schools in Xinjiang to become 'more Chinese' and be loyal to the Communist party as part of its campaign to indoctrinate Uyghur children from an early age and make them 'hate their own culture'.[72]

With respect to article 27,[73] the Committee notes that, even in places where a religion is recognised as a State religion or that it is established as official or traditional or that the followers of such religion constitute a majority of the population, the rights of persons belonging to ethnic, religious or linguistic minorities shall not be curtailed, especially, the rights enumerated under articles 18 and 27.[74]

- **The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, 1981**

The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief was proclaimed by the General Assembly of the United Nations by resolution 36/55 of November 25, 1981. Articles 1 and 5 of the Declaration generally follow the provisions of the ICCPR.[75] Article 6 of the Declaration provides a list of freedoms of thought, religion, and belief. This list provides the rights that fall within an accepted minimum standard.[76]

Articles 2 and 3 of the Declaration are of significance because they address intolerance and discrimination based on religion and belief. Article 2(2) mentions intolerance and discrimination as 'any distinction, exclusion, restriction or preference based on religion or belief and having as its

[70] *Ibid.*
[71] *Supra* note 68 at para 6.
[72] Amy Qin, "In China's Crackdown on Muslims, Children Have Not Been Spared", *New York Times*, (December 28, 2019) available at <https://www.nytimes.com/2019/12/28/world/asia/china-xinjiang-children-boarding-schools.html>(last visited on December 12, 2020).
[73] The International Covenant on Civil and Political Rights, 1966, art. 27-'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.
[74] *Supra* note 68 at para 9.
[75] The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, 1981, available at: https://www.refworld.org/docid/3b00f02e40.html (last visited on December 12, 2020).
[76] *Ibid.*

purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.'[77] Further, as per article 3, discrimination on the grounds of religion or belief is an attack on the human dignity and goes against the principles of the Charter of the United Nations. Such discriminatory behaviour shall also be seen as a violation of the human rights and fundamental freedoms proclaimed in the UDHR and other international treaties and convention.[78]

The Uyghur Muslims have been denied the fundamental freedom to right to religion or belief enshrined in the above mentioned international instruments. As mentioned in section II, the Chinese government has been actively pursuing policies that are intolerant and discriminatory towards Muslims in the Xinjiang region. Note that, a joint statement on the human rights situation in Xinjiang on behalf of 39 countries not only took note of the developing situation in Xinjiang but also called on China 'to allow immediate, meaningful and unfettered access to Xinjiang for independent observers including the Office of the High Commissioner for Human Rights, and relevant special procedure mandate holders and to urgently implement the Committee on the Elimination of Racial Discrimination eight recommendations[79] related to Xinjiang.'[80]

5. CONCLUSION

The persecution of Uyghurs in Xinjiang (evident from numerous reports)is a clear violation of their basic human right to practice any religion or belief. The Chinese government's policy to suppress religion in Xinjiang, particularly the religion of Islam to protect its national security from 'extremism' and 'terrorism' goes against the mandate of the UDHR and other international instruments that recognise and protect the inherent dignity and the equal and inalienable rights of all human beings.

As noted by the Committee on the Elimination of Racial Discrimination, despite reports highlighting the detention of Uyghurs in the Xinjiang region, there is no official data available regarding the number of people who have been illegally placed in long term detention or who have

[77] *Supra* note 75.
[78] *Ibid.*
[79] Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Fourteenth to Seventeenth Periodic Reports of China (including Hong Kong, China and Macao, China)*,CERD/C/CHN/CO/14-17, (August 30, 2018) para 41.
[80] "*Joint Statement on the Human Rights Situation in Xinjiang and the Recent Developments in Hong Kong, Delivered by Germany on Behalf of 39 Countries*", United States Mission to the United Nations, (October 6, 2020) available at <https://usun.usmission.gov/joint-statement-on-the-human-rights-situation-in-xinjiang-and-the-recent-developments-in-hong-kong-delivered-by-germany-on-behalf-of-39-countries/>(last visited on December 12, 2020).

been forced to spend varying periods in so-called 're-education camps'.[81] There are also reports that mention mass surveillance targeting Uyghur Muslims which raises an additional issue relating to violation of the right to privacy which is a well-recognised right under international law. The torture and ill-treatment of Uyghurs is the result of misuse of anti-terrorism laws and vague references to extremism and separatism. Unfounded allegations of breach of peace, foreign infiltration, terrorism have been used as an excuse to criminalise peaceful civic and religious expression and facilitate criminal profiling of Uyghurs in the region. What is worrying is that the existing laws, regulations, and practices in China are narrowly tailored to advance State-Party objectives[82] that allows authorities to undertake any measure in the name of 'providing active guidance to religions so they could adapt to socialist society'.

In order for the torture of religious minorities to stop, it is crucial that, alongside the implementation of the eight recommendations by the Committee on the Elimination of Racial Discrimination, a thorough legal reform is done of China's domestic polices regulating religious beliefs. Again, this will only be possible if the international community continues to put pressure on the Chinese government to come forward and disclose all laws and regulations applicable to religious practice in the XUAR and ensure that China fulfill its obligations to protect the right to freedom of religion or belief under international law.

[81] *Supra* note 79 at para 40.
[82] *Supra* note 43.

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RIGHT TO MAINTENANCE FOR MUSLIM WOMEN: A CRITIQUE OF LEGAL CONNOTATIONS

DEBASREE DEBNATH*

ABSTRACT

India is a hub of multitudinous and multilingual languages, where people celebrate their own traditional culture, customary practices in a diversified manner; people gratifies their own culture and respect their conventional practices. Here, the personal laws are based on religious belief and practices which are diverse in nature. Right to maintenance which is governed by the personal law of an individual is a matter of great concern as the basic objective of such law is to provide support and economic benefit to the other spouse who is not fiscally autonomous and needs to be hold up by his or her better half. But the notion of criminalization of triple talaq not only violates such right of maintenance to the wife but it also makes her destitute in the society. The objective of this article is to look through the lenses of different colours which in the one hand criminalizes the triple talaq practice – a blatant practice against the Muslim womanhood, and on the other hand by criminalizing such act it violates the maintenance right of the women as it is only the husband who has the moral as well as legal responsibility of maintenance towards his wife. The researcher also discussed the notion of Uniform Civil Code for explaining the positive effects of such law which can provide the women their right to 'dignity' which is also incorporated in the Constitution of India in its true sense.

1. INTRODUCTION

The right of wife to be maintained by her husband has been recognised and protected under all the personal laws; the respective legislative enactments incorporate the conditions and procedures to have the maintenance from the husband. Personal laws under Hindu, Christian, Jews and Muslim are based on the customary practices, usages and traditional practices and with time they have been given the legal authority to safeguard such rights of women. Maintenance or *Nafaqa* like any other religious law, is a legal right of a Muslim women and such right arose due to the status of 'wife' which is attached with her after the solemnization of the *nikah* or marriage. The maintenance for the wife includes food, clothing, accommodation and other necessities of life which are customarily

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extended towards a wife.[1] The authority to have the maintenance right for women has arisen from the age old days of human civilization and from the tradition and customary practices in the society. The jurisprudence relating to maintenance right of women can be looked through the lenses of historical scenario and condition of women prevalent in the past era. With respect to the Muslim women right of maintenance is concern, it is the Holy Quran and Prophet's preaches which provided such right to the Muslim women. The Quran depicts that, - Men are the protectors and maintainers of the women as God provide them more strength than other; it is also because the men supports women from their earning and means.[2] A Muslim husband maintains his wife during the coverture; however, if the marriage is dissolved by a competent court, a Muslim husband is responsible to maintain his wife only for a limited period. The legal connotation here restricts the liability and obligation of the husband only during the *iddat* period of the wife. Such *iddat* period differs based on the facts of each case – in case of a *talaq* or divorce the *iddat* period is three menstrual courses if the wife is in that stage or three lunar months. In case the wife is pregnant the *iddat* period subsists even after three months and if the delivery of the child happens before such period, the *iddat* will terminate with the delivery of the child. Such women have no remedy of maintenance after the *iddat* period is over under their Muslim personal law; it is only the secular law of the country which provides remedy to those Muslim women after the completion of the *iddat* period. The Code of Criminal Procedure 1973 provides equal law for people from all religion and apply uniformly irrespective of their religion, caste, creed, place of birth. The Muslim women who do not have any means of survival after the *iddat* period can knock the door for justice under the secular law of the country to get the remedy and to hold back their economic condition. Although the Muslim personal law provides the remedy of paying the unpaid *mahr* or dower money immediately after the dissolution of their marriage, but it cannot be equated with the maintenance allowances of the wife; as *mahr* is a token of respect towards the wife from their husband and maintenance is payable after the dissolution of the marriage or if the wife is residing separately from the husband. The Dissolution of Muslim Marriage Act 1939 also provides the remedy to pay the unpaid *mahr* and maintenance allowances during the *iddat* period only. Therefore, such law does not meet the requirements of the divorced wife who is unable to survive after the *iddat* period.

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1 Keith Hodkinson, *Muslim Family Law: A Sourcebook* 147 (Croom Helm, London, 1st edn., 1984).

2 The Nobel Quran, *The Women, Quran LV: 34*, Quran, available at: https://quran.com/4/34?translations=101,19,84,22,18,21,95,20,17%20 (last visited on December 09, 2020).

The researcher in this paper highlights the constraint and dilemma of the Muslim women who are not able to maintain themselves after the *iddat* period and the notion of secular law which protect the rights of such women. The objective of this paper is to emphasize on the constitutional vision of dignity of women and to underline the quandary and predicament of the maintenance right of women under the Muslim personal law. The researcher also pens down the recent judicial pronouncements and other legal mechanisms including Uniform Civil Code (UCC) to suggest a pathway to secure the maintenance right of Muslim women.

2. MUSLIM PERSONAL LAW AND RIGHT TO MAINTENANCE FOR WOMEN

A Muslim husband is duty bound to maintain his legally wedded wife for his lifetime, if the wife obeys his reasonable order, permits him the access of her in all legal situations and remain dutiful towards her husband; but she cannot have the maintenance right if she resides apart from the husband without any reasonable ground or becomes rebellious or refuses to cohabit with the husband. The Muslim personal law obligates rights and duties to either spouse and to have conjugal rights; such rights have also been protected under the legal shield. Various legislatures such as the Dissolution of Muslim Marriage Act 1939, the Muslim Women (Protection of Rights on Divorce) Act 1986 and Muslim Women (Protection of Rights on Marriage) Act 2019 were enacted to provide remedies to the Muslim women and to remove the constrains from their customary laws. Muslim women were sufferers of many evil practices in the early era which made the legislative drafters to think and protect their rights; the Dissolution of Muslim Marriage Act 1939 was framed with the very objective to clarify the provisions for the dissolution of Muslim marriage and to remove all the doubts and effects of renunciation of Islam by a married Muslim woman on her marriage tie. This Act also provides the grounds for the dissolution of marriage, which again give relief to the woman to dissolve her marriage in any of the grounds as mentioned under section 2 of the said Act. Under this Act the husband is bound to perform his marital obligation as well as provide maintenance to the wife.[3] The goal of maintenance law is to ensure the availability of all the necessity which he or she enjoys when they lived together as jurisprudentially after the solemnization of marriage it becomes the responsibility of the husband to support and provide maintenance to his wife. The idea is that the woman should not be dejected and left in the hand of the harsh society. The Dissolution

[3] The Dissolution of Muslim Marriage Act, 1939 (Act 8 of 1939), s. 2 (ii), (iv).

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of Muslim Marriage Act 1939 also provides security to the *mahr* or dower which is paid to the married woman which is a customary practice under the Muslim personal law. Therefore, this Act can be termed as a 'relief provider' which give supports and clarifies many unsolved issues which prevailed even before the enactment of this Act. In *Badruddin* v. *Aisha Begum*[4] the court decided that the wife may claim maintenance and refuse to live with the husband if the husband marries a second wife or keeps a mistress. Again section 3 of the Muslim Women (Protection of Rights on Divorce) Act 1986 provides a 'reasonable and fair provision' for maintenance to the wife from her former husband within the *Iddat* period; the amount of maintenance is decided based on the income of the husband, requirements of the divorced wife and lifestyle of the spouses when they resided together. The significant aspect which needs to be mentioned here is under this Act the maintenance for the wife is determined only till the *iddat* period and after such period according to section 4 of the Muslim Women (Protection of Rights on Divorce) Act 1986 the wife's relatives who will inherit property after her death or the children or her parents or the State Wakf Board are given the responsibility to provide the maintenance to the wife who do not have any independent income and is unable to maintain herself by her own income. The situation becomes worst when such women are not even maintained by their family members or if the family is very poor; the situation become very susceptible and helpless for such women that it becomes difficult for her to survive and carry on her life in such a miserable condition. Sometimes these women find no other way but to get married again with some other male members of their community even though she does not wish the same. The Muslim Women (Protection of Rights on Marriage) Act 2019 provides an age old legacy and declared *triple talaq* as void and illegal.[5] This Act not only assists the Muslim women in protecting their rights but it also provides subsistence allowance to her as well as for her dependent child.[6]

Apart from the personal laws of Muslim which governs the maintenance law, the Code of Criminal Procedure (CrPC) 1973 also provides remedy to the Muslim women; such law not only gives relief to the wife within the period of *iddat*, but afterwards.[7] CrPC 1973 has a uniform applicability and appropriateness to each and every people regardless of their religion though Muslim law is applicable to the individuals who profess Muslim religion. Section 125 CrPC 1973 works as a fruitful solution

4 1957 All LJ 300.
5 The Muslim Women (Protection of Rights on Marriage) Act, 2019 (Act 20 of 2019), s. 3.
6 The Muslim Women (Protection of Rights on Marriage) Act 2019 (Act 20 of 2019), s. 5.
7 *Mohd. Ahmed Khan* v. *Shah Bano Begum*, AIR 1985 SC 945.

to the women who cannot look after herself after the *iddat* period. But the proceedings under the Code of Criminal Procedure 1973 also need certain time to provide relief to the women and even if the maintenance is granted to the wife, the execution of such order becomes a question mark as many of the husband either prefers to serve the imprisonment or they flee to a place which is not known by the wife or by the relatives to escape the maintenance allowances to the wife granted by the court. In such situations it becomes really difficult for the women to live a dignified life with basic amenities for survival. Keeping in mind the contention and logical inconsistency between the personal law and secular law the Supreme Court through its purposive interpretation of the textual law makes a road of justice towards the women who are in dire need of financial support; the legislative intent behind the maintenance law is to secure justice to those women who are economically weak and do not have any individual income, therefore the court while delivering judgement looks after such aspect and condition of the women and grant maintenance allowances to them accordingly.

3. RATIONALE OF MAINTENANCE RIGHT OF MUSLIM WOMEN

The significant objective of maintenance right of women is to secure their financial and economic condition and to help them in distress. The traditional cultures and practices prevailing in the society provide us a clear vision about the obligation of the husband towards his wife after the solemnization of the marriage and such obligation is not only moral in nature but it also has legal facets. The status of 'wife' itself provides the women the right of maintenance from her husband under the Muslim personal law; such right needs to be claimed if the husband having the means to maintain the wife, neglects her to provide maintenance when she is unable to maintain herself. The Muslim women can claim remedy under their personal law or under the secular law of the country. Section 3 of the Muslim Women (Protection of Rights on Divorce) Act 1986 provides maintenance remedy to the wife from her former husband till the period of *iddat*.

Maintenance guarantees economical benefit to the women after the marriage was dissolved or the wife resides separately from her husband. The customary and traditional notion inculcates the religious beliefs which somehow carry on the age old practices in the new generations and consequently the laws are also carrying the age old practices and belief which need to be changed with time. The underlying principle and objective of maintenance law is to provide security to women and to make her life lively and easeful; therefore, the Muslim personal law requires a

modification so as to include maintenance after the *iddat* period or UCC should be implemented so as to secure the maintenance right of Muslim women.

4. IMPACT OF CRIMINALIZATION OF *TRIPLE TALAQ* AND THE LAW OF MAINTENANCE

The historic decision by the Supreme Court which struck down the age old practice of '*Talaq-e-Biddat*' or '*Triple Talaq*'[8] was delivered on August 22, 2017; it illuminated not only the struggle for the Muslim women but also brought them from the shadowy side to the forefront of the society. The 3:2 majorities of the judges declared the practice of *triple talaq* as unconstitutional and eventually after the enactment of the Muslim Women (Protection of Rights on Marriage) Act 2019 this practice was criminalised by the parliament; but what we failed to remember here is the practice of *triple talaq* prevailed in the Muslim community for several years and it is deeply institutionalised by the societal structure and also accepted by the people; the reforms of personal law requires to come from the individual themselves and only imposition of law to a particular religious community will not be sufficient for the implementation of the law itself. Flavia Agnes rightly mentioned that,

> *"Several studies have shown that rather than approaching the formal structures of law, women from marginalised sections use informal community-based mechanisms to negotiate for their rights. Women find the religion-based dispute resolution fora such as darul qazas more accessible than courts and police stations as there is a general fear among the poor of accessing these formal structures."*[9]

The Austin's theory of 'Sovereignty' is also criticised by many jurists on the ground that, law is not an arbitrary command but it grows with the consciousness of the people; law did not grow as a result of 'command' over the people, but in modern democratic society law is nothing but the expression of the people which ultimately achieve the goal of a welfare state. Therefore, in the democratic set-up of India 'sanction' is not something which can be attached with everything and can be implemented for every community, but it can be attached with the things when it is necessary. 'Sanction' cannot be a better choice always to the things prevalent in the society; hence, divorce being a civil law, needs to be dealt by the state through a civil remedy. Criminalization of an act should be the last option if no civil remedy can act as a pathway for reformation; Jeremy Bentham also mentioned four conditions

[8] *Shayara Bano* v. *Union of India*, AIR 2017 SC 4609: (2017) 9 SCC 1: 2017 SCC OnLine SC 963.
[9] Flavia Agnes, "The Politics Behind Criminalising Triple Talaq" 53 *Economic & Political Weekly* 13 (2018).

where an act should not be pointed out as offence,[10] firstly – where it is groundless, it means where there is no mischief for it to prevent. Criminalization of *triple talaq* also seems to be groundless as section 3 of the Muslim Women (Protection of Rights on Marriage) Act 2019 already declared the pronouncement of *triple talaq* as void and illegal; secondly – where it must be inefficacious, it means where it cannot act so as to prevent the mischief. By the criminalization of *triple talaq* the goal of achieving the 'gender equality' and help the destitute women in need is not fulfilled, as under the said Act the husband will be put behind the bar after he pronounces *triple talaq*; therefore it only hampers the right to maintenance for the wife and does not lead to any fruitful thoroughfare; thirdly – where it is unprofitable or too expensive, it means where the mischief it produces would be greater than what it prevents. Also in *triple talaq* it would not provide any benefit to the women as her marriage will be dissolved and fourthly or lastly – where it is needless, it means where the mischief may be prevented. The criminalization of *triple talaq* is also needless as it can be sorted out by civil remedy and criminalization should not be used by the state as a mechanism to reform the personal law of a community.

Another important aspect which needs to be penned down here regarding the criminalization of *triple talaq* is the objective of maintenance right of women, as such criminalization would lead not only to infringe the very objective of maintenance right, but it also makes the condition of women discarded in the hands of the vicious society. Law and emotion are not contrary to each other, but they need to be segregated in civil obligation as husband is the only person who has the responsibility to maintain his wife, but if he gets imprisonment then who will be responsible to provide maintenance to the wife during his imprisonment. Law and emotion can be put together while discussing or making legal policies with respect to criminal law keeping in mind the reformative or rehabilitative theory of punishment which can provide a second chance to a person to reform and become a law abiding member of the society.

The age old practice of '*triple talaq'* triggers the emotional aspect of the community at large as it was seen to be discriminatory towards the Muslim women and it needs to be reformed for a progressive society under the Muslim laws; such emotional aspects lead to criminalization of *triple talaq*; but we need to consider here that the objective of criminal law is not only to punish the individual, but also to reform the offender. Again the matrimonial suits are mostly civil in nature; criminalizing certain

[10] Jeremy Bentham, *An Introduction To The Principles Of Morals And Legislations*, 170 (Dover Publications Inc., 1st edn., 2007).

practice will not stop such practices unless there is a change in the mindset of people and they welcome a new beginning which provides equal respect to the women as well. 'Maintenance' being a matrimonial remedy tries to protect and safeguard the women who are in need of allowances for their survival and it cannot be achieved through the means of punishment; it can only be achieved by civil remedy such as attachment of property of the husband in case he fails to maintain his wife, or the matrimonial family members who inherit the property from the husband can be given responsibility to provide maintenance to the destitute wife. The strategy of criminal law in ensuring civil obligation is not only inappropriate but also counterproductive; therefore the maintenance law which is civil in nature needs to be given a civil remedy in situations when someone violates such law. Section 5 of the Muslim Women (Protection of Rights on Marriage) Act 2019 although provides 'subsistence allowance' to the wife and dependent children, but it did not mentioned about 'maintenance' for them as other statutory laws mentioned about the right of maintenance for the wife and children. 'Subsistence allowance' cannot be equated with maintenance allowance as, 'subsistence allowance' is the bare minimum amount which is required to meet the day-to-day living, on the other hand 'maintenance' allowance means the amount which is required for the wife to live a life which she was living while residing with her husband or the minimum amount which she needs for maintaining herself and dependent children in the society. The said Act specifically mentioned that, the husband can be put behind the bars if he pronounces *triple talaq* which is also reflected in a significant judgement of Rahna Jalal v. State of Kerala[11] where the court held that, it is only the husband who can be imprisoned and punished; however the relative of the husband cannot be punished under the said Act as section 3 and 7(c) applies where it mentioned the crime committed by the husband and not by any other matrimonial members of the family. But, still the difficulty of getting the maintenance for the wife is not solved; it needs to reconsider the criminalization of the *triple talaq* so as to provide solution to the situation which is created through it. The court in this case also observed that anticipatory bail can be granted under this Act if the court hears the married Muslim woman who filed the complaint before it, then such bail is granted to the accused.

Together with the objective of maintenance laws, we need to consider here the concept of 'justice' which is attached with maintenance laws; it means distribution of assets of the husband or pecuniary measures from the husband if the wife is not able to maintain her; hence, by such measures the objective of maintenance right of the women can be secured and protected under the legal shield.

[11] 2020 SCC OnLine SC 1061.

Women who are discarded and do not possess any property of their own can have the financial security by the maintenance allowances for her livelihood. Such allowance is granted by the court based on the factual matrix of each case as the circumstances of every case differ from each other. In *Kusum Sharma* v. *Mahinder Kumar Sharma*[12] the Supreme Court decided that, the parties are required to file an affidavit with the divorce petition which shows their assets, income and other expenditures; this will help the court in determining the maintenance to the other spouse.

5. MAHR AND MAINTENANCE UNDER THE MUSLIM PERSONAL LAW

The Arabic word *mahr* literally means 'price' which is translated as 'dower' or 'bride price;' it is the wealth or the property which is given by the husband to the wife. It is a mark of respect towards the wife and is also termed as a 'token of love' for the wife and has its own significance in the Muslim personal law. The book of the 'Wedlock' mentioned that, the husband is required to give the wife something in lieu of the *nikah* – it may be in the form of any material things or even it may be an iron ring; the *mahr* is obligatory which the husband needs to give to his wife at the time of marriage with a good heart.[13] The book of 'Wedlock' also mentioned that, if the husband has nothing to give to his wife then he can marry her for what he knows about the holy Quran as *mahr*.[14] The Muslim personal law provides the right to the wife to demand the *mahr* from her husband at any time after the marriage or *nikah*; she even has the right to refuse herself to her husband until she receive the stipulated *mahr* amount. *Mahr* is the recognition of her status as a 'wife;' it provides economic as well as financial stability in her matrimonial home. On the other hand, the term 'maintenance' needs to be understood in the light of its objective and its differences with the '*mahr*.' Maintenance is provided when the marriage is dissolved or the spouses are living separately, but *mahr* is something which is given to the wife as a symbol of respect. The judiciary also helped in Bai Tahira v. Ali Hussain Fissalli Chothia[15] to understand these two terminologies and decided that; *mahr* amount can only be taken into consideration while fixing the amount of maintenance, but it cannot disentitle a divorced woman automatically to claim her maintenance under section 125 CrPC 1973.

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12 2020 SCC OnLine Del 931.

13 Muhammad Muhsin Khan, *Sahih Al- Bukhari*, 64-65 (Darussalam, Saudi Arabia 1st edn., 1997).

14 The Hadith - Sahih Al- Bukhari, Sahih Bukhari available at: https://www.sahih-bukhari.com/Pages/Bukhari_7_62.php (last visited on December 02, 2020).

15 AIR 1979 SC 362.

The Muslim personal law ordained the provision of *mahr* as a separate right for the women; it is neither a provision for maintenance nor it is provided in lieu of maintenance allowance. *Mahr* has a separate and individual social as well as legal purpose under Muslim personal law. Later on, again through the judicial decisions the differentiation between these two – '*mahr*' and 'maintenance' has helped to understand the nuance separately. In Fuzlunbi v. K. Khader Vali[16] the court held that,

> *"The quintessence of mahr whether it is prompt or deferred is clearly not a contemplated quantification of a sum of money in lieu of maintenance upon divorce. Indeed, dower focuses on marital happiness and is an incident of connubial joy."*[17]

Therefore, it is very clear from the above decision of the Apex court that, *mahr* and maintenance are not same, as *mahr* is a consideration for a valid marriage which is given to the woman for her sole benefit. The Supreme Court in Mohd. Ahmed Khan v. Shah Bano Begum[18] further clarified the difference between '*mahr*' and 'maintenance' in the following words,-

> *"If Mahr is an amount which the wife is entitled to receive from the husband in consideration of the marriage, that is the very opposite of the amount being payable in consideration of divorce.....no amount which is payable in consideration of the marriage can possibly be described as an amount payable in consideration of divorce. The alternative premise that Mahr is an obligation imposed upon the husband as a mark of respect for the wife, is wholly detrimental to the stance that it is an amount payable to the wife on divorce."*

Hence, the difference between '*mahr*' and 'maintenance' is quite apparent and they cannot be equated with each other. Moreover, to bring to a close with the discussion on '*mahr*' and 'maintenance' it can be mentioned that '*mahr*' is not a substitute payment for 'maintenance' and it is separately given to the wife by the husband.

6. JUDICIAL REFERENCES AND NEED FOR UNIFORM CIVIL CODE

Judiciary being the protector and guardian of the people always tries to provide justice to all those who have asked for the same. The contemporary nuances and variations in the society make the judiciary to think and look again to the customary and prevailing practices in the human civilization. History evidenced that, the judiciary not only provides literal interpretation of the black letters of

[16] AIR 1980 SC 1730.
[17] AIR 1980 SC 1736.
[18] AIR 1985 SC 945.

law, but it also uses purposive interpretation to provide justice to the individual; even the judiciary looked beyond the statutory provision and applied the mischief rule of interpretation to help the individual in need. The famous jurist Durkheim mentioned that, society is a complex and multifaceted system where everything is interrelated and interdependent which helps in maintaining the balance and stability in the society.[19] According to Durkheim a sociologist need to consider the social facts beyond the individuals which play an active role in serving and governing the social life of every individual; the society is a place which held together by its common languages, symbols and shared values, so it requires to think in the light of morals, laws, religions, beliefs, rituals and customs and then only the society will be able to groom itself in a diversified colour. Hence, to maintain all these dynamic equilibrium which prevails in the society, the judiciary need to look again through the glasses of the new society and then only it can provide equal justice to every individual who knows the door for justice.

The judiciary while upholding the new vision about the new visionaries and thinking of the age old society recently welcomed a new era for protecting the rights of Muslim women; the age old practice '*triple talaq'* which curtailed the rights of Muslim women was declared as unconstitutional by the Supreme Court to help the Muslim women and to provide them their rights which have been violated for such a long time. The court in Shayara Bano v. Union of India[20] enhances the condition of Muslim women and gives them to celebrate their 'equality' and 'dignity' on the touchstone of Article 14, 15, 21 and 25 of the Constitution of India. It enlightens the Muslim women the notion of 'gender justice' and guarantees them their fundamental rights under the Constitution of India. Alongside, the Supreme Court in *Shayara Bano's*[21] case also had an opportunity to frame guidelines for Uniform Civil Code (UCC) but due to the political controversy and other backlashes the Apex Court of India did not touched on the personal law of the people of India and made it open again for the Parliament to frame laws for Uniform Civil Code. The very objective of UCC is to enhance national integrity and to bring all the civil code under one umbrella. The civil laws such as marriage, divorce, maintenance, property right, adoption – all will be covered under one law. It aims to bring all the religious communities on a common platform to provide equal laws for all.

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19 Whitney Pope, "Durkheim as a Functionalist" Vol. 16, No. 3 THE SOCIOLOGICAL QUARTERLY 361, 362 (1975).

20 AIR 2017 SC 4609: (2017) 9 SCC 1: 2017 SCC OnLine SC 963.

21 AIR 2017 SC 4609: (2017) 9 SCC 1: 2017 SCC OnLine SC 963.

The judiciary always tries to bring all the civil laws into a single platform and it is in favour of making a uniform law for all the community; it can be traced from various decisions given by High Courts as well as Supreme Court starting from State of Bombay v. Narsu Appa Mali[22] to Jose Paulo Coutinho v. Maria Luiza Valentina Pereira.[23] Article 44 of the Constitution of India provides the pathway to frame equal laws for all, but it seems that our society is not yet ready to utilise such constitutional mandate. In Jorden Diengdeh v. S.S. Chopra[24] the court decided that,

> *"The law relating to the judicial separation, divorce and nullity of marriage is far from uniformity. Surely, the time has now come for a complete reform of the law of marriage and makes a uniform law applicable to all people irrespective of religion or caste; we suggest that the time has come for the intervention of the legislature in these matters to provide for the uniform code of marriage and divorce."*[25]

Apart from the above mentioned judgements, also in Mohd. Ahmed Khan v. Shah Bano Begum[26] the Supreme Court granted maintenance to a Muslim woman after the *iddat* period under section 125 of the Code of Criminal Procedure 1973 and laid down the need for a uniform law for all the communities in India. The UCC is a prerequisite in the contemporary era to provide justice to all the women equally as their rights are also guaranteed under the Constitution of India. Women are fighting for their rights since decade and till now the notion of 'gender equality' is still a dream far from reality; the stereotyping behaviour and patriarchical setup in the society never allowed women to walk in the same footing with the men. The notion of UCC not only brings the concept of 'gender equality' but it will also bring all the women into one legal shield. Recently, an initiative was again taken to formulate the UCC in Ashwini Kumar Upadhyay v. Union of India[27] but the Supreme Court did not support the Public Interest Litigation (PIL) which prayed for uniform law with respect to the personal laws governing divorce, maintenance and alimony of every community; the petition contended that discriminatory personal laws and practices violate Article 14, 15 and 44 of the Constitution of India and other rights conferred under various international instruments. However, the court replied the PIL in negative and held that being a court it cannot encroach upon the personal laws, only the Government can bring a change in personal law as it is the pulse of the people.

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22 AIR 1952 Bom 84.
23 (2019) 20 SCC 85: 2019 SCC OnLine SC 1190.
24 AIR 1985 SC 935.
25 AIR 1985 SC 935.
26 AIR 1985 SC 945.
27 (2018) 9 SCC 64.

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7. OPINION ON RIGHT TO MAINTENANCE FOR MUSLIM WOMEN

India being a diversified country with its own flora and fauna encompasses in it many religious belief and diverse cultures; people here celebrate their own traditional customs and ethnicity. The laws are also believed to be formed from the customs and traditional notions which prevailed in the society; the notion of maintenance being a personal law concept has its own cultural and time honoured belief. The researcher believed that, the right to maintenance for women is a basic need for them who are not able to maintain themselves after the dissolution of marriage or when they are residing apart from the husband. The researcher suggests some of the following measures for the betterment of these women and to bring them in the main streamline of the society:-

i. The right to maintenance for the Muslim women should be amended so that they can also have maintenance allowance after the *iddat* period
ii. The execution of maintenance order needs a proper mechanism for better implementation of the maintenance order granted by the court, the attachment of property may be one of the solution in situations where the husband escapes to provide maintenance to the wife
iii. Alongside the court decision, a committee should be formed to look into the implementation of the maintenance order
iv. A committee should be formed for identification of the original income and all other assets of the husbands who are working in a non-governmental organisation or private job holder
v. There should be proper measures and awareness programmes to work on the gender stereotype behaviour which prevails in the society so as to understand and educate the people about the inequalities, and the actual necessity of providing equal rights to the women
vi. Uniform Civil Code needs to inculcate the broader aspects of every religion to provide major benefits to each community
vii. Uniform Civil Code being a constitutional mandate could help all the religious community in securing their rights which will be advantageous for all the individuals.

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8. CONCLUSION

After so many years of independence, women are still not free from the barriers of gender stereotype behaviour prevailing in the society and they are not given equal right in its true sense. We have various laws and other machinery for guaranteeing them their legal as well as fundamental rights; but, what is most important is the individual people need to inculcate within them the sense of moral and legal duty, they need to look beyond while providing rights to the women who are victimised and discarded from many years in the human civilization. Laws are always enacted to protect and uphold the rights, and the individual and personal laws are not an exception to it. Having diversified personal laws based on their religion not only creates confusion but it also constructs inequality between the women themselves who belongs to different religion. Maintenance is given for the financial benefit of the women including her dependent children and the maintenance law requires an equal platform for all women as the decisive factor for claiming the maintenance allowance remain same for each women. The Uniform Civil Code can provide the equal platform for all through the prism of human dignity; it will not violate individual religion but it will provide an equal podium which will work as a legal shield in upholding the fundamental rights of the women and in bringing them within a single legislation.

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POLICE REFORMS: NEED, ISSUES & PROSPECT

REFIQUE KHAN*

ABSTRACT

In the November of 2014, Prime Minister Modi gave an iconic speech at the 49th Annual Conference of Heads of Police. The central idea of the speech was to reform the police into a SMART Police which is the acronym for Strict & Sensitive, Modern & Mobile, Alert & Accountable, Reliable & Responsive, Techno Savvy & Trained force. However, nothing concrete had been done so far. Several instances of Police Brutality, Police Politician Nexus and Police Insensitivity came to light in the past few years which created a huge upsurge in the demand of police reforms by civil society groups, social activist and common people. This paper is an attempt to systematically study the underpinning of Police Establishment in our country and trace out the outcomes of various committees and commissions constituted to suggest restructuring of police force in India and thereby suggesting the way forward.

1. INTRODUCTION

Occasion was, 49th Annual Conference of Heads of various Police forces, where Prime Minister of India, Narendra Modi came up with the concept of a *SMART Police*, here the term SMART wasn't being used in its ordinary connotation but to imply, "Strict & Sensitive, Modern & Mobile, Alert & Accountable, Reliable & Responsive, Techno Savvy & Trained force[1]". This idea of 'SMART' force was given back in November'14 and six years have elapsed since then. The National Government in India under the leadership of the Prime Minister came in power on the tagline of *"Modi hai toh mumkin hai"* (if it's Modi, it's possible), Modi Government can be attributed for spearheading several reform measures like revamping the Planning Commission of India and replacing it by NITI Ayoga, consolidating and enacting a new Insolvency and Bankruptcy Code (IBC), amending Indian Penal Code, schemes like rural electrification, LPG connections to rural households, Jan-Dhan yojana (benchmark for financial inclusion), etc. just to name a few. However, what is still a sham, is the idea

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1 Sushanta Talukdar, "Modi wants SMART police", *The Hindu*, available at: https://www.thehindu.com/news/national/portray-police-positively-modi/article6649115.ece (last visited on October 29, 2020).

of police reform. Rather than digging up the old graves, a sheer glance at recent incidences would provide substantiation to the said argument which organically dismantles *smartness off SMART*.

The chilling incident of Hathras Gang Rape in the State of Uttar Pradesh[2] wherein police were accused of insensitively cremating the victim of crime in absence of her family. This bought about criticism around the modus operandi of police post-commission of crime and lack of empathy towards the family of the deceased victim.

According to a study undertaken by the *United Nations Office on Drug & Crime*, recommended ratio of police is 222 per lakh of population, however it was at the fifth-lowest position (amongst seventy-one countries understudy) in India with just 138 police/lakh population[3]. This issue of understaffing of police is one of the biggest impetuses in streamlining the police with modern state warfare techniques.

Delay in filing First Information Report (FIR), a recent case wherein, a fire broke out at a district hospital in Bhandara, Maharashtra and there was an unjustified delay of more than forty-eight hours on part of the local police station to register the FIR, this at the very least is a reflection leniency or insensitivity on part of police. In the case of *Emperor vs Khawaja*[4] court observed that the delay in registering the FIR gives rise to suspension about the role of police and puts them in a dark spot.

Another incident of police apathy in Uttar Pradesh came to light when a sub-inspector was suspended for allegedly taking cash for fuel from an aged disabled woman to start the search of her kidnapped daughter, implying a lack of reliability and responsiveness on part of police.

In the stir of the coronavirus pandemic, courts (of law) have resorted to virtual hearing and most of the courtroom proceedings are done through online mode. As per the report by Tata Trust around 40% of jails in India lack video conferencing facilities[5]. Indian Justice Report 2020[6] based its finding on the data from the Bureau of Police Research & Development *according to which only 10 out of a total of 36 States and Union Territories had video* conferencing facilities across all their jails. This is a clear

[2] Omar Rashid, "Hathras gang rape case", *The Hindu*, available at https://www.thehindu.com/news/national/hathras-rape-is-it-fair-to-allow-district-magistrate-to-continue-in-his-post-asks-allahabad-hc/article33037454.ece (last visited on November 9, 2020).
[3] PRS India, Police Reform, available at https://www.prsindia.org/policy/discussion-papers/police-reforms-india (last visited on November 19, 2020).
[4] Emperor vs Khwaja Nazir Ahmed (1945) 47 BOMLR 245.
[5] Tata Trust, "Status of policing in India Report" 62-78 (2019).
[6] Tata Trust, "India Justice Report" 44-50 (2020).

indication of the huge vacuum of tech in the criminal justice infrastructure of which jails form an integral part.

Bottom-line, given the existing realities, the idea of having SMART[7] police is an ambitious one but it's the need of the hour. This article is a systematic attempt to look into the evolution of police administration in India, highlight the recommendation of studies undertaken by several commissions and committees to streamline and restructure police administration, and thereby suggesting the way forward.

2. POLICE ACT, 1861: THE UNDERPINNING

Before the advent of Britishers in India, the concept of a separate police force was relatively absent. However, under Mughals administration, the role of few officers resembles the present-day police viz Faujdar (the rural district in charge), Kotwal (the town in charge), Zamindar (in charge of village policing).

In the year 1765, the East India Company was granted the Diwani rights of Bengal. Due to the foreign character of the new boss, local people were more or less affront with the Company's authority[8]. This gave the need to revamp the law and order maintaining machinery. The first effort in this direction was made by Lord Cornwallis, who replaced the Faujdar with English Magistrate and thought Zamindars retained their role but were made answerable and subordinate to the magistrate[9]. The new system had its limitations which were readily exploited by the zamindars and very soon the need was felt to dilute the powers of zamindars, in this sequence Lord Cornwallis introduced what was popularly known as the Cornwallis System[10] under which the district was divided into Thana, which was headed by the Drogas and the jurisdiction of the Thana stretched in the area of around 20 to 30 miles. However, the success of this model came under troubled clouds due to the growing Daroga-Zamindar nexus[11]. This Nexus became an instrument of exploitation and oppression of the local people. As a cumulative result of these failures, the Daroga system was

[7] *Supra* note 1.
[8] Anupam Sharma, "Police in Ancient India" 65 The Indian Journal of Political Science 101-110 (2004).
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*

bought to an end in 1812[12], and subsequently, the post of district collector was created who was made in charge of revenue police and judicial functions at the village level.

The failure to mend the local policing system paved a way for new experimentation. In the year 1843 Sindh was conquered by Sir Charles Napier[13]. A separate police department on the lines of Royal Irish Constabulary was tailored to suit the needs of the Company. Under this model, the inspector general was in charge of the whole territory while the superintendent of police was in charge of the district and he was made answerable to go to the inspector general as well as the district collector presented the civilian authority.

Many scholars attribute the Revolt of 1857 as the final step towards the formalization of police administration in India in the shape and structure in which it is seen today. The experiences of the revolt exposed the weaknesses on the part of both the colonial government as well as the local population. In this sequence, the police commission was appointed in the year 1860 based on who recommendation the police act of 1861 was enacted which till date is the central piece of legislation that governs the police force in India.

3. NITTY-GRITTY OF EXISTING FRAMEWORK

As of now police force in India is largely governed by multiple legislations namely, Police Act 1861[14], Code of Criminal Procedure 1973[15], Indian Penal Code 1862[16], and Indian Evidence Act 1872[17]. The Seventh Schedule of the Indian Constitution[18], Article 246, categorizes police as a state list subject under entry 2A which is further substantiated by Section 3 of the Indian police act 1861. Thus, empowering state governments to have their police forces and regulate their functioning. Besides these legislations which largely provide for the *duties* of police, in the year 1985, The Code of Conduct for Police[19] was adopted. The code was different from the legislation as it intended to fill in the gap and enlist certain *responsibilities* of the police officials, which were largely absent in the colonial era legislation. However, the effectiveness of this code of conduct is highly debated due to

[12] *Ibid.*
[13] *Ibid.*
[14] The Police Act 1861 (Act 5 of 1861).
[15] Code of Criminal Procedure 1861 (Act 2 of 1974).
[16] Indian Penal Code 1862 (Act 45 of 1860).
[17] Indian Evidence Act 1872 (Act 1 of 1872).
[18] The Constitution of India.
[19] Government of India, "GUIDELINES TO THE INDIAN POLICE CODE OF CONDUCT FOR THE POLICE IN INDIA" (Ministry of Home Affairs, 1985).

the usage of ambiguous language which very often than not have reduced the code to a dead letter, as evident from point 4 and 5 of the said code,

> *"In securing the observance of law or in maintaining order, the police should as far as practicable, use the methods of persuasion, advice and warning. When the application of force becomes inevitable, only the irreducible minimum of force required in the circumstances should be used."*
>
> *"The prime duty of the police is to prevent crime and disorder and the police must recognize that the test of their efficiency is the absence of both and not the visible evidence of police action in dealing with them."*[20]

A plain reading gives the idea about ambiguity therein which in turn gives space for a huge amount of discretion, just to say, what would be the extent of warning, persuasion, usage of force? What would be the objective criteria to judge as to when would be the usage of the above-mentioned tools justified. Furthermore, cases like Aarushi Murder, Delhi Gang Rape, Hathras Gang Rape, Vikas Dubey encounter give evidentiary backing to the argument of inefficient police force when it comes to judging their role as a crime prevention organization. Though Police is a state list subject but Section 4 provides for dual control on police i.e., being under control of both district superintendent of Police as well as district magistrate (who is generally the member of India Administrative Service, which is a central service). These practical flaws are just the tip of an iceberg. Several ambitious attempts were made by various states, mostly post a sensation law and order crisis in the name of 'high-level committee' but most of these committee recommendations today stand as nothing more than sheer words as not much efforts were made into the implementation part of these recommendations. Despite failure on part of the executive and legislature in terms of operationalizing these studies, the efficiency with which they highlighted the prominent loopholes in the functioning of police machinery is worth going through.

4. COMMITTEES, COMMISSIONS, AND DIRECTIVES

Taking lessons from the experiences with the police under the colonial regime, post-independence many states came up with police commissions to study and streamline the police force with the vision of shackling the bitter experiences of the past and realizing the goals of the future. In the sequence first, a state-level police commission was established in the year 1959 in Kerala. However, the biggest flaw of these state-level commissions was that there used the Police Act of 1861 as the

[20] *Ibid.*

point of reference. Following are the highlights of the major commissions that were constituted to look into the issue of police reforms in India:

- **The Gore committee on police training**

  Headed by Mr. Gore, established in the year 1971 and submitted its report in 1973, the main focus of the committee was to bring about change in the training of police personals (constables to IPS) right at the entry-level. The committee is still a benchmark as its recommendations that pertained to training of police were accepted but those related to reforming the structure of police establishment were largely overlooked. The committee made a total of 186 recommendations of which loosely 45 pertained to police reforms and the rate of acceptance is even lower.[21]

- **National police commission**

  Commission was established under the chairmanship of Dharma Vira, a distinguished civil servant in the year 1977. NPC is often regarded as the foremost commission which was entrusted to study and review every nut and bolt of the police system in India. Commission submitted its report in the year 1981, encapsulating its findings, observations, and recommendations in eight reports (cumulatively making 291 recommendations). 1st report highlighted need to address, pay scale issue, housing etc, 2ndReport focused on welfare measures for the families of the member of police force, reclassification of responsibilities and duties of police, security of tenure establishing a state-level security commission, divorcing the interference of politicians and executives, 3rd Report studied the role of police in rural areas and particularly those encompassing the weaker segment therein and corruption in police was highlighted and recommendations were made regarding how to tackle the prevalent corrupt practices and guidelines for arrest, 4th Report laid emphasis on role of police in trial, investigation and prosecution, 5th deals with training, public relation of police, 6th took up issues around IPS and emphasised on the need to create IPS cadre all CPO's, 7th studied the paucity of finances as a huddle in attaining full potential of the force, issues of policing in North Eastern areas, 8th Report addressed the need of having a police that's more accountable[22]. The reality of 2021 is that not even a handful of the recommendations of NPC are implemented either by State or Centre.

[21] Government of India, "THE GORE COMMITTEE REPORT ON POLICE TRAINING" (Ministry of Home Affairs 1973).
[22] Government of India, "NATIONAL POLICE COMMISSION" (Ministry of Home Affairs 1981).

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- **Ribeiro committee on police reforms**

  Constituted under the chairmanship of Julio Ribeiro, this committee was a result of Supreme Court directives in a Public Interest Litigation filed before it. Constituted in the year 1998, the committee submitted its findings and recommendation in form of two reports in October 1998 and March 1999 respectively. 1st Report concentrated on having a Security Commission in each state which would encompass of members from executives, watchdogs and the name suggested for such commission would be, 'The Police Performance & Accountability Commission', besides it also emphasized having a District level non-statutory complaint authority, the Role of Director General of Police and issues around it like political nexus, tenure, transfers, and investigation. 2nd Report was a bold attempt as it recommended the ousting of the existing Police Act,1861 and replacing it with a new one, supported the idea of Central Police Committee has been suggested by the Nation Police Commission in its seventh report, having a state-level board to oversee the recruitment of all non-gazetted police force members at the state level, qualitative changes in the training process and increasing the opportunities of promotion for lower lank officials were amongst the major highlights.[23]

- **Padmanabhaiah committee on police reforms**

  Constituted in the year 2000 by the Ministry of Home Affairs, the committee made recommendations in the area of improving Sub-Inspector to Constable Ratio from the existing range (1:7 ~ 1:15) to a teeth-to-tail ratio of around 1:4, establishing a Police Training Advisory Council, classifying Constables as 'skilled workers', making provisions of weekly off and a yearly paid holiday, separation of investigation from law & order slog, amending Evidence Act to delete the provisions under section 25 and 26 which makes confession before police officers as inadmissible before the court of Law, need for having trained forensic experts in police stations, non-statutory District Level Police Complain Authority amongst other things[24].

- **Group of Ministers on national security**

  Post the bitter experiences of Kargil war, in the year 2000, Group of Ministers on National Security was instituted and submitted its report in 2001, the main tasks before the committee were to look into the functioning and suggesting reforms into the intelligence system, internal security, border management, and management of defence[25]. The throbbing reality of this

[23] Government of India, "Ribeiro Committee on Police Reforms" (Ministry of Home Affairs 1996).
[24] Government of India, "Padmanabhaiah committee on police reforms" (Ministry of Home Affairs 2001).
[25] Government of India, "Group of Ministers on National Security" (Ministry of Home Affairs 2001).

committee's fate can be identified by the simple statement of fact that, 54/62 of the recommendations of this committee are sitting in a cold bag and no effort had been neither on the part of central nor on part of state government to look into the practicability of implementing them.

- **Malimath Committee on reforms of the Criminal Justice System**

  This committee was established in the year 2001 with the view of revamping the criminal justice system to restore the faith of the public back in the system. In this sequence, the committee reviewed IPC 1860, Cr.P.C 1872, Evidence Act 1973[26]. The committee examined the European System of Law and concluded that a shift from adversarial to the inquisitorial system is the need of the hour wherein the judicial officer supervises the investigation and thereby separating investigation from law and order. It further recommended an increase in the number of days permissible for filing of charge sheet and also snow balling the upper limit of days of police custody. Provisions need to be made regarding victim and witness protection, reclassification of offenses, the involvement of the victim in all stages of the trial (wherever possible), insulating police from political pressure, reiterated the need of having a State Security Commission as mooted by NPC.

- **National Human Rights Commission**

  Participating in the proceedings before the Apex Court of India in the case of Prakash Singh[27], NHRC made the observation highlighting the need of separating the investigation wing of the police to mitigate if not eliminate the extraneous pressure from the executive or politicians, it also suggested having a Police Security and Integrity Commission at the state level to appoint and fix the tenure of Chiefs, NHRC submitted it before the Supreme Court that PSIC would be a multifunction, non-statutory, advisory body that would aid the state government in discharging its police superintending functions and any premature transfer of officer on or above the rank of SP would require a prior approval from the PSIC. It also endorsed the idea of having a District Police Complaint Authority.

- **Supreme Court Directives**

[26] Government of India, "Malimath Committee Report on Reforms of Criminal Justice System" (Ministry of Law and Justice 2001).
[27] Prakash Singh &Ors vs Union of India And Ors Writ Petition (civil) 310 of 1996.

Prakash Singh vs Union of India (2006)[28]is the landmark case wherein the Supreme Court while hearing a Public Interest Litigation by an Ex-Top Cop gave directions to the state and central government to carry out structural reforms in the existing police system. The idea behind it was to have a more accountable police force and to insulate it from the extraneous pressure. It was a list of seven directives about, security of tenure and manner of selection of the Director-General of Police, tenure of the inspector general, divorcing investigation and law-order maintaining function, having a police board, Complaint Authority, National Level Security Commission. The gravity of grave noncompliance with these directives needs no light to reflect it as it's very evident. Mr. Sanjoy Hazarika (International Director), Commonwealth Human Right Imitative remarked, "Government failure to adhere to the directives can only be cured by the Supreme Court's continued monitoring".

5. RECENT DEVELOPMENTS

The Central government is mooting for bringing the Police as a subject under the Concurrent list under the 7th Schedule of the Constitution which is currently a subject matter for the state list. The idea behind this vision is to enable proper coordination between various policing agencies. In this sequence, a Multi-Agency-Centre is also been proposed to oversee the time bound and efficient sharing of inputs amongst various agencies of police and paramilitary and such sharing of info would be supplemented by Crime and Criminal Tracking Network System (CCTNS). Director-General Ranked Director of Prosecution in Every State. Consolidating all the legislation into a single umbrella Internal Security Act[29]. However, these are mere suggestions that are no more than a piece of paper until they are implemented and their viability is put on the test of time.

6. SUGGESTION AND WAY FORWARD

- **Insulating Policy& Politics**

  Police-Politics nexus is by far inherent characteristic of the Police Act,1861 as evident from provisions of the Act.

- **Having a Special Monitoring body**

[28] *Ibid.*

[29] National, "Centre mulls to bring policing under Concurrent List", The Pioneer, available at https://www.dailypioneer.com/2018/sunday-edition/centre-mulls-to-bring-policing-under-concurrent-list.html (last visited on November 3, 2020).

As discussed in the preceding segment, having a non-statutory body for ensuring a code of ethics and a sense of professionalism amongst the member of the force.

- **Security of tenure**

  Due to interference from the Political bosses and Executive masters, impartial working on part police force is a rare trait. The absence of provisions guaranteeing security of tenure exposes the police officials to the mercy and satisfaction of those sitting in a higher office. Thus, it's important for impartial working of officials to ensure some security of tenure to them.

- **Transparent & Merit-based appointment**

  One pertinent question that is time and again raised against the appointment to the highest posts of police establishment is the criteria and consideration for such appointments. Various committees have recommended having a collegium styled appointment body to ensure fairness and transparency.

- **Segregating Investment from Law & Order**

  One of the obvious reasons for suspicion and lack of confidence about the manner of function of the police department is the dual-role it performs, i.e., of an investigator and enforcer. Therefore, having a DG rank level officer as Director of prosecution can help in the separation of these two functions of police and thereby ensuring non-bias and impartiality.

- **Ensuring accountability**

  Duties and Responsibilities are inherent parts of a right. The current framework isn't enough to strike the balance between power and accountability. Various non-institutional mechanisms like social audit, community-based feedback reports can be used in preparing the Annual service record. This will inculcate a sense of local accountability in the police.

- **Community participation**

  Institutionalisation of community policing. CLG (Community Liaising Groups) should be promoted for better cooperation between the local community and police. This can help in transforming the outlook of the local community towards the functioning and role of the police establishment.

- **Sensitization**

  A sense of empathy is something police are accused of lacking in. Many chilling instances have come up highlighting the negative role of police towards the victim, especially in sexual offenses.

The absence of this trait has tainted the image of police and people try to stay out of them as much as possible.

- **Increasing police to population ratio**

  As stated earlier the ratio of police per lack of population is one of the lowest in India, this has acted as an impetus in crime prevention, modernization, and adaptation of the modern warfare techniques.

- **Raising the level of professionalism**

  A Model Code of Conduct in form of a Citizen Charter can be put in place to fill in the gaps left out by the legislative provisions. This will induce an element of certainty on part of police functioning with in turn will help to raise the standard of professionalism in the force.

- **Revisiting the Police Act, 1861**

  At the first instance, this suggestion might sound a rather ambitious one but it's the need of the hour. The backdrop of the enactment of the Police Act, 1861 was the Revolt of 1857 and the aim for enactment was to suppress the voice of dissent rising against the establishment and to protect the interest of the crown even if it's at the cost of oppression of the subject. This by far is still the reality as police work in close nexus with politicians which very often than not leads to corruption, political bias, and favouritism.

7. CONCLUSION

"The Police Force is far from efficient, it is defective in training & organization, it is inadequately supervised, it is generally regarded as corrupt and oppressive, and it has utterly failed to secure the confidence and cordial cooperation of the people"[30]

- A.H.L. Fraser (Chairman of the Second Police Commission)

The above statement was made in the year 1902 and today, the situation in 2021 is hardly any better. We live in a globalized world and any local happening can start a chain of international reactions and incidences of police brutality, inefficiency, and lack of empathy puts the entire system of criminal justice administration in a dark spot and has the potential of tarnishing the image of an entire nation. Furthermore, police have a key role to play in the realization of fundamental rights which are a

[30] Government of India, "THE INDIAN POLICE COMMISSION", available at https://police.py.gov.in/Police%20Commission%20reports/THE%20INDIAN%20POLICE%20COMMISSION%201902-03.pdf (last visited on November 7, 2020).

cornerstone for the material and spiritual growth of a human being. Hence, it's inevitable to restructure the police functioning on lines of the democratic values of our country to realize the vision of a nation-state envisaged in the Preamble of the Indian Constitution.

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TACKLING THE TWO-PRONGED PROBLEM OF NPA CRISIS AND COVID-19 THROUGH IBC

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ABSTRACT

Indian economy for the first time in the history has been pushed into recession with two successive quarters of GDP contraction. A report by the CMIE states that 21 million people had lost their jobs by the end of August 2020. The downward spiral of the Indian economy started when in 2018 the IL & FS went under. In November 2019 the India economy saw six successive quarters of declining GDP growth, the longest slowdown in 23 years. The outbreak of the novel corona virus and the ensuing global lockdown further pulled down the already downward spiraling economy. This paper aims to highlight the steps that can be taken to avert the impending economic crash. Firstly, the paper points out the inefficiencies prevailing in IBC due to lack of Pre-Packs, secondly, it puts forth a case for adopting the UNCITRAL model law on cross border insolvency and thirdly, it points out the flaws in the recent amendment passed hastily in the wake of Covid-19 pandemic. It is this multi-factorial analysis which is a novelty of the paper as it tries to lay down a wholesome approach towards solving the downgrading Indian economy which is a need of the hour.

1. INTRODUCTION

The economic health of India has been deteriorating since the fall of IL & FS, an NBFC, an Rs 90000 crore behemoth. The fall of IL & FS led to the bursting of India's housing bubble which triggered the economic slowdown. On inquiry it was found that all NBFCs including IL&FS had majorly lent to the Real Estate Sector. A Surge in supply of real estate outpaced demand. Real estate companies therefore couldn't repay loans on time, consequently banks to save NBFCs; lend funds to them, which the NBFCs couldn't repay. Therefore, the NPAs of banks increased manifold. To add fuel to the fire the year 2020 marked the outbreak of the novel Corona virus. The ensuing global lockdown has caused trade and business to plummet. Micro, small and medium enterprises (MSMEs) are at a risk of being wiped out altogether. Therefore, the efficiency and effectiveness of IBC becomes a necessity in such a situation. If the IBC fails to realize its objective to rescue and

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restructure firms which have filed bankruptcies stressed enterprises get stuck in a place where their debts are mounting and their capacity to pay is diminishing. This would lead to deterioration of the value of the firm at an ever-increasing cost to the banks that lent them and ultimately the taxpayers will be footing the bill.

This paper aims to provide a solution to the spiraling down Indian economy through the strengthening of the IBC procedure. The authors believe that the problems of increasing NPA, the four-balance sheet problem and the economic meltdown caused by the pandemic can be solved through a more efficient and time bound insolvency procedure. The paper will first provide a brief historical account of why the Indian banking system started to rot which in turn affected the Indian economy adversely. Next the paper will point out how and why the Indian economy reached its current state. Then the paper moves on discuss pre-packaged deals which can be introduced in the Indian insolvency regime to make it more time and efficient. Next the UNCITRAL model law for cross border insolvency is discussed and how adopting the model law can assist in value maximization by facilitating coordination of the various insolvency proceedings in different jurisdiction. Finally the flaws in the amendment of IBC passed in wake of Covid-19 have been discussed which may harm the MSME sector and result in unnecessary litigation which ultimately culminates into a spiraling down economy.

2. WHERE THE ROT STARTED

Non-performing assets (NPA's) are the financial equivalent of robbery. RBI in the wake of Covid-19 pandemic in its latest financial stability report[1] has stated that an increase from 8.5% to 12.5% may be noticed in the gross non-performing assets of banks from March 2020 to March 2021. When companies take huge loans from banks on the basis of future projections to grow and expand their business, they put themselves in leveraged positions. When due to external factors such future projections prove to be false the companies default on the loan payment. The debts of the company outgrow its incomes and assets because of which the company becomes insolvent ultimately becoming a non-performing asset of the banks. Efficiently handling these NPAs can result into revival of such companies which not only benefits the banks and the other creditors but also keeps

[1] Reserve Bank of India, RBI releases the Financial Stability Report- July 2020, RBI press release (July 24, 2020), https://rbidocs.rbi.org.in/rdocs/PressRelease/PDFs/PR9678F6C303CF604D159D32D2CF5B5BDED6.PDF.

sometimes thousands and lakhs of employees and workers from losing their jobs. Therefore, in turbulent times like these the need for an efficient IBC increases many-fold.

George Santayana said, "*Those who cannot remember the past are condemned to repeat it*" and therefore it becomes important to know and understand that how the rot called NPA started. Prime Minister of India Mrs. Indira Nehru Gandhi lit the fuse when in 1969 she chose to nationalize the banks. In the case of NPAs, PSBs bear an inordinate and growing burden among the bank groups. Over the last decade, and particularly since 2009, the share of PSBs in gross NPAs has increased. The NPAs of PSBs accounted for 85% of the banking system's NPAs in 2013, compared to 75% in 2003.[2]This contrasts sharply with the performance of other segments of the new private sector banks, whose share of NPAs dropped from more than 14% in 2003 to 8% in 2013. And therefore, one is bound to infer from this data that it is nationalization of banks that has riddled the balance sheets of PSBs with NPAs.

Anything that is taken over by the government or nationalized, immediately becomes susceptible to three evils, namely – inefficiency, corruption and unprofitability.

1. Inefficiency

The economic survey titled "Golden Jubilee of Bank Nationalisation: Taking stock"[3] points out the inefficiency of the public sector banks. The report points out that in 2019 for every rupee of taxpayer invested in a public sector unit 23 paise were lost on an average. While on the other hand for every rupee invested in private banks on average gained 9.6 paise. For the month of January 2020 through the tool of the stock market to book value ratio it was calculated that each rupee invested in the public sector bank earned 71 paise while each rupee invested in private sector banks earned ₹3.7. This clearly points at the magnitude of inefficiency in public sector banks.

2. Political influence and Corruption

The 1976 amendment of the SBI Act, 1955 is the prime example of a public sector bank being a victim of political influence. Through the Act 73 of 1976, Section 19 and 20 of the SBI Act were amended. The amendment gave the central government the powers to appoint the chairman as well as remove such chairman even before the expiry of his term. This amendment is known as the Talwar amendment in the banking circle as it was brought with the sole object of ousting Mr. Talwar, the then chairman of SBI. This is where the rot started. Public Sector Banks became the

[2] "*Two decades of Credit Management in Indian Banks: looking back and moving ahead; address by Dr. K. C. Chakraborty, Deputy Governor, RBI*", BANCON (Nov. 18 2013).

[3] Government of India, Golden Jubilee of Bank Nationalisation: Taking Stock, 1 economic survey 150 (2019-20) https://www.indiabudget.gov.in/economicsurvey/doc/vol1chapter/echap07_vol1.pdf.

puppets of the political masters. And therefore, it is not surprising that 15 of the 17 banks that gave loans to Vijay Mallya who was a member of parliament were public sector banks.

3. Unprofitability

As per economic survey of 2020[4] in 2019 public sector banks reported non-performing assets equivalent to 80% of the total NPA's in the banking industry. 85 % of the reported bank frauds as per the same reports, hail from public sector banks. Further the public sector banks suffered a loss of ₹661 billion while the private sector banks reported a profit of ₹390 billion.

While it is true that bank nationalization marked the beginning of a flawed and weak banking system, there are other factors at play which have led us to the current situation. The causes of the current botched up economy have been discussed in the next section.

3. THE BOTCHED-UP ECONOMY

3.1 Twin Balance Sheet Problem

In February 2016 many public sector banks reported the highest ever quarterly losses aggregating at over Rs 12000 crore. Bank of Baroda reported a loss of over Rs 3000 crore, the highest quarterly loss posted by any public sector bank ever.[5] HDFC bank alone was valued to be equal to 24 public sector banks put together.[6] But this sudden rise in the NPAs which caused the rise in the losses was very odd. This was because the country wasn't hit by 3Fs, namely[7], failure of food harvest, rise of fuel prices globally and fisc spiraling out of control, which are considered to be the standard triggers for an economic meltdown, in fact, GDP was soaring. Subsequently, RBI conducted an asset quality review post which the banks were forced to clean their books, however, it didn't do much to put a leash on the ever rising NPAs. Credit Suisse on the other hand reported that companies that had borrowed from banks had interest coverage ratio less than 1, which in other words means that the companies were simply not earning enough to pay off their debts.[8] This pointed at the twin balance

[4] Id.

[5] *Public Sector Banks book highest ever loss of Rs 12k crore as bad loans mount*, Financial Express (Feb. 14, 2016, 1:58 PM), https://www.financialexpress.com/industry/banking-finance/public-sector-banks-book-highest-ever-loss-of-rs-12k-crore-as-bad-loans-mount/211440/.

[6] *The Festering Twin Balance Sheet Problem*, Ministry of Finance, https://www.indiabudget.gov.in/budget2017-2018/es2016-17/echap04.pdf.

[7] Arvind Subramanian & Josh Felman, *India's Great Slowdown: What Happened? What's the Way Out?*, Harvard University,https://www.hks.harvard.edu/centers/cid/publications/faculty-working-papers/india-great-slowdown.

[8] Ira Dugal, *39% Of debt still with companies that can't cover interest: Credit Suisse,* Bloomberg Quint (Sept. 28, 2016, 10:00 AM), https://www.bloombergquint.com/business/39-of-debt-still-with-companies-that-cant-cover-interest-credit-suisse.

sheet problem in which both the banks as well corporates were under immense amount of stress. The seeds of the twin balance sheet problem were sown in the mid-2000s when market got overly optimistic. GDP growth had at that time surged to 9-10% per annum and it was expected that such growth rates would continue for decades. Based on this expectation companies launched ambitious projects worth lakhs of crores. The companies it seemed has abandoned the conservative debt to equity ratio. The debt to equity ratio soared, an obvious indication of the leveraged positions of the companies. The aggressive expansion of the companies was financed by a credit boom which included credit from domestic banks as well as the overseas. The Global Financial Crisis (GFC) 2008 marked the arrival of the twin balance sheet problem. The basic assumption of double-digit growth rates considering which all the ambitious projects were launched proved to be false. To add to the woes of the companies the cost of finance increased phenomenally. The dollar got costlier by Rs 20 – 30, consequently, the companies were forced to pay back overseas debts at this costlier rate. Even the interest rates were increased by the RBI to put a check on the skyrocketing inflation. As a result of growth rates being halved and increase in cost of financing the problem of debt servicing arose. These problems were not adequately addressed which finally resulted in fiasco of public sector banks in 2016.

3.2 Slew of Changes

Post the fiasco of 2016 which exposed the powder kegs in the balance sheets of public sector banks various sweeping changes were made to insulate the economy from the twin balance sheet problem. The first and foremost reform that brought about a colossal change was the introduction of Insolvency Bankruptcy Code (hereafter referred to as IBC).

In May 2016 the IBC was brought into force to deal with the twin balance sheet problem. It is India's biggest structural reform in the economic sphere since independence. Before the introduction of IBC there were multiple legislation in force such as SICA, The Provincial Insolvency Act, The Presidency Towns Insolvency Act, etc. IBC was enacted and implemented with the intention remove the inefficient, debtor-centric model, to minimize the manifold increase in the non-performing assets (NPA's) of banks and most importantly to bring uniformity. It provided a mechanism which could assist in value optimization of assets of the insolvent corporate debtor in a time bound manner.

Taking lessons from the Spanish banking crisis of 2015 and the Greek banking crisis of 2016, another change was brought in the form of amendment in the Banking Regulation Act. Through the

amendment two sections were added in the act, namely Section 35AA and 35AB. Under §35AA it has been prescribed that the central government may authorize the Reserve Bank of India (RBI) to issue directions to any bank to initiate insolvency resolution process under IBC against any defaulter. Under Section 35AB the RBI can issue directions to any bank for resolution to any bank for resolution of stressed assets. This amendment was a small part of a larger objective to bring about a comprehensive change in the insolvency resolution regime. Through this amendment the scope of the powers of RBI was widened in a desperate attempt to unclog the system. This step also resulted in transparency in the whole process. RBI is the mother of all banks and has a bird's-eye view of the entire Indian banking system. Therefore, it is well equipped to deal with the problem of the ever rising NPAs.

Exercising its power under section 35AB in February 2018 RBI came out with a circular titled "Resolution of Stresses Assets – Revised Framework"[9]. The circular provided that lenders are to immediately on default classify stressed asset under the special mentions account (SMA). After such classification for those assets which exposed the bank to over Rs 2000 Crore a resolution plan was to be worked upon and implemented within a period of six months from the date of default. And in case of failure of implementation of a resolution process within 6 months, insolvency resolution proceedings were to be initiated under IBC within 15 days from the expiry of the stipulated time limit. This new framework replaced the older framework which included corporate debt restructuring schemes, strategic debt restructuring schemes and scheme for sustainable structuring of stressed assets. However, this new framework couldn't last very long as the Supreme Court in *Dharani Sugars and Chemicals Ltd. v. Union of India*[10] struck it down labelling it as unconstitutional. The court opined that the circular was ultra vires of section 35AA of the Banking Regulation Act as it was not authorized by the central government. It is important to note that the judgment most definitely dilutes the authority of the banking regulator in India. The power to order banks to refer cases to insolvency courts will now be limited to circumstances where authorization is sought from the central government thereby striking down the ability of the regulator to force banks to deal expeditiously with the NPA.

[9] *Resolution of stressed assets – Revised framework*, Reserve Bank of India (Feb. 12, 2018),https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11218.
[10] Dharani Sugars and Chemicals Ltd. v. Union of India, 2019 SCC Online SC 460.

All of these measures were taken to control the rising NPA which could potentially put the country's economy in the ICU. But the question is "were these measures enough to save the country's economy from taking a nosedive"?

3.3 Four Balance Sheet Problem

In financial year 2019-20 the IIP (consumer durables) showed a negative growth of -6.7%[11] and IIP (infrastructure goods) showed a negative growth -2.6% [12]. Electricity generation is directly proportional to the growth of the economy. As the economy of a country grows the energy requirement of the country also grows as factories and households start consuming more and more energy. In the FY 2019-20 the growth in electricity generation nosedived from 5.2% to 1%.[13] These statistics clearly show the pathetic condition of the Indian economy. Government and the RBI were constantly taking measures to cure the sick Indian economy. These measures included corporate tax cuts, slashing of interest rates and privatization of PSUs. And yet the economic growth kept deaccelerating. Arvind Subramaniam in his paper "India's Great Slowdown: What Happened? What's the Way Out?"[14] theorized that this deacceleration in the economic growth was due to the "four balance sheet problem". Four balance sheet problem includes the original two industries namely banks and infrastructure companies which composed the twin balance sheet problem as well as the real estate companies and NBFCs. The fall of ILFS, a giant NBFC worth Rs. 90000 crores, triggered the economic slowdown. This failure was unexpected and therefore NBFCs as a whole were reevaluated. According to the report[15] by Liases Foras between the period of 2009 and 2018 value of unsold inventory has increased by 4.72 times. The same report also provides that the lending to the real estate sector during that same period has increased by 3.33 times from 1.2 trillion to 4 trillion. The share of NBFCs in real estate lending increased between 2009 and 2018 from 0.3 trillion to 2.2 trillion[16]. The real estate developers will have to increase their sales by 2.5 times to

[11] *QUICK ESTIMATES OF INDEX OF INDUSTRIAL PRODUCTION* AND USE-BASED INDEX FOR THE MONTH OF DECEMBER 2019, Ministry of Statistics and Programme Implementation (Feb. 12, 2020), http://mospi.nic.in/sites/default/files/iip/iipdec19.pdf.

[12] *Id.*

[13] *Annual Report 2019-20*, Reserve Bank of India, https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR201920DA64F97C6E7B48848E6DEA06D531BADF.PDF.

[14] *Supra* at 6.

[15] Liases Foras (Feb. 2019), https://www.liasesforas.com/admin/WhitePaper/36/WhitePaper_2019-05-02_63692396967411.pdf.

[16] *Real Estate Lending – NBFCs most exposed*, Ambit Capital, https://www.propstack.com/news/wp-content/uploads/2018/02/Ambit_BFSI_Thematic_Real-Estate-NBFCs-most-exposed_15Feb2018.pdf.

even stay afloat.[17] This aggressive expansion by the real estate developers which also started in the mid-2000s was on the premise that the middle-income earners would deploy their newfound wealth to buy real estate. However, the demand tapered off post the 2008 global financial crisis (GFC). Even after the tapering off of the demand the real estate sector was pumped with money. It seemed as if it was a Ponzi scheme in which new finance was being pumped to sustain the unsustainable lending. The basic assumption on which NBFCs pumped real estate sector with so much money was that the real estate developers will be able to sell of their inventories and repay the debt. This basic premise proved to be false. The surge of supply had outpaced the demand and it led to the creation of a bubble which finally burst in 2019.Banks came to the rescue by lending funds directly to the well run NBFCs and indirectly to the others, by buying some of their better assets and therefore, the slew of changes that took place post 2016 fiasco could only manage to delay the impending crisis.

3.4 Fuel to the fire

The year 2020 marked the outbreak of the novel corona virus. It has brought the world economy on its knees. The global growth percentage on account of COVID-19 fell to 2.9%, the lowest since 2009. The year 2019-2020 also marked the India's lowest GDP since GFC in 2008. The IIP (manufacturing) 41.5 in April, 2020 which was 126.2 in April, 2019.[18] The IIP growth of mining, manufacturing and electricity for April to June was -22.4, -40.7 and -15.8 respectively.[19] IIP of consumer durables fell from 127.1 in April 2019 to 5.1 in April 2020.[20]

IIP of capital goods as well as infrastructure also fell to abysmally low levels. Indicators of the investment demand that is the production of capital goods contracted by 36.9%[21]. Similarly import of capital goods, consumption of steel and production of cement has also shown a sharp downturn. The lockdown has resulted in reduced labour supply to firms which in turn reduce the spending ability of the people. The reduced spending ability again reduces demand which therefore results into firms laying off their employees and this vicious cycle continues. In such a scenario the firms

[17] *Supra* at 14.
[18] *QUICK ESTIMATES OF INDEX OF INDUSTRIAL PRODUCTION* AND USE-BASED INDEX FOR THE MONTH OF JUNE 2020, Ministry of Statistics and Programme Implementation, (Aug. 11, 2020), http://mospi.nic.in/sites/default/files/iip/iipJune20.pdf.
[19] *Id.*
[20] *Id.*
[21] *Annual Report 2019-20*, Reserve Bank of India, https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR201920DA64F97C6E7B48848E6DEA06D531BADF.PDF.

will not be able to pay off their debts and initiation of insolvency proceedings against them will become inevitable.

To revive the country's economy, it is imperative that the IBC be reanalyzed because it hasn't been very efficient. More than two years after the RBI referred 12 large debtors to the IBC only eight cases have been resolved.[22] As of March 2020, Rs 1.84 lakh crore have been recovered against claims of Rs 4.13 lakh crore.[23] Therefore, when the country's economy is fighting both the four-balance sheet problem and the devastating effects of a virus it is necessary that certain changes be made in the IBC. Only if these changes are made will the IBC be able to achieve the objective of timely resolution with value maximization as stated in the preamble of the code.

4. PRE-PACKS– THE WAY FORWARD

The BLRC Report had recognized the significance of a timely resolution by proposing that "*the quintessence of the working of the code is speed*"[24]. The Apex Court opined that "*The core objective of the Code is to unify the insolvency law in India under a single legislation with the object of triggering the insolvency process*".[25]They way to achieve this objective can be pre-packs. Pre-packaged bankruptcy also known as "pre-packaged rescues" or "pre-packs", is a transpiring concept in concept in India. The pre-pack enables a distressed company and its creditors to enter into an arrangement in advance of statutory administration procedures that allows the execution of statutory procedures at full pace[26].This concept has gained significant traction in various countries like the United States, United Kingdom, Germany and France.

IBC's implementation in 2016 has shown fruitful outcome to a large extent as India's rank made headway from 136 to 108 in 2018[27] and to 52 in 2019[28] in the 'Resolving Insolvency' category in an

[22] *6% of total and 14% of closed cases find resolution under IBC so far*, CNBCTV 18, (May 20, 2020), https://www.cnbctv18.com/legal/6-of-total-and-14-of-closed-cases-find-resolution-under-ibc-so-far-5964301.htm#:~:text=Overall%20creditors%20had%20admitted%20claims,44%20percent%20recovery%20rate%20overall.

[23] *Id.*

[24] Ministry of Finance, *The Report of the Bankruptcy Law Reforms Committee,* 1 Rationale and Design (2015), https://www.ibbi.gov.in/BLRCReportVol1_04112015.pdf> accessed 19 August 2020.

[25] Innoventive Industries Ltd. v. ICICI Bank and Ors, AIR 2017 SC 4084.

[26] Varun Akar, *Prepacks the future of IBC*, IBC Laws (May 24, 2020), https://ibclaw.in/pre-pack-the-future-of-ibc-by-varun-akar/.

[27] World Bank, *Ease of doing business-2018*, https://www.doingbusiness.org/en/data/exploretopics/resolving-insolvency (last accessed Aug 18, 2020).

index published by World Bank known as the Ease of doing business. IBBI recently released data which reflects that less than 6 percent of the total cases filed under IBC have found resolution till March 2020[29]. A total number of 3,774, CIRPs have been filed since the IBC was implemented[30]. Of these 3,774 cases, about 1,604 cases, (43 % of the total) have been disposed, either by resolution, or have been liquidated or by other means.[31] The remaining 2,170 cases (57% of the total) are still sub-judice, of which some matters have surpassed maximum days' time limit which is 330 as set under the IBC[32]. Out of the remaining 1,604, closed cases, 914 (56% of the total) cases have ended in orders for liquidation, 312 (20% of the total) cases are on the stages of appeal or review or have been settled; most importantly 221 (14% of the total) cases have had their resolution plan approved by the competent authority and 157 (10% of the total) cases have been withdrawn[33].As the data clearly suggests that most of the disposed cases have not yielded in resolution or restructuring but have ended up being liquidated. Liquidation poses a serious threat to the corporate debtor. Failure of the CIRP process leads to liquidation which leads to rise in unemployment and ultimately an ill economy. Liquidation may seem as the best option in the short run but is not a desirable solution either for debtors or the sick economy. The situation is worse for micro, small and medium enterprises (herein after MSMEs) which account for 90% of all economic enterprises. They also claim the lion's share when it comes to industrial production and exports. Further, they also generate a lot of employment. CII calls the MSMEs as the backbone of Indian economy.[34] Without pre-packs MSMEs will be forced into liquidation which will lead to a rise in unemployment rates and a decrease in the GDP as well as foreign exchange. Cumulatively the harm that the economy will face due to the death of MSMEs will be of colossal proportions.

The advantages of the pre-packs are numerous. Pre-packs vis-à-vis the current mechanism take much less time. This efficiency in regard to the time taken by pre-packs directly translates into a decrease in the cost incurred by both debtor and the creditor. There exists a surety for the creditors

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[28] Asit Ranjan Mishra, *India's rank jumps 14 places in World Bank's ease of doing business ranking*, livemint (Oct. 24, 2019), https://www.livemint.com/news/india/india-jumps-14-notches-in-world-bank-s-ease-of-doing-business-rankings-11571882591868.html.

[29] Ritu Singh, *6 of total and 14 of closed cases find resolution under IBC so far,* CNBCTV18 (May 20, 2020), https://www.cnbctv18.com/legal/6-of-total-and-14-of-closed-cases-find-resolution-under-ibc-so-far-5964301.html.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Confederation of Indian Industry, *Sectors*,https://www.cii.in/Sectors.aspx?enc=prvePUj2bdMtgTmvPwvisYH+5EnGjyGXO9hLECvTuNuXK6QP3tp4gPGuPr/xpT2f, (last accessed Aug 18, 2020).

about repayment of the loaned amount. However, when CIRP is initiated the share to each creditor depends upon the resolution plan submitted[35]. Pre-pack transactions assure that the business remains a going concern as such transactions are extremely confidential. This confidentiality results into protection from erosion of value. Ministry of Corporate Affairs said that pre-packs will reduce litigation costs, delays and decongest the courts.[36] This decongestion of courts will ultimately lead to decrease in the burden on the courts and therefore, increase the bandwidth of the adjudicating bodies.

Apart from the above-mentioned benefits it also poses some risks and challenges, which must be specified for a reasonable analysis. Confidentiality is like a double edged word as it leads toto loss in transparency. The interest of many stakeholders may also be put to stake if the debtor decides to deal behind their backs with only a few financial creditors and agreeing to a resolution plan only with them. Pre-packs could also become a way to legitimize frauds and doctor the balance sheets. Bad management would run the companies into the ground, and through pre-packs a new company would rise which would be again managed by the same management. This would give legitimacy to mismanagement and frauds. Thus, if Pre-packs are to be integrated in the code, then all these concerns have to be dealt with first. BLRC also opined that Indian economy is primordial enough to allow out of court restructuring, without intervention from NCLT.[37] However, the report by BLRC has also pointed out that such an out of court settlement can be allowed only if it is mandated to get approval from the NCLT within 30 days of filing.[38]

The Indian IBC, 2016 largely borrows from UK, and therefore, in the same way the concept of pre-packs should also be borrowed, formulated and integrated in the code. The feasibility of pre-packs in India has been long debated by the BLRC. The government had invited comments from stakeholders in this regard[39] and also formed a sub-committee to propose a detailed strategy for

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[35] Varun Akar, *Prepacks the future of IBC*, IBC Laws (May 24, 2020), https://ibclaw.in/pre-pack-the-future-of-ibc-by-varun-akar/.

[36] Ministry of CorporateAffairs, 13Z Monthly Newsletter (Nov. 2018): (The Ministry of Corporate Affairs has also sought public comments on, inter alia, pre-packaged insolvency resolution process under the Code. See MCA Notice dated 16 April 2019).

[37] Bankruptcy Law Reform Committee, The Interim Report of the Bankruptcy Law Reform Committee, THE MINISTRY OF FINANCE (Feb. 2015),https://www.finmin.nic.in/sites/default/files/Interim_Report_BLRC_0.pdf.

[38] *Id.*

[39] Ministry of Corporate Affairs, *Notice inviting Comments from Stakeholders,* MCA (June 16, 2019). https://ibbi.gov.in/webfront/Notice%20for%20inviting%20public%20comments%20on%20Code.pdf.

implementing pre-packs and prearranged insolvency resolution process through an order[40] dated 24th June 2020. This step was taken to uphold the two most important objectives of the code, i.e. timely resolution and value maximization. Thus, pre-packs can be the answer to the current challenges faced by the Indian IBC.

5. CROSS BORDER INSOLVENCY- LEARNINGS FROM THE GFC

The peculiar case of Jet Airways is the perfect example to understand as to why there is a need for a regime that deals with situations where a corporate debtor may have creditors and assets dispersed across various jurisdictions. Videocon industries insolvency rigmarole also points at a need for a regime that deals with cross border insolvency. The first report of the insolvency and bankruptcy committee constituted by the Ministry of Corporate affairs stated that the existing provision in the code i.e. Section 234 and 235 do not provide a comprehensive framework for cross border insolvency matters.[41]

In 2008 when the Lehman Brothers collapsed it was conducting business in over 40 different jurisdictions through over 650 separate legal entities. Cross-Border Insolvency Protocol for the *Lehman Bros*. group of companies was formed by the agreement of insolvency representatives in seven different countries. In such a scenario where the complexity and scale of cross border insolvency is so high, uncoordinated legal proceedings in separate jurisdictions can prove to be extremely detrimental to the interests of the creditors. There are two principles in Private International Law which are adopted by different countries to tackle the problem of cross border insolvency.

- Principle of universality[42]
- Principle of territoriality[43]

The main tenet of universality is that the assets and liabilities of a debtor across the globe should be dealt by a single insolvency proceeding. The main idea is that the law of debtor's domicile jurisdiction should deal with the assets of the debtor that are scattered across the globe. Territoriality is when the country uses its own cross-border insolvency laws without deferring to other countries'

[40] Ministry of Corporate Affairs, Insolvency Section Government of India Order No. 30/20/2020 (Jun. 24, 2020), http://www.mca.gov.in/Ministry/pdf/ACT_24062020.pdf.
[41] Ministry of Corporate Affairs, *Report of the Insolvency Law Committee* 5 (Government of India, Mar. 2018).
[42] Halimi, Ryan, "*An Analysis of the Three Major Cross-Border Insolvency Regimes*", International Immersion Program Papers 47 (2017), http://chicagounbound.uchicago.edu/international_immersion_program_papers/47.
[43] *Id.*

laws. It is based on the idea of state sovereignty. The court in whose jurisdiction the proceedings have been initiated will have jurisdiction over the assets present only within the boundary of its state. Foreign proceedings aren't recognized. This theory sets out that to deal with the assets in foreign jurisdiction a separate insolvency proceeding is required in the country where the assets are located.[44] This is prima facie an inefficient approach as it proposes a time consuming, lengthy and cumbersome process. Though the universality approach to cross border insolvency is more efficient than the approach of territoriality, it comes with its own set of problems. For instance, what if the loan agreement between debtor and the creditor is not according to the law of contract of the debtor's domicile country? Adopting the UNCITRAL model law can however answer these questions and smoothen the process of cross border insolvency.

The 1997 UNCITRAL model on cross border insolvency has emerged as the most accepted legal framework to deal with cross border insolvency with the model law being adopted in 48 states in a total of 51 jurisdictions.[45] The UNCITRAL model focuses on authorizing and encouraging cooperation and coordination between jurisdictions, rather than attempting the unification of substantive insolvency law, and respects the differences among national procedural laws.[46] It also gives importance to national interest and public policy[47] of the enacting country thereby respects the sovereignty of the country and making it all the more country friendly. The preamble of the UNCITRAL Model law states that the main purpose of this law is to promote cooperation between courts, fair and effective administration of international insolvency matters and to maximize the value of assets.[48]

Implementation of the UNCITRAL model law has several advantages. The primary advantage being increase in foreign investments, a total of 51 jurisdictions have adopted the model law which is a testament to the popularity of the model law. Adopting the model law will make it possible for India to align its laws with globally accepted practices in the field of insolvency resolution thereby signaling global investors to invest in India. However, implementation of UNCITRAL model law has its own challenges. The first one being legislative reciprocity, legislative reciprocity means that

[44] Justice A K Sikri, Cross Border Insolvency: Court to Court Cooperation, 51 J. of the Indian Law Inst. 4, 467-493 (Oct.- Dec., 2009).
[45] United Nations, UNCITRAL Model Law on Cross-Border Insolvency (1997), https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.
[46] *Id.*
[47] *Id.*
[48] United Nations, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf.

the domestic court will only recognize and enforce the judgement of foreign court if such foreign court has also adopted the UNCITRAL model law. The report of Insolvency Law Committee of India suggests that reciprocity should be adopted. Such adoption would lead to the problem of the undercutting of the discretion on the adjudicating authority as it will be forced to outrightly reject any and all application without even considering their merits. Another problem is in relation to "public policy". Under Article 6 of the Model Law a country which has adopted the UNCITRAL model law may refuse to take action according to the adopted law by citing the reasoning that such action may be detrimental to the public policy. The term "public policy", undefined, is a very wide term. Absolutely everything and anything can be convoluted so as to show that it is harmful to the "public policy". In such a scenario adoption of such model law serves absolutely no purpose and flings back the country to square one as if it never adopted the model law.

To conclude UNCITRAL Model law on corporate insolvency provides a robust and flexible mechanism. Adopting the model law after the concern pointed out above have been dealt with will go a long way facilitate coordination of the various insolvency proceedings in different jurisdictions thereby maximizing the value in a timely manner and also fulfilling the aims and objectives set out in Indian IBC.

6. COVID-19 AND THE INSOLVENCY REGIME

The outbreak of novel coronavirus or Covid-19 have resulted in an economic crisis, due to which global firms such as Avianca airlines and Diamond offshore drilling have gone under. It also forced the Indian government to announce a nation-wide lockdown which entailed closure of all commercial establishments other than those which were absolutely essential. MSMEs are the affected the most due to the lockdown. To cushion the effect of lockdown and to protect such small businesses from the threat of insolvency the government has taken a slew of measures mentioned below:

- The minimum threshold to initiate insolvency proceedings under IBC has been raised to 1 crore INR from 1 lakh INR, which largely insulates MSMEs.
- Fresh initiation of insolvency proceedings under IBC has been suspended for 1 year, depending upon the pandemic situation in the country.
- 'COVID-19 related debt' has been excluded from the definition of 'default' under IBC for the purpose of triggering insolvency proceedings.

Pre lockdown the minimum threshold to trigger insolvency and bankruptcy proceedings was Rs. 1 lakh as per Section 4 of IBC 2016. The government increased the minimum threshold from Rs. 1 Lakh to Rs. 1 Crore vide notification dated 24-03-2020 in the official gazette of India.[49] This was a much-awaited policy decision. The government with this change in policy targeted two problems, the first being of the bandwidth of the courts being used up and the second being the threat of bankruptcy faced by MSMEs. Previously even small creditors dragged corporate debtors to NCLT without exploring the option of Debt Recovery Tribunals, Lok-Adalats or SARFAESI. This resulted in long delays in resolution of bigger cases. The downside to this is the brunt that the operational creditors may face. Operational creditor as per the Section 8(1) of the code may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed. However, there is no provision for joint action by operational creditors. Consequently, the operational creditors will be pushed out from the realms of IBC as most of the operational creditors individually will fail to meet the one crore mark. Arguendo even if operational creditors individually manage to meet the one crore mark, the suspension of Section 9 of the code will mean that operational creditors will not be able to initiate CIRP. MSMEs make up a considerable chunk of the operational creditors[50] and therefore the very enterprises which were to be protected through this notification will be adversely affected by it.

Under the Atmanirbhar Bharat Package the government has announced that all defaults due to Covid-19 will be excluded from the purview of IBC.[51] The aim of the government in taking this step is to protect companies struggling to get back on their feet from being dragged to tribunals. However, the question is how a differentiation will be created between Covid-19 related debts and non Covid-19 related debts. Also, it remains a puzzle as to why government has excluded Covid-19 related debts from the definition of default when it has already suspended initiation of insolvency proceedings for a period of one year.

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[49] IBBI, Notification for increasing threshold of default under section 4 of IBC,2016, IBBI (September 2020) https://ibbi.gov.in//uploads/legalframwork/48bf32150f5d6b30477b74f652964edc.pdf.

[50] Indian Ministry of Corporate Affairs, *REPORT OF THE INSOLVENCY LAW COMMITTEE*, Insolvency and Bankruptcy board of India, https://www.ibbi.gov.in/uploads/whatsnew/4e94077d49f9dbd49c875097dbdcf791.pdf.

[51] Ministry of Finance, *Finance Minister announces reforms and enablers across seven sectors under Aatma Nirbhar Bharat Abhiyan*, Press Information Bureau (May 17, 2020), https://pib.gov.in/PressReleasePage.aspx?PRID=1624661.

Section 10A has been inserted into the code which provides for suspension of the Sections 7, 9 and 10. The proviso to this section states that no application for insolvency resolution shall ever be filed against a corporate debtor for any default occurring during the suspension period. This means that under section 10A of the code initiation of insolvency proceedings on account of a default committed by an entity during time period of suspension is perpetually prohibited. Proviso is generally given to explain the true meaning of a provision when its meaning is unclear, but in this particular the proviso rather obfuscates the meaning of the main provision. This ambiguity raises a very important question – After the expiry of the suspension period can an application to initiate CIRP be made if the default is a continuing one? If the case is that the creditors cannot claim the dues that have become payable during the period of suspension even after the suspension period has ended and corporate debtors have become financially stable it will have an impact on the MSMEs contrary to what is desired. Suspension of IBC for a period of one year also means that corporate debtors will have absolutely no fear of being dragged to the tribunal and therefore the cases of willful defaults may increase geometrically which will again have an adverse impact on the MSMEs who form a major chunk of the operational creditors[52] thereby impacting the whole economy adversely.

The suspension might provide some relief in the short term but in the long run might prove to be highly detrimental to the economy. The objective with which IBC was brought into force was to provide for maximization of value of the assets in a time bound manner[53] is defeated. The Code was introduced with a creditor-in-control model but the amendment coverts the code into a debtor-in-control model. It will also increase the Gross non-performing assets (NPAs) to 11.3-11.6 % by the end of this financial year from 8.6 % as of March 2020, due to disruptions caused by the coronavirus pandemic as per the report of ICRA.[54] There will be an astronomical rise in the number of cases filed after the suspension of IBC is uplifted thereby eating the bandwidth of the court. This will affect the resolution process ultimately resulting in resolution plans to have lower valuations which again goes against the objective of the IBC that is value maximization which in turn will be detrimental to the interest of the creditors, which again is in contradiction to the object

[52] *REPORT OF THE INSOLVENCY LAW COMMITTEE*, Ministry of Corporate Affairs, (Feb. 20, 2020), http://www.mca.gov.in/Ministry/pdf/ICLReport_05032020.pdf.
[53] The Insolvency and Bankruptcy Code, 2016, No. 31, Acts of Parliament, 2016 (India).
[54] PTI, *Bank NPAs may worsen to 11.6 by end of this fiscal due to coronavirus pandemic,* The Economic Times, (June 2020) https://economictimes.indiatimes.com/news/economy/indicators/bank-npas-may-worsen-to-11-6-pc-by-end-of-this-fiscal-due-to-coronavirus-pandemic-report/articleshow/76197977.cms?from=mdr.

with which IBC was formulated. All in all, this amendment was brought with the best of intentions but as they say "road to hell is paved with good intentions".

7. CONCLUSION

The problem of rocketing NPAs coupled with the Covid-19 pandemic has sent the Indian economy in a downward spiral. With over 21 million people losing their job within a span of five months from April to August[55] and the contraction of GDP by 23.9%[56] mass bankruptcies are impending as the companies are not going to be able to pay their loans back. In such a situation, companies which are the backbone of any economy may have to undergo liquidation. The role of IBC to save the companies from liquidation is of utmost importance. However, 57 percent of the total closed cases have ended in liquidation.[57] Clearly pre-packaged deals must be incorporated in the current insolvency regime to make sure the companies are not liquidated. Pre-packaged deal can not only save companies from being liquidated but it also saves up the time of the court thereby making the whole process time efficient. Further, taking lessons from previous economic meltdowns adopting the UNCITRAL's cross border insolvency model law is another way to combat the impending bankruptcies. The model law can be the tool to rein in the chaos which might ensue if another Jet Airways or Lehman Brothers like situation arises. Lastly, there are flaws in the recent amendment which may prove to be fatal for the economy. The amendment was passed to protect the MSMEs and in general to protect all companies from a constant threat of initiation of CIRP due to the pandemic. The amendment in its current form is flawed as pointed out in the perusal undertaken and such flaws may result into harming the very same entities which the Government sought to protect. To sum up the Indian economy is critically ill and the IBC can be a tool to lift the economy out of its current state. IBC, however, in its current form may not be able to achieve that objective and therefore the authors have proposed changes in the current insolvency regime so that the current regime can efficiently combat the two-pronged problem of rising NPAs and Covid-19 pandemic.

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[55] *CMIE: 'Slump in growth starts showing: About 21 million salaried jobs lost in Apr-Aug',* The Indian Express (Sept 9, 2020), https://indianexpress.com/article/business/economy/slump-in-growth-starts-showing-about-21-million-salaried-jobs-lost-in-apr-aug-6588479/.

[56] *PRESS NOTE ON ESTIMATES OF GROSS DOMESTIC PRODUCT FOR THE FIRST QUARTER (APRIL-JUNE) 2020-2021,* Ministry of Statistics and Programme Implementation (Aug, 31 2020), mospi.gov.in/sites/default/files/press_release/PRESS_NOTE-Q1_2020-21.pdf.

[57] *Supra* at 28.

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UNRAVELING THE NEW MEDIA POLICY, 2020 AFTER SCRAPING OF ARTICLE 370

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ABSTRACT

The engineers of the Indian Constitution were eager to make the nation sovereign steady, and peaceful. Constitutional laws have a very pivotal role in establishing the nation's legal system, including Art.370 and 35A, empowering the residents of Jammu and Kashmir with extraordinary powers. The goal was to put an end to terrorism in the nation and to fulfill the demand of the people of Ladakh, who wanted it to be a separate entity. But, these articles have always remained mired in controversy attributable to its inconsistent allotment inside the structure of free India. After the abrogation of Article 370, the interpretation of the Fundamental Rights of the Press contributed questionably to the formation of the new 2020 Media Policy, and it applies only to J&K. After the dissatisfaction with regards to Article 370 in Kashmir, the policy emits an impression to be an endeavor of the legislature to turn things well in Kashmir. This paper likewise explores the history of Jammu & Kashmir, the post-era of the repealed Article 370, and towards the end, it explains what progressive improvement of the state has occurred. It also inspects the legitimacy of legislative issues associated with that disentangling the Media Policy 2020, once rejecting Article 370.

1. INTRODUCTION

The Indian Constitution is one of the finest authoritative archives of our nation, which covers all highlights to control the country and its general public calmly for social steadiness, human rights, and to shield people from committing serious crimes. Constitutional laws have always contributed an essential role in the judicial system of our country, guiding it to deal with the present complex scenarios. But an analysis concerning the security of international and national issues at north Indo-Pak outskirts of Jammu & Kashmir observed that new laws are to be adopted to tackle the problems arising in the region. Recently, the increasing intrusion from Pakistan in the J & K, and from China during the COVID situation, attack in the Ladakh region, these serious issues are proceeding with which makes the issue complex to settle. The residents of Jammu and Kashmir have confronted a

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gigantic measure of dread and fear for decades continuously, and they have been doing combating for their freedom against anxiety and discontent faced by them. Since independence, when India & Pakistan became two separate States, Pakistan took up the Kashmir issue as a weapon against India and often assaulted India to fulfill its evil motive.[1]In late 1947, Sheik Abdullah, who had by then been elected Prime Minister of J&K by the Maharaja, accompanied by some of his colleagues, took part in the Indian Constituent Assembly to haggle about the special status of J&K, driving towards the adoption of Article 370.[2]In 1949, the domain of Jammu and Kashmir was granted autonomy by an extraordinary course under Article 370 in Part XXI of the Indian Constitution. Article 370 of the Indian Constitution was an interim provision whose applicability was predetermined to last until it gets adopted by the State's Constitution. However, the State Constituent Assembly did not recommend to revoke or to amend Article 370, which was later considered as a permanent feature under the Indian Constitution by various judgments laid down by the Supreme Court of India. Article 370 has always been questionable right from the commencement, with Dr. B R Ambedkar as the primary drafter of the Constitution, having would not draft the article owing to its inclination and inconsistent administrations inside the system of a free India. By this arrangement, the state was qualified to have its own Constitution. Even after 73 years of independence, the residents of Jammu and Kashmir are still under the captivation of terrorism. To end this, on 5th August 2019, under the Modi Government, Shri Amit Shah notified the revocation of Articles 370 & 35A of the Indian Constitution which, lead to the bifurcation of the states into two Union Territories, Jammu & Kashmir, and Ladakh. Mr. Amit Shah, during the Parliamentary discussion, pointed out that Article 370 does not help in any improvement of Kashmir and brought about discrimination against women.[3] He likewise said that it would stop illegal intimidation, and the area will lead to advancement in the way of development.

They also laid down two significant purposes behind the bifurcation, first, to satisfy the solicitations of the residents of Ladakh to provide the status of an affiliation area and second, to keep up internal security and hinder cross periphery mental fighting in the state. This revocation has created a threat to vote based system as it an endeavor to spellbind and assuage the Hindu populace in the valley and has also expanded the political weakness and precariousness in the region. However, the abolition of

[1] Khalid Wasim *Hassan, "*History Revisited: Narratives on Political and Constitutional Changes in Kashmir (1947–1990)*", Bangalore: The Institute for Social and Economic Change, (2009).*
[2] Maj Gen Sheru Thapliyal, "Article 370 : The Untold Story", (last modified on February 14, 2019), *available at :* http://www.indiandefencereview.com/news/article-370-the-untold-story/.
[3] Kashika Mahajan, "Abrogation of Article 370", 8 *International Journal of Science and Research (IJSR)*, (2019).

Article 370 has made a situation of disorder and instilled insecurities in the valley of Kashmir. Not so much as one year past this abrogation, another new provision known as the Media Policy, 2020 has been introduced by the legislature. The emerging digital & social media and the pressure of 24x7 news are pressurizing the government to keep up with the pace of the media. This new Media Policy 2020 authorizes the government to intervene and to set up a few limitations on the journalists to avoid the spreading of fake news leading to anti-national activities.

2. ARTICLE 370: THE PROMISE

Article 370 is the most controversial article which was included on 17th Oct. 1949 in the Constitution of India, which grants the State of J&K with extraordinary powers, and allows the State exemption from the Constitution of India to draft its own Constitution, granting it some autonomy.[4] While to begin with Article 370, we had to go to the pages of history that began when Maharaja Hari Singh of Jammu and Kashmir in 1947 was in a dilemma whether to connect with India or Pakistan. But before he takes the decision, Pakistan attacked Jammu and Kashmir, which forced Maharaja to ask military help from the government of India.[5] Subsequently, in late 1947, an Instrument of Accession was signed by Sheik Abdullah, who was the Prime Minister of J&K, elected by the Maharaja, agreeing to the Domain of India regarding three explicit subjects that manage international concerns, defense, and communication on which J&K would transfer its power to the legislature.[6] The Constituent Assembly of the State gathered to decide regarding the other subjects which the State may agree. Sheikh Abdullah and his companions joined the Constituent Assembly of India, and the preparation to implement Art.370 in the J&K was started. In 1949, as an interim provision, Art.370 was added to the Indian Constitution, which restricted the legislative power in Jammu and Kashmir, unlike the other states governed by the Central Union of India. The Constitutional Order, 1950, applicable to J&K, which is relative to the Instrument of Accession, as prescribed by Art. 370(b)(i), became operational concurrently with the Constitution of India.[7] In J&K, some of the articles of the Indian Constitution was brought into effect, with separate amendments and extraordinary cases being followed as agreed by the state government. The constitutional order, passed by the President of India under Article 370, has been extended to the

[4] Sameer P. Lalwani, and Gillian Gayner, "India's Kashmir Conundrum: Before and After the Abrogation of Article 370", *US Institute of Peace*, (2020).
[5] *Hassan., Supra note 1.*
[6] Lalwani., *Supra* note 4.
[7] *Hassan., Supra note 1.*

state of Jammu & Kashmir with certain limitations. The State Constituent Assembly did not take any step to revoke or amend the Art.370, and later it was considered to be a constant proviso in the Constitution of India supported by various judgments given by the Apex Court of India at different times.

In addition to this, the Presidential Order 1950 declared that 235 articles of the Constitution of India had been rendered obsolete within the jurisdiction of J&K, 9 were made partly relevant, and 29 had been maintained in the amended framework.[8] This order was followed by the Presidential Order, 1954, acknowledging the Maharaja of Jammu & Kashmir as Sadr-i-Riyasat by the President at the request of the State Assembly.[9] This was a comprehensive order to annul the government's implementation of the 1952 Delhi Agreement. It went debatably quite well in a few ways than the Order 1950, but a couple of clauses were not selected out of the Delhi Agreement and were struck down during the expansion, but included later. Subsequently, Article 35A was inserted in the Indian Constitution, allowing the State Council to manage the advantages of permanent inhabitants with their fixed properties, settlements within the state, and jobs.[10] In essence, Art.35A grants full discretionary authority to the J&K legislature to determine who the permanent residents of the territory are and then assign them special rights and privileges. It also requires the state legislature to enforce certain limitations on individuals with respect to the aforementioned article, rather than being permanent residents.[11]

Notwithstanding these original orders, 47 Presidential Orders were issued, making J&K subject to some other clauses of the Indian Constitution.[12] These orders had been passed without the Constituent Assembly with the consent of the State Government. There were few orders issued under the discretion of the President, all of which were granted as amendments to the 1954 Order rather than as replacements, presumably because their authenticity was a matter of concern.[13] After the rise, the perpetual population of J&K has come forward to embrace the numerous advantages

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[8] *Bodh Raj Sharma, "The Special Position of Jammu and Kashmir in the Indian Constitution", 19(3) The Indian Journal of Political Science, (1958).*

[9] A.G. Noorani, *Article 370: A Constitutional History of Jammu and Kashmir, (*Oxford University Press, 2011).

[10] Ashutosh *Kumar, "The Constitutional and Legal Routes", in Ranabir Samaddar (ed.), The Politics of Autonomy: Indian Experiences, 93–113 (SAGE Publications, 2005).*

[11] Rakesh Singh Bhadoriya, *"Origin of Jammu and Kashmir: Analysis of Article 370 in Present Scenario", (last modified on* December 4, 2016), *available at: https://web.archive.org/web/20171012042000/http://lexhindustan.com/%E2%80%8Borigin-of-jammu-nd-kashmir-analysis-of-article-370-in-present-scenario/.*

[12] Noorani., *Supra* note 9.

[13] Jill *Cottrell, (2013), "Kashmir: The vanishing autonomy", in Yash Ghai, Sophia Woodman (eds.), Practising Self-Government: A Comparative Study of Autonomous Regions, 163–199, (Cambridge University Press, 2013).*

and privileges. In 1957, the Constitution of Jammu and Kashmir came out to be handicapped, as there was no chapter in the Constitution dealing with the constitutional rights of permanent citizens of the Valley.Nevertheless, by following the principles of the **1954 Order, the permanent inhabitants of Jammu & Kashmir** have **now been rendered** to certain amendments and exceptions, that is, to the constitutional rights bestowed upon **them, as per** Part III of the Indian Constitution. **In the Constitution of Jammu and Kashmir, 1951, Articles 6 to 10 of Part III interacted separately with the permanent residents of the state.**[14]Since the state was entitled to extraordinary powers, its presence in any manner negates the impression of the Apex Court in the Indra Sawhney Case due to socio-political variables. In the case of *Indra Sawhney v Union of India*, 1992, the Apex Court noted that there is one common nationality in India, **and every citizen should have confidence in the functioning of the system.**[15] **There has been and there continuously will be controversy in the handling of affiliation of Jammu and Kashmir with India.**

3. ABROGATION OF ARTICLE 370

It's as of now been a year when India has abrogated a standardized law on August 5, 2019, that allows the special status to Indian administered Kashmir, yet the Valley is in the midst of the unfortunate circumstance. It was in 1989 that the rebellion was born, as an indigenous uprising against Sheikh Abdullah's oppressive government and autocratic rule. This continuing insurgency in the territory of J&K has destroyed its regular functioning, forcing New Delhi to declare the former State as a "disturbed region" and to invoke divisive and punitive laws to preserve stability and peace, such as the Armed Forces Special Powers Act (AFSPA). While over the years, New Delhi attempted intermittently to connect Pakistan, and even to Kashmiris, peace in the Valley did not prevail.Prime Minister Narendra Modi, like his predecessors, also tried to reach out to Pakistan for a constructive response. In the midst of the fatigue of the last few decades and after undertaking numerous ineffective soft measures to resolve the violence, in its attempt to retain harmony and stability, the state found it difficult for the territory of Jammu & Kashmir to take steps such as 'Operation All-Out'. Later, taking the intensified dispute in the Valley as a plea, the BJP led government attempted to appease Dr. S.P. Mukherjee's philosophy to revoke Articles 370 and 35A. He died in 1953 while leading a rally against Jammu and Kashmir's special status, which emphasized a dual Constitutional

[14] V.K Dewan, *Law of Citizenship, Foreigners and Passports* 41 (Asia Law House, Hyderabad, 2010).
[15] *Indra Sawhany v. Union of India*, AIR 1993 SC 477.

provision, provision for two prime ministers, and two different flags in one country that should not exist.[16]All the executives and the political leaders of Kashmir were under house arrest, military forces were sent in to put an end to the disturbing elements in the Valley with **complete internet blackouts. A**ll this occurred before New Delhi's unilateral decision to abolish Article 370 and bifurcate Jammu & Kashmir state into two new union territories.[17] As per government opinion, this constitutional transformation was implemented to create a better atmosphere for strong governance and sustainable economic growth in the Valley. The government claimed that one of the key factors behind repealing Article 370 is the menace of extortion and belligerence in the valley of Jammu & Kashmir.

The President of India released the Constitutional Order 2019, which applies to J&K, replacing the preceding order, on 5 August 2019. The provisions of the Indian Constitution will be applicable to the state of J&K in totality without any modifications or exceptions.[18]In essence, this new order meant that the partitioned Jammu & Kashmir structure was void. The President issued an order in agreement with the government of J&K in accordance with the Governor, as chosen by the Union.[19]**Amit Shah, the Minister of Home Affairs, after the 2019 Presidential Order, moved a resolution recently in which he demanded the President to issue an agreement to amalgamate all the clauses under Art.370**.[20] Any clause laid down in Article 152 or 308, which is contrary to the statute or any other article of the constitution of J&K, shall not be enforced under the constitution.[21]

Back then, it was a controversial question of whether Art. 370 of the Constitution of India ought to be annulled or not. These arguments for and against the topic of repeal of Art. 370 of the Constitution of India are perfectly balanced. Arguments suggested that the temporary clause of Art.

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[16] Ayjaz Wani, "Life in Kashmir after Article 370", (last modified onJanuary 28, 2020), *available at:* https://www.orfonline.org/research/life-in-kashmir-after-article-370-60785/.

[17] Rebecca Ratcliffe, "Kashmir leaders placed under arrest amid security crackdown"*, (last modified on* August 5, 2019), *available at*: https://www.theguardian.com/world/2019/aug/05/kashmir-leaders-placed-under-arrest-amid-security-crackdown.

[18] S.P.Sathe, "Article 370: Constitutional Obligations and Compulsions." 25 *Economic and Political Weekly*, pp. 932–933, (1990).

[19] The Gazette of India, PART II, Section 3(i), (last modified on August 5, 2019), *available at:* https://web.archive.org/web/20190805094806/http://egazette.nic.in/WriteReadData/2019/210049.pdf.

[20] *Kaushik Deka, "Kashmir: Now for the legal battle", (last modified onAugust 19, 2019), available at:* https://www.indiatoday.in/india-today-insight/story/kashmir-s-new-normal-1582167-2019-08-19.

[21] President Declares Abrogation of Provisions of Article 370, (last modified on August 7, 2019), *available at*:https://www.thehindu.com/news/national/president-declares-abrogation-of-provisions-of-article-370/article28842850.ece.

370 of the Constitution of India which caused a lot of debate and was eventually required to be repealed in a few years supported its abrogation. If Article 370 were to be repealed, the proposal for a plebiscite would be more deadly because a referendum after sixty years from the date of accession would create more chaos. This counterpoint of view is in favor of those who have been rejected abrogation. An amendment to the Indian Constitution, as provided for in Article 368, can be reversed by Art.370, the only provision being the non-destructive existence of the alteration with respect to the fundamental structure of the Constitution.[22] But the question isn't how revocation can be affected, it is whether revocation can be affected or not. The answer isn't within the affirmative. Without the consent of the Kashmiris, the abolition of autonomy has increased the sense of risk among the residents of the Valley. People are experiencing an increased sense of anxiety and distrust about their identities and cultural problems, such as religion, traditions, and language, after 5 August 2019. The core sectors of the Jammu & Kashmir's economy have suffered a sharp decline after the repeal of Article 370, and in the last five months alone, due to communication blockades, curfews, and militant attacks, the Kashmir economy has suffered a loss of about INR 179 billion and about 100,000 jobs relating to art & craft, tourism and information technology sectors.[23] Colleges and University students have been seriously strained because of internet blockade. The respondents have complained that internet access was available at district headquarters only in government offices, for which they have to wait long hours, and that very little personal internet access was available. Rural Kashmir is facing an economic slowdown of this size for the first time in the last 70 years since the revocation of article 370 of the Indian Constitution. It manifested how, in the post-abrogation period, the annulment of Article 370 made the people of Kashmir lose their trust in Kashmir's pro-establishment political class. Jammu & Kashmir citizens feel that New Delhi has labeled all prominent Kashmiris as separatists with this move, accusing New Delhi of violating India's Constitution and its democratic essence and neglecting Kashmiri sentiments.

4. MEDIA POLICY, 2020

In the present era, communication is an essential element of administration. In light of this statement, a new and dynamic media strategy is necessary to introduce so that it can carry out the message of government assistance, advancement, and create awareness about the new initiatives or

[22] Sathe., *Supra* note 18.
[23] Kashmir Economy suffered loss of Rs. 17,878 cr in 4 months after Article 370 Abrogation, (last modified on December 17, 2019), *available at*: https://indianexpress.com/article/india/kashmir-economy-suffered-loss-four-months-after-article-370-abrogation-jk-6172096/.

schemes of the government. Ceaseless attention, given to the criticism and complaints of the people, which is projected to the government by the media, assures them that they are a part of this improvement cycle.

The media in Kashmir experienced a harrowing year to report its impact on the residents of Jammu and Kashmir in the post abrogation era of the Art.370. Further, a complete communication blockade in the state, before the revocation of Art.370, created commotion in the entire Kashmir Valley and the Jammu division. Most of the reporters were not able to document stories in their papers, and collecting news articles got impossible. As soon as the internet and media connections got restored in the region, many journalists started posting articles and photographs on social media, which glorified anti-national activities of the terrorists and vitiated the image of law enforcement agencies, causing mass hatred against our country.[24] In April 2020, FIRs were registered against some Kashmiri journalists, and photojournalists, who were held liable under the harsh Unlawful Activities (Prevention) Act, which entails imprisonment for up to seven years if proved guilty.[25] Summing up the above scenario, it can be distinguished that the life of a journalist has changed a lot in the post era of the abrogation. After one year of abrogation of Article 370, the Jammu and Kashmir government, on 2nd June 2020, thought of a new Media Policy, which approves the legislature to choose what is fake, untrustworthy, or hostile to the public news so that they can take legal action against those journalist or media organizations who post such news. It additionally legitimizes what the nearby media associations see as an assault on the freedom of the press, and the policy document peruses Jammu and Kashmir have critical lawlessness and security concerns.[26] Moreover, when the nation is fighting a proxy war across the border, the anti-national elements need to be under control to ensure peace in the valley. **Looking into the current situation, the new media policy has been drafted. It will be administered by the DPIR who has been designated as the Chairperson of the Empanelment Committee. There is a provision of a**

[24] Misbah Reshi, Media Policy 2020 : Mocking Freedom Of Speech and Expression in Jammu and Kashmir, (last modified on September 18, 2019) , *available at :* https://www.theleaflet.in/media-policy-2020-mocking-freedom-of-speech-and-expression-in-jammu-and-kashmir/#.

[25] Laxmi Murthy & Geeta Seshu, Silence in the Valley: Kashmiri Media After the Abrogation of Article 370, (last modified on October 26, 2019) , *available at* : https://www.epw.in/engage/article/silence-valley-kashmiri-media-after-abrogation.

[26] Irfan Amin Malik,Why Journalists Are Worried About the New Media Policy in Jammu and Kashmir?, (last modified on July 17, 2020), *available at*: https://thewire.in/media/kashmir-new-media-policy-press-freedom.

review committee chaired by the administrative head of the Information Department under the new policy.[27]

DPIR will guarantee that all the objectives under this new media policy are maintained strictly. The objectives of this policy are to establish a framework on the functioning of the media and government interference in the news to encourage the highest standards of state journalism and to develop a Standard Operating Procedure to meet people in critical situations such as medical conditions and catastrophic events. Moreover, it has been obligatory to check the foundation of editors and the staff of media houses before empanelling them for government commercials, and apart from the 'security clearance' is required before any journalist is conceded government accreditation through the DIPR. It also sets out a strong establishment to utilize all types of media to build public trust, focus on complaints of people projected by the media, and fortify the connection between the different stakeholders. But, the new policy mainly focuses on to prevent misinformation, counterfeit news and builds up a component that will raise caution against any endeavour to utilize the media to tarnish public harmony, sovereignty, and integrity of the nation. It also encourages establishing new media foundation/institute in trustworthy public organizations in Jammu and Kashmir, for example, IIMC, IIM that will advance the best quality of news coverage, and arrange study and exploration in the field. Further, the strategy visualizes that all administration divisions will nominate a nodal official to liaise with DIPR, which will guarantee stable communication with the public on the web and via web-based media, and it also aims to set up new Social Media Cell in all the administration. Some of these new limitations set up on the Kashmiri media indicate the endeavour to suppress the voices of the people of Kashmir and prohibits to preach the prevailing scenarios of Kashmir to different parts of the nation. The provisions of this new policy in J&K, legitimately assault the Constitutional right of media with regard to Freedom of Expression and Speech as per Art.19 of the Indian Constitution,and it likewise demonstrates that the Doctrine of Colourable Legislation[28] is as yet being drilled in India. For decades now, in a nation where the judiciary is the most dominant element of the Indian Constitution with numerous cases where it emphasizes the significance of Freedom of Press through various interpretations and judgments, the legislature of Kashmir has enacted the most debatable policy in a similar domain.

[27] Jammu and Kashmir Media Policy 2020, (last modified on June 11, 2020) , *available at* : https://kashmirlife.net/jammu-and-kashmir-media-policy-2020-236330/.
[28] The Constitution of India, art.246.

These new guidelines and limitations of the policy, which are forcibly imposed on the media, now raises our eyebrows against the actual intentions of the legislature.

Further, in one of the landmark cases named *Romesh Thapper v. State of Madras*[29], the Apex Court passed a judgment stating that the Freedom of Speech according to Article 19(1)(a) of the Constitution of India is an integral aspect of democracy and can only be limited in particular circumstances. It also held that Freedom of Press is one the integral component of Art.19(1)(a) of the Constitution of India, where media seeks protection against censorship and other methods of smothering freedom of speech. The New Media Policy doesn't legitimately force limitations on the freedom of press yet puts an obstacle wherein journalists cannot publish unethical and fake news which tantamount to anti-national activities. This made the New Media Policy, 2020 more complicated. The new controversial media policy has limited the privileges given to the citizens of India under Article 19(1) dealing with the Freedom of Speech and Expression through such methods, which can be limited only by the limitations determined under Art. 19(2) of the Constitution of India. To interpret the validity of restrictions under the Art. 19(2) of the Indian Constitution, important aspects like reasonableness, i.e., whether the purpose is commensurate with the provisions of the Article, the proximity, and the proportionality. The essential points when judging the **reasonableness of the regulation are the scope and continuance of the restrictions, the intent, and its viability to restrict wrong deeds.** It is thus vital to feature here that the time of activity of the Policy is undefined.By legitimizing a discretionary framework; the system tries to introduce the standard for media reporting in Kashmir. Although the policy attempts to maintain the provision under Art.19(2) of the Indian Constitution, which is to prevent any attempt by the media to propagate prejudicial matters on India's sovereignty and integrity yet, it does not satisfy the third condition of proportionality.

The court in the case of *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia*[30], held that there must be no unconstitutional or unreasonable constraints imposed on Article 19(1) of the Constitution of India. *It should highlight the conditions of vicinity and proportionality regarding the public order as well. In the given case, the most critical clause that deals with whether the action is least violative of one's right is the application of proportionality. It also questions the proximity in terms of provisions applied and the object accomplished. After the evaluation, the new media policy seems to neglect the requirement of various tests.* The

[29] *Romesh Thapper v. State of Madras*, 1950 AIR 124.
[30] *The Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia,* 1960 AIR 633.

method fails to accomplish the objective of regulating data proliferation, which is antagonistic to the sovereignty of India, and the essence of the policy action is undeniably extreme. *On the contrary, it must be least violative of fundamentals rights in actual. Whereas in practice, India has adopted and ratified the Universal Declaration of Human Rights (UDHR) along with the ICCPR in which it has guaranteed the protection of Freedom of Speech and Expression. The provision of the policy should not be put in jeopardy when the State is imposing certain limitations on the Right to Freedom of Expression and Speech as per Article 19(2) of the Indian Constitution.*[31] *But in the current situation, the new media policy exhibits an extreme and disproportionate breach of the rights according to Article 19 of ICCPR and UDHR. Such an act raises the question of the Freedom of Speech in the Indian Democratic system where at times, all news put through the administrative filter to avoid information that put Indian sovereignty and integrity at stake.*

5. CONCLUSION

Article 370 of the Indian Constitution was meant to be an instrument for vulnerable groups who were confused about the security of their identity and community. Likewise, in order to build space in government and allow citizens of Jammu and Kashmir to determine their future, it was intended to ensure democracy in the State.From the difference of opinion, it tends to be seen that delegation of power remained mired within the clutches of a few groups.Numerous meetings were led with individuals in Kashmir, giving a brief look at how Kashmiris have lost their confidence in the legislature because of the abrogation of Article 370.After unraveling the New Media Policy 2020, we observed how it has sought to suppress the voices of the media in the Kashmir valley in a roundabout way. The Kashmir Valley still appears to be a place of danger and challenge to journalists in terms of the restriction of the constitutional right to freedom of the press as well as abuse against journalists. The functioning of the Policy, which is ostensibly meant to regulate the distribution of information and to demonstrate the change to the citizens, appropriately, and in its due implications, are highly complicated. The new policy prohibits the people of Kashmir from the constitutional right to freedom of speech, as per Art.19(1)(a) of the Indian Constitution, and it also prevents the rest of the public from learning about the existence of Kashmir by empowering the government to indulge in limited truthful exposure. The outcome leads to the avoidance of any likelihood of criticism or retaliation that might occur. Criticisms and loud protestations against the

[31] Mahima Balaji, Kashmir's Media Policy, 2020: Crackdown on Freedom of Expression, *Law School Policy Review*, (last modified on July 31 2020), *available at*:https://lawschoolpolicyreview.com/2020/07/31/kashmirs-media-policy-2020-crackdown-on-freedom-of-expression/.

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New Media Policy, 2020, demonstrate the injury to press freedom, professional rights of journalists, and media organizations. This new policy is an indicator of the most obscure period of curbing the right to press wherein the legislature will script customized tales of reality. However, we may expect that life in Kashmir will slowly and gradually limp toward normalcy, granting people as well as the journalists their fundamental rights in the future. The Valley, however, stands amid an unsettling calm, which may be disturbed from across the border at the slightest provocation.

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THE MENTAL HEALTH PANDEMIC IN INDIA

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ABSTRACT

The more tangible effects of the pandemic have overshadowed another one brewing in the minds of people – the mental health pandemic. Mental health finds significant inclusion in the Right to healthy life under Article 21. This particular bane of coronavirus will outgrow and outlive the pandemic itself into becoming something even worse. This is a cause for concern and warrants immediate consideration. The wars of the world killed many, but so did the period following them, which remain marred with mass suicides. Hence, due significance to psychological rehabilitation must be given. The article takes a multi-disciplinary approach connecting psychology, policy and law. Certain groups of people have emerged who have faced hazards, distinctly aggravated by their position or nature. The article analyses the pandemic's impact on the mental health of Primary Healthcare Workers, Migrant workers, Women, Children and Adolescents. It emphasizes the sharp rise in suicide and suicidal ideation among the masses. Further, it raises to light contemporary legal concerns surrounding the issue, referring the Mental Healthcare Act, The Occupational Safety, Health and Working Conditions Code, 2020, certain schemes and ordinances. Lastly, it highlights existing solutions and suggests new ones to curb the menace. The research is doctrinal and analytical.

1. INTRODUCTION

When you are peacefully sleeping and it starts to thunder outside, do you *feel* a little uneasy? What if you saw a neighboring car hit a dog and drive away, do you cringe? Do you feel angry? So, things happening around us do have a direct impact on how we feel even if they are not remotely connected to us in any practical or personal manner. So, do we need to be in the mud with the pandemic, fighting against it or suffering from it for it to be valid for us to feel concern, or agitation? Let us continue with the horrible analogy till it reaches bizarre. Say what if all the cars in the world went into frenzy and started hitting every dog they find continuously for months and this is all you can see? What if one of the dogs is yours? And what if you are the doctor who has to treat dozens of these dogs each day with no control over or estimation of a better future? The ridiculously bloody picture that is painted here is fundamental to put things in perspective, as it still falls short when put next to the reality that is this year. The doom of the infamous Sars-Cov-2 does not lie in its fatality

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against your mortality, it lies in the perpetual sense of impending doom upon yourself and all your loved ones. It is in the forced infliction of physical isolation branching into social and emotional isolation from your support systems. It is in the utter scarcity of basic necessities of life which make it excruciating for the tired, helpless brain to perform even perfunctory tasks of the day. This is the level of mental torture at which an average individual 'ordinarily' lives amid the pandemic.

A contrast, thus, is with most difficulty drawn here to those who remain affected by the situation more directly or gravely. The level at which one suffers when they or their known are inflicted with the virus, and which the healthcare workers face in the trenches with the virus remain beyond comprehension. Similar is the aggravated suffering of those placed by nature and circumstances to a position where they are hurt more. These constitute the migrant workers, the women and children. The first part of the article dedicates itself to bringing out the special circumstances of these groups, only with the aim of creating the realization that special, specific and immediate rehabilitative strategies is of utmost importance for the especially vulnerable.

2. THE PROBLEM: A SECTION-WISE ANALYSIS

- **Suicides**

Let us begin where it ended for 72 people who took their lives since the first COVID 19 case, with the primary causative factor being fear of infection[1]. This Indian study examined 69 national newspaper reports to draw certain resounding conclusions on the severity of attack on mental health by the virus. The fear of infection, isolation of quarantine, social stigma and even unavailability of alcohol led to many self-inflicted deaths in India. But another primary cause (19 out of 72) in a third world nation like ours was the extreme financial hit and the pressure for providing. People have arguably lost more jobs today than during the financial almost-emergency and many of those who retain it are unable to do it or wait in line for their payments. Another study in the United States has found that people are experiencing historically high insomnia, i.e. lack of sleeping which is directly

[1] Deena Dimple Dsouza et al., "Aggregated COVID-19 Suicide Incidences in India: Fear of COVID-19 infection is the Prominent Causative Factor", 290 *Psychiatry Research* 1-2 (2020).

leading to suicidal thoughts[2]. Preserving one's sleep is really important and often leads to a wide array of conditions if unchecked.

- **Primary Healthcare Workers (PHWs)**

It was inevitable that the saviors in need would be the one taking the most bullets. The Healthcare *system* may be a subject of admonishing and critique on account of its inadequacies that were revealed but it must not be construed as the inadequacies of those who hold it on their shoulders. The world's doctors, nurses, and staff have been under the pressure of their lives and their mental health is doomed to suffer for quite a while. In a recent Indian study of 1124 PHWs including doctors, nurses, paramedics, managers and staff, one-third were found to have depressive and anxiety symptoms[3]. The most affected group was female nurses but the impact remains almost uniform in all who are involved.

There are several layers to the problems faced by the PHWs. PHWs feel the fear to contract the infection themselves and worse carry it to their homes first hand every day. The staff is not yet trained in the use of PPEs and feels the continuous fear that they may not be doing it right. The fear and stress pervades deeper as the patients under their care transfer their own worries to them about families and finance, having no one else to turn to. The doctors and nurses don the hat of a therapist and take on the second hand stress from their patients. "The treating doctor becomes a one-stop shop for patients' social, psychological and rehabilitative needs," say leading psychologists Ritin Mohindrab et al. in their study in a hospital in North India[4]. Those workers who actually catch the infection suffer from the guilt of leaving the line of duty and their peers in such a time and not being able to be productive.

Another invasion on the minds of PHWs is the revolting stigma still associated with them. Stigma faced by health workers is significantly associated with increased chances of experiencing symptoms

[2] William Killgore et al., "Suicidal Ideation during the COVID-19 Pandemic: The Role of Insomnia", 290 *Psychiatry Research* 1-2 (2020).
[3] Simmi Gupta et al., "Survey of prevalence of anxiety and depressive symptoms among 1124 healthcare workers during the coronavirus disease 2019 pandemic across India", *available at:* https://doi.org/10.1016/j.mjafi.2020.07.006 (last visited on Sep. 21, 2020).
[4] R Mohindrab et al., "Issues relevant to mental health promotion in frontline health care providers managing quarantined/isolated COVID19 patients", 51 *Asian Journal of Psychiatry* 1-2 (2020).

associated with depression, anxiety, and insomnia[5]. Where the social media remains filled with people expressing their gratitude for the 'warriors', the same people cringe away from them in real life.

- **Internal Migrant Workers**

There's no place like home. A pretty girl and a tin man told us this, and faced with an unknown threat of humungous proportions the Indian migrant workers listened. In the heart of the pandemic, India saw a large chunk of its population make the long winding journey to their Oz on foot in disregard to law and life. Is the act of thousands of people totally irrational? I believe it makes complete and simple sense. One feels at ease at home, both safe about himself and his loved ones. Every statement that the government or even individuals may make in a pandemic, whether supportive or prohibitive, inevitably adds to the uneasiness and hence results in greater desire to reach home. False hope added fuel to the fire and similarity of fear among the group spread it till thousands were afoot.

Both categories of migrants suffered mentally – those who were prevented from going to their homes, and those who did. In the suicide study referred above, the inability to come back home was also listed as a prominent factor. The fear associated with your loved ones suffering in your absence is inhuman, even if necessary. However, those who left, left with the possibility of carrying the disease to their children. They left with thoughts of whether they will reach their homes or not, and how they will provide for their family without work. "Rural India may be particularly susceptible to suicide in near future due to the heavy economic load of jobless migrant workers.[6]"

Migrant workers are a particularly vulnerable population. Owing to occupational health hazards, unhygienic living conditions, common malnutrition this population remains the prime target for infection[7]. And with no one to care for them, once infected the treatment and recovery are additionally difficult. While the focus of law was on preventing their escape, there was a miserable dearth of beneficial laws for them and worse implementation of the few that existed.

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[5] P Khanal et al., "Mental health impacts among health workers during COVID-19 in a low resource setting: a cross-sectional survey from Nepal", 16 *Global Health* 8-11 (2020).

[6] Nelson, V.M., "Mental Illness and Suicides on the Rise in India during COVID 19 lockdown", *Suicide Prevention India Foundation,available at*:https://thewire.in/health/covid-19-mental-health-suicidal-tendencies-self-harm-rise (last visited on September 21, 2020).

[7] Ranjana Choudhari et al., "COVID 19 pandemic: Mental health challenges of internal migrant workers of India", 54 *Asian Journal of Psychiatry* 2-3 (2020).

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- **Women, Children and Adolescent**

The UNFPA had released its estimation in the end of April 2020 that if the lockdown extended for 6 more months, there would be 7 million cases of unwanted pregnancies and 31 million additional cases of domestic violence against women[8]. The main reason for the pregnancies is attributed to lack of contraceptives in supply. Depression remains clearly associated with pregnant women and new mothers and it has significantly increased with the stress of their babies' safety or of unsafe abortion.

Further, the infamous 'shadow pandemic' has struck again as cases of household violence rise to threatening proportions. The complaints which the National Commission for Women receiveddoubled within one month of the lockdown being imposed[9]. The implementation of the Protection of Women from Domestic Violence Act, 2005 ('DV Act') becomes difficult with unprecedented problems like infection in shelter homes, lack of medical facilities, sick protection officers and suspended or overburdened courts. Thus, in un-remedied situations, the woman goes through the stress of living with her abuser under the same roof all day. In a great initiative by the Ministry of Health and Family Welfare, in collaboration with NIMHANS, the helpline number 080-4611007 has been started to provide psychological support to women facing domestic violence.

Children and adolescent are one of the most energetic group rendered trapped and isolated by the lockdown. 'Everything Online' is a double edged sword. Though their education may be facilitated, the lack of physical interaction plus the effects of long stretches of screen-time has deep hazardous effects on the young mind. The children are lonely, angry and frustrated. Increased social media presence has been universally reported which, psychologists say lead to 'emotional contagion', i.e. rapid spreading of one's distress and fear to another,[10] like a forest fire of panic and distress. The UNICEF in association with CHILDLINE, which works under the Ministry of Women and Child

[8] "New UNFPA Projections Predict Calamitous Impact Women's HealthAsCovid19 Pandemic Continues",*available at:* https://www.unfpa.org/press/new-unfpa-projections-predict-calamitous-impact-womens-health-covid-19-pandemic-continues (last visited on Nov. 8, 2020).
[9] Gayatri Gupta, "Domestic Violence During Lockdown: Dealing With The 'Shadow Pandemic'*", The Logical Indian* (Sep. 24, 2020).
[10] Gao J et al., "Mental health problems and social media exposure during COVID-19 outbreak"*, SSRN, available at:* https://ssrn.com/abstract=3541120 (last visited on Nov. 8, 2020).

Development, India has released an illustrative manual to address and help provide psychosocial support to the children (attached)[11].

3. LEGAL CONCERNS

Section 115 of the new Mental Healthcare Act, 2017 decriminalized attempted suicide and made it a 'duty' of the State to provide for care and rehabilitation to people in severe stress. The Act envisioned a Central Mental Health Authority which receives a sharp cry for help during the mental pandemic India is facing. However, the act is quite new and the body is yet to make its presence felt in the issue.

Another controversial provision of the Act is Section 21 which orders that all health insurance providers should provide for mental health treatment on same basis as physical health. Amid this comes the IRDAI with its dual policy of 'Corona Kavach' and 'Corona Rakshak' making *COVID 19 insurance coverage mandatory* for all providers. It even seeks to include within the coverage treatment of any co-morbidities the person may have or acquire. Now, the issue arises that these insurances almost, if not always, do not cover any mental health condition associated with COVID 19, including it neither as a part of COVID 19 nor co-morbidity.

We have already seen the failing implementation of DV Act in the face of the pandemic. The Delhi High court received a petition[12] regarding the unavailability of Protection Officers, and it said that temporary protection officers must be appointed quickly to fill the gaps till regular hiring resumes properly. It asked for proper training of staff who man the helpline numbers.

The migrant workers may be the most disappointed group with expectations of legal relief. While the ration and necessities under various schemes never came, the 'Shramik trains' came when most of them had already taken harsher ways. At the end, when the enactment of The Occupational Safety, Health and Working Conditions Code, 2020 promised something big for them, it turned to ignore the large chunk of intra-state migrant workers, and seems to lack the structural detail to successfully protect the rest.

[11] UNICEF, *available at*:https://www.unicef.org/india/media/3401/file/PSS-COVID19-Manual-ChildLine.pdf (last visited on Nov. 8, 2020).
[12] *All India Council of Human Rights, Liberties and Social Justice* v. *Union of India*, 2020 SCC OnLine Del 537.

Lastly, the warriors of the pandemic, the PHWs have remained content through the pandemic with little more than guidelines, pretty advisories and a 10 percent discount in insurance premiums by the Government. Hurray for the generosity! One relief came in the Epidemic Diseases (Amendment) Ordinance 2020 which protected the PHWs from violence. The law made any commission or abetment of violence against a PHW or his property a cognizable offence with up to 7 years of prison and 5 lakhs fine (in aggravated stage) plus compensation for damage. This is a commendable step.

4. SUGGESTED SOLUTIONS

As anyone with a mental health condition would tell you, the first step in solving a problem is admitting that you have it. The Government is yet to do so in this regard. The Central and State authorities under the MHCA 2017 need to take the helm in this situation. If that seems to face technical problems, a separate emergency task force may be initiated declaring a mental health crisis that needs to be addressed with expediency, but not haste. With the Global authorities vocal and active, there is no dearth of guidelines on the issue. What remains is their proper application. One must realize that there exist different sections of people in the situation who have suffered differently. This division is important for both analysis (as done above) and application, as is to be done by the erstwhile leaders of the nation.

There exists an 83% treatment gap for mental health in India under normal circumstances. The remaining 17 would be easily filled by even greater lack of money with patients and unavailability of doctors than usual. Non-profits, charitable organizations, and government hospitals must make the gap navigable providing affordable therapy with phone-based appointment system such as to replace the 6 hour waiting period at the clinic. Influential people who have suffered from these conditions themselves should maybe contribute to the funding.

A scientific approach to the above problem has rendered a solution as well – Artificial Intelligence. Researchers have recommended an intelligent approach toward reducing the treatment gap, which is use of AI Apps infused with tele-psychiatry and surveillance system[13]. In simple words, it is virtual therapy by bots trained to do the same, by digitally drawing data from sources like the WHO website and guidelines, and using them to give advice and therapy. It can be adapted for the specific

[13] Ransing R, "Potential role of artificial intelligence to address the COVID-19 outbreak-related mental health issues in India", 290 *Psychiatry Research* 1-2 (2020).

requirements of a place and person. Start-up incubators should take up initiatives like these which seek to digitize mental health.

When something affects all of us, the ordinary setup of provider and consumer gets disrupted. Simply speaking, the doctor is ill as well, so the system must adapt to a model which doesn't rely on them completely for survival. Here is where Community Interventions come into play. Everything is relatable, everyone is suffering – so why not unite ourselves in it, in small moderated groups. This is one person in a building gathering the neighbors on the terrace to talk it out. Although more feasible after the threat of infection is evaded, building-size groups mean enough distancing on the terrace, and obviously masks and sanitizer are a must. Now, wouldn't it be the best if that one building person has received a digestible, 2 day online training on psychosocial supportive talks made available by some generous people for free? Well, let's hope they do.

We must give the nurses what they deserve so we may keep getting what we need. Study has shown that support and pride from family members, validation and appreciation from peers, and gratitude from patients have positive affect of PHWs health and make it easier to work[14]. Basically, if one is the hero at an apocalypse, he must be made to feel like one to take the leap each day. Toward more tangible solutions, it must be made sure by the administration that insurance has been mandatorily taken by the PHW. The lacuna in mental health insurance must be bridged. In case of a PHW getting infected, he must be reassured that his family will be taken care of on priority.

The World Health Organization has done an amazing job drafting messages in psychosocial aid of several groups of people. It speaks about reducing stigma by abstaining from the use of words like 'Covid Family' to refer to people infected. It preaches the importance of not making the disease the person's identity. They further advise us not to consume content related to the disease in excess, as they *will* subconsciously increase anxiety. These must be endorsed by influential people and given more publicity over social media.

Remember, it is important to understand that every one of you can be a positive image to help someone else get through, but feeling negative or needing help does not make you weak. ***Stress is not weak, Stigma is; and we will get through.***

[14] S*upra* note 4 at 2.

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THE ROLE OF QUASI-JUDICIAL AUTHORITY IN ADMINISTRATION OF JUSTICE

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ABSTRACT

The introduction of tribunals is the latest way of imparting justice. The system of the tribunal is becoming the specialised form and easiest way of providing justice. The tribunals function as a quasi-judicial authority. The initial tribunal in India was established by the 42nd Constitutional Amendment in 1976. The legal validity of the tribunal has been challenged along with its formation before the Supreme Court soon after its formation. The assumption behind the challenge was based on the fact that when the independent judiciary is functioning in the country what is the need for another forum of justice, but the Supreme Court upheld its validity. Now we see the development of the specialised and knowledge-based tribunal in the various fields. The disputes which are specific in nature are filed before the concerned tribunals for the judgement and the appeal against the order of these tribunals lies before the High Court or the Supreme Court as the case may be. Now the time is coming when it will be expected from the regular judiciary to be specialised in the knowledge of various fields of development to provide better justice. It is the need for time to enlarge the knowledge space of the judiciary also. The judiciary also needs specialised officers to solve the issues of that field and assess the cases coming from the tribunal to them in the form of appeal. Strengthening both the arms i.e., the judiciary as well as quasi-judiciary, are better for the success of the Indian Judicial System. The number of tribunals is increasing day by day in our country and the integration and standardisation of these tribunals are essential. Where, on one side, the judicial work allocation to the quasi-judicial authority is considered genuine then on the other side it is creating a large gap between the public and the judiciary. This judicial gap may harm the litigants and even may harm the system also in near future. The effect of the creation of a large number of quasi-judicial authorities between the public and judiciary will create a huge number of litigations also between the public and the government. Such a huge number of litigations will decrease the efficiency of the justice delivery system and may shake the faith of the public in the judiciary.

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1. INTRODUCTION

Separation of power between the organs of the government is the essence of any democratic country. The theme of the separation of power is the independence of all three organs of the government. The independence of the organs of the government is essential to perform a certain critical function for the country. If one organ of the government disturbs the functioning of another organ of the government then it will create a clash within the organisation. It may destroy harmony and hamper the growth of the country. So, all organs of the government deemed to be on equal footage of the government. Although this theory may have much impact on the books rather than on the ground, yet democratic countries are trying to implement it on the ground to a larger extent. A few countries of the world which do not follow the democratic system are still trying to understand this concept of separation of power and see this concept with suspicion. The countries in which the separation of power is implemented to a great extent are presently termed as the developed countries.[1] The concept of separation of power is also part of the Indian constitution as explained in the basic structure doctrine by the Supreme Court in the Keshavananda Bharati case.[2]

2. HISTORICAL DEVELOPMENT

The three independent organs of the government are first the legislature second the executive and third is the judiciary. In our country, the pure form of division within these three organs is not available but to great extent, it is followed. In all three pillars, the executive is more liquid than the rest of the two. The executive can be converted or merged with any of these other two branches and form something new organ of the government with a combined new culture. When the executive is mixed with the legislative, the new organ becomes politico-executive. The politico executive is the boss of the executive office and known in the name of the minister of the department. When the executive is mixed with the judiciary a new form of judiciary comes into existence. This new form of the judiciary is named as quasi-judiciary. The politico-executive have the quality of executive, as well as political leaders and the quasi-judiciary, have the quality of executive and judiciary both.

The working space of politico-executive and quasi-judiciary is increasing day by day in our society. Within the ambit of the Indian constitution, the framework is being developed day by day for the

1. Abraham A Awolich, "The Challenge of Constitutionalism and Separation of Powers Doctrine in South Sudan," 2016, https://about.jstor.org/terms.
2. Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

effective implementation and the increasing role of the quasi-judiciary in the system of governance. The historical development of mixing the ideas can be seen after making the constitution of India which support the distinction between the judiciary and executive only but not between the executive and legislative. The making of the Indian Constitution was based on the background of the society in which the political leader was having the opportunity to pass the law, but no power to control the executives in the British era of India. So, at the time of the making of the constitution, this British system was pierced through the needle to take revenge from the executive by establishing the post of head of all the ministries chaired by Political leaders who himself is not executive and come by the way of public elections, but capture to the post of the head of the executive. It is evident from the Indian Independence Movement that the society was more troubled by the executive than by the judiciary of the British system. Since at the time of the making of the Indian Constitution, the makers were not sure about the effect of the introduction of quasi-judiciary, they left the judiciary in the original shape but experimented in the executive. There was great respect for the judiciary at that time even if it was also of British origin. The reason was that there were a large number of leaders who were part of the team of making the constitution were also been the barristers and advocate of that time or anytime in their past life term.

The concept of quasi-judiciary was introduced after fully utilising the capacity of working of the Indian Constitution for approximately twenty-six years from the implementation of the Constitution of India in the year 1976 by way of the Constitution (Forty Second Amendment) Act, 1976.[3] The statement of object and reasons appended to the forty-second amendment Act states:[4]

> *"5. To reduce the mounting arrears in High Courts and to secure the speedy disposal of service matters, revenue matters and certain other matters of special importance in the context of the socio-economic development and progress, it is considered expedient to provide for administrative and other tribunals for dealing with such matters while preserving the jurisdiction of the Supreme Court in regard to such matters under article 136 of the Constitution. It is also necessary to make certain modifications in the writ jurisdiction of the High Courts under article 226.*
>
> *6. It is proposed to avail of the present opportunity to make certain other amendments which have become necessary in the light of the working of the Constitution."*

3. Legislative Department, "The Cosntitution (Forty-Second) Amendment Act, 1976," Ministry of Law and Justice, accessed November 30, 2020, http://legislative.gov.in/constitution-forty-second-amendment-act-1976.
4. Ibid.

In the year 1976, the constitutional amendment introduced the system of tribunals by assessing the performance of the courts and judicial forums. The condition of the judiciary was being deteriorated due to the high pendency of the cases before it. The matters before the judiciary have also become complex. It can be understood by using the reference of various ministries of the government. At the time of the independence of India, there were only approximately eighteen ministries of the central government.[5] The number of ministries has increased approximately fifty-three as on the date based on the importance of the subject, the volume of work and the change of orientation of the central government of India.[6]

3. JUDICIAL EVOLUTION

Let us go back to the development of human culture when there was no law. The muscles power was the only way to hold the tangible and intangible assets. The development of the law was the concepts of the weak and thin in society. They need protection. So, to protect the society of the weak from the strong it was the need of the time to make some rule which the weaker should accept and follow to save them. The major issue to bring the stronger under the umbrella of law was the most difficult task at that time. It is even today much difficult to bring the stronger under the law and the result of bringing the stronger under the law is only possible by application of force in the law. Frederick Schauer has described two types of forces i.e., first coercion (sanction based) and second the sanction independence.[7]All those who consider themselves above the law are breaking the law now also. Now we can imagine the situation in light of the present law-breaking situation, concerning the older time when there were no laws. How hard was the time? The concept of law is the result of the interactions of the person and group of the persons in the society. The natural inner feeling is the hunger for power of any person but different people use different types of covers to be socialized in society. Even the emotions, which are part of the human, slowly it is being converted into moral laws. The moral law is the first law and when the moral of a group of people become binding, we generally called it law. For example – taking or enticing away the property of others without his knowledge is theft. It was moral law in a certain period. But later it was thought that if

5. "Profile - The Union - Administrative Set Up - Know India: National Portal of India," accessed November 30, 2020, https://knowindia.gov.in/profile/the-union/administrative-set-up.php.
6. "Ministries/Departments | Union Government | Government of India Web Directory," accessed November 30, 2020, http://goidirectory.gov.in/ministries_departments_view.php.
7 Tom R Tyler, "Understanding the Force of Law," Tulsa Law Review 51, no. 2 (2015): 13, http://digitalcommons.law.utulsa.edu/tlr/vol51/iss2/23.

everyone in the society will not take away the things of others then the weak and poor in the society will be safe, so the law related to theft has been evolved and theft was made punishable by the king or the powerful person of that time. Now it is true that it is not possible to bring someone and punish them easily, so the system of police, judge, jail, and correction centres etc. established. So, to fulfil the wishes of morals in society the legal system evolved. In reality, the life of emotions is very short and the life of the law is long. So, there is always a clash between the law and human emotions. The breaker of all laws is not always hard criminals but the simple person also under certain circumstances. The heart is the sole witness that we have also broken the law either knowing or unknowing many times but either not caught or not punished. But is it not necessary to discuss why we do something against the law despite knowing that such law exists around us? It shows that the law which shows the fear of being punished is less violated than those laws where the punishment is minor or no fear is involved. When the law is formed then the society needs certain persons who can implement such laws in the society. The king was the person who has to implement the law in society at the oldest time. The origin of the police and judiciary is the person who helps to implement the law in the present system. It is not hyperbole that the police and judiciary are the by-products of any legal system. It is necessary for the legal system that the law must be workable on the ground.

4. ORIGIN OF TRIBUNAL SYSTEM IN INDIA

The development of tribunals in India is more recent than that of the courts. The Constitution of India has provided the system of the courts for dispute resolution methods. The courts were deemed to be the best system of the dispute resolution process. The Constitutions of the Supreme Court, High Court and the District and Lower Courts have been deemed enough to resolve the disputes after independence. The hierarchy of the court system also has been fixed by the Constitution makers. The system of selection of judges, their pay, and allowances, posting and administrative control, removal of judges etc. which are the essential part of the independence of the judiciary has also has been directed. The importance of the independence of the judiciary is the essence of our Constitution. Article 50 of our Constitution emphasis that:

> *"50. Separation of judiciary from the executive- The State shall take steps to separate the judiciary from the executive in the public services of the State."*

The provision of separation of judiciary is the mandatory requirement and essence of the Indian Constitution. Such a type of separation is not available between the executive and the legislatures. Supreme Court reiterated the need for independence of the judiciary in its various decisions latter. The judiciary, which the Indian Constitution discussed before the amendment of Article 323A and 323B consists of the judges of the Supreme Court, High Court and District and Subordinate Courts only. With the development of the jurisprudence of the administrative law in India and after evaluating the requirement of speedy and accessible justice to all, the formation of a tribunal felt necessary in our country.

The American system of justice emphasizes the facts that within all government departments, there must be a system of providing primary justice to the citizens. Several studies also revealed the fact that the just environment is more public-friendly than that of going to the court for small disputes. The '*just environment'* within the executive has led to the concept of tribunals in India. The constitutional debate on the formation of the tribunal in India also based on the concept of speedy and accessible justice to the people. The Constitution of India provides power to the people by using the word "*We the People of India ……..."* The concept of justice affects more on the people hence the need for the tribunal has been justified in India. Our parliamentary committee has discussed in their debate the need for the formation of tribunals in India. Based on the need of the public, the Indian Constitution has been amended[8] and a new part XIVA named 'Tribunals' with two new Articles 323A and 323B have been added by way of a forty-second constitutional amendment Act, 1976. Article 323Ais related to the establishment of the Central Administrative tribunal [9] for the Central Government servant and the State Administrative Tribunal for the State

8. Parliament of India, "The Constitution of India,1950," Pub. L. No. Act of 1950, Government of India (n.d.).

9. See - Administrative Tribunal: Art. 323A. (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.
(2) A law made under clause (1) may—
(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;
(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints
referred to in clause (1);

Government servants. As the knowledge of the people is increasing day by day regarding their right and duties, the claim of the rights and duties are also starting among them. This is leading to initiate mutual litigation. The litigations regarding the recruitment and service conditions of the persons appointed by the union government or the state government have increased manifold. The courts are being flooded with such litigations over and above in their routine work. Therefore, the creation of the tribunal is justified and more and more tribunals are being established. In the same way, there were many other fields, which are developing very fast. To keep pace, it is necessary to update the judicial officers in these fields also. Hence the provision has been made in the Constitution to form other tribunals under Article 323-B.[10]It has become the need of the time to provide justice not only

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(e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;
(f) repeal or amend any order made by the President under clause (3) of article 371D
(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.
(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.
10. Tribunals for other matters: Article 323B. (1) The appropriate Legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters specified in clause (2) with respect to which such Legislature has power to make laws.
(2) The matters referred to in clause (1) are the following, namely:—
(a) levy, assessment, collection and enforcement of any tax;
(b) foreign exchange, import and export across customs frontiers;
(c) industrial and labour disputes;
(d) land reforms by way of acquisition by the State of any estate as defined in article 31A or of any rights therein or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way;
(e) ceiling on urban property;
(f) elections to either House of Parliament or the House or either House of the Legislature of a State, but excluding the matters referred to in article 329 and article 329A;
(g) production, procurement, supply and distribution of food-stuffs (including edible oilseeds and oils) and such other goods as the President may, by public notification, declare to be essential goods for the purpose of this article and control of prices of such goods;
[(h) rent, its regulation and control and tenancy issues including the right, title and interest of landlords and tenants;]
[(i)] offences against laws with respect to any of the matters specified in sub-clauses (a) to 3
[(h)] and fees in respect of any of those matters;
[(j)] any matter incidental to any of the matters specified in sub-clauses (a) to 4
[(i)].
(3) A law made under clause (1) may— (a) provide for the establishment of a hierarchy of tribunals;
(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;
(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;
(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to all or any of the matters falling within the jurisdiction of the said tribunals;
(e) provide for the transfer to each such tribunal of any cases pending before any court or any other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment (f) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as the appropriate Legislature

in general but in particular, also. To cater to the requirement of a particular specific form of justice, and it is necessary to have some specialization to the judicial officers in these fields also. It has become the need to get specialized training to all the judicial officers or make separate institution where the function of imparting justice may be assigned to the judges and the special knowledge persons. These separate institutions were formed and connected to the judiciary, which was later named 'tribunals'. The tribunals are generally presided by the judges or the equivalent persons having special knowledge in that field or subject.

The first tribunal, which has been formed by making the constitutional amendment, was Central Administrative Tribunal. After the country became independent, the role of the independent judiciary came into existence. The courts were assigned the responsibility to adjudicate all types of disputes. This system of adjudication of cases has increased the burden of courts manifold in due course of time. The service matters in which one party was the government employee and the other party was the government itself have increased manifold. As the concept of a welfare state increased, the government has increased its share of work and responsibility in more and more fields of society. It has caused the interaction of the government and the public to increase manifold. The more interactions led to the situation that in most of the litigations, the government became one party to the litigation. The government started to fight for the rights of people against the right of the person. In such a situation, public money and time are being utilised for litigation against the public itself in an individual capacity. To get rid of such litigation, it is necessary to bring a possible solution that the person heading the tribunal bench must know the government rules and procedures at one hand to sit on the chair of the judge. To balance the equity the person who is having sufficient experience known as Judge, should sit together on the bench to decide these issues. The same thing is being followed in tribunals. There is generally two member bench, one is member judicial and another though name may be different, the person comes from the senior post from the department. In this way, the essence of justice and equity are achieved in the tribunals.

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may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.
(4) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.
Explanation.—In this article, "appropriate
Legislature", in relation to any matter, means Parliament or, as the case may be, a State Legislature competent to make laws with respect to such matter in accordance with the provisions of Part XI.]

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5. SUMMARY

The tribunals on one hand are busy with the work allocated to them from the date of their formation. On the other hand, the workload of the tribunals are increasing or sometimes keeps on changing, based on the policy of the government. It is true to the belief of the public that there is indeed no interference of the government in the judgement of the tribunal like the other organs of the judiciary. But at the same, it is also true that the tribunals are enjoying the monopoly of independence as there is no superior authority over them. The high court and Supreme Court are also not in the direct chain of command to the tribunals as in the case of the lower judiciary. Hence it may be termed as inefficient control of the higher courts over tribunals. This inefficient control is leading to the choice of working within the tribunal regarding the disposal of the cases before them. There is no authorised way to measure the consistency of performance of the tribunals either by the department itself or by the high court or the Supreme Court.

Now the government is under the obligation and guidance of the Supreme Court in the case of Madras Bar Association vs. Union of India and is planning to setup a department that will take care of the functioning of all the tribunals in a new and uniform way throughout the country.[11]

[11]. See the Writ Petition (C) No. 804 of 2020 before the Supreme Court which was decided on 27 November 2020.

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ALL LIVES MATTER: THE LEGAL RIGHTS OF NONHUMAN ANIMALS

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ABSTRACT

Nature and human development are interconnected and their balance sustains life on the planet. India has been one of the first few countries to incorporate concerns regarding the animals in the Constitution. However, it has also witnessed a sharp rise in the instances of cruelty against animals. In the current scenario when the world is facing a pandemic, it prompts us to reflect on the exploitation of the flora and fauna and what are our obligations towards them. This paper aims to discuss animal rights and the jurisprudence regarding it and provide comparative analysis of Indian Laws with the European Union and countries like the United State of America and the United Kingdom. We seek to incorporate civil liability under the "doctrine of parens patriae and public trust" for offences against animals. Moreover, we recognize the need for non-cognizable status of these offences to reduce the friction between the offenders and police. The paper shall end on a note that animal law jurisprudence in India needs immediate action to curb the exploitation of animals and provide a deterrent effect to its offenders.

1. INTRODUCTION

"The worst sin towards our fellow creatures is no to hate them, but to be indifferent to them: that's the essence of inhumanity."

-George Bernard Shaw

Law is an instrument used for resolving conflicts and establishing a sense of tranquility in the society and so it acts like a guardian of only the rational beings which are humans because of their very nature to question themselves and their surroundings. Animals and their rights are often kept out of the ambit of law because of the very inability to rationalize or question their existence. But the relation of humankind and animals has been well established from the very day they first interacted.

This being given, there has often been huge debates contemplating the rights of animals and whether they should exist in the very first place. The idea of life has been so idolized by humans that the existence of animals has been illustrated as the bottom line of 'life'. Even justice Field from the

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case of *Munn v Illinois*[1] has interpreted the meaning of the term 'life' as *something more than the animal existence* and so has the same interpretation been used by many jurists and Indian judges following the same precedent.[2]

Cultivating the arguments from the main proponent of animal rights theorist, Tom Regan, it can simply be understood that all animals have an 'inherent value' which must be respected even though they may not have a moral awareness about themselves. Neither are animals a man's property nor shall they be used in that way just because mankind has a neural edge over them. Rather animals must be treated as non-human persons with some minimum basic inherent rights like the right to life and the right to freedom from bodily interference.

While India is now seen as the engine of the economic growth amongst the other developing nations, it still lacks far behind in its outreach of animal rights and the biggest testament can be seen through the fact that the main legislation that deals with animal rights that is the ***Prevention of Cruelty to Animals Act (PCA)***[3] has never even been amended since its year of inception of 1960. Yet slowly and steadily with more and more media awareness along with the prominent and increased role of institutes and NGO's like PETA, India is seeing a considerable moral change in the attitude of people in which the judiciary has played the most prominent role of acting as a guardian to not only mankind but also the non-human persons i.e. animals themselves.

2. INDIAN LAWS DEALING WITH ANIMAL PROTECTION

There is not much that an individual can achieve without the strong back of laws that work for that particular cause. India too has an array of laws that deals with animal welfare with specific alterations that can change the situation of how creatures are treaded in normal spheres of life and how an individual knowingly or unknowingly violates these laws in everyday life due to lack of awareness and moral obligations.

The Indian laws focus on three spheres, i.e. cruelty, wildlife, and control. Taking note of the hurt and grief of animals, the ***"Prevention of Cruelty against Animals Act, 1960"*** was the first legislation passed by India. Later to further widen the ambit of this protection, The Wildlife (Protection) Act, 1972 was enacted. Again in 1976, the Constitution of India was amended to

[1] *Munn* v. *Illinois*, 94 U.S. 113 (1876).
[2] *Ibid.*
[3] The Prevention of Cruelty to Animals Act, 1960 (Act 59 of 1960).

incorporate article 48A[4] and 51A (g)[5], to cast a fundamental duty of care and respect amongst the citizens for the flora and fauna.

3. COMPARATIVE ANALYSIS WITH THE INTERNATIONAL REALM OF ANIMAL WELFARE

Animals are dealt in different manner in different places and the way how these creatures are dealt with is additionally subject to social standards and convictions. Furthermore, this treatment of animals differs from nation to nation for example in India[6], cows are viewed as sacred creatures though in western countries, bovines are regarded fundamentally suppliers of meat, dairy, and calfskin items. In Western countries, people use to keep hares as pet and yet hares are reared for their hide. The first nation that executed laws to secure Animals from cruelty is the UK. A legislation to stop the cruel and wrong treatment of cattle was executed in 1822.

Looking from a historical perspective Aristotle's way of thinking incorporated a chain of command.[7] This order is referred to by researchers as extraordinary fetter. It was recommended that things in the bottom side of the fetter were prepared for those on upper side of fetter. At the end of the day, flora was created for fauna, fauna were created for individuals, labours were created for owners, ladies were created for men, and men were at the top of this fetter, created exclusively for God. As per this way of thinking, animal was regular slave created for human to be utilized as necessary chore. The Bible is another wellspring for the present position of wildlife. During the Origin, God provided human territory over every living creature that crawled on soil. Further, In the United States, animals are considered property.

Looking at the present times, in the United States three primary government resolutions are identifying for benefit of animals: ***"the Humane Methods of Slaughter Act, the Twenty-Eight Hour Law of 1877, and the US Animal Welfare Act"***. The US Animal Welfare Act[8] is the greatest thorough of government resolutions. It doesn't apply over the management of the livestock utilized for foodstuff or the management of pets by their holders or in pet stocks, in this way doesn't apply

[4] The Constitution of India, art. 48.
[5] The Constitution of India, art. 51, cl.A(g).
[6] Szűcs E, Geers R, Jezierski T, Sossidou EN, Broom DM, "Animal welfare in different human cultures, traditions and religious faiths" *Asian-Australas J Anim Sci.*1499-506 (2012).
[7] Bodnar, Istvan, "Aristotle's Natural Philosophy" *The Stanford Encyclopedia of Philosophy* (2018), Edward N. Zalta (ed.) (July 16, 2020).
[8] Congressional statement of policy, 7 U.S.C. §§ 2131-2159 (1994).

to this conversation.[9] As it applies to certain creatures utilized in or reproduced for examination, shows, and zoos, fighting of animals, and sales. The meaning of the term 'Animals' is restricted in the ***US Animal Welfare Act*** and used mostly for animals of warm-blood, like hounds, felines, non-human apes, guinea pigs, and hares.[10] This act is a central enactment however the states have separate laws against cruelty & pitilessness that regulate the treatment of animals raised for food or slaughter. Also, no Central law was there directing the management of pets. Cruelty against pets drops in the domain of state anti-cruelty rules.

The landmark case of *Celinski v. State*[11] is demonstrative of how courts in the US usually take cognizance of matters related to animal cruelty. The Court here in this case upheld the conviction for committing cruelty against animals.

Now if we look at the European Union, numerous laws in the EU depend upon the arrangements developed by the Council of Europe. It is a diplomatic organization intended to advance human rights and a democratic system. There are at present six conventions dealing with the welfare of animals, among these the ***"European Convention for the Protection of Pet Animals"***[12] extends people's duty as to their pets. Essential standards for animal protection & government assistance introduced in this convention are that no one will cause a pet pointless agony or trouble. Moreover, it provides that nobody should relinquish a pet. It further clarifies that an individual who keeps a pet or who has consented to care for it is liable for its wellbeing and protection, also the individual must give convenience, attention also consideration, drinking water, foodstuff, practice. He should implement sensible steps to prevent escaping of pets. Those animals which cannot adjust to bondage must not consider as pet. Among other countries, Portugal sanctioned the ***Portugal Protection of Animals Law***[13](PAL). PAL incorporates, for example, a prerequisite of licenses for commercial utilization of animals. Portugal additionally attempts to adjust rights for all animals with social customs that date from the longest periods of Portuguese history. A portion of these social conventions includes bullfights and horse racing. Unique exemptions are made for these games. Further, if we inspect the Philippines Animal Welfare Act of 1998, it accommodates the security of

[9] *Ibid.*
[10] Animal Welfare Act, 1966, s. 2 (U.S.).
[11] *Celinski*v. *State*, 911 S. W.2d 177 (1995).
[12] The European Convention for the Protection of Pet Animals, 1992.
[13] The Portugal Protection of Animals Law, 1995.

animals against abuse, torment, misuse, disregard, however, the issue with the Philippines Animal Welfare Act is that it isn't being implemented carefully all through the nation.

There are a few global legal sources which are also concerned about animal welfare. Additionally these instruments have been created to manage animals with government assistance on a worldwide parameter, like the non-restricting proposition of the ***"Universal Declaration of Animal Welfare (UDAW)"*** by the ***"World Society for the Protection of Animals"*** in 2000. The content comprises of lot of definite essential standards identified with animal protection and government assistance. The selection of this proposition is being upheld by around 40 governments. By this, the legislative organization is reflected as a proper "Global Forum for the elaboration and harmonization of appropriate welfare standards".[14]

Further, if we observe India had restricted ivory trade since 1972 the time when the '*Wildlife Protection Act'* came in; but even today illegal trading of animal continues. Their abuse is concealed under some activities such as leisurely rides, shackled in temples in the name of giving blessings; and hired for festivals, weddings, and celebrations, where these animals are habitually tortured midst loud, overexcited crowds. They are often kept in captivity of entertainment purposes and are made to go through years of torment, and thus we see the results in the form of human-animal conflicts.

The illicit & unregulated trade of wildlife products generates revenue around USD 7 to 23 billion yearly which is "the fourth most illicit trade after drugs, people, and arms". '*The Prevention of Cruelty to Animals Act'* passed in 1960 by the Parliament of India, prevents the cruelty upon animals & provides for punishments for the same. It has been used to make appeal to the government in contrast to harsh activities on animals. India likewise has one of the most strict animal welfare legislations. What's more, the Government of India restricted testing on animals for cosmetic agents in 2014.

4. ORGANISATIONS DEALING WITH ANIMAL PROTECTION IN INDIA

The animals' welfare is of much importance to lot of humankind in many parts all across the world. The way in which animals are treated at different place depends on several factors, including socio-economic conditions, culture, religion, and tradition.

[14] Alokparna Sengupta, "Animal Welfare: Where Does India Stand?", *Inter Press Service,* Sept. 03, 2019.

Animal welfare means *"the relationships people have with animals and the duty they have to assure that the animals under their care are treated humanely and responsibly."*

4.1 Indian Organizations

Although registered in 2010, FIAPO was established in New Delhiin 2007, where many community-based NGOs came together to form a large animal organization. The seven organizations that joined FIAPO were Blue Cross of India, Compassion Unlimited Plus Action (CUPA), People for Animals (PFA) Goa, Blue Cross of Hyderabad, Welfare of Stray Dogs India, Animal Aid Unlimited, and Sancwele for the Health, Animal & Biodiversity Integration (SHARAN).

Animal welfare organizations affect the health, safety, and mind of each animal. These organizations include animal rescue groups and wildlife rehabilitation centers, wildlife sanctuaries, and indoor areas, where animals are brought in and protected for health reasons. Their goals often differ from conservation organizations, which focus more on the conservation of species, people, habitats, ecosystems, and biodiversity, rather than on the welfare of individual animals. The important features of animal welfare consist of suitable tools for prevention of animals, accommodation, supervision, nourishment, humane handling, and caring.

The Institutional Framework provides a list of organizations and persons dealing with animals. The framework aims to guide the various teams involved in the role they play. Various IA institutions, ranging from the Local Municipal Corporation, Animal Welfare Board, ethics committees, the Animal Council, and the SPCA, as well as dog feeders, individual activists, etc. are included in this list.

5. REAL LIFE SITUATIONAL CRISIS FACED BY ANIMALS

Animal abuse, also known as animal cruelty, neglect of animals or cruelty to animals, abuse that can be removed (ignored) or sent by poor people or harmed by anything that is not human. More important, it could be the cause of injury or pain in some way, like the slaying of animals for pleasure; Animal cases sometimes include injury or suffering as extinction, defined as zoo sadism.

At hand number of theories exists about animal cruelty. Some think that animal status means that it is in no wrong to use animals for various purposes like food, entertainment, clothing and research, but it should be carried out in the manner that lessens needless agony & grief, occasionally called

humane management. Other side argues that human management. Meanings of the word 'do not need' are very diverse and are found in almost every means used by animals.

Education advocates argue over '*costs and benefits'* and differ in their outcomes about official management of animals. Several users of the opposition group say that this weaker approach is very close to animal welfare, while others maintain for a stand like to animal rights. Animal rights experts condemn these standings, saying that the terms "unnecessarily" and "man" simply fall under various meanings, and those animals have fundamental rights. They point out that the overuse of animals themselves is needless and it cause suffering to animals, so the single manner to make sure the safety of animals is to finish their status as an asset and to make sure that animals are not used as living things.

5.1 Industrial Animal Farming

Farm animals often live in large, industrial areas where huge number of animals live in the highlands; occasionally called factory farms. Industrial situation in such areas provides that many animal programs or practices that affect animal welfare and can be considered degraded, Henry Stephen Salt in 1899 stated that *"it is impossible to go and kill very large and humble animals kindly."* In the wool industry, they ride races, and they are also used in houses and foundations, which are less important than farm animals, hence the term "animal welfare issue". Campaigns for chickens, cattle, pigs and various other farm animals are some of the most endangered, e.g. because chickens do not lay eggs, newborn males are vaccinated using males. Creator or meat-based grinders made of meat on Earth is one of the reasons for the deplorable state of farm animals. Many investigators found that animal crime took place within the farming industry and there was proof that customers were providing specific info of the meat production method and the misuse that leads to a change in their circumstances.

5.2 Cultural Rituals

Many times, when Asiatic elephants are caught in Thailand, management uses a process called training ground, where "managers use sleep, thirst, and hunger to 'break' the elephant's spirit "and make them subservient to its owners"; also, officials sprayed nails in feet and the ears of elephants. The process of divination is based on ancient myths, and some religions like Santeria continue to

offer animal sacrifices to appease the dead. Taghairm was made by the ancient Scots to summon demons.

5.3 TV and Film Making

In TV and film industry, animal abuse is long run problem and major Hollywood films are making a huge budget by receiving criticism for allegations that animal cruelty is sometimes fatal. Court decisions have moved to films that harm animals such as certain videos in part depicting dog fights.

5.4 Circuses

In Circus, use of animals has been controversial topic as many times animal welfare organizations have showed incidents of animal abuse while these animals are trained. Many forms of basic animal abuse exist such as incarceration, neglect of routine animal care, self-harm, and failure to control regulatory bodies. Veterinarians say that some condemnation is not fact based; such as the belief that shouting makes animals think that their trainer will injure them, that boat making is cruel and common with the impact of using whips, chains, or training aids. Some groups now do things without animals Bolivia has issued a law that activists for animal rights say the first ban on animals from all animals in debt.

5.5 Bull Fighting

Caution is a violation of animal rights or animal welfare activists, so-called cruel or bizarre games in which a bull is attacked as a result of stress and death. Many activist groups actively fight cattle rustling in Spain and abroad. In Spanish, protesting the expulsion of oxen is called agriturismo. Bullet point Bullfight warns that looting cattle is "not about immersion", advising viewers that they are "ready for blood". It describes the long and heavy bleeding caused by the chariot riders, the case of a blind horse, armed with an arm and "sometimes bound, and unable to approach a cow", a dance banned by rapists banderilleros, followed by a deadly sword with Matador's sword. We emphasize that these processes are part of cattle rust and that death is rarely premature. He also warned those who came to the herd to "be prepared to witness various attempts to kill this animal before it falls asleep."

6. SUGGESTED LEGAL ADVANCEMENTS IN THE ANIMAL WELFARE REGIME

Although the Indian framework is one of the first of its kind to constitutionally recognize various animal laws, yet it has not been able to rationally solve the man-animal conflict. There have been numerous factors contributing to the conflict; however, failure of effective implementation of the legal provisions is one of the primary setbacks in pursuance of animal abuse in India. Our most prominent legislation against animal abuse was legislated in 1960 which, in itself, creates a difference of 50 years currently. Such legislations demand amendments and inclusion of stricter laws at the earliest.

6.1 Imposition of Civil Liability

A practice can be employed of civil liability under Section 9 of the PCA apart from the criminal liability under Section 11. Civil suits shall broaden the scope of liabilities and help in providing greater enforcement of the law against the cruelty of animals. To bring this into effect, animal rights shall be recognized concerning the trusteeship and guardianship. With the recognition of the same, civil suits can be brought against any harm to animals. The doctrine of *parens patriae* states that it is the duty and authority of state to guard those lawfully incapable to perform on their own[15], can also be applied. Moreover, AWBI which is statutorily set up to promote animal welfare shall be given the command and accountability to enforce civil liability against the defendant.[16] In the benefit of animal welfare, this civil liability imposition model would also necessitate that the pecuniary amounts obtained through enforcing civil liability be shifted to the AWBI Fund[17] which can be used to further the interests of animals.

6.2 Non-Cognizable Offences

The non-cognizable status of the offences under Section 11 of the PCA stands as a major hindrance to the animal rights jurisprudence. Section 2 of the Criminal Procedure Code, 1973 ('Cr.P.C.') states the non-cognizable offence where the Police cannot arrest the accused or offender in absence of the issuance of a warrant. The offences under Section 11 often need immediate action but get neglected because of the provisional barriers in the non-cognizable offences. Removal of such status shall curb the violence against animals to a greater extent and work as an effective deterrent. In furtherance of

[15] George B. Curtis, "The Checkered Career of Parens Patriae: The State as Parent or Tyrant?" 25 *DEPAUL L. REV.* 895 (1976).
[16] Abha Nadkarni & Adrija Ghosh, 'Broadening the Scope of Liabilities for Cruelty against Animals: Gauging the Legal Adequacy of Penal Sanctions Imposed" 10 *NUJS L. REV* 543 (2017).
[17] *Id.* at 549.

this, the permission of easy bails can also be controlled and hence offer a potential deterrence against such crimes.

6.3 Meagre Penalties

The penalties should have a deterrent effect on society but inadequate penalties work in the opposite force. The penalty under Section 11 of PCA amounts to fifty rupees which can hardly be considered as a penalty to the grave offences against the animals. These penalties lack the proportionality to the offences committed. Proportionality explicitly in cases where punishment has to be executed requires fulfilling dual purpose, i.e. justice to the offender & justice to the society.[18] This penalty can be determined in the light of the object and aim of the law.[19] The monetary threshold shall be decided according to the proportionality of the crime committed and the penalty shall not be harsher than that crime.

In the course of this part, we have attempted to suggest certain amendments and inclusions in the animal rights jurisprudence in India. The inefficacy of the toothless provisions of the PCA needs immediate attention. Furthermore, there is a need for a ban on animal testing, a regulation of Animal Birth Control (ABC) Program to vaccinate and sterilize stray dog populations instead of their ruthless killings. There is a need to recognize the legal status of the animals to enable civil liability against the offenders by the role of the Government as a guardian as in *"the doctrine of parenspatriae and the doctrine of public trust"* through providing animals an 'equitable self-ownership title'.[20]

7. CONCLUSION

Though India has stringent and elaborative animal protection laws at place but there's a huge lack in the implementation process wherein lack of incentive on the part of the executioners acts as the biggest catalyst paving a path of immorality and injustice towards these modest creatures. While there are organizations both at the state and personal levels that try to encompass the protection of the helpless animals yet the legal recourse is often avoided on their part due to the gaping holes in the laws because of their inadequacy in implementation. Lack of awareness amongst the latent masses along with the police can be deemed as the major drawback on non- implementation of the

[18] Joel Goh, "Proportionality: An Unattainable Ideal in the Criminal Justice System" 2:41 *MANCHESTER L. R.* 48 (2013).
[19] The Prevention of Cruelty to Animals Act, 1960 (Act 59 of 1960), Statement of Object & Reason.
[20] *Supra* note 16 at 553.

laws. The Acts of cruelty to animals are indicative of a deep mental disturbance amongst the members of the society who are often recorded to commit further crimes in the future. We all must strive to bring a paradigm shift in the legal as well as the social status of the animals. The inherent value of these sentient beings shall be recognized and their treatment as a means to human ends shall be abolished. Henceforth, we conclude with the words of Mahatma Gandhi- "*The greatness of a nation and its moral progress can be judged by the way its animals are treated.*"

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MARITAL RAPE: REMEDIES AVAILABLE & STANDARD OF PROOF

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ABSTRACT

Keeping in consideration the dynamic nature of the institution of marriage from sacramental to contractual, the author has suggested the criminalization of marital rape, especially for married women aged eighteen years and above. Marital rape, owing to its convoluted elements, should be criminalized under a statute separate from the Indian Penal Code, with the standard of proof falling between the 'beyond reasonable doubt' benchmark (as is for offences under the Code) and the civil law standard of 'preponderance of probabilities'. Setting such a balanced standard would effectively capture the true gravity of the offence. Additionally, the author recommends the repeal of Exception II to Section 375 of the IPC while permitting the continuance of the sentencing policy for rapists under Section 376, in concomitance with the recommendations of the Justice Verma Committee. Furthermore, the author suggests the provision of the Right to Restitution of Conjugal Rights selectively to women only, as an additional safeguard under civil law.

1. INTRODUCTION

"*Her friends used to tell her it wasn't rape if the man was your husband. She didn't say anything, but inside she seethed; she wanted to take a knife to their faces*."— **F. H. Batacan**

Imagine being a girl aged eighteen years and being directed to marry a stranger that you met twice. Picture the dreams of love and companionship she cultivated get destroyed in their entirety when she is subjected to vituperation and sexual assault by her husband on the marriage's very first night.[1] The same man that had vowed to protect her now torments in the most despicable ways imaginable, injecting items like a candle into her vagina and coercing her to mimic pornographic videos.[2]

Complaining to her family elicits advice of making a compromise with her torturer, while imploring the police for aid evokes vile remarks like "*how she should be thankful for her husband not visiting brothels and instead returning home*." When she requests the Indian Supreme Court for relief, they tell her that

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[1] Editorial, "Night after night, the torture grew: A survivor of marital rape speaks up" *Daily Bite*, Dec. 5, 2016.
[2] *Ibid.*

her personal claim cannot be equated with a public concern, an essential requisite for the law to undergo alteration.[3]

Currently, India is one of the several jurisdictions across the globe where both the law and society don't recognize marital rape as a crime, especially for married women aged eighteen years and above.[4] Even the countries criminalizing rape and prescribing penalties for the same exempt such criminalization if there exists a marital relationship between the perpetrator and the victim. These exemptions manifest via the '**marital rape exception clause**'.

Arguments adduced in favour of non-criminalization of marital rape often originate from the perception that the wife is subservient to her husband. Women are seen as chattel designed for the sexual gratification of their husbands, while enjoying little to no rights in the marriage themselves.[5]

Additional justifications furnished by advocates of non-criminalization stem from the '**Theory of Implied Consent**', propounded by Sir Mathew Hale in 1736,[6] who had ignorantly stated that "*the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.*" Another infamous rationalization for non-recognition of marital rape can be traced back to **William Blackstone** in 1853, as he defended the **Doctrine of Coverture or Marital Unity**.[7]

However, the 'social' institution of marriage has moved away from its sacramental character to assume contractual attributes in the past years.[8] This has been a welcome change for married women specially, who now have a way to escape tumultuous relationships via divorce and judicial separation under their respective personal laws.

This paper seeks to adjudge the impact of the aforementioned change in the nature of marriage on the Indian milieu vis-a-vis the legislation governing marital rape. Firstly, the author shall critically

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[3] Chhavi Sachdev, "Rape Is A Crime In India — But There Are Exceptions" *NPR*, Apr. 13, 2016.
[4] Aditi Khadegi, "Marital Rape: Why Are Indian Laws Still Confused About This?"*Feminism in India*, Jun. 11, 2020.
[5] Rebecca M. Ryan, "The Sex Right: A Legal History of Marital Rape Exemption" 20 *AMERICAN BAR ASSOCIATION* 946 (1995).
[6] Sir Mathew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 628(first published 1736, Gale Ecco, Print Editions, 2010).
[7] Sir William Blackstone, *Commentaries on the Laws of England in Four Books* 442 (first published 1897, Geo. T. Bisel Co., 1922). (Blackstone stated that, "[*B*]*y marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything [sic] . . . and her condition during her marriage is called her coverture*.").
[8] Gunjan Jain, "Significance of Marriage as a Social Institution in Indian English Writings" 1(1) *SOCIAL VALUES & SOCIETY* 20 (2019).

analyse the Independent Thought[9] judgement of the Indian Supreme Court. Secondly, the inadequacy of the remedies available to marital rape victims under Criminal Law shall be critiqued. Thereafter, marital rape shall be viewed from the lens of Family Law and suggestions for more appropriate remedies shall be made.

2. CRITICAL ANALYSIS OF INDEPENDENT THOUGHT V. UNION OF INDIA (2017)

The given case was filed by an **NGO named Independent Thought** as Public **Interest Litigation ('PIL')** to accord protection to child brides from marital rape.[10]**Exception II to Section 375, Indian Penal Code ('IPC')** exempted men from having committed rape on their wives despite indulging in non-consensual intercourse, provided the wife was not less than fifteen years of age.[11] Fortunately, a division bench of the Supreme Court read down this Exception,[12] that now stands thus altered: -

> "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape*."

The judgement can be split up and subsequently analysed in three parts: -

2.1. Constitutional Validity of Exception II:

2.1.1. Infringement of the Right to Equality under Article 14

Firstly, the Exception, as applicable to minor girls, was held to be unconstitutional for violating **Article 14 of the Indian Constitution**.[13] The absence of a palpable aim behind differentiating between "unmarried" and "married" minor girls, coupled with the lack of a reasonable nexus between a minor girl's marital status and the ambiguous object rendered the classification wholly arbitrary. The categorization didn't take into account the right of women to refuse to indulge in sexual intercourse, inevitably infringing the aforementioned Article.[14]

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[9] *Independent Thought v. Union of India* and Another (*2017*) 10 SCC 800[¶ 1].
[10] Urmila Pullat, *The Legal Dissonance Between Marriage and Rape in India*, THE WIRE (New Delhi) Oct. 14, 2017.
[11] The Indian Penal Code, 1860, § 375, Exception II.
[12] *Independent Thought v. Union of India* and Another, (*2017*) 10 SCC 800 [¶ 1].
[13] THE CONSTITUTION OF INDIA, 1950, Art. 14: *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*.
[14] Independent, *supra* note 10 [¶ 82].

2.1.2. Infringement of the Right to Life under Article 21

Furthermore, the exception was held to be in direct contravention to a girl child's 'Right to Live with Dignity' guaranteed under **Article 21 of the Constitution of India**,[15] as was stated by the Hon'ble court:

> "*A girl child's right to preserve her bodily integrity is effectively destroyed via a traditional practice sanctified by the IPC.* ***Her husband, for the purposes of Section 375 of the Code, essentially has complete control over her body and thus, can coerce her to indulge in sexual intercourse without obtaining her consent or without her willingness, because such an activity would not tantamount to rape.***"[16]

The "traditional practice" being alluded to is that of child marriage.

Moreover, the exception was adjudged as being transgressive of Article 21 since it deprived child brides of the right to arrive at their own reproductive choices[17] and privacy,[18] especially in the case of an unwanted pregnancy.

2.2 Discrepancy of Exception II with Other Laws:

2.2.1. Marital Rape vis-à-vis the POCSO Act

The Supreme Court acknowledged that the Exception was quite inconsistent with legislations like the **Protection of Children from Sexual Offences Act, 2012 ('POCSO Act')** [19] and the **Protection of Women from Domestic Violence Act, 2005 ('PWDVA')**.[20] While the former criminalizes non-consensual coitus with a minor, the latter outlaws sexual abuse.

A girl under eighteen years of age is incapable of furnishing consent to a sexual act or copulation, as per the POCSO Act.[21] On the contrary, Exception II under Section 375 surmised a child bride's consent merely due to her being married, and was consequently held to be discordant with the provisions of the former legislation.

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[15] THE CONSTITUTION OF INDIA, 1950, Art. 21: *No person shall be deprived of his life or personal liberty except according to procedure established by law.*
[16] Independent, *supra* note 10 [¶ 88].
[17] Independent, *supra* note 10 [¶ 22, 38, 39].
[18] *Justice KS Puttaswamy v. Union of India* (2017) 10 SCC 1.
[19] Independent, *supra* note 10 [¶ 47, 48, 49,50].
[20] Independent, *supra* note 10 [¶ 34].
[21] Protection of Children from Sexual Offences Act, 2012, Chapter I & § 5(n).

However, the exemption continues to be anomalous as it fails to take into account the lack of consent of those women that are legally capable of doing so. '**Consent**' has been defined as an unambiguous voluntary agreement or a communication conveying willingness to partake in a given sexual act.[22] This is indicative of the fact that consent rendered to a single sexual act doesn't automatically extend to other acts of similar nature and it ceases to remain valid post the said occasion. Thus, one cannot assume that consent given by a woman to marry a man also entails implied consent for indulgence in coitus throughout the duration of the marriage.[23]

2.2.2. Marital Rape vis-à-vis the PWDV Act

As far as the PWDVA is concerned, **Section 3(a) of the Act** defines '**domestic abuse**' as encompassing verbal, emotional, economic, physical and sexual abuse. **Sexual abuse** has been elucidated as "*any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.*"[24]Undoubtedly, non-consensual coitus would fall within the ambit of this definition. As the PWDVA is applicable to all married women, and not just child brides, the discrepancy extends to marital rape committed on adult women as well.

The marital rape exception causes the IPC to become internally inconsistent too. While husbands enjoy exemption from the heinous crime of rape, they can be held criminally liable for lesser sexual offences like sexual harassment, voyeurism and outraging the modesty of their wives.[25] This absurdity is clearly not subject to the wife's age, as it would arise even if she was 18 years old and above.

2.3 India's International Obligations:

The Hon'ble court firstly relied on the '***In-depth Study on all forms of Violence against Women' of the United Nations***[26] *to emphasize the disastrous ramifications of early marriages and alluded to marital rape as a particular kind of violence against women that ought to be criminalized. Secondly, they looked at* ***Article 16.2***

[22] The Indian Penal Code, 1860, § 375, Explanation II (as amended by the Criminal Law (Amendment) Act, 2013).
[23] *Krina Patel, "The Gap in Marital Rape in India: Advocating for Criminalization and Social Change" FILJ 42.*
[24] The Protection of Women from Domestic Violence Act, 2005, § 3, Explanation I(ii).
[25] Independent, *supra* note 10 [¶ 120, 121].
[26] U.N. GAOR, *In-depth Study on all forms of Violence against Women: Report of the Secretary-General*, U.N. Doc. A/61/122/Add.1 (2006).

of the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'),[27] *which states that:*

> "*The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."*

The court cited this provision to further advocate the end of child marriages, one of India's several obligations under the CEDAW.[28] *It was asserted that a husband indulging in non-consensual coitus with his minor wife would stand in direct contravention to her* ***Right to Live with Dignity****, incorporated within International Conventions like the CEDAW, that have been duly ratified by India.*[29]

The court also referred to ***Article 16 (g) of the Convention****, which imposes an obligation upon state parties to ensure that women are able to efficiently exercise their personal rights within marriage, without facing any discrimination. The right to render or refuse consent to any sexual act is an intrinsic attribute of an individuals' bodily integrity and sexual autonomy.*[30] *Thus, by virtue of being a fundamental personal right, it deserves State protection.*[31]

While the Supreme Court has laid the groundwork towards the declaration of the marital rape exemption as unconstitutional, it's merely half a battle won. The judges in this case categorically stated that the judgement is not a general ruling on marital rape across India,[32] *which implies that men still enjoy the* ***'license' to rape their adult wives****.*[33] *This is a red flag that reminds us that there still exist archaic laws like the IPC, which normalize sexual violence within marriage. Undoubtedly, such chauvinistic provisions ought to be amended immediately in accordance with the progressing times.*

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[27] The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) 1981, Art. 16.
[28] Law Commission of India, 205th Report on the *Proposal to Amend the Prohibition of Child Marriage Act, 2006 and Other Allied Laws* (February, 2008) p. 7 & 28.
[29] Independent, *supra* note 10 [¶ 33].
[30] Anupriya Dhonchak, "Standard of Consent in Rape Law in India: Towards an Affirmative Standard" *BERKELEY JOURNAL OF GENDER, LAW & JUSTICE* 57, 68 (2019).
[31] The Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) 1981, Art. 16: *State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
Clause (g) - The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.
[32] Independent, *supra* note 10 [¶ 2].
[33] Bhavish Gupta and Meenu Gupta, "Marital Rape: Current Legal Framework in India and the Need for Change" 1(1) *GALGOTIAS JOURNAL OF LEGAL STUDIES* 19 (2013).

3. INADEQUACY OF THE CRIMINAL LAW REMEDIES FOR MARITAL RAPE

3.1. Cruelty vis-à-vis Rape

Advocates of non-criminalization of marital rape often cite **Section 498-A of the IPC** as a viable alternative.[34] However, this section deals with cases of **cruelty** against married women, an offence distinct from the crime of rape. While rape is a form of cruelty, it differs starkly from mental and physical abuse and traces its origin to convoluted structures of patriarchy and power. Both criminal statutes[35] and evidence law[36] accord different treatment to rape vis-à-vis grievous assault or hurt.

3.2. Section 498A: Ingredients & Threshold for Conviction

The threshold for conviction under Section 498-A is quite high. The conduct of the accused should not only be wilful and offensively unjust to the woman, but also possess such intensity that is likely to provoke her to commit suicide or cause severe danger or injury to life, limb and health.[37]

Moreover, conviction under the Section necessitates the conduct to have been done repeatedly or over considerable time duration.[38] Thus, in case the act of coercive intercourse is done once or twice, conviction wouldn't be possible. The requirement of the conduct's longevity contributes to the prevalent rhetoric of Section 498-A being misused to harass men.[39]

This misconception makes the prosecution of marital rape incidences even more difficult. Additionally, the maximum punishment for cruelty under the Section is three years,[40] with/without fine, while that for rape is life imprisonment.

Such major distinctions in the nature, standard of proof and the prescribed punishment for the two offences indicate that the concept of cruelty is not adequate or appropriate to deal with cases of marital rape.

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[34] National Commission for Women (NCW), Report: *Marital Cruelty and 498A: A Study on Legal Redressal for Victims in Two States* (2014) p. 11.
[35] The Indian Penal Code, 1860 (The offence of "hurt" is covered under Sections 319 to 338, while Sections 375 to 376-E deal with the offence of "rape").
[36] The Indian Evidence Act, 1872, § 114-A.
[37] *Bomma Ilaiah v. State of Andhra Pradesh*, 2003 CrLJ 2439 (AP).
[38] *Samar Ghosh v. Jaya Ghosh* (2007) 4 SCC 511.
[39] *Rajesh Sharma v. State of Uttar Pradesh*(2017) SCC OnLine SC 821.
[40] The Indian Penal Code, 1860, Chapter XX-A, § 498A.

4. CIVIL LAW REMEDIES FOR MARITAL RAPE & FURTHER SUGGESTIONS

4.1. Marital Rape under the HMA

While advocating the criminalization of marital rape, we mustn't forget that marriage encompasses a relationship between two individuals and Family Law governs it. It becomes essential to institute corresponding civil remedies for marital rape victims.

Currently, women enjoy a civil remedy against sexual abuse under Section 3 of the PWDVA.[41] Additionally, '**rape**' is available as one of the **grounds for divorce to the wife under the Hindu Marriage Act, 1955**.[42] While these two Acts provide women with recourses to remove themselves from precarious situations, they don't deter the dangerous conduct itself.

4.2. Marital Rape & the Repercussions of RCR

In the author's opinion, the *selective abolition* of the **Right to Restitution of Conjugal Rights ('RCR')** for men is the need of the hour. RCR entails the reinstatement or restoration of the marital privileges and rights of an individual.[43]This Right, as under the HMA,[44] has been known to work in a fashion detrimental to the interests of women. RCR has been misappropriated over the years to compel several wives to recommence conjugal relations with their husbands.[45]

Unfortunately, the progressive measure taken by the High Court of Andhra Pradesh in ***T. Sareetha vs T. Venkata Subbaiah***,[46] where **Section 9 of the HMA** was struck down and held to be violative of Articles 14, 19 and 21 of the Indian Constitution was overturned by the subsequent Supreme Court verdict in ***Smt. Saroj Rani vs Sudarshan Kumar Chadha***.[47]

[41] The Protection of Women from Domestic Violence Act, 2005, § 3, Explanation I(ii).
[42] The Hindu Marriage Act ,1955, § 13 (2) (ii).
[43] *Ela Dasu v. Ela Lachamma*, (1990) 2 HLR 249 (Ori).
[44] The Hindu Marriage Act, 1955, § 9.
[45] Priyanka Priyadarshini, "The Futility of the Provision of Restitution of Conjugal Rights (As Under the Hindu Marriage Act, 1955) in the Present Scenario" 1(3) *INTERNATIONAL JOURNAL FOR LEGAL DEVELOPMENTS AND ALLIED ISSUES* 111 (2019).
[46] AIR 1983 AP 356.
[47] 1985 SCR (1) 303.

The apex court essentially upheld the Delhi High Court Judgement in ***Harvinder Kaur* v. *Harmander Singh***,[48] opining that the sphere of 'marital privacy' falls outside the Constitution's purview. However, this understanding of 'marital privacy' is very ambiguous.

While the State's coercion of two individuals into resuming conjugal relations via RCR is not considered as an invasion of the private sphere, judicial intervention to adjudge the constitutionality of such provisions is viewed as an incursion on the relationship of marriage.[49] Clearly, making RCR available only to women would protect their sexual autonomy while preventing its misuse by men.

5. CONCLUSION

The author believes that marital rape should be criminalized under a legislation distinct from the IPC, with a standard of proof less stringent than that of 'beyond reasonable doubt', as is required for most other crimes. Moreover, Exception II to Section 375 should be entirely removed and substituted with an explanation stating that the relationship of marriage won't constitute a valid defence or create a presumption of consent, as per the **J.S. Verma Report's recommendations**.[50] The sentencing policy as mentioned in Section 376, IPC should however, continue.

As an additional civil remedy, the RCR should be made selectively available only to women. Efficient police practices and accessible crisis centres should be established to ensure effective case-filings and investigations and provide alternative support systems to marital rape victims respectively. Financial reliance of such victims on their husbands shouldn't hamper them from receiving justice.

[48] AIR 1984 Del 66.
[49] Harvinder, *supra* note 39 [¶ 36].
[50] Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* (January 23, 2013).

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REPARATIVE AND REHABILITATIVE JUSTICE FOR VICTIMS OF CRIME: A COMPARATIVE ANALYSIS OF INDIA AND INTERNATIONAL LEGAL FRAMEWORK

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ABSTRACT

In general terms, a victim may be defined as a person who has suffered physical, emotional or economic damage due to the acts of others. People generally tend to sideline the concept of victimology while focusing on crime and criminals. Providing reparative justice to the victim of crime is as important as preventing the crime itself. Collectively, it is the society's/State's responsibility to prevent the crime from happening but it is humanly not possible to prevent crime at all times. In the present day, with such a huge population, India is facing the biggest challenges of reparation of victims and rehabilitation of criminals. Moreover, the bigger challenge is to follow the standards set by the international legal framework. In this article, the authors try to analyze Indian laws related to the reparation and rehabilitation system and compare it with the international legal framework. Further, the authors try to find the causes of the problems while executing rehabilitating the perpetrators and repairing the damage done to the victims. In the end, the authors will conclude the findings by making plausible suggestions through which India can meet the standards set by the international legal framework.

1. INTRODUCTION

The United Nations Declaration of Basic Principles on victims of crimes defines victims as '*persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.*'[1] Access to justice, reparation and rehabilitation is of utmost importance in any criminal justice system. Reparations are a right-based approach that seeks to mitigate the harm and suffering caused to the victims of crime. If reparations are adequately provided to the victims of crime, especially to victims of gross human rights violations, the rights of victims are progressively realized. Reparation of victims can be done by restitution, compensation, assistance and access to free and fair treatment. Further, rehabilitation of victims can be

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[1] UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, GAOR, UN Doc A/RES/40/34 (Nov. 29, 1985) para 1.

understood as a process of restoring the lives of the victims through education, therapy, skill development, etc. Indian judicial system majorly focuses on punishing the criminals but it is an undeniable fact that the victims are always sidelined. Besides punishing the criminals it is equally important to provide reparative and rehabilitative justice to the victims. Even in the twenty first century where the world believes in collective justice, India tends to ignore the rights of the victims. It is desolating to see the practicality of victims' development in India, and the sight is not a pleasing one. Indian judiciary and executive bodies can achieve collective justice only when they are working on par with the expectations of the international legal framework.

2. INTERNATIONAL LEGAL FRAMEWORK ON REPARATION FOR VICTIMS

2.1. International Human Rights Law

The *Universal Declaration of Human Rights* (UDHR), one of the foremost human rights instruments lays down that people whose fundamental rights have been violated have the right to an 'effective remedy' by their domestic courts.[2] *International Covenant on Civil and Political Rights* (ICCPR) mandates the States to provide remedies to the victims by judicial, administrative or legislative process.[3] Such remedies should be enforced even if violations have been committed by persons acting on behalf of the State.[4] ICCPR also provides that victims of unlawful arrest and unlawful conviction shall have the right to be compensated.[5] The *Convention Against Torture* prescribes redressal mechanisms for victims of torture and lays down that the victims get 'right to fair and adequate compensation' including rehabilitation.[6] *The International Convention for the Protection of All Persons from Enforced Disappearance* (ICPPED) was framed for the protection of persons who are arbitrarily arrested, detained or abducted by the State or by support from the State. ICPPED recognizes the right of victims of forced disappearance to obtain reparations in the form of compensation, restitution, rehabilitation and guarantees of non-repetition.[7] The *Convention on the Rights of the Child* (CRC) acknowledges that child victims who have been exploited, abused, tortured or have underwent other forms of trauma need to be rehabilitated and State should ensure their 'physical and psychological recovery and social reintegration'.[8] The

[2] The Universal Declaration of Human Rights, 1948, art. 8.
[3] The International Covenant on Civil and Political Rights 1976, arts. 2 (b), 2 (c).
[4] *Ibid*., art. 2 (a).
[5] *Ibid*., arts. 9 (5), 14 (6).
[6] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, art. 14.
[7] The International Convention for the Protection of All Persons from Enforced Disappearance, 2010, arts. 24 (4), 24 (5).
[8] The Convention on the Rights of the Child, 1990, art. 39.

International Convention on the Elimination of All Forms of Racial Discrimination states that victims whose human rights have been violated by racial discrimination shall have the rights of adequate reparation and remedies.[9] The UN Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation 29 has identified that caste-based discrimination also forms a part of racial discrimination. The Committee urged India to provide compensation to the victims of caste-based discrimination and for effective rehabilitation mechanism for crimes committed against them.

The *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985* was adopted by the General Assembly of United Nations and recognized the importance of providing reparation and rehabilitation to the victims of human rights abuses. The Declaration has given a wide interpretation to the term 'victim'. For a person to be considered as a victim, it is not necessary for the perpetrator to be 'identified, apprehended, prosecuted or convicted'.[10] The 'familial relationship between the perpetrator and the victim' does not affect the rights of the person to be considered as a victim.[11] The Declaration states that victims of crime are entitled to redressal mechanisms provided for in the national legislations. Victims should be able to obtain 'expeditious, fair, inexpensive and accessible' judicial and administrative mechanisms either by formal or informal procedures. The Declarations states that the mechanism adopted should be in line with the interests of the victims such as protecting their privacy, ensuring safety of them and their families and providing necessary legal support. The Declaration emphasizes on the mechanism of restitution, compensation and providing appropriate assistance to the victims. The offenders are liable to make restitution to the victims in the form of payment for harm caused, reimbursement for expenses borne by the victim, etc whenever possible. When the offenders are the agents of the State, then the State is liable to make restitution to the victims. In cases where the offender cannot pay monetary compensation to the victim, then the State should take positive steps to financially support the victims or their families for serious crimes committed against them. The Declaration envisages establishing national funds to provide compensation to the victims. It also calls for providing adequate 'material, medical, psychological and social assistance' to the victims and catering to their needs. The Declaration also recognizes category of victims knows as 'victims of abuse of power'. They are the ones whose human rights (recognized internationally) have been violated though violations against them are not recognized in the domestic criminal law of their country.[12] The Declaration calls upon the States to incorporate

[9] The International Convention on the Elimination of All Forms of Racial Discrimination, 1969, art. 6.
[10] *Supra* note 1, para. 2.
[11] *Ibid.*
[12] *Ibid.*, para. 18.

provisions that are internationally recognized as serious human rights violations within their national legislation and provide compensation and restitution to victims of such abuses.

The United Nations General Assembly adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* in 2005. These principles place an obligation on the States to ensure that the provisions in their domestic law are consistent with International legal standards and obligations.[13] The principles states that in case of gross human rights violations that are recognized under International Human Rights Law, victims should be provided with 'adequate, effective and prompt reparation'. The reparation can be in the form of 'restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition'. Reparative measures should be enforced without any discrimination and States should not derogate from their duties under domestic and international law.

2.2. International Criminal Law

Apart from International human rights covenants, *Rome Statute* of the International Criminal Court that has jurisdiction over crime of genocide, war crime, crimes against humanity and crime of aggression has provisions that deal with victims' right to reparations. The Rome Statute confers a duty on the International Criminal Court to establish principles of reparation that includes 'restitution, compensation and rehabilitation.'[14] The Rome Statute recognizes the right of victims in administration of justice and mandates that the victims are given a representation while making an order for their reparations. The Court may award order the convict to pay appropriate reparations to the victim or can award reparations through the Trust Fund that is established by the member States for the benefit of victims.[15]

2.3. Transitional Justice & its approach in International Humanitarian Law

The very purpose of transitional justice is to cope with past abuses and to build a future of stability, peace and protection of human rights. In the aftermath of an armed conflict, the general transitional justice mechanisms include disarmament, demobilization and reintegration of the belligerents. The rehabilitation and restitution mechanism is extremely difficult at national and

[13] UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* GA Res 60/147, GOAR, UN Doc A/RES/60/147, (Mar. 21, 2006) paras 1, 2.
[14] The Rome Statute of the International Criminal Court, art. 75(1).
[15] *Ibid*., arts. 75(2), 79.

international levels.[16] However, apart from the basic duties of human rights law and international humanitarian law, there are other approaches to transitional justice such as prosecution, investigation, truth commissions and reparations. Mere prosecution and punishment of criminals is not enough to attain justice. It is important to provide with reparation programmes in order to acknowledge the sufferings of the victims of crime. In order to avoid hush money, the reparations need to be in the guise of rehabilitation, restitution, compensation and guarantee of non-repetition accompanied by accountability of the criminal. However, in practicality, providing compensation to all the victims at times of mass atrocities may affect the more important institutional reform. Hence, reparations are often considered symbolic.

(i) Prosecution

It is a general principle that all human rights violations shall be prosecuted. However, it is not possible to prosecute each and every violation, especially in cases of an armed conflict. These prosecutions may overburden the Courts both at national and international level. So, some States prosecute the authorities in command during the period of armed conflict. In the international level, there have been special Courts such as Residual Special Court for Sierra Leone, Extraordinary Chambers in the Court of Cambodia, etc. The ECtHR has opined that it is important to punish the criminals to have a deterring effect in extreme human rights violations.[17] There has been an increase of prosecution and compensation for human rights violations.

(ii) Truth Commissions

The truth commissions are established to inquire the post conflict situations to reveal the wrongs done in the past. These commissions may be set up by the States or international bodies. Some of the recent examples of truth commissions can be found in Ghana, Sierra Leone, South Africa, Philippines, etc. the purpose of these commissions is not to hold anyone accountable but to find out the sufferings faced by the victims and give an estimation of the compensation that can be provided to them. The post conflict peace building system has gained recognition after the South African Truth and Reconciliation Commission in the 1990s. It is an overburden to the justice systems to rehabilitate the criminals and also ask them to compensate the victims at a larger scale such as national scope. Further, the truth commissions will help in identifying the root causes of the conflict and patterns of post conflict violence, which will in turn help to prevent recurrence.

[16] M.E.I. Brienen and E.H. Hoegen, *Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure* 1057-101 (2000).
[17] *Kononov v. Latvia* App no 36376/04 ECHR (2010) para 118.

Many a times, these commissions provide amnesty assistance to the prosecution process of the Court. The truth commissions are considered to be second best option to prosecution.

(iii) Institutional Reform

Institutional reform system includes legal and constitutional reforms and to conduct free and fair elections. It involves replacing the higher authorities of a State in the post conflict period with new leaders who will end the totalitarian regime. This could be seen in East Germany and Eastern Central European States after World War II.

(iv) Role of United Nations

A majority of the initiatives for transitional justice have been established by the United Nations (UN). The UN is against any agreement that provides amnesty for the heinous of crimes such as genocide, crimes against humanity and war crimes. In the recent years, the UN has learned that it is better to provide case based incentives rather than a universal incentive. This is because the transitional requirements may differ from case to case. The UN promotes the political will for reform. It supports local Courts to look after the local cases of human rights violations such as Special Court for Sierra Leone, Extraordinary Chambers in the Court of Cambodia, Truth and Reconciliation Commission in Haiti, etc. that work in the local context. Different transitional justice mechanisms require coordination and cooperation instead of competition. The UN works for strengthening of the principle of rule of law. Apart from setting up local justice capacities and national consultancies, the UN also facilitates domestic reform.

3. INDIAN LEGAL FRAMEWORK ON REPARATION FOR VICTIMS

3.1. Reparation provisions under Code of Criminal Procedure, 1973

A 'victim' has been defined under Section 2(wa) of Code of Criminal Procedure, 1973 (CrPC) as "a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression victim includes his or her guardian or legal heir," The definition implies that a victim is recognized only when the offender has been charged and therefore is restrictive in nature.

Section 375 of CrPC deals with the compensation which is to be provided to the victims. Section 357(1) states that if the Court has imposed a fine on the accused, then whole or part of such fine

can be directed to pay compensation to the person who has suffered loss or injury due to the acts of the accused. The Court can direct to pay compensation if it is of the opinion that the victim could get such compensation from a civil court.[18] Such a provision is helpful to the victim as they need not approach a different court to claim compensation, thus saving their time and money. Section 357(3) states that when fine is not a part of sentence imposed on the accused, the Court may order the accused to pay compensation to the victim. The amount of compensation to be awarded is at the discretion of the Court. Though no limit is mention under the provision, the Supreme Court is of the view that the compensation awarded should be 'reasonable'.[19] This can be determined by 'the nature of crime, the justness of claim by the victim and the ability of accused to pay.'[20]

The victim can get compensation under Section 375 only when the accused is convicted and court imposes an order for the compensation. The compensation that victim may get also depends on the financial position of the convict. Further, Section 357(2) states that if the case is subject to appeal, then payment cannot be disbursed to the victim until the period of appeal has elapsed or the decision of the appeal has been given by the appellate court. This results in financial hardships to the victim in case of emergency and contingency situations. To cure this lacuna, Section 357-A CrPc was inserted by 2008 amendment of the CrPC. The 154th Law Commission Report had suggested the incorporation of Section 357-A CrPc for a fair and adequate compensatory scheme for victims.

Section 357-A (1) CrPC states that the State governments are required to prepare a scheme to provide to the victims or their dependants. If the trial court is of the opinion that compensation provided to the victim under Section 357 CrPC would not be sufficient for their 'rehabilitation', then it can make a recommendation to the District Legal Service Authority or the State Legal Service Authority to provide compensation under Section 357-A CrPC.[21] The District Legal Service Authority/State Legal Service Authority are competent to determine the amount of compensation when a court has made a recommendation. An important provision under Section 357-A CrPC is that even if the accused is acquitted or cannot be identified, the victim has the right for compensation.[22] The victims or their dependants can make an application to District/State Legal Service Authority and it should complete an enquiry within two months for

[18] The Code of Criminal Procedure 1973 (Act 2 of 1974), s. 357 (1) (b).
[19] *Hari Kishan & Anr v. Sukhbir Singh & Ors*, AIR 1988 SC 2127.
[20] *Ibid.*
[21] The Code of Criminal Procedure 1973 (Act 2 of 1974), s. 357A (2).
[22] *Ibid.*, s. 357-A (3), (4).

awarding them compensation.[23] To address the immediate needs of victim, District/State Legal Service Authority may order for medical services to be made available to the victim without incurring any cost.[24]

Section 357B CrPC is a specific provision to provide for additional compensation to the victims of acid attacks and gang rape. The provision states that victims of acid attack and gang rape should get compensation under Section 357-A CrPC in addition to the fine provided under the Sections 326A, 376AB, 376D, 376DA and 376DB of the Indian Penal Code. The provisions for additional compensation have been incorporated in view of the gravity and nature of these offences. Further, under Section 357C of CrPC both private and public hospitals are required to provide free medical treatment immediately for victims of acid attack, rape and gang rape.

3.2. Reparation provisions under Special Acts

Certain special acts enacted in India also contain provisions for compensation and rehabilitation of victims of specific offences. Special Courts under the *Protection of Children from Sexual Offences Act, 2012* are empowered to direct for payment of compensation to the child who has suffered physical or mental trauma or is in need for immediate rehabilitation.[25] Rule 7 of the *Protection of Children from Sexual Offences Rules, 2012* is dedicated to the compensation of victims. The special courts can award compensation either on its own or on an application filed by the victim, even if the accused is not traced or identified. The compensation awarded to the child victims should be paid by the State Government from the Victims Compensation Fund or any other scheme that are established in the respective States.[26] The *Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989* was enacted with the objective of perpetrators of caste-based atrocities. Under the Act, it is the duty of the State Government to provide 'economic and social rehabilitation' to the victims.[27] The *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995* mandate that the State Government should incorporate provisions in its annual budget to provide relief and rehabilitation facilities to the victims.[28] The Rules also mandate the District Magistrate to set up a vigilance and monitoring committee to review the relief and rehabilitation facilities provided to the victims.[29] Under the *Protection of Women from Domestic Violence Act, 2005*, the Magistrate is empowered to order monetary relief and compensation after an application

[23] *Ibid*., s. 357-A (5).
[24] *Ibid*., 1973, s. 357-A (6).
[25] The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012), s. 33(8).
[26] The Protection of Children from Sexual Offences Rules 2020, Rule 7(4).
[27] The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act 33 of 1989), s. 21(2)(iii).
[28] The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules 1995, Rule 14.
[29] *Ibid*., Rule 17(1).

made by the victim.[30] The *Sexual Harassment of Women at Workplace (Prevention, Protection and Redressal) Act, 2013* contains compensation mechanism payable to the aggrieved woman. The Internal Complaints Committee after having arrived at the conclusion that the respondent is guilty is bound to recommend to the employer to deduct salary of the respondent to pay it to the aggrieved woman while taking into consideration the factors such trauma caused to the victim, medical expenses incurred, etc.[31]

3.3. Judicial Attitude

The jurisprudence of reparations and victim compensation in Indian judiciary can be seen from the 1980's. The Supreme Court of India in a number of cases[32] has awarded reparations and compensation for violations of fundamental rights. The Supreme Court has recognized the duties on part of the State to compensate and rehabilitate the victims gross human rights violations.

In *Ratan Singh v. State Of Punjab*[33], the Supreme Court of India observed that mechanism of victim reparations is a 'vanishing point of our criminal law'. The Court noted that victims and their family 'do not attract the attention of the law'. In *Manu Ram v. Union of India*[34], the Supreme Court observed that rehabilitation of the victims is as important as reformation of criminals. The Court regretted how the victims are often neglected and stated that State has a duty to address the plights of victim as a part of Article 41 of Indian Constitution.

In *State of Gujarat v. High Court of Gujarat*[35], once again the Supreme Court reiterated how the victims are neglected in India legal system. The Court observed that Section 357 of Criminal Procedure Code is not completely effective as many convicts do not pay compensation and rather chose to be in jail. In *Ankush Shivaji Gaikwad v. State of Maharashtra*[36], the Supreme Court heard an appeal against the decision of High Court of Bombay that did not grant compensation to the family of the deceased victim. The Supreme Court observed that though under Section 357 CrPC it is the discretion of the Court to award or refuse compensation, the Court should apply its mind in every case and give reason for awarding or refusing compensation. The Court commented on the ignorance of statutory provision of Section 357 CrPC and stated that by

[30] The Sexual Harassment of Women at Workplace (Prevention, Protection and Redressal) Act, 2013 (Act 14 of 2013), ss. 12(2), 22.
[31] *Ibid*., ss. 13(3)(ii), 15.
[32] *Khatriv v. State of Bihar*, AIR 1981 SC 928; D.K. *Basu v. State of West Bengal*, AIR 1997 SC 610; *M.C. Mehta v. Union of India*, AIR 1997 SC 3021; *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960.
[33] AIR 1980 SC 84.
[34] AIR 1980 SC 2147.
[35] (1998)7 SCC 392.
[36] (2013) 6 SCC 770.

refusing to award compensation without adequate reasons, the Courts will be abdicating from their duties.

In *Suresh and Anr. v. State of Haryana*[37], the Supreme Court expanded the scope of Article 21 of the Indian Constitution with respect to compensatory mechanism to the victims of crime. The Court held that Article 21 is not limited to providing compensation only in the cases where State or its agents are guilt of an act but also in cases where a victim suffers due to individual act of a person. It is the duty of the State to provide rehabilitation to victims and their family and thus State's duty does not end with criminal trial. The Court referred the 154th Law Commission Report on the Code of Criminal Procedure that extensively discussed the concept of victimology. The report emphasized that the foundations of victimology can be found in both Part III (fundamental rights) and Part IV (Directive Principles of State Policy) of the Constitution. Article 38 that deal with social and economic justice and Article 41 that recognizes the role of state in public assistance should be liberally interpreted to include the victims of crime as well. The Court stated that Article 39A mandates the right to legal aid to the victim of the crime as well and held Article 39A casts an obligation on State to provide 'medical aid to the victims of the bereaved family and in appropriate cases, rehabilitation measures including monetary compensation'.

4. MAJOR DRAWBACKS IN REPARATIVE AND REHABILITATIVE JUSTICE OF VICTIMS IN INDIAN LEGAL FRAMEWORK

In many instances, India is yet to initiate any step towards reparative or rehabilitative justice of victims, especially the victims of armed conflicts. Some of the contemporary examples are Jammu and Kashmir and North Eastern India. The civilian population in those areas has been directly affected due to the decades-long armed conflicts.[38] In a conflict torn area, there tends to be military presence and that affects the daily lives of innocent civilians. One of the major drawbacks in Indian legal framework was when it enacted the *Armed Forces Special Powers Act* (AFSPA), 1958. The Act provided legal protection to army personnel from any kind of criminal liability for the damage caused based on a mere suspicion. The powers went to such an extent that they can arrest a person without warrant and even cause death of the suspect.[39] In the past

[37] (2015) 2 SCC 227.
[38] Navsharan Singh, *Thinking Reparations in the Context of Impunity in Landscapes of Fear: Understanding Impunity in India* 300-01 (2014).
[39] The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s. 4.

decade, human rights violations have become a day to day affair for the security forces.[40] Moreover, they are immune from legal proceedings unless sanctioned by the Central Government.[41] The Criminal Procedure Code defines a victim as a person who has suffered an injury or loss caused by the accused.[42] However, this definition cannot be applied in the context of army personnel because he cannot be called as an accused unless warranted by the Central Government. Hence it becomes extremely difficult to even recognize the affected people as victims of State oppression in India.

Another drawback in practical terms is inaccurate official records. Despite widespread complaints regarding illegal detention and torture by the armed forces upon the civilians in the State of Jammu and Kashmir, the State records are inaccurate to the fact. According to the Asian Human Rights Commission, at least eight thousand civilians have disappeared after being arrested by the authorities since 1989.[43] Even today, the actual number of civilian victims is not known, since the armed clashes between State armed forces and rebel groups. Moreover, the victim's compensation and other victim welfare schemes can be activated only after crossing the barricade of 'court's discretion'.

5. CONCLUSION

Indian legal framework has not attempted to define the terms 'reparation' and 'rehabilitation' and hence we need to depend on the international legal definitions. Reparative and rehabilitative justice is recognized throughout the world. Due to increase in crime around the world, it is pertinent to concentrate on providing monetary compensation as well as rehabilitation to the victims of crime. There have been many conventions for the protection of the rights of victims and the world community expects every State to adhere by those conventions. Being a developing State with an immense amount of human resource, India has potential to achieve plausible development of victims of crime, on par with international standards. However, there have been certain drawbacks in our judicial system as well as the working system of the executive bodies. The minimum compensation that is paid for the victims in India is not proportionate to the modern day financial expenditure. Except for certain heinous crimes such as gang rapes and acid attacks, there is no fixed minimum amount of compensation to be paid to the victim. Though section 357A of CrPC makes it possible for those victims where the accused is acquitted

[40] Asian Human Rights Commission, "India Human Rights Report 2007" (2007) http://www.achrweb.org/ (last visited on Dec. 05, 2020).
[41] *Ibid.*
[42] The Code of Criminal Procedure 1973 (Act 2 of 1974), s. 2(wa).
[43] Asian Human Rights Commission, "Justice: Action against Enforced Disappearance" (Apr. 22, 2003) http://www.achrweb.org/ (last visited on Dec. 05, 2020).

or has not been identified to get compensation, in reality, majority victims are largely ignored. In instances where the State itself is the violator of fundamental rights or has aided the commission of crime, it has become common for the victim to be denied justice. Incidents such as the recent Delhi riots wherein innocent civilians were killed, houses burnt and lives destroyed have proven that the State, far from providing rehabilitation and compensation, has even failed to acknowledge the victims of crime. Rising incidents of mob lynching and communal violence throughout India have left several victims remediless. If such crimes involve a political figure as the perpetrator, it is uncommon that charges are framed against them. Hence, there is a need to actively recognize the rights of victims of crime in India through comprehensive reparative and rehabilitative justice mechanism.

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