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TOPIC: ‘RESPECTING’ THE NATIONAL ANTHEM: WHEN DOES DISRESPECT BECOME SEDITIOUS?

Name of the Author:
Akshar Sarin

I. MEANING OF “RESPECT” IN THE CASE OF NATIONAL ANTHEM

In 2018, a group of people were heckled in a cinema hall for not standing up for the national anthem. They were called names such as ‘Pakistani Terrorists’ and “Anti-Nationalists. Similar incidents have been occurred in the past where people have been assaulted for not standing up for the national anthem. In Guwahati, a wheelchair-bound man was assaulted for not showing “respect” to the national anthem. But what does respect for the national anthem really mean? There is no provision in law which describes respect for national anthem and the supreme court itself has been ambiguous on the topic.

Section 3 of the Prevention of Insults to National Honour Act, 1971 states that “whoever intentionally prevents the singing of the Indian National Anthem or causes disturbances to any assembly engaged in such singing shall be punished with imprisonment for a term, which may extend to three years, or with fine, or with both.” Also, Article 51-A(a) of the Indian Constitution states that “It shall be the duty of every citizen of India to abide by the Constitution and respect its ideals and institutions, the national Flag and the National Anthem”.\(^1\) While Section 3 of the prevention of Insults to National Honour Act, 1971 talks about only intentionally disturbing the assembly engaged in singing the national anthem or preventing someone to sing it, and Article 51-A(a) of the Indian constitution\(^2\) talks about our fundamental duty to respect the national anthem, none of these provisions explicitly explain the meaning of respect, nor do they state whether sitting or standing during the national anthem constitutes as respect or not.

In a landmark case of Bijoe Emmanuel v State of Kerala, 1986, the bench asserted that “proper respect is shown to the national anthem by standing up when the national anthem is sung”.\(^3\) It further added that “It will not be right to say that disrespect is shown by not joining in the singing”. In 2018, the supreme court stressed on the need to show respect and stated

\(^1\) Prevention of Insults to National Honour Act 1971, s 3
\(^2\) The Indian Constitution 1950, Art. 51A (a)
\(^3\) Bijoe Emmanuel v State of Kerala [1986] AIR 748 (SC)
that “This court in Bijoe Emmanuel and Others vs. State of Kerala and Others (in paragraphs 9 and 10) has also emphasised on respect to the national anthem. We may hasten to add that it sustained the right of the petitioner therein, but yet observed that a person who stands up respectfully when the national anthem is sung, is showing proper respect. Thus, the stress is on respect when the national anthem is sung or played.”

Hence, even if no such provision exists on what really constitutes as “respect”, the supreme court has implied that it is mandatory to show “respect” when the anthem is played — with “proper respect” including standing up while it is played.

II. RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

Article 19(1)(a) of the Indian constitution states that “All citizens shall have the right to freedom of speech and expression;”

Nationalism and patriotism are very personal sentiments and should not be forced onto someone. Forcing an individual to stand and sing during a national anthem would go against the very grain of our fundamental right freedom of expression under the Indian Constitution.

One of the most fundamental and essential freedoms to have been constituted within the Indian Constitution is the ‘right to freedom.’ This right makes sure that people in the country lead their lives with dignity. Due to such freedoms being enshrined in the Indian Constitution, there is democracy in the country. Individuals can act, speak and also seek pleasure under the state of freedom without facing any unnecessary restrictions externally. This is very important as it consequently results in original thought process and imagination, a high standard of life and enhanced productivity.

The freedom of speech and expression is something that grants to the Indian citizens, the inherent and fundamental right to communicate their thoughts and views without any form of apprehension, and this could either through the means of words either written or spoken, any representation that is either visual or through images or any other form of communication including signs or gestures. This consists of the freedom to express opinions and the opportunity and the freedom to publish the views of other people. It is important to further

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4 The Indian Constitution 1950, Art.19 (1) (a)
consider that free expression cannot be equated or confused with making any kind of accusations against the Indian judicial system that are irresponsible and unfounded.

It is therefore essential that the right to freedom of speech and expression is not considered to be absolute right that is absolute and can therefore be enforced as a reasonable restriction within the ambit of Article 19(2) of the Indian Constitution. The reasonable restrictions include “defamation, Contempt of Court, Decency or morality, Security of the state, friendly relations with other states, incitement, public order, and sedition.”

III. SEDITION

“Section 124A of the Indian Penal code, defines Sedition as whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.”

“Explanation 1.—The expression disaffection includes disloyalty and all feelings of enmity.

Explanation 2.—Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3.—Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.”

Punishment for an offence under this section includes a fine and imprisonment which may extend to 3 years or life. The offence under this section is cognizable, non-bailable and non-compoundable in nature.

Section 124A is possibly one of the most controversial provision of law in India. In 1922, Mahatma Gandhi stated that “Section 124A under which I am happily charged is perhaps the

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5 The Indian Constitution 1950, Art. 19(2)
6 Indian Penal Code 1860, s 124A
prince among the political sections of the Indian Penal Code designed to suppress the liberty of the citizen. Affection cannot be manufactured or regulated by the law. If one has no affection for a person, one should be free to give the fullest expression to his disaffection, so long as he does not contemplate, promote or incite to violence.”

One should note that Sedition was introduced in India by the foreign imperialist, colonising power. The British did not want to be criticised and brooked no opposition. Their sole purpose was to deprive the people of this country of their rights, such as right to express views. The Britishers use this law to curb any demand for independence. The punishment for an offence under this section was life imprisonment at the time.

Major political leaders such as Jawaharlal Nehru also called this section as “obnoxious” and “highly objectionable” and stated that the sooner this section gets scrapped the better. However, after various political leaders believing and announcing similar views on sedition, it has not yet been scrapped nor there is any proposal to do so. In my opinion these statements are really empty and carry no weight. If the first Prime minister, himself believed that this section should not exist, then why has it not yet been scrapped or why has it not yet even been proposed to be scrapped? India had the peak of freedom of speech and expression in 1950 and 1951, when no such term as “reasonable restrictions” was included under Article 19.

I certainly agree that there should be provisions for combating secessionists, anti-nationals and terrorist elements, however sedition restricts unnecessary rights of a citizen. It makes one wonder whether sedition really is a “reasonable” restriction?

One can be charged with sedition for liking a Facebook post, drawing cartoons, criticising a yoga guru, cheering for a rival cricket team, asking a provocative question in a university and not standing up while the national anthem is being played in a cinema hall. Although, later, half of these charges are dropped in the court, but due to our slow-moving judicial system, which prolongs delay in disposing cases, the process itself becomes the punishment. Many believe that India should simply get rid of the section along with a raft of vaguely-worded, draconian laws such as criminal defamation and hate-speech. A renowned lawyer, Karuna Nundy stated that "Sedition itself needs to enter the dustbin of oppressive legal history".
In my opinion, the law of sedition should be toned down, if not abolished. Affection for the government cannot be forced and regulated by law. If a person does not feel for a person or a system, that person should have a right to freely express his disaffection, so long as he does not promote, contemplate or incite to violence. Over the years, the scope of Section 124A has been narrowed down. In the case of Kedar Nath Singh v State of Bihar, the constitutional validity of Section 124A was questioned on the ground that it was inconsistent with Article 19(1)(a) of the Indian constitution. The court noted that “sedition is incitement to violence or the tendency or the intention to create public disorders by words spoken or written, which have the tendency or the effect of bringing the Government established by law into hatred or contempt or creating disaffection in the sense of disloyalty to the State”.7

In 1974, the Government of India brought another change into the section where they made the offence cognizable. Further, in 1995, the supreme court ruled that raising slogans without the intention to create violence does not lead to sedition. In 2003, the supreme court decided in the case of Nazir Khan v State of Delhi that “it is the fundamental right of every citizen to have one’s own political theories and ideas and work towards their establishment”. In 2015, Arun Jaitley criticised the National Judicial Appointments commission on the social media website ‘Facebook’ for which a judicial magistrate had ordered that he be booked under Section 124A of the Indian Penal Code. Although, Arun Jaitley was rescued by the Allahabad High Court, which stated that “for any words to become seditious they should have a “pernicious tendency” to create public disorder”.8

There is another crucial aspect of this interplay between the law of sedition and freedom of expression. According to the law, sedition can only arise against a government established by law. The Government of India is a body, institution, not a person. Criticising a person should not be equated with criticising our government. During emergency, one such incident occurred where a president of a particular party tried to equate his leader with the country, although that attempt failed miserably. Criticising a senior functionary may amount to defamation for which, the person concerned can take action, however that definitely does not amount to sedition or creating disharmony.

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7 Kedar Nath Singh v State of Bihar [1962] AIR 955 (SC)
Even though there are various restrictions regarding the interpretation of Section 124A, the law of sedition is more often misused and abused and invoked in situations even where the prerequisites of such charge are not met. The police officials arrest those who criticise the people in power. National Crime Records Bureau released a data which shows a sharp increase in the number of sedition cases since 2014, and in the period of 2016 to 2018, the number of cases of sedition in India has doubled as well. “What makes sedition a valuable tool for harassment is not necessarily the conviction of an accused but the power that lies in the hands of the police”. As it is cognizable in nature, the police can arrest anyone without a warrant and can initiate investigation without securing approval from a magistrate. The conviction rate under this offence is very low. As of today, there are several cases still pending in the court which were filed even 8 years ago. In India, sedition is misused to target social activists, journalists, NGOs, and students.

There was a petition filed in the supreme court which demanded that the police should get an order from the commissioner or the director general of police certifying that a seditious act led to incitement of public disorder or violence. The supreme court stated that while investigating sedition, the police has to follow the guidelines issued in the Kedar Nath judgement.

It is important to address the question of the manner in which sedition is misused in the country in order to target social activists, journalists and students and in relation with this, Common Cause, a non-governmental organization filed a petition with the Supreme Court in the year 2016. One of the demands in the petition was that the police always should obtain an order from the Commissioner or the Director General of Police (DGP) specifically certifying that an act of sedition has taken place that further led to the incitement of public disorder or violence. It was held by the Supreme Court that the police should follow the guidelines that were issued in the Kedar Nath judgments, in the course of investigating sedition.

The fact that a law such as the one of sedition still exists within our Indian Constitution may be considered as a disgrace to the democracy of our country. In the year of 1977, the Law Commission in Britain had recommended that the law of sedition be abolished in the country in 1977, and the same was made effective in the year 2009. One of the reasons that were

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given for the removal of such law was the fact that it was misused in several commonwealth countries. It was perceived that such an act in Britain may push other countries to perceive their laws on sedition differently and recognise that the same ad a baleful effect. Such a belief is yet to arise in India. Although, even if it is taken into account that the apex court has narrowed down the interpretation of Section 124A, in practicality, it is still used to harass people who say ill of some political leaders, which really do not count as the “Government of India”.

IV. WHEN DOES DISRESPECT BECOME SEDITIOUS?

After understanding the concept of ‘Respect’ in regards of the national anthem, and the interpretation and ground reality of sedition, in my opinion, ‘Disrespecting’ the national anthem does not constitute to be an offence under Section 124A of the Indian Penal Code, 1860.

According to an order passed by the supreme court in 2018, and taking provisions under Article 51A of the Indian Constitution and Section 3 of Prevention of Insults to National Honour Act, 1971 into consideration, ‘Respecting’ the national anthem means standing up in attention and not disturbing or disrupting the national anthem while it is being played. As derived by the supreme court’s interpretation of sedition, every citizen has a right to write or say about the Indian government, by the way of comment or criticism, as long as it doesn’t “incite people to violence” against the government established by law or with the intention of creating public disorder.

Not standing for the national anthem or disrupting someone while the national anthem is being played is disrespectful, but as it does not incite people to violence nor it can ever be done with the intention of creating public disorder, disrespecting the national anthem is not seditious.

Even if it has been made clear by the court of law in India, this issue still persists people for the hardships they have to go through if they express their dissent. As discussed in the beginning of the response paper, people have been beaten up for disrespecting the national anthem, and they have been wrongfully charged with either sedition or under section 3 of Prevention of Insults to National Honour Act. Police misuses the power it has due to sedition’s nature of being cognizable. This leads to suppression of people’s right to freedom
of speech and expression under Article 19(1) of the Indian Constitution. Even if people have a right to sit down during a national anthem, the pressure that the society puts on them and the power that the police has over it is unreal.

Disrespect does not become seditious unless it incites people to violence or creates public disorder. However that is the actual legal point of view. In practical life, disrespecting one’s political opinions or not agreeing with any of the current laws could lead to being arrested and charged with sedition. This does not mean that the person will be convicted in the court of law.

A lot of people charged with sedition are acquitted in the court. But the main issue with this is that as they are wrongly charged, the slow judicial process acts as a punishment as well. So what should be done, in my opinion, is to make stricter laws regarding sedition so that the police is unable to misuse it. I do not think that making the law non-cognizable will help because that may delay the process or cause hinderance in cases where the sedition is actually happening. However I feel that the police should be answerable to the court if they are found to be misusing their power. This may prevent wrongful arrests under sedition which will lead to people being able to express their views freely. It is the moral duty of a person to stand in attention position when the National Anthem is being played but if they do not do so, then it is not a crime.

There should be proportionality and a balance between the restriction and right on one hand, and the duty and right, on the other. The true source of right is duty, and if disproportionate or undue emphasis is placed upon the right of a citizen without considering the significance of the duty, it will create an imbalance.
CONSTITUTIONAL VALIDITY OF CAPITAL PUNISHMENT IN INDIA

AUTHORED BY MANASVII VARMA

INTRODUCTION

A life for a life is a concept that has been around for some decades. Capital punishment, also known as the death penalty or death sentence is a form of punishment where a person’s life is taken for committing a crime. Most countries around the globe, including some first-world nations, have either abolished death penalty by practice i.e. no executions have taken place in the last ten years or more, or death penalty has been abolished by the law. Some other countries only carry out the death penalty for exceptional cases. The death penalty has no place in the 21st century, says the UN Secretary-General António Guterres.¹ In light of the same statement United Nations have time and again encouraged all member states to work towards abolishment of death penalty and towards the promotion of human rights. According to the Human Rights Council, Changes in practice comprise mainly of non-legislative measures, including executive and judicial measures, reflecting a new approach regarding the use of death penalty.² In India, a few executions have been carried out in the 21st Century. The Law Commission of India, in its Report No.262³ talks about the death penalty. In this report, the commission on reference from the Apex Court of India studied the cases, Santosh Kumar Satishbhushan Bariyar v. Maharashtra⁴ and Shankar Kisanrao Khade v. Maharashtra⁵. Earlier The Law Commission of India has discussed Capital Punishment in Report No.35⁶ and Mode of Execution of Death Sentence and Incidental Matters in Report No.187.⁷

¹ UN Secretary-General Press Release, SG/SM/19478-HR/5426 (Jeb. 27, 2019)
⁴ Santosh Kumar Satishbhushan Bariyar v. Maharashtra [(2009) 6 SCC 498]
⁵ Shankar Kisanrao Khade v. Maharashtra [(2013) 5 SCC 546]
LANDMARK JUDGEMENTS

Over a long period of time there have been several landmark cases and judgments on death penalty, its constitutional validity and death penalty in line with fundamental rights granted by the Constitution of India. The very first case to challenge the constitutional validity of capital punishment was the case of *Jagmohan Singh v. State of Uttar Pradesh* where Jagmohan Singh was convicted for murder in accordance with Section 302 of Indian Penal Code, 1980 and was awarded a death sentence by the Sessions Judge. Allahabad High Court confirmed and agreed to the conviction and the punishment that was decided by the lower court. The counsel of the appellant later argued about the infringement of fundamental rights under Article 14 that assure Equality before Law, Article 19 clauses (a) to (g) that assure freedom of speech etc and Article 21 that assure Protection of life and personal liberty. In accordance with the stated fundamental rights, awarding a death sentence for murder seems unjust. The counsel also highlighted that there exists no procedure stated by law for awarding a death sentence, thus the decision made by the judges was unguided and irrational. Therefore the counsel stated that death sentence is unconstitutional. Later, the Supreme Court of India, upheld the constitutionality of the death sentence and made an observation that a judge looking at all facts, circumstances and degree of crime should decide between life imprisonment and death sentence.

After the re-enactment of Code of Criminal Procedure 1973, the Supreme Court of India, in *Rajendra Prasad v. State of Uttar Pradesh* made a similar observation, where death sentence should only be awarded under special circumstance stating rationale and special reasons to do so. The court said, *special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal.*

Another landmark judgement was made in the case of *Bachan Singh v. State of Punjab*. Here a five-judge bench made a note that the decision made in Rajendra Prasad’s case was in contradiction to the decision made in Jagmohan Singh’s case. The bench overruled the judgement of the Rajendra Prasad case, where the bench stated that capital punishment

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should not be limited to cases relating to the security of state, public order and as such. The challenge made on death penalty in Bachan Singh’s case was said to be unconstitutional, inhumane, callous and degrading and its penological purpose has no ground. The bench also laid down guidelines for the \textit{rarest of rare} cases, where the reasons to award or not award capital punishment should include all facts and occurrences of the crime and the criminal. The court said, \textit{The expression special reasons in the context of this provision, obviously means exceptional reasons founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal}.\footnote{Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 161.}

The court further added, \textit{It cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3)\footnote{Section 354 (3), The Code of Criminal Procedure, 1973}. Judges should never be blood-thirsty ... It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in section 354 (3), \textit{viz}, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.\footnote{Bachan Singh v. State of Punjab, (1980) 2 SCC 684, at para 209.}

Once again, capital punishment was challenged in \textit{Shashi Nagar v. Union of India},\footnote{Shashi Nagar v. Union of India, (1992) 1 SCC 96.} The petition was turned down by the court. The plea was made on the execution method by hanging, stated as painful and inhumane should be replaced with a less painful execution method was also rejected by the court.

In \textit{Mithu v. State of Punjab}\footnote{Mithu v. State of Punjab, (1983) 2 SCC 277.} Section 303 of the Indian Penal Code, 1980 was put in question. Section 303 states a mandatory death sentence for a prisoner serving a life imprisonment who later commits a murder. The Supreme Court in this case stuck down Section 303\footnote{Section 303, Indian Penal Code, 1980}, stating it

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\textit{Section 354 (3), The Code of Criminal Procedure, 1973}  
Section 303, Indian Penal Code, 1980
as unconstitutional and in violation of Article 14 and Article 21 of the Constitution of India. The court further stated that murder shall only fall under Section 302\textsuperscript{21}.

**CONCLUSION**

The idea of justice differs from person to person, thus death penalty is one of the most debated form of punishment around the world. There people on both the sides of this debated topic with extremely strong arguments but the United Nations have been encouraging the member stated to move towards abolishing capital punishment. Prisoners and their families on death row go through agonizing mental and physical suffering during the process. With the unclear penological goal of capital punishment in the criminal justice system, the only question arises, ‘Is capital punishment a human rights violation?’

\textsuperscript{21} Section 302, Indian Penal Code, 1980
COMPARATIVE ANALYSIS: GENDER DISPARITY IN LEGAL PROFESSION IN INDIA AND THE WORLD

Authors: Mohd Mannan and Harshit Vijayvergia

ABSTARCT
This paper titled ‘Comparative Analysis: Gender Disparity in Legal profession in India and the world” frets about the imbalance that is allotted to the ladies dependent on their sex, in the lawful calling. India positions among the least in the sexual orientation correspondence list and the male centric arrangement is especially disguised in the general public. On a near examination from different wards far and wide, we can really see how far we behind we are.

The Issue of Gender Disparity:
"Also, the jury of men were quieted by her thunder, the adjudicators were scrambling for words and the individuals in the Court were in amazement. The lady advocate had hushed every individual in the Court by sheer presentation of boldness to oppose the man centric society in a supposed open gathering."

INTRODUCTION
Gender inequality can be traced in almost all the regions of the world but in different degrees. We are living in 21st century and still suffering from patriarchal mindset. Walking shoulderling with mens the womens are still not looked with dignity in some societies. Legal profession is also not left untouched and and utmost need is felt to consider this issue.

The key issues of gender disparity may arise from several factors such as ill mindest of society in a region, their custom, religion, illiteracy and lack of will of Government etc. These are the few obstacles that come across in attaining gender neutrality. Though, some efforts have undoubtedly been made to tackle the issue but still we have long way to go.

Gender disparity issue is not India specific but it is global one. This paper put light on the current status of women in legal profession in India, China, United kingdom and Pakistan, and how much scope of improvement is there through comparative analysis with above mentioned countries.
WOMEN IN LEGAL PROFESSION IN INDIA

In India the cause of gender inequality is the mindset of the people who presumes that the society needs to be controlled well by male only and this notion is believed to be right and just since primitive time. Sylvia Walby has satisfactorily characterized man centric society as "an arrangement of social structure and practices wherein men rule, abuse and endeavor women." as rightly mentioned in Sylvia walby, Theorizing Patriarchy(1990). Strangely, numerous religions in India do not restrict patriarchy, religions sometimes validates the concept of patriarchy and sanctions it in India.

In 2016 India was ranked 130 out of 146 in gender disparity under undp report. Such a bad rank shows how far have we come from patriarchy and how far we have to go. The legal profession is not left untouched from this bane.

Till 1990, the women were not much in number, but after 1990 numbers caught some pace to increase. According to a survey conducted in Lucknow at Allahabad high court, Between 1962 to 1997 there were 136,635 total registered practitioners were there, only 4,265 were women which share 3% of the total share. During 1998 to 2005 total 91,509 lawyers registered and 7346 were women. From 1962 to 2005 out of 2,28,144 lawyers only 11,611 were women sharing 5.08% of the total share. The petty indicated the position of women in legal profession.

FACTORS RESPONSIBLE FOR GENDER DISPARITY IN LEGAL PROFESSION IN INDIA

RELIGION:
Religion assumes a significant function in deciding the support of ladies in the legitimate calling. The women in India are treated differently according to their religion and things attached to customs and traditions they follow.

According to a survey conducted considering the data of allahabad high court, Out of the 73 ladies reviewed, 57 had a place with the Hindu people group, 15 were muslims, only a single lady belonged to Christianity. Its is quite surprising that the Christians legal advisors were quite low in number despite one of the educated class in India. On the other hand, it is noteworthy that ladies belonged to hindu religion got more opportunity than the ladies belong to muslim community. Consequently, a noteworthy distinction can be made on the basis of opportunity given to women by two groups.
MARRIAGE:
Marital status of women is deciding factor in pursuing a career. After being married, lot of women are denied to carry on their job by their husband. On the other hand, a woman is pushed for housekeeping work that led to quit the job sometimes.

A great deal of ladies providing legal counsel are unmarried on the grounds that the female lawyers face extreme family weight and they will in general quit their calling after marriage. What's more, when, female lawyers wind up settled expertly, they are begun to be viewed as excessively old for marriage.

HARASSMENT AND BULLYING:
Harassment and bullying is quite common in India, the women have to deal in almost every field of work. While dealing with the client or judge many a times they are harassed or asked sexual favours. Due to this, female lawyers give up the profession generally. It is considered that the women do not suit litigation. There are several instances where even a judges was alleged to have been harassed women.

OTHER FACTORS:
There are explanations behind the gender discrimination that ladies face internationally also, which are as per the following. Individuals see ladies as less capable than men and ailing in administration potential, and incompletely in light of these recognitions, ladies experience more noteworthy difficulties to or doubt of their thoughts and capacities at work. These observations likewise impact the profession progress diagram for the ladies and the moderate development in which will in general debilitate the ladies from taking up law as a vocation.

Men are viewed as bound to participate in prevailing or forceful practices, to start arrangements, and to self-select into serious conditions, which are viewed as practices that encourage the expert advancements. But, what stays unnoticed is the way that these thoughts depend on simply generalizations that have been made in our brains for throughout the long term. Also, regardless of whether it were valid, ladies don't have to receive these characteristics to get fruitful in the field of law rather, they should let to practice their normal impulses, which would be unquestionably more useful.
The ladies legal counselors do not have more time comparatively to their male counterparts to achieve their goals, the ladies run short of time because of the responsibilities they supposed to take like marriage and Job. On the other hand, men get more time to pursue their long term goals. Consequently the women limit their long term goals due to this very reason and end up in pursuing short goals and compromise in this manner with their objectives they undertake in their careers.

INDIAN JUDICIARY AND WOMEN:
There was a stiff and intense competition at council of bar during early nineteen century, between the top legal experts of India and the engagement of people at council of bar were quite low. At that point of time, the women were though literate but they were in a small number. Women demanded to be treated equally but the laws did not frame in such way so that they could benefit the women to enter into legal field. The women were prohibited to register at the bar, then court of Allahabad took cognizance and granted permission to Miss cornelia sorbji to initiate legal training in 1921. Through this decision of high court she turned out to be first lady advocate in India. In the year 1923 an act came Legal Practitioners (Women) Act, which gave women a statutory right to train herself at bar. This legislation also gave women a sense of equality which is guaranteed in fundamental rights of the constitution.

Considering the above facts, women attendance at legal field is still low figured. Mere twelve percent of ladies are judges at Apex court and other numerous high court. One should not be stunned by this gender inequality, it seems that the court themselves are unfair when it comes to biasness.

The first lady judge was appointed at apex court in India was justice Fatima beevi. It took around 39 years to appoint a lady at supreme court since 1950. The year 1989 brought a ray of hope for women who wished to enter into legal arena. From that point forward, just five additional ladies were named as judge at apex court. Now, it's been around 31 years and still women are not seen much in supreme court. Currently, only single lady judge Justice R Banumathi is there and advocate indu malhotra is still in queue. Since supreme court came into being to till now in independent India, there is no single occasion appeared to witness more than 2 women judge at supreme court.
The disparity in high courts is also reflect disappointment, and circumstances of these courts are similar to other lower or apex court. Sikkim tops the list where 33% are lady lawyers which are most elevated than comes Delhi (twenty seven percent) than high court of Madras (eighteen percent), high court of Karnataka (sixteen percent) than high court of Bombay (fifteen percent). There are several high courts of different states where there is no single lady among the judges. Out of total judges comprising both men and women there were total 64 lady judges when contrasted with 557 male adjudicators in all (twenty four) high courts of India.

The shortcoming is deep rooted in ground level which ultimately indicates towards shortcomings at Indian bar. The ill behaviour towards women and treatment they receive from male adjudicators affects their psyche and lower down their confidence. Merely (ten to fifteen percent) are female out of (seventeen lakh) advocates (registered on roll) at council of bar throughout the India. At apex court merely twelve ladies have been assigned as senior counsel till now. Just eight ladies have that qualification from court of Delhi and six from court of Bombay. Presently not a single woman is there in any office at BCI and till now not even a single time a lady became a head or chair holder of BCI.

Women are sufferers of inequality that emerges from a bad social norm. The Statements of men are given much importance comparatively to ladies counterparts in legal field.

**ATTITUDE OF INDIAN JUDICIARY AND LEGISLATURE TOWARDS WOMEN:**

The legislatures have taken important measures to tackle the issue of sexual orientation divergence, in any event, at paper. Two laws have been established as of late for the help and the advancement of sex disparity inside work environment in the country.

According to new companies act (twenty thirteen) it has become mandatory to appoint women in government owned company as a director on board.

A need was felt to protect and safeguard the women at workplace, and the guidelines laid by supreme court in vishakha case (1997) to curb inappropriate behaviour of women face at workplace, led to making of the sexual harassment of women at workplace act. This New legislation laid down meaning of certain things such as workplace.
Laws dealing with protection of interest of women are still not serving the purpose of tackling this issue because of some lacunae in them. The modifications in legislations have been developed but right implementation at place of work is still need to execute.

For instance, the Sexual Abuse law expects associations to characterize their lewd behavior arrangements, avoidance frameworks, techniques and administration rules; set up inward objections councils and hold customary sex sharpening and mindfulness exercises, the license must be given to organisations only if they are in compliance with above measures. Although, the said obligations which are supposed to be followed by organisations have not been bound by any legal framework.

In spite of developing confirmations that the associations which advance sex uniformity and decent variety perform better than the associations that don't do as such, a low attention is paid by organisations to eradicate sexual orientation dissimilarity and the law has been proved not sufficient in this regard. Lack of data regarding sexual abuse within organisations is also multiply the problem.

The state Andhra Pradesh have shown a good example of equality where under the legislation of HSA (Hindu Succession Act) 1986. The females have been given equal rights in inheritance. The right guaranteed in fundamental rights i.e. right to equality has been rightly given to women in state Andhra Pradesh. Eventually inequality will no longer be hindrance in order to support females family financially. Different state must come up with such legislations.

The judiciary of India has additionally assumed a critical function in tending to this particular problem. The apex court first smartly took up concerned problem in Vishakha case. In this case the court was told how women can be harassed at working environment in different manner.

At that point of time the strong legal provisions to tackle such problem was not in existence, then the writ jurisdiction was used in apex court. Lacking of strong legal provisions to protect the women in working environment an utmost need of capable laws were needed. For the time being, before framing the comprehensive and strong laws, certain guidelines such as women friendly environment, security of women etc. were needed to be ensured in organisations, so that they may execute accordingly and the goal of achieving gender neutrality can be realised. Vishakha guidelines continued till enactment of sexual abuse act of 2013.
The constitution of India gives right of education and right to contest for power at local level, security at place of work. The apex court maintained that 30% of jobs would be reserved for ladies in the government owned offices. The reference of an old case given and ruled that:

"To state that under Article 15(3) openings for work for ladies can't be made is cut at the very foundation of the fundamental motivation behind this Article. Making uncommon arrangement for ladies in regard of jobs or posts under the state is an essential piece of Article 15(3)."

On account of AEP Council v. A.K. Chopra, a ladies worker was explicitly irritated in lodging by staff-representative, throughout business. Apex Court ruled for the person in question or organization, the organisation brought the Vishaka blamed to court, again certified the standards or rules as expressed in the case.

Hence, the direction in this case laws developed has been very unmistakable. Sufficient consideration has been paid to the way that the survivor of sexual orientation imbalance gets satisfactory plan of action under the law and without any structure tending to the equivalent, the Court has guided the lawmaking body to come up with some solution to tackle this problem successfully.

Substantially, legal executive and assembly perceive and recognize problem of sexual orientation difference at place of work in the country and have been making strides, anyway little they may be, to address the equivalent. However, what stays an issue is the lack of will power of concerned authority to execute the measures.

**COMPARATIVE ANALYSIS WITH DIFFERENT COUNTRIES**

Inequality of gender is not problem specifically concerned to India only but it is global one. Various countries around the world have been dealing with this problem. Below are some researched comparisons drawned in countries such as China, United Kingdom, Pakistan. These different countries shows how womens are being treated in their society and how much scope of improvement is there to tackle this particular issue of gender dissimilarity.
China:

In China, the sex contrast in the legitimate calling is more than renowned. Feminisation of the Bar has been moderate and hence, the amount of women legitimate advisors rehearsing in China is less when diverged from their male partners. Graduate schools in China have had essentially same number of understudies graduating for a long time now, yet, the women appear to contain a minority in attorney populace, judge people and on graduate school assets in China.

There similarly exists a power hole in the country of China between the sexual directions. The men welcome a more authentic position while, the women are died down to the establishment and to do the helper tasks. There is an immense female people in the low-status positions in the legitimate bringing in China. The pay opening between the sexual directions is also extremely acclaimed in the legal bringing in China.

What further explanations behind pressure is that the Chinese female lawful counselors have been so significantly dove in man driven society that they are not prepared to recognize sex as a calling deterrent. Thus, the situation there is basically more dreadful than in India, where the women do see that they are being held down taking into account their sex and are raising their voices against such partition.

United kingdom:

In the year 1913, because of Bebb v. Law Society, the UK's Court of Allure kept up the blacklist put by the Law Society on women filling in as legitimate consultants in UK. Women were not considered to qualify as 'people' under the 1843 Specialists Act. Regardless, after the primary general battle, there was a critical change in the points of view and the obstruction set on woman ending up being lawful counsels was killed in the year 1919.

According to the quantifiable data from the Law Society, which advances and supports experts in Britain and Grains, women build up the 60% of the as of late qualified and practically half in light of everything. Over 66% of all law understudies are female. But, clearly, the happy picture is limited to simply as of recently.

The degree of female accessories in the principle 10 UK law workplaces is 18% as shown by a recent report by a specialist organizations firm PwC, and only 19% in the accompanying 15 firms. Along these lines, we see that notwithstanding the way that the surge of females
starting up their occupation in law is certainly more than their male accomplices, the amount of women making it to the top circumstance of power is way lower.

The attorneys and the adjudicators, who are female, are moreover standing up to an equivalent pickle. Data from the Bar Board in 2017, states that in Britain and Ridges, there were 1409 male freely utilized top advocates and only 254 of their female counterparts. With respect to the selected specialists, 22% in the High Court are women and the number rising to 24% in the Court of Allure.

**Pakistan:**

In various pieces of the world, especially in making countries, women have been standing up to issues due to nonattendance of possibilities and resources or considering their social establishment in the master zone. The real calling is seen as one of the most dependable purposes for living all through the world, anyway in various bits of the world, especially in making nations like Pakistan, it has been overpowered by men. In case we assess the current position and part of female lawful guides, we can see that the tables have turned in the made countries. In countries like the USA and Australia, women build up an immense degree of practicing lawful advocates, law assets and even adjudicators. These numbers are growing rapidly. The extended presence of women in the legal scene is changing the genuine calling. There is confirmation that the growing section of women in law is carrying greater respectfulness and refinement to the calling.

The condition of female legitimate counselors in Pakistan on the other hand is truly deplorable. Women in the genuine bringing in Pakistan are having an important effect, especially in family law cases and essential opportunity encroachment where they have been shown more strong in engaging against the dishonorable demonstrations.

It has been unquestionably communicated in Article 25 of the Constitution of Pakistan that all occupants are comparable under the watchful eye of the law and there will be no isolation dependent on sex.

The Asian Development Bank has consumed a considerable number of rupees on changes in the lawful system in Pakistan and have left the criticalness to choose more women as judges in both pervasive and lower courts in Pakistan. As of now, there is no female assigned as a designated expert in the Supreme Court of Pakistan.
In Pakistan, women started joining the legitimate calling during the 1960s. Without a doubt, the primary woman in Asia to be chosen as benefactor was from Pakistan, which was during the 70s and 80s. Two or three names in this fight merit referring to. Asma Jehangir and Hina Jillani are two sisters who have accepted an immense capacity for women rights similarly as in the Rule of Law. Their father went through various years in prison for confining a military dictator. Asma figured out the foremost open appearing in Islamabad against the slanted attack conviction of an outwardly impeded attack loss named Safia Bibi, a judgment which was later struck some place around the Federal Sharia Court as a result of specific grounds. This was an unprecedented public show by women against shamefulness. There were some more, especially during the lawful guides' improvement for the recovery and opportunity of lawful chief.

Despite the way that more women when stood out from men have been graduating with a law level of late, hardly two or three them seem to hold onto this as a calling. Different women protest of sexual direction isolation in the male-overpowered field and change to a calling that is all the additionally enduring of women, which searched after a calling for teaching.

The future for women in the legal bringing in Pakistan is a badly characterized circumstance. With limited possibilities and social goals to create, various women leave the calling or take up positions like in-house lawyers or genuine authorities. The opening among female and male accomplices is extremely clear in most law workplaces in Pakistan. Most female lawful advocates slant toward fighting corporate and family cases transcendentally to swear off going up against such a bullying. Among male lawyers and clients, it is a general perception that women legitimate advisors need to go far in order to be developed as strong specialists.

**SUGGESTIONS TO SOLVE THE ISSUE:**

The smart and new policies are needed to make women feel free in the profession. The fresh policies may include the paternal leaves, fixed working hours. These factors are pretty much important from a women point of view. If a fresh policy come up with these factors then it may bring some change.

The society is needed to become rational in nature when it comes to issues related to women. Through education a change could be brought to change the attitude of people towards women, an overall sensitisation should be done to change the notion of women being less than men.
The women must be given equal importance and given opportunity to keep up the profession. Their abilities must not be questioned and their promotion should be done according to their abilities.

Various organisations such as law firms should come up with employee training sessions in which their conduct towards women should be regulated. The training sessions must inculcate the moral duties, behaviour, fair language in order to bring a sense of respect towards women so that they may feel free.

Women engaged in legal profession should make strong lawyers associations to stand against any discrimination, oppression done to women on the basis of sex, race, caste, religion etc. Some good leaders and women rights activist can be the member of the association.

A capable regulatory board can be set up with sufficient staff and assets to address the issue of gender imbalance. There must be a mechanism of complaint with keeping the confidentiality of complainant. The Courts and the Bars must connect themselves with gatherings and people past their spaces to address the worries of the female individuals from the framework and to sharpen the male individuals from the Judiciary and the Bar.

Above are few measure to ensure the rights of the women and to give a blow to gender inequity but the structural change can be brought only when mindset of people is changed. Until the society does not change its thought process and age old practice of patriarchy the obstacles come up in the way of women in pursuance of their goals, profession cannot be removed.

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MEDICAL TERMINATION OF PREGNANCY
(AMENDMENT) BILL, 2020: A CRITICAL ANALYSIS

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INTRODUCTION

Legal unawareness is the root cause of deception, exploitation and victimization. This has been the state of affairs when it comes to women and their rights. In current times of women empowerment, it has become essential for women to realize their rights in its true essence. The recent amendment bill in the Medical Termination of Pregnancy Act, 1971 is in alignment with the reproductive rights of women and is a step forward towards achieving gender justice. Such an amendment became indispensable in the light of plethora of judgements wherein women were deprived of their right to abort in traumatizing situations.

Lancet Global Health published a study in 2015 which was jointly conducted by researchers at the International Institute for Population Sciences (IIPS), Mumbai, the Population Council, New Delhi and the New York-based Guttmacher Institute, called ‘The incidence of abortion and unintended pregnancy.’ Information on abortion statistics were either unreliable or incomplete; the aim of this study was to provide reliable information. Facility-based abortions were estimated from the 2015 Health Facilities Survey of 4001 public and private health facilities in six Indian states (Assam, Bihar, Gujarat, Madhya Pradesh, Tamil Nadu, and Uttar Pradesh) and from NGO clinic data. National medication abortion drug sales and distribution data were obtained from IMS Health and six principal NGOs (DKT International, World Health Partners, Population Services International, Marie Stopes International, Parivar Seva Santha, and Janani). A whooping 11.5 million (73%) abortions were done outside of health facilities, out of the total -

1 Amendment is a recognition that even unmarried women are entitled to seek legal abortion — as a right (indianexpress.com)

2 https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(17)30453-9/fulltext#seccestitle10
15.6 million abortions which occurred in India in 2015. One third of all pregnancies ended up in abortions, and nearly half of those pregnancies were unintended.³

However, the database for this study is limited and does not take country-level date within its ambit. The statistics compiled by the Indian government is amorphous as a number of abortions go unaccounted solely because, the coverage of facility based services is incomplete and in addition, numerous abortions happen outside of a facility setting. The rationale behind this very high under-reporting of abortions is the stigma associated to abortions. The new amendment which is going to save rape survivors, minors and women with abnormal and normal unintended pregnancies from the shackles of archaic abortion law, has largely gone unapplauded. Issue of abortion which has always being very controversial, has again been regulated by the new amendment of 2020.

**LACUNAE IN OLD ACT**

The Medical Termination of Pregnancy Act, 1971 has become outdated and is not able to cope up with the changing times. Due to this many adversities were faced by women all over India. According to the old act, a woman seeking termination of pregnancy had to get a certificate or recommendation from a registered medical practitioner upto 12 weeks of pregnancy and certificates from 2 registered medical practitioners if the pregnancy had gone upto 20 weeks. A woman could not even get an abortion done with her own will no matter how far along the pregnancy had gone. In the landmark case of Suchita Srivastava⁴, the Supreme Court of India held that the Article 21 of the Indian Constitution which guarantees the right to life and personal liberty has a broader dimension which extends to liberty of a woman to make reproductive choices. These rights form the basic components of a woman’s right to privacy, personal liberty, dignity and bodily dignity as enshrined by Article 21. Even in the judgement of Justice K.S. Puttawamy case⁵, the Supreme Court in a nine-judge bench unanimously affirmed the right to privacy as a fundamental right under the Indian Constitution and reiterated Suchita Srivastava’s

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³ India’s new abortion law is progressive and has a human face | ORF (orfonline.org)


⁵ Justice K. S. Puttaswamy (Retd) & Anrs. v. Union of India and Ors., (2017) 10 S.C.C. 1
case and held that the purview of right to privacy contains a woman’s right to abortion and therefore all her reproductive rights should be ensured by the State. Thus, we can say that the courts have established that a woman’s right to abortion is a fundamental right. Even then women don’t have the basic right to their body by denying them the right to choose freely whether they would like to terminate their pregnancy or not. This can be said to violative of Article 21 of the Indian Constitution.

Another issue with this provision is that the termination of pregnancy is not allowed after 20 weeks. The 20-week limit is based on outdated concepts from 1971 where abortion was something which was viewed as a surgery which was to be performed by an Allopathic doctor. There have been various developments in the medical field since then. Many new techniques for abortion are now available which weren’t there before such as vacuum aspiration in which suction is used to remove the fetus which therefore allows for relatively much safer abortions in the advanced stages of pregnancies. Even abortion pills are available now to the general public to help in easy abortion. Suchitra Dalvie, a practicing gynaecologist and co-founder of the Asia Safe Abortion Partnership said that “Since the fetus is at its largest size at nine months when it gets delivered, the risk to the pregnant woman is bound to be less when the size is less.” Therefore, it can be said that the risk to the life of the woman at any time during an abortion is very minimum or non-existent, assuming that it is being done by a trained and qualified person in a safe way.

Many fetal abnormalities occur after the period of 20 weeks. By not allowing easy abortion to women, they might resort to unsafe abortions outside proper healthcare facilities which in turn might result in serious infection, future infertility, sepsis, bowel injury, internal injuries, and even death. A 2015 study in the Indian Journal of Medical Ethics had observed that 10-13% of the total maternal deaths in India can be attributed to unsafe abortions. Another statistics mentions that a minimum of six to seven women loose their life daily due to unsafe abortions.

6 Medical Termination of Pregnancy Act Failing Women Who Need It The Most (indiaspend.com)
7 https://scroll.in/article/941210/the-abortion-law-in-india-is-failing-the-women-who-need-it-the-most
In Savita Sachin Patil vs. Union of India\textsuperscript{9}, the Court rejected termination of a 27-week pregnancy because it found that there was no physical risk to the mother but the fetus had severe physical anomalies. The court did not care about the physical anomalies as the 20-week mark had crossed. The trouble the child and his parents would have to go through is immeasurable but the court did not account for that.

In another case, the Supreme Court denied a Maharashtrian family the right to abort a fetus detected with Down Syndrome at 22 weeks, just because the 20-week mark specified in the MTP Act had been breached even when this family was already blessed with and is caring for a special needs child.\textsuperscript{10} In this case too, the family would have to face immense problems just because of a provision being outdated.

Another major issue with the old act is that it only recognizes failure of contraceptives for married woman. It does not recognize pre-marital sexual relationships which is common in the present time. Due to this, many unmarried women are not allowed to terminate their pregnancy which is unfair towards them.

In circumstances where there has been a sexual assault or rape, particularly of minors, the doctors are unwilling to perform abortions, irrespective of gestational stage. They don’t consider such situations to cause grave injury and anguish to the mental health of the pregnant women. The doctors deliberate on such cases.

In the MTP Act, approval by a medical board is not required to perform an abortion if it is legal under the Act. But the courts often ignore the medical advice which is given by the woman’s own gynaecologist, and wait for the approval of the medical board which consists of court-appointed gynaecologists. The boards do not consider the long-term effects of pregnancy and

\textsuperscript{8} It’s gender justice: Amendment to MTP Act will align the reproductive rights of women with 21st century medicine (indiatimes.com)

\textsuperscript{9} (2017) 13 SCC 436

\textsuperscript{10} It’s gender justice: Amendment to MTP Act will align the reproductive rights of women with 21st century medicine (indiatimes.com)
only allow abortions if there is an immediate risk to the life of the woman, according to the Pratigya report.\(^\text{11}\)

Once, an HIV-positive rape victim from Bihar was forced to give birth as she was denied abortion by Patna Medical College when she was 18 weeks pregnant, the reason for which was the delay in its decision making by the Patna High Court in 2017\(^\text{12}\).

**IMPORTANT FEATURES OF THE AMENDMENT BILL**

The lacunae of the Medical Termination of Pregnancy Act, 1971 was not unprecedented rather the shortcomings of this act was time and again mapped by the legislators, jurists and the common people especially women. Beyond the aforesaid reasons and case laws cited, numerous writ petitions were filed before the Supreme Court and various High Courts, wherein the parties to the suit prayed before the courts to allow the termination of the pregnancies beyond the statutory gestational period on the grounds of fetal anomalies or pregnancies caused by sexual violence faced by women. This proved to be a fertile ground for a consequential change in the act. The amendment bill was introduced in the lower house of the parliament on March 2, 2020 and was passed on March 17, 2020. It was supposed to be discussed in the Rajya Sabha, but was delayed due to Covid 19 Pandemic.

The amendment introduced the following provisions:

- The termination of pregnancy upto 20 weeks of gestation is allowed is allowed on the opinion of one medical practitioner, and the termination of pregnancy beyond 20 weeks and before 24 weeks of gestation on the opinion of 2 registered medical practitioners for special categories of women which are to be included in the rules such as rape survivors, minors, victims of incest, etc..\(^\text{13}\) The importance of such provision can be realized by the fact, that many women, especially women in rural areas, found it very difficult to get the permission to terminate their pregnancies beyond the

\(^{11}\) Medical Termination of Pregnancy Act Failing Women Who Need It The Most (indiaspend.com)

\(^{12}\) In a first, SC orders Rs 10 lakh relief for rape victim denied abortion | Hindustan Times

\(^{13}\) 5427LS.p65
gestational period of twelve weeks, owing to poor health facilities due to which there was a shortage of doctors, conflict in opinion of two medical practitioners thus adding to their anguish. Rural India has a 75% shortage of gynaecologists and obstetricians\textsuperscript{14}, with 85% specialist positions (4,757 of 5,624) vacant in community health centres, according to a 2019-20 report\textsuperscript{15} on the National Health Mission from Accountability Initiative\textsuperscript{16}, a research organization. This will also be a relief to women who realize the need for abortion very late and save them from the cottage industry of places which provide unsafe abortion services. This will lead to significant reduction in the number of unsafe abortions. The extension of limit would create a safe legal route for termination of pregnancy after 20 weeks, allowing the healthcare system to take care of safe termination of pregnancies by delivering quality medical attention. Another significance of this is that usually, a foetal anomaly scan is usually done during the 20th-21st week of pregnancy and if there is any delay in doing this scan, and it reveals a lethal anomaly in the foetus, 20 weeks shall be limiting.\textsuperscript{17}

- This amendment bill also provides for the constitution of a Medical Board which shall govern the cases in which the termination of pregnancy is soughted when a period of more than 24 weeks has passed.\textsuperscript{18} Such termination of pregnancy shall be allowed only in the cases of substantial foetal abnormalities. According to the provision every State and Union Territory shall have to constitute this board. Even the composition of such board in mentioned and it shall constitute of medical experts such as gynaecologist, sonologist and radiologist.\textsuperscript{19}

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To choose, the right of choice or the right to decide one’s fate is everyone’s individual right. To further the same, the MTP act has done away with antiquated ethos of our community wherein only a married woman can terminate a pregnancy and an unmarried woman is ostracised by the community for the same due to contraceptive failure. Contraceptive failure can lead to unintended pregnancy and to force a woman whether married or unmarried to continue the same, would be outrageous. Procreation is a direct determinant of family planning and abortion is a main determinant of unintended or accidental pregnancy due to contraceptive failure. The terminology of the MTP only allowed married woman and her husband to terminate a pregnancy occurred due to contraceptive failure. However, the new bill grants any woman and her partner to terminate a pregnancy occurring in the event of contraceptive failure.

Sexual intercourse between an unmarried couple should not be stigmatized. A couple undertaking contraceptive measures while have intercourse shall be legally allowed to terminate an unintended pregnancy. Safe abortion in such an event can only be encouraged when woman and her partner are legally protected from any stigmatization and mortification.

Thus, this section it is in the spirit of making the new bill more progressive and inclusive. The only way to realize the full benefit of a law is when other incidental and ancillary aspects attached to it are taken cared of thus a safe haven should be provided for them to approach safe healthcare system for termination.

Abortion is seen in a very poor light in our country though our law encourages couples to terminate pregnancy conditionally. Family Planning has become a necessity as the standard of living in time has been improving among the middle class and the rich section of our society. People no longer take responsibility of a child unless they can provide for the children in the best possible manner. Unfortunate event of rapes, incest, complicated pregnancies and diagnosis of medical disorder in the unborn child necessitates termination of pregnancy. However, community has left no stone untouched when it comes to making a negative judgment for a practice which they
consider is immoral. Thus, privacy and confidentiality comes handy when women develop internalised fear of such judgment.

The new bill impose responsibility on the medical practitioners to not disclose any particulars and details of women whose termination of pregnancy has taken place under the act. Only on authorisation of any law in force, such information can be disclosed to such person provided by the act. Any infringement is not only discouraged but also punished under the act. Section 5A (2) of the new bill imposes an imprisonment which may extend to one year or fine or both.

This amendment bill shall ensure the dignity, autonomy and confidentiality for women and will uphold their reproductive rights over their bodies which will lead to the maternal mortality rate reducing.

**LOOPHOLES IN THE AMENDMENT BILL**

The amendment progressively recognizes the rights of the women in regards of termination of pregnancy. However, this revolutionary amendment fails to eliminate certain shortcomings which the act previously had.

The period to terminate the pregnancy has been increased to 20-24 weeks. The requisite to terminate the pregnancy until 20 weeks is to seek approval from one registered practitioner however the same for the pregnancy until 24 weeks is to obtain approval from two registered practitioners. The amendment and the act, doesn’t legally provide a way to terminate a pregnancy of more than 24 weeks of females who do not want to continue the pregnancy. Moreover, this upper limit of 20-24 weeks is conditional as only special category of women such as rape survivors, incest victims, disabled women, minors etc. are benefitted by such an amendment. It doesn’t cater to all women but only special category thus, failing to recognize those category of women who are victim of intimate partner violence. Also, the amendment doesn’t account experiences of marginalized people such as migrant workers, trans and non-binary people. There is lack of a legal recourse for females who want to willingly terminate the pregnancy at a later stage. Thus, the act fails to fully realize the absolute right to terminate pregnancy beyond 24 weeks.
Requisite to terminate a pregnancy beyond 24 weeks is to obtain approval from a medical board consisting of a gynaecologist, a pediatrician and a radiologist. The constitution of a medical board has been provided but the amendment doesn’t provide as to who would ensure access to the medical board. The legal requirement to terminate a pregnancy doesn’t provide for the females who do not have sufficient financial support needed to contact the medical board or for females who are located in regions where the access to healthcare system is very difficult. Thus, absence or poor healthcare system can also lead to late diagnosis of a pregnancy and lack of true information regarding a complicated pregnancy; making it more agonizing for females seeking termination pregnancy beyond 24 weeks.

Abortion or terminating a pregnancy is a biological right of women, this right helps stimulating a safe environment for women to care for their reproductive health. It is one of the most essential element to care for one’s sexual and reproductive health, however this pathway to care is full of social, cultural and legal barriers. These barriers often manifest a situation for women wherein they build an internalised fear of community’s disapproval. This manifestation of an internalised fear in our country has compromised the health of women. This internalized fear is often perceived as norms disapproving or condemning abortions, though on papers abortion is seen as a right for women in our country. To save oneself from judgement, gossipmongers and ostracisation by the community, women go through a lot of mental and physical agony; resulting in taking of rash decision like unsafe abortions. Those who resort to safe and legal way of terminating the pregnancy, are often worried about revealing the same to anyone. However, the new bill indicates that the details of the pregnancy can be shared with a person authorized by law which compromises the confidentiality.

Lastly, the new bill does not recognize the right to abortion to trans, intersex and non-binary people. The terminology of the bill should be more inclusive thus the bill must include the term ‘pregnant person’.
CONCLUSION

Abortion is acknowledged worldwide as one of the most important aspect of women’s reproductive health and sexual well-being. At present, 26 countries including Egypt, Angola, Thailand, the Philippines, Madagascar and Iraq do not permit abortion whereas 39 countries including Brazil, Mexico, Sudan, Indonesia and Sri Lanka permit abortion only in those cases where a woman’s life is at risk. There are only a few countries like China, Russia, Canada, Australia, South Africa which permit abortion on request that too mostly up to 12 weeks. After the passing of this amendment bill in MTP Act\(^1\), India shall stand amongst those nations which have highly progressive abortion laws which allow legal abortions on a broad range of therapeutic, humanitarian and social grounds. The new MTP (Amendment) Bill, 2020, will act as a milestone which in turn will give women an assertive position to care for her reproductive health.

This bill also strives to strengthen those provisions which shall help women seeking refuge of law when confronted with such a life altering decisions to protect their dignity and privacy. The current amendment shall not only grant greater autonomy to women, but it will impose greater moral responsibility on medical practitioners to have a progressive approach who have in the past shown repressive and retrogressive mindset towards pregnancy termination procedures. Such stigmatization of abortion by the medical practitioners has been one of the biggest reason behind high incidence of unsafe abortion or because of which survivors of rape and incest were subsequently forced to approach the courts for judicial sanction.

This amendment bill will truly address the needs of gender justice through the prism of reproductive rights and will provide a solution which women in our country have been seeking for decades. Even though this amendment shall bear fruitful results and is a step forward but still there are many loopholes which need filling.

\(^{20}\) It’s gender justice: Amendment to MTP Act will align the reproductive rights of women with 21st century medicine (indiatimes.com)

\(^{21}\) Medical Termination of Pregnancy Act, 1971
Article 21\(^{22}\) of the Indian Constitution has provided women with an absolute right to choose whatever she wants to do with her body. No person can dictate to her what she should do in matters pertaining to reproduction. If any person interferes with a woman’s reproductive choices, it will be considered as a breach and invasion of her privacy and personal liberty. Even though this Amendment bill shall give freedom to women in abortion-related matters, her freedom is still restricted and limited to the shortcomings of the Act as seen above.

Even though the intention of the government seems to be right, the execution of the same seems to fall short. The addressal of certain lacunae which the act continues to have is hopefully possible when more liberal and progressive Rules under the Act are framed. Due to many advances in medical technology, the current discourse on women’s rights and available evidences, this could be said to be an opportune time to make the MTP Act truly women-centric. The global scenario in regard of abortion laws are still substandard which has cast a dark shadow on Women’s right to reproductive health and abortion in particular. This is a great opportunity for India to take a leadership role in setting the global agenda. For India to set a global standard would require an overhauling of amendment in order to review what is proposed. Such revamping of the act would give a contemporary colour to the act which in return would help save face the women who have been subjected to internalised fear, stigma and mortification. If this opportunity is not grabbed, we will be failing 50% of our population. Will the women in India have to wait for another two decades just to gain full control over their bodies?

Abortion laws in India are not completely liberal. There is still scope for development to suit the current requirements in order to protect the rights of the women in the county. The unconstitutional provisions which infringe the rights which are guaranteed by the constitution to women in the country have to be eliminated. Saying all this, there is one thing we can say in the end that the MTP (Amendment) Bill 2020 is a step towards the right direction.

\(^{22}\text{Right to Life and Personal Liberty}\)
UNCLAIMED INSURANCE POLICIES IN INDIA

Authored by Udisha Surana

ABSTRACT
The insurance sector went through a full circle of phases from being unregulated to completely regulated and then currently being partly deregulated. It is governed by a number of acts. Together with banking services, insurance services add about 7% to the country’s GDP. A well-developed and evolved insurance sector is a boon for economic development as it provides long-term funds for infrastructure development at the same time strengthening the risk-taking ability of the country. Unclaimed Insurance money is a breeding problem, thousands of crores of rupees are lying unclaimed with the bank and nothing constructive is being done. Insurance Regulatory and development Authority of India through several notifications tried to educate the policyholders regarding their rights of claiming their money as well as incorporated a sense of responsibility within the insurers to manage such problems.

This paper is mainly concerned with a detailed study about Life Insurance Policies and Unclaimed Insurance money lying with the banks. Policyholders invest money with the intention of getting benefits to either them or to their beneficiaries but due to certain uncertainties and loopholes in the banking industry, they are left with nothing. This paper further briefly discusses the problem and provides with a solution that is required and can be used to eradicate the problem and prevent such scenarios in the future.

Key Words: Insurance Regulatory and Development Authority in India (IRDAI), Unclaimed Premium, Insurance Policy, Abuse.
INTRODUCTION

Insurance is a co-operative device to spread the loss caused by a particular risk over a number of persons who are exposed to it and who agree to insure themselves against the risk. Under the plan of insurance, a large number of people associate themselves to share different types of risks attached to human life and property. The aim of all types of insurance is to make provision against such risks. In other words, it is a provision which a prudent man makes against inevitable contingencies, loss or misfortune. In this way, life insurance is a social device to share the risk of loss of life.

The best explanation of the definition and nature of life insurance contract undoubtedly occurs in the case titled Dalby v. India and London Life Assurance Company. It was decided that: “one who pays premium for the purpose of insuring himself pays on the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro quo, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid down in it applies, and shows that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on account of the defendant’s negligence”.

In Chandulal Harjivandas v. Commissioner of income tax, Gujarat supreme court on page 631 held that “life insurance in a broader sense comprises of any contract in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another party”.

The Insurance Act 1938 was the first legislation governing life insurance as well as non-life insurance to give strict state control over insurance business. The interest for nationalization was made over and over before until when it gathered momentum in 1944 when a bill to amend the Life Insurance Act 1938 was presented in the Legislative Assembly. Nonetheless, it was a lot later on the nineteenth of January, 1956, that life insurance in India was

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1 Dalby v. India and London Life Assurance Company (1854) 15 CB 365.
nationalized. Around 154 Indian insurance agencies, 16 non-Indian organizations and 75 provident are operating in India at the hour of nationalization.³

“The nationalisation of life insurance is an important step in our march towards a socialist society. Its objective will be to serve the individual as well as the state. We require life insurance to spread rapidly all over the country and to bring a measure of security to our people.”⁴

The goal of nationalizing these organizations was clear, for giving standardized social security in a welfare state. Given the social service character of life insurances it became imperative for the government to intercede and prevent jeopardizing the savings and security of the policyholders. Starting today with lying unclaimed premiums it totally invalidates the prime goal of these agencies. It goes without saying that life Insurance is an absolute necessity. It is a risk minimization and protection tool that must be purchased without any thought or choice. After all it is the question of a life that supports a considerable number of people. Hence, realize the significance of life insurance and compulsorily sign yourself up for it.

UNCLAIMED INSURANCE POLICIES IN INDIA

“Unclaimed Amounts” shall include any amount held by insurers but payable to policyholders or beneficiaries, including interest accrued thereon, remaining unclaimed beyond six months from the due date or settlement date of such amount, whichever is earlier.5

Sources breeding Unclaimed Insurance Policies in India:6

1. Nominees not aware of the policy: The nominees may not be aware that the policyholder had such an insurance policy or whereabouts of the policy document. Thereafter, on the death of the policyholders, the dependants may not be in a position to claim the amount. To avoid such a scenario, the nominees should not only be aware but they should also be in the know of where the policy document is. Also, make sure to update nominations in the policy.

2. Change in address: Where the settlement of claims happens through payments made by cheque, any change in the address of the policyholder/claimants will delay the process. To avoid this, ensure that the address is updated in the insurer's records.

3. Cheque misplaced: Cheque payments can become time-barred or misplaced leading to delays. Most insures have initiated claims payments through electronic transfer of funds, hence make sure to enrol for it in all the existing policies. For new policies issued after 2014, insurers insist on electronic transfer of funds and thus asking for blank cancelled cheque at the time of application itself.

4. Dispute among beneficiaries: In case there are multiple beneficiaries, probability of dispute among them is high. In such a scenario, in case of death of the policyholder, there would be no information to the insurer and based on the status of the policy the money payable could get transferred to unclaimed fund.

5. Policy cancellation and failure in refund processing: “policy cancellation and refund money not reaching the policyholders is another reason for the rise in unclaimed funds.” For instance, you have taken a life insurance policy with a limited premium payment period of 10 years for a policy term of 30 years. But, after 5 years you decide


6Circular: The Limitation Act, 1963 provides a time limit of 3 years for claim due to a policyholder under an insurance policy, the Authority vide circular no. IRDA/F&A/CIR/CMP/174/11/2010 dated 04.11.2010 had directed insurers not to appropriate/write back unclaimed amount of policy holders and disclose such amount as a separate line item under “Current Liabilities”, 2014, IRDA/F&A/CIR/GLD/056/02/2014, Insurance Regulatory and Development Authority.
to surrender your policy, so the refund amount could be small which is easier to slip from your follow-up list and adds to unclaimed amount.

**Today in India Rs 15,167 crore worth amount** of policyholders are lying unclaimed with 23 life insurers, according to Irdai data. Insurance regulator has already asked insurers to take steps to identify the policyholders or beneficiaries and disburse the claims. Board level committee for policyholder protection of every insurer is entrusted with the responsibility of monitoring the timely payout of the all dues to policyholders. It also oversees the steps taken by the insurers to reduce unclaimed amounts as part of the standard procedures on customer service.\(^7\)

In order to claim the unclaimed insurance money hassle-free, IRDA has directed all the insurers (life and non-life) to provide the details of unclaimed insurance money of Rs.1,000 or more on their websites. People are required to fill their details regarding their insurance policies\(^8\):

- **Policyholder’s name**
- Policy Number
- **Date of birth of Policyholder**
- **PAN card number**
- Aadhaar Number

If the filled information matches the insurance company record, the unclaimed insurance money lying with the company gets displayed on the screen along with the policyholder’s name and address. The information regarding unclaimed amounts shall be updated by the insurers on their respective websites on half yearly basis - as on 31st March and 30th September every year.

IRDAI had asked the life insurance companies to provide a search facility on their website to enable policyholders or beneficiaries or dependents to find out whether any unclaimed amounts due to them are lying with these companies. LIC, HDFC, SBI and various others banks have managed to provide an online portal after the regulations provided by the Insurance Regulatory Development Authority India where people can enter their details and

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claim their unclaimed insurance policy. Insurance sector regulator Irdai has asked all the insurers to inform policyholders through messages on receipt of premium from January 1, aimed at protecting the interest of consumers.  

IRDAI said the order is being issued to enhance the policyholder protection and information. Clear communication plays a vital role in servicing of insurance policies and in ensuring that the benefits of insurance policies flow to the beneficiaries in a timely manner. Insurance companies will have to inform about claim settlement status to policyholders at various stages of processing. Insurers need to adopt a clear and transparent communication policy to protect the interest of policyholders, it said in a circular. When it comes to claims, there is a need to make available a tracking mechanism for policyholders so as to enable them to know the status of their claims, it added. "In order to ensure fair and transparent claim settlement procedures, all insurers shall notify about the status of the claim at various stages of its processing.

Irdai has made it mandatory to forward proceeds of all the claims through electronic mode only from the next fiscal to make the settlements quick and direct. The insurer along with documentary proofs will also have to collect bank details as electronic clearance is mandatory for all new policyholders from now, while it is optional for existing life policyholders.

Policyholders are needed to be informed about this option in the next six months by the insurer. The insurer will need bank details of the nominee as well to pay the death claims. The insurer has an option to pay by cheque in case the payment doesn't exceed Rs. 25,000 for a non-life insurance policy or Rs. 10,000 for a life insurance policy. Irdai also asked insurers -- life, health and general -- to send all communication about issuance and servicing of policies through letter, e-mail, SMS or any other electronic form approved by it.

How is the unclaimed insurance money channelized in India?  

If Insurance money remains unclaimed beyond 10 years from the due date of claim settlement, the same is transferred to the Senior Citizen Welfare Fund, which has been formed by the Government through Finance Act 2015. The fund is utilized towards the welfare of the senior citizen in line with National Policy on Senior Citizens and National Policy on Older Persons. The other institutions which are directed to deposit the unclaimed

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9 ibid.
10 Supra note 7.
11 Supra note 5.
funds to the Senior Citizen Welfare Fund are Employees Provident Fund Organisation and Post Offices.

According to the Insurance Regulatory Development Authority India senior citizen welfare fund is defined as

“Senior Citizens ‘Welfare Fund ‘shall mean the Fund as defined in section 122 of Part II of Chapter VII of the Finance Act, 2015, or any amendment thereof.

Policyholders/ beneficiaries shall be eligible to claim the dues under their policies up to 25 years from the date of transfer of the same to the Senior Citizen’s Welfare Fund (SCWF) by the concerned insurer. If no claim is made up to a period of 25 years after transfer to the SCWF, such amounts shall escheat to the Central Government, in terms of Section 126 of the Finance Act, 2015.
THE PROBLEM

Banking Industry in India plays a very crucial role in India’s economic structure. The Indian banking system consists of 20 public sector banks, 22 private sector banks, 44 foreign banks, 44 regional rural banks, 1,542 urban cooperative banks and 94,384 rural cooperative banks in addition to cooperative credit institutions. As on January 31, 2020, the total number of ATMs in India increased to 210,263 and is further expected to increase to 407,000 by 2021, in addition to cooperative credit institutions during FY16-FY20, credit off-take grew at a CAGR of 13.93 per cent.\(^ {12} \)

Unclaimed Insurance Money is contemporaneously increasing with the banks, no guidelines, no regulations are able to eliminate such problems from the country. Despite the clear guidelines by Irdai in 2014 and a strict monitoring of unclaimed amount every six months, the figures are rising. Insurers need to ensure that every amount goes to the rightful claimant at the right time as intended by the policyholder at the time of buying it. Policyholders, too, need to make sure that the family members are well aware of the policy details and their rights as nominees.

On the contrary people have started taking undue advantage of such situations where people from anonymous sources, have randomly started asking people for their bank account numbers and passwords in order to offer unclaimed funds from none other than the Reserve Bank of India. It was seen that a large number of people believed the said email and got trapped into such scams. Since the year 2010 IRDAI have been issuing guidelines and regulations with respect to the unclaimed money lying with the banks but till date no strict actions have been taken. No substantive decrease has been noticed in the amount of unclaimed premium lying with the banks. Humans have a tendency to turn any situation in their own benefit, banks today have been enjoying themselves with the unclaimed amount lying with them. No regulations have been strictly followed by the banks and no guidelines have been issued by the banks.

It not only affects the policy holders but it is also affecting the capital generation in the economy as a huge amount of money is lying idle. Thousands of crores rupees are lying idle which decreases the capital generation in the economy, if the funds are appropriately allocated then people who use it properly in the economy for authorise and legal transactions can create more capital formation within the country.

\(^ {12} \) Indian bank industry analysis, INDIAN BRAND EQUITY FOUNDATION, (January27th 2021, 3:00 pm), https://www.ibef.org/industry/banking-presentation.
The country’s growth is hugely dependent on the banking sector and with so much of amount lying unclaimed and idle it is merely leading to wastage of resources and people who deserve them and who need the money to use it under contingencies can’t use it and have to suffer adverse consequences.

Even if the money is transferred to the senior citizen welfare fund due to immense amount of corruption present in our country the funds are not used appropriate but it is used by unauthorised transactions where people start using it for their personal advantage.

Channelization of insurance money to senior citizen welfare fund is not a solution to stop the prevalence of unclaimed insurance money, it has to be sourced back to the place it belongs and therefore policyholders should get their unclaimed money back.

Till today no cases of unclaimed life insurance policy has been filed against any insurer(banks) as once the contingency is dealt with people become oblivious to their rights and even after coming into the knowledge of their policies, do not try to claim it as they believe that once the contingency is dealt with thereafter what to do with the money.
THE SOLUTION

India is a country with 120 billion people where merely issuing guidelines for the banks will not make the situation any better, strict application of these guidelines is important and this can be achieved through enacting these provisions as law by the parliament to ensure that banks are fulfilling their obligations. United Sates back in the year 1944 had created a legislation where under section 700 headed ‘Unclaimed Life Insurance Funds’ made provisions to find the unclaimed money and try to return it to the beneficiaries.

Deterrence is one of the keys to reduce crime. Central Government should start penalizing the banks for having unclaimed insurance policies, as it was done by Maharashtra Government where Maharashtra consumer commission has held that in case there is a delay in receiving the reimbursement amount, one can claim interest on it. Ruling in favour of a woman who was reimbursed around Rs 1.7 lakh spent on an ovarian surgery almost three years after her claim, the commission said that she was entitled to 9% interest on the amount. Government can start charging interest on the unclaimed money owned by the banks. Along with strict provisions, it is important for the government to generate more awareness amongst not only the younger generation but also the older generation.

It is mandatory by the Master Circular given by the IRDAI in 2017 for the banks to systematically record and disclose all the unclaimed policies either on their website or maintain it at the bank, it should also become mandatory for the policy holders to maintain a systematic data on an online portal either created by the banks or government where people can enter their data and store it and the same can be accessed by the claimants or the beneficiaries when the time comes. Such schemes can also help India to become more digital and more systematic.

Rajeev Chugh, CFO, Aegon Life Insurance recommended, “Policyholders should record all his/her financials and insurance policy details at one place for easy reference in future.”

For instance, one can use e-books at no extra cost to maintain record of all such policies and financials of a family.

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General recommendations for policy holders Monitor and Track all your investments regularly. Try to invest online wherever and whenever it is possible. Update your latest contact details with your bank or other financial institutions. Keep your family members updated about all your investments.

Assign nominees for all the investment. With the vulnerabilities and possibilities of life, having Insurance Policies make it somewhat less dubious and furnishes with help amid troublesome circumstances people tend to relieve themselves of the contingencies with the belief that whenever faced with any contingency they will be well guarded with their policies. Thus, the significance of having a life insurance lies in the “peace of mind” that it brings along, however, when people are not able to avail the facilities, when people are not able to get the assistance, they deserve it hits the fundamental rule of equity. Indeed, even subsequent to paying immense amount of insurance premiums, the final product isn’t what they have anticipated. Such practices breed injustice within the society.

The life insurance industry plays an important role in improving national economy. The private life insurer offers various new policies to attract their policyholders. In modern competitive era human beings suffering a lot of contingencies. And life insurance policies help them to fight back against it. After understanding the root cause, the recommendations along with the existing regulations and guidelines, India only needs a strict implication of the policies and as for the policy holders, they need to be more aware and should make their nominees/claimants aware of their insurance policies to avail the benefits at the right time when needed. Life insurance Corporation of India and IRDA must concentrate in introducing new plans for facing health problem of day to day activities of human beings. Life insurance Corporation of India should educate importance of insurance to general public through the agent and corporate social responsibility activity.
CONCLUSION

With the vulnerabilities of life, having Life Insurance Policies makes it somewhat less dubious and furnishes with help during troublesome circumstances. People tend to often release themselves of the burden of facing uncertainty with the belief that whenever any contingency will fall into their lives, it will be well guarded by their policies. Thus, the significance of having a life insurance lies in the “peace of mind” that it brings along. However, when people are not able to avail the facilities, when people are not able to get the assistance, they deserve it hits the fundamental rule of equity which each person on this world merits. Indeed, even subsequent to paying immense amount of insurance premiums, the final product isn’t what they have anticipated. Such practices breed injustice within the society. The life insurance industry plays an important role in improving national economy. The private life insurer offers various new policies to attract their policyholders.

In modern competitive era human beings suffering a lot of contingencies and life insurance policies help them to fight back against it. After understanding the root cause, the recommendations along with the existing regulations and guidelines, India only needs a strict implication of the policies and as for the policy holders, they need to be more aware and should make their nominees/claimants aware of their insurance policies to avail the benefits at the right time when needed. Life insurance Corporation of India and IRDA must concentrate in introducing new and effective plans for overcoming such situation.
INVISIBLE CONFLICTS OF LGBTQ COMMUNITY

By: Sakshi Kanodia¹ and Nikhil Kashyap²

“There is nothing wrong with you. There’s a lot wrong with the world you live in”

- Chris Colfer

ABSTRACT

With zenith advancement of science and technology we live in a golden age but the deep-rooted prejudices, beliefs and bigotries about gender and sexuality of LGBTQ community has gripped the society in its invisible shackles. Even though all are created equally, the history of LGBTQ community always remains complicated as predominated heterosexual society refuses to perceive them as a part of them. Even after the members of the community are increasingly open, acknowledged, and visible part of the society, the community is often isolated and still struggling for its fundamental and civil rights. They face discrimination, abuse, violence, harassment and hatred because of their identity and sexuality which has tremendous negative consequences worldwide. The orthodox and patriarchal society excludes them from family, social events and cultural festivals and offer fewer job opportunities and healthcare facilities. This paper elaborates on the connection of human rights with gender identity and sexual orientation and provides global perspective as well Indian perspective on the community while critically analysing the landmark judgements that decriminalised homosexuality in India. The paper further highlights the importance of LGBTQ rights and the conundrums confronted by the community along with suggestions.

Keywords: LGBTQ, Society, Discrimination, Challenges, Transgender, Human rights

INTRODUCTION

Every human being is born with some inherent values. Foundation of human rights is based on a fundamental principle that every human being has dignity and should be viewed as equal. Constitution of India has embedded social, economic, and political justice along with fraternity among its citizens. However, around the world, people face inequality and violence because of reasons which are influenced by several factors including how they look, how they dress, who they are and who they love. Human sexuality is complex and accepting

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distinction between behaviour, desire and identity recognises the multidimensional nature of sexuality. The fact that these dimensions may not always remain harmonious in people proposes the complexity of this issue. The umbrella abbreviation of LGBTQ community encompasses an extensive combination of complex and contradictory identities which are diverse with regard to sexual orientation, gender, ethnicity, political agendas and socio-economic status. Prevalence of homosexuality is challenging to estimate because of associated stigma, social subjugation, unrepresentative samples, and failure to differentiate among desire, behaviour and identity. Gender identity and sexual orientation are integral facets of human being and should never lead to abuse or discrimination, but lesbian, gay, bisexual, transgender, or queer community (LGBTQ) have historically faced and continue to face humiliation and discrimination in all areas which has become a way of life. Abuse based on gender identity and sexual orientation worldwide include torture, arrest under unjust laws, medical abuse, denial of family rights and recognition, name-calling, bullying, unequal treatment, discrimination in jobs, health and housing which can be extensively damaging and sometimes even life-threatening.

In recent years, the rights of LGBTQ community are attracting attention and social knowledge around the world with major progressive changes including introduction of new legal protections but there still remains those invisible shackles of societal oppression upon LGBTQ community who have been an integral part of our nation and culture. Complexities in these identities call for respect, patience, and nuanced understanding of sexual matters. We need to advocate for and designed policies and laws that will protect dignity of everyone and ensure LGBTQ community a sense of belonging along with driving cultural barriers out of our society.

SEXUAL ORIENTATION AND GENDER IDENTITY WITH REGARD TO HUMAN RIGHTS

Human rights are universal and equal for all but from time immemorial LGBTQ community have been subjected to non-sanctioned discrimination and brutal abuse essentially because a dominant social group consider the LGBTQ community to be less human. Homosexuality is categorised as against nature or unnatural thus considered immoral by society. However, enjoyment of human rights does not depend on behaviour of humans or their gender identity or sexual orientation. Article 2 of UDHR states that rights provided in the declaration are “Without distinction of any kind, such as race, colour, sex, language, religion, political or
another opinion, national or social origin, property, birth or another status.”³ On the similar lines of UDHR, Article 14 of European Convention on Human Rights provides that “Enjoyment of rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or another opinion, national or social origin, association with the national minority, property, birth or other status.”⁴ In the case of Karner v. Austria⁵ and Frette v. France⁶ it was held that Article 14 of ECHR protects sexual orientation. On the other hand, Article 26 of ICCPR provides that “The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status.”⁷ Though sexual orientation is not expressly mentioned under this Article but in the case of Toonen v. Australia⁸ the Human Rights Committee held that sexual orientation is to be included as a protected distinction under sex. Human Rights Council adopted two resolutions about gender identity and sexual orientation which focuses on grave problems of discrimination, violence, and abuse against LGBTQ community i.e., 17/19 from 2011 and 27/32 from 2014. The reports of both the resolutions expressed the universality, equality, and non-discrimination that the states should apply regarding LGBTQ rights.

GLOBAL PERSPECTIVE

Same sex orientation and behaviour has been decriminalised in several countries. Many progressive and liberal nations have bestowed civil, political, and human rights to LGBTQ community. Countries such as South Africa, Brazil, France, Sweden, England, Spain, and other States of US have legally recognised same sex marriage and civil partnership. It also includes legislation on anti-bullying, employment, immigration equality, housing, education, equal age of consent and hate crime laws that attract enhanced criminal penalties for prejudice motivated violence against individuals of LGBTQ community. Ireland that decriminalised homosexuality in 1993 became the first country to permit same sex marriage at a national level by popular vote. Nepal, Taiwan, Vietnam, China, and Japan have legalised

³ Article 2, Universal Declaration of Human Rights
⁴ Article 14, European Convention on Human Rights
⁵ Karner v. Austria, Application no. 40016/98, (Council of Europe: European Court of Human Rights)
⁶ Frette v. France, Application no. 36515/97, (Council of Europe: European Court of Human Rights)
⁷ Article 26, International Covenant on Civil and Political Rights
homosexuality and some even protect members of LGBTQ community from discrimination. Recently municipal government of Tokyo passed a bill to forbid discrimination against members of LGBTQ community. Japan voted twice for UN resolution that took inspiration from Olympic Charter to stop discrimination and violence against LGBTQ community. In December 2014, the International Olympic Committee as part of its Olympic Agenda 2020 established that all future host city contracts would explicitly include an obligation of prohibiting discrimination based on sexual orientation. International Lesbian, Gay, Bisexual, Trans, and Intersex Association in its 2017 annual State sponsored Homophobia Report that homosexuality is no longer penalised in 124 countries which was given effect either through amending statutory enactments or judgements of court. States across the world have been increasingly according the protection to relationships between same sex couples and have enacted enabling legislations which allow them to adopt children and protect from discrimination. Theresa May, the then Prime Minister of Britain in her Commonwealth Joint Forum speech expressed regret regarding role of Britain in introducing such discriminatory laws across the world that criminalised same-sex relations the repercussions of which continue to affect the lives of many people thus urging Common Wealth Nations to overhaul out-dated anti-gay laws. In 1990, World Health Organisation specifically chose 17th May to declassify homosexuality as a mental disorder and this day is observed as International Day Against Homophobia, Transphobia and Biphobia. By 2016, 132 countries across the globe observed this day.

INDIAN PERSPECTIVE

Section 377 of the Indian Penal Code, 1860 provided that “Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished.”9 This section also included within its ambit private consensual sex between adults of same sex thus criminalising it. Delhi High Court in Naz Foundation v. Govt. of NCT of Delhi10 struck off Section 377 of the Indian Penal Code, 1860 for violating Articles 14, 15 and 21 of Constitution of Indian, thus legalising homosexual activities between adults. However, this judgment was overturned by Supreme Court in Suresh Kumar Koushal case11 where it was held that there was no need to decriminalise homosexual sex since LGBTQ community constitute a minuscule minority thus plight of sexual minorities cannot be used as an

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9 Section 377, Indian Penal Code, 1860
10 Naz Foundation v. Govt. of NCT of Delhi WP(C) No.7455/2001, (Delhi High Court)
11 Suresh Kumar Koushal v. Naz Foundation (2014) 1 SCC 1, (Supreme Court of India)
argument for determining constitutionality of this law. Also, the court ruled that it was for the legislature to look into the desirability of deleting Section 377 of the Indian Penal Code, 1860. Later dismissing the position taken in Suresh Kumar Koushal case the Apex Court in *Navtej Singh Johar v. Union of India*\(^\text{12}\) paid special focus to transformative constitutionalism and decriminalised homosexuality by further stating that “*History owes an apology to members of this community and their families, for the delay in providing redressal for ignominy and ostracism that they have suffered through centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution.*” The Court clarified that equality before law\(^\text{13}\) is guaranteed under Article 14 of the Constitution of India which applies to all classes of citizens thus restoring inclusiveness of the LGBTQ community. Upholding the pre-eminence of constitutional morality in India, the Supreme Court observed that equality before law cannot be denied by giving precedence to public or religious morality since “*Constitutional Morality is not confined to the literal text of the constitution, rather, it must seek to usher in a pluralistic and inclusive society.*”

It was further noted by the Court that legislations and modern psychiatric studies recognise that gay individuals and transgenders do not suffer from mental disorder and thus cannot be penalised. The Court observed that since homosexuality is not unique to humans, the prejudice that it is against the order of nature is ousted. The Court also stated that ‘*Yogyakarta Principles*\(^\text{14}\) on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity’ which recognises freedom of gender identity and sexual orientation as a part of human rights, should be applied as a part of Indian law. In *Justice K.S. Puttaswamy v. Union of India*\(^\text{15}\) the Court ruled that right to privacy is intrinsic to life and liberty thus guaranteed under Article 21 of the Constitution. Bodily autonomy which is an integral part of right to privacy has within its ambit sexual orientation of an individual. “*Discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual. Equality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution.*” The Court further noted that Section 377 of the Indian Penal Code, 1860 stripped an individual of his dignity and criminalised him solely on the ground of his sexuality which was ultra vires Article 21 of the

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\(^{12}\) Navtej Singh Johar v. Union of India (2018) 1 SCC 791, (Supreme Court of India)
\(^{13}\) Article 14, The Constitution of India
\(^{14}\) Outlined by a distinguished group of International Human Rights experts in 2006 in Yogyakarta, Indonesia.
\(^{15}\) K.S. Puttaswamy v. Union of India (2017) 10 SCC 1, (Supreme Court of India)
Constitution. The Supreme Court in National Legal Services Authority v. Union of India\textsuperscript{16} held that transgender should be treated as third gender which safeguards their fundamental rights guaranteed under Part III of the Constitution along with the laws made by the Parliament and the State Legislature and provide them a society inclusive of all genders. The Court also directed that transgender shall be regarded as socially and educationally backward section of society thus providing them reservation under Other Backward Classes (OBC) category in cases of admission in educational institutions and public appointments. With the reconstitution of Lok Sabha after the 2019 general elections, The Transgender Persons (Protection of Rights) Bill, 2019 was reintroduced in Lok Sabha on 19\textsuperscript{th} July, 2019 by the then Minister of Social Justice and Empowerment, Thawar Chand Gehlot. It was passed by Lok Sabha on 5\textsuperscript{th} August, 2019 and by Rajya Sabha on 26\textsuperscript{th} November, 2019. The Bill defines transgender persons, prohibits discrimination, decriminalise begging by transgenders and ensures healthcare rights and medical insurance schemes among many other rights and welfare schemes. However, since India does not possess uniform marriage law, none of the marriage laws in India recognise same-sex marriage thus denying them right to equality and right to privacy as to choose their family. In 2011, only a single case of marriage between same-sex couple was permitted by Punjab and Haryana Court. India also curtails the right of gay couples to adopt children though several LGBTQ couples have adopted children as a single parent, but their partners have no legal right over the adopted child. India lacks LGBTQ friendly hospitals as they struggle to function outside the binary framework health personnel and mostly untrained to provide appropriate services on HIV prevention and little information on sexual and reproductive healthcare of LGBTQ community because of which many individuals from this community do not receive proper healthcare. Thus, even though individuals of LGBTQ community are getting legal recognitions but within the boundaries of families, workplace and school acceptance of their sexuality and freedom to express their gender preference continues to be a constant conundrum and a big-time struggle.

**IMPORTANCE OF LGBTQ RIGHTS**

Everyone is entitled to feel proud of who they love and who they are. We all have a right to express ourselves freely\textsuperscript{17} and this right is protected under Article 19 of the Universal Declaration of Human Rights. Everyone has a right to life, safety, and freedom and by conferring rights on LGBTQ community we can end transphobia and homophobia and thus

\textsuperscript{16} National Legal Services Authority v. Union of India AIR 2014 SC 1863, (Supreme Court of India)

\textsuperscript{17} Article 19, Universal Declaration of Human Rights
save lives since they are exposed to high risk of physical and psychological harm. By understanding their identities and embracing LGBTQ community we can learn to eliminate many barriers imposed by gender stereotypes and help this community take one step closer to living with dignity. These stereotypes by defining and limiting how the people belonging to this community are expected to live damages the dimensions of society. Thus, by removing these age-old taboos we set everyone free to come out in the open with their sexual preferences and achieve their full potential without any social constraints and discrimination. LGBTQ community is often at risk of social and economic exclusion but with decriminalisation of homosexuality, demand can be made for formulation of progressive laws and policies that are more inclusive of people regardless of their gender identity and sexual orientation will permit them access to right to housing, employment, education, marriage laws, inheritance, adoption, health, and protection from gender identity-based discrimination, among others. Decriminalisation has also led to more self-acceptance along with psychological and emotional security among LGBTQ community.

**CHALLENGES FACED BY LGBTQ COMMUNITY**

Innumerable impediments are faced by the members of LGBTQ community in the society where the only accepted orientation is heterosexuality while homosexuality is considered abnormal or mental illness or psychological disorder. People with homosexual orientation often struggle in acknowledging their homosexual feelings and find meaning of closure. Some members of LGBTQ community face problem or fear or never come out of the closet because of social and cultural expectations such as in various parts of sub-Saharan Africa, people of LGBTQ community continue to live in constant fear of being found out, attacked, and even murdered. LGBTQ people are more likely to experience discrimination, abuse, harassment, intolerance, threat to violence because of their sexual orientation than those that identify themselves to be heterosexual. They are often mocked, bullied, experience derogatory name calling and homophobic language for being different from others that escalated the level of slander, threat and intimidation triggered by gender non-conforming behaviour. They gradually develop low self-esteem and self-confidence and isolate from family and friends. Lack of communication and support from family often lead to conflict and misunderstanding thus resulting in many LGBTQ youths leaving home and family or being placed in foster care, juvenile detention. Some even drop out of school in the early years. LGBTQ teens have a high risk of suffering from mental and health issues because of
rejection from their parents and caregivers. With bare job prospects, limited educational opportunities, lack of legal rights and continuous discrimination, members of LGBTQ community suffer from social and economic inequalities and face racism, violence, and poverty. A lot of times they are victim of violent hate crimes, and are harassed on streets, beaten up, and sometimes even killed. On some occasions, hostility directed at LGBTQ community is fuelled by the government that ought to protect them. In Chechnya, a State-sponsored campaign led to targeting of gay men, some of whom were abducted, tortured, and even killed. LGBTQ activists in Bangladesh were hacked to death by armed groups and the police and government took little interest in ensuring justice to the families of victims. Many countries prohibit and do not legally recognise same sex marriage and same sex sexual activity is a crime in around 70 countries. It even attracts death sentence in nine countries including Iran, Yemen, Sudan, and Saudi Arabia. Criminalisation of homosexuality results in discrimination, inadequate access to services health care services and barriers to both availability and ability to access HIV prevention, testing and treatment services. Countries where such laws are not actually enforced but the knowledge of their very existence reinforces prejudice and hatred against LGBTQ community thus making them feel an outcast with no protection against blackmail, violence, and harassment.

WAY FORWARD

Though several welcoming victories have been made with respect to rights of LGBTQ community in India but that does not imply that the community is completely free or perceived as equal among their fellow citizens. It underlines how much work remains in India as well as around the world to eliminate antiquated and repressive anti-gay laws that focus on sexual orientation of people rather than humanity. With respect to societal and cultural consent and acceptance, where homosexuality will be considered to be natural and not made dominant identity of an individual, the world has a long way to go. In order to suit our ever-growing society and its dynamic culture, the makers of Indian Constitution left room for expanding or curtailing the laws in part or as a whole. Thus, the pressing issues of LGBTQ community are not something that cannot find light at the end of the tunnel. There is a need to stimulate debate on equality, diversity, promote shared understanding of equality, disseminate good practices, and also to sensitise, train and empower the general public to welcome and support LGBTQ community. There is an immediate need to introduce an anti-discrimination law that empowers LGBTQ community to establish productive lives and
relationships regardless of gender identity and sexual orientation. Clinical assessment should be detailed and move past routine labelling and also assess various issues related to lifestyle choices, relationship, identity and social support. It is mandatory to assist people in understanding their sexuality and afford support for living in a pre-dominantly heterosexual world. With combined efforts of leaders, legislators, activists, academicians, and civil society progressive laws can be formulated that uphold the fundamental rights and dignity of LGBTQ community. Instead of changing the individual, India needs to put the onus on State and society to change its perspective and attitude towards LGBTQ community and look at them with respect and dignity rather than as a symbol of social pollutants and vulgarity. Positive, sensitive, and non-judgemental outlook will go a long way in relieving stress of this community and ensure more holistic care. We all need to work for a world where every individual can fully enjoy their rights. Taking initiative to enhance the LGBTQ community is the true essence of democracy. As Johann Wolfgang Von Goethe “I am what I am, so take me as I am.”
KHAP PANCHAYAT- HONOUR KILLING AND JUDICIAL APPROACH

(By Bhawna Yadav)

ABSTRACT-
Indian society is a multicultural and pluralistic society where a lot of beliefs and faith regulate the human life of the citizens. In a patriarchal society, women are considered as bearer of honour of the family. This perception is so well entrenched that any attempt by women to assert their rights is seen as an attack on the cultural norms of the community and is strongly countered. And these counter activities taken by the family in the name of honour is known as Honour Killing. Though there are no specific laws on such killings, certain other provisions in statutes are used to punish the perpetrators. Due to this, such crimes go unreported or are passed off as suicide or natural deaths by the family members involved. In examines the factor of honour killing by khap panchayats and judicial approach in this regard.

INTRODUCTION
Khap panchayat can be regarded as a traditional body which was constituted when people started living in a community and to protect their culture and tradition. This was constituted in which 5 to 15 members were elected who belongs to upper caste and they mainly include older people of village and mainly male are only member of this body. Gradually, this became powerful body in those areas and they govern their area which geographically comes within their jurisdiction. The ‘khap panchayat’ is an ancient concept which has written references found back from the Rig Vedic times. The members of these castes comprise mainly having higher social status, age, gender, financial power etc.

HISTORY
The exact origin of khap is not known but it is believed to be started back in six hundred AD. In ancient time when people were living nomadic life, villages were formed, and man was moving towards civilization and better standard of life. Even then the many villages and tribes continue to exist in all parts of India who are more inclined to the customs and traditions and to preserve these they constituted a body known as khap panchayat to give authority to protect their culture, custom and punish who violates the rules made by them.
IN WHAT STATES DO THESE KHAP PANCHAYAT MOSTLY EXIST?
These khap panchayat exist mostly in the states of western Uttar Pradesh, Eastern Rajasthan but are most prevalent in Rohtak, Jhajjar, Sonepat, Bhiwani, Karnal, Jind, Kaithal and Hisar district of Haryana.

WHAT ARE THEIR PURPOSES?
Khap panchayat mainly maintains the khap laws made by the same gotra. It mainly asks for the amendment under the Hindu marriage act, 1955 banning marriages within the same gotra or even the gotra in the same village. According to them the boy and the girl of the same gotra or the same village are regarded as brothers and sisters. Love marriages are regarded as sin to the village and the family. They themselves regard as protector of customs and traditions and keep a watch on youth. According to them the youth’s life style shall be according to the rules made by the khap and if they dare to violate those rules then they are punished harshly. The girls don’t have right to make their own decision according to them in 21st century also the life and decisions on women before marriage is controlled by father, brother or other male member of the society and after marriage y the husband.

HOW DO THEY FUNCTION?
There are mainly ten to fifteen members constituting khap panchayat. These are the people who mainly control and make the decision regarding the lives and way of lives of the young people. They themselves regard like they are maintaining culture, custom and tradition of the society. People of the village also support them because of the efficiency in delivering the decision in a single sitting. Justice is speedily given to the people and they don’t have to go to the court and wait for a long time to get justice, so they rely on the verdict of the khap panchayat only. These people have faith on the khap decisions. Since they ensure that there is neutrality in the decisions and so they can survive from the court where innocent people are harassed because of the long term pending case in the court and the police sometimes.

Khap panchayat enforces its decisions mainly through imposing heavy fines or sometimes even kills the victims or makes them commit suicide.

In some villages of Haryana, young girls are threatened, tortured, killed and sometimes they are forced to commit suicide. Families sometimes feed their girls with pesticides and then burn these bodies to get rid of them without giving evidence to the police about it. In these khap there is no question of rights of these girls. They only have the duty to maintain the
honor of the village. In village the honor has to be maintained by them, the burden is on the girl’s shoulders. If a girl tries to alter the rules she gets subjected to the punishment. Sometimes these are bent for boys also. If a couple runs away then the family of the couple has to suffer. They get boycotted and had to pay extensive amount of fines.\footnote{Ashok Bagriya, \textit{You’re no one to interfere in the marriage: Supreme Court to Khap Panchayats on ‘honor killings’}, HINDUSTAN TIMES, Feb 05, 2018.}

**STATUS OF KHAP PANCHAYATS**

The khap panchayat does not have any legal status; they are extra-constitutional body, which exercise their powers over the victims who dare to live their life according to their own wish. These khap panchayat shall be abolished. They punish the victims so harshly and torture them which amounts to human rights violations. The political parties are well aware of the problem caused by the khap in the lives of youth but then also they have no courage to speak against them as they may alter their fate in the election, as they are the powerful people of the village on which the result of election depends.

These panchayat are in lime lights because of the acts like honour killing, forced marriages, punishments to rape victims, punishment in case of adultery to women, etc. according to them the burden of protecting the honour of the family is on the girls and sometimes man also become the victim of these honour killing mainly if they belong to lower caste and dare to marry the higher caste girl.

**WHY PEOPLE BELIEVE IN THESE KHAP**

The people who have so much belief in such organizations because:

1. Khap delivers the judgement in one sitting while the legal courts take years for it.

2. In many cases the innocent people are harassed by the court and police authority while in case of khap there us surety of neutrality.

3. The members of khap are generally senior citizens and they are experienced and are regarded as custodian of culture so no one goes against their decisions.

4. The khap is old powerful organization at local level so no one dares to go against it.
KHAP PANCHAYAT AND HONOUR KILLING
Whenever any act is done by the youth especially girls which is against the culture, or rules of the khap then they are harass punishment which may extend to the killing of the victim and this is known as honour killing. Killing in the name of honour.

HONOUR KILLING IN INDIA
Honour is an act in which either the person who commits an act against the custom, culture or rules made by the khap or the whole family of that person is put to death or tortured to the extent that they themselves commit suicide. It is an act of killing which is mainly when the person does not agree for arranged marriage, or marrying a person according to their own wish, or doing inter-caste marriage which is against the village of their family. In India this is an older practice. Supreme Court had brought a decision which is based on honor killing that “killing a person assault being made over young men/women who marries against the wish of the member of the family is illegal.” In India honour killing mostly takes place in Punjab, Uttar Pradesh, Haryana, and Rajasthan. The main reason is that the higher caste people do not accept the inter-caste in order to maintain their caste and does not want to lower their status at any cost, so if any one dares to commit such act they are mainly put to death. Even the status, sorgotra is also same, people do not agree for love marriage. According to them killing is done to restore the status which is lowered by that man/woman. Honour killing is a rarest of rare case crime and till now no strict laws are made to suppress it.

SPECIFIC TRIGGERS OF HONOUR KILLING

The following are the reasons for honour killing:

- **Refusal for an arranged marriage**: if any member of the family (whether male or female), if refused to marry according to the wish of the family, they are killed to the welfare of the family. It is a shame to that family when they do not accept the marriage arranged for them by the family.

- **Seeking a divorce**: divorce is regarded as bringing down the status of the family. If the victim of honor killing is a married party and if there are some issues in their martial life which cannot be solved and decided to divorce. This lead to lower down to prestige of the family and they are put to death or are tortured to such an extent that they commit suicide.
• **Homo-sexuality**: homo-sexuality was not regarded in our society earlier when the couple of the same sex wants to live together and form a family, society does not permit it as this cause to lower the status of the family, but now Supreme Court has “decriminalized homo-sexuality under Section 377 of IPC.” But then also the thoughts of society have not changed and strict laws shall be made to curtail this practice.

• **Victims of rape**: in a society where a woman shall be protected, they are reaped and in that case the family of the rape victim shall accept her and support her, the family feels shameful and thinks that she is completely useless to the society and the family and thus she is put to death.

• **Patriarchal mindset**: Men are considered as controller over the actions of women and prevent women from committing any act which would bring dishonor to the community and family. This shows that patriarchal system is still prevalent in our society.

• **The education system**: The education system is expanding in our country thereby women are also educated, going for jobs which is not accepted by some people of the community and regard as women are spoiling their culture which leads to honor killing.

• **Caste system**: The existence of caste system is curse to the Indian society which leads to its destruction. The right to marry is a right provided in Universal Declaration of human rights (UDHR) irrespective of religion, race, caste, class. But then also the caste system is deep rooted in our society. If a man or woman dare to choose partner outside the caste are killed by the people.

In a supreme court (Lata Singh v. state of Uttar Pradesh), it was stated by justice Markanday Katju that “honor killing are nothing but cold blooded murder and honor is involved in such killings”. The Supreme Court also observed that “inter-caste and inter-religious marriages should be encouraged to strengthen the social fabric of society.”

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POLITICS AND KHAP PANCHAYAT:
The political parties have power to curb the practice of honor killing and abolish the khap panchayat but because of their own selfish motives they don’t dare to speak against them. In fact sometimes it is noticed that they favoured khap panchayat.

“Some of the instances are:

- The active CM of Haryana state Manohar Lal Khattar had given his statement in the favor of khaps recently, “They are like parents minding the children, and they take swift decisions on matters in which the courts are silent. Khap Panchayats consist of experienced members of the society and they make sensible decisions.” He further added, “The existence of khap panchayats makes the courts work easily at most times. There are several litigations that go on for several 20 to 30 years. If a matter is solved outside court, it is better.”

- The ex CM of Haryana Bhupinder Singh Hooda had no small feat in admiring these panchayats, he urged, “Khap Panchayats are like NGOs as we have resident welfare associations…they are part of our culture.”

- The leader of AAP and current CM of NCT of Delhi Arvind Kejriwal had also responded on the question of banning khap panchayats. No, it is not a question of banning these panchayats. Khap Panchayats are a group of people who come together. There is no bar on people to assemble in this country…(But) whenever they take a wrong/illegal decision, they ought to be punished.”

EXECUTIVE, LEGISLATIVE AND JUDICIAL ACTS

- EXECUTIVE AND LEGISLATIVE ACTIONS:
The political parties have no courage to speak against the khap as their fate in the elections can be altered by them. However the two bills were suggested and drafted by the law commission if India for the banning of honor killing. But, so far no law is made to curb the practice of honour killings and all the execution are covered under the murders and homicides.

In 2012, the law commission of India has drafted a bill “prohibition of unlawful assembly (interference with the freedom of matrimonial alliance) bill, 2012.” This bill was proposed

https://www.britannica.com/topic/honor-killing

to prohibit the people from coming together and pronouncing such marriages as illegal on the ground that such marriage has brought dishonour to the caste or community. But so far this bill is not moved forward.

Another bill was drafted again by the law commission of India which was “endangerment of life and liberty (protection, prosecution and other measures) act, 2011. This bill was to prosecute and punish person or gang of persons who are involved in threat, encouragement and creating environment where the loss of life and liberty is caused.

They bills are only proposed and no legislative reform has been made to curb the practice of honor killing or abolishing khap panchayat.

The few suggestions for legislative measures are:

1. The fast track courts shall be constituted to deal with the cases of honour killing.
2. The duration of registration of marriage shall be reduced in special marriage act.
3. Protections shall be provided who are engaged in inter-caste marriage.

- JUDICIAL ACTS:

Some of the judicial actions that are directed towards bringing down the kangaroo courts:

1. **State of Uttar Pradesh v. Krishna master**\(^4\) — in this case Supreme Court awarded life sentence to the three accused of honour killing.
2. **Manoj and Babli murder case**\(^5\) — in the case the seven convicts of honour killing were sentenced to life imprisonment by the Punjab and Haryana high court.
3. **Armugan Servai v. state of Tamil Nadu**\(^6\) - Supreme Court that the khap panchayat are illegal and they must be rooted out.

**HIGHLIGHTED CASES OF KHAPS AND HONOUR KILLING:**

- **Smt. Chandrapati v. state of Haryana and others on 27 may, 2011**\(^7\)

In this case Manoj and babli both were major capable of performing marraige, both performed their marriage according to Hindu rites and ceremonies, but according to khap

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\(^4\) JT. 2013 (6) S.C. 1.
\(^5\) Smt, Chandrapati v State of Haryana and others on 27 May, 2011
\(^6\) (2011) 6 S.C.C. 405
\(^7\) Smt. Chandrapati v State of Haryana and ors.
panchayat they violated the rules made khap and they were killed on the order passed by khap panchayat. The court convicted the khap for honor killing.

- **Lata singh v. state of Uttar Pradesh**

The supreme court took judicial notice over the increase in honor killing and said that the society is taking transformation and the court cannot be silent spectator. The Supreme Court observed that in a democratic country and people have freedom and the right to choose a partner for them and marry according their own wish. If parents do not like it then they can cut off social relations with them but they don’t have right to threaten them or harass them or make their life miserable.

- **The case of honor killing of a journalist, Jharkhand**

In April, 2010 a woman journalist was killed in the name of honor. She was from a Brahmin family and was in love with a boy of another caste.

The point to be noted here is that where even a journalist became victim of honor killing then how come a woman not adequately educated could be saved from such cruelties.

- **Arumugam Servai v. state of Tamil Nadu**

The Supreme Court opined that the act of violence or threats are illegal and those who commit it shall be punished. The country is a democratic country where people are given liberty to choose for them. They can marry according to their wish whether within caste or outside caste. The parents, relatives cannot get in the way. They only had an option to cut off social relations with them if they are not accepting them.

The supreme directed the administrative authority and police throughout the country that they shall keep an eye on young boys and girls undergoing inter-caste or inter-religious or love marriages so that they are not harassed and if any complaint is made then the protection shall be provided.

- **Shafin Jahan v. Asokan K.M.**

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The right to choose faith is also a fundamental right and gives right to every woman according to her wish converts her religion after marriage. She has a right to do so and no one can violate her right to do so.

**CONCLUSION AND SUGGESTION**

**Conclusion:**

Khap panchayat do not have any legal status, they are extra-constitutional body, which regard themselves as protector of culture and tradition. They curtail the liberty, rights which are fundamental rights of human being, which are also provided in the preamble. If liberty of any person is curtailed then how would he be able to develop his personality.

These khap panchayat curtail the liberty of an individual and does not provide the rights to the individual to choose a partner to them, the LGBT are not allowed to marry with the same sex person, they are not given right to marry and if sometimes married they are married against their wish. In divorce cases if a woman due to problem in her marital life thinks of taking divorce she is put to death, the rape victims are not treated properly, they are not accepted by the family, they are considered useless, they are put to death.

Honour killing is a heinous crime which shall be curbed down by making it as a heinous crime and increasing the punishment to death or life imprisonment and not lower to that. The people of shall be made aware of the fact that khap panchayat is not panchayat which is a constitutional body. And no one has a right to interfere in the decision making right of any person nor has right to take away the life and liberty of any person. Life is creation of god, birth and death shall be decided by him. Family is important but a family killing a member is not important. The political parties also do not dare to speak against them nor made an attempt to make any law to abolish it. As they have their own interest of vote bank. As the society is transforming and making new changes there is need to change laws also, so the amendment shall be made in the existing laws to make honour killing as a separate offence and make laws to curb the illegal practice of honour killing.

The Indian constitution has much provision to protect the rights, liberty and freedom of an individual. Rights are vested in the individual irrespective of their caste, gender, religion and

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shall be protected from honour killing. The certain provision of the constitution are violated by this crime. They are Articles 14, 15(1), 15(3), 19 and 21.

In the personal laws like Hindu Marriage Act, Muslim Law, etc. and Universal Declaration of Human Rights the requirement of valid marriage is that the consent of parties to marriage (man and woman) shall be free and no requirement of consent is needed by the family. Then also khap panchayat and family goes against the law.

The homo-sexuality is now decriminalized by the Supreme Court in “Navtej Singh Johar and Others v. Union of India”\textsuperscript{12}, but till now no separate laws are made to protect their rights and protect them from honour killing.

In honour killing the victim is not third party but the member of the family who killed her or tortured her or made her to commit suicide.

**SUGGESTIONS**

- The superstitions belief and old orthodox practices shall be removed that can be achieved only by providing education with some moral values also because to run the society smoothly some moral values are also needed.

- According to article 21 the procedure must be procedure established by law and the act by khap panchayat are not the procedure established by law and in real sense they don’t have right to take law in their hand as they are not statutory bodies. Therefore, amendments are needed in IPC, Evidence Act and Hindu Marriage Act as well as in Special Marriage Act, so that strict laws can be imposed on the offenders.

- Law has to be enacted at the centre as well as the state level and NGOs shall be made available at the local level.

- Women shall be given higher education so that they are capable of being appointed at higher legal authority. So that they may get authority to speak out these issues which are being committed.

- Literacy is one of the tools to curb these types of practices. People shall be made aware about the validity and authority of khap panchayat and their laws.

\textsuperscript{12} Navtej Singh Johar and Ors. v. Union of India, A.I.R. 2018 S.C. 4321.
Government of Maharashtra published and brought into force the Maharashtra protection of people from social boycott (Prevention, Protection and Redressal) Act, 2016 which is a welcome step to check these kinds of activities.

Police authority shall be made available to the people so that their lives are protected from these khap panchayat.

The provision in Special marriage act shall be amended which provides that notice of intended marriage shall be given to the marriage officer before thirty days. The period is very long it shall be reduced or else it shall be removed as the parties to the marriage are adult and they are free to marry and this notice makes an advertisement of their marriage which creates problem for them. And other provisions are there to tackle the situations which may occur in future if notice is not given of the marriage.

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INTERNET

COMPETITION POLICY VIS-A-VIS CONSUMER WELFARE

(By Hariharan Venkateshwaran)

1. INTRODUCTION

“Competition is not only the basis of protection to the consumer, but is the incentive to progress.”

- Herbert Hoover

In India, the Competition Act, 2002 controls and maintains up competition in the market through its provisions forbidding anti-competitive agreements and abuse of dominance. We likewise have the Consumer Protection Act, 1986 which tries to ensure the interests of the consumers against information asymmetry, unfair trade practices, deficiency of services and so on. Under the Competition Act, the Competition Commission of India is the adjudicatory body for issues competition with rivalry while under the Consumer Protection Act, the District Forum, the State Forum and the National Consumer Forum are enabled to manage issues influencing consumers.

This polarity and partition of the adjudicatory bodies managing the issues of competition and consumer interests is as a glaring difference to the instrument set up in the US and the UK where the Federal Trade Commission and the Office of Fair Trading individually, are endowed with the authorization of competition law as well as consumer law. This unification of forces of implementation in a single body is not just a question of managerial comfort. It is in acknowledgment of the way that consumer law and competition law are both worried about the goal of consumer welfare, a term that can be deciphered in various manners. It is additionally recognized that consumer welfare cannot be accomplished in disengagement by the use of either of the two. Additionally in accomplishing the expressed goal, it is imperative to see how both the arrangements associate with one another. Such regulatory models accept that the collaborations between the two areas of law can be best used if jurisdiction is vested in a single adjudicatory body.

Despite the fact that a single body is given the cudgel to adjudicate the cases under the two enactments, comprehend that the arrangement objectives of competition law contrast altogether from the goals that consumer law tries to accomplish. While the previous is

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worried about the sustainability of competition in the market, but the latter is essentially on the productivity of the transaction between the individual seller and the consumer.

The focus of this paper is to comprehend and outline the approach and objectives of competition law and consumer law considering their shared objective of accomplishing ‘consumer welfare’. The significance of this activity lies in understanding the job that the Competition Commission of India has assumed all by itself. The Competition Commission of India has taken upon itself to adjudicate even when the impact on competition is circuitous, for example where direct injury to the consumer streams from the adverse effects of the reproved act itself. The issue with this lies in the way that the appropriate remedy would lie with consumer courts. In spite of the fact that the type of such practices would propose a customer law remedy, their distortive consequences for competition may bring about competition law investigation.

This paper intends to resolve the wrinkles and give a sound legal and economic reason for the utilization of competition law and consumer law. Despite the fact that reflections and principles are appropriate, an endeavour has been made to attest them as a final essential as this encourages the cycle of for all intents and purposes applying the standards to a given case.

2. COMPETITION POLICY

Competition Policy is a public policy of the state for ensuring that the competition is the market is unrestricted or undermined, that affects the economy and society. It is a known fact that the competitive markets are major platform for investment, innovation, grown and efficiency.2

The competition Policy contributes to economic growth to the ultimate benefit of the consumers, in terms of better choice, better quality and lower prices. Competition policy serves as a supplement to consumer protection policies to address market failures, for example, absence of bargaining position, information asymmetries, towards makers and high transaction costs.3 Under the basic constitutional provisions of the USA, the EU and many European countries, the overall purpose of legal rules against private restraint on competition is to favour economic prosperity, which includes consumer welfare. The mandate of the

Constitution is to protect competition law directly by the individual’s freedom to compete. By doing so, consumer welfare is promoted indirectly as the experience shows. It is not the promotion of consumer welfare which should become the goal of competition law. Instead the freedom of individuals to compete and thus the free competitive process should remain the goal, especially since this concept promotes consumer welfare indirectly in an effective way.

2. CONCEPT OF CONSUMER UNDER COMPETITION REGIME

The term “Consumer welfare” is coined and defined by Judge Robert Bork, means all things that are good for consumers, such as low prices, innovation, and choice among different products. Under this definition, the consumer includes owners of firms and producers. According to competition analysts, the competition law of India does not specify different evaluating criteria, other than the AAEC rule i.e. Appreciable Adverse Effect in Competition Rule, to analyse different kinds of vertical agreements. The competition law of India bears similarity with EU law in the sense that it lays down criteria or testing adverse effects on competition. However, it seems to be an incomplete adaptation of Article 101(3) of the EC law which imposes certain compulsory conditions for exempting vertical agreements, which requires the agreement to share the benefits with the consumers, and does not force limitations that are superfluous to accomplishing proficiency objective, and does not considerably eliminate competition. These conditions are missing under the competition law of India, which can provide a water-tight framework for the analysis of vertical agreements.

The notion of consumer under competition law is broader than under consumer law. This means that competition law might acknowledge certain situations as favourable for consumers while such situations do not benefit the final consumers; only the direct customers of the undertakings. Second, competition law is mostly concerned with the economic interests of consumers and while in a few cases it might take account of wider consumer interests it is definitely not concerned with other significant consumer interests like health and safety issues or information disclosure. Competition policy also has other goals than improving final consumers’ welfare.

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5 *re Anand Gas*, RTP Enquiry 43/1983 (India).
The Consumer Law and Competition Law are both concerned with the objective of ‘Consumer welfare’, a term that can be interpreted in a number of ways. It is further acknowledged that consumer welfare cannot be achieved by isolation by the application of either of the two. The role of competition law is to ensure the sustenance of free and fair competition in the market as no matter how well informed or rational the consumer might be, he or she cannot prevent the formation of a cartel or a vertical agreement that would limit their options and sources of supply in the market. In the case of *Shri Giriji Meena v. Mohan Gas Service*, it is clear that the main goal of the Competition law in India is to regulate competition, which in turn benefits the consumer. For consumer grievances which do not involve the contravention of the Competition Act, Consumer Forums are the appropriate authority. It does not fall within the domain of Competition Act.

### 3. ECONOMIC EFFICIENCY

The competition law concentrates in maintaining the process of competition between enterprises and tries to remedy behavioural or structural problems in order to re-establish effective competition in the market. The outcome of this is higher economic effectiveness, more prominent development and improvement of consumer welfare. Consequently the buyer encounters more extensive choices and more prominent accessibility of goods at reasonable costs. It focuses on various market failures and offer various remedies, yet pointed toward keeping up well-working, competitive markets that enhance consumer welfare.

#### 2.1. HEALTHY COMPETITION

The word “Competition” is derived from the Latin word “*Competitio*” (rivalry) which means the activity or condition of striving to gain or win something by defeating or establishing

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superiority over others. The word “competition” is very aptly defined by World Bank in 1999 as “a situation in a market in which firms or sellers independently strive for buyers’ patronage in order to achieve a particular business objective, for example profit sales or market share”. It means Competition introduces greater market efficiency in an economy by encouraging innovation, technical development, lower price and better quality of products and services and variety of choices for the consumers. As per Stigler’s words, the state of market in which the individual buyer or seller does not influence the price by his purchases or sales, i.e., the elasticity of supply facing any buyer is infinite, and the elasticity of demand facing any seller if infinite. For such a competitive market to arise four conditions must be satisfied, (1) the perfect knowledge, (2) large numbers, (3) product homogeneity and (4) divisibility of output.

The Neo-classical economic theory plays a crucial role in competition policy, and is based on the presumption that society, or consumer welfare to use a more technical term, is better-off when a state of perfect competition exists in a market. The Markets are where producers and consumers interact, and in theoretical world of “perfect” competition a market will produce an efficient result. Efficiency has a particular meaning in economics; it is a situation in which no one can be made any better off, without someone else being made worse off, as stated as Pareto Principle. The theory is based on the prediction of different market outcomes from perfect competition at one end of the spectrum and monopoly at the other. The advantages of perfect competition are three-fold, i.e., it ensures allocative efficiency, productive efficiency and dynamic efficiency.

3. COMPETITION AS A STATE OF AFFAIRS THAT MAXIMISES CONSUMER WELFARE.

The best definition of competition as provided by Chicago School that competition may be read as designating a state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through the intervention of antitrust law and that, conversely, monopoly designates a situation in which consumer welfare could be so improved so that to monopolise would be to use practices inimical to consumer welfare. This

16 *Id.*
interpretation of competition coincides with everyday parlance as the competition for the man in the street implies low prices, innovation and choice among differing products. Competition thus equates with consumer welfare as the sole meaning thereby that antitrust law’s sole goal is the maximization of consumer welfare. Consumer welfare is most noteworthy when society's financial resources are distributed with the goal that purchasers can fulfil their needs as completely as technological constraints permit. Consumer welfare, in this sense, is simply another term for the monetary abundance, the economic wealth of the country.\textsuperscript{17}

The interesting aspect of the relation between competition law and consumer welfare is that the consumer interest is protected indirectly by protecting the freedom of actors to compete in markets. The purpose behind this is that opportunity to contend by and generally prompts competition, and competition prompts a productive distribution of resources and subsequently to consumer welfare. The Hon’ble SC in \textit{Ashoka Smokeless Coal India (P) Ltd. v. Union of India},\textsuperscript{18} reflected on consumers’ interest as follows, that, In a market administered by free economy where competition is the popular expression, producers can fix their own price. It is hard to offer impact to the constitutional obligations of a State and the principles prompting a free economy simultaneously. A level battleground is the vital factor for summoning the new economy. Such a level battleground can be accomplished when there are various providers and when there are rivals in the market empowering the consumer to exercise choices with the end goal of procurement of products. On the off chance that the approach of the open market as to be accomplished the benefit of the customer should be remembered highest by the State.

\section*{4. CONSUMER WELFARE VIS-À-VIS COMPETITION POLICY}

The Supreme Court of India in the case of \textit{Competition Commission of India v. Steel Authority of India}\textsuperscript{19} observed that:

\begin{quote}
\textit{“The principle objects of the Act, in terms of its preamble and Statement of Objects and Reasons, are to eliminate practices and sustain competition in the market, to protect the interests of the consumers and ensure freedom of trade carried on by the participants in the market, in view of the economic developments of the country.”}
\end{quote}

\begin{flushleft}
\textsuperscript{18} \textit{Ashoka Smokeless Coal India (P) Ltd. v. Union of India}, (2007) 2 S.C.C. 640 (India).
\textsuperscript{19} \textit{Competition Commission of India v. Steel Authority of India}, Civil Appeal No. 779 of 2010 (India).
\end{flushleft}
In other words, the Act aims not only for the protection of trade but also protection of consumer interest. Competition law of India advocates consumerism mainly through four important aspects:

1. Protecting consumers from anti-competitive agreements by market controllers;
2. Protecting consumers from any abuse of dominance by market players;
3. Protecting consumers from a blend for example from mergers, acquisitions, amalgamations and so on;
4. By educating consumers on Competition Advocacy.

It is of a general assumption that the consumer stands at a disadvantageous position in the market with respect to the seller due to which the consumer needs to be protected from the potential malpractices of the seller. It seeks to correct the consumer’s position in the market with respect to the supplier, so that cost effective and efficient transactions are ensured.

Reliance is brought upon the OECD roundtable on the Interface between competition and consumer policies, it was stated that “Now it is widely understood to have a single purpose: the enhancement of Consumer welfare. Thus, competition policy and consumer policy now speak the same language; they have a common overarching goal.” It is necessary to prove adverse market effects in the market, where the defense will be on the ground that adverse effects are outweighed by the beneficial effects. The competition rules ensure a fair choice at a fair price of goods, or services of a good quality, they are indirectly promoting consumer interest in the market economy. It is to be noted that as long as the right to freedom of choice is upheld, no practice by the firm in the market can be concluded to be anti-competitive.

It is to be noted that National Competition Policy, 2011 also stated that the principal part of competition policy is to ensure consumer welfare assistance by empowering ideal distribution of resources and giving economic agents appropriate incentives to seek after profitable productivity, quality and development. Consumer welfare is thusly, one of the

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24 *Supra* 17.
objectives of competition law. Competition law expects to secure competition in the market as methods for upgrading consumer welfare and guaranteeing the efficient allocation of resources.

It is modestly presented that 11th Planning Commission Report\textsuperscript{26} expresses that advancement of consumer welfare is the shared objective of customer protection and competition policy. At the base of both customer protection and competition policy is the acknowledgment of an inconsistent connection among consumers and producers. There is solid shared trait between competition policy and law from one perspective and customer protection policy and law on the other. A successful competition policy brings down entry and exit barriers and makes the environment helpful for advancing business venture, which likewise gives space to the development of small and medium enterprises and ensuing work extension and employment advancements.

It is submissively presented that the Report of the High-Level Committee on Competition Policy and Law\textsuperscript{27}, prevalently known as the Raghavan Committee, clarifies that frequently consumer interest and public interest are viewed as interchangeable, yet they are not and should be recognized. For the sake of public interest, numerous Governmental policies are planned which are either anti-competitive in nature or which show themselves in anti-competitive conduct. In the event that the customer is at the support, consumer interest and consumer welfare ought to have power in all Governmental policy formulations. The connection between competition policy and consumer welfare is represented by three fundamental principles:

Principle 1 - Competition policy exists inside the domains of consumer welfare and not the reverse way around.

Principle 2 - Competition policy ought to empower just direct which advances consumer welfare.

Principle 3 - Competition policy forces a commitment on consumers, not just on merchants.\textsuperscript{28}

Competition law has inherent limits in that respect.

\textsuperscript{26} Supra 11.
Also, the protection of consumer interest is the parliamentarian intention while drafting the Competition Act, 2002 which is clearly evident on the bare perusal of its preamble and Section 18 that specifies the duty of the CCI to eliminate practices having adverse effect on competition, promote and sustain competition in markets, protect interests of consumers and ensure freedom of trade in the market. Above all, the judiciary has to play a pivotal role by interpreting the law based on the changing socio-economic conditions of society and make time to time recommendations with respect to the required changes in law to ensure the fully and perfectly competitive markets in India.

4. CONCLUSION

Consumer inclinations change from individual to individual and every once in a while. Accordingly, without the ceaseless contribution from the public, it is improbable that any framework for disseminating products to customers could precisely reflect Consumer inclinations. In a consistent way, the competitive interaction catches consumer inclinations and redistributes productive resources to reflect these inclinations. Consumer inclinations are reflected by the general interest for every good. Any remaining things steady, an increment in the demand for a good bring about an increment in the relative price of the good.

The increased price will increase the normal returns from providing the product; and in particular, the competitive process guarantees that more resources are assigned to produce goods that customers incline toward the most. The unadulterated virtuoso of competition policy is that it does not force on consumers, the products and services that the Government accepts will advance consumers’ welfare. The genuine job of competition policy is to cultivate an environment wherein consumers are engaged to seek after their joy by managing dealers to produce reasonable goods and services with the quality and assortment requested by them.

"The consumer is King!" - The consumer will not rule, in any case, except if he claims the throne. To guarantee his throne, consumers should assume an active part by keeping themselves educated about the goods they would regularly buy and guarantee that they buy the good from just the traders which offer the best deals.
BODY CORPORATE’S PRIVACY POLICIES: EXISTING LAWS AND EFFECT OF EMERGING LAWS.

-Megha Dugar

I. INTRODUCTION

All the body corporate storing information of Public at large has to mandatorily have a Privacy Policy in order to protect the data provided by people at large. Such data is of high value and can be misused to any extent if the same is not protected. In this globalising era, India is very new to technology and technology laws. Thus, the system is still on the verge of inculcating new rules and regulations for data protection. On the other hand, right to privacy is a fundamental right of any citizen of India. Considering the world is globalising and Internet has made it very convenient for the Corporates to store, transfer and sell data for their personal gains. It becomes very difficult to protect one’s confidential information. With the emerging speed of internet, data theft has become a major threat to Privacy as well as Security of the Country and it’s citizen. Cyber Crime is the most easily done and most difficult to catch. Thus, it is if paramount importance that the Body Corporates understand the value of Data Privacy and similarly People become more aware of how, where and how much data is to be furnished.

As per Section 43A of the Information Technology Act, 2000\(^1\), any Body Corporate, possessing, dealing or handling, any personal data belonging to any citizen of this country, need to follow certain basic protocol and maintain reasonable security practices. They cannot use this data for any sort of wrongful gain or loss. If so done, they are liable to compensate the affected person by paying damages. Section 72 of Information Technology Act, 2000\(^2\) prescribes the penalty for causing any breach of confidentiality and privacy of any information kept with them in their records.

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\(^1\) “43A. Compensation for failure to protect data— Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation to the person so affected.”

\(^2\) “72. Penalty for Breach of confidentiality and privacy.—Save as otherwise provided in this Act or any other law for the time being in force, if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information,
II. **EXISTING LAWS**

Information Technology Act, 2000 read with Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011 (“GDPR”)

- Section 43A
- Section 72
- RBI notification dated 06.04.2018\(^3\) regulating Data Localisation- It states that:

  “2. It is observed that not all system providers store the payments data in India. In order to ensure better monitoring, it is important to have unfettered supervisory access to data stored with these system providers as also with their service providers / intermediaries/ third party vendors and other entities in the payment ecosystem. It has, therefore, been decided that:

  i. All system providers shall ensure that the entire data relating to payment systems operated by them are stored in a system only in India. This data should include the full end-to-end transaction details / information collected / carried / processed as part of the message / payment instruction. For the foreign leg of the transaction, if any, the data can also be stored in the foreign country, if required.

  ii. System providers shall ensure compliance of (i) above within a period of six months and report compliance of the same to the Reserve Bank latest by October 15, 2018.

  iii. System providers shall submit the System Audit Report (SAR) on completion of the requirement at (i) above. The audit should be conducted by CERT-IN empaneled auditors certifying completion of activity at (i) above. The SAR duly approved by the Board of the system providers should be submitted to the Reserve Bank not later than December 31, 2018.”

III. **EMERGING LAWS**

Personal Data protection Bill, 2019 (the “PDP Bill”)- The PDP Bill was cleared by the Union Cabinet on December 4, 2019. The same was introduced before the Lower House of Parliament on December 11, 2019. The PDP Bill is currently being examined by the Joint Parliament Committee (“JPC”) and the report is likely to come soon.

document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.”

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\(^3\) RBI/2017-18/153.
Salient Features of PDP Bill, 2019

A. Data Protection

PDP Bill segregates and identifies data in 3 different categories:

(i) Personal Data

(ii) Sensitive Personal Data ("SPD")

(iii) Critical Personal Data ("CPD")

It prescribes the manner in which the data may be processed - from collection to storage to disposal and its overall processing. It further explores the aspect of notice, consent, permitted purpose, exemptions, penalties, compensation, code of conduct and an enforcement mechanism. The PDP Bill lays down a framework for ensuring privacy and protection of data of individuals, which includes, inter alia, limits of usage, collection, and processing of personal data, along with providing for a regulator, the Data Protection Authority ("DPA"). While there are overlaps, in many aspects, the PDP goes beyond the General Data Protection Rules ("GDPR"); certain notable differences between the two are mentioned below:

- **Sensitive Personal Data and Critical Personal Data:** The definition of SPD is broader under the PDP Bill than that under the GDPR. The PDP Bill empowers the government to notify any personal data as CPD, a category of personal data which requires the highest degree to caution while processing. The GDPR doesn’t provide for such categorization.

- **Data localization:** The PDP Bill does not restrict cross-border transfer of personal data, however, the transfer of SPD is conditional. Cross-border transfer of CPD is strictly prohibited under PDP Bill. Under the GDPR cross-border transfer of personal data is permitted:
  - when the transfer is made to countries which offer an adequate level to protection; or
  - through intra-group codes; or
  - through a pre-approved model contractual clause;
  - upon explicit consent;
  - in case of necessity.
• **Storage Limitation:** GDPR permits retention of personal data for a longer time for the purpose of archiving/research/statistical purposes, whereas under the PDP Bill, personal data can be retained for a longer time only where explicit consent for doing so has been provided by the data principal or where such data is necessary for complying with any obligation under any applicable law.

• **Purpose Limitation:** The GDPR permits processing by a data controller based on a legitimate interest which is to be determined by the data controllers. However, under the PDP Bill, personal data may only be processed for reasonable purposes as specified by the DPA.

• **Notice and Consent:** In addition to the requirements of notice provided for under the GDPR, the PDP Bill requires that such notices be made available in multiple languages and data trust scores, etc be displayed to the data principals. The PDP Bill requires that a data fiduciary obtain explicit consent for the processing of SPD. Further, the PDP Bill allows data principals to be able to manage consent through consent managers.

• **Rights of data principals:** The GDPR and the PDP Bill, considerably provide similar rights to the Data Subject or Data Principal, namely right to access and confirmation, right to rectification, right to erasure or forgotten, right to update data, right to data portability. However, the PDP Bill provides for an additional right to data principals, namely the right to not be subjected to automated decisions.

• **Reporting data breach:** Under the PDP Bill, a data fiduciary is obligated to report a data breach to the DPA where such breach is likely to cause harm to the data principal and not otherwise. However, under the GDPR all breaches are to be reported to the supervisory authority, except where such breach is unlikely to result in a risk to individuals.

• **Treatment of anonymized data:** The applicability of GDPR is restricted to the regulation of personal data only, however, the PDP Bill provides that the government may access to non-personal data held by any data fiduciary for specific purposes.

### B. Data Localisation

1. The PDP Bill provides for the manner and the extent to which localization of sensitive personal data and critical personal data is to be ensured. The PDP Bill provides that the all personal data which is notified as being critical personal data may only be stored and
processed in India and can only be transferred abroad, where such transfer is permitted only on the grounds of medical emergency of the data principal, or where the transfer of such critical personal data to a country is not prejudicial to the security of the state. When the transfer of critical personal data is made for a medical emergency.

2. Conditional transfer of sensitive personal data\(^4\) is permitted under the PDP Bill upon obtaining explicit consent of the data principal and subject to retaining one copy of such sensitive personal data in India. Additionally, transfer of sensitive personal data out of India can be undertaken in the following instances, namely-
   a) Where the transfer is made under a contract or intra-group scheme approved by the DPA;
   b) Where the central government has allowed for transfers to another country or an organisation in such country having regard to the adequacy requirement and effective law enforcement;
   c) Where the DPA has allowed the transfer for a specific purpose.

3. \textit{RBI Circular on storage of Payment Data}
   a) The Reserve Bank of India (“RBI”) has mandated, vide its notification dated April 6, 2018, that online payment firms operating in India must exclusively store their data on Indian servers. The RBI has also issued a clarification to its circular on storage of payment data by stating that a copy of domestic data may be stored abroad in the case of cross-border transactions which must be harmonised with strict data localisation provisions in the PDP Bill.
   b) Previously, various global payment entities had requested the RBI to allow for data mirroring, i.e., to allow them to store a copy of their data in India while allowing for cross-border flow of financial data. The RBI rejected such a request,

\(^{4}\) “Sensitive Personal Data” means personal data revealing, related to, or constituting, as may be applicable—
   a. financial data;
   b. health data;
   c. official identifier;
   d. sex life;
   e. sexual orientation;
   f. biometric data;
   g. genetic data;
   h. transgender status;
   i. intersex status;
   j. caste or tribe;
   k. religious or political belief or affiliation; or
   l. any other category of data specified by the Authority under section 15.
insisting that the original requirements be met by all firms. Similarly, the RBI also rejected requests for extending the deadline to comply with the notification beyond the previously stipulated date.

IV. IMPACT OF EMERGING LAWS ON THE EXISTING PRIVACY POLICY OF BODY CORPORATE.

A. Data Protection:
1. Owing to the notable differences between the GDPR and the PDP Bill, GDPR compliance might not translate directly to compliance with PDP Bill. Specific compliance audits and diligence of Body Corporate’s business operations, as well as its technology platform, shall have to be undertaken to ensure full compliance with the PDP Bill.

2. More specifically, Body Corporate’s privacy policy, its terms of use and intra-group schemes for the transfer of personal data shall have to be reviewed to assess compliance with the requirements of processing personal data, SPD and CPD (once the government notifies CPD) under the PDP Bill, including the requirements for notice, consent, collection, the processing purpose, cross border transfer of personal data and SPD.

3. Accountability for non-compliance with the provision of the PDP Bill shall vest on the person who collects personal data and permits its processing, the data fiduciary. Failure to comply with the provisions of the PDP Bill, once it becomes enforceable shall attract hefty penalties as opposed to modest penalties under the IT Act. Additionally, criminal sanction may also be imposed on any person, where he re-identifies de-identified data of any data principal.

B. Data Localisation:
1. Where Body Corporate collects and stores sensitive personal data, it shall have to ensure that explicit consent is obtained from the data principal for transferring such data outside India. However, in all cases, one copy of such data shall have to be retained in India. Body Corporate’s intra-group schemes for the transfer of sensitive personal data will have to be approved by the DPA.

2. Further, critical personal data has not been defined and it is open for the government to notify any personal data as critical personal data, hence, Body Corporate will have to ensure regular monitoring of the types of personal data notified as such and accordingly ensure that the same is not transferred outside India.
V. STATE AND NON-STATE RESPONSE

1. State’s response to the emerging need of Data Protection, PDP Bill, 2019 is pending before the Lok Sabha- 43 A only encompasses liability for body corporate and not government.

2. On the other hand, Government entities has a lot of exemptions under the New Bill, majorly Body Corporates are made to stick by the rules and regulations. Excessive compliance has been prescribed for the Body Corporate without adequate/specific time frame to comply with the same. The Scope and applicability of PDP Bill is very wide. And the obligations and liabilities are not very well dealt with in the PDP Bill leading to regulatory issues.

VI. CONCLUSION

Owing to the notable differences between the GDPR and the PDP Bill highlighted above, compliance with GDPR might not translate directly to compliance with PDP Bill. Specific compliance audits and diligence of Body Corporate’s business operations, as well as its technology platform, shall have to be undertaken to ensure full compliance with the PDP Bill.

1. Body Corporate’s processing of the personal data, SPD and CPD will have to be specifically reviewed for compliance with the PDP Bill, and the platform’s UI/UX will need modifications in order to comply with the specific requirements of notice, consent, and other data principal rights.

2. Both Significant Data Fiduciary (“SDF”) and Guardian Data Fiduciary (“GDF”) obligation can significantly alter Body Corporate’s current operation models / strategies. In this context, the following obligations are important:

2.1 Handling personal data of children:

- Since personal data of children is currently being processed by Body Corporate, a mechanism for verifying the age of users must be put in place child in the manner prescribed by the DPA (this is yet to be prescribed).
- Consent of parents/guardians must be obtained before processing personal data of children.
- The functioning of the platforms will have to be amended in order to meet the obligations of a GDF, if Body Corporate is notified as such;
If designated as a GDF, Body Corporate will have to ensure that it does not undertake profiling, tracking of children; child users’ behaviour monitoring; targeting advertisement at children, or any processing activity which can cause significant harm to the child.

2.2 Significant Data Fiduciary: Given the construction of the SDF provision, and the inclusion of social media intermediaries with users above a certain threshold (which is as yet undefined, but likely to be around 5 million), Body Corporate will qualify as an SDF. Hence, Body Corporate will be required to:

- Undertake the data protection impact assessment (“DPIA”), where it intends to undertake any processing involving new technologies, or large-scale profiling or use of SPD, or any other processing which is likely to cause significant harm to DP;
- Appoint a Data Protection Officer (DPO), based out of India, to:
  - advice Body Corporate on fulfilling its obligations under the PDP Bill, carrying out DPIA, and on developing an internal mechanism for privacy by design policy;
  - monitoring processing activities and maintaining an inventory of records for Body Corporate;
  - assisting and cooperating with DPA on compliances with the PDP Bill;
  - reviewing DPIA report and submitting the same to the DPA;
  - acting as a point of contact for grievance redressal
- Maintain accurate and updated records of important operations of data lifecycle, security safeguard review, and DPIA.
- Have its policies and processing routinely audited by a Data Auditor (DA) for compliance with provisions of this Act in the prescribe manner.
- Provide its Indian users the ability to voluntarily verify their accounts.
- Provide its Indian users the ability to voluntarily verify their accounts and have a process to visibly indicate verified accounts by using a distinct mark.
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ALTERNATE DISPUTE RESOLUTION AND ITS
ACCEPTIBILITY IN INDIA

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ABSTRACT

As long as the manner of dealing of business, personal as well as professional continue to change, Indian courts have to look for other ways to handle the conflict arising out of those dealings to maintain the their integrity and deliver the promised justice in fast, just and equitable manner. Indian courts are burdened to such extent that Chief Justice of India had to ask judicial magistrates and judges to relinquish their summer vacations in order to get rid of the pendency of cases. Adoption of alternate dispute resolution methods is not only in favour of courts, but also help the petitioners to save their time and money. Alternate dispute resolution provides an escape from hundreds of legal paper work and flexibility to the people too. As India is on the journey of becoming a $5 trillion economy in coming 5 years, it is very essential to allocate the time and work energy to the components that require more attention and would render better economic output rather than engaging in legal maze that could be solved by other methods and could create better satisfaction for the people involved in the dispute. Alternate dispute resolutions are not only for big multi-national companies which deals in millions and billions, it would be helpful to common people in the matters of insurance claims, consumer claims, breach of contract, matrimonial disputes, tortuous liabilities, motor vehicle claims etc.

Keywords: Alternate Dispute Resolution, Speedy Justice, Indian Judiciary, Legal Aid, ADR Mechanisms

INTRODUCTION

“Justice denied anywhere, diminishes justice everywhere”¹

There is not only one reason that could justify the need of alternate dispute resolution (ADR), the list goes on. But the main cause which is known worldwide is the abundance of work which is not necessarily to be taken to court and only to be handled by judge or jury. As it is very well said by Warren E. Burger, Former Chief Justice of Supreme Court of United States

¹ Martin King Luther Jr.
“...the system is too costly, too painful, too destructive, too inefficient for a truly civilized world.”\(^2\) It is essential to know that ADR is very much efficient and warranted in this era of development and chaos. There are several perspectives to recognize its applicability, it may be for the humongous business transactions and multimillion dollar deals or may be to provide the right a common man have but cannot access it because of the ineffectiveness of the whole system. “Law is a regulator of human conduct. No law works smoothly unless the interaction between the two is voluntary.”\(^3\)

In nation like India, where the list of obstacles is never ending, a slow and ineffective justice delivery system is tip of the iceberg. The effectiveness of ADR techniques is unquestionable but its relativity to the general public in India is not very common. Also people in India have some major issues which remain unheard for so long that it almost becomes irrelevant to attend it afterwards. As said by Justice Krishna Iyer – ‘Law and justice can no longer remain distant neighbours’\(^4\). Also it is very important to realize that these techniques are supposed to be an alternative not a complementary to the judicial system.

**HEALTH OF INDIAN JUDICIARY**

The position of judiciary is not very satisfying throughout the world, but as far as we are concerned about the Indian judiciary, its ailments are not hidden. India had suffered enough in the colonial rule by the lack of fundamental and human rights, people seek the door of judiciary with a lot of hope. The constitution framers were very well versed with the challenges of the Indian downtrodden man, they provided for the inalienable fundamental rights to every citizen and also the weapon to enforce those rights by Article 32. But it is not just unacceptable but disheartening too to see such grave violation of their basic rights. The judiciary was framed and given such eminent position to set the justice free and accessible not to hang it for decades that eventually end up drying all hope for equality and justice.

As per the recent data of the National Judicial Data Grid (NJDG)\(^5\), there are around 54,719 cases pending in Supreme Court alone. More than 25% cases are pending for more than 5

\(^2\) 52 USL W 2471 (1983)
\(^3\) Law Commission of India, 222nd Report on Need for Justice-Dispensation through ADR etc. (2009), Page No. 9
years and around 1,550 cases are pending for more than a decade. An average of 1.65 lakhs of cases is pending in every high court. The Chief Justice of India, Dipak Misra requested the Chief Justices of High Courts to conduct proceedings even during vacations in order to get rid of the huge back log of cases.

Justice delayed is justice denied. Saying that the Indian justice delivery system had come a long way since the 1700s would be way of sugarcoating the whole menace. The largest democracy in the whole world lacks the very basic norm of democratic society and what good does a right will do to a man if he cannot get it enforce.

**ALTERNATE DISPUTE RESOLUTION**

ADR refers to a set of techniques and aid that could be used to address and resolve an issue in alternate to stepping on the door of the courts. Although there are several problem that render the need of ADR inevitable, but ADR should be opted before every possible court proceeding not only because it is time and money efficient but also it provide a much satisfying result to both the parties.

Following are some ADR techniques that are used, and it is important to understand their scope in order to make a more prudent and beneficial choice as per the issue:

1. Arbitration: It is a procedure where the parties submit their disputes for adjudication by an arbitration tribunal comprising of a sole or an odd number of arbitrators, which render its decision in the form of an award that finally settles the dispute and is binding on the parties. It is governed by the Arbitration and Conciliation Act, 1996.

2. Conciliation: Here a third person assist the parties to resolve their dispute by agreement, by providing them with merits and demerits of the case so that they can arrive on a more effective, efficient and satisfactory settlement. It is governed by the Arbitration and Conciliation Act, 1996.

3. Mediation: Here a third person assists the parties to reach to a negotiation for the disputed issue. Not any sort of advisory service is rendered by a mediator that is performed by a conciliator.

4. Ad Hoc Arbitration: When both the parties decide on the rules and procedure of the arbitration proceeding by them and do not seek service of an arbitration tribunal or institution and appoint a simple unbiased arbitrator to adjudicate is referred as ad hoc arbitration.
5. Negotiation: A non-binding procedure which allows both the parties to establish a direct contact and offer a negotiable deal which would be of optimum advantage to both the parties.

6. Med-Arb: This is a combination of mediation and arbitration, where initially the dispute is handled by the mediation procedure and if it remains ineffective in providing satisfactory outcome then arbitration proceedings get incorporated.

7. Pre-trial Mediation: It is a settlement of disputes by the aid of courts before initiation of proceeding before it. Such provision\(^6\) is incorporated in Code for Civil Procedure, 1908 where court recommends the parties to try first to resolve the matter through ADR methods, including mediation. It is also known as Michigan Mediation because this procedure was evolved in the U.S.A court of Michigan.

8. Expert Determination: Where both the parties let their dispute goes by the unbiased expert of the issue in order to get his view and opinion on the matter. If the parties agree they could make the opinion binding or otherwise it is not mandatory.

9. Early Neutral Evaluation: This method is precautionary as the parties refer their dispute with intention to resolve it at a very early stage by a third unbiased person by seeking his advice and evaluation report. This is non-binding and flexible in nature.

10. Hybrid Conciliation, Mediation and Arbitration: If a conciliator fails to provide redressal to the dispute between the parties then the same conciliator could work as arbitrator in order to proceed for the dispute and adjudicate on it after gaining the consent of the parties, that’s way it is called hybrid conciliation, mediation and arbitration.

11. Mini-trial: Both the parties present their case before an executive who possess the power to give decisions and could also be assisted by a neutral person. This process is non-binding in nature.

12. Fast-track Arbitration: This process focuses on the two very important aspects of an adjudication i.e., binding nature and speedy decision. Here both the parties agree to resolve the issue early and in a speedy manner by using arbitration. Amendments in Arbitration and Conciliation Act, 1996 in 2019, lay down a path for fast, effective and more efficient dispute redressal.

13. Neutral Listener Agreement: here both the parties share their best and acceptable offers for settlement with a third neutral person in presumption of confidentiality and

\(^6\) Section 89
then that third person evaluate the offers and assist the parties to negotiate and achieve best outcome.

14. MEDOLA: When both the parties on the failure of arriving at a satisfactory result by mediation and neutral third party, incorporate the initial offer made during the mediation to the extent mediator considers it fair and just. It is binding in nature.

15. Rent a Judge: Here both the parties reach to a court to appoint a referee to adjudicate the matter of dispute between the parties. Usually a retired judge is appointed by the court as a referee.

16. Final Offer Arbitration: This methods too gets its origin from U.S.A court, where both the parties their monetary claim before a panel who render their decision by accepting one and rejecting the other and rendering the accepted one the binding power.

17. Lok Adalats: It means Peoples’ Court. Here the voluntary efforts are aimed at arriving to a settlement to disputes between the parties through conciliatory and persuasive efforts, and render speedy and inexpensive justice.

It is really a shame that in spite of knowledge of so many alternative ways, India is still relentless to use them. There are small causes courts established under Code for Civil Procedures, 1908 and provision of summary trials are rendered by Criminal Procedure Code, 1972. There are several issues which do not require the presence of a judicial body and the whole process of ‘My Lord! Objection’ in every judicial proceeding.

List of issues that could be addressed outside the court:

- Consumer complaints
- Business or commerce relates disputes
- Family or marriage issues
- Civil Suits
- Labour disputes
- Public Utility issues
- Motor Accident issues
- Insurance matters
- Banking disputes

Particularly not only the Indian judiciary but also the citizens have to accept let alone appreciate the ADR in their daily life. Because peoples’ participation and legal awareness
and legal literacy can work wonders for the smooth, effective, efficient and optimum working.

**INDIA’S INTERNATIONAL OBLIGATION AND STANDING OUT**

India is obligated to supplement its municipal laws with United Nations Commission on International Trade Law, 1966 (UNCITRAL Model Law), in order to do so the Indian Arbitration and Conciliation Act, 1996 got enacted which is compatible with the Rules of Arbitration of the International Chamber of Commerce (the ICC Rules). But before this three statutes Indian Arbitration Act, 1940, the Arbitration (Protocol and Convention) Act, 1937 and Foreign Awards (Recognition and Enforcement) Act, 1961 were working in this domain, it was inspired from the English Arbitration Act, 1934, the General Protocol, 1923, the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 respectively.

As India is moving forward in the arena of technology, industrialization, globalization, trade, commerce and many more it is extremely essential to have a hassle free dispute resolution system which suites and fulfills not only the domestic need but also become shows topper before the world.

Illustration – In *ONGC v. Western Co. N. America* where it was contended that award made in India under the statute of Indian Arbitration Act, 1940 but subject to the New York Convention, 1958 could be enforced in India only if it became binding as per the clause V(i)(e) of the New York Convention, 1958. It was held non-executable in India as it was not made the rule of court in India, and the respondent was refrained from making it a decree.

But the above problem was taken care of in the new statute of 1996, although recent amendment of 2015 is more of an improvement in this respect.

**THE MYTH OF A NEW BEE**

The alternate dispute resolution system is not new in India, although we had some unconventional methods but they were very effective at that time. Although in recent times what is visible that we are reviving those old methods and taking advantage of them. The disputes among people of a certain community, occupation or clan were addressed by the Kulas (assembly of members of a clan), Srenis (guilds of a particular occupation or

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7 AIR 1987 SC 674
profession) and Pugas (neighbourhood assemblies). Also panchayat system was quiet prevalent, as majority of the issues were resolved their only.

Now the people are quiet reluctant to inculcate ADR methods for seeking redressal of their issues. They perceive these methods as unfamiliar and susceptible. This should be given enough consideration as in nation like India where literacy rate is severely low, seeking legal literacy and awareness is a much bigger challenge. Although our former Prime Minister Dr. Manmohan Singh, tried to incorporate the culture of legal literacy in the life of common man from 2005 to 2009, the policy got discontinued in spite of the fact that it was the need of the hour and was rendering affirmative result.

Campaigns and public appeals could give a constructive way to proceed in adopting the ADR methods in India at ground level too. the online free portals initiated by government for consumer disputes redressal is one of the best example and landmark that could be easily adopted in other areas of governance that would not only ease the public issues but also provide an escape from courts and lessen the burden of the judiciary. IRDA, Consumer forum provide free helplines to people that helps common citizens with no legal knowledge to register complaints and get timely and appropriate justice, it also helps in restoring the faith in law, order, justice, government and courts.

**RECOMMENDATIONS**

Following recommendations could help to in familiarizing the general public with the advantage, need and efficiency of ADR methods:

1. Changes in substantive laws in order to incorporate ADR methods rigidly in the statute itself, so that as a mandatory process before initiating any litigation proceeding as effort has to made to filter the matters that proceed to court rooms.

2. Awareness campaigns that could directly associate to common people in order to provide sufficient and amiable information that could be easily understood by them and make them interested in choosing these methods instead of litigation.

3. Making online portals to register complaints and disputes so that online mediation and negotiation could take place without the hassle of institutional structure and could involve people in the process throughout the world.

4. Alteration in the mindset of lawyers that a dispute needs resolution not a victory. So that the whole vicious circle of appeal after appeal could be replaced by amicable settlements.
5. Flexibility and feasibility to access the judicial system could help in making a direct link between people and justice. Because the justice should be cheap, effective and acceptable.

**CONCLUSION**

*The Charter of Magna Carta of Henry II had the following lines – “To no man will we deny, to no man will we sell, or delay, justice or right”, but never ever this promised got fulfilled and that’s why Gurney Champion in his book ‘Justice and the Poor in England’ laid down an appendix and repealed the above section of Magna Carta “as so far poor persons are concerned”*.\(^8\) This implies that it doesn’t matter that in which provision or statute any right have been rendered, what matters that does it come to life or not.

*Use of ADR techniques would definitely be an improvement for the people and judicial administrative system. Although there are several reasons that must instigate the use of the ADR methods, but it is noteworthy that do we really need a reason to make our life and judicial administration more hassle free and effective. As it was commented by J.K. Lieberman\(^9\) that “litigation has become the nation’s secular religion”, is completely accurate and more of all universal in nature and affirmatively depict the status in every country of the world.*

*The wise words of John F. Kennedy\(^10\) render goals that needed to be given consideration that “let us never negotiate out of fear but us never fear to negotiate”. Dr. A.S. Anand, a former Chief Justice of India have and wish for high hopes that coming centuries would not be a century of litigation, but of negotiation, conciliation and arbitration.\(^11\)*

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\(^8\) Government of Gujrat, Report of Legal Aid Committee (1971), Page No. 1
\(^10\) Ibid.
\(^11\) Law Commission of India, 222nd Report on Need for Justice-Dispensation through ADR etc. (2009), Page No. 13
STRUCTURAL INJUNCTIONS: A STUDY ON THE DEVELOPMENT OF THE EQUITABLE REMEDY UNDER AMERICAN AND INDIAN JURISPRUDENCE

Authored by Simran Ubee

ABSTRACT

The remedy of structural injunction is based on the principle of equity and was developed by the courts to oversee bureaucratic processes and eliminating constitutional violations in the interest of the public. It has been used in the United States since the 1950s, however, in India it was only used by the courts in the 1980s, with the terminology of continuing mandamus instead of structural injunctions. Ever since it has been adopted in the jurisprudence of both the countries, it has been used to create social, economic, political and enviro-human right reforms. However, the pro-active approach of the courts has been met with equal parts of lauds and criticism. This paper is a critical appraisal of the development of the remedy of structural injunction in India and the United States.

Keywords: Structural injunction, Indian laws, American laws, Continuing mandamus.

INTRODUCTION

Structural Injunction, or continuing mandamus as it is known in Indian jurisprudence,¹ is a form of injunction whereby the court directs a government authority to perform its duty or perform an act in the public interest. It is an ongoing equitable relief wherein the court chooses not to dispose of a case but in fact issues multiple injunctions over the course of a proceeding to make structural reforms.

The remedy of structural injunction is based on the principle of equity and was developed by the courts to oversee bureaucratic processes and eliminating constitutional violations in the interest of the public. It recognizes the ‘bureaucratic nature of modern state’,² and is thus a mechanism used by the judges to confront the administration over its failure to abide by constitutional norms and then ‘restructure the [bureaucratic] organization’.³ The courts in the

² Owen M. Fiss, INJUNCTIONS 528, 2nd ed. 1984.
United States have been extensively using the remedy of structural injunctions in matters of public importance, like improving the conditions of prisons\textsuperscript{4}, reforming the racial structure of public schools\textsuperscript{5}, environment conservation\textsuperscript{6} and housing policies\textsuperscript{7}.

In India, the terminology is different; the courts in India have developed the principle of continuing mandamus, wherein the writ of mandamus/injunction is issued continuously to the administrative wing of the government.\textsuperscript{8} It is not one writ or one injunction but a series of them, issued by the courts to guide the administration- hence, the name ‘structural’ injunction or ‘continuing’ mandamus. It has primarily been used in public interest litigations in India, extending the constitutional remedies\textsuperscript{9}, like for guiding the CBI in their investigation\textsuperscript{10}, in environment reform cases\textsuperscript{11}, education reforms\textsuperscript{12}, etc.

The present paper analyses the development of structural injunction as an equitable remedy in American and Indian jurisprudence, and the underlying principles of the remedy. Further, a critical appraisal and comparison have been made between the structural injunctions passed by the American and Indian judiciary.

**SCOPE AND OBJECTIVES OF THE RESEARCH**

Structural injunction is born out of the principles of equity in the common law and has been consequently adopted by many countries including India, USA, Canada, South Africa and Zimbabwe. However, for the purpose of this paper, only the development of structural injunction in America and India has been considered. Consequently, only the case laws of the two countries are analyzed in the paper. Further, the paper is limited only to the structural injunctions made in the public interest against the policy or governance of governmental organizations. For clarity, the phrase ‘structural injunction’ has been used primarily throughout the paper instead of ‘continuing mandamus’; however, they mean the same.

The objectives of the paper are thus mentioned below:

\textsuperscript{5} Swann v. Charlotte-Mecklenburg Board of Education, 431 F.2d 138.
\textsuperscript{8} Reflection, Supra note 1.
\textsuperscript{9} Constitution of India, Art. 32, 226, (1950).
To study the development of structural injunction as an equitable remedy.

To analyze structural injunctions passed by American courts and continuing mandamus passed by the Indian courts, and to critically compare them.

To critically appraise the remedy of structural injunctions vis-à-vis separation of powers in India and the US.

**LITERATURE REVIEW**

Structural Injunction has been extensively used in the American jurisprudence for years to ensure the bureaucracy in the state works on the constitutional principles. In India, the writ of mandamus under constitutional remedies has been enlarged and evolved into structural injunction or continuing mandamus. Since structural injunction in India is an extension of constitutional remedy, it is primarily issued in public interest litigations.

Mr Chintan Chandrachud, in his paper titled ‘Structural Injunctions and Public Interest Litigation in India’ (2019) analyzes the use of structural injunction in India. The author lays down the various phases, more like spheres, of public interest litigation – first, protection of poor and marginalized, second environment reforms, and third governance and transparency of governmental organizations. He further goes on to analyze the grounds for issuance of structural injunction in these cases by the Indian judiciary.

Robert Easton in his paper titled ‘The Dual Role of Structural Injunction’ (1990) talks about the two crucial roles played by structural injunctions – of ‘legitimation of a regulatory’ body and implementation of accepted policy directives made by the courts. The idea of legitimizing regulatory body by way of structural injunction was given Professor Schuck, who sees the equitable remedy as a way of furthering the sanctity of government institutions. However, Professor Fiss describes a seemingly similar but yet not approach of structural injunctions – that of implementation of administrative remedies. With these twin approaches in mind, the author goes on to analyze the role of judges in issuing structural injunctions.

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14 Chintan Chandrachud, Structural Injunctions and Public Interest Litigation in India, PJ CRA (2019).
**STRUCTURAL INJUNCTION IN THE UNITED STATES**

The remedy of structural injunction has been described as “the most distinctive contribution to… remedial jurisprudence drawn from the civil rights experience.”  

It was used for the first time by the American courts in the 1954 case of Brown v. Board of Education which issued guidelines against the state laws which were segregating the school population based on race. In the matter of Brown II, taken by the Supreme Court of America a year later in 1955 the court issued guidelines to follow the guidelines of Brown I with “all haste” and directed that the district court had an affirmative duty to ensure that the court’s orders were followed by the schools. The sphere of structural injunctions in the field of education was expanded further by the courts in subsequent decisions.

In 1990, a class action lawsuit was raised alleging that the overcrowding of prisons was leading to mental health deterioration in the inmates which is unconstitutional. The court ruled in favour of the petitioners and observed that the failure of prison management, like insufficient staff, delays in care, involuntary medication etc. were unconstitutional and issued a permanent injunction. The court also appointed a ‘special master’ to oversee compliance from the prison management. When the matter was taken up again in 2001 in the case of Plata v. Brown, the prison authorities were still found to be providing inadequate medical care which has resulted in the death of 34 prisoners. Incidentally, the parties to the lawsuit negotiated an amount for injunctive relief which was later approved the court. However, in 2006 in another hearing, it was discovered that the conditions of the prison had not yet recovered. Both the matters of Coleman and Plata were clubbed and taken up the United States Supreme Court.

The matter was taken up the Supreme Court in 2010 in Brown v. Plata, it was held that deciding on the capacity of the prison was in the realm of the court’s powers and that it is the ‘obligation of the court’ to enforce constitutional rights of all persons, including prisoners –

17 Allure, supra note 3.
22 Id.
the court cannot shirk away from this obligation merely on the ground that it would invade into the realm of the prison administration.

As much as structural injunction has been used in the United States to further social reforms in the bureaucracy, it has equally been criticized. The Congress even passed an Act to limit the power of the judiciary in issuing injunctions against the prison administrations. Separation of power, as envisioned by Montesquieu, is more rigidly applied in the United States than in India. Structural injunction goes against the very notion of separation of powers, allowing the judiciary to meddle into the policy decisions of other wings of the government.

Until the 1990s, structural injunctions were being used extensively by the courts and was even heralded as “[the] central mode of constitutional adjudication.” However, the shine of the new equitable remedy wore off quickly, and the use of structural injunctions waned subsequently at the start of the 21st century.

**STRUCTURAL INJUNCTION IN INDIA**

India adopted the idea of structural injunction from the American courts and to enlarge the sphere of the writ of mandamus, started using the remedy of continuing mandamus issuing orders for the civic bodies to perform their legal duty. Article 32 of the Constitution leaves a wide ambit for interpretation – the language of the Article allows the court to issue writs other than the five writs mentioned therein. Therefore, it was not a very far stretch to evolve a continuing writ of mandamus or what is known in the American jurisprudence as structural injunction. The courts while issuing a continuing mandamus may not always formally admit the petition but urges the civic body concerned to perform its obligations while hearing the case every few months to ensure compliance. Consequently, India today has many ongoing cases of continuing mandamus or structural injunction which have been taken up time and time again to oversee compliance by the government bodies.

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24 Prison Litigation Reform Act of 1996.
26 Myriam Gilles, An Autopsy of the Structural Reform Injunction: Oops ... It's Still Moving, 58 UMLR 143 (2003).
27 D.Y. Chandrachud, Constitutional and Administrative Law in India, 36 IJLI 335 (2008).
One of the earliest cases where structural injunction was issued was the case of Bandhua Mukti Morcha.\textsuperscript{29} In the present matter, it was alleged that the working conditions of labourers, especially bonded labourers were inhumane in certain areas of Delhi. The Supreme Court in the matter issued varied orders in the case including a detailed examination of the situation, directing the state government to form committees and frame schemes for the rehabilitation of affected labourers. The court further went on to appoint a commissioner who would report on the progress to the court. A similar approach of the court was seen in the PUCL case of 2001\textsuperscript{30}, wherein the court ordered the governments to mandatorily implement the ‘mid-day meal scheme’ in the primary schools.

The longest ongoing case of structural injunction is the forest rights case of 1995.\textsuperscript{31} In the particular matter, the petitioner approached the court to protect the Nilgiris forest land from the illegal timber industry. This was caused due to a loophole in the law, whereby the legislature had not recognized the area as ‘forest’. The court in the present matter went on to interpret the word ‘forest’ to include the Nilgiris forest area also and thus bringing the area under the protection of the government. The injunction order further went on to direct the state governments to make expert committees which would be tasked with identifying similar forest areas, essentially donning the robes of “saviours of India’s forests”.\textsuperscript{32}

However, the court did not stop there and instead of disposing of the matter, went on to look into other administrative issues with regards to forests\textsuperscript{33}, repeatedly issuing injunctions to ensure better management like constituting committees to ensure compliance, perusing revenue figures from timbre industry and looking into transportation records.\textsuperscript{34} The case still has not been disposed of, even after the petitioner passed away in 2016.

A similar pro-active role of the judiciary was seen in the cases of Vineet Narain (1988)\textsuperscript{35}, the 2G spectrum case\textsuperscript{36} and the Coalgate case\textsuperscript{37}. The Supreme Court not only ordered the CBI to conduct investigations in the matter but almost micromanaged the entire investigations. The injunctions issued by the court in these cases were meant to look into the “inertia of the

\textsuperscript{30} Peoples Union for Civil Liberties v. Union of India, WP(C) 196/2001, Supreme Court of India.
\textsuperscript{32} Chandrachud, supra note 14.
\textsuperscript{33} Armin Rosencranz, Supreme Court and India’s Forests, 43 EPW 11 (2008).
\textsuperscript{34} Godavaraman, supra note 27.
\textsuperscript{36} CPIL v. Union of India, (2011) 1 SCC (Cri) 463.
\textsuperscript{37} Manohar Lal Sharma v. Principal Secretary, (2014) 2 SCC 703.
investigating agency” and not so much into the actual allegation of the accused. In fact, in the Coalgate case, the court also looked into the appointment of the special public prosecutor.  

**COMPARISON AND ANALYSIS**

Structural injunction as an equitable remedy reinforces the idea that no wing of the government can go against the grund-norm, the Constitution. Taking a step further, the decisions where structural injunctions have been issued suggest that not only can the administration be held liable when it goes against the Constitutional norms, but it will also be held liable if it fails to ensure that Constitutional norms are followed proactively – this is the idea of the negative and the positive duty of the state.

One of the most essential differences between the American and Indian jurisprudence is that in the USA, the structural injunctions arise out of principles of equity which limits the scope of the injunction; whereas in India, the basis of structural injunction lies both in the principle of equity and constitutional remedy given under Art. 32 and 226, thus giving it more ‘legitimacy’ and scope for wider interpretation.

It has to be borne in mind that the government structure of India and the USA vary; while the Unites States readily accepted the separation of power doctrine and distributed powers in (almost) rigid boxes for the three wings of the government, India never did the same. In India, it is often the case that powers across the three wings of the government overlap. It is for this reason that the courts in America face far more criticism when the Federal court judges interfere in the policy-making of states. In India, judicial activism, though criticized has been accepted especially in the areas concerning public interest.

In the 1980s when the use of structural injunction was at its peak in the US, India had just started venturing into the field of using continuing mandamus along with public interest litigations. However, the use of structural injunction in the US was met with far more disapproval by the administrative bodies. The criticism combined with ‘conservative

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38 Vineet, supra note 31.  
39 Manohar, supra note 33.  
judges\textsuperscript{42} and the limitations the judiciary created on itself, structural injunctions are sparsely used today in America. The only recent cases where structural injunctions have been used relate to prison reforms and racial segregation. However, since in India, the foundation of structural injunctions holds more legitimacy than in the US (supra) their use has only increased.

While there are no doubt merits to the remedy of structural injunction, there are certain drawbacks too. Firstly, it has to be kept in mind that the function of the judiciary is to interpret the law, and not to make them. Even if it ventures into the arena of law-making, it can only do so with limited scope and even then, only temporarily. The elected members of the government are the real lawmakers and that is the spirit of democracy. Secondly, the judiciary in itself is not equipped or competent, and definitely not the correct body to make policy decisions for the state. Thirdly, venturing into policy-making may very well lead to drifts between the judiciary and the administration, as was seen in the USA post-prison reforms in 1996.\textsuperscript{43} Lastly, Indian courts have reportedly been overburdened by an ever-increasing pile of cases and if structural injunctions are passed continuously without disposing of the matter, it will end up burdening the courts even more.

\textsuperscript{42} Myriam, supra note 40.

\textsuperscript{43} A.M. Bertelli, Structural Reform Litigation: Remedial Bargaining and Bureaucratic Drift, 18 JTP 18 (2006).
CONCLUSION

Structural injunction, as an equitable remedy, is one that is needed to ensure that the state does not shirk away from its duty to provide the citizens of the state the rights promised to them under the Constitutions. It becomes crucial that the judiciary has such a tool to make socio-economic and enviro-human reforms in case the policy-makers fail to do the same. However, separation of power, as diluted as it has become is important because it keeps checks and balances on absolute power in the hands of one body. Every civic body is prone to corruption; where discretion is allowed, it may easily be coloured by personal beliefs and ideologies. It is for this reason that there should be clear and unambiguous limitations on the power of the courts to issue structural injunctions. Remedies like structural injunctions become increasingly important to ensure transparency in the administration and legislature. At a time when there is large public unrest regarding controversial laws and allegations against the state for alleged violence or police brutality, structural injunctions can become an effective tool for the courts to legally scrutinize the administration's actions.
LAW AND DEMOCRACY – IS SOCIAL MEDIA SANDWICHED?

Authored by R.V Vishnukumar,

ABSTRACT

The Twitter and other blogs, SMS messages, emails, Facebook, LinkedIn, Youtube WhatsApp are omnipresent forms of communication within modern society. The role of these apparatuses in empowering individuals to express their political opinions, as well as whether and how social media should be regulated and structured, have emerged as questions of substantial interest, particularly in recent times. However, the issue of interlinking social media within a possible sparking of tensions between regulation and democracy remains of current and perennial nature and form. Law happens to be only one of the forces or ‘watchdogs’ that control and define systems such as the internet, the others being markets, architectures and norms.

Social Media has ability to engage political engagement and the prospect can be curtailed by legal constraints. The topic on hand is significant because the influence of social media is frequently exaggerated and, in debates where democracy is at stake, the desirability of regulatory controls is typically overlooked.

The author has in first phase deliberated upon the social media and explored the premise that social media is favorable to enhanced democracy. It also recognizes certain intimidations and perils from the political participation in this specific medium. In the later phase contest between law and democracy is reflected upon.

Recent developments in Sweden and India and elsewhere have gained special attention. For national security, acquiescence and other purposes, there is a discernible inclination to increase public control of social media within each of these jurisdictions due to multifarious reasons. The topics to be deliberated include values of individual rights, access to and participatory conditions in the social media and the tolerability of restrictions within a democratic society, all-encompassing regulatory development and guaranteeing government accountability. The premise is that, in order to

1 Lawrence Lessig, Code and Other Laws of Cyberspace (Basic Books, 1999).
accommodate conflicting policy priorities, the embracing of regulatory measures inevitably but certainly weakens the enjoyment of human rights and constrains the civic potential offered by social media.

In this article the author has endeavoured to explore the relationship between social media on one hand and law and democracy and explores the premise that social media is conducive to enhanced democracy. It also identifies some of the risks and dangers of relying on this particular medium as a means of political participation.

SOCIAL MEDIA AS A MEANS FOR CIVIC ENGAGEMENT

Social networking sites such as Facebook are accessible for online visitors who share information, search and interact. The web-based social media can be described as the community of web-based applications based on the conceptual and technological basis of Web 2.0, facilitating user created content to be generated and swapped. Blogs like Twitter encourage users to post observations and to publicly broadcast them on the internet. Social networking like YouTube helps users to post, download and share images, videos and music online. Notwithstanding the medium in question, social media has many common features. Primarily, the opportunity to reach a large audience. Second, content is generated when one user interacts with another user.

Social networking is quickly becoming the preferred mode of education, work, trade and personal speech. Indeed, non-access and disconnection from the Internet has been defined as ‘non-existence.’ Social networking can be used for a number of reasons.

Non-governmental human rights groups profit from the Internet in terms of information sharing and ease of contact.

The internet has also modified the social conditions for expression. The cultural and

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participatory elements of the human right to freedom of speech are illustrated.⁵

The United Nations (UN) Special Rapporteur on the promotion and security of the right to freedom of thought and speech, Mr Frank La Rue, has been mandated to present his views on the benefits and challenges of emerging information and communication technology, including the Internet and mobile technologies.⁶ The Internet thus encourages citizen engagement in the creation of democratic societies⁷. Marginalised or disadvantaged social sectors can also obtain information and participate in public debates concerning social, economic and political changes affecting their circumstances.

But the connection between social media and political engagement is not so obvious. One view is that social media is a catalyst for political transformation—information is so readily available that people can formulate and share their own political views.⁸ Social media, on the other hand, encourages mainstream engagement and greater democratisation within governments. Via the Media, ‘[i]nvestigators become less passive and therefore more active participants of social spaces that might theoretically become objects of political conversation; they become more engaged in conversations about their findings.’⁹ However, analysts remain split between those who deem the Internet to be a boon to democracy ¹⁰ and for those who think it is a weapon of injustice.¹¹

It is true that the Internet will prove to be an effective medium for political advocacy, especially when paired with conventional means of communication media.¹² Social

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networking promotes practices as diverse as civic education, fundraising, coalition building across territorial borders, the dissemination of petitions or intervention notices, and the preparation or organization of events at national, regional or international level.

For example, the Internet and email have helped mobilize customer boycotts against selective regulation that has not only national but also foreign consequences. In the later part of my post, I will be discussing this in detail on this with some very recent debatable event. Several groups have used social media sites, including Facebook and Twitter, to distribute progressive messages and organise demonstrations. Blogging has become a center of information for political activists free from surveillance or exploitation by conventional state-controlled media. The government has described Facebook as a dangerous program and officials have entered Facebook groups to advise people not to attack.

It has also been proposed that the extent of internet access will predict the degree of democratic achievement. In other words, the more improved the basic communications system of any given country, the more likely it would be to promote and demonstrate the freedoms and rights of its people. The significant democratic benefit of the Internet is that ‘those who have computers and Internet connections are better educated, better informed and better motivated to engage in democracy.’

The history with web-enabled open governance highlights the essence of human actions and the problems facing agencies. The Internet is opening up the methodologies of government departments to public scrutiny, encouraging increased transparency, making knowledge more available and increasing public involvement in the decision-making of agencies. For example, ‘e-regulation’ requires public comments to be made online via social media in order to formulate laws. Individuals, however, show ‘drive-by-

14 Audrey Selian, IT’s in Support of Human Rights, Democracy and Good Governance (International Telecommunications Union, 2002).
participation."\(^{17}\) In addition, citizen engagement will postpone agency action, overwhelm decision-makers and promote agendas that satisfy the desires of small but vocal interest groups.\(^{18}\) As a result, Rule and Web 2.0 became ‘very odd bedfellows. Law is bureaucratic, oppressive, and bound; the network is elastic, endlessly possibilistic, even anarchic."\(^{19}\)

One problem with social media is that engagement is marked by discrimination.\(^{20}\) The presence of a limited proportion of consumers who supply a significant percentage of information is extreme. Ideally, people should gather objective facts, share an own viewpoint, confront other points of view and address topics rationally.\(^{21}\) Yet the Internet is still a strong platform for disseminating disinformation, propaganda and hateful posts. This is precisely the ongoing controversy. It is also difficult to draw a distinction between vigorous discourse that advances knowledge-creation and expression that harms democratic deliberations. Will these threats and dangers be handled in an acceptable way through regulation?\(^{22}\)

### POLITICAL INFLUENCE OVER SOCIAL MEDIA AS A DEMOCRATIC BARRIER

The leading developed countries believe that the Internet helps to foster democracy and freedom of speech, expression, information, assembly and association.\(^{23}\) Arbitrary or indiscriminate surveillance or limits on access to the Internet are claimed to be incompatible with the international commitments of the State and to be unconstitutional. They have also dedicated themselves to facilitating the use of the Internet as a medium for fostering civil rights and political engagement. It is critical, however, that the

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19 Farina et al., ‘Rulemaking in 140 Characters or Less: Social Networking and Public Participation in Rulemaking’ (2011) 31 Pace Law Review 461

20 ibid 453


application of these goals is qualified by respect for the rule of law.\textsuperscript{24}

In particular, a clear connection between freedom of speech via social media and political engagement can be established. The free exchange of knowledge or ideas on topics important to the economic, social or political life of a state is central to and intrinsic in the very existence of a democratic country.\textsuperscript{25} Equality of speech, including political discourse, is an important cornerstone for a democratic society and a necessary prerequisite for individual self-fulfillment. Equality of speech, along with the freedom to take part in the public affairs of the state, ‘means that people, in particular through the media, should have broad access to information and the ability to disseminate information and views on the actions of elected bodies and their representatives.’\textsuperscript{26}

So, what is the essence of the confrontation between law and democracy?

a) It is the individual interest in free political speech does not always coincide—and indeed can conflict—with government objectives. The attractiveness of an unhindered multimedia contact space seems to be in contrast with the exercise of power in the wider public interest. What position, if any, does the law have in bridging or perpetuating the gulf?

b) Second, the legislation imposes restrictions on the steps which the Member States are allowed to follow. Using the right to freedom of speech to highlight this point, any limitation of that right must fulfill a three-part cumulative test:\textsuperscript{27} Limitation must be established by a statute that is transparent and open to all (i.e. the concepts of predictability and transparency);

c) the restriction shall safeguard the interests or reputations of others,

\textsuperscript{24} ibid [11], [13], Section II [10].


\textsuperscript{26} Human Rights Committee, Decision: Communication No 633/95, UN Doc CCPR/C/ 65/D/633/1995 (5 May 1999) [13.4] (‘Gauthier v Canada’).

\textsuperscript{27} Frank La Rue, Special Rapporteur, Report on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc A/HRC/17/27 (16 May 2011) [24].
national security, public order, public health or morality\(^{28}\) (the idea of legitimacy);

\(d\) the restriction must be necessary and the least restrictive means to meet the desired purpose must be used (the principles of necessity and proportionality).

e) In addition, any statutory measure must be enforced by an agency which is independent of any governmental, economic or other unwarranted interference in a manner which is neither unreasonable nor biased and which has sufficient protections against violence, including the potential of challenging and remedying any abusive implementation.\(^{29}\)

International benchmarks such as these, as a guide to national laws, are all well and good. But States increasingly censor online information by unilaterally banning or deleting news, criminalizing legitimate speech, enforcing intermediary liability, Disconnect users from internet access.\(^{30}\)

Non-governmental groups in the area of human rights are concerned that the challenges to the freedom of the Internet are increasing and becoming more complex. In one survey of 37 countries, 15 blocked politically related content.\(^{31}\) Reports on Internet censorship, information exploitation and imprisoning users have risen in recent years. For example, in Brazil, India, Indonesia, South Korea, Turkey and the United Kingdom, the freedom of the Internet is gradually threatened by judicial intimidation, vague filtering regulations, or expanded surveillance.

So the question to ask is - Why, then, is regulation viewed as a danger to the democratic

\(^{28}\) *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entry into force 23 March 1976) art 19(3).

\(^{29}\) *Opinion and Expression*, UN Doc A/HRC/17/27 (16 May 2011) [24].

\(^{30}\) Reaching for the Kill Switch’, *The Economist*, 10 February 2011.

potential of social media, particularly if counterbalancing interests are at stake? Social media empowers people by allowing freedom of speech. Thanks to its low cost, open existence and broad scope, the Internet is an important medium for the dissemination of independent views on state authorities and government policies. Many policymakers have developed an interest in regulating, tracking and, where possible, censoring digital media.\textsuperscript{32}

The apparent advantages resulting by the use of social media, including the facilitation of greater involvement by individuals, are not without substantial qualifications. The desirability of enforcing limitations with a view to preserving privacy, prestige, intellectual property rights, national security or public order can be readily acknowledged. International human rights legislation offers only limited normative guidelines to regulatory agencies for how to guarantee protection for the right to freedom of speech and, in any case, specifically provides for restrictions to its practice.

At the end of the day, it seems that regulating social media will prove theoretically or politically difficult. Controlling public Internet usage can enable policymakers to forgo the advantages of linking or expending political capital to block websites. The ‘cute cat theory of digital advocacy’ claims that governments cannot block activist action without depriving them of access to other content, like pictures of cute animals.\textsuperscript{33} Governments cannot close down Facebook, for example, because doing so alienates people and can politicize those who lose access to it.

Social networking tools, as all means of contact, are subject to violence. Its ability to improve political engagement should not be overstated. Caution is also appropriate when advocating social media as an instrument for radical political reform.\textsuperscript{34}

\textbf{THE TOOLKIT EPISODE}

With the very recent debatable issue of Swedish climate activist Greta Thunberg allegedly sharing a ‘toolkit’ with an Indian has brought forth the issues of social media and the dividing


\textsuperscript{34} Sarah Joseph, ‘Social Media, Political Change and Human Rights’ (2012) 35 \textit{Boston College International & Comparative Law Review} 145
lines of the various stakeholders getting blurred. It has also taken within its sweep individuals in India with diametrically opposite claims on the issue by the participant individuals on one hand and authority stakeholders on the other hand.

‘Toolkits’ — in modern day internet parlance — consist of a set of guidelines to ensure the achievement of certain shared goals.

While toolkits are readily used by government departments and private organisations, they have also gained momentum in social protests across the globe.

Protest toolkits usually provide methods for holding protests, tools and hashtags to create momentum on social media, and guidelines for protestors regarding remedies available during police arrests or clampdown.

Interest in this case was piqued by a toolkit tweeted by Greta Thunberg, which she later deleted citing that the same is being “updated by people on the ground in India”.

Soon after, Thunberg tweeted an updated and detailed version of the protest toolkit. As per a copy of the earlier toolkit accessed by The Quint the alleged document contained various guidelines under heads such as “Urgent Actions”, “Prior Actions”, and “How Can You Help”.

Issues emanating from the episode

Can activism be equated to sedition?

Allegedly, the authorities in an unnamed FIR which claims that a ‘criminal conspiracy was hatched by her along with Swedish environmental activist Greta Thunberg and various others to prepare a toolkit’ on the farmers’ protests in India.

As per the said FIR, the content of the toolkit and the very act of its preparation amounts to sedition, as it allegedly intends to wage a “cultural, economic, and regional war against India”.
In a series of tweets allegedly posted, it has been claimed that one Disha is the ‘editor of’ and a ‘key conspirator’ behind the preparation and dissemination of the allegedly seditious protest toolkit.

They have further claimed that she created a WhatsApp group to ‘formulate the toolkit, collaborated with an allegedly pro-Khalistani group Poetic Justice Foundation, and transferred the toolkit to Greta Thunberg’.

Questions have already been raised however, beyond the procedural issues, there are also questions about the police narrative itself.

It has also being allegedly claim

“The main aim of the toolkit was to create misinformation and disaffection against the lawfully enacted government. The toolkit sought to artificially amplify the fake news and other falsehoods and also sought to precipitate action on 26 January, that is, India’s Republic Day.”

This allegedly motivated the arrest of Disha Ravi and invoke offences such as sedition and criminal conspiracy against her, based on their claims that she had ‘collaborated’ with others to draft the toolkit.

Section 124A of the Indian Penal Code defines sedition as an offence committed by whoever “attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the government established by law in India”.

The law on sedition in India owes its origin to the colonial government, which incorporated it in the penal code in the 19th century to curb the rising movements of civil disobedience against the British Raj.

Many scholars have traced the post-Independence development of the sedition law in India to argue that the ambiguous wording of the provision has allowed the governments to constantly invoke it against to clamp down dissent.
The Supreme Court in multiple decisions has held that the test for establishing sedition is stringent, asking the State to establish a direct link between the allegedly seditious speech and the consequent public disorder.

Further, the courts have also held that actions that show disapprobation of government’s actions without inciting violence, speech made to improve the conditions of the people or secure change through lawful means would not amount to sedition.

In the present case, the verbatim of the protest toolkit, as accessed by The Quint, nowhere asks or incites the protestors to resort to violent means. The toolkit also doesn’t ask the protestors to participate in actions to “overthrow the government” or create “public disorder”.

On the contrary, the guidelines prescribed in the toolkit ask the protestors to use lawful means of expression to create a global momentum around the plight of the protesting farmers.

It asks for using social media and online petitions to communicate to the government their disapproval of the violation of rights of the protesting farmers.

Senior advocate Sanjay Hegde believes that this would be a difficult case for the Delhi Police to make in a court of law, explaining to The Quint:

“Sedition has a high bar to cross. The speech must be such as to actually incite violence. The toolkit was only speech in support of farmers. I doubt that it meets the standard of what constitutes sedition, as upheld by the Supreme Court in Kedar Nath & Balwant Singh cases.”

Sanjay Hegde, Senior Advocate, to The Quint

Commenting on this issue, senior advocate and human rights activist Indira Jaising told The Quint that in our country “difference of opinion is seen as sedition or called fake news”.

She further stated:
“When a State worries about a 21-year-old and arrests her, there is something rotten in the State, when a woman is sent to jail without being represented by a lawyer, the process of law and the constitution have parted company.”\textsuperscript{35}

CONCLUSIONS

Social media will mobilize people for good or bad. It is beneficial to democratization in so far as this platform has the ability to increase the civic participation of individuals. Social media promote the enjoyment of the right to freedom of speech, which is relatively unhindered by external controls and is mainly subject to technical problems such as connectivity and power. The degree of political engagement cannot be left to those technological aspects, considering the nature of ‘internet divides.’

While the use of social media as a radical political weapon should not be overstated, governments should be made more transparent through this platform. Whereas social media promotes greater democratization in repressive states, some democratic states, are heading towards stricter control. In this sense, what is the essence of the controversy between, on the one hand, the legal constraints placed on freedom of speech and democracy and, on the other hand, the acceptable role of social media? Efforts are observable within oppressive and democratic states to control social media for legitimate purposes, such as grappling with derogatory material or for reasons of national security or law enforcement. Governments are now trying to balance increasingly complex communications networks with a more robust law-enforced surveillance and control apparatus. Inevitably, however, the statute has the ability to necessarily conflict with private privacy, limit the enjoyment of other human rights and suppress the civic potential of social media. This condition illustrates the truism that the rule of law and technical determinism are engaged in a relentless fight for dominance.\textsuperscript{36} It is not a contest that will soon be resolved, if at all, and the context of social media presents no exception. Time alone will unravel the answer.

\textsuperscript{35} BLOOMBERG QUINT KARAN TRIPATHI Published: 15 Feb 2021, 8:09 PM IST

A GLITCH IN THE FEDERAL SYSTEM: THE GROWING TREND OF ‘HUNG LEGISLATURE’ IN INDIA

-Anvitarth Tripathi & Parth Chaturvedi

ABSTRACT:
The Constitution of India establishes a system of parliamentary form of Government in the States on the lines of Union Executive. The position of the ‘real executive authority’ in the political and administrative system of a State is held by its Chief Minister elected by its people and appointed by the Governor. By virtue of Article 164 of the Constitution, the Chief Minister (de facto executive) shall be appointed by the Governor (de jure Executive). However, if the elections deliver a fractured mandate, the gubernatorial discretion exercised by the Governor becomes a vexed issue. The Apex Court in Bommai case¹ had reiterated that in situation of a ‘hung assembly’, floor of the Legislative Assembly of the concerned State is the only and appropriate forum that should determine the eligible party to form the Government rather than the contesting parties themselves. It is the demand of the Constitutional ‘good faith’ that the Governor’s act of discretion be an ‘informed’ act based upon a ‘sound’ basis and not a politically motivated one, and aims to provide a stable Government to the people he serves. In the words of former President Abdul Kalam, the Constitution casts upon the Governor a duty to “rise above day-to-day politics and override compulsions emanating from the central or the state system”². Albeit impartiality is theoretically desired, it is a difficult virtue to imbibe. Appointment to the office of Governor is often done as sheer political expediency by the ruling dispensation in Centre. India has witnessed several State governments dismissed by the Centre or horse-trading of elected representatives as a matter of course. The authors attempt to expound upon the aforementioned issues by buttressing their rationale backed by authorities and underscore the threat which Executive aggrandizement pose on India’s federal polity.

Keywords: Constitution of India, Hung Assembly, Governor, Coalition, Fractured Mandate.

INTRODUCTION

The Indian political scene has witnessed stalwart leaders of impeccable credentials on both national and regional turfs. The rise of India as an economic and military superpower is largely attributed to the political will, competence and vision of our leaders. However, the thirst for power and the ‘compulsions of coalition politics (where even the opposing political ideologies come together to form government) have, over the years, become drivers of political power and thus, the term ‘hung assembly’ has acquired the form of a ‘regular guest’ in India’s polity. Political commentators Andrew Blick and Stuart Wilks-Heeg believe that the phrase "hung parliament" did not enter into common parlance until the mid-1970s. It was first used in the press by journalist Simon Hoggart in The Guardian in 1974. In recent memory, the coalition of People’s Democratic Party (PDP) and BJP to form government in J&K in 2016, the political montage of ‘Mahagathbandhan’ before the 2019 general elections and alliance of Shiv Sena – NCP – Congress forming the ‘Maha-Vikas Aghadi (MVA)’ government in Maharashtra are ripe examples of politics over ideology. Although there is a lack of settled law on both- hung parliament as well as hung assembly, the focus of this article is on how the system has tried, if it has, to deal with the issue of hung assemblies because of its more frequent appearance.

MEANING OF ‘HUNG ASSEMBLY’

The term ‘Hung Assembly’ often comes into play when no particular political party or pre-existing alliance secures an absolute electoral mandate in the Assembly. In such scenario, the question arises as to who is eligible to form the Government in the State with such stability to ensure a smooth functioning of the affairs of the State. Several countries view a hung assembly as an unfavourable outcome, and ‘decisive mandate’ as emblematic of a strong and stable government. Amidst a period of uncertainty in the aftermath of the election results, major party leaders enter into arrangements with independents and minor parties to establish a working majority. In the Westminster system of governance, this typically involves an agreement on a Common Minimum Programme (CMP), with several ministerial portfolios allotted to minor coalition partners in return for their support. Alternatively, a minority government may establish and retain confidence of the House by concluding supply agreements in return for policy bargains agreed in advance.

3 Blick, Andrew; Stuart Wilks-Heeg, “Governing without majorities: Coming to terms with balanced Parliaments in UK politics” (April 2010).
INSTANCES OF GUBERNATORIAL PARTISANSHIP

The political imbroglio which follows every election makes a mockery out of the system of a country where the Constitution covers every complex intricacies of governance. Recent elections and political theatrics that ensued in Karnataka, Goa, Telangana, Haryana and Meghalaya are pertinent instances of a Hung Assembly. Hence, while Indian National Congress emerged as the single largest party in Goa, Manipur and Meghalaya, the BJP formed the government in these States in a coalition. However, the factual matrix got reversed in Karnataka. In 2018 Karnataka elections, the Governor invited the single-largest party lacking a majority (the BJP) to form government in the State, conveniently ignoring the coalition with a clear majority (the Congress-JD(S) alliance). Political analysts alleged that his decision was not motivated to establish a party commanding majority but by partisan considerations. However, the Supreme Court timely intervened in the fiasco and ordered an immediate floor-test in Karnataka, which the BIP failed. The political turmoil in Karnataka poignantly demonstrates the recurring events in Independent India’s history. As Udai Raj Rai comments, “political institutions work by natural play of political forces, and not by decorative, though irritating, discourses and platitudinous discussions.” In other words, fundamental concern of the top political brass is to acquire, distribute, exchange, and consume the power to rule, albeit it is veneered on all sides by appeals to democratic ideals and constitutional morality.

In Jammu & Kashmir Assembly elections of 2018, when the non-BJP parties joined forces to form a government in the State, the Governor brazenly dissolved the House and called for fresh elections, characterizing the alliance as “unholy.” New Delhi and Puducherry have also been at the receiving end of political aggrandizement by the Centre. In 2015, the Aam Aadmi Party swept the Delhi Assembly polls with a humongous majority and formed government in National Capital Territory (NCT) of Delhi. The federal government, acting through the Lieutenant Governor, not only pushed through key appointments in the Secretariat in contravention to the advice of the Chief Minister, but also obstructed major policies and legislative initiatives of the elected government of Delhi. In part, these controversies are largely attributed to Delhi’s peculiar status as the capital of India in our constitutional framework. While it does have an elected parliamentary government, the

6 Supra 3.
powers of Delhi’s elected executive are somewhat less than those of fully-fledged states.7

When the political tussle inevitably reached the doorsteps of the Apex Court, it unanimously held that LG is bound by the “aid and advise” of the Council of Ministers of Delhi government, except in matters under Article 239 or those outside the purview of the National Capital Territory (NCT) government. While the judicial caveat left enough ambiguity for the LG to continue with some meddling, even this limited relief came after the elected Delhi government had already completed almost three and a half of its five years in office.8 Furthermore, in Puducherry, a Union territory with a constitutional status parallel to Delhi, the LG has been at loggerheads with the State government since taking office. The tumultuous confrontation between the Raj Nivas and the Congress government played out variously as power tussles, courtroom battles, tangles over policy and a slow burn of several key schemes.9 In Maharashtra, the Governor recommended President’s rule in the State even when the Sharad Pawar-led NCP was allotted time by him to cobble up sufficient numbers to stake its claim to form government.10

But these political confrontations can be prudently avoided. For instance, most of the Western European countries work in coalition and are considered to be as amongst the most stable regions post Second World War despite difficulties in their power arrangements. Partners in the coalition need to arrive at a political consensus on issues which will be addressed by their government. That can be tricky, given that “before they started working together in the Government, they were competitors in the elections, even if the parties were relatively close in terms of substance”, Müller said.11 Even if the government is eventually formed, it walks a tight rope to survive amid pressure from coalition partners to address regional issues and in some cases, to massage personal ego. But the phenomenon of hung assembly cannot be solely attributed to political shenanigans. With a large population in a federative multi-party parliamentary democracy which is governed by a plethora of ideologies, it is conveniently possible that elections deliver a fractured mandate. But India has also witnessed its fair share of coalition compulsions threatening the national security and

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8 Ibid
10 Ibid
prestige of the nation. For instance, the Jayalalithaa-led AIADMK pulled plug on the Vajpayee led BJP government at the Centre months before the Kargil War of 1999. It was bewildering to witness a caretaker government leading the armed forces to war. Later, the Congress led UPA government was on the verge of collapse and marginally survived a vote of confidence in Lok Sabha when the Left Front withdrew support from the Centre in the aftermath of the Indo-US Civil Nuclear deal of 2008.

WHERE DOES THE LAW IN INDIA STAND?

Article 164(1) of the Constitution of India provides that the Governor shall appoint the Chief Minister (“CM”) on whose advice he shall appoint the cabinet ministers. An important corollary of this power to appoint the CM is the power to choose who is eligible to be appointed as a CM. However, the chronological sequence in which the Governor should invite political parties to form Government in cases of a hung assembly has been a vexed one to which no clear answers are applicable in all times.12 The problem gets exacerbated by the fact that the Constitution as well as the Representation of People’ Act are silent on the exercise of Governor’s prerogatives in case of a hung assembly.13 Granville Austin speculates that this absence might be the result of lack of anticipation on the part of the Constitution drafters of a situation in which no single party would be in a position to secure a majority in the Legislature.14 Nonetheless, the exercise of discretionary power by the Governor in the appointment of the CM has been an arena of political manipulation for some time now and the constitutional vacuum with it provides enough latitude to the Central Government to meddle into State politics through the Governor’s office.

Although, an ‘Instrument of Instructions’ was drafted and approved by the Drafting Committee to guide the President and the Governors with regards to exercising their discretion, it was dropped minutes before the Constitution was adopted on 26th November, 1949 because it was felt that the matter should be left entirely to the convections of parliamentary form of government. The second paragraph of the ‘Instrument of Instructions’ to the President enjoined the President “to appoint a person who he finds most likely to command a stable majority in Parliament as the Prime Minister”15 As no such convention was prevalent in the Indian politico-legal system, the framers of the Constitution apparently left

13Ibid
this matter to be governed by the British convention that the party which has secured the majority in the House would govern while the parties which are in the minority would sit in the House as members of the opposition.

The judicial approach concerning the selection of the CM was highlighted by the Hon’ble Supreme Court in *Mahabir Prasad v. Prafulla Chandra* \(^{16}\) where it was that the Governor has the absolute power with regard to the appointment of the CM of the State and it is his sole discretion and therefore, the Court cannot call in question the same. In the case of *Jagdambika Pal v. State of UP* \(^{17}\), a special Assembly session was held by the Hon’ble Supreme Court where a composite floor check was ordered among the opposing sides in order to determine which among two sides had a majority in the House. The Gauhati High Court, with reference to the Governor's discretion in the process of appointing or dismissing the CM, discerned that the repository of the power to appoint or revoke the pleasure provided in Article 164 of the Constitution of India and/or dismissal of the ministry is the Governor's exclusive pleasure-cum-discretion which cannot be questioned. He holds the absolute and exclusive power to select and subsequently, appoint the Chief Minister of the concerned State. \(^{18}\)

This convention works well when the political party gets a clear mandate in the Assembly Elections and the Governor has practically no option but to invite the leader of that political party to form the Government and appoints the person as chosen by the party as their leader, as the Chief Minister of the State. The problem arises when no particular party gets a clear mandate and it all boils down to a political tussle of ‘cobbling numbers’. In such situation, the Governor is vested with the power to exercise his individual discretion, subject to judicial review to invite that political party to form the Government which he deems fit of forming a stable ministry and which can retain the confidence of the house.

In case of a fractured mandate, there may be a single largest party, a pre-poll alliance (like NDA or UPA) or a post-poll alliance (like the coalition of Shiv Sena- NCP- Congress). Certain available options for a Governor are: (a) Invite the leader of the single largest party and ask him to prove his numbers, (b) Invite the leader of the pre-poll alliance for the same, (c) Invite the leader of the post-poll alliance or, (d) Dissolve the Assembly and call for a re-election.

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\(^{16}\) *AIR 1969 Cal 198.*

\(^{17}\) *JT 1998 (4) SC 319.*

COMMITTEES’ AND COMMISSIONS’ GUIDELINES
In the absence of a settled law, various Commissions have been set up from time to time to deliberate on the manner of exercising the discretion by the Governors in choosing the CM of the State who can form a stable ministry. Let’s know about recommendations of such commissions:

- **The Committee of the Governors (Bhagwan Sahai Committee) in 1971** proposed certain guidelines to be followed by the President or the Governors, in case of a fractured mandate, as to who should be first invited to form the Government. The Committee laid down the responsibility upon the Governors to ensure that the Administrative stability of the State does not breakdown due to the political instability. An important recommendation of this Committee was that, the leader of a minority party may also be invited to form the government if the Governor is satisfied that the leader will be able to muster majority support in the House in combination with other parties or with support of other members of the Assembly.  

  Although these recommendations were useful, the idea of instructions to the Governors was withdrawn in November, 1971 by the Governors’ Conference when the report was analysed.

- **The Committee on Centre-State relations commonly called as the Sarkaria Commission** submitted its report in 1988 and recommended that the Governor shall be guided by certain principles. It suggested that where a single party gets an absolute majority in the results of the Assembly elections, the leader of that party should automatically be invited to become the Chief Minister of the State. However, in a situation where there is no such party with absolute majority, the Governor should select a Chief Minister from among the following parties or groups of parties according to the below stated order of preference:

  I. A pre-electoral alliance.
  II. The largest single party putting a claim for forming the government with the support of other parties, including 'independents'.
  III. A post-electoral alliance, with all the partners in the coalition joining government.

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19Krishna Murari Yadav, “Urgent need of law to regulate the situations of Hung Legislative Assemblies”, Delhi Journal of Contemporary Law (Vol .1).
IV. A post-electoral alliance of parties, with some members of the coalition forming a Government and the remaining member parties, including 'independents', supporting the government from outside.20

The Sarkaria Commission also laid down a criteria which should be followed while appointing a Governor:

(i) He should be eminent in some walk of life.
(ii) He should be a person from outside the state.
(iii) He should be a detached figure and not too intimately connected with the local politics of the state; and
(iv) He should be a person who has not taken too great a part in politics generally and particularly in the recent past.21

In the case of Rameshwar Prasad v. Union of India22 a five-judge Constitution Bench, particularly supported and endorsed the suggestions made by the RS Sarkaria Commission in its Centre-State Relations Study, which illustrated the impartial nature of Governors while exercising their discretion and their position in maintaining the constitutional mandate.23

- **Punchhi Commission Report of 2010** in its report was of the view that certain guidelines need to be laid down on the Governor’s role in the appointment of the CM. The report said, “There are various recommendations of several expert commissions and committees as well as judicial opinions in the past on the matter of the appointment of the Chief Minister in case of a ‘hung assembly’. After examining those materials and having taken cognizance of the dynamic political scenario in the country, the Commission is of the view that it is required to lay down certain clear guidelines which ought to be followed as Constitutional Conventions in this regard.”24 The guidelines which were recommended by the Commission were:

I. *The party or combination of parties which commands the widest support in the Legislative Assembly should be invited to form the Government in the State.*

II. *If there is a coalition or a pre-poll alliance, it should be treated as one political party and if such alliance or coalition obtains a majority, the leader of such alliance or coalition shall be invited by the Governor to form the Government in the State.*

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23 Supra note 18.
III. In case no party or pre-poll coalition has a clear majority, the Governor should appoint the Chief Minister in the below stated order of preference:
   a. the group of parties which had pre-poll alliance commanding the greatest number;
   b. the largest single party putting forward a claim to form the government with the support of other parties, including ‘independents’;
   c. a post electoral coalition with all partners joining the coalition, and
   d. a post electoral alliance with some parties supporting and joining the government and some supporting the government from just from outside.25

The Committee was of the view that if specific guidelines are not laid down to governs the claims of a post-electoral alliance; it would result in ambiguity in appointment of the CM. In cases of narrow majorities, there are no uniform conventions and this can be remedied by adopting constitutional amendments, by laying down specific guidelines and approaches which ought to be followed by the Governor. This would remove the ambiguity and result in greater clarity and certainty. The Apex Court in *Nabam Rebia and Bamang Felix v. Deputy Speaker*26, opined that the Punchhi and Sarkaria commissions on granting the governor a unilateral right to take an appeal on the floor check when the government lost the legislature’s confidence.

**CONCLUSION AND RECOMMENDATIONS**

For a federal character of India to work, it is necessary that the Governor rises above the partisan politics and exercises his discretionary powers as per the Constitutional ethos. However the reality shows a different picture. Even as back as Madras elections of 1952 to the recent Maharashtra elections of 2019, Governors have often acted like political agents of ruling political parties who promoted them to the position which is mostly the majority party in the Central Government and hence, the Governors’ role has, more often than not, been found to be in controversies since inception of the electoral politics of independent India. Several Commissions and Committees (as we have discussed earlier) have proposed guidelines in the nature of ‘Instrument of Instructions’ to guide the manner in which the appointment of CM should be made, but it has not been proven sufficient to either make Amendment to the Constitution or even establish a settled convention as the Hon’ble Supreme

25Ibid.
262016 SCC SC 694.
Court had observed in the case of Supreme Court Advocates on Record Association v. Union of India\textsuperscript{27} that there is no actual difference between “Constitutional Law” and an existing “Constitutional Convention” and that both are binding in their own spheres. The Supreme Court went further to explain that for a convention to be accepted and applied as part of the Constitutional law of the land, it needs to be established and operated in the interest of the Court.

Some possible solutions to put an end to the issue of ‘Hung Assembly’ and ‘Hung Parliament’ are suggested here:

- The concept of Investiture Vote can be incorporated in the Indian Constitution. It is system of formal voting among the MPs or MLAs (as the case may be) to determine who should be invited to form the new Government. This is prevalent in other Parliamentary Democracies of the world like Germany, Spain, Hungary, Japan, Slovenia, Sweden, Ireland, Finland and South Africa. The formal incorporation of this would distance the President and the Governor from choosing, as per his discretion, the Prime Minister or the Chief Minister as the task will now be performed by the Parliament and the State Legislative Assembly respectively thereby giving the powers ideally in the hands of ‘the people’. This approach was also accepted by the Hon’ble Supreme Court in cases of Jagadambika Pal\textsuperscript{28} and Anil Kumar Jha\textsuperscript{29} where the Speakers of the State Assemblies of Uttar Pradesh and Jharkhand were directed to conduct ‘floor test’ in the House between the contending parties to determine the party with the ‘numbers to form the Government’.

- Another solution is the formal incorporation of the Guidelines of Sarkaria and Punchhi Commissions into the Constitution by way of Amendment. This would ensure a stable and uniform practice in case of ‘Hung Parliament’ or ‘Hung Assembly’. This would also rule out the ambiguity in the exercise of discretionary powers of the Executive head thereby reducing the degree of Political Theatrics after every election.

- Some Parliamentary Democracies also use the mechanism of Informateur in selection of their Prime Minister. An Informateur is a trusted and experienced Statesman who is appointed by the Crown in the U.K. for assistance in choosing the Prime Minister. He explores the various possibilities of forming the Government and facilitates the talks between different political parties. This can be incorporated in Indian system where the President or

\textsuperscript{27}A.I.R 1994 S.C 268.
\textsuperscript{29}Anil Kumar Jhav. Union of India,(2005) 3 S.C.C. 150.
the Governor would be assisted in the similar manner. This would reduce the burden of the President or the Governor in political negotiations and bargains.

- Another solution can be to incorporate the system of **Constructive No-Confidence Vote** which means that the Opposition in the Parliament or a State Assembly can be allowed to pass a No-Confidence vote against the Government only when it can positively prove majority for a prospective successor to the Government. This is to maintain the stability of the Government of coalitions and would restrict, to a large extent, the frequent efforts to overthrow the party in Government by applying various political permutations and combinations. This system would incorporate both the positive and negative aspects of Parliamentarianism.

It would be correct to argue that there is an undeniable need to establish a set procedure to deal with the issue of ‘Hung Parliament’ or ‘Hung Assembly’ in India because of the nature of coalition politics. We are also of the view that the Hon’ble Supreme Court should also step in to develop its powers of suggestive jurisprudence to reinforce guidelines of the reports of the Punchhi and Sarkaria Commissions. It is also necessary that the Court absolutely negate the the Law Commission draft white paper (from April 17, which recommends simultaneous elections to the Lok Sabha and the assemblies from 2019) which problematically suggests the relaxation the provisions of the Tenth Schedule of the Constitution in case the situation of ‘hung Parliament’ or ‘hung Assembly’ inevitable arises again. 30, should also be resolutely negated by the Court. If this trend is not reversed, India’s democracy ‘by the people’ will become more ‘oligarchic’ that is, of the few and for the few.31

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31Bimal Jalan, India’s Politics: A view from the Backbench (Penguin Books 2007).
RULE OF LAW INDEX, 2020: AN ANALYSIS OF THE PERFORMANCE OF INDIA’S RULE OF LAW MECHANISM

- Udit Sharma *

INTRODUCTION

The concept of Rule of Law is as old as the writings of Plato and Aristotle. Plato once wrote “Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state”\(^1\). Similarly, Aristotle was of the view that “law should govern and those who are in power should be servants of the laws”.\(^2\)

The term Rule of Law is derived from the French term “la principe de legalite” which literally means the principles of legality and a system or a government that runs on the principles of law and not on the principles of certain individuals. It is a state of affairs in which there are legal barriers to governmental arbitrariness and there are available legal safeguards for the protection of the individuals.\(^3\)

Sir Edward Coke, the Chief Justice in James I’s reign is said to be the originator of the concept. In his banter against James I’s reign, Sir Coke succeeded in maintaining that the king must be under the God. It was A.V. Dicey who developed this doctrine in his famous work “Law and the Constitution” (1865).

According to A.V. Dicey, rule of law refers to the following three aspects:

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* The author has pursued his LL.M. in Constitutional Law from Himachal Pradesh National Law University.


These three foundations of rule of law have been followed diligently as a pedantic and theoretical concept. The concept has been accepted at the international level as the modern form of law of nature by the Delhi Declaration of International Commission of Jurists, 1958 which was affirmed in Lagos in 1961.

Many legal systems such as the English legal system has adopted Rule of Law within their justice delivery mechanism as evident from Entick v. Carrington and Wilkes v. Wood.

On the similar lines, the concept of Rule of Law has been incorporated within the Indian legal system through several constitutional provisions and judicial pronouncements.

However, mere adoption of a principle does not guarantee its effective implementation. There needs to be a barometer which tests this implementation. The Rule of Law Index by the World Justice Project is such an initiative which gauges Rule of Law in various nations. Although, the Index does not find its place in the common discussions in relation to law and administration, its findings can highlight the legal and the administrative environment of a nation.

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4 (1765) 19 St Tr 1029: 95 ER 807.
5 (1763) 19 St Tr 1153: 98 ER 489.
RULE OF LAW IN INDIA

Rule of law in India has progressed into multiple dimensions and has transcended beyond the tri-modelled principle postulated by A.V. Dicey. Rule of Law in India is based upon constitutional principles and administrative actions. It is metaphorical vehicle of which Constitution is the fuel and administrative actions are the functionary tyres. The Constitution validates it, the administrative actions give motion to the same.

Rule of Law is sine qua non for any democracy. The sentiment was proclaimed by the Supreme Court in *Bachan Singh v. State of Punjab* ⁶ whereby Bhagwati J. stated that Rule of Law is a concept that “permeates” the entire fabric of the Constitution. The Court declared its as one of the ‘basic features’ of the Constitution.

Similarly, in *A.K. Kripaik v. Union of India* ⁷, the Supreme Court stated that law was supreme over all the fields of administration in India.

The concept of rule of law exists in the nation by virtue of the following features:

1. **Supremacy of Law:**
   This aspect of rule of law finds its place within the Constitution of India. The ideals of Justice, Liberty and Equality adopted in the Preamble of the Constitution reflect the principle of Rule of Law in India.
   Judicial pronouncements have also validated on this aspect of rule of law in India. As held in *A.K. Gopalan v. State of Madras* ⁸ that the Constitution is supreme (para 145). All the three organs of the State are under the Constitution and act according to the provisions of the Constitution.
   Furthermore, any malice within the working of the executive or the government is a violation of Rule of Law as held in *Express Newspaper (P) Ltd. v. Union of India*. ⁹
   The executive and legislative powers of the State and the Union are required to be exercised according to the provisions of the Constitution. Also, if the government and public officials encroach upon the fundamental rights of the people, they can be regulated by the use of writs by the Courts.

2. **Equality Before Law:**

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⁷ AIR (1970) SC 150.
⁸ AIR (1950) SC 27.
⁹ (1986) 1 SCC 133.
Article-14 of the Constitution enshrines this aspect. Further, The aspect “Equality Before Law” is a direct emulation of rule of law doctrine. Everyone is equal before law and the “king can do no wrong” has no application within India. The Supreme Court even emphasised on this in *Indira Nehru Gandhi v. Raj Narain* 10 whereby the Court held that the rule of law is embodied in Article 14 of the Constitution of India and is part of the basic structure of the Constitution and it cannot be demolished even by an Amendment under Article 368.

3. Predominance of Legal Spirit:

The Rights in the Constitution of India has been guaranteed to every person and is enforceable by the Courts under various writs. This principle of Predominance of Legal Spirit was used in interpretation of Constitutional provisions in several cases such as *A.K. Gopalan v. State of Madras*11 and *Ram Prasad v. State.*12 This aspect can be validated by referring to *Chief Settlement Commissioner, Punjab v. Om Prakash* 13 whereby the Court held that the rule of law also includes the power of the courts to “test all administrative actions”.

**Social Welfare**

Social Welfare is also an aspect of Rule of Law. In the case of *Veena Sethi v. State of Bihar* 14 whereby the question of illegal detention of certain prisoners for two to three decades was in issue. The Court held that Rule of Law does not extend only to those who can fight for their rights, but also to poor and down-trodden.

In *People’s Union for Democratic Rights v. Union of India* 15, popularly known as “Asiad Case”, the Supreme Court held that rule of law does not mean that it must be available to only a fortunate few. The poor too have civil and political rights and rule of law is also meant for them.

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10 AIR (1975) SC 2299.
11 Supra note 8.
12 AIR (1953) SC 215.
RULE OF LAW INDEX

The World Justice Project (WJP) Rule of Law Index 2020 is an annual report that gauged the countries on the basis of Rule of Law from the perspective of citizens as well as academicians.

The World Justice Project is an “independent, multidisciplinary organisation” that works for the vociferous spread of the rule of law mechanism all over the world. The Organisation was established in 2006 by William H. Neumon in a collaborative initiative of the American Bar Association.

The WJP Rule of Law Index 2020 portrays rule of law mechanism in 128 countries by providing scores and rankings based on eight factors, which are:

1. Constraints on Government Powers
2. Absence of Corruption
3. Open Government
4. Fundamental Rights
5. Order and Security
6. Regulatory Enforcement
7. Civil Justice
8. Criminal Justice

The current set of Index is a result of surveys whereby 130,000 Household Surveys and 4,000 Expert Surveys were conducted in the 128 participating countries. The Index is based on primary data which has been collected in lines with the opinions of the citizens regarding the status of rule of law in their respective nations.

The Index has been created so that it reflects the picture of the administrative and judicial system of the respective nations not just to the people at the helm of the affairs but to the citizens as a whole.

The 2020 Index was topped by Denmark, Norway and Finland. While Venezuela, Cambodia and Democratic Republic of Congo fared at the bottom of the Index.

**Mode of Data Collection**

The scores and rankings of the eight factors and 44 sub-factors of the Index draw from two sources of data collected by the WJP\(^{17}\):

1. A General Population Poll (GPP) conducted by leading local polling companies, using a representative sample of 1,000 respondents in each country
2. Qualified Respondents’ Questionnaires (QRQs) consisting of closed-ended questions completed by in-country practitioners and academics with expertise in civil and commercial law, criminal justice, labour law, and public health.

**Basis of Formulating the Index**

The report has been framed on the basis of four universal principles of Rule of Law. These Principles are mentioned in the rule of law report as follows:

1. Accountability:
   This means that both the sectors of the state that is public and private are responsible. Meaning thereby, that the government as well as private actors are accountable under the law.
2. Just Laws:
   The laws are clearly stated and free from any bias. Further, such laws must protect the fundamental rights as well as the human rights.
3. Open Government:
   The government must be transparent in framing of law, enacting it and its application. Further, such application must be fair & efficient.
4. Accessible and Impartial Dispute Resolution:
   The administration of justice must be free from any bias and must be delivered by the competent authority without compromising on the ethical facets.

Furthermore, according to the Rule of Law Index, 2020 these indicators are linked to two chief principles that refer to the relationship between the state. One, regarding the limits imposed by the law on the State in exercise of its power on the citizens and the other, the limits imposed by the States on the society.

\(^{17}\) World Justice Project, Report: *World Justice Project Rule of Law Index 2020*. 
FRAMEWORK OF RULE OF LAW INDEX INDICATORS

The Rule of Law Index works on the aforementioned several indicators. However, there are various factors that determine these indicators in itself. These indicators are evaluated on the basis of following components:

<table>
<thead>
<tr>
<th>FACTORS</th>
<th>COMPONENTS</th>
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</table>
| **CONSTRAINTS ON GOVERNMENT POWERS** | Government powers are effectively limited by the legislature.  
Government powers are effectively limited by the judiciary.  
Government powers are effectively limited by independent auditing and review.  
Government officials are sanctioned for misconduct.  
Government powers are subject to non-governmental checks.  
Transition of power is subject to the law. |
| **ABSENCE OF CORRUPTION**      | Government officials in the executive branch do not use public office for private gain.  
Government officials in the judicial branch do not use public office for private gain.  
Government officials in the police & the military do not use public office for private gain.  
Government officials in the legislative branch do not use public office for private gain. |
| **OPEN GOVERNMENT**     | Publicized laws & government data.  
|                       | Right to information.  
|                       | Civic participation.  
|                       | Complaint mechanisms.  |
| **FUNDAMENTAL RIGHTS** | Equal treatment & absence of discrimination.  
|                       | The right to life & security of the person is effectively guaranteed.  
|                       | Due process of the law and rights of the accused.  
|                       | Freedom of opinion & expression is effectively guaranteed.  
|                       | Freedom of belief & religion is effectively guaranteed.  
|                       | Freedom from arbitrary interference with privacy is effectively guaranteed.  
|                       | Freedom of assembly & association is effectively guaranteed.  
|                       | Fundamental labour rights are effectively guaranteed.  |
| **ORDER AND SECURITY** | Crime is effectively controlled.  
|                       | Civil conflict is effectively limited.  
|                       | People do not resort to violence to redress personal grievances.  |
| **REGULATORY ENFORCEMENT** | Government regulations are effectively enforced.  
|                       | Government regulations are applied & enforced without improper influence.  
|                       | Administrative proceedings are conducted without unreasonable delay.  
|                       | Due process is respected in administrative proceedings.  
|                       | The government does not expropriate |
The above table describes as to how extensive the coverage of rule of law is in practice. While many scholars and theorists often surmise Rule of Law into the tri-principled doctrine of Dicey, its actual coverage is much wider and more extensive. Its ambit starts form the
powers of the government and spans across transparency, rights, security, regulation and dispensing of various forms of justice.

**Informal Justice**

Rule of Law Index mentions an additional factor to the estimation of rule of law across the world, that is, *Informal Justice*. This refers to the justice delivery outside the formal civil and criminal justice lines. The WJP collects data on the informal justice through various surveys. However, measurement of this kind of indicator is difficult due to the complexities of this system and the non-uniformity attached to it.

**INDIA’S PERFORMANCE IN THE RULE OF LAW INDEX 2020**

India’s performance in the Rule of Law Index, 2020 can be categorised as average. Globally, it ranked 69th out of 128 nations. India saw a one rank slump in comparison to the Rule of Law Index, 2019 and Four rank drop from the Index of 2018, with an overall score of 0.51 points.

However, amongst its South Asian counterparts, India ranked 3rd out of the six nations of the region after Nepal and Sri Lanka, whose overall rank were 61 and 66, respectively. A detailed analysis of India’s performance across various parameters is as under:

A. **Constraints on Government Power**

In this aspect of Rule of Law, India scored a factor score of 0.61 out of 1 which was highest in the South Asian Region and 41st on a global level. The reason for this can be attributed to the fact that India has a robust mechanism of law and the judiciary. There are several checks on government power through various mechanisms such as judicial review. Furthermore, the other nations of the South Asian Regions are usually involved in political turmoil and hence, there often exists a proxy government backed by the rebel groups or by the Army such as Pakistan and Myanmar, respectively.

B. **Absence of Corruption**

In this aspect, India scored a factor score of 0.42 (a drop of 0.01 from preceding year) which was second highest in the South Asian region and 85th globally. The global rank in this aspect
can be said to be below average, to say the least. The reasons attributed to the same is the ground level corruption and absence of a vigilance body over the organs of the government.

Though India appointed a Lokpal in Justice Pinaki Ghosh, but the efficiency and effectiveness of the Lokpal Act, 2013 has no correlation with his appointment. Furthermore, vigilance agencies such as Enforcement Directorate and the Central Bureau of Investigation in India are often maligned to be working at the behest of the government in power, which not only puts the anti-corruption mechanism into question but also casts serious doubts regarding the willingness of the democratic nation to counter it.

C. Open Government

In the facet of open government, India scores on the same lines as it did in constraints on government power that is, 0.61. Its regionally ranked first and globally ranks in this aspect is 32nd out of 128 nations (a jump of two places from the Index of 2019).

This is a significant aspect of rule of law status in India which can be attributed to several legislations such as the Right to Information Act, 2005 and digitisation of major government services in the recent past. Also, with e-delivery of services being introduced in India, this facet has improved.

D. Fundamental Rights

This is the most vocal aspect of modern-day democracy. From Bill of Rights in the American Constitution to the Fundamental Rights within Part III of the Indian Constitution, this aspect is something very essential to the rule of law.

In the aspect of fundamental rights, India’s factor score is just above average at 0.51 ranking third in the South Asian region and 84th globally (a drop of 9 ranks). However, this can be attributed to the several incidents such as infringement of privacy rights by the State, reports of restrictions on freedom of speech and expression as supported by a constant slump in India’s rankings in the Press Freedom Index, 2020 to 142 from 140 in 2019.

E. Order and Security

The aspect of order and security is very much relevant to the modern-day States. With the impending doom in the form of terrorism and extremism, order and security is the worst hit. With order and security in shambles, the rule of law’s position is consequently bleak.
India’s score in this aspect was close to better at 0.59. However, it ranked 4th locally and 114th globally. The fact that it ranks behind some of the most volatile States speaks volume about the order and security situation in India. The reason for this can be stated to be several incidents of terrorism across the nation and several internal bursts of violence over certain issues in the past year.

F. Regulatory Enforcement

The enforcement of regulations is important in any civilised State. It is the regulations that keep the unhinged powers in check and ensures that there is no misuse of power by the administrative bodies.

India ranks 98th on a global scale in this aspect of Rule of Law, which is a massive drop of 12 ranks from Rule of Law Index, 2019. Its factor score is below average at 0.45. This low score can be correlated with the reasons attributed to low score in the absence of corruption aspect namely, bounding of enforcing agencies such as CBI and ED and also, delay in enforcement is also one of the causes of this low score.

G. Civil Justice

Justice is an important barometer for the efficiency of the rule of law mechanism of any nation. A State having efficient justice delivery mechanism can enforce rule of law and protect the rights of the individuals. The WJP evaluates justice on two fronts namely, Civil Justice and Criminal Justice.

India ranked 98th globally and second in the South Asian region in this factor of Rule of Law with factor score of 0.45. The score and the rank are both below average.

This is perhaps due to the truth in stereotype of a delayed justice delivery system in India. With 18.75 lakh civil cases pending in High Courts of India (as stated by the Law Minister of India), this low rank seems to be on somewhat correct lines.

H. Criminal Justice

This factor witnesses the lowest Factor Score across all the factors for India. With a below average factor score of 0.40 and a global rank of 78, this aspect throws a very significant

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perspective at our faces. The criminal justice delivery mechanism in the nation is already associated with a bad repute with many cases not even getting reported due to lacunas at the fundamental level of law & order services.

Even those who get reported, are mostly subject to delayed administration of justice as evident by the statement given by the Indian Law Minister that a total of 12.15 lakh criminal cases are pending across various High Court of the nation.\textsuperscript{19}

Hence, the report reflects to us the status of Rule of Law in India. In certain aspects India fares decently, while in some its performance lacks as against the expected standards. The problem does not lie with the concept in theory but with concept in practice. While Dicey’s principle finds ground in judicial pronouncements and the law of the nation, its practice does not connote to these developments in real sense. Its score is again satisfactory, but if the reputation of being the world's largest democracy is to be attached beforehand in this score, calling it satisfactory would be an overstatement.

**CONCLUSION & SUGGESTIONS**

Therefore, to sum up one can state that the situation of Rule of Law in India in theory is very sound. It lies on the foundations of Constitutional Provisions such as Article 13, Article-14, Article-19 and Article-21 and on the judicial pronouncements of ADM Jabalpur v. Shivakant Shukla\textsuperscript{20} and Indira Nehru Gandhi v. Raj Narain.\textsuperscript{21} Rule of Law, thus, is a sound principle in theory in the Indian context.

The application of Rule of Law is showcased by the Rule of Law Index, 2020. And if the application is to be gauged, it does not match up to the expectations associated with the Indian democracy.

However, not all is so loose in this fabric of rule of law. There are still certain positives that can be taken from this report such as its performance in open government and constraints on government powers. These aspects show that on the foundations of equality before law, the State is doing a lot better than the report gives it credit for in real sense. With the advent of several e-governance measures and public interest litigations along with judicial activism- these aspects are bound to get strengthened with the test of time.

\textsuperscript{19} Supra note 18.
\textsuperscript{20} (1976) 2 SCC 521.
\textsuperscript{21} Supra note 10.
The other aspects need improvement in one way or the other. The problems addressed in the analysis of the reports are to be resolved first hand. For the resolution of these problems, there is the pre-requisite of intent and execution. Intent on the part of the Montesquieuan divisions of power and execution on the part of these divisions and the people themselves.

Any changes, to any aspect of any sector requires the plough of execution along with sowing of intent of execution. It is a participatory process in which every individual, whether belonging to the administration or to the administered has to play his/her part collectively rather than individually.

It is only through these two ends of periscope that the situation of the rule of law would rise above the existing ocean of despotism that is prevailing all over the world. The status at which newer democracies have already reached and India, being the mother of all democracies is still to touch the checkpoint. This all, would be possible by collective effort and systematic execution of rule of law mechanisms in the nation which already is seeing a slump not just in the rankings but in the effective implementation of the principle.

Authored by Zainab Juveriya

1. INTRODUCTION:

The Indian Constitution envisages the principles of Democracy by the mechanism of checks and balance among the organs of the state. While every organ is given the independence and a specified role, the existence of checks and balance ensures the vested power is not abused in violation of rights, Constitution, or democracy. Transparency and Independence of a State organ is inherently related to the appointment system put in place. The Judiciary’s appointment system- The collegium system has been a matter of controversy for two reasons; the lack of transparency of the process to the public and secondly, the escape from checks and balance as executive has no role in the appointment. While the collegium system vests power in the hands of the judiciary, the grounds on which selections are made are not revealed to the public. Judiciary being the most prominent organ to ensure Justice fails to abide by the basic tenants of democracy such as Transparency. The lack of transparency can lead to corruption, manipulation, and violation of Justice.

The judiciary has time and again relied on the arguments of independence of Judiciary being of pertinent importance which could have been considered validate if the process would be transparent enough to engage citizens in the appointment process rendering executive interference invalid. An impenetrable veil between the citizens right to know and the Judiciary, the custodian of Constitution is a violation of democratic ideals of transparency.

The NJAC Act¹ which was passed to remedy the lacunas of the Collegium system was both praised and criticised hugely on the argument that it doesn’t provide transparency rather transfers over to the executive breaching Judicial Independence. As much as necessary is the system of checks and balance, the power given to the executive cannot be arbitrary. Hence the powers of executive over the appointments if given, must be carefully structured to avoid party biases, political considerations, and political impact on judiciary. Such carte blanche in the hands of executive would function against the interest of Justice in long run. The aim of

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¹ The National Judicial Appointments Commission Act, Act no.40 of 2014.
the research would be to look into both systems and analyse whether the NJAC system was the rightful replacement of the collegium system.

2. **HISTORY:**

Currently, the appointments of judges of High Court and Supreme Court is done through a system called the collegium system where the judges of High court and Supreme court are appointed by a group of judges including Chief justice and other senior most judges. This system is however nowhere to be found in the Indian Constitution; the system has evolved through a different interpretation in several cases of Supreme Court. The constitution had merely stated that appointment of judges of supreme court and high court must be made by the president with consultation of chief justice of supreme court under Article 124 and 217 Indian Constitution)

The first case that dealt with appointment system of Judges was *SP Gupta vs Union of India* 1981, the Supreme Court in this case held that as per article 124 and 217 of the Indian Constitution the appointment of judges has to be made by the President, and the chief justice has to merely be consulted. President is not bound by the advice of Chief Justice in this judgement concluded that appointment of judges must be in the hand of Executive.

This was challenged in a case *Advocates on record Association v. Union of India* 1993 where the constitutional bench of Supreme Court overruled previous judgment and started the collegium system. This case in particular provided the Genesis of the present collegium system. The court interpreted article 124 and 217 of Indian constitution in a different manner stating that the term “consultation” will not terminate the role of chief justice in judicial appointments the executive has merely duty to consult it the CJI on the appointments and not take the decisions themselves. The court stated that this was necessary to protect the integrity of the Judiciary and to get the independence of judiciary Consequence of this case the role of executive in selection of judges was reduced.

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2 INDIA CONST. art. 124.  
3 INDIA CONST. art. 217.  
4 AIR 1982 SC 149.
In the year 1998 few steps were taken by the Supreme Court to ensure the appointments were made in a fair manner. The president K.R. Narayanan moved to Supreme Court seeking their advice on what the term “consultation” means in the appointment of judges. The Supreme Court giving further guidelines and establishing a better collegium system; declared that 4 judges instead of 2 should assist the CJI in making the recommendation. It was also decided that if the assisting judges have different opinion on the nominee, the CJI cannot further recommend the name. However, these alterations did not ensure complete transparency and still received criticisms.

The BJP government (1998 to 2003) appointed a committee under Justice Venkata Chalaiyah. The committee looked into the transparency in the collegium system and suggested that the system is not transparent and need to change drastically and the BJP government decided to pass an act to change this system. The NJAC Act- National Judicial Appointments Commission Act was passed in the year 2014 which added a provision to Article 124 providing for a commission who would be responsible for appointments to the Supreme Court and High court. However, in the year 2015 Supreme Court declared the constitutional amendment and the act unconstitutional and ultra vires basic structure of Constitution, which kept the collegium system intact.

2.1. PERSPECTIVES OF THE JUDICIARY:

The grounds on which the Judiciary supported the Collegium system in Supreme Court Advocates on record association v Union of Indian and the grounds on which the NJAC act was declared unconstitutional showcases the perspectives of the Judiciary regarding safeguarding the autonomous appointment system.

In Advocates on record Association v. Union of India 1993, The Supreme court held that Independence of the Judiciary was a part of the Basic Structure Doctrine, which is an unalterable feature of the Constitution necessary to maintain the holistic ideals of Democracy and Law of land. By legitimising the consultation process and making such recommendation of the Chief Justice binding on the President, the Supreme court displayed that the risks of

5 Civil Writ Petition 1303 of 1987
unfettered powers of the executive causing political interference outweighs the risks of an non transparent but autonomous system driven by professionals.  

In the NJAC Judgement, the bench dealing with constitutionality of the NJAC act strongly opposed the composition of the Commission recommended by the act, as it included three- non judicial members effecting primacy of Judiciary in Appointments. The inclusion of the Union Law minister was thought to bring in political biases in the appointment system. 

Both the cases similarly display the Judicial dismissal of Executive role in the appointments but differ on the rationale judiciary used to protect the autonomy. While the former merely relied on arguments of independence, autonomy and constitutionality, the latter did not disregard the necessity of transparency in totality, rather was critical of the composition of the commission that could sway the independence of the Judiciary.

3. **LEGISLATIVE INTENT**

The seeds of both democratic ideals; Independence of Judiciary and the system of checks and balance were sowed during making of the Draft constitution by the Constituent Assembly. The constituent assembly envisioned a strong independent judiciary, free from the clutches of Political influence and on the other hand, the Judiciary of the new democratic India was not seen above the public mandate. It was a part of a system, a democracy which would be run by the public through their representatives. This was rationale behind providing for such provisions of appointment that inter-twine executive and judiciary, alongside maintaining the independence of the judiciary, hence the provisions were provided with the recommendation/ consultation by the President. However, how this consultation would function and which of the two equally important organs of the state would have the upper hand in the appointment was a matter of debate even during the stage of drafting. It becomes pertinent we investigate and study the intentions of the makers of the constitution on this matter. To test the waters, the constituent assembly debate provides clarity on the legislative intent behind the provisions.

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7 Supreme court of India v Union of India, Civil Writ petition No.13 of 2015.
The Constitution Assembly debate which took place on 24th May 1949 took up the draft Article 103 which dealt with appointment and retirement of Judges. One of the members suggested that the article must state “Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal, and a judge other the Chief Justice must be appointed with consultation of the Chief Justice” giving absolute power to the executive in the appointment. The member relied on the ideals of 1935 Government of India Act, which provided, the King on suggestion of his minister appointed the Chief Justice. He suggested that even now, the Chief Justice shall be appointed by the mandate of the ministers which are representatives of the sovereign state instead of King. The parliament member however clearly discarded the idea that the new Democratic idea provided for independent organs of the state.

Another member who abided by the supremacy of Parliament in appointment of Judiciary was Prof. Shibban Saksena; nevertheless, he considered the protection of Judiciary from political bias of the cabinet was also necessary in the interest of Justice. He suggested that the appointment of Chief Justice must be by the President however must be subjected to the two-third vote of Parliament which would consider the opinions of the opposition and as well as the ruling party cabinet. He believed this would discourage party bias while maintaining the parliamentary hand in appointment. On the contrary, Member Sir. K.T Shah suggested that such absolute powers in the hands of the President, indirectly in hands of the cabinet and so in the hands of the Prime Minister would cause so much imbalance of powers that if arbitrarily used might result in a dictatorship. Hence the system of appointment must be made in such a manner that advise of the council of states must be taken however must not be binding enough to cause interference in the Independence of the Judiciary.

Hearing all the debates ad considering all the perspectives, the drafting committee headed by B R Ambedkar concluded that the present article would suffice the aim balance of powers, without compromising on the independence of Judiciary. Therefore, an analysis of B.R. Ambedkar’s comment would suggest that the article was made to find a middle road among the two extremes. He believed the Article will provide for consultation by persons who are well qualified. Sir Ambedkar in his comment strongly opined that judiciary must be independent and self-competent, he made a point to state that ‘it would be dangerous to leave the appointments to be made solely by the President who would be driven by the Prime
Minister and his cabinet’ “because there would be possibility of political pressure and political considerations”.

It can be concluded that the intention of the makers of the constitution was not to give arbitrary power to the executive over appointment of the judiciary, nor to make appointments of Judiciary an opaque and unbreachable wall to public or executive. The legitimacy of the appointment process be it collegium or NJAC must be read against this ideal of balance of power.

4. CRITICAL ANALYSIS OF THE COLLEGIUM SYSTEM:

4.1. The Lack of Transparency

The first and foremost drawback of the collegium system is the lack of Transparency. Collegium system ensured that from the selection of the judges to the promotion of judges to higher positions the appointments take place in private, within the courtyards of Judicial Authority. The grounds on which the judges are chosen is not disclosed depriving the citizens and other lawyers and judges of the knowledge of selection criteria. This withholding of information has twofold impacts on the stakeholders.

Firstly, that such deprivation causes public distrust in the Judiciary. The passage of Right to Information Act 2005 encouraged public spirit to question authorities even though the judiciary was not included in the scope of the Act, it raised a lot of question about the distance judiciary keeps from the public through privatising placements, appointments and promotions to court which are essentially Public offices. When such critical information as the merits and the grounds on which the Judges of courts are chosen is withheld, it leaves room for corruption and nepotism to become an inherent part of any state body further destroying the trust for the judiciary in the citizens. This in turn results to distrust of citizens in the justice system itself. Hence it becomes pertinent to protect the judiciary from being a victim to such destructive factors like corruption, nepotism, political biases to act as incentive. Transparency of the appointment process will induce accountability and reduce the probability of these factors.


Secondly, there is no incentive left for the aspiring lawyers/judges as the criteria is unknown, there is limited data to confirm the ground for selection is merit solely; and even if such provisions ensuring merit as the selection criteria were to come in force, there would be no surety of compliance unless the appointment process and selection criteria both was made public information. Disclosing the grounds would provide incentive to the inspiring judges, would ensure an efficient system of knowledge and professionalism, and would also develop public involvement in the governance of Justice.

4.2. The Lack of Diversity:

Another short fall of the collegium system which is an outcome of lack of transparency is the lack of Diversity. As the grounds of selection remain undisclosed, the issue of diversity in the judiciary gets buried. Under the collegium system, the judiciary is free from any accountability to answer the citizens about the diversity in selection, which is huge deterrent to the socio-equality principles of the democracy. The linguistic, gender, socio-economic and religious minorities are at the receiving hand of this drawback. A report by Ministry of Woman and Child Development stated shocking statistics of Gender polarity in the judicial appointments; Till 2009 there were 51 female judges out of sweeping 649 male judges which amount to a meagre 8% representation. In the 2020 there are only 2 women judges out of 31, representation of less than 6.5%.

The backward class representation is estimated to be less than 12% in disproportion to 40% population in lower courts. Dalits and scheduled cast representation are not exceptions as well.

5. CRITICAL ANALYSIS OF NATIONAL JUDICIAL APPOINTMENT COMMISSION ACT.

The National Judicial Appointments Commission Act was passed in 2014, which added a provision to Article 124 providing for a commission who would be responsible for appointments to the Supreme Court and High court. This was done to remedy the shortcomings of the existent collegium system. The Act was seen as a dynamic change that could protect the democratic ideals in the Judiciary hence, it bore the promises of balance of powers, transparency and accountability that was lagging since years; but in reality, the act

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was far from reaching its objectives. The provisions did not fulfil the aim of transparency and accountability in any form. Even though the act brought a probability of placing a system of checks and balance, there were many structural lacunae due to which it failed to replace the collegium system.  

The proposed commission would be consisting of The Chief Justice of India, two senior most judges of Supreme court, the Law minister, and two eminent persons select by a committee comprising of the Prime Minister and the Leader of Opposition. While the commission has Chief Justice and other two members from the judiciary, the presence of the Union Law minister may lead to ruling party asserting their will over the Judiciary. The combination of the Judiciary and the executive members does not exclude the possibility that priorities of the executive which pleases even the opposition party may be negotiated. The mere existence of judicial members does not guarantee independence of judiciary as the act vests ‘Veto’ power in the members of the commission which gives the non-judicial members and specifically the Law minister the power to reject and accept selection which does not or does align with the ruling party perspectives. The provision of Veto could force the judicial members to exercise limited choice compromising with the contradicting views of the commission members.

The stark downfall of the Act has to be the continuation of the lack of transparency in the NJAC system. Ensuring transparency was one of its major support gathering factors and it has failed to provide any provision for disclosure of data, grounds of selection further barring public from the judiciary. The act vaguely refers ‘ability and integrity’ to be the grounds which does not clarify and is similar to the standard in place. A mere claim of integrity is widely available to any candidate the commission may wish to appoint. Additionally, the commission doesn’t answer the question of the lack of diversity in the Judiciary. There is no explicit mention of inclusion of members from diverse socio-cultural or economic background; In this regard the NJAC provided no development from the collegium.

The NJAC merely shifts the power of selection from the hands of the judiciary to the executive; but there is no rights whatsoever vested in the hands of public, which leaves the citizens of India in same disadvantageous position as before. This structuring of provisions

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then casts a shadow over the intension of the executive and what it aims to do so with such power to select members of Judiciary.

6. CONCLUSION:

On the whole, through rigorous understanding of both the systems that Collegium system as it is in the present form needs dynamic changes in interest of Justice, the disadvantages of this system include complete unawareness of citizens about the inner happenings of the collegium, the people of nation are not aware on what basis the appointments are made, the collegium is under no obligation to revel the criteria of appointment nor the reasons. This system gives rise to intra judicial politics, discrimination, manipulation, and corruption.14

However there are a certain hidden advantages of the collegium system, this system ensures that political opinion in selection of judges is limited, it protects the judicial integrity from prohibiting political parties selecting judges as per their convenience and who would father their political agenda. It helps maintain independence of judiciary and ensures that judiciary doesn’t favour the government and further strengthen public trust in the judiciary. It helps the judges to be selected on the basis of skill and knowledge rather than political inclination.

On the other hand, The NJAC system even if appoints judicial officers as its members, still doesn’t provide for transparency of criteria of appointment or eligibility and allows the executive to influence the appointment. I believe the positions of court must not be chosen by people in politics rather by the people of Justice, knowledge, and guardians of Constitution itself. Giving the Veto power to executive to in appointment of judges is a direct interference with independence of Judiciary and leads way to corruption and in turn disrupting Justice itself. Considering its lacunas, the NJAC act fails to be the rightful replacement of the Collegium system.

The inspiration to curate such a system which ensures Checks and balances, and transparency must be taken from other countries such as a. France, where the judges are appointed on Merit basis. The qualification of merit is specific, and the candidates must attain a special qualification called Doctor of Law in order to be eligible for the appointment. The candidates are appointed through a commission of both Judicial and executive members, including Chief Justice, President of Assembly, and senate members. France acts as marvellous example of limiting the powers of the commission to exercise their

choices to the eligible meritorious candidates only. Other countries like Berlin, Netherlands, also function as an example of why an eligibility criterion is necessary and why such criteria and grounds of selection must be made public.

The disclosure of appointments to the Public would be the essential change that the Judicial system requires; such transparency will act to bridge the distance between the public and the judiciary by allowing more involvement of Public and will act as a limitation to the power vested in the judiciary. Hence it can be concluded that Collegium system per se is not problematic rather, the level of transparency it follows is the issue that must be addressed.
THE INEFFECTIVENESS OF TADA IN ITS EFFECTUAL YEARS – AN ANALYSIS.

- Rajshri Shrivastava

ABSTRACT

South Asia is known to be the worst affected by terrorism in the world. Terrorism alone has the tendency to slam every sphere of human life and development. Countries have adopted their own procedural methods to combat this phenomenon. India, came up with a fresh Act of legislation called TADA as an expedient to retaliate terrorism. However, it was later repealed due to the atrocities it caused. This paper revolves around the TADA Act and the subsequent changes that came in the legislation of laws dictating prevention of terrorist activities. The main idea is to rule out the reasons for the non efficiency of the Act and what led to such a dismay in the country. Crime in fact increased on folds and justice was never served. The basic tenets of democracy were shaken with the coming of the Act and the consequences are so listed. Many subsequent Acts came into force thereafter and some were even successful in reaching the end goal to some extent. Security being the main agenda, the liberty of people came at stake in the process. Here’s a study as to how this happened.
INTRODUCTION

“Everyone’s worried about stopping terrorism. Well, there’s really an easy way: Stop participating in it.” - Noam Chomsky

The evils that have existed in the Indian society or any other society for that matter are bound to have repercussions in the manner no one can ever think of. Out of the threats the society is constantly under, the havoc terrorism brings in the busy and galloping lives of innocent people is so traumatizing that it sends a chill down our spine every time we think of the past incidents of terror. Poor level of socio-economic developments, poverty, health, communal violence and every other issue a country finds itself to be constantly combating with, can directly or indirectly be linked to terrorism.

As inhuman it is by its act, terrorism has led to countries come up with new policies and measures to curb this practice or the least, to protect the general public from terrific loss of life and property. In a country like India which has its own heterogeneous needs to cater to, while it has been repeatedly subjected to violent insurgencies within its own borders, it also has had its own history of dreadful terrorist attacks and relatable losses. Today, India is ranked the eighth most affected by terror country in the world1. As a result, the legislative of the country in the year 1985, came up with The Terrorist And Disruptive Activities (Prevention) Act, popularly known as the TADA, Act to counter terrorist activities. It was brought about in legislation in order to counter the violent insurgencies in Punjab which later spread across the country. The initial motive was clear and effortful for a good cause but in subsequent years the Act had to undergo various amendments due to the wide misuse of the Act which shook the very foundations of democracy in the country.

This Act was however repealed down and was succeeded by Prevention of Terrorism Ordinance (POTO), later by Prevention of Terrorism Act, 2002 (POTA) and finally by the amended version of 1967’s of The Unlawful Activities (Prevention) Act (UAPA).

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THE INEFFICIENCY OF THE ACT

The question of effectiveness of the Act with respect to the growing crime rates or even with respect to the purpose it was meant to serve, was brought to light in the subsequent years of its enactment. The manifolds of the history of party politics in Indian electoral have been time and again subjected to alarming disruption to the democratic spirit of the country. 1980’s witnessed extensive use of arbitrary laws, TADA being one of them which permitted non-justifiable forms of detentions which further led to massive misuse of this law rather than serving the actual purpose.

Under this Act, the executive in this case, the police were given immense power of detection of suspect and since, the burden of proof was left over the accused by the Act, this started an endless series of unlawful detentions. This was a deviation from the notions of presumption of innocence and admissibility of evidence.2 By the year 1994, 76,166 suspects were arrested under this act and when their trial took place only 4 percent were actually found guilty. Within years the cases of misuse of this Act increased in large number so much so the lawyers started calling this Act as “the Act which converts innocents into terrorists”. Instead of terrorists, children, journalists, political rivals all were targeted under this misuse of power. Being referred as the harshest piece of legislation according to some reports, it was blatantly started to being used as a threat to religious minorities, to dissolve political rivalries and even to settle landlord-tenant disputes.

It was in fact, during the same time that the film industry and the nation were taken by shock with the arrest of the actor, Sanjay Dutt for his alleged role in the 1993 Mumbai blast case.3

The Act never gave a proper definition to who a terrorist is and what can be classified as terror activities and as a result this led to various interpretations that encompassed both private as well as public activities to be considered as terrorist activities leading to the high number of arrests. The provisions of arrest without warrant and prolonged pre-trials made the situation worse. With this, the Union was pressurized for the withdrawal of the Act. Reasons for its withdrawal were given by Justice Ranganath Misra underlining the importance of transparency, legitimacy and

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3 Sanjay Dutt vs State Through C.B.I. Bombay
accountability. The manner in which it has been used since 1989 was so reckless that in most of the cases the police themselves created a situation which invoked TADA. It had a draconian nature which was against the tenants of democracy. Violation of fundamental rights of innocent citizens, gross misuse and abuse of provision under the law became common under the name of TADA. The Act was also found to be in conflict with international human rights convenants of which India is a firm signatory. The executive went on to polluting the essence of the Act by prolonged trials and torturing the suspects in custody to the extent that the innocent suspects admitted to the crimes they never really committed. The bail provisions under TADA were so stringent that even today, after the lapse of the Act itself, prisoners continue to perish. The Act introduced exceptions to the law of granting bail under Section 436 to 450 of XXXIII of CrPC. Conviction rate went as low as 0.8 percent and many considered that the administration of the statute being left solely to the executive was the main reason for its ineffectiveness. Given the large scale crime rates in India and seeing how easily people get drunk in the name of power and wealth, TADA in its years of effectiveness failed to comply with law and order and in the contrary resulted in tension among the people.

We often relate criminal activities to a group of uneducated lot not realizing that crime can be done at the hand of the privileged as well. Many police officials in order to increase the loopholes in the charge-sheets made unlawful changes by themselves by ignoring the due procedure of law to be followed such as dependence on circumstantial evidence, overlooking of confession procedures, exemption of the accused from identification parades. Consequently, many witnesses turned hostile under duress from militants. Many militant gangs, say police officials, were known to have a well-knit network to threaten witnesses. All this led to birth of new forms of crime by the white collars and so were easily taken care of without any justice being served.

THE SCRAPPING OF THE ACT AND SUBSEQUENT ACTS
The rise in extra judicial killing within the custody, rape cases, torture and disappearances made the years in implementation of TADA a nightmare for the nation. The lack of accountability

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from the government further aggravated the situation\textsuperscript{6}. When the laws raised significant concern to human rights and started gaining international attention, judicial intervention was demanded.

In the year 1989, 1991, 1993 and lastly on 11 March, 1994, Supreme Court upheld the constitutional validity of the TADA Act. 1995 was the year of its renewal and amidst political pressure it got lapsed. Providing an afterlife to TADA, Prevention of Terrorism Act (POTA), 2002, and the Unlawful Activities (Prevention) Act (UAPA) came into force with respective criminal law amendments.

However, POTA brought the same issues to light bringing back TADA in disguise. The numbers of days police can detain the terror suspects in custody without putting charges was as a matter of fact, doubled. POTA was unconstitutional in many ways and primarily lacked procedural safeguard\textsuperscript{7}. It was rightly repealed.

The Unlawful Activities Prevention Act which came into force after POTA was scraped out indeed has taken due care in its functioning. For example, under UAPA, confessions made under police custody have become admissible in court of law which the person can deny under criminal law. It is an amendment to the 1967’s Act. It precisely defines ‘unlawful activity’ along with defining ‘terrorist act’. It though puts reasonable restrictions in the interests of the sovereignty and integrity of India has underwent scrutiny like any other legislative Act and is still under consideration of subjugation.


\textsuperscript{7} Christopher Gagné, \textit{POTA: Lessons Learned From India’s Anti-Terror Act}, 25 B.C. Third World L.J. 261 (2005), https://lawdigitalcommons.bc.edu/twlj/vol25/iss1/9
CONCLUSION

The basic foundation of democracy should be preserved at any cost which went at stake with the coming of the TADA Act. Given the high crime rate in India it is essential for the government to come up with measure that curb the growing rate and not such Acts that lead to increased crime and rather new forms of crime. We are seeking to achieve a nation free of terror. Therefore, in the process due care should be taken that people have not to undergo terror in order to reach the ends. Learning from the past acts the legislation need to put forth measures that are in compliance with the IPC and CrPC and also take care of specifying each and every definition. As in the case of the POTA Act, special investigating officers should be placed to ensure no mistaking and misusing of the powers and clauses of the Act take place. Human rights have got its part to play and should make sure that the right of citizens are guarded as per the Constitution of India.

We have waked a long road after the freedom struggle to find an identity as a nation in the world. However, this identity is under a constant threat of terror activities. The legislature of this country has always tried to work in the best interest of people but there are chances of failure when dealing with such a huge and hybrid nation. Crime and terrorism are two branches of the same tree. When dealing with one, we need to be careful of the other. Security at the cost of liberty would not be tolerated.