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IMS Law Review

Student Edition

School of Law

Edition - II

ABOUT THE SCHOOL OF LAW

School of Law (SOL), is amongst the fastest growing law schools in northern India. It strives to impart exemplary legal education by making it inter-disciplinary where there is a convergence between the disciplines of law, social science, humanities and management studies. Therefore, our curriculums are designed and developed to be both highly theoretical and intensely practical in nature. The school is a great teaching and research institution with a profound and distinctive commitment to undergraduate and post graduate education. To cater the student's varied interests and educational backgrounds, the School offers a choice of two undergraduate courses - B.A.LL.B. (Hons.) and B.B.A.LL.B. (Hons.). At the post graduate level too, the students get to pick their choice of specialization from six exceptionally designed LL.M courses. The Ph.D. program offered by the School is designed so as to be instrumental in enhancing legal scholarship. We, at School of Law understand the importance of a sound and wholesome environment for the students to flourish academically, socially and intellectually. With this belief, we have designed a disciplined curriculum with focus on high standards of legal education, extra-curricular activities and intellectual wellbeing to transform every student into a valued citizen of the society and an accomplished personality in the legal arena. Ever since its inception, School of Law aspires to inculcate humanistic approach, entrepreneurial skills, innovative outlook and academic focus in our budding lawyers. Our emphasis on learning, creativity and innovation is based on the belief, that our students can and will achieve prodigious success. Most importantly, the school provides an environment which prepares the students for meaningful lives and careers broaden their outlook and help shape their character.

IMS Law Review: Student Edition

Edition – II, July 2021

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FROM THE DESK OF CHIEF EDITOR

It is a matter of great pride for us, to present to the readers, the Second Edition of the IMS Law Review: Student's Edition of 2021, which is symbolic of the success of the First Edition. Our first attempt was received by the readers with such great appreciation and admiration that it made our task for the Second Edition paradoxically easy and difficult. On one hand we know that our efforts are rightly striking our goals and we need to proceed enthusiastically on the same path, on the other hand we are now laden with a responsibility to keep the trust of our readers intact by presenting a second edition that's not just what they expect but something that far exceeds their expectations. And trust us, that's what we have accomplished this time.

Our Faculty Editorial Board and the Student Editorial Board have worked uncompromisingly on the Second Edition to bring to you, our dear readers, what is best, from the best and in the best possible form. Though this journal's key focus is to provide the students a fair chance to get their hard work in research writing published, we also are mindful of the content we provide to the readers. We as editors aim at presenting the articles to you all, which have the potential to be a significant addition to your knowledge and learning.

We hope that this Second Edition of the IMS Law Review: Student's Edition will be another step forward in our journey together, towards our united aim i.e., promoting student's academic excellence in the field of legal research and writing.

In Solidarity

Prof. (Dr.) R.N. Sharma
Dean, School of Law

FROM THE DESK OF FACULTY EDITORIAL BOARD

IMS Law Review: Student's Edition (IMSLRW) is a non-profit, student reviewed annual publication journal. Law students all over face a paradoxical situation. On one hand they are encouraged by their esteemed institutions and faculties to be better in academic research and writing, while on the other hand, not many journals are willing to include their novice attempts in their publications. We at IMS Unison University School of Law believe, that students have the massive yet unexplored capabilities of brilliant academic research which needs to be polished at our ends. For this very noble aim we have established IMS Law Review Student's Edition, exclusively intended for students, which will provide them with an opportunity to continue healthy discourse regarding the relationship of law and public policy in the current scenario. It seeks to create a platform where there is a flow of ideas and thoughts regarding issues mutually relating to law and the contemporary legal issues.

Since the Journal is dedicated wholly to the students, what can be better than to have an editorial board that is comprised of students themselves. This initiative thus, does not only provide opportunities to the young and brilliant minds of the student researchers but also give the students a unique experience of honing their skills as editors. At this point we would like to elaborate on the tireless efforts of our current Student Editorial Board in bringing to you the Second Edition of the Journal. Their outstanding contribution and commitment to the task has led the Journal to aim even higher in achieving what once was just a dream. As it is rightly said that it is the editor who adds the colour to the first draft, we applaud the skills of our Student Editorial Board in presenting to you all a myriad of academic research articles in their best possible form.

We hope that the readers will find this well-crafted source of academic writings helpful in refilling their reservoirs of knowledge.

Wishing all the readers success and health!

Faculty Editorial Board

FROM THE DESK OF STUDENT EDITORIAL TEAM

From the success of our First Edition, it gives us immense pleasure and motivation to bring and introduce our Second Edition of IMS Law Review: Student's Edition 2021.

It is said that the first draft reveals the art and the revision reveals the artist, likewise the Second Edition of the journal blossomed into a meliorated version of the prior edition and fosters ingenuity, brilliance and novelty to unravel different legal issues and questions.

The purpose of this journal is to provide a forum which could elevate the cogitations and ideas of different people of the legal fraternity by way of submissions in the form of articles, case comments and Legal essays. This edition has been incorporated with a wide range of topics showcasing numerous ongoing social, legal, and environmental aspects in our country including the debate upon unravelling the hijab, vestige of succession sexism, climate change and climate migration, violation of preventive rights by the women, prenuptial agreements, judicial interpretation of 'consent' in cases of rape, a comparative study of different constitutions of India, U.S.A and U.K. etc. Through this, we aim to encourage the zeal of learning amongst the researchers from all the corners of the country.

But, all the teamwork would have never been achievable without the guidance of the Faculty Editorial Board who have been the guiding path of our team and the support of which can accord us to reach new heights of recognition and readership. Also, we highly appreciate the contributions which has been made by the various authors from all the different corners of the country and further, wish to receive more contributions in order to assure a continued flow of knowledge.

And, what is most precious to us is our readers recommendations and criticisms, the doors for which are always open. We look forward to your response.

Hope the read to be delightful!

With Love and Regards to Readers,

Student Editorial Board

IMS Law Review: Student Edition

Edition – II, July 2021

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BIOLOGICAL WAR

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I. INTRODUCTION

Biological warfare / bio wars or you may call it germ warfare, has been a part of our history since the beginning of the civilization, only its form changed with time and with increase in technology. The American organization which deals with disease control and prevention, defines bio-wars or bioterrorism as "the intentional release of viruses, bacteria or any other germs, that can sicken or kill people, livestock or crops". Utilization of natural fighting to debilitate your foes or to handicap economies by influencing the vegetation, has been an unmistakable practice and is uncommon yet the utilization of bio-weapons is definitely not an obscure marvel. The sicknesses frequently spread by different miniature life forms to hurt others in an indestructible way can likewise be deadly and its belongings can likewise be never-ending for a few. This can likewise be utilized as an instrument of psychological warfare. They can be used in a number of ways, such as using air sprays with disease causing agents, or via directly injecting into the body of a person, or through eatables a person consumes or through any living career. Also, they are substantially more destructive than the hazardous or war weapons utilized and can be spread effectively, in this manner, it can likewise go about as a modest specialist of fighting.

II. WHAT ARE BIO-WEAPONS?

Any biological disease yielding vehicle, such as bacteria, virus, fungi, toxins, etc. that can be used as a weapon for bulkelimination of any species of humans, animals or plants are called as Bio-weapons or can be also called as germ weapons. They are manufactured under labs by nations or psychological militant gatherings, to be utilized against foes or adversaries, with an aim to weaken or slaughter them as a conflict act.

III. IT'S EFFECTS

These weapons do not include the category of nuclear weapons, chemical weapons or radiological weapons, and are different from them. They not have combustible or touchy character, and accordingly are not the standard or regular weapons. They might be infectious or might be utilized to slaughter people. Subsequently, they are regularly utilized for causing mass deaths and not mass annihilation of foundation, property or anything.

Be that as it may, such natural combat hardware can possibly make an inescapable pandemic. They can cause more mischief than any hazardous or atomic weapon. The pandemics made are uncontainable much of the time and this failure to control their spread is the thing that has the effect. A new disease takes time to create vaccinations or treatment, by the time in which these weapons can be very lethal, and there spread depends on factors such as the agent's

infectiousness, its length of incubation, its stability and the ability to survive the treatments or the vaccines.[1]

These kinds of wars have been seen many times in the history and will also be discussed further, and to combat them, various treaties have also been signed, but what if countries still don't follow the treaty or its rules? What if at present time a situation occurs where we face a lethal disease in the form of a bio-weapon? Is the world yet prepared to face such situations, where countries spend trillions of moneys at border for security can a disease like this be tackled if such weapon is used?

Basically, if we see the effect of any biological weapon, it is indefinite, unpredictable and can be terrific.

IV. HISTORY OF BIO-WARS

Since the dawn of the civilization bio-weapons are used by people, be it for war purpose or terrorism. Many diseases have been used as war agents in different ways and forms, that we may see below.

1. VARIOUS AGENTS USED AS BIO-WEAPONS-[2]

CATEGORY-A
(Major health hazards)

Category	**Pathogens**	**Used in/by**
Anthrax	Bacillus Anthraces	World war I World war II Soviet Union, 1979 Japan, 1995 UNITED STATES OF AMERICA, 2001
Hemorrhagic fever	Marburg virus Ebola virus Arena viruses	Soviet bioweapon program
Plague	Yersinia Pestis (B)	World war II Swedish Forces, 1710 Europe, 14th century
Smallpox	*Variola Major*	North America, 18th century
Tularemia	*Francisella Tularensis*	13th century B.C. World war II

[1] Barry R. Schneider, *Biological weapon (Encyclopaedia Britannica)*<https://www.britannica.com/technology/biological-weapon> accessed on 05 May 2020.
[2] *Bioterrorism- should we be worried, (Medical News Today)*https://www.medicalnewstoday.com/articles/321030accessed on 09 May, 2020.

CATEGORY-B

(Health hazards)

Disease	**Pathogen**	**Used in/by**
Cholera	*Vibrio Cholerae*(B)	World war II
Encephalitis	Alphaviruses (V)	World war II
Food poisoning	*Salmonella Shigella*(B)	World war II UNITED STATES OF AMERICA, 1990
Glanders	*Bulkholderia Mallei*	World war I World war II
Typhus	*Rickettsia prowazekii (B)*	World war II
Q fever	*Coxiellaburnetti*(B)	Never used
Psittacosis	*Chlamydia* psittaci(B)	Never used

Where, (B) is for Bacteria and (V) is for Viruses.

Category C consists of the emerging pathogens, or genetically engineered pathogens, that may contain Nipah virus, Hanta Virus, etc.

Recent disease, COVID-19 caused by the 'corona virus' can also be included in major health hazards, it is not yet used as a bioweapon but if used, it can cause major health hazards.

2. INCIDENTS OF USE

Looking back to the ancient warfare, as recorded in the Hittite texts in 1500-1200 BCE, the people who were contaminated by the epidemic tularemia were driven in the enemy lands to spread the disease.[3] It can also be called the first traces of biological warfare. Also, if we look back to 5th century B.C.E. the Scythians archers mixed human blood with decomposed bodies of venomous adders and dung into sealed vessels, putrefied them and used the poison dipping their arrows, that would attack the nervous system and could also cause respiratory paralysis.[4]

Coming to the middle era, in the 12th century A.D., emperor Barbossa in Tortona, Italy contaminated drinking water wells with human bodies, to spread diseases. In 1346, in the city of Kaffa[5] (present day Feodosia, Ukraine), the Mongols, while attacking the kingdom of Tatar, catapult the bodies of plague victims in to the enemy city to initiate an epidemic.[6] It is believed that this was the cause of the spread of black death plague in Europe, and resulted into death of

[3]SiroIginoTrevisanato, "THE 'HITTITE PLAGUE', AN EPIDEMIC OF TULAREMIA ANDTHE FIRST RECORD OF BIOLOGICAL WARFARE" (Vol. 69, Medical Hypothesis, 2007) 1371-1374.
[4]Mayor A, DIRTY TRICKS IN ANCIENT WARFARE(1997) Quarterly journal of military History, 32-37.
[5]Wheelis M, "BIOLOGICAL WARFARE AT THE 1346 SIEGE OF CAFFA" (Emerg Infect Dis., 2002) P. 971-975.
[6]Thomas J Johnson, *A history of Biological Warfare from 300 B.C.E to the Present*<https://c.aarc.org/resources/biological/history.asp> accessed on 09 May, 2020.

almost 25 million.[7] This was again repeated in 1710, by the Swedish forces when they did the same to Russia, by catapulting plague victims dead bodies into the city.[8]

In 1763, during the French and Indian wars, first traces of weaponized biological agents are found, the 'fomite' bacteria spreading small pox in the Indian subcontinent also affecting the British forces, was sent to the Native America, under the guidance of sir Jeffrey Amherst, through the used blankets of the smallpox patients containing dried pus.[9] While, in 1863 too the confederates sold clothes from smallpox and yellow fever patients to the American Union troops.[10]

In 1874 and 1899 Brussels and Hague taking an initiative and a positive step, and looking at the harmful effects of these weapons, prohibited the use of poisonous weapons respectively.

Coming to the World War I, use of bio-weapons, was started by Germany. German task forces in Romania infected sheep that were to be exported to Russia with Anthrax and Glanders, which also affected America, long before its entry into the war[11], although the attacks were on a low scale and thus did not affect much.[12]

After this, during the World War II, Japan was the country that used bio weapons on a massive scale, it continued to research on bio-weapons. The Japanese infected over one thousand wells in China villages, with Cholera and Typhus, that cause outbreaks, also their planes dropped plague-infested mites over Chinese cities and also spread them in rice fields and along roads.[13]They organized intensive bio warfare research camps during the World war, under the guidance of doctor Shiro Ishii and Kitano Misaji. The weapons had long-term effect and killed over 30,000 people and its horrific effects were seen from 1932 to even after the war, especially in the Chinese city of Manchuria. They experimented with a lot of diseases, namely bubonic plague, anthrax, typhus, cholera, small pox, gas gangrene, yellow fever, glanders and hepatitis among the others.[14]

During the World war II in 1940 sir Frederick Banting created first biological weapon research Centre[15] and from 1942, United States of America started intensive bio research programs under the direction of sir George W Merck, and also open tested their experiments with air testing, exposing animals, human volunteers and other civilians, testing it in its own cities

[7]*Bioterrorism- should we be worried,* (Medical News Today)
<https://www.medicalnewstoday.com/articles/321030/>accessed on 09 May, 2020.
[8]Edmund Hooker, *Biological Warfare* (eMedicine Health, 01 October, 2019)
<https://www.emedicinehealth.com/biological_warfare/article_em.htm> accessed on 09 May, 2020.
[9]Thomas J Johnson, *A history of Biological Warfare from 300 B.C.E to the Present.*<https://c.aarc.org/resources/biological/history.asp> accessed on 09 May 2020.
[10] Friedrich Frischnecht, *The history of Biological Warfare* (EMBO Reports, 2003)
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1326439/> accessed on 09 May 2020.
[11]Witcover J., *Sabotage at Black Tam: Germany's secret war in America* (1914-1917).
[12] Chapel Hills, ALGONQUIN BOOKS OF CHAPEL HILLS (1989).
[13] Friedrich Frischnecht, *The history of Biological Warfare* (EMBO Reports, 2003)
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1326439/> accessed on 09 May 2020.
[14] Barry R. Schneider, *Biological weapon* (Encyclopaedia Britannica),
<https://www.britannica.com/technology/biological-weapon>accessed 10 May 2020.
[15]Geissler, Erhard, and John Ellis van Courtland Moon, (eds). BIOLOGICAL AND TOXIN WEAPONS: RESEARCH, DEVELOPMENT AND USE FROM THE MIDDLE AGES TO 1945 (Vol. 18, Stockholm International Price Research Institute: Oxford University Press, 1999).

using 'Surrogate biological agents'. A release of bacterial aerosols from 200 different naval sites on the coasts of Virginia, and San Francisco, infected lakhs of people among which eight lakh infected were only in the Bay area alone.[16]

Post-world war followed the cold war era, and the United States of America and Soviet Union were silently fighting, and the Soviet Union accused the United States of America at United Nations General Assembly for using germ warfare in Korea. This was rather an extreme allegation.

Further, in 1966, the United States of America conducted tests in New York[17] to know the spread of diseases, and the vulnerability of subways, and released pathogens of Bacillus Subtilis, and through one all of the subways in the city were affected.[18]They ended all this in 1969.

During the Vietnamese war, the Viet Cong Guerillas, (the communist), dig punji pits with human feces contaminated bamboos in it, whoever stepped in the pit was pierced upon and rapidly produced a virulent infection.[19]

In the year 1979, anthrax was released in the form of an accident through a weapons research facility in Sverdlovsk, USSE. This incident took the lives of a minimum of 66 people. The government, in their part had originally asserted that the deaths were one due to consumption of infected meat. Only in 1992, the government under the president Boris Yelstein officially acknowledged the incident.[20]

In 1995, in the Tokyo subway of Japan, Aum Shinrikyo Cult, released sarin gas, which killed 12 folks and injured more than 5000 people.[21]

On 11 September 2001, a box containing the Bacillus Anthracis was sent to America, due to which 16 people were killed.[22]

Through this we can see that there has been a huge history of the utilization of bio-weapons, and how much dangerous a little drop of such toxic weapon can be. These should be precluded and, for every one of these, laws were made and settlements were endorsed to battle or to restrict the utilization of bio-weapons.

[16] Friedrich Frischnecht, *The history of Biological Warfare* (EMBO Reports, 2003) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1326439/> accessed on 10 May 2020.
[17] US Army, *US Army Activity in the US biological warfare programs, 1942-1977* (1977).
[18]Cole, Leonard A. CLOUDS OF SEECRECY: THE ARMY'S GEM WARFARE TESTS OVER POPULATEDAREAS.(Rowman & Littlefield), (1990).
[19] Robert wells, THE INVISIBLE ENEMY: BOOBY TRAPS IN VIETNAM (published in February 1992) (Delta Pr Ltd 1992).
[20]Edmund Hooker, *Biological Warfare*(eMedicineHealth, 01 October, 2019) <https://www.emedicinehealth.com/biological_warfare/article_em.htm>accessed on 10 May, 2020.
[21]Cole L.A., THE SPECTER OF BIOLOGICAL WEAPONS (Scientific American, 275), (1996) 30–35.
[22]Leitenburg Milton, BIOLOGICAL WEAPONS IN THE TWENTIETH CENTURY: A REVIEW AND ANALYSIS (Critical reviews in microbiology, 2001) 267-320.

V. LAWS AND TREATIES

The earlier treaties prohibiting the use of gases to which the protocol denotes are in particular The Hague Declaration concerning asphyxiating gases of 29 July 1899 and the Treaty of Versailles of 28 June 1919 as well as the other peace treaties of 1919.

The earlier examples of international law in the form of agreed treaties in relation with the usage of gas protocols were few, some of the earliest treaties on this subject matter are the Declaration of Hague along with the various other treaties of Hague which concerned the usage of Asphyxiating gas due to the incident on 29 July 1899. Furthermore, the peace treaties of the First World War also provided an effective tool for control of the nerve and other gas agent. But they did not prove that effective and a strong step was needed to combat the use of such weapons.[23]

1925 Geneva Convention (Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare)

The 1925 Geneva protocol, was signed at a conference in Geneva between 4 June to 17 June 1925, and was signed by the league of Nations, and was enforced on 8th February 1928.[24]

The particular protocol in particular. It was a peace treaty post WW1 which aims to stop and prohibit the usage of Poisons gases in wars, after the harmful effects of bio-weapons used by Germany.

The "Geneva Protocol, in full Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, in universal law, settlement marked in 1925 by the vast majority of the world's nations forbidding the utilization of substance and natural weapons in fighting. It was drafted at the 1925 Geneva Conference as a major aspect of a progression of measures intended to keep away from redundancy of the barbarities submitted by the belligerents in World War I.

Expanding on a few settlements that had finished World War I (quite the Treaty of Versailles [1919] between the Allies and Germany), the Protocol explicitly denied the utilization in war of suffocating, toxic, or different gases and bacteriological weapons. The protocol didn't boycott the turn of events, creation, or stockpiling of such weaponry, in any case. Hence, the protocol was later enhanced by the Biological Weapons Convention (BWC) of 1972 and the Chemical Weapons Convention (CWC) of 1993.

VI. BACKGROUND

The broad utilization of suffocating gas during World War I introduced another time of human-incurred mass pulverization and significantly frightened the worldwide network. The harmony bargains that the victorious Allies marked with vanquished Germany, Austria, Bulgaria, and Hungary flagged a solid acknowledgment of the gigantic threat that compound and organic

[23]International Committee of the Red Cross, *Treaties, states parties and commentaries*, (ICRC databases) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/280> accessed on 15 May 2020.
[24]*1925 Geneva Protocol*, (United Nations office for disarmament affairs) <https://www.un.org/disarmament/wmd/bio/1925-geneva-protocol/>accessed on 15 May 2020.

weapons spoke to. The 1925 Geneva Conference, sorted out by the League of Nations, the ancestor to the United Nations, took those settlements above and beyond. At the activity of the United States, France, and Poland, the member nations at the gathering drafted what came to be known as the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

The protocol was marked and sanctioned by numerous nations in the prior year's World War II. The United States, be that as it may, didn't formally confirm the protocol until 1975, in spite of the fact that it viewed itself as limited by the boycott all through the war and complied with the signatories require the protocol to turn out to be "a piece of International Law, restricting the same the still, small voice and the practice of countries."

VII. **LIMITATIONS**

Since its beginning in 1925, the Geneva Protocol has been a significant bit of global enactment, and most nations on the planet have formally remembered it—including all nations that have realized capacity to deliver compound and natural weapons.

The restrictions of the protocol, be that as it may, became apparent not long after the Geneva Conference. At the hour of its marking, a few significant forces (counting the United Kingdom, France, and the Soviet Union) expressly maintained whatever authority is needed to utilize the illegal weapons for retaliatory purposes. At the end of the day, should a state choose to utilize concoction or bacteriological weapons against another nation, in full resistance of the specifications of the protocol, the nation enduring an onslaught would lawfully be permitted to react in kind. Additionally, the 1925 report neglected to address the creation, storage, testing, and move of the illegal weapons, a disappointment that permitted nations, for example, the Soviet Union and the United States to gather enormous supplies of concoction and bacteriological specialists. In spite of its conspicuous deficiencies, the protocol remains the legitimate establishment for a long arrangement of multilateral settlements managing the danger that weapons, for example, mustard gas and Bacillus anthracis speak to.

VIII. **FURTHER SCENARIO**

Drawing upon the language of these harmony arrangements, the United States - at the Washington Disarmament Conference of 1922 - took the activity of bringing a comparative arrangement into a bargain on submarines and toxic gases. The U.S. Senate offered its guidance and agree to endorsement of this bargain without a disagreeing vote. It never went into power, notwithstanding, since French approval was essential, and France questioned the submarine arrangements.

At French recommendation it was chosen to draw up a protocol on non-utilization of toxic gases and at the proposal of Poland the forbiddance was stretched out to bacteriological weapons. Marked on June 17, 1925, the Geneva Protocol along these lines repeated the denial

recently set somewhere near the Versailles and Washington bargains and included a boycott bacteriological fighting.[25]

Before World War II the protocol was confirmed by numerous nations, including all the extraordinary forces aside from the United States and Japan. At the point when they approved or accepted the protocol, a few countries - including the United Kingdom, France, and the USSR - pronounced that it would stop to be authoritative on them if their foes, or the partners of their adversaries, neglected to regard the restrictions of the protocol. Albeit Italy was involved with the protocol, it utilized toxin gas in the Ethiopian war. In any case, the protocol was commonly seen in World War II."

But, neither US nor Japan ratified the treaty, before the World war I and were secretly developing deadly diseases like anthrax, Russia and Germany were also involved in producing such weapons, and evidently Japan used them during the World War II, and the treaty clearly failed, and post the World war the United States and the Soviet Union started fully ascended bio-weapons programs.[26]

But in the USA, the "hostile organic weapons program" was ended by President Nixon by official requests in 1969 all the stocks of anthrax in US were destroyed in 1972, and in the same year a new treaty was signed by 160 countries.[27]

IX. BIOLOGICAL WEAPONS CONVENTION 1972

The treaty signed by the major world powers in 1972 lacks significant provisions for successful enforcement and/or verification. As a result of this lack of protection, a number of the players in the world arena have been suspected of secretly maintaining active bio weapons. This was the first convention which prohibited the research on biological weapons and thus some more strong measures.[28]

"The Biological Weapons Convention (BWC) is a legally restricting arrangement that outlaws' natural arms. In the wake of being examined and haggled in the United Nations' demobilization discussion beginning in 1969, the BWC opened for signature on April 10, 1972, and went into power on March 26, 1975. It as of now hosts 183 states-gatherings, including Palestine, and four signatories (Egypt, Haiti, Somalia, Syria, and Tanzania). Ten states have neither marked nor approved the BWC (Chad, Comoros, Djibouti, Eritrea, Israel, Kiribati, Micronesia, Namibia, South Sudan and Tuvalu).

During the last part of the 1960s, open and expert concerns were brought generally up with respect to the capricious thought of, irregularity of, epidemiologic threats of, absence of epidemiologic control measures for natural weapons. What is more, more data on different

[25]Bureau of International Security and Non-proliferation, *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol)*https://2009-2017.state.gov/t/isn/4784.htm> accessed on 15 May 2020.
[26]Stanford University News Release, *Biological warfare: an emerging threat in 21st century* (News Service (650) 723-9296).
[27] Encyclopaedia Brittanica, *Anthrax as a biological weapon*, (Encyclopaedia Brittanica), <https://www.britannica.com/science/anthrax-disease> accessed on 15 May 2020.
[28]*The Biological weapons convention*, (United Nations office for disarmament affairs) <https://www.un.org/disarmament/wmd/bio/>.

nations biological weapons programs got apparent, and clearly the 1925 Geneva Protocol was inadequate in controlling the proliferation of organic weapons. In July 1969, Great Britain presented a proposition to the UN Committee on Disarmament laying out the need to disallow the turn of events, creation, and stockpiling of natural weapons. Besides, the proposition given to measures for control and examinations, just as procedures to be followed if there should rise an occurrence of infringement. Soon after accommodation of the British proposition, in September 1969, the Warsaw Pact countries under the lead of the Soviet Union presented a comparable proposition to the UN. In any case, this proposition needed arrangements for examinations. After two months, in November 1969, the World Health Organization gave a report with respect to the potential results of the utilization of natural fighting specialists.

In this way, the 1972 Show on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, known as the BWC, was created. This settlement confines the development, creation, and amassing of microorganisms or poisons in sums that have no guard for prophylactic, protective or other serene purposes. Under the BWC, the advancement of conveyance frameworks and the exchange of natural fighting innovation or mastery to different nations are likewise denied. It further required the gatherings to the BWC to demolish stockpiles, conveyance frameworks, and creation hardware inside 9 months of confirming the arrangement. This understanding was reached among 103 consigning countries, and the settlement was confirmed in April 1972. The BWC became effective in March 1975. Signatories that have not yet endorsed the BWC are obliged to cease from activities that would invalidate the point of the arrangement until they explicitly impart to the UN their aim not to approve the settlement. Audit meetings to the BWC were held in 1981, 1986, 1991, and 1996. Signatories to the BWC are required to present the accompanying data to the UN on a yearly premise: offices where organic resistance examines is being led, logical gatherings that are held at indicated offices, trade of researchers or data, and illness episodes.[29]

In any case, similar to the 1925 Geneva Protocol, the BWC doesn't give firm rules to assessments and control of demobilization and adherence to the protocol. Likewise, there are no guidelines on execution and how to oversee encroachment. In addition, there are unsure discussions about the importance of monitored research and the measures of microorganisms essential for selfless exploration. Affirmed infringement of the BWC were to be accounted for to the UN Security Council, which may thus start reviews of charged gatherings, just as modalities of revision. The right of changeless individuals from the Security Council to veto proposed reviews, notwithstanding, subverts this arrangement. Later occasions in 2003 and 2004 again represented the unpredictability and the tremendous challenges the UN faces in implementing the resolutions of the BWC."

The USA received a strategy to never utilize organic weapons, including toxins, under any conditions. National Security Decisions 35 and 44, gave in November 1969 (microorganisms) and February 1970 (toxins), commanded the discontinuance of hostile natural weapons research and creation and the annihilation of the organic weapons stockpile. Nonetheless, look into endeavours kept on being took into consideration the reason for creating countermeasures, including immunizations and antisera. The whole munitions stockpile of

[29]Daryll Kimball, *The biological weapons convention at a glance* (Arms Control Association, March 2020) <https://www.armscontrol.org/factsheets/bwc> accessed on 15 May 2020.

organic weapons was annihilated between May 1971 and February 1973 under the protection of the US Department of Agriculture, the US Department of Health, Education, and Welfare, and the Departments of Nature Resources of Arkansas, Colorado, and Maryland. After the end of the hostile program, USAMRIID was built up to proceed with inquire about for advancement of clinical resistance for the US military against a potential assault with natural weapons. The USAMRIID is an open research establishment, and none of the exploration is ordered.[30]

X. VERIFICATION

The course of action framework orders that states-parties talk with one another and facilitate, equally or multilaterally, to settle consistence concerns. It additionally permits states-gatherings to stop a grievance with the UN Security Council on the off chance that they accept other part states are disregarding the show. The Security Council can research objections, yet this force has never been summoned. Security Council casting a ballot rules give China, France, Russia, the United Kingdom, and the United States veto control over Security Council choices, including those to lead BWC examinations.

XI. IMPLICATIONS

The show has been outrageously damaged previously. The Soviet Union, a state-gathering and one of the show's depositary states, kept up a huge hostile natural weapons program subsequent to endorsing the BWC. Russia says that this program has been ended, yet questions stay about what befell components of the Soviet program. Iraq damaged its responsibilities as a signatory state with its organic weapons program, which was revealed by the UN Special Commission on Iraq after the Persian Gulf War. Iraq has also been a culprit in violation of the 1972 treaty on bio weapons. The Iraqi government has been mass-producing weapons-grade anthrax and are simultaneously conducting research on weapons grade anthrax, along with this the Iraqis have also been found of conducting research on a other wide variety of weapons. The details of the Iraqi intrusion in the Fields of biological weapons came to light only in the aftermath of the 1991 Gulf War.[31],,

In November 2001, the United States freely denounced Iraq, just as part state North Korea, of breaking the show's terms. Washington likewise communicated worry about consistence by Iran and Libya, which are additionally states-parties, and by Syria. The United States itself brought worries up in 2001 about whether a portion of its activities, apparently being directed as a major aspect of its biodefense program, are allowed under the BWC. In 2002, Washington included Cuba, additionally a state-party, to its rundown of nations directing activities that abuse the show.

In a 2017 report on consistence with the BWC, the United States demonstrated that Russia was the main state to have remarkable consistence issues with the BWC.

[30]Stefan Riedal, *Biological Warfare and bioterrorism: A historical review* (2004) (Baylor University Medical Centre) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200679/> accessed on 15 May 2020.
[31]Stanford University News Release, *Biological warfare: an emerging threat in 21st century* (News Service (650) 723-9296).

XII. DEFENSES AND PREVENTIONS

Science was not yet discovered much until the late 1870s, when Louis Pasteur and Robert Koch, discovered microbiology and the reason behind the spread of such diseases was known. However, it is still not discovered about all the pathogens spread or how the newly emerged pathogens would promulgate but we surely can have defenses against it.

The 2014 Ebola episode in West Africa indicated that we are so defenceless against these kinds of irresistible ailment, how rapidly it spreads, and how frail general wellbeing frameworks are in probably the least fortunate nations on the planet.

The World Health Organization, nevertheless released an advisory, for the States that want to be already prepared for any of the epidemic/pandemic diseases, notwithstanding if it is deliberate or not, it says-

When a Member State is concerned and wants to be prepared, World Health Organization advises on strengthening public health surveillance and response activities, with an emphasis on:

1. more effective national surveillance of outbreaks of illness, including alert and response systems at all levels that can detect diseases that may be deliberately caused;

2. better communication between multiple sectors, including public health, water supply, food safety, nuclear safety and poison-control;

3. One other method could be the improvement in the shortcoming of the 1972 treaty by improvement in the areas of effective communication about risks;

4. A readiness preparation for successful handling of vulnerability and making sure that there is a presence of effective combat measures for deliberate use of a biological weapon by any state;

5. A well maintained and regularly updated contingency plan for the process of a successful and enhances response by all the states.

World Health Organization's plan for globe alert and response activities along with the Global outbreak Alert and Response Network, is something which continuously represents a major pillar of security in healthcare sector, which is aimed at detection, verification and containment of epidemics among other things. In the likely event of deliberate or incidental release of a biological weapon in the world's environment, these organization and their sister organizations comes up as the first line of defence.[32]"

Firstly, to battle the infections causing the plague, or sicknesses that are utilized as bio-weapons, their identification should be done as quickly as time permits, for this when the microbes of the illness are advanced, it should be discovered that how the concerned microorganisms spread and in what way do they influence the daily routine of experiencing creatures.

The medical care group and specialists should be intensive with the said sicknesses and how might they treat the influenced. They should have the option to perceive the examples of the

[32] *Biological weapons* (World Health Organisation) <https://www.who.int/health-topics/biological-weapons#tab=tab_2>accessed on 13 May 2020.

infection and should have the option to distinguish the early casualties. Therefore, the medical officials must always be prepared, even if any new disease occurs, they must be able to find the symptoms and the treatment as soon as possible, i.e., we must also focus on human intelligence.[33]

Also, to prevent such further diseases, vaccines must be made and every citizen must be provided with it. They must always be prepared with the vaccines of already occurred epidemic diseases, for example, US has enough stock of small pox vaccines to vaccinate the entire American population if any outbreak occurs.[34] They are also preparing for the vaccines of plague and cholera.

Masks and clothing provide a major protection, as most of the micro-organisms cannot penetrate through clothes or untorn surfaces.

Antibiotics can help keep away the diseases, by increasing immunity. Showering and changing clothes on a regular basis can also be helpful as they may remove up to 99% of the germs from the human body.

Medical care groups should consistently be wearing gloves and covering their body, while getting such patients protecting them from the organisms.

Also, the warning system must be strong to spread the word of such diseases, and the government must also be instructing the safety measures and preventive measures. Individuals should be taught enough to comprehend the significance of counteraction of the illness and should adhere to the directions given.

In the events of International Biological emergencies, an Inter connection between the Nations is a must, existing mechanisms and technologies must be strengthened and can be done if we have international reach and we can also get pre-informed about the findings.[35]

In such situations, physical contact must also be prevented, as the pathogens can travel out of the victim's body through body fluids or excreta such as sweat, saliva, urine, tears, faeces, etc. and can stay on the body and if came in contact can travel to another body, and infect others.

XIII. PRESENT SCENARIO

Gram-for-gram, natural weapons are the deadliest weapons at any point created. Germs don't regard outskirts, so organic dangers—artificial and normally happening—can rapidly have worldwide impacts. Albeit just a couple of nations are associated with having organic weapons, quickly delivering and weaponizing natural specialists is shockingly simple.[36]

[33]R Roffey, BIOLOGICAL WEAPONS AND BITERRORISM PREPAREDNES: IMPORTANCE OF PUBLIC HEALTH AWARENESS AND INTERNATIONAL COPERATAION (Clinical microbiology and Infection, 2002) P. 522-528.
[34]Barry R. Schneider, *Biological weapon*(EncyclopaediaBritannica) <https://www.britannica.com/technology/biological-weapon>accessed 10 May 2020.
[35]Richard Danzig, BIOLOGICAL WARFARE: A NATION TO RISK- A TIME TO ACT (National Defense University, Institute for National strategic studies, 1996) P. 4.
[36]The nuclear threat initiative, *The Biological threat*<https://www.nti.org/learn/biological/> accessed on 15 May 2020.

Presently, it is an unsafe time, as we as a whole know, present is constantly influenced by the past and numerous nations have effectively explored, delivered and put away the Bio-weapons that whenever delivered can influence the entire humanity or the world. Yet, every present is influenced by a past and numerous nations began to investigate about the Natural creatures and loading them up, and subsequently this time additionally numerous weapons.

During the years following World War II, papers were loaded up with articles about malady flare-ups brought about by outside specialists furnished with organic weapons. During the Korean War, the Soviet Union, China, and North Korea blamed the USA for utilizing operators of organic fighting against North Korea. In later years the USA conceded that it had the capacity of delivering such weapons, in spite of the fact that it denied having utilized them. In any case, the validity of the USA was sabotaged by its inability to endorse the Geneva Protocol of 1925, by open affirmation of its own hostile natural fighting project, and by doubts of coordinated effort with previous Unit 731 researchers.

In fact, the US program extended during the Korean War (1950–1953) with the foundation of another creation office in Pine Bluff, Arkansas. What's more, a cautious program was propelled in 1953 with the target of creating countermeasures, including antibodies, antisera, and helpful specialists, to shield troops from conceivable natural assaults. By the late 1960s, the US military had built up a natural weapons store that incorporated various organic pathogens, toxins, and parasitic plant pathogens that could be guided against harvests to initiate crop disappointment and starvation.

At Fort Detrick, natural weapons were detonated inside an empty 1-million-liter, metallic, round aerosolization chamber known as the "eight ball". Volunteers inside this chamber were presented to Francisellatularensis and Coxiellaburnetii. The examinations were led to decide the powerlessness of people to certain aerosolized pathogens. Further testing was done to assess the viability of antibodies, prophylaxis, and treatment. During the hostile natural program (1942–1969), 456 instances of word related diseases gained at Fort Detrick were accounted for at a pace of < 10 contaminations for every 1 million hours worked. This pace of contamination was well inside the contemporary gauges of the National Safety Council and beneath the rate detailed from different laboratories. Three fatalities because of gained diseases were accounted for from Fort Detrick during this period: 2 instances of Bacillus anthracis happened in 1951 and 1958, and 1 instance of viral encephalitis was accounted for in 1964. What's more, 48-word related contaminations were accounted for from the other testing and creation locales, yet no different fatalities happened.[37]

Somewhere in the range of 1951 and 1954, a few investigations were directed to exhibit the helplessness of US urban areas. Urban areas on the two coasts were clandestinely utilized as laboratories to test aerosolization and dispersal techniques when stimulants were discharged during undercover investigations in New York City, San Francisco, and different locales. Aspergillus fumigatus, Bacillus subtilisvarglobigii, and Serratiamarcescens were chosen for these trials. Life forms were discharged over huge geographic territories to examine the impacts of sunlight-based illumination and climatic conditions on the reasonability of living beings. Concerns with respect to potential general wellbeing perils were raised after episodes of urinary

[37]Stefan Riedal, BIOLOGICAL WARFARE AND TERRORISM: A HISTORICAL REVIEW (2004) (Baylor University Medical Centre) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200679/> accessed on 15 May 2020.

tract diseases brought about by nosocomial S. marcescens at Stanford University Hospital between September 1950 and February 1951. The episode followed secretive trials utilizing S. marcescens as a stimulant in San Francisco.

Notwithstanding these endeavours in the USA, numerous different nations proceeded with their natural weapons look into, including Canada, Britain, France, and the Soviet Union. In the United Kingdom, the Microbiological Research Department was built up in 1947 and extended in 1951. Plans for pilot organic fighting were made, and examine proceeded on the advancement of new natural specialists and weapons structure. England led a few preliminaries with organic fighting specialists in the Bahamas, in the Isles of Lewis, and in Scottish waters to refine these weapons. Notwithstanding, in 1957, the British government chose to surrender the hostile natural fighting examination and to annihilate stockpiles. Around then, another accentuation was put on further advancement of organic cautious research. Simultaneously, the Soviet Union expanded its endeavours in both hostile and protective natural fighting innovative work. Reports with respect to hostile research over and over happened during the 1960s and 1970s, albeit formally the Soviet Union asserted not to have any natural or synthetic weapons.

A US civil defence program that can make a difference in a biological emergency is the 'Strategic National Stockpile' program, which has created push packages of 50 tons of vaccines, medications, decontamination agents, and other emergency medical equipment, which are stored in more than 12 locations across the country in preparation for emergencies. Furthermore, every U.S. state has bioterrorism response plans in place, including plans or guidelines for mass vaccinations, triage, and quarantines.[38]

Special vaccines have been formed, tested, and verified to deal with the two most dangerous biological agents used in the history that can also be most easily weaponized that are anthrax and small pox. Effective vaccines for plague and cholera have now been created and have been authorisedto use, but have been produced in small quantities, such small quantities are very less than what might be needed if a large number of people is infected.

Besides this, in US a number of vaccines are in the Investigational New Drug (IND) category and awaits further checks before the Federal Drug Administration (FDA) to validate their efficiency and safety. These also include vaccines for tularemia, Q fever, encephalitis, botulism and viral hemorrhagic fever.[39]

At the presenttimeno effective vaccines are there for the prevention of infectious disease causedby glanders, brucellosis, staphylococcal enterotoxin B, ricin, or T-2 mycotoxins—all are biological agents that are man-made, researched by countries for military use or have been used as weapons in the past. However, in some cases where vaccines are not yet available, medicines have been developed that help the sick to recover.

[38]Barry R. Schneider, *Biological weapon* (Encyclopaedia Britannica) <https://www.britannica.com/technology/biological-weapon> accessed 10 May 2020.
[39]*Ibid.*

Long-standing medical researches are being organized to investigate the possibilities of developing vaccines and supplements that when treated with, might raise the efficacy of the immune systems of the recipients to protect against the probable biological warfare agents.[40]

XIV. COUNTRIES CURRENTLY HAVING BIOWEAPONS

Many nations have had or are right now associated with having organic weapons programs: Syria, Iraq, Iran, Libya, Israel, Egypt, Taiwan, China, South Africa, Libya, Cuba, Romania, Bulgaria, Pakistan, India, France, Germany, the Netherlands, Norway, Sweden, Canada, Japan, North Korea, Russia, South Africa, the United Kingdom and the United States.[41]

Iraq has constantly been researching on and been developing bioweapons, from a very long time, and has stockpiled them.[42]

America and Russia still have frozen stocks of the smallpox virus.[43]

There is across the board agreement against the ownership and utilization of organic weapons. Most nations are involved with the Biological and Toxin Weapon Convention, yet it is extremely unlikely to know whether nations are following their duties.

Fear based oppressor bunches have just attempted to utilize natural weapons. The Japanese faction Aum Shinrikyo fruitlessly attempted to weaponize botulinum toxin and Bacillus anthracis in the mid-1990s. In the days after the September 11 assaults in the United States, a progression of Bacillus anthracis bound letters sent to a few news organizations and two U.S. Senators murdered five and sickened 17 others. Fear based oppressors are attracted to organic weapons for their relative minimal effort, basic conveyance and mental impact

The world saw first-hand how access to prepared clinical experts, clean gear and essential clinical offices are an uncommon item in the creating scene, empowering ailments to grow past what present day clinical advances may propose. Worldwide travel makes the natural risk much progressively authentic and highlights the necessity for an overall method to manage and improve general prosperity. Prodded by the Ebola emergency, numerous nations took steps to improve worldwide wellbeing security so as to monitor and react to infection dangers, yet there is considerably more work to do.

[40] *Ibid.*

[41] Joseph P Dudley, Michael H. Woodford, BIOWEAPONS, BIODIVERSITY AND ECOCIDE: POTENTIAL EFFECTS OF BIOLOGICAL WEAPONS ON BIOLOGICAL DIVERSITY: BIOWEAPON DISEASE OUTBREAKS COULD CAUSE THE EXTINCTION OF ENDANGERED WILDLIFE SPECIES, THE EROSION OF GENETIC DIVERSITY IN DOMESTICATED PLANTS AND ANIMALS, THE DESTRUCTION OF TRADITIONAL HUMAN LIVELIHOODS, AND THE EXTIRPATION OF INDIGENOUS CULTURES. (Bioscience, Volume 52, Issue 7, July 2002) P. 583-592.

[42] Raymond A. Zilinskas, IRAQ'S BIOLOGICAL WEAPONS:THE PAST AS FUTURE? (Jama 278.5, 1997) 418-424.

[43] Stanford University News Release, *Biological warfare: an emerging threat in 21st century*(News Service (650) 723-9296).

XV. CONCLUSION

Though biological weapons have a huge history and have been in use for a very-very long time, it still is used very rarely as compared to other weapons in war. These weapons are one of their kind. The guilty parties can undoubtedly move away without getting seen and can cause an immense misfortune, and be perilous to many. This can be known as a plague just as an aid likewise a danger to the human culture. Despite the fact that restricted for ordinarily, nations are as yet continuing exploring on this, not just in wars, these weapons of mass annihilation can likewise be utilized in illegal intimidation. An incredible wellspring of annihilation, a weapon of war can be utilized in any way. It has been utilized a great deal of times, and surprisingly caused enormous deaths in different structures, and through settlements and shows there has been power over them, however we actually don't know whether any nation is having or exploring on them or not. The deals have effectively bombed wretchedly and the danger to world is on a consistent increment.

Though not all have the lethal effects, but if any harmful one is used, even the tiniest drop could make a huge impact, and therefore, it shall not be used and must always be prohibited. The primary prevention of it lies on our hand, our Nation must always be prepared to face such epidemic diseases, and must always be well equipped with technical equipment and biological defences against it.

KINDS OF CONSTITUTION: A COMPARATIVE STUDY AMONG THE CONSTITUTIONS OF INDIA, THE U.S.A. AND THE U.K.

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ABSTRACT

Comparative law may be regarded as the technique of looking one's own legal system through the mirror of analogous laws of other countries. It ascertains the differences and similarities in legal rules, principles and institutions of two or more countries with a view to finding solutions to local problems. This is the only aim that researcher has sought to achieve through this paper i.e. to study the differences and similarities of the USA, UK and Indian Constitution. In this paper the researcher has categorized the kinds of constitution in three broad categories and has studied that category while discussing under it the differences and similarities of the constitutions of these three countries under.

Keywords: Supremacy of the Constitution, Independence of judiciary, Federalism, Centralization of Powers.

I. WHAT IS A CONSTITUTION?

A Contemporary constitution may be described as a document consisting of principles that sets out the governmental structure; how a country is to be governed, how the power is to be distributed, how such power is to be controlled and what rights do the citizens of a country possess. No single definition of the term 'Constitution' is available which is of universal application or is uncontested. This is because the nature, content and kind of constitution are directly proportional to the social, legal and political setup of a country. Thus, due to these social, legal and political variations among different countries, there is a variety of meanings and interpretations of the term 'constitution'. Notwithstanding, a broad definition of the constitution would be, a set of fundamental principles which:

1. Are binding on everyone equally including those who are responsible for making laws in the country;

2. Are based on general public rightfulness;

3. Sets out the structure and mode of operation of government as well as ensures that the mentioned structure of government is in accordance with international norms;

4. Cannot be amended by the law-makers easily like any other Legislation;

5. Lays down the rights that the citizens of a country possess which are further in consonance with the international norms set for human rights.

6. Does not differentiate among the classes or masses on the grounds of religion, race, caste, creed, sex, place of birth.

A number of eminent jurists have defined the term 'Constitution' and this began ever since the period of Aristotle. There has been some or the other deficiency in the previous definition, however, the definition given by Wade and Philips is quite descriptive. They defined the term 'Constitution' as, "The Constitution of a country seeks to establish its fundamental or basic or apex organs of government and administration, describe their structure, composition, powers and principal functions, define the interrelationship of these organs with one another, and regulate their relationship with the people, more particularly, the political relationship."[1]

II. KINDS OF CONSTITUTION

In order to study the kinds of constitutions and also, to conduct a comparative analysis of the nature and salient features of Constitutions of India, United Kingdom and United States of America following classification is done:

1. Written and Unwritten Constitution
2. Enacted and Evolved Constitution
3. Unitary and Federal Constitution

1. WRITTEN AND UNWRITTEN CONSTITUTION

Written Constitution is the one in which laws are codified and put together in a systematic and cohesive format. For a constitution to be regarded as a written constitution it is essential that the laws are codified and complied into one single document, like the Constitution of India and the Constitution of the United States of America. The Indian Constitution is the lengthiest, elaborate and detailed document. Being the lengthiest written constitution in the world it took two years, eleven months and 18 days to write this into a single document which came into full effect from 26th January, 1950. Originally it consisted of 395 Articles structured under 22 Parts along with 8 schedules. Today, after 104 amendments there are 448 articles in 25 parts and 12 schedules. The Constitution of the United States of America on the other hand is the world's oldest written constitution. The US Constitution came into force in 1789 and since then it has been amended 27 times, out of which first ten are collectively known as the Bill of Rights and were certified on December 15, 1791. Ever since the last amendment in the US Constitution in 1992, at present it contains 7 articles arranged under 3 parts.

1.1. Features of the Written Constitution

1.1.1. *Supremacy of the Constitution*- Article VI of the constitution of the United States clearly states that, "… This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

[1] Wade. et al, CONSTITUTIONAL AND ADMINISTRATIVE LAW 1, 5 (9th Edn.,1997).

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution…"[2]

*William Marbury v. James Madison, Secretary of State of the United States***,** it was held "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature repugnant to the constitution is void. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."[3]

As far as the supremacy of Indian Constitution is concerned; Honorable Supreme Court of India in the case of *Minerva Mills v. Union of India* **[4]** has held,

"...It is clear from the majority decision in Kesavananda Bharati case that our Constitution is a controlled Constitution which confers powers on the various authorities created and recognized by it and defines the limits of those powers. The Constitution is suprema lex, the paramount law of the land and there is no authority, no department or branch of the State which is above or beyond the Constitution or has powers unfettered and unrestricted by the Constitution. The Constitution has devised a structure of power relationship with checks and balances and limits are placed on the powers of every authority or instrumentality under the Constitution. Every organ of the State, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of such authority..."

In *Supreme Court Advocates-on-Record - Association and another v. Union of India*[5], Supreme Court has again cited the decision of *Minerva Mills***'** case and upheld the supremacy of the Indian Constitution.

1.1.2. *Judicial Review*- This principle has been evolved from the principle of constitutional supremacy. The power of judicial review is a classic example of independence of judiciary. *William Marbury v. James Madison, Secretary of State of the United States*[8]was the first case in the United States of America where Justice John Marshall marked the beginning of the principle of Judicial Review. It was held that,

"Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law… This doctrine would subvert the very foundation of all written constitutions… The judicial power of the United States is extended to all cases arising under the constitution."[6]

[2]CONSTITUTION OF THE UNITED STATES, 1788.
[3]William Marbury v. James Madison, Secretary of State of the United States, 1803.
[4]Minerva Mills N.T.C Labour Union Bangalore v. Management Of Minerva Mills Ltd Bangalore (1991) KANT 467
[5]Supreme Court Advocates-on-Record - Association and others v. Union of India (2015) SC 611.
[6]*Supra* note 3.

Unlike the US Constitution the Indian Constitution expressly lays down the power of judicial review under Art. 13, 32, 131-136, 143, 226 and 246. Thus, this concept is rooted in the spirit of the Indian Constitution. Article 13(2) of the Constitution empowers the Constitutional Courts of India to review the constitutional validity of all the legislations in the country which are contrary to the Fundamental rights enshrined under Part III of the Constitution, pre as well as post framing of the constitution.

To bring attention on the explicit provision of judicial review given in the constitution, The Supreme Court of India Court in *State of Madras v. Rowre* affirmed this and held that

"*The Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution and that the courts 'face up to such important and none too easy task' not out of any desire 'to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution."*

In the case of *A. K. Gopalan v. State of Madras*, the Supreme Court of India emphasized on- "In India it is the Constitution that is supreme statute law to be valid, must in all cases be in conformity with the constitutional requirements and it is for the judiciary to decide whether any enactment is constitutional or not and if a legislature transgresses any constitutional limits, the Court has to declare the law unconstitutional "for the Court is bound by its oath to uphold the Constitution."

In various cases the Supreme Court has emphasized the role and importance of judicial review in India, while in *Kesavananda Bharti v. State of Kerala* opined that judicial review comes under the purview of the basic structure of the constitution and held-

"As long as some Fundamental Rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these Rights are not contravened…Judicial review has thus become an integral part of our Constitutional system…"

Later, in the case of *Minerva Mills v. Union of India* followed by the case of *L. Chandra Kumar v. Union of India*, all the subsequent cases till date the Supreme Court adhered to the view laid down in the Kesavananda case.

UNWRITTEN CONSTITUTION is the one where laws are not codified and complied into a single document. The British Constitution is recognized as an unwritten constitution as the laws are not codified and embodied in a single legal document to outline how the State shall work.

For any constitution to be an unwritten constitution it does not mean that all the laws are unwritten and followed like a custom. It connotes those laws are written though they are not compiled into one single document and adopted as the grand norm of the country. In other words, they follow the laws passed by the parliament i.e. the statutory law and not the constitutional law. This is because they have adopted the concept of Parliamentary Supremacy instead of Constitutional Supremacy.

1.2. Features of the Unwritten Constitution

1.2.1. *Parliamentary Sovereignty*- This is one of the fundamental principles in the U.K. Constitution. The concept of parliamentary supremacy in the United Kingdom makes it the supreme body of governance which can create, amend, and repeal any law at any point in time. Moreover, the courts are also not given the power to overrule or review the legislations passed by the Parliament of the United Kingdom.

Criticizing this concept of parliamentary supremacy, Jean-Louis de Lolme has coined that, "*British parliament can do everything but make a woman a man and a man a woman*"[7].

Characterizing this as the "formlessness of the British Constitution", KEETON goes on to observe: "The absence of a written Constitution deprives us of a fundamental starting point from which all Constitutional law can be derived. We have no Grundnorm from which the individual norms of Constitutional law can receive their validity."[8]

1.2.2. *Absence of Formal Procedure Rather Prevalence of the Conventions*- When a country is run by a written constitution there are rules defined in it and the organs of the government has to work according to the procedure established therein and any exercise outside the constitutional limits is straightway void or unconstitutional.

Since every step taken by the institutions of the government is to be in conformity with the constitution, there is also a defined procedure to amend the constitution. But in the case of unwritten constitution there is a different scenario. Here conventions play an important role.

Whatever has been followed from past years is still followed but there is no such rigidity in the rules. The laws could be easily adjusted unlike the amending procedure in case of written constitution.

2. ENACTED AND EVOLVED CONSTITUTION

Enacted Constitution refers to the constitution for enactment of which a special body was created and the entire document came into force on a single day. The constitution of India and the constitution of The United States of America are examples of the enacted constitution.

2.1 Features of the Enacted Constitution

2.1.1. *Came into force on a single day*- The Indian Constitution was adopted by the Constituent Assembly on 26th November, 1949 and it came into force on 26th January, 1950. On the other hand, the constitution of The United States of America Constitution was signed by 39 delegates on September 17, 1787, and it was submitted for ratification to the 13 states on September 28 and became the oldest constitution in the history.

[7] Jean-Louis De Lolme, available at https://en.wikipedia.org/wiki/Jean-Louis_de_Lolme#:, (Last visited on November 18, 2020).
[8] M.P Jain, INDIAN CONSTITUTIONAL LAW, (8thEdn.).

Unlike the British Constitution, the laws here did not become the part of the constitution over the period of time rather all at once. Once the Constitution came into force since then all the provisions became applicable simultaneously.

2.1.2. *A special body is framed to enact the constitution*-The struggle for independence in India was over by 15th August, 1947 but the independence was yet to be attained. It was time to adopt and enact a new constitution that could ensure whatever the freedom fighters had sought from this independence.

In 1934, M N Roy first proposed the idea of a constituent assembly. The demand was taken up by the Congress Party in 1935 as an official demand. The British accepted this in the August Offer of 1940. Under the Cabinet Mission plan of 1946, elections were held for the formation of the constituent assembly. A Constituent Assembly was set up and came into being in November, 1946. The members were elected by indirect election by the Provincial Assembly.

This body was not independent rather under the British control and had to work as per the scheme laid down in the Cabinet Mission Plan however, after passing of the Indian Independence Act, 1974 it will be independent and sovereign body.

The prime objective of the Constituent Assembly was to frame a Constitution for India. "Objective Resolution enshrined the aspirations and values of the constitution makers. Under this, the people of India were guaranteed social, economic and political justice, equality and fundamental freedoms. This resolution was unanimously adopted on 22 January 1947 and the Preamble to the Constitution is based on it"[9].

Similarly, making of the constitution of the United States of America has been through a journey and came into being as a result of Philadelphia Convention. "Stimulated by severe economic troubles, which produced radical political movements such as Shays' Rebellion, and urged on by a demand for a stronger central government, the convention met in the Pennsylvania State House in Philadelphia (May 25–September 17, 1787), ostensibly to amend the Articles of Confederation."[10]

"The Convention formally began its business on May 25, combined to concoct a plan not merely to "amend" the Articles of Confederation, but to set the proceedings of the Convention on a far more ambitious course"[11]

"Controversy over the abolition of the importation of slaves ended with the agreement that importation should not be forbidden before 1808. The powers of the federal executive and judiciary were enumerated, and the Constitution was itself declared

[9] available at https://nios.ac.in/media/documents/srsec317newE/317EL5 , (Last visited on November 19, 2020).
[10] The Editors of Encyclopaedia,*"Constitutional Convention"*, ENCYCLOPEDIA BRITANNICA, (28 August 2019), available at https://www.britannica.com/event/Constitutional-Convention, (Last visited on November 20, 2020).
[11]Richard R. Beeman, *The Constitutional Convention of 1787: A Revolution in Government*, INTERACTIVE CONSTITUTION.

to be the "supreme law of the land." The convention's work was approved by a majority of the states the following year"[12].

EVOLVED CONSTITUTION is the one for whose construction no separate body was appointed rather it is evolved during the historical evolution. Moreover, such kind of constitution is the result of various laws existent in the country adopting it i.e. it contains provisions that have come into being due to the need of the society by way of some revolution. Since laws are not codified at once, they evolve over a period of time. These are not even laws in true sense rather conventions prevailing in the society that has taken the shape of law.

2.2. Understanding the British Constitution as an Evolved Constitution

The constitution of the United Kingdom is a classic example of an evolved constitution. Conventions and the decisions of courts have played an important role in constructing the British constitution. "The earliest date in the history of our constitution is 1215 when the barons forced King John to accept the *Magna Carta*, the 'Great Charter of the Liberties of England', which limited the power of the king, making him subject to the law of the land. Two of its key principles, the right to a fair trial by one's peers and protection from unlawful imprisonment, form the basis of common law in Britain. *Magna Carta* would also be a major influence on the US constitution"[13].

"Another landmark piece of legislation was the Bill of Rights of 1689. This followed the 'Glorious Revolution' of 1688, in which William III and Queen Mary replaced King James II. This bill declared that the monarch could not rule without consent of Parliament. As part of the bill, Parliament would meet regularly; there would be free elections and freedom of speech in the chamber. It outlined specific liberties for the people, including the freedom to bear arms for self-defense, freedom from taxes imposed by the monarch without the consent of Parliament and the freedom from cruel and unusual punishment"[17].

"The Act of Settlement of 1701 controlled who should succeed to the throne and established the vital principle of judicial independence. The number of men entitled to vote was greatly increased by the 1832 Great Reform Act, and the Representation of the People's Act of 1928 gave all men and women over the age of 21 the right to vote"[14].

These are the laws which have primarily helped in shaping the British Constitution. These laws and the other laws together form an unwritten and evolved British Constitution. In which the laws are written but not compiled into a single formal document as well as the laws did not come into force on one single day rather, they have evolved over a period of time.

3. UNITARY AND FEDERAL CONSTITUTION

Unitary Constitution is the one which is governed constitutionally as one single unit. Here the powers are concentrated in the union i.e. in such type of constitutions centralization of

[12]*Supra* note 13.
[13]Ellen Castelow, *The Constitution of the United Kingdom*, available at https://www.historic uk.com/History UK/History of Britain/British-Constitution , (Last visited on November 21, 2020).
[14]*Id.*

the powers is the main theme. Another essential thing in such type of constitutions is that the States are subordinate to the Centre with absolutely no sharing of power all the powers like that of legislature, execution, judicial is in the hands of the Central body. Example of such type of constitution is the constitution of the United Kingdom.

In the United Kingdom the powers are not distributed but delegated with certain conditions. For administrative convenience powers are delegated to local governments but it is not that these powers are their own and absolute rather it belongs to the centre and may be taken back by it at any time.

3.1.1 Features of the Unitary Constitution

3.1.2 *Centralization of Powers*- U.K. government finance chief Sharon White, "almost the most centralized developed country in the world"[15] "Politics in the United Kingdom takes place within the framework of a constitutional monarchy, in which the monarch (Queen Elizabeth II) is head of state and the prime minister is the head of the UK government"[16].

"The Cabinet is a formal body made up of the most senior government ministers chosen by the prime minister. It is the committee at the center of the British political system and the supreme decision-making body in government".

This does not mean that all the tasks are performed by the central government rather there is existence of local governments. The powers in Britain are thus, in the hands of 'Sovereign Parliament' however, some powers have been delegated to Scotland, Wales and Northern Ireland. But since the powers are centralized in one body this becomes overload on the central government and might lead to arbitral decision making.

3.1.3 *Responsible Government*- One of the most reliable feature of the U.K. constitution is that the government there is responsible. The responsibility is confined in the defined institutions. The central legislative body i.e. the 'Sovereign Parliament' is altogether responsible for legislation, executive for implementation and judiciary for adjudication. The citizens owe their allegiance to the Central government and this also promotes nationality at some point in time.

3.2. Unitary Features of the Indian Constitution

3.2.1. The constitution has conferred more powers in the Union government than in the State government i.e. the subjects in the Union list are of greater importance for the country than the subjects in the state list. Such as Defense, International Relations, Foreign jurisdiction, etc.

3.2.2. Indian constitution grants unequal representation in the upper house of Parliament i.e. the number of representatives in the upper house are selected on the basis of the population in the state.

[15] Winnie Agbonlahor, *UK 'almost most centralised developed country'*, GLOBAL GOVERNMENT FORUM, available at https://www.globalgovernmentforum.com/uk-most-centralised-developed-country-says-treasury-chief/, (Last visited on November 21, 2020).

[16] available at https://www.lawteacher.net/free-law-essays/constitutional-law/the-uk-system-of-government-constitutional-lawessay.php.

3.2.3. Emergency Provisions are in the hands of Union Government. Whenever an emergency is imposed in any states, all the administration of the state is taken over by the Central government.

3.2.4. Single Citizenship- Indian constitution does not recognizes dual citizenship rather single citizenship granted by the Central government.

FEDERAL CONSTITUTION is the one which splits power between two separate bodies which are autonomous in it. The bodies are sovereign and can work independently without intervention of each other in each other's work.

Constitution of The United States of America is one of such kind; it is the world's oldest federal constitution that separates power between the centre and the states. "Federalism in the United States has evolved quite a bit since it was first implemented in 1787. Two major kinds of federalism have dominated political theory. There is dual federalism, in which the federal and the state governments are co-equals. Under this theory, there is a very large group of powers belonging to the states, and the federal government is limited to only those powers explicitly listed in the Constitution. As such, the federal government has jurisdiction only to the extent of powers mentioned in the constitution.

Under the second theory of federalism, known as cooperative federalism; the national, the state, and the local governments interact cooperatively and collectively to solve common problems.

Cooperative federalism asserts that the national government is supreme over the states"[17].

They follow the system of dual citizenship which implies that citizens get two separate citizenships out of which is of the country and the other one is of a particular state. There important topics such as defense, foreign affairs, imports and exports are in the hand of the centre rest the states are independent to make laws on every subject relating to them.

"The real test of the federal character of a political structure is, as Prof. Wheare has himself observed that, however, is what appears on paper only. It remains to be seen whether in actual practice the federal features entrench or strengthen themselves as they have in Canada, or whether the strong trend towards centralization which is a feature of most western governments in a world of crises, will compel these federal aspects of the Constitution to wither away"[18].

3.3. **Features of the Federal Constitution**

3.3.1. *Dual-government*- One of the prime features of federal constitution is the two-tier government; one at the central level and the other one at the state level; with both levels

[17]*Federalism*, available at https://system.uslegal.com/federalism/,(Last visited on November 21, 2020).
[18]*The Division of Powers*, available at https://courses.lumenlearning.com/atd-monroecc-americangovernment/chapter/the-division-of-powers/, (Last visited on November 21, 2020).

being elected by the people and each level assigned different function. "In the U.S. federal system, all national matters are handled by the federal government, which is led by the president and members of Congress, all of whom are elected by voters across the country. All matters at the sub national level are the responsibility of the fifty states, each headed by an elected governor and legislature. Thus, there is a separation of functions between the federal and state governments, and voters choose the leader at each level"[19]

3.3.2. *Written Constitution*- Having a written constitution is a must in order to create a federal structure but on top of that the main thing is that this constitution cannot be changes without the substantial consent of the sub national governments.

"In the American federal system, the twenty-seven amendments added to the Constitution since its adoption was the result of an arduous process that required approval by two-thirds of both houses of Congress and three-fourths of the states. The main advantage of this supermajority requirement is that no changes to the Constitution can occur unless there is broad support within Congress and among states. The potential drawback is that numerous national amendment initiatives—such as the Equal Rights Amendment (ERA), which aims to guarantee equal rights regardless of sex—have failed because they cannot garner sufficient consent among members of Congress or, in the case of the ERA, the States"[25]

3.4. Federal Features of the Indian Constitution

3.4.1 In India there is a three-tier government. Other than that, as the federal system demands, Indian constitution under 7th Schedule grants powers to the government at each level. The union list sets out subjects on which only the Union government is entitled to make law and similarly the State list sets out the subjects on which only the State is empowered to make laws. But there is also a Concurrent list on the subjects of which both the governments can make law.

3.4.2. The Indian structure has adopted the supremacy of the constitution[20]. The Supreme Court of India has also laid down in several case laws that the basic structure of the Indian constitution is indestructible.

3.4.3. The Indian Constitution has adopted single and integrated judiciary but has also made several provisions to ensure the independence of the judiciary[21].

3.4.4. "The Drafting Committee described the Constitution as "federal in structure'25but they preferred to call it a "Union'26to indicate two essential features of Indian federalism, namely, (a) that the Indian federation is not the result of an agreement by the units and (b) that the component units have freedom to secede from it. It would not be proper to describe the Indian Constitution as quasi federal 27 unless one is prepared to classify the Canadian Constitution, too, as quasi-federal"[22].

[19] *Id.*
[20] See pg. 3 and 4.
[21] See pg. 5 and 6.
[22] Bhavya Gupta, *Indian Federalism Under The Light Of Judiciary*, VOL. 16, SUPREMO AMICUS.

Sir. Ivor. Jennings holds that "India is a federation, with a strong centralizing tendency According to *K. M Munshi*, the constitution made India "a quasi-federal union invested with several important features of a unitary government". Prof. P. K. Tripathi, formerly member of the Law Commission of India, finds "federalism in India a myth and not reality"[23]

Ganga Ram Moolchandani v. State of Rajasthan[24]the Supreme Court reiterated: **"**Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely supremacy of the Constitution, division of power between the Union and States and existence independent judiciary"[25]**.**

III CONCLUSION

The researcher has listed various kinds of constitutions and has attempted to study the nature of the Constitutions of the United States of America, the United Kingdom and India. This has unfolded several things about the features of the constitutions these countries possess. The researcher has also discussed the differences and similarities among the constitutions of these countries. All the Constitutions are unique in themselves and the primary thing is that all the countries have agreed that their constitution is a living document which means they are ready to accept the changing nature of the society and ultimately adapt to that change by making developments in their existing constitutions.

[23]*Id.*
[24]Ganga Ram Moolchandaniv. State of Rajasthan (2001) AIR.
[25]Siddharth Dalabehera, *Federalism InIndia- A Judicial Interpretation,* ACADEMIKE (2015), available at https://www.lawctopus.com/academike/federalism-india, (Last visited on November 21, 2020).

PROTECTION OF RIGHTS OF ELDERLY PEOPLE-THE NEED OF THE HOUR

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ABSTRACT

Mostly, in India we are disturbed about the increase in population for over fifty years, yet we neglect the importance and need of the 60+ population which has expanded considerably. India today isn't simply going through fiscal enlargements but also from budgetary changes, which might be a not all that awful sign for a creation country anyway not for its occupants who need to hold up under the repercussions for that improvement and need.

As shown by United Nations World Happiness Report 2016, India ranks 118th which was crippling just as disturbing. As India in the twenty-first century is climbing the ladder to progress, we disregard to understand where we are missing and which set of occupants are bearing the repercussions. The wonders can be seen once we audit the objectives which the United Nation General Assembly had held onto which were known as "United Nation Principles for Older persons" (1982).

In India, nowadays joint families have been diminishing and nuclear families are in the making, with which the difficult issue is that the children feel disturbed while developing watchmen are around them. The standard which gives protection of their benefits is The Maintenance and Welfare of Parents and Senior Citizen Act, 2007 which endeavours to improve the secured affirmation provided for the development. In this assessment paper I would be generally separating the pieces of the recently referenced act and the genuine utilization by social affair Section 125 of Criminal Procedure Code, 1973. The makers would be shutting by proposing certain changes in the current existing laws which the legitimate official is endeavouring to push an incomparable system for better utilization of the present law.

INTRODUCTION

Today in India in urban territories as well as rustic regions the idea of joint-family is dissolving. We are moving towards the idea of an essential social unit which is a 'family unit' where a couple is living with their child. The vast majority of the older populace today had remained in joint family during their working age and had upheld their maturing guardians. However, today the social structure of the general public has changed because of the high desire of the adolescent, industrialization, urbanization and western impact winning in the general public. Incidentally, India's more seasoned populace doesn't know about their privileges, because of high commonness of ignorance and absence of mindfulness.[1]

Another perspective which can't be immaculate is that, the more seasoned individuals are imperilled by a few issues like physical, physiological boundaries and dysfunctional behaviour.

[1] A report by Age Well Foundation: *Human Rights of Older People- A Reality Check*, Pg 5, para 3

Regularly their supplication isn't heard in light of the fact that their rights are being disregarded with-in four-walls. Indeed, Japan has the largest number of elderly individuals, the individuals of Japanese inception[2] believed the-gathering to be vital, and that a person's prosperity ought to be relinquished to benefit the gathering. The inabilities which the maturing populace is confronted which are not tallied by the administration if the maturing individual has a kid who has implies for his/her upkeep.

SOCIAL ORDERS POSITION ON OLD-AGE

Society in India has changed radically in the twenty-first century, where the family structure has changed with women entering the workforce. Already in Indian social orders, there used to be a pre-considered idea that the ladies should deal with maturing older folks. With ladies entering the work power this idea has changed. Consequently, now in social orders where ladies take interest in practical exercises and are hugely enabled to make their own choice, they will in general work as opposed to sitting at home. Besides the general public which was excessively subject to care of their elderly have gotten increasingly free from the same duty.

Maturing is a characteristic procedure; in Indian the populace has expanded gigantically. The Census of 2011 has given stunning figures; the number of inhabitants in maturing people has expanded four-overlap in a decade. This legitimately suggests the social insurance office which is not prepared to adapt up to such a circumstance, the legislature has no extensive strategy to handle this situation.

1. ISSUES LOOKED BY MATURING PEOPLE

There are a few issues at the national level which will in general, harm and mischief the outfitting time of bliss where an individual ought to appreciate the greatest number of qualifications for which he has given to the general public in his administration years. A portion of the serious issues are:

1. Economic issues which the elderly needs to confront. India like other western nations has followed the comparable retirement age as per the callings. In any case, the legislature in India couldn't give far reaching privilege changes which is the need of great importance. The maturing people are monetarily injured as they have little extent of work and pay opportunity possibilities.

2. Medicare is another hazy area; in India we have no particular government financed Medicare scheme. Consequently, the elderly need to manage the medicine costs and other vital expenses without anyone else. This makes them admired and inclined to maltreatment as the youngsters taking care have to bear every one of these expenses.

3. The mental injury of reliance on others which have a danger to their state of mind, the maltreatment which they need to look by their precious ones. The maltreatment is typically verbal in nature, it is inferred that the expectation is to mortify and empty their admired condition.

[2]Tomita S.K, *Exploration of Elder Mistreatment Among the Japanese*

2. UNIVERSAL PRINCIPLES

The position of United Nations has been as a firm defender of rights given to maturing individuals, in the exhaustive goals passed by General Assembly reviewing the standards set somewhere around Economic and Social Council goals 1989/50[3]. The significance of these United Nation goals became known when the creating countries with high pace of populace development confronted major issues in drafting vigorous laws for insurance of their privileges. Significant standards which were followed while drafting these goals were:

1. Responsibility lies with the local government to give essential comforts to the older populace. The State will be liable for securing and conceding fundamental requirements like safe house, food of such individuals.

2. Equal chance to work, frequently the maturing individuals are disposed of from the work power. Their activity which is most extreme fundamental for their upliftment. The approach of disposal of such individuals will be denounced, as it is the duty of the state to guarantee an equivalent chance of salary for all its residents.

3. Care is additionally another delicate territory which the countries will guarantee. In the above goals it is unmistakably referenced that the State has guaranteed sufficient consideration of all such maturing people. This is another hazy area for member nations like India which have no such vigorous laws to guarantee the equivalent.

4. Right to live with pride, the older individuals are regularly embarrassed and demeaned by their own family. Presently the countries will guarantee that each individual has an option to lead his existence with poise and others conscious regard. The most thorough law which can be induced is European Convention on Human Rights (EHRC).

These were some thorough standards which were set somewhere near the United Nation General Assembly in goals no. A/RES/46/91, which needed to follow while making any hearty authorization in this field.[4]

3. CONSTITUTIONAL PROTECTION

There are sure articles which maintained the assurance of old in such a field, wherein the older are given equivalent options to flourish and live with pride. As per Article 41 of the Indian Constitution which articulates that each individual ought to have the option to work, to instruction and open help. By open help the ancestors have attempted to distil the idea that the duty of the State isn't just to draft complete enactment yet in addition the hearty execution of such law, usage through open help.

As per Article 46 of the Indian Constitution which expresses that the State will be answerable for extraordinary instructive and affordable capacities for the more fragile segments of the general public, by definition the older individuals don't comprise among the more vulnerable areas. Yet, it tends to be surmised where the older individuals have no methods for

[3] available at http://www.un.org/documents/ga/res/46/a46r091.htm

[4] available at https://academic.oup.com/hrlr/article/12/2/199/722093/The-Meaning-of-Life-Dignity-and-the-Right-to-Life.

monetary gains and are expelled by their families at that point, the old individuals can expect that the State owes them a unique financial capacity towards their enhancement.

The above standards are in Chapter 4 of the Indian Constitution for example Mandate Principles of State Policy under Article 37, whereby the administration is to follow certain standards to accomplish its objective as a Welfare State, however these approaches of the state are not enforceable by law. Henceforth these standards can't be tested in any official courtroom, as it isn't enforceable by law its usage can be addressed.

4. LAWFUL REMEDIES

There are sure lawful means which are given in the event of infringement of rights. Before we evaluate the lawful means, we have to locate the lawful sculptures which secure the rights. Under different laws existing in India protection of privileges of old individuals who can't keep up themselves are given. There are different laws which are gotten from old existing customs just as resolutions which were pushed by abrogating points of reference.[5]

1. UNDER PERSONAL LAWS

1.1. Hindu Law-Majority of the Indian populace is mediated on premise of this resolution of the law. Section 20 of the Hindu Adoption and Maintenance Act, 1956 arrangements with this part of the law. The maturing guardians can guarantee support from both their children.

Section 20. Upkeep of kids and matured guardians (1) Subject to the arrangements of this area a Hindu is bound, during their lifetime, to keep up their legitimate or illegitimate kids and their matured or decrepit guardians.

(2) A legitimate or illegitimate child may guarantee support from their dad or mom insofar as the kid is a minor.

(3) The commitment of an individual to keep up their matured or decrepit parent or little girl who is unmarried stretches out to the extent that the parent or the unmarried girl, all things considered, can't keep up oneself out of their own income or other property

Clarification In this segment "parent" incorporates a childless stepmother.[6]

1.2. Muslim Law-In this course of the law, both children are obligated for their maturing guardians, in Muslim law the idea of support is managed with more earnestness.

Despite the fact that there is one issue where the Muslim Law is quiet, as there exists no understanding of selection in Muslim Law so the guardians who embrace are no qualifies for support from their received beneficiary.

1.3. Christian and Parsi Law-In both the resolutions the idea of support is not there, so it is exhorted that upkeep is to be guaranteed. The case must be under Section 125 of

[5] ABC v. State of NCT SLP (Civil) 28367 of 2011
[6] available at http://mospi.nic.in/mospi_new/upload/elderly_in_india.pdf

Criminal Procedure Code, 1973.Hence there is consistency of law which is kept up when ground upkeep under Section 125.

2. THE CODE OF CRIMINAL PROCEDURE, 1973

In India we are denied consistency, we have various arrangements of individual laws administering over ourselves. Under Article 44 of the Indian Constitution, it expresses "The State will try to make sure about for the residents a Uniform Civil Code all through the region of India" yet this is a long way from the real world and a fantasy in current socio-political situation, where decisions are battled on premise of position and classism.

In any case, the issues of upkeep of maturing guardians are managed consistently under Section 125 of The Code of Criminal Procedure, 1973.

125. Order for maintenance of wives, children and parents.

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct.

As indicated by sub section (d) of section 125, there is clearness over the weight of evidence which is over the maturing guardian to demonstrate 'disregard' and 'refusal' with respect to their youngsters. In the event that such disregard and refusal to keep up is demonstrated before the top-of-the-line officer, at that point the justice would arrange a month-to-month stipend for the upkeep of the elderly.

3. MAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZEN ACT, 2007

This Act authorized by Parliament in the Fifty-eight Year of the republic, expects to perceive and ensure the rights which are given to senior residents and maturing guardians. This act contains 32 Sections which lay far reaching enactment on insurance of admired residents for the State, who are inclined to infringement and misuse.

Before basic investigation of the act, we have to initially express the definitions gave by the act;

2(b) "upkeep" incorporates arrangement for food, clothes, home and clinical participation and treatment;

2(h) "senior Citizen" signifies any individual being a resident of India, who has achieved the age of sixty years or above;

2(k) "government assistance" signifies arrangement for food, medicinal services, entertainment focuses and different pleasantries important for the senior residents.

Support in this, has a basic importance which is giving fundamental courtesies like food, apparel, and clinical help. It would be important the component of expectation to keep up is missing. The child or the girl could conceivably have the expectation to keep up, yet should keep up as indicated by the Statute. In the matter of old enough, the Statute has carefully followed the rules given by the World Health organization.[7]

Government assistance thus, characterizes all the conveniences that the individual element or the State will give or try to give.

As per Section 4 of the previously mentioned act characterizes when an individual can guarantee upkeep under this Act. The request for upkeep must be made by the older individual when he and his assets are inadequate to look after him. Essentially if an offended party goes to the court he would need to pronounce every one of his advantages and it ought to demonstrate that he can't look after himself. In the event that the offended party qualifies area 4, at that point he can make an application for upkeep under Section 5 of the demonstration which would be perused with Section 125 of The Code of Criminal Procedure, 1973.[8]

A milestone case *Dr. Vijaya Manohar Arbat v. Kashirao Raja Ram Sawai and Anr.*[9], the Apex Court held that a thorough enactment should be drafted which would have powerful effects on the circumstance which the older maturing individuals are confronting.

Case Note:

Criminal - upkeep - Section 125 of Criminal Procedure Code, 1973 - regardless of whether respondent qualified for guarantee support from litigant being hitched little girl - girl after marriage doesn't stop to be girl of guardian's moral commitment of kids to keep up their folks under Section 125(1) (d) forced risk on both child and little girl to keep up their dad or mom who can't look after themselves - order of High Court for support of guardians maintained. In the wake of giving our best thought to the inquiry, we are of the view that Section 125 (1)(d) has forced an obligation on both the child and the little girl to keep up their dad or mom who can't keep up on their own. Segment 488 of the old criminal Procedure Code didn't contain an arrangement like Clause (d) of Section 125 (1).

The assembly in authorizing Criminal Procedure Code, 1973 thought it was astute to accommodate the support of the guardians of an individual when such guardians can't look after themselves. The motivation behind such authorization is to uphold social commitment and we

[7] available at http://www.who.int/mediacentre/news/releases/2015/older-persons-day/en/
[8] Criminal Appeal No. 378 of 1986
[9] Criminal Appeal No. 378 of 1986

don't think why the little girl ought to be prohibited from such commitment to keep up their folks.

This was a significant case which had developed the idea of parent assurance in the field of support and government assistance.

There is an assumption that the principal elements of the State are enacting, executing and mediation. Regularly the most significant capacity of the State is missed this is the monetary capacity. In India the State has a foremost task to carry out in the monetary circle, being a creating nation with a vigorous development rate and expanding gross household the duty of the State raises.

4. OLD AGE PENSION SCHEMES

National Social Assistance Program (NSAP) is a stage towards satisfaction of Directive Principles of State Policy under Article 41 and 42 of the Indian Constitution. The three extensive frameworks drafted under this mature age benefits conspire are:

(1) National old Age Pension Scheme (NOAPS)

(2) National Family Benefit Scheme (NFBS)

(3) National Maternity Benefit Scheme (NMBS). The National Maternity Benefit Scheme (NMBS) was consequently moved on first April, 2001 from the Ministry of Rural Advancement to the Ministry of Health and Family Welfare. In February 2009, two new Schemes known as Indira Gandhi National Widow Pension Scheme (IGNWPS) and Indira Gandhi National Disability Pension Scheme (IGNDPS) were presented.

Distinctive State governments have their own benefits; however it would be important that the State and Center both spend in this field. As per reports distributed by the Social Justice Ministry, Haryana State has been working an incredible jump forward towards mature age annuity changes. Many State Governments are yet to actualize their own extensive and strong enactments to help the maturing residents dwelling their domain. Old Age Samman Allowance and Widow Pension and Destitute Women Pension Scheme are stalwarts in this field executed by Haryana Government. These plans are regularly induced by the Central Government in various reports and studies.

Henceforth, the job of the state stays fundamental and most extremely important for each circle of security of right and government assistance which should be with an awareness of others' expectations. In the event that the legislation is adequate, at that point the usage must be checked as this wrongdoing is submitted inside the four dividers of assurance.

5. CONCLUSION

As per the World Health organization show on Aging Individuals it was expressed "Longer lives not really more beneficial lives" this idea was to ingrain the possibility of clinical guide and care to poor and admired maturing people. In India we need such plans which would give a sufficient sum to the human services office.

A few recommendations by the author in view of this research paper:

1. A far-reaching enactment to give medical coverage and human services for all. It is seen that the private part is a hindrance to give low-premium protection to maturing residents of this nation.

2. Implementation of the Maintenance and Welfare of Parents and Senior Citizen Act 2007 which is a sole resolution perceiving and ensuring the privilege of maturing guardians and senior residents. For better usage the family courts which are set up need to act in such a way, that the rights are secured and the cure is given as punctual as could reasonably be expected.

3. Counselling for the maturing individuals who are confronting ceaseless maltreatment and are mental disabled on account of the disposition rendered towards them. This adds to their hardship, subsequently they are intellectually tormented.

Violations submitted towards older individuals have expanded chivalrously in the ongoing past which is disturbing and calls for changes in current execution and translations of different enactments which is progressively disposed towards retributive arrangement of equity. Some core values could be produced using the arrangement of a Law Commission which would adulate the situation of such maturing admired residents in India as this is of great importance for an edified and prosperous society.

PREVENTIVE RIGHTS VIOLATED BY WOMEN

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ABSTRACT

Possession of rights and authorities has a huge impact on an individual life, which is prominent for the functioning of society. Every country has either a presidential or dictator form of governance but India is the only country that appears to follow the democracy for the departmentalization regarding the delegation of accountabilities and duties. From the ancient transition, society used to blame every circumstance on the shoulder of women because the weaker section was tagged as children as well as women's portion. Customs and practices were upheld as rigid as well as certain guidelines to be followed by every person with the replacement of the Constitution. Contrary to the situation of coercion and threat which was surrounded within the people's mentality is been implemented as upside down or in the simpler word all the accusations are been turned up in the contemporary era. Misuse or misleading the legal provision or any such disciplinary action which acts against the welfare of the nation is been denoted as "legal terrorism". The main agenda will be highlighted to avoid frivolous complaints and restrict the assertion of false allegations. The critical and crucial purpose of the misconduct which is performed irrespective through the acts or omission will be limited and the ruling of courts by openly convicting the women with the unwanted charges by disrespecting the sanctity of family. Laws, schemes and legislative enactment were amended to prevent the fake claims made unnecessary irrespective of the gender biasness and safeguard the doctrines of all the parliamentary crisis. Revealing the allegation as false which turns out to be as an ulterior motive can be used against the term "innocent masculinity" which can make the economy urge towards the downfall."

Keywords: Democracy, Customs, Legal-terrorism, False allegations, Innocent Masculinity.

I. INTRODUCTION AND SITUATION FROM HISTORIC ERA TILL CONTEMPORARY WORLD

In the contemporary stage, one element which is inbred as a child when born is the basic fundamental rights which make sure that no one is segregated from any circumstances. A country like India, is been highly subjugated under the constitution which gave efficient rights and empowers every citizen to live healthily and with all the defined levels of precautions. The main aim and objective of writing this article is to give a wider conceptual elaboration of schemes when basic and necessary rights are misused by the normal public especially by women although the defined set of rules and regulations has been made for the enhancement of the position and protection of the women's mindset. There are punishments as well as penalties for the defined accusation which can be imposed for the wrongdoing by any person. In the era where ascendancy has been shared among males as well as females in equal ways and defined manners with reference to the given authority still, there are many types of mischief happening in the

society which ultimately leads to changes in the rules and policy of the guidelines. Due to all the amendments and dynamic changes in society, the law was enforced for the protection of every specified subject matter and to ensure every single citizen should get justice with a uniform level of participation.[1]Stronger and rigid law sometime leads to conflicts between the communities which ultimately end up having intrinsic flaws and corruption.

The contradictory statement and the behaviour of the people are that, if there is any enactment of rules or order then there will certainly be some set of individuals who will oppose the rule, as not every regulation and law need to be accepted widely. These issues sometimes led to conflicts and disputes among the communities and finally, as an outcome there is a huge sort of imbalance and instability in the society. The State, as well as Government, cannot deny the fact that there are many provisions under fair, impartial, and equal treatment among humankind, within which Indian, males and females are considered as subordinating partners to the economy. It is history that territory the most suffering group of the civilization is the woman. Mass movements were performed and at a huge level of participation for the pleading and appealing of right but sometimes it leads to unwanted events which made a negative attempt as an outcome of misuse of possession over rights.[2]The data remains constant in evolutionary scenario i.e. in the present era – they face a huge amount of segregation, partial treatment, injustice, and dishonour from every corner of the coterie. To reduce the crime and discrimination of women, the government took many steps regarding the upliftment of the position of the female in society, with this particular reference many laws and policies were made only for the benefits of the weaker section i.e. women and children. India is been considered as a supporter of Democracy as well as a mixed economy which elaborates as people's government with an unbiased form of economy.[3]

II. MISUSE OF RIGHTS BY WOMEN: INTENTIONALLY AND ACCIDENTALLY

Society can be stated as egalitarian until the people and law treat everyone equal in the eye of law. The general disclosure is about the misuse of power and authority which is been given in the hands of any mankind, which is headed under the explicit form of unconstitutional and draconian. For the up-gradation and enhancement of the status in society, someone should be given accountability to perform efficient duties but not in an excessive manner. If there is any sort of belief in a democratic form of government then definitely there should be the distribution of resources and facilities among people. Distribution of responsibility leads to specific allotment of work and as an outcome less level of conflict between individual interests occurs. As the most suffered group of the society were women and children, so for the improvement of the clan, the government made many separate rules and regulations which ultimately made a huge impact on an individual life. The violation of rights which was crippling affliction by the segment of women and few violative rights were the violation of Right to Equality, Education, Political, Property, Health, and Employment but for preserving the rights there were many strict

[1] Harry Mills, *With abuse of power more likely to occur in male-dominated environments, surely balancing the gender gap is all the more desirable,* ACCA, (1 March 2018), available at https://www.accaglobal.com/uk/en/member/ discover/cpd-articles/leadership-management/gender-imbalancecpd.html (Last visited on August 8,2020)

[2] Riya Mishra, The Gender Advantage: Women Who Misuse It & Men Who Bears It, TIMES OF INDIA, (September 5, 2019).

[3]Avantika Tiwari, *The 498A Debate: The Legal void in which 'Fear of misuse' is misused*, FII, (8 August 2020), available at https://feminisminindia.com/2017/08/07/498a-debate-legal-void/.

punishments imposed for the welfare of weaker section.[4]Matrimonial disputes and conflicts which was raised by the misunderstanding between the communities openly disgrace the interest of the women that cause the chaos among the people and society.

When the society was set up all the delegation of authority as a result it leads to decentralised among the various department for better functioning, but as the division of power and possession was allotted for the enforcement of ruling of law uphold the massive holding up authority in a specific department. India has been known for the fact of hauled for the treatment of women and heinous crime which take place on daily basis and if the society has any sort of negative effect then it ultimately leads to disgracing a particular section for upholding the main agenda of upliftment. As many surveys and judgments were suggested to upbring the various amendments for the protection of women within the ambit of misleading of a false allegation. With the reports which were presented in front of judges and statutory authority stated that there were almost 75% cases of sexual assault and rape which were claimed as false allegations within which fake FIR's appeals were filed. To safeguard the interest from the unwanted finding of the facts which also stated that at a large proportion frivolous amounts of complaints and termed the men's rights as "innocent masculinity".[5]

III. DEBATABLE LEGAL PROVISIONS FOR FALSE AND UNWANTED FILED CASES

As the fact is India is a country that has a dense population in which there are acceptance as well as denial of the particular rule, and many times this denial of the situation can cause a huge level of destruction. However, the most targeted section in this particular scenario is Sec. 498A of IPC in which the men activist argues in that subject matter which the women are misusing as well as misleading the law and over the past few years, this particular section has been popularly known as "the most misused rule as well as the law in the history of past and present Indian Jurisprudence which subsequently led to leniency and inefficiency in the investigation".[6] The situation changes whenever there is a maximum intensity of authority upheld by a male or a female person in the society which subsequently leads to inflexibility and mishandling of the issues related to the societal aspects. As there are many acts and schemes which are specially made for women's welfare and various types of remedies are given whenever there is an infringement of rights but sometimes these specific circumstances mislead humankind.

There are many ways in which a female violated her own set of rights – which was granted to her for protection. There are many fake and unwanted cases which have been made against the people of society. Few of the female take as an act of revenge and remaining misuse

[4]Videh Upadhyay, *Emerging issues and concerns in a Rights based perspective*, WATER RIGHTS AND THE NEW WATER LAWS IN INDIA(2011).

[5]Mehak Ahuja, *How Women Misuse their Rights*, LEGAL SERVICES, available at, http://www.legalserviceindia.com /legal/article-3095-how-women-misuse. their:~:text=Women%20use%20this%20law%20as,under%20section%20498A%20is%20false.,(Last visited on August 09, 2020).

[6] Anil Kumar Saroj, *Mother of daughters abandoned by the husband, stigmatised by society*, VIDEO VOLUNTEER, available at https://www.videovolunteers.org/mother-of-six-daughters-abandoned-by-husband-stigmatised-by-society-2/?gclid=EAIaIQobChMI18LptpCR6wIVlg4rCh0o5QsbEAMYAiAAEgLnzfD_BwE (August 10, 2020).

the given right based on getting equal status in the society. In this instance, it is been termed as women misleading the society as well as the community and here the big sufferer is the male section of humankind. This particular grip in the society sometimes establishes an inadequate and highly influential investigation as the law is tilted towards the protection and welfare of the people living in the society.[7] "If there is excessive use of resources and facilities that will automatically lead a downfall as well as deterioration of the country", concerning this if only a set of people hold immense authority and non-delegated power then that will be termed as the destruction of the society. India is been known for its democratic value, in which the power is embedded in the hands of people concerning for an equal and fair extent. There are many false cases which made the constitution as well as the government in the questionable state, with respect of an outcome it initiated cruel action against the petitioner (women) itself and debate along with Sec. 182 of IPC which states about the false information or any type of facts which intent to cause any unlawful power against the public servant for the purpose of injuring another person. Controlling and manipulating the investigation can sometimes cause negotiation but question the identity of the person leads to a negative impact. From ancient era women and children are the two most segregated sections who were disallowed for the socio-cultural approach as an outcome in the contemporary world it leads to the vicious impact upon the people.[8]

In contemporary relevance, there are many cases which have been put under the consideration of the government that it is not mandatory that only women and children can be the victims or segregated for the wrongdoings. In many investigations men or the male section of the society can also be the sufferer in the circumstances. The situation and incident which took place in the history as well as in ancient era within which women and children were not awarded equal rights neither in workspace where they used to be employed nor in the society among the communities. In the following several decades, one crime or offence which never stopped or got under the restrictions was related to women which are also known as the marginalized group of the population. False allegation and improper scrutiny sometimes lead to unwanted charges that were imposed in the human nature as an outcome of the scenario there is always a pinch of revenge as well as the right for suing the person which negatively incline the judicial function in a negative way as the result of the imposition of the eventual unreasonable factual information.

IV. CONCLUSION

Policies and Laws are made for the enactment purpose but the major principles which is upheld are actually within the hands of the general public. The Population of the territory has a wrong presumption that custom and legal procedures are performed equally and lead to the same impact within the society, contrary to the reference both are interrelated not the same. The agenda of the legislature is not the wide fluctuation of law but not having any sort of defined restriction over the limit of application and operation of the law. State Government and Courts made the law for the welfare and uplifting the conditions of the weaker section, i.e. women living in the society but with a good aim and propaganda. Utility, as well as protection of law

[7]Akriti Dixit, *Has the rise in misuse of women protection laws lowered the conviction rate*, ONE INDIA, available at https://www.oneindia.com/india/has-the-rise-in-misuse-of-women-protection-laws-lowered-the-conviction-rate-2936837.html(August 10, 2020).

[8]Aruna Sharma, *Women's rights: Misuse of laws erode faith in justice system*, FINANCIAL EXPRESS, (November 14, 2017).

towards the general public, acts as a double-edged sword, which can be applied for any purpose, likewise, the burden and pressure among the people also lie within the boundaries of the state which cannot be stated that the implementation of the rights will be used only in a positive manner. Many people commit various types of offence for sake of intentional as well as accidental purposes that they ultimately disclose as the essential part of the living, but although as a result it always ends up harming and unlawful activities. Lastly, the rights and laws are made for the people of the society to control and diminish the rate of unwanted crimes, which are taking place among different types of communities but biases, prejudice, and corrupted socio-economic activities will be having a direct correlation with the deposition of the executed law. In conclusion, this action will be considered as a severe loss to the country and within this, there should be some sort of restrictions and limitations among them.

IMPACT OF COVID-19 ON LEASE DEEDS

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ABSTRACT

COVID-19, in recent times, has affected the economy a lot, because of the lockdown period, various businesses have been shut down, and thereafter some relaxations were given to the business sector, for maintaining the supply in the market. But they were forced down to reduce the costs due to loss of turnover. Instead of the economy, various lease agreements have been influenced at a large scale. Various persons have faced a financial crisis, as some of them must have lost their jobs, and they are unable to pay their rent. *Force Majeure* clause plays an important role while making a contract, due to which an event becomes unforeseeable, which is beyond the control of either of the parties and could not have been avoided if the affected party had taken reasonable care, and for which none of the parties can be held responsible. This pandemic phase has led to the termination and suspension of various contracts which include lease agreements as well. However, in the present scenario, it is very difficult for the lessee to perform its obligations. The doctrine of frustration helps in getting the contract frustrated. Various legal remedies are also available for both parties.

Keywords*:* Impact, COVID-19, Lease Deed, Force Majeure, Frustration.

I. INTRODUCTION

COVID-19 has led to the termination of various contracts, which incorporates various lease agreements as well, which has resulted in the collusion of various interests of both parties. Lessors and Lessees both have been affected a lot. Lessors are suffering, as they are not getting rent, and they have been underprivileged of their monthly income. On the other hand, lessees were also not able to enjoy possession of the property due to the lockdown phase. Various lease agreements have invoked *Force Majeure* clause, during this phase, for getting prevented from paying rent to the lessor. If there is a clause of force majeure in the agreement, it helps in invoking such clause for getting prevented, but if there is no such clause in the agreement, then the party which is impeaching the loss will have no claim. However, a claim can be claimed under the doctrine of frustration.[1] This article aims on the impact of COVID-19 on lease deeds and applicability of force majeure in the lease deeds, whether it is there in the deed or not, and also about the applicability of doctrine of frustration or other remedies pertaining to the same.

II. FORCE MAJEURE CLAUSE IN LEASE DEED

Force Majeure clause in an agreement plays an important role in unforeseen events, for which none of the parties can be held liable. *Force Majeure* is a derivation of civil law; it

[1] Prahalad Singh, *Force Majeure for Rent and Lease Agreement in India*, COMMONFLOOR (July 21, 2020), available at https://www.commonfloor.com/guide/force-majeure-for-rent-and-lease-agreement-in-india-57255

pertains to any supervising event and affects the ability of the party to contract from performing it. This clause is often inserted into contracts to either execute a party from performing its obligations or suspend its obligations due to unforeseen circumstances, which renders the action impossible.

The impossibility based whereon the force majeure clause was being invoked must pertain to the contractual obligation that has purportedly become impossible to perform.[2] A clause relating to the pandemic or an epidemic, the equivalent might be argued and asked by the contracting parties, in which its performance becomes impossible because of COVID-19 outbreak. The clause of *Force Majeure* should be interpreted strictly in terms of the contract.[3] On the off chance that there is a Force Majeure provision in an agreement, which is pulled into current realities of the case, at that point Section 56 of the Indian Contract Act, 1872 has no application.[4]

COVID-19 pandemic has disturbed the establishment whereupon the parties entered into the lease deed and the court has pronounced the end of rent as substantial and valid.[5]

In the event where there is a *Force Majeure* proviso that has been agreed between the lessor and lessee and it is there in a lease deed, the invocation of *Force Majeure* clause would depend on the degree and augmentation of the significance of the *Force Majeure* clause. For the situation that the parties have unequivocally fused a pandemic, by then invocation of *Force Majeure* may be less complex. As it accommodates the Act of God yet may not unequivocally accommodate a pandemic.

Section 108 (b) (e) of Transfer Property Act, 1872 includes terms *"irresistible force"* which renders the property for the unfit use, so if there is an absence of *Force Majeure* clause, then lessee has some rights in its favour. But if there is no *Force Majeure* clause and there is an occurrence of lease deeds, the relevance of Section 108 (b) (e) of the Transfer of Property Act would rely on the understanding of the words *"irresistible force"* as there in the said provision.

In the case of *Pawan Pathak Prakash v. Bar Council of India*[6]the Supreme Court passed an order where it rejected a writ petition for seeking waiver of rent of lawyer's chambers during lockdown and directed Bar Council of India to assist its members by keeping in mind about the prevailing situation.

As per Indian law, a *Force Majeure* clause isn't a general term of an agreement; it plays an important role in an agreement. A court would not regularly read such a proviso into an agreement. Additionally, the edge of demonstrating an inferred term is high, particularly for a basic term which will host the impact of releasing a party from performing its obligations. Preferably, it should be explicitly specified.

[2]Markfed Vanaspati & Allied Industries v. Union of India (2007) 7 SCC 679
[3] Ramanand and Ors. v. Dr. Girish Soni (2020) SCC OnLine Del 635
[4]Satyabrata Ghose v. Mugneeram Bangur& Co. (2017) 14 SCC 80
[5] Mr. Mohammed Yusuf &Ors. v. M/S. Just Dial (2021)
[6] Pawan Pathak Prakash v. Bar Council of India W.P. (Civil) No. 10949 of 2020

On the off chance that the agreement specifies a *Force Majeure* it must be carefully and barely understood. Indeed, even the court can't rework that statement or read into it what isn't explicitly specified.

In the case of *Ramanand & Ors. v. Dr Girish Soni*[7] the Delhi High Court noticed that without an agreement concerning the *Force Majeure* clause, the lessee may for the most part look for suspension of rent by conjuring the purview of the Court because of non-utilization of the premises. The Court likewise observed the:

i) nature of rented premises, and

ii) the financial condition of the parties

If a lease deed contains *Force Majeure* clause, then its interpretation needs to be done quite carefully. *Force Majeure* clause is not applied if alternate modes are applicable, however, during the pandemic there is no alternate available here, therefore, the clause does not provide for epidemic or lockdown in its purview, the lessee would be obliged to pay the rent as agreed.[8]

III. DOCTRINE OF FRUSTRATION AND LEASE DEEDS

The Doctrine of Frustration plays an important role in such situations. It has been impliedly there under Section 56 of the Indian Contract Act, 1872. This doctrine can be applied in situations where the circumstances change and become unforeseen, resulting in the performance of such a contract becoming impossible to do so, and such changes must not have been done by the default of any of the parties. This doctrine has been established in the case of *Taylor v. Caldwell*[9].The frustration of contract comes only in the case of occurrence of a genuinely unexpected and unanticipated event, which could not reasonably be said to have been a contemplated event, which makes it impossible to carry out the terms of the contract.[10]

The difficulty based on where the *Force Majeure* provision was being invoked, should relate to the contractual obligations that have purportedly become difficult to perform.[11] This doctrine is based on a maxim *"les non cogit ad impossibilia"* which means that the law will not compel a man to do what he cannot possibly perform.[12] Doctrine of frustration is to be understood in its practical sense and not in literal sense.[13]

If there is no *Force Majeure* clause in the deed, then the parties do apply the doctrine of frustration. In the case of *Raja Dhruv Dev Chand v. Raja Harmohinder Singh*[14] The Apex court looked into the situation whether Section 56 of the Indian Contract Act, 1872 is applicable when

[7] *Supra*

[8] Abhinav Shrivastava, *The Impact of COVID-19 on Lease Deeds*, LEXISNEXIS INDIA (April 13 2020), available at https://lexisnexisindia.wordpress.com/2020/04/13/the-impact-of-covid-19-on-lease-deeds/

[9] (Taylor v. Caldwell) Judgment ,1863, 3 B&S 826 : (1861-73) All ER Rep 24:32

[10] Industrial Finance Corporation of India v. Cannanore Spinning and Weaving Mills ltd. &Ors. (2002) 5 SCC 54 (India)

[11] Markfed Vanaspati & Allied Industries v. Union of India (2007) 7 SCC 679

[12] Abhinav Shrivastava, *The Impact of COVID-19 on Lease Deeds*, LEXISNEXIS INDIA (April 13 2020), available at https://lexisnexisindia.wordpress.com/2020/04/13/the-impact-of-covid-19-on-lease-deeds/

[13] Satyabrata Ghose v. Mugneeram Bangur& Co. (2017) 14 SCC 80

[14] Raja Dhruv Dev Chand v. Raja Harmohinder Singh (1968) 3 SCR 339

the rights and liabilities of the parties have been enshrined under a lease deed, and it was held by the court that the frustration would not apply to lease deeds.

Segment 56 of the Indian Contract Act, 1872 just applies to a contract. If there should arise an occurrence of a lease deed, it turns into a completed transfer under which the lessee gets an interest in the property. There is a reasonable differentiation between a completed transfer and a contract.[15]

The doctrine of frustration embodied under Section 56 of the Indian Contract Act, 1872 which makes the contract void by the reason of impossibility of performing such act, which the promisor could not prevent it, would not apply in the case of a lease.[16]

The Section 108 (b) (e) of the Transfer of Property Act doesn't bar the parties from including a Force Majeure provision in the deeds. As this provision starts with the words *"In the absence of a contract or local usage to the contrary"*, which means subsequently, that Section 108 (b) (e) would apply if an agreement which is contrary, doesn't exist.[17]

Assuming there is no *Force Majeure* proviso in the lease deed, the parties can't invoke Section 56 of the Indian Contract Act, 1872, yet they can pass by Section 108 (b) (e) of Transfer of Property Act, which incorporates the words "irresistible force". Nonetheless, in the event that there is a *Force Majeure* statement in the lease deed, the lessee would need to invoke it cautiously to one or the other suspension of payment of rent or to terminate the lease deed or for both, which relies on the provided *Force Majeure* proviso in the lease deed.

If there are financial difficulties with the lessee, then he cannot use this defense as a shield for escaping himself from his liabilities.[18]

IV. CONCLUSION

COVID-19 had an adverse impact on the lease deeds, which has stained the relationships of the lessors with the lessees, due to non-payment of rent because of no earnings of the lessee, which ultimately affected the rights of lessor and lessee from taking the benefits from the property respectively. It is clear from the above-mentioned circumstances that the grant of waiver of rent in the case of lease, will depend upon the clauses mentioned in the lease deed. So, it is finally concluded that, if there is no *Force Majeure* clause in the lease deed, then the relevant provisions of Transfer of Property Act will be applicable, for making the lease deed void, and if there is a *Force Majeure* clause in the lease deed, then it needs to be invoked carefully, by keeping in mind about the nature of the premises, and of the financial conditions of the parties. The situation of COVID-19 has given a lesson to the people for adding some clauses regarding the natural calamities or the outbreak, to be added in their agreements as an exception for the non-performance of the obligations, and which could be invoked easily against the party.

[15]Sushila Devi v. Hari Singh (1971) 2 SCC 288

[16] Amir Chand v. Chuni Lal AIR (1990) P&H 345

[17]Abhinav Shrivastava, *The Impact of COVID-19 on Lease Deeds*, LEXISNEXIS INDIA, (April 13 2020), available at https://lexisnexisindia.wordpress.com/2020/04/13/the-impact-of-covid-19-on-lease-deeds/

[18] Shankar Prasad &Ors v. State of MP &Ors AIR (1965) MP 153

RESTRUCTURING OF INDIAN DRONE LAWS AS PER LIBERALISED INTERNATIONAL DRONE LAWS

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ABSTRACT

There are various Drone's regulations and legislation approaches followed by different nations. Some Nations have adopted a rigid approach while some are having a liberal approach regarding these regulations and legislations. Earlier the use of these unmanned aircraft vehicles (UAVs) was only prevalent among the defence forces of the nations but with the popularizing trend of vlogging, aerial videography of private and public ceremonies, etc. These UAVs become popular among civilians also and with their growing demands, the Government of all nations realized the need for its regulations and legislation in order to control air trafficking, invasion to privacy and other kinds of misuse of these UAVs. Recently India too has adopted some regulations regarding Drones. In India these UAVs and Remotely Piloted Aircraft (RPAs) are regulated by the Civil Aviation requirements (CAR). This paper proposes Indian drone regulations to be restructured as per liberalised international drone laws. In addition to some relaxation in Indian drone's regulations; the paper also suggests some measures to be considered while formulating Drone strike Policy and policy to prevent infringement of Privacy by these drones. The point what differentiate this paper with other research paper is though the basic ideas are drawn from liberalised International Drone laws but it proposes it to be implemented with some modifications to tackle the issues already faced by Indian Government in existing drone laws. It is found that the proposed relaxations and measures will not only ease the use of drones for drone operators but also going to incorporate the Indian Government safety concerns in regard to these drones. Thus, this Research paper is an effort to create a balance between Drone operators concern and Government safety concerns.

Keywords: Proposing, Amendment in Indian Drone laws, Indian drone strike policy, Indian policy regarding prevention to invasion of Privacy by Drones

I. INTRODUCTION

It has been observed that with the advent of Drones, the Government of all Nations have some challenges in its responsibility to tackle issues arising with the growing demand for Drones. Some of these issues are in regard to registration of the drone; its insurance, demarcation of its restricted zones, pilot's license, some regulation requirements which are based upon certain parameters such as drone altitude, mass, population density etc.[1]

It has been tracked down that to acclimatize drones into overall sets of laws; various countries have received various methodologies. A few countries even put prohibitions on the

[1]Therese Jones, *International Commercial Drone Regulation and Drone Delivery Services*, RAND CORPORATION (2017).

utilization of business drones, while some have gone for tolerant enactment; there are not many countries who keep a torpid remain to see the impact of other country's strategy. The fundamental obstacle behind advantageous utilization of conveyance drones is its need to remain inside the pilot's VLOS. Scarcely any Nations like Japan, are exploring different avenues regarding conveyance BVLOS around there, to extend the program all through the country with the presentation of viable guidelines. The change in these robot laws consistently happens with a more lenient methodology.[2]

Drones are generally utilized in the military for an assortment of purposes, including following foe developments, reconnaissance, line watches, and search and salvage mission's outfitted robots have additionally been utilized to find and obliterate fear mongers. As of late Indian armed force use those to find fear-based oppressor in Uri, careful strike. Truth be told in 1990s the Afghanistan went in to US research facility to foster furnished robots when look for Osama Bin Laden raised. Anyway, after the 9/11 fear-based oppressor assaults the utilization of military got endorsed by US Government. From that point forward, the utilization of drones expanded in military activities all through the world. This pattern emerged the requirement for the detailing of a Drone Strike Policy.[3]

The question of invasion of privacy by drones is getting complex day by day. As almost all drones are having high resolution cameras except in nano drone category along with high quality internal microphones; which not only results in intended invasion of privacy but also the unintended invasion of privacy. This facet makes it difficult to find out the invasion of privacy under existing Indian laws.[4]

The purpose of this paper, therefore, is to propose reforms in Indian drone's regulations, formulation of drone strike policy and policy to curb invasion of privacy by drones in India. The said reform in existing drones' regulations will not only ensure relaxation to the drone operators and manufacturers but other changes like compulsory UIN and flight permission for high resolution Nano drones such as DJI Mavic MINI will incorporates Indian Government safety concerns also. Thus, the purpose of this research is to create the balance between convenience of drone operators and government safety concerns. The research paper is an effort to give solutions to tackle problems faced by Indian Government in existing Drone laws and also to provide basis for the formulation of Drone strike policy and policy to deal with infringement of privacy by drones; which are not yet formulated in India.

RESEARCH METHODOLOGY

The research method used for this study is Doctrinal research. In literature review it relies on peer reviewed journals, articles, etc. This research answers these questions:

1. What is the need and benefits for change in existing drone regulations of India specifically in weight-based classification of drones?

2. What measures to be taken in consideration to formulate Indian drone strike policy?

[2] *Ibid.*
[3] Rajeshwari Pillai Rajagopalan, Rahul Krishna, *Drones: Guidelines, regulations, and policy gaps in India*, ORF (2018).
[4] *Ibid.*

3. What measures to be look upon to formulate policy for prevention of invasion to privacy by drones in India?

In achieving the abovementioned purpose, this paper shall discuss various International Drone regulations, laws and policy. In order to understand their approaches and to understand what are the problems faced by other nations who have adopted more permissive approach in their drone laws in order to take an idea what changes are required in our existing Indian drone laws and what could be the basis for the formulation of our drone strike policy and Prevention of infringement of Privacy by Drones policy.

II. INTERNATIONAL COMMERCIAL DRONE REGULATIONS

It has been discovered that however ways to deal with drone laws could contrast from one country to another yet the components of guideline are same for all; like enrolment, pilot's permit, protection, confined zones and so on. The impediments forced on these components reflect whether the country advances security concern approach or more tolerant methodology. This prerequisite doesn't make a difference on Nano classification of drones. Utilization of Drones over intensely populated is limited; even the Airspace around destinations of public significance and air terminals are confined zone for these robots. Visual line of sight (VLOS) frequently made necessary for all administrators. Obligation protection isn't required in US however it's very pervasive across quite a bit of Europe.[5]

"There are six broad approaches followed across globe pertaining to commercial drone regulation: 1. Absolute ban on commercial Drones. 2. Implied ban by enabling a formal process for commercial drone licensing, where requirements are either impossible to meet. 3. Constant VLOS Requirement. 4. Experimental uses of beyond visual line of sight (BVLOS). 5. More Permissive approach. 6. Observational approach".[6]

There are eight countries that are having an absolute ban on commercial drone use: Cuba, Saudi Arabia, India, Morocco, Barbados, Argentina, Uzbekistan and Slovenia. Until recently, Belgium had such ban only for scientific testing and recreation was allowed. Both Indian and Belgium approach reflects safety concern approach.[7]

Eight countries with implied bans on commercial drones: Egypt, Kenya Algeria, Belarus, Colombia, Chile Nicaragua, and Nigeria.[8]

VLOS with the UAV, with a condition of having one pilot per UAV is the most common requirement for commercial and private drones use. VLOS is compulsory in 18 countries. Restrictions to fly over populated area often accompany both VLOS and experimental BVLOS operations. In the case of Denmark, Finland, France, Austria, Canada, and Poland, drones are not allowed to fly over heavily populated areas. China and Japan have permitted some BVLOS.[9]

[5]Therese Jones, *International Commercial Drone Regulation and Drone Delivery Services*, RAND CORPORATION (2017).
[6]*Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9]*Ibid.*

Six countries have a legislatively permissive approach to commercial drones: Italy, Norway, Costa Rica, Iceland, Sweden, and the United Arab Emirates. Each of them understands the significance of the technological development for its future and each has cautiously set the procedures for permitting and licensing; followed by the use of experimental BVLOS technology.[10]

In U.S the business drones are not permitted to work 400 feet over the ground level which fills in as an obstacle for the foundation of a suitable Drone Delivery framework. In spite of this impediment a few businesses previously began putting assets in to growing huge scope drone conveyance framework. For instance, Amazon's potential conveyance framework will utilize trucks and transports to convey items weighing as much as five pounds to clients. Domino's Pizza as of late finished New Zealand's first dynamic ethereal pizza conveyance by means of drones. With campaigning of these Industrial giants in US, numerous government laws are authorized toward this path. Such drive frames the premise of more tolerant methodology for plan of liberal Drone Laws across the Globe.[11]

1. INDIAN EXISTING DRONE REGULATIONS WITH PROPOSED REFORMS

1.1. Penalties for not complying with the regulations and laws governing drones

In India, if someone violates the CAR, then it will attract some penalties. The DGCA have the authority to cancel or suspend the unique identification number (UIN) or unmanned aircraft operator permit (UOAP) given to the Drone operators. The non-compliance of CAR and forgery of documents or records may attract penal action, including imposition of penalties under the Indian Penal Code, 1860 which includes:

- Section 287: in cases of any negligent conduct related to machinery (maximum imprisonment which may extend to six months or a fine which may extend up to 1,000 Indian rupees, or both);
- Section 336: in cases of act endangering life or personal safety of others (maximum imprisonment which may extend to three months or a fine which may extend to 250 rupees, or both);
- Section 337: in cases where hurt is caused by an act endangering the life or personal safety of others (maximum imprisonment which may extend to six months or a fine which may extend to 500 rupees, or both);
- Section 338: in cases where grievous hurt is caused by an act endangering the life or personal safety of others (maximum imprisonment which may extend to two years or a fine which may extend to 1,000 rupees, or both); or

[10] *Ibid.*

[11] Roderick O'Dorisio, *The Current State of Drone Law and the Future of Drone Delivery,* Vol. 94 DENVER LAW REVIEW (2016).

1.2. Any other important section of the IPC.

Non-compliance of any rules or directions issued under Rule 133A of the Aircraft Rules 1939 is punishable to the extent of imprisonment, not exceeding six months or a fine not exceeding 200,000 rupees or both.[12]

1.3. Weight-based classification system for drones

- Nano Drones: Such drones are less than or equal to 250g;
- Micro Drones: They are greater than 250g and less than or equal to 2g;
- Small Drones: They are greater than 2kg and less than or equal to 25kg;
- Medium Drones: They are greater than 25kg and less than or equal to 150kg; and
- Large Drones: They are greater than 150kg.[13]
- There are clear cut differences in the rules applicable to different drones.

1.4. UIN and UOAP requirements

Nano drones flying below 50ft in uncontrolled airspace or enclosed premises are exempted from obtaining a UIN, while nano and micro drones flying below 50 and 200ft respectively, and are exempt from obtaining a UOAP.[14]

1.5. Remote pilot training requirements

Pilots of Nano and micro drones intending to fly drones in uncontrolled airspace are exempted of remote pilot training. All other operators, falling under any other category, are required to obtain UINs, UOAPs and such remote pilots are also required to undergo remote pilot training.[15]

1.6. Security and safety requirements

Nano drones operators are not required to report any accident to the appropriate authority, while all other operators are required to do so.[16]

1.7. Equipment requirements

Nano drones intending to fly below 50ft in uncontrolled airspace or enclosed premises are exempt from involuntarily being furnished with features such as a global satellite system (GNSS); return to home options or autonomous flight termination system; app-based real-time

[12]Sarin & Co, *Drone Regulation in India*, LEXOLOGY (2019).
[13]Sarin &Co, *Drone Regulation in India*, LEXOLOGY (2019).
[14]*Ibid.*
[15] *Ibid.*
[16]*Ibid.*

tracking; flashing anti-collision strobe lights; fire-resistant identification plates with the UIN inscribed; and flight controllers with data logging capability.[17]

1.8. Operating requirements

Nano drone administrators needn't bother with authorization before flight, while other classification requires consent through the online application based Digital Sky platform. Further, nano and miniature drones meaning to fly beneath 15.24 meters and 60.96 meters individually in uncontrolled airspace or encased premises separately don't need to outfit a flight plan 24 hours before the flight and furthermore are not needed Air Traffic Control (ATC) and air protection freedom. Nano drone administrators flying underneath 15.24 meters are not needed to advise the nearby police recorded as a hard copy before flight.[18]

1.9. Minimum standard for manufacturing of RPAs requirements

Nano drones are not required to furnish a certificate of compliance by drone manufacturer to the DGCA.[19]

2.0. Taxes and fees paid for certification and licensing procedures

- For grant of UIN - 1,000 Indian rupees;
- For a grant of UAOP - 25,000 rupees;
- For renewal of UAOP - 10,000 rupees."[20]

The Purpose behind examining the laws identified with drones in India is to propose certain progressions in them like change in their standard according to weight based grouping. As we have seen as of late DJI who involves 70% of drone market all through the world accompanied its new model in Nano class; the DJI MAVIC MINI which being a Nano drone have a high goal camera. A few vloggers around world have effectively mount a go expert in flying MAVI MINI and it can likewise convey the heaviness of propellers. Alongside this it can soar up to 1500 ft. With this highlight it raises a similar measure of wellbeing worries as other class drones does. So as opposed to thinking of it as identical to toy drones. Government should make it mandatory for all robot administrators to acquire UIN for their drones and on the off chance that it is found in the process that some Nano drone gets such development includes then it too should be needed to document a flight plan and should need to look for authorization for trip by proper power.

This proposition serves the Government security worry as well as going to support the spending agreeable vloggers. For whom it's difficult to fly a particularly progressed highlights Nano drone above 15ft. The examination likewise proposes to expect VLOS and DVLOS not from the beginning but rather from the surface from where administrator made its robot take off or the surface which administrator planned to catch in the wake of looking for authorization from suitable position.

[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *Ibid.*

The research also aims that required fees for grant of UIN and grant and renewal of UAOP must be different category wise. The Government must take initiatives to allow commercial drone use in India. With advent of vlogging concept across globe its high time Government must liberalised its drone laws to promote tourism. As its evident from the data that nations with relaxation in their drone laws attracts more tourist than nations rigid in it. The best example is Bali, world's most favourite tourist spot and most drone liberalised regulations spot in the world.

III. INTERNATIONAL DRONE STRIKE POLICY

The utilization of unmanned aerial vehicles (UAVs) continued filling in the combat zones. Once the former US President Barack Obama even proclaimed them as the best weapon against psychological warfare. Despite the fact that UAVs sending brings up numerous issues in the global local area, including good and lawful inquiries. In 2001 under organization of Bush, US led many drones strikes in the domains of Pakistan, Yemen, and Somalia. After the 9/11 fear monger assault former US President George Bush dispatched the conflict on dread. "The US National Security Strategy 2010 remembers a unique area for how to upset, destroy, and rout Al-Qaeda, and adds that the United States is waging a global campaign against Al-Qaeda and its terrorist affiliates." [21]

There is an increased global concern over lack of transparency in regard to civilian casualties and the lack of accountability results in causing tension among the people of those nations where such strikes have been conducted.[22]

Debates and discussions over these drone strikes have led many scholars and UN experts to question the lawfulness of these drone operations. On March 2014, the UN Human Rights Council adopted a resolution urging UN member states using drones to ensure that "the use of armed drones comply with their obligations under international law, including the UN Charter, human rights law and international humanitarian law (IHL), in particular the principles of distinction and proportionality." Although the name of no specific nation was mentioned in the resolution. Yet six states including the United States, Britain, and France voted against it, 14 states abstained from voting and 27 states voted in favour.[23]

1. PROPOSED INDIAN DRONE STRIKE POLICY

Before proposing a Drone strike policy for India, it's relevant to understand the drone use in Indian military. Since a long time Indian military has been using Israeli Searcher and Heron drones for C4ISTAR roles. India even own anti-radiation suicide drones imported from the Israel. India is now looking for an indigenously developed Rustom-I Medium Altitude Long Endurance (MALE) UAV over which our Defence Research and Development Organization (DRDO) working overnight.[24]

[21]Cholpon Orozobekova, *The US Drone policy under International law*,Vol. xxxiv Nos. 11&12 ACADEMIA (2015).
[22]*Ibid.*
[23]*Ibid.*
[24]Saurav Jha, India's Armed Drone Fleet, THE DIPLOMAT (June 25, 2015).

An essential element behind armed UAV flights in India would be newly developed SBAS called GAGAN, which has already received certification for both precision vertical guidance for assisting planes to land safely and en-route navigation. GAGAN was designed to aid civil aviation in India. GAGAN receiver module can be fitted aboard UAVs and is capable of receiving strong and clear signals from the Russian GLONASS, American GPS, and Indian Regional Navigation Satellite System which will become fully operational in coming days.[25]

The Research paper propose our Drone strike strategy should be figured as per UN basic liberties committee, 2014 goal in regards to Drones use in war zone. As India is one among those couple of countries who stand IHL in letter and soul in the combat zone. Indeed, even our new utilization of Drones in Uri, careful strike was in consonance to UN laws which permits a country to find and target adversary country assailants in Retaliation. We utilized our drone for finding fear-based oppressor as it were. We didn't hurt any non-military personnel in our retaliatory advance. A strategy drafted should be such which should deal with the proviso of Proportionality in 2014 US goal. The strategy should arrange the equipped drones on premise of weight and usefulness. Its pilot preparing necessities. Such measures can possibly bring operational ability of UAVs and furnished UAVs in Military.

IV. RIGHT TO PRIVACY

1. CHALLENGES

When a drone invades an individual's privacy, this invasion led to many challenges. These are certain issues enumerated: (1) naming of a defendant; (2) establishing the intent; (3) Reasonable expectation of privacy; and (4) determining offensiveness of an invasion. [26]

2. NAMING A DEFENDANT

It is nearly impossible to find out the drone's owner name in order to name a defendant. Just imagine a girl was inside her home where a drone floats above the street and pass by her window while she was dressing for the day. The problem here is we can't expect the victim to identify the owner of the drone or to note down the registration number of the drone.[27]

3. ESTABLISHING THE INTENT

It's very difficult to determine the intent of Drone operator in cases of invasion of privacy by drones. As it's impossible to find out whether the invasion was intentional or unintentional. The main issue is that under common law or statute when a drone involvement is there, it's the plaintiff who is asked to prove the intent of drone operator who intrudes his privacy.[28]

4. REASONABLE EXPECTATION OF PRIVACY

In this case of *Florida v. Riley* a helicopter was used for surveillance. According to Florida's drone statute a person is presumed to have a reasonable expectation of privacy on their

[25]*Ibid.*
[26]Rebecca L. Scharf, *Drone Invasion: Unmanned Aerial Vehicles and the Right to Privacy*, SCHOLARLY COMMONS @ UNLV LAW (2019).
[27]*Ibid.*
[28]*Ibid.*

privately owned real property. If they cannot be seen by people at ground level then they have all right of privacy from aerial invasion too. But In other US states the same liberalised view is not followed. The courts must keep in mind that a UAV can retain more information for longer period of time and it can also find its way to areas where other aerial platforms cannot reach.[29]

5. DETERMINING OFFENSIVENESS OF AN INVASION

This type of presumption already exists in Wisconsin's statute on "Damages by Aircraft or Spacecraft." Although the said statute is not explicitly related to drones. It is related to the liability of UAV owners for the physical damage caused by their drone's flight. This presumption is rebuttable as it may be rebutted by proof that "the damage or injury was not caused by negligence on the part of the owner, lessee or pilot and the burden of proof in such case shall be upon such owner, lessee or pilot to show absence of negligence on his or her part."[30]

6. PREVENTION OF INVASION OF PRIVACY BY DRONES IN INDIA

A UAV is capable to record sound from a room even at normal conversational level. It can block wireless communication in an area by being used as a network jammer. So far the Indian Government didn't make any effort in direction of addressing the concern related to invasion of privacy by drones. The DGCA guidelines include only one line on significance of privacy.[31]

In contrast the United States, had acknowledged this issue when former President Barack Obama published a memorandum asking for solutions to the question of right to privacy while allowing free operation of drones. [32]

The Indian government is currently considering the revision of certain sections of the Information Technologies Act. The IT Act covers many questions related to technology and privacy that includes data protection and distribution. Article 21 of the Indian Constitution, also covers the concept of Right to Privacy. However, no direct application of such laws can be made in case of UAVs.[33]

Today, the public authority organizations in India are utilizing these robots for different exercises from checking of traffic to upkeep of safety in packed occasions. For example, the Mumbai Police utilize these drones for observation in parades during large celebration. The old observation procedure is ineffectual to keep up rule of peace and law in packed occasions. So these UAVs end up being a major guide at such time. This discussion has builds up speed in the US over most recent couple of years that what will be the degree of observation law that implementation organizations need to exercise to guarantee security.[34]

[29] *Supra Note* 26.
[30] *Ibid.*
[31] Rajeshwari Pillai Rajagopalan, Rahul Krishna, *Drones: Guidelines, regulations, and policy gaps in India,* ORF (2018).
[32] *Ibid.*
[33] *Supra Note* 26.
[34] *Ibid.*

The Research paper propose to formulate a policy in India in regard to invasion of privacy by drones by keeping in mind the following challenges which are prevailing before the nation with more permissive approach towards Drones regulation: (1) naming of a defendant; (2) establishing the intent; (3) Reasonable expectation of privacy; and (4) determining offensiveness of an invasion.

V. CONCLUSION

This paper examines the effectiveness of Nations with more permissive approach in sphere of drone regulations and further analysing the issues tackles by them in their existing law. So that they can be drawn to formulate some new laws and modify the existing drone laws of India.

Further, the paper explains about different nations drone commercial use regulations, their drone strike policy and their policy prohibiting invasion of privacy by use of these UAVs. Thereby propose to inherit them in our system with modifications and besides that some international legislation related to drone strike policy and Right to privacy need to introduce first in our system with their inference drawn from the liberalised international drone laws.

The suggested relaxation and measures not only going to benefit the drone operators but also going to incorporate Government safety concern. All in all, this paper strikes a balance between individual interest and the general interest.

PATENT POOLS IN INDIA, EU, AND USA: ARE THEY EFFECTIVE IN REMOVING IP BARRIERS?

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ABSTRACT

A large portion of the resources and supplies required for the innovation of better products have already been patented by developed countries such as the UK and the USA which acts as a barrier to the invention of new and improved products in developing countries like India. Patent pools or "agreements between patent owners to license their patents to one another" are thus an effective mechanism to overcome such IP barriers. Patent pooling agreements, however, are double-edged swords that have both advantages and disadvantages. On the one hand, they provide various benefits such as assisting companies to bring about further development in existing technology, aiding firms to escape the threat of infringement claims and litigation suits, allowing businesses to clear up blocking patents, and permitting corporates to earn a steady income in the form of royalty or licensing fee. They also help newcomers in securing all the required licenses pertaining to a particular field, from a single place itself. On the other hand, they pose various problems. Parties who are not members of the pool might become discouraged from investing in the research and development of related products due to the threat of infringement suits. Additionally, if the pool was created amongst establishments dealing in similar products, then there is a high probability of anti-competitive business practices like tying agreements and price-fixing. The creation of patent pools is neither allowed nor forbidden under the Patent Act, 1970. Furthermore, as the topic is fairly new and rather underdeveloped in India, there is a dearth of case laws in the country pertaining to it. The present paper will hence discuss the position of patent pooling agreements in India, EU and USA, examine the positive and negative implications of patent pools as well as analyse and interpret whether patent pooling agreements are effective in removing IP barriers.

Keywords: Patent Pools, Patent Pooling Agreements, Patent Rights, IP Barriers, Positive and Negative Implications.

I. INTRODUCTION

> "Patents are like fertilizer. Applied wisely and sparingly, they can increase growth. But if you apply too many chemicals, or make patents too strong, then you can leach the land, making growth more difficult."
>
> -Alexander Taghi Tabarrok

WIPO defines a patent pool as "an agreement between two or more patent owners to license one or more of their patents to one another or third parties."[1] Patent pools thus save third

[1]M. D. Nair, *TRIPS, WTO ,and IPR - TRIPS and Affordable Healthcare: The Concept of OSDD and Patent Pools*, Vol.15 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 74 (2010).

parties from having to deal individually with multiple patent owners. Patent pools, however, are double-edged swords. On one hand, they may reduce transaction costs, litigation expenses, etc., and result in the facilitation of innovation in the industry.[2]They may also help in the navigation of patent thickets. On the other hand, they may cause price-fixing, post-sale restraints, tying agreements etc., and give rise to monopolies and cartels.[3]

The healthcare sector is one of the fields wherein the impact of patent pooling in India can be felt. In 2011, Aurobindo Pharma Limited and Med Chem Pharma Private Limited joined the Medicines Patent Pool which allowed them to manufacture and sell antiretroviral drugs as well as make use of the patents of Gilead Sciences Inc.[4] Additionally, patent pooling has also helped in making medicines and medical technology more accessible and affordable in the country. The benefits of patent pools in India can also be observed in other fields such as nanotechnology and biotechnology. In this respect, a huge percentage of the materials and tools necessary for the creation of new products have already been patented by developed countries. This acts as a barrier for innovation in countries like India, which may be overcome only with the help of patent pools and other such means.[5]

The Patent Act, 1970 neither permits nor prohibits the formation of patent pools in India.[6] There is also a dearth of Indian case laws on the topic as patent pools are a relatively new concept in the country. This paper hence seeks to examine the current legal position of patent pools in India, the EU, and the USA and thereafter analyse whether or not patent pools are effective in removing IP barriers.

II. PATENT POOLING IN INDIA

Patent pooling is a relatively new concept in India and the jurisprudence pertaining to the same is hence not as developed as that of other countries such as the UK and the USA. The Indian Patents Act, 1970 neither lays down any guidelines for the creation of patent pools nor imposes any restrictions on the formation of such pools.[7]However, the Act does contain a few provisions that are relevant in the case of patent pooling. Section 68 of the Act stipulates that licenses and assignments pertaining to patents, share in patents, etc. are not valid unless they are in writing and have been duly executed.[8]In addition to this, Section 69 of the Act prescribes that these licenses and assignments have to be registered by making an application in writing to the controller of patents.[9]

Furthermore, Section 140 of the Act prevents and controls the imposition of restrictive conditions, opposed to the competitive policy, in contracts pertaining to patents and stipulates

[2]Robert P. Merges and Michael Mattioli, *Measuring the Costs and Benefits of Patent Pools*, Vol.78 OHIO STATE LAW JOURNAL 282, 281-346 (2017).
[3]*Id.*
[4]PTI, *CCI Rules Out Case Against Gilead Sciences*, The Mint (March 12, 2013)
[5]Ankit Singh, *Analysing the Role of Patent Pooling in the Diffusion of Green Technology: Perspectives from India and USA*,Vol.1 INTERNATIONAL JOURNAL OF INTERDISCIPLINARY CURRENT ADVANCED RESEARCH 75, 75-83 (2019).
[6]*Supra Note 5.*
[7]*Id.*
[8]Manas Bulchandani and AkshayKhanna, *Patent Pooling in the Indian Scenario*, Vol.4 INTERNATIONAL JOURNAL OF LAW 15, 15-21 (2018).
[9]*Id*.

that it is not lawful to insert clauses that require the acquisition of or prohibit the usage of articles other than the patented articles, by the buyer or licensee from the seller or licenser. It thereby combats the misuse of patent agreements.[10]Additionally, Section 102 of the Act confers power on the Government of India to acquire patents, on payment of compensation to the patentee, if the acquisition of such patent is necessary for the fulfilment of public purpose.[11] It hence logically follows that the government may set up patent pools in the public interest by acquiring patents. The Competition Act, 2002, however, for the most part acts as a barrier in the creation of patent pools as the Act seeks to curb anti-competitive business practices within the territory of India.[12]

One of the major uses of patent pooling in India can be observed in the healthcare sector wherein it results in accessibility and affordability of medicines and medical technology to the general public and common masses. In 2011, Indian pharmaceutical companies such as Aurobindo Pharma Limited and Med-Chem Pharma Private Limited joined the Medicines Patent Pool, established by UNITAID, which allowed them to manufacture and sell antiretroviral drugs, i.e., medicines used to treat HIV/AIDS without payment of royalty.[13] They were also able to make use of the patents of Gilead Sciences Inc., an American pharmaceutical company, in this regard.[14]

In the case of other fields such as nanotechnology and biotechnology, a huge percentage of the materials and tools necessary for the creation of new products have already been patented by developed countries.[15] This acts as a barrier to innovation in developing countries such as India. The high price and other such restrictions imposed by patent holders on technologies such as Ozone Depleting Substances is a prime example of such a barrier.[16] Patent pools, however, help in overcoming these barriers.

III. PATENT POOLING IN EU

In the context of the European Union also, jurisprudence pertaining to patent pooling is not a very developed area. However, Article 81(1) of the European Community Treaty prohibits anti-competitive practices such as fixing purchase or selling prices; restricting production, technical development, or investment; applying different conditions to similar transactions; imposing supplementary obligations that are not connected to the subject matter of the contract; etc.[17]Article 81(3) of the Treaty, however, stipulates that the provisions of Article 81(1) would not be applicable if such practice improved the production or distribution of goods, promoted technical, or economic progress, or benefitted consumers in some other manner.[18]

[10]*Id.*
[11]*Id.*
[12]Victor Rodriguez, Patent Pools: *Intellectual Property Rights and Competition*, Vol.4 THE OPEN AIDS JOURNAL 62, 62-66 (2010).
[13]Kanikaram Satyanarayana & Sadhana Srivastava, *Patent Pooling for Promoting Access to Antiretroviral Drugs (ARVs) - A Strategic Option for India*, Vol.4 THE OPEN AIDS JOURNAL 41,41-53 (2010).
[14]*Supra Note* 4.
[15]*Supra Note* 8.
[16]*Id.*
[17]*Supra Note* 8.
[18]*Id.*

The analysis of whether a particular patent pool indulges in anti-competitive business practices or not is hence decided on a case-by-case basis, taking into consideration the specific facts and circumstances of that particular case. In furtherance to this, the European Commission often issues comfort letters stating that certain patent pools do not intend to challenge any arrangement.[19]Letters issued by the Commission with respect to the Toshiba DVD Patent Pool in 2000 and the 3G Mobile Pool in 2002 are two famous examples of this.[20] In the case of Toshiba, the Commission stated that the pool would promote technical and economic progress by introducing DVD technology into the market.[21]

In 2004, the Commission brought out a new regulation and also accompanying guidelines providing block exemption to technology transfer licenses.[22] Though technology pools were not brought within the ambit of the regulation, the guidelines prescribed certain conditions that had to be complied with by patent pools, in Articles 219-221, 224 and 225.[23] The Articles prescribe that patent pools should not foreclose third-party technologies. They also stipulate that the licensee has the power to decide the price at which he or she wishes to sell the product. In addition to this, the articles also highlights that independent experts should be given the responsibility of choosing the patents in the pool.[24]

IV. PATENT POOLING IN USA

The United States has a history of courts breaking up patent pooling arrangements due to cartel-like attributes. *United States v. Radio Corporation of America*[25] and *Hartford Empire v. United States*[26]are two famous examples of such court intervention wherein a patent pool set up by Radio Corporation of America, General Electric Company, Westinghouse Electric Corporation, and American Telephone and Telegraph were broken up; and the members of a patent pooling arrangement involving 600 patents pertaining to glass-blowing technology were ordered to license the patents at a reasonable rate. There are, however, no hard and fast rules as to when a patent pool becomes anti-competitive and the rule of reason doctrine is thus what is usually applied.[27]

In the case of *E.Bement and Sons v. National Harrow Co.*[28], it was opined that patent pools were exempt from anti-trust actions as the objective behind granting patents was conferring monopoly on the patent holder. The court, in this case, hence held that patent holders had the right to determine the price at which their inventions were to be licensed. However, the court expressed a different view in the case of *Standard Sanitary Manufacturing Co. v. The United States*[29]. In this case, it was held that patent pooling arrangements were increasingly

[19]Indrani Barpujari, *Facilitating Access or Monopoly*: *Patent Pools at the Interface of Patent and Competition Regimes*, Vol.15 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS 345, 345-356 (2010).
[20]*Id.*
[21]*Id.*
[22]Shama Mahajan, *Patent Pooling and Anti-Competitive Agreements*: *A Nascent Dichotomy of IPR and Competition Regime,*Vol.6NLUJ LAW REVIEW 35,35-70 (2020).
[23]*Id.*
[24]*Id.*
[25]United States v. Radio Corporation of America**,** 341 U.S. 412 (1951).
[26]Hartford Empire v. United States, 323 US 386 (1945).
[27]*Supra Note* 22.
[28]E.Bement and Sons v. National Harrow Co., 186 US 70 (1902).
[29]Standard Sanitary Manufacturing Co. v. United States, 226 US 20 (1912).

being used to fix prices and limit industrial output; and that the patent pool in question was violative of anti-trust laws. It was, however, in the case of *Standard Oil Co. v. The United States*[30]that the present understanding of patent pools came into existence. In this case, it was held that contracts would be subjected to anti-trust laws only when they restrained trade unreasonably. The court further added that patent pools were not only beneficial but also essential as otherwise, technical advancement would be blocked by threatened litigation. This case also saw the development of the rule of reason doctrine as we know it today.

Patent pools in the United States have oftentimes indulged in anti-competitive business practices such as tying arrangements, price-fixing, etc. The perception as to what all practices may be categorised as being anti-competitive, however, has undergone considerable change over the years.[31]In the case of *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*[32], it was held that anti-competitive practices had been resorted to and that the patents had been misused by the patent pool. In this case, a patent pool comprising of motion picture exhibitors fixed the price at which their patented projection equipment could be resold. They also stipulated that this equipment could be utilised only to showcase the patented films of the licensors. These conditions were held to be invalid by the court as they were restrictions that had been imposed on a licensing agreement.

Later on, in the case of *Morton Salt Co. v. G. S. Suppiger*[33], it was pointed out that tying arrangements, price-fixing and post-sale restrictions on patented goods were all instances of patent misuse. In addition to this, in the case of *United States v. Line Material*[34], it was opined that a licensee paying royalty to the licensor as compensation for utilisation of the patented product was neither unlawful nor wrong. However, when such an arrangement resulted in price-fixing or other such practices, then it became unlawful. Furthermore, in the case of *United States v. National Lead Co.*[35], National Lead Co. agreed to share existing and future patents as well as technical information with foreign producers of titanium dioxide. The court, however, opined that this would amount to a patent thicket that would prevent new players from entering the market. Additionally, in the case of *United States v. New Wrinkle Inc.*[36], it was opined that those patentees involved in the same field should not combine their patents for the purpose of controlling the price of the product in the market or any other such mutual benefit.

Finally, in the 1970s, the US Department for Justice brought out a list of practices that would be considered to be an infringement of anti-trust laws which included requiring the purchase of unpatented materials, requiring the licensee to assign back subsequently developed patent, restricting resale, restricting usage of non-patented products, imposing minimum resale price, etc.[37] This list, later on, came to be known as the Nine No-Nos. Thereafter, in 1995, along with Federal Trade Commission, the Anti-Trust Guidelines for the Licensing of Intellectual Property were introduced. These guidelines were more appreciative of the benefits of patent pools and hence identified only a few practices under patent pooling arrangements such as

[30]Standard Oil Co. v. United States, 221 US 1 (1911).
[31]*Supra Note* 19.
[32]Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 US 502 (1917).
[33]Morton Salt Co. v. G. S. Suppiger, 314 US 488 (1942).
[34]United States v. Line Material, 333 US 287 (1948).
[35]United States v. National Lead Co., 332 US 310 (1947).
[36]United States v. New Wrinkle Inc., 342 US 371 (1952).
[37]*Supra Note*19.

excluding those outside the pool from access to patents within the pool, imposing restrictions that hamper further research and development in the field, etc. to be problematic.[38]Even the above-mentioned practices would be considered to be unlawful only in certain conditions. Anti-trust laws with respect to patent pools are hence now more relaxed in the country than it was earlier on.

In order to understand the current status of patent pooling arrangements in The United States, however, two cases must be looked into, i.e., *re Summit Technology Inc. and VISX Inc.*[39]*as well as US Philip v. International Trade Commission*[40]. In the first case, Summit Technology Inc. and VISX Inc., two competing firms involved in the manufacture of lasers for eye surgery purposes formed a patent pool by way of Pillar Point Partners, a partnership entity. Taking into consideration the fact that the pool did not license patents to any third party, the firms were held to have indulged in price-fixing as the creation of the pool resulted in the elimination of all possible competition in the market. In the second case, Philips was able to prove that package licensing lowered their transaction cost, administrative and monitoring cost, etc. by eliminating the need for multiple contracts. It was hence held that package licensing would not amount to misuse of patent or violation of anti-trust laws.

V. POSITIVE AND NEGATIVE IMPLICATIONS OF PATENT POOLING: AN ANALYSIS

Patents are of two types: substitute and complementary. As substitute patents may be used in place of one another, bundling them into a pool will result in the elimination of competition in the market. On the other hand, as complementary patents cannot be used interchangeably, this argument is not applicable.[41]Patent pools can hence be said to be highly beneficial in many respects. They will help companies in reducing the cost incurred in participating in the market, escaping the threat of infringement claims and litigation suits, earning a steady income, recovering their investments, bringing about further development in existing technology by carrying out research and innovation in the field, etc.[42] They will also help in clearing up blocking patents, i.e., patents that prevent other patents from being used due to the latter being dependant on the former.

Patent pools also allow newcomers and other interested parties to secure all necessary licenses pertaining to a specific technology or particular field, from a single place itself. This is much easier when compared to securing various individual licenses from different individual patent holders. In addition to this, the royalty paid by third parties and newcomers will be distributed amongst the members of the pool in the pre-decided ratio. This will encourage the pool to license their patents to more and more interested parties.[43] Patent pooling can hence be said to be beneficial to the members of the pool, third parties who wish to secure the license of certain patents from the pool, and also consumers or common masses. In the case of *United States v. Birdsboro Steel Foundry and Mach. Co.*[44], the defendants entered into an agreement on

[38]*Id.*
[39]Re Summit Technology Inc. and VISX Inc., 9286 F.T.C. 1,13, 1998.
[40]US Philip v. International Trade Commission, 424 F.3d 1179.
[41]*Supra Note* 22.
[42]*Supra Note*8.
[43]*Supra Note*22.
[44]United States v. Birdsboro Steel Foundry and Mach. Co., 139 F.Supp. 244.

the lines of a patent pool with respect to cooling beds used in steel mills as both the companies had patents in this field which would not be useful individually and could be termed as blocking patents. In this case, the court opined that if the agreement had not been entered into, then neither the producers nor the public would have benefitted in any manner. The agreement was hence held to be valid and justified.

Despite these advantages, however, patent pools also pose various problems. They may become obstacles for parties involved in the particular field who are not part of the pool. This holds true especially in export manufacturing businesses as non-foreign players who are not members of the pool will not be able to participate in the market without payment of royalty in this case. Patent pools with international standards are also likely to demand huge amounts of money as royalty or licensing fee. As this is the only way in which they will be able to enter the foreign market, third parties will be left with no other option than to make such payment. This will prove to be especially difficult for small low-cost firms who will have to pay the same licensing fee as large high-cost companies.[45]

Furthermore, third parties who are not members of the pool might become discouraged from investing in the research and development of related products due to the threat of litigation or infringement suits. Also, if these firms are forced to resort to alternative technology not covered by the pool, the process of innovation will become slower especially if the alternative technology is inferior.[46]Fostering monopoly and limiting competition are two other risks posed by patent pooling arrangements. In such a scenario, it would be a violation of Competition Laws. Additionally, if the pool was created amongst firms dealing in similar products, i.e., firms that are meant to compete with each other, then there is a high chance of anti-competitive business practices such as tying arrangements, price-fixing, etc. The number of products to be manufactured in a particular field may also be regulated or controlled by such pools.[47] All this is likely to affect the normal functioning of the market.

It can hence be said that patent pools are like a double-edged sword. It helps third parties in securing necessary licenses without incurring any significant negotiation cost as they do not have to deal with individual patent holders. However, there is also an equal chance that the third party will not be in a position to negotiate in terms of payment of royalty within the pool due to a lack of other alternatives.

VI. CONCLUSION AND SUGGESTIONS

Benefits of patent pooling can be observed in fields such as healthcare, biotechnology, nanotechnology, etc. in developing countries such as India. However, The Indian Patent Act, 1970 neither permits nor prohibits the creation of patent pools. Also, there is also a dearth of Indian case laws on the topic. It is, however, an indisputable fact that patent pools have both merits and demerits. Patent pools help companies in clearing up blocking patents, bringing about further development in existing technology by carrying out research and innovation in the field, escaping the threat of infringement claims and litigation suits while manufacturing their products, earning a steady income in the forms of royalty or licensing fee and also recovering

[45]*Supra Note* 8.
[46]*Supra Note*19.
[47]*Id.*

their investments in this manner. Patent pools also help newcomers in securing all necessary licenses pertaining to a particular field, from a single place itself. Despite these advantages, patent pools also pose various problems. Parties who are not members of the pool might become discouraged from investing in the research and development of related products due to the threat of infringement suits. In addition to this, if these firms are forced to resort to alternative technology not covered by the pool, the process of innovation will become slower especially if such technology is inferior. Also, if the pool was created amongst firms dealing in similar products or firms that have substitute patents, then there is a high probability of anti-competitive business practices such as tying arrangements, price-fixing, etc. that are violative of The Competition Act, 2002. It can hence be said that patent pools are like double-edged swords and utilising them in an effective and efficient manner is hence the only solution. In furtherance to this, the following suggestions may be taken into consideration:

- Though few provisions of The Indian Patents Act, 1970 such as Section 68, 69, 102,and 140 can be made applicable in the case of patent pools, the Act does not have any proper provisions to govern patent pooling. Also, the Act neither permits nor prohibits the creation of patent pools. This confusion and ambiguity hence have to be addressed by enacting Sections dedicated to patent pools in the Act.

- There is also a dearth of case laws pertaining to patent pooling in India. Courts will hence have to guide the direction of jurisprudence and precedent-based law in this regard placing reference on case laws from developed countries such as the US.

PARLIAMENTARY PRIVILEGESIN INDIA

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ABSTRACT

The success of a Parliamentary Democracy is dependent on the protection of dignity and independence of the institution as well as of its members. Parliamentary privileges are certain special rights and immunities, which are enjoyed by the Members of each House of the Parliament individually as well as by the House collectively. These privileges protect the authority and self-esteem of the legislature and empower the legislature to carry out its affairs effectively, independently and without any external interventions. Some of the important privileges that are granted to a Parliament are the "freedom of speech in the House"[1], "freedom from arrest in civil cases"[2], "right to prohibit the publication of its proceedings"[3], "Power to punish for breach of privilege or contempt", "right to regulate its own composition", etc. The concept of parliamentary privileges, as they exist in India, are an "importation from England". Articles 105 and 194 of the Indian Constitution recognise the Parliamentary Privileges., the codification of privileges in India is an essential requirement in the contemporary era.

There are only a few privileges expressly provided for in the Constitution of India and "other privileges" should be found in the Rules of Procedure and Conduct of Business in Lok Sabha and Rajya Sabha, as they have not been codified. The Houses of Parliament of India can still validly claim all the privileges granted by the Parliament of the United Kingdom, which existed and were enjoyed before the entry into force of the Constitution.

I. INTRODUCTION

Enactment, over sighting the responsibility of the chief and portrayal, are the three significant capacities that the assembly acts in any parliamentary majority rule government. It is indispensably significant that the parliament be given sure powers, advantages and invulnerabilities so these destinations can be accomplished. The origin of the word 'privilege' is from the Latin word 'privus', which means "private" and, lex, leg, meaning "law". Hence a privilege is defined as 'a right, advantage or immunity granted to or enjoyed by a person or a class of people, beyond the common rights or advantages granted to the others.'[4]

The legal definition of 'privilege', is termed as "immunity or an exemption from some duty, burden, attendance or liability conferred by special grant in derogation of common right".[5]

[1] Art. 105 Cl. 1 and Art. 194 Cl. 1, THE CONSTITUTION OF INDIA, 1950.
[2] Art. 105 Cl. 2 and Art. 194 Cl. 2, THE CONSTITUTION OF INDIA, 1950.
[3] *Ibid.*
[4] Shreya, *Law Relating To Parliamentary Privileges In India Problem And Issues*, SHODHGANGA (7 October 2020), available at http://hdl.handle.net/10603/302016 (Last visited on November 20, 2020).
[5] The Seven Eleven Departmental Store v. State Of Uttarakhand And Others, Writ Petition (M/S) No. 832 of 2018.

Sir Erskin May, who is considered as the pioneer analyst in law of parliamentary privileges, has defined Parliamentary Privileges[6]as under-

"Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals."

In the case of Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Ors**.,**[7]the term privilege was defined as "A special right, advantage or benefit conferred on a particular person. It is a particular advantage or favour granted to one person as against another to do certain acts".

The **Oxford Dictionary**[8] defines the term privilege as a "special right, advantage or immunity to the particular person. It is a special benefit or honour".

From the above definitions it very well may be expected that albeit an advantage is essential for the tradition that must be adhered to, it is somewhat an exclusion from general law. There are sure rights and insusceptibilities which are offered fundamentally to the individual individuals from each House to such an extent that the elements of the House can be performed and that the administrations of its Individuals isn't hampered, similar to the right to speak freely of discourse and independence from capture. Nonetheless, there are sure rights and invulnerabilities which are allowed to the House in general, regardless of whether to ensure its individuals or to declare its position or protect its nobility, like the ability to rebuff for scorn of court and the ability to direct its own constitution. In established compositions, the term alludes to the two rights and invulnerabilities.

It would be incorrect to equate privilege with a right. The reason for such a conclusion is that every right has a "correlative duty", which is not so in the case of a privilege. To further enhance the meaning of the term "Privilege", it can be understood as an advantage which the law confers on a specific person or category of persons and which is not available to others.

"These privileges are an exception to ordinary law and are intended to allow parliamentarians to perform their duties without fear of intimidation or punishment, and without impediment."[9] A parliamentary privilege is the privilege of the Houses of Parliament "as a whole and not simply of the individual member".[10]These advantages secure the position and confidence

[6] Sir Erskine May, TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT (Lexis Nexis, U.K., 23rdEdn., 2004).
[7] Raja Ram Pal v. Hon'ble Speaker, Lok Sabha and Ors., (2007) 3 SCC 184.
[8]*Oxford Dictionary*, 1138 (Oxford University Press, 10thEdn.).
[9] Rachel Macreadie & Greg Gardiner, *An Introduction to Parliamentary Privilege*, No. 2 PARLIAMENTARY LIBRARY'S RESEARCH SERVICE, DEPARTMENT OF PARLIAMENTARY SERVICES, PARLIAMENT OF VICTORIA 9 (2010), *available at* https://www.researchgate.net/publication/280735124_An_Introduction_to_Parliamentary_Privilege (Last visited on November 15, 2020).
[10]United Kingdom, House of Lords, Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, laid before the House by the Clerk of the Parliaments 199 (2007), *available at* https://www.parliament.uk/globalassets/documents/publications-records/house-of-lords-publications/rulesguides-for-business/companion-to-standing-orders/companion-to-standing-order-2007.pdf (Last visited on November 10, 2020).

of the assembly and empower it to lead its business productively, freely and without outside impedance.

Some of the important privileges that are granted to a Parliament are the "freedom of speech in the House", "freedom from arrest in civil cases", "right to prohibit the publication of its proceedings", "Power to punish for breach of privilege or contempt", "right to regulate its own composition", etc.

II. NEED FOR PARLIAMENTARY PRIVILEGES

It was observed in the *Narsimha Rao's Case*[11]that "the object of the protection under Art 105(2) of the Constitution is to enable the members to speak their minds in the Parliament and vote in the same way free from being answerable on that account in any Court of Law."

Parliamentary privileges are an essential part of a parliamentary democracy. It makes sure that members of parliament are able to speak freely in debates, and protects parliament's internal affairs from interference from the courts.[12]

For the successful working of the Council, parliamentary advantages are significant. To empower the Parliament to effectively oversee the Chief's exercises, it is indispensable that the elements of the Parliament be shielded from the impedance and analysis by the leader and every other person and that the voice of Parliament and its individuals isn't smothered. The privileges and the immunities, protect the authority and uphold the dignity of the Parliament and its members by acting as a shield and enabling the members of the House to affirm their right to talk with pride and independence and to freely express their views without any fear or threat of proceedings by anyone outside the Parliament. It puts the Parliament and its members in a position where they can effectively discharge their duties and responsibilities.

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The concept of parliamentary privileges, as they exist in India, are an "importation from England". It therefore has the same characteristic nature of "not being codified" but "being in crystallized" form by modes of "resolutions, standing orders, conventions and practices of the Houses, and they are part of the Law and Custom of Parliament (Lex et consuetudo Parliamenti)".[13]The concept of parliamentary privilege in India in its modern form is one of scion. "It is an importation from England, a plant of an alien stock from which it continues to receive its very life and substance."[14]

The Constitution of India under Articles 105 deals with the power, privileges and immunities of the Union Parliament and its members, whereas Article 194 deals with the power, privileges and immunities of the State Legislature and its members. On a careful reading of both the above-mentioned Articles, it can be seen that the position of the Parliament is the same as

[11] P.V. Narsimha Rao v. State (CBI/SPE), A.I.R. 1998 S.C. 2120.
[12]*Parliamentary Privilege*, available at www.official-documents.gov.uk/document/cm83/8318/8318.pdf(Last visited on November 15, 2020)**.**
[13] Shashikant Hajare, THE LAW OF PARLIAMENTARY PRIVILEGES IN INDIA: PROBLEMS AND PROSPECTS 1 (Himalaya Publishing House Pvt. Ltd., Mumbai, 2012).
[14]Prititosh Roy, PARLIAMENTARY PRIVILEGE IN INDIA 1 (Oxford University Press, 1991).

that of the State Legislature. Hence it can be said that Article 105 applies Mutatis Mutandis to the state legislature as well[15].

It is upon the discretion of the House to decide the manner and the way in which the privilege or the immunity is being exercised and the role of the judiciary is confined only to the question of deciding "whether a particular privilege exists or not".

III. FREEDOM OF SPEECH

For a Parliamentarian to successfully satisfy his obligations, confined and without the dread of being indicted for anything said in the House and to keep up the assembly's opportunity, the ability to speak freely is a sin qua non.

Under the Montagu-Chelmsford Reforms, for the first time, the Freedom of speech to the Indian Legislator was expressly granted and were given statutory recognition. The provisions of the Government of India Act, 1919[16] relating to Provincial Legislatures provided: "Subject to the rules and standing orders affecting the Council, there shall be freedom of speech in the Governor's Legislative Council." Over the years by actual observance of this provision, it was known that the freedom of speech had a variety of limitations. Freedom of speech under the Government of India Act, 1935 both as originally enacted and as adopted remained practically unchanged, after independence, under the provisions of Article 105 (1) and Article 194.

Clause (1) of the Indian Constitution states that the freedom of speech has been expressly safely granted to the members of the Parliament and the State Legislatures. This has been granted to them independently of the 'freedom of speech' under Article 19(1)(a) of the Constitution, which is enjoyed by all the Indian citizens.

Also, Clause (2) of the above mentioned articles, holds no member of the Parliament/ State Legislature liable to any Court proceedings for anything that has been said by the member or in respect of any vote that has been given by such member in the Parliament or State Legislature or any committee thereof. The expression 'any proceedings in court", as given in Clause (2) of Article 105 and Article 194, not only includes within its ambit civil and criminal proceedings, but also is wide enough to the incorporate or the writ proceedings under Article 32 and 226 as well.

This privilege is not only available to the Members of Parliament, but also to the persons like the Attorney General of India or Ministers who even though are not members but have a right to speak in the House, are also entitled to this privilege under Article 105(4) of the Indian Constitution.

Even though it has not been expressly stated in the respective articles, but certain other acts done by the member in connection with the proceeding of the House like resolutions, questions, committee reports, or notice for motion, would also be included in the freedom of speech. Immunity from the process of the courts, in relation to anything which has been said in the House, is what makes Article 105(1) more effective.

[15] *Parliamentary Privileges*, available at https://www.lawctopus.com/academike/parliamentary-privileges/ (Last visited on November 15, 2020).
[16] Sub-sec. (7) of Sec. 72D, Government of India Act, 1919.

In the case of *Tej Kiran Jain v Sanjeeva Reddy*[17], it was held by the Supreme Court that "once it is proved that parliament was sitting and its business was being transacted, anything said during the course of that business was immune from proceeding in any court".

The freedom of speech under Article 105 and Article 194 is not absolute in nature, but is subject to certain limitations, even though few, to "other provisions of the Constitution" and "the rules and standing orders regulating the procedure of the House". One such limitation is that this freedom is subject to the provisions of the constitution and the rules and procedures of Parliament, which are those that have been framed under Article 118 of the Indian Constitution. Moreover, the Parliament is also barred from discussing the conduct of any Supreme Court Judge or High Court Judge, under Article 121 and Art. 211. There are certain limitations that are imposed by the House on its members also like those given under Rules of Procedure and Conduct of Business in Lok Sabha[18]. But even if a member violates any of these provisions, the courts would still not have any jurisdiction to look into the matter and only the Parliament would exclusively have the authority to deal with these matters.

In President's Reference No. 1 of 1965[19] (*Keshav Singh's case*) one of the issues before the Supreme Court of India was whether a Legislative Assembly could held judges of any High Court responsible for contempt of the House. The Supreme Court of India held that "Article 211 is mandatory in nature and it prohibits a discussion in the State Assembly as to the conduct of any judge of Supreme Court or of any of the High Courts". Further, it also said that "a High Court Judge could not be held guilty of contempt of the Legislative Assembly for exercising his constitutional power under Article 226 of the Constitution deciding upon a writ petition filed by a citizen for enforcement of his fundamental rights against the Assembly". Moreover, the freedom of speech would only be subject to the supervisory powers of the presiding officer of the House under the internal rules regulating the procedure and conduct of business.

In the case of *Surendra Mohanty v. N.K. Choudhry*[20], in which contempt proceedings were initiated against the Chief Minister of Orissa in relation to a speech made by him in the Orissa Legislative Assembly, the High Court of Orissa decided that, "the language of clause (2) of Article 194 is quite clear and unambiguous and is to the effect that no law court can take action against a Member of the Legislature for any speech by him there."

In the case of *A.K. Subbiah v. The Chairman, Karnataka Legislative Council, Bangalore*[21], it was held by the High Court that "the expression "proceedings in any court" should be given the widest meaning possible and it was inclusive of writ proceedings under Article 226 of the Constitution." The Court also justified that the Presiding Officer of the House had the exclusive jurisdiction to decide whether a member had violated Article 211 or not.

Article 122 of the Indian Constitution barres the courts from leading any enquiry into the legitimacy of any Parliamentary continuing. However, it is important to take note of that the Parliament should be sitting and that the advantage can't be extended to cases including easygoing discussions in the House. Additionally, this insusceptibility can't be asserted by a part

[17] Tej Kiran Jain v. Sanjeeva Reddy 1970 AIR 1573.
[18] Rules 353 and 354, Rules of Procedure and Conduct of Business in Lok Sabha.
[19] President's Reference No. 1 of 1965 A.I.R. 1965 S.C. 1186 [*Keshav Singh's case*].
[20] Surendra Mohanty v. N.K. Choudhry, AIR 1958 Ori 168, 1958 Cri LJ 1055.
[21] A.K. Subbiah v. The Chairman, Karnataka Legislative Council, Bangalore, AIR 1979 Kant. 24.

for any discourse that he may make outside the House regardless of whether it is an in exactly the same words proliferation of what he has said inside the House.

IV. ARTICLE 105 (1) AND ARTICLE 192 (1) VIS-À-VIS ARTICLE 19 (1) (A)

There are certain differences between the freedom of speech which are guaranteed to the members of the Parliament and the State Legislature under Article 105 (1) and Article 192 (1) and the rights which are granted to the citizens as a fundamental right under Article 19 (1) (a). The fundamental right to freedom of Speech under Article 19(1)(a), does not grant absolute protection to an individual in respect of anything that is said by him and is subject to reasonable restrictions under Article 19(2).

Whereas, the freedom of speech which is conferred on the members under Article 105(1) and Article 192(1), protect the members of the Parliament and the State Legislature for anything said by them within the House and not outside the House and this freedom cannot be restricted under Article 19(2). Hence the member will be liable if he publishes his speech outside the Parliament or State Legislature and if his speech is defamatory in nature.

Another important thing which needs to be considered is that this freedom of speech, as provided under the provisions of Articles 105 and 192, under Clauses (1) and (2), are available to the members only when such a member attends the session of the Parliament or State Legislature and not otherwise. Henceforth, if any part can't go to the meeting of the Parliament or State Governing body because of a request for confinement against him, at that point that part will not have the option to practice his ability to speak freely, and can likewise not say anything negative that the privilege has been invalidly penetrated. Initially, Additionally, the right to speak freely of discourse under Art 19(1)(a) being a crucial right, can be upheld under Art 32 in the event of any encroachment. Yet, the right to speak freely of discourse under Art 105 (1) is outside the domain of Part III of the Constitution. Henceforth, just the Speaker or the managing official of the House can implement that right.

V. RIGHT OF PUBLICATION OF PROCEEDINGS

The provisions stated in Clause 2of Articles 105 and 194 of the Indian Constitution are two fold as it states that the members of Parliament and those of the Legislative Assemblies have "the immunity from the liability to any proceedings in any court in respect of anything said or vote given by them in the House". Clause (2) of these articles also expressly declares that "no person shall be liable in respect of the publication by or under the authority of either house of Parliament of any report, paper, votes or proceedings". Hence, this immunity did not extend to any publication which has been made by a private person, without the authority of the house.

In the case of *Wason v. Walter*[22], it was observed by Cockburn, C.J. that since the public is deeply engrossed in knowing what passes in the Parliament, therefore, it is of paramount national and public importance that the proceedings in the parliament should be communicated to the public. But if only a partial report or an incomplete part of the Parliamentary proceedings is published with the intent to injure the individuals, then no protection can be granted. In India too, this law is followed.

[22]Wason v. Walter (1868) LR 4 QB 73.

The Parliamentary Proceedings (Protection of Publication) Act, 1956[23]provided that "no person shall be liable to any proceedings, civil or criminal, in any court in respect of the publication of a substantially true report of the proceedings of either House of the Parliament, unless it is proved that the publication is made with malice." But, during the 1967 Emergency, the above-mentioned Act was repealed.

However, The Constitution (44th Amendment) Act, 1978, by adding Article 361-A[24], with effect from 20th June, 1979, has incorporated the provisions of the above-mentioned act, and the immunity for publication has been put on a very sound footing. This Article states that reporting the proceedings of either House of Parliament or a State Legislature shall not make a person liable to any civil or criminal proceedings, unless it is proved that the reporting was made with malice. Moreover, this provision is not applicable to the reporting of proceedings of the secret sittings of the Houses.

In *P.V. Narsimha Rao v. State (CBI/SPE)*[25]the Supreme Court of India adjudicated that "by virtue of Article 105(2) of the Constitution, a Member of Parliament can claim immunity from prosecution on a specific charge of bribery in a criminal court if the acceptance of the bribe constitutes a motive behind the vote given by him in the Parliament". Bal subramaniyan, J.[26] commenting upon the above said decision of the court and the "nature and scope of the privileges enjoyed by the legislative bodies in India" opined that it was evident that subject to very minor limitations, the privileges under Articles 105(1) and (2) with regard to speech in the House were complete, conclusive and outside the scope of scrutiny or enquiry by other organs of the state.

VI. OTHER RESTRICTION UPON MEMBER'S RIGHT TO PUBLISH

There are certain other restrictions relating to the member's right to publish, which are imposed by the Rules of the Parliament:

1. If a member intends to put or move certain question or resolutions in the House, then he should not publish them until they are admitted by the Chairperson.[27]

2. Members should not give for publication any answers which they propose to give in the House until they have been actually given.[28] But a member is free to decide which piece of information is of such a nature that it must be prioritized to disclose in the House.[29]

3. Except when approved by the House, the proceedings and decisions of any secret sitting of the House should not be disclosed, until it is authorised.[30] In the case, the question before the Supreme Court was that whether the expunged portions of a member's speech in the State Assembly can be validly published and protected under Article 19(1)(a). The

[23] Section 3, Parliamentary Proceedings (Protection of Publication) Act, 1956.
[24] Cl. (1) of Art. 361A, THE CONSTITUTION (44th Amendment) ACT, 1978.
[25]*Supra* note 8, at 3.
[26] P.K. Balasubramaniyan, *Parliamentary Privileges: Complementary Role of the Institutions*" 2 SUPREME COURT CASES (JOURNAL) (2006).
[27] Campion, AN INTRODUCTION TO THE PROCEDURE OF THE HOUSE OF COMMONS, 64 (Macmillian, London, 3rd Edn.).
[28]Anson, Parliament, 1985, p. 173
[29] Rule 383, Rules of Procedure of the Lok Sabha.
[30] MSM Sharma v. Shri Krishna Sinha, AIR 1959, SC 3951.

Court decided that the freedom of speech in a Legislature contained in Article 194(1) was specific as compared to the general freedom of speech under Article 19(1)(a). Hence, the general restrictions that applied to 19(1)(a) by virtue of Article 19(2) would not apply to specific freedom of speech under Article 194(1). Further, it was also stated that since it was not the intention of the framers to make the immunity for speeches made or votes given in a legislature subject to the Fundamental Right provided by Article 19(1)(a), therefore the more specific privileges in Article 194 available to Parliament would set aside the general rights of their constituents contained in Article 19(1)(a) and hence the privileges of a Legislature would not be subject to Fundamental Rights.

Any publication, as for example of a member's question, which has been disapproved by the Speaker, will not be granted immunity.[31]

VII. FREEDOM FROM ARREST

The immunity which is granted to the Parliamentarians with respect to freedom from arrest, is in harmony with the other privileges granted for effectively discharging their functions. The main objective behind this freedom is to ensure the safe arrival and regular attendance of members on the scene of their parliamentary duties. If the members do not enjoy freedom from arrest and have to work under a constant threat of arrest, they will rarely feel free to express themselves or be frank during the deliberations.

In any civil proceeding, no member of the parliament or of a state legislature shall be arrested or imprisoned, during the time the Parliament is in session or during any meeting of a committee of which he is a member and this exemption extends to a period of 40 days before and 40 days after the session of the house[32]. During this period, if a member is arrested, then he shall be released so as to enable him to attend the session. But this freedom from arrest does not apply when there has been a contempt of court, in the case of a criminal charge[33]or in the case of preventive detention.

Even though the privilege of freedom from arrest does not cover matters other than civil matters, but even in such cases, under the provisions of Rules of Procedure and Conduct of Business in Lok Sabha Rule[34],the House concerned has to be notified of the arrest and detention and the reasons for such arrest.

In the case of *K. Ananda v. Chief Secretary to the Govt. of Madras*[35]**,** it was adjudicated by the Supreme Court that in relation to a valid detention order, a member of Parliament can claim no special status higher than that of an ordinary citizen.

In the case of *Anandan Nambiar v. Chief Secretary to the Government of Madras*[36], it was confirmed that the legislators are not immune to arrest unless the case against them is of civil nature.

[31]Dr.Jatis Chandra Ghose v. Hari Sadan Mukherjee, AIR 1961 SC 613.
[32] Section 135-A, Civil Procedure Code, 1908.

[33] Kalyan Chandra Sarkar v. Rajesh Ranjan, 2005 (3) SC 307.
[34] Rule 229, Rules of Procedure and Conduct of Business in Lok Sabha Rule.
[35] K. Ananda v. Chief Secretary to the Govt. of Madras, AIR 1966 SC 657.

VIII. EXEMPTION FROM ATTENDANCE AS WITNESS

A member of the Parliament has a privilege, exempting him, from attending the court as a witness. This privilege is parallel or similar to the privilege of freedom from arrest in a civil case. Hatsell, said that the Members should be at perfect liberty to attend the service of the House and no call of an inferior nature should be permitted to interrupt with this duty.[37]

The justification allowing such an exception is that participation by a part in the procedures of the House needs to take over the wide range of various commitments. Be that as it may, to help in the organization of equity, the advantage given to a part can be postponed off by the House.

IX. RIGHT TO EXCLUDE STRANGERS

Every House has the right to not involve the strangers and to hold a debate within closed doors. This right flows as a necessary repercussion to the privilege of freedom of speech as it enables the House to obtain, when necessary, such privacy as it may secure freedom of debate. The Supreme Court has observed as follows:

"the freedom of speech claimed by the House (House of Commons) and granted by the Crown is, when necessary, ensured by the secrecy of the debate which in its turn is protected by prohibiting publication of the debates and proceedings as well as by ruling out the strangers from the House"[38]

There are two primary reasons behind the grant of the right to preclude strangers:

(a) Firstly, to prevent the presence of strangers and them being counted in division.

(b) Secondly, to prevent any outside influence.

Rule 248, Rule 387 and Rule 387-A of the Rules of Procedure and Conduct of Business in Lok Sabha give the power to the Presiding Officer to deal with strangers.

X. RIGHT TO REGULATE INTERNAL PROCEEDINGS

As per the provisions of Article 118 of the Indian Constitution, each House has the exclusive right to regulate its internal proceedings in a manner in which it deems fit, without any interference from any authority. The only authority which has a say in the matters relating to the conduct of proceedings in the House is the Presiding Officer[39].This right has further been strengthened to Article 122 (Article 212 in case of State Legislature), where it has been expressly given that the validity of any proceedings shall not be called in question and shall not be inquired into by the courts, on the ground of any alleged irregularity of procedure.

No writ, etc. can be issued by a court restraining the Presiding Officer from allowing a particular question to be discussed, or impeding with the legislative processes of either House of

[36]Anandan Nambiar v. Chief Secretary to the Government of Madras, 1951 SCC ONLINE MAD 254.
[37] Gaurav Deswal, *Parliamentary Privileges Under Indian Constitution*, SHODHGANGA (2016), available at http://hdl.handle.net/10603/173760 (Last visited on November 20, 2020).
[38]*Supra note* 25, at 8.
[39] Surendra Mohanty v. Nabakrishna Choudhary, AIR 1958 Orissa 168.

the Legislature or interfering with the freedom of discussion or expression of opinion in either House.[40]However, in the case of *Keshav Singh's Case*[41]*the* Supreme Court stated that "though, by virtue of Article 212(1), any action in the house cannot be challenged in any court on the ground of any irregularity of the procedure, the same would be open to scrutiny in a Court of law on the ground of patent illegality and unconstitutionality."

XI. OTHER PRIVILEGES

The provisions of **Articles 105(3) and 194(3)** of the Indian Constitution, as modified, simply states that the privileges of each House of Parliament, its members and its committees are those which Parliament may determine from time to time and until Parliament does so, be those which existed immediately before the entry into force of Section 15 of 44th Amendment Act, 1978.

The words 'House of Commons' in Articles 105(3) and 194(3) were removed by the 44th Constitutional Amendment Act in 1978. "Whilst the explicit reference to the House of Commons was removed by the said amendment, it has made no material change in the substance of existing position of the law because the privileges enjoyed by the Houses before the said amendment cannot be established without making an indirect reference to the House of Commons."[42]

Till date, the 'other Privileges' have not been codified; therefore, the specific nature and extent of parliamentary and legislative privileges remain vague and unclear. The Houses of Parliament of India can still validly claim all the privileges granted by the Parliament of the United Kingdom which existed and were enjoyed before the entry into force of the Constitution.

The 'other privileges' have to be searched from the Rules of Procedure and Conduct of Business in Lok Sabha and Rajya Sabha.

XII. BREACH OF PRIVILEGE AND CONTEMPT OF PARLIAMENT

Whenever the privileges and immunities of either the Members of the House individually or of the House collectively, is neglected or attacked by an individual or authority, then it is known as a breach of privileges and is punishable by the House. Apart from the reach of specific privileges, those actions which are in the nature of offences against the House's dignity or jurisdiction are also considered as contempt of the House and punishable. It is for the House to decide as to what constitutes breach of privilege and contempt. Members of the House as well as strangers and all the contempt whether committed within the House or outside, are covered under the penal jurisdiction of the House.

Admonition, reprimand or imprisonment for a specified time period are the punishments that a House may give to a person who is guilty of breach or contempt. But in case, when the person guilty is the member of the House, then the House can award two other punishments - suspension from the service of the House and expulsion.

[40] Raj Narain Singh v. Atmaram Gobind, AIR 1954 Allahabad 319.
[41] *Supra* note 15, at 5.
[42] *Supra* note 10, at 4

1. PUNISHMENTS FOR BREACH OF PRIVILEGE OR CONTEMPT

The House may enforce the following punishments on the person convicted of breach or contempt.

1.1. Imprisonment

Wrongdoers might be rebuffed with imprisonment in situations where the offence of break or disdain of the house is of a grave sort. The time frame during which the House can imprison a guilty party is restricted by the length of the meeting of the House. The prisoner is set at freedom when the House is prorogued. In an incident two persons who had thrown leaflets from the Gallery into the Chamber were ordered by the House, by a motion, to be detained in the custody of the Watch and Ward Officer till the rising of the House that day.[43]

In yet another incident that occurred on 23 March 1982, a lady visitor who shouted slogans from the Visitors' Gallery was let off with a warning (according to the report of the Watch and Ward Officer, she was in a state of mental distress).[44]

1.2. Admonition or reprimand

In cases where the offence of breach or contempt of the House is not of a serious nature to justify imprisonment, the person concerned may be called to the Bar of the House and reprimanded or admonished by the Speaker of the House, on order of the House. If admonition is the lightest form of punishment, then reprimand is the gravest mark of the House's displeasure.

1.3. Power to expel and suspend the members of parliament and state legislature

Since the beginning of the 18th century, the UK House of Commons has exercised the power to expel its own members. Since the expulsion does not create any disability, the expelled member can be re-elected.

The Rules of Procedure and Conduct of Business in the Rajya Sabha[45] confer powers on the "Chairman to preserve order and enforce his decisions". Under the provisions of Rules 255 and 256 of The Rules of Procedure and Conduct of Business in the Rajya Sabha, the Chairman is empowered to provide for the withdrawal and suspension of members in case the members resort to disorderly behaviour etc. A member of the House may be punished for his disorderly behaviour not only within the House, but also for any conduct outside the House which tends to impair its dignity and authority. Some instances of expulsion of Parliamentarians are - the expulsion of Mr Moudgil, J.V. Dhote, Subramaniam Swami etc.

In the case of *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha*[46] the Supreme Court held that "the Parliament has power to expel a member but the sovereignty, which can be claimed by the Parliament in England, cannot be claimed by any of the Legislatures in India in the literal and absolute sense and the parliamentary privileges in India are subject to the supervision and control

[43] *Parliamentary Privileges*, available at https://rajyasabha.nic.in/rsnew/rsat_work/CHAPTER—8.pdf (Last visited on November 20, 2020).
[44] *Ibid.*
[45] Rule 259, Rules of Procedure and Conduct of Business in the Rajya Sabha.
[46] Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha and Others, (2007) 3 S.C.C. l84.

of the courts and the Parliament cannot determine for itself the nature, scope and effect of its privileges".

XIII. PRIVILEGES AND FUNDAMENTAL RIGHTS

The Indian Legal executive's and the Law-making body's methodology in situations where there is a contention between a principal right and a parliamentary advantage, is deserving of analysis. Through a progression of cases, it very well may be seen that the greater part of the occasions, on account of a contention, the Parliamentary Advantages are viewed as more significant than the Principal Rights and beat them. It can likewise be seen that there is an absence of harmony between the two.

In the case of *Gunupati Keshavram Reddi v. Nafisul Hasan*[47], a person - Homi Mistry was arrested in compliance of a warrant at that had been issued by the Speaker of U.P. Legislative Assembly for contempt of the House. The person, contending that his detention was violative of Article 22(2), applied for a writ of habeas corpus. Since he had not been produced before a Magistrate within 24 hours of his arrest, the Supreme Court quashed the detention. The decision of the Supreme Court in this case was therefore indicative that Article 194 (or Article 105) was subject to the fundamental right guaranteed under Article 22(2) in Part III of the Constitution.

In the case of *Re Under Article 143*[48], the Supreme Court went on to explain the proposition that was laid down in the case of M.S.M. Sharma, and said:

'We do not think it would be right to read the majority decision as laying down a general proposition that whenever there is a conflict between the provisions of the latter part of Article 194(3) and any of the provisions of the fundamental rights guaranteed by Part III, the latter must always yield to the former. The majority decision, therefore, is taken to have settled only that Article 19(1)(a) would not apply and Article 21 would.'

In the case of *M.S.M. Sharma v. S.K. Sinha*[49], the petitioner had contended that the privileges of the House under A.194 (3) are subject to the provision of Part III of the Constitution. He relied on the decision of the Supreme Court in the case of *Gunupati Keshavram Reddi v. Nafisul Hasan,* in support of his contention. But the Supreme Court in the present case held that whenever there is a conflict between fundamental right under Article 19(1)(a) and a privilege under Article 194(3) the latter would prevail.

In the case of *M.S.M. Sharma v. S.K. Sinha*[50], the question before the Supreme Court was that whether the expunged portions of a member's speech in the State Assembly can be validly published and protected under Article 19(1)(a). The Court held that the freedom of speech in a Legislature contained in Article 194(1) was specific as compared to the general freedom of speech under Article 19(1)(a). Therefore, the general restrictions that applied to 19(1)(a) by virtue of Article 19(2) would not apply to specific freedom of speech under Article 194(1). Further, it was also held that since it was not the intention of the Framers to make the immunity

[47] GunupatiKeshavramReddi v. Nafisul Hasan, AIR 1954 SC 636.
[48] Re Under Article 143, AIR 1965 SC 745.
[49] *Supra note* 25, at 8.
[50] *Ibid.*

for speeches made or votes given in a legislature subject to the Fundamental Right provided by Article 19(1)(a), therefore the more specific privileges in Article 194 available to Parliament would override the general rights of their constituents contained in Article 19(1)(a) and hence the privileges of a Legislature would not be subject to Fundamental Rights.

XIV. CONCLUSION

The Parliamentary privileges are an integral part of the Indian democracy, which are provided to the Members in order to ensure a smooth functioning of the parliament. Parliamentary Privileges, as a concept, was adopted from the House of Commons of the UK, as a temporary provision, but till date, these have not been codified. It has been rightly stated that *"power corrupts and absolute power corrupts absolutely*".

Over a time of numerous years, there have been different examples where these advantages have been abused, in this way prompting a self-assertive utilization of the authoritative forces. To keep this from occurring, it is significant that general society and the other overseeing bodies should consistently be on vigil.

In order to determine the privileges that the Indian Parliament can adopt, the Court has evolved the proper doctrine. The Doctrine of Pen, Ink and Indian rubber theory which was explained by the court in the case of *Hardwari Lal v. The Election Commission of India*[51].

In the case of *M.P.V. Sundaramier & Co. v. State of Andhra Pradesh*[52], the Supreme Court has cautioned that: "The threads of our Constitution were no doubt taken from other Federal Constitution but when they were woven into the fabric of our Constitution their reach and their complexion underwent changes. Therefore, valuable as the American decisions are as showing how the question is dealt with in sister Federal Constitution great care should be taken in applying them in the interpretation of our Constitution".

It is significant that these advantages be classified, and what might establish their break and the outcomes of such breach be characterized, to check the subjective utilization of these advantages. Through codification, the self-assertive forces of the parliamentarians would be delimited. Codification would likewise expose advantages to key rights and furthermore to judicial review. The press and the media would have greater autonomy thus, safeguarding their right to freedom of speech and expression, thereby leading to a more transparent and accountable government. The following reasons states the need to codify parliamentary privileges:

1. Maintain the independence and defend the dignity of the representatives of the nation to maintain parliamentary democracy;

2. Ensure the supremacy of the fundamental law of the land, i.e. the Constitution of India;

3. To harmonize the dignity and independence of representatives, as well as individual rights, essential for the development of the country.

4. Create a balance between fundamental rights and parliamentary privileges.

[51]Hardwari Lal v. The Election Commission of India, (1977) 2 Punj. & Har. 269.
[52]M.P.v. Sundaramier & Co. v. State of Andhra Pradesh, AIR 1958 SC 468.

The National Commission to Review the Working of the Constitution (NCRWC), in its report submitted on 31st March, 2002, has also recommended that "The privileges of legislatures should be defined and delimited for the free and independent functioning of Parliament and State Legislatures."[53] Hence, it can be said that the rule of law would be strengthened once the privileges are codified.

[53]*Parliamentary Privileges*, available at https://www.lawctopus.com/academike/parliamentary-privileges/ (Last visited on November 15, 2020)**.**

PRENUPTIAL AGREEMENTS- A REQUIREMENT?

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ABSTRACT

A prenuptial arrangement, also known as a prenup, is a settlement contract entered into by a couple about to marry in which they outline and formalise the distributing scheme of their assets and liabilities if their marriage fails. In India, the legislative provisions do not recognize prenup under marriage or personal laws. This agreement is often governed by the contract laws of India and not the personal laws. The government has consistently asserted that prenuptial contracts are very much legitimate and enforceable under the Indian Contract Act 1872, but the question of whether to recognise them in India is still up for debate.

The author, through this research paper, "*Prenuptial Agreements- a Requirement?*" will throw light on the various legislative as well as social aspects on the said practice and determine if the said theoretical explanation is valid in India by further scrutinizing the provisions and substantiating it with relevant case laws. Furthermore, the author also aims to perform a comparative study of its applicability in India with the existing agreements in numerous different countries. The author would also examine and analyse the pros and cons of adopting a prenup and its consequential effects on the marriage and the marital bond. Despite the fact that these premarital arrangements are not recognised by Indian law under the personal laws, the author through this research paper will address as to why it is not being known under marital laws, but subsequently under the contract laws of India.

Key Words: Comparative study, Conjugal Bond, Contracts, Distribution of Assets and Liabilities, Divorce, Prenuptial Agreements.

I. INTRODUCTION

"Laws are like metals in the crucible of time and circumstances; they melt, they solidify into different shapes; they re-melt and assume diverse forms. This process of evolution is coterminous with the human society" and personal laws in India are no exception to this rule. The personal laws concerning marriage are subjected to two main forces pulling in a different direction. On the one hand, the effects of conservatism and dogmatism are trying to safeguard the traditionally acquired personal laws and to preserve its pristine purity. On the other side, lie the staunch and devoted modernists holding a rather modern liberal thought which acts to modify the personal laws to suit the changing conditions of the society. The traditional rules treat marriage as a holy sacramental tie, union of sexes, a bond that fosters the preservation of the human race, and a route for the establishment of the paternity of the child, this marital bond goes much beyond the face value. But modern thoughts treat marriage as a civil contract.[1]

[1] Bhagwati Saran Singh v. Parmeshwari Nandar Singh (1942) All 518

A prenuptial arrangement, also known as a prenup, is a settlement contract entered into by a couple about to marry in which they outline and formalise the distributing scheme of their assets and liabilities if their marriage fails.[2] It is more of a western concept which now has slowly been influencing the Indian conjugal bonds and agreements along with the marital laws.

Matrimonial property and assets are one of the central issues about the institution of marriage. There are various situations where the contributions made by the women to the household economy, in turn, receives mere unsatisfactory, substandard and incongruous financial support after the dissolution of marriage. The arrangement is described as a *precautionary mechanism* in its classical-western ideological context, guaranteeing the safety of all parties' properties. In this era, where the divorce takes place faster than marriages[3], a prenup needs to be recognized.

In India, the legislative provisions do not recognize prenup under marriage or personal laws. Still, there has been a sense of pressure from the couples as they tend to discuss their assets and liabilities in the form of an agreement to protect their interests during the marriage and after its dissolution. This agreement is often governed by the contract laws of India and not the personal laws. The government has consistently asserted that prenuptial contracts are very much legitimate and enforceable under the Indian Contract Act, 1872, but the question of whether to recognise them under the Indian personal laws is still up for debate.

I. PRIMER TO PRENUPTIAL AGREEMENTS

The marital and matrimonial tie is a sacramental and holy prelude to a journey of happiness and love. Still, marriage is often halted and interrupted by uneventful occasions leading to dissolutions, divorce, and breakdowns. All the tenderly cherished and nursed dreams and plans are shattered, and all that is left behind is a sense of bitterness and emptiness, mainly over emotional and financial matters, and this is where prenuptial agreements fit the bill.

A *prenuptial*, *antenuptial*, or *premarital* arrangement, usually abbreviated to *prenup* or *prenupt*, is a contract entered into by spouses about to marry under which they outline and finalise, i.e. properly sign and record, the allocation scheme of their properties, mostly relating to financial assets and liabilities, should their marriage fail.[4] Although it is still considered a movement popularised by Hollywood's rich and famous, it is increasingly taking momentum in the Indian Societies.[5] A prenuptial agreement's content varies, but it usually contains provisions for land separation and spousal care in the case of divorce or dissolution of a marriage. Prenups are recognised and enforced in various countries around the globe, including Canada, France, Italy, and Germany.

[2] (Matthews v. Matthews)Judgement, 1968, 162 S.E.2d 697, 698-99 (N.C. Ct. App.)
[3] Akansha Ghose and Pallavi Agarwal, *Prenuptial Agreement: A Necessity of Modern Era*, Vol. 2(5) INTERNATIONAL JOURNAL OF RESEARCH AND ANALYSIS (2014)
[4] Rishabh Tiwari, *Prenuptial Agreements in India*, Vol. 4(5),INTERNATIONAL JOURNAL OF ADVANCE RESEARCH AND INNOVATIVE IDEAS IN EDUCATION ISSN(O)-2395-4396 (2018)
[5] Ipshita Mitra, *Happily married, but conditions apply*, Times of India, available at https://timesofindia.indiatimes.com/life-style/relationships/love-sex/Happily-married-but-conditions-apply/articleshow/12230194.cms (last visited on Jan 3, 2018)

The Indian legal system and Jurisprudence do not recognize prenups as a legal document but only enforceable under the Indian Contract Act of 1872. Despite which the jurists claim that prenups are against the *doctrine of public policy* and thereby to be held void under Section 23 of the Indian Contract Act of 1872, which talks about lawful considerations and objects.[6] Further to its validity, a prenup will be legally binding on both the parties if it is solemnized under the Special Marriage Act of 1954, provided the relevant documents are presented to the registrar and marriage officer accordingly. Though prenups cannot be legally enacted because they only reflect the parties' intentions, the courts consider them while pronouncing their judgment, order or decree.

II. PRENUPTIAL AGREEMENTS IN THE BOOKS OF HISTORY

Prenups are an essential tool for the modern era marriages and the concept of judicial separation, divorce. Metaphorically, divorce does take place faster than marriage. The concept of prenup wasn't discredited and was widely commonly embraced in various religions in different forms, and it's not a new, novel thought. When it comes to *Anglo-Saxon society*, marriage has a very distinct contractual flavour and resemblance to it, where the groom purchases the wife's guardianship; thereby, holding the right to marry her for a price fixed in accordance to her social status and rank in the community and society.[7]

In *Ketubah Marriages*, a form of marriage practised amongst the Jews, it portrays a very slight impression of a valid prenup and the usage of the same. *Ketubah Marriage* is a Jewish prenup, which consists of the rights of the wife and obligations of a husband towards that wife, along with the maintenance from the husband during any uneventful dissolution of marriage either by death or divorce.[8]*Ketubah Marriage* has always been one of the most ancient and primary documents promising monetary rights of a woman when there is an event which ceases marriage. The need for the emergence of this kind of a marriage was because in the Jewish community, men were not financially stable; therefore, the terms of marriage made it appropriate for the parties to negotiate upon the property and finances upon dissolution.

Similar to the *Ketubah Marriage*, the Mohammedan law adopted the concept of *Dower*, which resembled a prenup and was ultimately available and adopted well before the common western notion. As part of a marital arrangement, most Muslim marriages include the agreement and negotiation of a *Mahr* clause, which is a monetary contribution from the husband to the bride.[9] In *Akileh v. Elchahal*,[10] The Court recognised the validity of the Mahr clause and observed that, "*marriage is sufficient consideration to uphold an antenuptial agreement*" and held the *Mahr*, a prenup, valid and enforceable.[11]

[6] Sec. 23, Indian Contract Act, 1872

[7] Lloyd Bonfield, *Property Settlements on Marriage in England from the Anglo-Saxons to the Mid-Eighteenth Century, in Marriage, Property, and Succession*, p(p). 287, 292-93 (Lloyd Bonfield, 1992)

[8] *Id.*

[9] Matisa Majumder, *Prenuptial Agreement: Enforcing Marriage in the eyes of Law*, INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES, available at http://ijlljs.in/wp-content/uploads/2016/02/31.pdf (Last visited on Jan 3, 2018)

[10] (Akileh v. Elchahal)Judgment, 1996, 666 So. 2d 246 (Fla. Dist. Ct. App.)

[11] *Id.*

Thus, the model of a prenup was in existence for a long time; every country, society and community exercise this practice in diverse forms. However, it is also very essential to realize that prenups, in its pure and absolute form, did not exist. Still, only little elements and bits were visible, which contributed to the evolution of such a concept. *Anglo-Saxon*, *Ketubah* and *Dower* cannot be considered as a perfect example and agreement symbolizing prenup, they are certain ancient documents that have glimpses of prenups in them.

In the case of *Sugra Bibi v. Masuma Bibi*,[12]the requirement and need of a prenuptial agreement were highlighted and laid down the sole reason behind the arrangement of a prenup, which is to primarily ensure transparency in the provisions of maintenance of one party to another in the event of termination of dissolution of marriage and to ensure the process of termination is hassle-free and less time-consuming.

Additionally, the case of *Razia Begum v. Sahebzaadi Anwar Begum*[13] was one of the early judgements related to the concept of prenuptial agreements. The Court held the definition of a prenuptial agreement to be that of "*a document promising financial security to the spouses during the wedlock or on marriage and their financial and monetary security is of utmost importance, and therefore it is imperative to protect the same.*"

III. NATURE OF PRENUPTIAL AGREEMENTS

Prenuptial agreements are not held valid in India, and they do not have any legal enforceability and value. Still, the purpose of a prenup and the reason it is being held valid and given the legal recognition is that prenups are more than just a piece of contract. It plays a significant role in ensuring and helping, aiding the financial status and stability of the spouses, as well as establishing the demanding security between them. The society and authorities and the legal jurists might think of this very concept as something that would extract the romance and intimacy factor out of the wedlock, and where people rely on this piece of paper which supposedly ensures their financial safety. The purpose of a prenup is to maintain the transparency in the marital bond and further to manage the disposal of the assets after marriage. Diverse forms and structures of a prenup exist throughout the world. An 'excellently drafted' prenuptial agreement is between 50 and 60 pages in length and is structured as a multi-tiered document.[14] This structure contains many provisions that include concerns such as the disposition of mutually owned property, child care, liability division, exclusion of individual property names from division upon dissolution, establishing an upper limit on alimony, and so on. But, the structure of a prenup is not fixed and will change according to the will of the spouses, upon fulfilling such requirements as mentioned above. A prenup can be enforced otherwise only if few conditions are duly acknowledged and followed, being:

1. The agreement made must be clear, rational, voluntary, mutually signed and in writing.

[12] Sugra Bibi v. Masuma Bibi (1880) 2 All 573

[13] Razia Begum v. Sahebzaadi Anwar Begum & Others (1958), SCR 1111

[14] Amrita Ghosh and Pratyusha Kar, *Prenuptial Agreements in India: An Analysis of Law and Society*, NUJS LAW REVIEW, available at http://nujslawreview.org/wp-content/uploads/2019/12/12-2-Ghosh-and-Kar.pdf (Last visited on July 5, 2019)

2. The execution of the agreement must be done before the marriage, and must not further develop in any way, wherein either party is being forced, pressurized or coerced in any way, etc.

3. After the agreement is drafted, it needs a compulsory notarization and certification after a valid review by an advocate.

4. The agreement should list down all the assets, liabilities, financial belongings, in detail.

5. The agreement should never contain any information that proves to be deceiving, false, invalid or misleading.

6. The agreement must include any kind of necessary history of proposed alliances, etc.

These are few of the criteria and prerequisites that need fulfilment before a prenup is enforced and registered in India.

IV. LEGISLATIVE PERSPECTIVE & CRITIQUE

Prenuptial agreement as a concept is not widely known to the Indian public because it is treated and seen as a foreign concept in a country that takes pride in its rich cultural heritage and the love and warmth that people and citizens share.[15] In European countries, the model is accepted, adopted and legally enforceable because the marriage is considered a contract, but in India, the marital bond is regarded as a solemn ritual and very holy; thus the introduction of prenups in any form and manner has always remained an alien concept in the Indian Legal Jurisprudence.

1. VALIDITY AND ENFORCEABILITY:

We see prenups throughout the western countries, but not in India. The Indian Jurisprudence finds it impossible to weigh relationships in contractual terms when they are given a sacred status.[16] In India, prenups are neither legal nor seen as valid under the matrimonial laws for an essential reason that marriage is not seen as a contract but as a sacred bond. Marriage, a religious oath between the husband and the wife, where prenuptial agreements have never found a place in and any social acceptance irrespective.

The Honourable English Court in the case of *Granatino v. Granatino*[17] recognized and accepted the legality of a prenup and made it binding on both the parties. On the other hand, courts in India can take cognizance of these agreements if the parties have mutually agreed to make, sign and enforce one such arrangement, without any undue influence, coercion or force in any form or manner. Besides which the parties should treat and draft such a settlement in a fair, and elaborate style, which talks about the subsequent divisions in the property and assets with

[15] Bijaya Das, *Is a Prenuptial Agreement Valid in India?*, News18, available at https://www.news18.com/news/india/is-a-pre-nuptialagreement-valid-in-india-1474033.html (Last visited on Jan 8, 2018)

[16] *Band, Baajaa, 'bargain': Legal Status of Pre-nuptial Agreements in India*, MANUPATRAFAST.COM, available at https://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=e42868ef-4b1d-43cb-ade4-720680f59c6e&txtsearch=Subject:%20Family%20Law (Last visited on Dec 8, 2018)

[17] Granatino v. Granatino, (2010) UKSC 42

clear distinctions, which further should be certified and notarized by a competent advocate/ lawyer. Furtherance to which, all the remaining roles and duties, conditions to be duly acknowledged and fulfilled.

The legality of prenups lies in the fact that even though they aren't popularly accessible in India, they still will be and can be governed under the Indian Contract Act, 1872 and not under the Matrimonial laws of the land. They are legally binding upon the parties and spouses to the contract if mutually agreed upon, and the clauses are fair and without any ambiguity. The arrangement will then be considered like any other contract operating under Section 10 of the Contract Act, which states that all deals are contracts provided they are made with the free consent of parties competent to contract, for a lawful consideration, and for a valid purpose, and are not explicitly deemed to be void.[18]

In this regard, a prenuptial agreement will be treated as a valid form of contract because of the following reasons:

1. If both the parties have signed, adopted and enforced this contract on mutual and free consent, and not because of any external pressure of force, threat, coercion in any form. There should be a voluntary entry.

2. Parties should abstain from having any ulterior motive, and unlawful aim or consideration further is as defined under Section 2(d) of Indian Contract Act, 1872[19] as, *"when, at the desire of the promisor, the promise or any other person has done or abstained or abstains from doing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise."*

3. Section 23 of the Indian Contract Act, 1872[20] lays down certain specific conditions for the legality of that consideration and objects to the contract according to which, consideration would be unlawful if,

    a) It is forbidden by law

    b) Is of such a nature that if permitted would defeat the provisions of law

    c) Involves or implies, injury to the person or property of another

    d) The Court regards it as immoral or opposed to public policy.

2. IMPEDIMENTS:

Why does the Indian Legislature discourage the idea and adoption of the concept of prenups? Predominantly because such an arrangement implies that the couples do not envision the marriage to last forever thereby incentivizing divorce and the option of divorce. The contract can adversely influence the life of both the parties to the wedding, post-termination, further heavily impacting and changing their lifestyle as well. Deciding to switch to a prenup is a difficult and a complicated step for both the parties, says the Legislature. A country like ours,

[18] Sec. 10, Indian Contract Act, 1872
[19] Sec. 2(d), Indian Contract Act, 1872
[20] Sec. 23, Indian Contract Act, 1872

very diverse, a lot of cultures influencing marriages, and thereby complex to adopt. Furthermore, since prenuptial agreements are regulated by contract law rather than marital law, they must meet the same requirements as Section 10 of the Indian Contract Act.[21]

Why should the Indian Legislature be open to the concept of prenups? Notably because adoption of such an agreement system will facilitate the process of seeking maintenance speedily and further prevent the parties from spending excessively and exorbitantly on the fees given to the advocates; thereby avoiding the whole process of multiple strenuous hearings in the Court. The agreement will further protect the parties from each other's debts and ensure their security during uneventful death of one of the spouses. In furtherance to which the agreement will protect the child and its security upon the termination of the marriage during a mutual separation or even otherwise. For women, it promises to secure the life of the wives after marriage and financially supports them. Thereby, the prenups reduce the strenuous process of visiting the Court, the hike in fees, ensures spousal support, alimony and maintenance.

Therefore, it is a complex concept to adopt for India. There is no statute or legislation exclusively forbidding and illegalizing prenuptial agreements, nor there is legislation allowing it. Law is silent in this matter, and this can be presumed.

V. DEGREE OF NECESSITY FOR ENFORCEABILITY

Inescapably, prenups are about money. They are concerned with property and support rights after the statutory or natural dissolution of a marriage.[22] The primary objective of enforcing a prenup is to foresee and protect the finances and fate of such finances, personal liabilities and uncalled for consequences in case the marriage fails, and eventually the parties decide to obtain a divorce. Furthermore, prenuptial arrangements allow a person to defend a family business or a certain piece of property from claims made by a former spouse.[23] In such cases, jurists conclude that prenuptial arrangements can play a beneficial role in mitigating conflicts about the allocation of the share of assets and other possessions, bonds, and liabilities, and that they will prove to be a hassle-free alternative to paying alimony to the other party.

A prenup can be a wise choice and a wiser amendment to the existing matrimonial jurisprudence. The government has ruled out any immediate changes to the legislation to recognise prenuptial agreements, claiming it is an *urban phenomenon* and *too early* to grant it legal support.[24] The underlying reason behind the arrangement is to ensure transparency in the provision of maintenance by one party to another in the event of termination of marriage and to ensure that the process of separation is hassle-free and less time consuming. Therefore, it is easy to switch yet equally complex.

[21] Sec. 10, Indian Contract Act, 1872

[22] Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS, 8 JAAML 1, 8 (1992)

[23] Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, STANFORD LAW REVIEW 887 (1997)

[24] Moushumi Das Gupta, *Too early to give prenuptial agreement legal backing*, available at https://www.hindustantimes.com/india-news/too-early-to-give-prenuptial-agreement-legal-backing-govt/story-1AK9s4oUMRT6eGdKtDgbYM.html (Last visited on June 18, 2018)

In the case of *Sri Bataha Barik v. Musammat Padma*[25], The need for prenuptial agreement in deciding the matrimonial home of the husband and wife can be inferred. The Court, in this case, quoted the lines from *Mayne's Hindu Law*, "*as soon as the wife matures, her home is necessarily in her husband's house*".

VI. CONCLUSION AND SUGGESTIONS

Prenuptial Agreements are more than a piece of contract, as it plays a crucial role in ensuring and helping in the financial stability as well as the security of both the parties entering the marital bond. The society and authorities might think of this agreement as something that would extract the romantic and intimate factor out of marriage, where people rely on a piece of paper for the proper functioning of their wedding instead of just conventionally and customarily trusting them. The number of divorce cases are on the rise and has been rising exponentially since. The presence of prenups would not only fuel up the strict and necessary need for the verification of spousal and marital assets which eventually would rule out the possibility of either of the parties concealing their possessions and assets but also would help in keeping track and monitoring the discharge of such assets after the dissolution of marriage.

By determining the emergence of the agreements, by analysing and scrutinizing the legal stance and provisions, by determining if the said theoretical explanation is valid in India and the degree of its necessity and implication in Indian Legal System, the author tries to put forth and assert that there is a need for the legal recognition and validation for the prenuptial agreements, even though the laws in India are silent about it and on matters related, if such an agreement is made valid for entering into the marital bonds, then divorce and the consequences or legal repercussions would become hassle-free and less time consuming, as the dictums of maintenance and assets, primarily financial, become fundamental determinants and legal implications of divorce, even though the law in India is silent on matters regarding prenup.

[25] Sribataha Barik v. Musamat Padma (1969) Ori 122

RECIPROCITY BETWEEN SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL JUSTICE

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"The environment and the economy are really both two sides of the same coin. If we cannot sustain the environment, we cannot sustain ourselves"- Wangari Maathai.

Due to the upswing in population, urbanization, industrialization, aviation, shipping, and vehicular emission, the concern for environmental quality has become a crucial issue in the present scenario. Environmental conservation has deduced even more significance in neoteric times with increased industrialization engendering not only in over withdrawal of natural resources but also triggering pollution and thereby impacting the flora & fauna.[1]In the developing nations, environmental issues are not constricted to the side effects of industrialization withal reflects the paucity of resources to provide infrastructural provisions to avert industrial pollution. Indeed, the breakthrough in science and technology have bestowed umpteen benefits on society in the form of finer and improved quality of goods at relatively reasonable costs and in proportionately substantial quantities. Nevertheless, the advent of technology has also fetched in its trajectory the impediment of pollution. Certainly, there is an interface between environment and development.[2]Whilst development is crucial for every economy, it is also indispensable that no irreparable damage is caused to the ecosystem.[3]Therefore, the modus operandi would patently be that of 'sustainable development to equipoise the exigencies of industrial growth against the trade-offs in environmental concerns. It is our collective responsibility to utilize the earth's resources prudently and sustainably so that we don't knock back the benefits of our future generations. There is a necessity to amalgamate development and conservation- development to facilitate the people all around to enjoy healthful, long& fulfilling lives and conservation to keep our actions within the capacity of the earth.

The notion of 'sustainable development' was first accentuated at the United Nations Conference on the Human Environment held at Stockholm in June, 1972.[4] Since then, several nations such as the US, France, Germany, Japan, etc. besides India, have implemented legislations pertaining to the conservation of the environment and thereby incorporated strict penalties for the damages incurred due to hazardous substances, etc. The tenets of sustainable

[1]Ramakrishna &Jayasheela, *Environmental Problems and Sustainable Development: With Special Reference to India Issues and Challenges*, JOURNAL OF GLOBAL ECONOMY6(2) (2010), available at https://ideas.repec.org/a/jge/journl/622.html#:~:text=In%20India%2C%20rapid%20growth%20of,and%20hence%20cannot%20be%20ignored(Last visited on September 25, 2020).
[2]The World Bank, *'India: Green Growth- Overcoming Environment Challenges to Promote Development'* (2014) available athttps://www.worldbank.org/en/news/feature/2014/03/06/green-growth-overcoming-india-environment-challenges-promote-development(Last visited on September 25, 2020).
[3]Hemant Sethi, *'How is India dealing with environmental risks and climate change?'* The Economic Times(11 October 2019), available athttps://energy.economictimes.indiatimes.com/energy-speak/how-is-india-dealing-with-environmental-risks-and-climate-change/3824.(Last visited onSeptember 25, 2020).
[4]Nikolas et.al. (eds), ENVIRONMENT AND DEVELOPMENT (2016).

development as set out in the stratagem for sustainable living, pivot on veneration and care for the community of life, ameliorating the standard of human life, preserving the diversity and vitality of the earth, curtailing the exhaustion of non-renewable resources keeping within the earth carrying potentialities, remoulding personal practices and attitudes, facilitating the coteries to care and manage their own environment, proffering a natural structure for consolidating development and conservation.

Worldwide sustainability relies upon a robust alliance amongst all the nations. However, the magnitude of development in the globe is asymmetrical and therefore, the lower income nations must be succoured to reinforce sustainability and to safeguard their environment. The ethic of care applies at the individual, national as well as international levels. No country is self-sufficient by itself. Hence, they all tend to profit from global sustainability, and all are imperilled if we fail to accomplish it.[5]

Therefore, we used to have a glorious tradition of environment preservation which enlightened us to deference nature and to take consciousness of the verity that all the life-forms: plants, animals and humans are closely interconnected and that disruption in one causes an imbalance in others. This dogma is also enshrined in the Indian Constitution under the Directive Principles. In the judicial pronouncement, the prerogative to a healthy environment has been decoded as a part of the right to life under the ambit of Article 21 of the Constitution. Moreover, it is our fundamental duty to safeguard and tweak the natural environment encompassing the forests, rivers, lakes& wildlife and to have solicitude for living creatures (Article 51-A). We have majorly failed to inculcate the principles and fulfil our obligations constructively. Latterly, India had secured 168th rank out of 180 countries in the 12th edition of the Environment Performance Index (EPI) 2020.[6]Although over the past years, the economic growth of India has upheaved the prospect of alleviating large-scale penury within a generation nevertheless, this progress has been clouded by a deteriorated physical environment and burgeoning dearth of natural resources that are indispensable for enduring further development and eradicating poverty.[7]

We need to always keep in mind that we have not only inherited the Earth from our antecedents, but we have also borrowed it from our children, hence, it is our individual and collective duty to safeguard it. Therefore, development should take place without harming the environment.

[5]ICSI, LAW RELATING TO POLLUTION CONTROL AND ENVIRONMENTAL PROTECTION(2012).
[6]Siddhi Jain, *'India ranks 168th on Environmental Performance Index'* OUTLOOK(9 June 2020), available athttps://www.outlookindia.com/newsscroll/india-ranks-168th-on-environmental-performance-index/1860519(Last visited on 25 September 2020).
[7]The World Bank, *'Environmental Management in India'*, available at https://www.worldbank.org/en/news/feature/2011/09/22/environmental-management-india(Last visited on September 25, 2020).

VINEETA SHARMA v. RAKESH SHARMA: THE LAST VESTIGEOF SUCCESSION SEXISM

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ABSTRACT

The Hindu Laws on Succession have long stood as the incubating factor for the prevailing gender asymmetries. The outright discriminatory practice of withholding coparcenary rights to the joint property from women has not only robbed them of the right to be recognized as a family member but also fuelled the stigma of subordinacy, which presently prevails in a society claiming to impart equality. The dissolvement of this biased distinction that coparcenary draws between man and woman was the aim of the legislature, and in its pursuance, they amended The Hindu Succession Act to confer coparcenary rights to women. However, the judgements of the Supreme Court while seeing through the conferment of these rights as an attempt to bring about gender parity in the society sank the teething of the amendment into a deeper void due to the discrepancy and conflict that had emerged in its interpretation of different but interlaced elements. The lacuna created by the inadvertent contradiction of legal opinion halted the true effect that was sought, i.e. gender justice. It was only after fifteen years that light was once again shed on this divergence in law. The paper aims to trace the problems that were brewed by the conflicting judgements and comments upon the clarity that has been brought to cure them through the verdict of *Vineeta Sharma v. Rakesh Sharma*.

Keywords: Females as Coparceners, Females Right to Joint Property, Females Right in Partition, Females Share in Coparcenary Property, Hindu Succession Act 2005 Amendment.

I. INTRODUCTION

The rules of devolution of property and the anterior basis for the creation of entitlement within this devolvement have since time immemorial been a representation of the subordinacy in position a woman occupies in the society. Under the *Mitakshara system,* the most pervading Hindu school of thought women were annotated as only a temporary member of the joint family, their linkage to their own blood was felt necessary to be severed, and it was imbibed as the duty of the father or the brother to see through this severance by way of her marriage[1]. Consequently, all rights to claim the ancestral property were exclusively vested in its male lineage[2]and women were deliberately incapacitated to accrue the same rights as their brother by birth. The claim of females was only recognized in separate property which constituted a very small portion of the property then. This claim was further not only restricted in application in a handful of sub-schools, but within them also only a few classes of female were held entitled based upon

[1]Poornima-Advani, *A Giant Step to Address Gender Injustice*, Live Mint(15 August,-2020), available at https://www.livemint.com/opinion/online-views/a-giant-step-to-address-gender-injustice 11597478771696.html
[2]S.A-Desai-and-Dinshah-F.Mulla, PRINCIPLES OF HINDU LAW,-170-(Butterworth's,New-Delhi 17th edn. 1998).

propinquity[3]. The only major school to not draw a distinction in gender asymmetries for property was the *Dayabhaga system*, but it too had nothing to do with equality, and rather its attunement to indiscrimination was attributed to its omission of any accordance of a joint right by birth to any member of the family[4].

Thus, the consecrates of patriarchy which was writ large in the Indian society was responsible for the deteriorating the status of woman[5], and the crevices where it didn't exist was not because of observance of equal stature of both genders but rather because of the absence of any preempt for males themselves. This adorned patriarchal system once considered an integral part of the religious sects was now seen as discriminatory and the source of the prevailing adversity of woman in India. It was this notion which was kept in mind by the framers of the constitution while creating the proviso to make special laws to ensure equality and parity for women[6], In lieu of the constitutional mandate for protective discrimination and the commitment of the then government of Pandit Nehru to ameliorate the disparities of women[7]The Hindu Succession Act[8] was brought in force as a means not only to codify all laws of inheritance under one umbrella act but also as a measure of reforming the discriminatory practices. Initially, it conferred the right for certain females to claim what would be the share of their deceased relative as their own[9] but this was more a consequential counter than cure to the indoctrinated discrimination. And so, another legislative attempt was made to cure the Hindu Laws of its covenants of discrimination by way of the 2005 amendment which extensively whittled down this gender bias and provided recognition of daughters irrespective of marriage as equal coparceners and confederates of the same rights and liabilities as a son by birth[10].

However, the intent behind amendment of 2005 was shortchanged by its interpretation to such a length that the law was mere ad-lib to the discrimination it sought to uproot and has only now after fifteen years been once again teethed to incubate equality by the verdict of the case in limelight, *Vineeta Sharma vs. Rakesh Sharma*[11].

II. FOMENTING LACUNA

The-amendment-amidst-other-changes-had-incorporated the right of females to be equal coparceners-by-birth, their entitlement-to-share-in-property-was-deemed-to-be-same-as-that of-a-son[12]. However, the-intention-behind-the-amendment-was submersed to ambiguity owing to-the-other-provisions-which-were-added-whereby, when read together, and-interpreted-wholly-another-intention appeared-causing-a-wrongful-application-of-the-same.

The first infirmity was whether the provision is prospective or retrospective in application. By relying on the wordings of sub-section one[13]it was contended that the use of

[3] *Id.*, at 175.
[4] *Id.*, at 181.
[5] Dr Poonam S. Pradhan, FAMILY LAW LECTURES II,-72-(Lexis-Nexis, Calcutta-4t-ed. 2019).
[6] CONSTITUENT-ASSEMBLY-DEBATES, Vol VII (November-29,1948).
[7] 174th Report of Law-Commission-of-India, (2000).
[8] No.-30, The-Hindu-Succession-Act, 1956.
[9] *Id*., s.6-Proviso.
[10] The-Hindu-Succession-(Amendment)-Act, 2005, No.-39, Acts of Parliament.
[11] Vineeta Sharma vs. Rakesh Sharma(2019)-6-SCC-162.
[12] *Supra*-note-10, s.6(1) &(3).
[13] *Id.*, s.6(1).

words *'on and from'* clearly denotes the future application of the law. And when supplemented with sub-section 5[14] which states that the section shall have no effect on partition prior to its commencement, it can easily be gleaned that the entire amendment is prospective and a daughter born after the commencement would be deemed a coparcener[15]. While the first imposition was rejected mainly on the ground that, right to coparcenary property accrues by birth, and thus applicable to living daughters irrespective of when they are born[16], the second contention of its prospective effect was sustained because of the express indictment by the legislature in sub-sections 1 & 5, and thus an already effected partition cannot be reopened, and all living daughters become coparceners only after commencement of the amendment[17].

The next impetus was whether a living father at the time of commencement is required for a share in coparcenary by the daughter. Leaning on the provision stating that upon death of a coparcener, the property would be deemed to have been partitioned[18] the court held[19] that it is imperative for the father to be alive as upon his death, a legal fiction of partition is created, and any partition effected prior to 2005 will have no application of the amended position[20]. The requirement of partitions to be registered or court decreed in the amended position does not take away the validity of previous partitions which were lawful under the unamended position due to its prospective application[21].Therefore, a claim of daughter as a coparcener will remain as long as no partition takes place, and so it is necessary for the father to be alive at the time of commencement.

But his position on father's prominence in the daughter's claim was disturbed in another judgment by a coordinate bench of the Supreme Court which held[22] that the wordings '*daughters shall be coparceners by birth'* in sub-section one clearly lays down that it is the factum of birth that creates coparcenary, and the devolution of property or a notional partition is a mere consequence of death and not actual partition and thus it does not affect this right as long as it was not a registered or a decreed partition as stipulated by the explanation to sub- section 5. Hence, father's living is immaterial for the daughter to become a coparcener. This not only contradicted the supposition of father being alive but also indirectly conflicted with the previous decided position by incidentally holding the amendment as retrospectively applicable.

The last predicament created by this amendment was the validity of oral and unregistered partitions. The Apex Court in its earlier decision[23] held that the averment of sub section 5, explanation is clearly meant to oust false transects of the joint property so as to take away the right conferred by ensuring that all rightful coparceners get their shares through the pre condition of registration or decrement. This in no way, however, takes away the validity of partitions prior

[14]*Id.*,s.6(5).
[15] Amit Jain, *Vineeta Sharma v. Rakesh Sharma: Clearing the last hurdle towards gender equality in Hindu property law*, BAR AND BENCH (24 August, 2020), available athttps://www.barandbench.com/columns/vineeta-sharma-v-rakesh sharma gender equality hindu property law.
[16]Prakash & Ors.v. Phulavati & Ors.(2006) 1 SCC 36 (Civ-549), at para 23.
[17]*Id.*, at para 18.
[18]*Supra* note 10, s.6(3).
[19]*Supra* note 15, at para 17.
[20]*Supra* note 10, s.6(5).
[21]*Supra* note 16.
[22]Danamma v. Amar Singh (2018) 3 SCC 343, para 26.
[23]*Supra* note 15, at para 22.

to amendment notional or not, and thus, the explanation governs only partitions effected after the commencement[24] and also thereby reaffirming the prospective effect. But this stance was contradicted by the decision delivered by the coordinate bench of the same court[25] which implicitly held that partition for all intent and purposes of section 6 has to be accorded the definition in the explanation for both those effected prior and post amendment by averring father's death as immaterial and that the devolution is a consequence of death and not partition in notion.

It was this discrepancy between the two judgments that invited ambivalence in the understanding of the amendment and its wrongful application thereby creating a series of obstacles for women to successfully claim the right that was conferred to them.

III. VINDICATINGVERDICTUM

The verdict delivered by a three-judge bench of the Supreme Court headed by Justice Arun Mishra sheds much-needed light on the position of the amendment to settle the controversy once and for all. The premise of the verdict is concerned with the applicability of the provision which the court held to be retroactively applicable. It observed that the right to coparcenary accrues from birth, the effect provided by clause b & c of sub-section 1 clearly creates and attaches an antecedent right and liability to daughters. At the same time as per clause a, of the same provision and the use of words '*on and from'*, to claim such right it has to be made from the date of commencement and hence a prospective component. Thus, the section is retroactive[26] i.e. the characteristics of the footing on which the benefits are conferred is antecedent but whose availment can be proactively asserted or accrued[27]. This retroactivity that has been forged by the court is not a new proposition in the rules of coparcenary and has actually been borrowed from the *Doctrine of Relation Back*[28].The facet of conferring coparcenary rights retroactively is the backbone of adoption of a Hindu son, wherein a legal fiction was created that severed the relation of the adopted child with his previous family and consecrated his ties with his subsequent household from the date of his birth[29]. The accruement of right in coparcenary cannot be prospective owing to the reason that it can only be vested by birth, which is an unobstructed right in coparcenary. If it were to be retrospective, then it would undo the finality of already carried partitions thereby affecting the interest of society to a remote extent and piling the courts with the burden to redecide already settled cases. Thus, the court has rightly struck a balance between inhibiting gender discrimination and maintaining the status quo through the retroactive nature of the provision and has partly reaffirmed the position held earlier in 2018[30] that it is the factum of birth that confers the right.

[24]*Supra* note 15, at para 23.
[25]*Supra*-note-21.
[26]Darshan Singh etc. v. Ram Pal Singh & Anr., (1992) Supp. (1) SCC 191.
[27]Vineeta Sharma v. Rakesh Sharma(2019) 6 SCC 162, para 56.
[28]*Supra* note 5, at 79-82.
[29]Ashok G. Venkateshmurthy, *Retrospective, Prospective or Retroactive Application Of The Hindu Succession (Amendment) Act Of 2005: Decoding The Vineeta Sharma Verdict*, MONDAQ (13 August, 2020), available at https://www.mondaq.com/india/wills-intestacy-estate-planning/975930/retrospective-prospective-or-retroactive-application-of-the-hindu-succession-amendment-act-of-2005-decoding-the-vineeta-sharma-verdict
[30]*Supra*, note 21, at para 26.

By adopting the retroactive application of the amendment, the court also partly reconfirmed the position that was held vide *Prakash v. Phulavati*[31] that the provision confers rights to daughters born before and after the commencement of the amendment. The ratio for this can be perceived from the basic principle of coparcenary, i.e. it is not a creation of law and comes to existence only by birth. Thus, the amendment *ipso facto* is incapable of creating daughters of certain date of birth coparceners opposed to others, and the provision merely expands the eligibility to become coparceners to the daughters. The court added that such right is irrespective of whether the daughter is married or not as the intention of the cabinet[32] while introducing the amendment was to do away with this unfair gender-based distinction the vices of which violates Article 14[33].

The court next came to the finding that for the conferment of the right to daughters, the father need not be alive. The rationale behind this can be traced from the modality of creation of coparcenary, which is by the factum of birth in the family. Right to coparcenary by birth is an unobstructed right; nothing can prevent it as long as the coparcenary exists thus the same cannot be obstructed for a daughter who is a coparcener on equal footing due to the father's demise[34]. Further, the legislature has not provided any precondition of either the father to be alive or the requirement of the father's share to be intact, it accredits coparcenary the same way it is accredited to a son. It is immaterial whether the share of the coparcener through which a daughter claims her right has either been distributed to legal heirs or merged with that of other coparceners, as this dilution of the deceased's share is in no way concerned with the creation or deletion of any coparcenary right. Hence the court carefully examined corollaries to arrive at the conclusion that what is required for section 6 is the *factum* that the coparcener to be a living daughter of another coparcener[35].

The Supreme Court also observed that the notional partition deemed by the law cannot be stretched beyond the purpose it was consecrated for. In this averment, the court reiterated its long-running formula of interpretation wherein, for any provision a close nexus between the object sought and outcome effectuated must exist. Existence or dissolution of coparcenary cannot be wrested from a notional partition as the legislative reason behind such partition was only to properly compute the share of the deceased that would go to the classes of heirs in the unamended provision. The notional partition was in no way purposed to either severe the interest of any coparcener or to carve a fixation of shares of the existing coparceners[36]. Such an interpretation would make a coparcenary impossible to continue upon death of any member. A coparcenary only ends either on death of all coparceners until a new member is added or when a partition by metes and bounds is effectuated. The court also ventured into the interpretation of legal fiction which it held by relying on *Controller of Estate Duty v. Smt. S. Harish Chandra*[37] that it cannot be strewn beyond the purpose, it is to serve.

[31]Prakash v. Phulavati(2006) 1 SCC 36 (Civ 549) at para 12.
[32]*Supra*note 26, at para 109.
[33] Savita Samvedi (Ms) & Anr. v. Union of India & Ors..,(1996) 2 SCC 380.
[34]*Supra*note 26, at para 43.
[35]*Supra*note 26, at para 44.
[36]*Supra*note 26, at para 101.
[37]Controller of Estate Duty v. Smt. S. Harish Chandra(1987) 167 ITR 230.

The court in last delved into the validity of oral or unregistered partitions affected both prior and post amendment. The court before deliberating on its validity stated that what the explanation to subsection 5 seeks is to bind finality and save from reopening partitions which are registered or court decreed and effected prior to the commencement. Thus, the court propounded the rule that as long as the rights and shares in a coparcenary are not crystallized[38] by partition, prior-to-the-amendment, and nothing-can-shadow-the-working-of-this-amendment.

It then continued that the explanation is not concerned with the validity or invalidity of the modality of partition but rather reinventing the degree of entertainment of certain partitions over others. And so, with the amended position only the scope of which partitions are to be recognized readily has been changed and by the principle of exclusion a more vigorous burden of proof has been cast on oral and unregistered partitions. Any plea of oral or unregistered partition made from the commencement irrespective of the date it was effectuated will now be scrutinized stringently and are to be accepted not on the preponderance of probability but on the basis of the documentary evidence adduced. The object of the explanation is to rid the benefits of this provision of any naught that may be caused by a sham or bogus defense of a crystallized partition[39]. Thus, in its endeavor to uphold gender equality, the Supreme Court dealt with each emanating issue that sought to take it away while delivering the verdict.

IV. CONCLUSION

It is evident in the verdict pronounced by the Supreme Court, that while deciding the issues at hand it kept the object of gender equality in its closed fist. It construed the application of each clause with a two-fold objective of ensuring maximum gender justice is done prior to and post amendment. Instead of tagging the provision as welfare legislation that seeks to redo rights for the welfare of women moving forward, it earmarked it as a necessary cure to an old defect in law; to make sure as much effect as possible can be dated back from its execution. Even while deciding the approach of the courts to any future litigation, it urged them to first bear in mind gender parity over the issues at hand[40]. Despite the well-intentioned efforts made by the Supreme Court earlier, the magnitude of the effect of its legal imbroglio was underestimated, as a consequence of which rights of several women have been wrongly denied or delayed. The judgment while praiseworthy for its progressiveness ironically fell prey to fifteen years of slow progressing legal journey before bringing a close to one of the many necessary gender asymmetries. While the post-2005[41] amendment saw a considerable increase in property held and owned by women, at the very onset it cannot be denied that the judgment would most certainly help in further disrupting this disparity.

[38] *Supra* note 21, at para 26.
[39] *Supra* note 26, at para 127.
[40] *Supra* note 26, at para 127.
[41] World Bank Policy Research, *Klaus Deininger et al. Aparajita Goyal & Hari Nagarajan, Inheritance Law Reform and Women's Access to Capital: Evidence from India's Hindu Succession Act*, (2010), available at http://documents1.worldbank.org/curated/en/364061468283536849/pdf/WPS5338.pdf.

CONSTITUTIONAL CONVENTIONS AND COURTS: HOW CAN CONSTITUTIONAL CONVENTIONS BE ENFORCED IN INDIA?

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ABSTRACT

In recent decades, the judiciary has been forced to grapple with questions relating to constitutional conventions. The breaching of established conventions by constitutional actors has raised questions of whether the judiciary can enforce conventions to make constitutional actors comply with the conventions attached to their constitutional role. The Supreme Court of India has indeed engaged in, and has been willing to engage in the enforcement of constitutional conventions on numerous occasions. In this context, the paper attempts to clarify and restrict the power that the Supreme Court should exercise when attempting to enforce a constitutional convention. The paper proposes a three-step mechanism to enforce conventions in a manner that upholds the separation of powers. The paper emphasises upon the various risks that the enforcement of conventions could pose while also providing the judiciary with an effective tool to keep the government in check.

I. Introduction

The written constitution cannot provide for every eventuality[1]. Constitutional conventions are vital as they fill up the gaps and silences in the constitution[2]. Constitutional conventions are commonly accepted as a set of uncodified norms, that can be said to have been sanctified by a tradition of practice[3]. The object and purpose of constitutional conventions ensure that the legal framework upholds constitutional morality and values[4]. Thus, underlying constitutional conventions are values of democracy such as parliamentary sovereignty, executive accountability, responsible government, and separation of powers[5]. Constitutional Actors adhere to these conventions out of a sense of political duty that they ought to enforce such conventions owing to principled reasons[6]. Additionally, they conform to conventions due to their fear of the political cost and criticism attached to deviation from conventions which are established social rules[7].

[1] I. JENNINGS, THE LAW AND THE CONSTITUTION (5th,1959), p. 136.
[2] A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION CXLI (8th ed., 1915)
[3] G. MARSHALL, CONSTITUTIONAL CONVENTIONS: THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY (1st ed., 1984), p. 210.
[4] *Id*.
[5] O. Hood Phillips. *Constitutional Conventions: Dicey's Predecessors*, The Modern Law Review 29(2)(1966), 137-48
[6] *Id*.
[7] *Id*.

Traditionally, academic discourse concerning conventions categorizes them as non-legal social rules[8]. Thus, scholars have widely argued that constitutional conventions are always distinguishable from the law[9]. Scholars typically argue that constitutional conventions are rules not enforced by courts, although they may be recognized by courts in certain instances[10]. Constitutional Conventions are thus widely seen as a body of constitutional or political ethics, having little to no role in the judicial context[11].

Political developments in India in the recent decade show how constitutional actors have recurrently engaged in flouting conventions[12]. Furthermore, the actions of the executive and legislature have often come in conflict with constitutional conventions[13]. These actions have been challenged in the Judiciary, which is increasingly facing questions relating to constitutional conventions[14]. These developments bring to light the importance of re-examining the traditionally advanced arguments that conventions cannot be enforced in courts.

The paper aims to provide a mechanism of how the Judiciary can enforce conventions. The paper is divided into 6 Sections. Section II assesses the Indian Judiciary's past engagement with constitutional conventions. Section III analyses the enforceability of conventions in India. Section. Section IV assess when conventions should be enforced. Section V envisages a mechanism to enforce judicial conventions. Section VI provides concluding remarks.

II. Constitutional Conventions in the Indian Judiciary

Over the years, the Supreme Court has often made significant references to constitutional conventions[15]. Most notably, constitutional conventions have often been employed by judges to interpret constitutional provisions. However, in recent decades, constitutional conventions have also often seen a more central role, with judges often asked make a determination upon the scope and the content of constitutional conventions[16]. The advent of Judicial Review has caused the

[8]A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION CXLI (8th ed., 1915); G.S. WADE, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION(1st ed. 1885); I. JENNINGS, THE LAW AND THE CONSTITUTION (5th,1959), p. 136; O. Hood Phillips; *Constitutional Conventions: Dicey's Predecessors*, The Modern Law Review 29(2)(1966), 137-48; Colin Munro, *Laws and Conventions Distinguished*, L. Q. Rev. 218(1), 91; Nathan Barber, *Law and Constitutional Conven*tions, 125 L. Q. Rev. 294 (2009) 302.

[9]Colin Munro, *Laws and Conventions Distinguished*, L. Q. Rev. 218(1), 91.

[10]*Id*.

[11]Joseph Jaconelli. *Do Constitutional Conventions Bind* ?, The Cambridge Law Journal 64(1) (2005), 149-76.

[12]Gautam Bhatia, *judicial Supremacy amid the Breakdown of Constitutional Conventions: What the Karnataka Controversy Tells Us about our Parliamentary Democracy,* July 16, 2019, available at https://indconlawphil.wordpress.com /2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/; Gautam Bhatia, *How the Constitution was betrayed*, November 26, 2019, available at https://www.hindustantimes.com/columns/how-the-constitution-was-betrayed/story-MCweF1LKbQZGuQwQ5rQK7N.html.; Rakhahari Chatterji, *Recurring controversy about Governor's role in state politics*, June 6, 2020, available at https://www.orfonline.org/expert-speak/recurring-controversy-governor-role-state-politics-67433/.

[13]*Id*.

[14] Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1; Madras Bar Association v. Union of India, 2015 S.C. 1571; Consumer Education Research Society v. Union of India, 9 S.C.C. 648; K. Lakshminarayanan v. Union of India, LNIND 2018 SC 635.

[15]A. G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS (1st ed.,2006); U.N.R. Rao v.Smt. Indira Gandhi, (1971) 2 SCC 63.

[16]Govt. of NCT of Delhi v. Union of India, 2019 SCC OnLine SC 193

judiciary to actively engage with constitutional conventions. Courts have also begun witnessing constitutional questions relating to the enforcement of certain constitutional conventions[17].

The traditional perspective on the limited role of conventions in the judiciary is becoming increasingly inconsistent with judicial practice in India. Arguably, the *Second Judges Case* provided the most significant impetus to such a development[18]. The judgement of Justice Kuldip Singh laid the foundation for much of the subsequent judicial involvement with constitutional conventions.

In the *Second Judges Case*, the Judiciary used constitutional conventions to 'read into' the provision of the constitution relating to judicial appointments[19]. Justice Singh held the judicial primacy in the appointment process to be a firmly established convention[20]. He argues that constitutional actors must follow such conventions as binding precedent[21]. Thus, Justice Singh concludes that an established convention becomes part of the constitutional law of the land[22]. Therefore, the judgement upholds the collegium system of appointments.

The judgement is indeed radical, and not free from lacunae. However, what is significant to note is the change in judicial attitudes, from merely employing constitutional conventions in the act of reasoning and interpretation[23], to actively enforcing them. Thus, the judicial practice is that once a court finds a constitutional convention, they tend to enforce it. This attitude continued with the *NJAC* Case[24] as well as with the *National Tax Tribunal* Case[25]. These, and other cases will be assessed subsequently.

III. An assessment of the enforceability of constitutional conventions in India

There exists significant debate surrounding the status of conventions as laws[26]. Justice Singh argued that conventions enjoy the same status as a law[27]. Thus, he argued that conventions in India have indeed crystallized to the status of laws[28]. However, such a determination would necessarily depend upon the jurisprudential lens used to assess the question. Although Justice Singh's determination of the 'crystallization' of conventions into law in India is flawed due to the lack of any preceding practice of enforcing conventions, the judiciary seems to have adopted

[17] Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1; Madras Bar Association v. Union of India, 2015 S.C. 1571; Consumer Education Research Society v. Union of India, 9 S.C.C. 648.
[18] Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] A. G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS (1st ed.,2006).
[24] Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1.
[25] Madras Bar Association v. Union of India, 2015 S.C. 1571.
[26] T.R. S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM (1st ed., 1995), p. 253; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions. Oxford University Commonwealth Law Journal,* 11(1), 29–51*;* T. R. S. Allan "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case." *The Cambridge Law Journal* 45(2), 305-20; Joseph Jaconelli. *Do Constitutional Conventions Bind*?, The Cambridge Law Journal 64(1) (2005), 149-76; Colin Munro, *Laws and Conventions Distinguished*, L. Q. Rev. 218(1), 91.
[27] Supreme Court Advocates on Record Association v. Union of India (1993) 4 SCC 441, ¶ 532.
[28] *Id*.

Justice Singh's views of enforcing conventions in the same way as laws[29]. Indeed, a growing body of case law suggests that judges are increasingly willing to enforce conventions, viewing the same as a constitutional duty[30].Thus, to argue that conventions must not be treated as laws by the Judiciary may have limited practical implication owing to recent judicial practice in India.

This development indicates that the judiciary is increasingly willing to uphold constitutional values and morality by enforcing conventions. A situation of judicial intervention to ensure that constitutional actors follow established conventions is not ideal. However, in a political climate where conventions are often flouted, the court is often forced to intervene. Through the judicial review of the actions of constitutional actors, the courts can uphold the core essence of a convention, and thus, the constitution. Indeed, the Indian judiciary treats the infringement of an established convention to be unconstitutional. The Court has indeed adopted this framework in recent cases.

However, this pattern also presents significant dangers. Excessive engagement with constitutional conventions could blur the separation of powers, while threatening parliamentary supremacy. Thus, it is extremely important to clarify and restrict the powers that the Judiciary has seemingly given to itself with respect to enforcing conventions. This caveat forms the basis of the subsequent sections of the paper which assesses how the judiciary should engage with conventions in the future.

IV. When should conventions be enforced?

The enforcement of certain conventions often involves political issues and implications. It has been argued that in the interests of separation of powers, the Judiciary should not engage with conventions due to their inherently political and social nature[31]. These arguments also cite the political questions doctrine, which is modelled on a similar premise[32].

However, this argument cannot promote a blanket prohibition on the enforceability of all conventions. Thus, the question courts should ask should not be whether the issue arises in political circumstances, but whether the issue poses a legal question. This would ensure that the government is not given unencumbered power to trample the constitutional values that conventions protect by hiding behind the garb of politics. Thus, the determination of justiciability with regard to the enforcement of convention should depend upon the specific issues of each case[33].

The enforcement of conventions must be subjected to important restrictions. Firstly, through it conduct, the judiciary must uphold the separation of powers and constitutional supremacy. Secondly, the court should ensure that they do not act in a manner that inhibits the intrinsic flexibility and adaptiveness of conventions. Such actions could defeat the very essence

[29]A. G. NOORANI, CONSTITUTIONAL QUESTIONS AND CITIZENS' RIGHTS (1st ed.,2006).
[30] Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1; Madras Bar Association v. Union of India, 2015 S.C. 1571; Consumer Education Research Society v. Union of India, 9 S.C.C. 648; K. Lakshminarayanan v. Union of India, LNIND 2018 SC 635.
[31]Colin Munro, *Laws and Conventions Distinguished*, L. Q. Rev. 218(1), 91; Nathan Barber, *Law and Constitutional Conven*tions, 125 L. Q. Rev. 294 (2009) 302.
[32]*Id*.
[33]T.R. S. ALLAN, LAW, LIBERTY, AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM (1st ed., 1995), p. 253.

of the convention the court is trying to protect. Thirdly, the court must ensure that it does not involve itself in the day-to-day political affairs, which could have dangerous implications on judicial independence and separation of powers. Fourth, the Judiciary should only implement certain conventions, as would be assessed below. The following section envisages a mechanism of enforcement of conventions that is built upon these principles.

V. The Process of Enforcement of Constitutional Conventions.

The previous sections conclude that Judicial conventions have significant scope for enforcement by Indian courts. This section envisages a mechanism to address the process of enforcement of constitutional conventions in a consistent manner that upholds the separation of powers while aiming to protect the constitutional values embodied in conventions.

The enforcement of Constitutional Conventions should be subjected to a three-step process. The first step is the recognition of a Convention. if a Convention indeed exists, then the second step would be for the court to engage in assessing the nature of such Convention to determine whether such Convention is of a nature that should be enforced. The third and final step would be the actual implementation of the convention, which could be undertaken through different means.

1. THE RECOGNITION OF A CONVENTION

The first step towards judicial involvement with a convention is recognition. Recognition is a fact-finding activity, where the court engages with the convention's existence or scope on a factual basis[34]. Thus, if the convention's scope or existence is of an uncontroversial or obvious nature, the court would take judicial notice of the convention. If there exist questions of fact relating to the existence of the convention itself, then the court will consider evidence to determine whether the convention in question indeed exists.

A test for assessing the existence of a convention has been expounded by Sir Ivor Jennings. This test has been accepted by the Indian Judiciary itself[35]. According to the test, three questions have to be assessed. The first part relates to the precedents with respect to the convention in question. The second part relates to whether the constitutional actors engaging in such precedent believe what they were bound by a rule. The third part determines whether there is a reason for such a rule[36]. Thus, according to the 'Jenning's test' a convention would exist when there exist precedents amounting to more than mere practice[37]. Thus, in the case of a convention, the constitutional actors are under a belief that they have to respect and reinforce such precedents[38]. This is backed by a principled reason that has sustained this conventional practice[39].

[34] Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions. Oxford University Commonwealth Law Journal*, 11(1), 29–51; Farrah Ahmed, Richard Albert, Adam Perry, *Enforcing Constitutional Conventions*, International Journal of Constitutional Law 17 (4), 1146–65.

[35] Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1; Madras Bar Association v. Union of India, 2015 S.C. 1571; Consumer Education Research Society v. Union of India, 9 S.C.C. 648; K. Lakshminarayanan v. Union of India, LNIND 2018 SC 635.

[36] I. JENNINGS, THE LAW AND THE CONSTITUTION (5th,1959), p. 138.

[37] *Id*., p. 139.

[38] *Id*.

[39] *Id*., p. 136.

Thus, if the court determines that the Jennings test is fulfilled, it would conclude that a valid constitutional convention exists. The Court could then move towards the next step of enforcement. If the Court determines that there exists no constitutional convention based on the Jennings test, the question of enforcement would not arise. Indeed, the Indian Judiciary has adopted a similar framework. In the *Lakshminaranan* Case, the court engaged in an examination of whether requirement of the concurrence of the Chief Minister is required for nominations of to the legislative assembly[40]. More Significantly, in the *Consumer Education Research Society* Case, the validity of the act was challenged on grounds of violation of a convention[41]. The Court upheld the validity of the act, but only because the alleged practice did not amount to a constitutional convention, but only to a parliamentary procedure[42]. Thus, in both these cases, the court first engaged in a determination of whether the constitutional convention exists only to conclude no enforcement is possible as the practice is not a valid constitutional convention. This presents a significant shift in judicial attitudes towards enforcing valid constitutional conventions when infringed upon.

2. THE ASSESSMENT OF THE NATURE OF THE CONVENTION

Conventions can, and should, be distinguished based upon their nature. This is especially true when confronting the question of their enforcement. Conventions can broadly be categorized as follows.

1.1 Internal conventions of Institutions

Internal conventions of institutions regulate the internal affairs of a governing institution[43]. In India the process of nominating the speaker of the Lok Sabha could be seen as one such convention. Here, the speaker is nominated by the majority party after informal consultations with the leaders of the other parties in the parliament[44]. Judicial enforcement of such conventions would necessarily compromise on the separation of powers between different organs of government. This would cause the judiciary to overreach by interfering in the internal matters of another organ of government. Indeed, it would necessarily compromise on the ability of the organ of government to fulfil the role it is provided by the constitution. Thus, the Judiciary should not enforce such conventions.

1.2 Conventions of accountability

Conventions of Accountability make a political institution or a constitutional actor accountable to another political institution or actor[45]. The essence of such conventions is a form of political accountability; accountability by political actors through political means. Thus, legally enforcing conventions of accountability would entail judges, and not democratic

[40] K. Lakshminarayanan v. Union of India, LNIND 2018 SC 635.
[41] Consumer Education Research Society v. Union of India, 9 S.C.C. 648.
[42] *Id*.
[43] Andrew Heard, *Recognizing the Variety among Constitutional Conventions*, Canadian Journal of Political Science / Revue Canadienne De Science Politique 22(1) (1989), 63-81.
[44] Role of the Speaker of Lok Sabha, office of the speaker Lok Sabha, Available at https://speakerloksabha.nic.in/roleofthespeaker.asp.
[45] Andrew Heard, *Recognizing the Variety among Constitutional Conventions*, Canadian Journal of Political Science / Revue Canadienne De Science Politique 22(1) (1989), 63-81.

representatives, holding the government to account[46]. This would defeat the purpose behind such conventions in the first place.

1.3 Conventions of power-shifting

Conventions of power-shifting aim to transfer powers granted in a constitution from one person to another[47]. Thus, power-shifting conventions grant *de facto* authority to an actor who has not been granted *de jure* authority. Such conventions reflect the collective judgement of constitutional actors that the legitimate exercise of power would be with another actor, who perhaps enjoys greater accountability or expertise[48]. Thus, these conversations reflect the legitimate allocation of power according to constitutional actors themselves. When an actor breaches a power-shifting convention, the actor breaches a standard established by his own constitutional community[49].

Thus, enforcement of power shifting convention would in fact uphold the legitimate allocation constitutional power[50]. Furthermore, unlike accountability conventions, the enforcement would not defeat the purpose behind the convention. It would instead uphold its purpose, which is to shift power to another authority that has not been conferred *de jure* authority. Similarly, it would not undermine intra-institutional conventions as it does not relate to the internal workings of an institution. The Supreme Court's enforcement of the collegium can indeed be seen as an implementation of a power-shifting convention.

Thus, this section presents a significant finding. Not all constitutional conventions are of a nature that should be enforced. In certain cases, the enforcement of conventions may indeed defeat rather than protect constitutional values. This is a significant restriction on the judiciary's powers of enforcing conventions. In essence, the Judiciary should only enforce power-shifting conventions[51].

3. THE TYPES OF ENFORCEMENT OF CONVENTIONS

The final step towards the enforcement of a convention is the means that the Judiciary will employ to enforce the convention. This enforcement must be guided by two considerations. The first is that it may be determined on the basis of the willingness of the actor who breached the convention to adhere to the court's decision. The second is that the intervention must be one that is the least intrusive

[46]Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787–806.
[47]Andrew Heard, *Recognizing the Variety among Constitutional Conventions*, Canadian Journal of Political Science / Revue Canadienne De Science Politique 22(1) (1989), 63-81.
[48]Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787–806.
[49]*Id*.
[50]*Id*.
[51]*Id*.

1.1 Declaration

A Convention can be enforced by declaring that a constitutional actor's conduct violates a rule[52]. Thus, after a judicial declaration, the constitutional actor would, in an ideal scenario, alter their behavior or make amends for the violation[53]. Although a declaration is a mild remedy as it neither leads to an invalidation of the act or any damages, it could be an effective remedy[54]. This is due to the public nature of constitutional actors and such proceedings, as well as due to the very essence of conventions as social rules. In the very least, it ensures that violations of established conventions are met with a formal legal consequence. Thus, a declaration of illegality of conduct is a possible means of judicial enforcement for a convention. Significantly, the landmark *patriation reference* in Canada can be in fact be seen as a declaration, post which the constitutional actors in question altered their behavior to conform to the convention[55].

1.2 Nullification

A convention can be enforced through nullification. Through nullification, the court can enforce a convention by holding an act that is contrary to the convention in question as invalid[56]. Thus, Courts can hold legislation inconsistent with conventions as invalid. Indeed, the Indian judiciary itself has quashed executive acts that are inconsistent with Constitutional conventions.

In *the National Tax Tribunal Case*, The Supreme Court assessed the National Tax Tribunal Act's validity[57]. One of the grounds of assessment was its compliance with the convention that requires that upon the constitution of a tribunal or a court to substitute another, the Security of tenure for the judges as well as the appointment must be the same as the court that is sought to be substituted[58]. Thus, as this convention was contravened by the Act, the Court nullified the same.

In the *NJAC* Case, the Supreme Court of India quashed the 99th Constitutional amendment[59]. This amendment established the NJAC, which sought to establish a commission to appoint High Court and Supreme Court Judges[60]. This commission sought to replace the collegium system. However, with a 4-1 Majority, the Supreme Court held the Judicial primacy of the Chief Justice, established the Collegium system as a Constitutional Convention[61]. Thus, the

[52] Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions. Oxford University Commonwealth Law Journal*, 11(1), 29–51*;* T. R. S. Allan "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case." *The Cambridge Law Journal* 45(2), 305-20

[53]Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787–806.

[54]Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787–806; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions. Oxford University Commonwealth Law Journal*, 11(1), 29–51.

[55]Patriation Reference, [1981] 1 S.C.R. 753; Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787–806.

[56]Farrah Ahmed, Richard Albert, Adam Perry, *Judging Constitutional Conventions*, International Journal of Constitutional Law 17 (3): 787–806; Leonid Sirota, *Towards a Jurisprudence of Constitutional Conventions. Oxford University Commonwealth Law Journal*, 11(1), 29–51.

[57]Madras Bar Association v. Union of India, 2015 S.C. 1571.

[58]*Id*.

[59] Supreme Court Advocates on Record Association v. Union of India (2015) 11 Scale 1.

[60]*Id*.

[61]*Id*.

judgement argued that such Judicial primacy was part of the basic structure of the constitution[62]. Accordingly, it 'nullified' the amendment to the constitution as it contravened an established convention.[63] Whether the Collegium system indeed formed a valid constitutional convention is a question relating to recognition, as outlined above. What is important to note is the Supreme Court's position of nullifying a procedurally compliant constitutional amendment based upon its contravention with a convention. This indicates a significant development in the enforcement of conventions.

1.3 Political remedies

The Judiciary could often be faced with a situation where legal solutions are neither ideal, nor effective. Thus, in a case where there exists significant bad faith on the part of a constitutional actor through the flouting a convention, the court may employ political remedies. The Supreme Court's decisions in the controversy in Karnataka in 2018, where it recommended a floor test could be seen as a model for such cases[64]. Thus, the court was able to provide a remedy which found a solution to the crisis through the existing democratic process, by making it difficult for constitutional actors to violate conventions[65].

In this case, the court struck the fine balance between respecting the sovereignty of the parliament and ensuring that constitutional values are upheld. Indeed, subject to the caveats mentioned above, political remedies can be an effective means of upholding conventions.

VI. CONCLUDING REMARKS

The importance of conventions in the constitutional framework of India cannot be understated. Conventions are built upon the values and principles that the judiciary otherwise seeks to protect. The traditional perspective on constitutional conventions emphasises on its non-legal and unenforceable nature. However, recent judicial practice indicates that the Indian Judiciary has indeed engaged in a trend of enforcing conventions. The paper thus envisages a mechanism that subjects this enforcement to certain important restrictions. It argues that after a convention has been recognized, only power-shifting conventions should be enforced by courts. This enforcement can be through a declaration, nullification and notably through political solutions, which the judiciary has successfully employed in the past. The enforcement of conventions in India is indeed path-breaking innovation. In the current political climate, it could provide a important power to the judiciary to keep the government in check.

[62] *Id*.
[63] *Id*.
[64] Gautam Bhatia, *judicial Supremacy amid the Breakdown of Constitutional Conventions: What the Karnataka Controversy Tells Us about our Parliamentary Democracy*, July 16, 2019, available at https://indconlawphil.wordpress.com/2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/
[65] Gautam Bhatia, *judicial Supremacy amid the Breakdown of Constitutional Conventions: What the Karnataka Controversy Tells Us about our Parliamentary Democracy*, July 16, 2019, available at https://indconlawphil.wordpress.com/2019/07/16/judicial-supremacy-amid-the-breakdown-of-constitutional-conventions-what-the-karnataka-controversy-tells-us-about-our-parliamentary-democracy/

SARKARIACOMMISSIONREPORT

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ABSTRACT

This research paper provides the overview of the Sarkaria Commission Report which is constituted in 1988. It is the most leading topic to examine the central- state relationships. This paper stresses on why the Sarkaria Commission Report is constituted and what are the reactions for it when it was constituted. This paper also focuses on how the collection of basic information is done. It also points out on the key arguments that are shown by the State Government. It concludes with the significance or the importance of the Sarkaria Commission Report, and also why some of the suggestions are still not implemented yet because of structural reasons.

Keywords- Centre- State relationship, Recommendations, Collection of Basic Information, Government, Framework of Constitution.

I. INTRODUCTION

As we know that government focuses on setting up of commissions for the well being of our country. The same way, Sarkaria commission was setup to give their report. Basically saying, in the june, 1983 the commission was setup by central government of India[1]. The Sarkaria Commission Report's main motive and purpose was to study or to check the central and state government relations on various platforms, the balancing of power between centre and state governments and to propose some amendments which are based on Indian Constitution. The Sarkaria commission submitted its report on 27 October, 1988 to Rajiv Gandhi. It (SARKARIA COMMISSION REPORT) was made on the name of Justice Ranjit Singh Sarkaria who is basically the Chief Chairman of the commission, and one of the judges of the Supreme Court of India (Retired). The committee also includes other members naming–Mr. Balaram Sivaraman (as Cabinet Secretary), Mr. S.R. Sen.[2] (who was former Executive Director of International Bank for Reconstruction and Development (IBRD) and Mr. Rama Subramaniam (Secretary General).

The principal drafters of the Indian Constitution were exceptionally stressed and they gave a valiant effort to guarantee about the solidarity and trustworthiness of the country. They were additionally very much aware about the division and disunity which was winning that time inside the country. These risks during that season of freedom can be defeated simply by a solid Central Government. In this manner, the drafters of the Constitution made Center to assume its significant part. At a similar mark of time, they guaranteed for the foundation of co-employable government framework. The connection between the Center and States has not generally been

[1]*Different commissions and their recommendations*, BYJU'S , available athttps://byjus.com/free-ias-prep/different-commissions-recommendations/
[2]*Sarkaria Commission*, WIKIPEDIA, available at https://en.wikipedia.org/wiki/Sarkaria_Commission

warm which has been demonstrated through the activity of the Indian league during the previous 5 years.

The Indian government delegates the Administrative Reform Committee and different boards every now and then to control the connection between the middle and the state. The Sarkaria commission was appointed by Union Government to propose and recommend a few available resources to improve the Center-State relations. The interest for self-rule for example self-rule led to the foundation of Sarkaria Commission in 1983 which was approached to study, audit and overhaul existing arrangements between the Centers and the States in all works and give suitable changes and measures.

Akali Dal then, gave a speech which was in favor of demanding and asking for Punjab to provide more powers in order to occupy an important position in the commission's investigations. The Central government also agreed and they referred the document to this commission in further terms of the Punjab agreement between Mr. Rajiv Gandhi and Saint Harchand Singh Longowal.

The opposition party strongly criticized the work of the committee and pointed out in its recommendation that the committee "will take into account social and economic developments in recent years and give prior consideration to the scheme and structure of the committee. The founding fathers have set the goals to defend independence and safeguard the unity and integrity of the country which importance for promoting the welfare of the people."

Also, due to the need to overcome the Indira Gandhi's crisis system, they assembled them in various circumstance. Further, Indira Gandhi's Congress party got back with an outright lion's share and the developments for state self-governance gradually falls back behind the scenes. In present situation, there is no development for state self-governance like past occasions, albeit the battle to get more monetary assets for the state actually proceeds.

II. MEANING

Sarkaria Commission Report means a report which is made to examine the central and state relationships. It consists of XXII chapters and 247 specific recommendations. It is said basically that the Commission suggested change to whatever extent; the government will not implement the recommendations.

1. FORMULATION OF THE SARKARIA COMMISSION REPORT

The committee was formally established in accordance with the instructions in Circular IV/11017/1/83-CSR issued by the Government of India and the Ministry of Home Affairs on June 9, 1983. Then two more members joined the committee, namely Mr. B. Sivaraman and Mr. S. R. Sen. appointed on July 7, 1983 and July 27, 1983. The details of the committee contained in the communication are given below:

i. Initially, This Committee will investigate and audit the working and elements of the current arrangements between the Union and States in matter of forces, capacities and duties in different fields and furthermore propose such changes and amendments or different measures that may should be taken.

ii. Secondly, while surveying and investigating the activity of the current arrangements between the Union and States and making a few suggestions according to the necessary changes and measures.

iii. Thirdly, The Committee will consider the social and economic changes which have occurred over the years. The founding fathers used to protect the independence and ensure the unity and integrity of the country which secure prime importance for promoting the well-being of the people.

iv. The term "arrangements", used twice in connection with “the Union and the States", having larger scope than the word "relations" in Part XI of the Constitution. In addition, it includes all intergovernmental relations derived from constitutional or legal provisions or administrative practices and conventions.

2. SOME INITIAL PROBLEMS

In the early stage, the committee encountered many difficulties and troubles which obstruct the rapid and effective operation of the committee and which were mentioned as:-

a) There are reasonable delays in the appointing of staff and providing premises and facilities. The committee was not able to concentrate on fulfilling its tasks until February, 1984.

b) Second, due to the frequent transfer of the secretary of the committee, the work was delayed and interrupted. During the term of the committee, upto 3 secretaries are appointed people.

c) Further many complexities were experienced at various levels promptly with suitable persons during filling up posts.

3. GATHERING OF BASIC IMFORMATION

1. The 1sttask of the Commission was to gather essential data. For this, some fundamental measures have been taken. From the start, a declaration was given to promote in all significant papers of India, welcoming from every intrigued individual, experts, associations and different sources, data and commercials. Smoothening the distinguishing proof of issues, issues and troubles acknowledged during the execution of arrangements among Union and State in the authoritative, regulatory, tax assessment, financial and some other fields.

2. The President semi-officially asked 90 former Prime Ministers and other important personalities from different States requested such information. Relevant Research and data which was collected from various publications, including public seminars, debates and reports from former committees, Studies and researches. The decisions were given by the Supreme Court and High Courts on various aspects of the relationship between Union and state relations. A message was also sent to the state wide government requesting information on specific difficulties.

3. In January 1984, a questionnaire was compiled, including 109 questions, divided into 7 parts, as follows: -[3]

1) Introduction part i.e. Introductory,
2) Legislative Relations,
3) The Role of Governor,
4) Financial Relations,
5) Administrative Relations,
6) Economic and Social Plans and various palms including Industry,
7) Food and Civil Supplies,
8) Trade and Commerce,
9) Agriculture,
10) Education and Inter-Governmental Coordination

6800 English questionnaires and 500 Hindi questionnaires were distributed to:

- Parliament members,
- State Legislative members,
- Governors and ex-Governors,
- Chief Ministers,
- ex-Chief Ministers,
- Institutions,
- Journalists,
- Vice-Chancellors of Universities,
- Jurists,
- Statesmen,
- Economists,
- Trade Unions,
- present Members of Constituent Assembly
- And exceptional political parties.

Also Copies of the Questionnaire had been additionally dispatched to the Union Government and its Heads of Departments.

Supplementary Questionnaires- containing a set of approximately 10 or 12 questions about technical issues, have been circulated to the professionals involved together with:-

[3]*Download Sarkaria Commission Report PDF on Centre-State Relations*, SMARTPREP.IN 3(para 3), (March 14, 2017), available at https://smartprep.in/2017/03/download-sarkaria-commission-report-pdf-center-state-relations/

a) Central Government Ministries,

b) State Governments,

c) eminent Jurists,

d) former Governors,

e) Prominent Statesmen and others.

4. The Constitution has been in operation for the remaining37 years. The Administrative Reforms Commission (1966-70) made overview of the executive elements of Union-State relations. Many matters had passed on since then in the Union-State relations. In the awakening of social, monetary and political trends over the years many new trends, tensions and problems have arisen.

5. The policy of confrontation threatens the consensus and cooperation necessary for the normal functioning of union-state relations. From this perspective, after careful planning and wise scrutiny, the Prime Minister called for a new comprehensive review of agreements between the alliance and the state in various fields.

6. On March 24, 1983, he reported in Parliament the proposition to delegate a council led by R. S. Sarkaria (retired) Judge of the Supreme Court. He said that "The council will audit the current arrangements between the Center and the States and furthermore consider the financial changes that have occurred lately. The significance of public solidarity and solidarity is critical to the advancement of individuals. The prosperity of the organization is of most extreme significance.

7. He also said that the committee" will study the operation of existing agreements between the center and the states and make recommendations for changes to agreements that may be necessary."

III. THE FEATURES OF SARKARIA COMMISSION REPORT

- The Sarkaria Commission stated in its overall report that there is no need to amend or reform the Constitution to give more powers to the states because it already contains provisions that give them territorial freedom.

- This form of arbitrary and unplanned action has caused political suspicion: the committee. Therefore, it is recommended to follow the codification of the governor's rules.

- The committee cited important statements. For instance, the industry case shows how the center slowly occupied 85% of the industry, and the states had sufficients over eignty in the first year after the constitution was established.

- The Central government adopted Article 356 to adopt the state on the grounds that the constitutional mechanism is invalid.

- In addition to this, the committee requested for the codified rules to be incorporated into the Constitution so that violations can be challenged in a court. (In the current situation, the Centre government is not responsible for imposing its rules on states or governors. Any actions allegedly carried out in the process of "exercising and exercising their power)."

- Another specific recommendation of the committee is the recommendation of Article 263 of the Constitution on the establishment of aninter-governmental council.

- The committee was disappointed that the government had not done even 38 years after the Constitution came into force. It is proposed to establisha permanent secretariat and some standing committees to assist the Inter governmental Council to maintain regular contact with the center and the states.

- The committee praised the flexibility of the Indian Constitution compared with the US Constitution in many parts of its report. However, they regret that too many changes have been made to the Constitution, and sometimes they have not even achieved their original goals.

- There is no summary in four volume report. The committee seems to agree that the abstract will be unknowingly relevant under certain circumstances.

- The committee hopes to read the full report and accepted the conclusions appropriately.

IV. CHAPTERIZATION OF SARKARIA COMMISSION REPORT[4]

The report of the Sarkaria Committee contains the following chapters:-

- Chapter 0. Introduction
- Chapter 1. Perspective
- Chapter 2. Legislative Relations
- Chapter 3. Administrative Relations
- Chapter 4. The Role of the Governor
- Chapter 5. Reservation of Bills by Governors for President's consideration and Promulgation of Ordinances
- Chapter 6. Emergency Provisions
- Chapter 7. Deployment of Union Armed Forces in States for Public Order Duties
- Chapter 8. All India Services
- Chapter 9. Inter-Governmental Council
- Chapter 10. Financial Relations

[4]*Sarkaria Commission*, WIKIPEDIA, available at https://en.wikipedia.org/wiki/Sarkaria_Commission

- Chapter 11. Economic and Social Planning
- Chapter 12. Industries
- Chapter 13. Mines and Minerals
- Chapter 14. Agriculture
- Chapter 15. Forests
- Chapter 16. Food and Civil Supplies
- Chapter 17. Inter-State River Water Disputes
- Chapter 18. Trade, Commerce and Inter-course within the Territory of India
- Chapter 19. Mass Media
- Chapter 20. Miscellaneous Matters
- Chapter 21. General Observations
- Chapter 22. Appendices

1. CHAPTER0- INTRODUCTION[5]

In this first chapter, the introduction part is mentioned. It includes the overview of whole the Sarkaria commission report. In this report, the history and making of Sarkaria commission report is mentioned. Further it tells us about how the report is sent to and passed by the central government. It also tells us about the collection of basic information.

2. CHAPTER 1- PERSPECTIVE

This is the second chapter and this chapter gives us a deeper understanding of the report. In addition to the brief introduction above, it is divided into 4 parts. The next section provides a brief historical background.

Section 3 Nature of the Indian union- it deals with the nature of the Indian union.

Section 4 Survey- It contains a survey of the socio-economic and political compulsions, &

*Section 5 Major Issues-*gives an outline of the major issues in Union-State relations.

The nature and characteristics of Indian union, supremacy were also mentioned later in this chapter.

3. CHAPTER II- LEGISLATIVE RELATIONS

This is the third chapter and in this chapter the legislative relations are mentioned. Later, it also talked about the separation of power between the central government and the state. Further going on the criticism of it is also discussed in this chapter. Article 246 and article 254 is also discussed in this. Going on, rule of repugnancy and rule of pith and substance is also described.

[5]Available at interstatecouncil.nic.in/report-of-the-sarkaria-commission/

4. CHAPTER III- ADMINISTRATIVE RELATIONS

It is the 4th Chapter and in this chapter the administrative relations are mentioned in this. The chapter tells us about the discussion which was held while making the report. It describes constitutional provisions and scope. This chapter defines federal supremacy of different countries. In this, scope and also misuse of Article 365 is also mentioned.

5. CHAPTER IV- ROLE OF THE GOVERNOR[6]

In this Chapter, the function of the Governor is described. The role of the Governor has become one of the core issues Union-State relations. In the years after independence, India's political situation has been controlled by one political party. The need of governor office is also discussed in this chapter. Basically this chapter also contains the details that why governor is necessary, what are his powers and functions, how he works etc. topics are discussed.

6. CHAPTER V- RESERVATION OF BILLS BY GOVERNOR FOR PRESIDENT'S CONSIDERATION AND PROMULGATION OF ORDINANCES

This chapter portrays how the governor stores accounts. The constitution makes the governor a necessary piece of the state governing body (according to Article 168). It is said that he can't be an individual from any office of the legislative assembly. To turn into an Act; each Bill passed by the State Legislature should get his endorsement or having been held by him survey to acquire the president's endorsement. On the off chance that both of the Governor or the President, by and large, with holds his endorsement, at that point the Bill won't become law.

7. CHAPTER VI- EMERGENCY PROVISIONS

In this chapter, the emergency provisions are mentioned. Emergency provisions mean those provisions which are used or those steps which are taken for safety and security for India or for any part of it. Both intervention and union support are needed. The union has the responsibility to protect all countries from external aggression and internal destruction.

8. CHAPTER VII- DEPLOYMENT IN UNION ARMED FORCES IN STATES FORPUBLIC ORDER DUTIES

The purpose of this chapter is to study the possibility of improving coordination among Union-State coordination in this vital area and to eliminate some of the most commonm is understandings. Public order refers to the main responsibility of the state government which is the infrastructure necessary for goal i.e. the police, the magistracy, the judiciary, etc. When there is a serious public disorder occurs that endangers the security of the country or the country itself, the situation will also become a problem for the union government. The role of the Union Government is the role of the state government in handling this situation. It is discussed in detail in the chapters "Legislative Relations" and "Emergency Situations".

9. CHAPTER VIII- ALL INDIA SERVIES

In this chapter the union and state services were mentioned. The Constitution responds to the need for effective administration by the federal and state governments to achieve national

[6]Available at https://www.iasabhiyan.com/sarkaria-commission-punchhi-commission/

goals. After entry into force, the center and the provinces are common, and its name has also been changed and renamed to the Indian Administrative Service (IAS) and the Indian Police Service (IPS).Subsequently, the Parliament passed the All India Services Act of 1951. If Rajya Sabha passes at least 2/3 of the approval resolution, the drafters of the constitution will also provide for the establishment of All India Services (AIS) in other regions[7]

10. CHAPTER IX- INTER- GOVERNMENTAL COUNCIL

Article 263 is related to the Intergovernmental Council. The provisions of Article 263 are the same as those of Section 135 of the Government of India Act of 1935. This chapter provides for the establishment of an inter governmental council, whose responsibilities are the same as those of the intergovernmental council under Article 263.

11. CHAPTER X- FINANCIAL RELATIONS

Financial resources play a very important role in all levels of governance systems. If they are not managed in a spirit of understanding and harmony, it will lead to complex problems and difficulties in inter governmental relations.

12. CHAPTER XI- ECONOMIC AND SOCIAL PLANNING

Planning is very important to do any work. Planning in our country has emerged as a comprehensive area of governmental functions. In our country, planning has become an integral part of government functions. The "Guiding Principles of Public Order" states that the state should strive to promote the well-being of the people by ensuring and protecting justice, economic and political in fluence on the social order of all institutions of national life.

13. CHAPTER XII- INDUSTRIES

Industry plays an important role in the development of urbanization. The Industrial Policy Act of 1948 marked an important milestone in the country's industrial development. He recognized the importance of rapid industrial development as an essential part of an economic development strategy. Ammunition, nuclear energy and rail transportation will be the monopoly of the Union. In major industries such as steel, coal, shipbuilding, telephone, telegraph and wireless equipment (excluding radio equipment), the state will be solely responsible for the creation of new departments. Companies need the government to gradually participate.

14. CHAPTER XIII- MINES AND MINERALS

In this chapter, the issues of mines and minerals have been discussed based on the concept of industrialization. Industrialization has led to an increase in demand for natural resources. These resources are not interchangeable and are largely insufficient. There fore, It is a matter of national concern.

[7] *Report of the Sarkaria commission*, INTER-STATE COUNCIL SECRETARIAT, available at http://interstatecouncil.nic.in/report-of-the-sarkaria-commission/

15. CHAPTER XIV- AGRICULTURE

Agriculture isn't unquestionably the biggest area in our economy, it is likewise a perplexing issue. As you probably are aware, the vast majority of our populace straightforwardly or by implication relies upon it. The majority of our mechanical development additionally relies upon advancement of the farming area. Accordingly, the quick advancement of this area a decided way is critical for both to the Union and the States.

16. CHAPTER XV-FORESTS

Forests are important for our wildlife. The national forest policy stipulates that in India's 329 million hectares of geographical area; there should be at least 1/3rdor about 100 million hectares of forest. Facts have proved that in the 3 years from 1972-75;the actual forest area was only 55.5 million hectares. And in 1980-82, the forest are a has been reduced to 46 million hectares. The forest area has decreased by about 9 million hectares in 7 years. This is the most concerned issue of the country.

17. CHAPTER XVI- FOOD AND CIVIL SUPPLIES

In this, the food Regulation by license, permit or otherwise, production or manufacture is discussed. In this chapter the controlling the price of purchase or sale is also mentioned. Prohibited sale, prohibited class or any prohibited matter is also mentioned in this chapter. Charging of fees, required deposited fees, security every aspect is discussed in it.

18. CHAPTER XVII- INTER STATE RIVER WATER DISPUTES

There are many interstate rivers in India. The regulation and development of these rivers and valley waters is still the source of interstate friction. Article 262(1) of the Constitution states: “Parliament may provide for the resolution of disputes or complaints concerning the use, distribution, or control of interstate river water or in-state river water in accordance with the law. In addition, the Parliament approved the River Water Interstate Dispute Act of 1956.

19. CHAPTER XVIII- TRADE,COMMERCE AND INTER-COURSE WITHIN THE TERRITORY OF INDIA

This chapter examines the free progression of exchange, trade, and trade inside and outside worldwide boundaries. This is a significant essential for guaranteeing the financial solidarity, steadiness and flourishing of nations that execute the two-level strategy. Most federal constitutions contain extraordinary arrangements to secure this opportunity. Our Indian Constitution additionally contains arrangements to guarantee the opportunity of business, exchange and relations all through India. In any case, no freedom can be supreme. The restrictions for the benefit of all are characteristic in such opportunity. Limitations on basic interests are innate in freedom, so laws and guidelines are not viewed as limitations on opportunity.

20. CHAPTER XIX- MASS MEDIA

This chapter discusses various topics related to radio and television broadcasting systems. Radio and television are two powerful mass communication systems, usually called mass media.

These systems belong to "wireless transmission and other similar forms of communication" in Entry 31 of the Union List in the Seventh Schedule to the Constitution. Both systems are owned and controlled by the Union.[8]

21. CHAPTER XX- MISCELLANEOUS MATTERS

In this chapter all the matters related to language, union territories, high court judges were discussed. Language issues are an important issue that has caused serious disagreements and resentment between the Union and certain states. Language can be a powerful as well as a difficult depending on how it is handled. According to the method of the decision, after a fierce debate in the Constituent Assembly, a compromise was reached at and the present Part XVII (Official Language) of the Constitution. Therefore, the use of specific languages as the official language or State language and teaching in bilingual or multilingual areas are also common causes of conflict. Further adding on, criticism is also mentioned.

22. CHAPTER XXI- GENERAL OBSERVATIONS

In this chapter general observations were provided. In the previous chapters, we have studied in detail the legislative, administrative and financial provisions of the Constitution, which are vital to the relationship between the Union State. We also analyzed its practical effectiveness in the past 37 years. According to our service description, we basically limit the first few chapters of the report to those topics that have a direct impact. However, in an organically constituted political system; there are many external issues that make the relationship between the Union-State. If we do not solve the most important issues, we will not be able to perform our duties.

23. CHAPTER XXII- APPENDICES

This is the last chapter of the Sarkaria Commission Report. In this chapter public notice is mention. Further going on in this chapter, committee on centre & state relations is also mentioned. In this, lists of individuals & bodies were also mentioned. Further dates were also mentioned in this chapter. Memorandum and replies were also included in it. These above mentioned are the chapters which are included in the Sarkaria commission report. This report is basically based as per constitution of India.

- *S.P Gupta v. President of India (A.I.R. 1982)*

In this case, the SC expounded about such shows. A solitary point of reference is sufficient for foundation of a show. For this situation, the governor himself set a trend by giving the BJP 48 hours to affirm the dominant part. On the off chance that there is no 72-hour prerequisite, the governor may show the current offended party a similar liberality as he gave towards the BJP. Nonetheless, if time-cut off points of 24 hours for demonstrating greater part become point of reference, and the post-political race time of the Indian Treaty is finished.

[8] *Download Sarkaria Commission Report PDF on Centre-State Relations*, SMARTPREP.IN 521 (March 14, 2017) at https://smartprep.in/2017/03/download-sarkaria-commission-report-pdf-center-state-relations/

- *Rameshwar Prasad & Ors. v. Union of India &another (2016)*

It has been mentioned in this case, that the term "by or under the Constitution" which means that the basic need to exercise such power may come from the explicit provisions of the Constitution The Sarkaria Committee's report continues that "according to" the rules and regulations promulgated by the Constitution may also create such a need. The Sarkaria Commission noted that the governor should be exempted from "dual responsibility" to the federal and state. [9]Try to test the role of the governor on some controversial issues, such as appointing the Prime Minister, determining the majority, dissolving the Prime Minister, dissolving the legislative assembly, recommending presidential orders, and retaining bills for President's consideration.

- *Gujarat Mazdoor Sabha v. State of Gujarat (2020)*

In this definition of 'internal disturbance' case it is mentioned in Article 355 of the Constitution. Sarkaria Commission Report on Centre-State Relations says: It is very hard to define the concept of 'internal disturbance' accurately. However, this has also happened in the constitutions of other countries Domestic violence is used in the constitutions of the United States of America and Australia. The drafters of the Indian constitution used the term "internal disturbance" instead of the term. But there is one more thing, the term "internal disturbance" is better than "domestic violence". The scope of the term 'internal disturbance' is bigger than 'domestic violence'.

- *B.P. Singhal v. Union of India & Another*

In this case, the SC refers to the report of the Committee on the Relationship between the Center and the State also refers to there commendations of the National Commission to review the working. The Constitutional bench ruled that although these suggestions are useful, they are still suggestions and will not go beyond the provisions of the Constitution or contribute to the interpretation of Article 156.[10]

The Supreme Court ruled as follows:

- The entire basis of the petition has not been carefully considered.
- Debates in the Constituent Assembly will not produce any enforceable or legitimate rights
- In this sense, the recommendations of the Sarkaria Commission can be classified as necessary constitutional guarantees, but isn't it?
- As the Supreme Court discovered, the implementation of the recommendations should be implemented through constitutional reforms, not through judicial review.

[9]Ziauddin Sherkar, *Engineering a constitutional crisis in Maharashtra*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY (November 22, 2019) is available at https://indconlawphil.wordpress.com/tag/sarkaria-commission/
[10]B.P.Singhal v. UOI & anr., INDIAN KANOON, available at https://indiankanoon.org/doc/1471968/

V. CONCLUSION

At the end we conclude that Sarkaria Commission Report plays an important role. Governor also has to follow these recommendations. The whole Sarkaria commission report consists of various recommendations which are still followed by the higher authority. Basically this report was made to make friendly relations between the state and centre. Further going on this report also mentions the powers duties and responsibilities of authorities.

Language, high court judges etc were handled with this report. This report helps us in every aspect like food, media, agriculture, governor's powers etc.

Chief Minister is also appointed by this report. This report also mentions about the lists which are presented in our constitution. Basically this report work according to the Constitution of India.

HOW THE RIGHT TO PRIVACY IS VIOLATED WHEN PRIVATE AND CONSENSUAL CHATS ON SOCIAL MEDIA APPS ARE CRIMINALISED UNDER SECTIONS 67 AND 67A OF THE IT ACT 2020?

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ABSTRACT

After the Bois Locker Room case, there had been a lot of speculation and discussion as to whether the Right to privacy is violated if the boys are criminalized under the Information and Technology Act 2020 (hereinafter "IT Act")? Whether the IT Act makes a person liable for even private and consensual chats of obscene nature? But the question of 'how the Right to privacy is violated if private and consensual chats are made liable under the IT Act?' remains unanswered. Also, people often mistake to term all the chats on all social media apps "private" in ignorance of the concept of "encryption". The present article attempts to answer the legal question of how the right to privacy is violated if private and consensual chats are made liable under Section 67 and Section 67A of the IT Act.

The article is broadly divided into three heads. In the first head, the writer attempts to prove that one-to-one chat and group chat which are private (encrypted) and consensual should not be punished under Section 67 and Section 67A. In the second head, the article attempts to prove that even when such private and consensual communication is leaked or published illegally, Section 67 and Section 67A will not apply to punish the sender and the recipient. In the third heading, it is shown how such a criminalization under these sections is violative of the right to privacy of the sender and recipient.

Keywords: private, consensual, chat, right to privacy, obscene, sexually explicit.

I. WHAT DO SECTION 67 AND SECTION 67A OF THE IT ACT SAY?

Section 67[1] punishes the transmission or publication of obscene material in electronic medium and Section 67A[2] punishes the transmission or publication of sexually explicit material in an electronic medium. A bare reading of Section 67 and Section 67A shows that all kinds of "transmission" or "publication", consensual or non-consensual, public or private, which are either obscene or sexually explicit are punishable.

These sections do not pose any problem when applied on electronic communications which are of public and private and non-consensual nature. However, these sections become violative of the fundamental right to privacy when applied to private and consensual one-to-one chats and private and consensual group chats.

[1] No.21, Information and Technology Act, 2000
[2] *Id*.

II. PRIVATE AND CONSENSUAL CHATS SHOULD BE BEYOND THE PURVIEW OF SECTION 67 AND SECTION 67A

Different social media apps have different encryption and privacy policies. Some social media apps do not provide encrypted transmission (e.g. Instagram, Snapchat). There are some social media apps which provide for encrypted communication (e.g.Whatsapp[3], Imessage) and some other social media apps provide for optional end-to-end encryption (e.g. Messenger, Allo).[4] Transmission of messages which is completely encrypted from the view of the third party is private in the true sense. This is because they remain between the sender and the recipient only. Encryption prevents chats from being stored on the company's server. Those conversations which are not encrypted cannot be said to be truly private as the intermediary may have access to the chats. For the purpose of this article wherever the term private is used, it means 'a private chat which is encrypted'.

1. ONE TO ONE COMMUNICATION

A private one-to-one chat can be consensual as well as non-consensual. There have been instances where one-to-one chats of non-consensual nature have been brought into light.[5] However, where two people consensually and privately share any material of obscene or sexually explicit nature then they should not be punished under these sections. The reasons are as follows.

Firstly, it is not possible to punish obscene or sexually explicit transmission or publication done on either private one-to-one chat or private group chat because who will bring the matter to light? Since the chat is being done between two consensual people or between consensual group members, nobody will be willing to report it as they are sharing the material within their realm of privacy. Secondly, even if the chats are leaked by somebody illegally without the consent of the people involved in the conversation and if subsequently the people are punished under Section 67 or Section 67A then it will amount to a violation of the right to privacy. The people cannot be punished for exercising their right to privacy especially for an act which wouldn't have come into light but for illegal publication. Also, there may be many such private and consensual one-to-one chats and groups transmitting obscene or sexually explicit material without anyone knowing about them. In other words, to call an act a crime, independent machinery should be in place to know that a crime has occurred. The state cannot depend on a person or wait for a person to leak the private and consensual chats illegally by violating the right to privacy. The state cannot allow an illegal act to punish another illegal act.

Thirdly, in the case of *Nivrutti v. State of Maharashtra*[6], the question before the court was whether communication on Whatsapp will amount to a public place under Section 294 of the Indian Panel Code, 1860 (IPC[7])? The court held that one-to-one communication on Whatsapp does not involve any public platform. Whatsapp has end-to-end encryption and the one-to-one

[3] *End to End encryption*, Whatsapp, https://faq.whatsapp.com/general/security-and-privacy/end-to-end-encryption (Last visited on Sept. 1, 2020)

[4] Kurt Wagner et al., *The apps to use if you want to keep your messages private*, VOX (April 152017EDT) available at https://www.vox.com/2017/4/15/15297316/apps-whatsapp-signal-imessage-hacking-hackers-messages-privacy.

[5] Jayaraj v. State of Kerala(2018) SCC Kerela 9931; Jaykumar Bhagwanrao Gore v. State of Maharshtra (2017) SCC Bom 7283; Adrash Singh v. State of Punjab(2013) SCC P&H 25944

[6] Nivrutti v. State of Maharashtra, (2020) SCC Bom 410

[7] No.45, Indian Penal Code, 1860

messages are truly personal. So, sharing any material of whatever nature between two people on one-to-one chat on Whatsapp doesn't amount to publication.

Even though this case dealt only with Whatsapp chats, this ruling can be extended to other social media apps which have the feature of private chats.

2. GROUP CHATS

The social media apps like Whatsapp and Messenger provide the feature of private groups wherein the communication can be done privately by those who are the members of the group. This means that the non-members will not be able to access the chat of the group. The group is a private group suggesting that a lot of people come together and whatever they share remains amongst them only.

It is hard to digest that even group chats can be called private owing to the number of people in the group which is more than two. The content posted on it will not come into light. A private group is hidden from the eyes of the general public and something which is not present cannot be punished. Unless there is a mechanism to report the existence of such a private and encrypted group which consensually enjoys obscene or sexually explicit material, the law will not be effective as there will be no one to apply the law on. Further, even if a check mechanism is laid down, it will come in direct conflict with the right to privacy.

This can be contrasted with the public chats groups on platforms like Telegram social media app.[8] In public groups, anyone can become its member and the membership is open to anyone. A person doesn't need to contact the admin of the group to be a member of the public group.

The only difference between one-to-one chat and private group chat is that in the former the chat remains private between the two people while in the latter the chat remains private between two or more than two people. However, the number of people cannot change the 'nature' of the chats from private to public chats.

A parallel can be drawn between private and consensual one-to-one chat and private and consensual group communication. Therefore, a private and consensual group communication should not be punished under Section 67 or Section 67A. The reasons are the same as mentioned for one-to-one communication.

In the *Nivrutti*case[9], a different observation was marked by the court concerning group chats. It was held that a group chat involving more than two people "may" be of the nature of a public platform. This means that a private chat group on Whatsapp having two people is also a private chat and will not be a public platform. However, the ruling of the court for group chats involving more than two people cannot be relied upon. Firstly, the case dealt with whether the nature of a group is a public place or not and made it clear that any material shared on a group of two people is not publication. However, Section 67 and Section 67A not only talk about 'publication' but also 'transmission'. A sexually explicit image on a group of two people may

[8]*Telegram FAQ*, Telegram, available athttps://telegram.org/faq#q-what-39s-the-difference-between-groups-and-channels (Last visited on Sept. 1, 2020)
[9]*Supra* note 6.

not amount to publication but it will still be 'transmission' and hence is currently punishable under Section 67A. Secondly, the case had primarily the facts involving one-to-one communication and hence, the court was not concerned with the nature of group chats. Thirdly, the court uses the word "may" when it deals with the nature of group chats. Fourthly the case before the court was concerning Section 294 and not Section 67 or Section 67A.

The above case is good to be relied on when deciding about the nature of one-to-one chats. It is not a convincing authority for the nature of group chats as the court itself is not confirmed about the nature of the group chats.

Therefore, even if these sections do not provide for an express elimination of private and consensual chats from their purview, it has to be interpreted that these sections are limited to public chats or private and non-consensual chats.

III. PUBLICATION OF THE CHATS DOES NOT BRING THE MEMBERS OF THE GROUP WITHIN THE AMBIT OF SECTION 67 AND SECTION 67A

The above arguments show that private and consensual obscene or sexually explicit chats do not come under Section 67 and Section 67A. What if such chats are leaked?

There have been such incidents where a group was formed for some purpose and when unacceptable material was shared on it, it was reported to the concerned authorities by the other disagreeing members of the group.[10]

It is to be noted that these cases had private chat groups but the content that was reported was 'non-consensual'.

1. PRIVATE AND CONSENSUAL GROUP CHATS WHEN LEAKED BY A MEMBER

The following arguments are made using the example of 'private and consensual' group chat. The same arguments will apply *mutatis mutandis* to one-to-one 'private and consensual' communication.

Suppose on a social media app, some people come together and consensually make a private chat group to share obscene or sexually explicit material. If a member of the private chat group publishes the chat along with the obscene or sexually explicit material without the consent of the other members of the group then he 'alone' should be liable not only for violating the right to privacy of the other members of the group but also under Section 67 or Section 67A or both as the case may be. This is because the members shared the material of whatever nature within the realm of their privacy and the other member secretly exposed the privacy. The member who published the material did a wrong act by making obscene or sexually explicit material public.

If such a member publishes only chat without the consent of the other members of the group and not the obscene or sexually explicit material then he may be or may not be liable

[10] *Uttar Pradesh: Journalist charged with defamation after sharing a video of Narendra Modi on WhatsApp*, SCROLL.IN (September 1, 2020), available at https://scroll.in/latest/856572/uttar-pradesh-journalist-charged-with-defamation-after-sharing-a-video-of-narendra-modi-on-whatsapp.

under Section 67 and Section 67A depending on the nature of the chat but will be liable for violating the right to privacy.

2. PRIVATE AND GROUP CHATS WHEN LEAKED BY A NON-MEMBER

Is it possible that a non-member can also leak the conversations of a private group? Yes. Even though the conversations of a private group are accessible only by the members of the group yet there are situations where even an outsider can access the conversation of a private group and leak them. An outsider can be some friend or relative of the member of the group. Such a person may be permitted to use the member's phone or such a person may have the password or the member of the group might himself show his friend the obscene material so that his friend can also enjoy and the like. An outsider can be a hacker who hacks such chat groups with some motive and leaks obscene material or sexually explicit material.

From the above discussion, it appears that if anyone (member or non-member) intrudes into the privacy of the members without their consent and leaks their communication in the form of images or screenshots then the members cannot be punished for being exposed wrongly at the hands of some intruder. Punishing the members of the group for enjoying their right to privacy is not justified. The members never intended to spread obscenity on a large scale and hence made a group of a private nature. The screenshots so leaked should be seen as independent images or pictures containing sexually explicit or obscene material and not as some group's obscene or sexually explicit chat.

IV. SUCH A CRIMINALISATION UNDER SECTION 67 AND SECTION 67A IS VIOLATIVE OF THE RIGHT TO PRIVACY

The right to privacy is a fundamental right under Art. 21[11].[12] It is a right which protects the inner sphere of the individual from interference from both State and non-State actors.[13] The right to privacy in cyberspace, internet, social media, etc. is a form of right emanating from the right to privacy.[14] This means that a person communicating within the realm of privacy on the internet is an exercise of his right to privacy.

As already shown above, encrypted one-to-one chats and encrypted group chats are private in nature and any interference with the privacy of an individual without his consent is violative of right to privacy.

It can be seen that such chats can be used to escape liability as people will not publish obscene material on public platforms and circulate them on such groups. There is indeed a possible misuse of such chat groups in future to commit a crime. But there are always pros and cons of a right decision. This cannot be a basis of making a thing liable by violating a person's right to privacy

[11] Art. 21, THE CONSTITUTION OF INDIA, 1950
[12] K. S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1, 618 (Kaul, J., concurring)
[13] *Id.*, at 634.
[14] K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1 (Kaul, J., concurring)

V. CONCLUSION

The above proposition resolves the conflict between the right to privacy and Section 67 and Section 67A. However, a pertinent question will still appear in the minds of the people. The act of the people of sharing obscene or sexually explicit material on private chat groups or one-to-one chats is socially and morally wrong. These virtual groups, if not stopped, can lead to crimes in the real world. But it must be noted that an act being socially and morally wrong is not sufficient to render it legally wrong. There are many acts which are morally wrong but are not legally wrong. Example, adultery is morally wrong but is not legally wrong.[15]

This conflict can officially be ended either by the judiciary or by introducing an amendment to these sections. Till that day comes, the application of Section 67 and Section 67A to private and consensual online communications should be done as far as possible respecting the right to privacy of the sender and the recipient.

[15] Joseph Shine v. Union of India(2019) 3 SCC 39

WHY WE CAN'T LET HER BE: SOCIO-LEGAL VIEW ON WOMEN, RIGHTS AND HIJAB UNRAVELLING THE DEBATE

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YOU CAN CHOOSE, BUT CAN THEY?

"Love the Life You Live, Live the Life You Love" is a famous quote by Bob Marley and we heard it at a point or other in our life. In a practical sense the quote does not hold good especially for the vulnerable groups of society. They can't live the life they love. The reasons are multidimensional ranging from orthodoxia, religious hurdles made by so-called custodians of religion and how to forget the disparity aspect coupled with patriarchal society still exists in the different parts of the world.[1] We celebrate 8th March as International women's day but what we were celebrating every year the honour killings, sexual harassment against women, denying them their basic human rights and lot more.[2] The list is long if I need to quote as still how women are suffering and violence against women's autonomy.

Men can wear whatever they want but still there is a conundrum on this very aspect as what women should wear. UDHR provides everyone the right to freedom and liberty that also implicitly includes the right to choose to wear clothes as per one's choice.[3] Let's understand the unravelled aspect of *Hijab, Choice and Rights of Women* and how it leads to violation of human rights. Women's voices are constantly being heard in the streets, in the courts, and in Parliament in today's world. Women's problems, on the other hand, are not given priority in society. Let's try answering one question: in 2021 how far have we come in upholding women rights? Today in theory, women are at par with men at least in most countries but how much it translates in practice is a big question. Discrimination against women seems only normal and inequality is deep rooted in our systems that it's difficult to even acknowledge it. The aforesaid aspect is a universal reality and yes, we come a long way from the past as women are leading corporations, countries and a lot of women today have a voice but it's all their rights and many women are still in abeyance of their basic rights.

I. DECODING THE DEBATE: SOCIO LEGAL ASPECT AND VIOLATION OF RIGHTS

They say that life is a sum of choices and if you want a different life make a different choice. These are nice quotes but they do not always measure up in the current world and real

[1] *The age of patriarchy: how an unfashionable idea became a rallying cry for feminism today, The Guardian (2018), available at https://www.theguardian.com/news/2018/jun/22/the-age-of-patriarchy-how-an-unfashionable-idea-became-a-rallying-cry-for-feminism-today (Last visited on April 26, 2021)*

[2] *Blog, R. and India, H. Honor Killing- A major offence in India, Times of India Blog, Times of India (2019), available at https://timesofindia.indiatimes.com/readersblog/know-your-rights/honor-killing-a-major-offence-in-india-5248/ (Last visited on April 25, 2021)*

[3] *What is the Universal Declaration of Human Rights? (2021), available at https://www.amnesty.org.uk/universal-declaration-human-rights-UDHR (Last visited on April 25, 2021)*

life, especially for women. Many choices are forced and they can't choose how to live, how to dress, what to wear and many more. The best aspect can be taken into consideration is the right to choose what women can wear. A lot of us have freedom that we want. A lot of us still do not have that freedom and liberty in real life. One piece of clothing that best sums up the debate (as an illustration) choice of clothing is Hijab. It is perhaps the most controversial piece of clothing in instant time. It is imposed on many women as a compulsion while some adopt it voluntarily, some wear it all the time, some wear it during prayer, some wear it as a cultural identity and some are forced to wear it because it is a norm in their family. There are some questions that need an urgent answer and to unveil whether the rights of women are really violated or it is just a fiasco. We need to know that Is Hijab is mandatory in Islam or it is just a product of political Islam or it is only a cultural identity that is not compulsion or Is it a symbol of devotion or symbol of oppression. The aforesaid are some of the important questions that give you an insight about the clothing of Hijab and why there is always a difference of opinions in a stalwart manner on matters of Hijab and choice of women. It is also pertinent to take a note that there is a right to practice religion to each one of us and many Muslim women wears Hijab as a practice in their religion.[4] The aspect here is not about banning Hijab or something one those lines, the bigger picture here is Hijab mandatory in Islam and can't women choose what they want to wear.

II. WHAT HOLY QURAN SAYS?

Before dwelling into the debate of women, Hijab, Choice and rights it is imperative to know what Hijab is and a clear understanding of the word Hijab. The word appears at least 8 times in the Holy Quran which is the guiding force for Muslims in religious ways and personal laws. The reference to the word Hijab provided in the Quran in different verses each time refers to the meaning as partition, barrier or a curtain. The concept is spiritual and not sartorial. Islam has strongly emphasized the concept of decency and modesty and dress code is a part of overall teaching provided in Quran. It is to be noted that in Chapter 24 known as an-Nur (the light), in verse 30 and 31 prescribe the dressing sense. The Hijab is a concept that upholds decency, morality and modesty in the interaction with opposite sex. According to the Quran it is a concept that is applicable to both *men and women*. The general idea and core principle behind incorporation of Hijab in Islam is that all Muslim should behaves modestly, dressed decently, cover their private parts and avoid sexual exploration irrespective of their genders.

The aforesaid is what Quran says but actually vast majority of Muslim society believes that these rules are only applicable to women. This fatal ignorance or misunderstanding largely stems from the deep-rooted problem of society that is patriarchy. Look around the historical texts, religious texts, traditional versus other forms of intellectual texts you will mainly find that rules and interpretations are dictated by individuals who always happened to be male. Ranging from scholars, intellectuals, clerics, persists all men and projecting themselves as custodian of Islamic values and guardian of female modesty.

When the holy Quran provided the Hijab for both the Men and women why there is a disparity here and moreover it is just a spiritual concept that promotes the teachings of Allah by wearing a dress code. We know that society makes law and with changing times we have seen

[4] *Discrimination Against Muslim Women - Fact Sheet (2010), available at https://www.aclu.org/other/discrimination-against-muslim-women-fact-sheet (Last visited on April 25, 2021).*

many laws, customs and religious practices were abolished as they were violating one of the most cherished rights of individuals in one way or another. It is absolutely unreasonable to force the Muslim women to wear Hijab against their choice. To wear or not to wear Hijab is not a question but the notion of consent, choice and rights should not be superseded in the name of religion.

III. WEARING HIJAB: NOT AN ISLAMIC DUTY?

We need to see that most so-called custodians of Islamic values are a group that originated from the roots of patriarchy and hence most of them have cherry picked Islamic verses from Quran for justifying their narrative but sadly they forgot that verses of Quran are not only for women but also for them. These discourses argue that Hijab and headscarf are a barrier for women because they confine her freedom and feminism. There is a need to understand aspects of choice and compulsion while analysing the rights to choose what they should wear and what not. Hijab is imposed on many but freely adopted by few. Having said that literature on Hijab is much denser and more diverse, there are some Islamic scholars who say that wearing a Hijab is not an Islamic duty. Scholars also say that it is not at the core of Islamic faith, not a part of Sharia law, not obligatory like the five pillars of Islam and that donning a Hijab is just a personal choice.

It is pertinent to note that nowhere in Quran obligation or compulsion for Hijab is mentioned. If the hijab were meant to be obligatory it would have been clearly commanded in the Quran and not phrased in the way it is in the Quran. The Hijab debate has seen both sides as feminists correctly argue that it is a matter of choice and the obligatory aspect is made by male chauvinists who believe in patriarchy. Debate has influenced both politics and laws. In 1936, Iran's ruler Reza Shah issued a decree banning all Islamic veils, women who still choose to wear it were beaten and had their scarfs torn. Then in 1979, an Islamic revolution took place in Iran and Hijab was made compulsory. Women who did not wear it were detained and beaten. A similar story goes for Turkey which once was a model for Islamic world. In 1924, Turkey's leader Mustafa Kemal banned headscarves in public institutions but in 2013 current Turkish President Erdogan lifted bans on veils. There are many other instances like Ottoman Empire when Islamic world has gone through a cycle of unravelling and ravelling Hijab as a compulsion.

The Hijab has evolved into different forms and there is no uniform style of Hijab as what it looks like there are different forms of Islamic veils ranging from Khimar to Chador. I would like to present a statistical aspect as how Muslim women are not getting their basic rights and compulsion of wearing Hijab cannot be accepted at any cost. In 2015, a poll was conducted in Iran and respondents were segregated on the basis of their education level and where they stood on the human development Index. The question is the same that I referred to here, *Should Hijab be voluntary or mandatory?* 51% with higher education said it should be voluntary while 61% without higher education said it should be mandatory. In terms of human development Index, people who are from less developed areas supported mandatory hijab while those from developed areas supported it voluntarily.

It can safely be concluded that education, social milieu and societal values have a lot to do with how Hijab is viewed and practiced. Women have to wear Hijab in some societies because people around them insist on it and expressing a difference from the practice can cost you too much, even your life sometimes. Women are trivialised as blasphemous and western

influence hence women are forced to comply. This contention is further strengthened by inane parallels and memes as comparing a woman without hijab from uncovered lollipops, exposed meat and more disgusting corollaries. It is not only offensive but it is unacceptable but it is a product of religious chauvinism that each society has.

At least, 10 European countries have banned hijab in one form or other as they consider it as a security threat. This facet has also two faces as critics called it Islamophobia and it was witnessed that there have been numerous xenophobic attacks on women. Women in western world said that they wear Hijab for showing cultural solidarity and to embrace their ethical identity. This has led to a fashion aspect for few as Nike came up with its pro-women hijab but here things get complicated as for many women Hijab is not an option but an obligation which is a clear violation of the right to freedom and liberty. It is used to harass them mentally and socially as it is forced to them as a divine punishment and sometimes to subvert them. Some women have even been killed for not wearing Hijab. In toto, the global policy and legal instrumentality needs to be balanced. Hijab is being used to enslave thousands of women, and any time we refer to it as an option, we risk perpetuating this oppression by feeding a social narrative that totally absolves men of sexual harassment and places the burden of protection on the victim to cover up.

IV. CONCLUDING REMARKS

In summation, there was a wind of change when women in Iran decided to put off their Hijabs' but the Iranian regime did not accept it. They arrested women and imposed hefty fines and since then women are bullied every day in Iran. I would like to conclude that why we can't we just let women be. You wear it you are attacked; you don't wear it you are attacked. You oppose it you are called blasphemous and immoral; you ban it you called Islamophobic. In this religious cultural and political war of Hijab it is the women who suffer, take the religious connotation away and you know that hijab is just a piece of cloth. It should be a choice if you do not care about its repercussions. If a woman feels that she doesn't want to wear Hijab let her be and if she thinks she needs to wear it then also let her be. It's her life we are no one to restrain someone's basic human rights. This all is possible but sadly not suitable to some male chauvinist section of society.

Hijab should not be a tool of oppression but a tool of beautification as per the choice of women. Compulsion of wearing hijab, xenophobic crime and many allied aspects need an urgent ponderance. And then we can say that, yes women have the right to choose and freedom completely in a practical sense and not just on paper.

EXTRA-JUDICIAL EXECUTION – AN UNCONSTITUTIONAL MEASURE AND ITS FAR-FETCHED CONNECTION WITH THE IDEA OF JUSTICE

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ABSTRACT

Extra-judicial execution is one such underrated contemporary issue the solution for which cannot be sought at an international level. The reason being, the gravity of such executions differs from country to country; lawlessness of law enforcement agencies; and the general public's perspective towards it. In a layman's language, extra-judicial executions can be understood as ways and measures adopted in order to swiftly fade away from the constitutional measures of providing justice. Sometimes high-profile individuals back such measures to protect themselves from the verdict of the judiciary.

The author in the essay has focused upon the terror which is surrounding the accused, specifically within the territory of India. The author has taken into consideration the idea of justice for not only the victim, but also for the accused. The author has also given recommendations for the enhancement of laws for uplifting the rights of accused and for ensuring equality for all, irrespective of one's status as victim or accused.

Keywords: Justice, unconstitutional measures, accused, police, India.

I. INTRODUCTION

The Phenomenon of extrajudicial is not restricted to the territory of India, it extends to worldwide territories and states. The lawlessness which is present in targeted police officials and law enforcement agencies is reflected through their actions while they conduct extrajudicial executions. The Sixth United Nations Congress on Prevention of Crime and Treatment of Offenders, 1980 made an attempt to define such unconstitutional executions as, *"the practice of killing and executing political opponents or suspected offenders carried out by armed forces, law enforcement or other governmental agencies or by paramilitary or political groups acting with the support, tacit or otherwise, of official forces or agencies."*[1]

The authorities in the abovementioned definition state that they are empowered by the respective statutes which govern them; for example Code of Criminal Procedure, 1973 (CrPC) provides authority to the police officials and armed forces derive their power from Armed Forces (Special Powers) Act, 1958. One common explanation which is given by these empowered authorities is that their actions were justified as were done under self-defense. However, when such executions are examined, the examiners tend to forget the basic intricacies of law; that no individual, while preventing himself, is supposed to harm another individual with such gravity

[1] Jaspal Singh Gosain and Others v CBI LNIND AIR (Online) 2018 Del 242, 247 (2018) DLT 744.

that it may cause the death of the latter. The individuals and the agencies have been given the authority to prevent themselves from any kind of bodily attack, however, in today's scenario, this defense is one of the most-exploited one in their hands. This research paper stands against the explanations and justifications of the perpetrators of human rights, as the ones who are subjected to such executions even though they are humans and have a family who are always forced to bear the consequences of the actions of law enforcement agencies.

There are various questions which haunt the families of deceased accused; whether they were at fault; whether the scenario which was painted and depicted by the perpetrators was real; whether a proper inquiry was conducted or were they simply framed etc. One such initiative was taken in the year 2016 and it stood against the ideals of law enforcement agencies and their baseless justifications. A writ petition was filed before the apex court, in order to know the truth behind the fake encounters which were carried on by the Manipur police and armed forces of the Union.[2] Through this petition, the dependability of allegations was questioned; whether they were determined on lawful grounds or were partially true or entirely rubbish. The petitioner in this case highlighted the right that was articulated by the United Nations High Commissioner for Human Rights – the right to know the truth.[3] Initially this right was vested with the kin of individuals who were subjected to enforced disappearances. Later, upon analyzing the situation posed by worldwide extra-judicial executions, this right was extended to family and kin of these deceased-cum-victim as well.

This case of Manipur is not novel, various such complaints have been filed against the unlawful actions of police officials but they all fall upon deaf ears. None of the law enforcement agencies have catered to their requests and complaints. No FIR had been lodged against the maximum of such deceased who were alleged to have committed some offence. Such executions are backed by the public support as it is important to cater to their demands than ensure justice to alleged offenders. The so-called justice which was provided to the Hyderabad gang-rape deceased is an apt example of how police officials strive hard to provide justice to the deceased victim but tend to forget that even the alleged offenders are liable to receive just treatment.[4]

The author, through this essay, has attempted to bring forth the true picture of law and order in India if such unconstitutional executions continue to rise at an inflated rate. The author would establish the importance of justice for accused/alleged offenders and fair treatment for them. This attempt is made in order to make the public realize the importance of fair procedure and rule of law in a democratic country.

[2] Extra Judicial Execution Victims Families Association (EEVFAM) and Anr. v. Union of India and Anr. (2016) 4 MLJ (CRL) 675

[3] 62nd session of the commission on Human Rights (2006), Promotion and Protection of Human Rights: *Study on the right to the truth. Report of the Office of the United Nations High Commissioner for Human Rights*, Item 17 of the provisional agenda.

[4] Rohan Venkataramakrishnan, *Hyderabad encounter killing may seem like justice, but here's why no good can come of it*, SCROLL.IN, available at https://scroll.in/article/945987/hyderabad-encounter-killing-may-seem-like-justice-but-heres-why-no-good-can-come-of-it (Last visited on Dec 6, 2019)

II. LOOP BETWEEN UNCONSTITUTIONAL EXECUTIONS AND IDEA OF JUSTICE

Justice is a gift which is attached with numerous birth rights an individual enjoys since their birth. Each constitution, each international convention, directly or indirectly, addresses its presence; however, the difference lies in the ways and means adopted by respective authorities in order to safeguard this right to justice. The purpose behind formulating laws is to secure justice to each and every individual. This can be said to be one of the most important reasons why every state, upon securing freedom, strives hard to develop laws for itself. It gives them a reason to walk on the path of justice. However, the well-known concept of targeted killing or extra-judicial killing, where state officials exercise lawlessness, gives them an opportunity to vitiate from their duties and responsibilities.[5]

1. NOBLE CAUSE CORRUPTION – A CALCULATED MOVE

If given a chance to term the loop or relation which exists between extrajudicial executions and the idea of justice, it would be utilized in a manner to address them as a concept of dirty hands.[6] In simple words, it could be understood as an immense power and duty of handling the state and its citizens in the hands of the most undeserved institution. Interestingly, if the law enforcement agencies are found exercising noble cause corruption, they would not be questioned. On the contrary they would be applauded as they would then be doing something with a positive intent. However, upon observing some cases, it has now become a threat to the basic principles of law.

The tragic killing of a Boston Police Officer which took place on February 17th, 1988 culminated the dire consequences of following the path of Noble Cause based law enforcement regime.[7] The officer lost his life when the squad went to arrest an alleged offender. Upon investigation, it was discovered that the arrest warrant was issued based on false information and as a result of this, the offender who shot the sheriff was discharged and the sheriff became a martyr for an unwanted sacrifice. Many such incidents have occurred across the world and none could be reported nor be redressed as the matter revolves around law enforcement agencies only. Such cases showcase that no benefit can be achieved by the officials if the constitution is suspended and officials take the path of fabricating the evidence in the shadow of justice.

The concept of noble cause corruption is vulnerable in nature and is somewhat similar to extra-judicial killings; the difference lies only in the nature of aim. The former is conducted in order to achieve a legitimate aim, and the latter is carried out without any lawful objective. And both of these result in destruction of justice. Both tend to harm the viable rights of accused as none of them are codified and enforced by law. The above mentioned case was an apt example of violation of an individual's dignity. On a false ground, an individual's image was tarnished and was subjected to such a trauma that he took the step of killing an innocent. It was a clear case of innocent killing another innocent. This completely destroys the idea of justice as unnecessarily

[5] Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 405 (2009)
[6] Seumas Miller, *The Ethics of Assassination and Targeted Killing,* 19 JRE 309 (2011)
[7] Steve Rothlein, *Noble Cause Corruption*, PUBLIC AGENCY TRAINING COUNCIL, available at http://www.patc.com/weeklyarticles/noble-cause-corruption.shtml

people are laid open to such instances wherein they cannot think of a justified action. The author here is trying to replicate the various loose and biased strings which exist between extrajudicial executions and the idea of justice, taking defense of which various police officials escape the penalties of their lawlessness. They stand at zero loss and the accused are exposed to their worst nightmare.

2. IDEA OF JUSTICE – INTERPRETATION BY GREAT THINKERS

For understanding the basic intricacies of a particular field, we turn towards the valuable points which were jotted down by the philosophers. In order to understand the importance of justice for each and every individual, irrespective of their status as victim or accused, we need to touch on the philosophies of such great thinkers; whether they were of the opinion of having a varied application of justice; whether they evolved the concept of justice only for the victims; and how do they elucidate the common yet paramount concept of justice.

John Salmond, one of the eminent jurists of New Zealand, has been known for his immensely valuable contribution in the field of law and jurisprudence. According to him, law, rules and regulations are such bodies of principles which the tribunals or law enforcing agencies recognize and implement while administering justice.[8] He was of the view that punishments must be imposed, but should be backed by procedure established by law. In today's scenario, where law is implemented as per the whims and fancies of law enforcement agencies, it does not fit with the purpose for which such eminent people derived law, and interpreted it so as to make it appear precise, and not vague. The implementation of law must be backed by rationale of jurists; by the unfabricated legal documents; and by procedure established by law. No statute, no constitution gives immense powers to police officials and armed forces, ones who have statutory access to weapons, to cause the death of individuals who are mere accused or those whose actions are in conflict with the law of land. Unless proven guilty, they are just like the fellow civilians.

Plato's interpretation of the term justice was way different from what is expressed in constitutional or legal terms. According to Plato, justice lies in the harmonious, hierarchical well-ordering of the society.[9] His theory can be interpreted to be in favor of the society; whatever is good for the society as a whole that must only prevail. Providing justice to all individuals, irrespective of them being victim or accused, is more favorable for society than depriving them of the same. Usually this deprivation is based on irrational grounds. Surprisingly, some of the law enforcement agencies consider an alleged offender only as actual offender and employ excessive force which usually results in extra-judicial torture or killing. His philosophy was entirely focused upon the moral values and ethics of an individual. He contended that if an individual decides to walk on the path of justice, they willingly give up the irrational desires which might give them selfish satisfaction, and harbor themselves to discharge functions which would benefit society as a whole.[10] Law cannot be imposed upon authorities to follow the path of moral values and ethics. The law enforcement agencies have been instituted in order to ensure

[8] NZ HISTORY, available at https://nzhistory.govt.nz/people/john-salmond#
[9] Ish N Mishra, *Plato's Theory of Justice*, COUNTER CURRENTS.ORG, available at https://countercurrents.org/2018/08/platos-theory-of-justice/
[10] D.R. Bhandari, *Plato's Concept of Justice: An Analysis*, PAIDEIA, available at https://www.bu.edu/wcp/Papers/Anci/AnciBhan.htm

law and order in the society, which is ensuring a just environment for all individuals. Their sole duty and responsibility is questioned upon when they are found guilty of such unconstitutional executions, as it is apparent that such an act, in no way, ensures justice.

III. SECTION 46 OF CrPC – A VALID SOURCE OF POWER FOR EXTRA-JUDICIAL KILLINGS?

When individuals demand justice, what exactly do they look forward to? Talking about it in the context of Indian legal system, justice pertains to 'instant justice.' This concept has gained importance due to the rise of crime rate in India. According to the general public, each accused, irrespective of the gravity of offence committed by them, must be either encountered or subjected to torture by public. This need of the general public is fulfilled by the police officials and they are not questioned by the other law enforcement agencies. The encounter of four individuals who were alleged to have committed the offence of gang-rape and murder in Hyderabad, and of the history-sheeter Vikas Dubey are few of the latest encounters which were conducted by the unpowered police officials. Also, the case of custodial death of a father-son duo in the state of Tamil Nadu is one such example of police atrocities.[11]

1. SECTION 46 OF CrPC – WAY TO UNCONSTITUTIONAL EXECUTIONS

When a particular authority enjoys immense powers, the question which arises is whether this power is statutory or not. Section 46 of CrPC deals with the manner in which police officials are empowered to conduct an arrest of an individual. The author would analyze the powers under this provision, and determine the reason for its exploitation.

Section 46(2) of the Code elucidates that, "If such person forcibly resists the endeavor to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest."[12] By applying the rule of strict interpretation, the intention of Legislature which is reflected by a plain reading of this provision is that; if a police official, with a rationale mind, wants to conduct the arrest of an individual in order to subject him to the process of investigation and trial, then that police official would attempt to cause such a nature of injury whereby neither the individual is severely injured nor would be in a position to escape the arrest. This is what the Legislature intended to convey by this provision, but the manner in which this provision is being misused at the present time, the duty to abide by the Legislature has vanished.

Hardly an attempt has been made to determine whether the means used were necessary or not. The interpretation that; the means used were necessary or not depends on whether a prudent man, having no intention to cause serious injury to the other; is what is required to be promoted amongst all.[13] When inquired upon, a series of justifications are provided by the respective authorities. Their common argument that such encounters have a deterrent effect in the society

[11] Devika Prasad, *Tamil Nadu custodial deaths case: Police impunity must end*, DECCAN HERALD,available at https://www.deccanherald.com/specials/sunday-spotlight/tamil-nadu-custodial-deaths-case-police-impunity-must-end-857198.html (Last visited on Jul 5, 2020)

[12]Sec. 46(2), The Code of Criminal Procedure, 1973;No. 2, Acts of Parliament, 1973 (India)

[13] Keshab Roy Choudhury, *Deconstructing Section 46(3) of the CrPC: A Tacit Approval for Encounters*, THE CRIMINAL LAW BLOG, available athttps://criminallawstudiesnluj.wordpress.com/2020/04/23/deconstructing-section-463-of-the-crpc-a-tacit-approval-for-encounters/ (Last visited on Oct 21, 2020)

has always been accepted by the general public, and surprisingly, by the judiciary as well as though petitions have been filed in order to question the lawlessness of police officials, they either been dismissed or have been hung in line of several petitions which are never addressed. The ones who have been statutorily directed to follow procedure established by law, they only state that due process of law creates barriers in maintaining law and order.[14]

Section 46(3) of the Code clearly states that, "Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life."[15]The literal interpretation of this provision gives the reader a clear meaning that no individual excessive force could be used in order to conduct their arrest, if they are alleged to have committed an offence punishable with grave penalties, death or life imprisonment. Majority of the fake encounters or extrajudicial executions are of the individuals against whom either the charges are not framed, or even if framed, they are not conclusive enough to take such a step. Emphasizing upon the recent Hyderabad encounter, not even a charge-sheet was filed against the alleged offenders. Just a mere allegation against an individual does not empower police officials to conduct targeted killing and make it look like an act under Section 46(2).

Upon a combined reading of both the provisions, it is apparent that one has the authority to cause the death, provided that individual is accused of an offence punishable with grave penalties. This interpretation was considered in the case of *Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. V. Union of India*[16].However, this needs to be reconsidered as then the existing agencies might get a reason to violate the due process of law because of public ablaze.

2. CONSTITUTIONAL VALIDITY OF SECTION 46

The Constitution is considered to be an impartial book of law; it governs all individuals equally, leaving few sections of society. Though it has created certain special provisions for some communities, it has not explicitly made separate provisions for accused as well as victim. Meaning, it has never attempted to treat these two parties distinctly. The Constitution of a country is considered to be supreme governing authority, and none of the other statutes and law enforcement agencies can go against it. Moreover, Article 14 of the Constitution states that, *"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*[17] This freedom article clearly depicts the scenario the author is trying to emphasize on. Every individual enjoys the right to be treated equally before the eyes of law by virtue of their birth in India. However, the distinction which is created by Section 46(2) and Section 46(3) is unfair as just on the basis of gravity of punishment, it is decided whether an accused must be subjected to harsh procedure or not. Article 14 is applicable to both substantial as well as procedural laws, and by virtue of that, no intelligible differentia is there in this

[14] Harshit Sharma, *Private Defence and section 46(3) CrPC – "Way to Extra-Judicial Killings"*, THE LAW BLOG.IN, available at https://thelawblog.in/2020/07/12/private-defence-and-section-463-crpc-way-to-extra-judicial-killings/ (Last visited on Oct 10, 2020)

[15]Sec. 46(3), The Code of Criminal Procedure, 1973; No. 2, Acts of Parliament, 1973 (India)

[16] Extra Judicial Execution Victim Families Association (EEVFAM) and Anr. v. Union of India, W.P. (Criminal) No. 129 of 2012

[17] Art. 14, THE CONSTITUTION OF INDIA, 1950.

distinction.[18] The varied amount of pain to be inflicted upon accused by the arresting authority is unjust and thus needs to be reconsidered by the law-making authority, as this is only being misused by the law enforcement agencies. The objective behind such an intelligible differentia is discriminatory in nature and holds no nexus with the objective of CrPC.[19]

Article 21 of the Constitution talks about right to life and liberty, fair treatment and adherence to procedure established by law. Fair and just procedure is directly related to the concept of principles of natural justice[20] and the most essential and core principle of these is *audi alteram partem*, meaning to hear the other side. Without giving the opportunity to an accused to present them before the court of law, their core right to life is being hampered. By empowering the arresting authority to cause the death of an individual accused of a particular offence vitiates the basic purpose of fair treatment as by this, they are not given a chance to be heard by the court of law.[21]Article 22 of the Constitution, which is drafted specifically for the rights of accused, even that is ignored under the shadow of instant justice.

IV. REMEDIAL MEASURES FOR CURBING EXTRA-JUDICIAL EXECUTIONS BY STATE

Until now, hardly any remedial measures have been laid down in order to improve the current situation. Whenever such a question has been raised before the court of law or law enforcement agency, it is dismissed on the ground that the life of police officials would then be compromised. According to a survey, during 2005-07, almost 420 medico-legal autopsies were conducted by a medical college situated at Thrissur, out of which 23 succumbed to their injuries i.e. due to custodial torture.[22]

Owing to the capability of media and human rights activists, there are chances that many of such cases either had not been reported or not revealed. Specifically talking about Kerala, such chances are less due to vigilance of the media. However, the number of complaints which NHRC received has been comparatively inflated. From 496 complaints in 1993-94, it has reached a mark of over one lakh complaints in 2007-08.[23] The current status of custodial death and extra-judicial executions is an alarm for all the general public as well as the court of law. In the name of meagre powers passed on by virtue of statutory enactment, the rights of all the citizens are threatened.

Apart from the complaints filed before NHRC or Human Rights Commission, several activists have knocked the doors of judiciary by way of petitions but all pleas fell on deaf ears. EEVFAM or the Extra Judicial Execution Victim Families Association has approached the court by way of petitions in order to seek redressal for their grievances. They were accepted and committees were also formed in order to probe into the respective matter but none of the reports

[18] State of West Bengal v. Anwar Ali(1952) AIR 75

[19] Nagpur Improvement Trust and Anr. v. Vithal Rao and Ors., (1973)SCR (3) 39; Dr. Subramanian Swamy v. Director, CBI & Anr W.P.(CIVIL) NO. 38 OF 1997

[20] Kartar Singh v. State of Punjab(1994) SCC (3) 569

[21] Nirmal Singh Kahlon v. State of Punjab & Ors., (CIVIL) APPEAL NOS. 6198-6199 OF 2008

[22] Hithesh Shankar T S and Praveenlal Kuttichira, *Custody Deaths in Kerala: A Study from Post-mortem Data in Thrissur Medical College*, 47 ECONOMIC AND POLITICAL WEEKLY 23, 24-26 (2012)

[23] NHRC, available at https://nhrc.nic.in/sites/default/files/NHRC-AR-ENG07-08_0.pdf (Last visited on Oct 22, 2020)

have been brought before the sufferers. *EEVFAM & Anr. v Union of India*[24], *EEVFAM & Anr. v Union of India*[25], and *EEVFAM & Anr. v Union of India*[26] are few of such petitions which have directly approached the apex court but none of their grievances had been catered to.

V. ROLE OF INTERNATIONAL LAW IN SECURING JUSTICE FOR ACCUSED

"Everyone has the right to life, liberty, and the security of a person."

-Universal Declaration of Human Rights, Article 3

India is a signatory to numerous International treaties and by virtue of Article 51 of Indian Constitution, it is obligatory on part of India to abide by the provisions of such treaties in order to maintain justice in the country. However, India has not taken sufficient measures in order to do justice with what has been stated in the International law. There are various international institutions which are striving to extend their support to the victims of cruelty by law enforcement agencies. The recent issue of 'Black Lives Matter' initiated from such a cruel act only, where one individual was forced to death at the behest of a police official just because he was 'different' according to them. This is one of the many examples which show the atrocities and lawlessness of those who are expected to teach others the importance of law.

In international context, extra-judicial executions are termed as "disappearances." They show not only acts of cruelty, but also violation of international standards on human rights by the perpetrators.[27] These standards were formulated after the destruction of life and property during the Second World War and continued to be cherished in today's date as that realization has helped the nations in understanding the rights of all individuals. The Universal Declaration of Human Right states that each individual has right to life and security, no one can be denied these on any legitimate or illegitimate ground. Moreover, the UN Committee on Crime Prevention and Control drafted the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and the Declaration on the Protection of All Persons from Enforced Disappearances in order to control the situation of rights of accused.[28] All countries who are signatory to these are obliged to follow the norms and adopt them in order to secure justice for all.

In order to control the actions of police officials as well, the UN has adopted Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. This would ensure the reduced possibility of imminent threat on the lives of accused as on various occasions it has been observed that the ones who are statutorily allowed to use firearms, they tend to misuse their privilege.

[24] EEVFAM and Anr. v. Union of India and Anr. (2016) 4 MLJ (CRL) 675
[25] EEVFAM and Anr. v. Union of India and Anr. (2016) LNIND SC 292
[26] EEVFAM and Anr. v. Union of India and Anr. (2013) 1 MLJ (CRL) 388
[27] AMNESTY INTERNATIONAL, available at https://www.amnesty.org/download/Documents/188000/act330051993en.pdf(Last visited on Oct 22, 2020)
[28] *Id.*

VI. RECOMMENDATIONS AND CONCLUSION

Upon jotting down the state of accused, the author would make certain recommendations which can be pondered upon future researchers-

1. Stringent laws must be framed and new precedents must be set in order to bridge the gap between rights of accused and the idea of justice.

2. Current laws relating to the duties and responsibilities of police officials must be reconsidered and amended in order to restrict their powers.

3. Awareness campaigns must be set up by NHRC for the general public and must highlight the importance of justice for both, accused as well as victim/deceased.

4. A separate statute must be enacted solely for the rights of accused and must bear heavy penalties against those who intend to violate their rights.

The author would conclude this essay by emphasizing on the need for justice for all. The victim expects law to safeguard their interest and grievances. Similarly, even an accused expects law to give them a chance to put forth their position before the court of law. If such executions and torture continue to prevail, the general public's faith in judiciary would be at stake. The respective authorities must exercise their duty at the behest of law, and not according to some immaterial advantages. When the legislature is not at the position of discriminating against individuals, the interpreters of law have no right to twist and turn law as per their whims and fancies. Though justice is not defined anywhere, its presence and prevalence is ensured by the Preamble to Indian Constitution, and therefore, everyone must adhere to it irrespective of the status of any individual.

JUDICIAL INTERPRETATION OF 'CONSENT' IN RAPE CASES AND APPLICATION IN MARITAL RAPE CASES

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ABSTRACT

Indian Judiciary has been defining consent according to the changing societal perspectives. The criminal justice system has considered itself liberal while giving such definitions and clarifications on the concept of consent in rape cases. This paper examines the definitions and interpretation of consent in various judgments by the High Courts and the Supreme Court and examines the possibilities of applying the same interpretations to marital rape. This paper also analyses various criticisms that were faced by some of the judgments, which interpreted consent in various ways. From this analysis, I shall try to analyze the reason why our justice system is procrastinating the debate on criminalizing marital rape by using the same rationale of consent, which is applied in rape cases.

Keywords: Consent, judiciary, rape, marital rape, judgements, interpretation.

METHODOLOGY

RESEARCH QUESTION

In this paper, I try to find an answer to the question; "Can the constantly evolving definition of consent with respect to rape be applied to criminalize marital rape?" This analysis also delves into the reasons that are given against criminalizing marital rape.

In writing this paper, articles and research papers of scholars from various disciplines were referred to obtain diverse perspectives on the idea of 'consent'. This paper also studies various judgments and obiter dicta on consent. My other references include blogs, articles from newspapers and books, which tried to interpret and analyse the application of consent by the justice system in cases of rape.

SCOPE & LIMITATIONS

This paper analyses the interpretation and application of consent in rape cases. I have obtained some research papers submitted by various scholars to different universities and analyzed them. I have referred many articles online and offline to study these concepts. Most importantly, I have studied many judgments of rape cases. However, I have chosen to mention only a few, which are pertinent to answer the research question.

AIMS AND OBJECTIVES

This paper follows the interpretive approach that Max Travers talks about in his paper called ''*Putting Sociology Back into the Sociology of Law".*

- To analyze the concept of consent in rape cases given by the judicial precedents.
- Analysis of the perceptions on those precedents by various scholars.
- To analyze the possibility of application of the present and established definition and interpretation of consent in marital rape cases to criminalize marital rape.

I. INTRODUCTION

Section 375 of Indian Penal Code, criminalizes intercourse with a wife, who is 15 years old and less, by her husband. The SC in *Independent Thought V. Union of India***,**[1]ruled that sex with a wife who is a minor (less than 18 years old) is rape, regardless of consent. However, the rape of a married women who is 18 years old and above, by her husband, is still not considered rape. Since ages, rape is considered as a crime, which is easy to accuse and hard to prove. One of the main reasons of this is that there are often, no witnesses and the court needs to reply on the facts given by both the parties, which are obviously in contrast and the reliance is on other available evidence. Though these are the reasons that are cited by the scholars, the main conception of rape being an 'easily-accused' crime, come from the notion of women being considered inferior individuals who cannot make strong decisions and weak in maintaining 'character'—inherently and complicity operating patriarchy is the main cause of such conception. The reason for marital rape not being criminalized, comes from the Victorian norm of consent being given at the time of wedding, which is irrevocable and after wedding, man and his wife becomes a single entity, which cannot be separated.[2] However, in Indian context, Hindu marriage is considered sacramental and Muslim marriage is considered partially sacramental (presence of process of reciting some verses of Quran) and partially contractual. Most of the times, the Indian Justice system cited the reason of marriage and family system being collapsed in case marital rape is criminalized. Women, basically wives, were treated as property of their husbands and the law was made as such that the men protect their 'property' from other men.[3] All the cases that will be discussed in this paper are selectively picked up after analysing various judgments and these cases give the idea as to how the courts have interpreted consent using the facts of the respective cases and how those facts changed the interpretation of consent.

II. ANALYSIS OF THE COURTS' INTERPRETATION OF 'CONSENT'

1. *Mahmood Farooqui v. State*:[4]

The Delhi High Court held that, where film director Mahmood Farooqui was accused of rape (oral sex without consent), acquitted him saying that there was no clarity in the case to establish the absence of consent. This was one of the many grounds for the acquittal. The court

[1]Independent Thought V. Union of India (2017) SC 1222.
[2] H. Clark, *Law Of Domestic Relations In The United States*219 (1968).
[3] B. Toner, THE FACTS OF RAPE 112-30 (1977).
[4]Mahmood Farooqui v. State (2017) 4 DLT (Cri) 328.

concluded this because the resistance on part of the victim was 'feeble'. Precisely, the court did not consider a weak 'no' and this raised curtains for the debate whether hesitant denial is sufficient to establish the absence of consent. When the victim challenged this verdict in the Supreme Court, the court held that it is a well-decided case and upheld the acquittal, saying that there are no reasons for the court to believe that the act of oral sex happened with a negated consent. This judgment by Delhi High Court accrued major criticisms because it tried to reinforce the stereotypes like 'No does not all ways mean no' and further stated that there are examples where a feeble 'no' from a woman, in certain circumstances, means a 'yes'.

Another reason why this judgment is criticized because the court reversed the trial court judgment which held Mr. Farooqui, guilty and said that the victim faked an orgasm which makes the rape accusation unreliable. The victim claimed that she had faked an orgasm fearing the violence that had happened in the case of Nirbhaya, where one of the perpetrators said that Nirbhaya remained silent and had not resisted, they would not have injured her so badly. The Delhi High Court described this as an 'act of passion' and the circumstances should be considered while trying to establish consent. Section 375 of IPC defines consent to be clear and voluntary. It should be unequivocal, including non-verbal forms of communication.[5] All the criticisms that this judgment has received and is receiving are more sensible than the judgment and its reasoning.

Section 114-A of Evidence Act,[6] allows to make a presumption of absence of consent when such accusation is made by the victim. In this case, the court completely ignored the presence of coercive and potentially dangerous circumstances. The definition and concept of consent is almost the same all over the world. The burden to prove is on accused I.e. to establish that the sexual intercourse was consensual. This is also applied almost in all the countries. However, sometimes, these definitions are focused on presence of consent, rather the procedure to obtain such consent. There are countries that recognize the presence of coercive conditions and one of such countries is Namibia.

2. *Deelip Singh v. State of Bihar*:[7]

Description of facts of the case is relevant for this paper. In this case, the victim filed an FIR against the alleged perpetrator while she was pregnant by 6 months. According to the victim, she was in love with the alleged perpetrator, who was also her neighbour. She alleged that he raped her and then promised to marry her. She said that because, he promised marriage with her and their physical intimacy continued. The relations and parents of the victim were also aware of their intimacy and they believed that he would marry her eventually. The accused continuously avoided the marriage and father of the victim tried to persuade him, but result was negative. Left with no other option, the victim filed a FIR against the accused. During the trial, the majority of the victim was also questioned. Later, it was proved in court of law that the victim was major and her consent matters. Only then, the court proceeded to deal with the further questions. The charges of rape were pressed against the accused on the grounds of 'misconception of fact'. The Apex Court held that intercourse with consent obtained through false promise of marrying the woman, this will be considered rape under misconception of fact. However, the Court held that

[5]Section. 375 Indian Penal Code, 1860.
[6]Section.114-AIndian Evidence Act, 1872.
[7]Deelip Singh V. State of Bihar (2005) 1SCC 88.

in this case, it is a 'breach of promise' and not a false promise. This is because the prosecutrix was unable to prove the lack of intention to marry her, on part of the victim, beyond reasonable doubt. The Court acquitted the accused from the charges of rape, but held him liable for a breach of promise and ordered him to pay a sum of INR 50,000. This case is highly criticized for the way the Court dealt with consent. The Court relied on establishing the intention to marry or not to marry, on part of the accused. The Court agreed that consent obtained by false promise of marriage shall be vitiated. In the case of *Uday V. State of Karnataka*,[8] the Court held that the under said circumstance, the consent will not be vitiated and will not be considered rape. The court observed this even when it was established the accused had no intention of marriage. Now, in the present case, the court acknowledged that false promise of marriage would fall under the definition of misconception of fact in the code. In Deelip's case, the court recognized that the consent will be vitiated by false promise, yet acquitted the victim by getting 'intention' into the case. In a similar case, *Rani Panda V. State of Bengal*,[9] the court held that there is lack of evidence to prove the absence of intention. Thus, it amounts to failure to keep up his promise and not a false promise.

3. Independent Thought case[10]

The judgment that criminalized the sexual intercourse with wife, who is below 18 years, is mostly based on the Protection of Children from Sexual of Offence Act 2012 (POCSO) and its overriding effect, Articles 14, 21 and 15. This judgment is a huge step taken by the court to protect the minor girls from being raped by their husbands. However, the judicial system failed to protect women who are 18 and above 18 years old from such atrocity being committed on them by their husbands. However, this judgment did not consider the cases where the husband is also underage and consensual sexual intercourse happens between them. But this point might start another debate about having gender neutral rape laws in India. The judgment also mentions that the case is not about 'marital rape' as such and only the matter that the bench is dealing. It is not about the girls who are 18 and older. However, the court ignored the fact that the reasoning applied in this case, which is that the exception to violate fundamental rights and is applicable to women who are 18 and older, without any limitations.

4. *G. Achyut Kumar v. State of Odisha:*[11]

In this latest judgment by Odisha High Court controversially ruled that the intention of lawmakers is that the rape laws should not intervene in personal and consensual relationships and thus ruled that the rape law will not cover the present case because the perpetrator and the victim are in a consensual relationship. The judge also commented 'virginity is a prized element,' which in itself is a very conservative and misogynistic statement. Even if the interpretation of the intention of the lawmakers is considered, it still restricts the justice being denied to the victims who are in a relationship and started the consensual act, which later turned into a non-consensual one. The Judge in this case cited another judgment titled *Arak Sk. vs. State of West Bengal*,[12] in

[8]Uday V. State of KarnatakaAIR 2003 SC 1639.
[9]Rani Panda V. State of Bengal (1984) Cri. L.J 1535.
[10]Independent Thought V. Union of India (2017) SC 1222.
[11]G. Achyut Kumar V. State of Odisha (2020) SCC OnlineOri 417.
[12]Arak Sk. v. State of West Bengal(2001) Cri. L.J. 416.

which the court held that when the accused abandons a girl on getting pregnant, who he had promised to marry, is wrong but it should not be considered rape.

5. *Rao Harnarain Singh v. State of Punjab*[13]

In this case, the court held that consent is said to be present when the woman has applied her reasonable mind to the circumstances and situations, decides to give her consent for intercourse. The requirement for the consent to be present is that she should have an option to revoke such consent during anytime of the act. The Supreme Court in the case of *State of Himachal Pradesh V. Mango Ram,*[14] ruled that all this should be decided based on all the relevant circumstances of the case.

6. *Pratap Misra & Ors. v. State of Orissa*[15]

The victim in this case used to be a concubine and was in a bigamous relationship with a married man. She went to a National park with her husband, on a fun trip, while she was 5 month pregnant. There, she was gang-raped by three people. Due to this, the woman had to suffer a miscarriage. The court decision in this case is very disturbing. The court ruled that she consented to the intercourse with those three accused and she did not scream but merely 'sobbed' while the act was happening. Thus, it was not rape. The court further said that had the fetus been aborted immediately after the act, then it could have been concluded that the act was done by force. But the miscarriage happened few days subsequent to the act.

7. *Tukaram & Ors. v. State of Maharashtra*[16]

Infamously known as Mathura rape case, this is one of the most criticized judgments by the Indian Courts. Mathura was a sixteen year old tribal girl, who was gang-raped in a police station. The accused were acquitted by the Supreme Court because, there were no injuries on Mathura's body and thus it was a 'peaceful' and consensual affair. Her tribe had a practice of open marriage and thus she was labelled a woman with 'immoral character' and thus the court did not 'trust' in her testimony.

III. DID THE COURTS PERCEIVE THE CASES IN THE POV OF VICTIMS OR IS IT JUST PATRONIZING THEM?

To understand the explanation of my analysis, we need to understand the analysis of Srimati Basu in her article titled *"Cutting to size"*. In this paper by Basu, she studies various cases to present a pattern about the way in which judiciary is acting towards the women. She criticizes the elite male people who are in the positions of authority for using the re-definition of women's rights as a weapon to establish command. While she discusses this topic in the context of property law, the gist of the paper can be applied to the cases of rape and the judgments can be analysed this way. To summarize Basu's argument in a reductionist manner, the court often acts as a saviour to the women who fit in the 'stereotypical' victim bracket and rule in their favour while the judges put themselves in a position of authority by treating such judgment as a mere

[13]Rao Harnarain Singh v. State of Punjab AIR (1958) P&H 123.
[14]State of Himachal Pradesh v. Mango Ram (2000) SCC (Cri) 1331.
[15]Pratap Misra &Ors. v. State of Orissa (1977) SCC (Cri) 447.
[16]Tukaram & Ors. v. State of Maharashtra (1979) SCC(Cri) 381.

help to the victim. Such approach can in no way be considered as progressive and the judges are not acting as the allies of equality in anyway.

After analysing the interpretations and 'considerations' that the courts have made and refrained from making for the victims of rape and for the victims of marital rape, respectively, my conscious and reasonability certainly makes me question, if this whole process of delivering justice for the victims and protecting the potential victims of rape, is a mere act of patronizing women by the whole justice system. This would surely be a strong statement to make. However, I propose that it is very important to try and find an answer for this question or a mere explanation for the acts of justice system. This should not in any way be considered as an attack or blame on the judiciary. This is just a process of deciphering the results of such interpretations by the judges. *Pratap Misra's case* is an example of such cases where the court used ideal victim concept, where, to fit into the box of victim, a woman should qualify certain criteria. In this case, the history of the women being concubine, having involved in a bigamous marriage and the fact that she did not scream, are not the situations, which the court expected to be the traits of victim. These affected her case and it was held that the act was consensual. In Mathura rape case, just because the victim was not a virgin, had sexual intercourse several times in her life, she became a liar and her testimony has been rendered untrustworthy.

The problem, with such judgments is that, instead of trying to make society a better or safer place, the system asks the women to be careful and men to be mindful of the fact that they might be adjudicated for their acts. The system waits for months and years to make an affirmative decision, which brings a change in society. The court responds only when some brutal act is committed and someone is indicted. It is merely curative and not preventive. The judiciary waited to address the problem of interpretation of passive consent till the country agitated the decision in Mathura's case. The wait to amend the definition of rape continued till Nirbhaya's case happened.

As India celebrated the hangings of Nirbhaya convicts in March 2020, saying that the justice has been delivered at last, it just shows our obsession with violence and brutality.[17] Nothing has changed drastically even after Nirbhaya and Disha incidents. The encounters of the accused in Disha's case was also widely celebrated by us. Most of us hoped that there would be a drastic decrease in the number of rape cases. Unfortunately, that did not happen. The following day, of Disha's incident, other rape cases got quickly registered in the country. The conviction rate in the cases of rape in India seriously low at 27.2%, according to National Crime Records Bureau (NCRB).The conviction rates dropped to said percentage from 32.2% from the previous year.

All these acts by judiciary point that the judgments that were delivered are mere consolations for the victims and not the decisions made to curtail such crimes in future. For instance, the Deelip's case is an example where the justice system used its interpretation to acquit the accused by saying that the act does not include the failure to keep the promise. This defies the object of the concept of consent and opens it for prospective cases where the defendant would claim that he has always had an intention to marry the victim but he failed to do so because of the circumstances. This is a problematic precedent.

17*Nirbhaya Convicts Hanged in Tihar Jail*, The Wire, available at https://thewire.in/law/nirbhaya-convicts-hanged, (Last visited on May 27, 2020)

IV. APPLICATION OF THIS DEFINITON IN MARITAL RAPE

The above cases are the evident and famous example of the failure of judiciary with the steps that are preventive in nature for rape cases. The judiciary might wait till a case of marital rape gets to the bench, which is brutal enough for the society to consider that lack of criminalization of marital rape is problematic and for the protests to happen, to criminalize marital by applying their own definitions and interpretations of consent. Despondently, it would be too late and numerous victims who are silent victims of marital rape would go unpunished and continue to perpetrate the crime without any legal restrictions.

Another aspect of criminalizing marital rape is considering the brutality of the act. We, as a hypocritical society, would always consider that only those victims who are injured so brutally that our standards of brutality and the characteristics of 'victim' are met, deserve the justice, quickly and the perpetrator should be punished as brutally as possible. Ironically, we forget that our opinions do not matter and the victims need not be injured badly to prove that they have been raped. This is the case with most of the rapes that happen inside marriage. There wouldn't be bad injuries but there is a victim and a perpetrator and yes rape.

Marital rape has this element of inducing serious mental health issues. The victim has to live her life with her rapist as if nothing had happened to her and being not sure if it might happen again. She should birth the children who are results of rape. Though marital rape is a ground for divorce and the husband can be tried for cruelty for raping his wife, this would not compensate the crime that has been committed. Nothing can compensate a victim of rape. But denying the minimum that the justice system can so is not a very progressive or even a moral response that should come from the justice system. This might sound emotionally motivated argument and might be criticized on those grounds. However, when something is affecting the victims in an emotional way, then why not to consider the emotional arguments? While that is said, the other facts that this paper discusses are not emotional in nature but purely legal. However, the justice system always seem to find one or the other reason to not proceed with criminalizing one of the most brutal form of tortures.

V. CONCLUSION

Applying the Interpretive approach, which is coming to a conclusion after studying the patterns and the actors, it can be said that the justice system is walking on egg shells in its interpretation of concept of consent. All the cases and interpretations denote towards the conclusions that the courts mostly presume this 'ideal victim' identity of the victims and the victims who do not fit into the ambit of that idealness are being denied justice in the most blatant to the most subtle forms. The courts seem to adopt this savior complex were they assume the duty towards only those who fit into the bracket of helpless ideal victim, who is brutally affected. The other concerns are being ignored or considered not as pertinent as the stereotypical considerations by the courts of law.

ANNIHILATION OF THE RELATIONSHIP BETWEEN THE BANKER AND CUSTOMER THROUGH THE OPERATION OF LAW

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ABSTRACT

The banker-customer relationship can be easily determined at a particular period which can have a lot of consequences related to the law for both the parties who are in a contractual relationship. It is not important to see the duration of the relationship rather if there is one single transaction then the relationship can arise. It is very essential to state the conditions in which the relationship between the banker and customer will be terminated. This peculiar legal relationship explains the behavior of the bank, in any case, is scrutinized and if there is any kind of deficiency then it can be detected easily. Through this research paper, it will be clear about the various major decisions which are related to the legal remedies which can be provided to the banking customers and the steps which the judicial system is taking for the conceptualization of the relationship between the banker and the customer.

Keywords: Consequences, Contractual, Transaction, Relationship, Deficiency.

I. INTRODUCTION

If we look at the contemporary world then we will realize that the banking customers are experiencing a lot of problems by the bankers due to which there is a need for the customers to take various legal remedies so that they can take the compensation and the damages which are occurring on them due to the bogus services which are granted by the bankers. The various legal remedies which are provided to the banking customers are in the form of some important acts such as the Consumer Protection Act, 1986, and the Banking Ombudsman Scheme, 1995.

The Consumer Protection Act, 1986, was passed so that the interest of customers can be protected and so that the consumer councils could be formed as well as other authorities who are essential to be formed to settle the disputes which arise within the consumers. This act contains the provisions which are in the addition and do not derogate any other law.

The Banking Ombudsman Scheme, 1995 was introduced by the Reserve Bank of India so that it could provide the redressal to whatever grievances arose in the services of the bank, loans, and advances as well as other matters. The Reserve Bank of India introduced this scheme through the exercise of his powers bestowed over them under Section 35A of the Banking

Regulation Act, 1949, because they found it necessary for the interest of the public and the banking policy. All the banks must comply which the directions.

In this world which is governed by the markets and the trade as well as commerce, the banks have received unprecedented importance[1]. The banks have now become the curator of the monetary economies throughout the world. Through many years the banks have developed a lot and have evolved from the rudimentary forms and converted themselves according to the present-day system[2]. Now the banks are known to be the backbone of the industries.

It is very important to analyze the definitions of banks, bankers, and customers so that it will be easy to understand the duty of the banker. The main function of the bankers of the ancient world was to do the money changing. The economy of our country in the ancient times was not at all developed because most of these money lenders were agriculturist so a relationship which was totalling descriptive never existed. The bankers and customers even did not have any duties to follow or perform. But in today's world, the bank sector has grown a lot in the fields of money lending as well as the fiscal services[3].

The relationships of the parties cannot be defined easily because of the multifarious functions which are performed by the banks in the present times. The nature of the transactions will define the relationship between the parties. The relationship between the banker and the customer is based on contracts but still, it has to follow various statutory provisions[4].

II. BANKER/ BANK

A banker refers to a person who is acting to be a banker in any post office savings bank[5]. The banker is an individual, partnership whose main business is banking i.e. the receipt of the money in any current or the deposits account and even the payment of the cheques which are drawn and the collection of the cheques which are paid by the consumer[6]. A banker is a person who will honour the cheques which are drawn upon him in the ordinary course of the business[7]. Bank refers to a place where the money is laid up so that it can be called occasionally and the banker refers to a person who traffics that money[8].

III. CUSTOMER

The term customer is not defined in any of the statutes[9]. But a customer refers to a person who has an account opened in a bank irrespective of the duration of the relationship[10]. The

[1]L.C. Goyle, LAW OF BANKING AND BANKERS,468 (Eastern Law House Private Ltd. ,Calcutta, 1st Edn. , 1995)
[2]S.N Gupta, BANKING LAW IN THEORY AND PRACTICE, (Universal Law Publishing Co. Pvt. Ltd , 4th Edn. ,2017)
[3]*Supra* note 2
[4]*Supra* note 1
[5]Section 3, Negotiable Instrument Act,1881.
[6]HALSBURY'S LAWS OF ENGLAND, Vol 3 31(LondonButterworths,4th Edn. ,1973)
[7]17, DR. HART H.L., THE LAW OF BANKING, 41-56 (4th Edn.,1954)
[8]Samuel Johnson, DR. JOHNSON'S DICTIONARY, CONSORTIUM, (Great Britain,15 April 1755)
[9] Supporting the view expressed by Dr. Hart, the Kerala High Court in Central Bank of India Ltd., Bombay v. Gopinathan Nair and others (AIR. 1979 Kerala 74) observed: "*so far as banking transactions are concerned, a customer is one whose money has been accepted on the understanding that the bank will honor transactions up to the amount standing to his credit, irrespective of his connections being of short or of long-standing"*

Kerala High Court in the judgment of the *Central Bank of India ltd, Bombay v. Gopinath Nair*[11] had stated the same thing. This meaning of customer will even include in the meaning of the bank. For receiving the status of a customer, they must have an account in the bank.

The Reserve Bank of India (RBI) has introduced various guidelines which are particularly for the identification of the customers such as the 'know your customer' (KYC) so that the frauds which are related to finance etc. can be controlled. The RBI has issued a circular which is under section 35A of the Banking Regulation Act, 1949[12].

IV. BANKING

The most important element in the definition of banking is the acceptance of deposits. According to the definition of Halsbury's Laws of England[13] banking refers to "an individual, partnership or corporation, whose sole or pre-dominating business is banking, that is, the receipt of money on current or deposit account and the payment of cheques drawn by and the collection of cheques paid in by a customer".

In the Indian law of the banking regulation act the terms bank, banker, customer, and banking are defined[14]. This act even describes that no other person other than the banking company, State Bank of India (SBI), RBI, and any other banking institution, firm, or the person who was notified by the central government should accept the deposits by the public which can be withdrawn by the cheque[15].

According to this Act, the bank has the right to engage in any activity even other than banking but they cannot engage in any commercial activity because it is nowhere included in the act[16].

In the case of *Mahalaxmi Bank Ltd v. The Registrar of Companies West Bengal*[17], the Calcutta High Court had held that through the definition of banking it is clear that it is an essential characteristic of banking that the receiving of money on the deposits from the customers and even honouring them. If the bank does not exercise its duties of granting loans, receive deposits from the public which need to be repaid then the bank cannot be called the banking company according to the act. The lending of money is only a phase of the banking business it is not considered to be the main phase[18].

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[10] Taxation Commissioners v. English, Scottish and Australian Bank Ltd (1920) A.C. 683 UKPC

[11] This appears to be the correct and acceptable exposition of law since the 'Duration theory' (requiring a course or habit of dealing with the bank) has now been discarded by Courts universally. A wider definition describing the customer as 'any person having a dealing with a bank' may be useful for many purposes, but the context of acceptance of deposits is irrelevant.

[12] Financial Services Management Act ,Sec 138(7) about the meaning of customers, (British)

[13] *Supra* note5

[14] Section 5(b), Banking Regulation Act,1949.

[15] Section 4(A), *Ibid*.

[16] Section 6(1),*Ibid*.

[17] Relying on Bank of Commerce Ltd., v. Kunja Behari Kar, AIR .1961. Cal.666, AIR 1944 F.C.2

[18] *Ibid* in this connection, it may be noted that the E.C. approach to banking business is to consider the function of granting credits also, as an equally important and essential ingredients as deposits taking from the public. See. Art.I of both, the 1st and 2nd Banking Directives of the European Community. The Indian Parliament, however, followed the English approach.

In the case of *Bank Nationalization*[19], the supreme court of India had questioned that whether the term "banking business" refers to only the business which can be expressed under section 5(b) of the banking regulation act and it even does not include the term business under section 6(1) and even the four types of the nonbanking business.

Therefore, in short, banking is considered to be a business that includes the receiving of the deposits which are payable on the demands and whose sole intention is to circulate in the form of the money, collecting notes or drafts, the buying, and selling of the bills of exchange, negotiating of loans and they deal in the negotiable securities. There is no mandate to exercise these functions[20].

V. RELATIONSHIP

After understanding the definition of the banker, customer, and banking next, we will discuss the various aspects which are related to the banker-customer relationship. It is very important to have a piece of theoretical and practical knowledge about this aspect. Because of this relationship the rights and the liabilities of the parties can be determined in the legal form. Such a relationship cannot be determined in general form because this relationship depends upon the services which are provided by the banker.

For having a relationship between the banker and customer there is a need to have a mutual intention of the parties that they want to open a bank account[21]. Such a relationship cannot emerge if both parties do not agree or have an intention to enter. The relationship comes into effect from the moment the customer does the first payment to the banker for the opening of the account[22].

If we discuss the basic services which are provided for the acceptance of the deposits then there are four types of relationships which are existing between the banker and the customer:

- *The bailor and the bailee.*
- *The trustee and the beneficiary*
- *The principal and agent*
- *The debtor and creditor*

The obligation of the relationship depends totally upon the nature of the relationship which exists between the two[23].

[19] R.C. Cooper v. Union of India. AIR 1970 SC.564
[20] *Ibid*, at.p.590
[21] Robinson V Midland Bank Ltd. (1925) 41 TLR 402
[22] Lord Davey in G.N. Railway V. London & County Bank (1901) ALL ER REP.1004(HL)
[23] Herbert P.Sheldon et al , PRACTICE AND LAW OF BANKING, 162(London, Macdonald & Evans Ltd., 10th Edn.,1972)

1. The Relationship between The Bailor And Bailee

When there is a situation where the customer hands over its valuable goods to the bank for safe custody then the relationship between the bank and the customer is referred to as the bailor and bailee which is governed by the Indian Contract Act, 1872[24]. The process or the term bailment refers to when a person delivers its goods who is known as bailor to other person known as bailee for the safe custody of the goods for a contract and when the purpose gets accomplished then the goods need to be returned to the bailor or the bailee must dispose of the goods according to the directions which are provided by the bailor. It is different from the term agency because the bailee does not represent the bailor[25].

For the bailment, money is never considered to be the actual subject matter rather it can be if the actual coins are being delivered which needs to be returned[26]. In the past, the deposits which were made to the goldsmiths were considered to be of this nature and the goldsmith had to use the money then it was considered that this transaction is not a bailment[27]. The bailee does not exercise with the leave of the bailor which is covered under the contract then the bailor has no powers to form any contracts on the bailor which is on the behalf of the bailor and he cannot even make the bailor liable for any of the acts which he performs as a bailee[28].

When the process of bailment takes place from a contract which is governed by the Indian Contract Act, 1872 then there is a possibility of bailment and there can be a relationship of a bailee in respect of particular property without the presence of any enforceable contract and presence of consent for such relationship to arise and the finder of goods can be considered to be a bailee in some of the special circumstances.

The banker who does the advancement of money for the security of railway receipts which are sent to him for the money collection then, in this case, he does not become the bailee of the goods which form the topic for the receipts, where the banker has the possession of the goods there is an obligation on the banker to take care of those goods. In situations where the bank maintains the vault for the safe deposits and then, in turn, accepts the property and the valuables from the customers for keeping them safe then in that condition the bank is in the position of the bailee. The bailee must show that they are taking proper care of the goods which are in its custody[29].

The banker as the bailee has the right to contract himself out from the duty of taking care of the goods which were imposed upon him under the Indian Contract Act, 1872 and can therefore avoid taking any responsibility for any kind of loss or destruction which is caused to the goods bailed even after the bank has taken the proper care if the goods according to the terms which are mentioned in the Indian Contract Act, 1872 under Section 152[30]. The bank bailee may or may not repudiate the liability in the negligence which is related to the damages and the loss

[24] The Indian Contract Act, 1872.
[25] HLI, Halsbury's Laws of India vol.30 (Banking and Finance), LexisNexis,2017
[26] For e.g., when placed in a sealed bag or box
[27] S.N. GUPTA, THE BANKING LAW IN THEORY AND PRACTICE', Vol.1 1-25 (New Delhi, Universal Law Publishing Co., 3rd Edn.,1999)
[28] United Corporation Bank v.Hem Chandra Sarkar (1990) 3 SCC 389.(India)
[29] State of Bombay v. Memon Muhammed Haji Hasan (1967) 3 SCR 938.
[30] Bombay Steam Navigation Co. Ltd., v. Vasudev Babu Rao AIR 1928 Bom.5

which is caused to the goods which are placed in the custody[31]. If the subject matter of the goods bailed is itself lost then it will beprima facie evidence of the negligence which is caused by the bailee and can therefore lead to a rebuttable presumption[32]. If the bank then proves that they have taken proper care of the goods and wasn't negligent then the bank will not be held liable[33].

2. The Relationship Between The Trustee And The Beneficiary

There are situations where the banker can become the trustee of the funds which are provided by the customer to them. So, these types of relationships are formed when the banker receives the money of his customer which is not for deposits rather it is for some other purpose. These situations come up when the customers provide some particular instructions or directions to the banker to engage them in a particular transaction on the behalf of the former. If the relationship is considered to be one of trustee and the banker would then be barred from the usage of the amounts which are deposited by him[34].

In the case of the *New Bank of India Ltd vs Peary Lal*[35], it was held that the customer who is making the payment to the bank with giving proper instructions for the transmission of a particular amount of money to another branch. Then after some time, a moratorium was imposed and the bank was barred from making any payments. The court then held that the transaction made was for the entrustment of the amount of money to the bank for making a transmission. If no further instructions are provided then the bank does not cease to be a trustee and if the instruction is not given then the bank can hold the amounts which are transmitted on the behalf of the plaintiff as a trustee.

When in any case the bank is appointed to be the receiver by the court then the bank has the chance to become a trustee for the money which he received and the money will continue to stay as the property of the party who had deposited the amount in the bank.

From this case, it is clear that the fiduciary duties are implicit when the concept of trust arises and it can even compel the banker to make the entire disclosure of the profits and will be able to gain full consent from the beneficiaries which are part of the business. If there is a breach in any fiduciary duty then there are high legal consequences to it and if the trustee beneficiary characterization is adopted then the whole of the banking business can be finished which happened in the case of the bailor bailee characterization[36].

3. The Relationship Between The Principal And Agent

When the bank is providing its services of remittance of the money, collecting the cheques, paying the telephone bills, etc. of their customers then in such cases the bank acts as the agent of the customer and in such situations, the rights and the obligations of the bank towards its customers will be very different. The rights and duties of the banker and the customer are

[31] Vijaya Bank v. United Corporation Bank AIR 1991 (Ker) 209.
[32] K. Chellappan Pillai v. Canara Bank (1971) 71 Com. cas.584. Cochin Porttrust v. Associated Cotton Traders Ltd., AIR 1983, (Ker) 154 Jagadish Chandra Trikha v. Punjab National Bank (2000) 100 Com. cas.839 (Del)
[33] Dena Bank v. Glorphic James (1994) BC 240(Ker) DV.
[34]Section 19&20,The Indian Trust Act, 1882.
[35]India ltd v. Peary LalAIR 1962 SC 1003.
[36] A breach of fiduciary duty can lead to an injunction, damages, or to the fiduciary having to account for any profits made in addition to the criminal sanctions for breach of trust.

mentioned along with the special provisions about the principal and agent in the Indian Contract Act.

The boundation over a Banker

- For conducting the business of the customer or the principal which should be done according to the directions provided by the principal and if there are no directions then it will follow the prevailing custom at the place of the transaction at a particular time[37].
- They have to conduct the business of agency with making use of the skills which are within the people who are engaged in the business[38].

After all these boundation the banker or agent must make the compensation according to the consequences of the neglect or misconduct which is liable for conducting the business even after the directions given by the principal[39].

In the case of *Bharat Bank Ltd v. MS Kashyap Industries*[40], a company in Kanpur had ordered some cloth made of silk which should be of special quality and color for this the plaintiff had sent a DD through the Bharath bank, Delhi branch and had provided with the instructions that the draft should be presented within 10 days of the date of receipt. The bank had then presented the draft according to the instructions but then the company refused to accept it and said that it was a ground of overcharging by the plaintiff. Then the plaintiff had instructed the bank that they should deduct the overcharge and then present the draft. Due to this, the bank had taken a lot of time to present it, and then it was refused by the company. The bank had provided the credit to the plaintiff for the receipt of the draft and then they had debited it to the account which was then covered by the draft of the dishonoured cheque. The plaintiff then sued the bank based on the recovery of the price of silk[41].

On this, the trial court stated that on the grounds of negligence the plaintiff should be provided with the full amount of money as it was stated in the draft[42]. When the appeal was filed stating the explanation about the delay done by the bank in the presenting of the draft the high court had said that the plaintiff can only claim for the damages which are incurred because of the negligence of the defendant in the presenting of the drafts and not the price which was dispatched to the third party[43]. The bank acts on the instructions provided by the customer related to the negotiable instrument and had entered into a contract with the third party then the customer will withdraw the directions and can revoke the transactions.

[37]Section 212, Indian Contract Act 1872.
[38]*Ibid*
[39] Punjab National Bank Ltd., v. Dewan Chand AIR 1931 Lah. 302. Punjab National Bank Ltd., v. RBL Benarsi Das and Co. AIR 1960 Punj. 590 Bank of India v. Official Liquidator AIR 1950 Bom.376. First National Bank Ltd., v. Industrial Oil Com.AIR 1962. Punj. 170 First National Bank Ltd., v. Pioneer Commercial Bank. AIR 1951 Cal.34 Indian Bank v. Aluminium Industries Ltd., (1990) CCV 69 Ker 427. Keshari Chand v. Shillong Banking Corporation Ltd., AIR 1965 SC. 1711.
[40]Bharat bank ltd v. MS Kashyap industries, AIR 1958 J&K25 (India)
[41] Central Bank of India Ltd., v. Ram Sarup Khanna AIR 1956 Punj. 78.
[42] Section 211-218, The Indian Contract Act, 1872.
[43]Ross Cranston et al,'PRINCIPLES OF BANKING LAW',520(Oxford, Clarendon Press,1997)

If the bank is providing the services to deposit the bills of the customers then they will be held liable for any kind of damages or the loss which is incurred due to the customer because of the time they took in depositing the amount in the bank. Therefore, it is evident that the agent in many aspects in the position of the trustee[44].

4. Debtor-Creditor Relationship

When the customer deposits the monetary fund in the bank then the connection between the banker towards his customer is mainly termed as debtor and creditor. It has been said that the money that is deposited in the bank is feasible to cause misapprehension. In reality, what happens is that the money isn't deposited in the bank but it is lent to the banker, and to all those bankers that engage to do is to clear the debt by paying over an equivalent amount when they are called upon. But in reality, the contract dominates the law that is related to the deposit of a customer's money in a bank[45].

The contract of debt that is stated as to be on the legal basis with relevance to the relationship between the banker and the customer is, however, not similar to an ordinary commercial debt or a debt, simple and pure. Accordingly, the general debtor-creditor law cannot apply without the necessary alterations, in the case where the debt is owed by a banker to his customer. The most significant distinction between a banker's debt and an ordinary debt is all about their general rules i.e., the debtors have to pay back or repay the sum to his creditor that involves the duty of seeking him out and terminating the payments, doesn't apply to banker debtors[46]. This fundamental rule is described by the maxim that is "the Debtor must seek the creditor". The matter is essential because of the legal outcomes that may arise out of it. For, if we state that the rule applies to all the bankers as well then it will follow that the banker would be in an extended state of default and that the customer would be designated to sue the person for the repayment of the balance of the persons account without calling the person to pay[47].

Promptly, when the money is been deposited by a customer in the bank then the interconnection relationship is been formed between the customer and the bank. Hence, the bank is not liable to keep the money in the form it was given to it but they are responsible to use it in a way it considers constructive to them. The Bank is only liable to repay the amount total when the customers want or demand the same. In other terms, when the banker accepts deposits from the public then the money received is for all the purposes, the money of the banker. They are empowered to do with it as they please and were guilty of no breach of trust in employing it. Furthermore, they are no Answerable to the administration, the person puts it into jeopardy or even if the person involves in hazardous speculation, and in that case, the person is not bound to keep it or deal with it as the property as his principle. But the person is liable to the amount if the person is contracted, having received the money and has to repay to the customer when the customer asked or demand for it, the sum equivalent to that amount should be paid into his hand with the prescribed interest if any.

[44]Rajanayagam, M.J.L. *Marking Or Certification Of A Cheque By The Drawee Bank — The Legal Consequences*. malaya law review 12 298-307(1970) available at http://www.jstor.org/stable/24862628 (Last visitied October 5,2020)
[45] Sir Ross Cranston et al ,632 principle of banking law, (February 2018)
[46]*Chorley* and *smart leading cases* in the *law* of *banking*, 110 (Butterworths, *London*, 6th Edn.,1996)
[47]*Ibid*

The maxim put down in all the cases as mentioned above is that the banker is empowered to exercise the money without being called upon to consider for such a user, his only responsibility is to return the amount following the terms granted between the person and the customer. It is inquisitive to perceive that the law, as asserted in those terms in the old and well-known judgment of the *House of Lords in Folly v. Hills*[48] has never been challenged by any of these succeeding decisions.

But the bank is not obligated to execute the payment to the customer elsewhere from the department in which the statement is managed as though the branches of a bank are agencies of one principal. They are discrete, for the mortgage of customer's cheques. In the Joachim son case, it was conclusively held that it was certainly a term of the agreement among the parties that the bank was not accountable to pay the customer the full expense of his balance until he asked payment from the bank at the branch at which the prevailing account is grasped. This is the authorization for the proposal that the credit balance on a current with a bank is obligatory to the customer solely at the branch where the account is maintained.

From this, it certainly comprehends that the purpose of action, in the matter of refusal to pay, can occur only at the concerned branch of the bank and that the law administering the contract among the banker and the customer will be the law of the place where the branch at which the deposit is obligatory is located. This practice is appropriate irrespective of whether the account is current or savings account. It is further unnecessary if the deposit is performed through another branch of the bank or another bank. Furthermore, the requirement to make the payment should be executed by the customer following the prerequisites of the Negotiable Instruments Act and the banking methodology.

In *Delhi Cloth & General Mills Co. Ltd. v. Harnam Singh*[49] court mentioned – "in banking transactions, the subsequent rules are now settled: (i) the responsibility of a bank to pay the cheques of a customer rests fundamentally on the branch at which he holds his accounts and the bank can justly refuse to cash a cheque at any distinct branch. (ii) a customer must request payment at the branch where his current account is kept before he has a purpose of action toward the bank.

The rule is the equivalent of whether the account is a current account or whether it is a state of deposit." English Courts hold that the situs of the debt is at the position where the current account is maintained and where the demand must be executed. Therefore, it can be observed from the preceding considerations that the law had alternated among these four impressions before it eventually settled on the last of them, i.e. the debtor-creditor relation.

Ultimately, the duration of limitation of 3 years relevant to ordinary debts does not apply to the money deposited in a bank. The term of limitation will commence running in the matter of debt as soon as it becomes due[50]. In the occurrence of a deposit performed with the bank, the duration of limitation commences from the time, the amount is commanded by the customer from the bank[51].

[48]Lord Chorley, 'LAW OF BANKING' 31(London. Sweet and Maxwell, 6th Edn.,1974).
[49]Delhi Cloth & General Mills Co. Ltd. v. Harnam Singh, AIR 1955 SC 590.
[50]Art 44, The India Limitation Act 1963.
[51]*Ibid*

VI. CESSATION OF BANKER- CUSTOMER RELATIONSHIP

The decision of whether the banker-customer connection is in an occurrence at a distinct period has significant legal importance for both parties to that contractual relationship[52]. As duration is not of the nature of the relationship, even a particular transaction can give acceleration to it[53]. It is accordingly essential to circumscribe the contingencies under which the banker-customer connection may be terminated. *In tradition, it arrives at an end in one or another of the subsequent ways;*

1. *by mutual agreement among the parties,*
2. *by unilateral action on the part of one of the other parties, and*
3. *by enforcement of the law.*

Termination of the banker-customer connection by process of law may happen in the subsequent steps, viz,

1. *death of the customer,*
2. *mental incapacity of the customer,*
3. *the bankruptcy of the customer,*
4. *winding up of a company customer,*
5. *winding up of a bank, and*
6. *the outbreak of war.*

Since comprehensive research on this point is irrelevant as far as our theme is concerned, it is withdrawn from the distant discussion[54].

VII. CONCLUSION

From the preceding analysis, it is manifest that, for legal persistence, the receiving of securities by a bank from the public is considered as borrowing by the bank. But as a debtor, the bank is not similar to other commercial debtors; it has specific perquisites and is charged with contractual, statutory, and customary responsibilities. It is concerning this unique legal relationship that the behaviour of the bank in any distinct case is examined and any insufficiency in service is identified.

[52] For e.g., a banker who wrongly judges the relationship to be at an end and fails to honor a customer's cheques is exposed to the possibility of substantial damages and sometimes, evendefamation

[53]Commissioner of Taxation v. English, M Scottish and Australian Bank Ltd., (1920) AC 683. See further, Central Bank of Idia Ltd. Bombay v. Gopinathan Nair and others, AIR 1979 Kerala 74.

[54] N. Krishna Kumar. *Termination of the Banker-customer Relationship by Operation of Law.* Vol 3(1) JOURNAL OF BANKING & INSURANCE LAW,25-37 (2020). available at: http://lawjournals.stmjournals.in/index.php/jbil/article/view/551 (Last visited on 05 Oct. 2020)

CLIMATE CHANGE AND CLIMATE MIGRATION: A CRISIS AND ISSUE WITHOUT BORDERS

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I. INTRODUCTION

The effects of climate change and environmental degradation are plummeting to mortifying levels evident from the California wildfires[1] in the US, Uttarakhand floods[2]in India, cyclone Idai in Southern Africa[3] and land degradation as well as loss of forests in general, in Asia and Africa. While challenges posed by this global crisis have exacerbated to levels that governments and international organizations are not prepared to handle, to make matters even more critical and despite the highly damaging effects of all consequences of climate change, there are some issues that are argued to warrant even more attention than others. One such issue, looming large at the intersection of climate change and human rights is the case in point issue of climate migration. Apart from the point of view of 'negative impact assessment', a 'human rights' lens further assists in conceiving how the particular consequence of 'climate and environmentally induced migration' is one that requires multipronged strategizing and scrutiny by governments and international organizations. The research paper is an exploration of climate migration as a ramification of the climate and environmental crisis, why it requires immediate action aimed at protection and accommodation of migrants, analyzing burden of responsibility, existing mechanisms and their capacity to provide support and the need for and suggestions regarding a new international legally binding framework to accommodate those persecuted by the climate and environmental crisis.

Just as it has taken a protracted and concerted effort on the part of advocates, activists and international organizations to get nations to recognize the severity of the climate crisis, climate migration too, has long been neglected either on the grounds that it is not the sole cause or that often this migration is simply internal, seasonal and exploration for new opportunities. However, in the context of life-threatening sea-level increase, desertification, increased ocean acidification, and freshwater salination in the developing south, lower latitudinal belt regions of Latin America, Southeast Asia, Pacific islands region and Sub-Saharan Africa it has been estimated by the World Bank that an additional 143 million will become climate migrants by 2050[4].

[1]*2020 California Wildfires*, WIKIPEDIA (April 11, 2021), available at: https://en.wikipedia.org/wiki/2020_California_wildfires.
[2]*2021 Uttarakhand Floods*, WIKIPEDIA (March 26, 2021), available at: https://en.wikipedia.org/wiki/2021_Uttarakhand_flood.
[3]*5 Natural Disasters That Beg for Climate Action*, OXFAM INTERNATIONAL, available at https://www.oxfam.org/en/5-natural-disasters-beg-climate-action.
[4]Brookings, *The Climate Crisis, Migration and Refugees*(July 25, 2019), available at https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/#footnote-17.

II. DEFINITION AND LACK THEREOF

Even though the following definition of climate migration has been given by International Organization for Migration (IOM), it has no legal utility, it is a definition used simply for the purpose of analytical research, study as well as advocacy. According to the definition, climate migration is a phenomenon that involves: the movement of persons or a group of persons who, predominantly for reasons of sudden or progressive change in the environment due to climate change, are obliged to leave their habitual place of residence or choose to do so, either temporarily or permanently, within a State or across an international border. The central point is that the migration that is caused by some environmental change or anomaly is because of the effects of climate change. Despite having no legal validation, the term 'climate migration' has been utilized as a part of the legally binding 'Cancun Agreements' on climate change adaptation, adopted by State Parties to the United Nations Framework Convention on Climate Change at the conference held in 2010. Furthermore, displacement, migration as well as planned relocation were the three kinds of movements that have been accepted as those triggered by climate change. However, in terms of a definition embedded in an international framework of law that can provide actual protection to these migrants legally, is still non-existent.[5]

Walter Kälin, Representative of United Nations Secretary-General, Human Rights for Internally Displaced Persons, 2004, gave a list of situations that may potentially lead to climate-induced migration:

1. Sudden-onset disasters such as floods.
2. Slow-onset disasters such as rising sea levels and increased salination of freshwater.
3. The sinking of small island states, which is a special case of slow-onset disasters.
4. Governments designating 'high-risk zones' on account of environmental dangers.
5. Unrest, seriously disturbing public order, violence or even armed conflict resulting from depleting natural resources, such as drinking water because of climate change.[6]

III. IMMEDIATE ACTION NEEDED

2000 climate disasters triggered the internal displacement of 24.9 million people across 140 countries and territories, as of 2019[7]. According to Eco Watch, an environmental website, by 2050, one billion people would become climate refugees[8]. Despite such alarming evidence and data of the impacts of climate change on human mobility, scientists, legal scholars and policymakers have failed to form a consensus on an agreed-upon definition of 'who is a climate/environmental migrant'. Problem identification is the necessary stage to form adequate international frameworks, laws as well as protection and mitigation strategies. This drawback

[5]IOM (2020), *Environmental Migration Portal - Environmental Migration*, available at https://environmentalmigration.iom.int/environmental-migration-1.
[6] Rafael Leal-Arcas, *Climate Migrants: Legal Options*, PROCEDIA: SOCIAL AND BEHAVIOURAL SCIENCES 88 (2012).
[7]*Migration Data Portal*, ENVIRONMENTAL MIGRATION (Last updates October 27, 2020), available at https://migrationdataportal.org/themes/environmental_migration#:~:text=In%202019%2C%20nearly%202%2C000%20disasters,were%20the%20result%20of%20tropical.
[8]Maria Trimarchi and Sarah Gleim, *One Billion People May Become Climate Refugees by 2050*, ECOWATCH (September 24, 2020).

(among others) at the primary stage is one of the main reasons why the international community has been unable to adequately deal with the problem at hand. One of the reasons for this lack of a definite understanding of what a climate migrant is that climate and environment are usually one of the 'flights'(migration) causing factors amongst others, that have led many to flee. Moreover, it is believed that some migration is not forced, and rather is just a seasonal movement that herding communities undertake to adapt to the slow-onset climate changes. For instance, in Mongolia, herding communities have begun to move from north to south in search of fodder for their livestock – this is just their way of adapting to a sparse green cover and they may not wish to be seen as climate migrants and require the same level of protection and support[9].

Nevertheless, the fact remains that a humanitarian crisis is underway wherein communities as a whole are having to uproot their lives because of situations that are out of their control and which they are not responsible for, like flooding, droughts, etc. Even if these changes in their surroundings are slow onsets, like sea-level rise and the decision to move is one that has been taken after 'consideration' and with the aim of restarting their livelihood practices elsewhere, it is in actuality not a real 'choice' per se. It is forced, due to circumstances wherein apart from the option to migrate, the only other option is to perish and starve due to loss of livelihood and live in a surrounding wherein their homes and communities will become dysfunctional, as a result of lack of resources or by being destroyed by a climatic event.

IV. CLIMATE CHANGE SHOULD BE RECOGNISED AS A LEGITIMATE CAUSE FOR MIGRATION/DISPLACEMENT: TORT LAW PERSPECTIVE

A tort law perspective can be administered on the question of 'climate change being just one of the many factors and therefore, not enough to be recognized as a solid source of persecution like religious identity and political beliefs'. The logic of the 'but-for' test shows that a certain cause is not the source of an outcome if that outcome would not have occurred without that cause. Additionally, tort law also allows for an event to be a causal factor for an outcome, even if it cannot pass the 'but-for' test, on the condition that it can be said to be a substantial factor causing that outcome[10]. The past few years are rife with examples of internal and cross-border displacement due to a climate-induced disaster as well as slow-onset climate change effects that alter the environment to the extent that communities are no longerable to survive upon their livelihood. In 2012, more than six million people in North-Eastern Nigeria were forced to migrate due to floods.[11] With climate related consequences such as flooding and desertification getting exacerbated, 60% of the population in Nigeria is living below the poverty line[12]. With a majority of the population still dependent on agriculture, which is in turn dependent on climatic conditions, an increasing number of people will lose their livelihood and an even higher proportion of the population will go hungry. On another front, extreme drought and desertification in Syria leading to conditions that resulted in the civil unrest clearly shows two things: the first, that climate change affects the security situation in a country and second,

[9]*Let's Talk About Climate Migrants, Not Climate Refugees*, SUSTAINABLE DEVELOPMENT GOALS (June 6, 2019).
[10]Rafael Leal-Arcas, *supra* note 6, at 3.
[11]Newsletter for the European Union, *Climate Change and Migration: The Sahel Case*(March 10, 2019), available at http://www.newslettereuropean.eu/climate-change-migration-the-sahel-case/.
[12]The World Bank, *Nigeria Releases a New Report on "Poverty and Inequality in the Country*" (May 28, 2020), available at https://www.worldbank.org/en/programs/lsms/brief/nigeria-releases-new-report-on-poverty-and-inequality-in-country.

more pertinent to the argument that even though climate change cannot always betaken as the sole cause (of a conflict situation) leading to migration, but it is definitely a substantial contributing factor, especially when the unrest caused is due to depletion of resources leading to reduced accessibility [13].

V. WHO IS RESPONSIBLE FOR CLIMATE MIGRANTS?

Once it gets established that climate migration is a human rights issue, violating the right to life and right to liberty and security, triggered off by the ongoing alarming climate crisis, it is important to identify who is most responsible for protecting, accommodating and aiding climate migrants. For this, an exploration of the context prevailing in previous centuries is necessitated. The origins of climate change can be traced back to the beginning of the industrial revolution in the 1600s,the capitalist economy with its market hunger-led business interests of those that came to be known later as colonizers, led them to what are now the decolonized developing nations of the south. This is the context for the argument being made here having two-fold components. First, colonization of nations in Asian, African and Latin American regions was done with the aim of being able to exploit people as well as their natural resources, for industrializing the economy of colonized nations. Second, historically, developed nations have produced more Green House Gases (GHGs) from production activity and left a large carbon footprint to support their 'high standard of living' and 'consumerism'. The U.S. has been the largest historical emitter with being responsible for 25% of the world's total GHG emissions. While China and India today, are respectively 1st and 2nd largest emitters, they don't have the same historical burden which can be seen in the case of U.S. and 28 countries of the European Union (EU) being responsible for 22% of the emissions[14]. The principle of 'Common But Differentiated Responsibilities' formalized at the United Nations Conference on Environment and Development at Rio de Janeiro, 1992, held that nations have contributed differently to emissions and the developed nations who have contributed more to the GHG emissions historically and thus, to climate change have a larger responsibility for the pursuit of sustainable development.[15] The developing and under-developed nations, on the other hand, most of which were formerly colonies have a lesser burden to prioritize climate change mitigation and adaptation and should get to develop their economies and nations without constraints. In this sense, the contribution of developed nations to climate change is larger, meaning that they are more responsible than other countries towards the consequences of climate change, such as climate migration. Moreover, for instance, taking the case of Bangladesh, despite being the lowest emitter, historically and presently, it is the most helpless victim of repeated climatic disasters. It is predicted that Bangladesh will lose 17% of its land by 2050, due to flooding caused by climate change, triggering 20 million climate migrants. Being a developing nation, wherein as of 2019, 2 out of every 5 persons are employed in agricultural activities, fertile land is a necessity for people to be able to earn a living, loss of land would have devastating consequences[16]. With a lack of proper disaster mitigation mechanisms in place due to institutional weakness and resource crunch, Bangladesh amongst other countries, especially coastal ones, suffer the brunt of climate change,

[13]Brookings, *supra* note 4, at 2.
[14]Hannah Ritchie, *Who has Contributed Most to Global CO2 Emissions?*, OUR WORLD IN DATA (October 1, 2019).
[15]*United Nations, Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992), available at https://www.un.org/esa/dsd/agenda21/Agenda%2021.pdf (1993).
[16]Light Castle Analytics Swing, *An Overview of Agriculture in Bangladesh*, DATABD.CO (June 23, 2019).

and its vulnerable citizens become climate migrants, despite not contributing to the global crisis in the same way as developed nations, whose actions have only hastily worsened it. It is due to these reasons that the burden of protecting climate migrants from nations such as: Bangladesh, Nigeria, Honduras, Brazil, India, Haiti, China, Kiribati among others has to necessarily be shared in large amounts by developed nations such as the USA, Australia, Canada and EU nations[17]. While international frameworks are required to accommodate climate migrants, it is all the more important to open up existing channels for migration to make the process smoother, sans more obstacles that those displaced have already faced.

VI. A CASE FOR WHY AN INTERNATIONAL LEGAL FRAMEWORK IS REQUIRED

Currently, there is no international framework of protection for those persecuted by climate change. Numerous instruments and mechanisms exist but they are neither legally binding (and thus not properly implemented) nor do they have stipulations for the provision of adequate support and aid giving. Agreements such as the Global Compact for Safe, Orderly and Regular Migration, established with the aim of preventing and providing support for climate induced relocation comes under the aforementioned category of inadequate mechanisms and weakening it further, is the lack of U.S. participation in it[18]. The Geneva Refugee Convention does not recognize climate migrants as refugees[19]. Some say that including climate refugees within its fold will affect those who are persecuted due to religious and political reasons. While the convention has legal mechanisms to protect other refugees, it lacks the same protection for climate refugees legally, that makes them vulnerable to a larger political risk than other migrants (who are included). An international framework established on public international law is a necessity and the following reasons build a case for the same:

1. Not just to provide migrants with support and provisions for proper and adequate resettlement, but to share the know-how regarding resilience building that could essentially prevent such climatic events as well as accommodate those who have been internally displaced.

2. Risk pooling and arranging for security provisions requires the availability of forums for dialogue and deliberation, which can accompany such international and regional frameworks of cooperation.

3. Provision of funding for infrastructural and other efforts (undertaken by risk-prone countries) by developed countries in order to prevent environmental flight situations from arising. Adaptation measures such as: developing risk zone maps, improving early warning systems, resilient infrastructure especially for flood and cyclone-prone areas, improving land use, etc.

[17] Migration Data Portal, *Environmental Migration* (Last updates October 27, 2020), available at https://migrationdataportal.org/themes/environmental_migration#:~:text=In%202019%2C%20nearly%202%2C000%20disasters,were%20the%20result%20of%20tropical.
[18] IOM (2020), *supra* note 5, at 2.
[19] Margit Ammer, Prof. Manfred Nowak, Lisa Stadlmayr and Prof. Gerhard Hafner, *Legal Status and Legal Treatment of Environmental Refugees*, ENVIRONMENTAL RESEARCH OF THE FEDERAL MINISTRY OF THE ENVIRONMENT, NATURE CONSERVATION AND NUCLEAR SAFETY 8 (2010).

4. The threat to life and livelihood currently looming over potential climate migrants due to climate change disasters, sudden as well as slow-onset is so much so that it violates basic minimum level of human rights that human beings are entitled to. This threat requires an international response.

VII. RECOMMENDATIONS FOR BUILDING A NEW INTERNATIONAL LEGAL FRAMEWORK

Following are the ways in which existing regimes can be utilized to leverage cross border responsibility for climate migrants:

1. 'International assistance and cooperation' obligations enshrined as part of the Economic, Social and Cultural Rights under the UN Human Rights regime.

2. The deriving basis for the right to a healthy environment conducive to wellbeing as an indirect component of existing human rights that postulate for a healthy environment[20].

3. The opportunity arose as a result of the 2015 Paris Agreement signatories' request that the 'Warsaw International Mechanism for Loss and Damage Associated with Climate Change (WIM)' to come up with recommendations for tackling the issue of people getting displaced due to climate change[21].

The current xenophobic and anti-immigrant atmosphere hitherto seen in the US(especially under the Trump administration) and European countries presented a higher likelihood of reducing protections for migrants rather than expanding their scope. A ray of light in such dark times has been President Biden's recent order to his advisers to explore mechanisms for accommodating those displaced by climate. However, the 'political feasibility' of an international legally binding framework seems bleak because the formulation of a comprehensive and strict instrument will require compromises and nations even other than, the strongest ones have had a tendency to agree on the lowest common denominator with regard to stipulations that will hold them responsible for accommodation and resettlement[22]. Despite such a context, efforts at developing an instrument should be made because the humanitarian crisis at hand is rising and worsening as the global climate crisis worsens. It is also important to recognize that this reluctance often results from shirking off obligations and responsibilities rather than from genuine considerations and uncertainty regarding who can be considered a climate refugee.

A research paper titled 'Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees' suggests five principles to address the issue of climate refugees, of which the following can be utilized as aims in the new framework:

1. Planned relocation and resettlement

2. International assistance for domestic measures

[20] *Id*., at 3.
[21] Brookings, *supra* note 4, at 2
[22] Biden Orders Advisers to Explore Options for Resettling Climate Migrants, CLIMATE HOME NEWS (February 8, 2021).

3. International burden sharing[23]

A binding agreement, enshrined with solid obligations, concrete sanctions and an enforcement mechanism must be the way to go. Criteria for identifying specifically responsible states would have to be developed. Avoidance of embedding the new instrument in an existing legal frame work will prevent its scope from being limited by the existing regime's established principles. However, existing principles such as: Common but Differentiated Responsibility, a human rights-based lens while considering methods of aid and resettlement and 'the polluter pays' principle, should be utilized to develop a comprehensive instrument. Countries like Australia and New Zealand have come up with Seasonal Employer Programs which involve employing migrants in their agricultural activities, horticulture activities and the tourism sector. In Australia, this programme is extended specifically to migrants from Kiribati, Samoa, the Solomon Islands, among other nations in the Pacific region as these are source nations for climate migrants. Such a programme can be incorporated into the international framework for the protection and accommodation of climate migrants[24]. The dearth of accurate data regarding movements of climate migrants is another issue that requires attention. The framework can establish committees to study and understand these trends as well as come up with numerical data showing a more authentic ground-level situation. Moreover, including regional instruments that augment the interests and principles of the international law and the new framework while taking into account peculiarities of the regional variables could enhance the utility and relevance of the instrument for different regions.

VIII. CONCLUSION

Displacement and relocation due to climate change has long been a common adaptation strategy used by mammals, birds and amphibians. As of 2013, it was found that about 3000 species were forced to move for survival in the face of climate change[25]. Similarly, human beings, especially those who depend on their natural environment for homestead and livelihood have moved away from their homes as part of a survival strategy in the face of climate and environmental disasters. When they move in a bid to 'survive' not only is their access to basic human rights endangered, but it is hardly a real 'choice'. It is forced due to climatic events which are essentially a result of exploitative tendencies of western nations as well as recklessness with regard to GHG emissions. The point of interest is that mammals and birds are able to move freely to survive, however, human beings are not. It is high time to recognize climate migration as a humanitarian crisis needing cooperation on developing a multipronged strategy and holding international organizations and developed nations accountable for their reluctance to recognize them as refugees, forced to flee due to climatic events out of their control.

[23]Bayes Ahmed, Who Takes Responsibility for the Climate Refugees?, EMERALD PUBLISHING LIMITED 7-8 (January 10, 2017).
[24]Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific*(2012), available at:https://www.adb.org/sites/default/files/publication/29662/addressing-climate-change-migration.pdf (2012).
[25] Bayes Ahmed,*Supra* note 23, at 8.

IMS Law Review: Student Edition

Edition – II, July 2021

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Editorial Policy of the Journal

PRELUDE

IMS Law Review: Student's Editionis a product of School of Law, IMS Unison University and is an annual peer-reviewed journal, first published in 2020. It seeks to promote original and diverse legal scholarship in a global context among the law students all across the country. It is a multi- disciplinary journal aiming to provide a platform to the students to communicate high quality original research work, reviews, short communications and case report that contribute significantly to further the knowledge related to the field of Law. The Editorial Board of the IMS Law Review: Student's Edition solicits submissions for its Third Edition (July 2022). While there are no rigid thematic constraints, the contributions are expected to be largely within the rubric of legal studies and allied interdisciplinary scholarship.

CONTRIBUTION

We seek contributions in the form of:

1. Articles (Maximum 8,000 words inclusive of footnotes and Abstract)
2. Essays (Maximum 4,000 words inclusive of footnotes)
3. Case Comment/Legislative Critique & Notes (Maximum 3,000 words inclusive of footnotes)
4. Book Review (Maximum 2,000 words inclusive of footnotes) besides other forms of scholarly writing

- Place tables/figures/images in text as close to the reference as possible. Table caption should be above the table. Figure caption should be below the figure. These captions should follow Times New Roman 11point.

Submission Guidelines

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   The whole document should be in Times New Roman, single column, 1.5 line spacing. A soft copy of the document formatted in MS Word 97 or higher versions should be sent as submission for acceptance.

2. Main Text:

   Title of the paper should be bold 16 point, and all paragraph headings should be Bold, 12point.

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5. Plagiarism Disclaimer:

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6. Citations:

   All citations shall be placed in footnotes and shall be in accordance with format specified **(Annexure II)**. The potential contributors are encouraged to adhere to the Appendix for citation style.

7. Peer Review:

   All submissions will go through an initial round of review by the editorial board and the selected papers will subsequently be sent for peer-review before finalization for publication.

All Correspondence/manuscripts should be addressed to:

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Annexure I

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Annexure II

CITATION STYLE

CASES

IN MAIN TEXT:

Jassa Singh v. *State of Haryana*

IN FOOTNOTE:

Jassa Singh v. State of Haryana, (2002) 2 SCC 481

The full citation should be provided in the footnote even if the case name has been mentioned in full in the main body.

Government to be written in full.

Example: Kesavananda Bharati v. State of Kerala; M.C. Mehta v. Union of India.

SHORTENED FORM

If the same case is going to be cited subsequently, the full citation used the first time should be followed by the shortened form by which the case will be referred to subsequently, in inverted commas, and in square brackets.

Example: M.C. Mehta v. Union of India, [1997] 2 SCC 353 [*Taj Trapeziumcase*] Subsequent references

Taj Trapezium case, [1997] 2 SCC 353

The shortened form should be used every time after the first time a case is cited.

QUOTES FROM CASES

Per Subba Rao J., "*a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution*". (Footnote original citation of case or shortened form as perrules statedabove)

Single Judge:

S.H. Kapadia J.

Chief Justice of India

Thakkur C.J.I.

More than one Judges

K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.)

UNPUBLISHED DECISIONS

Name of the parties, Filing No of Year, Decided on date (Name of Judges) (Name of Court)

Example:

BP Singhal v. Union of India, W.P. (Civil) No.296 of 2004, Decided on May7, 2010(K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.) (Supreme Court of India).

INTERNATIONALDECISIONS

Case name, (Party names) Judgement, Year, Publisher, Page No (Court Name) **Example:**

Case Concerning Right of Passage over Indian Territory (India v. Portugal) Judgment, 1957, ICJ reports, 12 (International Court of Justice)

LEGISLATIVE MATERIALS

When citing Constitution, it should be in capital letters while other Statutes it should be First letter of the word in uppercase followed by lower cases.

CONSTITUTION

Art. 21, THE CONSTITUTION OF INDIA, 1950.

OTHER STATUTES

Sec. 124, Indian Contract Act, 1872.

BILLS

Cl. 2, The Companies (Amendment) Bill (introduced in Lok Sabha on March 16, 2016).

PARLIAMENTARY DEBATES

Question/Statement by Name, DEBATE NAME, page no (Date) Example:

- Question by N.G. Ayyangar, CONSTITUENT ASSEMBLY DEBATES 116 (August 22, 1947).
- Statement of V. Narayanasamy, LOK SABHA DEBATES 5 (March 10,2010).

BOOKS

TEXT BOOKS

Name of the Author, NAME OF THE BOOK, Volume (Issue), Page (Publisher, Edition, Year)

Example:

H.M. Seervai, CONSTITUTIONAL LAW OF INDIA, Vol. 3, 121 (Universal Law Publishing Co.Pvt. Ltd.,4thEdn., 2015)

- **In the case of a single author,**

  M.P. Jain, INDIAN CONSTITUTIONAL LAW, 98 (Kamal Law House, 5th Edn., 1998)

- **If there is more than one author and up to two authors,**

  M.P. Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW, 38 (Wadhawa, 2001)

- **If there are more than two authors,**

  D.J. Harris *et al*, LAW OF THE EUROPEAN COMMUNITY ON HUMAN RIGHTS, 69 (2nd Edn., 1999).

- If there is no author then the citation would begin from the ***Title of the Book***.
- If the title of the book includes the author's name, then the book should be cited as an authorlessbook.

Example:

Chitty on Contracts, Vol. 2, 209 (H.G. Beale ed., 28th edn., 1999).

EDITED BOOKS

Name of Editor/s (Ed.) NAME OF BOOK, page no./s (Publisher Name, Year of Publication)

- **In the case of a single editor,**

  Nilendra Kumar (ed.), NANA PALKHIVALA: A TRIBUTE, 24 (Universal Publishers, 2004).

- **If there is more than one author and up to two editors,**

  S.K. Verma and Raman Mittal (eds.), INTELLECTUAL PROPERTY RIGHTS: A GLOBAL VISION, 38(2004).

- **If there are more than two editors,**

  Chatrapati Singh *et.al.* (eds.), TOWARDS ENERGY CONSERVATION LAW 78 (1989).

COLLECTION OF ESSAYS

Name of Author, *Name of Article* in Name of Collected Book Page No (Editor Name, Year of Publication)

M.S. Ramakumar, *India's Nuclear Deterrence* in NUCLEAR WEAPONS AND INDIA'S NATIONAL SECURITY 35 (M.L. SondhiEdn., 2000).

REGILIGIOUS AND MYTHOLOGICAL TEXTS

TITLE, Chapter/ Surar Verse (if applicable)

Example:

THE BHAGAVAD GITA, Chapter 1 Verse46

ARTICLES

Name of Author, *Name of Article*, Volume (Issue) NAME WHERE ARTICLE IS PUBLISHED page no (Year of Publication)

LAW REVIEW ARTICLES

A.M. Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, Vol. 87(3) VIRGINIA LAW REVIEW 415 (2001).

MAGAZINE ARTICLES

- **Articles in print versions of magazines**

  Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK 22 (June 11, 2016).

- **Articles published in a magazine arranged by volume**

  A. Bagchi, Sri Lanka's Experiment in Controlled Decentralization: Learning from India, 23(1) ECONOMIC AND POLITICAL WEEKLY 25 (January 2, 1988).

- **Articles in print versions of newspapers**

  Robert I. Freidman, India's Shame: Sexual Slavery and Political Corruption are Leading to an AIDS Catastrophe, THE NATION 61(New York Edn., April 8, 1996).

MAGAZINE ARTICLES ONLINE VERSIONS

Name of Author, *Name of Article*, NAME WHERE ARTICLE IS PUBLISHED (Date of issue) *available at* link where it is published (date of last visit)

It is mandatory to use exact link where the article of published removing the hyperlink

- **Articles in online versions of newspapers**

  Mehboob Jeelani, *Politics stretches list of Smart Cities from 100 to 109*, The Hindu (2 July 2016), available at http://www.thehindu.com/todays-paper/politics-stretches-list-of-smart-cities- from-100-to-109/article8799010.ece(Last visited on July 2,2016).

- **Articles in online versions on magazines**

  Uttam Sengupta, *Jack of Clubs and the Cardsharps*, OUTLOOK (11 June 2016), available at

  http://www.outlookindia.com/magazine/story/jack-of-clubs-and-the-cardsharps/297427(Last visited on July 2, 2016).

REPORTS

LAW COMMISSION REPORTS

243rd Report of the Law Commission of India (2012)

ONLINE REPORTS

World Trade Organization, *Lamy outlines "cocktail approach" in moving Doha forward*, (2010), *available at* http://www.wto.org/english/news_e/news10_e/tnc_chair_report_04may10_e.htm (Last visited on May 10, 2016).

INTERNATIONAL TREATIES

Art. 5, UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010),July 12, 1998, ISBN No. 92-9227-227-6, available at:http://www.refworld.org/docid/3ae6b3a84.html (accessed July 2, 2016)

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FORMATTING

- Single numbers do not begin with a0
- Remove hyperlinks in all citations of URLs
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- Capitalisation – The start of every sentence should be in capitals. In titles, do not capitalise articles, conjunctions or prepositions if they comprise of less than four letters.
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  - Non-English words
  - Emphasis in the main text, but not forming part of a quote
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  - Cl. for clause
  - No. for number
  - Reg. for regulation
  - Sec. for section
  - Vol. for volume
  - Edn. For edition
  - Ed. For editor
  - Ltd. for Limited
  - Co. for Company
  - Inc. for Incorporated
  - Add "s" to the short form for the plural form.

FOOTNOTES

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  - When the page number(s) being referred to are the same as in the previous footnote
  - *Id.*
  - When the page number(s) being referred to are different from the previous footnote
  - *Id., at 77-78.*
  - The last name of the author, when available, should be used before the supra. The format for referring to footnote earlier than the immediately prior footnote shall be: Seervai, supra note 6, at 10.
- Introductory Signals
  - No introductory signal to be used when the footnote directly provides the proposition.
  - The signal 'See' shall be used when the cited authority clearly supports the proposition.
- All footnotes must not end in a period (fullstop).

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- For quotations below fifty words in length, the quote should be in double inverted commas and should be italicized.
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ABOUT IMS UNISON UNIVERSITY

IMS Unison University, a constituent of Unison Group is a premier educational and research University nestled amidst beautiful and serene surroundings offering an environment that fosters learning and stimulates creativity.

The journey started in 1996 as IMS Dehradun, a nonprofit organization set by a group of visionaries dedicated to the cause of changing the face of professional education in Northern India.

IMS Unison University has been rated as one of the top private universities of India, it boasts of picturesque campus surrounded by the Shivalik range of the mountains. The well laid out campus with buildings standing tall in red-brick design, amongst the serene atmosphere, offers the most conducive ambience for the learners in pursuit of higher education. The University believes in continuously evolving through the adoption of the best practices in the education industry with a strong focus on the growth of its students, faculty and staff.

The University today provides a platform for excellence in teaching, learning and administration. State-of-the-art Information Technology is extensively used in the University contributing to the development of well-trained graduates, post- graduates and doctorates to fulfill the manpower needs of the corporate world.

The University presently offers undergraduate, post-graduate and doctorate programs in several streams of Management, Law, Mass Communication, Hospitality Management, and Liberal Arts under the following five schools:

1. School of Management
2. School of Law
3. School of Mass Communication
4. School of Liberal Arts
5. School of Hospitality Management