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I, Altaf Ahmad Bazaz, Chairman of the College, do hereby declare that the particulars given above are true to the best of my knowledge and belief.

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KASHMIR JOURNAL OF LEGAL STUDIES (KJLS)

Editorial

The changing nuances of law demand a continuous process of reappraisal, mapping, documenting and dissemination in order to answer the emerging challenges of technology & dynamic society in the domain of legal research. Main objective of every academic work remains the same. However some endeavors become distinct on account of their quality. The Kashmir Journal of Legal Studies has been contributing substantially in the field of legal research, resulting in accreditation of the journal as UGC approved listed journal which is a great achievement for a Private Law college of the Valley. The journal is being indexed by Indian Citation Index (ICI) as a sequel to its quality of content in the field of legal education. It gives us immense pleasure to note that the ICI has authorized the college to use their Logo in this Journal which is duly acknowledged. The Journal is also listed in UGC-CARE which is a rare distinction of its nature.

The present issue of the journal has twenty three articles which are delineated as under:

Dr. Mohammadi Tarannum in her article '*Law of Limitation and Cognizance of Criminal Cases – An Analysis*' has highlighted the relationship and different dimensions involved in in computing limitation and relation between Criminal Procedure Code, 1973 and Limitation Act, 1963 with the help of various judicial decisions on limitation for taking cognizance of crimes.

Dr. Yasir Lateef Handoo and Iman Abdul Muiz in their article *'Protection and Regulation of Big Data in India: Need For Legal Framework'* have highlighted the need for the requirement of a legal framework in India to regulate and protect Big Data and offers certain suggestions and recommendations thereto.

Seema Deshwal in her article '*Force Majeure and Hardship in International Commercial Law: Analysis of UNIDROIT Principles, PECL and CISG'* has made a comparative study of the international instruments has been undertaken to understand and analyze force majeure events and hardship, provisions under these instruments to find out the most comprehensive provision.

Dr. S. A. Bhat & Dr. Mudassir Nazir in their article *'Emerging Challenges in Corporate Governance: - A Critical Analysis*' have attempted to highlight various dimensions of Corporate Governance and the emerging challenges it faces.

Dr. Shahnaz in her article *'Tenth Schedule and Defections: A Constitutional Perspective'* has attempted at analyzing the role of the Constitutional Courts in construing the provisions of the Tenth Schedule and its impact on the Indian democracy.

Aratrika Chakraborty and Dr. Kavita Singh in their article *'A Critical Analysis of Post Partum Depression As A Diminished Responsibility In Infanticide Crimes In India'* have attempted to analyze the medico-legal aspects related to Post partum depression as a defense to infanticide and the present gaps in judicial and legislative framework.

Dr Smita Sarmah in her article *'Geographical Indication as a Tool to Protect Traditional Knowledge: Assessing its adequacy in reference to Assam's Agro-Medicinal Plants'* focused on some of the plant varieties which are traditionally grown or found in Assam and a need of stringent Sui Generis law to ensure protection of traditional knowledge over the rare medicinal herbs of the region.

Gulafroz Jan in her article *'Non-Conventional Trademarks with Special Reference to Smell and Sound: A Cross Jurisdictional Analysis'* has an attempted to discuss the law relating to non-traditional trademarks in developing countries such as the European Union & United States, as to analyze the position of these marks in Indian legal domain.

S. Suganya & E. Prema in their article '*New Beginning in Intellectual Property Rights: The Role of Artificial Intelligence as Authors & Inventors – Legal Analysis'* have highlighted the various mechanisms involved in the process of artificial intelligence and its impact on the overall intellectual property rights.

Dr. Leena Moudgi in her article **'***Application of Arbitration and Taxation Laws in International Commercial Contracts With Specific Reference to India'* has highlighted the relationship between FDI, Taxation and Arbitration in the present legal mechanism.

Dr. Zubair Ahmad Khan & Dhawal Shanker Shrivastava in their article '*The Vagaries Associated With Determination Of Relevant Market With Special Reference To Real Estate And Intellectual Property Rights'* have focused on determination of relevant market in real estate and intellectual property rights.

Sabeel Kawoosa in her article '*Criminal Procedure (Identification) Act, 2022; A Critical Appraisal'* endeavors to analyze the various provisions of this Act and its impact on various rights of an individual as there is skepticism over the data protection and privacy concerns under this Act.

Dr. Urba Malik in her article '*Violence and Legal Process: Exploring the Narratives of Kashmiri Women'* has attempted to analyze the different levels of violence which a Kashmir women has been subject of, narratives attached to it and the involved legal process.

Dr. Ajai Singh & Pragati Raj in their article *'Bail Pendency in India: A Ridicule to Criminal Procedure Code'* have attempted to inquire the causes of pending bails in the given criminal justice system and the alternate measures regarding the same.

Shahid Parvez in his article 'Transgender *Children: A Socio-Legal Perspective'* has attempted to highlight the possible social and legal measures to protect the interests of transgender children.

Dr. Mohammad Hussain & Mir Mubashir Altaf in their article *'Impact Of Covid19 Pandemic On The Legal Profession– A Case Study Of Kashmir'* have attempted to highlight the impact of COVID19 pandemic on the legal profession in Kashmir viz the impact on Legal practice and emerging of virtual courts.

Dr. Pradeep Singh Bali & Farhat Deeba in their article '*Media and of Euthanasia: A Study of Mediated Discourse and Public Perspective in India'* have attempted to discover the role of media in generating public perspective with regard to Euthanasia, besides providing space for the participation of public in discussion on Euthanasia.

Dr. Riyaz Ahmad Mir & Tawseef Hamid in their article '*An Appraisal of Droit Administration'* have highlighted on the various dimensions of droit administration.

Noor Mohammad Mir & Jyoti Angrish in their article **'***A Case Study of Banking Services in J& K Bank'* have attempted to evaluate the proper implementation of consumer protection Laws in banking services of J&K and to find the awareness level among the consumers.

Dr. Mohd Yasin Wani & Naveed Naseem in their article *'Political Empowerment Of Women Vis-À-Vis 73rdconstitutional Amendment'* focused upon the various impediments that are roadblock to political empowerment of women vis-à-vis 73rd Constitutional amendment.

Dr. Manu Sharma & Dr. R. K. Singh in their article '*Criminal Justice System and Media Trials: Recent Trends and Judicial Approach* have highlighted the challenges and problems in the aftermath of increasing media trails and glamorization of crime, its impact on the regular criminal justice system and the administration of justice.

Dr. Heena Basharat & Dr. Ifthikhar Hassan Bhat in their article '*Injunctional Remedies in the Context of Copyright Law- An Indian Perspective'* have highlighted the changing nature of injunctional remedies in the context of copy right law in India.

Dr. Sofiya Hassan Mir in her article '*Socio-Psychological Scenario of Child Rights and POCSO: An Empirical Analysis of District Srinagar'* attempted to address the crimes committed against the children and to devise the appropriate support mechanism by collecting data through qualitative and quantitative methods in the light of POCSO Act.

The present issue is the combined contribution of the editorial board and the legal experts who have directly or indirectly helped to bring out the issue in the best possible presentable form. The efforts made by the team of editors has remained quite immense and laudable which is duly

acknowledged. The editor wants to put on record the contribution of **Muzamil Masood** for layout and the design of the Journal.

Last but not the least, all credit goes to Mr. Altaf Ahmad Bazaz, Chairman of the College for his unfailing commitment to academic excellence and financial support to make the publication of this journal possible.

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Law of Limitation and Cognizance of Criminal Cases – An Analysis

Dr Mohammadi Tarannum*

Abstract

In sections 467 to 473 of chapter XXXVI of the Code of Criminal Procedure, 1973, prescribes the time limits for taking cognizance of different offence as part of the procedure for trial of offences. To protect the accused from undue harassment, this statute of limitations barred late and dormant claims. In the case of less serious offences, such as those punished by a fine only or by imprisonment for up to three years, the Code has emphasized the concept of limitation. A judicial notice or knowledge, as well as the judicial recognition or hearing of a cause, is known as cognizance. In the Code, the term 'cognizance' is not defined. The first time it occurs in the Code is in section 190. Except when special provisions have been made to that end, the Limitation Act of 1963 does not apply to criminal prosecutions. In addition, the code contains limitations pertaining to the exclusion of time while calculating the limitation period.In this article meaning, basic rule regarding taking cognizance, exclusion of time in computing limitation and relation between Criminal Procedure Code, 1973 and Limitation Act, 1963 are discussed. Besides in the present article various judicial decisions on limitation for taking cognizance are mentioned.

Key words –Cognizance, Bar to take Cognizance, Period of Limitation, Exclusion of Time

Introduction

Adherence to the principles of natural justice to give fair trial to an accused is the very foundation upon which the edifice of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Code') has been erected.Conducting a fair trial for those who are accused of a criminal offence is the cornerstone of our democratic society. A conviction resulting from an unfair trial is contrary to our concept of justice. Conducting a fair trial is both for the benefit of the society as well as for an accused and cannot be abandoned.[1]Fair trial is not confined to the substantive law. It takes within its sweep procedural law as well. Therefore, fair trial includes fair investigation and fair prosecution.[2] Taking of cognisance is a pre-trial exercise by a criminal Court in cases triable by the Magistrates and Sessions Judges. After the completion of investigation,

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[1]*State of Punjab v. Baldev Singh*, (1999) 6 SCC 172: 1999 SCC (Cri) 1080
[2]*Manu Sharma v. State (NCT of Delhi)*, (2010) 6 SCC 1

taking of cognisance is the very first stage where the function of judicial authorities is contemplated in the Code. It is the very first stage where the outcome of the investigation done has to pass through the gaze of judicial scrutiny.[3] The criminal courts in India may take cognizance of offences under sections190 to 199 of the Code of Criminal Procedure, 1973. But in respect of certain offences, the Code has provided for a time frame within which the cognisance has to be taken, otherwise it will be barred by limitation. Sections 467 to 473 of Chapter XXXVI of the Code of Criminal Procedure specify different limitation periods for taking cognizance of specific offences, depending on the gravity of the offences.The purpose of limitation in legal action is to provide importance to the maxim *"interest reipublicaeut sit finislitium,"* which states that the State's interest demands that a time restriction be applied to litigation. Another maxim, *"vigilantibus et not dormientibus jura subveniunt,"* states that the law will only help those who are diligent, not those who are not careful or sleep on their rights.

Meaning of the term cognizance

A judicial notice or knowledge, or the judicial recognition or hearing of a cause, is known as cognizance. According to Law Lexicon "the word 'cognizance' is used in the sense of 'the right to take notice of and determine a cause.'[4] According to Black Law Dictionary, "cognizance is a court's right and power to try and to determine cases."[5] On the other hand, Wharton's Law Lexicon describes "Cognizance is a knowledge upon which a judge is bound to act without having it proved in evidence."[6] According to Chambers 21st Century Dictionary, "taking cognizance of something is to take it into consideration."[7]

In *Ajit Kumar Palit v. State of West Bengal*,[8] the court held"the word 'cognizance' has no esoteric or mystic significance in criminal law or procedure. It merely means to become aware of and when used with reference to a Court or judge, to take notice of judicially."

Further in *Darshan Singh Ram Kishan v. State of Maharashtra,*[9]the Court observed "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a magistrate first takes judicial notice of an offence."In reality, the term 'taking

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[3]*State of Bihar v. P.P. Sharma*, 1992 Supp (1) SCC 222

[4] P Ramanatha Aiyar (2000). *The Law Lexicon*, 2nd Edition, Nagpur: Wadhwa and Company, p. 343

[5] Garner, B. A. (2008). *Black's Law Dictionary*. 8th Ed. p. 276

[6]*Wharton's Law Lexicon* (1999). New Delhi: Universal Law Publishing Co. Pvt. Ltd. p. 209

[7]Robinson, Mairi, (2000). *Chambers 21st Century Dictionary*, New Delhi: Allied Chambers (India) Ltd. p. 266

[8]AIR 1963 SC 765 : (1963)1 Cri.L.J 797(SC)

[9]AIR 1971 SC 2372 : 1971 Cri.L.J 1697(SC) : (1971)2 SCC 654; See also *R. R. Chari v. State of Uttar Pradesh*, AIR 1951 SC 207; *Bhusan Kumar and another v. State (N.C.T of Delhi) and another*, (2012)5 SCC 424 : 2012 Cri.L.J 2286(SC)

cognizance' has no specific meaning. It is not practical or desirable to specify precisely what "taking cognizance" means."[10]

Again, the Supreme Court in *ManharibhaiMuljibhaiKakadia& another v. ShaileshbhaiMohanbhai Patel & others*[11]observed that "the term 'cognizance' is not defined in the Code of Criminal Procedure, 1973, but it has acquired definite meaning for the purposes of the Code. It appears for the first time in section 190 of the Code. The word 'cognizance' occurring in various sections in the Code is a word of wide import. It embraces within itself all powers and authority in exercise of jurisdiction and taking of authoritative notice of all allegations made in the complaint or a police report or any information received that an offence has been committed."

Basic rule regarding taking cognizance

The term 'taking cognizance' of an offence has not been defined. Section 190 of the Code specifies the methods for taking cognizance under clauses (a), (b), and (c).Section 190(1) provides that –

"Subject to the provisions of sections 195 to 199, any magistrate of the first class and any magistrate of the second class especially empowered in this behalf, may take cognizance of any offences –

(a) Upon receiving a complaint of facts which constitute such offence.

(b) Upon a police report of such facts.

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such an offence has been committed."

The intention of the Legislature in prescribing a time limit can be gauged from the Joint Committee of Parliament's statement, where it was stated that[12] –

> *"These are new clauses prescribing periods of limitation on a graded scale for launching a criminal prosecution in certain cases. At present there is no period of limitation for criminal prosecution and a court cannot throw out a complaint or a police report solely on the ground of delay although inordinate delay may be a ground for entertaining doubts about the truth of the prosecution story. Periods of limitation have been prescribed for criminal prosecution in the laws of many countries and the Committee feels that it will be desirable to prescribe such periods in the Code as recommended by the Law Commission".*

In its broad and literal sense, it means taking notice of an offence. This might include the intent to file a criminal complaint against the offender for that offence or taking efforts to determine if there is a basis for filing a criminal complaint or for other purposes. Taking cognizance is not the same as commencing proceedings; rather, it is a prerequisite or *sine qua non* to initiating

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[10]*Fakhruddin Ahmad v. State of Uttaranchal and another*, (2008)17 SCC 157 : 2008 Cri.L.J 4377 (SC)

[11](2012)10 SCC 517; See also *Darshan Singh v. State of Maharashtra*, AIR 1971 SC 2372 : 1971 Cri.L.J 1697 (SC) : (1971)2 SCC 654

[12] Gopal, R (2005). *Sohini's Code of Criminal Procedure* (p. 5936). New Deli: LexisNexis Butterworths

actions.[13] It is settled law that the court takes cognizance of the offence and not the offender. Cognizance is said to be taken when the Magistrate applies his judicial mind to the offence indicated in the complaint or the police report, etc. When a Magistrate takes judicial notice of an offence, it is known as cognizance.[14]

In *S.K. Sinha, Chief Enforcement Officer v. Videocon International Ltd. & others*,[15] it was held by the Supreme Court that "cognizance indicates the pointwhen a court takes judicial notice of anoffence with a view to initiating process in respect of the offence alleged to have been committed. Cognizance isentirely a different thing from initiation ofproceedings; rather it is the conditionprecedent to the initiation of proceedings bythe court."The court further held that "the expression 'cognizance' has not beendefined in the Code. But the word (cognizance) isof indefinite import. It has no esoteric or mysticsignificance in criminal law."It simply means "to become aware of," and when used to a court or a Judge, it means "to take notice of judicially." It denotes the point at which a court or a Magistrate takes judicial notice of an offence in order to begin proceedings against the person who is accused of committing it."Taking cognizance" does not imply any type of formal activity. It happens when the application of mind is made by magistrate on the alleged commission of an offence. Prior to the start of criminal proceedings, a person is required to take cognizance.Taking cognizance is thus a condition prior or *sine qua non* for convening a legitimate trial. Whether a Magistrate has taken cognizance of an offence is determined by the facts and circumstances of each case, and there is no universally applicable rule as to when a Magistrate can be said to have taken cognizance.

Limitation for taking cognizance

Sections 467 to 473 of Chapter XXXVI of the Criminal Procedure Code of 1973 deal with "Limitation for taking cognizance of certain offences." The basic rule is that except when express provisions have been made with regard to limitation, the provisionsof the Limitation Act of 1963 do not apply to criminal proceedings.[16]The aforesaid chapter reinforces the basic postulates of fair trial that no one accused of certain less serious offences be vexed after the expiry of a certain time period. The purport of imposing a bar of limitation was to prevent parties from submitting cases after a lengthy period of time, which may cause crucial evidence to vanish, as well as to prevent abuse of the court's process by filing vexations and late prosecutions long after the date of the offence. Moreover, the provisions relating to limitation aims at entailing speedy disposal of certain specified criminal cases. The Supreme Court in *State of Punjub v. Sarwan Singh*[17] held that "the object of enacting a bar of limitation on

[13] *State of West Bengal v. Mohammed Khalid*, AIR 1995 SC 785 : (1995)1 SCC 684
[14] *Anil Saran v. State of Bihar and another*, AIR 1996 SC 204 : (1995)6 SCC 142
[15] (2008) 2 SCC 492
[16] Articles 114, 115, 131, 132 of Limitation Act, 1963
[17] (1981)3 SCC 34

prosecution is in consonance with the concept of fairness of trial enshrined in Article 21 of the Constitution of India."

Peeping back to the previous Code of Criminal Procedure of 1898, no traces of concept of 'bar of limitation in criminal prosecution' can be found though time limit was contemplated for filing appeals and revisions. With the advent of new Code, time limit was prescribed for taking cognisance for certain offences. As a general rule, according to Section 468(1) of the Code of 1973 the court must not take cognizance of an offence once the period of limitation has expired. The offences and the period of limitation for such offences are described in sub-section (2) of Section 468.If the offence is punishable only by a fine, the period of limitation is six months; one year if the offence is punishable by imprisonment for a term of not more than one year; and three years if the offence is punishable by imprisonment for a term of more than one year but not more than three years.However, no time limit is prescribed for offences punishable with imprisonment of a term exceeding three years.

The opening words of Section 468, "Except as otherwise provided elsewhere in this Code," are another feature worth noting.These words directly refer to Section 199 (5) of the Code, which provides for a six-month sentence for an offence mentioned in Section 199(2) of the Code, as well as Sections 198(6) and 198(7) of the Code.Sections 84(1), 96(1), 198(6), 199(5), 378(5), 457(2), and the proviso to Section 125(3) are the seven exceptions to Section 468 in the Code. The legislature has specifically provided for a time limit for all the above-mentioned provisions.Each of these provisions differs from Section 468 in terms of language. An analysis of these seven exclusions reveals that the intent of Section 468 of the Code is to limit the power of the Court to take cognizance, and not its power to file complaints or to do anything else.[18]Sections 4(2) and 5 of the Code will also have indirect effect on above-noted expression used in Section 468 of the Code.

In *Bharat Damodar kale v. State of Andhra Pradesh*,[19] the Supreme Court held that "for the purpose of computing the period of limitation, the relevant date is the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of a process by court." The aforesaid "*Bharat Kale*", was further referred and relied upon by the Supreme Court in *Japani Sahoo v. Chandra Sekhar Mohanty*,[20], where the Court upheld the decision given by it in the "*Bharat Kale*" case and held that the simple delay in accessing a Court of Law would not be enough to dismiss the case, but it might be a factor in reaching a final decision.

Section 469 CrPC deals with the "commencement of the period of limitation". As per the said provision, the period of limitation, in relation to an offender, shall commence on the date of offence or where the commission of the offence was not known to the person aggrieved by the offence or to any police

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[18]*Mrs. Sarah Mathew v. The Institute of Cardio Vascular Diseases by its Director – Dr. K.M. Cherian & Others*, (2014) 2 SCC 62

[19](2003) 8 SCC 559

[20](2007) 7 SCC 394, See also *Krishna Pillai v. T.A. Rajendran & another*, (1990) supp. SCC 121

officer, the first day on which such offence comes to the knowledge of such person or to any police officer, whichever is earlier.[21] This section provides two exceptions to the general rule that the period of limitation begins to run from the date of the commission of the offence.One is when the aggrieved party or the police is unaware of the offence committed, and the other is when the offender's name remains unknown. The first day is not included in the calculation of the limitation period.

The specific objective of Section 469 (1) clauses (a), (b), and (c), which provide three alternative dates for the start of the limitation period is not clear. The sub-section does not include any specific instruction for selecting one of the dates, such as "whichever is later" or "whichever is earlier."If the accused is given the option, he will almost always select clause (a), since it is the most favourable to him in any case, and clauses (b) and (c) will become redundant.On the other hand, if the option is prosecution, clause (c) is always chosen since it provides the most of the time for prosecution, rendering clauses (a) and (b) otiose. If the Court is convinced on the facts and the circumstances of a case that the delay has been sufficiently explained or that it is essential to do so in the interests of justice, Section 473 of the Code allows it to take cognizance of an offence after the period of limitations has expired.

A question arises as to whether the period of limitation provided under Section 468 of the Cr P C is applicable to the accused added by the Court under Section 319 of the Cr P C. it is submitted that the limitation provided under Section 468 does not apply to the accused who is subsequently added under Section 319 of the CrPC.Reading of Section 319(4)(b) of Cr P C makes it very clear that subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. Therefore, even if an accused is subsequently added in exercise of power under Section 319 of Cr P C cognizance of the alleged offences against him would be from the date on which the Court has originally taken cognizance of the offences in the said case. The added accused will be tried along with other accused in respect of the offences for which already cognizance has been taken by the Judge and therefore, the bar under Section 468 of Cr P C will not be applicable to the accused persons who are subsequently added pursuant to the orders passed by the Court in exercise of power under Sections 319 of Cr P C.[22]

Exclusion of time in computing limitation

Sections 470 and 471 of the Code provide that certain time is to be excluded whilecalculating the period of limitation.Section 470 (1) states that time spent in prosecuting another case, whether in the Court of first Instance, or appeal, or in revision, is not included for calculating the period of limitation, if the following conditions are met –

(a) The previous case was prosecuted with due diligence;

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[21]*Cheminova (India) Ltd. v. State of Punjab*, (2021) 8 SCC 818

[22]*Baswaraj v. State of Karnataka*, ILR 2021 Kar 2423

(b) It was against the same accused;

(c) It relates to the same fact;

(d) It was prosecuted in good faith;

(e) And due to a lack of jurisdiction or another matter of similar character, the court in which the preceding case was prosecuted was unable to hear it.

In effect, section 470(2) states that if the institution of the prosecution has been stayed by an order of injunction or an order stopping the institution of the prosecution, the period of limitation is computed accordingly.Section 470(3) states that where notice of prosecution for an offence is required, the period of such notice shall be excluded in computing the period of limitation, and where any law requires the prior consent or sanction of the Government or any other authority for the prosecution of a person, the time required for consent or sanction, including the date on which the application was made and the date on which the order was received, shall be included in computing the period of limitation.

The period during which the offender is absent from India or any region outside India administered by the Central Government, or has avoided arrest by absconding or concealing himself, is excluded from the period of limitation under section 470(4).

Section 471 states that if the Court is closed on the last day of the limitation period, cognizance may be taken the next day the Court reopens. According to the explanation appended to the Section, a Court is considered closed if it remains closed on that day for any part of its usual working hours.

In the case of a continuing offence, according to section 472, a new period of limitation begins to run every moment that the offence continues.

Limitation under Criminal Procedure Code, 1973 and Limitation Act, 1963

Sections 468-473 of the Code cannot be compared with the provisions of the Limitation Act, 1963.Despite the fact that limitation has not been set up as a defence, section 3 of the Limitation Act states that any action, appeal, or application filed after the statutory period would be dismissed, subject to the requirements of sections 4 to 24.If the appellant or application satisfies the court that he had "sufficient cause for not preferring the appeal or making the application within such period," Section 5 of the Act allows a court to hear an appeal or application after the prescribed period if the appellant or application shows that he had "sufficient cause for not preferring the appeal or making the application within such period."Section 473 of the Code, on the other hand, has a completely different scope and application. It has a non-obstante clause and shall prevail over section 468, which specifies the time limit for taking cognizance of offences.The court must evaluate the facts and circumstances of each case while exercising discretion under section 473 of the Code, such as the nature of the offence, the victim's class, the crime's background, and so

on.[23]Section 469(2) of the Code is identical to the section 4 of the Limitation Act, 1963. Sections 470 and 471 of the Code provide for calculating the period of limitation, which are mostly based on the requirements of sections 12, 14, and 15 of the Limitation Act of 1963, which regulate litigation, with certain additions and modifications appropriate for a criminal case.The provisions of Section 472 for continuing offences are modelled after Section 22 of the Limitation Act of 1963 which provides for continuing breach of contract and continuing tort. Section 473 is analogous to Section 5 of the Limitation Act of 1963, which can be used in a criminal proceeding. The main difference between Section 5 of the Limitation Act and Section 473 of the Code as explained in *VankaRadhamanohari v. VankaVankata Reddy and others*[24] is that "in order to exercise the power under Section 5 of the Limitation Act, the applicant must convince the court that there was sufficient cause for the delay to be excused, whereas Section 473 requires the court to examine not only whether the delay has been explained, but also whether it is necessary to ignore the delay."

Conclusion

As a matter of fact, unless there are strong and justified grounds, the fundamental objective of the law should not be permitted to be avoided by using the magic words "interests of justice." Although the Code does not clearly require that the accused be given notice before the delay is excused, natural justice principles demand that no order of condonation of delay should be allowed until the accused is given notice and given an opportunity to be heard. When an application for extending the period of limitation is submitted to the Court, the principles of natural justice mandate that the accused should be heard before an order is made on the application as the denial of hearing to the accused is likely to prejudice the accused and seriously affect his vested right which is created with the lapse of time-frame for limitation. "C*rime never dies*" is the most well-known adage in criminal law. Despite the fact that this principle is well-established, its implementation has given rise to various difficulties when the question of calculation of period of limitation is to be dealt with.

[23]Takwani, C.K (2007). Criminal Procedure (p. 386). Nagpur: Wadhwa and Company
[24](1993) 3 SCC 4

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Protection and Regulations of Big Data in India: Need for Legal Framework

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Abstract

In simply terms, Big Data is comprised of the private information of individuals collected from the internet in a very large capacity. The data in our phones or computers, and whatever, is stored on the applications and websites, collectively constitutes Big Data. The private data is collected from various websites and applications, and all of that remains open on the internet, for anyone to access it. Such information sometimes can be very personal and sensitive. The issue is that such data is used by different companies and institutions for the purpose of market analysis, customer analysis, political analysis, etc. Also this data can be used to commit fraud, intrude one's privacy, election rigging, and customer choice for choice manipulation, and so on. Therefore, keeping the vulnerability of Big Data to any misuse by vested interests, this paper examines the meaning and scope of Big Data and attempts to investigate the existing legal laws in various countries. To build transparency and engender trust through good practices in protection and regulation of Big Data, the focus has to be on the need for a regulatory policy concerning the de-identification of personal information in India. Hence, this paper identifies need for the requirement of a legal framework in India to regulate and protect Big Data and offers certain suggestions and recommendations thereto.

Key Words: Privacy; Personal Data; Big Data; Legal Regulation & Protection.

Introduction

In the contemporary era, internet has virtually become the dwelling place for people and hence, there is a deep and inevitable attachment amongst the two. Every individual, using internet through any of its modes, generates great amount of data and information both private and public, commonly referred to as 'Big Data'. This data, which is stored in 'data-mines', is used/misused by cyber sniffers, corporate entities, government agencies, etc., for numerous purposes and has the potential of causing devastation psychologically, economically, and socially, to the individuals or group of

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individuals. The potential threats of not protecting and regulating such Big Data-pool (except little localised security parameters by the giant data miners), raises a serious concern about the legal protection of individual privacy and legal regulation of such entities by authorities. To that extent, there are four major enquiries in the current global debate with respect to the privacy regulation in 'Big Data' processing:

Firstly; can the privacy regulations and laws enable beneficial uses of Big Data for the society, and at the same time, preclude culturally or socially unacceptable Big Data practices?

Secondly; can the existing privacy laws and regulations be reformed or applied so as to accommodate beneficial uses and applications of Big Data?

Thirdly, if the laws of privacy regulation require supplementation or reworking to address the potential threats of Big Data, whether those changes be made without threatening broader integrity and regularity of an individual's privacy protection ?

Fourthly; can such changes be made quickly enough so as to address the growing concerns of citizens about the hidden and unacceptable Big Data practices?

The answers are to be found in responsible governance of data analytics affecting citizens, whether by private or government entities using it. It also requires a new dialogue and community understanding about the appropriate transparency and ethical borders to use data analytics. It is for these private and government entities to acknowledge that for many citizens, privacy still matters and that there is now a deficit of trust among the citizens as a consequence of the unwarranted and non-permissible usage of their personal/private information by the government itself or by someone in the corporate world. Before, we delve into the discussion on need for a legal framework in India, it is essential to consider the meaning and significance of Big Data.

Big Data: Definition And Meaning

The etymology of 'Big Data' has been traced to the mid-1990s, first used by John Mashey, retired former Chief Scientist at Silicon Graphics, to refer to handling and analysis of massive datasets.[1] Big Data is commonly understood as the use of large scale computing power and technologically advanced software in order to collect, process and analyse data characterised by a large volume, velocity, variety and value.[2] It may also be defined as 'huge amounts of various types of data, produced at high speed from different sources whose analysis and handling require powerful processors and

[1] Diebold F (2012) A personal perspective on the origin(s) and development of 'big data': The phenomenon, the term, and the discipline. Available from http://www.ssc.upenn.edu/fdiebold/papers/paper112/Diebold_Big_Data.pdf (accessed 5 February 2022).

[2] Big Data: Bringing Competition Policy to the Digital Era, Executive summary by the OECD Secretariat contains the key findings from the discussion held under Item 3 of the 126th meeting of the Competition Committee on 29 November 2016 Available from https://one.oecd.org/document/DAF/COMP/M(2016)2/ANN4/FINAL/en/pdf (accessed 5 February 2022).

algorithms'.[3] While there is "no standard definition" on Big Data, however, in nutshell, it is extremely large data sets that may be analysed computationally to reveal patterns, trends, associations especially relating to human behaviour and interactions.[4] In 2001, Doug Laney, a renowned author and advisor on data and analytics strategy, detailed that Big Data was characterised by three traits:[5]

Volume: Organizations and platforms like business houses, financial transaction houses, smart (IoT) devices, industrial equipment, videos, social media, etc., gather data from different sources from the past, (storing it would have been an issue) but storage on platforms such as Hadoop and Data Lakes have eased the burden.[6]

Velocity: With the growth in the Internet of Things, RFID tags, sensors and smart meters that is presently pouring, the need to deal with these torrents of data in near-real time data and streams in to businesses at an extremely fast speed and must be handled in a prompt manner.[7]

Variety: Data is available in all types of formats – fro, numeric, structured data in traditional databases to unstructured text emails, documents, videos, stock ticker data, audios and financial transactions.[8] Thus, to put it the simplest terms, Big Data is large and complex unprocessed data.

Application Of Big Data

Big Data has both positive and negative effects. Undoubtedly, it has played a significant role in the growth of various sectors of the country as well as benefited the Governments in governance and corporations in analysis of customer preferences. The process of data collection may seem harmless and difficult to monetize at small scale. However, the gigantic databases of consumer information are a result of the network effects leading to repositories with massive consumer preference related data collections, which are of immense commercial value. Big Data in isolation is not of concern, but the canvas of advantages and disadvantages of information it provides about

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[3] European Union 2014, A Preliminary Opinion of the European Data Protection, Privacy, Competitiveness and Supervision in the age of Big Data: The interplay between competition law, data protection and consumer protection in the Digital Economy, 7th of March, 2017, p.6. Available from https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf (accessed 5 February 2022).

[4] Oxford University Press (2022) Definition of wake. Available from https://www.lexico.com/definition/big_data (accessed on 14 February 2022).

[5] Rob Kitchin, Gavin McArdle (2016) What makes Big Data, Big Data? Exploring the ontological characteristics of 26 datasets. Available from https://journals.sagepub.com/doi/pdf/10.1177/2053951716631130 (accessed 5 February 2022); Laney D (2001) 3D data management: Controlling data volume, velocity and variety. In: Meta Group. Available from http://blogs.gartner.com/doug-laney/files/2012/01/ ad949-3D-Data-Management-CoBig ntrolling-Data-VolumeVelocity-and-Variety.pdf (accessed 10 January 2022).

[6] See https://www.sas.com/en_in/insights/big-data/what-is-big-data.html#:~:text=Big% 20data% 20is%20a%20term,with%20the%20data%20that%20matters. (accessed 10 January 2022).

[7] Ibid.

[8] Ibid.

individuals is tremendous such as their behaviour, preferences, age, geographic location, social status, political views, personnel orientation, or turnover achieved by a business entity.

Advantages of Big Data

Fraud Detection: It has been quite helpful in Fraud Detection because of its cutting-edge way of using consumer trends to detect and prevent suspicious activities. Analytics by detecting fraud requires expert knowledge and computer resources, but it has now been simplified and easier due to improvements in programming languages and server technology. Even subtle differences in a consumer's purchases or credit activity can be automatically analysed and flagged as potential fraud.

Healthcare: Big Data analysis gives knowledge derived from healthcare provider and clinical insights by prescribing treatments charts and then, makes clinical decisions with greater accuracy, resulting in enhanced patient care with reduced costs. It also contributes to greater insight into patient cohorts that are at greatest risk for illness, thereby permitting a proactive approach to prevention. In short, such analysis of healthcare Big Data helps to identify outlier patients who consume health services far beyond the norm.

Market: It has been observed that Big Data solutions and facilities store and analyze structured and unstructured data from IT operations, then turn it into appropriate information and insights. By this act, these companies in e-world evaluate their internal processes and enhance operations, hence increase the operational efficiencies and reduce costs. It is expected that the data analytics sector hold will the largest market size during the forecast period. The data generated from various sources such as social media, call logs, and service forms, give Big data solutions to enable more precise segmentation of potential consumers and facilitate a deeper and better understanding of those buyers, their motivations and needs. Online market platform enables data experts to understand various trends, such as identifying financial growth opportunities, financial benchmarking against industry standards, and identifying financial implications.

Lawyers (Law firms): Besides start-ups, other companies in the legal support services industry have penetrated the Big Data market too[9]. LexisNexis is one example, which provides a software called *LexMachina* that "mines litigation data and reveals insights never before available about lawyers, parties, judges, and the subjects of the cases themselves, acquired from millions of pages of litigation information"[10], another example is Bloomberg's "Bloomberg Law Litigation Analytics", which aims to "identify meaningful patterns among infinite legal data points to inform you a litigation strategy, better advise clients and predict possible outcomes"[11].

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[9] See https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1179&context=jbel (accessed 13 April 2022)

[10] See https://lexmachina.com/about/ (accessed 13 April 2022)

[11] See https://pro.bloomberglaw.com/ai-powered-litigation/ (accessed on 13 April 2022)

The Insurance Sector: Big Data has helped the insurance sector to assess risk much more precisely than in the past. More specific data about the insured and the risk insured allow individualised pricing and the refusal of policies to individuals and businesses considered high risk.

The Air Transport Industry: Big Data has influenced the aviation industry profoundly, improving the efficiency of functioning in the aviation industry.[12] The Air Transport Industry (ATI) has grown up with computerisation and standardisation as key components in getting passengers and their baggage to the airport of departure, to and from the airport of arrival, and on to the plane. During all stages of their journey, the Airlines and other ATI companies generate and hold vast amounts of personal data about passengers' preferences which in turn help ATI players to develop insights about their customers that might give them a competitive advantage. It also checks the use of passenger name record (PNR) data to combat terrorism and serious crime constitutes another regulatory concern. The long-term retention, sharing and use of this data for those purposes without sufficient safeguards has been controversial and has attracted criticism from privacy groups and some courts.[13]

However, if this Big Data remains unprotected and unregulated, there can be negative implication of it as well, which have raised serious concerns among the people about the safety of their data, and countries have also realized the threats faced by it. These concerns are summarized below:

Disadvantages of Big Data:

Privacy: Privacy is the major concerns of citizens. All of the personal data of users is stored of the internet which remains to be unprotected. Similarly, the collection of data which as such is inevitable remains to be unregulated. For instance, we have some online meeting application or online chatting application. The data, which is stored by the server, is stored on an unsafe server which can be easily leaked or hacked or destroyed. Another example is Aadhaar data, personal data of citizens like fingerprint, picture, name and address, is stored on some unsafe server which was last time hacked.

Social Media: Consumers worldwide are concerned with the data that is being collected by companies like Facebook and Google whether it is through personal data profiles or user searches on Google which are sent into Big Databases on Facebook.

National Security: National Security is another important sector where accumulated unprotected Big Data can cause serious damage to the socio-economic fabric of country.

Dark Net: A safe haven for Organised or tans-national criminality. In this Dark world- netizens comprising of Drug Lords, Arms Dealers, Cyber Hackers, Espionage groups, professional white collar criminals viz, vultures & eagles.

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[12] Gomathy, C K. (2019), THE IMPACT OF BIG DATA ON AVIATION. Available from https://www.researchgate.net/publication/335464492_THE_IMPACT_OF_BIG_DATA_ON_AVIATION (accessed 13 April 2022)

[13] Enerstvedt, Olga. (2017). Aviation Security, Privacy, Data Protection and Other Human Rights: Technologies and Legal Principles. 10.1007/978-3-319-58139-2.

These criminal entities and enterprises are potential threat to the personal information stored on Big Data pertaining to individuals or group of individuals who are naïve to privacy threats and its obvious dangers

Big Data: Regulation In Foreign Countries

The present article argues that for the effective regulation of Big Data and for that, what is required is a combination of legal tools and other instruments. Protection and regulation of Big Data has to be on the top priority of the legislation. In developed jurisdictions, presently the focus of any regulation is 'personal data'. For example, Article 2 of Directive 95/46/EC of the European Parliament and of the Council encompasses that personnel data is any information pertaining to an identifiable natural person by reference to an identification number or to one or more than one factors specific to his physiological, economic, physical, mental, social, or cultural identity which is extensively regulated therein.[14] The Federal regulation of Big Data in United States is done through different statutes, however there is still no unified federal privacy law. To name few: Health Insurance Portability and Accountability Act of 1996, referred to as HIPPA. It is enacted with an objective to protect patient information and controls the type of patient data that can be released.[15] There is another enactment known as Family Educational Rights and Privacy Act of 1974 (FERPA regulates) that protects the privacy records of students in schools and places limitations on data that can be used and obtained by third parties.[16] In 2016 the Federal Trade Commission (FTC) issued a report on Big Data and observed that:

> "*The use of Big Data has the potential to harm the underserved and low-income communities because it can be used to exclude those communities from employment and credit opportunities.*"

The commission has also noted that organizations using Big Data must be aware of the regulatory limitations that are in place, such as the Fair Credit Reporting Act (FCRA), the Federal Trade Commission Act (FTCA)[17], and Equal Opportunity Laws.[18] At State level, the Big Data is affected by State privacy laws and one example of such state level privacy law in US is Californian Online Protection Privacy Act, 2004 (CalOPPA) and it was amended in 2014 especially for the reason to address online disclosures and record keeping. Under this enactment the websites ought to provide explicit privacy rights statements and allow users to know how their information will

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[14] Geetanjali Sharma, Move to Regulate Big Data Competition: EU Ready to Take the First Step INDIAN COMPETITION LAW REVIEW (APRIL 2017) Vol. II Issue 1 p.70

[15] HIPPA is result and outcome of an effective big data movement (although it has been updated lately in 2013 in the Omnibus Bill), and due of that the data stored as or used as big data is being regulated to conform to HIPPA regulations.

[16] https://instituteforpr.org/big-data-privacy-and-the-law-how-legal-regulations-may-affect- pr-research/ (accessed 13 April 2022)

[17] The FTC's analysis focused on one particular aspect of big data usage i.e. credit offerings.

[18] https://instituteforpr.org/big-data-privacy-and-the-law-how-legal-regulations-may-affect-pr-research/ (accessed 9 January 2022)

be used in the future.[19] Large states such as California and New York are legal influencers because of their size and level of commercial activity and can go further in privacy regulation than the federal government.[20] In order to govern the data involved in operations, contractual requirements, and other industry and/or region-specific regulations that apply to these businesses, any company or organization looking to engage in Big Data activities must comply with various regulations, including the sector-specific privacy laws. Such a legal process is a patchwork laws and can be seen in many other jurisdictions as well.[21] Lately, in United States, there have been various committees and recommendations pushing for a comprehensive, all-encompassing national data privacy legislation.[22] In Europe, under the European Union Regulation of Big Data, Article 16 and Article 7 of the Treaty on Functioning of the European Union, (hereinafter referred as TFEU) provides for recognition of everyone's right to protection of personal data, identifies the European Commission's obligation to ensure that that the laws and policies are applied in a consistent manner and allows for a coordinated enforcement through data protection commission and the agencies. In addition to that, all EU agencies including the Commission by virtue of Article 8 are bound to protect and promote rights set out in the European Charter of Fundamental Rights that specifically talks about 'right to data protection'.[23] The Commission and the National regulators have begun examining these aspects of data related power in 2018 when European Union (EU) replaced its earlier EU Data Protection Directive (DPD) with the General Data Protection Regulations (GDPR).[24] The GDPR is

[19] Other states, such as Alabama, South Dakota, Delaware, and Oregon started to address data privacy issues for employees of organizations as well. The laws, of course, state laws have limitations, and sometimes these state laws can be superseded by some federal regulation.

[20] https://instituteforpr.org/big-data-privacy-and-the-law-how-legal-regulations-may-affect-pr-research/. (accessed 9 January 2022)

[21] In United States, at federal level, the United States. Federal Trade Commission (USFTC) has the power to enforce data protection regulations, however, due to its federal structure, the actual enforceability is still in doubt, and the regulations are mostly at the state level leading to even more confusion as many a time various state regulations are incompatible with each other, hindering how companies across state lines operate. The organisations involved and engaging in the Big Data activities also need to ensure that they are comply with any industry or region-specific regulations such as the Health Insurance Portability and Accountability Act, which governs the use of Protected Health Information, the Children's Online Privacy Protection Act, the Computer Fraud and Abuse Act and region-specific regulations which includes the California Online Privacy Protection Act and the Massachusetts Data Security regulations.

[22] https://www.lawyered.in/legal-disrupt/articles/big-data-law-regulating-big-data-sanjay-mehta/ (accessed 9 January 2022)

[23] Though it is not the objective of the data protection that the Commission seeks to enforce, but the data related power might result into market power which might cause in agreements precluding competitors or mergers which have not been adequately addressed by the turnover thresholds.

[24] The General Data Protection Regulations lays down a baseline set of standards that companies dealing with data of EU citizens will have to comply with including requiring the consent of data subjects for the processing of their information, anonymizing the data collected to protect the privacy of data subjects, providing data breach provisions, notifications for the safe transfer

acknowledged as the most comprehensive data protection law currently in the world, due to several factors and the most significant of which is that the GDPR is not just applicable to an organisation operating in the EU, but rather takes a sweeping approach, in that it protects all data of EU citizens even when a foreign organization which include those based and operating overseas, processes such information.[25]

European Parliament: Proposed Digital Services Act & Digital Markets Act

Soon after the new Digital Services Act (DSA) was proposed in the Commission's 2020 Work Programme, the European Parliament´s Internal Market and Consumer Protection committee (IMCO) took the initiative to draft a legislative report with recommendations on a new DSA that would improve the functioning of the single market (Rapporteur: MEP Alex Agius Saliba). According to the IMCO report, the DSA should work along two pillars: Pillar one was set out to ensure trust and safety online by increasing responsibilities, obligations, and liabilities for digital services; & Pillar two, on the other hand, should bring ex ante regulation for big platforms, so-called 'gate-keepers'.[26] These ex ante measures are aimed at preventing market failures caused by gate-keepers' anti-competitive behaviour. [27] In fact, the European Commission incorporated, to a great extent, the IMCO committee' proposal and split the reform of the digital single market into two legislative packages , and officially proposed on 15th December, 2020: the Digital Markets Act and the Digital Services Act. European Parliament introduced amendments to **Article 24** (AM 499 and 500) which aim to introduce a ban on the processing of personal data of minors or personal data of sensitive nature[28] for targeted advertising purposes.[29] For example, when an intermediary service is primarily aimed at minors or is pre-dominantly used by them, "the provider of intermediary service shall explain the conditions and restrictions for use of the service in a way that minors can understand" in their terms and conditions.[30] These proposed Acts and Amendments thereto may become a starter in the pursuit of

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of data across borders, mandated requirements for companies to appoint a data protection officer to oversee General Data Protection Regulations compliance. This extract has been extracted from Move to Regulate Big Data Competition: EU Ready to Take the First Step, (2017) 2.1 ICLR at page 71.

[25] https://www.lawyered.in/legal-disrupt/articles/big-data-law-regulating-big-data-sanjay-mehta/ (accessed 9 January 2022)

[26] Kevin Paul KAISER, Christina RATCLIFF(March 2022) Digital Services Act & Digital Markets Act: Opportunities and challenges for the digital single market and consumer protection' Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies ISBN 978-92-846-9162-3, Available from https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/703347/IPOL_BRI(2022)703347_EN.pdf (accessed 10 April 2022)

[27] Ibid.

[28] As defined by Article 9(1), General Data Protection Regulation (GDPR).

[29] European Consumer Association (14th February 2022) DIGITAL SERVICES ACT BEUC recommendations for the trilogue negotiations. Available from https://www.beuc.eu/publications/beuc-x-2022-018_dsa_trilogues_recommendations.pdf (accessed 10 April 2022).

[30] Ibid.

regulation and protection of Big Data, which may push other countries to adopt and enact legislations along the same line.

India: Need For An Exhaustive Legislative Framework

Technological boom in India, particularly after introduction of 4G/5G internet service, India has witnessed an exponential increase in accumulation of Big Data. This accumulation of Big Data requires a proper regulation and protection mechanism. Furthermore, the uploading of personal data for the purpose of Aadhaar Card has also raised serious concerns about the protection and regulation of such Big Data. The right to privacy of the citizen and, the security and integrity of India are of paramount importance which are under threat and have been compromised. In India, as such, there is no explicit law on the regulation and protection of Big Data. Though, we have certain legislations, however they cover some little aspects of Big Data yet not a major framework. Many countries in world have adopted legislations which provide for protection and regulation of Big Data. A similar model can be sought to be introduced in India as well, and with all required additions and subtractions.

Existing Protection and Regulation of Big Data In India

There is no wide and efficient description of the current legal framework pertaining to protection and regulation of Digital Data, because India has no explicit statute relating solely to data protection and privacy. Though certain aspects of data protection are covered under the Information Technology Act of 2000 ('IT Act') and the Reasonable Security Practices & Procedures and Sensitive Personal Data or Information Rules of 2011 ('Data Protection Rules'). Few provisions under these rules which pertains to Big Data protection and regulation are enumerated as below:

Rule 4 of the Data Protection Rules necessitates the body corporate across the chain of data processing that engage in the storage, collection or otherwise handle or deal with 'personal information,' to publish a privacy policy on their specific websites.[31] Under such policy companies or entities are bound to clearly delineate their data processing practices, the type of personal information collected, the purpose of collection and usage, as well as details of any disclosure made to the third parties, and the reasonable security procedures and practices adopted. But despite creating additional transparency, a privacy policy of such ambit does little to actually prevent misuse of data. In case of furthering a lawful contract, it is critical to note that **Rule 4**[32] creates a unique obligation upon the corporate body to ensure that its privacy policy is available to the individuals who have provided information to view it.[33] As per **Section 72A of the IT Act**, wherein penal liability has been

[31] See the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. Available from https://www.meity.gov.in/writereaddata/files/GSR313E_10511%281%29_0.pdf (accessed 10 April 2022).

[32] Ibid.

[33] The difference between the information collected under a contract and the information otherwise obtained appears to ascribe higher threshold of protection for information and data that is contractually obtained.

established for persons, including intermediaries, for any wrongful disclosure of personal information secured while providing services under the terms of a lawful contract. Under the **Section 43A of the IT Act**[34], when otherwise, the mere compensatory-liability has been provided in case of any wrongful gain or any wrongful loss arising out of the negligence of a body corporate in maintaining and implementing reasonable security procedures and practices for sensitive personal information or data.

Rules 5, 6, and 7[35] of the Data Protection Rules mandates that the body corporate shall obtain consent from data providers prior to any collection, disclosure, or transfer of data. Specifically, **Rule 5**[36] requires a body corporate to disclose the purpose of collection, intended recipients of information, the particulars of the collecting agency, and where the collected information or data will be stored, and also the details of the intended use of the data collected. However, these stipulations are limited in their applicability to sensitive personal data or information. Bearing in mind the kind and extent of limited scope of sensitive personal data or information is, it leaves a large amount of data for processing without obtaining prior consent or making passable disclosure to data providers.

Competition Regulatory Authority In India And Big Data

While Concerns About Competitiveness Associated With Net Neutrality Are Still Fresh From The Telecom Regulatory Authority's Decision Against Discriminatory Access To Data Services[37], Big Data Has Not Come Under Specific Competition scrutiny in India.[38] There has been an attempt to make out a case for the Competition Commission examining the Facebook/WhatsApp merger[39] too.[40] While the Commission of India is yet to examine Big Data and its impact on competition, it is noteworthy to mention

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[34] Section 43A of the Information Technology Act requires a body corporate handling or possessing sensitive personal data or information in a computer resource to implement 'reasonable security procedures and practices' to protect such information from 'unauthorized access, use, disclosure, damage, modification or impairment.' Explanation to Section-43A clarifies that the design of these security procedures and practices may be specified in an agreement between parties or in any law being in force at the time.

[35]The Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. Available from https://www.meity.gov.in/writereaddata/files/GSR313E_10511%281%29_0.pdf (accessed 10 April 2022).

[36] Ibid.

[37] Ghoshal, D. (2016, February 8). Why TRAI backed net neutrality—and killed Facebook's Free Basics in India — Quartz. Quartz. Available from https://qz.com/612159/why-trai-backed-net-neutrality-and-killed-facebooks-free-basics-in-india/ (accessed 10 April 2022).

[38] SPN Staff Writers 2014, Facebook-WhatsApp Deal needs approval of India's fair trade regulator, SiteProNews, Available from http://www.sitepronews.com/2014/03/10/facebook-whatsapp-deal-needs-approval-indias-fair-trade-regulator/ (accessed 10 April 2022).

[39]There were reports which indicated that the Facebook-WhatsApp merger might be looked into, but there were no follow-up reports as to whether an application of approval was made or not and whether an approval came through.

[40] Bose, A. (2014), A Review Is Needed: Why India's Antitrust Regulator Should Scrutinize the Facebook-WhatsApp Merger, Competition Law Insight. Available from https://ssrn.com/abstract=2534732 (accessed 10 April 2022).

the judgement issued by the Competition Commission of India[41], wherein dominant position of WhatsApp and Google was alleged by the Informant.[42] The Commission however observed that the informant has failed to make out a case under **Section 4** of the Competition Act 2002, under which, imposition of discriminatory or unfair terms, has to be reflected in sale of services, goods, or price in purchase or sale of services or goods.[43] Que may be taken from EU efforts on competition policy and data regulation wherein the legislators and data protection officers may have looked at these concerns and identified privacy issues, that is why competition authorities in EU have decided to arm themselves with new ammunition to address Big Data players' behaviour which influences competition market. Not only that, in a trendsetting move, the Competition Commission has joined hands with the data protection authorities to develop a holistic understanding of the emerging Big Data and the way it influences people and competitors. In a proactive approach of EU regulators to prepare themselves for Big Data is an inspiring move which promises a shift in EU competition policy in the coming years.[44]

Personal Data Protection Bill, 2019: A Way Forward

India At Present Does Not Have A Comprehensive, Dedicated And Specific Data Protection Legislation, Neither Does It Have Any Regulations Pertaining Specifically To Big Data, Except As Mentioned Above. It Was In 2019, The Government Of India Introduced The Personal Data Protection Bill Of 2019 (Pdp Bill). Currently, A Joint Parliamentary Committee Is Considering The **Personal Data Protection** Bill, And A Further Revised Draft Of The **Personal Data Protection** Bill Is Expected To Be Issued Sometime in the near future. Once enacted, this will be India's first law on the protection of personal data and will repeal the amended sections under IT Act and the 2011 Rules. Comparable to the General Data Protection Regime of EU, it does not specifically cover any provisions relating to Big Data, nevertheless its implementation in India shall have a far-reaching impact, which is expected to regulate the Big Data and its activities.[45]

Conclusion

To summarise it all, Big Data is indeed a powerful tool that makes things easier in various fields. Besides, the present research piece could only be measured as a summary about the Big Data applications and its advantages. However, without a proper systematic framework, it can prove to be a catastrophic disaster. Hopefully, we will soon have a comprehensive Big Data Regulation and Protection Act, passed by Parliament after enacting a Personal Data Protection law.

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[41] In Re: 1. Taj Pharmaceuticals Ltd. & Ors. V. Facebook & Ors. Case No. 83 of 2015, Competition Commission of India.

[42] Ibid.

[43] Geetanjali Sharma (APRIL 2017) Move to Regulate Big Data Competition: EU Ready to Take the First Step INDIAN COMPETITION LAW REVIEW Vol. II Issue 1 p.74.

[44] Ibid.

[45] https://www.lawyered.in/legal-disrupt/articles/big-data-law-regulating-big-data-sanjay-mehta/ (accessed 10 April 2022).

Recommendations

In light of the above discussed pros and cons of Big Data and the need for regulation and protection, the question arises what steps should be taken to contain the cons and to avail benefit? In this direction the ways and means that can be looked into for pragmatic protection and regulation of Big Data are given as under:

a) the Parliament should establish a special committee for specific investigation into Big Data issues.

b) need for Special Robust Legislation. Parliament is already engaged with a Personal Data Protection Bill. However, a separate Bill is imperative for a systematic and proper legislative framework containing exhaustive framework for competitive market, handing of Big Data, mechanism for regulation of Big Data on Internet. Furthermore, there is need to restrict use to the Big Data by companies. Civil and Criminal liabilities have to be attached in case of breach.

c) Government must rethink all its policies in view of the upcoming Artificial Intelligence technologies.

d) Government must establish a separate state of art institution for protection and management of Big Data, since Big Data if used by a foreign organisation, they can hack any system connected with internet which may include railways, airplanes, nuclear weapon sites, etc.

e) a separate competent investigation unit must be established to investigate into matters pertaining to breach of any law related to Big Data. Well equipped with proper training and qualification with an ethical and moral code.

f) establishment of separate State and National tribunals for adjudicating matters pertaining to Big Data.

g) Sole discretion and decision about keeping data private and in personal capacity shall be given to the END-USER: who is a citizen, organisation or like. Laws needs to be framed in this direction and to regulate privacy policy by corporates who use Big Data.

h) Government of India must appoint a permanent steering committee for regulation and protection of Big Data.

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Force Majeure & Hardship in International Commercial Law: Analysis of UNIDROIT Principles, PECL and CISG

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Abstract

In the international regime of commercial contracts, the emphasis is majorly laid on upholding the sanctity of contracts. Liability exemption for non-performance of the contractual obligations has developed from the principle of clausula rebus sic stantibus and although recognised under various names in different countries, its application is still considered narrowly. The international legal instruments promoting uniform guidelines to regulate international trade contracts such as United Nations Convention on Contract for International Sale of Goods (CISG), UNIDROIT Principles for International Commercial Contracts (UPICC) and Principles on European Contract Law (PECL), expressly refers to the concept of hardship and force majeure to address the problem of changed circumstances adversely affecting the international trade. In this paper, a comparative study of these international instruments has been undertaken to understand and analyze how the transnational legal instruments accommodate force majeure events and hardship and how liability exemption for non- performance of contractual duties can be sought under these legal instruments. The paper further aims to compare the force majeure provisions under these instruments to find out the most comprehensive provision. The paper also attempts to analyse if hardship is governed by CISG and whether provisions of UPICC and PECL can be used as supplementary principles to interpret Article 79 of CISG.

Keywords: Hardship, Force Majeure, Changed Circumstances, CISG, UNIDROIT Principles & PECL.

Introduction

In commercial contracts, it's a natural assumption that the parties will perform their obligation authentically. Despite the best intention, a party may not satisfactorily fulfil its contractual obligations due to occurrence of an unanticipated incident, which may cause interference with completion of

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undertakings by the parties to a contract. The sudden change in surrounding circumstances can have baneful impact on the performance of a contract such as complete impossibility or the performance becoming extremely burdensome or frustration of purpose. In international trade, particularly in long term contracts, unexpected change in circumstances can be a major challenge. The globalization has increased the risk further with involvement of large number of countries in the process of manufacturing and procurement wherein change in political scenario, economy and natural calamities can be considerable factors that may affect the contractual bargain. In such cases of changed circumstances, it becomes a pertinent question whether the parties to a contract can avail exemption from non-performance arising due to change in surrounding circumstances that were neither foreseeable nor in control of the party. Though various contractual exemption theories in many legal systems are prevalent such as *imprecision*, force majeure, impracticability, frustration, hardship and impossibility, the relief for changed circumstances in international contractual practice, arises mostly under the contractual defence of hardship and force majeure. Even though defence of hardship and force majeure are not commonly used in many countries but are extensively recognised and frequently used in international commercial contracts. The terminology, cardinal ingredients and the legal effects of force majeure and hardship clauses are broadly different from each other. The contractual practice in international realm denotes that clauses of hardship and force majeure are encompassed in the international commercial contracts irrespective of governing law.[1] These clauses are very often inspired by the instruments released by international regulatory bodies such as United Nations Convention on Contract for International Sale of Goods (CISG), The International Institute for the Unification of Private Law's (UNIDROIT) Principles for International Commercial Contracts (UPICC) and Principles on European Contract Law (PECL).

In this paper, the researcher has undertaken comparative analysis of these legal instruments to understand how to seek exemption from non-performance due to conditions of hardship or events of force majeure. The hardship and force majeure provisions under these instruments are explained and compared to find out the most comprehensive provision. The paper further intends to analyze if there is a gap in CISG when it comes to application of hardship and if provision of UPICC can be used as supplementary to CISG or as an interpretational aid thereof.

Force Majeure

The contractual excuse theory of force majeureis a concept of civil law, also recognised in common law jurisdictions. It usually refers to an event, incident or a circumstance which was unpredictable, unforeseeable, unanticipated and was beyond reasonable comprehension of parties and could

[1] Hubert Konarski, "*Force Majeure and Hardship Clauses in International Contractual Practice*", 2003, International Business Law Journal, p. 408.

not have been controlled by the parties, causing interfering or preventing performance of the contract. The principle has Roman origins and resulted from legal abstraction of two opposing legal principles popular in early Roman Empire's merchant law i.e. *Pacta Sunt Servanda* and *ClausulaRebus Sic Stantibus*.[2] The defence of force majeure allows the parties to temporarily postpone performance of their contractual obligations and revive performance when the conditions of force majeure event are remedied or have passed. The consequences of a force majeure event on a contract can be suspension of the performance of the contract, severance of non-performed obligations and termination of contracts in case of time-bound contracts.

The cardinal ingredients of any incident to be characterized as a force majeure event are unpredictability, externality and irresistibility and to avail the defence of a force majeure event, these essential conditions should be satisfied. In ***Devas Multimedia Private Limited v. Antrix Corporation Limited,***[3] the claim by respondent Indian corporation asserting that the event cited by the respondent was not foreseeable and could not have been anticipated at the time of making the contract and thus cannot be considered a valid defence, was rejected by the Arbitral Tribunal.

Hardship

Hardship refers to a situation where circumstances of performing a contract radically change after the conclusion of contract, so much so that it upsets the fundamental equilibrium of the contract. It implies that a contracting party is disadvantaged to such an extent that if that party is required to continue to perform that contract it would be excessively burdensome for that party. Hardship can be physical as well as economic. In simple terms, hardship can be referred to as a situation that made the performance of an obligation extremely onerous and has the effect of re-negotiating the contract. The notion of hardship is embodied distinctively in different legal systems of countries such as France,[4] Belgium,[5] Germany[6], Portugal,[7] Netherlands,[8] Greece,[9] Italy,[10] and Austria,[11] nevertheless, the intent is common, to entitle a party in disadvantageous position to seek good faith renegotiation to adapt and restore the contractual equilibrium in its original state. Richard Speidel, in this context has stated in his article that "*when a long-term supply contract is disputed by changed conditions, at a minimum, the advantaged party should have a legal duty to*

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[2]Richard Hyland, "*Pacta Sunt Servanda: A Meditation*", 2001, Vanderbilt Journal of Transnational Law, 34, p. 412.
[3] ICC Case No. 18051/CYK.
[4]French Civil Code, 2016, article 1195.
[5]Belgian Civil Code, 2007, article 1147 and 1148.
[6]German Civil Code, Burgerliches Geserzbuch (BGB), 2002, article 313.
[7]Portuguese Civil Code, 1967, article 437.
[8]Dutch Civil Code (BW), 1992, article 6:258.
[9]Greek Civil Code, 1946, article 388.
[10]Civil Code of Italy (Codice Civile), 1942, article 1467-1469.
[11]Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), 1812, article 936, 1052 and 1170.

accept an equitable adjustment proposed in good faith by the disadvantaged party".[12] Main distinction between concepts of force majeure and hardship is that to avail defence of force majeure, performance of the obligation under contract must be capable of performing for the time being due to occurrence of any unexpected event and allowing extension of time to perform would save the contract. Whereas to avail defence of hardship, the occurrence of the event must have disturbed the financial balance to such an extent that performance of contractual duties becomes highly onerous though still possible to perform.

International Legal Regime Regulating Changed Circumstances

The important duty aligned with the international commercial contracts is that they organize the relationship of the contracting parties in an optimum manner with an aim to provide remedies for breach of contracts.[13]With growing cross country trade, the need was felt to have suitable law to regulate the international trade. United Nations, with a view to establish uniform set of rules to regulate international trade, in 1988 set the sails of CISG. Countries having largest economies in the world are contracting parties to CISG. CISG, in its Article 79, recognizes the concept of changed circumstances stating that "*a party is not liable for a failure to perform, if the failure was due to an impediment beyond its control*."[14] Similar provisions are incorporated in Article 6.2.2 and 7.1.7 of the UNIDROITPrinciples for International Commercial Contracts (UPICC)[15] and Article 6.3 and Article 8.1 of the Principles on European Contract Law, 1999 (PECL).[16] Most recently, during the Covid-19 pandemic, the International Chamber of Commerce (ICC) had issued a model clause of force majeure and hardship,[17] from which the parties could take cue to draft their force majeure clause and hardship clauses in their respective contracts.

UNIDROIT Principles for International Commercial Contracts (UPICC)

UPICC were initially released in 1994 with an aim to harmonize and regulate the commercial contracts in international trade, with revised editions in 2004, 2010 and in 2016. UPICC expressly defines force majeure and hardship and their legal effects in international commercial business transactions. The official commentaries on the Article 7 of UPICC explains that the title "*force majeure*"was preferred since the term is renowned in international business

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[12]Richard E. Speidel, "*Court-imposed price adjustments under long-term supply contracts*", 1981 Northwestern University Law Review, 76, p. 369.

[13]Dietrich Maskow, "*Hardship and Force Majeure*", 1992, The American Journal of Comp. Law, 40/3, p. 657–669.

[14] United Nations Convention on Contract for International Sale of Good, 1980(CISG), article 79.

[15] UNIDROIT Principles for International Commercial Contracts, 1994 & 2016 (UPICC), article 7.1.7.

[16] Principles on European Contract Law, 1999 (PECL), article 6.111, article 6.3, article 8.1, article 8.2 and article 8.108.

[17] International Chamber of Commerce, "*ICC Force Majeure and Hardship Clause March 2020*",*available at:*https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure hardship -clauses-march2020.pdf, accessed on 16th June 2022.

community and covers the similar grounds as that of doctrine of frustration as well as doctrine of force majeure but identical reference to the domestic concept of these doctrines must be avoided. The preamble to UPICC clearly states that these rules are not binding in nature but the parties may choose to apply these principles as governing law for their contracts and may serve as a model for national and international legislators."[18]

A. Force Majeure

Article 7.1.7(1) of UPICC released latest in 2016 has distinct provision of force majeure which provides that non-performing party will be excused from liability of damages if the non-performance of contract was neither in control of the non-performing party and nor it could have been rationally taken into consideration at the time of contract was made and which could not have been avoided by the contracting parties.[19]For temporary impediments, Article 7.1.7(2) has the effect of suspension of the performance of a contract.[20] Article 7.1.7(3) pertains to liability of damages payable by the non-performing party, if it fails to timely notify the counterparty of the hurdle in question and impact of the hurdle on its ability to discharge its obligation under the contract.[21]

To attract the provisions of this article, it is important to establish beyond doubt the causal link between the impediment and the non-performance. Article 10.8(1) provides for general limitation period of suspension to be extended for a period of one year after the impediment in question is over.[22] The Iran US claims tribunal, in ***Anaconda-Iran Incorporation v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Company,***[23] held force majeure to be a general legal principle. The tribunal further held that if the parties if the parties want to limit their right to invoke force majeure defense, it should be explicitly mentioned in their contract, a general presumption to that effect does not limit their rights.

B. Hardship

Article 6.2 of UPICC deals with hardship. In the first part, it affirms the binding character of a contract and emphasis on its strict performance as envisaged in Article 6.2.1, regardless of how onerous it may be for the party to perform. Article 6.2.2 further explains that the general rule of strict performance not in any way absolute and is subject to certain exceptions. It is important to understand that merely the change in circumstances *per se*does not trigger hardship, but the consequences arising out of an event are the

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[18] Preamble to UPICC.
[19]UPICC, article 7.1.7(1).
[20]UPICC, article 7.1.7(2).
[21]UPICC, article 7.1.7(3).
[22] UPICC, article 10.8(1).
[23] Iran-US Claim Tribunal Case No. 169, Case No. 167 (Award No. ITL 65-167-3), 1986, *available at:*https://iusct.com/cases/correction-to-award-no-65-12-january-1987/, accessed on 15th June 2022.

determining factors. Article 6.2.2 defines essential requirements to be met in order to invoke the defence of hardship; (i) the event must have disturbed the fundamental balance of the contract; (ii) the event either have occurred or its occurrence came to the knowledge after the contract is made; (iii) the event must be unforeseeable; (iv) the event must be beyond the control of the parties; (v) the risk arising out of the event were not capable of assuming by the parties.[24] Article 6.2.3 deals with the effects of hardship which entitles the non-performing party in a disadvantageous situation to request the counterparty to renegotiate and adjust the contract in accordance with new circumstances. Pending the request for renegotiation, the disadvantaged party must not withhold its performance, unless warranted by the exceptional circumstances. The Article further states that if the disputing parties do not reach to an amicable settlement within reasonable time, they may approach the court. It is then for the court to find out whether it is a case of hardship and decide whether to*(a) terminate the contract at a date and on terms to be fixed, or (b) adapt the contract with a view to restore its equilibrium*.[25]

Principles of European Contract Law (PECL)

The law academicians of Europe collectively drawn PECL as model principles for trade regulations. PECL comprises of the fundamental rules of contract law and the law of obligations as found in the domestic legal structure of various jurisdictions of European Union. This instrument has identical provisions as that of UPICC that deal with non-performance, hardship and force majeure.

A. Force Majeure

Article 6.3 of PECL contains provisions of Force majeure. Similar to Article 7.1.7(1) of UPICC, Article 6.3(a) of PECL excludes liability of party for not performing its duties under a contract arising out of an unforeseeable impediment beyond their typical sphere of control, occurred after the contract was made and where it was not possible for the non-performing party to avoid or overcome the impact of such impediment.[26]Article 6.3(b) further defines a list of events such as such as war, armed conflict, blockade, natural disaster, act and orders or government pertaining to the force majeure events or similar events, which can be considered events of force majeure for the purpose of these principles, unless the parties may have agreed to contrary in their agreement.[27] It is important to note that mere apprehension of an occurrence cannot be categorised as force majeure but an actual event must have taken place for the purpose of force majeure. In a relevant case on the subject matter titled as ***Sub-Zero Freezer Co. Inc. v. Cunard Line Limited,***[28] the contract had no force majeure clause. The facts of this case were instructive in nature and explained that force majeure should be a real occurrence preventing a party

[24]UPICC, article 6.2.2.
[25]UPICC, article 6.2.3.
[26]PECL, article 6.3(a).
[27] PECL, article 6.3(b).
[28]01-C-0664-C (W.D. Wis. Mar. 12, 2002).

from actually performing the contract. The apprehension of a certain incident or threat of terrorism cannot be termed as an event of force majeure. Article 6.3(c) suspension of performance, Article 6.3(d) notice requirements and Article 6.3(e)extension of limitation period, of PECL are identical of Article 7.1.7(2), Article 7.1.7(3) and Article 10.8(1) respectively.

B. Hardship

Article 8.1 of PECL defines the hardship as an event of legal, political, economic, technical, financial or similar in nature, which is beyond the control of disadvantaged party's typical sphere, occurred or become known after the contract was concluded and the associated risk of which were not anticipated by the disadvantaged party, causing fundamental change in the basic contractual balance and making it excessively onerous for the disadvantaged party to perform.[29] This provision is quite similar to Article 6.2.2 of UPICC. Akin to Article 6.2.3 of UPICC, Article 8.2 of PECL further lists the legal consequences of hardship; (a) renegotiations to decide alternative contractual terms to continue the contract[30]; (b) apply to arbitral tribunal or court[31]to either (i) adjust the contractual stipulations according to the changed circumstances to restore initial balance and if such restoration is not possible, to equally distribute the losses caused by the hardship between the parties[32]; or (ii) terminate the contract when restoration of contractual equilibrium is not possible.[33] The non-performing party has an obligation to timely inform the counterparty of the intervening event and failure to send timely notice entitles the other party to claim damages arising out of non-receipt of the notice.[34]

Convention on International Sale of Goods (CISG)

United Nations Commission on International Trade Law (UNCITRAL) adopted CISG as a diplomatic conference on 11th April 1980 with an objective to create standard set of rules to govern the international sale of good contracts to establish international economic order. It further aimed at promoting development of international trade by taking into account various economic, social and legal systems and remove legal barriers in international trade.[35] Section IV of CISG Article 79 contains provisions whereby a party can seek exemption form contractual liability of damages payment arising out of unexpected impediment. Article 79(1) provides "*A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided*

[29]PECL, article 8.1.
[30]PECL, article 8.2(a).
[31]PECL, article 8.2(b).
[32]PECL, article 8.2(b)(i).
[33]PECL, article 8.2(b)(ii).
[34]PECL, article 8.2(c).
[35] Preamble to CISG.

or overcome it, or its consequences."[36] Article 79(4) clarifies the requirement of notifying the other party with clear indication of failure to notify the counterparty of the known impediment will entitle the counterparty to receive payment of damages arising out of such non-receipt of notice. However, Article 79(5) makes it clear that the application of Article 79 only offers exclusion of liability for payment of damages and the parties are not prevented from exercising any other rights under the convention. The provision of Article 79 aims to protect a disadvantaged party from the risks of uncontrollable and unavoidable situations. This article can be invoked where the pre-requisites are fulfilled; i.e. (i) Impediment must be beyond the control ;(ii) Un-foreseeability; and (iii) Unavoidability.[37] In an international dispute titled as ***Macromex Srl. V. Globex International Inc.***,[38]the contract did not have the force majeure clause hence the seller resorted to Article 79 of CISG. The Arbitrator expressed that the case of the seller fulfils conditions of Article 79(1) (2) and even 79(4), however it does not satisfy the conditions of Article 79(3) i.e. "*the impediment could not be reasonably avoided or overcome.*" The tribunal in order to fulfil the gap, relied on the uniform commercial code of united states' substituted performance as the seller did not attempt to deliver the shipment at a neighbouring port and thus was held liable to pay damages. The important take away from this case was that it's important that in order to avail the defense of force majeure under Article 79 of CISG, all important pre-requisite conditions of force majeure laid down in said article must be satisfied.

Analysis

In international regime, the tribunals emphasis on the ancient principle of *pacta sunt servanda* i.e. strict performance of contracts for smooth flow of business. The application of exception doctrine *rebus sic stantibus,* although recognised,[39] is still considered narrowly. The international instruments to promote uniformity for commercial contracts discussed herein refers to the concept of changed circumstances and the same is defined as an "impediment" within these instruments. However, the headings of Article 7.1.7 of UPICC and Article 6.3 of PECL have clear mention of "force majeure" whereas Article 79 of CISG has only mentioned impediment therein but the events falling within scope of impediment are not defined. The pre-requisite of events constituting force majeure impediment under these principles is similar and all of them excuse parties from their liability of non-performance.

It is incumbent upon the parties to establish that facts of their case fulfil the essential pre-requisite conditions of force majeure. In an ***ICC Case No.***

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[36]CISG, article 79(1).

[37] Ingeborg Schwenzer, "*Force Majeure and Hardship in International Sales Contracts*", 2008, Wellington Law Review of Victoria University, 39(4), p. 710.

[38] ICDR Case No. 50-181-T-00364-06, *available at:* https://jusmundi.com/fr/document/decision/en-macromex-srl-v-globex-international-inc-interim-award-tuesday-7th-august-2007, accessed on 16th June 2022.

[39]David R. Rivkin,"*Lex Mercatoria and Force majeure*", in Emmanuel Gaillard (ed.): Transnational Rules in International Commercial Arbitration, ICC Publication No. 480/4, 1993, p. 165.

9978/1999,[40] the seller failed to deliver the contracted items and sought refuge of Article 79 of CISG, stating that its liability for not delivering the goods is excused in terms of Article 79 of CISG as well as the force majeure clause of the contract. Pursuant to applicable German law, the tribunal applied CISG to the contract and stated that the supplier's delivery failure is a business risk well assumed by the seller. The tribunal noted that the impediments relating to commercial risks cannot be presumed to be under Article 79 of CISG and the parties should preserve the sanctity of contract. The tribunal further concluded that the decision of the tribunal is consistent with practice adopted by most ICC arbitrators who allow force majeure defence sparingly. It is considered that Article 6.3 of PECL and Article 7.1.7 of UPICC are similar to Article 79 of CISG but the PECL and UPICC are more flexible because in order to be applicable they require only relative impossibility and not absolute impossibility.[41] However, it is important to point out that Article 79 of CISG also offers liability exemption even in case of third-party failure causing non-performance, that is not the case with Article 7.1.7 of UPICC and Article 6.3 of PECL. Further, the impediment in CISG andUPICC covers all kind of events whether natural occurrences or artificial ones if they satisfy the threshold stated in these Articles, whereas, Article 6.3 of PECL clearly explains the force majeure events in Article 6.3(b) such as war, civil riot, epidemic, act of government and blockade etc. The exemption offered in Article 79 CISG and Article 6.3 of PECL is only for the duration that the impediment exists and the excuse under Article 7.1.7 of UPICC remains in force for a period as may be reasonable considering the impact that the impediment in question may have on the performance of the contract.[42] The most common factor among these laws is that they put liability on the affected party to notify the other and also have provision for damages arising out of such non-receipt.[43]

Although, the primary purpose of these instruments is to get temporary relief to an affected party, they offer exceptions to determine the claims. CISG[44] restricts the parties to claim damages and PECL[45]exempts claim for damages and performance and offers termination of contract and claim of damages if the non-performance continues for an indefinite period. In contrast, UPICC while it offers to excuse a party from non-performance due to an impediment, it neither preventsa party from withhold performance nor from terminating the contract or recover monies due.[46] Since these laws are not

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[40]ICC Court of Arbitration, Award in Case No. 9978, March 1999, published in ICC Bulletin No. 11-2 of 2000, p. 117.

[41]Sylvette Guillemard "*A comparative study of the UNIDROIT Principles and the Principles of European Contracts and some dispositions of the CISG applicable to the formation of international contracts from the perspective of harmonisation of law*", 2001, Kluwer Law International, p 83-113.

[42]UPICC, article 7.1.7(2).

[43]UPICC, article 7.1.7(3), CISG, article 79(4) and PECL, article 6.3(d).

[44]CISG, article 79(5).

[45]PECL, article 6.3(c).

[46]UPICC, article 7.1.7(4).

mandatory but are guiding principles, the parties to international contracts are free to adapt these provisions according to the need of their contract and trade or may have elaborate provisions in their contract to govern change in circumstances. It is widely believed that Article 79 of CISG addresses the difficulties of changed circumstances in international trade without resorting to any of the national laws. The terminology of the article develops its system from the domestic laws deliberately excluding references to the terms like force majeure and frustration. In this context, the most frequently asked question is whether the radical change in circumstances (often referred to as hardship), causing performance of the contract unduly burdensome but not impossible is governed and settled by this provision. The vague language of Article 79 does not allow sufficient certainty to decide on the issue solely on its own basis. Some arbitral awards of international arbitrations such as ***African Holdings Company of America v. the Democratic Republic of Congo***[47]***and Chevron Corporation and Texaco Petroleum Corporation v. Ecuador (II),***[48] confirm that the domestic law can be interpreted with the help of UPICC but UPICC as an aid to supplement and interpret Article 79 of CISG is a rarity.

In a leading case titled as ***Scafom International BV v. Lorraine Tubes S.A.S***[49]after the contract of sale was made between a Dutch buyer and a French seller, steel price increased by 70% unexpectedly. The buyer declined request to renegotiate and demanded delivery of goods at the price agreed in the contract. The contract had CISG as governing law. The Tongeren Commercial Court's verdict was overturned by the Antwerpen Court of Appeal stating that CISG does not deal with economic hardship in a contract and the domestic law of France should be applied to this case, which was further rejected by Supreme Court. Finally, the Belgian Court of Cassation ruled that the unforeseeable change in circumstances have unduly increased the burden of performance and further relied on Article 7(2) of CISG which states that the matters that are governed by CISG but are not expressly settled in it, must be settled in conformity with the general principles on which it is based and in absence thereof, in conformity with the law applicable by virtue of rules of private international law.[50] Thus, in order to fulfil the gap of hardship being governed but not settled by Article 79 of CISG, Article 6.2.3 of UPICC was used by Court to interpret Article 79 of CISG and allowed seller the right to renegotiate. Comparatively, UPICC's provision to deal with hardship and non-performance

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[47] ICSID Case No. ARB-05-21, as cited by Jarrod Hepburn in "*The Role of the UNIDROIT Principles of International Commercial Contracts in Investment Treaty Arbitration*", 2015, Int. and Comparative Law Quarterly, 64, p. 905.

[48] Permanent Court of Arbitration, Case No. 2009-23, as cited by Jarrod Hepburn in "*The Role of the UNIDROIT Principles of International Commercial Contracts in Investment Treaty Arbitration",* 2015, Int. and Comparative Law Quarterly, 64, p. 905.

[49] Supreme Court of Belgium, Case No. C.07.0289.N, 2009 *available at*:http://cisgw3.law.pace.edu/cases/090619b1.html.

[50] CISG, Article 7(2).

are more comprehensive than CISG.[51] UPICC gives power to the tribunals to alter the contract to reinstate the initial balance of the contract whereas CISG offers no such provision. In order to safeguard the contractual obligations, UPICC emphasis on the exceptionality of the event.[52] PECL is geographically more concentrated on the regulations prevailing in the European Union. The term "*hardship*" or "*changed circumstances*" are not found in CISG, though suggestions were made to include such a provision.[53] In the process of drafting CISG, proposals to include provisions relating to hardship were rejected. Said rejection was clear indication that CISG did not intend to include this provision. Interestingly, the secretariat commentary on draft counterpart of Article 79 of CISG which was Article 65 of CISG's 1978 draft expressly prohibits release of seller from its obligation in case of major change in circumstances where the contract does not remain same as originally agreed.[54] Although, the judges in international arbitration does acknowledge existence of hardship, there is no general rule that Article 6.2.3. of UPICC serve as a gap filler for Article 79 of CISG, because CISG expressly debars adaptation of the contract by the judges. Further, the autonomous rights of the parties in Article 6 of CISG allows the parties to decide whether to exclude or include CISG as their governing law. The parties to international contracts have the right to choose, CISG, UPICC or PECL as their governing law. If parties so choose, the Article 6.2.3 of UPICC or Article 8.1 PECL becomes a part of their contract and supplement application of Article 79 of CISG. Considering the uncertainties surrounding application of Article 79 and its narrow interpretation, it is strongly recommended that the parties chose and incorporate their governing law preferably in the contract itself to avoid disputes after the contract is made.

Conclusion

The principle of force majeure and hardship both aim to reduce the damage that may be caused due to compelled performance in changed circumstances. The arbitrators in international commercial practice discourage the defence of hardship to uphold the sanctity of contracts, instead defence of force majeure is preferred because the performance can be resumed once the force majeure event is over. The international legal instruments of UPICC, PECL and CISG are used for illustrative purpose and parties to the international commercial contracts tend to give widest meaning possible to the hardship and force majeure clause in their agreements in order to invoke said clauses and protect themselves from unpredictable circumstances leading to burdensome contracts if the need arise so. Further, the force majeure and

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[51] Johanna Hoekstra, "*Regulating International Contracts in Pandemic: Application of the Lex Mercatoria and Transnational Commercial Law*", in Carla Frestman and Andrew Fagen (eds.) "*Covid-19, Law and Human Rights: Essex Dialogues"*, 2020, University of Essex, p. 117.

[52] *Ibid*.

[53] Secretariat Commentary on Article 65 of draft of CISG, 1978, Comment No. 5, available at: http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-79.html.

[54] *Ibid*.

hardship provisions given under Article 6.3 and 8.1 of PECL and Article 7.1.7 and 6.2 of UPICC is far more elaborate than that of Article 79 of CISG, however, the CISG is more prominent being an official treaty with more than 80 signatory member states, which means that the CISG takes precedence over other instrument of international legal principles unless the parties agree to contrary by express terms in their contracts or the arbitral tribunal chose to differ in absence of express provision in the contract in this regard. UPICC and PECL may be used as an interpretational aid to Article 79 of CISG, but not as supplementary provisions because that was not the intention of the drafting committee. The only possibility is that if the parties choose to expressly incorporate UPICC and or PECL as either supplementary law to CISG or as governing law in their contract.

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Emerging Challeges in Corporate Governance: A Critical Analysis

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Abstract

Effective governance is the fundamental in any organisation. Effective and credible governance leads to the better management. In the globalised world, and the growing corporate culture has increased the importance of corporate governance. A fundamental dilemma of corporate governance emerges from the debate concerning the extent to which each actor should be given 'control' to drive the company. On the inside, the Board of Directors (BoD) is the key player, yet factors like disproportionate control in Indian companies and prejudicial nature of internal controls system as witnessed in frauds like Satyam continue to influence and compromise the board's independence. Problems created by the behaviour and influence of insiders like the BoD and outside forces and actors like influences of market for corporate control and disclosures and statutory auditing are resolved by certain internal and external control mechanisms instilled either by law or norms. This article seeks to present a corporate governance analysis of these inside and outside control mechanisms and highlight the deteriorating corporate governance practices in India vis-à-vis the 'control' in a company. The extent and importance of these mechanism are adjudged on the parameters of information, influence, and independence. Through a comparative analysis of presence and viability of such inside and outside control mechanisms in India and Germany, it is realised that besides some additional checks and balances in the German model, the contrast in board structure makes all the difference. As an aftermath of huge corporate scams, it is believed that the lessons and rules have been learnt and accepted only in letter and not in spirit. The corporate governance regulations fail to maintain a balancing act providing efficient safeguards as well as ensuring ease of doing business, thus suggesting a need for a collective conscience and for regulatory mechanisms to be modelled around best practices across the world.

Key words: Governance, Corporate Constitutionalism, Responsibility.

Introduction

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Almost 25 years have passed since India steered its way into a new era of commercial liberalization and reform. With this opening up of economy, significant growth in the domestic consumer demand, there has been an influx of foreign investment which has resulted in strengthening of Indian companies. With such an influx, a wave of corporate governance has started which refers to "the control of companies and the systems of accountability by those in control."[1] Good corporate governance entails a commitment by the controllers of a company to run it in a legally, ethically and in a transparent manner.[2]The control held by the board, protection of shareholders' rights and of investors and creditors have been the worry of corporate law ever since the public companies started emerging in the19th century. Today, much of what is practiced as corporate governance norms across nations is already part of the company law statutes but very few have translated into reality. This debate is rather resentful because it is essentially about the turfs to defend. A fundamental dilemma of corporate governance arises from this debate which is, to what extent should each actor associated with the company be given 'control' to drive the company in terms of decision-making and upholding the interests of the shareholders. For instance, on one hand, the regulation of intervention by large shareholder may safeguard the small shareholders, but such regulations might also increase managerial discretion and scope for abuse. At this point, the agency problem of ownership versus control also seeps in. It emerges from the principal-agent relationship between investors, with shareholders and outsiders acting as 'the principal' and insiders and the management acting as 'the agent'. There is widespread awareness in the company law discourse that managers often indulge in actions that hurt shareholders. Frauds like Satyam speak to that effect. Thus, to lower the risk of incurring high agency costs, corporate governance norms introduce certain control mechanisms which can be categorized into two types, Inside and Outside.

One of the primary principles of corporate governance is to balance the inside control and the outside control of a company. Hopt's in his seminal book, *Comparative Corporate Governance,* highlighted the following elements as the "building blocks" of inside and outside control in companies.[3]The chief element on the inside is the Board of Directors (BoD). India, like most other common law countries, has a one-tier board structure. It is the regulating body on the inside of a company constituting both non-executive and executive directors. The board's function is to delegate executive control on a day-to-day basis. Post the Satyam debacle of 2008, the composition, independence, and accountability of the board under the old company law was heavily questioned. An overhaul of the Companies Act, 1956somehow improved the

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[1] JOHN FARRAH ET. AL., CORPORATE GOVERNANCE 3 (2nd ed 2005)

[2]CONFEDERATION OF INDIAN INDUSTRY (CII), REPORT OF THE CII TASK FORCE ON CORPORATE GOVERNANCE(2009) https://www.mca.gov.in/ministry/latestnews/draft_report_nareshchandra_cii.pdf

[3]COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH, 1201-10 (klaus j. Hopt et al. Eds., 1998)

situation but the corporate governance regime in India still has a long way to cover as loopholes in the law still try to impede its efficiency.

The paper aims to portray a corporate governance analysis of the inside and outside control mechanisms driving a company including different actors which control the company directly or indirectly. It poses to underline the dwindling corporate governance practices in India vis-à-vis 'the control' in a company. The extent and importance of such controls is adjudged on parameters like information, influence and independence. Through this discussion about the 'control' of a company, the paper will also decode the norms and realities of corporate governance in India within the company and beyond. Lastly, a comparative analysis of presence and viability of such inside and outside control mechanisms in India and Germany is presented.

Hues of "Control" in Corporate World

The concept of 'Control' is perhaps the most debatable issue under any corporate law regime but more so under the Indian corporate law regime. Despite its elusiveness, various attempts have been made to define 'control' and explore its facets within the sphere of corporate law. Scholars like Edward S Herman have tried to define it in a holistic way, "It relates to power—the capacity to initiate, constrain, circumscribe, or terminate action, either directly or by influence exercised on those with immediate decision-making authority".[4] The board is the immediate decision-making authority and thus 'control' is predominantly associated with the restraints shown by the board and the influence held by it. Although the legal power to exercise control on the corporate affairs of a company lies with the board, shareholders are the ultimate controllers by virtue of ownership of shares in a company. Umakanth Varottil presents a spectrum along which the concept of control can be categorised as absolute or total control (100% voting rights), *de facto* control (less than 50% voting rights), management (no controlling shareholding).[5]Thus, it is pertinent to note that control usually exist in respect of ownership of voting shares in a company although it is not a *sin qua non*. Scholars[6] have argued that this is the very reason ownership structure in a company is often the source of corporate governance problems.

With a significant shift in the company law paradigm since its inception, the motivation behind having 'control' has also altered and may lie less in making profit for the company's shareholders and more in the ability to satisfy other interests. Legal scholars like Adolf A. Berle believe that now control is not solely about an "attribute of stock ownership" or merely a definable portion of the bundle of rights held by stockholders, but a "function",

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[4] *See* EDWARD S HERMAN, CORPORATE CONTROL, CORPORATE POWER: A TWENTIETH CENTURY FUND STUDY 17(1981)

[5] Umakanth Varottil, *Comparative Takeover Regulation and The Concept Of 'Control'* SINGAPORE JOURNAL OF LEGAL STUDIES (2015), pp. 208–231. *JSTOR*, www.jstor.org/stable/24872278

[6] Jayati Sarkar, *Ownership and Corporate Governance in Indian Firms*, CORPORATE GOVERNANCE: AN EMERGING SCENARIO (N. Balasubramanian & D.M. Satwalekar eds., 2010)https://archives.nseindia.com/research/content/CG_9.pdf

"a non-statist political process" which is although private but entails substantial public responsibilities.[7] He also gives a perfect analogy to that effect, "Control is to a stock corporation what political parties are to a democracy".[8] That is to say, like how a democracy would grapple in absence of political parties, a corporation will break-down in absence of an organization neatly tied with affirmative control. Another parallel that could be drawn from this analogy is how like the political parties often form a coalition in a democracy although there might be internal competition, in a corporation different actors and forces together control and influence the company while some compete to gain the control of the company. These actors and forces can be categorized into inside control and outside control both of which needs to be strictly governed by the mechanisms instilled by corporate governance norms.

Inside Control

The key player on the inside of a company is the board. It oversees the management and thus the overall strategy and direction of the company. Board members achieve control only by gaining the majority support of the shareholders of the company. Although the fundamental principle behind shareholders' democracy is the fact that majority rule must prevail. But it is also essential to ensure that the power exercised by the board is circumscribed within reasonable boundaries and does not oppress the minority voice, while also not leading to mismanagement.[9] India, like most other common law nations has a unitary board structure. Board's responsibilities demand exercise of judgment, thus it has to be vested with reasonable discretionary power. However, this power and control held by the board is subject to and must be governed by the legal and behavioural norms under the corporate governance regime like "well-informed and deliberative decision-making, management monitoring and fairness in performing duties towards the company and the shareholders".[10]To keep the board's behaviour in check, the 2013 Companies Act introduced concepts like performance-evaluation of the board, individual directors, and committee. In 2017, SEBI released a 'Guidance Note on Board Evaluation 'elaborating different attributes of performance evaluation and call for disclosing it to public.[11] However, it is contended that such a disclosure may

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[7] Adolf A. Berle,*Control in Corporate Law*, 58COLUM. L. REV. 1212, 8 (1958)

[8] *id.*

[9] Ministry of Corporate Affairs, Govt. of India, Minority Interests, Repott of the Expert Committee on Company Law (2005) https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/minority-interest.html

[10] Ministry of Corporate Affairs, Govt. of India, Minority Interests, Repott of the Expert Committee on Company Law (2005) https://www.mca.gov.in/content/mca/global/en/data-and-reports/reports/other-reports/report-company-law/management-and-board-governance.html

[11] SEBI, Guidance Note on Board Evaluation, SEBI (Jan.5, 2017) https://www.sebi.gov.in/legal/circulars/jan-2017/guidance-note-on-board-evaluation_33961.html

prove to be counterproductive as evaluation is a sensitive subject. Further, the independent directors are also obligated to follow the 'code of conduct'.[12]

Following are some of the most common realities which impede the incorporation of good corporate governance practices with respect to 'control' in Indian companies. In addition, case studies and future recommendation sare also provided.

Disproportionate Control

One of the key difficulties with the insider control of companies in India is that there is a constant battle between the inside actors. If we further dissect the insider control of a company, ownership of shares forms the basis of control. However, the classic agency problem of separation of ownership and control (Fama, 1980)[13] always seeps in. Business scholars[14] claim that India follows the concentrated form of ownership where the promoters are the block holders. A study shows that 38.78% of Indian companies have inside block holders holding more than 50% of the shares.[15] While only 0.20% of companies have institutional investors as block holders holding 50% of the shares. Thus, it is evident that promoters are in control of the large majority of listed companies and the influence of institutional investors through their shareholding as a counteracting force against the promoters is weak. This leads to the disproportionate control on the inside. Such control also has a spillover effect onto the management of the company. For instance, a study reveals that 67% of the companies in a sample of 307 out of 500 top companies had promoters either as a chairperson or as a managing director on company boards, and these promoters already have the controlling stakes which are on an average 50%.[16] Therefore, in such a scenario the information, independence, influence of the board is heavily prejudiced, resulting in an autocratic environment.

The Satyam debacle of 2008 was a testament of the crippling insider control of Satyam Computers. By exercising his disproportionate control over the management and ownership of the company, Ramalinga Raju, the promoter committed the biggest corporate fraud India has ever seen. Analysts[17] have observed that the passivity of the directors led to the callous negligence bordering on 'collusion' with the promoters. Raju and Co. had been

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[12] DELOITTE INDIA, CORPORATE GOVERNANCE IN INDIA – PRACTICES, FRAMEWORK https://www2.deloitte.com/in/en/pages/risk/articles/governance-101.html

[13] Eugene F. Fama, *Agency Problems and the Theory of the Firm*,88, THE JOURNAL OF POLITICAL ECONOMY, 288, 2 (1980)

[14] N. Balasubramanian & R V Anand, Ownership Trends in Corporate India 2001 – 2011 Evidence and Implications (Indian Institute of Management, Bangalore, Working Paper No. 419, 2013) at p. 8 https://www.iimb.ac.in/sites/default/files/2018-07/WP_No._419_0.pdf

[15] *Ownership and Corporate Governance in Indian Firms*, *supra* note 6 at 244.

[16] *id*.

[17] J.P. Singh, Naveen Shrivastav and Shigufta Uzma, *Satyam Fiasco: Corporate Governance Failure and Lessons Therefrom*THE IUP JOURNAL OF CORPORATE GOVERNANCE(2010) https://www.researchgate.net/publication/228118526_Satyam_Fiasco_Corporate_Governance_Failure_and_Lessons_Therefrom

furnishing fictitious accounts to the BoD for 6 years prior to 2008.[18] Yet, no evidence was recorded by the directors including the independent directors. Even the proposed investment in Maytas which was placed before the Board in the meeting of16th December,2008 had enough elements to arouse doubts and curiosity. For instance, the sheer magnitude of the investment in Maytas which stood at swooping $1.47 billion.[19] However, there seemed to be no record of any of the members of expressing suspicions about the investment. From the above observations, it is evident that the Independent Directors as well as the board at Satyam Computers failed to fulfil their fiduciary duties. Thereby, making it evident that the board is the supreme authority on the inside of a company and any failure on their part tofulfil their duties can lead to breakdown of a company and unfairness to the shareholders.

Thus, in order to prevent a Satyam 2.0, it is imperative that measures be taken to check the excessive interference of promoters. In fact, very recently it was reported that SEBI is planning to substitute the notion of "promoters with controlling shares" to "shareholders with controlling shares". This is a refreshing change in the corporate structure as it would break the practice of concentrated ownership and bring India's market regulations at par with best-global practices. While, also ensuring that shareholders with controlling shares do not overshadow the board. An analogy fits correctly here that," Moving away from promoters to controlling shareholders is like moving away from a 'family feudal concept to a democratic concept".[20] Companies might start to be managed professionally while also checking interference of promoters with minority stake.[21]

Internal Controls System

The Board of directors while exercising their control must make sure they act in compliance with the company's goals and objectives and also maintain an effective system of internal control. These are mechanisms implemented by a company to ensure the integrity of financial and accounting information, compliance with laws and regulations, promote accountability, and prevent fraud.[22] For this, the BoD shall constitute an audit committee as mandated under S.177 of the Companies Act, 2013. The audit committee oversees the internal controls and reviews the efficiency and effectiveness of

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[18] RK Aneja, *The Satyam Scandal Explained*, THE HARBUS (Feb. 17, 2009) https://harbus.org/2009/the-satyam-scandal-explained-4479/

[19] S. Prasadand S. Srinivasan S, *Satyam Row: Where was Corporate Governance?*IBNLIVE(2008) http://ibnlive.in.com/news/satyam-row-where-was-corporate-governance/80795- 7.html

[20] *SEBI to replace promoters with controlling shareholdersin new corporate structure: Report*MONEYCONTROL (Nov. 19, 2019) https://www.moneycontrol.com/news/business/controlling-shareholders-may-replace-promoters-as-sebi-rethinks-corporate-structure-report-4652021.html

[21] Pavan Burugula, *Sebi Plan Faces Resistance from Promoter-Driven Companies*THE ECONOMIC TIMES(2020) https://economictimes.indiatimes.com/markets/ stocks/news/sebi-plan-faces-resistance-from-promoter-driven-companies/articleshow /76378490.cms?utm_source=contentofinterest&utm_ medium =text&utm_campaign=cppst

[22] Will Kentan and Julius Mansa, *Understanding Internal Controls*INVESTOPEDIA(2020) https://www.investopedia.com/terms/i/internalcontrols.asp

the system as a whole. The BoD must make sure they satisfy the audit committee and provide them reasonable assurance that the policies, processes, tasks, behaviours facilitates an efficient operation along with maintaining quality internal and external reporting and conformity with applicable laws.[23] An effective internal controls system pivots on the right-tone set at the top, that is the board along with audit committee must convey a strong and clear-cut message that the responsibilities against the internal controls system must be taken sincerely. Thus, the influence and importance of the audit committee is supreme on the inside.

In the past, some of the biggest corporate scams in India have robbed the nation of its citizens' trust, money and reputation. The Satyam scandal of 2008 was an accurate demonstration of the breakdown of the internal control machinery and a prima facie failure on part of the directors and the audit committee to prevent the unfortunate turn of events. Facts show that although the company complied with the provisional requirements of appointing an audit committee which unfortunately indulged in prejudicial auditing practice.[24] The dubious nature of the Maytas investment *inter alia* was not disclosed and reported. The Satyam scam not only highlighted the importance of 'independent directors' but also underlined the significance of fiduciary cooperation between the actors when it comes to internal control. Because even though Satyam's auditing committee had independent directors, but the fraud still occurred. Under the overhauled Companies Act 2013, several changes were made to improve the transparency in internal control system. An internal financial control (IFC)system was introduced via Section 134(e), which ensures an efficient conduct of company's business along with prevention and detection of frauds. Section 143(11) requires the auditor's report to include a statement on prescribed matters.[25]Recently, to further increase the robustness, Companies Auditor's Report Order (CARO) Rules, 2016 were introduced which mandates disclosure of financial statements by auditing committee in its report on subjects like fixed assets, loan given by company, deposits etc. Yet in another scandal involving Punjab National Bank (PNB) and Nirav Modi, where in order to obtain loans from branches of Indian banks overseas, fake PNB guarantees worth $1.77 billion were used by the latter.[26]It was claimed by analysts that one of the primary reasons for the fraud was failure of the audit report to recognise potential risk zone.[27] They also said that had adequate system and controls been in place to identify these risks and all internal audit

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[23] KPMG INTERNATIONAL, ASSESSING THE SYSTEM OF INTERNAL CONTROL (2018) https://assets.kpmg/content/dam/kpmg/be/pdf/2019/12/assessing-system-of-internal-controls.pdf

[24] *Ownership and Corporate Governance in Indian Firms*, *supra* note 6 at 244

[25] NEERAJ BHAGAT & CO, INTERNAL FINANCIAL CONTROLS: NEW PERSPECTIVES AS PER COMPANIES ACT 2013 AND CARO *2016* (2016) https://neerajbhagat.com/pdf/IFC.pdf

[26] *What Is PNB Scam | Who Is Nirav Modi | PNB Fraud Case | Nirav Modi Case*BUSINESS STANDARD https://www.business-standard.com/about/what-is-pnb-scam

[27] NEERAJ BHAGAT & CO., INTERNAL CONTROLS (2016) https://neerajbhagat.com/pdf/Internal%20Controls.pdf

reports were shared with the Government and RBI, the fraud could have been detected earlier and appropriate action could have been taken.[28]Post-this in 2018, the RBI tightened rules saying no SWIFT-transactions were to be made without making surethat it reflected in the accounting system.[29]Even within PNB, the internal auditing process has strengthened to give more prominence to off-site monitoring mechanism which detects the any deviations when transactions are made. It is contended that it will not only reduce unnecessary dependence on underperforming physical audits to identify thesefraud risks but also improve the transparency.[30]

These scams unfolded a series of grave corporate governance failures in the Indian corporate law regime prevalent on the inside of a company and showthe board's and internal controls system's influence in driving the company forward. Moreover, its need to be independent. Thus, with the thrust of digital economy and trust within the board and other actors, the corporate governance regime may sustain only to improve by the day. In the end it is all about self-governance and self-scrutiny.

Outside Control

The insider control mechanisms of corporate governance are far from being invincible. Where they become ineffective, it is crucial to set in motion some external control mechanisms to realize the aim of corporate governance.

Market for Corporate Control (MCC)

The market for corporate control especially the dispute over control rights are a reflection of the external control mechanisms where problems arising out of corporate governance are resolved through external pressure. The dispute for control rights has two sides –firstly, with respect to company's acquisitions and mergers, particularly hostile takeovers, and secondly, in terms of procurement of proxy voting rights.[31]

A. Mergers and acquisitions in companies

The functioning of MCC has become a popular debate over the years. Analysts claim that India provides a favourable business environment for public takeovers due to its deep and liquid stock markets. While there have been only a few hostile takeovers in the past, there is a growing consensus in the public discourse that if companies are more efficiently managed, the incidence of such takeovers can be further reduced. Thus, it is argued that MCC forms a new corporate governance mechanism under which companies indulge

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[28] *id.*

[29] Sankalp Phartiyal &Devidutta Tripathy, *RBI Orders Changes to Bank Protocols After $1.8 Billion Fraud Case*REUTERS(22 Feb. 2018) https://in.reuters.com/article/punjab-natl-bank-fraud/rbi-orders-changes-to-bank-protocols-after-1-8-billion-fraud-case-idINKCN1G70JK

[30] *After Nirav Modi Episode, What Punjab National Bank Is Doing to Curb Frauds?*THE FINANCIAL EXPRESS(May 1,2018) https://www.financialexpress.com/industry/banking-finance/after-nirav-modi-episode-what-punjab-national-bank-is-doing-to-curb-frauds/1152258/

[31] Grossman, *Chapter 4: The theory of the market for corporate control and the current state of the market for corporate control in China*OECD(2004) https://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/31601011.pdf

in increased self-governing due to the threat of a takeover. Henry G. Manne first posed the possibility of the governance function of the MCC. He emphasized that a strong relationship exists between the managerial performance and the share price of a company. "Lower the share price, makes takeovers more attractivefor those who believe that they can manage the company more efficiently".[32] It is a natural push-back mechanism wherein shareholders of the company exit as a response to the poor managerial performance, resulting in falling of share prices which eventually creates incentives for outsiders to hoard control rights and replace the management. Thus, it is evident as to how the market for corporate control has an implicit control over a company and can strongly influence the decision-making. It induces a feedback mechanism between decision-making process and the stock market while enhancing the scope for shareholders to make their voice heard because their exit incites a threat for takeover. Due to the lacking shareholder activism in India, chances of shareholders adopting this route in order to make this voice heard is relatively high. While, this implicit driving force is stronger in western nations especially UK and USA where more than 200 takeovers resulted in mergers instead of acquisitions in a year.[33]

B. Acquisition of Proxy Voting Rights

The second method of gaining corporate control is through proxy voting rights. Company law provides for shareholder's voting rights to be exercised by a proxy on due authorization. In the Indian context, Section 105 of the 2013 Act read with Rule 19 of the Companies (Management and Administration) Rules, 2019 governs the appointment, rights, obligation, penalties of the proxies. Basically, allowing minority of shareholders topublicly acquire such delegated proxy rights from others. In 'Takeovers, Restructuring, and Corporate Governance', Weston observed that even if a proposed acquisition fails, this conflict over proxy rights still has a deep effect on the company's decision-making and the capital of the company's shareholders.[34] It is argued that the acquisition of such proxy rights not only gives minority shareholders to voice their opinions but also becomes a source of external pressure over the majority shareholders and the management, thus having some controlling influence over it. Under the 2013 Act, the proxies are still deprived of the right to vote by show of hands, contrary to the law in the UK. This not only impedes the momentum of the meeting but also contravenes the objective of the proxy system which was to increase shareholder participation in the meeting. Thus, the issue must be addressed promptly so that the acquisition of proxy voting rights can flourish as a proper external control mechanism to uphold the aim of corporate governance.

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[32] *See* Henry G. Manne,*Mergers, and the Market for Corporate Control*, 73,JOURNAL OF POLITICAL ECONOMY, 110, (1965)

[33] Shilpi Thapar, *Markets for Corporate Control – An Effective Mechanism Of Corporate Governance?* (Chartered Secretary Ed. 2009) <https://sites.google.com/site/ professional legalexpert/markets-for-corporate-control-an-effective-mechanism-of-corporate-governance>

[34] *The theory of the market*, *in China supra* note 31

Therefore, it is imperative that external control mechanisms like the market for corporate control is sustained in order to maintain good corporate governance and ensure compliance as regulatory authorities like SEBI cannot keep checks and balances at all times.

C. The Post-Takeover Saga over Control Acquisition

One of the key principles of corporate governance is shareholders' primacy especially the protection of minority shareholders' interests. There are certain unresolved issues with respect to 'control' even when a deal of acquisition has been signed between the target and the acquirer company. India's takeover regulation resists the implementation of the mandatory-bid-rule (MBR) which seeks to give equal treatment towards the minority shareholders by giving them an option to exit in the event the control of the company changes hands. It is argued that this resistance hampers the occurrence of value-enhancing takeovers and undermines the salient principles of corporate governance. For instance, the much-talked about Jet Airways-Etihad Airways deal of 2013 brought up serious regulatory concerns and revealed certain inconsistencies in the law. The parties had entered into several contractual arrangements governing the operations of Jet. However, some clauses with respect to Etihad's right to appoint nominees on the board, appoint vice-chairman and members of audit committee etc. were seen to give Etihad undue and excessive powers. It attracted attention from the regulators, while both SEBI and CCI had different views. In SEBI's view, these contractual agreements did not result in acquisition of control by Etihad. However, the CCI observed that the effectively the arrangements aimed that establishing the acquirer's joint control. In light of this, SEBI served show cause notices to promoters of Jet and Etihad alleging that such joint control required an open offer under regulation 4 of the Takeover Code.[35] It was SEBI's contention that that on comparing the definition of 'control' under the Competition Act, 2002 and the Takeover Code, 2011 the former deals with "controlling the affairs and management"[36] as against the latter which has a narrower approach and includes, "to appoint majority of the directors" or "controlling the management or policy decisions". Eventually, SEBI cleared these arrangements because the Abu Dhabi-based airline held a 24% stake in Jet Airways and thus it was not mandatory for them to make an open offer for Jet since under SEBI rules, the acquirer company having a 25% stake in the target has to make an open offer to the shareholders which is an Indian customized version of the MBR.[37] But these developments further muddied the waters on the issue of MBR and the acquisition of control, thereby leading to an uncertainty for the shareholders to get a chance to exit fairly and lucratively. Moreover, these issues further flame

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[35] Abhinav Harlalka & Nishchal Joshipura, *SEBI Clears Jet-Etihad Deal - Corporate/ Commercial Law - India*MONDAQ.COM(May 20, 2014) https://www.mondaq.com/india/securities/ 314658/sebi-clears-jet-etihad-deal

[36] Competition Act, No. 12 of 2003, §5 (Ind.)

[37] P.R. Sanjai Anirudh Laskar, *Sebi exempts etihad from open offer to hold stake in jet*MINT(May 9, 2014) https://www.livemint.com/Companies/RN5lwHcydANKjcLYQabN8N/Sebi-exempts-Etihad-from-open-offer-to-hold-stake-in-Jet.html

up the existing agency problem of ownership and control. These also impedes the efficiency of the management as the decision-making is stalled while the institutional mechanisms are at battle figuring out the definition of 'control'.Such issues also create impediments to a flourishing and conducive market for corporate control, the essentiality of which has been highlighted before. Thus, this issue needs clarifications at the earliest.

Disclosure and Statutory Auditing

Proper compilation of the financials of a company and its due disclosure to the shareholders is central to the credibility and integrity of the company and goes to the heat of healthy corporate governance. Accountability is the underlying corporate value attached to such auditing. Statutory auditing is the 'outsider' equivalent of the internal control mechanism. It obliges companies to mandatorily conduct an audit as required by the statute, the Companies Act, 2013 It is carried out by independent professionals appointed as auditors. It is argued that the auditors resolve the agency problems prevalent in a corporate structure while also forms an external controls mechanism in a corporate governance regime. They act as neutral decision-makers and presents an autonomous check on the workings of the agent. It facilitates the principal to maintain trust and confidence on the agent. Auditors often act as 'gatekeepers' with a crucial task to give unprejudiced assertion that a company's financial condition is portrayed fairly. Thus, statutory auditors although being outsiders have a great influence on the inside of the company as their report makes or breaks the future of the company. It is contended that although the key task of auditors is to resolve agency problems, but their appointment often creates a new series of agency problems.[38] As pointed out by Gavious, the reason for these new problems is involvement of the management in practice who gives recommendations to the shareholders as to the appointment of auditors.[39] Moreover, the fear of losing payments from long-term audit contract and some additional services often bring into line mutual incentives between the auditors and management, thereby, leading to conflict of interest problems.[40] These conflicting interest could severely jeopardies the independence of auditors impeding them to resolve the real agency problems.

The biggest auditing failure was witnessed in the Satyam debacle of 2008 wherein Satyam Computers' independent auditor, Price Waterhouse Coopers (PWC), one of the Big Four was said to have callously conspired to defraud the public. For nearly eight years, PWC was not able to detect the fraud while Merrill Lynch (now Bank of America) discovered it within ten days. It was contended by several accounting and auditing experts that the presence of a 'non-interest-bearing deposits' on Satyam Computer's balance

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[38] MINISTRY OF CORPORATE AFFAIRS, GOV'T OF IND., FINDINGS AND RECOMMENDATIONS ON REGULATING AUDIT FIRMS AND THE NETWORKS(2018) http://www.mca.gov.in/Ministry/pdf/2018_CommitteeExperts_Report_08112018.pdf

[39] Gavious, *Alternative perspectives to deal with auditors' agency problem*,18, CRITICAL PERSPECTIVES ON ACCOUNTING, 451 (2007)

[40] *supra* note 38

sheet was an indication of an impending fraud as a reasonable company would either invest money or return the extra to depositors. The Auditors did no independent verification with banks where the money was deposited.[41]PwC, sanctioned all the misrepresented financial statements.[42]Satyam used to create fictitious sources whenever income was needed to be shown. Thus, it is evident that the disclosure and statutory auditing requirements indirectly play an influential role in how companies take decisions and how its mistakes can have a large impact on company's control.

Post-Satyam two major premises of policy reforms surfaced - firstly, the need for an autonomous oversight body for auditors, secondly, legal strategies for tackling auditors' conflicting interests.[43] For this, several committees and taskforces were set-up to give recommendations on corporate governance regime in India, like ICAI constituted an expert study-group to look into the functioning of audit firms in India. An overhaul of the Companies Act, 1956 occurred giving birth to the new Companies Act, 2013 wherein rotation of auditors was introduced to prevent the statutory auditors of a company and the management getting into a mutually benefitting relationship that might disrupt an audit to be conducted independently. Moreover, as per the new rules, a firm can be the statutory auditor for only 5 years.[44] One of the major setbacks in India's external auditing regime many Indian audit firms follow the methodology and processes adopted by their networks of Multi-National Accounting Firms (MAF), thereby creating an imbalance in maintaining consistent standards within India. It is argued that although these networks bring good business opportunities, this inconsistency often leads to frauds and therefore needs to be subjected to proper checks and balances under the corporate governance regime. Following the global trend of shifting from Self-Regulatory Organisation (SRO) model to an independent regulatory model in auditing business, the 2013 Act introduced the formation of the National Financial Reporting Authority (NFRA).[45] However, it is argued that the implementation of NFRA has severely affected the powers of ICIA, but as long as a ICAI continues to exist as a governing body separate from NFRA, effective implementation is difficult.[46] It is hopeful that these impediments are resolved in the future to realise the aim of corporate governance.

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[41] Arpit Khurana, *Corporate Governance: - A Case Study of Satyam Computers Services Ltd.*,SCHOLARLY RESEARCH JOURNAL, 3 (2016) http://www.srjis.com/pages/pdfFiles/147367354829.%20ARPIT%20KHURANA.pdf>

[42] V. Gopalan, *Corporate Scams in India: Lessons to be learnt*, COMPANY LAW JOURNAL, 76 (2009)

[43] *supra* note 40.

[44] Companies Act, No. 18 of 2013, §139(2)(b) (Ind.)

[45] *supra* note 40

[46] Manendra Singh & Suhail Nathani, *The National Financial Reporting Authority(NFRA) – A Case Of New Audit Governance In India* BW BUSINESSWORLD(Feb. 23, 2019) http://www.businessworld.in/article/The-National-Financial-Reporting-Authority-NFRA-A-case-Of-New-Audit-Governance-In-India-/23-02-2019-167457/>

Comparative Analysis: The German Model

Some common corporate governance norms tend to exist around the world, but each country's approach is derived from its own legal, cultural, and political milieu, thereby offering diverse approaches. This section will focus on the German-approach in comparison to India.

Inside Control Mechanisms

A. Board Structure

German law requires a two-tier board structure or the dual-board system for stock companies. It consists of a management board and a supervisory board.[47] Members cannot sit as members on the other board.[48] The responsibility of managing and running the everyday activities of the company is on the management board. The management board must comprise one or more directors and with minimum of two directors if the company's capital exceeds EUR 3,000,000, unless the company's AoA provide otherwise.[49] While, on the other hand the supervisory board must consist of at least 3 members and at most 21 members, contingent on the specified capital of the company.[50] The duties of the supervisory board includes appointment and removal of directors of the management board while also supervising the management of the company.[51] As against the Indian regime of singular board structure where the management board acts autonomously with no supervising body except following regulatory mechanisms, the German system provides to the supervisory board certain control mechanisms over the management board. For example, it has a right to ask the management board for any information about the company, if the AoA provide for certain kinds of transaction to be approved by the supervisory board, then it has to be.[52] Moreover, it can also comment on management board's decisions and in case of rejection of their opinion, justification needs to be provided by the management board.[53] However, reality may be different as public debate in Germany raises questions vis-à-vis the influence, information, and independence of the members of the supervisory board.[54] Thus, in principle, Germany's two-tier board structure provides a robust accountability system on the inside of the company, preventing instances of management board acting arbitrarily, chances of which are high in a one-tier board structure like in India. Although in India, non-executive directors or independent directors can also fulfil the monitoring role of supervisory board to some extent. For example, under the2013 Act, companies are required to constitute and audit committee supervised by

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[47] Stock Corporation Act 2007, § 76(1), § 95 § 96 (Eng.)
[48] Richard Thomas ed, COMPANY LAW IN EUROPE (2003)
[49] id.
[50] Stock Corporation Act 2007, § 95 (Eng.)
[51] Stock Corporation Act 2007, § 111 (Eng.) *See* http://www.gesetze-im-internet.de/aktg/
[52] Elizabeth Shi, *Board Structure and Board Composition in Australia and Germany: A Comparison in the Context of Corporate Governance*, 4,MACQUARIE J BUS L,197 (2007)
[53] Stock Corporation Act 2007, § 111 (Eng.) *See* http://www.gesetze-im-internet.de/aktg/
[54] OECD, Modern Company Law Problems: A European Perspective Keynote Speech by Prof K.aus J.Hopt (2000).https://www.oecd.org/daf/ca/corporategovernanceprinciples/ 1857275.pdf

independent directors. Moreover, the autonomous existence of the audit committee from the board adds additional protection for the shareholders.

B. Labour Codetermination

With respect to the representation of employees and shareholder's interests, the German model provides for 'labour codetermination'. It refers to the co-operative decision making at the management-level by involving shareholders' as well as employees' representatives.[55] The German law allows company workers to elect representatives to the supervisory board. Although some scholars believe that this may lead to long-term increase in productivity of the company. But it is argued that given the principal goal of the employers to maximize profit in the interest of the shareholders, labour codetermination might revamp the company's goals in the interest of the employees. India does not have such a system which keeps such administrative conflicts at bay.

C. Effect of Bank-based v. Market-based economy

Germany has a bank-based system, thus making the role of banks crucial in corporate governance regime on the inside of a company by controlling management through their position as creditors or even as owners of equity stakes in large German companies.[56] With respect to voting process, banks control equity voting rights as they exercise proxy votes on behalf of shareholders who deposit their shares with these banks.[57] Thus, it is not like the proxy system as understood in India. Moreover, this voting power also helps banks to place their representatives on the supervisory board, thereby giving them a supervisory control over the management. Scholars claim that "Bank monitoring partially resolves the agency problem, while market-finance is more "hands-off".[58] From a comparative point of view, India has a mixed system both market-based and bank-based with a little bent towards the latter. The former is still in the developing stages. Recently RBI noted that the credit disbursement by Indian banks has shown massive increase, it is still below world average.[59] While, market-capitalization has also increased sharply. Thus, there is no indication suggesting that banks have an overpowering control in Indian companies.

Outside Control Mechanisms

Coming to the outside control mechanisms, historically the German corporate governance system relied exclusively on institutional control and not

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[55] *See* E McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law*, 23,COLUMBIA JOURNAL OF EUROPEAN LAW, 135(2016)

[56] *See* Jeremy Edwards & Marcus Nibler, *Corporate Governance in Germany: The Influence of Banks and Large Equity-Holders*, Faculty of Economics and Politics University of Cambridge (1999) https://www.ifo.de/DocDL/ces_wp180.pdf

[57] TheodorBaums,*Corporate Governance in Germany: The Role of the Banks*, 40, THE AMERICAN JOURNAL OF COMPARATIVE LAW, 503,(1992)

[58] Shankha Chakraborty& Tridip,*Ray Bank-Based Versus Market-Based Financial Systems: A Growth-Theoretic Analysis* (2002). SSRN: https://ssrn.com/abstract=332501

[59] N Satyananda Sahoo, *Financial Structures and Economic Development in India: An Empirical Evaluation*,DEPARTMENT OF ECONOMIC AND POLICY RESEARCH (2013) https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/2WPSN140313.PDF

market for corporate control as a means to drive management control.[60] Until 1992, no public hostile takeover was successful. But as seen in the aforementioned discussion, the future belongs to market control. The German example is very similar to Indian as there is slow but steady development in the capital markets, along with emergence of public takeovers. For example, the hostile takeover of Mannesmann by British mobile phone group Vodafone AirTouch.[61] With respect to disclosure and auditing requirements, under the German Corporate Governance Code, the boards of public-listed companies have to disclose instances of non-compliance with code's recommendations on an annual basis ("the comply-or-explain-principle)."[62] While, India has some peculiar mandatory regulations like mandatory requirement for board evaluation. Rotation and independence of statutory regulators is something very recent in both countries but is equally relevant and important. [63]

Conclusion

The concept of control has seen a shift in paradigm as actors are more interested in personal gain than for the benefit of the companies and ultimately the shareholders. Therefore, they act in a prejudicial manner when encountered with situation of conflict of interest, leading to corporate governance problems. These problems created by the behavior and influence of insiders and outsiders in a company are resolved by the internal and external control mechanisms instilled either by law or by norms as explained through the discussion above. Although on the inside, the board is the key player but there are certain other factors which influence and compromise its independence. Firstly, disproportionate control in Indian companies which further feeds into the agency problem of ownership versus control. Secondly, the internal control system whose prejudicial nature may drive the company in an unhealthy direction often leading to bad decision-making. Frauds like Satyam speak to that effect. While, in addition to these insider controls, some forces and actors on the outside play an influential role in driving the company. The decision-making by the board is often heavily influenced due to external pressure from the market for corporate control where companies compete for acquisition of control, specifically in situations of hostile takeovers. Secondly, the external control mechanism of disclosure and statutory auditing forms the backbone of corporate governance regime in India. Acts of PwC in Satyam debacle speaks volumes for its improvement. With respect to India's comparison with Germany, it is noted that the contrast in board structure makes all the difference. It cannot be said that one is better over another, but the German model does instil some additional checks and balances. Having highlighted few

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[60] *supra* note 57

[61] Thorsten Schulten, *Vodafone's hostile takeover bid for Mannesmann highlights debate on the German capitalist model*EUROFOUND (1999) https://www.eurofound.europa.eu/publications/article/1999/vodafones-hostile-takeover-bid-for-mannesmann-highlights-debate-on-the-german-capitalist-model

[62] PRICEWATERHOUSECOOPERS (PWC), DOING BUSINESS AND INVESTING IN GERMANY (2018) http://.de/de/internationale-maerkte/doing-business-in-germany-guide-2018.pdf

[63] *id*.

loopholes in law and in practices, there is still a wide gap between the norm and reality. Compliance to regulations has effectively improved and no big-scale scam like Satyam has occurred but they have not reduced drastically even after the strictness in regulatory mechanisms. It is believed that the acceptance of rules has happened in letter and not in spirit. Despite these effective attempts to manifest good corporate governance within companies, the corporate governance regulations fail to strike a balance between providing efficient safeguards and ensuring ease of doing business. Thus, there is a need for a collective conscience for achieving the desired results and for business practices to flourish. Thus, going forward, regulatory mechanisms must be modelled on best practices across the world which suit the business environment in India coupled with embracement of these mechanisms by the board and other actors – both in form and in spirit.

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Tenth Schedule & Defections: A Constituional Perspective

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Abstract

Defections have been a perennial problem after the commencement of the Constitution of India. The Indian polity has had to content with the menace of the political defections time and again, bringing in its trail political instability, both at the Union and the State level on different occasions. In 1985, the Constitution 52nd Amendment Act made necessary changes in Articles101, 102, 190 and 191 and added Tenth Schedule to the Constitution to combat the menace of defections. While the law has succeeded in this direction to some degree as judiciary has tried to expound it, however, the ambiguity in the law continues and the lacunae continue to hold the ground as is evident from the events unfolding after the developments leading to the decision in NabamRebia case and the developments, thereafter, which has prompted the Apex Court to refer the matter to a Constitution Bench. This paper is an attempt at analysing the role of the Constitutional Courts in construing the provisions of the Tenth Schedule and its impact on the Indian democracy. Furthermore, paper delves on the pivotal role of the Speaker within the Tenth Schedule framework and his perceived political susceptibilities while discharginghis onerous role under the Constitution.

Key Words: Disqualification, Defections, Whip, Speaker, Split.

Introduction:

On August 23, 2022 a three judge Constitution Bench of the Supreme Court referred a batch of petitions on political developments in Maharashta including the dispute in Shiv Sena to a Constitution Bench of five judges for the final adjudication. The bench expressed doubts about the law laid down by a Constitution Bench of the Supreme Court in NabamRebia and Bamang Felix v. Dy. Speaker, Andra Pradesh Legislative Assembly[1] wherein it was held that a speaker cannot initiate disqualification proceedings when his own removal is sought. The three judge bench observed:

The proposition of lawlaid down by the constitution bench in NabamRebia..... stands on contradictory reasons, which requires gap filling to

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[1](2016) 8 SCC 1.

uphold the constitutional morality. As such, the question is referred to a constitutional bench for the requisite gap filling exercise to be conducted.[2]

The Indian polity has witnessed the menace of political defections time and again, bringing in its trail political instability, both at the Union and the State level on different occasions. There have been splits and formation of break-away groups time and again. To address this growing menace, the Constitution was amended in 1985 and the Tenth schedule was added to Constitution by the Constitution (52nd Amendment) Act, 1985 making provisions as to disqualification of the members on the grounds of defection.

An Analysis of Anti-Defection Law:

The Tenth schedule of the Constitution commonly known as anti-defection law, was introduced with a view to curb the tendency among legislators to switch their loyalties from one party to another and facilitate the toppling of governments and formulate new ones. It provides for presiding officer of the legislature to disqualify any defector on a petition by another member. The law contemplates two kinds of defections:

a. By a member voluntarily giving up membership of the party on whose symbol he got elected[3];
b. By a member violating directions (whip) issued by his party to vote in a particular way or to abstain from voting;[4]

While voting contrary to the party's whip is quite a straight forward instance of defection, the other mode of defection has proved to be a source of dispute and litigation. A member, voluntarily giving up membership, does not always refer to a legislator writing a simple resignation letter and formally joining another party rather it is often an inference drawn by the party that loses a member to another based on the legislator's conduct. Further under paragraph 4th of Tenth Schedule, disqualification on account of defection does not apply in case of merger of one party with another, if two third of party's total strength agrees to the merger[5].

The anti-defection law came up for consideration for the first time before the Punjab and Haryana High Court in *Prakash Singh Badal& Others v. Union of India & Others*[6], wherein the court held:

> "*So far as the right to be a member under Article 105 is concerned, it is not an absolute one and has been made subject to the provisions of the Constitution and the rules and standing orders regulating the procedure of Parliament. The framers*

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[2]https://www.livelaw.in/top-stories/nabam-rebia-decisions-reasoning-prima-facie-contradictory-read-issues-referred-to-supreme-court-constitution-bench-in-shiv-sena-dispute-207250 (Last visited 23rd August, 2022)

[3]Tenth Schedule:: 2 (1) (a).

[4]Ibid, 2 (1)(b).

[5]Paragraph 4 of the 10th Schedule provides: (2) For the purposes of sub-paragraph (1) of this paragraph, the merger of the original political party of a member of a House shall be deemed to have taken place if, and only if, not less than two-thirds of the members of the legislature party concerned have agreed to such merger.

[6]AIR 1987 P &H 263.

of the Constitution, therefore, never intended to confer any absolute right of freedom of speech on a member of the Parliament and the same can be regulated or curtailed by making any constitutional provision, such as the 52nd Amendment. The provisions of para 2 (b) cannot therefore, be termed as violative of the provisions of Article 105 of the Constitution.[7]

In Kihoto Hollohan v. Zachillu[8] some questions of grave constitutional importance were raised. The case related to the disqualification of some members of the Nagaland Legislative Assembly on the ground of defection. The case was heard along with some other matters relating to other legislative assemblies including those of Manipur, Meghalaya, Madhya Pradesh, Gujarat and Goa which raised similar constitutional issues. The constitutional validity of Tenth schedule was challenged on different grounds. Firstly, it was contended that the amendment was destructive of the basic structure as it violated the fundamental rights of freedom of speech, right of dissent and freedom of conscience, as para 2 of Tenth schedule penalised and disqualified elected representatives in the exercise of their rights which were vital to the nature of parliamentary democracy. M.N. Venkatachaliah J. for the majority put the problem in a proper perspective saying that one has to take a balanced view of the degradation of democracy in India in the context of political evil of defections or floor crossing as popularly called. He pointed out:

"*The argument that the constitutional remedies against the immorality and the unprincipled chameleon like changes of political hues in pursuit of power and pelf suffer from something violative of some basic features of the Constitution, perhaps ignores the essential organic and evolutionary character of a Constitution and its flexibility as a living entity to provide for the demands and compulsions of changing times and needs. The people of the country were not beguiled into believing that the menace of unethical and unprincipled changes of political affiliations is something which the law is helpless against and is to be endured as a necessary concomitant of freedom of conscience..... This is pre-eminently an area where judges should defer to legislative perception of and reaction to the pervasive dangers of unprincipled defections to protect the community.*"[9]

The majority also rejected the attack on the statutory distinction between 'defection and split' by saying that the courts had to defer to the legislative wisdom and perception in experimental legislation to deal with certain crises. The court has no practical criterion to go by except "what the crowd wanted" using Justice Holmes aphorism.

The contention that in so far as para 7 of Tenth schedule ousted the jurisdiction of Supreme Court and High Courts under Articles 136, 226 and 227 while adjudicating on the disqualification of the defected members, the mandatory requirements of ratification by state legislatures before Presidential assent had to be complied with under Article 368 (2). The majority applied the doctrine of severability to uphold the validity of the amending Act minus para

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[7]Ibid at para 28.
[8]1992 Supp. (2) SCC 651
[9]Id at 681.

7 which ousted the judicial review. The majority further held that the speaker, while exercising the power under tenth schedule acts as tribunal adjudicating the rights and obligations under the Tenth schedule and their decision in that capacity is amenable to judicial review. However, in consonance with the well accepted principles of administrative law, the scope of judicial review would be confined to jurisdictional errors only, namely, "Infirmities based on violation of constitutional mandate, *malafides*, non-compliance with rules of natural justice and perversity.[10] Para 6 (2) of the Tenth Schedule incorporated a fiction that all proceedings under para 6 (1) be deemed to be "proceedings in parliament" or "proceeding in the legislature of a state" attracting immunity from the judicial scrutiny under Article 122 or 212 as the case may be. Consistent with its view on the nature of power under articles 122 and 212(1) was only for "mere irregularities of procedures".

Justice Venkatachaliah further added:

> *. . . . .. that even after 1986 when the Tenth schedule was introduced, the constitution did not evince any intention to invoke Article 122 and 212 in the conduct or resolution of disputes as to the disqualification of members under Article 191 (1) and 102(1). The very deeming provision implies that the proceedings of the disqualifications are, in fact, not before the House, but only before the Speaker as a specially designated authority. The decision under paragraph 6 (1) is not the decision of the House, nor it is subject to the approval by the House. A deeming provision cannot by its creation transcend it own power.There is, therefore, no immunity under Articles 122 and 212 from judicial scrutiny of the decision of the Speaker or Chairman exercising power under Paragraph 6 (1) of the Tenth Schedule.*[11]

The minority, however, felt that the entrustment of power on the speaker violated the basic feature of the constitution and hence invalid. It was observed pertinently:

The speaker being an authority within the house and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out. The question as to disqualification of a member has adjudicatory disposition and, therefore, requires the decision to be rendered in consonance with the scheme for adjudication of disputes...[12]

Post Kihoto Hollohon Developments:

While implementing the law against defections, the role of the speaker has emerged as highly controversial. The speakers by and large have not exercised their power to decide whether or not a member has incurred disqualification objectively and impartially. One of the reasons for this was rightly pointed out by the dissenting judges in Kihotto case itself viz; the speaker depends continuously on the majority support in the House. Therefore, if a member from a smaller party defect to a larger group and the speaker too belongs to that group, an impartial adjudication on the defecting members

[10]Id at 710.
[11]Id at 706.
[12]Id at 742.

disqualification becomes extremely improbable. It seems that the Anti – Defection law has stirred up more controversies than it has been able to solve. In October 1997, 22 members of the Congress party and 12 members of the BahujanSamaj Party defected from their parties and supported the confidence motion in the BJP government to give it a majority in the Uttar Pradesh legislative assembly. Later all the defectors were made Ministers and the Council of Ministers came to have 94 members. The leader of BSP complained to speaker that the 12 MLAs who had defected from their party ought to be disqualified from the membership of the House. The speaker procrastinated and ultimately decided that there was a split in BSP and that 1/3rd members of the party (numbering 23 MLAs) had split and hence the defecting MLAs (12 in number) had not incurred the disqualification. The fact that 23 MLAs and not 12 MLAs had split from BSP was never substantiated, but the speaker by taking recourse to some technical procedural arguments came to his conclusion[13] the speaker's decision was appealed before Supreme Court in Mayawati v. Markendeya Chand.[14] There was complete difference of opinion amongst the three Judges comprising the bench. Though Thomas, J., held that the decision of the speaker was perverse and there was in fact no split within the meaning of paragraph 3 of the tenth schedule. Punchi, C.J., did not voice any final view but opined that the matter be referred to the Constitution Bench for decision. The difference of opinion was left unresolved by the Constitution Bench which disposed of the appeal finally as infructuous in November 2004. In Jagjit Singh v. State of Haryana[15], the Supreme Court relying on the decision in KihotoHollohon observed;

> *The speaker while exercising power to disqualify members acts as a tribunal and though validity of order, thus, passed can be questioned in the writ jurisdiction of this court or high courts, the scope of judicial review is limited. The order can be challenged on the ground of ultra vires or malafides or having been made in colourable exercise of power based on extraneous or irrelevant considerations...*[16]

In 2007 the Constitution bench in Rajinder Singh Rana v. Swami Prasad Maurya[17] in effect upheld Thomas, J's., view in Mayawati v. Markendeya Chand[18] and setaside the decision of speaker as unconstitutional, interalia, because it was based on no evidence. The court did not remand the matter for a fresh decision by the speaker but itself decided the issue and since the term of assembly was yet to expire, issued a declaration that the concerned members stood disqualified from 27 August, 2003.[19] It seems that anti-defection law has stirred up more controversies than it has been able to solve. A peculiar situation arose in 2016 in NebamRebia and Bamang Felix v. Deputy Speaker[20].

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[13]M.P. Jain ; Indian Constitutional Law (7th Ed. 2014) Lexis-Nexis.p.49
[14]AIR 1998 SC 3340
[15]AIR 2007 Sc 590.
[16] Id. At P.596.
[17](2007) 4 SCC 270.
[18]Supra note 12.
[19]Supra note 15 at P.305.
[20](2016) 8 SCC 1.

The Governor of Arunachal Pradesh summoned the 6th session of the legislative assembly from January 14, 2016. However, another order was passed by the Governor pre-poning the said session from January 14, 2016 to December 16, 2015. The actions of the Governor were challenged contending that they were extraneous and inappropriate exercise of constitutional authority. The controversy arose in the backdrop of certain defections. Two letters were addressed to the Governor by some of the members of the ruling party bringing several issues relating to the composition of the cabinet, financial affairs of the state and the prevailing allegations of corruption against the government to his notice. The congress legislature party issued a show cause notice to these members on indulging in anti party activities. On November 19, 2015,13 MLAs, 11 of them from BJP and two independents moved a notice of resolution for removal of the petitioner from the position of speaker of the assembly. Simultaneously chief whip of the congress legislature party filed a disqualification petition under paragraph 2(1)(a) of the Tenth Schedule seeking disqualification of 14 MLAs of the Indian National Congress on the ground that they had severed their ties with INC, by their refusal to respond to or associate with the political leadership in the State. The name of the deputy speaker, Tenzing Norbal Thongdok, figured in the disqualification petition. On receipt of the disqualification petition, the speaker issued notices to the concerned 14 MLAs. At this juncture, the Governor of the state of Arunachal Pradesh, without consulting the cheif minister and his council of ministers or even the speaker issued an order not only preponing the 6th session of the assembly scheduled to be held on January 14, 2016 to December 9, 2016 but also fixing the resolution for the removal of the speaker as the first item of the house agenda, at first sitting of its 6th session. He further directed that the deputy speaker shall preside over the first sitting of the house. The speaker decided to continue the disqualification petition and none of the 14 MLAs sought to be disqualified, responded to the notice issued to them. As a result on December 15, 2015, the speaker disqualified them ex-parte. The order was quashed by deputy speaker even though he himself had been disqualified by the order of the speaker. Along with other issues raised in SLP, the Supreme Court dealing with the issue whether the speaker can continue with disqualification process when his own position was in question pointed out that:

> *A speaker may be removed from his office by a resolution of the assembly passed by a majority of all the then members of the assembly." Hence continuing disqualification of members under the tenth schedule when a process of resolution for his own removal is pending would be unfair*.[21]

Misra.J., in his concurring judgement observed

> *The power conferred on the speaker under tenth schedule is enormous. It is not to be forgotten that the constitution of India is a controlled constitution. It provides for checks and balances. Some are fundamentally inherent. It is to be borne in mind that at the time of framing of the Constitution, the Tenth schedule was not in*

[21]Id at para 194.

existence in the Constitution. Certain grounds were mentioned in the Constitution itself and it has also been provided that a person may be disqualified by or under any law made by Parliament. Therefore, it is necessary to sustain the elevated position the speaker constitutionally enjoys and also have room for constitutional propriety.[22]

A word of caution was expressed by the court that the Governor while exercising his powers under the constitution must maintain distance from all the political activities of the parties. The case represents a classical example of how the Governor's office became political. It is the constitutional stand that the Governor shall not have any role in the internal feuds of the political parties. If the governor feels that the Chief Minister of the ruling party is not in a position to run a govt in accordance with the constitution due to internal feuds, he has to take recourse by sending a report to the President and draw his attention to the problem.[23] The Tenth Schedule of the constitution inserted in 1985 and amended in 2003 has not really killed the market for legislative members. Regarding Sena control, a three judge bench, headed by C.J N.V.Rmamana held that the spectrum of legal questions emanating from the tussle between the factions belonging to Maharashtra Chief Minister Eknath Shinde and former C.M Uddhav Thackeray requires to be dealt by a larger bench for an authoritative pronouncement. The court referred the adjudication of legal issues arising out of the spilt to a constitution bench of 5 judges, noting that the matter "raises important issues" involving the contours of disqualification proceedings and the powers of governor and the speaker in their respective spheres. The bench also doubted the correctness of 2016 judgements in NebamRabia case in holding that the speaker cannot initiate disqualification proceedings when his own removal is sought. According to the bench the proposition of the law laid down in NebamRebia stands on contradictory reasons which requires gap filling to uphold constitutional morality.[24]The draft of issues framed by 3 judge bench in its order included the question as to whether the notice of removal of speaker restricts him from continuing the disqualification proceedings under Tenth Schedule of the constitution.

Conclusion:

The anti-defection law in India came in to force through the 52nd amendment to the constitution by the addition of the Tenth schedule. The schedule contains the provisions on the ground of defections along with certain exceptions. The introduction of Tenth schedule attempts to bring in a comprehensive law that would curtail the menace of defection and courts have done a fair job in expounding by applying the said law to particular facts and circumstances. However even after upholding the constitutional validity of the law and keeping intact the power of judicial review in KihotaHollohoa, the

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[22]Id at para 232.

[23]M.R.K Prasad, "Constitutional Law-II" Annual Survey of Indian Law-2016 (The Indian Law Institute, New) Delhi p.29.

[24]www.hindustantimes.com (last visited Aug 24 2022).

menace of defection and the void in the law continues as is evident from the Nabam Rebia case and split in Shiv Sena in Maharashtra. It is submitted that the tenth schedule of constitution needs a fresh look. It needs to be supplanted with a regime that does not make mockery of those who openly float its provisions and enjoy the trapping of power without any serious consequences.

It may be pointed out that the paragraph 3 of the Tenth Schedule was omitted by the constitution 91st Amendment Act, 2003. Paragraph 3 as it existed prior to the amendment protected defectors as long as 1/3rd of the members of the political parties formed a separate group. In the context of small assemblies 1/3rd of members could easily be cobbled together. Often the speaker of assembly was seen to be collaborating with the political party in power to protect the defectors under the 1/3rd rule. It is submitted that the partisan conduct of the speakers invariably lies at the heart of non-functional Tenth schedule. After the omission of paragraph 3, paragraph 4 allowed for the protection of defecting members provided 2/3rd of members of the legislative party merged with another political party. The provision has invariably been misused. The seeming political bias of the speakers acting as tribunal is apparent from how disqualifications petitions are dealt with. This has happened in states like Manipur, Goa, Madhya Pradesh, Uttrakhand and other jurisdictions. To supplant the Tenth Schedule, speakers when elected must resign from the party to which they belong. Paragraph 4 of the tenth schedule needs to be omitted by moving a constitutional amendment. Lastly it is submitted that all those disqualified under paragraph 2 of the tenth schedule should neither be entitled to contest elections nor hold public offices for 5 years from the date of their disqualification.

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A Critical Analysis of Post-Partum Depression as a Diminished Responsibility in Infanticide Crimes in India

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Abstract

Infanticide by a mother seems to be the most abhorrent of crimes and yet throughout history such crimes have been sketched across time and place. However, any crime requires the requisite mens rea. A fair trial in criminal jurisprudence requires individualized sentencing and punishment only to serve the penological justification. The past few decades have witnessed an increased recognition of mental health aspects in law. The varied constructs of mental illness have an increasingly important role in criminal jurisprudence. Post partum depression is such a category of mental illness that has emerged as a major concern in India as well as globally. Committing Infanticide in cases of Post partum depression is an area of law which seems to be in the grey area, as the present insanity defence in India may not prove to be adequate or appropriate in such cases. The present laws and approach of the investigative authorities and the judiciary in India presents a picture of grave concern . This paper will try to analyse the medico-legal aspects related to Post partum depression as a defense to infanticide and the present gaps in judicial and legislative framework. By doing a comparative study with US and England, the paper will suggest a legislative framework in India.

Keywords: Post-partum depression, mitigating factor, diminishing responsibility, insanity, infanticide

Introduction

41 year old Yeeda Topham was tried for jumping from the eight storey of a building with her child James in her arms who was of 2 months. She had suffered severe injuries and the child had died. After serving some time in prison, she was freed by the West Australian (WA) Supreme court on being held suffering from severe post natal depression . Following 11 months in

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prison awaiting her sentence, was told by the WA Supreme Court she would not need to serve any more time over the death of 21-month-old James. There was lot of stress which she had undergone following the breakdown of her marriage and had chosen a building in which she and her husband had lived , which was observed by a judge having an " element of vengeance". There were a lot of notes which revealed that she had been convinced that the bond with her child was lost and she had earlier also made an unsuccessful attempt to gas herself and the child to death. The court recognized that psychiatric treatment and not prison is to be meted out to her. Her deteriorating condition was even acknowledged by her in-laws, who had expressed dismay at their grandchild left in her care.

The judge recognized it as, *"a sad case calling for mercy and not punishment."*[1]

With the development of psychiatry and a recognition of a varied spectrum of mental disorders , the scope of mental illness as a mitigating factor has developed over the last few decades. In modern clinical school of criminology and forensic psychiatry, individualization and understanding the personality of the accused has become the cardinal principle of penal policy.[2] The diagnosis of Mental illness in the context of medical science and its application in law is totally different. The intersection of mental illness and law is only to the extent of determining the culpability of the offender, and without *mens rea*, culpability cannot be ascribed to crime.

Childbirth is a significant aspect of a woman's life and often it associates with it a plethora of physical, psychological, financial and socio-cultural transformations. The socio-cultural setup and expectations demand a woman to associate this event only with happiness and a positive aspect of her life, in fact the pinnacle of one's life. However, there are also indeed some morbid or darker sides of a human mind which may require immediate attention and its neglect may often result in disastrous consequences. Childbirth may accompany some manifestations of mental disorders in some cases which may lead to acts which are offensive in nature but they may not have the requisite *mens rea* associated with it.

Post-partum depression (PPD) is such a category of mental illness which is associated with childbirth and is experienced by a woman just after her childbirth. Often starting at childbirth , it may just persist for some days due to an increasing hormonal and physical changes, but it may also increasingly persist to last through weeks or even longer. Termed as 'baby blues' in layman terms, this may be just associated with some mood swings and diminish with time with not any significant repercussions. But if it

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[1] Warwick Stanley, *Yeeda Topham killed her baby son but walks free*
Australian Associated Press AAP (May 30, 2022, 2: 50 pm) , https://canadiancrc.com/Newspaper_Articles/AAP_Baby_Killing_Mother_Walks_Free-Yeeda_Topham_killed_her_baby_son_05DEC09.aspx

[2] NV PARANJAPE, CRIMINOLOGY AND PENOLOGY WITH VICTIMOLOGY46 (Central Law Publications 2011)

continues and develops into a disorder which subsequently affects cognitive aspects to a large extent and hamper with her normal behavior then it may require immediate attention and diagnosis.

1. The Emergence Of PPD: Some Appalling Data

The crime of infanticide has been since times immemorial and associated with several social complexities. There have been instances of infanticide in some sacrificial rituals, or for sex-selections in cultures where the birth of a female child has been considered as burdensome because of several social obligations it carries with it. Ancient Greek and Roman scriptures permitted exposure of the infants to such hostile conditions which would ultimately lead to death. This could be in cases of weak, deformed or children who would become burden to the State.[3]

Modern laws very clearly punish the crime of infanticide. However, in certain cases , there can be overshadowing of unseen burdens of community or groups which may lead to crimes.

According to a report by UNFPA in 2020, China and India together account for about 90-95 per cent of the estimated 1.2 million to 1.5 million missing female births annually worldwide due to gender-biased (prenatal) sex selection. Between 2013 and 2017, about 460,000 girls in India were missing' at birth each year. According to one analysis, gender-biased sex selection accounts for about two-thirds of the total missing girls, and post-birth female mortality accounts for about one-third, the report said.[4] A study conducted in 2021 among 80 different countries shows a prevalence of Post-partum depression among 17.22% of the global population. [5] The current literature suggests that the burden of perinatal mental health disorders, including postpartum depression, is high in low- and lower-middle-income countries.[6]

2.1 Major concern for India

The prevalence of post-partum depression in India also has begun to be recognized in the last few decades, and is going to become a major challenge in the coming decades. A 2017 review of 38 India-based studies involving 20,043 women, which has been subsequently cited by the World Health Organization (WHO), noted that the estimated pooled prevalence of the condition was highest in south India (26%). This was followed by east (23%), south-western (23%) and western regions (21%).[7] A study conducted in 2019 of 210 women in

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[3]Sandy Meng Shan Liu, *Postpartum Psychosis: A Legitimate defense for negating criminal responsibility?*,4 THE SCHOLAR 339, 363 (2002)

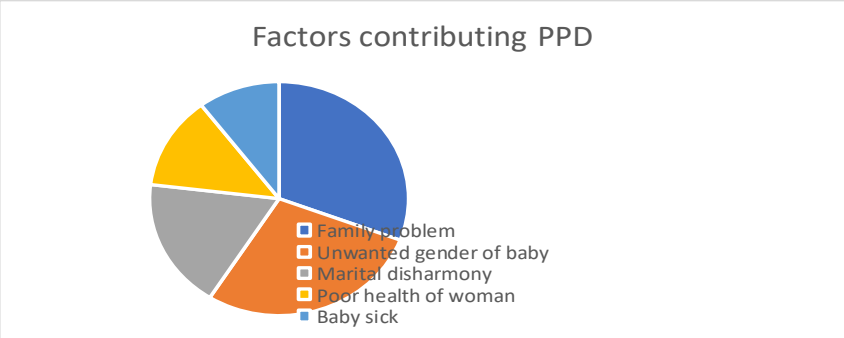
[4]*India accounts for 45.8 million of world's missing females over last 50 years: UN report*, The Print (May 30, 2022, 10:14 am), https://theprint.in/india/india-accounts-for-45-8-million-of-worlds-missing-females-over-last-50-years-un-report/451545/

[5]Wang, Z., Liu, Jet al. , *Mapping global prevalence of depression among postpartum women*, 11 TRANSL PSYCHIATRY 543, 549 (2021)

[6] Upadhyay, R. P. et al. , Chowdhury, R., Aslyeh Salehi, Sarkar, K., Singh, S. K., Sinha, B., Pawar, A., Rajalakshmi, A. K., & Kumar, A. (2017). *Postpartum depression in India: a systematic review and meta-analysis. Bulletin of the World Health Organization*, 95(10) Bulletin of the Word health organization, 706, 706 (2017)

[7]*Postpartum depression in spotlight after Soundarya's death*

an urban health center in the city of Delhi, showed a prevalence of PPD in 29% women. [8] The crimes against children pertaining to abandonment, foeticide and infanticide according to the NCRB data in 2020 account for 6549 total cases.While Maharashtra recorded 1,184 cases, Madhya Pradesh stood second with 1,1168 instances, followed by Rajasthan (814), Karnataka (771), and Gujrat (650). Among the cities, Delhi topped the list with 221 cases, followed by Bengaluru (156), Mumbai, Ahmedabad (75), and Indore (65)[9] Let us look at the factors for prevalence of postpartum depression as per a study conducted on a rural population in Mugalivakkam Primary Health Centre area of Kanchipuram district in Tamil Nadu, of 365 women who had completed 6 weeks after child delivery. The prevalence of depression among the study women was found to be 11% (40/365). The prevalence of major depression was found to be 7.4% (27/365) Among the factors contributing to the Post-partum depression, the chart shows the prevalence of various factors among the 40 women showing signs of depression.[10]



[11]

The above data shows that there are many factors contributed with the lack of awareness about the mental health problems which poses an increasing danger and vulnerability to these sections of women. In most rural and semi-urban areas, mental health issues are still considered a taboo and so, many such cases largely go unreported. In urban areas, the prevalance may be also more than semi urban or rural areas because of the stress, problems of urbanization or fragmented family patterns and resulting social support systems. India is experiencing a steady decline in maternal mortality, which means that the

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, Deccan Herald (May 30, 2022, 10:38 am), https://www.deccanherald.com/city/top-bengaluru-stories/postpartum-depression-in-spotlight-after-soundaryas-death-1076075.html

[8] Basu S, et al. *Postpartum depression burden and associated factors in mothers of infants at an urban primary health center in Delhi, India*. 33(1) Tzu Chi Med J 70, 72 (2021)

[9] Shweta Singh, *Delhi Records Highest Infant Abandonment Cases In Last 5 Years: NCRB Data*, The Logical Indian (May 30, 2022, 10:50 am), https://thelogicalindian.com/trending/ncrb-infant-abandonment-delhi-32841

[10] Shriraam V, et al. , *A community-based study of postpartum depression in rural Southern India*, 35 (1) Indian J Soc Psychiatry 64, 66 (2019)

[11] *Ibid*

focus of care in the future will shift towards reducing maternal morbidity, including mental health disorders.[12]

2. Ppd As A Category Of Mental Illness

In India, Mental Healthcare Act 2017 defines mental illness as *"a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life"*[13]

3.1 DSM 5, ICD 10 and PPD

There are two main worldwide standards of classification of mental disorders, mainly American Psychiatric Association's (APA) Diagnostic and Statistical Manual of Mental Disorders, currently the Fifth Edition (DSM-5) and the World Health Organization's (WHO) International Classification of Diseases, currently the tenth revision (ICD-10) are followed in most jurisdictions including India to make an evaluation for the overall psychological condition. Both ICD 10 and DSM 5 recognizes postpartum depression. However the recognition of the onset of depression during and upto 4 months of pregnancy is given. Mainly the diagnostic criteria in these cases would be Major depressive disorder, so separately the period of postpartum depression is not extending beyond just after the delivery. Postpartum mental illness may take various forms. It may manifest in the form of postpartum depression often having the elements of a clinical depression. Postpartum psychosis involves psychoses like delusions or hallucinations. Often postpartum disorders may be associated with anxiety, Post Traumatic stress disorders, OCD or Bipolar disorders.[14]

In most cases other such associated disorders take the precedence and diagnosis is on the basis of that.

3.2 PPD as insanity defense or mitigating factor in infanticide

The recognition of the postpartum depression and its increasing prevalence requires also an understanding of these medical constructs in the criminal justice system , specially in infanticide cases. There are two approaches to deal with the inclusion of this mental illness in the jurisprudence. As a defense of insanity, or as a diminishing responsibility approach.

3.2.1 As an insanity defense

Insanity defence under M'Naghten's rules of insanity have been the long established criteria for insanity defense in most jurisdictions including India. Under M'Naghten's rules of insanity which were developed as a response to the outcome of the case of *R v M'Naghten* in 1843[15], a defense of

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[12] Upadhyay, R. P. et al. , Chowdhury, R., Aslyeh Salehi, Sarkar, K., Singh, S. K., Sinha, B., Pawar, A., Rajalakshmi, A. K., & Kumar, A. (2017). *Postpartum depression in India: a systematic review and meta-analysis*. *Bulletin of the World Health Organization*, 95(10) Bulletin of the Word health organization, 706, 706 (2017)

[13] S. 2 (1) (C), Mental Health Act, 2017

[14] *Postpartum Disorders*, Anxiety and Depression Association of America (May 30, 2022, 11:17 am), https://adaa.org/find-help-for/women/postpartum-disorders

[15] R v M'Naghten, (1843) 8 E.R. 718

insanity would be established in the defendant could neither understand the nature of his actions or that they were wrong. The cognitive aspect of M'Naghten's rules of insanity has long been under the purview of criticisms and discussions. With the increasing awareness about mental illness and forensic psychiatry, the narrow and rigid scope of the defense has been recognized and as a result if we trace the history of the last few decades, the alternative versions of the insanity defense have been emerging.

In US, and UK. the irresistible impulse test has been numerous times recognized and allowed by jury in which the accused though able to exercise the cognitive elements, could not resist the action which affected the volitional component and the action could not be resisted. The Durham rule which is now only followed in New Hampshire in US, was developed in the case of *Durham v US* in 1954[16]. It requires that the offence was a " *product of mental disease or defect".* The court required the need for a broader test because the defect of reason in M'Naghten's rules of insanity may be too limited for most of the cases of mental illness. However, it was overturned in *United States v Brawner*[17] , because the test relied on psychiatric evaluations to the maximum extent and it could lead to the blurring of line between psychiatry and law. Many states in US, also opted for the MPC standard of insanity defense after this.The MPC is a combination of the cognitive aspect of M'Naghten's rules of insanity and volition aspect of irresistible impulse test, which was drafted by the ALI in 1962.

S. 4.01 of the MPC recognizes mental disease or defect to exclude responsibility for those if "*he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law*" Though after the Insanity Defense reforms Act, 1984, the Federal laws standard again changed to "appreciating the wrongfulness" of the conduct, which is a return to the cognitive aspect only.This was in the backdrop of The attempted assassination of president Ronal Raegan in the John Hinckley trail, where the accused was held not guilty by reason of insanity applying the ALI standard. In US since there is no specific defense for infanticide in postpartum mental disorders, the accused would have to depend on the insanity defense. Again different states have different standards of insanity defense but largely its based on the M'Naghten's rules of insanity.

PPD as a separate category as a diminished capacity:

In England, till the 19th century, the concealing the death of an illegitimate baby was, *prima facie*, indicative of having killed it. Beyond the bounds of the criminal courtroom, the eighteenth century saw changes in attitudes to women, illegitimacy, and poverty, each of which was an ingredient in infanticide trials. Over the course of the eighteenth century, judges and juries became increasingly aware of 'the physical and mental distress associated with

[16]Durham v United States, **214 F. 2d 862** (D.C. Cir. 1954)
[17]United States v Brawner, (471 F.2d 969 (D.C. Cir. 1972))

labour' and the idea that this led women to act 'irrationally'. [18] The application and recognition of psychiatry into law, paved the way for a separate legislation for infanticide fitting into a separate category of crime. By the end of the 19th century, the law was already recognising the need for excusing from the culpability the situations which caused such acts of infanticide.

Infanticide Act, 1938

As per the infanticide Act, 1938, a charge for murder can be reduced to manslaughter if the woman has killed her child less than 12 months by a wilful act or omission . And during that time she had lost her balance of mind due to after-effects of giving birth to the child.

There are two clear components for the applicability of the provision. The Actus reus is , applicable to killing a child under 12 months , and the mens rea component is talking about the absence of rationality or losing the balance of mind. Now the provision does not mandate that the killing was caused due to her losing the balance of mind. So this is just a temporal connection that during the time when the child was killed she did not possess a rational and normal mind. So, it can be seen that it is almost like the diminished responsibility is presumed within the section.

Apart from most of the countries in Europe, there has been a similar legislation in many developed countries like, Australia, Canada, New Zealand. However US does not have such a law specifically culled out for infanticide cases, though there had been a bill in Texas regarding the diminished responsibility for infanticide in postpartum mental disorder case. But due to several oppositions, it did not develop into a law. [19]

Jury and judge: The variables in sentencing of PPD crimes

In UK and US, trial by jury is a right of an accused in a criminal trial, and the verdict by the jury cannot be overturned by judge also unless some strong evidence is present refuting the verdict. Trial by a jury has several connotations at a socio-psychological level because they are the peers of the accused in terms of societal structure. Now the jury would definitely play an important role and several variables could emerge which would give varying results in infanticide cases. This projects the desirability of a specific law of diminished responsibility for postpartum disorders.

The jury trials in US reflect many factors such as the common perceived notion of the insanity defense. Moreover the gender of the jury also may pose a different result. A jury consisting of more female ratio may consider such cases with sympathy than juries with more male ratio. [20] Also , a separate category of infanticide defense helps in maintaining the clarity in the verdict because the jury may be often hesitant to return a verdict of insanity

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[18]ARLIE LOUGHNAN , MANIFEST MADNESS: MENTAL INCAPACITY IN THE CRIMINAL LAW 207 (Oxford Scholarship Online, May 2012)

[19]Rhodes, A. M., & Segre, L. S. , *Perinatal depression: a review of US legislation and law*,16(4) Archives of women's mental health 259, 267 (2013)

[20] Kaplan, M. F., & Miller, L. E. , *Effects of jurors' identification with the victim depend on likelihood of victimization*, 2 Law and Human Behavior, 353-361 (1978)

because they may perceive the accused as a danger to the society, or recidivist in case there have been recurrent attacks of insanity. Let us see, how , a verdict can vary across juries. Let us look at two cases in US which would let us appreciate the complexities of the problem

Case Study: Andrea Yates[21]

In June 20, 2001, Russel and Andrea Yates, living in their Houton suburban house, had started another apparently normal day when Russell Yates left for work and the children had finished their breakfast around 9:00 am in the morning. Andrea soon after, filled the bath tub with water, and took her five children and drowned all of them one by one, the youngest being 6 months, and others aged, 2, 3, 5, and 7 years.

She called the police and her husband and surrendered herself confessing that she had killed her child soon after. She was arrested and charged with Capital murder. The circumstances which were revealed thereafter, made a clear indication as to her disturbed mental status. She confessed that she had planned to kill her children since almost 2 years, because she was convinced that the Satan or evil had possessed her, and the only way to save her children would be to kill them, and with her punishment by the court, the Satan also would be destroyed.[22] She had been schizophrenic and had been diagnosed with mental illness previously, however things were largely ignored. After her marriage, she had given birth to 5 children over a span of 7 years. The family also had a history of orthodox religious beliefs and association with fundamentalist preacher. She had started developing hallucinations since the birth of the couple's first child and her calls for help were grossly ignored because she also had a history of attempting suicide after the birth of her 4th child. The doctors had also warned against the dangers she was posing herself and to her children. She had been admitted to hospital and discharged on numerous occasions and despite being clear signs of depression. This case primarily depended on expert testimony of the psychiatrists. In the initial trial, the jury had returned a verdict against her because the expert witness for the prosecution, Dr. Park Dietz, had given a testimony regarding airing of a particular television show in which such kind of act was held " not guilty" due to insanity. Therefore Yates' actions were influenced by the show and she did know that her actions were 'wrong' and she also did the act in a hidden way. However, on appeal, the court found that the testimony of the expert witness was indeed false and there was in fact no such episode aired on the television. So , it was held that the conviction was largely influenced because of the false testimony leading to the conclusion that she knew right from wrong. When again the jury sat for deliberation, she was found not guilty by reason of insanity, and that she suffered from psychosis and did not know

[21]Yates v State, 171 S.W.3d 215 (Tex. App. 2005)

[22] Faith McLellan , *Mental health and justice: the case of Andrea Yates* , 368 (9551) WORLD REPORT (THE LANCET) 1951, 1951 (2006)

her actions were wrong, and was later committed to a state psychiatric facility.[23]

Case study of Deanna Laney[24]

Deanna Laney , who was a 38 year old woman, was tried for murder of her 2 children Joshua and Luke, aged 8 and 6 years. After killing them she severely injured her 14 month old son Aaron. Afterwards, she called 911 and confessed to have killed her children. When the police reached their house, Deanne was still in the backyard of the house with splattered blood on her clothes. Her husband Keith Laney was unaware of the incident. She had crushed their heads severely with rocks killing two and severely injuring the youngest. The youngest son survived but the other 2 died. She was tried for capital murder. During the trial, the jury faced with similar evidence as was present in the Andrea Yates case. She was a devout member of the church and almost lived in isolation and homeschooled her boys. However, the mental condition of Denna Laney was totally unnoticed and even her husband was unaware. Only her sister had noticed some abnormalities in her behavior. Though she did not have any history of mental illness or diagnosis and treatment. Even after her arrest, she went into hysteria and kept on suicide watch. She admitted that she had killed her sons, because God had ordered her to do so to prove her faith in him , like he did for Abraham. There were lot of evidences of such delusions where she had communications with God and even identified herself with Andrea Yates who had committed a similar crime 2 years ago. She thought that keeping her sons would be a selfish act and so sacrifice was required for their proper resurrection. She kept seeing God's messages in everyday events and identified Satan's presence in her jailroom.[25]

Here, the expert testimony consisted of five psychiatrists , two of them who were also present in the Yates Trial, Dr. Phillip Resnick and Park Dietz. They testified that Deanna did not know right from wrong, and had mental illness which was undiagnosed for the past 3 years.[26] So the jury held Deanna Laney not guilty by reason of insanity. Texas does not have a special law like the UK which has an infanticide Act culling out diminished responsibility for such post natal disorders. So, the dynamics of such cases totally depend on the interpretation of the existing law which is primarily the insanity defense under M'Naghten's rules and the psycho-social constructs with which the jury would decide the case.

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[23]*Andrea Yates case: Yates found not guilty by reason of insanity*, CNN World (May 30, 2022, 1:45 pm) https://edition.cnn.com/2007/US/law/12/11/court.archive.yates8/index.html

[24]*Texas woman says God told her to kill* , CNN USA (May 30, 2022, 10: 52 pm) , https://canadiancrc.com/newspaper_articles/CNN_Texas_woman_says_God_told_her_to_kill_sons_13MAY03.aspx

[25]Susan Ayres, *Newfound Religion: Mothers, God, and Infanticide*, 33 Fordham Urb. L.J. 335 (2006)

[26]*Deanna Laney: God Told Her to Kill Her Children*, (May 30, 2022, 10: 40 pm) https://delanirbartlette.medium.com/deanna-laney-god-told-her-to-kill-her-children-b31378bc900f

In the present case, if we analyze the cognitive aspect of M' Naghten's rules of insanity, she did know the nature of the act was killing her own children. She knew that it was illegal because she had made sure that she had done the act in secrecy. However, if she thinks that she is trying to provide salvation to her children, does she really understand the nature of the act? The overturning of the decision by the jury was primarily because of the wrong expert testimony which would reveal that she in fact did not understand that she would be punished for her act and since she made a conscious decision because she knew there was a way to escape liability. However, in absence of this, the jury whether would not have considered her condition as an exculpating factor is a moot question. Whereas in the second case, the expert testimony was relied upon to show that Deanna Laney did not know right from wrong. For Deanna Laney the jurors based their decision on the premise that she did not know that her act was wrong because 'God' directed her actions. In contrast, in Andrea Yates the verdict was reached on the basis that she knew that her actions were wrong because she was directed by 'Satan' to instigate the murder of her children. This suggests that legal insanity was based upon the content of the psychotic hallucinations, rather than an understanding of whether the defendants considered their actions were wrong at the time offences .[27] So, application of the M'Naghten's rules seem to depend on a very thin line which would decide whether the accused could understand right from wrong, which itself seems a very grey area. Both had similar facts, but the jury based their decision on Yates understanding the guilt and Laney not understanding. Both had called 911 after the murder, but Laney had non-chalantly reported that he had killed her sons , but Yates did not. [28] In cases, where a woman having postpartum disorder, consciously takes a decision and tries to evade the legal system also, would the disorder lose its medical construct because of this aspect? Is knowing the legal culpability the only distinguishing factor or does moral culpability also comes into play here?

Present Laws In India And Need For Changes.

Since in India, the judge's discretion primarily would decide the case, a verdict of not guilty by reason of insanity would basically mean deciding as per the cognitive capacity only. Aggravating and mitigating factors largely vary from the perspective of the deciding judge. In many cases the judiciary has also recognised that evolving proper sentencing guidelines and outlining the exact scope of the aggravating and mitigating factors may be the role of legislature, and "achieving sentencing uniformity may not only require judicial efforts, but even the legislature may be required to step in".[29]

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[27] Spinelli, M. G., *Infanticide: Contrasting views*, 8 Archives of Women's Mental Health 15-24 (2005)

[28] Lauren Johnston, *Tale of Two killer Moms* , CBS News(May 30, 2022, 22:31 pm), https://www.cbsnews.com/news/tale-of-two-killer-moms/

[29] Accused X v State of Maharashtra, AIR 2019 SC 3031

Approach of the judiciary

Let us look at two cases from the same state to understand the implication of individualized sentencing approach as practiced in India on such cases where the awareness is only at the inception. In 2017, The Bombay High court in the case of *Savita Manish Chaudhari v State of Maharashtra*, [30] quashed an FIR against a woman exercising its inherent powers under S. 482 CrPC, who had attempted to kill her 3 month old son. The three month old had been poisoned by an unknown miscreant thereafter which he was admitted to a hospital and while being under treatment, was attempted to be killed by the mother. She was charged under S. 307 IPC, but the relevant evidence showed her suffering from postpartum depression which was substantiated by her family members in affidavits pertaining to her condition during the delivery of the child and thereafter.. The Court held it could not be an offence as she could not be said to understand the nature and consequences of her actions and so it could not be envisaged an offence as per the general exception under S. 84 IPC. However, a sessions court in Bombay has sentenced a mother to life imprisonment and rejected the defense of postpartum depression. She had killed her infant daughter after throwing her out of the bathroom window. [31]

Now here, she had given birth to a boy and a girl. After killing the girl, she raised an alarm of her daughter missing from her cot. This has led the court to conclusively hold that she was in a fit state of mind and therefore did her act with a proper plan. Though the defense witness psychiatrist deposed that she was suffering from postpartum depression due to financial, emotional stress due to the birth of the premature birth of the twins, and had also a history of failed pregnancies. This case has two aspects which are worth noting. Firstly, as per the prosecution the deliberate choosing to kill the girl child. Secondly her conscious attempt to evade the situation by raising a false alarm. Both these factors coupled with a lack of medical history of being referred to a psychiatrist for any mental health issues, made the court arrive at this conclusion. However, both the factors are placing the complexity of the situation because in most cases, a normal middle class family from a restricted social background would not have medical evidence pertaining to the treatment and diagnosis of such conditions prior to the crime. Secondly, in most cases, postpartum depression may not result in losing the balance of mind completely. So the woman may still have proper reason and try to evade the law as she would know the act to be illegal. So , judging it by the standards of S. 84 and a presence of psychotic manifestations may not be a proper approach. Moreover, a recent judgment of the Supreme court has clarified that depression does not qualify as an unsound mind under S. 84 IPC.[32]

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[30]Savita Manish Chaudhari v State of Maharashtra , 2017 SCC ONLINE BOM 369

[31]*Woman Who Suffered From Post-Partum Depression Gets Life Term for Killing Infant Daughter*, The Wire (May 31, 2022, 12:33 pm), https://thewire.in/law/woman-who-suffered-from-post-partum-depression-gets-life-term-for-killing-infant-daughter

[32] Praveen Kumar Pal v UOI, CIVIL APPEAL NO. 3524 OF 2020 (D.NO. 31802/2019)

Present application by the law enforcement agencies and judiciary: A recent case study in Kolkata

Most cases would be registered under S. 302 of IPC- Most of the incidents where a mother kills her child under abnormal conditions would be registered under S. 302 of IPC. Sandhya Maloo , a homemaker in Beliaghata region of Kolkata, and mother of two children killed her 2 month old daughter by gagging her with polythene and throwing the dead corpse in a septic tank. Thereafter, to mislead the police , she raised a false alarm and lodged a complaint of her child being kidnapped. Later, when the police found inconsistencies in her statement she confessed to her crime, and telling the police that she was tired and incapable of taking care of her child and was planning to murder her since a long time. [33] She had undergone an abortion two years prior to the incident. The police investigation largely proceeded on circumstantial evidences. There were also her phone internet search records showing research on ' effective ways of breastfeeding and effects of phenyl on human body", to maintain her incapacity to feed the child. [34]

The Calcutta High court granted her bail and re-directed the case to the Trial court after being in police custody for around 400 day, as there was no direct witness to the incident and the court pointed out to the improper nature and recording of confessional statements which did not inspire confidence. The dead body was recovered from a place in the control of the other members of the family. This case was registered under S. 302 of IPC, and the police had to largely base the investigation on circumstantial evidence to understand the state of mental health of the mother during the murder of the child. The Court has also asked the Commissioner of Police, Kolkata to initiate appropriate disciplinary proceedings against the investigating officer in the event in which he is unable to render a proper explanation for his conduct in the course of the said enquiry and to submit a report in the next hearing.[35] This shows the several practical aspects which emerge in the investigation of such cases. Firsly, there are various pre-conceived notions which are at play specially in a societal fabric like India. In such cases, the media would report such incidents with such false fervor and antagonistic remark which portray a very unhealthy cultural stigma. A newspaper report reported the accused as a *"Kaliyugi Mother"*.[36] the reporting and treating of such incidents are often with a

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[33]*Beliaghata baby murder: Cops stitch circumstantial evidence together*, The Statesman, (May 30, 2022, 1:57 pm) , https://www.thestatesman.com/bengal/beliaghata-baby-murder-cops-stitch-circumstantial-evidence-together-1502851129.html

[34]Police probe what led Beliaghata mom to undergo abortion two years ago, The Times of India (May 30, 2022, 2:30 pm), https://timesofindia.indiatimes.com/city/kolkata/police-probe-what-led-beliaghata-mom-to-undergo-abortion-2-yrs-ago/articleshow/73746486.cms

[35]*High court of Calcutta Expresses disapproval over police for recording Confessional Statement in very uncaring manner* , Law warriors (May 30, 2022, 2:05 pm), http://www.lawwarriors.co.in/high-court-of-calcutta-expresses-disapproval-over-police-for-recording-confessional-statement-in-very-uncaring-manner/

[36]Kaliyugi mother crosses the border of cruelty, throws 2-month-old girl into manhole, News 24/7 (May 30, 2022, 2: 06 pm), https://www.news247plus.com/news/4457/Kaliyugi-mother-crosses-the-border-of-cruelty-throws-2monthold-girl-into-manhole

retributive angle given to such circumstances which rather call for immediate medical attention.Also, often there are dissociative rejection of female baby in postpartum disorders, and such psycho-socio- cultural factors are not even recognized as a problem.

Suggestion For Amended Law

In India, the laws relating to crimes against infants relevant in this context can be categorised under two provisions of the Indian Penal Code - which relates to infanticide and abandonment or exposure of the child below 12 years. **S. 299 and S. 300 –** provides for culpable homicide and murder. **S. 315** provides the punishment for done with an intention to cause the death of the child who is just born or prevent the child from being born alive. This act if not done in good faith or for saving the mother of the child is punishable to the extent of imprisonment for 10 years. **S. 317** relates to exposing or leaving the child in a place , with the intention of wholly abandoning the child.

The maximum punishment for this section is seven years. Also, the Explanation to the section provides that if death is caused to the child in consequence, there could be a trial for murder or culpable homicide. The *mens rea* is a sine qua non for the offence of culpable homicide or murder. Either there is a direct intention of causing the death of the child, or an intention of causing a bodily injury to cause the death, or having a knowledge that by such an act, death would be caused in all probability cause the death of the child. S. 315 and S. 317 also have a clear constituent element of intention or *mens rea*. Now, as per the existing laws and precedents, there are two options for incorporating the cases of postpartum disorders in such cases. As a defence or general exception under S. 84 IPC- this general exception as discussed above is based on the M'Naghten's rules of insanity. And if the mother is shown having an absence of a cognitive capacity, whereby due to an unsound mind, she could not appreciate the nature of the act or that it is wrong or contrary to law, there would be a defense under S. 84. Firstly, let us understand the implications of opting for the insanity defense. In most jurisdictions this would squarely culminate in court ordered institutionalization. Now, in many instances such cases of postpartum mental disorders may require psychiatric intervention and can be cured also, but not guilty by insanity may pose an undesirable result.

As per S. 335 of CrPC, in most cases, a verdict of not guilty by reason of insanity would result in the institutionalization in mental health facility. In postpartum disorders, with treatment and proper care, the disease may be curable and such orders may be rather prove to be detrimental.

Also, insanity defense majorly involves psychosis, so 'unsoundness of mind' only to that extent may be used as a defense.

Mental illness definition as per the Mental Health Act, 2017 is much broader. S. 2(1) (s) defines mental illness as-

> *(s) "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental*

retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub normality of intelligence;

However, the legal insanity would pertain to only cases where there is a total lack of cognition. This is hardly possible to prove in many cases involving postpartum disorders. For example, in the Andrea Yates case, she was aware of her actions and exactly knew the nature of the act, so, it is not exactly under S. 84. However, it can still be categorised a mental illness in broad terms. So, another approach is a mitigating or diminished responsibility in such cases.

Since the landmark case of *Bachan Singh v State of Punjab* (1980) , individualised sentencing is mandated with proper consideration to aggravating and mitigating factors. Though the Court had given an indicative list it acknowledged that since the list cannot be exhaustive, the courts have to implement it through an individualised sentencing procedure.[37]

Now, as a mitigating factor the scope of postpartum disorders can be explored to some extent This would be in such cases where life imprisonment or death penalty may imposed, and during the sentencing stage the court may consider this factor. Though recent judgements have tried to endorse many mitigating factors but what is required is a doctrinal framework in mitigating factors, and also the standard and procedures have to be clarified. The concept of diminished responsibility is not present in Indian law. In UK, Based on the report of the British Royal Commission in 1953, which stressed on the importance of abolition of capital punishment from those with mental abnormality, S. 2 of the Homicide Act, 1957, provides a reduced punishment in murder charges, if the accused due to some recognised medical condition had impaired his mental responsibility. It may not be an inherent defect as in cases of insanity, and does not act as an absolute defence like insanity, but reduces the charge from murder to manslaughter and therefore exemption from capital punishment. It includes not understanding the nature of the conduct, or form a rational judgement or exercise self control.[38]

This is not present in Indian Law. Though S. 300 has five exceptions which reduces the murder to culpable homicide not amounting to murder, none of them relate to abnormality of mind. The closest is grave and sudden provocation in Exception 1 of S. 300.

Though the Law commission observed this in its 35th report, it did not suggest any changes, because discretion not to impose death penalty is anyway there in all murder charges. [39]

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[37]Nithika Vishwanath and Ninni Susan Thomas , *The Supreme Court's Death Penalty Focus Reflections on Sentencing Developments*, 54 (3) EPW 15-19 (2019)

[38]S. 2 (1)(A) of the Homicide Act, 1957

[39]Ajay B. Sonawane1 and Adv. Radhika S. Banpel-Raje Bhonsle, *Defence Of Insanity In India And England: Comparative Legal Paradigm*, 3(1) International Journal of Law and Legal Jurisprudence Studies, 146, 150

Also, there is no separate legislative provision for incorporation of post partum disorders as a diminishing factor in infanticide cases. This is also present in UK as discussed above.

So, the authors suggest a separate provision in IPC after S. 304, which is not culpable homicide and can incorporate this as a diminishing factor:

S. 304AA- Diminished responsibility in certain cases of postpartum disorders

> *Where a woman by any wilful act or omission, causes the death of her own child who is below 12 months, but who was suffering from a mental illness due to the effect of childbirth, it shall not amount to culpable homicide and shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*
>
> *Explanation: For the purposes of this section the meaning of the term mental illness would be as per S. 2(1) (s) of the Mental Health Act, 2017.*

5.1 Rehabilitation and health care aspects

Post partum depression is related to socio-cultural dimensions along with biological risks. The period just after the delivery of the child , at least the initial six months, requires a lot of care and a holistic approach is required for proper health care laws also. The timely screening and diagnosis of postpartum depression can avert many severe implications caused due to severe postpartum depression cases. The clinical conditions have a varied aetiologies and methods and course of treatment. Also, the rehabilitation and healthcare aspects include several co-related and integrated awareness and community based laws and programs like economic growth, de-addiction and domestic violence issues and gender-specific awareness.

The mental health facilities require reach as well as awareness, which would be possible through proper, focused and specific laws. For example, the timely diagnosis and treatment of postpartum depression is stressed upon and is included in the healthcare rules and protocols in several countries. The screening and identification and a proper follow up is strived upon by several US state legislations, The US Preventive services Taskforce 2009 also talks about opportune diagnosis of onset of depression. Perinatal depression Screening is made mandatory by several US National Healthcare organizations like American College of Nurse-Midwives 2002; Association of Women's Health Obstetric and Neonatal Nurses 2008; National Association of Paediatric Nurse Practitioners 2003. The maternal depression screening is a sine qua non in cases of maternal healthcare services by Health Resources and Services Administration's Maternal and Child Health Bureau (HRSA-MCHB).[40] In India, the lack of awareness and empirical study in the area has been very detrimental, acerbated by neglect on mental health aspects. Traditional post-natal care is prevalent but hardly contributing to the changing dynamics and requirements of the stressful changing conditions of society and increased urbanization. The challenge that post-partum psychiatry faces in India is to

[40]Rhodes, A. M., & Segre, L. S. , *Perinatal depression: a review of US legislation and law*, 16(4) Archives of women's mental health 259, 261 (2013)

translate research findings into practice by working closely with other agencies, adapting established modes of care to local needs and resources and finding innovative care delivery methods both in the hospital and the community.[41]Such laws which would mandate mandatory screening and uniform and standardised tools for diagnosis are required which would help in timely and efficient medical and community based help.

Conclusion

The data of increasing mental health problems such as PPD and their dire and unwanted consequences requires an effort at national and global levels to overcome the inefficiencies in mental health resources specially in less developed countries. In a country like India, where awareness and action about mental health issues in general is a taboo , such complex and vulnerable issues like maternal mental health services remain largely deficient. Often there are no standard tools for screening and diagnosis and also a lack of data and resources. As these disorders may be related to complex psycho-socio-cultural variables and a combination of genetical and environmental factors may contribute to such conditions, specific societal settings may contribute to the associated causes. For example, financial difficulties in a lower or lower-middle income family, domestic violence and marital discord or lack of support from husband for birth of a female child may have a positive correlation with post partum depression. So, the role of legislature can also complement in framing a guideline when it comes to the cases of postpartum mental disorders. The laws complementary to the concept of mental illness as outlined by the Mental Health Act 2017, which could further clarify the scope of postpartum mental illness as a mitigating factor and act as a tool for guided discretion by the judiciary.

[41]Chandra P. S. , *Post-partum psychiatric care in India: the need for integration and innovation*,*3*(2) *World psychiatry* 99, 100 (2004).

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Geographical Indication as a Tool to Protect Traditional Knowledge: Assessing its Adequacy in reference to Assam's Agro-Medical Plants

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Abstract

There are hundreds of medicinal herbs grown in the region of Assam which are locally utilized to cure many diseases. Assam and the North-Eastern region of India is one of the 34 major bio-diversity hotspots of the world, in the forests of which innumerable medicinal plants are found. The rural local people of Assam have immense knowledge of the use of these medicinal plants which are grown in abundance. But, in spite of having exclusive knowledge about the use of these natural resources, their rights are often violated by some exploiters. The intellectual property rights of the local traditional knowledge holders over these herbs are never recognized due to which they are deprived of their rightful claims over these plant varieties.

This paper, therefore, wants to focus on some of the plant varieties which are traditionally grown or found in Assam and which typically belong to this particular region only, bearing some specific geographical features. The paper also focuses on the potential of cultivating these medicinal plants so that these can be widely and legally utilized for medicinal purposes and their protection-needs get prominence. It is certain that these herbal medicinal products will prove to be very beneficial to the humankind. If the medicinal herbs are properly utilized by giving their due credits to the traditional knowledge holders, it will open the gate for economic development of the rural people. The paper highlights the requirement of Geographical Indication under the existing legal system and if possible, adopting a Sui Generis law in protecting the traditional knowledge of people over the medicinal plants. A stringent Sui Generis law is the current need to ensure protection of traditional knowledge over the rare medicinal herbs of the region.

Keywords: Agro-medicinal plants, traditional knowledge, intellectual property, geographical indication, bio-diversity, bio-piracy.

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1.1. Introduction

Geographical Indication is the only available legal protection which can save the traditional knowledge of a community. A community, which is based on indigeneity, culture, folk traditions, regional aspirations or any other such attributes, must be having some specific unique features which are very personal to them. No outsider is ever allowed to intervene into the personal aspects of these communities without proper permission. The traditions, knowledge and practices associated with such communities can be termed as traditional knowledge which is subject to protection in fulfillment of certain characteristics. As of now, the traditional knowledge has not been inserted into the protected intellectual property right regime. Therefore, these are subjected to piracy.

Assam, situated in the North-Eastern part of India, is a place where the nature is very rich in its resources as well as the people in their traditional knowledge. Sections of Assamese people are very expert in making their livelihood easier by pursuing their traditional art and crafts. The researcher, in this article, has made an attempt to throw some flashlight on the variety of medicinal plants found in Assam that are utilized by the local people for treating diseases and the need of their protection by Geographical Indications. But, the circumstances are so adverse that the people neither get any chance to make themselves aware of the concept of Intellectual Property Rights, nor they get any support to develop their medicinal knowledge in an economic way. Here, the economic utilization implies cultivating the medicinal plants in large quantity so that these can be widely used for medicinal purposes. Even after having so many varieties of natural resources, Assam has got geographical indication only in nine products till date, such as- Muga Silk of Assam, Assam Orthodox Tea, Tezpur litchi, KarbiAnglong Ginger, Joha Rice, Chokhua Rice, BokaChaul, KajiNemu and Gamosa.

Geographical Indication (GI), an intellectual property protection system, serves the purpose of protecting the relationship between product quality and the geographic region of its origin. GI assigns value to a product that specially belongs to a particular geographic region and which is considered to be a specialty of that place. Trust upon the quality of traditional products is assured by GIs. Therefore, it is expected to provide such protection to the medicinal and agricultural plants found in the region of Assam.

1.2. Delimitation and Terms Used

Assam is a storehouse of innumerable rich medicinal plants which are mostly naturally grown and many of them are cultivated by the local and indigenous people of the region. Assam belongs to the Himalayan range of biodiversity which records of having more than 10,000 species of plants.[1] Assam has many reserve forests which are extremely rich in different variety of medicinal herbs, such as Kaziranga National Part, Manas National Park,

[1] Govt. of Assam, *National Park*, *2019*, Principal Chief Conservator of Forest and Head of Forest Force, (April. 20, 2022, 11.30 AM) https://forest.assam.gov.in/portlets/national-park

Nameri Wildlife Sanctuary, Nambor Wildlife Sanctuary and many other reserved areas. The researcher, hence, has focused only on a handful of such plants citing their medicinal qualities and their prospects as a cultivable crop. The researcher has used the term "agro-medicinal plants" which specify the medicinal plants that are found naturally in Assam and which can also be cultivated to increase its production. In the current scenario, when the importance of intellectual property rights has been understood by the whole human community, the rare medicinal values of the plants found and grown in the regions like Assam are also to be popularized.

1.3. Data Sources and Methodology

The research has been carried out on the basis of primary and secondary sources that include the information collected through survey and from the available documentary data. A purposive sampling method has been used for selection of the informants who can impart some required information. It was done through a semi-structured open-ended interview technique with the help of schedules. Questionnaires were also distributed to some laymen to enquire about their idea on the protective measures and also to some botanists. 100 questionnaires were received. The data analysis was done in a qualitative form through narrative analysis.

1.4. Rare Medicinal Plants of Assam and the Requirement of Geographical Indication

Being a home to many indigenous tribes, the North-Eastern states of India have a forest cover of almost 47 per cent and countless naturally grown medicinal plants. Assam alone contributes nearly 3,000 species of plants, which are used in indigenous medicines. Assam's rural people have carried out this tradition of treating ailments with the local home grown plant varieties which are proved to very effective. There are some community recognized medicine practitioners who are trusted and revered by the whole community in treating different ailments. These healers are experts in extracting medicines from plants, animals and other such items and they have extensive knowledge on the use of plants and herbs for medicinal and nutritional purposes. An example will be the Mishing community of Assam who are distributed in Dhemaji, North Lakhimpur, Sonitpur, Tinsukia, Dibrugarh, Sibsagar, Jorhat and Golaghat districts of Assam. This community is known for their traditional healing practices of different diseases including malaria and jaundice. Assam is full of such ethnic communities who have mastery over traditional medicines prepared from the local plants.[2]

But, with the development of allopathy, increasing urbanisation and destruction of forests, many plant species have become extinct and unique medical traditions getting destroyed. Assam is one of the 34 prominent and major biodiversity hotspots[3] of the world. The resources of this region include

[2]Information collected by first hand study.

[3] HIMANSHU RAI & RANJAN KUMAR GUPTA, Biodiversity HOTSPOTS: A TOOL FOR BIODIVERSITY CONSERVATION (IK International Publishing House, New Delhi, 2011)

the rare agricultural and medicinal herbs that are normally used for curing many chronic and dangerous diseases. The earliest written record of Rig-Veda has recorded ethno medicinal plants from the Himalayas which are 6,500 year old.[4] This knowledge has been carried out through ages by the local communities. The people of rural areas are still dependent on traditional medicines for health care and treatment of diseases. Traditional medicines have developed through the experiences of many generations and have been primarily dependent upon locally available plants. Medicinal plants are one of the major natural resource in pharmaceuticals and healthcare activities. Many high valued medicinal plant species have become extinct because of continuous exploitation and substantial loss of their habitats[5]. Endangered plants are the biodiversity factor of that area. Among the thousands of effective medicinal herbs and plants found in the State, some are mentioned below:

1. Akon (***Calotropisprocera*):** *Akon* plant is otherwise poisonous. Only people having proper knowledge of its use can apply it in actual quantity to treat diseases. Experts say, this plant is very effective in treating skin, digestive system and disorders like respiratory, circulatory and neurological. It is also used to treat fever, nausea, vomiting, elephantiasis and diarrhea. The whitish substance extracted from the plant is useful in treating arthritis, snakebites and even cancer.

2. Bhedailota (*Paederiafoetida Linn*. Family- *Rubiaceae*): This is an annual medicinal creeper. It smells very bad when its leaves are crushed, but once cooked provides cure to diseases like stomach problems. It is also known as anti-inflammatory, anti-tumor, anti-arthritis traditional drug which is very effective. This is used as a food in Assam.

3. Bih-langani *(Polygonum Orientale L., Family: Polygonaceae*): This is an annual plant naturally grown in the moist environment. Leaf of the plant is applied as a paste to relieve pain, in snakebite and also in skin diseases. Roots are useful in treating headache.

4. Bisalyakarani (*Tridax Procumbens*):This herb is a stimulant and useful in curing asthma, rheumatism and colic in children.It may have the potential to be the basis for a birth control pill for men. It can deal with different kinds of hemorrhage and ulcers. In Assam, it is mainly used for pain relief.

Biodiversity Hotspot' is a concept that recognizes areas of our planet having critically threatened biodiversity and need instant attention. The areas those are rich in biodiversity which are now at danger, come under this concept. In 2004, the number of biodiversity hotspots in India has been increased to three from two, which are:
(a) Himalaya (West Bengal, Sikkim, Assam and Arunachal Pradesh)
(b) Indo-Burma (Manipur, Mizoram, Tripura, Meghalaya, Nagaland and South Assam)
(c) Western Ghats and Sri Lanka

[4] NCBI, *Ethnobotany in the Nepal Himalaya*, NCBI, (April. 19, 2022, 10:10 AM), www.ncbi.nlm.nih.gov › pmc › articles › PMC2639547.

[5] GoI, *Report of the Task Force on Conservation and Sustainable use of Medicinal Plants*, *2000*, Planning commission, Government of India (April 19, 2022, 11 AM), https://niti.gov.in/planningcommission.gov.in/docs/aboutus/taskforce/tsk_medi.pdf

5. BhimKol/AthiaKol (*Mussa Balbisiana Colla, Family: Musaceae*): This is an indigenous type of banana grown in Assam. This is also widely cultivated because of its demand and useful qualities. In Assam, this banana is extensively used to feed babies as it is considered to be healthy. Young banana stem is cooked as vegetable which has very rich iron and fiber. Every part of this plant is utilized for medicinal uses in the region. The banana peel is dried up and burnt to make edible Sodium Bicarbonate from the ash extracts which is tremendously good for stomach upsets. This extract is known as "Kolakhar". The banana peel is also useful to cure acne and skin issues.

6. Bok phool (*Sesbaniagrandiflora pers*. Family- *Papilionaceae*): It is also known as agati or hummingbird tree. It is a small tree.Leaves are used as tonic, diuretic, laxative, antipyretic, chewed to disinfect mouth and throat. Flower is used in headache, dimness of vision, Catarrh, Headache, cooling and improving appetite, bitter, astringent, acrid, antipyretic. Bark is used for cooling, bitter tonic, febrifuge, diarrhea, Small pox, Astringent. Fruits in Bitter and acrid, laxative, fever, pain, bronchitis, anemia, tumors, colic, jaundice, poisoning. Root is used in Rheumatism, Expectorant, Painful swelling, Catarrh.

7. Bora Saul (*Oryza Sativa*, Genus: *Oryza*): This is a variety of indigenous cultivated rice which is mainly used for preparing *pitha*s (traditional Assamese cakes) during Bihu. Bora saul is a glutinous rice found in Assam which does not contain glutanin and gliadin. There is no protection available for conversation of this variety of rice in the State.

8. Dhekia (*Diplaziumesculantum*, Family: *Ebenaceae*): This fern is widely found in Assam and used as a leafy vegetable by the people of the Northeast. It contains high amount of protein which is even higher than the meat protein consumed by people. It is known for antioxidant properties. It regularizes blood pressure and bowel movement and purifies blood.

9. Doronesak (*Leucascephalotes*, Family: *Lamiaceae*): In Assam, this is used as an edible leafy vegetable. This fern is used as an Ayurvedic medicine. The medicinal properties of this fern are:

- This is historically used for snakebites both externally and internally.
- The small white flowers of this plant are crushed and used as a syrup as a domestic remedy for coughs and colds.
- The flower extracts are also known for its effective treatment of sinusitis, pharyngitis, decay of teeth, loss of appetite and body ache.
- This is also used in fever, helminthic manifestations, jaundice, psoriasis, respiratory diseases and skin diseases.
- The juice of its leaves is useful in skin diseases.
- This is also utilized as a homoeopathic drug to treat asthma and malaria.
- Roots are also used as medicine in liver and lung problems, influenza, arthritis and many other such diseases.

Such immense use of this fern certainly attracts its need of protection as an effective medicinal herb.

10. Duportenga (*Briophyllumpinnatum*): It effectively dissolves kidney stones because the leaves contain more than 10 percent isocitric acid. *Duportenga* can be found widely in the Brahmaputra valley. The juice of its leaves, which has a sour taste, is used widely for urinary problems.

11. GolNemu (*Citrus medica L.* Family- *Rataceae*):*GolNemu* limes or Assam limes are native to this region of India. *GolNemu*limes are used to add sourness to spicy dishes in the Assam and Nagaland regions of Northeastern India. The limes are cut in half and juiced, the skin and seeds discarded. The Assam limes can be dried or pickled and preserved for years. This sour fruit that can cure dysentery, jaundice and anaemia when taken in actual proportion as directed.

12. Jaluk (*Piper Nigram*):*Jaluk* has antimicrobial properties. It is known for strengthening immunity. This is very helpful in treating indigestion, improving appetite, treating coughs, colds, breathing and heart problems. *Jaluk* traditionally treats stomach ailments such as dyspepsia, flatulence, constipation and diarrhea while mixed with ghee in proper quantity.

13. Jom-Lakhuti (*CostusSpeciosus*): This is an anti-diabetic plant easily found in every yard in Assam. This is also known as Insulin Plant, use of which controls diabetes in patients. Research shows that chewing one leaf of this plant or consuming a spoonful of the dried leaf powder daily helps in regulating blood glucose level.

14. Koldil (Bananaflower):*Koldil* means the banana flower which appears from the tip of the stem and develops into tubular, white flowers. These are very rich in dietary fibers, proteins, unsaturated fatty acids, vitamin E and flavonoids. They are part of many cuisines in the region of Assam. They also possess immense medicinal value. Ethanol-based extracts of banana flowers inhibit the growth of pathogenic bacteria such as Bacillus subtalis, Bacillus cereus, and Escherichia coli in the laboratory and may help heal wounds and prevent infections. Banana flower is one of the best home remedy for excessive bleeding in women as it helps in increasing progesterone in the body. It can lower the insulin level in diabetes patients. Banana flower is excellent for the lactating mothers as it helps increase the breast milk supply.

15. Kosu (*Colocasiaesculenta*): The root of this plant is a great source of fiber and other nutrients like potassium, magnesium, Vitamin C and E and offers a variety of potential health benefits, including improved blood sugar management, gut and heart condition. The fresh leaves are very rich in iron components. These are very useful for the pregnant ladies. This plant is also known to be an anti-cancer drug.

16. Laijabori (*Drymeria Cordata*): This is an annual herb with very small flowers. These are grown in the moist habitat of the region. The plant is used for sinusitis, hemicarnia and in nasal polypus. It is also used as laxative.

17. Manimuni (*Centellaasiatica*): There are two varieties of *Manimuni*:

(a) BorManimuni (*Hydrocotyleasiatica Linn.* Family*Apiaceae*): *Centellaasiatica*, commonly known as centella and gotu kola, is a small, herbaceous,

annual plant. It is used as a medicinal herb in Ayurvedic medicine. It has the capacity of curing stomach trouble, indigestion, weak memory, low appetite, dysentery, diarrhea etc.

(b) Soru Manimuni *(Hydrocotylerotundifolia Roxb*. Family-*Apiaceae*): This herb has the same features as*Centellaasiatica*or *BorManimuni.* This is found anywhere in Assam.

18. Mati-kaduri (*Alternantherasessilis*, Family: *Amaranthaceae*): This is used as a herbal medicine. It is used for treatment of stomach problems and hemorrhoids. It is counted to be beneficial for eyes and hair. Hence, utilized for making hair oil preventing hair fall.

19. Modhusoleng (Polygunum*chinense* L. Family: *Polygonaceae*): This herb is used as a vermicide. It is also used for treatment of local dermatitis, pharyngitis, otitis. In Assam it is one of the delicacies.

20. Mosondori (*Houttuyniacordata Thumb*): It cures dysentry and stomach ache. It is also useful in treating pneumonia, hypertension, constipation, and hyperglycemia via detoxification, reduction of heat and diuretic action.

21. Ou tenga (*Dilleniaindica*): Dilleniaindica commonly known as elephant apple or *outenga* is an evergreen tree grown in the moist forest of sub-Himalayan region of Assam. In Assam, the unripe fruits are used to make curries because of its sour taste and ripe fruits are for making pickles. The studies show that the plant possesses various qualities like antimicrobial, antioxidant, analgesic, anti-inflamatory, dysentery, antidiabetic etc. The fruits are used for the treatment of various diseases especially diabetes.

22. Posotia Sak *(Vitexnegundo Linn*. Family-*Verbenaceae*):*Vitexnegundo*, commonly known as the five-leaved chaste tree, is a large aromatic shrub with quadrangular shape, densely whitish. It is widely used in folk medicine. It is commonly found near bodies of water, grasslands and mixed open forests. Roots and leaves of this plant used in eczema, ringworm and other skin diseases, liver disorders, spleen enlargement, rheumatic pain, gout, abscess, backache; seeds used as vermicide. It is also used to control population of mosquitoes.

23. Sarpagandha (*Rauvolfia Serpentina*):Due to its over-exploitation from the wild because of its rich medicinal property, it has been included in the list of endangered species. This is widely used in Ayurvedic medicines. The root of the plant is exported to foreign countries to prepare medicines. The roots contain several alkaloids and the most important among them is reserpine, which has a depressent action on the human central nervous system. It produces sedation and lowers the blood pressure. The root of the plant is used in the treatment of insomnia, epilepsy, mental disorders, pain and poisoning.

24. Sukloti (*Pojostemonbenghalensis*. Family- *Lamiaceae*): It regularizes the irregular periods of women. Also helps in speedy recovery of a mother after delivery. *Sukloti* is mainly applied for uterus related problems and pregnancy issues.

25. Tengesi Tenga (*Oxalis Corniculata*): Indian Sorrel leaves or *TengesiTenga* in Assamese is prescribed for insomniacs. The juice produced by crushing the leaves helps in facilitating sleep. These are very rich in Vitamin C. It increases memory power. It cures lower back pain, dysentery, leprosy, fever, high blood pressure, diabetes, urinary tract infections, sleeplessness and breathing problems. It is also helpful in strengthening nervous system and relieving alcohol hangover. However, it should be taken in proper quantity.

26. Titaphool (*Phlogacanthus Nees*): *Bahektita* or *Titaphool* is a tiny red flower grown in Assam which is used as a delicacy for its bitter taste. This is a creeper. It has rich medicinal value and used in curing respiratory disorders like cough, cold, bronchitis, throat infections, pulmonary infections and allergic disorders like bronchial asthma.

These are some of the hundreds of medicinal plants found in Assam which deserve immediate protection so that their geographical identity is saved and the people who are practicing these plants as medicines for different diseases, their traditional knowledge is saved. Currently, there is only one legal protection which can save the traditional knowledge of the local people over the abovementioned traditional medicinal herbs i.e. Geographical Indication. Geographical Indication can be applied for a product when it has specific territorial, local and regional geographical features and it includes the climatic conditions which are specific to a region, biological qualities, cultural attributes, traditional practice which find expression in the social affairs of the community. In this light, the traditional medicinal herbs of the region attract GI protection.

Acquisition of Geographical Indication is a technical effort which can be ensured under the existing laws of the Country. India has adopted the Geographical Indication of Goods (Registration and Protection) Act, 1999 which is counted to be a *Sui Generis* law for the protection of GIs. Geographical indications are rooted in the soil of the region for which they stand and contribute to the socio-economic improvement of that region. They create employment, contribute to the regulation of the market and encourage the diversification of production. In addition, they protect natural treasures and maintain the cultural heritage.[6]

1.5. Cultivation of the Indigenous Medicinal Plants of Assam for Economic Benefits of People

The number of medicinal plants which were initially found in abundance in the forests and grown in the rural areas of the region, are now decreasing. The reason is these are exploited by outsiders without any norm and without any Prior Informed Consent (PIC) of the local people. Therefore, the need has been felt that the concerned authorities should take some initiative to protect these herbs and cultivate these systematically so that these can be protected against extinction. Cultivation of these plants might open the gate to

[6] WIPO, *Geographical Indications*, (April. 20, 2022, 10:30 AM), https://www.wipo.int/geo_indications/en/

register them as GI protected products. Because, it has been reported that the people who have mastery over the medicinal use of these plants are mostly rural, scarcely literate who have no awareness about any legal protection of their traditional knowledge. The goodwill of the concerned authorities might grant these people their due recognition.

It was informed to the researcher that in 2013, the National Medicinal Plants Board has approved a Rs 7,77.73 lakh-project for conservation, development and sustainable management of medicinal plants in the region under which Kamrup, Nagaon, Chirang, Dibrugarh and Cachar districts of Assam were to start cultivation of medicinal plants. But since then, no much initiative has been seen to be taken to make the project a reality.[7]

Some of the medicinal plants like different variety of bananas are still cultivated by the farmers as a traditional habit. Assam has Asia's largest banana market in Darangiri in Goalpara district. More than 15000 people are involved in this market who earn their livelihood out of this cultivation. The bananas of Assam are exported to places like Bhutan, Bangladesh, Nepal and many other neighbouring countries. To accelerate the growth of banana cultivation and to make it a means of economic growth, the Government has announced establishment of Assam Agricultural University in Goalpara.[8] There is a need to encourage cultivation of the other mentioned medicinal herbs which are taken away by the usurpers without any PIC. Cultivation of these herbs will make their importance public and hence automatic protection will be afforded. Also it will encourage the growers and TK holders to claim legal protection. Growth of useful agricultural goods will also generate employment like Darangiri's banana market.

However, the economic consequence of such medicinal herb cultivation in the developing countries is a bit difficult to assess as the GI quality mark on the agricultural goods will give these products a place in the export market. The legal, international protection to these herbs will certainly expand their market and earn revenues, which might adversely affect the local enterprises. It should be taken into consideration that while expanding the market and granting legal protection to these herbs do not take away the benefits of the local growers and TK holders. There will be a need to conserve the rights of the local people and enterprises in the profits of the market. But, whatever may be the consequences, there is an urgent need to grow these herbs systematically and expose them to quality protection and market. Without this, there is no guarantee that the TK of the local people will be protected and recognized.

1.6. Analysing the Problems

The local and indigenous communities of Assam are in a very vulnerable position regarding protection of the TK over plant varieties. The

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[7] Information collected from the local village Headman of Chaigaon.

[8] Jiyaur Rahman, *Banana Cultivation in Assam*, (April. 24, 2022, 12 PM), https://abhipedia.abhimanu.com/Article/State/NDQxNwEEQQVVEEQQVV/BANANA-CULTIVATION-IN-ASSAM-Assam-State

researcher has interviewed people from 10 villages in Dhemaji, Lakhimpur, BishwanathChariali and Kamrup districts. These villages are mostly resided by the Miri, Mishing, Karbi, Dimasa, Borocommunities of Assam who are indigenous. The reasons which came out to be contributing to this usurpation of natural plant resources are many, such as:

1. The local rural people who know the medicinal uses of the herbs have no idea of their legal rights over these products. They do not know anything about the value of these herbs in the market and about intellectual property protection. These are mostly poor rural people who are struggling to earn their livelihood to feed the families. They are not given any benefit by the pharmaceutical companies that visit the places to collect herbs.

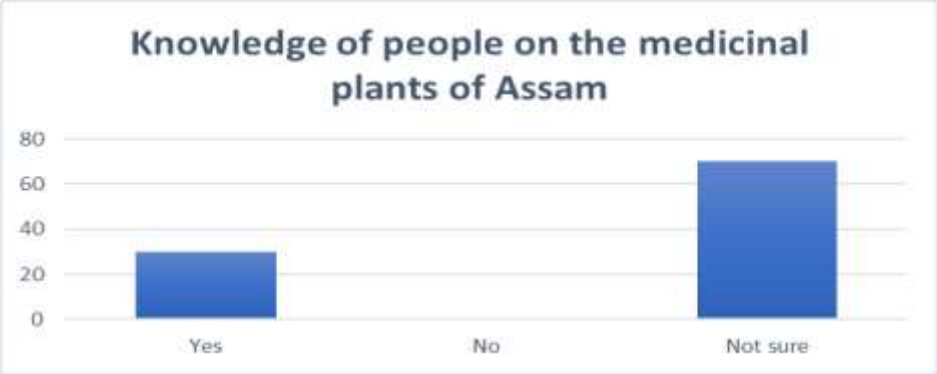

Figure 1: Awareness among people about medicinal herbs.

2. Non-recognition of the traditional knowledge of the indigenous communities is another problem. The value generated by TK is not adequately recognized and compensated. There is no prior informed consent taken from the local people who mostly do not know about their legal rights. The legal recognition of traditional knowledge of the local communities is very necessary for boosting their ability and confidence to negotiate and transact with outsiders and for protecting themselves and their resources against the undue interference of outsiders, including the state.

3. Government has not taken any initiative to make the TK over medicinal plants recognizable and to make the TK holders aware of their claims. The Government is also not taking any step to legally protect the medicinal resources of the region. This is an open secret that many multi-national companies come to this region to collect medicinal herbs. But, no rule or law has been adopted by the governments to protect the natural resources of the region. The governments are also not taking the cultivation of the medicinal herbs seriously. No much effort has been made in this regard.

4. Bio-piracy is very dangerous as it snatches the rights of the rightful TK holders and no benefits are given to them. Traditional knowledge associated with such biological resources has a potential to be translated into commercial benefits by popularizing them in the national and international market. The commercial potential associated with TK has assumed much importance in the last couple of decades with the tremendous proliferation of the biotechnology

industry. As the most of the world's biodiversity-rich countries are the developing countries, these nations should have that tendency and intention to gather knowledge about protection of their bio-diversity and TK. Many national and international and regional laws have been adopted to deal with bio-piracy, *viz* United Nations Convention on Biological Diversity, 1992, Cartagena Protocol on Bi-Safety, 2000, Nagoya Protocol, 2010, Biological Diversity Act, 2002 (India) etc., but only laws cannot do anything if the concerned authorities do not have the intention to stop it.

5. Insurgency and displacement are two connected issues that have posed a problem for the TK holders in the State as the insurgents reside in the remote rural areas which are the homes of the medicinal plant TK holders. Due to insurgency in the region, many indigenous people are living a traumatized life and hundreds of them are displaced. When displacement takes place the indigenous peoples lose their original places of residence and hence their access to the natural resources is also lost. Insurgency problems have thus caused much disaster in the lives of the people and especially the TK holders. Due to these issues the local people of the region are suffering and their due rights are not being recognized and respected.

1.7. Conclusions and Recommendations

The researcher collected information about the awareness among the people of their rights over Traditional Knowledge and on agro-medicinal plants. Some responses are portrayed below:

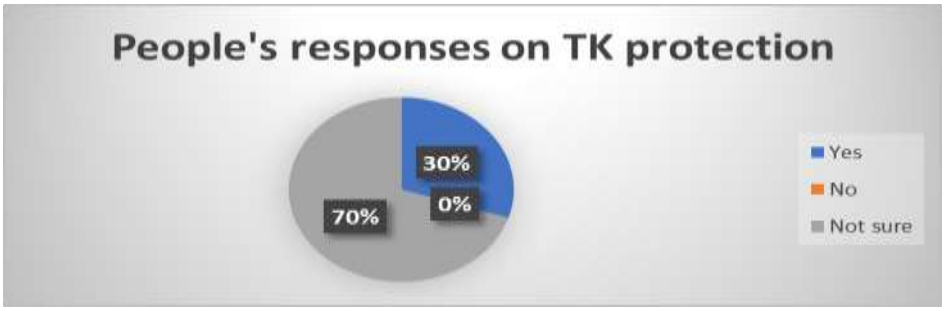

Figure 2: Adequacy of the TK protection

The study reveals that it is very essential to cultivate the medicinal plants found in the region to safeguard these from the usurpers. Many of the medicinal plants are cultivated by the farmers to earn their livelihood which mostly depends upon the current market demand. There is little idea among the mass about the medicinal properties of these agro-medicinal plants. For this unawareness of the mass, the blame goes to the literate prominent people, civil society representatives, Botanists, scientists and the governments who are not doing anything to protect the rare herbs of this region and hence, people are also ignorant.

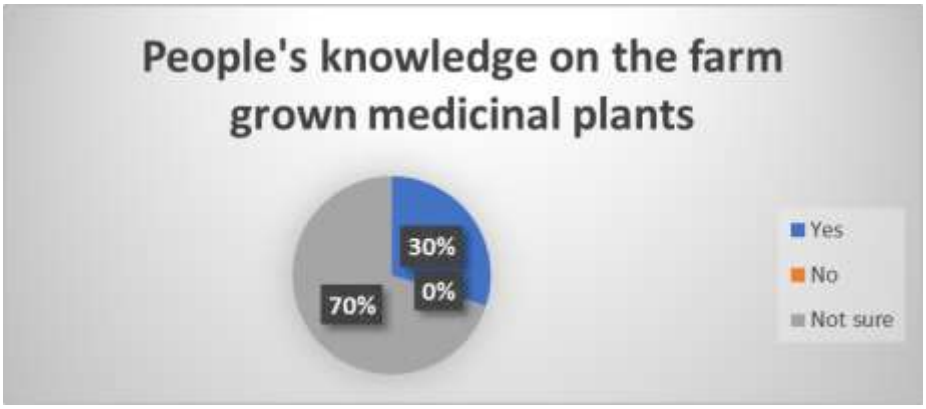

Figure 3: Peoples' knowledge on farm grown medicinal plants

The future of the TK of the indigenous peoples of Assam is highly dependent upon changes in political will and the will of the commercial sector. The development works should consider the rights of the indigenous peoples of the region and protection of their intellectual property rights. Indigenous knowledge can no longer be considered a raw resource from which others are benefitted. The plantation of these medicinal plants will also contribute towards maintenance of sustainability of the biodiversity of the region.

For the cultivation of the agro-medicinal plants and their protection through Geographical Indication, governments should take effective steps by establishing a monitoring body to follow-up the implementation of the laws like Geographical Indication of Goods (Registration and Protection) Act, 1999. Some NGOs may be entrusted with the responsibility to impart the indigenous people about the importance of these medicinal herbs and their rights over the TK.

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Non-Conventional Trademarks with Special Reference to smell and Sound: A cross Jurisdictional Analysis

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Abstract

The ambit of trademark law has broadened manifold due to the aggressive commercialization, technological developments and competition strategies prevalent in the present day global market. The companies spend a huge amount of finances on developing their brands and goodwill. To make their products stand out, attract customers, and capture the competitive global market, they implement new tactics, provide newer brands with newer characteristics, and adopt non-conventional markings such as colour marks, shape marks, smell marks, sound marks, moving images, and so on. The introduction of these non-traditional marks on the one hand has no doubt widened the scope of trademark protection but on the other hand has raised the level of concerns about their registration . No doubt as per the TRIPS Agreement non-conventional marks are qualified for the same protection as traditional marks, however there are some inherent challenges that obstruct the registration procedure, such as graphical portrayal of these marks. Many countries across the globe have extended protection to these marks but still others including India express their reservation for the same . In this paper, an attempt is made to discuss the law relating to non-traditional trademarks in developing countries such as the European Union and the United States, as well as to analyse the position of these marks in India, and to make appropriate recommendations as to how the legal jurisprudence in this area should be developed.

Keywords: Non conventional trademark, graphical representation, sound mark, smell mark

Introduction

Trademarks are actually words, designs, numerals, logos, symbols or combination of these and, consumers have relied on these traditional forms of marks since ancient times. But with the unprecedented developments every passing day, aggressive commercialization, technological developments, the nature and form of trademarks are broadening. These developments have taken trademarks to different heights, both in real as well as virtual world and

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new generation of trademarks have come into existence in the form of non conventional trademarks like sound, smell, moving images, shapes, taste marks. These trademarks are very appealing to the senses and are easy to remember. Though the non conventional marks perform the primary function of a trademark but there are some inherent problems which impede their process of registration. These issues occur as a result of the legal definition of a trade mark being abstract. On the one hand, trademark law protects a broad category of marks with the functional status of a sign, i.e. distinguishing one person's goods and services from those of others; on the other hand, trade mark registration systems have historically endorsed the protection of trademarks that are visual and consist of words, symbols, figures, and other graphically representable elements.

The TRIPS agreement governs trademark registration on a global scale. According to the Agreement

> *"trademark should be able to perform its primary functions and it is not mandatory for a trademark to be tangible, visually perceptible or graphically representable.*[1]"

In United Nations and European Union registration of non-conventional trademarks has become very common. Registration of trademarks under TM Act 1999 is only possible if it has the ability to distinguish itself from other products and has the capability to be graphically represented.

Given that the visual representation requirement for trademark registration is the area that causes issue for non-conventional marks, this legal requirement gives rise to an important question regarding the extent to which trademark law principles apply to non-conventional trademarks. Furthermore, there is a risk that these trademarks would cause consumer confusion, contradicting the fundamental purpose of trademarks.[2]It is pertinent to note that newer methods of trademark registration have evolved across jurisdictions that have expressly or implicitly recognised such types of marks as trademarks, whether it is the sound of Intel-Inside, Nokia's start-up tune, Tarzan's Yell, MGM's Roar, the purple colour of Cadbury Dairy Milk chocolate, Nirma's moving image of a dancing girl, or the I-Smell, which spreads fragrance over the Internet.[3] They all aid in identifying source by all classes of people, whether literate or illiterate, even before they read their brand name.[4] Be that as it may,it is also a fact that non-conventional trademarks is still in an infancy in India and it needs to be seen whether these marks can be included within the definition of trademarks or not .

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[1] Mwirigi K. Charles & T. Sowmya Krishnan, Registrability of Non-Conventional Trademarks: A Critical Analysis, International Journal of Research and Analytical Reviews, 2019,p- 914-923.

[2] Arka Majumdar, Subhojit Sadha & Sunandan Mujumdar, The Requirement of Graphical Representation for Non-Conventional Trademarks, Journal of Intellectual Property Rights (2006).

[3]Dixit Aditi and Arushi Jain, "Unconventional Marks: The Trademark Umbrella Widened, available at http:www.jurisonline.in/files/unconventional tradermarks.doc

also see http://www.inter_lawyer.com/lex-e-scripta/articles/trademark-registration-smell-EU.htm.

[4]id.

This paper attempts to make an analytical study of the present trademark law relating to position and registration of non conventional marks in India and also highlight the position in European Union and United States , so as to identify the emerging issues and their resolution in light of the legal solutions provided to similar issues in United states and European Union in light of TRIPS. It is worth mentioning that the legal position of only two catagories of non conventional trademarks i.e Smell Marks and Sound Marks is discussed in this paper.

Non Conventional Trademarks

A trademark is a word, name, letter, number, logo, label, or other symbol or sign that is used to distinguish one person's goods and services from those of others and to identify the source of goods or services. Other types of marks, such as sound, taste, smell, texture, motion, and shape, can now be labelled as trademarks, thanks to advancements in intellectual property law.According to Article 15(1) of TRIPS Agreement[5]

> "any *sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trade mark*"

EU Trade Mark Directive 2015/2436 Article 3 reads as follows

> "A t*rade mark may consist of any signs, in particular words, names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:*
>
> *(a) distinguishing the goods or services of one undertaking from those of other undertakings; and (b) being represented on the register in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor".*

The EU trade mark laws provide no additional definitions to non conventional trademarks. However, the EUTMR's Article 4, includes examples of possible trade mark components as well as the fundamental registration requirements. As a result, any sort of sign that represents a good or service and satisfies the need for practical representation can be included in a European Union trademark. A trade mark had to be graphically represented prior to the implementation of the practical representation criterion on October 1, 2017. It has since been replaced with a broader criteria that stipulates that the trade mark representation must make it possible for the public and the competent authorities to identify the subject matter of protection precisely and clearly

US Lanham Act :

> *"A trademark is a designation which includes, any word, name, symbol, or device, or any combination thereof [which] serves to identify and distinguish [the mark owner's goods] from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."*[6]

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[5]Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15,1994, Marrakesh; Agreement Establishing the World Trade Organization, Annex1C (1994) 33 I.L.M. 1197.

[6] 15 USC § 1127 (Lanham Act § 45).

US Supreme Court observed,

> *"since human beings might use as a "symbol" or "device" almost anything at all that is capable of carrying meaning, [the statutory definition] read literally, is not restrictive".*[7].

According to Indian Trademark Act,1999

> "Tra*de mark' traditionally means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours"*[8]. *"'mark' includes a device brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof"*[9]

While this is a broad description, the Draft Manual specifies that specific types of marks, such as shapes, colours, sounds, and odours, "will necessitate special attention". [10]

Other marks, besides words, logos, and graphic designs, have also come to serve as identifiers of the source of products or services, thereby serving the purpose of marks, however their amount of trademark protection differs by jurisdiction[11].

General Requirements for Registration of Trademark

According to U.K. Trademark Act 1994[12] and Indian Trademark Act 1999,[13] following three requirements are necessary for trademark protection.

a) *Trademark must be a mark or sign which conveys information.*
b) *Trademark should be capable of distinguishing products and services of one undertaking from another.*
c) *The trademark is capable of graphical representation.*

Graphical representation is one of the most important statutory requirement of the trademark.[14] Graphical representation implies that the mark must be physically represented in the trademark registry and capable of publication in a trademark journal. It serves as a permanent point of reference for identifying the mark. [15]

The court explained two main reasons for the requirement of graphical representation standards in *Swizzels Matlow Ltd*. [16]

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[7] Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162 (1995).
[8] Section 2(1)(zb), Trademark Act 1999.
[9] Section 2(1)(m), Trademark Act 1999.
[10] Draft Manual Ch II, at 3.1.
[11] Dev Gangjee,Non Conventional trademarks in India, Vol. 22(1) *National Law School of India Review* 2010
[12] Article 2 of European Directive The Directive requires European Union member states to adopt or harmonise their respective trademark laws to comply with directives provisions.
[13] Sec. 2(1) (zb) of Indian Trademark Act, 1994.
[14] Mishra Neha, "Registration of Non-traditional Trademarks", Jor IPR, Vol.13, Jan 2008,P.43-50.
[15] K.C. Kailsasam & Raju Vedaraman, "Law of Trademarks and Geographical Indications, 2nd Ed, (Wadhwa & Co; Nagpur) 2005, p. 10.
[16] Swizzels Matlow Ltd's Applications (NO-2) 2000 ETMR-58

a) To allow traders to clearly recognize what other traders have registered for trademark registration.
b) To allow the general public to appreciate the sign that is the subject of trademark registration.

Graphical representation isn't an objective criterion because the degree of precession required to identify it isn't specified anywhere. However, a casual review of the Act's provisions reveals that such representation must be sufficient to allow for the Act's full and effective execution [17].The term graphical representation has to be liberally interpreted to accommodate non-traditional trademarks and must also be interpreted in light of the legislative intent in establishing a broader test of graphical represent ability and should not be subject to the narrower test of visual perceptibility used under the TRIPS agreement"[18].

Graphical Representation and non Conventional Marks

When an application for registration of the non conventional trademark is made the first and foremost question which arises is that how can a smell, sound, taste, texture etc be represented by words, graphics, drawings etc.? A registration based trademark system is justified on the basis that "*it enables those engaged in trade, and the public more generally, to discover quickly and cheaply which signs third parties have already claimed*".[19] As a result, the trademark registration procedure is reliant on a register that has accurate data, which is where the graphical representation requirement comes into play.[20] In *Sieckmann* v. *Deutsches Patent-und Markenamt*[21], the European Court (ECJ) elaborated on the rationale of this requirement, and held that

> "*the graphical representation must be "clear, precise, self-contained, easily accessible, intelligible, durable and objective*" (*Sieckmann* criteria).

These seven criteria, according to the ECJ, have a broader significance because they clearly "*define the mark itself in order to determine the precise subject of the protection*"; they allow the registry to fulfil its bureaucratic obligation to examine and process trade marks; and they make it easier for competitors to identify protected marks[22]. Burrell and Handler refer to these as the

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[17]Majumdar et al, "Graphical Representability of Non-Conventional Trademarks Jor. IPR, Vol. 11, Sept. 2006, P. 313-317.

[18]Art15 of TRIPS Agreement 1994 lays down that Members may require a condition of registration, that signs be visually perceptible.

[19] R. Burrell 'Trade Mark Bureaucracies' in G. Dinwoodie and M. Janis (eds.) Trademark Law and Theory: A Handbook of Contemporary Research, 95-98 (Edward Elgar, Cheltenham, 2007). However, Burrell is critical of the claim that trade mark registers accurately reflect the scope of the registered rights; registers often provide ambiguous information.

[20] Graphical representation is an essential element of the definition of a trade mark under sec. 2(1)(zb) and specifically defined in Rule 2(1)(k) to mean "*the representation of atrade mark for goods or services in paper form*". Presumably this will include e-filingforms as well.

[21] Sieckmann v. Deutsches Patent-und Markenamt Case C-273/00, 2003 E.T.M.R. 37

[22]*Ibid*., at 48- 54..

definitional, bureaucratic and informational functions of the trademark register.[23]

When it comes to the scope of exclusive rights, courts have recognised the need of clear and accurate trademark registrations:

> *"The form in which a trade mark is registered is important for a number of reasons. The trade mark as registered is a fixed point of reference by which infringement is to be judged. The registered mark must be considered in the precise form in which it is registered."*[24]

However, the result of applying these criteria in *Sieckmann* was that while scent marks in theory can be registered, in practice a successful registration is not possible. However in latter decisions the ECJ has laid down that for such marks to be registered external clarifacatory references may be necessary for greater precession .

In *Libertel Groep BV* v. *Benelux-Merkenbureau*,[25](*Libertel case*) where the court while dealing with the application registration of pure orange colour for goods related to telecommunications, held that

> *"Merely reproducing the colour on a sheet of paper was not sufficiently durable (due to fading over time) and the written description might be imprecise (how many shades did 'orange' encompass?). However an external reference point such as an internationally recognised colour code was permissible since such codes were deemed to be precise and stable."*

But latter on the United Nations trademark office accepted the colour codes for registration[26] along with a written description of the colour (e.g. 'dark blue') as adequate graphical representation but has also sounded a note of caution while registering these marks that there must be the presence of easily accessible external references justifying registration.

Specific Categories of Non Conventional as Trademarks

1. Smell as Trademark

Smell is one of the most powerful of human senses, that has a power to easily recognise the past fragrances without much efforts. Scent is an effective marketing strategy because of its uniqueness .It helps the company to stand out from the crowd by providing something that others don't have. Scent marks have been granted protection and recognition as a trademark in many countries across the world, and courts have ruled in their favour on the basis that distinctive, non-functional odours are acceptable for trademark

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[23] *See*, R. Burrell & M. Handler *Making Sense of Trade Mark Law*, I.P.Q. 388 (2003). However,the authors are critical of the effectiveness of these functions.

[24] L'Oreal SA v. Bellure, NV, [2006] E.W.H.C. 2355 (Ch) (European Court of Justice);[2007] ETMR 1, 82 (Lewison J.)

[25] Libertel Groep BV v. Benelux-Merkenbureau, (C-104/01) [2003] E.T.M.R. 63 (European Court of Justice).

[26] UK TM Registry Practice Amendment Notice 2/06 (Apr. 12, 2006). ("There are a number of colour identification systems in existence e.g. Pantone®, RAL and Focoltone.

registration.[27]. The registration of smell as a trademark is not always easy and becomes highly controversial all times and poses challenges on the count of distinctiveness and graphical representation. In many cases a particular chemical formula of substance is used to represent scent but there are instances where the companies fulfilled all the required tests successfully without banking on chemical formula and got their smell mark registered For example, "*the scent of roses of a UK Tyre Company, smell of beer in the dart flights of a London-based company are famous examples of smell trademarks*".[28]

Position in United States

The United States trademark system does not create any bar to registration of smell marks be it theoretical or practical as long as the scent to be registered is a distinctive feature of the goods and services and not an inherent attribute or natural characteristic. In its review of Lanham Act,

Scent can fall within federal definition, according to the United States Traders Association Committee[29]. The committee decides that the terms "Symbol or Device" should not be removed or limited in any way to prevent the registration of things like colour, form, scent, sound, or configuration that serve as a mark.[30].

The Trademark Trial Appealable Board (TTAB) ruled in 'Re-Clarke[31] ' that non-functional trademarks can be registered as trademarks. In this example, the applicant made embroidery yarn and sewing thread. She registered for a trademark for "a high impact, fresh, floral fragrance reminiscent of plumeria blossom," which she defined as "a high impact, fresh, floral smell reminiscent of plumeria blossom." The examining authority declined registration on the grounds of non-existence, but an appeal to the Trademark Trial and Appeal Board was successful (TTAB). The Board overturned the judgement, holding that "fragrance can serve as a trademark to identify and distinguish goods."[32] Board, on the other hand, drew a clear distinction between fragrances that are not an intrinsic element of a product and are of identifying nature, and scents that are known for their qualities, such as perfumes, colognes, and so on." Furthermore, in *Qualitex Co* v *Jacobsn Prods Co.*[33], the Supreme Court upheld the Board's decision in the *Re-Clarks* case, holding that "scent marks can be affixed directly to or infused into a product like

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[27] Jerome Gilson and Anne Gilson Londen, "Cinnamon Buns, Marching Ducks And Cherry-Scented Racecar Exhaust: Protecting Nontraditional Trademarks",Vil95 TMR p-773

[28] Smell, Sound and Taste-Getting a Sense of Non-Traditional Marks, WIPO http://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html

[29]Lanham Act codifies the United States trademark law. It grants national protection for trademark in a single statute.

[30] Bhagwan Ashitha, et al., "Economic Rationale for Extending protection to Smell Marks. https://mpra.ub.uni-muenchen.de/id/eprint/5604

[31]Re Clarke. 1990, 17 USPQ2d 1238, 1239 (TTAB).

[32]See. Intellectual property – cases and materials, D. Lauge, M. La France, G. Myers Eds, American Casebook Series, West Book Series, West Group 1989 P. 136-139.

[33]34 USPQ2D (BNA) 161, 1167 (1995)

plumeria blossom-scented yarn or hypothetical raspberry-scented upholstered furniture, or could be affixed as a scratch and sniff or scented card".

Following the decisions of *Re Clarks* case there has been a number of registrations of smell marks in United States. An application which was filed for registration scent mark for lemon scent used for tonner of Digital Laser Printers, Photocopier microfiche printers and tele-copiers . The mark was registered on the ground that combination of lemon smell for printers, photocopiers and tele-copiers is very unusual and lemon fragrance is not the inherent feature of the printers, telecopiers and lemon scent is not required for its commercial success. The United States Patent and Trademark Office (USPTO) has also granted the mark its first extension. In another application "cherry Scent" has been registered for lubricants by USPTO for recreational vehicles with high performance. Registration of two more scents was granted to the same registrant, one for grape scent[34] and strawberry scent[35] for lubricants and another for motor fuels of land vehicles ,aircrafts and water crafts of goods. Thus it becomes clear that in United States the modern trademark law has expanded its protection smell marks and the precedents laid down by the courts in cases of *Re-Clark* and *Qualitex* become guiding principle for the registration. It has been laid down that successful application for registration of scent can be made provided it is proved that the particular scent is not related with the function of the product.

Position of Smell Marks in Europe

The European Union in an attempt to remove barriers restricting free trade and competition, has adopted Harmonization Directives,1989[36] and Community Trademark Regulation 1993[37], which is a historic change [38], Art 2 of the Directives clearly provides that requirement for registration of trademark is its distinctive character and graphical representation but things are not as easy as it seems by just looking at early olfactory mark cases.

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[34] Reg. No. 2596156.

[35] Reg. No. 2568512

[36] First council directive 89/104/EEC of Dec. 21, 1988 to approximate to the laws of Member states relating to trademarks, recitation 9, 1989 OJ (I.40/1) As per directive, "It is fundamental in order to facilitate the free circulation of goods and services, to ensure that henceforth registered trademarks enjoy the same protectionunder the legal systems of all the member states.

[37] Justin A. Harwitz, "Conflicting Marks, Embracing the Consequences of the European Community and its Unitary Trademark Regime," Ariz. Jor. Of Intellectual and Comp. Law Vol 18, 2001 Pg. 245-261. The community trademark regulation creates community-wide mark, enabling a mark holder to maintain a work throughout European Union through use in single country.

[38]Luis-Alfonso Duran (1995), "The New European Trademark Law," Denv. Jor. Int'L & Poly Vol 233 Pg. 489-499. The European Union adopted the regulation and directive in an attempt to harmonise EU Trademark law and remove interval barriers restricting free trade and competition.

The case *Ralf Sieckmann* v. *German Patent Office*[39] was the first case of smell marks which came before the European Courts. The main issue was that whether Olfactory mark described as "Balsamically fruity scent with a slight hint of Cinnamon" could be registered as a trademark for advertising, education, medical, agricultural and scientific services

The application was made by giving a, description of the chemical formula used and sample of the scent

Two main issues were involved in this case

a) If a mark can't be reproduced visually, can it be reproduced otherwise.
b) Whether requirement of graphical representation under Art. 2 is met by chemical formula or a description or a sample or combination of these elements.[40]

The Court observed

"Art. 2 of trademark directives is not exhaustive, the provision does not expressly exclude signs which are not visually perceived like odours. Instead Art. 2 shall be included to mean a mark which even can't be visually perceived provided it is graphically represented and graphical representability must fulfil the two main criteria:

1. *It must be complete, clear & precise so that object of the right of exclusivity is immediately clear.*
2. *It must be intelligible to persons having an interest in inspecting the registers i.e., other manufactures and consumers.*[41]*"*

On the basis of the criteria laid down,the court refused to grant registration to the smell mark on the following grounds

1. *"Representation as a drawing was not possible.*
2. *Representation by chemical formula is not sufficient as formula represents the substance not its smell or odour.*
3. *Representation by chemical formula lacks clarity and precision, only because of the fact that very few people would have requisite technical knowledge to interpret odour but also owing to the reason that same substance would produce different smells at different temperature, concentration etc.*
4. *Deposit of sample of substance with registry was not feasible alternative as firstly it was not graphical representation and secondly odour being volatile may fade and even disappear over the period of time".*[42]

Thus the court held that even if the smell mark in question is distinctive but it cannot be registered because clear and precise graphical

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[39]Case No. C-237/00 before the ECJ 2003 ETMR3T http://www.copat.de/markenformers/c-273-ooEn.pdf.

[40]Seiko Hikada and Nicola Tatchell et.al., "A Sign of the Time: A Review of Key Trademark Decisions of European Court and their Impact upon National Trademark Jurisprudence in EU," Trademark Rep. Vol 94 p. 1105

[41]Majumder et al, "Graphical Representability for Non-Conventional Trademarks," JIPR Vol. 11, Sep. 2006 P. 313-317.

[42]Id, p. 315

representation is impossible . But in latter case of ***Shield Mark Bv.***[43] The above finding No. 2 in Sichmenn's case is in contrast with finding of same court where court allowed the registration of sound marks by way of using clefts and staves. Therefore, on the analogy of sound marks smell marks can also be registered and graphical representation requirement can be fulfilled by chemical formula along with other standard information that is required precisely and accurately to reproduce the exact scent.[44] But the Seickmann criteria was again applied by the ECJ in case of *Eden* v. *OHIM*[45].In this case too, "the scent of ripe strawberries" for shaving creams was rejected for the want of graphic representation .

The opinion of the courts reveal that the European Union is hesitant to grant the intellectual property rights to smell marks and arguably illustrates its opposition to registration of the same .[46]

Position of Smell Marks in U.K.

The law relating to trademark in United Kingdom is governed by Trademark Act of 1994.The definition of the trademark is broader under the Act and almost in line with the United States law. A number of applications have successfully been filed under this Act for registration of non conventional marks be it smell ,sound or shape marks . The basic premise behind registration is that apart from the visual sense human response can be stimulated by other senses as well[47]. The trademark registry of U.K has registered a smell mark with description of, "*the strong smell of bitter bear*", applied to flights for darts as a sufficient description to satisfy the graphical representation requirement.[48] "*Smell reminiscent of roses*" applied to tiers was also accepted as a sufficient descriptions[49] and it was known as UK's first olfactory trademark,[50] which was granted to Japan's Sumitomo Rubber company. The mark was latter transferred to Dunlop tyres. But in case of R.V. John Levis,[51] application to register for a mark with a description of "*the smell aroma or essence of cinnamon*" for furniture was refused on the ground that "*verbal description of smell ,electronic sensory*

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[43]Sheild Mack Bv. V. Joost Kist hodn Memex. Case No. C-283/01 before ECJ.

[44]Marsoof Althaf, "The Registrability of Un-Conventional Trademarks in India and Sri-Lanka: A Comparative Analysis," Jor IPR Vol. 12, Sep. 2007, Pg. 497-506.

[45]2006, ETMR. 14.

[46]Melissa E. Roth, "Something Old, Something Borrowed, Something Blue: A New Tradition in NonTraditional Trademark Regulation," Cardozo Law Review, Vol. 27, P. 457.

[47]Helen Britan, "The UK Trademarks Act 1994: An Invitation to Olfactory Occasions," EIPR, Vol. 17, No. 8, P. 378-384.

[48]http://www.copat.com/markenformen/eugh-kom/pinsent.pdf

[49]Case of Sumitomo Tires – http://www.jenkins-ip.com/sert/t-trad03.htm.

[50]Aditi Dixit & Anishi Jain, "Unconventional marks: The Trademark umbrella widened," available at http://www.jurisonline.in/fetes/unconventional trademark.doc. Also see http://law.nus.edu.sg/5jls/articles/SJLS 2005J-1.pdf.

[51] 2001 PRC 28.

analysis by chromatography technique would not be sufficient to satisfy the graphical representation".[52]

Thus, the courts in the United Kingdom feel that verbal description should be held to a level that is widely available. As a result, electronic sensory analysis using the chromatography approach can be employed to satisfy the graphical requirement by properly disclosing the test conditions used. It can thus be argued that the case would have been determined differently, if it had been decided under the standards.[53]

Position of Smell Marks in India

The definition of trademark under Indian Trademark Act 1999 does not expressly include the non conventional trademarks within its ambit but it is wider in its scope[54].It uses the words of widest possible amplitude. It inter alia defines "trademark as a mark which is capable of graphical representation and distinguishing the goods and services of one person from another". This expression has cast net on wide waters . it would include all non conventional trademarks that are capable of distinguishing goods and services and capable o being graphically represented which shows the intention of the law makers to be flexible in registering the non conventional trademark but to what extent these marks will be registered is still a question to be answered.[55]. In relation to inclusion of Smell as a trademark under Trademarks Act 1999, the law does not include smell within its scope but there is also not any specific exclusion. Though the definition of mark[56] under Indian Trademark Act 1999 resembles Sec 1(1) of UK Trademarks Act and E.U. Directives, with a difference that the Indian law does not require a mark to be usually perceptible like EU Directives. Smell marks may be difficult to register because pictorial representation is difficult, but if a smell is to be registered as a trademark, it must be capable of graphical representation and must be distinctive. The chemical formula and a sample of the odour are usually provided to meet this requirement.[57] Thus Indian law lag behind in providing expressly a workable definition and

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[52]Bentley and Sherman, Intellectual Property Law, Oxford University Press, Ist Ed. 2001 Pg. 742, footnote 43.

[53]Studipta Battacharjee and Ganesh Rao,"Broadening Horizons of Trademark Law:Registration of Smell, Sports,Merchandise and Building Design as Trademarks",JIPR,Vol-10,Mar 2005,pg. 119-126.

[54]In India, initially trademark was regulated under the Trade & Merchandise Marks Act 1958 which recognized only words, designs pictures numerals and all such marks which are clearly visible and affixed to goods as trademark. In 1999, the trademark law of India was changed to bring it in harmony with TRIPS . Sec 2(1)(zb) of this Act defines trademark which means a mark capable of being represented graphically and which is capable of distinguishing the goods and services of one person from those of other and may include shape of goods, their packaging and combination of colours.

[55]Kailasam K.C. and Ramu Vedaraman, "Law of Trademarks and Geographical Indications, 2nd Ed, Wadhwa & Co. Nagpur, 2005, P. 128.

[56]Mark includes device brand, heading, label, ticket, name, signature, word, letter, numeral shape of goods, packaging or combination of colours or any combination thereof.

[57]Deewedi Avantika, "Unconventional Trademarks and Position in India" SSLC online Journal 2006. Available at http://symlaw.ac.in/doc/avantika.pdf

protection to non conventional trademarks and principal of graphical representation is still a big impediment in registration of these marks.

Sound as Trademark

A sound mark is a mark in the nature of musically notated songs and everything auditory. In comparison to other non-traditional trademarks, it has the most registrations and is growing in popularity around the world, particularly in the United States[58].The purpose of a sound mark is to assist consumers in more precisely and accurately identifying a product or service. Music has the potential to appeal to emotions directly. Sound trademarks are gaining popularity since they do not require any translation or scripting to be understood. Sound markings, unlike other non-traditional trademarks, can be graphically represented using a succession of musical notes, with or without the use of words. While musical notes today shake the world and help people recognise brands, sound as a trademark is not always accepted. As of now, sound marks are protected by only around 30 jurisdictions, a small percentage of the over 180 jurisdictions where trademark rights can be registered or otherwise claimed. The sound of *Harley Davidson*, *Nokia Tune*, and others are some of the most well-known and valued sound brands. *Metro-Goldwyn-Mayer* first used the roar of a lion to signify the start of a movie in 1924, but it wasn't until 1985 that he filed a trademark application to register the sound mark (USPTO Registration 1395550). The three notes were initially used on television by NBC in 1961, and they were first used on radio by NBC in 1927 (USPTO Registration 523616 (expired) for radio services and 916522 for television services, both submitted in 1970). Intel recognised the importance of a good mark for their products. When the Intel bong® sound mark was created in 1994, Intel recognised the significance of a sound mark for usage in conjunction with technology products. Furthermore, noises such as Tarzan's yell (75332744) and the drums, trumpets, and strings chime from the iconic film Twentieth Century Fox (74629287) have been preserved. The Indian trade mark registration recently registered a sound mark for Yahoo, followed by another for Allianz Aktiengesellschaft, according to reports.[59]

Position in European Union

European Union registers the sound marks as a trademark but under quite restrictive conditions. The principle laid down by the European courts in *Seickmans case* is a touchstone for all the non conventional trademarks. This seven-fold requirement of graphic representation a "clear, precise, self-contained, easily accessible, intelligible, durable and objective" representation applies across the board to all marks.

The most important case of sound marks in European Union is *Shield Mark BV v. Kist*[60] in 2003. In the present case a Dutch firm was holding a set of

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[58] Mohan Dewan, Registering Shapes in India: Guidelines and Processes, Lexology ,2020 https://www.lexology.com/library/detail.aspx?g=94e581ac-5333-4a72-8dfc-111d746af82d

[59] Dev Gangjee, Non Conventional Trademarks in India, Vol. 22(1) *National Law School of India Review* 2010.

[60]

registered sound marks consisting the opening bars of Beethoven's "*Fur Elise*" and one more set of a cock crowing, for providing service of education on intellectual property. The registrant sued the defendant who used those marks to advertise seminars on intellectual property, including trademark law. The Dutch courts upheld an unfair competition complaint but dismissed trademark infringement claims on the basis that sound marks were not registrable. The case was referred to the E.C.J. on the ground whether sound mark can be registered. The court ruled:

> "*The sound marks were registrable but must comply with the requirement of graphic representation already mentioned. The marks were registered in a variety of forms except, oddly enough, by reference to any sound recording or sonogram; so the E.C.J. did not rule on two of the more obvious methods of representing a sound mark. As regards "Fur Elise", it ruled that representing the sound as notes in ordinary lettering –E, D#, E, D#, E, B, D, C, A – was inadequate: the lack of any indication of pitch and duration left the mark fatally undefined. The court however accepted the validity of a description of the mark by means of sheet music in bar and stave notation with tempo, accidental, and rest marks: this form, it said, satisfied the requirement of graphic representation. The other marks in issue in the case – the crow of a rooster – were all found to be unregistrable in the forms presented. Simply saying "cook crowing" is no description because roosters crow differently. Thus, we again observe the ECJ's retreat from a strict interpretation of the Sieckmann criteria. i\n Shield Mark the court had to determine the adequacy of graphical representation for both musical*[61] *and non musica*l[62] *sound marks*."

Even if such a depiction is not immediately understandable, the court said, "the reality remains that it may be easily intelligible." For non-musical sounds, however, a description in words ("the sound of a cock crowing") was insufficiently specific, and phonetic pronunciation (for example, "Cock-a-doodle-doo") caused a gap between the sign as registered and the real sound of a cock crowing. This created a conundrum: how non-musical noises be graphically represented?

The court held that for musical sounds to be registered as trademarks, the notation must be sufficiently detailed, such as a stave divided into bars and showing, in particular, a clef, musical notes and rests whose form indicates relative value, and, where appropriate, accidentals, with all of this notation determining the pitch and duration of the sounds. In response to the claim that not everyone can read musical notation and that it may be difficult to understand, the court suggested that even "*if such a representation is not immediately intelligible, the fact remains that it may be easily intelligible*". Jurisdictions with a more flexible representation requirement, such as the United States, have avoided this issue by mandating the deposit of a digital recording of the sound, which is then accessible online on the trade mark register. The European Union Office of Harmonization, on the other hand, found that "the markings in question were complex and partial substitutes of

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[61] The first nine notes of Beethoven's popular composition Für Elise.
[62] The sound of a cock crowing.

sounds" and that "only digital sound recording deposit and some type of graphical representation are required for registering sound marks."[63]

The EU has registered the signature tone of Nokia Corporation as below:

The trademark law of European Union does not directly include the sound marks but European court of justice has held that sounds can be registered if their use distinguishes goods and services of one undertaking from those of other undertaing .To be registered in the EU, in addition to the traditional requirement, the sound mark must also fulfil the criteria laid down in *Sciekmann's* case. Thus, musical notations that describe the sound fit these requirements, whereas onomatopoeic descriptions do not. This means the musical notes in the form of musical notation can be registered as sound marks but not the noises and mere sounds without being represented graphically, like barking of a dog etc. The trademark law of European Union does not directly include the sound marks but European court of justice has held that sounds can be registered if their use distinguishes goods and services of one undertaking from those of other undertaing .To be registered in the EU, in addition to the traditional requirement, the sound mark must also fulfil the criteria laid down in *Sciekmann's* case. Thus, musical notations that describe the sound fit these requirements, whereas onomatopoeic descriptions do not. This means the musical notes in the form of musical notation can be registered as sound marks but not the noises and mere sounds without being represented graphically, like barking of a dog etc. Article 3(3)(g) EUTMIR permits a sound mark may now be submitted as either an audio file or an accurate representation of the sound in music notation. According to the most recent EUIPO Guidelines, the applicant will be asked to retain only one audio file if they submit both a music notation and an audio file. Music notation can be delivered as an A4 sheet or as a single JPEG file. Pitch, tempo, lyrics (if any), and other factors that are required for understanding the melody must all be included in an accurate music notation. The audio file needs to be in MP3 format, not take up more than two megabytes, and not loop or steam. The sonograph will be deleted from the file if it is submitted along with an audio file. Additionally, the verbal description of the sound alone is not permitted beginning of October 1, 2017, according to the EUIPO Guidelines. because the subject matter of the registration is defined only by the depiction of the trade mark. It should be noted that the EUIPO Guidelines are primarily the EUIPO's thoughts on the broad situations presented in the case law and are not legally enforceable.

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[63] Decision No Ex-05-3 of the President of OHIM of 10 October 2005 concerning electronic filing of sound marks *available at* http://oami.europa.eu/en/office/aspects/pdf/ex05-3.pdf.

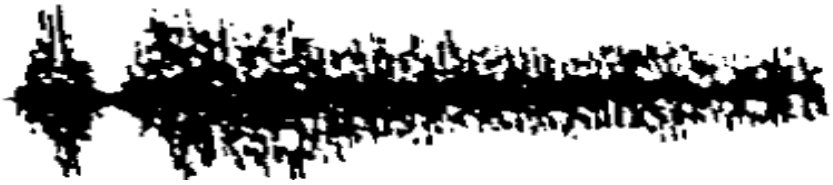
Position in United States

In United States sound trademarks are very common. The trademark rules in U.S and Trial and Appealate Boards have registered those sound marks which are unique, different, or distinctive and without proof of secondary meaning, but with a note of caution that sounds that resemble or imitate commonplace sounds require proof of acquired distinctiveness Among sound marks that have been registered, are the NBC Chimes and the Harley Davidson Engine sound 'Sweet Georgia Brown' for the Harlem Globetrotters basketball team, the spoken letters AT&T with distinct musical flourishing background, the advantageous services jingle, Intel and the three-second chord sequence used with the Pentium processor, THX and its Deep note Federal Signal Corporation and the sound of their "Q2B" fire engine siren, and the Tarzans roar and Twentieth Century Fox[64] This could be a reference to Harley Davission's attempt to register a trademark for the sound of a motorcycle exhaust produced by a V-Twin common crankpin motorcycle engine when the goods are used. This seemingly unique application has sparked a flurry of inquiries. Without a doubt, the Harley Davison's exhaust sound was distinct, but Japanese manufacturers (Suzuki, Yamaha, and Honda) and American manufacturers (Poloris) claimed that the sound produced by other motorcycles was identical. However, before a sound mark could be registered, the USPTO required proof of acquired distinctiveness. "Applicants for registration must be able to establish that their sound has acquired distinctiveness and functions as an indicator of source, in addition to giving proof that the sound has acquired distinctiveness and works as an indicator of source." [65]

In an another case *Metro Goldwyn Mayer (MGM) Corporation* had applied for the registration of a sound, that of a Lion roaring, by submitting a sonogram for the "Lion's roar". The application has been refused in the EU. Interestingly, the same trademark has been granted in the US. It was held, "*whether a sound can serve as a trade mark depends on the aural perception of the listener which may be as fleeting as the sound itself unless, of course, the sound is so inherently different or distinctive that it attaches to the subliminal mind of the listener to be awakened when heard and to be associated with the source or event with which it struck.*" Thus if a sound is lingering in the minds of the listeners which connects him/her to the source ,then sound can be registered as a Trademark.

MGM's Roar of a Lion" is registered as shown below:-

":



[64] http://www.activatedspace.com/Installations/endangeredsounds/USA%20Registered.html

[65] Morghan, Lewis & Bockius, Intellectual Property Handbook, 5th ed,Washington D.C,2000,p-58.

Position in India

The Indian Trademark Act does not provide for registration of sound marks but it does not expressly exclude "sound marks" from registration nor is there any requirement that only visually perceptible trademarks can be registered. It only provides that the trademark must be "capable of being represented graphically" besides having the quality of distinguishing the goods and services of one from other. Indian trademark registry has registered a sound mark for Yahoo[66]followed by another for Allianz Aktiengesellschaft.[67] The Delhi High Court has ruled in favour of a trade mark infringement case involving the form of Zippo lighter,.[68] India's largest private sector lender, ICICI Bank has got a trademark registration for its corporate jingle "Din Chik Dhin Chik" so Yahoo's yoodle, (the first sound mark in India) and ICICI's jingle (the first sound mark to Indian entity) are the two best examples of sound mark registration in India . In addition to these, sound marks in the country include Britannia Industries' four-note bell sound, Nokia's default ring tone, MGM's lion's scream, Raymond: The Complete Man's musical sequence, Edgar Rice Burroughs' Tarzan shout, National Stock Exchange's theme tune, and others.[69].

To register a sound mark as a trademark in India, an MP3 recording of the jingle, chime, or musical composition of not more than 30 seconds must be given to the office or registrar of trademarks, along with a graphical depiction of the sound. Furthermore, it must be stated explicitly that the application is for the registration of a sound; otherwise, the trademark sought will be assumed to be for a word and will be considered as such.

Assessing distinctive character of sound marks

For determining the distinctive character of a sound mark, it is very important to determine whether the consumer with average intelligence will in relation to a particular sound identify te undertaking exclusively associated with the goods or services .

According to Draft Mannual

> *"Where the mark consists of a non-distinctive sound but includes other distinctive elements, such as words it will be considered as a whole. prima facie, no sound marks will qualify for acceptance without evidence of factual distinctiveness. In particular, the following will fall in this category:*
>
> *a. very simple pieces of music consisting only of only I or 2 notes;*
>
> *b . songs commonly used as chimes:*
>
> *c. well known popular music in respect of entertainment services, park services;*

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[66]P. Manoj, *Yahoo Awarded India's First Sound Mark; Nokia in Queue* LIVE MINT, Aug. 22, 2008; *Yahoo! Yodels into India's Trade Mark Registry* MANAGING INTELLECTUAL PROPERTY WEEKLY NEWS, Sep. 1, 2008.

[67]*Sound Mark Granted*, *available at* http://spicyipindia.blogspot.com/2009/07/yet-another-sound-mark-granted.html.

[68]*Zippo*, IA 7356/2006, (High Court of Delhi) (13 July 2006) (H.R. Malhotra, J).

[69] Labna Kably, Jingles and Chimes can make Trademark Noise, The Times of India, Mar. 27, 2017.

d. *children's nursery rhymes, for goods or services aimed at children;*
e. *music strongly associated with particular regions or countries for the type of goods/services originating from or provided in that area".*[70]

Thus it is evident that sound can be registered as trademark. There is no specific mention of sound marks in Indian law, nevertheless the Indian Trade Mark Office is facilitating the registration of sound marks under trademark, if the sound is distinct and able to be represented graphically.

Conclusion

With the technological advancement, the relevance, acceptance and demand of non conventional trademarks is growing worldwide. There is nothing to show except on the grounds of graphical representation that different jurisdictions treat non-traditional trademarks differently from traditional trademarks. The questions of distinctiveness and graphical representation are the main benchmark on which these marks are judged for registration in different jurisdictions as these marks pose certain difficulties in terms of interpretation and applicability of traditional trademark principles. In the competitive global market where there is a cut throat competition and the newer strategies are adopted by the enterprises, the need of the hour is to have a uniform policy among TRIPS member states for registration of non-conventional trademarks No doubt over the period of time more and more countries are relaxing the laws relating to interpretation of trademark and various national laws are being amended to include non-traditional trademarks explicitly so that traders come up with entirely new avenues to explore more and more branding options. The change has been recently witnessed by implementation of Euroean Union Trademark Implementation Regulations (EUTIR) which revived the whole law relating to registration of non traditional trademarks by taking away the requirement of graphical representation which otherwise used to be big hurdle for registration and thus paving way for more and more non conventional marks to be registered. The graphical representation requirement was considered outdated, and part of 'obvious historical leftover. These provisions can be praised for their technology and method neutrality, which is conducive to innovation. In principle each mode of representability is allowed as long as it complies with the remaining *Sieckmann* requirements for representability 'clear and precise, self-contained, easily accessible, intelligible, durable and objective'which are still relevant.[71] The Lanham Trademark Act of 1946 outlines the parameters of a trademark as well as the procedure for obtaining a federal registration for a trademark from the U.S.PTO. This law governs trademark protection at the federal level. However, a trademark must satisfy two requirements in order to be eligible for trademark protection: a) it must be unique, meaning the mark must set apart goods manufactured by one person from those made by another; and b) it must not

[70] Draft Mannual 5.2.2.2

[71] Friedmann, Danny,EU opens door for sound marks: will scent marks follow? 10(12) JOURNAL OF INTELLECTUAL PROPERTY LAW AND PRACTICE (Oxford University Press December 2015) 931-939.

create a possibility of confusion with another mark. If a trademark is "inherently unique," it is protected by law the moment it is used. In order to get legal trademark protection for marks that are not "inherently distinctive," the owner must prove that the mark has acquired a "secondary meaning" or "acquired uniqueness." "Fanciful," "arbitrary," and "suggestive" trademarks are the three categories of inherently distinctive trademarks. The Trademark Act, 1999 is carrying the relic of old Trade & Merchandise Marks Act, 1958 that was not in harmony of the new technological developments. The new Act was mainly enacted to include the new developments in the area of Trademarks. This new Act contained definitions of the old Act. These old definitions should have been properly fine tuned to suit the new developments. One of such definitions is provided in Section 2z(b) defining Trademark. This definition makes it necessary that Trademark should be "graphically" represented. This requirement in no way serves any purpose of "Trademark" but is superfluous word borrowed from the Trademark law in force in other jurisdictions. This word is now an impediment for registration of new trademarks that cannot be "graphically" represented like "scent mark". It appears that the requirement that mark be "graphically" represented was necessitated for documentation purposes because of lack of alternative mode. For those signs where distinctive character can be proved, the requirement of graphical representation should not bar registration. Now technology has moved ahead and documentation of non conventional mark is possible by other means also not necessarily "graphically". It is therefore suggested that the word "graphically" be omitted from the definition of Trademark or the word "otherwise" be added to the word "graphically". Similarly the definition of "mark" provided is section 2(m) has to be amended so as to expressly include new technological developments. Otherwise, Courts have to fall back on the flexible interpretation of the expression " or any combination thereof"[72] provided at the end of the definition of "mark" as provided in the Trademark Act, 1999.

Furthermore, when it comes to the registration of unusual marks, the requirement of graphical representation needs to be liberalised, which is a significant modification that ha to be carried in the Indian trademark law. Checking whether such unusual markings are distinctive and able to set one product or service apart from another is a crucial consideration for the registration of such marks. An unconventional mark should be eligible for registration and the criteria of graphical representation should be reduced if it has developed a distinctive and original character that aids the general public in recognising and associating the goods or services with their source. It has been widely noticed and felt that the graphical representation requirement alone prevents the registration of non-conventional trade marks under the Indian trade mark regime. It is a high time to make these changes suggested changes in the Indian trademark laws so that India can compete with the dynamic IP regimes used by the industrialised countries across the world.

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[72] Section 2(m)- Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, share of goods, paking or combination of colours or any combination thereof.

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New Beginning in Intellectual Property Rights: The Role of Artificial Intelligence as Authors & Inventors – Legal Analysis

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Abstract

It's notoriously difficult to predict the future of technology. Indeed, anticipating how Intellectual Property legislation and regulation should be moulded to fit the needs of future technological breakthroughs in copyright and patent law. It is a difficult challenge that can often result in amusing projections. The current debate about the future of artificial intelligence shows how hard it is to predict how industries will change the creation and inventions.This article mainly focuses on the concept of author and inventor as a prerequisite for copyright and patent protection of AI discoveries. The entire discussion takes place in the context of IP legitimacy; we address authorship and invention rights for ideas generated by AI through a theoretical discussion of IP protection and access.

Keywords: Artificial Intelligence, Copyright, Intellectual Property, Technology, Patent

Introduction

Predicting the future of technology is relatively difficult. Envisaging how legislation and regulation should be structured to focus on new technological breakthroughs can sometimes lead to some interesting speculation. The current discussion on the future of artificial intelligence (AI) reflects the difficulty of predicting technological growth. Within this framework, two extremes can be identified: those who see AI as essentially a glorified form of data analysis and statistical reasoning, and those who see AI as the road to "super-intelligence" beyond humans. Regardless, in the near future, it seems plausible that the number of robots is capable of performing more activities in a more efficient and autonomous manner than humans' imagination. These duties include creating artistic, technical, and scientific inventions that may be protected by intellectual property (IP) law. Because of

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the obvious economic significance of these innovations, one may wish to "control" them through intellectual property rights (IPRs). How to understand the ideas of "authorship" (copyright) and "inventor" (patent) of creations and inventions made by AI is a key question in this context.

The main aim of IPR is to protect the fruits of human thought. An IPR is a limited set of exclusive rights, which may be natural or legal, granted to "people." Consequently, developed countries and developing countries' copyright and patent laws traditionally relied on the concept of an author or inventor as a natural person. In fact, this concept is embodied not only in the legal definitions of authors and inventors but also in terms such as "labor", "innovation," and the prerequisites for obtaining protection. AI naturally undermines these traditional, well-established legal concepts by potentially allowing "autonomous" innovative production. Under current rules, can AI-generated works or inventions be protected by IPRs? Is it necessary to make our authors and inventors seem and be thought of as real people? What are the advantages and disadvantages of such a change?

This article mainly focuses on the concept of author and inventor as a prerequisite for copyright and patent protection of AI discoveries. This question is important not only because authors and inventors have ownership of their copyrights or patents, but (more importantly) because, without a true author or inventor, IPRs may be rejected or found invalid in courts or unable to be executed. The article begins with an overview of some basic AI technology concepts and examples of AI-generated output that may qualify for IP protection. The second part looks at copyright and patent issues in the context of artificial intelligence, with particular attention to the current definitions of authorship and inventorship under European copyright and patent law. The entire discussion takes place in the context of IP legitimacy; we address authorship and invention rights for ideas generated by AI through a theoretical discussion of IP protection and access. We concluded that the law should say that only "natural" people can be considered authors or inventors and that only natural people should be considered authors or inventors if they make the necessary plans for production or invention.

An Overview of Artificial Intelligence

AI is a branch of technology whose goal is to create machines that mimic human intelligence. The main goals of AI are to improve reasoning, knowledge, planning, learning, natural language processing (such as understanding and communicating language), vision, and the ability to move and manipulate objects. Some people aren't sure if computers will ever be as smart as humans, but AI has made a lot of progress in consciousness, memory, learning, prediction, and experience, all of which are important parts of being conscious. Regardless of the philosophical debate, artificial intelligence could be a good cure for certain types of cancer or produce the next great American novel in the near future. AI is now being used in large research hospitals,

entertainment, and publishing. However, the true origins of AI may be traced back to the war against Nazi Germany[1].

At the height of World War II, Alan Turing's computer cracked an encrypted message sent by Nazi headquarters to his naval fleet. The concept of independent computing devices has been around since the creation of the mechanical differential engine by Charles Babbage in the 18thcentury, and the introduction of electronic digital computing devices in the 1940s ushered in the "information age," in which computer systems were used to not only contribute to the war of resistance but also greatly expand the industrial revolution and push technological society to new heights. Computer systems have been made for more advanced tasks like data analysis and automating business processes. They have also been made to do tedious calculations.

As Alan Turing anticipated in 1945, artificial intelligence enabled these systems to go far beyond simple mathematical problems, impressing many world-champion mind gamers[2]. Alan Turing predicted that computers would be able to learn beyond their original instructions: "[I am] like a student, learning a lot from his master, but adding more through his own work." When this happens, I think it's necessary to think of computers as intelligent." Over the past 50 years, we've seen machines do a lot of what Turing described. In 1997, chess champion Garry Kasparov was beaten 4-1 by Google's AlphaGo software, claiming he could "sniff" a new kind of intelligence at the table. In 2016, Li Shishi, one of the best Chinese Go players, was defeated 4-1 by Google's Alpha Go program[3]. 3: While watching the game, Fan Hui, the European Go champion at the time, described AlphaGo's moves as "very cute." Both games are extremely difficult to master, and the best players in the world rely on strategy, creativity, and intuition to outsmart their opponents. However, these two games, relying on a set of logical principles, seem to place them in the "cab" of computing systems. In 2011, however, IBM's Watson took on a more difficult human game, Jeopardy! which required Watson to interpret written language, infer accurate answers with tact and interesting clues, retrieve answers quickly, and ask questions out loud. Watson finally defeated two of the greatest dangers! All-time champions, including Ken Jennings, believe Watson's artificial brain is similar to their own.

Beat the world champions of chess, Go, and Dangerous Chess all at the same time! AI is also being used to create complex artwork, which is astounding. Back in 1956, Martin Klein and Douglas Bolitho programmed computers to produce a variety of tunes (up to 4,000 per hour), including the Push Button Bertha. They tried (and failed) to register with the Copyright Office. Today, Google's Magenta uses neural networks to simulate "human

[1]History of Artificial Intelligence, accessed from https://www.researchgate.net/publication/322234922_History_of_Artificial_Intelligence.

[2]Alan Turing and the beginning of AI, accessed from https://www.britannica.com/technology/artificial-intelligence/Alan-Turing-and-the-beginning-of-AI.

[3]How Google's AlphaGo Beat a Go World Champion, accessed from https://www.theatlantic.com/technology/archive/2016/03/the-invisible-opponent/475611/.

brains" to make music without using specific algorithms or human input. IBM's Watson is used to cut together movie trailers by looking at the themes of the finished film and putting them together in a way that hints at a longer story.

Over the past 20 years, computers have been used to generate ideas and potentially patentable innovations in terms of ideas. For example, computer scientist Stephen Thaler, who developed an "idea machine" using his own neural network, claims to be the inventor of the subject of a 1998 patent, "Neural Network-Based Prototype System and Method[4]." In addition, Creativity Machine has created chemical formulations for new super hard materials that can be easily enhanced to incorporate known composite fabrication methods, allowing them to be put into practice without much help from anyone. They meet general requirements for patented compounds. Other examples include the use of genetic algorithms, a problem-solving method that mimics the concept of evolutionary genetics, to independently recreate many of the innovative computer systems that have been previously patented. Finally, IBM's Watson has been improved to support "computational creativity" by combining deductive reasoning with huge datasets. For example, IBM created new methods for Watson and provided it with a wealth of data on nutrition, flavor chemicals, the molecular structure of food, and tens of thousands of recipes. In response, Watson assessed a dizzying array of possible meal combinations and created a variety of dishes using different culinary ingredients, some of which surprised human chefs. Watson has probably found more than one patented recipe, since mixing ingredients can lead to new combinations of substances or because the steps in making a meal can be seen as being new enough.

Capability of AI in Future

Even though the AI developments of today are remarkable, they only show how basic AI systems will be in the future. AI systems fall into three categories: weak AI, strong AI, and super intelligence[5]. Weak AI systems, such as IBM's Deep Blue chess champion or Thaler's Creativity Machine, are designed for specific tasks, such as playing a game or generating answers to specific questions. Strong AI, on the other hand, refers to more general intelligence, similar to human reasoning and problem-solving abilities. In theory, these technologies could replace humans in the workforce and be capable of the same amount of innovation and ingenuity as any individual. Lastly, there is super intelligence, which "far exceeds the best human minds in every field, including scientific innovation, general intelligence, and social skills."

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[4]Neural network based prototyping system & method, accessed from, https://patents.google.com/patent/US5852815A/en.

[5]What are the 3 types of AI? A guide to narrow, general, and super artificial intelligence, accessed from https://codebots.com/artificial-intelligence/the-3-types-of-ai-is-the-third-even-possible.

While super-intelligence may take decades or even centuries to emerge, weak and strong AI systems exist today. Weak AIs are currently playing (and winning) a variety of complex human games; increasing human productivity; creating a variety of artworks (including music, poetry, visual design, and movies); and assisting industrial systems to be safe, stable, and reliable. Strong AI, on the other hand, is still in its infancy, but many experts believe that 2017 will be the "tipping point" for AI, as tech giants such as Microsoft, Google, Amazon, IBM, and Intel have positioned AI to guide them into the future of business (or at least design new products for the democratization of AI). For example, Google, the company behind AlphaGo, created Deep Mind AI, which is based on the same principles of how the human brain functions, "learning" and building skills while tackling a variety of problems[6]. Watson is also IBM's attempt to build a powerful AI system with an approach to deductive reasoning and pervasive use across industries[7]. Clearly, with the right incentives, advances in AI will continue to be made with such a large investment.

What exactly do we mean when we say something is "AI-generated"?

According to Russell and Norvig, AI is "the study of agents that exist in their environment and perceive and act[8]."""[A] area of research aimed at explaining and replicating intelligent behavior in terms of computational processes[9],"Sharkoff said. The latter term emphasizes the importance of imitation and behavior. In fact, we may use words like "sense" and "think" when we see the behavior and products of AI systems without realizing their inner workings—as if they were "black boxes" that we couldn't open. But when we see how a system works in the form of algorithms, codes, or the ideas that support them, we may prefer to use terms like "input" and "process" instead[10].

What differentiates AI systems from other software systems is their increased autonomy. To better understand what this part has to do with the current topic, think about some common tools for making art. Even if it contributes to the creation of the novel, the word processing system has little to do with the final product (the novel). The user of the system is the author of the novel.[11] In other words, such a system is clearly a simple tool similar to a paintbrush. Even though different tools can be used to make different things, the person who uses them (the author) is still responsible for the creative work that goes into making any given thing.

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[6]What AlphaGo Can Teach Us About How People Learn, accessed from https://www.wired.com/story/what-alphago-teach-how-people-learn/.

[7]Accessed from IBM Webpage https://www.ibm.com/in-en/watson.

[8] Russell, S., Norvig, P. (2016). Artificial Intelligence: A Modern Approach. (n.p.): CreateSpace Independent Publishing Platform.

[9]Schalkoff, R. J. (1990). Artificial Intelligence: An Engineering Approach. Singapore: McGraw-Hill.

[10] Larson, E. J. (2021). The Myth of Artificial Intelligence: Why Computers Can't Think the Way We Do. United Kingdom: Harvard University Press.

[11]Janna, A. & Lee, R. (2018). Artificial Intelligence and the Future of Humans. Accessed from https://www.pewresearch.org/internet/2018/12/10/artificial-intelligence-and-the-future-of-humans/.

The opposite is a system that allows the user to choose from a small number of possible outcomes. Consider the method used to create an avatar on a computer gaming platform such as Microsoft Xbox or Sony PlayStation: The user can choose the height and weight of the avatar, as well as its gender, hairstyle, hair color, and other characteristics[12]. The system is mostly made up of a series of multiple-choice questions. Different answers lead to very different results, but the user's creativity doesn't come close to that of the artist who designs the body, face, and clothing of the work[13].

There is a continuous continuum between tools in the Brush group (such as word processors) and tools in the Avatar category. Many AI systems are somewhere in the middle, requiring a lot of user input while still being able to guide and change the results[14].

Another important component of many AI systems, particularly those based on machine learning, is data. Machine learning is a branch of artificial intelligence that studies algorithms and systems that improve their performance on a given task when more data is provided[15]. Data quality is critical to the effectiveness of machine learning-based AI systems. Therefore, the functionality of the data provider must also be recognized. To continue with the avatar example, the system can get the graphics needed to make the avatar from third-party data sources, such as pictures or paintings, that were not meant to be part of the avatar.

Here are some examples of AI systems that are already on the market that question the idea of authorship and invention.

The painting, dubbed "The Next Rembrandt," created entirely by artificial intelligence software, is now hanging in Paris alongside the eponymous painter's most famous work[16]. The Dutch multinational banking group ING worked with Microsoft, the Rembrandt House Museum, and others to create an algorithm that analyzed more than 168,000 fragments from more than 350 Rembrandt works[17]. The algorithm used facial recognition technology to create a new and original piece of art that mimics Rembrandt's style and technique while still being original[18].

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[12]Andrew B. (2021). How the Video Game Industry is Changing. Accessed from https://www.investopedia.com/articles/investing/053115/how-video-game-industry-changing.asp.

[13]Maria del Mar MaronoGargallo, The Concept of Inventor in Patent Law and Artificial Intelligence Systems, 12 Cuadernos DERECHO Transnacional 510 (2020).

[14]Mel Slater & Mari V. (2016), Enhancing our lives with immersive Virtual Reality. Accessed from https://www.frontiersin.org/articles/10.3389/frobt.2016.00074/full.

[15] Mitchell, T. M. (1997). Machine Learning. Germany: McGraw-Hill.

[16] https://www.theguardian.com/artanddesign/2014/oct/05/rembrandt-late-gem-shown-uk-first- time

[17]Ajani, G. (2020). Contemporary Artificial Art and the Law: Searching for an Author. Netherlands: Brill.

[18]Pieter De Grauwe& Sacha Gryspeerdt. (2022). Artificial Intelligence (AI): The Qualification of AI Creations as "Works" under EU Copyright Law, https://www.gevers.eu/blog/artificial-intelligence/artificial-intelligence-ai-the-qualification-of-ai-creations-as-works-under-eu-copyright-law/.

The only AI disruptor in the art world isn't a computer programme that learns to paint like Rembrandt. Last year, a novel written by Japanese artificial intelligence software came close to winning the Nikkei Shinichi Literary Award[19]. Likewise, Google has developed a programme that can learn to listen to, analyze, and write music on its own. While these achievements are remarkable from a scientific standpoint, they also have interesting legal consequences[20]. When a computer programme can paint, write a book, or compose music, how does the law know who owns these works? The question revolves around the creative steps that must be taken when creating a piece of art. Most works of art computer-generated in the past have had explicit copyrights due to programmers' directing the computer what to do. All activities are specially planned and attributed to human participation. Programs today, on the other hand, are guided only by parameters specified by the programmer, and they learn and generate on their own using a system called an "artificial neural network"[21] ("neural network" for short). Programs can now do creative tasks that used to only be done by humans, and copyright law may not have kept up with these changes in technology. Many potential authors are implicated when advanced AI creates works based on how they were formed. For example, Dr. Obed Ben-Tal of Kingston University has developed a programme called "Bot Dylan" that can study Irish folk music and generate original music based on its findings. Dr. Ben-Tal worked with a team of researchers to develop the algorithm. When Bot Dylan wrote a folk song, it was unclear whether the copyright of the song belonged to Dr. Ben-Tal, who co-authored it with his entire research team, or something else entirely, since the AI did all the creative work[22].

Eve made a game-changing discovery in the fight against malaria in 2015. Eve, on the other hand, doesn't care. She's not even alone. Professor Ross King, a distinguished scientist in automated drug design and synthetic biology, led the team that created and produced Eve and her predecessor Adam. Adam and Eve are robotic scientists, which is a name for complex electromechanical systems that use artificial intelligence to automatically find new drugs[23].

Artificial Intelligence and Intellectual Property Rights

AI in deep learning and robotics is growing the fastest, while AI patents in the transportation industry are growing the fastest. Telecom is not far behind. The following topics are personal gadgets, life, and medicine. IBM (US), Microsoft (US), Toshiba (Japan), Samsung (South Korea) and NEC (Japan)

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[19] https://futurism.com/this-ai-wrote-a-novel-and-the-work-passed-the-first-round-of-a-national-literary-award.

[20] A.I. Is Mastering Language. Should We Trust What It Says? accessed from https://www.nytimes.com/2022/04/15/magazine/ai-language.html.

[21] Barto, A. G., Sutton, R. S. (2018). Reinforcement Learning: An Introduction. United States: MIT Press.

[22] Bot Dylan is the computer using artificial intelligence to write its own folk music, accessed from https://www.mirror.co.uk/tech/bot-dylan-computer-using-artificial-10504774.

[23] The Adam and Eve Robot Scientists for the Automated Discovery of Scientific Knowledge, accessed from https://ui.adsabs.harvard.edu/abs/2017APS..MARX49001K/abstract.

are the top five AI patent applicants (Japan)[24]. The Chinese Academy of Sciences (CAS) is the most active university in applying for AI patents[25]. Since 2013, the number of AI patents filed has increased dramatically[26]. While AI was founded in 1956[27], the field's promise resurfaced in 1993. Around 1993, computing power began to rise. As computing power advances, structured training data becomes available. Structured data is data that has been organized into spreadsheets with multiple rows and columns[28]. Images, graphics, audio, video, web pages, PowerPoint presentations, and other unstructured data constitute unstructured data. Structured data helps AI learn and perform assigned work. Since 2012, AI has become increasingly data-driven and has achieved new achievements[29].

Who owns the rights to AI-based inventions is a matter of IP protection. An invention is created when a human being thinks of an imaginative step. The invention belongs to the person or his employer[30]. If AI is harnessed to create innovations, then the individual who uses the tool—in this case, AI —is the inventor and owner of the creation. Merely owning the tool does not entitle the owner to use it. For AI inventions that do not require human participation, the question arises of whether computers can be patented. Is a patent in the public domain if the "machine" cannot be applied for? According to UKIPO (UK Patent Office), USPTO (United States Patent Office), and EPO (European Patent Office), AI cannot be the inventor of a patent application. In a patent application, the person who came up with the idea must say that he owns it. The title of the invention, the name and address of the applicant, and other details are included in the patent application. Due to the law, only natural persons can be inventors. Nonetheless, it is possible to grant AI legal subject status. There are no obvious legal or other obstacles to AI's being identified as an inventor. AI engineers can use the rights conferred by patent protection. Owners of AI inventions may also receive patent protection. In some cases, AI is mentioned as the inventor of the patent application.

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[24]WIPOTechnology Trends 2019, ArtificialIntelligence, accessed from https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1055.pdf.

[25]Artificial intelligence and trends in patenting, accessed from https://www.asiaiplaw.com/section/ip-analysts/artificial-intelligence-and-trends-in-patenting.

[26]Artificial Intelligence patenting has increased dramatically in the last few years, accessed from https://cosmovici-ip.com/news/artificial-intelligence-patenting-has-increased-dramatically-in-the-last-few-years/.

[27]Rockwell Anyoha, Can Machines Think, accessed from https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/.

[28]The Age of Analytics: Competing in AData-Driven World, accessed from https://www.mckinsey.com/~/media/mckinsey/industries/public%20and%20social%20sector/our%20insights/the%20age%20of%20analytics%20competing%20in%20a%20data%20driven%20world/mgi-the-age-of-analytics-full-report.pdf.

[29]YongjunXu, Artificial intelligence: A powerful paradigm for scientific research, Science Direct, Innovation, Volume 2, Issue 4, available at https://www.sciencedirect.com/science/article/pii/S2666675821001041 (last visited on May 20,2022).

[30]Invention and innovation: an introduction, accessed from https://www.open.edu/openlearn/mod/oucontent/view.php?id=3440&printable=1.

Existing intellectual property rules, such as patent and copyright laws, must be modified to accommodate AI-driven advancements, including AI ethics, data security, and privacy. IP policy must also determine whether AI algorithms are patentable. The notion that artificial intelligence can invent is ubiquitous. Another issue to consider is sharing inventors. Is it possible for AI to do joint internships with humans? In technology, AI is becoming more and more important. The inventor declares that the use of AI software is fair[31].

The distinction between the inventor and ownership is clear in traditional applications. Customarily, IP law says human applicant claims to be the owner or inventor of the innovation or creation[32]. The question of ownership and inventorship of AI inventions or creations is unclear. Can we say that those who financially support the invention of AI are the owners, or that those who own the AI devices are the owners? What about those who help develop AI algorithms? Shouldn't they be protected by patents? Patent protection requires full disclosure by the applicant. Complete public reasoning is difficult to apply to AI inventions. Because the output data depends on the input data, it is not enough to just reveal the starting algorithm. The raw data used to train AI algorithms also needs to be made public. Additionally, the human knowledge involved in data training will or should be included in the disclosure. Copyright generally protects computer programs. Copyright law should provide clear advice on whether computer programmes used in AI are protected by copyright and patents. It is vital that intellectual property law has the power to control AI-based creations for the benefit of society. If current rules fail to protect the producers or inventors of AI-based inventions, the potential for patent infringement rises. To avoid hindering our digital future, intellectual property regulations should simplify the process of compensating originators[33]. WIPO is a key player in developing IP policy, starting with the question of whether AI inventions require IP incentives. The WIPO Dialogue on IP and AI was established, with its inaugural session held in September 2019. Nearly 250 submissions were made by member states and stakeholders. WIPO reports are available on the organization's website[34].

Artificial Intelligence and Copyright

Any discussion of copyright law must always begin and end with the author. For example, according to Locke's labor theory, the intellectual work of an author, combined with other resources, supports the author's right to the fruits of his labor. According to Hegel's theory of personality, a work belongs to or reflects the personality of the creator. While the utilitarian approach prioritizes the interests of the public and society as a whole, the fact that

[31]What is artificial intelligence, accessed from https://www.techtarget.com/searchenterpriseai/definition/AI-Artificial-Intelligence.

[32]Intellectual Property Rights-Laws and Practices, accessed from https://www.icsi.edu/media/webmodules/FINAL_IPR&LP_BOOK_10022020.pdf.

[33]Accessed from https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_ai_ge_19/wipo_ip_ai_ge_19_inf_4.pdf.

[34]Accessed from https://www.wipo.int/about-ip/en/frontier_technologies/ai_and_ip_policy.html.

copyright is seen as a driving force for authors' creativity cannot be ignored. But who is considered the author of the work?

The terms "work" and "author" are synonymous. There is no work in copyright law that does not have an author. Conversely, if there is no work, there is no author; authorship can only be questioned if it is shown that there is a work—an intellectual creation—that can be attributed to authorship. If AI-assisted production does not qualify as a work, it cannot have authorship[35].

International treaties have started to flourish with the aim of improving protection and allowing better access to copyright material. To encourage investment in improving the quality of books and journals and making them easy to find by distributing copyrighted works all over the world. This is to recognize creativity and culture in society. The copyright treaties focus on defining rights, applying those conferred rights, and providing exceptions or limiting the enforcement of copyright protection for fair use. With the TRIPS Agreement, the WTO tried to set a minimum standard for many types of intellectual property law. The copyright objective is based on "commercialized value" rather than protecting the authorship. Copyright is vested in two principles: exclusive rights were conferred on the natural author for creative purposes, which largely underpin the Berne Convention; and the right to disseminate works for the benefit of society. The latter's justification in copyright was the formers. An artistic, literary, or musical work is formed by the fruitful work of the person who is the author, and so it is treated as his property.

International Instruments and Copyright Protection

The human-centered concept of authorship is embraced by International Copyright Law. The major international treaties which are relevant to copyright are the Berne Convention, the WIPO Copyright Treaty, and the TRIPS Agreement. For example, the Berne Convention for the Protection of Literary and Artistic Works stipulates that the author must be an individual. "The author should have the exclusive right to compile his portfolio[36]," it said. It also clarifies that moral rights relate to "the right to claim authorship of a work and to object to any distortion, mutilation, or other modification of said work, or other negative conduct in relation to said work, which would be detrimental to his honor or reputation[37]." As a human right, copyright is also protected.

In the absence of evidence to the contrary, the Berne Convention implies a concept of authorship, which states that if an author is mentioned by

[35]David Vaver (2002). Principles of Copyright Cases and Materials. United Nations Development Programme.https://www.wipo.int/edocs/pubdocs/en/copyright/844/wipo_pub_844.pdf.

[36]Managing Intellectual Property in the Book Publishing Industry A business-oriented information booklet, (WIPO Magazine) assessed from https://www.wipo.int/edocs/pubdocs/en/copyright/868/wipo_pub_868.pdf.

[37]Explore the world's knowledge, cultures, and ideas, accessed from https://www.jstor.org/.

name, he or she is considered to be the author of a literary or artistic work[38]. Rather than naming authors, the rule seeks to provide rights holders with some clarity and ease the burden of proof. Because both can display their names on the work, it is acceptable to claim that the author can be a natural or legal person. Even though the Berne Convention must be followed by both the WIPO Copyright Treaty and the TRIPS Agreement, neither treaty defines the term "author"[39].

Protection under the European Union

The authorship of artificial intelligence appears equally dubious under EU law. The EU's Copyright Directive doesn't really address the question of whether only individuals can be called authors, with the exception of films and audiovisual works, computer programs, and databases. According to Article 1 (5) of Directive 93/83 (Sat-Cab Directive), the general director is regarded as one of the authors or one of the authors of the film or audiovisual work, and Member States allow others to be regarded as co-authors. According to Article 2(1) of Directive 2009/24 (Software Directive), the author of a computer programme is the natural person or group of natural persons who created the programme or, if authorized by Member State legislation, recognized as the right holder by the law of legal persons. According to Article 4(1) of Directive 96/9 (Databases Directive), the author of a database may be a person other than the person or group that created the database. Directive 2006/116 (Period Directive, subheading 14) uses the life of the author as a "natural person" to figure out how long the author's copyright protection will last.

The Court of Justice of the European Union in *Infopaq International A/S* v *Danske DagbladesForening*[40] extended the definition of originality to include all categories of works created by the "author's own intellect" and held that copyright protection should only apply to the subject matter that is original because it is the author's own intellectual creation. In other important cases, the European Court of Justice stated that "an author's own intellectual invention" means that an author "shows his creativity through free and creative choice in an original way so as to imprint his own touch or to reflect his personality." An AI wouldn't meet this requirement because it wouldn't be considered an author, and the work it produced wouldn't be unique.

US Copyright Statutes

Under the U.S. Copyright Act of 1976, a work must be created by an "author" in order to be protected by copyright. The Act does not define the term "author." However, recent lawsuits in the United States have delved into the question of human versus non-human authorship. The U.S. District Court

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[38]World Intellectual Property Organization (Wipo)Trt/Berne/001Berne Convention for The Protection of Literary and Artistic Works (As Amended on September 28, 1979) (Authentic Text), accessed from https://wipolex.wipo.int/en/text/283698.

[39]WIPO Copyright Treaty(WCT) (1996), withthe agreed statements of the Diplomatic Conferencethat adopted the Treaty and the provisions of the Berne Convention (1971)referred to in the Treaty, accessed from https://www.wipo.int/edocs/pubdocs/en/wipo_pub_226.pdf.

[40]C-5/08.

for the Northern District of California dealt with animal ownership in photography in *Naruto* v *Slater* (also known as the "Monkey Selfie" case)[41], in which a celebrity crested macaque named Naruto used a camera to take a selfie. The camera of a photographer named Slater took pictures of himself. In 2016, the court dismissed the lawsuit and dismissed Monkey's claim of attribution rights over the photos, on the grounds that copyright legislation primarily refers to the "people" who participated in the creation of the work, which must be "a human creation" to qualify as a copyrighted work. PETA, which represents Naruto, appealed the district court's decision, and the issue was settled out of court in 2017. The case is based on the compendium of the US Copyright Office, which clearly states that "a work must have been made by a human in order to be a work of authorship." Works that do not meet this standard are not protected by copyright. "Works created from nature, animals or plants will not be registered with the office." This compendium specifically mentions an image shot by Naruto, a non-human, as an example of a creation that cannot be protected under copyright law. The district court ruled that animals cannot be legally represented as "next friends."

The monkey selfie case has sparked a larger conversation about whether copyright protection can be extended to non-human authors. The U.S. Copyright Office, says that "works created by machines or simple mechanical mechanisms that operate randomly or mechanically without any creative input or interaction from a human author" are not protected[42].

Indian legal protection

In India, Section 2(d) of the Copyright Act of 1957 defines "author" in different copyrighted works, but it doesn't say anything about the other party's legal identity. Article 17 establishes a unique instance of ownership of a protected work when the work is created under a contract of service or apprenticeship with a legal person such as a government or an international organization. The absence of any artificial person mentioned in Section 2(d) suggests that the Copyright Act of 1957 can only protect natural persons as creators. Under section 2(d)(vi) of the Copyright Act 1957, "the person who contributed to the making of the work" in relation to any literary, dramatic, musical or aesthetic work generated by a computer. The fundamental problem with this definition is the use of the phrase "person who caused the work." The existence of an "expression" in the relevant information by a natural or legal person to identify who "caused" the production of the work. The more closely or directly a person is involved in the development of an "expression," the more he or she contributes to it, and the more likely he or she is to be considered a "contributor to the formation of the work." Therefore, the current legal framework established by the Copyright Act, 1957 may not be sufficient to

[41]Jason Slotkin,'Monkey Selfie' Lawsuit Ends with Settlement Between PETA, Photographer, accessed from https://www.npr.org/sections/thetwo-way/2017/09/12/550417823/-animal-rights-advocates-photographer-compromise-over-ownership-of-monkey-selfie.

[42]SreyoshiGuha,De-Coding Indian Intellectual Property Law, accessed from https://spicyip.com/2018/05/update-monkey-selfie-lawsuit-comes-to-an-end.html.

deal with the creation of works for which the creator or contributor of the "expression" is not an individual or legal entity.

In *Amarnath Sehgal* v *Union of India*[43], Justice Nandrajog recognized the moral rights of authors under section 57 of the Copyright Act 1957 and stated that authors have moral rights to preserve, protect, and nurture their inventions. He goes on to say that the author's paternity, preservation of integrity, and rights of withdrawal stem from the fact that "a creative individual is uniquely endowed with the power and mystery of original genius, resulting in a creative privileged relationship between the author and his work." The court's focus on the individual in considering the moral rights of the author in this case suggests that legal persons are intended to be excluded from the concept of authorship. Therefore, when it comes to AI-produced works, the authorship of these works will be disputed by Indian copyright laws. Human help is definitely needed to get AI's creative juices flowing, but when AI steps in and plays a big part in making a work, it's still hard to figure out who the author or owner is.

Current status in Indian Copyright Law

For the first time in India, an AI gadget was registered as a co-author of a copyrighted work. The image, titled "Suryast," is believed to have been made by "Raghav" (an artificial intelligence painting program) and Mr. Ankit Sahni, an intellectual property lawyer who owns the app. In an interview with the online platform, Mr. Sahni said the Copyright Office would only accept applications after both names, Sahni and Raghav, were listed as co-authors of the artwork[44].

The Copyright Office of India ruling is significant in light of the DABUS patent described last week[45]. This is only the third time an AI has been identified as a creator or co-creator of a protected work. The decision seems to be a step in the right direction, based on the suggestions in the report from the parliamentary committee to look at existing copyright and patent laws to protect works made by AI.

Most definitions of originality require a human creator, so creative works qualify for copyright protection if they are original. In most jurisdictions, including Spain and Germany, copyright protection is limited to works created by humans[46]. The recognition of AI in the copyright system has been hotly debated in India. The main goal of copyright law is to protect creative works produced by the human brain that demonstrate intelligence. In India, copyright protects an author's expression of his creative and original work, not his ideas.

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[43]2005 (30) PTC 253 (Del.).

[44]Exclusive: India recognises AI as co-author of copyrighted artwork, assessed from https://www.managingip.com/article/b1t0hfz2bytx44/exclusive-india-recognises-ai-as-co-author-of-copyrighted-artwork.

[45]India recognises AI as author of a copyrighted work, accessed from https://www.lexcampus.in/india-recognises-ai-as-author-of-a-copyrighted-work/.

[46]Copyright in works created by artificial intelligence: issues and Perspectives, available at https://www.lexology.com/library/detail.aspx?g=4513277a-6571-40f1-923d-c09ec5366fdd.

Section 2(d)(vi) of the Copyright Act of 1957 deals with computer-generated works and states that the "author" is the person responsible for creating the work. This does not provide an opportunity for non-human authors to be recognized, nor does it explicitly exclude the possibility of such recognition. However, computer programs are no longer just a tool with state-of-the-art AI. Now, it makes many decisions in the creative process without human involvement. Copyright law can deal with works with little or no human interaction in two ways. It can remove copyright protection from computer-generated works, or give credit to the person who made the program. When a programme was made entirely by AI, it is not ideal to give authorship to the person who made it for ethical reasons.

The Copyright Office of India's ruling is of great importance to all IP lawyers because all types of IP are issued on the same basis: recognition of human creation and protection from unfair exploitation by others. According to a parliamentary committee report, DABUS has been recognised as an inventor in two countries[47], and India has officially recognised AI as a co-author of a work of art. The findings appear to pave the way for a major shift in how the law views AI. This will almost certainly have profound implications for the business world and our understanding of legal concepts such as rights, personality, and culpability.

Conclusion

Historically, technological progress has caused conflicts in the IP system. AI is no exception. As AI becomes more advanced, the role of author/inventor is expected to become less clear. Because of this, conventional ideas in copyright and patent law about who is the author and who is the inventor will be put to the test. AI-created works, like fan fiction, are full of copyrighted aspects that, in turn, enrich the public's culture through randomised perspectives. Following the above recommendations, certain precautions can also be implemented in AI systems. As long as there is a person or group of people behind this computer-generated art, copyright law will exist. However, reality has changed dramatically as AI systems have gained the ability to generate themselves. Copyright law must be updated or reassessed to determine how it should deal with emerging AI systems, the products they produce, and the problems they pose to the existing copyright system. Special rights like database rights can be granted to AI-generated works without attribution.

[47]Hindu Newspaper, accessed from https://www.thehindu.com/sci-tech/technology/in-a-world-first-south-africa-grants-patent-to-an-artificial-intelligensce-system/article35817497.ece.

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Application of Arbitration and Taxation Laws in International Commercial Contracts with Special Reference to India

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Abstract

International Commercial Contracts bring Foreign Direct Investment (FDI) in any country. By adopting liberalization, privatization and globalization, India has FDI Equity inflow of Rs. 224,613 crores in 2020-21 as compared to Rs. 182,000 crores in 2019-20. India is at 163rd place among 190 countries in enforcement of contract. These contracts may include an arbitration clause so that the dispute, if arises, can be resolved speedily. The author examines the uncertainty in jurisdiction. Another, difficulty is faced in evasion of tax. The companies may take advantage of lacunas to evade tax. The judgment of the Hon'ble Supreme Court on capital gain and amendment in the provision of Income Tax to override the judgment has caused uncertainty. The author analyses the relation between FDI, arbitration and tax provisions.

Keywords*: Arbitration; Public policy; Tax; Retrospective; FDI*

1. Introduction

In 1991, India Allowed Liberalization, Privatization And Globalization (Lpg) Which Pumped Sums Offoreign Direct Investment and boomed the economy. In Financial Year 2020-21, foreign direct investment (FDI) Equity inflow was Rs. 224,613 crores. India holds 6th spot in 2020. Also, in 1996 India enacted Arbitration and Conciliation Act on the basis of the United Nations Commission on International Trade Law, 1985. Till date, amendments are made in arbitration laws to protect the investors. Though India has signed New York Convention, Geneva Convention and Bilateral Investment Treaty, a problem regarding uncertainty of jurisdiction of Courts or Arbitral Tribunal arises.The author examines the various concept of arbitration like 'public policy', 'seat' and 'place'. The companies pay tax on the income earned which must be in accordance with the statutes and policies of the concerned country. In the long run, it impacts the future investments. With the growing uncertainty in

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taxation provisions, the author analyses and provides viable suggestions on FDI, arbitration law and taxation laws in India

2. Foreign Direct Investment

The wave of liberalization and globalization sweeping across the world has opened many national markets for international business.[1]From 2011-2019, India has moved from 9th place to 5th place on the ranking of world economies.[2]India had overtaken the UK in 2019 to become the fifth largest economy in the world but has been relegated to the 6th spot in 2020.[3] It is hoped that India will overtake United Kingdom to become the fifth largest in 2025 and race to the third spot by 2030.

FDI EQUITY INFLOWS (MONTH-WISE) DURING THE FINANCIAL YEAR 2020-21[4]:

Financial Year 2020-21 (April - September)	Amount of FDI Equity inflows (In Rs. Crore)	Amount of FDI Equity inflows (In US$ mn)
1. April	21,133	2,772
2. May	16,951	2,240
3. June	11,736	1,550
4. July	22,866	3,049
5. August	1,30,576	17,487
6. September	21,350	26, 906
(from April, 2020 to Sept., 2020)#	224,613	30,004
(from April, 2019 to Sept, 2019)#	182,000	26,096
%age growth over last year	(+) 23%	(+) 15%

Figures are provisional, subject to reconciliation with RBI, Mumbai.

The flow of FDI in India displays a positive trend and is a positive signal for the Indian economy even though when the whole world is passing through the phase of a pandemic.[5]The Indian economy is one of the most favourable investment destinations for a number of countries.[6]In *Vodafone International Holdings* v. *Union of India*[7] the Court noted that strategic foreign direct investment coming to India, as an investment destination, should be seen in a holistic manner. While doing so, the Revenue/Courts should keep in mind the following factors: the concept of participation in investment, the duration of

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[1] Niti Bhasin, *Foreign Direct Investment (FDI) in India*1(New Century Publications, New Delhi, 2012).

[2]https://www.weforum.org/agenda/2020/02/india-gdp-economy-growth-uk-france/

[3]https://economictimes.indiatimes.com/news/economy/indicators/india-to-become-5th-largest-economy-in-2025-3rd-largest-by-2030/articleshow/79964750.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[4]https://dipp.gov.in/sites/default/files/FDI_Fact_sheet_September_20.pdf

[5]WHO declared COVID-19 as a pandemic on March 11, 2020 and complete lock down was announced by many countries.

[6]Vinay Kumar, "Trend of FDI in India and Its Impact on Economic Growth"*IJSR*https://www.ijsr.net/archive/v3i10/T0NUMTQ3OA%3D%3D.pdf

[7] (2012) 6 SCC 613

time during which the Holding Structure exists; the period of business operations in India; the generation of taxable revenues in India; the timing of the exit; the continuity of business on such exit. In short, the onus will be on the Revenue to identify the scheme and its dominant purpose.

Share of top investing countries FDI equity inflows (financial years): amount in Rupees crores (in US $ million)[8]

Rank and Country	2018-19 (April – March)	2019-20 (April – March)	2020-21 (April – September)	Cumulative Inflows (April, 00 – Sept.,20)	%age to total Inflows (in terms of US $)
1. MAURITIUS	57,139 (8,084)	57,785 (8,241)	15,019 (2,003)	810,960 (144,713)	29%
2. SINGAPORE	112,362 (16,228)	103,615 (14,671)	62,084 (8, 301)	671,646 (105,970)	21%
3. U.S.A.	22,335 (3,139)	29,850 (4,223)	53,266 (7,123)	229,488 (36,902)	7%
4. NETHERLANDS	27,036 (3,870)	46,071 (6,500)	11,306 (1,498)	219,628 (35,350)	7%
5. JAPAN	20,556 (2,965)	22,774 (3,226)	4,932 (653)	201,037 (34,152)	7%
6. U.K.	9,352 (1,351)	10,041 (1,422)	10,155 (1,352)	160,566 (29,563)	6%
7.GERMANY	6,187 (886)	3,467 (488)	1,498 (202)	70,442 (12,398	2%
8. CYPRUS	2,134 (296)	6,449 (879)	355 (48)	58,348 (10,796)	2%
9. FRANCE	2,890 (406)	13,686 (1,896)	8,494 (1,135)	59,005 (9,675)	2%
10.CAYMAN ISLANDS	7,147 (1,008)	26,397 (3,702)	15,672 (2,103)	65,520 (9,639)	2%
TOTAL FDI INFLOWS FROM ALL COUNTRIES	309,867 (44,366)	353,558 (49,977)	224,613 (30,004)	2,957,057 (500,123)	--

The above data covers three years FDI in India. Also, the data of 2020-21 is upto September 2020 where as for other years complete one year data is available. The last column shows the percentage increase of inflow when the economy of the whole world is going through COVID- 19. The increase exhibits a positive trend and situations will improve by 2033.[9] FDI always flows towards location with a strong governance infrastructure which includes

[8] https://dipp.gov.in/sites/default/files/FDI_Fact_sheet_September_20.pdf

[9] https://www.msn.com/en-us/money/markets/india-s-economy-will-take-years-to-recover-from-covid-19-damage/ar-BB1bvXK9

enactment of laws and how well the legal system works. Certainty is integral to rule of law.[10] However, GDP has shrunk by 23%. It is the worst contraction ever in India's history.[11] Another, difficulty isthe enforcement of contracts. India is at 163rd place among 190 countries.[12] According to the World Bank's Ease of Doing Business Report, it takes an average of nearly four years to resolve a commercial dispute in India. This is the third (3rd) longest rate in the world. Indian courts are understaffed and lack the technology necessary to resolve an enormous backlog of pending cases—estimated by the UN at 30-40 million cases nationwide.[13] In order to resolve a commercial dispute through the Singapore Courts take just 164 days, the shortest time recorded worldwide.[14]

The foundation of the contract is a promise. The promise establishes a trust between the parties. When the parties perform their part of thepromise then no dispute arises. However, when there is a breach it results in knocking at the doors of the Courts or arbitral tribunal. The same situation occurs in international contracts also. The international contracts ripen when the parties belonging to different states begin the commercial transactions.[15] The contracts help in boosting the economy of any country. However, one of the inevitable consequences of the commercial transaction is, of course, the growth of cross-border disputes involving multinational corporations and sovereign states.[16]

3. Arbitration Law

Foreign Direct Investment leads to many contractual relations between the parties. The parties may agree to include an arbitration clause in the contractthat give them thefreedom to decide the rules and procedures applicable. The freedom must be exercised in consonance with the law of country. In India, Arbitration and Conciliation Act was enacted in 1996. It is drafted along the lines of UNCITRAL Model Law 1985 and provides for a clear and concise legal framework for resolving commercial disputes in one of the

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[10] *Vodafone International Holdings* v. *Union Of India*, (2012) 6 SCC 613

[11] https://www.msn.com/en-us/money/markets/india-s-economy-will-take-years-to-recover-from-covid-19-damage/ar-BB1bvXK9

[12] https://www.business-standard.com/article/opinion/making-a-mockery-of-arbitration-120111900053_1.html

[13] https://www.state.gov/reports/2019-investment-climate-statements/india/#:~:text=According%20to%20the%20World%20Bank%E2%80%99s%20Ease%20of%20Doing,India,%20the%20third%20longest%20rate%20in%20the%20world

[14] https://www.infrastructureasia.org/en/Insights/Dispute-Resolution#:~:text=Based%20on%20the%20study,%20resolving%20a%20commercial%20dispute,and%20are%20about%20half%20of%20that%20in%20London.

[15] V N Deshpande, 'The Applicable Law In International Commercial Arbitration', (1989)31 *Journal of Indian Law Institute*127

[16] Harisankar KS 'Contemporary International Arbitration in Asia: A Stock Take' III*Indian Journal of Arbitration Law*(1) http://www.ijal.in/sites/default/files/IJAL%20Volume%203_Issue%201_Harisankar%20KS.pdf

fastest growing economies of the world.[17] It is an attempt to align its adjudication of commercial contract dispute resolution mechanisms with most of the world.[18] The parties face several issues in the arbitral proceedings like public policy and jurisdictional issues. The jurisdictional issues are regarding the 'seat' and 'place' of jurisdiction.

3.1 Seat

In international commercial arbitration[19], it is of utmost importance that jurisdiction is mentioned clearly in the contract. When the parties leave ambiguity in the contractregarding the jurisdiction of law applicable in substantive and procedural matters then the intervention of Court is needed to resolve. In the landmark judgment of 2012, the Hon'ble Supreme Court in *Bharat Aluminium Co*. v. *Kaiser Aluminium Technical Services Inc.*[20] (herein after referred as, *Balco case*) held that Section 2(2) of Part I of the 1996 Act shall apply to all arbitrations which take place within India. Also, 1996 Act would have application to international commercial arbitration held outside India only for the enforcement of arbitral award. When seat or place of arbitration is outside India then Indian Courts will not have supervisory jurisdiction.

Also, if "the closest connection" of the arbitration is with India, and the Indian Courts would normally have jurisdiction over the dispute then Indian Courts will play a supervisory role in the arbitration.

In 2014, *Enercon India Ltd* v. *Enercon GmbH*[21] the parties agreed to have the "seat" of arbitration in India and London to be the "venue" to hold the proceedings of arbitration. The Court opined that venue and seat are different. In the case of *Union of India*v. *Reliance Industries Limited(Reliance)*[22], the Supreme Court held that the proper law of the contract is Indian law and proper law of the arbitration agreement is the law of England. The 'doctrine of concurrent jurisdiction' cannot be allowed as the 'juridical seat' of the arbitration is at

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[17] Akaant Kumar Mittal, 'Seat in Indian Arbitration Law - Conundrum, Concomitants and Significance' (2021) 1 SCC J-51

[18] https://www.state.gov/reports/2019-investment-climate-statements/india/#:~:text=According%20to%20the%20World%20Bank%E2%80%99s%20Ease%20of%20Doing,India,%20the%20third%20longest%20rate%20in%20the%20world.

[19] Sec. 2(1)(f), Arbitration and Conciliation Act, 1996 "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is— (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) 2 *** an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country;

[20] (2012) 9 SCC 552.

[21] (2014) 5 SCC 1. In this case, the Supreme Court held that even though the venue of proceedings is London, it cannot be presumed that the parties have intended the seat to be London. Venue is often different from the seat of arbitration and should not be confused because of convenient geographical location. The hearing of the arbitration will be conducted at the venue fixed by the parties, but this would not bring about a change in the seat of the arbitration.

[22] 2015(10) SCALE149

London and that the arbitration agreement is governed by English law. Allowing this doctrine to prevail, will result in concurrent jurisdiction at two places is incorrect.

In 2015 Amendment[23] , a proviso is added to Sec. 2 (2) which provided that subject to an agreement to the contrary, the provisions of sections 9, 27 (1) (a) and 37(3) shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act. *InMankastu Impex Private Limited* v. *Airvisual Limited,*[24] the court held that the words in Clause 17.1 do not suggest that the seat of arbitration is in New Delhi. The words "without regard to its conflicts of law provisions and courts at New Delhi shall have the jurisdiction" do not take away or dilute the intention of the parties. The parties intent in Clause 17.2 is that the arbitration be administered in Hong Kong.

It is needed that the parties at the time of contract make their intention crystal clear regarding the 'Seat' and 'Venue' of arbitration. This will help in maintaining an amicable long-term relationship.

3.2 Forum selection clause

While choosing the place, the parties must understand the consonance between "seat of arbitration" and the "Forum where arbitration is sought" and find any reciprocal treaties or conventions; if there are no reciprocal treaties or conventions, then earlier decisions on enforcement of the court are seen; if the unsuccessful party is a State or State entity the laws of that country in relation to State immunity.[25]

The United Nations Commission on International Trade Law (UNCITRAL) has stressed that the selection depends on the economic position of contracting parties and generally each party prefers to have arbitration in its own country or a favourable country.[26] When there is an exclusive forum selection clause in the contract, demarcating the contract and the treaty claim and making the contract claim to be first determined by the forum selected by the parties amounts to allowing a contractual mechanism to supersede a BIT mechanism even in situations where the BIT has been violated.[27] The BIT mechanism is the result of a treaty between two sovereign nations and this should not be allowed to be overridden by a contract between a State and a private party. If such overriding is allowed then that will effectively lead to violation of matters concerning public policy. It is clearly the policy of international investment law to avoid excessive fragmentation of

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[23] Arbitration and Conciliation (Amendment) Act, 2015

[24](2020) 5 SCC 399

[25] Harsh Sethi and Arpan Kr Gupta, *International Commercial Arbitration and its IndianPerspective* 258 (Universal Law Publishing, New Delhi, 2011)

[26]C. Rama Rao, "Proper Law of Contracts with Arbitration Clauses", 29 *Journal of Indian Law Institute* 60(1987).

[27]T. Miracline Paul Susi,"Treaty Claims vs. Contract Claims in Arbitration from the Spectacle of Umbrella Clause" 6 *SCC J*-35 (2020).

investment law by leaving the settlement of investment disputes to an excessive number of local bodies.[28] A forum selection clause is an ouster clause agreement restricting adjudication to one of the courts having jurisdiction.[29] It is usually contained in the contract that the clause purports to subject to the jurisdiction of the chosen forum.[30] The contract may provide forum selection clause with or without choice of law. When the parties have not chosen the substantive law to be applied to an international dispute, the arbitrators in the absence of a *lex fori,* may make recourse either to a set of conflict rules, or choose directly (*la voiedirecte*) the applicable law or apply *lex mercatoria* or the *Tronc Commun*doctrine.[31]When choice of law is made, then (1) apply the substantive law of the seized forum (the *lex fori*); (2) apply the substantive law of the forum designated in the forum selection clause; or (3) apply the law that governs the underlying contract (*lex contractus*).When choice of law is not made, then the court has three options for determining the existence, validity, and scope of the forum selection clause: (1) apply the substantive law of the seized forum (*the lex fori*); (2) apply the substantive law of the state whose courts are chosen in the forum selection clause; or (3) apply the law that governs the underlying contract (*lex contractus*).[32]

3.3 Public policy

It is not appropriate to import the principles of public policy, which are imprecise, difficult to define, and akin to an unruly horse, in contractual matters. [33]In international arbitration, the function of public policy is of displacing the otherwise applicable law and determined in accordance with the conflict of law rules of the seat of arbitration.[34] Public policy has to be observed at the time of arbitration agreements; secondly, annulment of an award; thirdly recognition and enforcement of a foreign arbitral award.

Transnational public policy reflects the fundamental values, the basic ethical standards, and the enduring moral consensus of the international

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[28]Mihir C. Naniwadekar, The Scope and Effect of Umbrella Clauses: The Need for a Theory of Deference?*Trade, Law and Development, Vol 2, No 1 (2010) http://tradelawdevelopment.com/index.php/tld/article/view/2(1)%20TL&D%20169%20(2010)/47*

[29]*Rajasthan SEB* v. *Universal Petrol Chemicals Ltd.*, (2009) 3 SCC 107

[30] What Law Governs Forum Selection Clauses Excerpt from Symeon C. Symeonides, Oxford Commentaries on American Law: Choice of Law, copyright by Oxford University Press (forthcoming 2016) https://www.asil.org/sites/default/files/pdfs/Which%20Law%20Governs%20Forum%20Selection%20Clauses.pdf

[31] Mauro Rubino-Sammartano, *International Arbitration: Law and Practice* 141 (Kluwer Law International, Delhi, 1st Indian edn., 2007).

[32] What Law Governs Forum Selection Clauses Excerpt from Symeon C. Symeonides, Oxford Commentaries on American Law: Choice of Law, copyright by Oxford University Press (forthcoming 2016) https://www.asil.org/sites/default/files/pdfs/Which%20Law%20Governs%20Forum%20Selection%20Clauses.pdf

[33]*LIC* v. *Insure Policy Plus Services (P) Ltd.*, (2016) 2 SCC 507

[34] See Joel R. Junker, 'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards', 7 *CAL. W. INT'L L.J.* 228, 229–30 (1977).

business community.[35]International public policy means the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of the award would entail their violation on account either of the procedure pursuant to which it was rendered (procedural public policy) or its content (substantive international public policy).[36] Under the New York Convention, an award need not be enforced if it violates the public policy of the forum where recognition or enforcement is sought or has been set aside or suspended by the competent authority in which, or under the law of which, that award was made.[37] The corresponding provision is available is made under section 48, Arbitration and Conciliation Act, 1996. After the 2015 Amendment, it is clarified that an award is in conflict with the public policy of India, only if (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.[38]A similar provision is included under section 57, 1996 Act under Geneva Convention.[39]

In the case of *State of Rajasthan* v. *Basant Nahata*,[40] Court held that it is not possible to define public policy with precision at any point of time. It is not for the executive to fill these grey areas as the said power rests with the judiciary. Whenever interpretation of the concept "public policy" is required to be considered it is for the judiciary to do so and in doing so even the power of the judiciary is very limited. In international public policy, the following difficulties are faced like establishing a given principle's universality and uncertainty as to the degree of universal acceptance required before the principle becomes 'truly international'.[41]

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[35] Pierre Lalive, '*Transnational (or Truly International) Public Policy and International Arbitration*' in Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration (1987) 257, 285–6 referred from Andrew Barraclough And Jeff Waincymer, *Mandatory Rules of Law in International Commercial Arbitration Mandatory Rules of Law in International Commercial Arbitration*https://law.unimelb.edu.au/__data/assets/pdf_file/0003/1681167/Barraclough-and-Waincymer.pdf)

[36] Pierre Mayer & Audley Sheppard, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', (2003) 19 *Arbitration International*253 (referred from Nivedita Chandrakanth Shenoy , 'Public Policy Under Article V(2)(B) Of The New York Convention: Is There a Transnational Standard?'https://cardozojcr.com/wp-content/uploads/2019/01/Public-Policy-Under-Article-V2b-of-the-New-York-Convention-Is-There-a-Transnational-Standard.pdf)

[37] Article V, New York Convention, 1958.

[38] Section 48 Explanation 1, Arbitration and Conciliation (Amendment) Act, 2015.

[39] Arbitration and Conciliation (Amendment) Act, 2015.

[40](2005) 12 SCC 77

[41] Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration Mandatory Rules of Law in International Commercial Arbitration' https://law.unimelb.edu.au/__ data/assets/pdf file/0003/1681167/Barraclough-and-Waincymer.pdf

4. Taxation Law

International commercial contracts not only bring profits for the investors but also boom the economy of a nation. The tax paid by these ventures benefit the economy of a country. In any civilized society, a taxing statute is expected to be prospective i.e. levying the tax on the income / transaction which will take place in the future as it gives the tax payer a knowledge of the taxes which he is expected to pay at the time of entering into the transaction.[42]Viscount Simon quoted with approval a passage from Rowlatt, J. mentions:

> "*In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.*"

Expert Committee was constituted in 2012 to prepare a report on General Anti-Avoidance Rules (GAAR). The Committee was constituted under the headship of Dr. Parthasarathi Shome. GAAR, in conjunction with retrospective taxation, has generated worldwide opprobrium not only against the unpredictable approach to administration of the Indian tax authorities but also of policymakers who enact laws. The outcome is a widely held view that India is not a good place for investment at the moment.[43] Shome Committee recommended when indirect transfer of assets located in India is involved then taxation should be done with prospective effect and not retrospective. The Committee concluded that retrospective application of tax law should occur in exceptional or rarest of rare cases.[44] Moreover, retrospective application of tax law should occur only after exhaustive and transparent consultations with stakeholders who would be affected.

4.1 Retrospective taxation

It is undisputed that the legislature does have the power to legislate with retrospective effect.[45] The legislature has the power of retrospective legislation but it should be exercised in a well- defined criteria. The purpose of retroactive taxation is not based on a question of failure to pay for the debt associated with the services rendered to the former resident. But, it is also correlated to unjust enrichment. Retrospective legislation can be allowed only when it is beneficial. It should not be punitive. In USA, an income tax law made retroactive to the beginning of the calendar year in which it was adopted is valid.[46]*In the case of Welch v. Henry*[47]*the Court held that t*axation is neither a

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[42]https://www.caclubindia.com/articles/retrospective-amendments-hightime-for-introspection-by-india-5144.asp

[43]https://www.finmin.nic.in/sites/default/files/report_gaar_itact1961.pdf

[44]https://www.indianeconomy.net/splclassroom/what-is-the-controversy-related-to-retrospective-taxation-in-india/#:~:text=A%20retrospective%20tax%20law%20is%20one%20that%20takes,onwards%20(Income%20tax%20rule%20was%20passed%20in%201962).

[45] Prateek Andheria, 'The Validity of Retrospective Amendments to the Income Tax Act: Section 9 of the Act and the Ishikawajima Harima Case', (2011) 4 *NUJS L Rev* 269.

[46]https://www.law.cornell.edu/constitution-conan/amendment-5/retroactive-taxes#fn563amd5

penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measures are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute. In addition to India, many countries including the US, the UK, the Netherlands, Canada, Belgium, Australia and Italy have retrospectively taxed companies, which had taken the benefit of loopholes in the previous law.[48] The companies have tapped loopholes of the law to evade tax.

4.1.1 Merits

Retroactive tax legislation helps the states in the period of fiscal stress. It should be done only when there is a financial emergency and not to fill the budget gap.[49]However, it cannot be applied after any number of years. Also, the State should not discriminate between the three classes of taxpayers-nonresidents, former residents, and current residents. The application of retrospective taxation is needed to levy a tax on the companies which find loopholes in the law and take advantage of it to evade tax. The purpose of the law is defeated when taxpayers use lacunas to have an advantage for their personal gain. It curbs fraud and corruption. It brings neutrality.

4.1.2 Demerits

The principle of fairness is affected while giving retrospective effect. The companies are not aware of a new policy that will make their past act taxable. Also, the purpose of the law is to provide stability and maintain law and order. Retroactive gives rise to uncertainty. The businessmen not only from abroad but also within the country will be unaware of the laws which Government may implement from backdate. Retroactive legislation encourages legislators to act arbitrarily and irresponsibly and further, discourages litigation that serves as a check on legislative power.[50]A statute that is retrospective is generally presumed to be unjust and oppressive unless such retrospective effect is provided in the statute expressly or impliedly.[51]

4.2 Case Analysis of Vodafone Case

In the case of *Vodafone International Holdings BV* v. *Union of India*[52]the facts are that Hutchison Essar Ltd., an Indian Company, with share contribution by CGP (Mauritius) and Essar holding 67% shares and 33 % shares respectively. CGP was a 100% subsidiary of Hutchison Telecommunications

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[47]305 U.S., at 146-147, 59 S.Ct., at 125-126 retrieved from https://www.law.cornell.edu/supremecourt/text/449/292

[48]https://indianexpress.com/article/explained/retrospective-taxation-the-vodafone-case-and-the-hague-court-ruling-6613799/

[49]https://www.forbes.com/sites/taxnotes/2020/07/14/no-love-for-retroactive-tax-legislation/?sh=5e46cc213278

[50]https://www.forbes.com/sites/taxnotes/2020/07/14/no-love-for-retroactive-tax-legislation/?sh=5e46cc213278

[51]Vepa P. Sarathi, *Interpretation of Statutes*467(Eastern Book Company, Lucknow, 2003) .

[52] (2012) 6 SCC 613.

International Limited (HTIL) (Hong Kong). A Share Purchase Agreement was signed between the Non-resident Companies on 11.2.2007 between VIH and HTIL, whereby HTIL agreed to procure the sale of CGP shares.[53] HTIHL (BVI) was a wholly owned subsidiary (indirect) of Hutchison Telecommunications International Limited (CI) [HTIL].The issue was whether the sale of CGP share by HTIL to Vodafone would amount to transfer of a capital asset within the Indian Income Tax Act and attracts capital gains tax.

The Bombay High Court upheld the jurisdiction of Union of India(Revenue) to impose capital gains tax on Vodafone as a representative assesse after holding that the transaction between the parties attracted capital gains in India. However, the Supreme Court has aside the judgment.

"Section 9 (1) (i), Income Tax Act, 1961 provides that the following incomes shall be deemed to accrue or arise in India: --

(i)all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India."

This provision allows various types of income and directs that income falling under each of the sub-clauses shall be deemed to accrue or arise in India.Broadly there are four items of income.

Union of India submitted that the word "through" inter alia means "in consequence of".That, even if control over HEL were to get transferred in consequence of the transfer of the CGP share outside India, it would yet be covered by Section 9. The Supreme Court held,

> *"Section 9 (1) (i), cannot by a process of interpretation be extended to cover indirect transfers of capital assets/property situate in India. To do so, would amount to changing the content and ambit. We cannot re-write Section 9 (1) (i). The legislature has not used the words indirect transfer in Section 9 (1) (i). If the word indirect is read into Section 9 (1) (i), it would render the express statutory requirement of the 4th sub-clause in Section 9 (1) (i) nugatory. This is because Section 9 (1) (i) applies to transfers of a capital asset situate in India."*

Similarly, the words underlying asset do not find a place in Section 9 (1) (i). This proposal indicates in a way that indirect transfers are not covered under this provision. Revenue has failed to establish both the tests, Resident Test as well the Source Test[54]. Section 9 refers to a property that yields an income and that property should have the status in India and it is the income that arises through or from that property which is taxable. It covers only income arising from a transfer of a capital asset situated in India and it does not purport to cover income arising from the indirect transfer of capital asset in

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[53] https://taxguru.in/income-tax/vodafone-wins-arbitration-india-retrospective-tax-case.html

[54]Source in relation to an income has been construed to be where the transaction of sale takes place and not where the item of value, which was the subject of the transaction, was acquired or derived from. HTIL and Vodafone are off-shore companies and since the sale took place outside India, applying the source test, the source is also outside India, unless legislation ropes in such transactions

India. The Court interpreted that words "directly or indirectly" occurring in Section 9, therefore, relate to the relationship and connection between a non-resident assesse and the income and these words cannot and do not govern the relationship between the transaction that gave rise to income and the territory that seeks to tax the income.

Power to impose tax is essentially a legislative function as per Article 265[55] of the Constitution of India. Further, it is also well settled that the subject is not to be taxed without clear words for that purpose; and also that every Act of Parliament must be read according to the natural construction of its words. Certainty and stability form the basic foundation of any fiscal system. Tax policy certainty is crucial for taxpayers (including foreign investors) to make rational economic choices in the most efficient manner. The Hon'ble Supreme Court held that the demand of nearly Rs.12,000 crores by way of capital gains tax, in my view, would amount to imposing capital punishment for capital investment since it lacks the authority of law.

The controversy did not rest here and this case became the most controversial economic issue in the last five years was the tax dispute between Vodafone and the tax department.[56]Then Finance Minister Pranab Mukherjee circumvented the ruling by proposing an amendment to the Finance Act, which gave the I-T Department power to retrospectively tax such deals.[57] Vodafone was not ready to pay taxes after the SC verdict. In 2014, the company approached Netherlands government (its registered office) for invoking the India- Netherlands Bilateral Investment Protection Agreement.[58] The Investment treaty arbitration (ITA) tribunal was constituted under the India-Netherlands bilateral investment treaty (BIT). ITA tribunal observed that it has full powers to adjudicate upon a law enacted by a competent Parliament of a sovereign nation and examine whether such law breaches the country's international law obligations or not.[59]As per 8th Feb 2021 information, India has challenged in the Singapore High Court an international arbitration tribunal's verdict that overturned its demand for Rs 22,100 crore in back taxes from Vodafone Group Plc.[60] The Vodafone deal with Hutch started in 2007. Already 13 years are over, this much time period is enough for resolving dispute. By dragging the matter, India's image on the international platform is affected to a great extent.

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[55] No tax shall be levied except by authority of law.

[56]https://www.indianeconomy.net/splclassroom/what-is-the-controversy-related-to-retrospective-taxation-in-india/#:~:text=A%20retrospective%20tax%20law%20is%20one%20that%20takes,onwards%20(Income%20tax%20rule%20was%20passed%20in%201962). as retrieved on 13 Feb 2021

[57]https://indianexpress.com/article/business/cairn-arbitration-case-india-vodafone-7117486/

[58]https://www.indianeconomy.net/splclassroom/what-is-the-controversy-related-to-retrospective-taxation-in-india/#:~:text=A%20retrospective%20tax%20law%20is%20one%20that%20takes,onwards%20(Income%20tax%20rule%20was%20passed%20in%201962)

[59]https://www.barandbench.com/columns/indias-proposed-challenge-to-the-vodafone-bit-award

[60]https://www.financialexpress.com/industry/vodafone-tax-case-india-files-application-in-singapore-high-court-against-arbitration-panel-verdict/2190586/

4.3 Cairn Energy Case

The company is one of the largest foreign investors in India with cumulative investments of $6.5 billion and has a capacity to produce 1.7 lakh barrels of oil a day.[61] In 2006-07, Cairn UK had transferred shares of Cairn India Holdings to Cairn India. This was an internal rearrangement process. Income-Tax authorities then decided that since Cairn UK had made capital gains, it ought to pay capital gains tax.[62]In March 2015, the tax department sought Rs 10,247 crore in taxes on alleged capital gains made by the company in the internal reorganisation. The company denied any tax was due even if the retrospective amendments to Income Tax Act are applied as the group reorganization had not resulted in any real income accruing to it.[63] The matter was filed before Income-Tax Appellate Tribunal (ITAT). Cairn lost the case at ITAT. The High Court followed a case on the valuation of capital gains is pending before Delhi High Court.

The firm filed a matter before Permanent Court of Arbitration, Hague under BITS agreement. The Permanent Court of Arbitration (PCA) at the Hague had noted that the demand made by the Indian government was in breach of fair treatment under the UK-India bilateral investment treaty. The tribunal's order also highlighted the criticism by the present Indian government leaders of retrospective amendments and international who had likened them to "tax terrorism".[64]In December 2020, Permanent Court of Arbitration, Hague unanimously overturned Rs 10,247 crore retrospective tax demand on British oil and gas company Cairn Energy Plc and asked the government to return shares it sold, dividend it seized and tax refunds it stopped to enforce the tax.[65]The government has now hinted to work under the Vivad se Vishwas tax amnesty and dispute resolution mechanism and may consider that the only possible solution for both parties to avoid further litigation. The government wanted to facilitate greater foreign investment along with not abiding the arbitration ruling. This sends the wrong signal to the investor community.[66]In November 2021, Cairn Energy commenced the procedure to take back lawsuits that it had filed in several jurisdictions such as

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[61]https://www.thehindu.com/business/Industry/Understanding-the-Cairn-India-tax-conundrum/article14485000. ece

[62]https://indianexpress.com/article/explained/cairn-energy-ceo-finsecy-meet-today-tax-dispute-case-explained-7194012/

[63]https://www.thehindu.com/business/Industry/Understanding-the-Cairn-India-tax-conundrum/article14485000. ece

[64]https://indianexpress.com/article/opinion/editorials/cairn-energy-dispute-vodafone-permeanent-court-of-arbitartion-bjp/

[65]https://www.financialexpress.com/industry/vodafone-tax-case-india-files-application-in-singapore-high-court-against-arbitration-panel-verdict/2190586/ Also see, https://economictimes.indiatimes.com/industry/energy/oil-gas/india-may-give-oilfield-in-lieu-of-1-4-billion-it-has-to-pay-cairn-and-save-overseas-assets/articleshow/80612337.cms?utm_source= contentofinterest&utm_medium=text&utm_campaign=cppst

[66]https://indianexpress.com/article/opinion/editorials/cairn-energy-dispute-vodafone-permeanent-court-of-arbitartion-bjp/

France, Mauritius, Singapore, UK & Canada to enforce an international arbitration award which had overturned the levy of ₹ 10,247 crore retrospective taxes and ordered India to refund the money already collected. Cairn Energy confirmed that it has entered in discussion with India to settle its dispute that will see India refund 7900 crore in return dropping all legal proceedings against the country.[67]

5. Conclusion and Suggestions

The author has analysed the FDI with arbitration and taxation policy of India. FDIs have shown a positive trend over the past three years. However, to establish long term relations in contracts, an amicable dispute resolution mechanism is alternative dispute resolution. The arbitration laws are incorporated to support the parties in dispute. When any ambiguity is left in the contract by the parties, especially in international commercial contracts then it is resolved by Court like *Balco case, Enercon case, Mankastu case*. The author opines that the companies engage counsels who should look into the terms of contract and arbitration so as to find and establish clear intention on 'place' and 'seat' of arbitration. Also, 'public policy' has to be interpreted carefully. Another important issue discussed in the article is retrospective taxation. It should be allowed when it is beneficial for society[68]or there is fiscal stress. It should not be punitive. The author noted the merits and demerits also to bring clear picture of when the companies use loopholes and when the government imposes law retrospectively. *Vodafone case and Cairns case* disputes are more than a decade old and require India to abide by arbitration ruling to have more foreign investment and establishing institutional arbitration. The author wants to suggest the following points:

- Minimise court intervention in arbitral awards.
- Establish India as the base for institutional Arbitration and should learn from other International Arbitration Centres.
- Taxation laws lacunas should be removed.
- Implementation of fast-track procedure should be checked. The 2015 and 2019 Amendment to Arbitration and Conciliation Act, 1996 tried to protect the interest of parties by speedier resolution of disputes and included provisions on Fast track procedure and establishment of Arbitration Council of India.

[67]ttps://www.newindianexpress.com/business/2022/jan/05/britains-cairn-energy-withdraws-all-lawsuits-against-india-now-entitled-tors-7900-crore-tax-refund-2403387.htmlas on September 9, 2022.

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The Vagaries Associated with Determination of Relevant Market with Special Reference to Real Estate and Intellectual Property Rights

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Abstract

The essence of any competition law regime is to strengthen economic efficiency and productive efficiency in any market. There is no doubt that if the dominant player has been alleged to abuse its position of dominance, then it is necessary to comprehend and assess the nature of relevant market in totality. However, the task is tricky as the decisional trend shows that the determination of the relevant market has certain discrepancies of its own. It is also true that the abuse of dominant behaviour is difficult to establish in the real estate sector in particular. The issue of collective dominance is also one of the major concerns for any competitive market. It is significant to note that Indian competition jurisprudence needs to expand its horizon to include the concept of collective dominance and its concerns. There is further need to go for strict enforcement of competition law and CCI's ruling so that corporate governance and accountability can be inculcated in the real estate business and smooth compliance of RERA laws and policies. In this particular paper, the main area of concern is regarding determination of relevant market in real estate and intellectual property rights.

Keywords- Monopoly, Competition, Relevant market, Dominance, Real estate.

Introduction

One can see that the onset of globalisation, privatization and liberalization has changed the outlook of doing trade in India. There has been a phenomenal change not just in the behaviour of the consumer but also the producer as well. With the advent of globalisation, the consumer now has a wide range of products to choose from. The foreign players also saw India as a place with inexhaustible amount of opportunities and since the trade restrictions were loosened up a lot of foreign players started foregrounding

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their position in India. It was beneficial in way as oligarchic practices of a few dominant players were done away with. However, a new kind of domination was seen, the foreign players with deep pockets had the capacity to bring to rubble, the business of those infant players who were at a nascent stage.

In India the anti monopolistic sentiments have been very dominant. Such a tendency is primarily from the fact that country under the one man-ship of the British colonial policies saw a total destruction of local businesses as the market was totally at the mercy of the colonial rulers and the colonial rulers aimed at creating a monopoly in the market. Even post independence, the situation did not improve much. India parliament discovered that a large part of the wealth which was generated in the country was getting regimented in the few hands and the practice was endemic since the inception of the five year plans.[1]

The Monopolists Inquiry Commission and the Industrial Licensing Policy Inquiry Committee concluded in its report of 1969, that there has been a phenomenal increase in the assets controlled by the larger business houses.[2] It is true that prospering nations with vulnerable institutions should give their preference to ease the existing process of business activity and emphasize on creation of efficacious market.[3] If a competition authority is set up, priority should be given to competition advocacy and to pushing the role of competition policy in external trade, privatization and industrial policies.[4]

It was because of the above reasons that the need of a competition law become a necessity. As a result of which the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 came into existence after many different level of deliberations and discourse with an objective to encourage fair practices in market and discourage monopolistic behaviour .[5] The legislation was designed to control monopolies, prohibit restrictive trade practices and check concentration of economic power.[6] The preamble of the MRTP act stated:[7]

Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto.

The preamble itself hints at the problems which lied at the heart of this legislation. The act envisaged that neither concentration of wealth nor

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[1] N.K. Chandra, "Monopoly legislation and policy in India" 12(33) *EPW* 1405(1977).
[2] *Ibid.*
[3] Abel Mateus, "Competition and Development : What Competition Law Regime?" in D.Daniel Sokel, Thomas K.Cheng *et.al.* (eds.), *Competition Law & Development* 116(2013).
[4] *Ibid.*
[5] Ashok Chawla, "Global Business and Competition Law in India" 9(2) *Indian Foreign Affairs Journal* 169(2014).
[6] *Supra* note 5.
[7] Monopolies and Restrictive Trade Practices (MRTP) Act, 1969.

monopolies will be affected and the government took action only when it thought that such practices leads to common detriment.[8]

The MRTP Act went through various amendments with the passage of time and business dynamics and trade regime was also transformed through liberalization and ratification of different international legal instruments & agreements like TRIPS, GATS,etc. It also brought influx of many transnational entities in diverse business sector across the country.[9]In order to assess the problem, the government instituted an expert committee under the stewardship of R.K.Raghavan in the year 1999, to comprehend the existing trade market in context of fair practices and global competition regime so as to create a new competition law and policy. The committee also recommended number of action plans necessary for the competition policy in the national interest.[10] The committed submitted its report in 2000 and made the following assessment:

To summarize, the strategy of import substituting development along with the distorted price structure led to an allocation of resources towards heavy industry and the capital goods sector, which was not based on the principles of comparative advantage. The absence of domestic competition, along with the unconditional protection from imports provided to domestic industry together with the other aspects of the licensing regime.... A competitive financial sector would have ensured better utilization of scarce financial resources and have had a positive impact on the productivity of the industrial sector.

The competition law specifically aspire to preserve the thriving competition in any market and prevent practices which put adverse impact on competition regime in general and consumers. It is quite significant to maintain consumerism and economic sustainability in relevant market where there is no illegitimate loss to economic rights of existing rival competitors and new commercial entrants in any market and ensured freedom of trade. Anti-competitive agreements, abuse of dominant position and combinations are basic features of Indian competition law regime.[11] The feature of dominant position of a commercial entity is based on its market strength so that it can function independently in the thriving competitive market and to have an effect on consumers or on relevant market:[12]From the explanation above it becomes aptly clear that the concept of relevant market is highly important in analyzing a case of abuse of dominance.

Relevant Market

It has two facets in the form of relevant product market and relevant geographic market. It is important to introspect the construction & existing

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[8]*Supra* note 1.
[9] D.K.Sikri, "Competition Law Enforcement in India" 5(2) *JOAE* 163 (2017).
[10]*Ibid.*
[11] T. Ramappa, *Competition Law in India, Policy, Issues and Dvelopments* 1 (Oxford University Press, 3rd edn., 2014).
[12] Section 4(2), Explanation (a), The Competition Act 2002.

position of dominance. It has to be seen how a particular entity or group of entities got market strength and diverse factors like impact on consumers, barriers created for rival competitors, their economic capacity,etc.[13]The concept of relevant market was referred in the *United States* v. *Columbian Steel* in 1948 for the first time whereby analytical approach will be adopted to oversee the changes in supply of goods or services.[14] Historically, the competition authority defines relevant markets in a narrow manner, by virtue of interest, while the parties accused of abuse of dominance accords a wide definition for the same. There is a reason why the parties under impugnity while in a proceeding related to enforcement wish to define the relevant product market in a broad manner as the market share will be lower in a widely defined market.[15]

Basic principles for market definition

It's not just for the calculation of market shares, that determination of a relevant market should take place, but it is of more importance that determination involves an analysis of substitutability. It is to be seen that what is the substitution patterns in evaluating the competition effects of a merger or of a particular business practices.[16]

Competitive Constraints

There are three main sources of competitive constraints to which the firms are subjected to. Those are demand substitutability, supply substitutability and potential competition. If we look from an economic point of view then the demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decision.[17]Basically, in venturing a market definition, the exercise involves identifying the effective source of supply for the customers of the undertakings involved, both in the terms of the products and services and the geographic location of suppliers.[18]

Demand Substitution

In order to assess the demand substitution it is necessary to determine a range of products which are seen as substitutes by the consumers. One method which can be used is the method of speculative experiment which involves making a hypothetical small, lasting change in relative prices and thus evaluating the likely reactions of customers to that increase. This concept can provide with the indication as to the evidence pertinent in defining markets. The question which is to be answered is whether the parties customers would

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[13]*Ibid*.

[14] Ivan Stepanov, " Springer India Case: The Challenges in the Determination of the Relevant Market & Market power of Copyrighted Goods- The Indian Perspective", *available at* : SSRN:https://ssrn.com/abstract= 28/6002.

[15] Abir Roy and Jayant Kumar, *Competition Law in India* 149 (Eastern Law House, Kolkata, 2008).

[16] Willem H. Boshoff, "Why define markets in competition case"10(13) *Stellenbosch Economic Working Papers* 4(2013).

[17]*Supra* note 13 at 23.

[18]*Ibid.*

switch to readily available substitutes or to suppliers located elsewhere in response to a hypothetical small (in the range 5% to 10%) but permanent relative price increase in the products and areas being considered. It is not necessary that those substitute products are included which are identical. Office of fair trading in its report on Matches and Disposable Lighters included matches and disposable lighters in the same market as customers viewed both of these products as close substitutes and, therefore, functionally interchangeable.[19]

Supply Substitutability

Supply substitutability accounts for the bulwarks that impedes a producer from shifting production facilities or resources to some other group of products that would increase their profit margins.[20] It is very essential that supply substitutability should be ascertained at the market definition stage itself.[21] It may also take into account such situations where markets are defined on the basis of situations in which effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This tantamount to the fact that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. However in India, unlike the other matured antitrust jurisdictions, supply side substitutability is not a pertinent factor to determine relevant product market because of the definition of the relevant product market contained in S.2(t) of the Act.[22] But on the basis of factors mentioned under S.19 (7) of the Act, supply side substitutability is a factor which is equally to be taken into account while determining relevant product markets.[23] It examines the extent to which suppliers would switch their existing production facilities to make alternative products in response to a change in relative prices, demand or other market conditions.[24]

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[19] Government of United Kingdom, Report of the Office of Fair Trading on Market Definition: Understanding Competition Law(Office of Fair Trading, 2004).

[20] *Supra* note 17 at 165.

[21] *Ibid.*

[22] Relevant product market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of the characteristics of the products or services, their prices and intended use.

[23] S.19(7)(of the Competition Act, 2002) says that the Commmission shall, while determining the "relevant product market", have due regard to all or any of the following factors, namely:-
(a) physical characteristics or end-use of goods;
(b) price of goods or service;
(c) consumer preferences;
(d) exclusion of in- house production;
(e) existence of specialised producers;
(f) classification of industrial products.

[24] *Supra* note 17 at 166.

Potential Competition

This source is not taken into account when the market is defined, as the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances when conditions are pertaining to the entry level. It is only at the subsequent stages that this analysis is carried on, generally it is done when the position of the companies involved in the relevant market has already been ascertained and when such position gives rise to concerns from a competition point of view.[25]

Economic Tests to define relevant markets

The Hypothetical Monopolist Test is the process of defining a market by establishing as to which products are 'close enough' substitutes to be in the relevant market. The Short but substantial increase in Price test or the SSNIP test mainly seeks to establish the smallest product group in such a way that a hypothetical monopolist controlling that product group could sustain supra competitive prices which is still profitable. That product group is usually the relevant market. For the product under investigation the authorities start by considering a hypothetical monopolist which operates in a focal area. It is thereafter asked, whether it would be profitable for that hypothetical monopolist to maintain the price of the product under investigation at a small but significant amount. If the answer is yes, the test is completed and it is determined that the product under investigation under the hypothetical monopolist's control is the relevant market.[26] If the answer to this question is no, then it is further assumed that the hypothetical monopolist controls not only the product under investigation but the closest substitute as well. So the process is repeated, but this time for a larger set of products (assumed to be under the control of the hypothetical monopolist). The process is repeated until a group of products are found for which it is profitable for the hypothetical monopolist to sustain prices 5 to 10 percent above competitive levels.[27] The greatest benefit of this step is its capacity to ascertain the nature of competitive constraints that act upon firms or group of firms, in a best possible way ,as such constraints affecting competition originate from the behaviour of the consumers.[28] However there are many limitations to this test as well. In cases where there is no history of 'revealed preferences', *i.e* in cases where there aren't any changes in the pricing in the history of the product and no evidence of demand changes exist.[29] Also there is always a possibility of a dominant enterprise charging such price which is already above the competitive levels and as per the Hypothetical Monopolist Test, if there is an further raise in the prices, the consumers for the product under investigation will cease to buy the

[25] *Supra* note 13 at 26.
[26] *Supra* note 17 at 178.
[27] *Ibid.*
[28] *Supra* note 18.
[29] *Supra* note 17 at 180.

product.[30] This situation was witnessed in the case of *United States* v. *El du pont Nemour*[31] which is famously referred as the cellophane phallacy.

If we look at the Indian courts then the application of this particular test is quite inconsistent. In the case of *NSE* v. *MCX*[32], the Competition Commission of India imposed a hefty penalty of Rs 55.2 Crore on the National Stock Exchange on account of violation of the relevant provisions of the Competition Act, 2002 on being found guilty for predatory pricing, in a new market segment of Currency Derivatives (CD) in stock exchange, in which only other meaningful competitor was MCX-SX. MCX- SX alleged against NSE that NSE has systematically waivered off its admission fee only in the CD segment. NSE has never done anything alike either in past or in present. It was further alleged that it was deliberately being done by the NSE as it has the pockets deep enough to sustain loss as they might be loosing from the segment of CD but are deriving income from other segments. MCX-SX being the new competitor cannot afford this luxury as income from CD was its only source of income. Because of the kind of move from the NSE, MCX-SX was slowly bleeding to death. The first issue in the case for determination before the commission was as to what was the relevant market. The majority held that CD derivative segment will be the relevant market as MCX-SX operates only in CD derivative segment, the competition concerns must be specific to that segment only. The majority, however, did not consider the SSNIP test to be very effective, especially in the view of the fact that CD segment is relatively new and no costs had been charged to the transactions in this segment by any market player till that time.[33]

None of the two players were charging any fee, therefore, in the opinion of the CCI, the applicability of the SSNIP test was quite limited.[34] The commission also pointed out towards the limited applicability of the SSNIP test. In the words of commission:[35]

This commission finds it rather unnecessary to dive into technical tests such as SSNIP, particularly in the absence of historic data of prices. The SSNIP test is a tool of econometric analysis to evaluate competitive constraints between two products. It is used for assessing competitive interaction different or differentiated products. Ideally, time – series price data or trend should be examined to see whether a small but significant non transitional increase in price has led to switching of consumers from one product to another. However, international jurisdictions have not reposed excessive faith in this test.

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[30] G.R.Bhatia, "Assessment of Dominance: Issues and Challenges under the Indian Competition Act, 2002, *available at*: http://www.manupatrafast.com/articles/pop openArticle.aspx.

[31] 351 US 377.

[32] Case No. 13/2009.

[33] K.K. Sharma, "First successful case of predatory pricing in India- Imposition of penalty on National Stock exchange" 1*CLR* 133 (2016).

[34] *Ibid.*

[35] *Supra* note 35 at para no.10.16.

However, in the case of *Belaire Owner's Association* v.*DLF Ltd*[36], the CCI found that SSNIP is "often applied in abuse of dominance cases" and did not ventured into an economic analysis and held that SSNIP will lead to the same relevant market as delineated otherwise by CCI.[37] In the case of *Surinder Singh Barni* v. *Board for Control of Cricket in India*[38]the commission discussed about SSNIP test. In its own words:[39]

> *Considering the basic test of non-transitory relative price rise of 5% to 10% also known as SSNIP test for a cricket event and considering the consumer behaviour, it seems quite unreasonable to believe that a consumer would substitute cricket event with any other form of entertainment viz. Films, TV shows etc or any other sporting event. There is enough behavioural evidence to suggest the same is reflected in data regarding viewership.*

From the above discussed cases we can see that there is a huge inconsistency on the part of CCI when it comes to the application of the SSNIP test.

Confusing stand by the judiciary in ascertaining relevant market in the cases pertaining to real estate sector.

The case of *Belaire owner's Association* v. *DLF Limited*[40] is an important case to understand the approach of CCI in ascertaining relevant market in the cases pertaining to real estate sector. In this particular case DLF launched a housing project called as 'The Belaire'. It was alleged by the residents that the DLF had subsequently imposed such conditions which were unreasonable and unfair. The CCI after taking into cognizance, the information given by the informant considered that a *prima facie* case of dominance exists and an investigation was ordered to be conducted by the Director General (DG). DG after considering the conditions enunciated in S. 19(4) of the Act held that DLF was abusing its position of dominance. The major issues before the CCI were

1. Whether DLF occupies the dominant position in the relevant market.
2. If DLF is in dominant position then whether DLF has abused its position of dominance.

The relevant product market for this particular case was carved out to be the 'services provided by the builders' for providing 'high-end' apartments to the customers. As far as the relevant geographic market was concerned, the DG submitted that it would be the territory of Gurgaon, as decision to purchase a high- end apartment in Gurgaon is not easily substitutable by a decision to purchase high-end apartment in any other geographic area, though DLF had contended that the relevant geographic market would be whole of the NCR region and not just the Gurgaon region.On the issue of whether DLF holds the position of dominance in the relevant product market, the CCI took help of the

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[36] Case No.19 of 2010.
[37] *Supra* note 17 at 187.
[38] Case No. 61/2010.
[39] *Id.* at 8.36.
[40] 104 CLA 398 (CCI 2011), order dated- 12/08/2011.

Report of Centre for Monitoring Indian Economy (CMIE), the report stated that DLF along with its subsidiaries had highest market shares among all the listed companies engaged in the sector of housing construction during the year 2007-08 and 2008-09. It was held that DLF acquires the position of dominance.

On the second issue of whether DLF has abused its position of dominance, the CCI here held that DLF was abusing its position of dominance by imposing conditions which were not only arbitrary but also unilateral thus were detrimental towards the allotte. The court also discussed the concept of after market abuse, where once a buyer enters into the agreement with the seller, the seller tweaks the agreement in such a way which is detrimental to the buyer. The CCI imposed a whooping penalty of Rs 630 Crore on DLF.

The judgement delivered by the CCI is of significant importance. It is for the first time in India that Competition law has ventured into covering the exploitative nature ensuing out of the abuse of dominant position. Hitherto, Competition law mainly centred around the exclusionary abuses like predatory pricing etc. Also the court delved into the discussion of 'unfair trade practices' which is somewhat an area of discussion under the Consumer Protection laws.[41]This decision is laden with many discrepancies as well. First and foremost problem with the judgement is that in order to estimate company's market share in Gurgaon , CCI took help of an All India Revenue data and the methodology of the CCI might be questioned in the higher courts. A possibility cannot be overlooked where a company might be a market leader in Bangalore and it may have a project in Gurgaon. DG's estimation of market share on the basis of all India sales figure is not correct.[42] Also for ascertainment of the geographical area, an independent survey of flat buyers should have been carried on by the CCI to ascertain the size of the market as well as the preferences of the consumers.[43]

A case similar on the lines of DLF came before the CCI in 2015 which involved Jaypee Associates Ltd.[44] The facts of this case are analogous to that of the DLF case. Here it was alleged on the Jaypee Associates that it was abusing its position of dominance and has imposed arbitrary conditions over the allottee of flats, thus blatantly violating the canons of free and fair competition and thus the act of Jaypee Associates is in contravention to S.4(2)(a) and section (4)(2)(c) of the Competition Act.[45] It was also contended by the informer that an additional condition of *force majeure* was unnecessary imposed on them according to which the builders can take any amount of extra time in completion of the project even though if the builders have crossed the deadline. The CCI after looking over the entire material put before us ordered the DG to

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[41]M.M. Sharma and Vaishnav Chouksi, "Impact of Competition Law on Indian Real Estate Sector- An analysis of order against DLF 44 *CompLR* 239 (2011).

[42] "Regulators flawed definition of market in NSE, DLF orders may weaken case" *Economic Times*, Sep.6, 2011.

[43]*Ibid.*

[44] Case Nos. 72 of 2011; 16, 34 and 53 of 2012; and 45 of 2013, dated on 26/10/2015.

[45]*Id.* at para 5.

conduct an inquiry into the verisimilitude of the allegations. The DG first examined that whether Jaypee has dominance in the market or not. First and foremost, the relevant product market was analyzed, it was mentioned under the report that norms of development for residential house was altogether different from other kinds of properties. After considering the factors, the relevant product market determined was 'the provision of services for development and sale of residential apartments'. For the determination of relevant geographic market, Noida and Greater Noida were determined as relevant geographic market. It was seen that a customer who has decided for this particular location would not decide any other location. The apparent reasons for not switching are the facts that both the areas are distinctively homogeneous. Also the rules applicable in Noida and Greater Noida are analogous. The DG pointed out that the Jaypee group has a market share of 25.09% in terms of the number of projects launched/developed and Jaypee was behind its near competitor Amrapali with 27.32% market share during the period of 2009 to 2011. There were a number of other players such as Super-tech Ltd, with 16.18% of market shares, 3C had a market share of 8.33%, Uni-tech had a market share of 6.82%. According to the DG these were pertinent factors which provides competitive constraints on Jaypee. Based on these evidences the DG concluded its investigation report by declaring that Jaypee was not in a dominant position. Interestingly in 2014 the DG came out with its supplementary report, whereby it examined that Jaypee was in a position of dominance.

The CCI based on the earlier report submitted by the DG held that Jaypee was not in a position of dominance. However the decision certainly raises stern eye brows. It need to be understood that unlike the practice in the EU, the determination of relevant market under the Competition Act does not solely depend upon the factor such as market shares. Apart from the market shares, the other necessary to be taken into considerations which are economically sound , the factors such as capability of an enterprise to be able to act independently of competition in the market, it is very subjective area and stipulates a very detailed analysis which is backed up by statistical evidence.[46] The relevant market has to seen in terms of market for the product and it further depends upon degree of substitutability with other similar products or services in relation to price, the end use of the product, characteristics and the geographical region where the product operates.

Determination of relevant market in Jaypees's case and the dissent of the minority

While analyzing the case, one can come across a striking difference of opinion between the majority and the minority. The majority relied on the earlier decisional practice of earmarking relevant market as the market for sale of residential apartments to analyze the dominant position of the Jaypee Group

[46] M.M.Sharma, " Jaypee Not Dominant in Noida? Has CCI given the last word on real estate?" 1*Comp*LR138(2016).

as being not dominant.[47] The minority however, narrows down the product market to the sale of residential units in integrated townships.[48] The minority, therefore, concluded that Jaypee group is enjoying dominant position and is involved in abusing that position. If we compare it with the *DLF* case then we will see that in that case 'high end residential apartments' were not held substitutable with the 'low end or mid end apartments' and thus the commission considered it as separate product. We can see that there has been stark difference of opinion in this case from the decision delivered in the *DLF* case. In its supplementary report the DG considered integrated township and standalone residential apartment as two different and distinct products and are not similar enough for the consumers that would entail them to switch from one to other. The supplementary report was backed with solid reasons. The standalone residential apartments do not offer services such as schools, shopping complexes, parks, entertainment centres, gym, sports complex, etc. The residents of the standalone residential apartments, therefore, will have to depend upon on independent markets , sports complexes etc. the residents of integrated township, however, can avail such services within the township itself. The reasons given in the DG's supplementary report is reasonable. The majority order of the CCI, however, held that the concept of integrated township is vague and is in a nascent stage of development. It can not be said with surety that the so called integrated township constitutes a separate product market. CCI also held that geographic region of Noida and Delhi are distinct if seen from the viewpoint of a consumer. A small increase in the price of apartment in Noida will not lead a person to shift his preference to Delhi. This conclusion was derived at by the Commission without applying the SSNIP test.

M.M. Sharma has criticised the judgement black and blue, in his own words:[49]

Another particular omission is the disregard of the 'wanadoo test'...A generic internet search reveals that there exists a significant price difference in the per square feet rates of the same type of apartments in the standalone projects and compared with those in the integrated township. For instance, a 3 BHK apartment in JP Orchid (integrated township) is available for sale at the rate of Rs 5800 per square feet as compared to a 3 BHK apartment in Amrapali Crystal Homes at the rate of Rs. 4400 per square feet. The question arises, would a buyer like to switch to a 3 BHK apartment in an integrated township available at a much higher price just because of the attendant amenities and facilities available? May be yes, may be not. Consequently ,the situation presents a ripe case for segmenting the market on the basis of the buyer's inclination to pay premium prices in return for the premium services available with the product.

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[47] *Ibid.*
[48] *Supra* note 49.
[49] *Supra* note 49 at 140.

The interface between Competition Law and Intellectual Property Rights and the importance of relevant market in IPR regime

From the object of both Competition law and the Intellectual property Right, one can say that its like comparing apples with the oranges. IPR's is somewhere smacked with a tinge of monopoly as the concept of IPR's is based on the reward theory, that the creator of the Intellectual property must be benefitted. The competition law on the other hand aims at maintaining free flow of the competition in the market, that there shouldn't be any hindrances in the fluidity of the competition. Broadly it can be said that IPR aims at securing interest of an individual, whereas Competition law aims at securing the market.[50] Intellectual property has essential characteristics of non excludability which spawns conflict between competition law and Intellectual property.[51] In the Competition Act, we can, however, see that there has been an attempt to harmonize the IPR's and Competition law. Competition law itself enumerates that there is no harm in acquiring monopoly. The only harm is when the player at the position of monopoly tries to abuse it. The subject matter of IPR is expanding, the technologies are evolving which increases potential of IPRs to provide dominance.[52]

In the IPRs as well, the first step is the determination of the relevant market, with the following cases we will see that how the Competition Commission of India has determined the relevant market. In the case of *MCX* v. *NSE*[53] , the National Stock Exchange which was the leading giant in the stock exchange in India, denied to share the CD segment with Financial Technologies India Ltd(FTIL). FTIL produces ODIN software. As a consequence ODIN users were denied access by the NSE to its CD segment. ODIN was a unique software which allowed the traders to deal with multiple markets simultaneously through the same transaction terminal.[54] On an investigation by the DG into the market share of the NSE, it was found out that the NSE is holding the dominant position. Here whole stock exchange business was considered as one market. In this case the CCI stated that the intellectual property owner does not have a general duty to license their intellectual property to any third party. There are few extraordinary cases where the intellectual property itself is the part of infrastructure. In such cases the CCI in order to promote competition and innovation may order the party to compulsory license the product in impunity. If the firm refuses to transfer the technology to the other party, then it will tantamount to abuse of position of dominance. In this case NSE was ordered by the CCI to give access to its software. This case is a path breaking effort in relating to the refusal to license.

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[50] K.D. Raju, " The Inevitable Connection between Intellectual Property and Competition Laws",18*Journal of Intellectual Property Rights* 111 (2013).

[51] Ruchi Verma and Shanya, "Clash between Intellectual Property Law and Competition Law: A Critical Analysis", 1(1) *RGNUL Student Law Review* 150 (2014).

[52]Ravikant Bhardwaj, " Working Paper on Enforcement of Competition Law On Refusal to License of Intellectual Property Rights", *available at:*http://iica.in/images.pdf.

[53]*Supra* note 35.

[54]*Supra* note 55.

The case of *India Prints* v. *Springer India*[55], shows the problems faced by a young Competition law regime. In this case it was alleged by the India Prints that Springer India was abusing its position of dominance. Springer publication entered the Indian markets in 2002 and it entered into agreement with several reputable institutes for publishing the and thus captured a huge market in India for publishing activities. As the part of the agreement the right of the institute to further license came to an end. Springer India imposed several restrictions over India Prints. The conditions were regarding reducing the discounts given by the India Prints, indexing the price in foreign currency. The most important condition that was imposed on the India Prints was regarding supplying the end user details to the Springer India. Though India Prints accepted these conditions, it gradually started experiencing loss as the clients started leaving the India Prints. Consequently India Prints stopped to supply the names of the end users to the Springer India. Springer India up the ante against India Prints by stopping the supply of journals to it. The informant India Prints then alleged that Springer India was violating section 4 of the Competition Act. The informant further contended that the conditions imposed by the Springer India were unfair and as a consequence of supplying commercially sensitive information, the profit of India Prints was squeezing. On receiving the information the CCI considered that there was a *prima facie* case against Springer India and directed the DG to conduct investigation in the matter. According to the DG, the relevant market for the particular case should be the field of science, technology and medical (STM) journals and it would be appropriate to set the market as 'STM journals in English language'. The CCI accepted the report of DG regarding the relevant market. The CCI discusses about the substitutability of the journals on the basis of demand and observed that the two journals can hardly be substituted and, therefore, it is not necessary to narrow down the relevant market while assessing the anti competitive behaviour.In the decision it was observed by the CCI that Springer India entered into co-publishing agreements with the Indian Institutions in the STM sector. However in the report given by DG the designation Indian is lost and this change vastly contributed to the market being expanded. The CCI held the Springer India to be in dominant position. However, the CCI while coming to this conclusion, took notice of only one prime condition that the Springer India has increased the price of the journals and imposed additional requirements on the distributor. The distributor had no other option but to accept such conditions. The CCI primarily focussed on this aspect and but failed to take note of many other conditions that determine the relevant market. it is strange that the CCI jumped to the conclusion regarding market dominance without taking into consideration section 19(4). There should have been a further investigation on the economic evidences in the process of coming to this decision. It is interesting to note that the position of real estate market of India has substantially improved over the years considering the unambiguous nature of Real Estate (Regulation & Development) Act, 2016 and

[55] Case no. 16 of 2010.

other similar legislations. Though, it is important that regulatory bodies should be empowered in these legislation so as to improve the feature of transparency and accountability in the real estate market. Somehow, such regulatory reforms will definitely boost the investor confidence and in a way, it will reduce the impact of adverse effect of any case of abuse of dominance / cartelization/ anti- competition agreement in real estate market.

Conclusion

From the cases discussed above it can be seen that concept of relevant market is full of vagaries. Many times the relevant markets are being determined on the basis of investigations done which are not conducted properly. The CCI need to understand that decisions given today will have far reaching consequences on the future. In the Springer India case we can see that while establishing dominant position, the fact which was not taken care of was that adverse effect on business should not be there. India being a developing country wants resources for its scientific researches. Such decisions may create a chilling effect upon the foreign publishers to enter into the Indian market or for that matter, those publishers who are existing in the market to expand their market further. Less resources will only lead to the degradation of scientific researches. Similarly lack of evidences while determining relevant market has created a sort of ambivalence in the psyche of the players in the market. The way relevant market has been ascertained in the landmark cases of real estate has only exacerbated the concern. It is, therefore, high time that the CCI should be more diligent and scrupulous in determination of the relevant market. The investigation report of the Director General has often created confusion in the determination of the relevant market. It is necessary that such report should be backed by more scientific evidences. It is important to study the impact of cartelization on relevant market specifically in those cases where the issue of exploitative and exclusionary abuse of dominance become major concern. Similarly, there is need to include remedial measures with regard to collective dominance so that adverse effect on markets and rival competitors could be managed. Somehow, it is important to understand the defining approach of relevant market in context of economic analysis and how existing logistics will create impact in geographical or product relevant market including consumer preference and diverse range of costs. The existing competition regime in the evolving contemporary sectors like e-commerce, retail market, etc. also needs to be studied by analysing different parameters of market and global competitiveness factor. The standard principle of per se rule/rule of reason needs to be synergized and applied properly through different scientific tools to understand different nuance of competitive market and take necessary measures especially when the market is affected by hard-core cartelization or diverse type of bid-rigging. The acceptance of economic analysis and modern technology in the competition regime will also help in efficient economic investigation of those anti-market practices which have pernicious effect on rival competitors, end-users and other stakeholders of market.

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Criminal Procedure (Identification) Act, 2022: A Critical Appraisal

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Abstract

The Indian Parliament has recently repealed the Identification of prisoners Act, 1920 and replaced it with a new Act i.e. The Criminal Procedure (Identification) Act, 2022. The new law authorizes the taking and maintenance of measurements of not only an offender but also other persons for the purpose of identification and investigation in criminal matter. Under the new legislation, the power of the State and its enforcement agencies has been widened. The purview of the measurements that can be taken for the purposes of investigation by the National crimes Bureau has been expanded under the new Act. The Act of 1920 permitted a very limited list for which measurements could be taken. The measurements of finger, footprint impression and photographs could only be taken whereas under the current Act measurements of finger impression, palm print impressions, photographs, iris, footprint impressions, photographs, biological samples and retina scan along with its analysis. For the purposes of investigation, the exploration of behavioural attributes can also be done. The present paper endeavours to analyse the various provisions of this Act and its impact on various rights of an individual as there is scepticism over the data protection and privacy concerns under this Act.

Keywords: *Measurements, Biological Sample, DNA Profiling, Identification, Self-Incrimination, Forensic.*

Introduction

The earlier law was enacted with the object to provide legal authority to take measurements of persons convicted or arrested in connection with certain offences.[1] With the new scientific developments and breakthrough in technology a need was felt to replace this Act. Consequently, the *Criminal law (Identification) Act, 2022* was enacted.[2] This Act endeavours to carry out the requirement of collecting bona fide and complete evidence as well as to build up genuine and dependable law enforcement agencies. That will succour in

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[1] The Identification of Prisoners Act, 1920.It stand repealed through section 10(1) of the Criminal law (Identification) Act, 2022

[2] Hereinafter referred as Act.

increasing the conviction rates and will help in reposing the trust of people in the criminal justice system. The present Act authorizes the data collection of varying forms from divergent categories of persons for identification and investigation in criminal matters and for the preservation of records. The collection, analysis and storage of biometric and personal data are authorized to be taken the Executive Authorities. Previously, the authority to make rules and regulations pertaining to criminal investigation was entrusted with only the State Government. However, now the same has been vested with both the State and Central Governments respectively.[3]

Measurements defined under the Act

Measurements play a fundamental role nowadays in forensic activities, especially in Criminal Justice. Under the Criminal Law (Identification) Act, 2022[4] , the term *measurements* include behavioural, biological as well as physical attributes. Moreover, it also includes impression[5], iris and retina scan, photographs or any other examination as referred in Section 53 and 53A of the Code of Criminal Procedure, 1973 along with their *analysis*. It is quite evident that the scope of this provision[6] is very elaborate and magnified. Moreover, Section 53 CrPC in its *Explanation (a)* describes the term *examination* to be understood in the same sense as has been defined under section 53A and 54 CrPC. By such interpretation, the term examination includes an analysis of blood, blood stains, semen, swab, sputum, sweat, hair samples and finger nail clippings by the use of modern and scientific methodology. Moreover, DNA profiling and other tests which the medical practitioner considers necessary also come within the ambit of *examination*[7]. Measurements include terms like *physical* and *biological samples*, *behavioural attributes* and their *analysis* is extremely vague. Such uncertainties leave an ample scope for obscure interpretations, thereby, could result in the transgression of various Fundamental Rights guaranteed to an individual.[8] Thus it is evident that the horizon of the measurements to be collected for sampling has tremendously increased leaving the scope for ambivalence.

Persons from whom data may be collected

For the purposes of enquiry data can be collected from certain categories of persons which have been enumerated under Section 3 of the Act. There is an increase in the categories of persons from whom data is to be collected.[9] The data allowed to be collected under the present law is very personal to every individual, thereby, undermines various rights guaranteed by the Constitution.[10] Not only forced taking of measurements, is a matter of

[3] Section 8 of the Act.
[4] Hereinafter referred to as Act.
[5] Finger, palm print and foot impressions.
[6] Section 2(b) of the Act.
[7] Explanation (a) to section 53 CrPC, 1973.
[8] Article 20(3) and Article 21 of the Indian Constitution.

[10] Ibid

concern, but also its purview has been increased manifold. Under Section 3 of the Act, data can be collected from a person *convicted* of an offence, or a person ordered by the court to give *security* for his *good behaviour* or for *maintaining peace*[11], *or* any person *arrested* or *detained* under any law for the time being in force. A police or a prison officer has been given the authority to take the measurements in accordance with the procedure laid down by the Central and State Government. It is pertinent to mention that in enumerating the persons from whom measurements can be taken, the Act violates the Doctrine of Reasonable Classification. The *arrestee, detainee* or the person *convicted* have been treated at par, thereby, leaving room for more ambiguity. Although, the *proviso* to *Section 3* provides that an arrestee may not be obliged to give his measurements. However, the scope of the proviso is restrained in cases where an offence is punishable with imprisonment of not less than seven years, or is committed against the vulnerable groups. The utility of this exception becomes impractical in light of clauses (1) and (2) of section 6 of the Act as discussed below

Resistance in taking Measurements

Under the present Act, Section 6 explains the provision to be followed by the authorities in cases, where reluctance or resistance is shown in giving measurements. The police or prison officers have the authority to take measurements. However, in cases wherein any person denies or refuses to allow the taking of measurements, these officers can, nevertheless, proceed to take measurements. The person who shows any resistance or reluctance in giving his measurements will be penalized with imprisonment which may extend to *3 months* or fine that may extend up to *Rs. 500* or both.[12]

Although the earlier law also criminalized the resistance or refusal to give measurements, but the present Act has included all types of prisoners within its ambit. This has led to intrusion in the physical autonomy of individuals. The right to privacy is a fundamental and basic right of a person implied in Article 21 of the Indian Constitution and the same has been reiterated by the Supreme Court in its various judgements. Article 21 a shield to bodily integrity and dignity. In the case of *K.S. Puttaswamy v. Union of India*[13], it was held unequivocally that right to privacy is a part of fundamental rights which can be traced to Articles 14, 19, and 21 of the Indian Constitution. Furthermore, in the case of *Selvi v. State of Karnataka*[14], it was held that the scientific test including Narco-Analysis, Polygraph and Brain Mapping are unconstitutional as they violate the provisions of Article 20(3) of the Constitution. Subjecting a person to these techniques in an involuntary manner violates the boundaries of privacy. It was further emphasised by the learned Judges that an individual must not be compelled to be subjected any techniques for the purposes of investigation. Resorting to the same would lead

[11] Section 117 CrPC, 1973.
[12] Section 186 IPC
[13] (2017) 10 SCC 1.
[14] (2010) 7 SCC 263.

to an unwarranted interference with one's liberty. So keeping in view the above precedents, the integrity of this new Act becomes doubtful. In addition, the Act exonerates the authorities of any trial or proceedings for doing anything in *good faith* under the Act.[15] Such a protection extends to every person be that a prisoner, under trial, arrested person, detainee or persons in protection homes. Compelling any individual to give his measurements under Section 3 and Section 7 coupled with other provisions of the Act seems to be excessive and arbitrary intrusion into the dignity of either the convict or an individual who may have been allegedly involved in any petty offence.

The Role of National Crime Records Bureau (NCRB)

The National Crimes Records Bureau (NCRB) is an Indian Government Agency responsible for collecting and analysing Crime Data as defined by the Indian Penal Code, Special and Local Laws. As per *Section 4* of the Act[16], the NCRB has been given the authority to collect, process, store, preserve and even to destroy the records of measurements taken. Such an authority has been given to them for the purposes of prevention, detection and investigation of any offence. It is also provided that the NCRB ought to *share* and *disseminate* such records with any law enforcement agency in the prescribed manner.[17] The *proviso* to *Section 4(2)* clarifies that the data collected from the first time offenders, or of the persons who have been discharged, acquitted or released without trial should not be retained unless the Magistrate directs otherwise. This is against the principle of *purposive limitation*[18]as given under Article 5(1((b) of the General Data Protection Regulation (GDPR).

The Act authorized the taking of biological samples that includes the DNA. Taking DNA is an important tool for the criminal investigation and plays a vital role in resolving crimes. Undoubtedly, it has made a breakthrough in apprehending and convicting offenders. But even this technique is not free from flaws such as contamination of evidence in the laboratories or at the crime scene that eventually lead to miscarriage of justice. Many western countries and organizations, including European Union[19], and USA[20] provide for quality assurance for DNA testing laboratories and mandatory supply of forensic DNA Profiles to National Databases. In the United Kingdom, a Forensic Science Regulator has been established to detect errors so as to prepare guidance on various issues, thereby, avoiding the contamination of samples[21]. Such an ideal setup is yet to be made a reality in most of the countries including India. There

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[15]Section 7 deals with Bar of Suit.

[16] Collection, storing, preservation of measurements and storing, sharing, dissemination, destruction and disposal of records.

[17] Section 4(1) (d) of the Act.

[18] Purpose limitation is a requirement that personal data be collected for specified explicit and legitimate purposes and not be processed further in a manner incompatible with those purposes.

[19] United States DNA Identification Act, 1994.

[20] *Journal of European Union*, Brussels, 2009.

[21] Available on:https://www.gov.uk/government/organisations/forensic-science-regulator. Accessed on 19/07/2022.

is paucity of quality assurance for laboratories and a reliable mechanism to secure traceability of forensic evidence.

Retention of Data

The maximum time frame for which a data may be retained by the NCRB has been kept to be seventy-five years. This time period starts from the date of collection of data.[22] There are some practical issues for retaining the data for so long given the inadequacy of data protection laws in India. In the case of *Jitendra v. State of Maharashtra*[23], the Bombay High Court has directed in order to ensure quality control and assurance in measurements; the laboratories dealing with such samples need to be duly equipped.

Conclusion

In light of the discussion above, it is quite evident that the new Act is more broadened in its scope and ambit as compared to the previous law. It has increased the list of persons authorized to collect data which includes the police officer, prison officer and magistrate. At the same time wide discretionary powers have given to them in this regard. Basically, the Act does appear to be an achievement so far as the modern techniques it provides in the criminal investigations are concerned. The present Act has been enacted to bring it in line with the current modern technology in criminal investigation. The object was to build a technology based investigation to minimize the instances of custodial tortures and for improving the conviction rates. For that solid evidence is required, which the Act intended to achieve. This law undoubtedly endeavours to work on that aspect but falls of certain shortcomings as well. There is no specific legislation on data protection besides the provisions of Information Technology Act, 2000. There is a possibility of potential abuse given the insufficiency of safeguards to prevent the contamination of measurements or to protect the data. The Act has not placed any restriction on the authorities for data sharing and dissemination which can in turn pose a serious risk to the privacy of an individual. Developed countries have appointed forensic science regulators, which still is a distant reality for a country like India wherein we fall short of a specific legislation on data safety. The need of the hour is a comprehensive piece of legislation on data protection that would replace the obsolete provisions regulating data.

[22] Section 4(2) of the Act.
[23] 2017 SCC Bom 8600.

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Violence and Legal Process[1]: Exploring and Narratives of Kashmiri Women

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Abstract

The paper explores the debate of agency and victimhood of women in Kashmir Valley. Withstanding the decline in their socio-economic conditions, women express their resistance and protest, mobilize their agency to demonstrate that they are not passive victims of violence. The debate is being explored by focusing on narratives of Kashmiri women to analyze the dynamics of gendered sexual violence. The paper then investigates the role played by the legal process while understanding the agency victimhood debate. The domain of social sciences entangled with law and its functioning vis-à-vis gendered sexual violence has been focused and analyzed in this section. Although the rationale dynamics between what is spoken, what is heard, what is witnessed, what is unspeakable or unspoken is complex, but the truth of violence can be understood between the lines of women's narratives. The paper attempts to understand the female body not only through the prism of moral and cultural rules (symbols of tradition and family honour) but also from a legal aspect. The paper therefore argues how patriarchal violence operating against the women does not remain confined to the private domestic space rather moves beyond its confines into the public space. In this way patriarchy inadvertently becomes an ally of the legal processes.

[1]Legal Process is defined as the process of securing justice from the court through the means of issuing a writ, warrant, mandate or other process. The paper however focuses on the legal process and what happens in the legal process in a defined setting wherein police interviews and investigations, the medical examinations conducted, court room proceedings, cross examination of the victim by the lawyers, the language and vocabulary used by the lawyers while questioning, becomes important. The other aspect of bringing in legal process is to analyze the exceptions in law and legal process vis-à-vis sexual violence of women in Kashmir. Unlike rest of the country, Kashmir stands out as a crucial exception as far as the implementation of counter-insurgency laws such as the Armed Forces Special Powers Act, Disturbed Areas Act, and the Public Safety Act are concerned. Such laws by dint of their operative provisions provide impunity to the security forces and hence obstruct the process of securing accountability against the institutional abuse of power against the civil and political rights of the citizens (here women). The legitimacy of the legal process involved in such cases therefore raises serious concerns as far as the question of providing justice to the victim is concerned.

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Keywords: Kashmir, Women, Sexual Violence, Law, Patriarchy, Community, Agency.

Introduction

The section addresses the theoretical framework wherein the argument would aim to explore the question of agency and analyze its complexity with respect to gender from a postcolonial feminist frame of reference. The postcolonial feminists also called the Third World Feminists, station their contestation that the western Feminist discourse underestimates the distinctions and differentiations within the women. The answerability of which the postcolonial feminists place on the diverse array of backdrops manifested by markers of region, caste, religion, class, race, etc. To penetrate into the dynamics operating within the identity of the third world women, one therefore needs to figure out the complex relationships women have with community, state and law. So, what the postcolonial feminism does is focus on the *idea of difference* in preference to the *idea of an all comprehensive identity*. Though the postcolonial feminist debate has played a crucial role in taking forward the agency debate in the socio politico context, however, what needs to be done is a further examination of this frame of reference. Which is to say what does agency mean while making the claim that the subaltern[2] has its own subjectivity and voice. However before delving deep into the idea of agency and how the paper would analyze it in the context of Kashmir, where women live in a militarized space, it is important to explore the idea of the agency of the subaltern. In conceiving the idea of agency, I would now turn to the work of E.P Thompson, The Making of the English Working Class.[3]In Thompson's work on agency experience has a primary role. It is the structure[4] which generates a set of class experiences; these experiences can give rise to

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[2] Subaltern has been defined by Ranajit Guha in The Subaltern Studies Group (The Subaltern Studies Group (SSG) or Subaltern Studies Collective is a group of South Asian scholars interested in the postcolonial and post-imperial societies with a particular focus on those of South Asia while also covering the developing world in general sense) wherein the idea was significantly borrowed from Antonio Gramsci. The subaltern is defined as the one with limited means of representation. Despite the marginalization in terms of representation the subaltern has the will to the structure. Hence the task of the Subaltern Studies scholars became that of understanding the social and political processes by which such resistance is produced. The politics of the subaltern emanates from the condition of exploitation of the subaltern by the elites. It is characterized by perpetual resistance against the elite.

[3]E.P Thompson, *The Making of English Working Class* (1991).

[4]In social sciences a broad way to define structure would be to say that it is a patterned arrangement in a society. One can explain structure in terms of social, economic and political context in which the individual action occurs. The actions of the individual to the external environment are actually a response to the structure in which the individual is situated. The human actions are therefore purposive in the sense that they are produced as a counter to certain conditions. For structure, individual isn't then the atomized entity rather the individual acts under certain constraint, posed by the structure. Action of the individual is therefore shaped by structure. An important thing that characterizes structure is that it has a tendency to reproduce its design or scheme, even when the individual or society at large is unaware of these patterns and do not want them to reproduce.

consciousness. Agency sources from how consciously the individual interprets the experiences, and challenges or transforms the structure.

Agency-Victimhood Binary

The paper while interrogating the agency victimhood debate moves beyond the single source of oppression – family and community, and brings in other planes of oppression as well. The other sites of oppression apart from the private domestic space, includes state, law and how the legal process operates vis-à-vis women. In this context Sundarajan's work, "The Scandal of the State: Women, Law and Citizenship in Post Colonial India"[5] argues how any attempt to discuss and explore idea of agency is left inadequate if all the talking is focused too much on the social constraints and too less on the State. Sundarajan's work becomes crucial since the question of woman's agency in Kashmir further necessitates the bringing of legal process and its fairness into the discussion. Sundarajan addresses the relationship of women and state in India. It focuses on the relation of state and the gendered citizen. Sundarajan's work deals with the above problem by raising certain questions. How do women inhabit the nation state? How does one see the two categories, women and citizen interact with each other? How does citizenship function as an identity beyond the traditional questions of privileges and obligations? How does the law function in relation to women to observe equality and difference? How does state identify women's issues? What pressures and commitments operate in determining its address to women as citizens? The common thread running through all these questions is the idea of women citizenship and its possible contestations with the state, since citizenship is largely seen as a male attribute. Sundarajan's work orbits around the question regarding the disconnection between the state and its women citizens. This is to say, what does it mean to have citizenship and be part of a nation state if you are a woman? Her exploration rests on the fact of how one can find out and make sense of the ways in which women locate and inhabit themselves within the state. She enquires these issues through series of case studies such as child marriage, forced hysterectomies, sex work, female infanticide, each of which centers around an incident, which uncovers the contradictory position of Indian State vis-à-vis, its female citizens. The work brings out the bigger question of agency and choice that resides in the idea of citizenship.

Sundarajan's work further interrogates the position of state, community, family with respect to women, which is the issue of deciding who is the right authority in matters of consent with reference to women - is it the family and community at large or the state and its law? The agency victimhood debate thus cannot be a question merely related to the relation of women with the private space rather it punctures the domestic space and brings the state and its back into the discussion.The question of state and and its law vis-a-vis women is crucial because of the laws powerful role in production of gendered

[5]Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law, and Citizenship in Postcolonial India* (Permanent Black,2003).

identity. This is why most of the negotiations between women and the state roll in the context of law and citizenship. However, in line of this argument what also cannot be denied is that using the rhetoric of protectionism the Indian state constructs women as sexualized subjects, in need of protection. Thus the debate between the state and the women as its citizens is not as much about law and citizenship as it is about the lack of it.

A similar work on the engagement of law with women has been taken up by Ratna Kapur and Brenda Crossman in their work, "Subversive Sites: Feminist Engagement with Law in India".[6]However, where the distinction between the two works lies is the fact that the latter breaks the dichotomous characterization of law as regulator and strengthener of domination and subjection or as an apparatus for social change. On account of this distinction the work attains prime importance in articulating that though the law and its legalities view women as gendered subjects- as wives and mothers, as subordinates in need of protection however on the other side of it, the authors see law as a site where roles and identities of women as subordinates are being challenged. To put it in simpler words would mean that domesticity should not be made the prime identifier of women to battle their citizenship rights. To make this point Kapur in one of her essays uses the powerful slogan, "I am not your mother, daughter, sister or wife. I am a citizen. I demand equal rights." So Kapur problematizes the legal discourses by seeing law as a dynamic site wherein the existing subordinate roles and identities of women are challenged through the language of equal rights.Kapur analyses the interplay of *"familial ideology"*[7] and law. Familial ideology "shapes the legal regulation of women", morally, where "women are constituted as and judged in accordance with the standards of loyal… self sacrificing wives", and economically where "women are constituted as economically dependent." These debates which take up the legal perspective while analyzing the agency victimhood debate attempt to disrupt the binary of agency and victimhood. The till now untroubled idea of comfortable binaries is contested by the subaltern who seems to be further complicating the idea of agency, as has been brought to light in the above works of Sundarajan and Kapur.

These argument brings forth the fact that rather than defining subaltern women through their experiences of victimhood only there is a pressing need to acknowledge the fact that the subaltern women has a voice and the will to resistance. Thus the idea of agency and its conceptualizations in various approaches and across frameworks isn't systematic and homogenous. Agency therefore cannot be viewed as a fixed monolithic The structure and the challenges posed by it to its subaltern are quite different and divergent as the

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[6]Ratna Kapur and Brenda Crossman,*Subversive Sites: Feminist Engagement with Law in India* (Sage Publications, New Delhi, 1996).

[7]Familial Ideology is a set of norms, values and assumptions about the way in which family life is and should be organized. A set of ideas that have been so naturalized and universalized that they have come to dominate common sense thinking about the family.

subaltern grappling with the structure is conditioned by various factors: societal, cultural, familial, economic, political which vary across spaces. Agency therefore for the subaltern woman is a struggle to carve out a space of her own wherein she resists the diverse forms of oppression emanating from multiple sites - familial, community, state and the law.

Agency of Kashmiri Women

Keeping the variables intact, the paper moves towards the subaltern Kashmiri woman. The aim is to locate her agency in the debilitating confines of the structure. The Kashmiri woman is challenged by the state and the traditional confines of the community resulting in marginalization. The crucial point however is to see if the marginalization by the structure eventually leads to her being silenced or does she demand the right to speak as well as to be heard. We have to see if there are the transitions from her voicelessness and silence to her coming to voice in the social, cultural and political space. Mapping out her agency would mean to search for instances where her identity moves beyond the silent, voiceless victim, comfortable being a peripheral part of a muted background and becomes aware of her identity formed by the experiences she lives through. In December 2018 during my fieldwork I met Tasleema, 37 in the district Baramullah (North Kashmir), whose husband Sheikh Altaf was working as a paramedic in the government hospital at Sopore. One day while returning home after his working hours at the hospital, some masked men fired at him on the roadside. He died there and then only and left his wife and three children. It was assumed that Sheikh Altaf was the sympathizer of separatists, which became the reason of his killing. After a great struggle his wife Tasleema got the job in her husband's place under the government SRO.[8]She says, "Today I work among these men, who generally pass comments on me and make me feel miserable. When one has a husband, then men in the society look at you with respect, but when one has lost one's husband, their way of looking at that woman changes." In a similar context Wing speaks of Patrica William's concept of m*urdering spirit* that, "a fundamental part of ourselves and our dignity is dependent upon the uncontrollable, powerful external observers who constitute society."[9]Thus violence reflects patriarchal implications; it is never surprising that societal customs are generally structured as an instrument to maintain the existing divisions of power in gendered relations. Tasleema adds, "I had very good relations with my husband and now I feel lonely and everything at the hospital reminds me of my husband. Besides, I run out of money as my children — Ather Altaf, 10 (son) and two daughters, Shabnam Altaf, 15, and Shayista Altaf, 12 are pursuing education and their expenses are increasing which are not met by my meager salary." In rural areas of Kashmir Valley women are primarily seen as dutiful wives, mothers and daughters, in the absence of her husband,

[8]Statutory rules ordinance. Under SRO state government after taking cabinet decisions, issues fresh orders on any subject, which is of crucial importance and is in the interest of state.

[9]A K Wing, *Global Critical Race Feminism :An International Reader*333(New York Press, New York Press, 2000).

Tasleema has had to become sole breadwinner for her family. Thus Tasleema as an active and independent woman *deviated* from social expectations and this in turn raised the level of contempt against Tasleema. According to Nadera violence "can have the opposite effect; it can empower and turn women into creatures of survival strategies . . . as such women become more than passive recipients of violence."[10]

Similarly the question of Kashmiri woman's agency has been dealt with by Ather Zia's in her work, "The Spectacle of a Good-Half Widow: Performing Agency in the Human Rights Movement in Kashmir."[11] Zia's study loops around a Kashmiri half-widow, Sadaf, who is a mother of three. The author here is attempting to pin down the agency of Sadaf by closely inspecting the multiple ways she employs to battle the politically and culturally powerful structure - state and the traditional community space. The task in Zia's work is to map the course of rupture where Sadaf's silence broke the traditional structures. It entails the idea of reversing the chronicled ways of conceptualizing agency, which include certain rigid imaginations about the agent being able to carve out a larger than life niche for itself. The paper now introduces Sadaf and the idea of her agency in form of few excerpts taken from Zia's work.

Zia writes:

> *I follow Sadaf's performance as she subtly pushes the boundaries of the social and political norms, by foregrounding the performance of an "asal zanan"(…) initially people were sympathetic to her, but as her search grew, suspicions were being cast about "where she was going "and "who she was meeting with". There were whispers about her dressing like a "Mahren" (bride). Her rosy complexion, which had been her pride, became a bane, for she was suspected of doing make-up, which did not "befit a woman whose husband was missing". Sadaf had not realized that she was expected to change her attire after Manzoor's disappearance. She did not see herself as a widow who is expected to dress demurely and maintain a low profile. Sadaf was hopeful she would find Manzoor. She not only pursued the official and legal routes but sought spiritual interventions as well (...) Legally Sadaf was not a widow till 7 years after the disappearance. She could not remarry or qualify for any widow-welfare programs. Islamic scholars in Kashmir have shortened the duration for remarriage to 4 years. The time duration, be in 7 or 4 years indicates a potential "return" which makes it hard to consider the men dead. The fact there is no "dead body" also adds to the hope of the person being alive (...) Sadaf also faced sexual harassment from most men. Be it in the army, police stations or the courts; anyone who was in position to help wanted to take advantage of her. She has once even been molested, but never told anyone.*

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[10] Nadera Shalhoub-Kevorkian, Militarization *and Violence against Women in Conflict Zones in the Middle East* 70(Cambridge University,United Kingdom, 2009).

[11] Ather Zia,"The Spectacle of a Good- Half Widow: Performing Agency in the Human Rights Movement in Kashmir" *UCLA Center for the Study of Women*(2012).

What the excerpt underscores is the struggle of Sadaf on varying planes. Zia further writes:

> *Sadaf was not convinced to stop searching for Manzoor. To counter the vilification, she decided to wear a Burkha (…) Despite changing her attire people's behavior continued to worsen. The rumors heightened about "why she had begun hiding her face? (…) Her brothers berated her for becoming "bolder, day by day". Sadaf felt unable to explain her choice of dress for it would lay bare the crassness of her fears inside the army camp. The gossip and confrontations began to overwhelm Sadaf. After she became a member and an activist of the APDP, she moved to the city.*

Quoting Sadaf, Zia further writes:

> *She says, suddenly everyone became my husband, even the military-wallas told me what to do (…) Sadaf mourns the "disappearance" of her earlier self but she is not entirely submitting to the social diktats." For the author then Performing agency in this mode is harder since it must remain apparently undetected and still do what is needful. Sadaf's agency cannot be bound in one rigid definition or made synonymous with the trademark "confronting" face of resistance (…) It includes goal driven activities, and the propensity to make choices between pathways of action (Strathern 1996)*

The above cases outline the intricacies that come along with the idea of agency. What Tasleema and Sadaf's case highlights is the manner in which the subaltern woman is enmeshed in the structure and therefore her resistance has to be understood accordingly. Such stories appear to reverse the societal evaluations of women as unresisting and obedient to the norms of the society. They blur the divisions, which see women in the agency/victimhood or protector/protected binary. The cases discussed are about suffering and passiveness but are equally planted in ideas of splitting such divides by showing transitions towards resistance wherein women unlike the traditional understanding shoulder the role of a protector. These are the junctures where the feminine and masculine notion of identities hinged on the traditional hunches faces a discomfort thereby shunning the gendered functions of a body. Women take to new independent roles, as Manchnada calls them "stretched roles".[12]

Agency/Victimhood Debate: *Role played by the Legal Process*

A pertinent question to consider is how one can possibly decipher how legal process functions vis-à-vis the debate of agency and victimhood. One of the possible responses can be that a militarized space like Kashmir increases the vulnerability of women not only in the social and cultural echelons but also in the ways state functions vis-à-vis the law. This would further mean that women have to bear the troubled assumptions of honor, shame and humiliation within the courtroom spaces and beyond its confines as well. The anxiety of living in a patriarchal society shattered by conflict therefore has a potential to impact the women through the legal processes as well. The convergence of categories of religion and gender in a militarized space plays a

[12]Rita, Manchanda,"Women's Agency in Peace Building: Gender Relations in Post- Conflict Reconstruction" *Economic and Political Weekly*40 (44/45) (2005).

crucial role in how law turns to be a "subversive site" wherein law functions differently with respect to women.

The armed uprising in the Kashmir Valley in 1989 resulted in the state witnessing violations of human rights of the civilians at various planes that included rape and sexual abuse of women as well allegedly both by security forces and militants. The threat of sexual violence pervades Kashmir due to massive military presence everywhere and the reports on sexual violence in the region have raised fair levels of anxiety and stress.[13] It is to be noted that the documentation of sexual violence in Kashmir by security forces and militants as well specifically in rural areas is still not much. The incidents of sexual violence against women due to lack of proper documentation hence goes unpunished. Human Rights Watch in their report[14] mentions how most of the rapes happening in the valley go unreported. The most frequently cited case of rape is the infamous Kunan Poshpora mass rapes. In this context Kazi argues:

Rape and sexual abuse is often not accorded the significance it deserves due to the understanding of armed conflict as a quintessentially male, public domain where sexual violence against women is associated primarily with the private domain. This paper does not subscribe to this viewpoint; the argument here is that rape and sexual abuse of women by security forces in Kashmir involves and implicates state authority, and is therefore as subject to public accountability and legal process as other rights violations . . . In Kunan Poshpora (a hamlet in Kupwara district adjacent to the LOC) allegations of mass rape by soldiers of the rashtriya rifles in 1991 were dismissed by a single-member investigation by the Press Council of India that acquitted the army of sexual abuse and foreclosed the possibility of any further investigation. Military authorities, on the other hand, attempt to evade accountability for sexual abuse by impugning the integrity of women with kinship ties with alleged militants. Since military courts offer greater leniency and non-transparency than civil courts, soldiers accused of rape can opt for the former (see above) in order to escape prosecution by the latter. In the wake of mass public anger against allegations of rape of a woman and her ten-year-old daughter in handwara (north Kashmir), in 2004, the army ordered an investigation after making a statement to the effect that the charges were 'baseless'; the accused army major was acquitted of the rape charge in an army court martial.[15]

The gendered sexual violence in Kashmir takes place under the rubric of "state of exception" wherein the armed forces are given impunity through the immunity laws like Armed Forces (Special Powers) Act, 1990. This means

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[13]Women's Fact Finding Commission, "Wounded *Valley - Shattered Souls: Women's Fact Finding Commission Probing into Army Atrocities on Women and Children in Kashmir*. Sixth report of the Indian People's Tribunal on Environment and Human Rights" 7-10 (1997).

[14]Rape in Kashmir: A Crime of War.

[15]Seema Kazi, "Law, Governance and Gender in Indian-Administered Kashmir"*Working paper series*,*Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi* (2010).

that due to the legal immunity given to the armed forces by the state, any documentation of the gendered sexual violence is not reported and if reported, isn't addressed duly. The primary reason behind the lack of access to justice is that any prosecution of armed forces by civilian courts involves seeking executive sanctions, which are never granted.[16] However, in exceptional circumstances where there is extreme public pressure, court martial proceedings are initiated, for example in the Handwara rape case. However, these proceedings are met with widespread criticism for they fall short of international standards of fair trial. The process of having an access to justice is mostly difficult and opaque for the sufferers.

The judicial discourse on rape especially in conflict zones becomes instrumental for controlling the bodies of women. During the court examinations process and the judicial proceedings of the rape cases, the female body becomes objectified and turns to be a target of multiple forms of power. The judicial discourse on sexual crimes therefore becomes a crucial vehicle from which the state and community both, exercise power over the body. The female body is treated and judged through its sex, female virginity carrying with it the collective community honour of the society. Hence in the proceedings of rape trials, the body becomes the main target of legal forms of power. In this context Carvalho writes:

In rape trials the events are constructed in fine details (including for example, where the woman was touched, who removed the knickers, if she had a period or not). During most rape trials the complainant is forced to describe minutely which parts of her body were assaulted, and in which ways; the descriptions, which would embarrass women even in private circumstances, are particularly humiliating when given in public, in front of an audience. The paradox is that the very use of language to describe the sexual parts and functions of a woman's body is sufficient to render her unrespectable in the court room. And the graphic details of female bodies are not restricted to court room discourse. The detailed and probably distressing descriptions of the rape given by the rape complainants, plus evidence from medical examinations, also find their way into legal decisions . . . The distressing experience of giving evidence in court, the frequent practice of character assassination carried out by defense lawyers and even by judge, and the fear of having the most intimate details of one's life publicly discussed, laughed at or even enjoyed as erotic material are indications of what awaits women who file a complaint of rape, and probably leads many of them to keep quiet about male sexual violence.[17]

The various mechanisms of the courtroom from the examination to the judgment in rape trials thus results in strengthening the collective hold of state

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[16]Amnesty International, "Denied: Failures in Accountability for Human Rights Violations by Security Forces Personnel in Jammu and Kashmir" (2015).

[17]Debora de Carvalho Figueired, "Discipline and Punishment in the Discourse of Legal Decisions on Rape Trials",in Janey Cotterill (ed.), *Language in the Legal Process*270 *(*Palgrave Macmillan, 2002).

and community over the female body through law. The body of the rape victim is scrutinized through moral and cultural rules even in the courtrooms. This eventually results in seeing the gendered sexual violence by some men as acceptable. This also results in many women either accepting the violence as part of their lives or becoming frightened and shamed to report it.

Conclusion

The state hence makes use of the law to legalize the shaming of the female body through the category of the collective community honour thus repressing their agency through a denial to a fair judicial process. In this context Kazi argues, states have a right to legislate, yet this right cannot, and must never be, subservient to the security, dignity and development of citizens. In other words, laws exist to serve people, not power. "When laws serve only themselves there is a lack of legitimacy. Legitimacy watches over laws, ensuring that they serve their fundamental purpose—to improve the lives of those they govern."[18] As a result today there is a pressing need to restore the fairness in the legal processes by making the judicial process more responsive and accountable towards redressing the rights of women.

[18]Seema Kazi, "Law, Governance and Gender in Indian-Administered Kashmir"*Working paper series*,*Centre for the Study of Law and Governance Jawaharlal Nehru University, New Delhi* (2010).

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Bail Pendency in India: A Ridicule to Criminal Procedure Code

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Abstract

An increasing number of bail applications are being submitted daily in courts at all levels in India, where bail petitions have been pending for a very long time and cases are frequently still in the early stages of inquiry. Without a solid basis of laws built on concepts and principles, the law of bails would remain chaotic. State and federal agencies that are concerned about it cannot continue to ignore it, but before any reforms are carried out, systematization and analysis must be done. This research work tries to analyze the causes and pendency. With Supreme Court taking suo moto cognizance of bail pendency and making stringent remarks to the high court's regarding the same and high courts considering such remarks as guidelines are trying to tackle the long pendency.

Keywords: bail, bail pendency, Saudan Singh Case, Criminal Procedure Code, NCRB-Prison Statistics 2020, Ignorantia Facti Excused, ignorantia Legis neminem excusaf, Overcrowding of prisons, High Court of Allahabad, Patna High Court, High Court of Madhya Pradesh.

Introduction

Krishna Iyer J., once remarked that the subject of bail "…. belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion…..the issue is one of liberty, justice, public safety and burden of public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process."[1] Delay in disposal of bail applications and their pendency in listing in India, especially that of undertrial has been a major issue for more than a decade now. This problem persists from the root level of filing of any complaint to the matters presented before high courts in the form of bail applications. In any cognizable offence, either investigation is not concluded for a long time, or trial is not concluded, either witnesses stop cooperating, or it takes days or even months in listing of cases before the High Court.

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[1] *Gudikanti Narasimhulu* v. *Public Prosecutor*, AIR 1978 SC 43.

Bail or jail? That's the question. Every citizen in presumed to be law-abiding and innocent till proved guilty of the offence he/she is charged with. The Supreme Court time and again, has observed that refusal of bail is the rule and committal to jail an exception. It is also observed that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Art. 21 of the Constitution[2].This is based on the principle that every citizen is entitled to live in liberty till he commits an offence; and nobody, including the state, should take away his liberty without establishing before a court of law that he had committed the offence and thus rendered himself disqualified for enjoying the liberties of a free citizen.[3]

When a person commits a crime that falls under the Indian Penal Code or a Special Act, he will be arrested. He will be hauled into the courtroom, where the matter will be tried. All of this legal procedure takes a long time. Meanwhile, the accused would be held in detention for a much longer period than prescribed under Cr.P.C., before his acquittal or conviction is decided, robbing him of his personal liberty. In this regard Mr. Justice Bhagwati once observed, "*it is travesty of justice that many poor accused, 'little Indians', are forced into long cellular servitude for little offences because, the bail procedure is beyond their meagre means and trials don't commence and even if they do, they never conclude.*"[4]

But what current situation in India is bail applications are pending for years and years, trials are far from the stage of conclusion leading to more and more bail applications to be piled up every day in the courts at different level. Maximum period for detention of an undertrial as prescribed by the Criminal Procedure Code is one- half of maximum period of imprisonment specified for the offence he/she is accused of subject to certain exceptions.[5] But what current practice in courts is observed that accused are serving as undertrials for almost 8 years[6], 14 years[7], 12 years[8], 17 years[9] and so on. Allahabad High court once observed that courts should prefer to release women and children on personal bond pending the disposal of their bail applications as there is always a fear of sex abuse and child abuse in jail as well as in public custody and no one likes to report such outrages to the authorities out of shame or other reasons.[10]Law and judicial reform in India aimed at reducing judicial delays and pendency have met with limited success since they have been almost solely focused on increasing the number of courts and such other supply-driven mechanisms

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[2] Adv. Anil Sharma (ed.), *Commentaries on Laws of Bails (Practice and Procedure) 5th Edition by Aiyer and Mitter's* clxxxiii (Law Publishers (India) Pvt. Ltd., India, 5th edn./2012).

[3] *Bhola* v. *State* 1974 Cri LJ 1318 (SC).

[4] *Hussainara Khatoon* v. *State of Bihar*, 1979 Cri LJ 1036 (SC).

[5] The Code of Criminal Procedure,1973, s. 436- A

[6] *Saudan Singh* v. *State of Uttar Pradesh* MANU/SC/0645/2022

[7] *Rajendra Singh* v. *State of Uttar Pradesh* Writ Petition (Criminal) No. 52 of 2022 (decided on 25/02/2022).

[8] *Suleman* v. *State of Uttar Pradesh* (2022) 2 RCR (Criminal) 616.

[9] *Ram Yagya* v. *State of Uttar Pradesh* Crl. Appeal no. 1546/2005 (All H.C.).

[10] S.N. Mishra, *The Code of Criminal Procedure* 703 (Central Law Publication, Prayagraj, 22ndedn, 2022)

without ascertaining the cause of delay. Constant increase in prison occupancy leading to overcrowding of prisons, not only overburdens the government with the expense it requires in maintainability of prisons, but also crushes the backbone of legal system through burden of bundles of files stacked in administrative departments of various courts. As on 14 July 2022, 38,087 cases relating to bail were pending before Allahabad High Court. Similarly, 7052 cases of criminal nature were pending before Patna High Court and 1,59,368 cases before Madhya Pradesh High Court. These figures have been discussed in detail further in this research paper.[11]This article advocates a reorientation of the law and a reform of the judiciary through empirical methods. This study attempts to explore the varied dimension of the concept of bail- as a right that must be respected by the courts and as a matter of concession left to the judicial discretion of the courts.

This research work is dealt under various heads. Meaning of bail deals with the concept of bail and philosophy incorporated in it. Overcrowding of prisons through facts and data gives a clear picture of huge prison occupancy especially in the state of Uttar Pradesh, Bihar and Madhya Pradesh. National Judicial Data Grid compares the data available for institution and disposal of cases at high courts. Judicial Hunch on Bail Pendency covers the stand of Supreme Court and various High Courts through various decisions along with suggestions of 268th report of Law Commission. Travesty of Justice is dealt under Bail Pendency as Ridicule of Criminal Procedure Code. Lastly the outcome of this research work is penned in the form of conclusion and recommendations.

Meaning of Bail

Bail has not been defined anywhere in Criminal Procedure Code. The word 'bail' is derived from old French verb 'bailer' which meant ' to give' or 'to deliver', and set at liberty a person arrested of imprisoned.[12]However, Webster's dictionary defines bail as "the temporary release of a prisoner in exchange for security given for the prisoner's appearance at a later hearing[13]". *Law Lexicon* defines bail as security for the appearance of the accused person on giving which he is released pending trial or investigation.[14]*The Britannica Encyclopedia* defines bail as a "procedure by which a judge or magistrate sets at liberty one who has been arrested or imprisoned, upon receipt of security to ensure the released prisoner's later appearance in court for further proceedings.[15]Bail is basically release from restraint, more particularly, release

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[11] National Judicial Data Grid, *(available at* https://njdg.ecourts.gov.in/hcnjdgnew/?p=main/pend_dashboard*)* (last visited on July 14, 2022).

[12]Justice C.K. Thakker Takwani and M. C. Thakker, *Criminal Procedure* 160 (Lexis Nexis, 4th edn., 2015)

[13] "Bail." *'Dictionary*, *Merriam-Webster'*, *available at* https://www.merriam-webster.com/dictionary/bail. (last visited on 27 Jun. 2022.).

[14] P. Ramanatha Aiyar, *The Law Lexicon of British India* p.no. 109 (The Madras Journal Press, 1st edn.,1940).

[15] Britannica, The Editors of Encyclopedia. "bail". *Encyclopedia*, (*available at (https://www.britannica.com/topic/bail-law)* (last visited on 03/04/2022).

from custody of the police.[16]Bail is intended to obtain the release of a person from legal custody by requiring him to appear at the time and location specified and submit to the court's authority and judgement. Bail is mostly used in modern legal systems to ensure the freedom of someone arrested and charged with a criminal offence until trial, however it may also be used in rare situations to secure release pending an appeal of a conviction. Bail until trial is used in criminal situations to avoid punishing an innocent person (who may be exonerated at trial) and to allow him to prepare his defence without interruption. Although some magistrates consider other criteria such as the weight of the evidence, the character of the accused, and the accused's capacity to post bail, the amount of bail is normally established in accordance to the gravity of the felony charged and the likelihood of flight. No Magistrate or Sessions Judge has the authority to provide interim bail to the accused while his regular bail application is pending. This is the identical and exact majority position expressed in the Full Bench ruling in the matter of *Dr. Vinod Narain* v. *State of Uttar Pradesh*[17]. However, in another case[18] full bench of six judges convened to examine the ratio in *Dr.Vinod Narain's case*[19]and has accepted the right to release on interim bail to some extent in proper cases.

The court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course. There is a need to indicate in the order, reasons for prima facie concluding why bail was being granted particularly where an accused was charged of having committed a serious offence.[20]

Overcrowding of Prisons

Overcrowding of prisons is an issue of concern not only because of the difficulty in administration but also a burden on treasury of people. Proper care and maintenance of every prisoner is a duty of administration and government. National Crime Records Bureau has shared data in its most sought-after publication Prison Statistics 2020 popularly known as "NCRB Report 2020" which shares in its stats an alarming situation of prisons across India and pitiful situation of Indian Prisons. A careful study of the NCRB report will make it abundantly evident how miserable both the jails and the convicts are. According to NCRB Report 2020[21], there were 3,32,916 under trial prisoners in 2019 and 3,71,848 in 2020, an increase of 11.7%. As of December 31, 2020, District Jails had the biggest percentage of convicts awaiting trial out of all 3,71,848 inmates, or 50.0 percent (1,86,089), followed by Central Jails (36.1 percent (1,34,322) under-trials, and Sub Jails (11.9 percent (44,402) under-trials.

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[16] Sudipto Sarkar and V R Manohar (eds.), *The Code of Criminal Procedure* 2158 (Lexis Nexis, 2014).
[17] *Vinod Narain* v. *State of Uttar Pradesh*, (1996) 94 ALJ 628.
[18] *Amarawati* v. *State of Uttar Pradesh*, (2004) 50 ACC 742.
[19] *Supra* note 17.
[20] *Supra* note 2 at 481.
[21]NCRB Report 2020, "Prison Statistics India 2020, x" (Ministry of Home Affairs, December, 2021).

As of the end of 2020, there were 1,427 women behind bars who were also parents of 1,628 children. Among these woman inmates, 1,184 women prisoners were awaiting trial along with 1,345 kids.

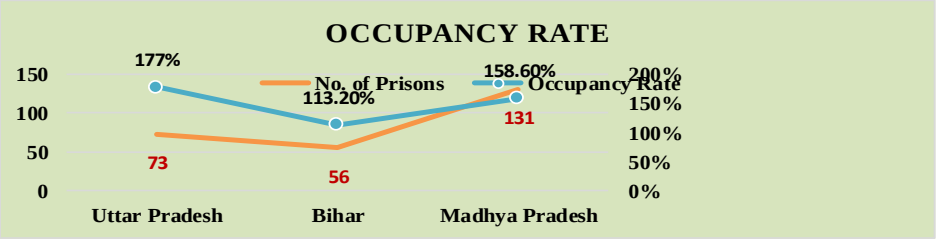
Comparative analysis of Uttar Pradesh, Bihar and Madhya Pradesh

Number of Prisons:

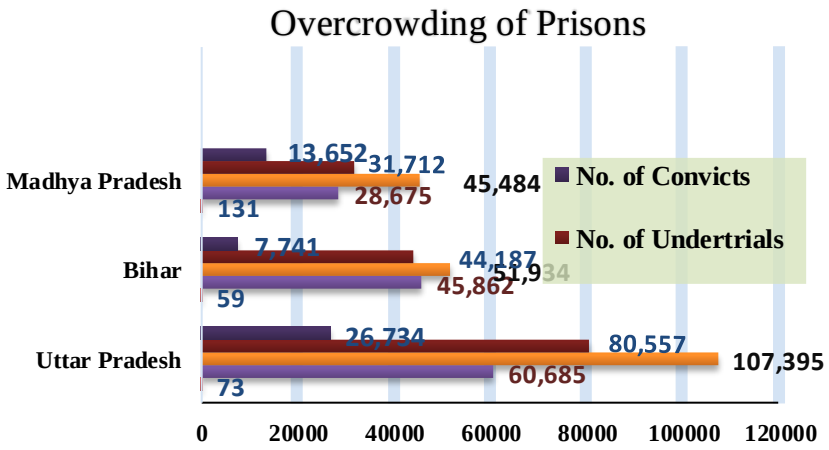
As reported in Prison Statistics 2020, there are 1036 prisons all across the India out of which Madhya Pradesh possesses third largest number of prisons i.e. 131 whereas Uttar Pradesh has 73 prisons and Bihar has 59. Prisons in Uttar Pradesh have the highest capacity of 60,685 followed by Bihar having capacity of 45,862 followed by Madhya Pradesh having capacity of 28, 675[22].

The Occupancy Rate and The Prison Population:

Over the capacity of 60,685 prisoners in Uttar Pradesh, current population consist of 1,07,395 prisoners out of which 80,557 are undertrials. Similar situation can be found in Biharwhich has 59 prisons having capacity of 45,862 prisoners, as on 31st December 2020 has the population of 51,934 out of which 44,187 are undertrials. Madhya Pradesh has the third highest numbers of prison in India having 131 prisons having capacity of 28,675. However, the current prison population of Madhya Pradesh consists of 45,484 prisoners out of which 31,712 are undertrials. If we shift our focus to the occupancy rate, average occupancy rate of all prisons in India in 118%. Uttar Pradesh has the highest occupancy rate which is 177% which is way above the average occupancy rate. Comparatively Bihar and Madhya Pradesh stand at better footing than Uttar Pradesh having occupancy rate of 120.4% and 158.6% respectively.[23] Below through the chart one can depict the contrasting situation of current prison population from that of capacity of prisons.



[22]*Supra* note 21 at 2,3.
[23]*Supra* note 21 at 2 – 6.

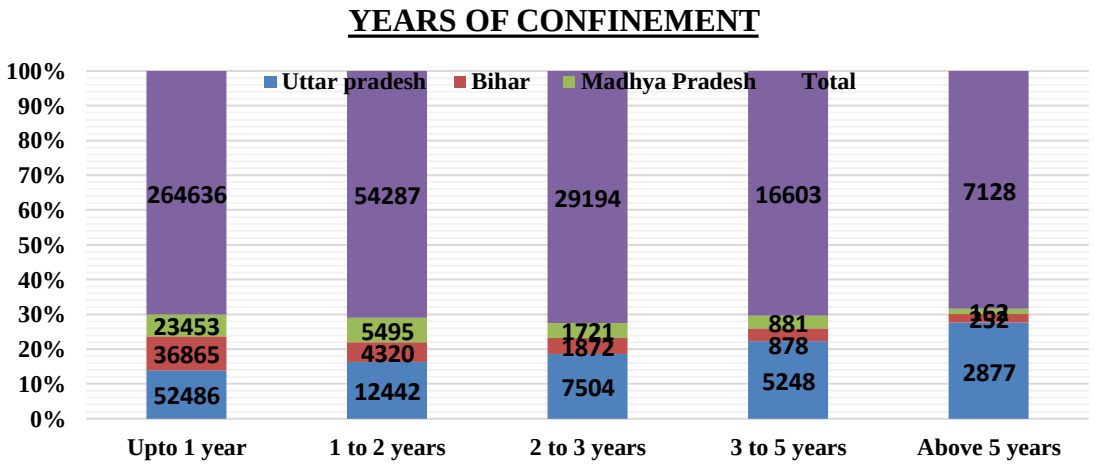


Source: Prison Statistics 2020[24]

Years of Confinement:

Among 3,71,848 undertrial prisoners in all prisons, around 71.2% i.e. 2,64,636 prisoners were confined for periods of up to 1 year, as on 31st December, 2020.Out of these 2,64,636 prisoners, 52,486 are confined in Uttar Pradesh, 36,865 are confined in Bihar and 23,453 in Madhya Pradesh which almost constitutes 20%, 14% and 9% respectively of total undertrials confined for period of up to 1 year which equals to 43% of total undertrials confined for up to 1 year. However, there were also 54,287 undertrial prisoners (14.6% of total Undertrials) confined for 1 to 2 years followed by 29,194 undertrial prisoners (7.9% of total Undertrials) confined for 2 to 3 years and 16,603 undertrial prisoners (4.5% of total Undertrials) confined for 3 to 5 years as on 31st December, 2020. The percentage share of Uttar Pradesh, Bihar and Madhya Pradesh 23%, 8% and 11% respectively for 1 to 2 years, 26%, 6% and 5.9% respectively for 2 to 3 years, 32%, 5.3% and 5.3% respectively for 3 to 5 years.It is more alarming is that there were 7,128 undertrial prisoners (accounting for 1.9% of total undertrial prisoners) who were confined for more than 5 years. The percentage share of the three states is 40.3% of Uttar Pradesh, 3.5% of Bihar and 2.5% of Madhya Pradesh. Below is the comparative graphical representation of years of confinement for Uttar Pradesh, Bihar, Madhya Pradesh and other states. Below is the graphical representation of years of confinement.[25]

[24]*Supra* note 22.
[25]*Supra* note 21 at 161,162.

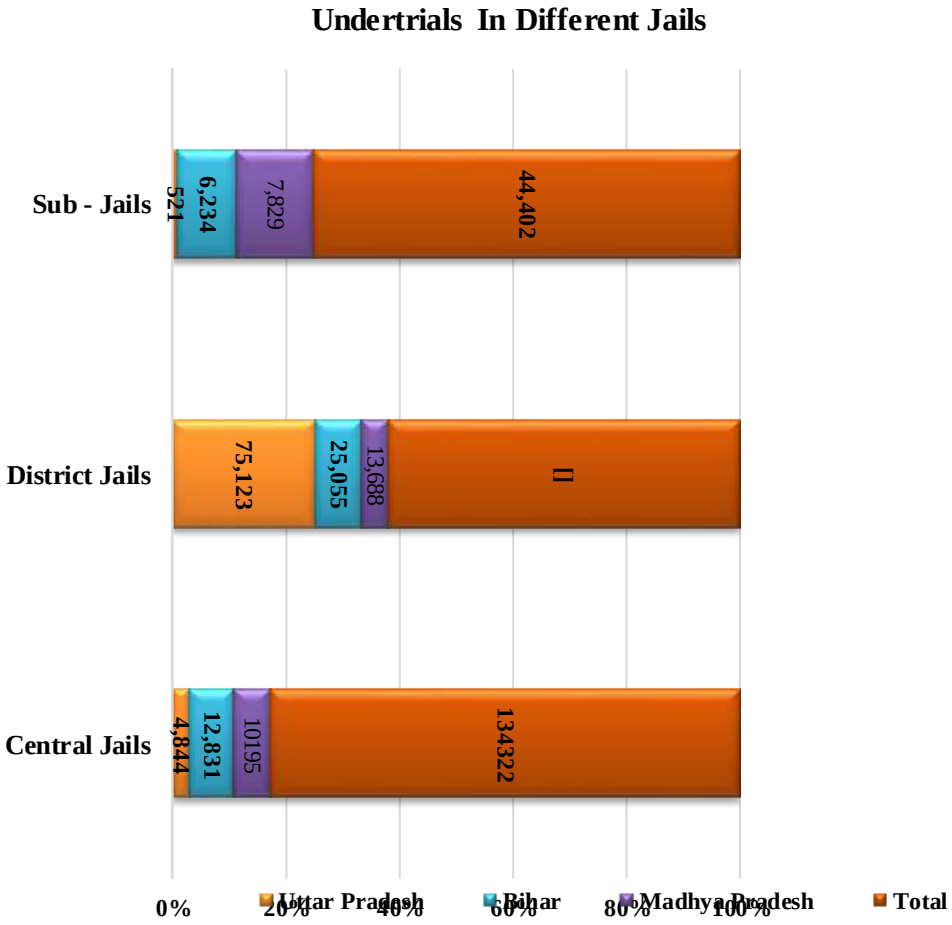


Source: Prison Statistics 2020[26]

Undertrials in Different Jails:

As of December 31, 2020, District Jails had the greatest percentage of undertrial inmates—50.0 percent, or 1,86,089 undertrials—followed by Central Jails (36.1 percent), or 1,34,322 undertrials, and Sub Jails (11.9 percent), or 44,402 undertrials. At the end of 2020, Uttar Pradesh recorded the highest percentage of undertrials in the nation (21.7 percent, or 80,557), followed by Bihar (11.9 percent, or 44,187), and Madhya Pradesh (8.5 percent, or 31,712). There are 4,844, 75,123, and 521 undertrials from Uttar Pradesh housed in Central Jails, District Jails, and Sub-Jails, respectively. Last but not least, there are 10,195 inmates in Central Jail, 13,688 in District Jails, and 7,829 in Sub-Jails in Madhya Pradesh.

[26]*Ibid.*



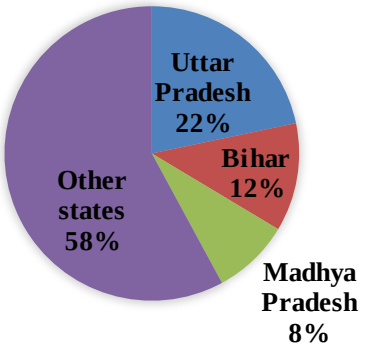
[27]

State – Wise Occupancy of Undertrials:

Uttar Pradesh has reported the maximum number of undertrials (21.7%, 80,557 undertrials) in the country followed by Bihar (11.9%, 44,187 undertrials) and Madhya Pradesh (8.5%, 31,712 undertrials) at the end of 2020. Among the 3,71,848 undertrial prisoners, only 10 were civil inmates.

[27] *Supra* note 21 at 48, 50, 52.

STATEWISE OCCUPANCY OF UNDERTRIALS



Source: Prison Statistics 2020[28]

During the year 2020, a total of 16,31,110 inmates were admitted in various jails of the country. Among the States/UTs, Uttar Pradesh has reported the highest number of inmates (3,19,402) admitted during 2020 followed by Bihar (2,30,795) and Madhya Pradesh (1,26,434) accounting for 19.6%, 14.1% and 7.8% respectively of total number of inmates at national level.[29]

National Judicial Data Grid (NJDG)

The National Judicial Data Grid is an online open- source database system setup under the ecourt program. It is a real – time database system connected with various district courts and high courts providing real time figures of pending and disposal cases. Bail applications pending in courts leads to overcrowding of already crowded prisons. It is not only an attack on one's liberty but also a counter attack on the treasury and administration. Below is a graph showing increase in the no. of bail applications pending filed in last 10 years. Source of the data furnished in the table below is collected from the official records of pending cases in High Court of Allahabad[30]. As on 14/07/2022, through data collected from NJDG, there were 38,087 cases relating to bail pending before Allahabad High Court.

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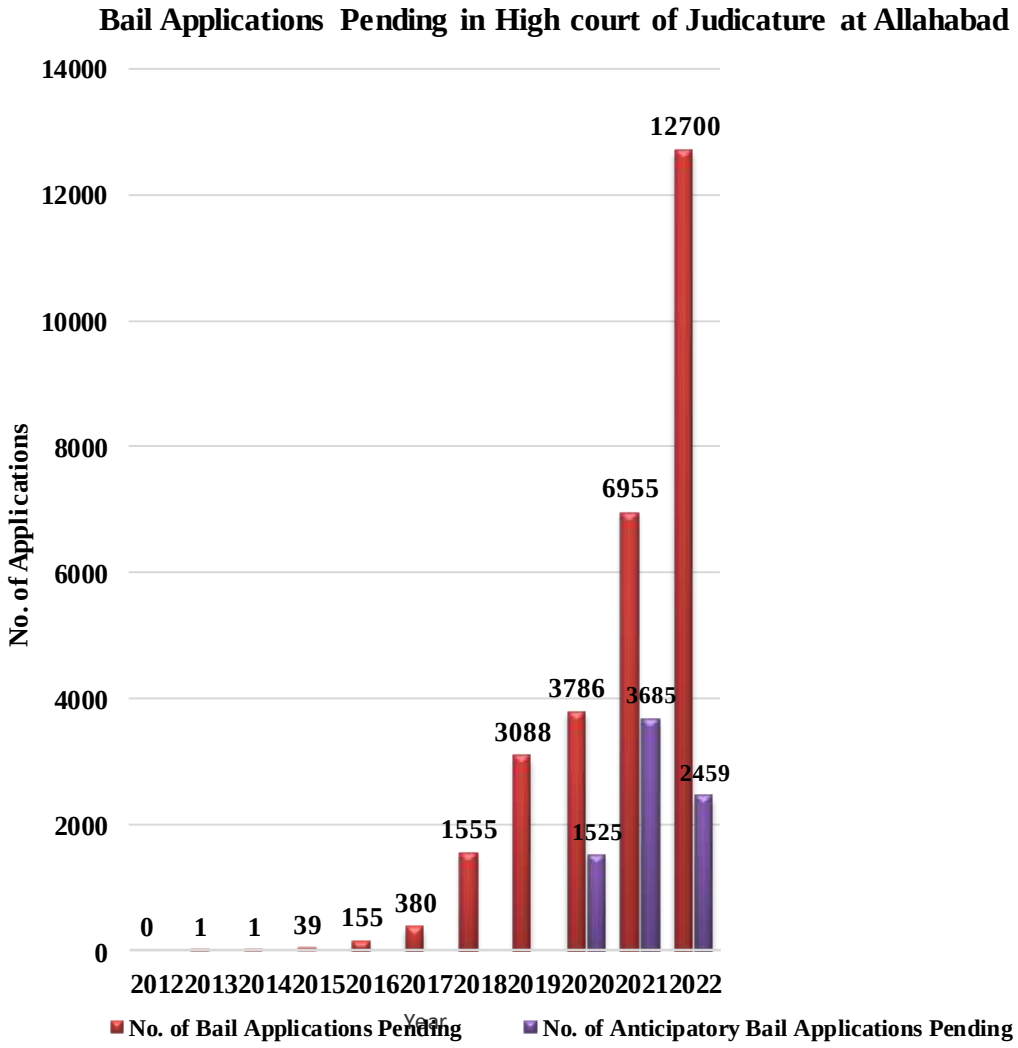
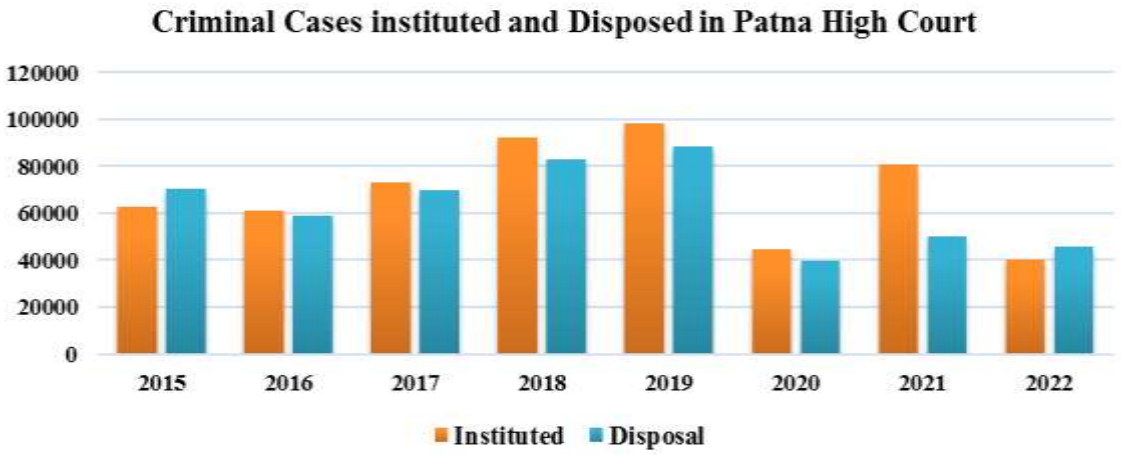
[28] *Supra* note 21.
[29] *Ibid.*
[30] High Court of Judicature at Allahabad, "case status" *(available at https://allahabadhighcourt.in/)* (last visited on 5/7/2022.



Source: High Court of Allahabad official website[31]

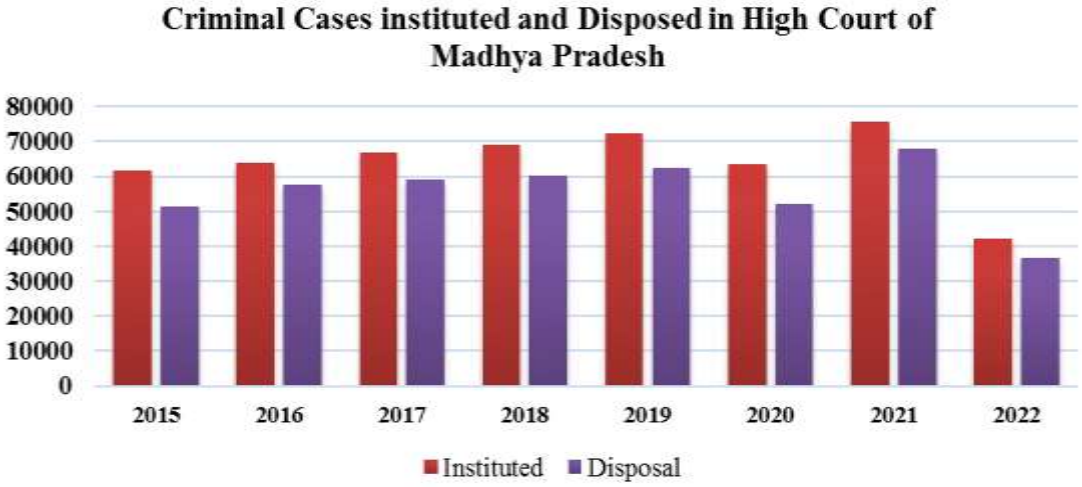
Furthermore, if we consider the situation at Patna High Court, as on 14/7/2022, between 2015 to 14/07/2022, 2,89,334 cases of criminal nature have been instituted before the Patna High court out of which 2,82,282 cases have been disposed of. Below is the year wise comparative analysis from 2015 till 14/07/2022 as per the figures available on NJDG.

[31] *Ibid.*



[32]

Also, we look at the figures available for High Court of Madhya Pradesh on NJDG, 1,59,368 cases of criminal nature are pending in total out of which around 43,600 cases are 5 to 6 years old instituted in between of 2017 to 2018. Below is the year wise comparative analysis from 2015 till 14/07/2022 as per the figures available on NJDG.



[33]

From the above data, be it from the NCRB Report 2020 or that furnished from Court, or from the figures available in the database of National Judicial Data Grid, popularly known as NJDG, one can very easily decipher the plightful condition our Indian Judicial System along with Prisons as well.

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[32]National Judicial Data Grid, *(available at* https://njdg.ecourts.gov.in/hcnjdgnew/?p=main/pend_dashboard*)* (last visited on July 14, 2022).

[33]*Ibid.*

Judicial Hunch on Bail Pendency

Supreme Court since last few years has been acting very stringent upon the question of pendency before the high courts and lower courts. It has from time to time taken many steps from taking suo motu step on pendency of criminal appeals in major high courts especially Allahabad High Court. It has also constantly been enlightened the courts with various suggestions and guidelines to reduce such pendency. Supreme court through number of cases has constantly proved itself as the true knight of fundamental rights of undertrials and prisoners. High Courts have also adhered to such suggestions and has been putting its constant effort in reducing such pendency.

Recently in the case of *Saudan Singh* v.*State of Uttar Pradesh*[34], where petitioner had already served 8 years in jail as an undertrial, Supreme Court taking it upon itself concerned with the long pendency of cases, directed High Court of Allahabad to enlarge bail of all such appellants who have served more than half of their sentence taking in view the nature of crime committed by them. Thus, aspects such as period undergone, the heinousness of the crime, the age of the accused, the period taken in trial and whether the appellants are diligently prosecuting the appeals inter alia may be factors which may be material. Treating these suggestions as guidelines, Allahabad High Court has also very diligently expressed its affirmation to these suggestions and granted bail in number of cases which deem fit with the above stated factors.

Again, in the case of *Rajendra Singh* v. *State of Uttar Pradesh*[35]where petitioner had already served 14 years of imprisonment as an undertrial, as for a long time his bail application was pending before the High Court, before he moved to Supreme Court. Following its own suggestion as a norm, Supreme Court in this case as well enlarged petitioner on bail, in a way similar to *Saudan Singh Case*.[36]

Further, on the same day as of *Rajendra Singh case*[37], Supreme Court in the case of *Suleman* v.*State of Uttar Pradesh*[38]made rather a harsh stand towards the approach of High Court of Allahabad in the matter of granting bail. In the instant case petitioner served incarnation for more than 12 years in actual custody, still his bail application was rejected by the High Court, against which he moved his appeal before the Supreme Court. Apex court accepted petitioner's bail appeal and petitioner was enlarged on bail setting a precedent for all High Courts.

Again, placing reliance on the *Saudan Singh case*[39], Allahabad High Court in the case of *Pankaj* v. *State of Uttar Pradesh*[40]granted bail to the applicant who has been in jail since 2014 and no possibility of conclusion of his trial was

[34]*Supra* note 6.
[35]*Supra* note 7.
[36]*Supra* note 6.
[37]*Supra* note 7.
[38].*Supra* note 8.
[39]*Supra* note 6.
[40] (2022) 119 ACC 939.

foreseen. Similar Reliance has been made by the High Court in many other cases.

Similarly, in the case of *Juber Ali* v. *State of U.P.*[41]applicant filed his 3rd application before the High Court of Allahabad, earlier two being rejected in 2018 and 2019. Applicant was charged with sections 302, 376 of IPC. High Court referring to *Saudan Singh case*[42] granted bail as applicant had been incarnation for more than 4 years.

One cruel example of bail application pendency was seen recently in the case of *Ram Yagya* v. *State of Uttar Pradesh*[43]Applicant in this filed his 6th Bail application before the High Court and has been in incarnation since 2005. He remained in incarnation for more than 17 years. Sixth bail application was presented before division bench of Allahabad High Court. Bench placing its reliance on *Saudan Singh* v.*state of Uttar Pradesh*[44] and *Rajendra Singh* v. *State of Uttar Pradesh*[45], enlarged petitioner's bail. Court also placed reliance on *Suleman* v.*State of Uttar Pradesh*.[46]

Even though High Court is treating the guidelines by the Supreme Court in *Saudan Singh's case*[47] as a norm in reducing bail pendency, but achieving its goal seems no easy task. Lack of bench for hearing criminal appeal, day per day increasing burden of cases resulting in equally delayed time in listing of any case. All such factors are likely to act as hinderances.

If we shift our focus to the state of Bihar, the cause of sudden increase bail applications in Bihar is slightly different from that of Uttar Pradesh. Patna High Court witnessed sudden spike in bail applications after the Bihar Liquor Prohibition Act was enacted in 2016. It made possession of Liquor a non-bailable offence.

In *Abhyanand Sharma case*[48] Supreme Court noticed the plight of Patna High Court due to the non- bailable provision in the Liquor Prohibition Act 2016. Compliance of this Act caused sudden rise in filing of bail applications burdening the High Court. Apex court observed that asked the state government to place before it social and legislative impact assessment of the law and also expressed concern that government is not taking preventive measures to stop violation of the law which is being done with complicity of its officials. We find a number of cases coming to this Court arising from proceedings initiated under the Bihar Prohibition and Excise Amendment Act, 2018. The trial Court and the High Court are both being crowded by bail applications to an extent that at some stage 16 judges of the High Court are listening to bail matters

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[41] MANU/UP/1005/2022.
[42]*Supra* note 6.
[43]*Supra* note 9.
[44]*Supra* note 6.
[45]*Supra* note 7.
[46]*Supra* note 8.
[47]*Supra* note 6.
[48]*Abhyanand Sharma* v. *State of Bihar*. (10.05.2022 - SC Order): MANU/SCOR/52079/2022.

and prosecutions under the Act concerned forms a large part of it. Denial of bail would also result in crowding of the prisons," the bench had said.[49]

The major cause for Madhya Pradesh High Court being burdened with heaps of bail applications is due to blind rejection of these applications by the Session Courts. Such bail applications are rejected at lower courts without getting into the merits of the applications. A single judge bench of Madhya Pradesh High Court constituting of Hon'ble Mr. Justice Deepak Kumar Agarwal in the case of *Devendra Lodhi* v. *State of MP*[50] on 29th April 2022 expressed its serious concern regarding the Lower courts blindly rejecting the bail applications without entering into the merits of the case. Court observed that:

> *"12. This Court is having day to day experience that the Court Below without going into the merits of the case, blindly rejects the bail applications of accused. It is a matter of great concern that in these types of petty matters, litigants have to approach this Court, despite Sessions Court are established all over the State to access the justice easily to the persons living in remote and deserted area. The Sessions Court and High Courts are vested with concurrent powers under Section 439 CrPC. To approach the High Court from remote places creates unnecessary financial burden upon the litigants. This type of order passed by court below frustrates the very purpose of establishing Court of Sessions in all parts of the State. It is also pertinent to note that while deciding a bail application Court is not convicting or acquitting a person, only liberty is extended to the accused from custody, during trial with certain conditions."*[51]

Court also advised the session courts to not reject these bail applications out rightly and blindly. While deciding such matters lower courts should pass orders after going through the provisions of law and the evidence collected during the investigation

Law Commission 268th Report[52]

- Law Commission in its 268th report very precisely paints the new norm of rich and powerful to get bail with ease.
- The Commission, led by retired Supreme Court judge B.S. Chauhan, recommends that all persons awaiting trial be able to get bail more easily.
- Bail practices must be "fair and evidence-based," according to the panel.

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[49] Amit Anand Choudhary, "Courts swamped, Supreme Court wants to know Bihar booze ban impact", *The Times of India*, *available at* https://timesofindia.indiatimes.com/india/courts-swamped-supreme-court-wants-to-know-bihar-booze-ban-impact/articleshow/90086751.cms , (last visited on 24/5/2022).

[50] MANU/MP/1280/2022.

[51] *Ibid.*

[52] Law Commission of India, "268th Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail" (May, 2017).

- Gender, colour, ethnicity, financial circumstances, or social standing should not impact custody or release decisions, according to the study.
- The large discrepancy in the issuance of bail is the primary reason that 67 percent of the present prison population is made up of undertrials.
- Even if they are granted bail, the majority of people are unable to fulfill the stringent financial requirements.

Recommendations of the Commission[53]

- The Commission seeks to improve on a provision introduced in 2005 to grant relief to thousands of prisoners languishing without trial and to decongest India's overcrowded prisons.
- According to Section 436A of the Code of Criminal Procedure, a prisoner who has already served half of the maximum sentence allowed for that offence may be freed on bail with a personal bond.
- The Law Commission suggests that people arrested for crimes carrying sentences of up to seven years in prison be freed after serving one-third of that time and those accused of crimes carrying sentences of more than seven years be released after serving half of that time.
- The time spent as an undertrial may be considered for remission for individuals who spent the whole duration in this status.
- In general terms, the Commission cautions the police against needless arrests and magistrates against mechanical remand orders.
- It gives an illustrative list of conditions that could be imposed in lieu of sureties or financial bonds.
- It advocates the need to impose the "least restrictive conditions".
- However, as the report warns, bail law reform is not the panacea for all problems of the criminal justice system.
- Be it overcrowded prisons or unjust incarceration of the poor; the solution lies in expediting the trial process.[54]

Bail Pendency as Ridicule of Criminal Procedure Code.

Constitution of India protects liberty of every person. Article 21 reads "No person shall be deprived of his life or personal liberty, except according to procedure by law."[55] It does not promotes protecting the offender but it is also a dictum of law that every person is innocent unless proved guilty. Arrest is a necessity to ensure the presence of accused where there is a doubt of absconding of accused or tampering of evidence. It is a common assertion that whenever anyone is accused of or charged with commission of some serious crime and is likely to be punished severely, chances of him absconding or jump

[53] *Ibid.*
[54] *Supra* note 52.
[55] The Constitution of India, art. 21.

bail in order to avoid the trial and consequential sentence are high. To avoid such circumstances along with preserving one's personal liberty, legislature in its wisdom has given some precise directions for granting or not granting bail in Chapter XXXIII of Code of Criminal Procedure. Judicial system works on the principle of 'bail is a rule and jail are an exception'. In a case where accused is of bailable offence, police officer is bound to release them on bail as a matter of right. But it is not the situation where a person is accused of non- bailable offence[56]. Whenever a person is accused of any non- bailable offence, court can grant bail upon its own discretion unless court has reason to believe that such person is likely to be convicted for offence punishable with death or imprisonment for life[57]. While exercising discretion in granting bail, certain considerations are necessary such as the nature and seriousness of offence, the character of evidence, circumstances peculiar to accused, reasonable apprehension of witness being tampered with, large interest of public or the state[58]. Apart from this, there is provision for bail during trial in the case triable by magistrate, the trial cannot be concluded within 60 days from the first date fixed for taking evidence, and the accused has the right to be released on bail by magistrate, unless reasons are recorded.[59] Criminal Procedure Code also provides that when a investigation is not completed within 90 days and 90 days for offences punishable with each imprisonment for life or imprisonment for ten years or more and any other offence respectively as the case may be, and accused person is in custody, he is entitled to get bail as of right[60].

But this system established by Code has been long forgotten by judicial system. Now jail seems to be a rule. Justice A.K. Sikri once said, "…If you don't grant bail, it is a human rights issue. If he is entitled to bail, and if he remains inside the prison for even a day or two, you have deprived him of his personal liberty…….".[61] Supreme Court in *Gurucharan Singh* v. *State(Delhi Administration)* observed that except for cases where reasonable grounds exist for believing that accused is guilty of an offence punishable with death or life imprisonment, in all other cases courts shall exercise judicial discretion in favour of Granting Bail[62]. Recently a bail granted by the Session Court of Delhi is being referred as 'travesty of justice'. In this case bail has been granted to a woman after 9 and half years as yet justification of framing was not put before the court and reason as stated by the court was she if convicted can be punished with imprisonment for 7 years only and she already has spent 9 and

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[56] The Code of Criminal Procedure, 1973, s. 436.
[57] The Code of Criminal Procedure, 1973, s. 437.
[58] *State* v. *Captain Jagjit Singh*, AIR 1962 SC 253.
[59] The Code of Criminal Procedure, 1973, s. 437 (6).
[60] The Code of Criminal Procedure, 1973, s. 167 (2).
[61] Charul Shah, "Lower courts need to grant bails to reduce pendency in courts, avoid overcrowding in prisons, say experts", *Hindustan Times*, 25/10/2020, *available at* https://www.hindustantimes.com/mumbai-news/lower-courts-need-to-grant-bails-to-reduce-pendency-in-courts-avoid-overcrowding-in-prisons-say-experts/story-1KJk8vkDUvKcsrxgnhp2AJ.html(last visited on 15/07/2022)
[62] 1978 Cri LJ 129 (SC).

half year in jail[63]. Apart from this, situation of listing of bail applications at High Courts is having a fair share of contribution in overcrowding of prisons. It takes even almost a year to listing of many bail applications before the court. The ratio percentage of institution and disposal of cases as analysed earlier from data available at National Judicial Data Grid is concerning. As we can see, Supreme Court has also been actively participating in taking steps as reforming as possible in transformation the plightful scenario of bail applications pending in Courts by issuing guidelines, taking suo moto cognizance and setting precedents. This issue has also made its way before in 268th Law Commission Report which also made certain suggestions regarding modification of existing laws.

Conclusion and Recommendations

After analyzing various data, hence it proves how the dictum of bail is a rule and jail is an exception is long forgotten and how jail has become a new norm. Data collected from NCRB Report clearly shows how plightful situation at prisons and jails is so much so as double the capacity of prison is occupied by prisoners. Definitely there is pendency of cases especially of bail applications at all major high courts. But situation at High Court of Allahabad, Patna and Madhya Pradesh. The ratio of cases instituted before the courts and that of matters disposed of seems far convincing than it should actually be. This difference can very easily be observed through the National Judicial Data Grid which is an API based database setup by Department of Justice for real time data collection and analysis.

After completion of this research work, following are few recommendations which can contribute to re-strengthening the backbone of overburdened courts of our Indian Judicial System from District Level to Apex Court.

1. Proper frequent listing of bail applications is important. If such applications are listed at a long duration of time, pendency is bound to increase.
2. Strict adherence to the suggestions and exceptions listed by Supreme Court in the *Saudan Singh Case*[64]must strictly adhered.
3. Increase in number or Courts and Benches must be ensured. Fewer the courts, more burdened they are.
4. There is a great need of controlling Abuse of liberty of Public Interest Litigation and Frivolous petitions. Courts are struggling in disposal of existing applications and petitions. Such Public Interest Litigations and Frivolous applications add to the burden of courts.
5. Situation at District Court needs to be improvised. Lack of infrastructure and proper facilities along with lack of judges in lower courts hampers the working of courts, leading to more pendency at lower courts level.

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[63]*State* v. *Raksha J. Ursh @Priyanka Dev Saraswat* Application no. 1642 10.05.2022
[64]*Supra* note 6.

6. Strict compliance of trial procedure under Criminal Procedure Code and various other statues must be ensured. Provisions relating to trial and bail especially provisions relating to term of remand and custody must be followed.
7. Criminal Procedural Laws need to be amended to make certain changes in provisions relating to speedy trial which shall ensure conclusion of trial procedure speedily decreasing the plight of undertrial detenues.
8. Whenever enacting a litigation, legislature should beforehand properly analyse the impact it shall have over the courts and the judicial system. Laws are enacted for curing the mischief and should be adhere to do so rather than adversely adding to the plight of its citizens and other institutions.

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Transgender Children: Socio-Legal Perspective

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Abstract

The Children are not born with the knowledge what it is called to be a boy or a girl but they learn it from their parents and the near and dear ones around them. This is the learning process which begins early. The moment the doctor declares based on observing the newborn's external sex organs, it is a boy or it is a girl, the world around the child begins to teach these lessons gradually. Whether it is the choosing of white clothes and pink clothes, boys' toys and girls' toys or saying young girls that they are pretty and the boys they are strong. It continues into the stage puberty and at adulthood as social expectations of masculine and feminine expression and behavior often become more rigid in the society. But gender does not simply exist in those binary terms, it is more of a concept, with all individuals expressing and identifying with different degrees of both masculinity and femininity. Transgender people identified as a gender that is different than the one they were assigned at birth. The Transgender Children too need care and equal protection of law but the agony is that neither the rules framed for proper implementation of the Juvenile Justice (Care and Protection of Children) Act, 2015 are accommodative enough nor the Transgender Persons (Protection of Rights) Act 2019 recognizing them being capable of equal protection. These are not violating the fundamental rights of the transgender children but also denying the basic human rights to them.

Key Words: Transgender children, Indian Constitution, Juvenile Justice, Human right, Right to Education, Census.

Introduction

The human beings have acquired the basic rights and freedoms which are guaranteed to a human by virtue of him or her being a human which can neither be created nor can be abrogated by any person any government of the day. These rights include the right to life, liberty, equality, dignity and freedom of expression, thought. The right to choose one's gender identity is an essential part to lead a life with dignity which again falls under the ambit of Article 21[1] of the Indian Constitution. In considering the right of personal freedom at

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[1]No person shall be deprived of his life or personal liberty except according to a procedure established by law

highest padastral and self determination, the Court held that the gender to which a person belongs must be determined by the person concerned himself or herself. The Court has finally recognised that the people of India have the right to gender identity. It goes without saying that the Children are not born with the knowledge what it is regarded to be a boy or a girl but they learn it from their parents and the near and dear one around them. This is the learning process which begins early takes shape at early stage of the life of a child. The time, the doctor after seeing the external organs of the newborn, declares, it is a boy or it is a girl, the parents , relative around the child begins to instill these lessons gradually. Whether it is the choosing of the blue clothes or the pink clothes, boys' toys and girls' toys or addressing young girls that they are pretty and the boys that they are strong. It continues into the stage puberty and at adulthood as social expectations of the masculine and feminine expression and behavior often become more rigid and tough in the society. But gender does not simply exist in those binary terms, it is more of a concept, thought with all individuals expressing and identifying with different degrees of both masculinity and femininity. The transgender people identified as a gender that is different than the one they were assigned at birth. The Transgender Children too need care and equal protection of law because of the fact that they are more vulnerable than the adults in the society. They are more affected than any other age group by the actions and non action, commission and omission of the society and governments. They are not regarded as the people having a mind of their own, freedom of having view to express and inability to decide. Their life is decided by the adults. The parents also abandoned them which leads to their mental agony and sometimes leads to suicide as well. They become vulnerable to exploitations and abuse in the society. The definition of the child is ambiguous in the Indian context, leading to more confusion with regard to the safety and well being of the transgender children. India, though a signatory to the United Nations Conventions on the rights of the child but till date it has different definitions of child under different prevailing laws throughout the territory of India. If noticed carefully then the symptom of transgender can be seen in a child at the early age of five years and sometimes it is detected after the age of 14 years. The Transgender Children who do not identify with the sex, assigned at birth are basically dependent on their parents like any other child for care, shelter, financial and emotional support and if the parents fail, then they are left at the mercy of others in the society, making them absolute vulnerable, capable of being easily abused, both physically and mentally, having none to listen to their endless agony.

Ambiguous Definition of Child under Indian Legislation

Indian, though a signatory to the United Nations Conventions on the rights of the child but could not provide a uniform definitions of the child, leading to more confusion and vulnerability of the transgender children leading their lives in different spheres, being capable of easy verbal, emotional and sexual abuse. In the developing country like outs, poverty forces a family to send the child to take up work outside their homes when they should

actually be inside the schools. The Children are often seen working in the most inhuman, hazardous and hostile conditions and it is all possibility of them being exploited due to their vulnerability conditions. Article 1 of the Convention on the Rights of the Child, 1989[2], child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. The Children Act, 1960 defines 'child' as a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.[3] In conformity with Article 24 of the Indian Constitution, the Child Labour (Prohibition and Regulation) Act, 1986 defines anyone below the age of fourteen years. Article 24 of the Indian Constitution prohibits the employment of children under the age of fourteen years in factories, mines and other dangerous works. This definition makes the transgender children vulnerable and capable of exploitation in the factories, mines and other dangerous work places if employed and they are above the age of fourteen years and below eighteen years. It will be difficult to bring the employer under the scanner of law for violation and abuse of child since the law limits the work of children only upto the age of fourteen years. If the transgender children who are above the age of fifteen years and are engaged in plantation work makes them quality for such work without hindrance under Section 2(c) of The Plantations Labour Act, 1951, which says child means a person who has not completed his fifteenth year.[4] The same category of child has been defined in The Motor Transport Workers Act, 1961.This limit of age has further been reduced by one year has been made to fourteen years[5] in Section 2(b) of The Beedi and Cigar Workers (Conditions of Employment) Act, 1966. The Protection of Children from Sexual Offences (POCSO) Act, 2012 and have put the definition of child in uniform way under the age of eighteen years. But surprisingly, the first legislation for the transgender i,e Transgender Persons (Protection of Rights) Act 2019 has not provided any definition of child.

Sex or Gender

Sex and gender are two different concepts. A person's sex refers to his or her biological status as either male or female. The determination of a person's sex depends primarily on various physical characteristics, including chromosomes, reproductive anatomy and sex hormones. Gender, on the other hand, is a societal construct that deals with the expected behaviors, roles and activities typically associated with the different sexes. The binary concept of sex, i.e, male and female is greatly recognised in the society and the parents also give due care to their babies if male or female child but they prefers to deviate from the parental duty once they detect that their child is transgender and not a male or female baby. If the parents fail to recognise and provide due care to their transgender children then can we expect the society to accept those children whole heartedly? Who is more responsible for the detrimental state of

[2]Article 1 of the Convention on the Rights of the Child, 1989
[3]Section 2(e), The Children Act, 1960
[4]Section 2(c) of The Plantations Labour Act, 1951
[5]Section 2(b) of The Beedi and Cigar Workers (Conditions of Employment) Act, 1966

the transgender children? Is it their parents or the society or both? This makes a wider gap to be filled up by the parents, society and the governments since the trasgender children are also the future of the Country like other male or female children. Their identity has been recognised and declared by the Hon'ble Ape Court in Nalsa case.[6]

There are some indications at early stages of the child in which the transgender qualities are developed. The parents need to look out for those qualities and preferences in the child in order to foster the child as transgender one. The parents need to listen their child in order to understand the gender and appreciate the same. They also need to see the way the child is using the washroom for pee, how they prefer to dress up and take part in their preferred games. The genitals of the child also lead to frustration amongst them if they are not comfortable with the genitals.

The Third Gender Journey Of A Child

The Patriarchal Society Like Ours Has Yet Come Out From The Narrow Minded Thought Of Binary Concept Of Sex, i.e. Male Or Female. Nothing Is More Devastating For A Child If His Parent Fail To recognize Him As Transgender And Leave Them At The Mercy of others in the society which in turn also does not accept the child as transgender and ultimately paving their ways to the transgender community, secluded and not acceptable to the society. This transgender community is known as gharana. headed by Naayak who is decision maker of the house. These Naayaks act as policy makers for the hijra community and each naayak has a number of gurus under him. The guru has the capability to have the followers, who learn various Hijra customs and rituals from the guru. Each hijra recognize and refers to each other as females, forming relations such as sister, maternal aunt and grandmother. The emasculation surgery (Nirvan) is performed by the *dai* upon the transgender child and transform him to a hijra. After the Nirvan, the child is kept in isolation for forty (40) days and on completion of forty (40) days the post ritual ceremony is observed and a full day celebration is done, known as jalsa in which the Nirvan hijra child is dressed up like bride and the journey begins a third gender.

The Journey Of Pain And Beauty

The third gender community has played a prominent role in Indian culture and was once treated with great respect. They find mention in the ancient Hindu scriptures and in the epics Ramayana and Mahabharata. In Mahabharata, 'Shikhandi', was a transgender. In medieval India too, they played a prominent role in the royal courts of the Mughal emperors and some Hindu rulers. Many of them rose to powerful positions. Their fall from grace started in the 18th Century during the British colonial rule when the Criminal Tribes Act of 1871[7] categorised the entire transgender community as "criminals" who were "addicted" to committing serious crimes. They were arrested for

[6]National Legal Services Authority v. Union of India
[7]Criminal Tribes Act of 1871

dressing in women's clothing or dancing or playing music in public places, and for indulging in gay sex. After Independence, the law was repealed in 1949, but mistrust of the transgender community has continued. Even today, they remain socially excluded, living on the fringes of society, in ghettoised communities, harassed by the police and abused by the public. Most make a living by singing and dancing at weddings or to celebrate child birth, many have moved to begging and prostitution. The spirit of the Constitution is to provide equal opportunity to every citizen to grow and attain their potential, irrespective of caste, religion or gender. In a landmark judgment in April 2014[8], the Supreme Court of India observed that "The transgender community, generally known as Hijras, are a section of Indian citizens who are treated by the society as "unnatural and generally as objects of ridicule and even fear on account of superstition". In its judgment, the Supreme Court passed the ruling that "In view of the constitutional guarantee, the transgender community is entitled to basic rights i.e. Right to Personal Liberty, dignity, Freedom of expression, Right to Education and Empowerment, Right against violence, Discrimination and exploitation and Right to work. Moreover, every person must have the right to decide his/her gender expression and identity, including transsexuals, transgenders, hijras and should have right to freely express their gender identity and be considered as a third sex. Thus, today the transgender people in India are considered to be the Third Gender.

Inappropriate Data Regarding Transgender Children

Before the legal recognition of third gender by the Hon'ble Apex Court in Nalsa case, the 2011 Census included the term as 'other' in the relevant form for census and a total of 4,87,803[9] persons were recognised as transgender out of which 54,854 were transgender children upto the age of 6 years. After the expiry of more than ten years there is no clear data regarding transgender children and the population of such children is undoubtedly bigger since there is no data regarding the transgender children upto the age of 18 years in 2011 Census and thereafter as well. This is mainly because due to the poor literacy rate amongst the transgender and lack of issuance of identity card in favour of the transgenders since more than 85% applications are pending for issuance of identity card with the appropriate government. This leads to the inappropriate data and implementation of schemes in favour of the transgender youth in relation to the education and employment, as guaranteed under the Indian Constitution. The pending applications for issuance of the identity card is viewed as hindrance in opening the bank accounts in favour of the transgender youth and the remain unable to get any financial help by the government regarding direct transfer of fund into their accounts.

Home For Boys Or Girls But Not For Transgender Children

Home is essential for any child for the proper upbringing. The transgender children who are abandoned by their parents, finds it hard to get a

[8]*Supra at 5*
[9]2011 Census

safe home. Though the statutes have provided the scope for homes but that is not sufficient since the said homes are made either for boys or girls. But there is no separate home for transgender children who are in need of care and protection. The Sections 48[10], 49[11] and 50[12] of The Juvenile Justice (Care and Protection of Children) Act 2015 talks about three types of homes such as special homes, place of safety and children' home respectively. Special homes are for rehabilitation of children in conflict with law who are found to have committed an offence and placed in such home on the strength of the Juvenile Justice Board.

The state governments are entrusted with the duty of framing the rules for the proper management and monitoring of these homes. The rules made under sub – section (2) may also provide for segregation and separation of children found to be in conflict with law on the basis of age, gender, nature of the offence committed by them including their mental and physical status. Place of safety is for a person above the age of 18 years or child in conflict with law who is between the age of 16 to 18 years and is accused of or convicted for committing a heinous offence. As per the mandate of the stature every place of safety shall have separate arrangement and facilities for stay of such children or person during the process of inquiry and children or person convicted for committing the offence. Again the State government is entrusted with the rule framing, prescribing the types of places that can be designated as place of safety and facilities and services may be provided therein. On the other hand the children' home is for the placement of children in need of care and protection for their care, treatment, education, training, development and rehabilitation. Again the state government is entrusted with the duty of rule framing for monitoring of management of children's home including the standard and nature of services, to be provided them based on individual care plan for each child.

It appears that the State governments play a pivotal role for administration and running of the homes which forms an integral part of child justice and child care from the grass root level, as the home are established either in each districts or in respect of multiple districts. Further more The The Juvenile Justice (Care and Protection of Children) Act 2015 under section 2(12) lays down the meaning of child which means who has not completed the 18 years of age. Therefore, the term child has been made gender neutral in the Act. Thus, when it comes to the above referred homes or child or person to be kept in the safe custody of the said home, it has no where been stated that a particular gender is to be accommodated. However, in reality either it is a girls home or a home for boys but there is no homes made for these transgender children or person who are equally the part of child justice and care system and

[10]Provision for special home in The Juvenile Justice (Care and Protection of Children) Act, 2015

[11]Provision for Place of Safety in The Juvenile Justice (Care and Protection of Children) Act, 2015

[12]Provision for Children's Home in The Juvenile Justice (Care and Protection of Children) Act, 2015

equally vulnerable. A child in conflict with law or a child in need of care and protection can also be a transgender. State government fails at this point of time to give equal and adequate protection to the transgender children. It is to be stated that under section 48, 49, and 50 of The Juvenile Justice (Care and Protection of Children) Act 2015 the State government has been given the ultimate power for framing of rules which they have neglected to frame in favour of transgender children whether they are child in conflict with law or the child in need of care and protection. If a transgender child is put in a segregated place in a home either for boys or girl, his mental health is being affected because of the different behavioral approaches of other inmates. Therefore, separate homes for the transgender children is the need of the hour for proper mental and physical growth of this third gender children.

Education And Transgender Children

The life of transgender people is a daily battle as there is no acceptance anywhere and they are ostracized from the society and also ridiculed. They face high levels of stigma in almost every sphere of their life such as health, schools/colleges, employment, social schemes and entitlement. Education of transgender children is equally important like others, but in this reference a question arises that is there adequate learning environment within school boundaries for education of transgender children, because from the time of identification of their sexuality orientation they started to face the stigma. This is duty of administration and school management to ensure adequate environment in school campuses, because there are greater possibilities that different stigmas might be start to affect to inclusion of transgender children as they had faced earlier. And different stigmas could break such children's interest and focus from the learning activities and more important that they could feel avoided, ignored, disrespectful, disgraced in educational conditions and they might be dropout from the school or college education system. To create the adequate learning environment in school / college boundaries this is necessary that administrators and school management personals should be sensitized regarding the educational rights of transgender children and how they could be helpful in creating in adequate learning environment to attain the learning goals by transgender children. Educational research can enrich the knowledge of this area and research will provide scientific evidences to choose particular direction for betterment.

In educational process at any level teachers and students are important to attain the goals of educational life keeping in mind the national goals and their roles. The quality of whole educational process is depend upon the teachers and somehow their learners. According to human right philosophy every child has right to be nurtured at fullest with full and adequate cognitive, psycho-social and emotional and moral support of every system around him/her. Similarly transgender children also have the right to education like other children and from humanistic point of view they should be nurtured at fullest and it should be clear each and every person who is engaged in educational process at any level so that s/he could contribute in their education

inclusively. Teachers must be sensitized regarding the issues related issues transgender, their life and culture, psycho-social and emotional condition and cognitive aspects, cooperation among all the children and relationship of transgender and other students etc. Teachers could be sensitized regarding content delivery which may be specially related to transgender children. Sensitization of teachers only can make the inclusion of transgender children success. But the cooperation of peer group is always considered at large in maintaining classroom dynamics, creating adequate motivating learning environment and in attaining the learning goals. Peers might be very helpful in maintaining stigma free school or classroom environment for better learning along with their transgender peer(s). Though, in this area also focused educational research is the demand of hour. Due to stigma and discrimination faced by transgender people they have fewer opportunities for their adequate development as compared to other people of the society. Mainly transgender children are living in very critical situations. Though, census-2011 counted 54,854 transgender children of 0-6 year's age group. They are not educated as they should be in their age, because the social or academic Since very time in history transgender persons are facing many challenges in their life for existence and survival in mainstream society. The classification for their gender identity as third gender create many problems to them and it put them at lower level in the socially accepted sexuality orientation. Third gender provides them legal acknowledgement but it does not make them able them to alleviate them from their real conditions and they remain at environment is favourable as they are nor accepted by the society and therefore do not receive proper education. Even if they are enrolled in schools, they again harassment at every moment and are pushed the school or they drop out at their own. Involvement in begging and sex education may be the big reason for this happening a part of marginalized group of society and are not treated equally as compared to other people. Transgender children are forced to quit their education due to harassment and bullying, impacting their chances of employment and societal integration. Individuals who identify as transgender often face discrimination from healthcare workers, limiting their access to health services. They are subjected to higher rates of gender based violence, especially by police personnel.

Conclusion

It is high time that our society must realize that every individual in this country has equal rights and privileges, and follow the policy of "live and let live." Thus the first and the foremost right transgender are deserving of is the Right to Equality under Article 14. Article 15 speaks about the prohibition of discrimination on the ground of religion, caste, sex or place of birth. Article 21, ensures right to privacy and personal dignity to all the citizens and article 21 (A) ensures education is a fundamental right to every Indian. The constitution provides for the fundamental rights to the equality and tolerates no discrimination on the grounds of sex, caste, creed or religion. The constitution also guarantees political rights and other benefits to every citizen. Despite such

laws in the constitution of India, the other sex (transgender) continues to be ostracized. Transgender people faced discrimination and harassment at family, school and community forces them to move to the other places. The nature of the harassment includes verbal, physical and sexual abuse which has serious impact on the mental health as well. In a democratic country like India Transgender has no access to the social and political rights. They are not the part of any welfare scheme. Each human being in this Universe is indeed unique, and an integral part of Nature. It would thus be wrong to judge and discriminate people who may be different from the stereotype. There is a need for prepare an environment where transgender feels secure. Teacher and community people can play an important role in inclusion. Use the name and/or pronouns appropriate to the young person's chosen gender identity. Remember that it is everyone's essential dignity to be called by our chosen name, and it is everyone's right to be recognized as the person we see ourselves to be. Please apologize if you use the wrong pronoun or the wrong name. Educate staff and youth about gender identity. Make sure that everyone understands that transgender youth. If possible, designate gender neutral restrooms and locker rooms. Government should provide fee-waiver, fee-reimbursements, scholarships, free textbooks, free hostel accommodation and other facilities at subsidized rates for students belonging to the transgender in order to make higher education and professional education accessible by the community. Special coaching should be provided to the candidates for competitive examinations. All the educational institutions/universities should establish an anti discrimination cell to monitor any form of discrimination against the transgender community. On the line of strict anti ragging cell, there should be zero tolerance towards any incidence of the discrimination.

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Impact of Covid-19 Pandemic on the Legal Profession – A Case Study of Kashmir

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Abstract

COVID19 pandemic has profoundly impacted the word with every aspect of life coming to a virtual halt. This unprecedented crisis has precipitated a change in the living patterns of people prompting everyone to modify their lifestyle. This pandemic has wreaked havoc on the world by claiming thousands of lives and devastating the world economy. Every country has been badly impacted by the pandemic irrespective of the fact whether it belongs to the league of developing or a developed nation. Within the country, the debilitating impact of the pandemic has been felt by everyone especially the downtrodden and unprivileged segments of the society. So far as the legal profession is concerned it seems to be one of the most affected sectors owing to the onslaught of the pandemic. This pandemic has severely impacted the legal professionals in terms of their livelihood and accessibility to the courts. However, on the flip side, this pandemic has allowed the judicial system to experiment with the idea of introducing a virtual court system at all levels of the judicial hierarchy thereby ensuring that the judicial system continues to operate albeit in a minimalistic manner. Notwithstanding, the introduction of virtual court rooms, genuine concerns have been raised regarding the efficacy of such courts. This paper is an attempt at appraising the impact of COVID19 pandemic on the legal profession in Kashmir. This paper would primarily seek to find answers to the questions as to (a) How far the pandemic has impacted the legal practice in the valley and (b) How far has the transition to the virtual court system mitigated the rigors of the pandemic so far as the legal professionals are concerned?

Keywords: Legal Profession- Virtual Courts-Judiciary- Livelihood

I. Introduction

The legal profession is considered one of the best pursuits when it comes to the prestige and lucrative nature of a vocation. The legal fraternity is known for its contribution to diverse aspects of social life. In India, the

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emergence of the legal profession coincided with the enactment of the Indian High Court Act of 1861 which for the first time established three High Courts at Bombay, Calcutta, and Madras respectively[1]. Within the country, there is a huge number of legal professionals practicing at the district, state, and national levels. According to conserve estimates more than thirteen lakh professionals are practicing in various courts in India[2]. These large numbers of legal professionals are regulated by various bodies operating at pan India level. Bar Council of India regulates the legal profession by prescribing standards of professional conduct and etiquette and by exercising disciplinary jurisdiction over the bar[3]. The statutory framework governing the legal profession is laid out in the Advocates Act, 1961. The Act of 1961 was enacted with the view to amend and consolidate the law relating to legal practitioners[4]. This Act provides for the establishment of the State Bar Council and Bar Council of India with an avowed object of laying down standards of professional conduct and etiquette for advocates; to exercise general supervision and control of State Bar Councils; to promote legal education and lay down standards such education[5]. Thus, the Bar Council of India is the premier body which regulates the legal practice at the pan India level with the help of State Bar Councils operating at the state level [6]. Over the years the Bar Council of India has introduced a

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[1] See, Sumeet Malik, *V.D.Kulshrestha's Landmarks in Indian Legal & Constitutional History* 351(Eastern Book Company, New Delhi, Twelfth edn., 2019).

[2] Figures in response to an RTI query filed in the year 2013. According to some un-official report this number has swelled to twenty lakh now. See, BCI Mishra's guesstimate of real & fake lawyers in India spikes to record 2 million, legallyindia.com, https://www.legallyindia.com/the-bench-and-the-bar/bci-mishra-s-guesstimate-of-real-fake-lawyers-in-india-spikes-to-record-2-million-20160602-7664 (Last visited 01/07/2020)

[3] Bar Council of India was established under the Advocates Act, 1961.

[4] The object behind the enactment of the Advocates Act of 1961 is reflected in its preamble that provides-'An Act to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils and an All-India Bar'.

[5] Section 7 of the Act of 1961 provides-] The functions of the Bar Council of India shall be— 6[***] (b) to lay down standards of professional conduct and etiquette for advocates; (c) to lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council; (d) to safeguard the rights, privileges and interests of advocates; (e) to promote and support law reform; (f) to deal with and dispose of any matter arising under this Act, which may be referred to it by a State Bar Council; (g) to exercise general supervision and control over State Bar Councils; (h) to promote legal education and to lay down standards of such education in consultation with the Universities in India imparting such education and the State Bar Councils; (i) to recognise Universities whose degree in law shall be a qualification for enrolment as an advocate and for that purpose to visit and inspect Universities 3[or cause the State Bar Councils to visit and inspect Universities in accordance with such directions as it may give in this behalf]; 1[(ia) to conduct seminars and organize talks on legal topics by eminent jurists and publish journals and papers of legal interest; (ib) to organise legal aid to the poor in the prescribed manner; (ic) to recognise on a reciprocal basis foreign qualifications in law obtained outside India for the purpose of admission as an advocate under this Act;] (j) to manage and invest the funds of the Bar Council; (k) to provide for the election of its members; (l) to perform all other functions conferred on it by or under this Act. (m) to do all other things necessary for discharging the aforesaid functions;

[6] See, Kailash Rai, *Legal Ethics-Accountability for Lawyers and Bar and Bench Relations 20* (Central Law Agency, 10th edn., 2011).

plethora of rules to regulate the legal profession however, the council has at time been criticised for failing to effectually realise it objectives. The Supreme Court in one of its dictums commented adversely on the working of the bodies regulating the legal profession in the country. The court observed that

> We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for the administration of justice in the country[7].

Recently, the Bar Council of India and the State Bar Council of UP invited the criticism of the court for failure to adhere to the directions of the court. In Mahipal Singh v State of UP, the Apex Court observed that:

> Legal profession being the most important component of justice delivery system, it must continue to perform its significant role and regulatory mechanism and should not be seen to be wanting in taking prompt action against any malpractice. We have noticed the inaction of the Bar Council of Uttar Pradesh as well as the Bar Council of India inspite of direction in the impugned order of the High Court and inspite of notice to the Bar Council of India by this Court.[8]

Over the years, there has been a massive increase in the number of advocates joining the legal profession which has led to overcrowding of the courts. Today a new entrant in the legal profession has to endure a lot of hardships for surviving the fierce competition within the advocates. As a consequence, there are several advocates who find it difficult to earn a decent livelihood from this profession forcing them to quit the legal practice. Dayal has succinctly summarised the hapless conditions of the young lawyers in the following words overcrowding, absence of partnerships and firms, lack of specialization, and an almost cut-throat competition scare the new entrants who must be prepared to face an initial starvation period for a number of years with an uncertain hope of eventually establishing themselves in the profession[9].

In the contemporary times, every law student who aspires to join the legal profession must be prepared to encounter a host of challenges associated with the legal practice. Owing to this abysmal state of affairs there has been a marked decline in the number of aspirants applying for the law courses, this trend is clearly discernible in the context of the traditional three-year law courses.

II. Legal Profession in Kashmir

The legal professionals in the union territory of Jammu and Kashmir practice within the state high court and subordinate courts spread across the union territory. Within the Union Territory of Jammu and Kashmir, there is a

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[7] R.K.Anand v. Registrar, Delhi High Court (2009) 8 SCC 106.
[8] (2016) 8 SCC 335.
[9] S.Dayal, Legal profession and legal education, *Journal of Indian Law Institute*.165 available at http://14.139.60.114:8080/jspui/bitstream/123456789/738/10/Legal%20Profession%20and%20Legal%20Education.pdf (Last visited 07/09/2020).

High Court at the apex of the hierarchy of Courts with twin benches at Srinagar and Jammu respectively. The High Court of J&K was established in the year 1928 by the Dogra ruler of the state[10]. Subsequently, the Constitution Act of 1939 elaborately laid down the powers and functions of the High Court. dealt with the powers of the High Court [11]. In the year, 1957 with the commencement of the state constitution detailed provisions were laid down in Chapter VII respect of the State High Court. By virtue of these constitutional provisions, the State High Court [12]was vested with similar powers as were vested in the other high court of the country under Article 226 of the constitution. Interestingly, Article 226 of the Constitution was made applicable to the state by virtue of the Constitution (Application to J&K) Order, 1971[13]; as such the state High Court operated under distinct provisions of two constitutions. With the promulgation of Constitution (Application to J&K) Order, 2019, the State High Court exercises its power under Article 226 of the Constitution only. At the level of districts, there are twenty district courts with ten courts each in Jammu and Kashmir divisions respectively[14]. Within the ten district courts that operate in the Kashmir valley, there are approximately ninety-seven courts wherein thousands of lawyers practice every day[15].

S.NO	DISTRICT	NO OF COURTS
1	ANANTNAG	11
2	BANDIPORA	5
3	BARAMULLA	15
4	BUDGAM	8
5	GANDERBAL	5
6	KULGAM	6
7	KUPWARA	10
8	PULWAMA	6
9	SHOPIAN	4
10	SRINAGAR	27
	TOTAL	97

[10] See, R.P.Sethi, *Commentary on the Constitution* of J&K 393 (Ashoka Law House, New Delhi, 2005)

[11] Part IV of the Act of 1939 dealt with the powers and functions of the High Court.

[12] Section 103 of the Constitution of J&K provided that - The High Court shall have power to issue to any person or authority, including in appropriate cases any Government within the State, directions, orders or writs. including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them. for any purpose other than those mentioned in clause (2A) of article 32 of the Constitution of India.

[13] See, S.K.Sharma, *The Constitution of Jammu and Kashmir* 303 (Universal Law Publishing Co. New Delhi, 2011).

[14] Latest figures cited from the website of the Department of Justice. https://ecourts.gov.in/ecourts_home/ (Last visited on 01/07/2020)

[15] Latest figures compiled from the information available on the website of the J&K High Court, jkhighcourt.nic.in (Last visited on 01/09/2020).

In the context of Kashmir, most of the advocates practice in the subordinate courts since corporate law firms are yet to make their foray into the valley. As such the main source of sustenance for an advocate in the valley is from the court practice. The advocates within the valley are organized under the umbrella of the Kashmir Bar Association which the apex body for legal professionals in the Kashmir province. Interestingly, it is the state High Court which is exercising the powers of the State Bar Council under the Advocates Act of 1961[16].

III. Covid 19 Pandemic and The Legal Profession

The year 2020 would remain etched in the human memory for the catastrophic impact of the COVID19 pandemic. The pandemic has engulfed the whole world wreaking havoc on mankind. World over, millions of people have lost their lives and the death count continues to swell with each passing day[17]. Despite the widespread technological advances in the medical sciences, the world continues to strive for the elusive cure to the coronavirus. This pandemic which seems to have originated in China has spread to every nook and corner of the earth bringing the whole world to a grinding halt. Every country has been adversely impacted by the pandemic irrespective of its economic status. In fact, the United States of America happens to be one of the most affected countries that has reported more than 220, 000 deaths owing to the pandemic[18]. On the economic front, all the countries have reported huge financial losses and a marked dip in their gross domestic product. The World Bank and the International Monetary Fund have projected a gloomy out for the world economy. The world bank in one of its latest reports has observed that

The COVID-19 pandemic has triggered what is likely to be the deepest global recession since World War II. In a base case scenario, the global economy could shrink by 5.2 percent in 2020…...The recession in advanced economies is hitting developing countries hard, and the World Bank now projects negative growth for over 150 countries in 2020. The emerging food crisis could intensify, and food insecurity could spread much more widely[19].

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[16] Under Act of 1961, the concerned state High Court can exercise the powers of the State Bar Council in a situation where a State Bar Council has not been constituted. Section 58 of the Act provides- Where a State Bar Council has not been constituted under this Act or where a State Bar Council so constituted is unable to perform its functions by reason of any order of a court or otherwise, the functions of the Bar Council or any Committee thereof, insofar as they relate to the admission and enrolment of advocates, shall be performed by the High Court in accordance with the provisions of this Act.

[17] World Health Organisation has reported more than 1,70,0000 deaths worldwide owing to the pandemic. Figures cited are available at https://covid19.who.int/.

[18] *Ibid.*

[19] World Bank Group COVID-19 Crisis Response Approach Paper, available at http://documents1.worldbank.org/curated/en/136631594937150795/pdf/World-Bank-Group-COVID-19-Crisis-Response-Approach-Paper-Saving-Lives-Scaling-up-Impact-and-Getting-Back-on-Track.pdf (last visited on 07/09/2020)

In fact, the ILO has pegged the estimates of labour income losses at 3.5 trillion dollars across the globe since the onset of the covid crisis[20]. Within the country more than 100,000 people have died owing to the pandemic; all the economic indicators have registered a sharp decline, according to some estimates the gross domestic product of the country has dipped considerably owing to the pandemic[21]. On the job front, millions of youths have lost their jobs because of the closure of workplaces in response to the lockdown. The International Labour Organisation (ILO) and the Asian Development Bank in their latest report have stated that more than forty lakh youth in the country have lost their jobs because of the pandemic[22]. Crores of skilled and unskilled workers are have suffered huge financial losses with a majority of them staring at the prospect of losing their jobs. Legal professionals across the country have been severely impacted by the pandemic following the closure of the courts. With the prolonged closure of the courts and hearing of only urgent matters through the virtual court system; the legal professionals were left in the lurch. The most severely impacted segmented among the legal professionals appeared be the young advocates who were left with no source of sustenance. Many legal professionals are living in pitiable conditions; a growing number of such professionals have resorted to other jobs to make their ends meet. Many newspaper articles have brought to fore the hapless conditions of the legal professionals chronicling the struggles of the young advocates. One of the articles portrayed an abysmal picture of the plight of such legal professionals highlighting the fact many advocates have started selling vegetables, weaving baskets, and selling street food to earn their livelihood[23]. This state of affairs has compelled many lawyers to approach the Bar Council of India and the State Bar Council for financial support. The Bar Council and State Bar Councils responded to such appeals for relief by laying down a scheme to offer some relief to the legal professional by offering them a paltry sum of a few thousand rupees. However, no 'major' initiative has been taken by them Bar Councils to help the legal professional in tiding over there financial losses.

IV. Legal Profession in Kashmir and Covid-19 Pandemic

Within the valley the legal professionals have been impacted more severely as compared to their counterparts on account of a variety of factors

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[20] See, ILO Monitor: COVID-19 and the world of work. 6th edition at page 1. Available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_755910.pdf (Last visited on 30/09/2020).

[21] See, How the Covid-19 pandemic has hit GDP growth available at

[22] This figure has been cited by the economic times while referring to the report of ILO. The news article is titled "41 lakh youth lose jobs in India due to COVID-19 pandemic: ILO-ADB Report" available at https://economictimes.indiatimes.com/news/economy/indicators/41-lakh-youth-lose-jobs-in-india-due-to-covid-19-pandemic-ilo-adb (last visited on 07/09/2020)

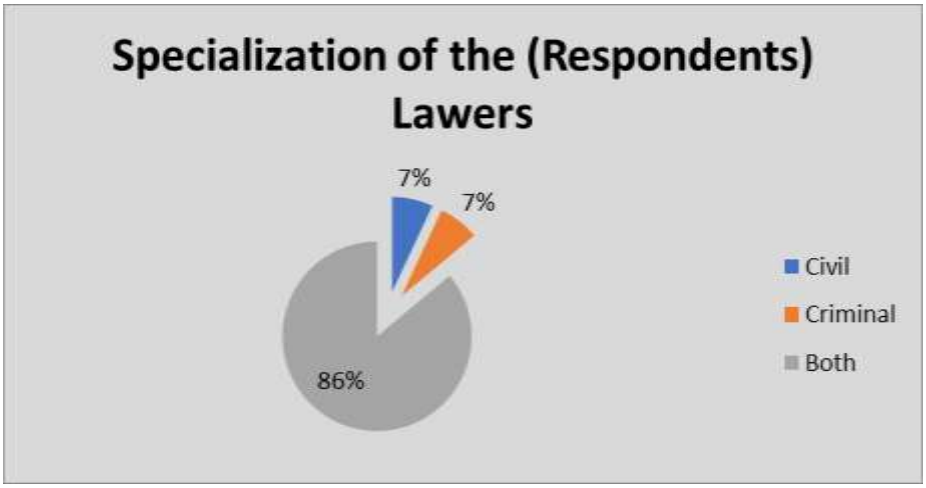
[23] Restricted Functioning Of Courts Forcing Advocates To Find Work Outside Legal Profession, https://www.livelaw.in/top-stories/covid-19-restricted-functioning-of-courts-forcing-advocates-work-outside-legal-profession-160143?from-login=536543 (last visited on 07/07/2020).

like prolonged lockdown owing to the August 5, 2019 constitutional changes and onset of COVID 19 pandemic; ban on the 4G mobile internet; lack of avenues to find work in the corporate houses or legal firms. Given the unique circumstances under which the legal professionals operate in the valley, the authors embarked upon an empirical study to access the impact of COVID 19 pandemic on the legal professionals in the valley. This empirical study was conducted by employing the online alternatives to data collection given the fact that the accessibility to the respondent groups was severely impeded by the lockdown. The foregoing part of this paper would deal with the empirical study conducted by the authors.

A. Data Analysis

The following section deals with data analysis. Data has been collected from 43 lawyers working at various district and lower courts of Jammu and Kashmir through the scheduled questionnaire. Data has been presented in tabular and graphical form. Data has been analyzed using the percentage method. It has been observed that on average each advocate within the respondent group has 5.8 years of experience as a practicing lawyer.

Figure 1



Source: Field Survey Data

The above figure gives information about the advocate's area of specialization. It was found that out of 43 respondents' 86 percent were dealing with both civil as well as criminal cases. It was also found that 7 percent of each respondent were engaged with civil and criminal cases. Therefore, it is clear that the majority of the respondents (lawyers) were engaged in both civil as well as criminal cases compared to those respondents (lawyers) who were engaged with either in criminal or civil cases.

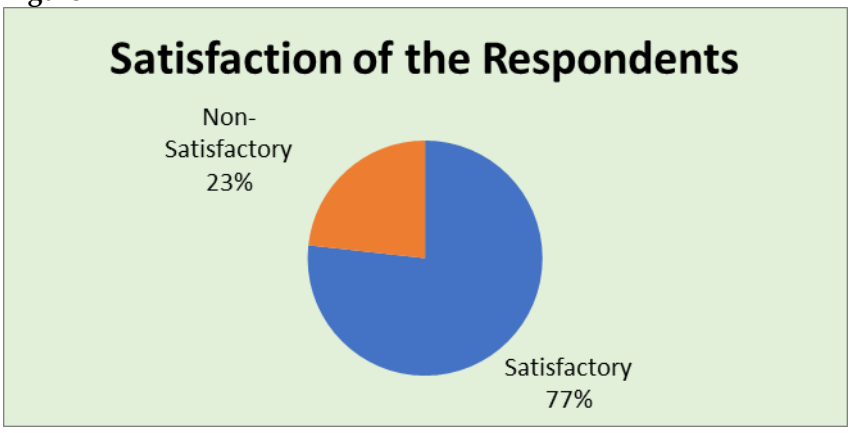
Table 1: Impact COVID19 Pandemic on Respondents Legal Practice

Impact	Number of the Respondents
Loss of clientele	23 (53.48)
Loss of earnings	38 (88.37)
Impeded accessibility to the courts	28 (65.11)
Respondents have not been able to pay salaries to their juniors/staff	9 (20.93)
Respondents had to reduce their staff strength due to loss of income	3 (6.97)
Respondents had to vacate their rented office space due to loss of income	7 (16.27)

Source: Field Survey Data. Note: Numbers in parenthesis show the percentage.

The above table reveals information about the impact of the COVID19 pandemic on respondents' legal practice. It was found that out of 43 respondents, 53.48 percent of respondents said that they have lost clientele due to the COVID19 pandemic. It was also found that 88.37 percent of respondents said that they have lost earnings due to COVID19 pandemic. It was further found that 65.11 percent of respondents said that COVID19 pandemic has impeded their accessibility to the courts. It was furthermore found that 20.9 percent of respondents said that they have not been able to pay salaries to their juniors/staff due to COVID 19 pandemic. It was found that 6.97 percent of respondents said that had to reduce their staff strength (due to loss of income) due to COVID 19 pandemic. It was also found that 16.27 percent of respondents said that they had to vacate their rented office space (due to loss of income).

Figure 2



Source: Field Survey Data

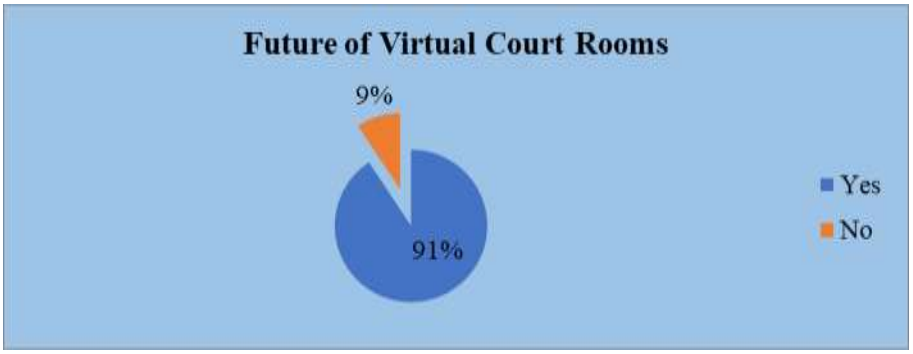
The above table gives information whether the respondents were satisfactory or non-satisfactory with access to switch over to virtual courtroom. It was found that 77 percent of respondents were satisfactory compared to 23

percent of respondents who were not satisfied with the switchover to virtual room.

Figure 3 Source: Field Survey Data

The above figure presents opinions of the respondents in response to the question whether there is any future for virtual courts or not? It was found that out of 43 respondents 35 percent opined that there is a future for virtual courts compared to 65 percent of respondents who have opined that there is no future for virtual courts.

Figure 4



Source: Field Survey Data

The above figure presents information whether the respondents have been negatively impacted by the transition to virtual courtroom settings or not. It was found that out of 43 respondents, 91 percent of respondents have been negatively impacted by the transition to virtual courtroom settings compared to 9 percent of respondents who have not been impacted by the transition to virtual courtroom settings. Therefore, it is quite clear from the above figure that majority of the respondent (lawyers) have been negatively impacted by the transition to virtual courtroom settings.

Table 2: Impact by the Transition to Virtual Courtroom Settings on the Respondents

IMPACT	Number
Loss of earnings	27 (62.79)
Loss of clientele	15 (34.88)
Impairs effective argumentation	20 (46.91)
Susceptible to technical glitches	19 (44.18)
Issues of accessibility	27 (62.79)

Source: Field Survey Data. Note: Numbers in parenthesis show the percentage.

The above table reveals information of the respondents about the negative impact with the transition to virtual courtroom settings.

It was found that 62.79 percent of respondents said that they have lost of earnings by the transition to virtual courtroom settings. It was also found that 34.88 percent of respondents said that they have lost clientele by the transition to virtual courtroom settings. It was further found that 46.91 percent of respondents said that they have impaired effective argumentation by the transition to virtual courtroom settings. It was further more found that 44.18 percent of the respondents said that virtual court system is susceptible to technical glitches. It was also found that 62.79 percent of respondents said that they have faced issues of accessibility by the transition to virtual courtroom settings.

Table 3: Impact by the Transition to Virtual Courtroom Settings on the Respondents *

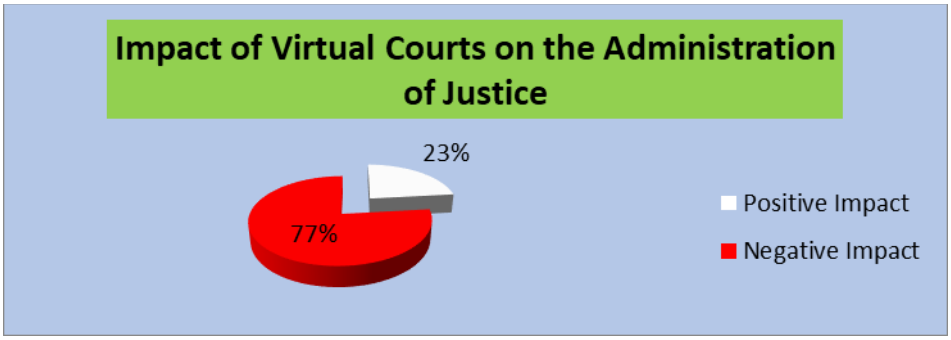
IMPACT	Number
Time saving	4 (100.00)
Accessible	4 (100.00)
Reduced the costs	4 (100.00)
Client friendly	4 (100.00)
Enhanced their earnings	4 (100.00)

Source: Field Survey Data. Note: Numbers in parenthesis show the percentage.

*This table presents information of the minority of the respondents who expressed the view that the switch over to the virtual court room settings has had a positive impact.

It was found that 100 per cent respondents have said that the 'switchover' to virtual courts impacted them positively in terms of time saving, accessible, reduced costs, client friendly and enhanced their earnings.

Figure 5



Source: Field Survey Data

The above figure gives information of the respondents about how they evaluate the impact of virtual courts on the administration of justice. It was found that 23 percent of respondents said that there is positive

impact of virtual courts on the administration of justice while as 77 percent of respondents said that there is negative impact of virtual courts on the administration of justice.

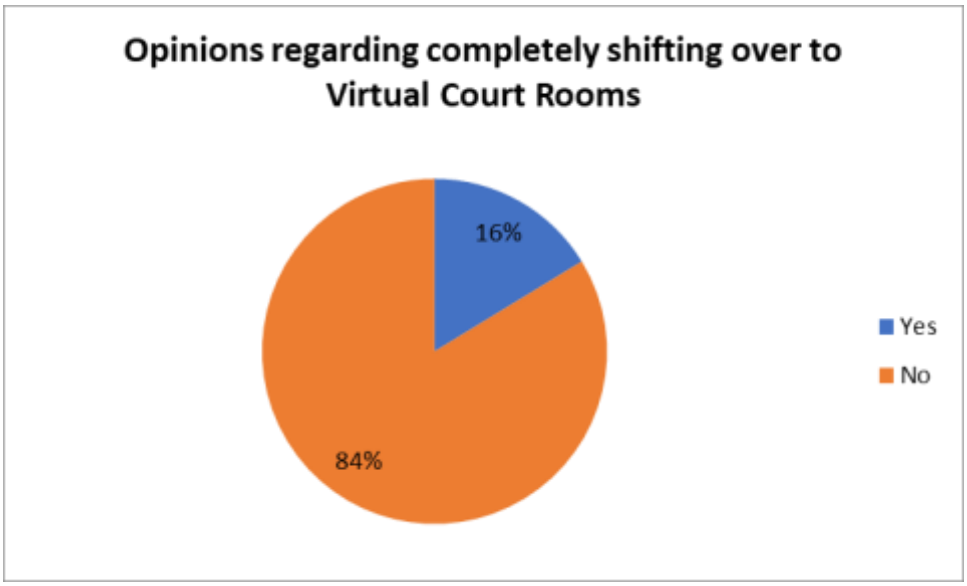
Table 4: Post Pandemic Impact on Legal Profession

Responses	Number
Loss of future earnings	28 (65.11)
Loss of existing clientele	21 (48.83)
Enhanced earning	3 (6.97)

Source: Field Survey Data. Note: Numbers in parenthesis show the percentage.

The above figure reveals opinions of the respondents about post-pandemic scenario on the legal profession. It was found that 65.11 percent respondents opined that there will loss future earnings. It was also found that 48.83 percent of respondents opined that they will lose the existing clientele. It was further found that 6.97 percent of respondents opined that their earnings will be enhanced in the post-pandemic scenario.

Figure 6



Source: Field Survey Data

The above figure gives opinions of the respondents whether they think that the time has come to completely shift over to virtual court rooms or not? It was found that 16 percent of respondents have opined that it is right time to shift over to virtual court rooms. It was also found that 84 percent of respondents have opined that it is not the correct time to shift over to virtual court rooms. Therefore, majority of the respondents have opined that it is not right time shift over to virtual class rooms.

B. Findings:

A study was conducted by the authors to inquire into the conditions of the legal professionals in the valley. As a part of the study, the authors embarked on the exercise by employing the questionnaire and interview method to solicit the views of the targeted respondent group. For the study the target respondent group comprised legal professionals practicing within the subordinate courts in Kashmir. To cover the universe of the study, stratified random sampling method for selecting the respondents. In this study, a questionnaire was mailed to the respondents through the online mode. Apart from it, interviews were conducted with the members of the Bar. Based on the analysis of the data collected the following findings came to the fore:

1. **Loss of Clientele:** A majority of the respondents in the study expressed the view that the COVID19 pandemic has resulted in the loss of clientele. Most of the respondents who expressed this view having been practising in the court for less than six years. The data therefore, points to the fact that the majority of the legal professionals who have been impacted happen to be young lawyers. A similar trend has been documented throughout the country wherein the young legal professionals have borne the brunt of the pandemic so far as their livelihood is concerned.
2. **Loss of future Clientele:** A majority of the respondents expressed the apprehension that the COVID19 pandemic may result in loss of future clientele. In this context, all the respondents across the group stated the view that the pandemic may result in the loss of future clientele.
3. **Loss of Earnings:** All the respondents expressed the view that the COVID19 pandemic has resulted in the loss of earnings. Most of the respondents who reported a substantial loss of earnings were young lawyers. This finding is in tune with the experiences recorded across the country. What compounds the matter further, in the context of legal professionals in Kashmir is the lack of avenues available to legal professionals apart from the traditional court system. Within the Kashmir valley, there are no major law firms or corporate houses that hire legal professionals. As such the condition of the legal professionals is much more abysmal as compared to their counterparts in the rest of the country.
4. **Impact of Virtual Courts:** With the onset of the COVID19 pandemic all the work in the courts across the country came to a halt. As a consequence, the judicial system was faced with a challenge to ensure the continuance of the justice delivery system by resorting to an alternative model. The alternative came in the form of the 'virtual courtroom' systems. This experiment with the working of the virtual court has been met with a mixed response. A majority of the respondents expressed a negative impression of the utility of the virtual courtroom on the ground that it has not substantially altered the condition of legal professionals. Apart from the factors which may be

attributable to the general limitations of operating in the virtual courtroom settings; another factor which may account for the aforementioned response would be attributable to the lack of 4G internet access in the valley.

5. **Impact on the administration of Justice:** Most of the respondents proffered the view that the introduction of the virtual courtrooms cannot be an effective substitute to the traditional courts. Some of the factors which can account for this may attributable to factor like accessibility to the internet, lack of proper infrastructure, inadequate technical proficiency in operating the internet. However, on a broader plane, the main reason which can account for this finding appears to be the broader understanding among the member of the bar and bench about the indispensability of physical hearing in the proper administration of justice.
6. **Future of Virtual Courts:** While the majority of the respondents were averse to having virtual courts as substitutes to the traditional courts. Yet, a majority of the respondents expressed optimism in virtual courts as an important adjunct of the justice delivery system. However, they were quick to point out that there is a need to augment the extant infrastructure so far as the virtual courts are concerned.
7. **Limitations of the Study:** This study was conducted during the COVID19 pandemic and as such the researchers operated within limitations brought to the fore by the lockdown which impeded the accessibility of the researchers in terms of access to the respondent groups.

V. Conclusion.

COVID19 pandemic has dealt a detrimental blow to the legal profession in the Kashmir Valley. The legal professionals within the valley have been virtually out of work owing to, two long drawn shutdowns. One of the factors which have escalated the financial losses of the legal professionals is the lack of alternative avenues in the form of corporate law firms. Moreover, the restriction on the 4G mobile internet has also contributed to the hapless condition of the legal professional in the valley. The COVID19 pandemic has caught the state institutions unawares and as such a prompt response to the pandemic was lacking. Perhaps, this lack of response may be attributable to the unprecedented nature of the crisis precipitated by the pandemic. There seems to be a lack of institutional response to mitigate the suffering of legal professionals. No doubt the governments and the Bar Council of India have taken some steps to ameliorate the conditions of legal professionals. However, these initiatives have proven to be inadequate in mitigating the conditions of the legal professionals. The transition to the virtual courts has been met with a mixed response owing to issues of accessibility and glitches associated with the use of the internet. However, what makes the situation diabolical is the fact that even after six months into the crisis a lot of legal professionals are finding it hard to meet ends meet. This state of affairs could be attributed to the

reluctance on the part of the courts to facilitate open hearings on account of the rising number of COVID19 cases.

VI. Suggestions

Based on the findings of the study, the authors are putting forth the following suggestions:

I. The Bar Council of India must come up with a comprehensive financial package for the advocates to help them tide over the financial losses suffered on account of the COVID pandemic.

II. The state/central governments must also contribute towards ameliorating the financial condition of the legal professionals by advancing financial support which can supplement the proposed financial package by the Bar Council of India.

III. The Bar Council/ State Bar Councils must establish a special fund for the welfare of the lawyers in the eventuality of a 'national disaster' keeping in view the catastrophic impact of the COVID19 pandemic on the legal professionals.

IV. There is a dire need to provide a comprehensive welfare scheme for the new entrants of the legal profession. In this context, the Bar Council may consider providing a stipend for three years to such new entrants provided they undertake to take a few *pro bono* cases every year.

V. The government must direct the financial institutions to lend soft loans to the legal professionals on low- interest rates to help them come out of the financial crisis.

VI. The government must introduce an insurance scheme to cover the legal professionals, this scheme can be modeled on the lines of the insurance schemes applicable to government servants albeit with reduced premium rates.

VII. The government must devise a comprehensive strategy to encourage corporate law firms to establish their offices in the valley so that the legal professionals in the valley can have alternative job avenues apart from the traditional legal practice.

VIII. In the context of the virtual courts, it is suggested the extant infrastructure within the courts needs to be augmented in terms of fully equipped smart courtrooms.

IX. Moreover, there is a need to properly train the members of the bar and bench in using the internet tools so that the virtual courts can operate effectively as adjuncts to the traditional courts.

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Media and of Euthanasia: A Study of Mediated Disclosure and Public Perspective in India

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Abstract

This study attempts to discover the role of media in generating public perspective with regard to Euthanasia, besides providing space for the participation of public in discussion on Euthanasia, as it continues to be the most controversial subject of discussion in India, especially given its legality and validity. There is no universal law pertaining to Euthanasia and it differs from country to country, making it the most relevant subject of study for researchers. Despite being of such relevance, very little academic research is done about the relationship between role of media and Euthanasia. To fill this academic gap, this study employs a mixed methodology to a case study of media in India, including a quantitative content analysis of news articles, a thematic analysis of news articles and a quantitative content analysis of social media engagements. Findings of the study indicate that the media, particularly print media in India explored all its possible capabilities to raise the cases of Euthanasia, but it showed very little interest in providing space for public participation to invoke discussion about Euthanasia, thus hampering social debate on the issue.

Introduction

Any discussion about Euthanasia, especially in India invokes debate on its legality and public perception. Since there is no universal law pertaining to Euthanasia all across the world, this particular issue continues to be one of the most controversial topics pertaining to individuals' quality of life. The concept of Euthanasia refers to an intentional ending of life. This issue is habitually assisted or administered by medical practitioners[1]. It is found that Euthanasia has introduced a concept of compassionate death, which is beyond natural

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[1] Gaignard, M.E, and S. Hurst. "A Qualitative Study on Existential Suffering and Assisted Suicide in Switzerland." BMC Medical Ethics 20 (34): 1–8, 2019.

death.[2] The word Euthanasia is derived from the Greek word 'Euthantos'. English philosopher and statesman Sir Francis Bacon coined the term 'Euthanasia' in early 17th Century, which literally means 'good death' and deciphered as 'mercy killing or a good death'.[3]

The concept of Euthanasia is itself derived from the notion of right to live the dignified life. An important topic of discussion pertaining to Euthanasia is its legality, which has been a moot point all over the world, wherein different countries follow different set of rules, but have framed no consensus in this regard, despite the fact that Euthanasia is prohibited in different countries.[4] As it is assumed that any tinkering with the idea may create a situation for the person that his family members and medical science would come down to their knees and become helpless due to medical restrictions.

Views on Euthanasia

All across the world, the concept of Euthanasia has been struggling to get its legal and legitimate position, despite ongoing debate among intellectuals, following the need of enactment of uniform policy. Universally accepted view is that no one has the right to end one's or any other's life.[5] There is a belief that humanitarian approach does not allow any human being to leave a person in difficulty. The very idea of family is built on the foundation of helping and keeping in practice the principle of togetherness, especially in unfavorable conditions. Besides, the society in general and governments in particular are invested with the duty to do work for the welfare of all citizens. The sacredness of life should be respected in every situation. The governments should provide and develop the means and measures in such a way that even a poor can get support. The law also does not endow the right in favour of anyone to kill the other person.[6]

While the media play a fundamental role in other social issues, little is known about its role in society concerning Euthanasia.[7] Indeed, the available material is mainly restricted to viewpoints expressed for and against the

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[2] Huxtable, R. "The Suicide Tourist Trap: Compromise across Boundaries." Journal of Bioethical Inquiry 6 (3): 327–36, 2009.

[3] Shondell, D., and C. Gonzalez. "When Death Is the Destination: The Business of Death Tourism–Despite Legal and Social Implications." International Journal of Culture, Tourism and Hospitality Research 7 (3): 293–306, 2013.

[4] Boston, P., A. Bruce, and R. Schreiber. "Existential Suffering in the Palliative Care Setting: An Integrated Literature Review." Journal of Pain and Symptom Management 41 (3): 604–18, 2011.

[5] Ladki, S. M., M. E. Hajjar, Y. Nacouzi, and L. Nasereddine. "'Euthanasia Services.' The Next Health Tourism Wave." International Journal of Health Management and Tourism 1 (2): 1–16, 2016.

[6] Shomron, B., and A. Schejter. "The Communication Rights of Palestinian- Israelis Understood through the Capabilities Approach." International Journal of Communication 14 (2020): 1725–43, 2020.

[7] Shomron, B., and N. Tirosh. "Contemporary Migrants and Media Capabilities – Understanding Communication Rights in International Migration Policies." Journal of Ethnic and Migration Studies: 1–18, 2020.

practice.[8] Thus, many of the exceptionalities of the mediated discussion remain inexplicable. Yet these features are vital to understand the relationship between media's role and Euthanasia. Therefore, through a case study of Indian media and a mixed methods approach, this study attempts to measure the mediated Euthanasia discourse and examine the Euthanasia's public perception. This is achieved through a quantitative content analysis of news articles, a thematic analysis of news articles and a quantitative content analysis of social media comments.[9] Thus, this study shall attempt to add to the existing knowledge about the healthy understanding of the media's role in society regarding Euthanasia. The role of media derives significance from two major aspects viz the Euthanasia itself and the analysis of the media's role.[10]

Literature Review

In their seminal work, Yu, Wen and Yang[11] (2020) stated that Euthanasia is actually based on the presumption that this concept is influenced by religious beliefs, moral convictions and human rights principles, due to which it has remained controversial in societies around the world. They maintained that such interventions usually manifest into legislation and regulation, though differ between countries. For instance, some intellectuals quote religious doctrine regarding sacredness of life and they profess that right to end life is in the hands of God alone, whereas some believe that human beings have the 'right to die and to die with dignity'. This group presses for the quality of life, entailing that the legitimacy of deliberate death is conditional on the existence of human sufferings. Similarly, Gaignard and Hurst[12] (2019) put out eight motives for Euthanasia, which included existential sufferings: 'physical decline and its consequences, solitude, apprehensions of the future, end of life, loss of social importance, being a financial liability, and loss of enjoyable activities'. They believed that the dynamics of this idea of Euthanasia is not restricted to its motivations, but to the procedural types in the act itself, which stretched from the more active acts of Euthanasia, such as injecting a patient with lethal drug, to the more passive acts of Euthanasia, such as treatment withdrawal and the removal from life support.[13] They also talked about social objection to Euthanasia, saying that the healthier patient seeking Euthanasia will receive more objections in the society as compared to aged one.[14] Accordingly, even among the countries wherein Euthanasia is legal, the

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[8] Booth, A., and D. Blake. "Assisted Dying in the Aotearoa New Zealand Media: A Critical Discourse Analysis." Mortality: 1–17, 2020.

[9] Jaye, C., I. Lomax-Sawyers, J. Young, and R. Egan. "The People Speak: Social Media on Euthanasia/Assisted Dying." Medical Humanities: 1–9. https://doi.org/10.1136/ medhum-2018-011565, 2019.

[10] *Ibid*, supra 6, p 1751.

[11] Yu, C.-E., J. Wen, and S. Yang. "Viewpoint of Suicide Travel: An Exploratory Study on YouTube Comments." Tourism Management Perspectives 34: 1–8, 2020.

[12] *Ibid*, supra 1, p 3.

[13] Brassington, I. "What Passive Euthanasia Is." BMC Medical Ethics 21: 1–13, 2020.

[14] Moshe, S., and G.-L. Avital. "Old and Depressed? What We Think About Ending Their Suffering—Attitudes Toward Euthanasia for Elderly Suffering From Physical Versus Mental Illness." OMEGA-Journal of Death and Dying: 1–16, 2020.

types of procedures available and the qualifications for each of the procedures vary greatly.[15] Such procedural differences make some individuals who do not qualify in their home countries, or who live in countries in which any form of Euthanasia is illegal, to travel to other countries which are more enabling. For instance, Switzerland is a famous destination for Euthanasia due to its virtual ease of system.[16] There are many other nations, like Belgium, Colombia, Mexico, Canada and the Netherlands, wherein Euthanasia is legal.[17]

As already discussed, there is no law pertaining to Euthanasia in India. A Report of Law commission of India "Passive Euthanasia – A Relook", recommended incorporation of a law on the matter of passive Euthanasia. It also brought a bill in this concern under the title, "The Medical Treatment of Terminally Patients (Protection of Patients and Medical Practitioners)". The bill was forwarded to the technical wing of the ministry of Health and Family Welfare in June 2014, for its observation. Undoubtedly, Euthanasia has remained an issue of legal and social debate in India for long time owing to unusual dismal situations portrayed in various facts and circumstances. At different occasions, Euthanasia was believed to be under the ambit of right to life with dignity as enshrined in article 21 of the Indian Constitution. A double bench of the Supreme Court held that a person has a right not to live a forced life and attempt to suicide is not illegal.[18] But this view was sidelined by the constitutional bench of the Supreme Court.[19] At presently, due to the decision of the Supreme Court, passive Euthanasia is legalized in India.[20]

In the matter of Gian Kaur[21] the legitimacy of section 306 was challenged on the grounds that it is in violation of article 21 of the Constitution, which punishes assistance in suicide by maintaining that as section 309 is held by two judge's bench in P. Rathinam judgment. Gian Kaur and her husband Harbans Singh were punished by a trial court under section 306 of the Indian Penal Code. They were punished with six years imprisonment and fine of Rs. 2,000/- for helping Kulwant Kaur to commit suicide. The comparison between right to life and right to die is unlike and unfair, due to the considerations of article 21. The court elucidated that at the end of life, death is natural with dignity cannot be blend or knitted with dying unnaturally, minimizing the sanctity of life. The constitutional bench of five judges declared section 306, 309 of Indian Penal Code, 1860 as constitutional. The Constitutional Bench of the Supreme Court held that both Euthanasia and assisted suicide are not lawful in

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[15] Hurst, S. A., and M. Alex. "Assisted Suicide in Switzerland: Clarifying Liberties and Claims." Bioethics 31 (3): 199–208, 2017.

[16] Luley, S. "Suicide Tourism': Creating Misleading 'Scientific' News." Journal of Medical Ethics 41 (8): 618–19, 2015.

[17] Kiliclar, A., F. N. Kucukergin, S. Kurt, B. Adiguzel, B. I. Ozkan, and H. C. Aktuna. "One Way Ticket-Route To Death: How Right Is To Promote It As A Commercial Initiative?" Journal of Business Research 9 (4): 84–105, 2017.

[18] P. Rathinam N. Patnaik v. Union of India, AIR 1994 SC 1844 at 1868.

[19] Gian Kaur v. State, AIR 1996 SC 946.

[20] Common Cause (A Regd. Society) v. Union of India (2018) 5 SCC 1.

[21] *Ibid*, supra 19.

India. The court upheld that Euthanasia should be made appropriate only through the legislation. In the case of Aruna Ramachandra Shanbaug[22] the writ petition was filed by the concerned person for the victim who was raped thirty six years back in 1973, she was a nurse in hospital. She was on bed incessantly and was taken care of by the hospital staff. The petitioner demanded that the respondents must be instructed to stop the feeding of the victim, but the court rejected the plea.

The recent case Common Cause Society v. Union of India[23] was decided by the Supreme Court, wherein the petitioner, a registered society argued that the right to die with dignity should be fundamental right. The petitioner sought directions to the respondent, to accept suitable procedures, in discussion with state governments where found necessary, to ensure that persons of depreciate health or terminally ill should be able to execute a document titled "My Living Will and Attorney Authorization" which can be presented to hospital for suitable action in event of the executants being admitted to the hospital with grave illness which may intimidate termination of life of the executants to appoint a committee of experts including doctors, social scientists and lawyers to study into the feature of issuing guidelines as to the Living Will; and to issue such further appropriate directions and guidelines as may be necessary.[24]

Media and Euthanasia

It is beyond any doubt that the media, in any form, including traditional as well as new, play a vital role in the society regarding Euthanasia. This erupts from the significant capabilities that the media can enable.[25] Capabilities signify what a person can do or be, reflecting the opportunities available to each individual in society.[26] The capabilities approach was developed by and as a structure for the reasonable distribution of resources in society.[27] The media's stand on Euthanasia actually derives from the potential of media capabilities as they play vital role in society[28] as well as from the more specific media role as a mediator of mortality and death.[29] Yet to date only small selection of empirical studies have been conducted on the relationship between role of media and Euthanasia. While some studies have pointed to a more fair and thorough, debate on Euthanasia happening in the news media, it has also been suggested that the media portrays the discussion in a naive

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[22] Aruna Ramachandra Shanbaug v. Union of India (2011) 4 SCC 454.
[23] *Ibid*, supra 20.
[24] *Ibid*, supra 20.
[25] *Ibid*, supra 6.
[26] Sen, A. "Human Rights and Capabilities." Journal of Human DEVELOPMENT 6 (2): 151–66, 2005.
[27] Sen, A. "Capability and Well-Being." In The Quality of Life, edited by M. Nussbaum and A. Sen, 30–53. Oxford, UK: Clarendon Press, 1993.
[28] *Ibid*, supra 6.
[29] Stone, P. R. "Dark Tourism and Significant Other Death: Towards a Model of Mortality Mediation." Annals of Tourism Research 39 (3): 1565–87, 2012.

form.[30] Moreover, studies have shown that the Euthanasia discussion is ongoing on social media. For example, a tentative study of YouTube comments on suicide tourism revealed that individuals were sharing opinions and attitudes for and against the act on the platform.[31] The same outcome was reported from a study conducted on social media content in New Zealand.[32]

Despite the aforesaid studies, little is known regarding the relationship between media's role and Euthanasia in general and mediated 'public participation' and 'perspective' of those affected by it in particular. Therefore, to fill the gap, this study sets out by asking the following research questions

(RQ): RQ1: To study the uniqueness of the mediated 'public participation' regarding Euthanasia in Indian newspapers?

RQ2: To study the 'perspectives' of those directly affected by Euthanasia to share their stories in the newspapers?

Methods

This study employs a mixed methods approach of both quantitative and qualitative analyses using three distinct samples. While the first sample included 82 articles, representing most of the write-ups discussing Euthanasia (from 1 January 2016 to 31 December 2021), published on two major Indian news platforms: The Hindu and The Times of India. This duration was selected because it allowed the aggregation of a substantial quantity of articles. The use of Lexisnexis software was used to collect the articles pertaining to Euthanasia. A quantitative content analysis was then conducted to measure the capability of 'public participation' in the discussion on Euthanasia. These two newspapers were chosen because of their highest level of credibility, which is evident from their circulation and high levels of audience exposure, which indicates their centrality as a media resource. Intercoder reliability tests were performed as they are necessary to wipe out any subjective judgments.[33] Although the researchers were the primary coders in this study, an experienced coder coded 10% of the articles and Facebook comments. Variables included media platforms, article type, article's publication date (2016–2021), time of publication, gender, age group, context, cause of Euthanasia, physical causes of Euthanasia, mental causes of Euthanasia and sentiment towards Euthanasia.

In the next stage, sample comprised of all articles which were analyzed in the first sample, containing personal stories of Euthanasia, as narrated by the patient themselves or their family members and friends were singled out. In total, 07 such articles were identified. Articles with individual stories were chosen as they could be seen as the understanding of the capability of 'perspectives'.[34] A qualitative thematic analysis[35] was then conducted on these

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[30] *Ibid*, supra 8.
[31] *Ibid*, supra 11, pp 5-6.
[32] *Ibid*, supra 9, pp 4-7.
[33] Macnamara, J. "Media Content Analysis: Its Uses, Benefits and Best Practice Methodology." Asia Pacific Public Relations Journal 6 (1): 1–34, 2005.
[34] Couldry, N. "Capabilities for What? Developing Sen's Moral Theory for Communications Research." Journal of Information Policy 9: 43–55. 2019.

articles with the aim of instructing the motivations of directly affected individuals to share their stories in the media.

In the third and last stage, the study included all the Facebook posts and comments which appeared on the official Facebook page of the selected newspapers. In total, 04 such Facebook posts were identified. These posts had 214 comments, of which 96 comments were available for analysis and therefore analyzed. The relevant posts of these newspapers were collected by typing the keywords from each of the articles' headlines and content into each of the selected newspaper's Facebook search. A quantitative content analysis was then conducted to understand the capability of 'perspectives'.

Debate on Euthanasia

The frequent coverage of Euthanasia in the past has been primarily used to measure this capability. During the course of this study, a total of 82 articles concerning Euthanasia were published in the selected newspapers. These comprised 38 articles in The Hindu and 44 articles in Times of India, suggesting that this capability was being realized more in Times of India. On an average, 13 articles were published a year, shifting between an annual minimum of 5 articles and an annual maximum of 21 articles.

Emotional Trial of affected

In the next step, the capability of those who were participating in the context of Euthanasia was measured. During the study, it was confirmed that those appearing in the articles were mostly common public (71.5%), followed by the person who chose to be euthanized (14.6%) and their family members and friends (13.8%). No significant disparity was found between The Hindu and Times of India. The articles in Times of India comprised 69.5% of the common masses, 16.8% of persons who chose to be euthanized and 13.7% of their family members and friends, contrary to The Hindu at 77.1% of the common masses, 8.6% of persons who chose to be euthanized and 14.3% of their family members and friends. More important part of this study remained that most of the articles on Euthanasia appeared as news items (79.2%) as compared to opinion and articles (20.8%). No significant difference was found between Times of India and The Hindu in this context. Moreover, the coverage in the selected newspapers was evenly divided between actual stories of Euthanasia (51.5%) and sharing of general opinions regarding the topic (48.5%). No significant differences were found between Times of India and The Hindu in this regard.

With regard to the emotional trial of the articles, it was found that they were impartial and neutral (73.1%), in contrast to supporting Euthanasia (20.8%) or opposing Euthanasia (6.2%). No major differences were found between Times of India and The Hindu. Study revealed that most of the articles (85%) on the topic of discussion were published after the Euthanasia was

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[35] Rietjens, J. A., N. J. Raijmakers, P. S. Kouwenhoven, C. Seale, M. Trappenburg, and J. J. V. Delden. "News Media Coverage of Euthanasia: A Content Analysis of Dutch National Newspapers." BMC Medical Ethics 14 (11): 1–7, 2013.

conducted and 15% of the articles were published prior to it. No significant differences were found between Times of India and The Hindu in this regard.

Who chose to die?

One of the important and final aspects of this study was to analyze what kind of individuals chose to be euthanized. Study revealed that males constituted (59.5%) of the individuals who chose to die, as covered by the selected newspapers, as compared to females (39.2%) and 0.8% included other genders. No significant differences were found between Times of India and The Hindu. It was found that reporting in both the selected newspapers were overt and expressive with regard to the gender of the person facing Euthanasia. They (newspapers) not only openly talked about gender of the individual to be euthanized, but also identified the age group of the person going through Euthanasia. Study found that the largest age group consisted of adults (54.2%), followed by the elderly (26.5%) and children (19.3%). Some differences were found between the two selected newspapers, with Times of India comprising 50% adults, 31.6% elderly and 18.3% children, and The Hindu comprising 65.2% adults, 21.7% children and 13% elderly, respectively in their reporting of Euthanasia cases.

Root Cause for opting Euthanasia

Throughout the study, the reason for opting Euthanasia has remained an important point and during study it was found that most of the articles in Times of India and The Hindu have identified the reason for opting Euthanasia. Of the reasons identified, majority (90%) cited physical ailments, while the remaining (10%) were for mental problems. There was no significant dissimilarity between the selected newspapers. The main physical ailments comprised cancer, neuromuscular, dementia and psychiatric disorders. No significant difference was found between Times of India and The Hindu in this context. The mental ailments mostly included stress, depression, hopelessness and isolation.

Mediated reality about Euthanasia

During the course of the study, it was found that of the total 82 articles published in both the selected newspapers regarding Euthanasia, 14 articles represented the realization of 'perspectives', as they carried the personal stories of individuals regarding Euthanasia, as told by the individuals themselves or their family members and friends. Times of India published 08 stories and The Hindu published 06, thus it can be concluded that The Hindu allowed less of this capability.

Conclusion

This study was set out to understand the media's role regarding Euthanasia discourse and Euthanasia perspective. This was accomplished through a mixed methods approach, including a quantitative content analysis of news articles, a thematic analysis of news articles and a quantitative content analysis of Facebook comments. Results show that the mediated social discourse concerning Euthanasia is restricted to a small collection of populations and circumstances, with inclinations to discuss adult men from the

majority group who suffer from a physical ailment. The main difference between the selected newspapers concerned only the incidence of coverage, with Times of India leading The Hindu in a ratio of 2:1 articles in the topic. Moreover, while the 'correct' levels of coverage for this topic in the media cannot be determined, there was a decline in coverage in both the selected newspapers, which makes it apparent that the mainstream media is not spreading activism, social change or even much of a debate regarding this topic in the public sphere. It points out at the limited and unassuming role the media is playing in society with regard to Euthanasia. These findings challenge scholars' prospect regarding the role of media and Euthanasia in general and the role of media as a mediator in particular. It was further established that the capability of mediated perspectives of Euthanasia differed in the selected newspapers, as they represented different perspectives in relatively considerable percentage of articles. It was found that Times of India largely enabled this capability as compared to The Hindu.[36]

It was further found that the analysis of the Facebook results confirms that the mediated perspectives of Euthanasia actually reached the users and were part of discussion, which was evident from the high occurrence of interactive activities on Facebook posts seen through the high number of likes, shares and comments, which serve as an indicator that those affected were reaching large audiences through their mediated perspectives. The findings also revealed that most of the Facebook users, through their comments, were in favour of Euthanasia.

Hence, it is concluded that this study shall contribute to understand the relationship between role of media and Euthanasia. During this study it was found that the selected newspapers were largely objective in their reporting on Euthanasia, without taking any stand for or against Euthanasia. This study established that the media highlighted cases of Euthanasia, but it should also play a responsible role in reinforcing its capabilities of public participation and public perspectives by providing larger space to such discourses.

[36] Dahan, M. B. "The Ripple Effects of a Partisan, Free Newspaper: Israel Hayom as Disruptive Media Actor." Studies in Communication Sciences 17 (1): 99–106, 2017.

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The Study on Droit Administratif in India

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Abstract

Regardless of Political Philosophies, administrative law has been a significant component of all legal systems. In a social safety net like India, where the government is required to act as the parent to its residents, the relationship between the administration and the people becomes particularly crucial. The French administration system known as Droit Administratif is based in part on the "green light" method of administrative law. France has established administrative courts that function independently of and in parallel with civil courts. Civil courts lack the authority to hear cases involving disputes between states and subjects, this method was designed to reduce the burden of administrative disputes on civil courts while establishing distinct criteria for administrative issues. The executive branch's administrative courts are allowed complete liberty to decide certain cases. The laws and guidelines established by this court to regulate the interaction between the state and its inhabitants are known as droit administratif. In 1885, Dicey believed that administrative law, or droit administratif, was in fact unknown in England and other nations that, like the United States, derived their civilization from English sources. Dicey believed that administrative law is, in its contents, completely unlike any branch of contemporary English law[1]. However, these ideas have changed in the more than 50 years that have passed since that was written, affecting even the author himself[2], therefore it is now widely acknowledged that not just countries on the continent[3] but even the United States and Britain have an administrative law. The resolution of administrative conflicts in India has been a topic of significant discussion among the judges. There are parallel courts in India that serve as tribunals for a variety of cases, including company disputes, tax concerns, railway claims, debt recovery claims, and army disputes, in addition to the administrative tribunals. The reality has been quite the opposite, despite the fact that this system was criticized by well-known jurists like AV Dicey for having the capacity to completely subvert citizens' rights and the courts being biased toward the administrative agencies. This study seeks to fathom the meaning of Droit administratif and how it operates in India.

Keywords: Droit, French, administratif, India, courts, Conseil d' Etat, administration.

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[1] Wade, law of the constitution, P.182, 9th ed., Longman Publication, 1939
[2] Dicev, law and opinion in England in the nineteenth century, P. xxix, 2d ed., Liberty Fund Inc, 1914
[3] Johnson Goodnow, Comparative Administrative Law, BiblioLife, (1893)

History of Droit administrative:

The Droit administratif was started by Napoleon Bonaparte[4]. He was in charge of founding the Conseil d'Etat. He enacted an ordinance stripping the law courts of their authority to decide administrative disputes, as well as another mandating that the Conseil d'Etat be the only body with the authority to do so. Droit Administratif alludes to the presence of separate courts for administrative disputes.

In the 16th century, the Consul du Roi rose to prominence as a result of its expanding jurisdiction, which included all disputes involving the government or its agents. In contrast to the civil courts, which had authority over appeals in administrative affairs, the Consul du Roi became known as the Conseil Prive in the 17th century. Even more so than the other two tribunals, the Court of Finance and the Judicial Court, the Conseil du Roi, the administrative court, experienced increased importance in the French legal system in this regard. Napoleon resurrected the Consul du Roi as the Conseil d'Etat in 1799, following the Revolution. The Conseil d'Etat was given the authority to resolve administrative disputes and required its authorization for actions against government agents in accordance with the provision in the 1791 Constitution prohibiting from regular courts the ability to conduct administrative tasks[5].

Dicey's View:

The concept of Droit Administratif is in contrast to Dicey's "Rule of Law," which states that everyone in a State must be subject to some form of common law and that no official, regardless of his or her position or level of authority, may be exempt from the application of the law. Dicey found it odd that the damaged party had to turn to the Conseil d'Etat, an administrative body that was undoubtedly closer to the administration than the judicial courts, for protection against the administration. This event left Dicey with a bad impression and was obviously contrary to the idea that the law should be impartial in every situation.[6] In addition, the Conseil d'Etat served as both the administrative body and the appeals court for disputes involving the government and its employees. Therefore, no authority for such things is open to further appeal.[7]

Nevertheless, the administrative courts have earned the trust that was initially placed in them. The issues with state liability that Common Law jurisdictions had appear to have been resolved by this arrangement. An executive agency would be held accountable to a citizen for any injury suffered

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[4] Napoleon Bonaparte, commonly known as Napoleon I (born 15 August 1769; died 5 May 1821), was a French military and political figure who rose to prominence during the French Revolution and oversaw a number of fruitful campaigns throughout the Revolutionary Wars

[5] C.Sumner Lobingier, "Administrative Law and Droit Administratif: A Comparative Study with an Instructive Model" P. 3445, Pennsylvania Law Review, 1942.

[6] Edwin Borchard, "French Administrative Law", P.3445, Faculty Scholarship series, 1933

[7] George D. Brown. "DeGaulle's Republic and the Rule of Law, P 462-492, Digital Commons, (1966)

as a result of a greater risk being imposed upon him by an executive action if the administrative courts, headed by the Conseil d'Etat, favorably or normatively determined that the State had acted honestly[8].

The French administrative structure has emerged as the most effective one for regulating interactions between the state and its people. The system has been successful in protecting citizens' rights and offering suitable remedies to those who have lost anything as a result of executive acts. The "bulwark of civil liberties" and "keeper of administrative decency" have been used to describe the Counseil d'Etat[9]. The functioning, principles, and procedure used by the administrative courts for case adjudication have been credited by Professors Brown and J.P. Garner as contributing to the effectiveness of the droit Administratif system[10].

India and Droit Administratif:

As far as India is concerned, the government had a huge responsibility to provide a wide range of social services to the populace because the contemporary Indian Republic was founded as a Welfare State. Numerous cases involving the methodology used by these administrative bodies to reach their rulings resulted from the administration's acquisition of quasi-judicial powers. The 14th Law Commission Report supported the opinions of the courts that these bodies must uphold procedural protections when making decisions and adhere to the principles of natural justice[11]. It was believed that the numerous welfare laws and the right to judicial review could overwhelm the civil courts with more cases than they could handle. As a result, several tribunals for railroad rates, labor disputes, income tax disputes, and corporation courts had statutory authorization to operate in tandem with regular civil courts.

Article 323A[12] of the Constitution serves as the legal foundation for India's tribunal system for administrative disputes. The 42nd Constitutional Amendment Act of 1976, which inserted Article 323A, providing for the adjudication of disputes relating to conditions of service of the public services of the Union and of the States from the hands of the civil courts and the High Courts and placing them in an Administrative Tribunal, gave rise to

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[8] Spyridon flogaitis, Administrative law at droit administratif, in J.F. Garner, Administrative Law, 36, The American Journal of Comparative Law, 565-567, 1988

[9] NimishaJha, "Droit Administratif: Adoption in India, UK, USA and France", The Lex Warrior Online Law Journal, 316-337, 2018

[10] The functioning, principles, and procedure used by the administrative courts for case adjudication have been credited by Professors Brown and J.P. Garner as contributing to the effectiveness of the droit Administratif system.

[11] R. Nayak, Administrative Justice in India,38, SAGE Publications Pvt. Ltd, 1989

[12] (1) Parliament may, by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the

administrative dispute resolution through separate tribunals for service matters.[13]

Similar to the goals of the Conseil d'Etat, this experiment aimed to reduce the backlog of cases before the High Courts and provide a quick and expert forum for resolution of disputes amongst government employees about their employment[14]. Even those who opposed the amendment saw the relationship between it and the newly developed Droit Administratif as a positive development.

The Central Administrative Tribunal Act and the Administrative Tribunals Act were passed in 1985 as a result of the revision to Article 323A. Additionally, High Court judicial review of CAT rulings was virtually prohibited by Section 28[15] of the Administrative Government.

(2) A law made under clause (1) may —

(a) provide for the establishment of an administrative tribunal for the Union and a separate administrative tribunal for each State or for two or more States;

(b) specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the said tribunals;

(c) provide for the procedure (including provisions as to limitation and rules of evidence) to be followed by the said tribunals;

(d) exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);

(e) provide for the transfer to each such administrative tribunal of any cases pending before any court or other authority immediately before the establishment of such tribunal as would have been within the jurisdiction of such tribunal if the causes of action on which such suits or proceedings are based had arisen after such establishment;

(f) repeal or amend any order made by the President under clause (3) of article 371D;

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[13] DR. Durga Das Basu, commentary on the constitution of India 10,645 8th ed., Lexis Nexis Butterworths Wadhwa, 2011

[14] Rajeev Dhavan, "Amending the Amendment: The Constitution (Forty-fifth Amendment) Bill, 1978", 20 J.I.L.I., p. 267, 1978

[15] Exclusion of jurisdiction of courts except the Supreme Court under article 136 of the Constitution: On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, [no court except—

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 (14 of 1947) or any other corresponding law for the time being in force, shall have], or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.

(g) contain such supplemental, incidental and consequential provisions (including provisions as to fees) as Parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of, such tribunals.

(3) The provisions of this article shall have effect notwithstanding anything in any other provision of this Constitution or in any other law for the time being in force.

Tribunal Act, which was authorized under Article 323A(2)(d)[16] of the Constitution. However, only Article 136[17] of the Constitution gave a party that felt wronged by the CAT order the right to appeal it to the Supreme Court.

Since judicial review of tribunal orders cannot be entirely eliminated, a comprehensive adoption of Driot Administratif is, therefore, not practicable in India. Any measure that limits the Supreme Court's jurisdiction violates the basic right guaranteed by Art. 32 and should thus be overturned. The Supreme Court has stated that, absent a sufficient substitute, the rule of law would become illusory and that the power of judicial review is a crucial component of our constitutional structure[18].

Nevertheless, prior to the ruling in the L. Chandra Kumar case in 1997, a quasi-executive authority could receive a limited exemption from judicial scrutiny from High Courts. S.P. Sampath Kumar v. Union of India raised the issue of Section 28's exclusion of High Court reviews[21]. In agreement with Justice Ranganath Mishra, Justice Bhagwati stated that "the basic and essential feature of judicial review cannot be dispensed with, but it would be within the competence of Parliament to amend the Constitution in order to substitute another alternative institutional mechanism or arrangement for judicial review in place of the High Court, provided it is not less effective than the High Court".

Therefore, it was believed that the Administrative Tribunal served as an appellate body akin to the High Court, but exclusively for service-related issues arising from SATs to CAT appeals. According to this interpretation of Articles 226 and 227 of the Constitution, the Tribunals have the same authority as the High Court. Additionally, inasmuch as they can review their own judgments[19], they have the same authority and adhere to the same rules as the

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[16] exclude the jurisdiction of all courts, except the jurisdiction of the Supreme Court under article 136, with respect to the disputes or complaints referred to in clause (1);

[17] Special leave to appeal by the Supreme Court

(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India

(2) Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces

[18] Minerva Mills Ltd. and Ors. v. Union of India and Ors, [1981] 1 S.C.R. 206. [21](1987) 1 S.C.C. 124

[19] State of West Bengal v. Kamal Sengupta, (2008) 8 S.C.C. 612

Civil Courts. Despite possessing such authority, they are not constrained by the Civil Courts' strict procedural rules[20].

The exclusion of the High Courts' jurisdiction by means of Section 28 and Article 323A(2)(d) was therefore justifiable, even though it was held that judicial review was a crucial component of our Constitution under the Rule of Law. By establishing this, judicial review was not entirely destroyed because the Supreme Court still had jurisdiction. However, the notion of a body established as an executive authority and functioning as a judge in its own affairs, which breaches the Constitution's separation of powers, was heavily considered. In this regard, Justice Mishra and Justice Bhagawati concurred that it was necessary to lessen the likelihood of an administrative majority on the tribunal and set the following four requirements: "(i) the Tribunal must have a legal expert with qualifications on par with the Chief Justice of a High Court serving as its chairman; (ii) the Tribunal must have benches at the locations of all High Courts; (iii) each bench of the Tribunal must include at least one judicial member and one administrative member; and (iv) appointments to the Tribunal must be fair and unbiased in order to guarantee the independence of its Chairman, Vice-Chairman, and members."

The authority of the Administrative Tribunal was nevertheless criticized despite the Sampath Kumar ruling. First off, the judgement did not address whether the tribunal could invalidate a law or act for being in violation of the constitution by equating the powers of administrative tribunals to those of High Courts. This issue arose in J.B. Chopra v. Union of India[21], where the Supreme Court determined that such a power was the obvious and logical outcome of Sampath Kumar's justification. Second, the Tribunal lacked the authority to determine whether directives pertaining to service concerns, such as those made by the President under Article 309 of the Constitution, were valid[22].

From the 42nd Amendment's original goals, the L. Chandra Kumar[23] decision reversed course. The Amendment attempted to establish Tribunals to reduce the workload of the High Courts by eliminating their jurisdiction, much like the Droit Administratif did for civil courts. The Amendment's three goals in creating the Tribunals were to provide for specialisation, alleviate the workload of the High Courts and Supreme Court, which were already overworked, and speed up the decision-making process[24].

The establishment of diverse tribunals offering the benefits of speed and procedural simplicity was suggested by the First Law Commission in its

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[20] Id

[21] (1987) 1 S.C.C. 422

[22] Dr M.L. Upadhyay, 'Administrative Tribunals: No Alternative Mechanism for Judicial Review', 2, Central India Law Quarterly, 433, 1989

[23] (1987) 1 S.C.C. 124

[24] 1, M.P. Jain & S.N. Jain, Principles of Administrative Law, 668, 6th ed., Lexis Nexis Butterworths Wadhwa,
2007

14th Report in 1958. However, the Commission also cautioned that the Tribunal system should be an addition to the regular courts, not their replacement. The L. Chandra Kumar[25] case should be reviewed by a larger bench of the Supreme Court, as recommended by the Eighteenth Law Commission in its 215th report in 2008. The Report digs deeply into the goals of both the Amendment and the Administrative Tribunals Act, the study finishes by supporting the stance taken in the Sampath Kumar case and urging that the L. Chandra Kumar case be given another look since, in the Commission's opinion, it undermined the goals of the Administrative Tribunals Act.

It is unclear whether the Indian Administrative Tribunals would be more effective at handling cases if they were modelled after the French Droit Administratif. H.M. Seervai has highlighted concerns about completely implementing this system in India only because it appeared to function well in France. While praising the system, he points out that the French Government was willing to pay the price to have its own employees serve on an independent tribunal that applied the law to public administration[26].

In India, there are not the same circumstances that existed when the Conseil d'Etat was founded in France. A tribunal that is subject to its own unchecked discretion would fall short of the fundamental structure's requirement for Supreme Court judicial review. As of right now, a division bench of the High Courts has the authority to review the CAT's orders. This, as has already been mentioned, goes against the purpose of the 42nd Amendment, which was to uphold the Droit Administratif as firmly as possible. The Administrative Tribunal is a hybrid institution that combines aspects of both the legal and administrative systems.

At paragraph 97 of the L. Chandra Kumar[27] decision, it was briefly mentioned the need to consolidate the administrative tribunal system under one organisation in order to potentially address its flaws. Justice Ahmadi noted that tribunals, such as administrative tribunals, must be under a single nodal ministry, ideally the Law Ministry, speaking for the bench. An independent nodal organization may receive this mandate from the Law Ministry. In the event that the tribunal's leaders erred in their judgement, this would guarantee that the entire system would not stall while waiting for a judicial or administrative body to address the problems.

Conclusion:

I can conclude it with that, in essence, the Droit administratif divides civil law from administrative law and establishes two sets of tribunals to decide on these various subjects. Although the system was first criticised by some academics, it has been notable for respecting people's rights and delivering justice.

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[25] (1987) 1 S.C.C. 124

[26] H.M Seervai, Constitutional Law of India 3059, 4th ed., Universal Law Publishing Co., 2008

[27] (1987) 1 S.C.C. 124

The administrative courts have correctly acknowledged the significant responsibility entrusted to them and have rendered decisions in accordance with the principles of justice, equity, and good conscience, rather than being biased towards administrative agencies. The interaction between administrative agencies and citizens in India has been made better by the incorporation of some of this system's concepts into Indian administrative law.

It was contended in the Delhi Bar Association[28] case that the legislative authority of the Parliament to establish tribunals could not be contested. The Union of India argued that giving tribunals jurisdiction would leave the High Courts without any cases, but the Court rejected this claim. Tribunals must not be perceived as administrative divisions of ministries or as being so autonomous as to be outside the purview of regular courts. Thus, implementing the Droit Administratif system in India is the wisest course of action. It is impossible to overthrow the Supreme Court's authority. As stated in Sampath Kumar[32] and recommended by the Law Commission, the High Courts authority may be removed without harming the Supreme Court's authority; nevertheless, they must answer to an independent entity that is neither a court nor an administrative agency. To maintain the effectiveness of this system, the Supreme Court must exercise caution when admitting appeals from tribunal orders. One method for addressing the system's current problems is a partial adoption of the Droit Administratif along with an independent nodal body that oversees matters, both free from excessive intervention from the administration or regular courts.

[28] Union of India v. Delhi bar Association, (2002) 4 S.C.C. 275 [32](1987) 1 S.C.C. 124

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A Case Study of Banking Services in J&K Bank

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Abstract

Thales of Miletus - a Greek mathematician, astronomer and pre-socratic philosopher from Miletus in Ionia (7th Century B.C.) is reported to have said "the hardest task of man is to understand man".

Consumer consideration and their protection is not new concept. Since times immemorial due thoughts has been given to this subject, so much so that back to ancient times. The protection of consumer has , therefore been a continuous process with different dimensions, more often than not slow and comprising. But the modern legislations has initiated an era of clear distinction of consumer rights and their protection with formal system of enforcement. The concern of consumer protection is to ensure fair trade practice, quality of goods and efficient services with information to the consumer with regard to quality, quantity, potency, composition and price for their choice of purchase. Legislatures give statutory protection to innocent and ill-informed consumers against unfair trade practices. Consumer protection Act 1986 was enacted and amended in 2002 an attempt to remove the helplessness of a consumer which he faces against the powerful business, described as network of rackets and the might of public bodies which are degenerating into storehouses of in action. The person who in turn is a customer is said to be consumer. The bank is providing services to its clients and hence the person who receives services of bank is consumer. Banking is specially mentioned as services under the consumer Protection Act. There has been a steady growth in the number of complaints filed against the banks. Since finance is the life blood of a modern economy, therefore, banking system is the linchpin of any development strategy. In present paper an attempt is made to evaluate the proper implementation of consumer protection Laws in banking services and to find the awareness level among the consumers.

Keywords: Services, Consumer Awareness, complainant, consumer Rights and service provider.

1.0 Introduction

Customers are those who buy and use products and services. Sellers have a responsibility to ensure that their products and services are of the

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quality promised to their customers. As a result, service providers make exaggerated promises and advertisements that they do not intend to fulfill with so few options for recourse, consumers are put in a difficult position. Because of the emergence of intense competition, manufacturers and service providers have become more aware of the importance of customer satisfaction. This has resulted in the widespread acceptance of the principle that "the customer is king."[1]

Consumer rights must be recognized and enforced, and legislation has been enacted to that end. The Consumer Protection Act, 1986, and Consumer Protection Act 2019, which came into effect in July 2020, were enacted because of the need for simpler and quicker access to redress for consumer complaints. The purpose of the law is to safeguard the economic interests of consumers, who are defined herein as both buyers of goods and users of services in the broadest sense. For example, the Act provides compensation to consumers who have been harmed or lost money because of poor service. It is widely accepted that the concept of services is critical in modern economies. Services of many kinds are essential in modern society if people are to live comfortably and orderly lives.[2]

Banks are included in the Consumer Protection Act's list of service categories. There has been a steady rise in the number of complaints lodged against financial institutions. The banking system is the cornerstone of any development strategy because finance is the lifeblood of the modern economy. So over the last few decades, the banking industry has grown tremendously, and the wide introduction of new technology, it has brought everything into its scope. Whether it's for paying your electric bill or doing your online shopping, banking is everywhere. Banks provide a huge number of services in present times some of which have been already discussed in previous chapters but the increase in commercial *activity the quality of* services sometimes does not match the customer satisfaction lev and banks are made *liable* for deficiency *of services. But most of the times a consumer do not even know he is being exploited by these big service providers because there is lack of awareness. People even sometimes do not know that the bankin services come under consumer protection law. Therefore, there is need for creating consumer awareness and to motivate the consumers concerning quality services. Higher the consumer awareness, lower the exploitation of consumers. The consumer should be vigilant with a discerning eye to enable to protect him from any malpractice on the part of the service provider.*

The consumer's lack of knowledge and the lack of an enlightened consumer organisation have made it difficult for the consumer to evaluate a product or service. There is a lack of understanding of how to distinguish between what is real and what is not real. Consumer awareness in J&K has not been given the attention it deserves. Those with vested interests have done everything in their power to keep consumers in the dark and misinformed.

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[1] *Dr. Manish Shrivastava, "A Study of Consumer Protection Act, 1986 in Banking Sector" Professional Panorama: A !JAMT*

[2] *Journal of Indian lm-11 Institute,* 1·0/. *34:I,p.41 (1992)*

Consequently, a need has arisen to address the situation that necessitates comprehensive consumer awareness and education programming.

This article describes the working of consumer protection laws in banking services. The parameters for evaluating the working of laws have been the rate of awareness of consumers regarding banking services, consumer rights, rate of awareness regarding consumer protection laws under banking services and grievances redressal mechanism available.

The present study is an empirical research based on both primary and secondary date. For purpose of the study primary data was collected through a set of questionnaire/interview schedule administered to various respondents. The approach was to seek information from various complainants/ consumers related to banking services and bank officials of the J&K Bank Ltd. The main focus in the article is to analyses whether the consumer are satisfied with the banking services and with the working of consumer protection laws in banking services.

Consumer protection, in the broader sense, refers to the laws and regulations that ensure fair interaction between service providers and consumers A consumer protection framework generally includes the introduction of greater transparency and awareness about the goods and services, promotion of competition in the marketplace, prevention education of customers, and elimination of unfair practices.

Like goods, we produce services too and make best possible efforts for their profitable selling. The present materialistic world, the services sector has occupied a place of outstanding significance in the national socio-economic fabrics, especially of the developed countries. It is right to comment that the developing countries too have been activating their efforts but truly speaking, they are still at the very nascent stage.[3]

Like goods, services were sold to the consumers but is unlike goods, there was no comprehensive legislation in India to deal with this a respect human activity until 1969 when the MRTP Act was passed and the "service" was defined. The remedies for the deficient services were provided. The 1990's has witnessed dramatic changes occurring at the market place, be it products or services. According to the dictionary meaning the world 'Service' means, "work that is done for others as an occupation or business."[4] As per the business dictionary it means, the intangible products such as accounting, banking, cleaning, consulting, education, insurance, expertise, medical treatment or transportation. [5]

Section 2 (1) (o) of the CPA defines the word' Service'.[6] It means service of any description which is made available to potential users

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[3] S. *M Jha "service Marketing ',Himalaya publications (N.D). isl Ed.1994., P. 2.*

[4] www.*thefreedictionary.com (visited on 15.3.17)*

[5] www.businessdictionary.com (visited on 15.3 17

[6] *Section 2(1) (o) of the CPA : "service" means service of any description which is made available to* potential *lential users and inch41es, but not limited to, the provision of facilities in connection with banking, banking,, insurance, transport, processing , supply*

and includes but not limited to, the provision of facilities in connection with banking, financing, insurance transport, processing, supply of electrical or other energy, board or lodging or both housing construction, entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service. Therefore, the services whether hired or availed of by consumer has assumed the most important place for consumers in India as well as the other parts of world. These services are offered by private persons, firms. companies and government departments and corporate bodies help in proper growth and development of the country. [7]

The term "service" has a variety of meanings. It may mean a benefit to the consumer, and it may be contractual, professional, public, and domestic, legal, statutory, etc. its interpretation depends on the context in which it has been used in the enactment.[8] Services which are included in the definition are banking, financing. Insurance, transport, and supply of electrical or other energy, boarding or lodging or both, entertainment, amusement or the purveying of news or other information."[9] Thus. Banking is specifically mentioned as services under the Consumer Protection Act.

Service and facilities offered by the banks to their customer establish the connecting link between the bankers and the customers. They are the medium through which the banks launch their relationship with their customers. No industry in the service sector can afford to ignore its customer and bank is no except to it. Service industry continues to grow in its importance, while at the same time it is important to maintain the service quality in general. If one were to go by the experience of the customers in their daily interaction with the banks, there is a sharp criticism of service quality of banks. The increasing number of bank frauds depicts the ineffectiveness and negligence of bank management in protecting and monitoring customer interests.[10] Banks render services such as remittances, accepting deposits, providing for lockers, facility for discounting of cheques, collection of cheques issue of bank drafts etc. Bank is charging interest and other charges as well in providing the services and thus, its service are not without consideration and come within the purview of meaning of clause (o) of sub-section (1) of section 2 of the CPA.[11]

1.1 Consumer under Banking Services

The term 'consumer' also covers any person who hires or avails of

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of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

[7] *Supra note 1, p 114*

[8] *Ibid p. 115*

[9] *Sec 2(1) (0) of Consumer Protection Act*

[10] *Dr. Ekta Verma, "Consumerism In Indian Consumer Banking " Ed 1, (Galgotia publications, 2007)*

[11] *Neela Vasanthraje v. Amogh Industries & Anor (1993) III CPJ 261 (NCDRC)*

any 'services for consideration and also includes any beneficiary of such sentences. According to sub- clause (ii) of section 2(1)(d) of the Act,[12] a consumer of services includes any person, who.

1. Hires or avails of any services for consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment, and
2. Includes any beneficiary of such services other than the person who hires or avails of them, when such services are availed of with the approval of the hirer.

For the purpose of consumer of services, it is essential that the services must have been hired or availed of for the consideration. But it is not essential that the payment of consideration must be made immediately, it may be paid afterwards or even in installments. Thus, the services which are rendered free of change or under contract of personal service are outside the purview of the Act.[13]

Before going into the issue who is customer/consumer of banking services we need to know the relationship between the customer and the banker. Though of the word ""customer" has been widely used while dealing with the banking transactions, the same has not been defined. There is no legal definition of the word ' customer'.[14] However some of the court rulings in India and in England have identified certain criteria that constitute a banker- customer relationship. One of the English theories says that two things are necessary for customer-banker relationship. Firstly, there should be habit of correspondence between the person and the bank. Secondly, the transaction should be in nature of regular banking business. In *Mathews* v. *William Brown & CO.*[15] it was laid down that 'to constitute a person as a customer of the bank, he should have some sort of an account with the bank, but the initial transaction in the opening an account did not set up the relation of the banker and customer'. In case of *Central Bank of India* v. *Gopinathan Nair,* [16] it has been held that so far as banking transactions are concerned, The customer is one whose money has been accepted on the understanding that the bank will honour transaction up to the amount standing to his credit, irrespective of his connections being short long standings. The dealings with the person and the bank should be relating to the business of the banking.[17]

However, the relationship between a banker and a customer is more complex and is usually governed by contract and other statutes dealing with the rights and obligations of the customer. According to Dr.

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[12] *Consumer protection Act, 1986 and J&K consumer protection Act, 1987*
[13] *Supra Note 2*
[14] *Y. G. Muralidharan, Banking and Consumer protection, Ed. l Navakarnataka publications, 2009*
[15] *10 TLR {1894) 386*
[16] *Air 1970 Ker 74*
[17] *Supra Note 55*

Hart, "a customer is one who has an account with a banker or for whom a banker habitually undertakes to act as such." Supporting this '1ewpoint, the Kerala High Court observed in the case of *Central Bank of India Ltd. Bombay v.. Gopinathan Nair and others,*[18] *"Broadly speaking, a customer is a person who has the habit of resorting to the same place or person to do business. So far as banking transactions are concerned he is a person whose money has been accepted on the footing that banker will honour up to the amount standing to his credit, irrespective of his connection being of short or long standing."* A customer has a right to expect 1hat the bank would follow his instructions in letter and spirit and where a customer instruct a bank to put certain money in to fixed deposits for maximum returns and banks fail to do so the same would constitute the basis for a claim against the bank.[19]

From the above rulings it may be observed that to be considered as a customer in relation to banking three things are essential. Firstly, the person should have opened an account with the bank or should have had a similar relationship. Secondly, the relationship starts as soon as the person deposits the money or cheque into the bank and 1he bank accepts it and is prepared to open an account. Finally, the duration of this relationship is of no consequence. Viewed from this perspective the relationship of banker and customer may took different forms, the first being that of the debtor and creditor. When a customer deposits cheque to the bank, the bank undertakes to pay the amount either to the customer on to other on behalf of the customer.[20] The other Relationship that may arise between the customer and banker include bailor-bailee, trusteeship, agency etc.[21]

1.2 Who is Consumer

'The person who in turn is a customer is said to be a consumer. The beneficiary of a service is also a consumer. Hence, the nominee of an account, a minor when account was operated jointly are also said to be consumers.[22] A member of a co-operative society is also said to be a consumer. The bank is providing service to its client and hence the person who receives the overdraft facility is said to be a consumer. The forms of business which can be conducted by a banking company is described in Section 6 of the Banking Regulation Act. It is doing it with consideration. The providing of overdraft service definitely comes under the term 'service' in CPA. The services to be provided by a bank are discussed in Section 6 of the Banking Regulation Act. In *Vimal Chand Grover v. Bank of India*[23] it was held that the bank giving overdraft facility to its client is doing service to its client and the client is said to be a consumer. The overdraft facility is not

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[18] *(A..l.R.,1979,Kerala 74):*
[19] *J. K Chopra, Unique Quigtessence of Indian Economy, Ed. 2008,p.166*
[20] *Supra Note 84*
[21] *Ibid*
[22] *Smt. Kalawati v. United Vaish Co-operative Thirfi and Credit Scoiety Ltd., R.P. Nos. 823 to 826 o 2001*
[23] *AIR 2000 SC 2181*

provided by the bank without consideration. Actually, the bank charges interest and other charges for providing the overdraft facility.

From the above it is evident that if a person wants to take advantage of the CPA by filing a complaint in the consumer forum he has to satisfy three requirements i.e. he must pay a sum (consideration), bank should agree to provide the services for this consideration and finally there should be sme sort of deficiency in services. There are hundreds of decisions and ruling given by the consumer forums, commissions, High courts and supreme courts which have held that persons hiring the services of banks are consumers.[24]

Banks provide or render service/facility to its customers or non-customers. Banking is a business transaction of a bank and customers of bank are consumers within the meaning of S.2 (1) (2) of the Consumer Protection Act.[25] In order to be a customer some sort of account is necessary with the bank, however, a consumer need not have an account as in the case of bank draft or credit card. In *Bimal Chandra Grover v. Bank of India,*[26] Supreme Court held that client was a customer when he gets over draft facility *Punjab and Sind Bank v. Manpreet Singh*,[27] it was held by the Punjab State Commission that a savings bank account holder is a consumer under the Act. It was observed that difference in the landing and borrowing rates is the consideration for rendering services by the bank. It was also noted that even if the bank does not charge fOr providing cheque facility to the account holder, it cannot be said that the same is given without consideration. Actually, the cheque book facility is obtained by the depositor in consideration of his putting funds at the disposal of the bank.

In *Shobhatai Daulatrao Talekar v. Maharashtra Rajya Shahakari Krishi & Gramin Development Bank,*[28] the issue before the Maharashtra State Commission was the justifiability of the order of the District forum holding that the Forum had no jurisdiction to entertain the dispute since the complainant was a member of the defendant bank which was registered under the Maharashtra Cooperative Societies Act, 1961 and that being so, the jurisdiction would lay before the co-operative court and not before the consumer court.

The State Commission did not agree with this view. It held that the nature of service hired by the complainant pertains to the banking business which is permissible by the bank to undertake under the provisions of the Reserve Bank of India Act and the Banking.

Regulation Act, 1949 and as such, would be squarely amenable to the jurisdiction of a consumer fora as per the definition of "service" under section

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[24] *Supra Note 84*
[25] *Avtar Singh, law of Conswner Protection (Principles and Practice), Ed. 4, Eastern Book Company Lucknow, 2005*
[26] *AIR 2000 SC 2181*
[27] *1994 (3) CPJ 532*
[28] *[2004 (2) CPJ 349]*

2(1)(o) of the Act. The State Commission further held that the jurisdiction of the consumer fora is also not ousted in view of the provisions of section 3 of the Act, which provides an additional remedy over and above those available in the other statutes to the parties.

1.3 Who is not a Consumer

There are instances where consumer forums and others courts have rejected the claims of the consumers on the ground that they are not the consumers within the meaning of CPA. Most of such complaints relate to loans. There is a general feeling among the

People that once a person applies for a loan to a bank and if it is not sanctioned, he can file a complaint in the consumer forum alleging deficiency in services. But in reality it Unless a bank sanctions the loan, borrower can't be said to be a consumer.[29]

In the case of *Khanchand T Sawlani v. Rajasthan Financial Corporation,*[30] it was held complainant, who applied for the loan from state financial corporation for purpose which was not considered favorably, is not a consumer for the of CPA, despite depositing processing fee as the relationship between bank and complainant is that of creditor and borrower-debtor.

It has been held that the father of an account-holder who applies for no objection certificate is not a consumer, as the complainant-father cannot be said to have hired the of the bank for consideration.[31] Similarly a complainant who stood as a r for the loan to his son cannot claim to be the consumer of the bank.[32]

In IDBI V. Krishnendu Ghosh,[33] *In* this case the complainant applied for the post of Deputy Manager (legal) along with a D.D. of Rs. 50/- as examination fee. The interview letter was received by him on the same day on which interview was to be The bank rejected the request for e-scheduling. A complaint was filed claiming compensation for injury and mental shock. The National Commission held that payment of Rs. *50/-* as examination fee was not consideration for hiring or availing of services of the bank. Therefore, the complainant was not "consumer".

T.A. *Abrahim v. RBI,*[34] in this RBI also came within the purview of the Consumer on Act. The issue before the Kerala State Commission was that the complainant applied for a loan under the Housing Facility Scheme of the RBI, of which he was employee. He claimed that he suffered loss an inconvenience due to delay in sanctioning of loan, which amounted to deficiency of service and for which he was to

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[29] *Supra Note 84 P. 31*
[30] *{1992 (/) CRP 314-315 (St.C) Rajasthan}*
[31] *Pawan Kumar Bir/a v. Stale Bank of Bikaner and Jaipur, (/I 1991ICPJI 92)*
[32] *Uggra Mohan Jha v. Central Ban of India, II (/ 994) CPJ 513*
[33] *[1996 (2) CPR 155}*
[34] *[2001(3) CPJ 293]*

compensation. The District Forum held that the complaint was not maintainable, but the state Commission before whom appeal was preferred by the lainant, held that availing a loan from an institution like RBI could be treated as ice" within the meaning of section 2(1) (o) of the Act as the opposite party 's 7character as a banking institution cannot be in dispute. Further, as per the definition of umer" in section 2(1) (d) (ii), it is not necessary that actual consideration should to the opposite party simultaneously with the availing of service. The said definition envi sages the consideration as the one, which is promised also. The State Commission noticed that when a person *applied for loan and get the* loan on sanctioning the same, the mount would carry interest. *The* same *should* be *treated as* consideration.

There are hundreds of decided cases relating to loans wherein it is decided that the persons who seek loans from banks are not consumers.

1.4 Deficiency of Services

Deficiency holds any defect, fault, imperfection in quality, nature and manner and performance of the medical service rendered by a hospital or a doctor. Deficiency define the quality or state of being deficient; failure lack; insufficiently. According to the Random House Dictionary deficiency means the state of being deficient, incompleteness insufficiency. Similarly, the Chambers Dictionary holds the meaning of deficiency as a defect shortage; the amount which is lacking of completeness; the amount by which a non-profit making organization annual income falls short of annual expenditure.

In Section 2(1) (g) of Consumer Protection Act, 1986 deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being inforce or has been undertaken to be performed by a persm in pursuance of a contract or otherwise in relation to any service.

Literally it can be say that service means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

In the land mark judgment of the Supreme Court delivered in Indian Medical Association Y.. P. Shanta35 deals with the following important issues:

1) The main part is explanatory in nature and defines service. Of any description which is made available to the potential users.
2) The exclusionary part expressly includes professional rendering services. Following ' this, view, the wide amplitude of the definition of service under Section 2(1) (o) as constructed by the Supreme Court that there is no plausible reason to cut down the of that part so as to exclude the services rendered by a medical practitioners the ambit of the main part, appears to be appropriate.

[35] 1994 AIR SCW 4463

In Bolam v. Friern Hospital Management Committee,[36] the classic statement made by McNair is, "*were you get a situation which involves the use of some special skill or nee, then the test as to whether there has been negligence or not is not the test of the* ***man*** *from the top of Clapham omnibus because he has not got these special skills. This test is the standard of ordinary skilled man exercising and professing to have that A man need not possess the highest expert skill at the risk being found negligent*

Therefore, in view of the above conceptual framework, the deficiency in service of any kind to be proved, it must be shown that:

a. The defendant had a duty of care to the patient;
b. The defendant has breached that duty i.e. failed in that duty;
c. The client has suffered damage as a result of breach.
d The client also suffered damage as a result of breach of professional miscount

The concept of Deficiency in services is a not specified in definitions rather it is used as, a broader sense. Broadly speaking deficiency means any fault, imperfection, shortcoming inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be p:rformed by a person in pursuance of a contract or otherwise in relation to any service.

1.5 Deficiency in Banking Services

Bank renders service to its customers in various forms and when lacking of service occurs it amounts to deficiency in service. When a Paying Banker has sufficient amount in the account of its customer and without any reasons denies the payment of cheque, then the Paying Banker will be held liable to the payee of the cheque and to the drawer of the cheque for any loss occurred. [37]As per section 2(1) (d), Consumer includes a person who avails or hires a service for consideration. Hence any person who owns an account in bank or takes a service form bank can file complaints under this act for "deficiency" or regarding unfair practices by the banks. Consumer courts not only compensate for the defect but also for the mental agony suffered or harassment faced.

Listed are the few deficiencies in banking services as laid down by consumer commissions and courts of law:

- Refusing or holding back the amount that was due on fixed deposit after maturity
- Delay in the payment of amount on term deposits after maturity
- Dishonor of cheques because of mistake or negligence by bank.
- Dishonoring of demand drafts because of omission by bank officials.
- Refusing grant of loans without any bonafide reason Causing undue delay in discharging installments of loan

[36] *(1957) 2 All E R 118 & 121.*
[37] *(Section 3I of the Negotiabl Instrument Act).*

- Charging interest at higher rate than what has been specified in loan agreement.
- Failure in returning securities even after the loan is repaid.
- Bank's failure to honour guarantee, if demand was as per guarantee.
- Liability is on bank if articles in locker are lost loss to customers due to unavailability of securities in bank premises
- Closing bank account without any instructions in that regard from the account holder
- Refusing cheque book facility to customer just because of the fact that the minimum balance has not been maintained
- Failure of bank cashier to account for money deposited at the counter with him (vicarious liability)
- Rude behavior of bank officials resulting in discomfort or mental agony to customers without even demanding repayment giving notice to "face the auction or make payment".
- Failure at returning the dishonored cheque[38]

Any person who fulfills certain conditions can approach the consumer forums for any deficiency in service. Firstly, the person must be a 'consumer' within the meaning of CPA and secondary there should be deficiency [39] in rendering the service on the part of the bank.

From above it may be banking observed in the field of banking service there may be a no. of instances where deficiency in service may arise. Yet one has to be careful before to a conclusion. Each case has to be closely examined depending on the facts and circumstances of each complaint. Given the fact that banking service covers a wide of services in the sector, a large no of complaints have been filed in the forums. Perhaps each and every transaction in the field of banking and financial service has witnessed a complaint on the grounds of deficiency in service. A study of some of the cases will help in understanding what constitutes deficiency. In a large number of cases, banks have been pulled up for deficiency in service and compensation has been awarded to complainants by the Consumer Courts. Some of the important cases are analysed hereunder;

In Standard Chartered Bank Ltd v. Dr. B.N. Raman,[40] the court held that the premature withdrawal in the absence of the depositor amounts to deficiency in service. In *Vimal Chandra Grover v. Bank of India*[41] it was held

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[38] *Apeksha Gupta A Student National law University, Odisha "consumer Protection In The Banking Sector"*

[39] *The CPA defines deficiency as "any fault , imperfection. shortcoming or inadequacy in the quality nature and manner of performance which is required to be maintained by or under any law for the time* lmrg *in force or has been under taken to be performed by a person in pursuanc e of a contract or .otherwise in relation to any service".*

[40] *AIR 2006 SC 2810*

[41] *AIR 2000 SC 2181*

that Non-responding to the request of customer to sell shares of him and clear the overdraft account within reasonable time to deficiency in service.

In Ganga Nagar Central Co-op Bank ltd v. Pushpa Rani,[42] it was held that there was deficiency in service and there was delay in refund of fixed deposit by the Mini Co-operative Bank and the deposit was not guaranteed by the apex bank and no liability be fastened in it. The Ganga Nagar Central Cooperative Bank Limited was the body of the Co-operative Mini Bank, Sujavalpur. The respondents herein opened their savings with the Mini Bank and after having used the service moved for withdrawal 1DOney and their request was rejected on the ground that there was no sufficient in their account. Hence, the complaint before the Forum for the release of the amount, compensation and the interest. It was stated by the Mini Bank that the dent had no account in their bank and the apex bank stated that they were not liable for the actions of the Mini Bank since it was an independent bank. Both the Apex bank and the Mini Bank were held liable jointly to pay Rs 10;000 and the interest was modified from 12% to 9%. It was held that it amounted to deficiency in service.

In Abha Bhanthia v. SB!,[43] the complainant had made an F.D. with the bank, which carried interest at the rate of 11.25 per cent as per the receipt issued. On maturity, bank paid lower interest @ 10.5 per cent. It was stated by the bank that the said rate of interest was the prevailing rate as per the directives of the RBI. The District Forum held that there was no deficiency in service by the bank as it followed the RBI directive. On appeal by the complainant, the State Commission held that the bank was obliged and under liability to pay interest as agreed by it and any omission or inadvertence on the part of the bank employees would not adversely affect the rights of the appellant depositor.

In *Uco Bank v. Surendra Kumar Bara,*[44] *the* issue before the Orissa State Commission was that the complainant had opened an account with the bank under a scheme called Laghu Bachat Yojana. An agent of the bank used to collect the deposits from the complainant periodically and make entries in the passbook issued by the bank under his initial. The agent of the bank misappropriated a part of the money. The Commission directed the bank to refund the amount misappropriated by its agent along with interest and also to pay compensation for mental agony, harassment and cost of litigation.

Consumer forums across the country have witnessed a number of cases relating to some or the other forms of deficiencies in opening bank accounts. Allowing unauthorized persons to operate the accounts, withdraw the amount from other's accounts, honouring cheques with doubtful signatures, giving credit to wrong accounts etc. are some of the instances that has reached the doors of the consumer forum. In many of such cases

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[42] *AIR 2008 SC 1908*
[43] *[2004 (2) CPJ I 38}*
[44] *[2004 (3) CPJ 472},*

banks have been held guilty of deficiency of services. However, there are also a handful of cases where the banks have been let off.

It needs to be emphasized that the relationship between the banker the banker and the consumer has an element of mutual trust and faith. The longstanding relationship of the banker and consumer may compel the banker to overlook certain formalities. But such -overlooking" has proved costly to the banks. In a case decided by the national Commission, it was found that the husband of the accounts-holder was allowed to withdraw the amount. The wife (account-holder) had not given any written authorization bank. The bank relied on the power of Attorney in the possession of the husband. But cheque books issued to the complainant by the banks were in possession and not with the husband who operated the account. The bank was held liable.[45]

The managing trustee of a private registered trust was operating the account for the past 12 years. The operation of the trust was stopped by the bank on the ground that during 1991, it was pointed out by the bank auditor that certain formalities were not ted at the time of opening of the account. The Bihar state commission held that the acttion of the bank was not correct and the complainant was granted interest at 12 t on the amount remaining as balance in account from the date of such stoppage.[46]

The Bangalore water supply & sewerage Board Employees' Association, Bangalore, was having an account with the syndicate Bank. Due to some dispute amongst the office bears of the association, the bank wrote to the association informing it that they would not permit the operation of the account without production of a specific order from the civil court. However, the bank permitted the operation of the account without to some of the office bearers, who withdrew Rs. 2 lakhs. On a complaint the Kamataka state commission held that an action of the bank was deficient in view of its own undertaking directed the bank to pay the amount with 18 per cent interest.[47]

It is to be noted that some of the banks have found to be guilty of gross deficiency in service. How can a bank carry out the instruction of a customer received through a hone call? The owner of the general store filed a complaint and alleged that the bank transferred certain amount from amount from his account to another account of a party. As a result of such fraudulent transfer four cheques issued by him were dishonored. The Rajasthan state commission held the transfer of amount from one unt to another without a cheque or similar instrument is not permissible. The commission directed the bank to pay a token damage of Rs. 5000 and also refund the amount in question.[48]

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[45] *State bank of lndia* v. *frennie Fitter lll (I994) CPJ 117 (NC)*
[46] *'Prem G's International v. Central bank of india ll (1995) CPJ 222(B)*
[47] *BWSSBEA v. Syndicate Bank, !!I (1995) CPJ 412. (Ka)*
[48] Vijay *laxmi general stores* v. *State Bank of india 1996 (/) CPC 517 R*

1.6 Cases Where there is No Deficiency

When there is no fault on the part of the bank, then the bank could not be held liable for deficiency in service. When there is fault on the side of the customers the bank could not be held liable. The charging of small charges by the bank for rendering services does not t to deficiency in service. On appeal the national commission observed a fraud involving fake entries in the pass book alone cannot be deemed to constitute a deficiency in service on the part of the financial institution, bank or post office as the case may be.[49]

Similarly, a bank cannot be held liable just because it has not followed the instruction given by the customer in the past. The case of *H P. Mantri v. City bank,*[50] a trust given instructions that the amount could be opened by the single trustee. Subsequently a resolution was passed that the bank account could be operated under the joint signature of the two trustees. The banks passed certain cheques notwithstanding the revision of instruction, however, after some time the cheques with single signature were not honoured. On appeal, the west Bengal state commission observed that the bank cannot be held responsible, merely it failed to implement the instructions in the past and, therefore, it should not implement the new instruction in the present.

Delay in crediting the proceeds of the cheques may not be material if the amount of cheques is small or negligible. But in case of businessmen and traders even a day's delay would be serious. For, cheques issued to other in anticipation of funds, may get dishonoured. Besides financial loss, it may also lead to loss of faith and creditworthiness. Mr. Devakanta Kakati deposited a cheque of Rs. 1384742 into State bank of India. There was a delay of one day due to the error on part of the bank employee. The national commission directed the bank to pay a compensation of Rs. 2500 to each complainant, allo wasjointly interested in the said amount.[51]

It was held in *Corporation Bank v. Navin J. Shah,*[52] by the Supreme Court that there was no deficiency of service on behalf of the appellant bank since the bank acted as per 1he terms of the agreement and under the contract between the two banks. In an export agreement when a stipulation that export documents had to be negotiated through a named foreign bank and the exporter entrusted export documents to an Indian Bank to get them negotiated through the foreign bank named therein .and the foreign bank was unable convert money realized under the document in United States (hereinafter win as US) dollars due to policy of foreign Government and it was held that there was deficiency of service on the part of the Indian Bank.

When a joint account is operated with the clause 'either' or 'survivor' and both the parties had stood as guarantors then the amount of the joint account could be adjusted towards the loan amount outstanding due to the principal debtor. In *Punjab National Bank v. Surendra*

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[49] *Suptd. Of Post Office v. Mahendra Nath (1995) (2) (CPR) 561 (NC)*
[50] *(III (1994) CPJ 93 (WB)*
[51] *Devakanta Kakati v.. Stat; Bank of India (II 1994/CPJI184/NC)*
[52] *(2000) CPJ I J (SC)*

Prasad Sinha,[53] both the account holder of a joint account stood as prantors to the principal debtor and had executed the security bond and the fixed Posit receipt was entrusted as security to adjust the outstanding debt from its maturity, It was held that the bank could do so and there was no deficiency in service.

1.7 Liability under Banking Service

When a bank commits deficiency of service, the bank will be held liable. Even making wrong entries bank could be held liable.54 In case of a cheque, the drawee will be held liable if the drawee fails to make payment of cheque even after having sufficient funds towards the payment of such cheque. The drawee bank must compensate the drawer for any loss or damage caused due to the default. [55] A successor bank could be held liable for the act of a predecessor bank. Change of bank name due to the bifurcation of the district and formation of a bank with a new name would not resolve a bank of its liability.[56] Moreover the bank will be held liable viariously for the acts of its manager in the course and within the scope of employment. When a manager of bank acted illegally within the scope of the employment, the bank was held liable vicariously.[57]

1.8 Position in State of Jammu and Kashmir

The Consumer Protection Act, 1986 extends to the whole of India except the state of Jammu and Kashmir as stipulated in section (2) of the Consumer Protection Act, 1986. By virtue of this clause and Article 370 of Indian Constitution, the Jammu and Kashmir Government had enacted a separate Act called J&K Consumer Protection Act in the year with almost identical provisions. [58] It is because of this reason the consumer Act, 1986 is not applicable to State of Jammu and Kashmir. The applications of the consumer Protection Act, 1986 to a consumer dispute that arose in Jammu came decision before State Consumer Commission, Chandigarh in the case of Hindustan *Petroleum Corporation v. Jammu & Kashmir Bank.* [59] In the light of the t of separate Consumer Protection Act for the State of Jammu and Kashmir in 1987, while disposing of the case, the said State Commission ruled that "since there is a e Jammu and Kashmir Consumer Protection Act, 1987, and the entire transaction dispute took place at Srinagar and Jammu, this commission at Chandigarh has no jurisdiction." This judgment is likely to affect the interest of consumers who are residing outside the State of

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[53] *1993(1) Supp SCC 499*

[54] *Anjana Kundu v. Bank of Baroda JV (2007) CPJ 124 (NC)*

[55] *Section 31 of the N J.Act: The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default.*

[56] *Viillupuram District Council v. Co-operative Bank IV, (2007) CPJ 31 (NC)*

[57] *Bank of Baroda, Lodra* 1! *Gitaben Baldevhai Raval 2009NCJ 860 (NC)*

[58] *Supra Note 27*

[59] Cons*umer Protection Reports 199 7(2) Pae 228, Chandigarh.*

Jammu and Kashmir.

All the provisions of the central Act and the state legislation are almost identical with few exceptions.

The provisions relating to definitions of consumer, deficiency and service are identical. In both the Acts the said definitions are covered under section 2 (1) (d), (g) and (0) respectively and are the carbon copy of one another. Hence, the section 2 (1) (g) and **(0)**[60] of the J&K Act provide definition of services and includes banking services as well. The consumer of Jammu and Kashmir can file a complaint for the deficiency in services of banks in general and Jammu and Kashmir bank in particular. If the consumer most satisfied by the resolution of grievance provided by the banks, he may approach the consumer redrassal agency provided under the chapter third of the Act.[61] The J&K consumer protection. Act provides for the identical remedies as available under central Act. *In Kamal Nagpal v. State Bank of India,*[62] The Jammu and Kashmir State commission held that if the bank do not pay the full amount of loan sanctioned or adequate and or timely working capital, that will amount to deficiency of services and the bank was liable for the same.

1.9 Data Analysis and Interpretation

To observe and evaluate the proper implementation of consumer protection laws in banking services. Based on this empirical study, the data collected has been analyzed in terms of the five factors listed. Following is a discussion of the aforementioned signs;

i. *Characteristics* of *sample* respondents
ii. Awareness level about banking services
iii. Awareness level about consumer rights.
iv. Grievance redressal under *banking laws*
v. Grievance redressal under consumer protection *Jaw*

1.10 Characteristics of Sample Respondents

As shown in table 5.1.the questionnaire was administered to 50 respondents out of which 15 (3)%) were administered to Bank officials and 35 (70%) to consumer/customers of J&K Bank Ltd. So far as the educational qualification of the respondents was concerned , 20% were graduates, 35% were post graduates, and 10 percent were illiterate. Furthermore, occupation wise data of respondents reveal that house- were businessmen 50% and 30% were employees and 30% were from other categories house-wives, students, employees working in other government departments.

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[60] *Section 2 (l}(o) "service" means service of any description which* is *made available to potential users* ***and*** *includes the provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, entertainment, amusement* ***or*** *the purveying a news or other information, under a contract of personal service;*

[61] *J&K Consumer Protection Act, 1986 t:hapter ill*

[62] *1995 (2) CPJ 342(J&K)*

Table 1.1: Percentage distribution of respondents by Characteristics

Variables	Types	No. of Responden	Percent-age
Designation	Bank officials	15	30.0%
	Consumers	35	70.0%
Educational Qualification's	Illiterate	5	10.0%
	Graduate	10	20.0%
	Postgraduate/Professional Degree	35	70.0%
Occupation's	Business/self employed	25	50.0%
	Bank employee	15	30.0%
	Others	10	20.0%

Source: field survey

1.11 Awareness about Banking Service

Under this sub-heading the awareness level about the banking services, opinion about Banking services, satisfaction level of consumers and the hindrances or problems faced by the consumers while dealing with the banks have been examined in detail on the of data collected and responses furnished by the respondents as shown in the following tables of this part(ii).

Table 1.2: Opinion about banking as a system of delivering services?

Opinion	Bank Officials	Customers	Total
Vital	40 (8.0%)	9 (18.0%)	13 (26.0%)
Essential	11 (22.0%)	24 (48.0%)	35 (70.0%)
Desirable	-	2 (4.0%)	2 (4.0%)
No answer	-		
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Source: Field Survey

Figure 1.2: Opinion about Banking as a System of Delivering Services

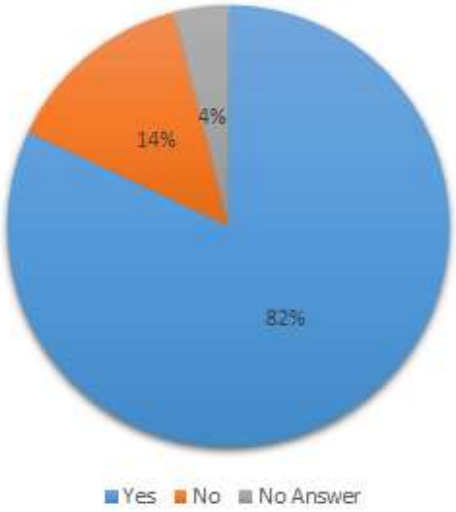
Historically, banking services have undergone numerous transformations, from the earliest days of the money landing to the modern era of rapid advancement in the banking system. Relationship marketing is essential to a company's success in today's competitive marketplace. An increasing number of Indian banks are realising that their success depends on providing excellent customer service and making their customers happy. In this regard, it's critical to know what customers think about banking services. Banking services are considered vital by 4.0 percent and 18.0 percent of bank officials and 24.0 percent of consumers, respectively; 11.0 percent of banking officials, on the other hand, consider banking services to be a necessity. 4.0 percent of both consumers and government officials believe it is a problem. A total of 26.0 percent of respondents think that banking is 'essential' and 8.0 percent think that banking is 'desirable'. This shows that there is a wide range of views on banking as a service delivery method. We all know that banking

has become indispensable in our modern world. With its wide range of applications, such as saving money and protecting valuable items, this is truly a vital service. The role of technology and e-banking has grown tremendously in the last few decades. As a result, banks must uphold a standard in their service deliver

Table 1.3: Is customer's information secured in your bank?

Information ured	Bank Officials	Customers	Total
a. Yes	13 (26.0%)	28 (56.0%)	41 (82.0%)
b. No.	20(4.0%)	5 (10.0%)	7 (14.0%)
c. No answer	-	2 (4.0%)	2 (4.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.3: Is customer's information secured

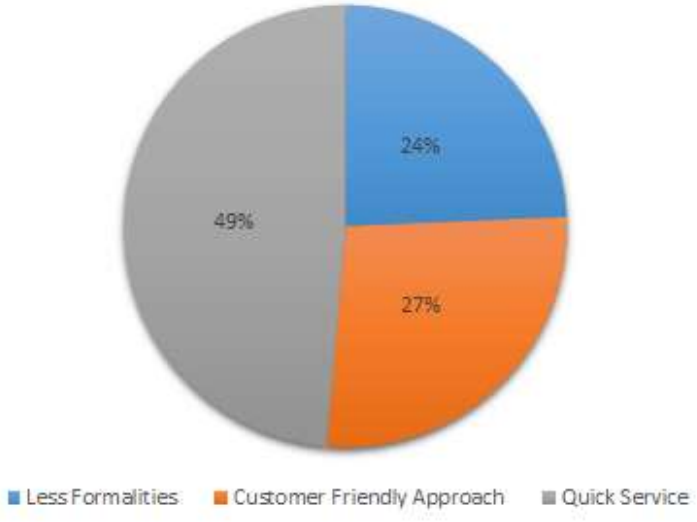


The figure/table 1.3 indicates the opinion of respondents about the security of customer's information. The analysis of data shows that 26.0% of bank officials and 56.0% i.e. total 82.0% of respondents are of view that customer's information is secured in the bank. 4.0% of bank officials and 10.0% of consumers i.e. 14.0% of respondents think that the information is not secured and 4.0% did not give any opinion. This shows that the customer's information is thought to be secured with the bank.

Table 1.4: What is your opinion about services provided by the bank?

Opinion	Bank Officials	Customers	Total
Quick Services	8 (16.0%)	10 (20.0%)	18 (36.0%)
Less formalities	5 (10.0%)	4 (8.0%)	9 (18.0%)
Customer friendly approach	2 (4.0%)	8 (16.0%)	10 (20.0%)
Variety service	-	13 (26.0%)	13 (26.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.4: Opinion about Services Provided by the Bank



The data given in the table/figure 1.4 shows that 16.0 % of bank officials and 20.0% of consumers i.e. total 36.0% of respondents think that banks provide quick services. 18.0% think there are less formalities with services of J&K Bank, 20.0% think the bank has customer friendly approach while dealing with consumers. 26.0% say that J&K Bank provides variety of services. This shows that there is mixed approach of respondents when it comes about the services provided by the J&K Bank.

Table 1.5: Are you satisfied with the services provided by your bank?

Satisfaction Level	Bank Officials	Customers	Total
Yes	15 (30.0%)	22 (44.0%)	37 (74.0%)
No.	-	11(22.0%)	11 (22.0%)
No. Answer	-	2 (4.0%)	2 (4.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.5: Satisfaction with Services Provided by the Ban

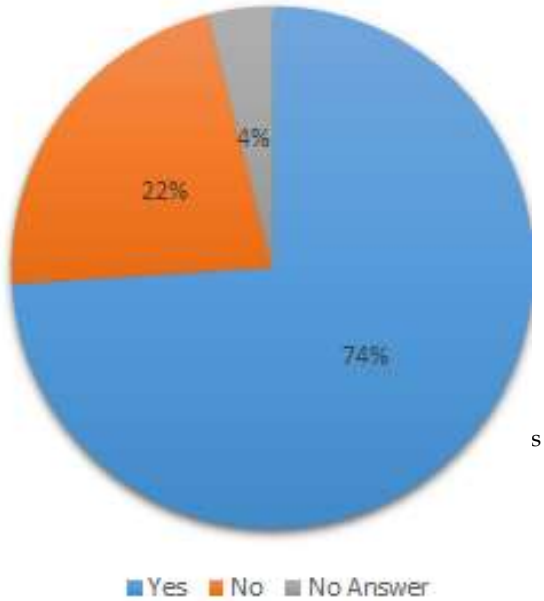


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Figure 1.5 and table 1.5 shows that all the J&K Bank officials are satisfied with the services provided by the bank. The analysis shows that when it comes to satisfaction level of consumers, 44.0% are satisfied with services provided by the bank and total 74.0% of respondents are satisfied. 2.0% of consumers are not satisfied and 4.0% did not have any answer. It shows that high proportion of respondents is satisfied with the services.

Table 1.6: If no, what hindrances or problems are faced by the consumers?

Hindrances	Bank Officials	Customers	Total
Slow Service	N A	12 (24%)	12 (34.0%)
Over crowding	-	13 (26.0%)	13 (37.0%)
Conventional service mode	-		
Rigid formalities	-	10 (20.0%)	10 (29.0%)
Total	-	35 (70.0%)	35 (70.0%)

Figure 1.6: Hindrances Faced by Consumers

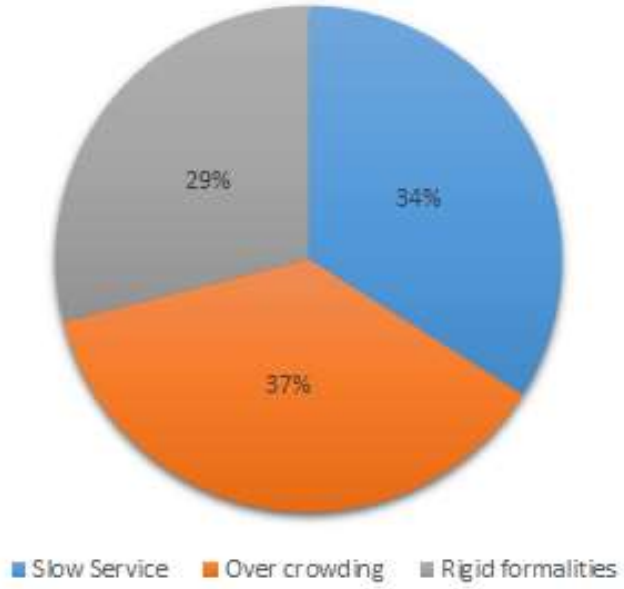


Table 1.6/figure 1.6 shows that 34.0% of consumers consider slow services of the bank as a hindrance or problem they face. 37.0% think overcrowding as a problem, 29.0% consider rigid formalities are problem they face regarding services of bank. It shows that consumer face different kind of hindrances or problems while dealing with the bank and it can be attributed to deficiency in services, on the part of the bank.

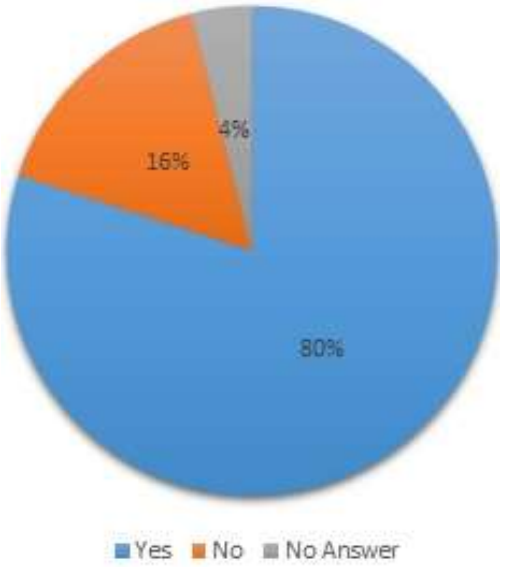
1.12 Awareness Level about Consumer Rights

Table 1.7: Do you know what the rights of bank customers/consumers are?

Awareness Level	Bank Officials	Customers	Total
Yes	15 (30.0%)	25 (50.0%)	400 (80.0%)
No		8 (16.0%)	8 (16.0%)
No answer		2 (4.0%)	2 (4.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Source: Field Survey

Figure 1.7: Knowledge about Consumer Rights.

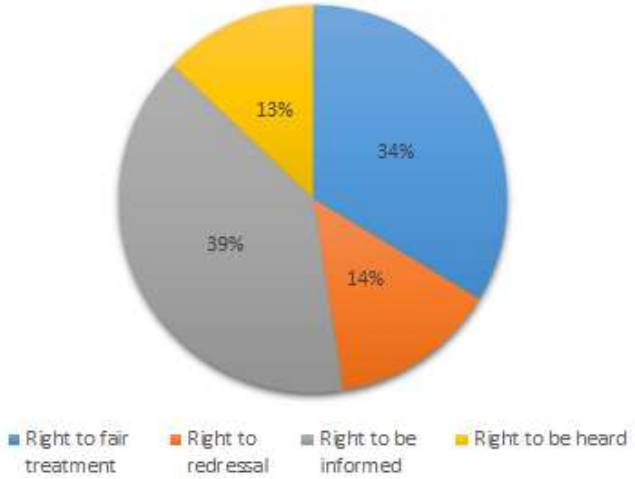


The figure/table 1.7 indicates the level of knowledge/ awareness about the bank customer/consumer rights. The analysis shows that 80.0% of respondents (30.0%of bank officials and 50.0% of consumers) are aware of the rights available to bank consumers. 16.0% of consumers are not aware about the rights and 4.0% consumers did not form any opinion. This shows that as far as bank officials are concerned they are aware about the consumer rights but the consumers are not fully aware about their rights and there is lack of knowledge about consumer rights among masses.

Table 1.8: Specify the rights?

Rights	Bank Officials	Customers	Total
Right to fair treatment	5 (10.0%)	12 (24.0%)	17 (34.0%)
Right to redressal	2 (4.0%)	5 (10.0%)	7 (14.0%)
Right to be informed	5 (10.0%)	15 (30.0%)	20 (40.0%)
Right to be heard	3 (6.0%)	2 (6,0%)	6 (12.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100.0%)

Figure 1.8: Rights Available to Consumers



As per the data given in table/ figure 5.8, it is found that highest level of awareness i.e. 40.0% is regarding right to be informed, then right to fair treatment 34.0%, followed by right to redressal 14.0% and right to be heard 12.0%. This analysis shows that majority of respondents are not aware about all the rights available to them and there is need to make them aware about their right to safeguard them against exploitation

Table 1.9: What is your source of awareness of consumer rights/protection?

Source of Information	Bank Officials	Customers	Total
Newspaper	10 (20.0%)	13 (26.0%)	23 (46.0%)
Television	0	8 (16.0%)	8 (16.0)
Radio	2 (4.0%)	4 (8.0%)	6 (12.0%)
Others	3	10 (20.0%)	13 (26.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.9: Source of Awareness of Consumer Rights

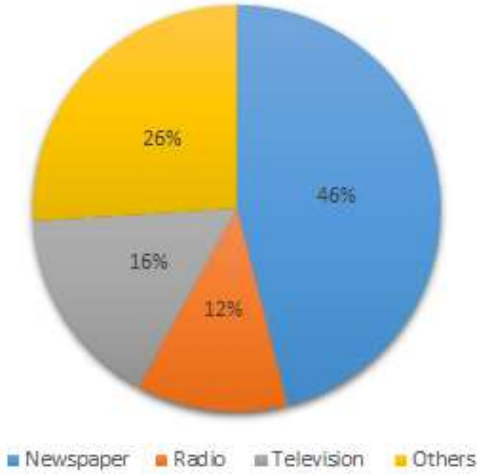
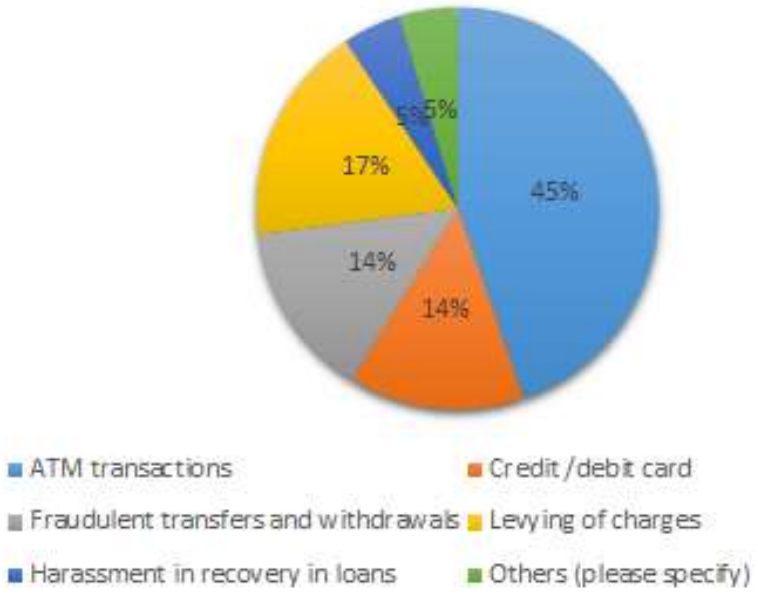


Table 1.9 and figure 1.9 shows that about the source of awareness of consumer rights 46.0% of respondents (20.0% bank officials and 26.0% consumers) chose newspaper, 16.0% chooses television, 12.0% choose radio and 26.0% choose others as source of awareness of consumer rights. This shows that there is need to educate the masses regarding consumer rights through different media, mostly with which they are well acquainted.

Table 1.10: According to you which of the areas are subjected to complaints relating to

Subject Matter of Complaints	Bank Officials	Customers	Total
ATM transactions	8 (16.0%)	11 (22.0%)	19 (38.0%)
Credit /debit card	1 (2.0%)	5 (10.0%)	6 (12.0%)
Fraudulent transfers & withdrawals	1 (2.0%)	5 (10.0%)	6 (12.0%)
Levying of charges	2 (4.0%)	10 (20.0%)	15 (30.0%)
Harassment in recovery in loans		2 (4.0%)	2 (4.0%)
Others (please specify)	-	2 (4.0%)	2 (4.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.10: Subject Matter of Complaint



The analysis of data of table 1.10/figure 1.10, it shows that highest number of respondents i.e. 38.0% (16.0% bank officials and 22.0% consumers) had complaints regarding ATM transactions and 30.0% have complaints regarding levying of charges, 12.0% have regarding fraudulent

transfers and withdrawals and 4.0% have regarding harassment in recovery of loans and others. This shows that people are not satisfied with working of the J&K Bank and there is deficiency of services.

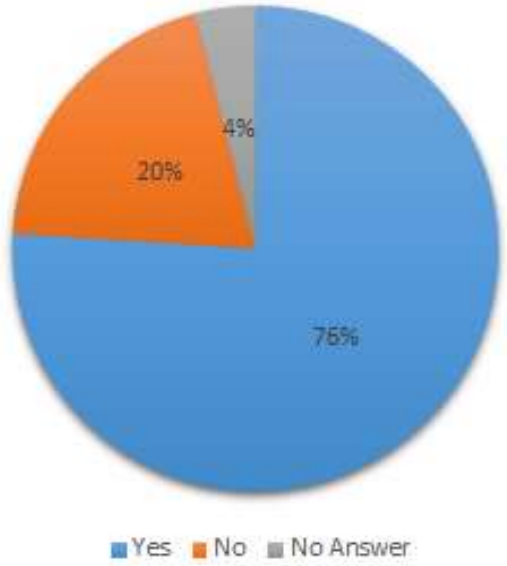
1.13 Grievance Redressal under Banking Laws Under banking services

Table 1.11 Do the bank have consumer grievances cell?

Response	Bank Official	Customers	Total
a Yes	15 (30.0%)	23 (46.0%)	38 (76.0%)
b. No	0	10 (20.0%)	10 (20.0%)
c. No answer	0	2 (4.0%)	2 (4.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Source: Field Survey

Figure 5.11: Knowledge about Bank Grievance Cell



As per the analysis of sample the table 5.11 shows that the bank officials are fully aware about the grievance cell but 46.0% of consumers aware about the grievance cell of the bank. This shows lack of awareness or knowledge about the presence of grievance cell and need of generating awareness among masses.

Table 1.12. Have you ever filed any complaint against the deficiency of banking

Response	Bank Officials	Customers	Total
Yes	2 (4.0%)	11 (22.0%)	13 (26.0%)
No	13 (26.0%)	24 (48.0%)	37 (74.0%)
No answer	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.12: Have Ever Filed a Complaint for Deficiency of Banking Services?

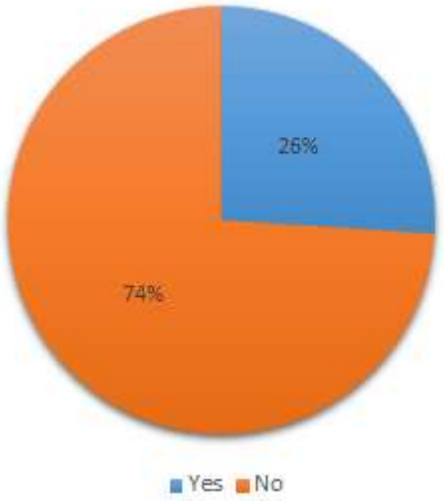


Table 1.12 indicates that only 26.0% of respondents (4.0% of bank officials and 22.0% of consumers) have filed complaints regarding deficiency in banking services. It shows people don't prefer filing complaints regarding deficiency of services and there may be number of reasons and most important reason is that they might not be aware that there is even deficiency in services provided to them. The other reason can be loss of faith in grievance redressal system of J&K Bank. People need to know what amounts to deficiency for which there is need to educate them about it, and its redressal mechanism.

Table 1.13: What is the first resort available in case of consumer grievances?

Resort Available	Bank Officials	Customers	Total
Bank official	12 (26.0%)	21 (42.0%)	33 (66.0%)
Grievance cell of Bank	3 (6.0%)	10 (20.0%)	13 (26.0%)
Consumer Court		2 (4.0%)	2 (4.0%)
Civil Court		2 (4.0%)	2 (4.0%)
	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.13: First Resort Available In Consumer Grievances/Civil Court/ Consumer

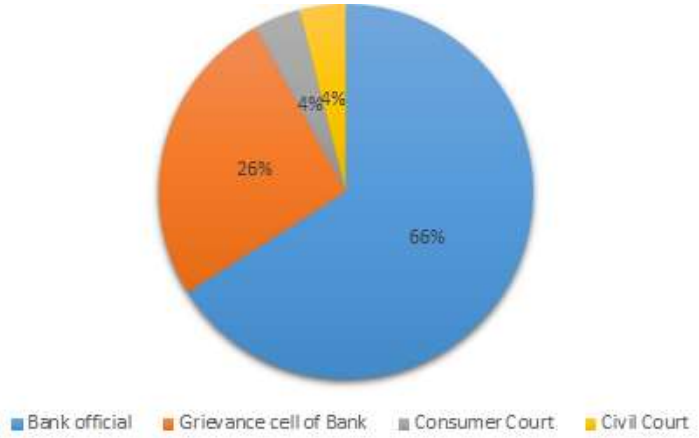


Table 1.13 and figure shows that 66.0% of respondents (24.0% bank officials + 42.0% consumers) are aware that concerned bank official is the first resort for consumer grievances. It shows there is lack of knowledge among consumers regarding the hierarchy of grievance redressal mechanism available as indicated by data analysis.

Table 1.14: Has the concerned bank official responsible for Redressal of your complaint,

Responsibility	Bank Officials	Customers	Total
Yes	14 (28.0%)	25 (50.0%)	39 (78.0%)
No.		6 (12.0%)	6 (12.0%)
No answer	1 (2.0%)	4 (8.0%)	5 (10.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.14: Whether Concerned Bank Official Responsible for Redressal helped you.

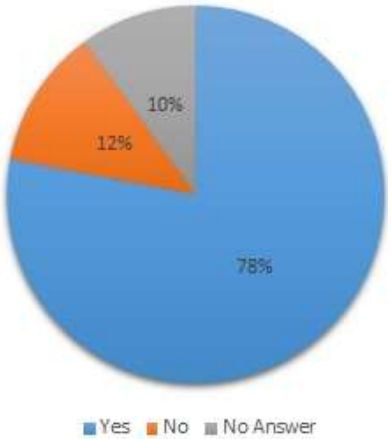
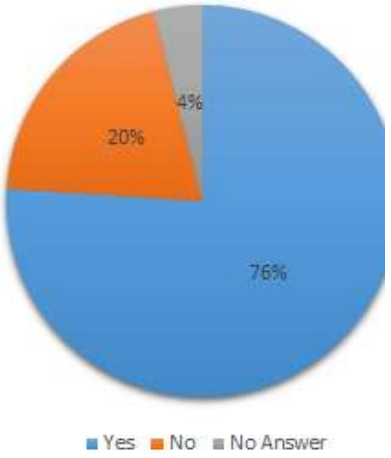


Table 1.14 indicates that 78.0% of respondents have been helped by a bank official responsible for grievances redressal and 12.0% were not helped. This shows that the bank has responsibly resolved the problems of consumers. But if we closely analyze the data we will find that only 50.0% of consumers were helped which means that banks have lagged behind in fulfilling their responsibility. This shows that the grievances redressal mechanism of the J&K Bank is not up to the satisfaction level of consumers.

Table 1.15: Have you ever heard the institution of ombudsman which is there to redress your grievances?

Ombudsman	Bank Officials	Customers	Total
Yes	15 (30.0%)	23 (46.0%)	38 (76.0%)
No.		10 (20.0%)	10(20.0%)
No answer	-	2 (4.0%)	2 (4.0%)
Total	15 (30.0%)	35 (70.0%)	50(100%)

Figure 1.15: Awareness about ombudsman



Analysis of data of table 1.15/figure 1.15 shows that only 46.0% of consumers know about institution of ombudsman and 20.0% (out of 70.0%) of consumers do not know about it and there is lack of awareness regarding it. It means that there is need of educating consumers regarding the presence of the institution of Ombud.

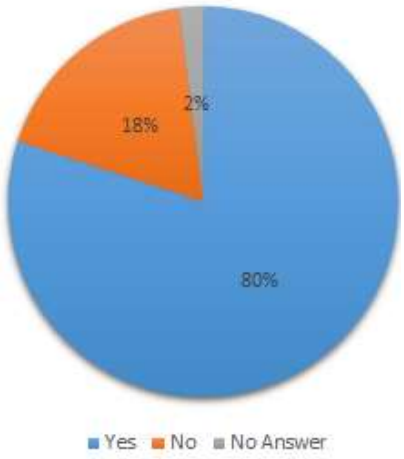
1.14 Grievance Redressal under Consumer Protection Law

Table 1.17: Are you aware of consumer courts for redressal of grievances of a consumer?

Awareness Level	Bank Officials	Customers	Total
a. Yes	15 (30.0%)	25 (50.0%)	40 (80.0%)
b. No	-	9 (18.0%)	9 (18.0%)
c. No answer	-	1 (2.0%)	1(2.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Source: Field Survey

Figure 1.17: Awareness of redressal of grievance



The data analysis of table 1.17 shows that 80.0% of respondents are aware of the consumer courts and only 20.0% are not aware of the consumer courts. It is analyzed that there is growing awareness about the consumer courts as grievance redressal agencies and the consumer courts have evolved as poor man's courts over the last decade. But much more is yet to be done.

Table 1.18: Are consumer courts able to redress the grievances of consumers?

Satisfaction Level	Bank Officials	Customers	Total
Yes	10 (20.0%)	22 (44.0%)	32 (64.0%)
No.	2 (4.0%)	5 (10.0%)	7 (14.0%)
No. answer	3 (6.0%)	8 (16.0%)	11 (22.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.18: Consumer Courts Able to Redressal

As per the analysis of data in table 1.18/figure 1.18, it reveals that as far as the satisfaction level of consumers is concerned only 64.0% of

respondents are satisfied that consumer courts are able to redress grievances of consumers and 14.0% are not satisfied and 22.0% have no opinion at all. It shows that there is a mixed approach with respect to the satisfaction level of consumers. There is scope for more improvement and more is to be done to increase the satisfaction level of consumers.

Table 1.19: what according to you are the reasons for the delay in the redressal of grievances through the machinery provided by the Act?

Problems Faced	Bank Officials	Customers	Total
a. Adjournments	3 (6.0 %)	6 (12.0 %)	9 (18.0 %)
b. Lack of knowledge	-	13(26.0 %)	13 (26.0 %)
c. Too many complaints	5 (10.0%)	5(10.0%)	10(20.0%)
d. Workload	5 (4.0%)	4 (8.0%)	9 (18.0%)
e. Complex and technical procedure	2 (4.0%)	7 (14.0%)	9 (18.0%)
f. others (please specify)	-	-	-
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Source: Field Survey

Figure 1.19: Reasons for Delay in Redressal

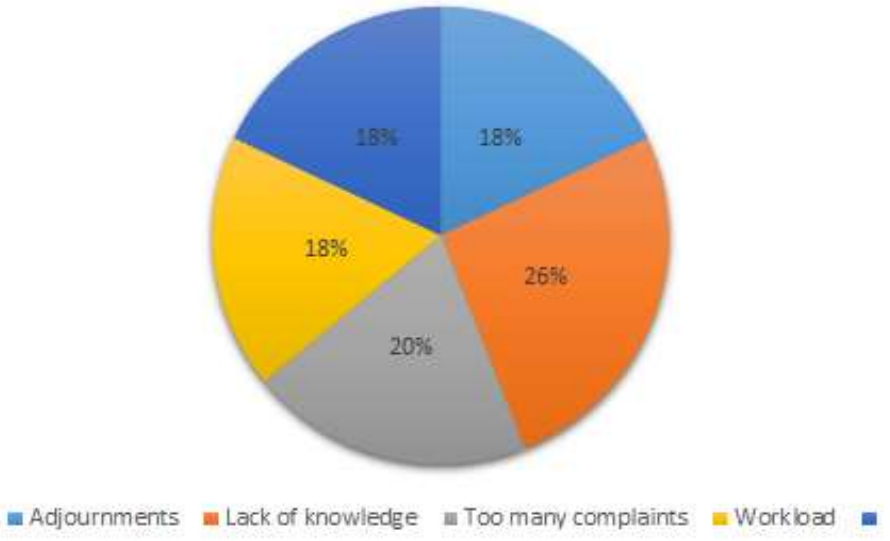


Figure 1.19 /table 1.19 indicates that highest proportion of respondents 26.0% consider lack of knowledge, 18.0% considers workload, complex and technical procedure and adjournments as reasons of delay in the redressal of grievances under the Consumer Protection Act 1986.20% of respondents think that 'too many complaints' is the main reason for delay. It also shows that there are different reasons for such delay in consumer justice as indicated above in the figure/table 5.19 and the same need to be rectified for the sake of consumer justice.

Table 1. 20: In your opinion should the consumer need to approach consumer fora at first instance?

Opinion	Bank Officials	Customers	Total
a) Yes	5 (10.0%)	19 (38.0%)	24 (48.0%)
b) No	8 (16%)	15 (30.0%)	23 (46.0%)
c) No answer	2 (4.0%)	3 (6.0%)	30 (6.0%)
Total	15 (30.0%)	35 (70,0%)	50 (100%)

Source: Field Survey

Figure 1.20: Approach Consumer Fora at First Instance

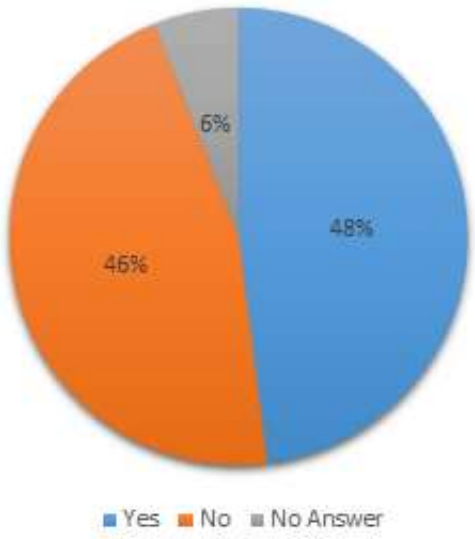


Table 1.20/figure 1.20 shows that 44.0% of respondents are of the opinion that consumers should approach consumer fora at first instance and 46.0% of opposite view. 6.0% have no opinion at all. It reveals that majority of respondents don't want to go to courts at first instance and want to resolve matter out of courts.

Table 1.21: Do you think that there is need to improve consumer redressal mechanism under both the systems?

Opinion	Bank Officials	Customers	Total
Yes	15 (30.0%)	31 (62.0%)	46 (92.0%)
No		1 (2.0%)	1 (2.0%)
No answer		3 (6.0%)	3(6.0%)
Total	15 (30.0%)	35 (70.0%)	50 (100%)

Figure 1.21: Need to Improve Redressal Mechanism

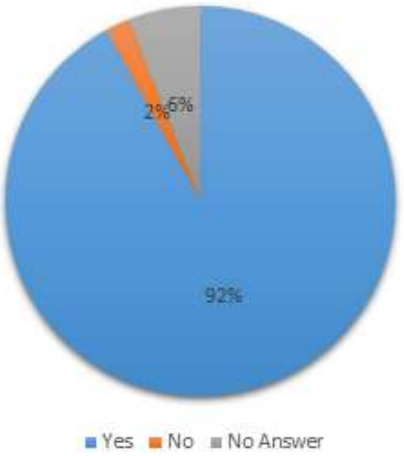


Table 1.21 shows that *as* far as opinion regarding the need for improvement of redressal mechanism under both the systems i.e. banking system and Consumer Protection Act is concerned, 92.0% of respondents are of the view that there is need for improvement and 2.0% are of opposite notion while as 6.0% has no opinion. It means that majority wants improvement and the systems has not been either properly working or is improperly implemented.

1.14 Conclusion and Suggestions:

To sum up, in today's competitive banking environment, customer service excellence is the most important tool for long-term business success. Complaints from customers are an inevitable part of any company's daily operations. Because banks are service organizations', this is more so. A bank's primary focus should be on providing exceptional service and delighting its clients. Regulatory measures are required in J&K Bank in order to meet the expanding demands of the vast majority. When it comes to enforcing financial consumer protection laws and regulations, supervisory agencies are crucial. The successful implementation of the current legal framework is heavily reliant on the effectiveness of the institutional framework. Consumer protection laws, agencies tasked with enforcing them, and raising public awareness of these rights are all urgently required. Customers of J&K Bank are dissatisfied because the bank has failed to provide the high level of service that it is required to provide by law, according to an in-depth examination of how consumer protection laws work in banking. When it comes to banking services, there is a primary reason why consumer protection laws aren't being implemented: the banks aren't following the RBI guidelines, which mandate that they inform customers of their rights and display certain programmes, such as the consumer right policy under consumer laws and the internal redressal mechanism for banking customers.

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Political Empowerment of Women vis-à-vis 73rd Constitutional Amendment

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Abstract

Bulk of legislations has been enacted at international and national level to boost the role of women in political arena so that they become empowered to be a part of decision making and good governance. In this context 73rd Constitutional amendment became instrumental to make women a part of decision making at ground level. But even after 26 years of this amendment results are not satisfactory, owing to various impediments that hamper the political empowerment of women. The present study focuses on the various impediments that are roadblock to political empowerment of women vis-à-vis 73rd Constitutional amendment.

Keywords: Constitutional, Empowerment, Women, Governance, Equality.

I Introduction

Breaking the shackles of stereotype, gender equality is the basic philosophy on which the governance structure of the state should rest. In this regard women empowerment becomes an imperative part of the good governance. Empowering the women inevitably means empowerment of men as well, because the word "*Women*" includes men in itself. Role of women in the present context of globalization and liberalization has not remained a prototype of femininity, but a basic human right which cannot be disregarded. The notion that women rights are human rights echoed in many conferences at international level to support the overall empowerment of women. In 1995 at a conference in China, Hillary Clinton declared that it is no longer acceptable to discuss women's rights as separate from human rights. She further said[1];

> *"If there is one message that echoes forth from this conference, let it be that human rights are women's rights and women's rights are human rights, once and for all."*

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[1] *Available at:* https://en.wikipedia.org/wiki/Women%27s_rights_are_human_rights (Last modified July 23, 2022)

Thus being fundamental and basic human right–women rights needs to be viewed as an overall development in the status of women and manifestation of their potential. *While empowerment is the process of enhancing the capacity of individuals or groups to make choices and to transform those choices into desired actions and outcomes. Thus the empowered people have freedom of choice and action. This in turn enables them to influence the course of their lives in such a way that their decisions have a positive effect on them.*

According to **UNFPA Guidelines**[2]**,** "The empowerment of women comprises five components— women's sense of self-worth; their rights to have and to determine choices; their right to have access to opportunities and resources; their right to have the power to control their own lives; both within and outside the home and their ability to influence the direction of social change to create more just, social and economic order on national and international levels." In this context education, training, awareness raising, building self-confidence, expansion of choices, increased access to and control over resources, and actions to transform the structures and institutions that reinforce and perpetuate gender discrimination and inequality are important tools for empowering women to claim their rights. For the realization of above mentioned five components political empowerment of women is the most important aspect. Women's political participation is a fundamental prerequisite for gender equality and genuine democracy. It facilitates women's direct engagement in public decision-making and is a means of ensuring better accountability to women. Supplementing the political empowerment of women one of the pillars of **UN Women's work** is advancing women's political participation and good governance, to ensure that decision-making processes are participatory, responsive, equitable and inclusive.

Even after 71 years of independence women in India are still occupying a subordinate and dormant position to men. In order to overcome this occupying position of women, since independence, various efforts have been made by Government of India in this direction and one of the major boom was 73rd Constitutional Amendment Act, 1992 towards political empowerment of women through Panchayat Raj Institutions.

I. The 73rd Constitution Amendment Act 1992- A boom for Political Empowerment of Women

73rd Amendment, 1992 added a new Part IX to the Constitution tilted "The Panchayats" envisaged under Article 243 to 243-O and it also added Eleventh Schedule covering 29 subjects within the functions of Panchayat. This Amendment implements the Article 40 of the Directive principles of state policy which says that "State shall take steps to organize village Panchayat and endow them with such powers and authority as may be necessary to enable them to function as units of self- government". However amongst this, the reservation of one-third of the seats for women in local bodies is the most

[2] United Nations Population Fund Guidelines for Women's Empowerment, *available at:* http://www.un.org/ popin/ unfpa/taskforce/guide/iatfwemp.gdl.html (Last modified July 24, 2022)

revolutionary provision, besides the reservation of seats for Scheduled Castes and Scheduled Tribes in proportion to their regional populations. Apart from this, it gave an impetus to the creation of a three tier Panchayat Raj structure at the Zila, Block and Village level.

The Constitution of India though confers equal rights to men and women, and even some special rights to women, but their empowerment is still at the rudimentary stage. In literal terms the argument that Article 40 of the Indian Constitution was spirited up by the 73rd Amendment for the organization of village Panchayat in a way that female participation becomes akin to the local self Government but the non uniform structures at State level had created a shallow image. Owing to which the Panchayat Raj institutions failed in many instances to acquire the status and dignity required for viable and responsive people's institutions. Apart from this, the absence of variety of elements like—absence of regular elections, prolonged supersession and inadequate representation of women and weaker sections and insufficient devolution of power and lack of financial resources also worsened the already deteriorated system. Therefore, a need was felt for the reconsideration and reviving of the entire PRI system, resulting in constitution of different committees to study the PR systems and make recommendations to strengthen the grass root governing institutions without which democracy is not complete.

Since State of Jammu and Kashmir has its distinct legal structure owing to which the laws passed by the Parliament do not directly apply to the State. It took a little time for the State Government to adopt the 73rd Amendment. Subsequently, in the year 2014 the said Amendment was extended to State. Hence it was made sure that women in State of Jammu and Kashmir are not being kept outside the ambit of units of Local Self Government. Conventionally the women in State of Jammu and Kashmir would not participate frequently in these institutions however, with the recent wave of women empowerment; the women in state of JK are breaking the stereotypes and have started participating in the panchayat as well as urban local Polls too.

II. Statement of Problem

No doubt that Government of India by virtue of 73rd Constitutional Amendment Act, 1992 has made various provisions for the participatory democracy at gross root level, but with respect to Jammu and Kashmir it took around 26 years after 73rd amendment to empower panchayats. Taking a holistic review of political empowerment of women via gross root governance it has been analysed that in spite of 33% reservations to women in panchayats, the role of women has not be so active and participatory to the extent to fulfill the real goal of empowering the women via local self government. Therefore, to access the real reasons which are road block in political empowerment of women, researcher(s) in this paper try to find the lacunas that have stalled the empowerment of women.

III. Objectives of study

The research paper has following objectives:

1. To assess the level of awareness among the elected women members about their roles, responsibilities and various development programmes; their participation in the activities of the Panchayat raj.
2. To critically analyse the extent of participation of women members in the decision-making process and
3. To suggest suitable measures to ensure their effective participation in the activities of the PRI and the decision-making process.

IV. Research Design

The present study has been conducted in Pulwama district of Jammu and Kashmir state. Pulwama district has one Zilla Parishad, eleven blocks namely Aripral, Tral, Dadsara, Awantipora, Lasipora, Pulwama, Kakapora, Newa, Shadimarg and Achgoza. In the sample district, one panchayat Halqa in each block Pulwama, Kakapora and Lasipora was selected in order to assess the role performed by the elected women members of various governing bodies. For the purpose of information collection, respondents were divided into two classes: Previously/Presently contested or elected women representatives of panchyat and general population of panchayat Halqa Naira of Pulwama block, Gundipora Panchayat halqa of Kakapora Block and Tumlahal panchayat halqa of Lasipora Block. One the basis of simple random sampling 5 respondents were selected in Panchyat halqa's of Naira, Gundipora and Tumlahal from previously or elected women representatives and 20 respondents each from general population of the above mentioned panchayat halqa's were selected. For the said study researchers have employed purposive and stratified random sampling technique. From among the previously/presently contested and elected respondents Schedule method of data collection was used and regarding general population questionnaire/schedule method was used.

V. Data analysis and interpretation

Previously/presently contested or elected women respondents

The total sample size of the study is 5 contested or elected women representatives of the panchayats. As the primary objective of the study is to assess the level of awareness among the elected women members about their roles, responsibilities and various development programmes; their participation in the activities of the Panchayat raj, a brief study of demographic profile of the respondents like age and educational status, is indispensable. The average age of the women representatives was 40.8 years. This shows the trend that women who have crossed the youth hood tend to participate in PRI.

The educational status of the respondents indicates that around 40% are having a basic qualification up to 10^{th} and rest 60% below 10^{th} class.

Information about the Panchayat Raj Institutions and the purpose of PRI

The Majority of the respondent's i.e. 80% have had the information about the said system and only a minimal percentage of 20% were unaware of it. However, the respondents have no information about the three tier system of panchayat raj and unfortunately do not possess any such know how of the

purpose and objective of PRI system to which empowerment of women is no exception.

Reservations of women in PRI

Reservation being an important aspect of the 73rd Amendment however is not known at the ground level. The complete ignorance of all the respondents of the study substantiates that fact. The research conducted revealed that not a single respondent was aware of reservations to women's in panchayat.

Role in Panchayat

Majority of the respondents were not aware of their role in panchayat as an elected representative and the rest 40% were aware of it.

Taking part in Panchayat meetings

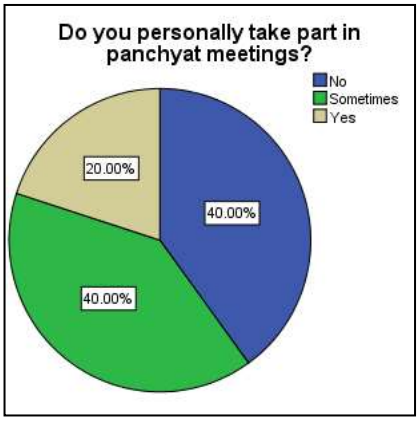

Figure 1

The result shows that only the sum of 20% of women respondents take part in the panchayat meetings, while 80% either sometimes or never take part in the meetings.

Awareness about developmental programmes

Around 80% of respondents are unaware of the various developmental programmes under panchayat raj and just 20% are aware about it.

Reasons for contesting elections

Table 1

Reasons	Frequency
Economic Consideration	**60%**
Family pressure	**20%**
Political Party persuasion	**20%**
Total	**100%**

Source: Field Work

General population within the Panchayat halqa's

To analyse the participation of women members in decision making process, structured interview schedule was administered to 60 respondents

(general population) within the three selected panchayat halqa's. Subsequently to increase the efficacy of the information 20 respondents were randomly selected from each Panchayat halqa i.e Naira, Tumlahal, and Gundipora— out of which 68.33% were males and rest 31.66% females.

Elected women in your panchayat

Table 2: Is there any women elected member in your panchayat?

	Frequency	Percent
Don't know	8	13.3
Yes	52	86.7
Total	60	100.0

Table 2 above reveals that out of total respondents, 86.7% possess the knowledge about women being the panchayat member in their panchayat halqa, whereas a meager percentage of 13.3% have no such information.

Participation of elected women in PRI

Table 3: Do elected Women take active part in PRI?

	Frequency	Percent
No	60	100.0

Depicted by table 3 above, it is quite clear that people are convinced that women don't take any active role in Panchayat Raj institutions.

Table 4: If No, who plays it?

	Frequency	Percent
Husband	51	85.0
Male family member	9	15.0
Total	60	100.0

When the respondents were asked as to the active role played by the women representatives, 85% respondents stated that it is the husband of the particular member who remains active on her behalf whereas another 15% stated that the role on behalf of women member is played by any female family member.

Political empowerment of women

The data collected and the respondents during the study discouraged the view that women should take part in political process under PRI's.

Do elected women know their role in PRI's

All the respondents said that women don't know their role in panchayats.

VI. Findings of the study

1. That the women in their early 40 are having the meager qualification of below or up to 10th standard mostly take part in PRI.

2. Though majority of participants know about the PRI system, however have ignorant about the reservations allotted to women in panchayat system.
3. That the minimal percentage of candidates is aware of their role but hardly take part in the meetings conducted off and on by the halqa.
4. Economic consideration is the main reason for their opting to contest panchayat elections.
5. Majority of the people do not know whether there is any woman representative in their area.
6. That majority of the people believe that women should not participate in any kind of political activity owing to their inactive role in PRI's.
7. Lastly, it was found out that either the spouse of female representative or any other male member of the family play their role and remains active on behalf of elected woman.

VII. Conclusion and suggestions

There is no denying to the fact that women have been the victim of a relentless exploitation throughout the human civilization. However, time and again there has been a continuous effort towards their empowerment so that they may work hand in hand with the male counterparts. In relation to this, apart from other legal developments, 73rd Constitutional Amendment has paved a way towards the participation of women in the local body polls, to ensure the empowerment of women at ground zero level. Yet when we look towards the regional implementation of this Amendment the outcome is not quite satisfactory. While conducting this study the researcher(s) found that people not only discourage the participation of the women in local body polls but the women representatives themselves are not able to deliver properly hence fail to break the shackles of conventionalism. The provision of reservation was purely meant for women to uplift them and be a part of good governance but it is very unfortunate that researchers found that people irrespective of gender are ignorant about the very fact. One of the important aspects established through this study is women representatives hardly remain active after their election, subsequently encouraging the male dominance. Another important element which should not go unnoticed is the lack of information within the female representatives in relation to the structure and functions of the Panchayat raj institution. It is very awful to mention that people are discouraging this practice irrespective of the fact that it was meant to change the mindset. Since the Kashmir region has long driven into conflict thus it is very difficult to find the favourable ground for the clear implementation of the said Amendment.

On the basis of present research study several submissions have been made in the form of following suggestions:

1. The study has shown that women are not actually conscious about their rights under PRI, it seems they are forced into it. Therefore, to

make them conscious about their rights they must be given full proof knowledge and information about PRI through various modes.

2. In order to increase the level of women participation, the level of education and the level of awareness of women PRI-members are required to be improved. For that various provisions should be incorporated in PR system.
3. Level of ignorance and male dominance has also effected the implementation of PRI which as ultimately stalled the women role in decision making. For this there is a need of attitudinal change in the behavior of men towards women and this can be achieved through sensitizing community so that they realise that the women involved in the affairs of the PRIs are doing an important job for which they require all support and cooperation.

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Criminal Justice System and Media Trial: Recent Trends and Judicial Approach

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Introduction

In a democratic country; like India; having diverse culture, community and interest in diverse corners of the nation; media plays a vital role. In fact, in a democratic set-up, the media is considered as 'fourth pillar' of the nation and also 'watchdog of democracy'. With such an important role being bestowed upon the media, there is a parallel responsibility of the media to perform its duty with care and caution. From the last few decades, the media has crossed its main role of reporting and began to examine any matter and draw its own conclusion, *i.e.*, assumed the place of investigating agencies and decision making bodies as well. Such a trend is called "media trial". With the advent of web based social media, it has become more convenient to interact with one another and share substance so that the 'media trial' became even easier.

Nowadays there is a flood of media trials in our country, which sometimes interferes with the Administration of Justice. Media trial is discouraged by the courts, jurists and cross-section of the society. Media trial has an impact of sensationalising the committed crime, portraying a suspect as accused and also has the tendency to infringe the basic principles of fair trial. The recent trends of media trials, in various cases, violate the human rights of accused & victim, and general principles of fair trial & natural justice.

Objectives:

The main objectives of this research paper are: i) to evaluate the concept of media trial in India, ii) to evaluate the impact of media trial on criminal justice system, and iii) in the criminal cases, to what extent does the media have the right to publish any fact and their opinion?

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Research Method Adopted:

In the present paper the doctrinal method has been used. For this purpose various books, research papers and case laws, online and offline, have been referred to. Beside this evaluative and critical approach has been adopted.

Scope / Limitations/ Universe of the study:

This research paper covers the impact of 'Trial by Media' on the Justice Delivery System and the various stakeholders related to the media and Justice Delivery System in Indian society.

Importance/ Significance:

To suggest reformatory measures to overcome the problem of increasing trend of media trials.

Concept of Medial Trial

The term "media trial" is made up of two words: 'media' and 'trial'. Media includes all forms, printed or digital, to assimilate or disseminate any kind of information. In modern times, media are gravitating more towards the digital side. Modern digital media include all forms of communication that are transmitted electronically, such as, internet, social media (Facebook, Twitter, Instagram, etc.) and they have completely revolutionized our world.[1] 'Trial' means, in common parlance, examination of facts/ statements/ evidences, provided by the parties and to reach/ make the conclusion. In the legal sphere, 'trial' means examination of facts by taking evidence, hearing both the parties, examining witnesses to reach to the decision of the case and to impart justice. Hence, we can say that a media trial means the power of the media to create perception against an accused that he is guilty or innocent. In other words, in a media trial, the media presents facts in such a way that the public believes the accused that he is either guilty or innocent. In such cases, it has also been seen that the media does not present the true facts without prejudice and influence the opinion of the people.

Present meaning of 'Media Trial' is derived from the case of Roscoe "Fatty" Arbuckle (1921), in which, the accused, Roscoe Conkling "Fatty" Arbuckle, was discharged by the Court but till then he had lost all his prestige and reputation due to the declared guilty by media and that's why he was thrown out of his job. In this case, "Roscoe Conkling "Fatty" Arbuckle, an American silent film actor, comedian, director, and screenwriter, was the defendant in three widely publicized trials between November 1921 and April 1922 for the alleged rape and manslaughter of actress Virginia Rappe and finally acquitted.[2] Another renowned case was the trial of "*The People of the State of California v. Orenthal James Simpson;* in Los Angeles County Superior Court in which former National Football League (NFL) player, broadcaster and actor O. J. Simpson was tried and acquitted for the murders of his ex-wife, *i.e.*,

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[1]. Justin Stoltzfus, 'Media', https://www.techopedia.com/definition/1098/media, retrieved on 04.04.2022.

[2].https://en.wikipedia.org/wiki/Roscoe_Arbuckle#:~:text=Arbuckle%20was%20the%20defendant%20in,and%20died%20four%20days%20later, accessed on 15.05.2022.

Nicole Brown Simpson and her friend Ronald Goldman;" [3] where the media influenced the minds of the people so much that people were forced to believe that the accused is the real offender.

The media is neither expressly (by any law) empowered nor restrained to do so. Nowhere media trials are banned by the pronouncement of the courts in India. All coins have two sides and in the case of journalism, it is also true. In many cases, the media has done its responsibilities very well. But in some cases, journalists project the image of an accused as a criminal. In this situation the decision of the court may also be affected. ***Nupur Talwar v. State of UP & Anr*** [4] with ***Dr. Rajesh Talwar and Another v. Central Bureau of Investigation and Anr*** [5] (which became famous as **Aarushi Talwar Murder** Case) is a famous case, in which the media had scaled new heights of irresponsibility by spreading canards and defamatory stories. The Talwars couple, *i. e.*, Rajesh Talwar and Nupur Talwar, have been acquitted by the Court but they have been lost all his reputation & prestige due to media trial. Another famous case, *i.e.*, ***Sheena Bohra murder case***, in which the media proved guilty to the main accused (Indrani Mukherjee) while the matter is under trial before the Court. Due to all these types of matters, when it comes, debate brake-outs on the 'media trial' of the accused.

The term 'media trial' is different from 'investigative journalism'. Investigative journalism is a process to bring out of any uncovering information or facts that has been hidden under a chaotic mass of facts, either intentionally or accidentally. The fundamental goal of investigative journalism is to provide information to the public that it cannot obtain on its own, because this is deceptive, secretive, and predatory in character. [6] It is true that investigative journalism is permissible in India. Negative and positive investigative journalism are two types of investigative journalism. Positive investigative journalism refers to operations that serve society by disclosing information in the public interest; negative investigative journalism, on the other hand, refers to operations that do not benefit society, trespass on people's privacy, and harm their reputation. Investigative journalism that is negative is unethical. [7]

Everyone in India is very curious to know about high profile cases and in these cases the media, to make the matter more sensational, publish its own version of facts and declared to the accused guilty or innocent.

Impact of Media Trial

When an accused is declared guilty by media trial, it has the following effect an accused and justice delivery system:

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[3]. https://en.wikipedia.org/wiki/O._J._Simpson_murder_case, retrieved on 23.05.2022.
[4]. (1984) 2 SCC 627.
[5]. 2013 (82) ACC 303.
[6]. https://www.imaginated.com/writing-glossary/what-is-investigative-journalism/ accessed on 29.4.2022.
[7].https://legaldesire.com/investigative-journalism-and-protection-of-privacy,retrieved on 28.03.2022.

a) Violation of basic principles of fair trail: The concept of 'fair trial' is the basis of criminal justice system and very foundation of imparting justice in true sense. It is said that justice should not only be done but seen also to be done. It implies, justice should be imparted in such a way that no party goes unheard. Justice should not be a matter of subjective notions of judges. For this purpose there are certain principles of fair trail which are accepted and recognised internationally as well as nationally. The concept of fair trial is recognised as an important facet of fundamental rights under Articles 20 and 21 of the Constitution. The Apex Court in series of cases time and again recognised these principles in number of cases. Such principles are as; 1) Presumption of innocence unless proved guilty beyond reasonable doubt, 2) Independent and impartial judge, 3) Expeditious trial, 4) Hearing in open court except in exceptional cases, 5) Knowledge of accusation and adequate opportunity of being heard, 6) Trial in presence of accused, 7) Evidence to be taken in presence of accused, 8) Cross-examination of prosecution witnesses, 9) Prohibition of double jeopardy, and 10) Legal aid.

As mentioned above, one of the basic principles of fair trial as well as natural justice is opportunity of being heard. As a matter of general rule the court has to give both the parties an opportunity of being heard and explain their part. Media, through its own second hand information, portray a suspect as a culprit/ innocent without hearing him.

b) Infringement of human rights, *i.e.*, right to privacy and reputation of victim: Media trail trends to infringe the rights of victims. Trial by media transgresses right to privacy of the victims in the cases of sexual offences. In the cases, involving sexual offences or female victims, right to privacy become absolute. Even law recognises such privacy of victim for number of reasons. One of the right of victim is to not to disclose her or his identity. Section 228-A [8] of the Indian Penal Code, 1860, imposes two years of punishment with or without penalty for revealing the name and identity of the victim of an offence under Sections 376, 376A, 376B, 376C or 376D of the IPC, 1860. [9] The object of this provision is to protect the victim from further victimization. It is manifestation of the right to privacy and right to reputation of the victim and also the duty of the State and society to protect the victim from further onslaught of his rights. [10]

c) Infringement of human rights of accused: One of the basic rule of fair trial and also right of the accused is to be presumed as innocent till he is proved guilty by the competent court beyond reasonable doubt. If there is iota of doubt, the benefit of doubt will go to the accused. However the trial by media has tendency to violate this basic principle of fair trial. The accused was made culprit in the eyes of society even before the verdict of court. In such a situation even if accused is acquitted by the court of law on merits, he will not be able to start his life afresh and might undergo mental trauma.

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[8]. Inserted by Act 43 of 1983, Section 2 (w.e.f. 25-12-1983).
[9]. Section 376 to 377 of Indian Penal Code, 1860 deals with sexual offences.
[10]. Madabhushi Sridhar, *The Law of Expression*, Asian Law House, Hyderabad (2007) p. 760.

d) Creating a situation whereby the lawyer can't accept the case of the accused: Media react upon the lawyers also, who accept the brief of the high profile case. For this reason the right of the accused, to be represented in the court by a lawyer of his choice, is sometimes infringed. This kind of media work is against the natural justice system. For example, when the famous lawyer Ram Jethmalani, in the Jessica Lal murder case, agreed to defend the prime accused of the case, *i.e.*, Manu Sharma, he faced public criticism. In another case, lawyer Prashant Bhushan was dubbed an "anti-national" for appearing on behalf of Yakub Memon before the court.

e) Impact on witnesses: Media trial also affects the psyche of witnesses involved in the case. It affects the role of witness in two ways. On one hand it affects the security of witness and on the other hand there are increased chances of turning hostile. Security of witnesses is a serious issue especially in high profile cases where the chances are influencing to the witnesses. Revealing the identity or whereabouts of witness not only impair the process of justice but might also proved as fatal for the person himself. Beside this, everyday reporting of any particular case, from the perspective of journalist, begins to dominate the free-thinking process and also shake the firm faith of witnesses. In such a situation, it will not be strange to revert back from their statements time and again.

f) Impact on judges: Trial by media can have an effect on the subconscious psyche of a judge trying the particular case. In the case of ***K M Nanavati***, [11] where the media had sensationalized the story and portrayed the accused as the victim instead. This narrative had a lot of influence on the jury members which led them to decide in the favour of the accused. Thus, media trials do have an impact on the functioning of the adjudicatory authority and can be held guilty of colouring the opinion of a judge in the sensationalized matter.

Chief Justice of India, N V Ramana, when he was addressing a programme organised at the Judicial Academy, Ranchi on 23rd July, 2022, said the media establishes the Kangaroo Court. [12] In such a situation, even experienced judges face difficulties in taking decisions. He said that there is still accountability in the print media, but the responsibility is not visible in the electronic media. He also said that judges have a special place in a democracy, judges can't turn a blind eye, but the judicial system is being affected by the irresponsible behaviour of electronic media. Further he stated that the trial starts in the media regarding any case and misinformation and agenda driven debate on issues related to the delivery of justice is proving to be harmful to the health of democracy.

In United Nations there is a settled code of conduct for the judges or jury members who are sitting to decide any high profile or sensational case. Such judges or jury members are prohibited to watch television and to read

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[11]. AIR 1962 SC 605.

[12]. Kangaroo Court means, in the common language, judgment is rendered arbitrarily or unfairly by any unauthorized, institution disregarding normal legal procedure.

newspaper. They are totally secluded from outside world so that they don't have any impact of media news or covering of that case. The jury or judges are also human beings and there is no denying that are also "subconsciously influenced" by media trials.

Legal Restraints

There is no any special legislation which deals with permission to media trials nor expressly forbidden it by any enactment. However there are some legislation, i.e., Indian Penal Code, 1860 and Contempt of Courts Act, 1971**,** which impliedly act as checks on the powers of media but they are not directly related to the media trial. But it is necessary to mention about all these too.

1. Indian Penal Code, 1860:

Indian Penal Code provides for protection of identity of victim of certain crime under Section 228A. Sub-section (1) of Section 228A of IPC makes to not disclosing the victim's identity in sexual offences under Sections 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB and 376E. Further, Sub-section (3) of Section 228A states that whoever prints or publishes any matter in relation to any proceeding before a court with respect to these offences without the previous permission of such court shall be punished.

Despite this, there are many cases in which the identity of the female victims has been exposed. For example, in the Delhi Gang rape case of 2013, [13] which people know as 'Nirbhaya' case **(a name used to protect the identities of rape victims), still** real name and photograph were running in the public platforms.

In the same line, in the Rajesh Talwar v. CBI, [14] case, which is famous as ***Noida Double/ Twin Murder case,*** is another example of the media's exceeding its bounds. The murder of Aarushi Talwar and Hemraj Banjade aroused a lot of interest from the public as the girl's parents were accused of double murder. **The case was riddled with speculations and rumours, and the media left no stone unturned in using it to their advantage.** Apart from conducting trials, most of the Indian media played as investigators, annihilating the privacy of a teenage girl. The media also spun a narrative that the parents saw the girl and housekeeper in a 'compromising position'. The Indian media had invaded the personal details of the deceased, maligning the accused and victims. While the Court had released the couple owing to insufficient evidence, the media had already declared them murderers. Many questioned the sensational media coverage, which included salacious charges against Aarushi and the perpetrators, as a media trial.

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[13]. Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1.
[14]. (2014) 1 SCC 628.

In ***Nipun Saxena & Anr. v Union of India & Ors.*** [15], which was decided in 2018, a bench of Justices, Madan B. Lokur and Deepak Gupta laid down the rule in their judgment and said:

> *"No person can print or publish in print, electronic, social media, etc. the name of the victim or even in a remote manner disclose any facts which can lead to the victim being identified and which should make her identity known to the public at large. The bar extends to anything which can even remotely be used to identify the victim".*[16]

2. Contempt of Courts Act, 1971:

The Contempt of Courts Act, 1971, as well as Articles 129 and 215 of the Indian Constitution, provide legal provisions aimed at ensuring the claimed privilege- Contempt Jurisdiction that is; Power of High Court and Supreme Court to punish for Contempt of itself respectively. Section 2 of the Contempt of Courts Act, 1971, defines criminal contempt and Sub-clause (i) of Clause (c) says that any publication, which scandalises or tends to scandalise any court, is contempt of court. Media trial has the tends to scandalise the court. Suppose, the public takes an accused guilty through media trial and he is later acquitted by the court then, the perception of the general public will be against the court and thus, the court will be tarnished. Further, Clause (iii) of Sub-section (c) of it's says that interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner is criminal contempt of court. It means publication of any matter which prejudices or interferes in any way in the administration of justice fall within the ambit of criminal contempt of court. The constitutional courts have said many times that the media trial is interference in the administration of justice. In this way media trial comes within the ambit of contempt of court, but till date the courts have not brought the media trial under the contempt of court.

Judicial Response

The higher judiciary in India has taken cognizance on the issue of media trail viz-a-viz fair trail whenever such issue comes before it either expressly or impliedly. In all such cases the courts has not only criticised such a trend but also suggested to reforms in this context.

In ***State of Maharashtra v. Rajendra Jawanmal Gandhi*** [17] ***case,*** the Apex Court said that trial of the accused/ case, by media or public demonstration, is the very contrast of the rule of law. This may lead to failure of justice. A Judge should guard himself against any such pressure. A fundamental principle of justice is that the accused should have a fair trial. In the case of ***Zahira Habibullah Sheikh v. State of Gujarat***,[18] the Top Court stated that 'fair trial' meant a trial that is conducted before a judge in which bias or prejudice for or against the witnesses and accused is eliminated. The

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[15]. https://indiankanoon.org/doc/143288964/, accessed on 10.07.2022.
[16]. *Ibid*.
[17]. (1997) 8 SCC 386.
[18]. Crl. Appeal No. 446-449 of 2004.

Supreme Court in the case of ***R. K. Anand v. Delhi High Court*** [19] observed that media should not act as an agency for the court.

In another important case, ***Maria Monica Susairaj v. State of Maharastra,***[20] Bombay High Court criticized the trend of media trials as it affects the dignity and privacy of an individual. In this case petitioner, a lady was co-accused in a murder case. Later she made a confessional statement before Judicial Magistrate. The contents of the confessional statement were published in various newspapers, some of which were true and some were false.[21] The High Court while deciding the bail application of the petitioner, among other things, criticized the irresponsible behaviour of the media. The Court observed that, "in a democratic society the public must have access to information." There can be no manner of doubt that, for "investigative journalism" misdeeds and mischief committed in the corridors of power would never see the light of the day. Over a period of time it is now proved that "investigative journalism" is a very valuable and inseparable facet of the freedom of press… It is only and only a "responsible press" which can claim not only freedom but also immunity from being compelled to divulge the source of its information. In our view, it will be too risky to permit the media to have a wide and sweeping pre-trial publicity of any case, whether civil or criminal, virtually developing 'a trial by Court' into 'a trial by media', especially on the basis of "undisclosed sources of information." [22] The Court further held the investigating agency is bound to take steps to clarify the incorrect reporting of a confessional statement of an accused by issuing appropriate clarifications promptly, especially when, on factually incorrect allegations, it results into character assassination of an accused, which, in law, is to be presumed innocent till on full-fledged trial is found guilty. [23]

In ***SidharthaVashisht @ Manu Sharma v. State (NCT of Delhi)*** [24] case, Supreme Court criticized the trial by media and observed, "every effort should be made by print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible." [25]

In ***R. K. Anand v. Delhi High Court*** [26] the Apex Court said that creating a widespread perception of guilt, regardless of any verdict in a court of law, by television and newspaper coverage, of a person is most unfair.

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[19]. (2009) 8 SCC 106.
[20]. 2009 Cr.L.J. Bombay 2075.
[21]. *Id*, at PP. 2076-77.
[22]. *Id*, at 2085.
[23]. *Ibid.*
[24]. AIR 2010 SC 2352.
[25]. *Id*, at 2430.
[26]. (2009) 8 SCC 106.

In the famous case of ***Shreya Singhal v. Union of India,*** [27] the Supreme Court de-constructed the essential elements of right to free speech and expression. Discussion, advocacy and incitement are fundamental in understanding this concept. Discussion or even advocacy of a cause, however unpopular, should be allowed but when such discussion or advocacy leads to incitement then it should be restrained by law. Therefore, to transpose this understanding on the issue at hand, it can be stated that when discussion or advocacy in an investigation is limited to ensuring that a free, fair and transparent investigation and trial occurs, it is acceptable. When such discussion or advocacy leads to incitement to conduct a parallel unsupervised and unregulated media trial then it is a fit case for being sanctioned under law.

The bench of Bombay High Court [28] consisting of Chief Justice Dipankar Datta and Justice GS Kulkarni dealt with the question of media trial by merging various petitions. Since the unnatural death of an actor, namely, Sushant Singh Rajpoot, on June 14, 2020, 5 (five) Public Interest Litigations came before the Court seeking multifarious relief. The petitioners urge that the electronic media, in derogation of their legitimate rights, are broadcasting irresponsible and unethical news. Such news is also direct interference in the investigation undertaken by the various investigating agencies. The petitioners contended that some television channels have televised interviews of the material witnesses, which is like cross-examination. Further, petitioners said that media have taken upon themselves the role of the investigating agencies, prosecutors and adjudicators. The reliefs claimed, inter-alia, was for issuance of necessary directions to the media channels for postponement of media trial regarding the unnatural death of the actor. The Court observed that trial by media obstructs the fair probe in a criminal case. The Court also held that the trial by media in case of Rajput's death hindered the administration of justice. It is also said by the Court that guidelines issued by the higher courts for media regarding reporting of cases of death and suicide [29] and the guidelines, made by the Press Council of India, [30] are applicable to media. According to the Court, media should avoid interviews with witnesses, reconstructing crime scenes, leaking sensitive/ confidential information while covering a sensitive case.

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[27]. (2015) 5 SCC 1.

[28].https://www.livelaw.in/pdf_upload/bombay-high-court-judgement-in-ssr-media-trial-387625.pdf, accessed on 14.04.2022.

[29].In this case the Bombay High Court also said that The duty of the press/media to have news items printed/telecast based on true and correct version relating to incidents worth reporting accurately and without any distortion/embellishment as well as without taking sides.

[30].The Press Council of India has issued the guidelines to the Press in the name of 'Norms of Journalistic Conduct' Eds.2010, 2018, 2019 and 2020, which includes the ethics related to the Accuracy and Fairness; Pre-Publication Verification; Caution against defamatory writings; Right to Privacy; Caution against Identification while reporting crime involving rape/ abduction or kidnap of women/ females or sexual assault on children etc.
The Press Council of India, in a release dated September 13, 2019, has adopted guidelines on reporting on suicides, based on the WHO guidelines. It states that media, while reporting the cases of suicide, must not use language which sensationalizes etc.

In the latest case ***Rhea Chakraborty v. State of Bihar*** [31] the Court said that when allegations and counter allegation are being levelled on each other, everyone along with media has taken the liberty to make their own free comments, pertaining to a sensitive case, is like a trial. Such a tendency will result in delay in investigation and interference in the justice administration.[32]

In another latest case, ***Venkatesh @ Chandra v State of Karnataka***[33] the bench consisting of Justices, UU Lalit and PS Narashimha, observed that debates and discussions held on TV Channels on the matters which are under the domain of Criminal Courts would amount to direct invasion in the justice delivery system. The criminal matters are to be decided on the conclusive piece of evidence by the competent court and not by the TV Channels. In this case the court was considering a criminal appeal under which the accused were convicted under Section 394 of IPC. The main evidence on which the conviction had been based was a DVD. It contains a statement in the form of confession to a police officer. The court further noticed that the said statement on DVD recorded by the Investigating Agency was played and published in a program "Putta Mutta" by Udaya TV. The Court held that permitting such electronic evidence to be played by private media is dereliction of duty and direct interference with the administration of justice. All the matters relating to crime happen to be conclusive piece of evidence shall be dealt by the court only. [34]

Conclusion and Suggestions

From the above analysis it is clear that the problem with 'media trials' is only the way of facts presentation. It is the job of investigative journalism to bring any fact without prejudice before the public and it has got this right in India. Public can make any opinion on the basis of these facts presented by the media and the media is not responsible for this. But when the media presents misinformation/ incomplete facts/ own-version facts or agenda driven debate, that someone/ accused be proven guilty or innocent, then the problem arises. In this way, the media enters, transgressing its boundaries, into the jurisdiction of criminal administration.

No civilized legal system will permit to any entity to interfere with the justice delivery system. In fact, Media trial is posing a problem to the justice delivery system in India. It is ironic that a sensitive issue like media trial goes unnoticed by the legislature and whatever is there in the direction of upholding the sanctity of media has been done by the courts. The courts have said in many of its decisions that media trial by misinformation and agenda driven debate is proving to be harmful to the health of democracy. Many directions are also given by the various constitutional courts regarding this. However, it is not practically possible for the constitutional Courts to take cognizance in each

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[31]. Crl. No. 225 of 2020 SC.

[32]. *Id*, para 39.

[33]. 2022 LiveLaw (SC) 387 available at https://www.livelaw.in/top-stories/supreme-court-tv-channels-discussions-crime-criminal-justice-venkatesh-chandra-vs-state-of-karnataka-2022-livelaw-sc-387-197027, accessed on 21.4.2022.

[34]. *Ibid*.

and every case of media trial. It is the duty of the state to take action against the media houses.

Now what is required is the effective implementation of those rules and regulations, which have been issued by the various constitutional Courts and Press Council of India. Firstly, the said directions should be followed strictly by the media itself. If such cases come to the fore, in which the media has presented the facts, in the form of its own version/ false/ incomplete and that's why the public has accepted someone guilty or innocent, and the decision of the court comes to the contrary, then the media should also be blamed and action (criminal/ civil as the case may be) should be taken under Indian Penal Code, 1860, such as, defamation, compensation to the victim etc.

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Injunctional Remedies in the Context of Copyright Law – An Indian Perspective

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Abstract

The overriding purpose of injunctive relief is to ensure that IPR infringements cease as soon as possible. However, necessary guarantees must be in place to safeguard the rights of all parties. The Copyright Act specifically authorizes the use of injunctions and Courts have routinely awarded them, both in the form of preliminary injunctions during the pendency of the case or as permanent injunctions after a finding of infringement. The paper examines the remedy of injunction available in the context of both traditional forms of infringement as well as in the context of the digital medium.

Key Words: Interlocutory injunction, Discretionary relief, Damages, Intermediary

Introduction

There is no right without a remedy, more so in the field of copyright protection where the efficacy of the protection is directly dependent on the efficacy of the remedies available. These remedies are available to a copyright owner. The expression 'owner of copyright' includes in addition to the original owner (1) an exclusive licensee and (ii) in case of an anonymous or pseudonymous work, the publisher of the work until the identity of the author is disclosed publicly [1] (iii) a person deriving title from the original owner under a valid assignment[2] or a bequest.[3]

The remedies available for copyright infringement can be divided into three classes:

a) Civil remedies:
b) Criminal remedies; and
c) Administrative remedies

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1 Section 54 Copyright Act, 1957
2 Ibid., Section 18(2).
3 Ibid., Section 20.

The civil remedies can be further divided into two groups:

i) Injunctional remedies
ii) Monetary remedies

In this paper, the remedy of injunction available in cases of copyright infringement shall be analysed.

Temporary injunction: A temporary injunction is merely provisional in nature and does not conclude a right; its effect and object is merely to preserve the property in dispute in status quo, until the hearing or further order, or to prevent future injury, leaving matters as far as possible in status quo, until the suit to all its bearing can be heard and determined.[4] Usually, the prayer for grant of an interlocutory injunction is made at a stage when the existence of the legal right asserted by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. The court, at this stage, acts on certain well settled principles of administration of this form of interlocutory remedy which is both temporary and discretionary.[5]

…The Court will exercise its discretion in favour of the applicant only in strong cases. The plaintiff must make out a prima facie case in support of his application for interim injunction and must satisfy the court that his legal right has been infringed and in all probability will succeed ultimately in the action. This does not mean, however, that the court should examine in detail the facts of the case and anticipate or prejudice the verdict which might be pronounced after hearing of the suit or that the plaintiff should make out a case which would entitle him at all events to relief at the hearing.[6]

Interlocutory injunction - Position in India

In India, the Copyright Act 1957 expressly provides the remedy of interlocutory injunction against the infringement of copyright.[7] This is granted under Order XXXIX, Rule 1 and 2 of the Civil Procedure Code.

In *Penguin Books Ltd. England v. M/s India Book Distributors*,[8] the Court made the following observation:

> "As most infringements of copyrights consist of a continuous process of successive infringing acts such as importation of infringing copies, as in this case, the most important remedy and in many cases the only effective one is injunction. …. In actions for infringement of copyright, damages are often not an adequate remedy since there are difficulties in both ascertaining and quantifying such damage as injury to the

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[4] Sir J.G.Woodroffe, Salil, K. R. Chowdhary,*et.al*. (eds.),"*The Law Relating to Injunctions in India* " 16(S.C.Sarkar, Kolkatta 2 edn.,1992).
[5] *Wander Ltd.v.Antox India P. ltd*[(1990) Supp SCC 726]
[6] *K.H. Mohammad Aboobacker v. Nanikram Maher Chand another* (874-75) 1957 (11) Mad LJ. 573.
[7] Section 55(1).
[8] AIR 1985 Del 29.

plaintiff's property, business and goodwill".[9]

The object of the interlocutory injunction ".....is to protect the plaintiff against injury by violation of his rights for which he could not adequately be compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial. The need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the balance of convenience lies.... The interlocutory remedy, is intended to preserve in status quo the rights of parties which may appear on a prima facie case. The Court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case, considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted".[10]

In granting or not granting an interim injunction, three factors are kept in view, namely the establishment of prima facie case, the balance of convenience between the parties, and whether if the interim injunction is not granted, it will cause irreparable injury to the applicants.[11]

To find which way balance of convenience lies, it is the substantial mischief or injury likely to be caused to the party seeking the relief in case of refusal to exercise the discretion which needs to be comparatively assessed with one that may be occasioned to the opposite side if the same is granted. The mere existence of a prima facie case is not enough to justify grant of discretionary relief of temporary injunction unless it is accompanied by balance of convenience in granting such a relief and there is likelihood of an irreparable loss being occasioned in the absence of grant thereof and further that the appellate Court would, normally, be not justified in interfering with the exercise of the discretion by the Court of first instance unless the discretion is shown to have been exercised arbitrarily, capriciously or perversely or by ignoring the settled principle of law regulating grant or refusal of interlocutory injunction.[12]

In a suit for permanent injunction while the Court is considering an interlocutory application, the Court is not called upon to decide the real disputes between the parties. The Court is called upon to see whether the party who has approached the Court has a plausible case and whether there is possibility of such case succeeding at the trial. If that test is satisfied, then it is

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[9] Id. at 38.
[10] Id. at 731.
[11] *Bharat Law House v. Wadhwa& Co. Pvt.Ltd.* AIR 1988 Del 68 at 70.
[12] *Fritco-Lay India and Anr.v. UncleChipps Private Limited* AIR 2000 Delhi 366, *Bharat Law House v. Wadhwa& Co. Pvt. Ltd. and Ors*. AIR 1998 Delhi 68, *Lark Laboratories (India) Limited* v. *Medico Interpharma Limited* 2002 (25) PTC 189(Guj) .

the duty of the Court to see whether the damages, the plaintiff is likely to suffer for the action of the defendants complained of, can be compensated in money and if so whether there is a standard for ascertaining such compensation. If such compensation can be ascertained and afforded in money, then the interlocutory order of injunction should normally be refused. But if, on the other hand, the Court is of the view that such compensation, cannot be ascertained and afforded in money then it is the duty of the Court to see the balance of convenience and inconvenience of the parties. If the balance of convenience is in favour of grant, then the Court shall normally issue an interlocutory order of injunction upon undertaking of the plaintiff to compensate the defendant against whom the order of injunction is passed if, at the trial, it is held that the plaintiff is not entitled to such permanent injunction. On the other hand, if it is found that the balance of convenience is against passing of such order, the Court will normally refuse to pass interlocutory injunction. The aforesaid are broadly the principles on which the Court acts while exercising discretion in deciding an interlocutory application for temporary injunction made in a suit for permanent injunction.[13]

Permanent Injunction

If the plaintiff succeeds at the trial in establishing infringement of copyright, he will normally be entitled to a permanent injunction to restrain future infringements. A permanent injunction is only granted a) when some established legal right has been invaded, and b) when damage has accrued or must necessarily accrue from the act or omission complained of. Proof of actual damage, however, is not necessary but likelihood of damage must be established. There must have been – (a) a material injury to a clear legal right; and (b) damages must not be a sufficient compensation.

The question whether an injunction ought to be granted permanently is one which is determined by reference to the circumstances and state of law existing at the date when the question falls to be determined and the Court's consideration is not confined to those circumstances existing at the date of writ.

An important point to remember is that the injunction will be operative only during the unexpired term of copyright. The reason for this is obvious – once the copyright expires, the work will fall into public domain and copying it will be perfectly legal. An exception to this, it is submitted, would be an injunction for enforcement of moral right such as right to claim authorship. This is because these rights exist independently of the author's copyright.

In circumstances where only part of a work been copied and that part can be separated from the work, injunction will be granted only against the objectionable part. But if such part cannot be separated from the original one, injunction would be granted against the whole work.

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[13] *Gramaphone Company of India Ltd. v. Shanti Film Corporation* AIR 1997 Cal 63 at 74.

Judicial Approach towards Grant of Injunctions in India

In *Super Cassettes Industries ... v. Chanda Cassettes Pvt. Ltd. ...*[14], material facts as set out in the plaint unfolded that the appellant acquired copyright, for consideration, in literary, dramatic, musical works and sound recording of several cinematograph films.

The respondents who were engaged in the business of production, manufacture and sale of sound recordings, etc. were prima facie found to have infringed the appellant's said copyright by making, producing and marketing the sound recordings containing, inter alia, the musical works of the appellant-company without a valid license, consent, permission or assignment. The trial Court while disposing of an application under Order XXXIX Rules 1 & 2 CPC and another application under Order XXXIX Rule 4 CPC, made by appellant and respondent respectively, vacated the ex parte ad interim injunction granted earlier in favor of the appellant. On appeal, the Delhi High Court held that the impugned order having been passed contrary to the settled principles of law was liable to be set aside. The Court observed that it being a case of infringement of copyright, ad interim injunction ought to have been continued pending disposal of the suit, particularly when a dishonest act of piracy was attributed to the respondent.

In *Muthooth Finance Ltd v. The Indian Performing Rights*[15], the Court was able to notice prima facie case which would entitle the plaintiff to have interim injunction pending the suit. Apart from that, balance of convenience was also in favour of the plaintiff. Hence the Division bench upheld the order of the Single Judge granting the injunction asked for.

In *Indian Performing Right Society ... v. Mr. Vishwanathan&Anr*[16] the plaintiff was a non-profit making body established on 23.08.1969 to monitor, protect and enforce the rights, interest and privileges of its members which consisted of authors, composers and publishers of literary and musical works, as well as on behalf of members of other sister societies who were owners of copyright in their literary and musical works.

They alleged that defendants channeled musical and/ or literary works of the plaintiff or those of its sister copyright societies, by way of mechanical devices such as Radio, Cable TV and/or RA. systems within the hotel operated by the defendants without obtaining a license from the plaintiff Society and without paying the requisite royalties, thereby amounting to infringement of the plaintiff society's performing rights in the same.

Holding the defendants guilty, the Court restrained them from infringing the plaintiff's copyright by communicating to the public the plaintiff's repertoire comprising of works of all its members, which it was authorized to administer in India, without obtaining a license from the plaintiff or doing any other act infringing the plaintiff's copyrights. The plaintiff was

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[14] MIPR 2007 (1) 232.
[15] 2010 (42) PTC 752 (Mad).
[16] CS (OS) No.2423/2007 8 November, 2011 HC, Del.

also held entitled for costs and punitive damages to the tune of Rs.1 lac.

In *Indian Performing Right Society ... v. Mr. R. Krishnamurthy &Anr*[17], the Court passed a decree of permanent prohibitory injunction restraining the defendants, from playing of music by live or any other means, without obtaining a license from the plaintiff Society and without paying the requisite royalties, which thereby amounted to infringement of the plaintiff society's copyrights in the same.

In *Indian Performing Right Society ... v. DebashisPatnaik and Ors.*[18] the plaintiff was a non-profit making body established on 23rd August, 1969 to monitor, protect and enforce the rights, interest and privileges of its members which consisted of authors, composers and publishers of literary and musical works, as well as, on behalf of members of other sister societies who were owners of copyright in their literary and musical works.

The plaintiff succeeded in establishing that the defendant continued with its illegal activities of playing music at its hotel premises in violation of the copyright possessed by the plaintiff therein, without a license from the plaintiff and without making payment of the license fee.

The Court held that the defendants persisted in their illegal and mala fide conduct and the plaintiff would be entitled to the injunction prayed for.

In *Sagarika Music Pvt. Ltd. &Ors. v. Dishnet Wireless Ltd. &Ors.*,[19] the Calcutta High Court passed an order of injunction directing the respondent ISPs to indicate to the plaintiff the address of the website owner/operator who was allegedly posting and playing songs in which the plaintiff claimed copyright. The Court also ordered blocking of the website in question. The Court made it clear that the order of blocking should be confined to the website only and should not,otherwise, interfere with internet service.

Later, Indian Music Industry (IMI), the umbrella organisation of the music industry along with Sagarika Music and Phonographic Performance Ltd won a crucial battle in its war against piracy with the Calcutta High Court directing 11 Internet service providers (ISPs) to block illegal music websites. IMI, along with Sagarika Music and Phonographic Performance Ltd had moved the Calcutta High Court earlier in 2012 against 11 leading Indian ISPs. However, the ISPs failed to represent themselves in Court and an ex-parte order was passed directing them to block the websites that illegally allow the downloading of the songs, which result in piracy.[20]

The Madras High Court issued a John Doe order on a suit filed by the city-based Copyright Labs for preventing piracy of Tamil Film *3* and a Telugu movie *Dammu*. The Madras High Court had issued an interim injunction on March 29, 2012 wherein the ISPs including MTNL, BhartiAirtel, Aircel Cellular, Hathway Cable and Datacom, Vodafone India, Idea Cellular, Reliance

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[17] C.S. (OS) No.2422 of 2007, 8 November, 2011 HC Del.
[18] 2007 (34) PTC 201 Del.
[19] GA No. 187 of 2012,CS No. 23 of 2012 HC Cal.
[20] *The Hindustan Times*, March 16 2012.

Communications and TATA Teleservices were directed against allowing infringement of copyright through the communication, duplication, downloading and uploading of content without a proper licence. As many as 26 websites including Daily motion, torrent and piratebay remained inaccessible to users.[21]

However, the Court modified its earlier order and passed interim order granting the interim injunction only in respect a particular URL (universal resource locator) where the infringing content was kept and not in respect of entire website. It also directed that the ISPs be informed about the particulars of URL where the content of the movie was kept and on such receipt of particulars of URL, they (ISPs) take necessary steps to block such URLs within 48 hours .[22]

It is submitted that the modification of its earlier order by the Court is in consonance with the principle of proportionality. It is therefore submitted, that the Courts should order blocking of specific web pages instead of entire websites.

In the context of Internet piracy, it is imperative that an injunction should be available against intermediaries regardless of whether they can be held liable with respect to third party infringement. The non liability of an intermediary by virtue of falling into a safe harbour under Section 52(ii)(b) &Section 52(ii)(c) should not bar the availability of an injunction against such an intermediary if its services are used by a third party to infringe a copyright. Fortunately, such a scenario is already covered by the proviso to Section 55 which provides that

> "*If the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for believing that copyright subsisted in the work, the plaintiff shall not be entitled to any remedy other than an injunction in respect of the infringement and a decree for the whole or part of the profits made by the defendant by the sale of the infringing copies as the Court may in the circumstances deem reasonable*."

In other words, the remedy of injunction is available against an intermediary if its services are used by a third party to infringe a copyright irrespective of its own knowledge or awareness.

Further, perusal of the case law reveals that in a large number of cases the defendants choose not to appear in the Court and decisions are given ex-parte.[23] Therefore, it is submitted that non compliance with an injunction

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[21] VasudhaVenugopal,"Internet users enraged over blocking of file-sharing sites" *The Hindu* (May 19, 2012).

[22] *The Hindu* ,Nov. 18, 2012 Chennai, Tamil Nadu.

[23] *Indian Performing Right Society ... v. Mr. Vishwanathan&Anr* on 8 November, 2011, High Court Of Delhi : New Delhi + CS (OS) No.2423/2007, *Microsoft Corporation v. Deepak Raval* on 16 June, 2006 Equivalent citations: MIPR 2007 (1) 72 *Microsoft Corporation v. Ms. K. Mayuri And Ors*. on 30 April, 2007 Equivalent citations: MIPR 2007 (3) 27, 2007 (35) PTC 415 Del, *Indian Performing Right Society ... v. Mr. R. Krishnamurthy &Anr* on 8 November, 2011 The High Court of Delhi at New Delhi C.S. (OS) No.2422 of 2007

should be treated as a criminal offence under the Act punishablewith fine and ultimately with imprisonment.

Conclusion

In the context of Internet piracy, it is imperative that an injunction should be available against intermediaries regardless of whether they can be held liable with respect to third party infringement. The non liability of an intermediary by virtue of falling into a safe harbour under Section 52(ii)(b) &Section 52(ii)(c should not bar the availability of an injunction against such an intermediary if its services are used by a third party to infringe a copyright. From the foregoing discussion, it is clear that such a scenario is already covered by the proviso to Section 55. In other words, the remedy of injunction is available against an intermediary if its services are used by a third party to infringe a copyright irrespective of its own knowledge or awareness.

It is submitted that the Courts ordering the blocking of entire websites instead of specific webpages fail to maintain the balance between the right to property and right to freedom of speech and expression. Such orders are in violation of the principle of proportionality. It is therefore suggested that Courts should order blocking of specific webpages rather than blocking of entire websites.

Further, perusal of the case law reveals that in a large number of cases the defendants choose not to appear in the Court and decisions are given ex-parte. Therefore, it is submitted that non compliance with an injunction should be treated as a criminal offence under the Act punishable with fine and ultimately with imprisonment.

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Socio-Psycholoical Scenario of Child Rights and POCSOA – An Empirical Analysis of District Srinagar

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Abstract

It takes a community to make a child. The school, parents and the community are all equally responsible in ensuring the safety and well being of a child. At the same time there has been an alarming rise in crimes such as rape, sexual assault and molestation among on children all across the country. This piece of research is intending to address the increasing crimes against children and to devise appropriate support mechanisms (psycho-social, legal and religious support). The study was conducted in Srinagar and both quantitative and qualitative method was adopted to collect the data. Psychosocial support empowers individuals and their communities to tackle emotional reactions to critical events and also creates community cohesion essential. Further, there is a crying need for citizens, the government, the political leadership, civic bodies and other stakeholders to come together and address this on a war footing. Our children are being seriously wronged and our judiciary has not been swift enough to mete out justice, which has only resulted in emboldening the bad elements in our society to take advantage of the situation and attack without any fear.

Key Words: Child right, POCSOA, Society, Legal bodies

Introduction

It takes a community to make a child. The school, parents and the community are all equally responsible in ensuring the safety and well being of a child. At the same time there has been an alarming rise in crimes such as rape, sexual assault and molestation among on children all across the country. This piece of research is intending to address the increasing crimes against children and to devise appropriate support mechanisms (psychosocial, legal and religious support). Psychosocial support empowers individuals and their communities to tackle emotional reactions to critical events and also creates community cohesion essential. According to ***World Health Organization (WHO),*** "child sexual abuse occurs when the child is involved "in sexual activity that he or she does not fully comprehend, is unable to give informed

* SRF, Indian Council of Social Science Research [ICSSR]

consent to, or for which the child is not developmentally prepared and cannot give consent, or that violate the laws or social taboos of society."[***World Health Organization, & International Society for Prevention of Child Abuse and Neglect, (2006)*** Further, the victims go through extreme **physical [**Injury and infection from abusers**], psychological [**body becomes threat sensitized and more vulnerable to stress when faced with subsequent stressors**], social [**higher rates of unstable relationships, divorce, and re-victimization at the hands of intimate partners**] and emotional [**Depression, anxiety, and PTSD responses to childhood sexual abuse.**]** trauma.

The POCSO Act 2012, is a special gender neutral law and its provisions will be attracted whenever a sexual offence is committed against a child (under the age of 18). Punishments under POCSO Act are more stringent than the ones given for similar offences under IPC.

Theoretical framework

The theoretical framework for this research is drawn from, major theories in the field of child sexuality. But mainly it tries to understand the issues using a right based approach with emphasis on rights of the child. Adoption of this sort of theoretical framework has enabled the researcher to include the elements of UNCRC in to the picture. UNCRC is considered as the major corner stone based on which most of the child related laws and policies were framed internationally.

There are various explanations of such deviant behaviors, still none explain all the aspects of this process. Within the specialist literature, biological, psychological and sociological theories have been formulated to mention the onset of deviant sexual fantasies and behavior.

According to attachment theory, humans have an inclination to establish strong emotional bonds with others, and when individuals have some loss or emotional distress, they act out as a result of their loneliness and isolation. The period surrounding pubescence and early adolescence is critical in the development of both sexuality and social competence. Research indicates that there is a relationship between poor quality attachments and sexual offending. It has been found that individuals who sexually abuse children often have not developed the social skills and self-confidence necessary for them to form effective intimate relations with peers. This failure causes frustration in these individuals that may cause them to continue to seek intimacy with under aged partners. (Marshall and Barbaree, 1990)

Biological theorists believe in organic explanations of human behavior. Therefore, when it comes to sexual behavior, these theorists mention that physiological factors, such as hormone levels and chromosomal makeup, have an effect on the behavior. (Marshall &Barbaree, 1990) Androgens, which are male sex hormones, promote sexual arousal, orgasm, and ejaculation, as well as regulate sexuality, aggression, cognition, emotion and personality (Rösler&Witztum, 2000). Researchers have also came up with hypothesized statements that there is a correlation between aggression and high testosterone

levels (Money, 1970). Biological theories are particularly concerned with the role of androgens and androgen-releasing hormones, which are known to be related to physical changes in the male. When males reach puberty, there is a major increase in testosterone levels in the testes. Because sex drive increases dramatically at this time, there is generally believed to be a correlation between testosterone levels and sex drive, with testosterone being the primary biological factor responsible for normal and abnormal sexual behaviour which finally reflects in sexuality (Pirke, Kockott and Dittmar, 1974).

Sexual behavior is explained as a learned condition by behavioral theorists. Marshall et al (1990) presented a theoretical model of sexually deviant behavior that mention how sexually deviant interests may be learned through the same mechanisms by which conventional sexuality is learned.

Review of Literature

In order to understand the problem of child sexual abuse it's important to initially go through the concept of child sexuality. Literature on child sexuality has previously mainly been based on theoretical assumptions on child sexual development and has mostly obtained its material from small case studies which are often based on clinical material. The literature review includes studies which explains how such inappropriate behavior can develop into sexually harmful behavior which can lead to child sexual abuse

Rutter, 1971- children are born with sexual energy and are initially entirely controlled by seeking sexual experiences. Development then progresses through various stages, which at the same time involves adapting to the surrounding world and controlling sexual impulses. If something goes wrong during the various stages, the child's sexuality can stagnate, resulting in deviations in adult sexuality.

Marshall (1989) found that men who sexually abuse children often have not developed the social skills and self confidence necessary for them to form effective intimate relations with peers. This failure causes frustration in these men that may cause them to continue to seek intimacy with under aged partners**.**

Heiman et al, 1998 - Child sexuality has always been an unresolved problem for both parents and professionals all over the world. Irrespective of cultural assumptions, great effort is put into defining the limits of normal sexuality in childhood compared with deviant/problematic behavior. The solutions vary depending both on family norms and the prevailing social and cultural context.

Kaufmann (2016) found that the provision of a structured and protective environment for children through Child Friendly or 'Safe' spaces are frequently the first psychosocial support intervention in an emergency, She highlights that the concept is simple and replicable, and that wide-scale play and recreation activities should be offered as soon as possible.

Review of Protection of Children from Sexual Offenses Act (POCSO November 14, 2012): The act was specifically formulated **to deal with**

offences: child sexual abuse, sexual harassment, child pornography and safeguarding the interest and well-being of children.

Thus, National and international literature says the Child abuse (physical, sexual, emotional) is a significant global problem prevalent in all cultural, ethnic, and income groups. It is a major public health problem which can leave the child with severe long – lasting psychological damage. Abuse may also cause serious injury to the child and may even result in death. Most studies have focused solely on the reasons that lead for the abuse and the consequences of abuse by exploring all the types of child abuse.

The major results of the studies indicate that detection and prevention of childhood abuse deserves attention from Child Protective Services and also interpersonal skills may be beneficial in prevention. There is a need to explore the determinants and perpetration of child sexual abuse in India from an ecological lens. Such researches may be work to work as engine to develop a culturally tailored primary prevention and treatment strategy for CSA victims in India.

Further, India being the signatory of UNCRC therefore the Articles in the report defines the definition of a child, respect towards Child Rights, Protection, Survival, Development and implementation of Child Rights. Most of the Articles are highlighting the protection, Participation, Freedom of expression, and seeking information in order to support all the basic rights of child.

Research Objective

Objective

- To understand the responses and the psychosocial needs of children / vulnerable groups
- To know the levels of awareness of POCSOA
- To identify the psychosocial support at school level
- To analyze the community networks and coping mechanisms
- To suggest action plans for psychological, social, emotional or other intervention and prepare a handbook in order to address the problems at various level

The relevant information was recorded /collected about the topic through **Case Studies, Questionnaire and Focused Group Discussions.** All the mentioned tools were used to elicit core information and views from the respondents. The pilot study was carried out for the field testing to gather more knowledge on the topic. The total 15 % of sample was taken for the field testing to finalize the schedule. All the necessary changes were made to improvisation.

The broad based empirical investigation about the topic was also carried out through secondary source . The purpose of using secondary source was to know the situation in totality and in broader perspective regarding the topic. It also enhanced the qualitative aspect of the report. The study includes a variety of primary and secondary sources. Secondary sources included journals, books, online articles, and reports.

Constraints

- Since the topic was very sensitive, therefore rapport building was quite time consuming.
- Lockdown situation due to the COVID-19 pandemic forced the researchers to revise the proposed methodology which proved quite challenging
- The research study is a sensitive topic and therefore, the majority of respondents were shy and reluctant to talk or discuss openly about it.

Findings of the Study

On 20 November 1989, the revised version was adopted by the UN General Assembly and on 2 September 1990 it entered into force as ***the Convention on the Rights of the Child (The realization of their protection, provision and participation rights)***. Meanwhile, this convention has been ratified by 196 states and is therefore the most universally ratified UN human rights instrument.

The CRC is the first UN treaty ever to guarantee the personal and political rights of children together with their economic, social and cultural rights. It is applicable to all individuals under the age of 18 (*CRC* Article 1) and defines them expressly as holders of rights. The implementation of the *CRC* is the duty of the state parties. The state parties undertake to respect, protect, and fulfill the rights codified in the *CRC*.

Religious background

Islam perceives children as pure individuals free from sins. This standpoint is marked with the provision of special rights for them. Islam acknowledges that there are groups of children who share higher risks factors. However, Islam agreed that every child is vulnerable to experiencing ill-treatment which may come from their parents, their family or their community. Child protection in Islam, therefore, aims at ensuring the life and the healthy growth of children so they can eventually turn into responsible adults. The Islamic perspective on child protection covers two broad areas. They are child protection as the sacred duty of the parent and protection of vulnerable children with greater risk factors as social responsibility of the community.

In our present society most of child abuse occurs inside family settings, and is usually perpetrated by persons close to the child. The Islamic perspective on such matters as child abuse and its protection must also be explored thoroughly.

Child abuse refers to a range of maltreatments towards children. Identifying risk factors of this typical abuse is a difficult task since the definition of the term abuse is dynamic and socially constructed. Hence, what perceived as abusive in one culture is often considered as normal in other cultures. Discussions on the issue of child abuse lead to a growing demand for a cross cultural understanding of the respected term, and it seems to be in accordance with the spirit of Islam as religion and as a way of life. Qur'an and the Hadith, have a set of directions about ideal childrearing. Islam also

promotes the protection of children by providing a comprehensive guidance for the parents about the rights of their children.

Broadly speaking, Islam makes it compulsory for parents to take care of their children from the hellfire as mentioned by God himself in ***Surah at-Tahreemverses six***

> ***Translation: O ye who believe! Ward off from yourselves and your families a Fire whereof the fuel is men and stones, over which are set angels strong, severe, who resist not Allah in that which He commanded them, but do that which they are commanded.***

A child could fall into a more vulnerable position of losing their basic rights due to many factors. Such factors are closely linked to a number of potential risks that may happen to the child in their social environment, even before the child was actually born. Al-Qur'an mentions economic factors several times, as a factor that causes a child loses their basic rights. ***It said in Q. S. al-Isra : 31***

> ***Translation: Slay (massacre) not your children, fearing a fall to poverty, We shall provide for them and for you. Lo! The slaying of them is a great sin. [Q. S. al-Isra : 31]***

Children do not disclose their experiences due to feelings of guilt and shame, bonds of dependence upon the perpetrators and/or their inability to understand the sexual meaning of the abuse. This situation is further aggravated when the perception and attitudes of adults toward children discourages them from expressing their feelings or experiences. In that case children who are sexually abused are even less likely to share their trauma with their parents, teachers or relevant authorities. In an environment where the voices of children are muffled in the web of tradition and culture and children are brought up in a way that they are there is a need for empowering them with a rights based education that empowers, informs and enables them to recognize and report inappropriate behavior

I) <u>Case studies (1)</u>

The present study identify the following cases

Case 1

In our society, placing your child in another's care is a matter of trust, which must not be misplaced lest it may affect the upbringing of the child and consequently affect the whole household. Going to school is a must for children to not just acquaint themselves with academia but come across social situations that bring them out of their supposed shells or confined proximities. Travelling to school via buses, autos, or any public transport should be safe for the child to feel secure and the parents to feel at rest. Unfortunately public transport is a means for predators to take advantage of the crowd that gathers, amidst which they can steal, grope and do other inappropriate things to the children.

A minor girl's (now 8+ years old) mother narrated an incident retelling her horrific experience as a child when the child had travelled in an auto, only to have the driver take advantage of her traveling alone (without a supervisor); he put his hands into her clothes, touching her here and there, which actions

were disturbing enough to shake her, given their repetitive occurrence (she traveled to school by the same auto allotted to her). Moreover, the driver's appearance was such that it couldn't be made out that he'd harbor impulses that would cause him to behave in such a way. As happens in such circumstances, she felt disgusted about the touch and being touched so frequently aroused still more feelings of shame in her which might have been why she kept it from her parents. Her anxiety showed in her reluctance to board autorickshaws caused her repressed fear to come to the fore (it was becoming obvious that something about autos put her off). This led her mother to inquire into the matter, at which question the victim burst into tears and revealed the details of what she'd been undergoing all the while. The incident went unreported, the case unfiled; the mother insisted that no one knew of the assaults her daughter had been subject to, for such a long time.

That such education is not provided to children in our society is fatal to its proper functioning in such matters as evident in the guilt the victim suffers being ignorant of where to lay the blame and if there is any blame to be laid at all. The supervision of parents/guardians doesn't stop at providing for their children but also in seeing to how the world outside their home or comfort zone may cause them harm.

Case 2

A neighborhood ought to be a safe place, one could refer to as one's second home or an alternate shelter, should such a need arise. Again, there is a question of trust and the danger of it's being misplaced. To leave your household or a family member in the care of a neighbor, you should be acquainted with them well enough that there is a certain level of trust involved due to long standing association. Disabled children or adults even need special care as regards their dysfunctionality and the consequent maleficence that they may encounter for their lack of resources. Such people are more prone to being taken advantage of by able bodied people who unfortunately do not see how much worse their criminal attempts become when attempted at disabled people. The mentally retarded are more so the victims of ill-placed intentions for they have a harder time in understanding how good and bad touches are to be distinguished.

As reported by the family members of a 16-year old adolescent girl, a series of gruesome episodes tell of a 65-year old neighbour assaulting a child, whom he beckons for several reasons to his house, and exploited her innocence in several visits, made over the course of 6-months. The child beside being young was also suffering from conditions which rendered her incapable of speech The mother however noticed unusual marks bruises all over her child's body which led to her becoming concerned. She questioned her daughter as to the cause, to which inquiry the child answered by pointing to the neighbour's house. The family, shocked and utterly bewildered took to confronting the neighbour who in turn denied such accusations and in fact returned the favor by claiming that his reputation was being compromised on the basis of a mentally weak child's unreliable statement(s).

The parents/guardians of the child might have acted out on account of the sudden shock they received, when instead they could and should have reported the incident to the police, given the bruises that could confirm the crime. Also the neighbor calling the child to his abode and being able to take advantage of the unguarded and disabled child, shows the child's parents in a negligent light, where they'd let the child be summoned by their old neighbor.

Case 3

Divorces and other reasons which cause families to break sometimes irreparably, leave the members of the affected family scathed. The parents may remarry but the children may likely not be accepted into the household with a new parent. There is usually apathy towards the child from the newly found parent who wouldn't want to accommodate each other. The child wants their parent's love and seeks their attention as shared with the step-parent. This divided care and affection is unlikely to amount to the requirements of the dependent child who feels lacking and may come to adjust to their circumstances to keep the peace or the child may throw tantrums to disturb the household. The mental plight of the child therefore is at stake. Now if this child were exposed to misconduct which secretly creeps into the secure proximities of the child, their health will be all the more compromised.

Narrated by the mother, this story, as real as it is disturbing, is of a girl aged 12 who kept her innocence and the cheerfulness that comes with being a child, until she was exposed to a rather darker side of the world where she had formerly been at such ease. Her parents got divorced in 2007, and it was settled by the court that the mother be given custody of the child. The two (mother and child) moved to a new household, the mother having re-married. Finding the mother of the child absent, the step-father would abuse her. The case didn't come to light until the mother discovered the child's bangle at her bed which evidenced something fishy having occurred about which the child was so upset. They talked about what had happened. The mother confronted her husband about it who deemed those allegations as untrue and retaliated with brute force, also threatening her with divorce. The abused child was brought to the same house that sheltered her abuser, after the much unfruitful argument and the supposed actions that her mother never took; having contemplated the graveness of the crime, she had momentarily considered filing a complaint against her husband (as the IPC and a case under the Protection of Children from Sexual Offences Act (Pocso)would have allowed her). Her reluctance stemmed from the fact that the abuser of her first child was also a father to the other.

Where does this place the child, the mother and the abuser are questions we need to ask ourselves. Beside the fearfulness, the reluctance comes from one's procuring a supposedly secure future for themselves or their kin, all of which safety measures might as well be dangerous.

Case 4

Working women take special care that their children find themselves

caretakers or guardians while they are out working, so they may send them to school early and not have so much time as to inspect the children's development as closely as non-working moms do. Not that they don't pay attention but they're likely to miss out on things that children may hide well.So their children find themselves in grave danger where they undergo many changes that their parents might overlook unintentionally.

Loneliness experienced early in life in childhood when ought to have company is likely to knock one out of normal tendencies because it affects mental and even physiological health which are deprived of their needs. Women widowed soon after their marriages, and not marrying thereafter are prone to feelings of loneliness. War widows are more likely to experience such emotions since their cause for grief comes so immediately or too gradually that it often remains unprocessed and therefore repressed. They may look for a gratification for the fixation thus occured by pursuing unpremeditated or reckless ways to make up for their feelings of solitariness.

A boy aged 4 to 5 years, at a kindergarten, found himself in the care of a caretaker- who would clean after children there. She would rub his private parts while cleaning after him, behaviour which was unlikely to stand out as abnormal given that it was her post to bathe the children. The activity continued quietly and went unreported until the discomfort it caused showed in the boy's demeanour. She would keep him for long intervals, during which time she would indulge him. He started fearing having to go there and complained bitterly. The worried parents discovered that his private parts had become swollen. They confronted the caretaker who denied the accusations outrightly. They went on to report her and had her suspended. They also withdrew their child from the institution.

Case 5

Closed doors are veils behind which all action may ensue quietly and go unnoticed. To be sure, one should know whether or not it is safe to share the roof with outsiders, let alone share the same room. Furthermore, to send one's child to be with the outsider in an enclosed environment, especially when the child is too young and the outsider old enough is fraught with danger.

This is a case of a12 year old village girl whose maternal cousin had come to their house to go to work from there as it was nearer to his workplace. Her father would send her for tution to this cousin who would assault her. This behaviour continued for 2 years. The impact of those recurring incidents made an impression on the girl who developed feelings of utter disgust in her. The happenings were brought into the notice of her aunt who wouldn't report her for fear of being divorced by her husband.

It would have served the aunt well had she confronted her husband and punished the contemptuous behaviour of her nephew but finding herself caught in a choice between her household and her principles, she made the difficult choice seem the only available option. Since the predator went unpunished, the victim alone suffered and paid the price. She had grown

distrustful and cautious of all men and fearful of any intimacy.

Case 6

Being left in the care of her grandparents while her parents stayed away- in Delhi, where they ran a business, a 13 year old child was abused by the 20 year old servant of the house who made her touch his private parts and indulged in other sexual actions with her. This behaviour continued for 2 years or so, eventually becoming pleasurable for both; the offender and the victim, thus developing a psychological response akin to or actually the Stockholm syndrome. After the mis-happenings between the two were discovered, the servant boy was thrown away until what time the girl had grown too attached to him. She missed the servant and hated her grandmother for having done away with him. Her performance at school also got affected. Her parents grew concerned and sent her to see a counselor, whom she confided in.

When she reported the case to the researcher, she was pursuing her graduation. With bitter remembrance and disgust she looked at the man whom she had formerly loved but eventually realized to have been her offender. She looks with disgust at the men folk who take women to be objects, no good for anything but their bodies. She voices feminist concerns such as the objectification of women and their subjugation at the hands of men.

Thus, there is much to infer from the cases discussed above; anyone, regardless their gender, age, social or economic standing, place or birth or residence etc. can fall prey to abuse both physical and psychological. Ignorance of what constitutes inappropriate behaviour deprives one of even the basic understandings that they're being victimized.

Where the youth have little constructive to do, they are prone to taking to immoral behaviour and bad habits. Their idle minds become the devil's workshop. Also, the lack of supervision on part of the parents, render them all the freer to indulge in gratifying their impulses. If not educated properly of the moral principles that must guide them, children are likely to grow into untamed adults who exercise their impulses without any regard for religious or societal parameters.

There is a pressing need to talk about socially held taboos but the awkwardness makes such discussion nigh impossible. If crimes are committed, they must be reported, lest the sufferer suffer more and the offender escape punishment and shame. Traumatic experiences stay with us unless there were any means to purge one-self of them, and one way we could do that is to bring to justice both the offender and the victim and even the onlookers who must be made cautious and conscious of the on goings.

II Field Work

Table 1: Socio- Demographics

Respon-dent	No of Respon-dent	Age group	Gender	Location	Family Strength	Educatio-nal Status	Income Group	Health Status
Children	**40**	8 to 16+	Male (**10**) Female (**30**)	Rural (**10**) Urban (**30**)	3 to 9 (no of children)	**a)** Studying (**25**) **b)** Never been to school (**7**) **c)** Kinder-garten/ pre-schooling (**8**)	4000 to above	**a)** Mentally unfit (**4**) **b)** Physically disable (3) **c)** Healthy (**33**)
	40		**40**	**40**		**40**		**40**

The data has been collected from the children consisting of both males and females which are important from the aspect that the POCSO act is gender-neutral and is applicable to both female as well as male child.

S.No	Response	POCOSA	UNCRC	Good Touch/ Bad Touch	Programme and project for children (GOs/ NGOs)
1	**Yes**	**6 (15%)**	**7 (17 %)**	**11 (27 %)**	**10***
2	**No**	**34**	**33**	**29**	**30**
Total		**40**	**40**	**40**	**40**

This table represents the amount of understanding the respondents have with regards to the special acts, U.N. resolutions and programmes for children to protect them from sexual offences.

Out of 40, only 6 respondents (15%) were aware of the POCSO act. The statute was passed in 2012 and it has been the failure of the state to make the act known to children for their protection, the acts which are considered to be improper and the ones which are offences, and make them aware of the mechanism in place for registering their grievances and ask for help if facing such situation. The most significant is that the 25 respondents are studying at various levels but still does not which acts are to be reported to the parents and authorities.

***Programmes projects in Kashmir respondents mentioned (orphanages, NGOs provide Educational support, relief Organisation, Social welfare)**

Table 3: Secure environment

S. No	Response	Family level	Community level	School level	Societal level (GOs/NGOs)*
1	Yes	31	20	29	7
2	No	09	9	9	27
	No response	-	11	2	6
Total		40	40	40	40

This table represents the responses recorded from the children on the locations where they feel safe and protected. In this table, the option of "no response" was used by the respondents for the first time which shows their anxiety and fear of opening up to the serious questions on sexual nature.

Table 4: support and assistance

S.No	Response	Family level	Community level	School level	Societal level (GOs/ NGOs)*
1	Yes	31	21	9	33
2	No	09	19	21	2
	No response	-		10	5
Total		40	40	40	40

This table denotes the response to the level of support and assistance the respondents got from their family, community, school, etc.

33 respondents found assistance at the societal level which includes NGOs and events organised in the schools and vicinities. Surprisingly this number is higher than at the family level. Because of the nature of such organisations and people affiliated with them understanding the nature and seriousness of the subject are most capable of the situation and can help and assist the children most. Two respondents answered in the negative and said that these organisations did not provide the support or assistance required. Five did not give any response.

Impact of child abuse

The data collected from the respondents signifies that the children who have faced sexual abuse show abnormal behaviour even in their adulthood. They show anti-social behaviour, are afraid of new places and find difficulty in talking to strangers. They may be hostile, quickly lose temper, show violent tendencies and may destroy things. They are aggressive and show intolerance to differences and opposition.

Psychologically, they have poor concentration and inability to focus on the task at hand; their anti-social behaviour results in poor conduct and feeling of uncontrolled emotions like fear, anger and jealousy.

They do not focus on their physical health which results in shabby body shape, obesity, IBS, migraine and their awkward behaviour results in them either talking loudly or in very low tone.

Physiologically, they have abnormal hormonal changes and are more prone of having BP and HB value problems. They also migrate more frequently than most and face problems in settling down.

Legal: The majority of sexual abuse happens in childhood, with incest being the most common form. Sexually abused children in India are often let down by repeated failure of the criminal justice system to redress grievances related to child sexual abuse and the accompanying social ostracism which comes along after the abuse. The instances of child sexual abuse cases not being reported is not unique to India but common to most other Asian countries where individual experiences are ignored so as to protect the family name and honour from shame which comes with sexual abuse.

III Focused Group Discussion

1. Parenthood and child sexual abuse [Parents]

Parents are the biggest stakeholders to the successful prevention of child sexual abuse (CSA). A better understanding of parents' perceptions and practice of CSA is essential for developing and implementing effective parent-involved prevention programs. Therefore, the purpose of this discussion was to explore how and why parents perceive and respond to the CSA problem. Semi-structured interviews were conducted with a sample of 16 parents of preschool- or primary school-aged children in Srinagar, who were purposely selected to be diverse in gender, age, and socioeconomic status. The highlights of the discussions were:

- Awareness on definition of CSA including sexual assault, rape, incest, and the commercial sexual exploitation of children was introduced by the facilitator. It was found that parents lack access to child sexual abuse (CSA) prevention programs.
- Parents shared that CSA risks differed between all children and their own children, between boys and girls, and between poor and non-poor children. They added that perpetrators usually more likely to be familiar rather than strangers.
- Parents also shared their views about the socio-cultural context. They mentioned some overall changes like tuition classes, outside trips, co-education, mobile phones, parent children relationships, working women and dress competition in our society are on rise therefore the social fabric is highly affected.
- Social stigma toward sexuality and CSA affects parents' confidence and evokes shame.

Thus, the majority of parents desire more assistance from experts regarding CSA.

2 Mental health and victims of sexual abused children [mental health experts

Childhood is the most beautiful part of our life. Sexual abuse in childhood can leave scars that can last for a long time. Since many cases are never reported due to stigma and trauma, the victims of CSAtend to feel embarrassed, guilty or ashamed and end up blaming themselves or believe that they deserved to be abused. The mental health experts explainedsuch impact of child abuse during focused group discussion as under:

- **The biggest casualty is trust.** Abuse may increase sense of insecurity and may impair the ability to trust others. This may be particularly difficult if the victim had a close relationship with the abuser.
- In some cases the victim may blame themselves for the abuse, even though it isn't their fault. Such feeling can damage their self-esteem. The victim may generate a lot of negative feelings, which may make it hard to cope with everyday stress. **S**uch incidents may increase the level of anger, anxiety and depression resulting in the abnormal behavior.
- In some case the mind of the victim "separates" itself from painful events to protect. They may have a hard time remembering what happened, feel like the world around them isn't real or feel like they aren't connected to their bodies. It's a common reaction to pain and fear.
- It has been also seen that victim tries to harm themselves, but do not truly intend to end their lives. It may be a way to cope with difficult thoughts or feelings.
- Experiencing CSA does not necessarily mean that the victim will develop a mental illness, but it is one of many risk factors. People who experience childhood sexual abuse may have a higher risk of experiencing anxiety disorders (such as post-traumatic stress disorder,low self-esteem), OCD depression, eating disorders, dissociative disorders and personality disorders.
- Survivors of childhood sexual abuse are at greater risk of developing problems like substance abuse.

Thus it is important to get help if such children are having a hard time coping with past trauma.

3. Law and society in reference to POCSO [lawyers]

POCSO Act remains one of the most important statutes passed by the Indian Parliament for protection of children from abuse and providing stringent and stiffer sentences for commission of any sexual offence against a child. It has undoubtedly improved the outlook on decreasing CSA and has helped numerous victims get justice in a prompt way that would not have been possible earlier.

An expert explains that once a POCSO case is filed, the long-winded proceedings give the accused ample time to try and pressure the victims or

their families to backtrack on their complaints. The situation is even more complicated when the accused is a family member. In the immediakte aftermath of such crimes, the victim continues to live in the same house as the accused - be it a father or a relative and is also emotionally attached to them. In many cases, the mother convinces the child to let it go.

Child rights-based approach cum awareness among teachers and parents

The 1989 UN Convention on the Rights of the Child (CRC), sets out a comprehensive series of rights to which all children are entitled, including children in street situations! The CRC isk9 legally binding on States who have ratified it - and this includes Kyrgyzstan. Kyrgyzstan has therefore committed to taking the necessary legal, administrative and other measures in order to implement the CRC. This could mean changing legislation, training civil servants and professionals, setting up monitoring mechanisms or elaborating new policies.

Definition of a The International Save the Children Alliance has also

Highlights

Teachers were aware about the UNCRC but they were not well equipped with the five umbrella rights of the CRC:

- **the best interests of the child (Art 3.1)**
- **non-discrimination (Art 2)**
- **participation (Art 12)**
- **implementation** (to the maximum extent of available resources) **(Art 4)**
- **the right to life, survival and development (Art 6)**

Major Findings

Violence against children is a multifaceted problem with causes at the individual, close relationship, community and societal levels. Important risk factors are:

Impact at individual level on victim:

- The increased their health risk behaviours associated with violence. Biological (hormonal changes) problems. Punishment to the offender (imprisonment) does nothing for the victim as her or his personality is ruined in terms of low confidence, concentration problems and isolation,
- Children exposed to such experience are more likely to drop out of school, have difficulty finding themselves into economic activities and are at heightened risk for later victimization and/or perpetration of interpersonal and self-directed violence, by which violence against children can affect the next generation.
- victim almost can funnel down or proven to use of alcohol and drugs

Close-relationship level:

- The majority offender is known (relatives, neighbours, associates) resulting into lack of emotional bonding between children and parents or caregivers
- poor parenting practices
- family dysfunction and separation

Community level:

- low social cohesion and transient populations
- easy access to alcohol and firearms
- Inclination towards high concentrations of gangs and illicit drug dealing.

Society level:

- social stigma or counterproductive *(social and gender norms* that create a climate in which violence is normalized)
- absent or inadequate social protection and society's hostile behaviour
- Settings with weak governance and poor law enforcement.

Discussion

Keeping the qualitative and quantities finding in view the following assessment is made:

- Negative family circumstances leads to negative experiences therefore have an impact on a child's vulnerability. Family content (positive relationships with extended family and friends) is must. In case of missing of family support children search love affection outside family thereby may increase their risk factors as far as exposure to child abuse is concerned. Positive factors that contribute to a child's resilience include child attributes like self-esteem and independence, family environment, quality parenthood, and high quality peer relationships and school environment) can help a child's development.
- Vulnerable children (children from broken families, orphans and neglected children) are proven to maltreatment resulting into a range of mental health problems, with post-traumatic stress disorder (PTSD) symptoms, attention deficit hyperactivity disorder, eating disorders, oppositional defiant and conduct disorders, substance abuse, and anxiety, mood, psychotic, and suicidal ideation, adjustment disorders Mental health problems, such as depression and anxiety disorders, have co-relation child abuse and neglect. Such children get a continuous feeling why it happened to me …why me…
- The feeling of re-victimization (experiencing abuse again at another time in their lives / who experience childhood sexual abuse are two to three times more) may affect children in all aspects.
- The impact of sexual behavior / violence can only be understood in context of local norms, customs and taboos.

Conclusion

Preventing and responding to crimes against children requires that efforts be made to systematically address risk and protective factors at all main interrelated levels of risk (individual, relationship, community, society). Further, Research on child maltreatment can provide insights and knowledge that can directly benefit victims of child abuse and their families. Individuals who have been victimized as a result of child maltreatment deserve to have research efforts dedicated to their experience, in the same manner as our society invests in scientific research for victims.

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