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WAR CRIMES VIS-A-VIS ISRAEL PALESTINE WAR

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ABSTRACT

Allegations of war crimes in the decades-long, violent Israel-Palestine conflict have drawn attention from around the world and calls for responsibility. Even though war crimes are widely acknowledged, it is nevertheless difficult to prosecute those who commit them because of political complications and a lack of accountability. In order to address these issues, the essay evaluates the function of international legal institutions, concentrating on the UN Security Council and the International Criminal Court (ICC). Furthermore, it examines the viability, benefits, and drawbacks of using international arbitration to settle war crimes. It also discusses the function of international arbitration in the Israel-Palestine conflict, emphasizing its potential for mediation, the participation of third-party arbitrators, and the possibility of reaching an agreement. The article discusses the potential benefits of international arbitration while acknowledging the debates and objections to this strategy, such as issues with public perception, enforcement, and sovereignty. The paper attempts to provide insights into the viability of international arbitration as a means of resolving the Israel-Palestine conflict and to highlight the pressing need to confront war crimes in the conflict via a thorough research.

Keywords: Israel-Palestine Conflict, War Crimes, International Humanitarian Law, Geneva Conventions, Rome Statute, Gaza Strip

INTRODUCTION

The Israel-Palestine conflict has been a source of constant bloodshed and displacement for several decades. It is intricately entwined with political, cultural, and historical complexities. This complex conflict has its origins in the mid-20th century with the establishment of the State of Israel, which not only signalled the birth of a new nation but also led to the widespread displacement of Palestinians, setting the stage for a long-lasting and deeply ingrained conflict that still exists today. The focal point of conflict is on hotly contested territory, such as the West Bank and Gaza Strip, which have seen frequent clashes punctuated by terrible occurrences. [1]

The unsettling prospect of war crimes has thrown a shadow over the geopolitical landscape throughout the story of this protracted struggle. Charges of violating international humanitarian law, as codified in the Geneva Conventions and the Rome Statute of the International Criminal Court, have emerged with frightening frequency. These accusations include a wide range of heinous acts, from the controversial growth of Israeli settlements in contested territory to indiscriminate attacks on civilian populations.[2] The complicated character of the fight is further highlighted by the diverse nature of these alleged war crimes, which also raise serious questions about the moral behaviour of those engaged. The essential elements of international humanitarian law, proportionality and distinction, are broken when strikes against civilian populations occur arbitrarily. Concurrently,

1 Louis Rene Beres, After the Peace Process: Israel, Palestine, and Regional Nuclear War, 15 DICK. J. INT'l L. 301 (1997)

2 Daniel Benoliel & Ronen Perry, Israel, Palestine, and the ICC, 32 MICH. J. INT'l L. 73 (2010)

the acrimonious encroachment of communities within contested areas not only intensifies territorial conflicts but also poses a significant threat to existing conventions.

Such war crimes are widespread and have a detrimental effect not just on the direct victims but also on the longer-term chances for stability in the region. The ongoing war exacerbates human suffering, since the problems encountered by impacted communities are made more intense by the flagrant contempt for established legal structures. Furthermore, committing these crimes feeds hostilities and deepens the rifts that already exist between the opposing groups. In the grand scheme of things, the likelihood of a peaceful conclusion is severely hampered by the frequency of war crimes.[3] The deterioration of confidence and the intensification of animosity caused by these violations make efforts at diplomatic diplomacy and conflict settlement more challenging. The complex web of geopolitical tensions that these transgressions weave, in addition to the immediate humanitarian crises they cause, provide a formidable challenge to the international community.

In addition to the immediate humanitarian consequences, holding war criminals accountable is essential to establishing justice, promoting healing, and eventually laying the groundwork for a long-lasting peace. In addition to fostering a climate of impunity, ignoring these flagrant violations erodes the legitimacy of international legal structures that are intended to deter and punish such crimes. [4]

Historical Context of Israel-Palestine Conflict

The State of Israel was officially created in 1948, which is when the conflict between Israel and Palestine first arose in the middle of the 20th century. The early and mid-20th century saw the emergence of several intricate historical, political, and sociocultural elements that culminated in this momentous event. The United Nations' adoption of the partition plan, which set the stage for the establishment of the State of Israel, is at the centre of the dispute. The goal of the partition plan was to divide the country into Jewish and Arab nations, with Jerusalem being governed by an international body. [5] Jewish communities across the world celebrated and rejoiced when David Ben-Gurion declared the State of Israel after receiving the UN's approval, as it signified the fulfilment of long-cherished dreams for a state.

But the creation of Israel also signalled the start of long-standing hostilities with the Arab nations and the Palestinian people. Many Arab countries fiercely opposed the land divide, seeing it as an injustice against the Arab populace and a violation of Palestinian rights. The UN partition proposal was rejected by the Arab leaders, who considered Israel's birth as an illegal act that upset the region's pre-existing political and demographic equilibrium. With the creation of the State of Israel, the generations-long residents of the area, the Palestinian community, experienced a deep feeling of loss and displacement. This feeling led to a generalized resistance movement against what they saw as the appropriation of their land and the rejection of their right to self-government. [6] Thus, the war grew firmly entrenched in the opposing national ambitions of both Israelis and Palestinians, and was further compounded by geopolitical factors, religious ties, and historical grudges.

The 1948 creation of the State of Israel had a significant impact on the Palestinian people, leading to an extensive and long-lasting humanitarian disaster called the Nakba, which translates to "catastrophe" in Arabic. Hundreds of thousands of Palestinians were forcibly uprooted from their ancestral homes because of this historic event, either as a result of forceful tactics or as a result of voluntary decisions inspired by the then-escalating tensions. A tragic period in Palestinian history, the Nakba was marked by the disintegration of social and familial relationships, the loss of livelihoods, and the upheaval of whole communities. The forced displacement of Palestinians resulted to a widespread exodus, as individuals and families sought safety in surrounding Arab nations, further altering the geopolitical landscape of the area. In addition to ruining the lives of those who

3 Asem Khalil, Israel, Palestine and International Law, 2 MISKOLC J. INT'l L. 20 (2005)

4 JillAllison Weiner, *Israel, Palestine, and the Oslo Accords,* 23 FORDHAM INT'l L.J. 230 (1999)

5 Reem Salahi, *Israel's War Crimes: A First Hand Account of Israel's Attacks on Palestinian Civilians and Civilian Infrastructure,* 36 RUTGERS L. REC. 201 (2009)

6 Eugene Kontorovich, I*srael/Palestine - The ICC's Uncharted Territory*, 11 J. INT'l CRIM. JUST. 979 (2013)

were immediately impacted, this forced relocation set the stage for a lengthy and deeply entrenched conflict that still has an impact today. [7] The Nakba had immediate and significant humanitarian effects. Palestinians who were displaced lived in appalling conditions, without access to essential supplies, and had to overcome the difficulties of making a fresh start in foreign lands. As Palestinians fleeing political unrest and violence in the post-1948 Middle East attempted to reconstruct their lives, the world witnessed the beginning of a massive and long-lasting refugee crisis.

Tensions between Israelis and Palestinians grew following the Nakba, which paved the way for a protracted and intricate struggle. Decades of bloodshed and animosity have been perpetuated by the Palestinian people's deep-seated grievances stemming from their forced displacement and dispossession. As a result, the Nakba symbolized not only a turning moment in history but also the ongoing suffering and unsolved situation of the Palestinian refugees, highlighting the complex issues that continue to influence the Israeli-Palestinian conflict.

The geopolitical war between Israel and Palestine is a long-lasting and intricate battle that has been profoundly impacted by several critical events that have permanently altered its course. The 1967 Six-Day War, from which Israel withdrew and went on to conquer the West Bank, Gaza Strip, and East Jerusalem, was one of the pivotal moments.[8] In addition to changing the boundaries, this military victory created the conditions for ongoing hostilities between Israelis and Palestinians. The construction of Israeli colonies in the occupied territory was a major factor in the escalation of hostilities. Intensifying the already tense ties between the two sides, this purposeful policy became a significant source of controversy and further complicated the geopolitical picture. These settlements' existence and growth have been a continual source of conflict and have greatly fueled the long-lasting hostility between Israelis and Palestinians.

The Oslo Accords, a set of accords between Israel and the Palestine Liberation Organization (PLO), offered some optimism for a resolution in the 1990s. These agreements sought to resolve concerns about borders, security, and Jerusalem's status as well as to set the stage for further discussions. But there were many obstacles in the way of carrying out these accords, and the promised peace never materialized. With the 2000's Camp David Summit, there was another attempt at reconciliation at the turn of the century. The summit, which was facilitated by the US, aimed to discuss important topics such as Jerusalem's status, the creation of a Palestinian state, and the right of return for Palestinian refugees. The fact that there was no comprehensive deal at the end of the high-profile conference underscores how intricate and entrenched the Israel-Palestine problem is. [9]

The main causes of violence continue to be the fight for independence, border conflicts, and Jerusalem's status dispute. The cited historical occurrences, from the Six-Day War to the Camp David Summit and the Oslo Accords, serve as essential benchmarks for comprehending the many undertones of this ongoing struggle. It is crucial to learn about the nuances of the history of these events in order to understand the complex dynamics that continue to define the Israel-Palestine conflict.

What constitutes a War Crime and how it is classified?

International Humanitarian Law (IHL)

A vital legal framework that strictly governs the conduct of parties involved in armed conflicts, including the intricate and protracted Israel-Palestine conflict, is provided by IHL, sometimes known as the Law of Armed Conflict. In an effort to lessen the effects of armed conflicts on both civilians and combatants who have ceased hostilities, this body of legislation is painstakingly crafted to strike a precise balance between military need and basic human principles.

Fundamentally, IHL lays forth a series of guidelines intended to protect the rights and welfare of everyone impacted by armed conflicts. These

7 *Ibid*

8 Kenneth Manusama, *Lawfare in the Conflict between Israel and Palestine*, 5 AMSTERDAM L.F. 121 (2013)

9 Louis Rene Beres, *After the Scud Attacks: Israel, "Palestine," and Anticipatory Self-Defense*, 6 EMORY INT'L REV. 71 (1992)

ideas are especially important when there is a possibility that the inherent cruelty of war may cause great suffering for a large number of people. IHL aims to place legal restrictions on the behaviour of the parties involved in the Israel-Palestine conflict, preserving some semblance of humanity in the midst of chaos. One of the cornerstone notions under IHL is the prohibition of war crimes. These include flagrant transgressions of the law, such the intentional targeting of civilians, the use of torture, and the employment of forbidden weaponry. These serious violations are held accountable and scrutinized by international law as basic violations of IHL's tenets.

The cornerstones of IHL are distinction, proportionality, and humane treatment. These principles provide unambiguous standards for the proper behaviour of armed forces in times of war. The concept of distinction necessitates a clear demarcation between combatants and civilians, attempting to safeguard non-combatants from the direct consequences of warfare. In order to minimize excessive and needless injury, proportionality demands that the use of force be appropriate with the military objective. Humane treatment emphasizes the treatment of prisoners of war and other detainees with such dignity and respect that it requires parties to a conflict to protect such rights and dignity. [10]

Together, these guidelines provide the parameters that the armed services must work within to reduce the number of people who die in combat. Following these guidelines becomes crucial in the context of the Israel-Palestine conflict to promote a more compassionate and equitable atmosphere despite the difficulties and complexity of the ongoing conflicts. It emphasizes the need to preserve human dignity even in times of war and the worldwide commitment to reducing the effects of armed conflicts on people that are already at risk.

Geneva Convention

A collection of four accords carefully devised to assure the protection and well-being of those not actively engaged in hostilities, including injured troops and civilians who are no longer engaging in armed conflicts, the Geneva Conventions are widely recognized as the cornerstone of international humanitarian law. The international community's dedication to reducing the suffering caused by war and creating a legal framework for the conduct of armed conflicts is demonstrated by these treaties.

The Geneva Conventions provide a wide variety of rules that address different humanitarian issues during times of conflict. A crucial aspect pertains to the definition of the rights granted to prisoners of war, which include safeguarding them from cruel treatment and guaranteeing that they receive humane and courteous treatment. To preserve people's dignity even in the midst of armed conflict, the Conventions place a strong emphasis on the humane treatment of those under the control of belligerent parties. [11]

Moreover, during armed situations, the Conventions uphold the concept of medical neutrality, which emphasizes the inviolability of medical personnel, facilities, and transportation. This fundamental component of IHL guarantees the impartial performance of medical professionals' duties, allowing them to treat the ill and injured without fear of violence or other disruptions. The Conventions protect medical services, which helps to preserve life and lessen suffering among people in war areas.

Apart from providing security for medical professionals and prisoners of war, the Geneva Conventions provide certain protections for civilians living in occupied regions. By forbidding intentional assaults on non-combatants and defining standards for the treatment of civilians in regions under military occupation, these rules seek to protect civilians from the worst effects of conflicts. [12] The Conventions emphasize that to reduce civilian deaths and safeguard their fundamental rights, belligerent parties must make a distinction between military goals and civilian populations.

The Conventions also explicitly condemn war crimes, covering acts such as purposeful assaults on people, the employment of illegal means of warfare, and the maltreatment of detainees. These actions are seen as grave transgressions of the values included

10 Bruce Zagaris & Michael Plachta, Crimes against Humanity and War Crimes, 39 IELR 405 (2023)

11 Charuprita G., *Biopiracy of Genetic Resources - Role of the Three-Tier Structure in Regulating Access - Potential Conflicts between the New System and IPR International Instruments*, 2 INDIAN J. INTEGRATED RSCH. L. 1 (2022)

12 *Ibid*

in the Geneva Conventions, which offer a framework for holding offenders accountable.

Furthermore, the Geneva Conventions were crucial in the creation of the ICC, a historic organization entrusted with the prosecution of those accountable for the gravest transgressions of international humanitarian law, including war crimes. In the wake of armed conflicts, the Conventions help to promote responsibility and justice by giving offenders a legal foundation on which to be prosecuted.

Rome Statute of the International Criminal Court

Adopted in 1998, the Rome Statute is a key piece of international law that paved the way for the creation of the International Criminal Court. This court exists as a permanent venue specifically designed to bring criminal charges against those accountable for the most serious transnational crimes. These transnational crimes cover a wide range, with one of its main focus areas being war crimes. War crimes are under the ambit of the Rome Statute and include grave breaches of the Geneva Conventions. Acts like purposeful targeting of non-combatants, wilful death, and torture are examples of such violations, albeit they are not the only ones. Based on the fundamental principle of complementarity, the ICC only steps in when national legal systems show a lack of motivation or capacity to bring serious criminal charges against people for these heinous crimes.

The UN Security Council, nations referral circumstances, or the ICC Prosecutor's independent initiation are the three main ways that scenarios that fall under the jurisdiction of the ICC might be brought before the court. This multimodal strategy demonstrates the Court's dedication to guaranteeing worldwide responsibility for the gravest crimes. Within the framework of the Israel-Palestine conflict, a painful example of the ICC's function becomes apparent. [13] The Court is prepared to deal with war crimes perpetrated in this intricate and long-lasting geopolitical environment. The ICC's involvement is based upon circumstances being submitted by interested governments, mandates from the UN Security Council, or the proactive introduction by the ICC Prosecutor. This emphasizes how important the ICC is as an impartial body charged with making people answerable for war crimes committed in the volatile Israel-Palestine conflict theatre.

War Crimes in the Israel-Palestine Conflict

Allegations of grave war crimes have tarnished the Israel-Palestine conflict, garnering attention and criticism from throughout the world. These claimed offenses cover a wide spectrum of behaviours that have contributed to the cycle of violence and misery in human society.

Allegations of Israeli soldiers carrying out excessive and indiscriminate assaults define the continuing debate surrounding military operations in the Gaza Strip. Due to the large number of civilian deaths that have ensued, there are now serious questions regarding the war's adherence to its core tenets, especially those pertaining to proportionality and the important difference between fighters and non-combatants. These worries are heightened by the use of heavy artillery and airstrikes in crowded locations, which calls into question the morality of military operations.

The controversial growth of Israeli settlements in the West Bank, a move that is generally considered to be unlawful under international law, has become a central focus point in this lengthy war. Not only are these settlements seen as provocative, but they are also thought to be blatant breaches of the Fourth Geneva Convention, which makes them war crimes. Tensions are heightened and the conflict's enduring depth is maintained by the founding and ongoing expansion of these settlements, which greatly contribute to the uprooting of Palestinian villages. [14]

In this backdrop, there have been ongoing claims about the intentional targeting of civilians in military actions. Accusations cover techniques that apparently ignore civilian life, including the purposeful destruction of residential structures and essential infrastructure. The question of purpose is central to the dispute at hand, with arguments focusing

13 A Jurisprudential Assessment & Louis Rene Beres, *Israel, Iran, and Nuclear War*, 1 UCLA J. INT'l L. & FOREIGN AFF. 65 (1996)

14 Thomas Obel Hansen, *Opportunities and Challenges Seeking Accountability for War Crimes in Palestine under the International Criminal Court's Complementarity Regime*, 9 NOTRE DAME J. INT'l COMP. L. 1 (2019)

on whether these acts are deliberate or accidental byproducts of larger military plans. The repercussions of such activities can have far-reaching effects on the diplomatic and humanitarian fronts, which emphasizes the urgent need for comprehensive and unbiased investigations to ascertain the real nature of these charges.

UN Inquiries

Acknowledging the need to examine the conduct of parties involved in wars, the United Nations has launched extensive inquiries to assess their behaviour. Several UN organizations and bodies actively participate in this comprehensive approach, with the Human Rights Council leading the way in initiating investigations. These investigations, painstakingly carried out by specialist teams, focus on certain events that have happened within the framework of the conflict. Finding out if the parties concerned are adhering to recognized international legal frameworks is the main goal. These frameworks cover a wide range of standards, such as human rights principles and humanitarian legislation, among others. [15]

Thoroughly and impartially carried out, the investigations are an essential tool for illuminating the intricacies of the conflict. They seek to ascertain the facts about purported transgressions of international law, provide a factual foundation for evaluating the concerned parties' behaviour. The United Nations uses these investigations to try and impartially record incidents, examine trends, and assign responsibility where violations of international law are found. The conclusions drawn from these studies are of the utmost importance since they not only aid in the formation of a well-informed knowledge of the war but also have a significant impact on how the world community views the circumstances. The reports produced by UN bodies and agencies are considered reliable sources that offer valuable perspectives into the dynamics of the conflict and provide a basis for well-informed decision-making at the international level.

Moreover, the implications of these discoveries go beyond simple reporting. They have a significant impact on the responses and following actions taken by the global community. Diplomatic initiatives, sanctions, and other actions intended to promote respect to international norms and support a settlement to the dispute are frequently based on the findings and recommendations obtained from these probes.

Human Rights Organizations

Several significant human rights groups, including globally renowned NGOs like Amnesty International and Human Rights Watch, have been relentlessly involved in the systematic monitoring and documenting of suspected war crimes within the framework of the Israel-Palestine conflict. These groups make great attempts to gather a multitude of evidence, using techniques including careful data analysis, in-depth investigations, and lengthy witness and impacted person interviews. [16]

These groups investigate many facets of the war in an effort to learn the truth. They look at occurrences, patterns, and trends that could violate human rights laws and international humanitarian law. The reports that these groups produce as a consequence offer intricate and nuanced insights into the intricate network of human rights issues that arise from the war. By painstakingly recording transgressions, they provide a substantial contribution to the worldwide comprehension of the effects of wars on civilians, drawing attention to the predicament of impacted communities and throwing light on possible transgressions of international law.

Human rights groups' reports are essential for promoting worldwide discussion on the Israel-Palestine conflict in addition to providing an accurate account of events. These records, which provide a well-supported description of alleged breaches and atrocities, are essential in forming the narrative around the conflict. These studies' thoroughness and reliability frequently attract attention from across the world, bringing attention to the difficulties that people in the region confront when it comes to their human rights.

Furthermore, the efforts of groups like Human Rights Watch and Amnesty International act as a spur for justice and responsibility. The painstakingly gathered data and comprehensive reports serve as

15 *Supra* note 13

16 *Supra* note 10

a basis for court cases and investigations, impacting the rulings of global justice organizations. These papers are also consulted by international leaders and policymakers when developing their plans of action and reactions to the Israel-Palestine conflict. The studies help to shape international initiatives, lobbying campaigns, and diplomatic attempts to address the conflict's human rights implications.

Challenges in Prosecuting War Crimes

An intricate web of difficulties surrounds war crimes in the Israel-Palestine conflict, making it difficult to successfully prosecute those guilty. These obstacles undermine the quest of justice and accountability and range from structural problems to political concerns.

Lack of Accountability

One major and urgent difficulty in the field of international law and human rights is the pervasive problem of inadequate accountability, particularly with regard to claims of war crimes perpetrated by individuals or organizations. This widespread absence of accountability is a complicated issue shaped by a number of factors, such as the lack of strong domestic legal frameworks, inadequate enforcement mechanisms, and a discernible reluctance on the part of relevant authorities to act decisively in holding those accused of such horrific acts accountable.

A significant aspect that contributes to the lack of accountability is the inadequate nature of domestic legal frameworks in many areas. Many nations lack thorough legal frameworks that adequately identify and deal with war crimes, leaving a legal vacuum that absolves offenders of accountability. This legal void not only makes it more difficult to pursue justice, but it also creates an atmosphere that is conducive to impunity. Moreover, the issue is made worse by the inadequate application of current legal measures. Even with strong legal frameworks in place, there are sometimes insufficient or ineffective measures in place to guarantee compliance and hold offenders responsible. This lack of enforcement may be the consequence of institutional flaws, political meddling, or corruption, which lets those who are charged with war crimes escape justice.

The problem is further exacerbated by the pertinent authorities' unwillingness to act decisively. Sometimes, those in positions of authority are reluctant to pursue members in their own ranks for political or military reasons, which protects the accused from justice. This resistance not only impedes the pursuit of justice but also feeds the cycle of violence, giving offenders the impression that their actions are unpunished. [17]

These elements contribute to the continuation of a culture of impunity, in which those who carry out war crimes largely escape punishment. This not only makes it extremely difficult to bring the victims' families to justice, but it also works against the larger objectives of advancing global peace and security. To effectively tackle this complex issue, there has to be a deliberate attempt to fortify national legal systems, improve enforcement protocols, and cultivate a culture of responsibility that surpasses political and military associations.

Political Impediments

A major factor hindering the prosecution of war crimes in the intricate dynamics of the Israel-Palestine conflict is political concerns. The drawn-out and deeply ingrained political aspect of this battle fosters a culture of reluctance among all parties involved, making it difficult to pursue real legal measures against those found guilty of war crimes. A complex web of political influences from both the local and international arenas feed this hesitation, which in turn creates a strong obstacle to the opening of unbiased investigations and judicial actions.

Domestically, political ties and interests greatly influence how war crimes are seen. Prioritizing justice over political concerns is difficult for decision-makers since they are frequently caught in complex webs of political alliances. Because authorities may be reluctant to vigorously pursue justice for war crimes out of concern for disturbing political balances, this internal politicization undermines the independence and efficacy of legal systems. [18]

The pursuit of justice is made more difficult on

17 Supra note 10

18 Ilan Dunsky, *Israel, the Arabs, and International Law: Whose Palestine Is It, Anyway*, 2 DALHOUISE J. LEGAL STUD. 163 (1993)

the global scene by geopolitical factors. Strategic alliances or diplomatic sensitivities may make nations and international organizations reluctant to move decisively against accused offenders. This worldwide hesitancy can undermine the credibility of international legal systems and obstruct the development of an all-encompassing, impartial legal system.

In addition to undermining the legitimacy of legal procedures, the widespread politicization makes it difficult to establish a strong legal system that is capable of prosecuting war crimes. The essential ideas of justice, responsibility, and the defence of human rights are all compromised by this. Political factors being entwined with judicial processes not only causes a delay in the settlement of war crimes but also feeds the cycle of impunity in which those who do horrible things escape punishment via political scheming.

Impartiality of Investigations

The pursuit of impartiality in inquiries into purported war crimes becomes a critical consideration, adding a subtle degree of intricacy to the larger goal of justice. The complex network of long-standing animosities and deeply ingrained divides that define the conflict between Israel and Palestine makes this task especially difficult. The accounts advanced by either side add even more layers of complication, making it extremely difficult to conduct investigations that are generally accepted to be objective.

Amidst this complex context, multinational organizations entrusted with investigating war crimes encounter the challenging assignment of managing the unique sensitivities present in the area. Because of the conflict's complexity, it is imperative to take a shrewd stance in order to guarantee that investigations are carried out as fairly and impartially as possible. Maintaining the integrity of the judicial system and preventing the public's confidence in the pursuit of justice from eroding depend on finding this balance.

The deeply embedded narratives on both sides of the dispute seriously compromise the impartiality of investigative work in addition to influencing perceptions. The emotional intensity of the conflict and the differing historical viewpoints make any international entity conducting fact-finding missions about war crimes face greater risks. To minimize any potential prejudice and guarantee that the pursuit of justice is beyond reproach, careful attention must be given to every stage of the investigation process, from data gathering to analysis.

To effectively address concerns about impartiality, it is necessary to both navigate the complex political terrain and promote transparency in the investigation procedures. International organizations need to take the initiative to use communication tactics that show their dedication to objective fact-finding. This entails communicating the techniques used, the information sources, and the precautions taken to minimize any possible influences that can taint the investigation's neutrality. [19]

Hence, the difficulty is not only in carrying out the investigation procedures with great care, but also in controlling the opinions that surround them. International organizations need to be highly aware of the conflict's emotive and historical aspects while also understanding that the pursuit of justice is inextricably related to public confidence in the integrity of the investigative processes. These entities have the potential to make a substantial contribution to maintaining the integrity of the legal procedures surrounding war crimes in the Israel-Palestine conflict by skilfully handling these difficulties with sensitivity, openness, and a dedication to justice.

Role and Prospects for Resolving War Crimes through International Arbitration

By agreeing to submit their disputes to an unbiased third party, such as an arbitrator or panel, through international arbitration, parties can resolve their disputes without going through the formal court system. The principal aim is to offer an impartial and equitable platform for settling conflicts, promoting a speedier and more adaptable settlement in contrast to protracted legal procedures. Arbitration provides a way to resolve complicated issues outside of national legal systems in the context of international relations.

In the Israel-Palestine dispute, international arbitration may be very important since it offers a

19 John Quigley. *Case for Palestine: An International Law Perspective* (2)

forum for discussing claims of war crimes. Owing to the conflict's deeply ingrained political nature, obstacles posed by national legal systems and geopolitical factors may be addressed via an unbiased arbitration procedure. International arbitration might promote accountability and justice by providing a neutral platform for a more impartial investigation of suspected war crimes. [20]

Regarding the Israel-Palestine conflict, the benefits of international arbitration include the option to choose expert arbitrators, secrecy, and procedural norms that are flexible. Moreover, it provides a middle ground between the competing parties, allowing for agreements that could be hard to accomplish through regular legal methods. On the other hand, obstacles include worries about the credibility of arbitration rulings and possible problems enforcing them. Furthermore, because arbitration is voluntary, all parties involved must consent. [21]

The possibility of mediation is provided by international arbitration, which establishes a forum where disputing parties can have amicable discussions with impartial arbitrators. This mediation component is vital in the context of war crimes, as it allows parties to address difficult problems and strive towards a mutually accepted conclusion. By addressing the underlying causes of conflicts, mediation can promote understanding and reconciliation.

To ensure a fair and impartial procedure, third-party arbitrators with experience in international law and conflict resolution must be engaged. These arbitrators can alleviate worries about the impact of political agendas by offering a new viewpoint and an unbiased opinion. Involving a third party raises the arbitration's legitimacy and improves the chances of reaching a fair settlement.

CONCLUSION

It is imperative that war crimes related to the Israel-Palestine conflict are addressed. Prompt attention and action are required due to the great suffering of people and the ongoing violations of international humanitarian law. In addition to the direct human cost, ignoring war crimes weakens the basis of accountability and justice, feeding the vicious cycle of impunity and violence. The international community must acknowledge that every passing day without accountability further deepens the scars of the conflict, making the prospects for enduring peace more distant.

The urgency is not limited to the conflict's immediate geographic area. The stability of the area and international security are significantly impacted by the Israel-Palestine conflict. Unresolved war crimes breed mistrust, which in turn encourages radicalization and extremism. The international community may lessen the suffering of individuals who are directly impacted by war crimes and contribute to the establishment of a more secure and stable global order by acting quickly to redress these crimes.

20 Tamara Jenkin, Peace *Through Arbitration: Using International Arbitration to Solve Intra-State Conflicts*, SSRN (Nov. 17, 2019), http://dx.doi.org/10.2139/ssrn.3485258

21 *Ibid*

A CONSTITUTIONAL SCRUTINY OF SECTION 438(4) CRPC : UNVEILING THE IMPACT OF THE 2018 AMENDMENT ON ANTICIPATORY BAIL JURISPRUDENCE

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ABSTRACT

The landscape of criminal law in India underwent a significant transformation with the enactment of The Criminal Law (Amendment) Act, 2018. Among the noteworthy amendments was the insertion of Section 438(4) into the Code of Criminal Procedure (CrPC), introducing an absolute bar on the grant of anticipatory bail in cases involving accusations under sub-sections (3) of section 376 or section 376 AB or section 376 DA or section 376 DB of the Indian Penal Code, 1860.

This paper undertakes a comprehensive analysis of the constitutional validity of Section 438(4) in the context of the Indian legal system. Anticipatory bail, a procedural safeguard aimed at protecting an individual's right to personal liberty, has been a subject of scholarly discourse and judicial scrutiny. The 2018 amendment, while ostensibly targeting heinous sexual offences, raises fundamental questions about the balance between societal interests, the accused's rights, and the overarching principles enshrined in the Constitution of India. As we delve into the historical evolution of anticipatory bail, scrutinise the legal framework leading up to the amendment, and assess the provision's constitutional implications, this paper seeks to provide a nuanced understanding of the legal landscape post the 2018 amendment.

Keywords: Anticipatory Bail, Code of Criminal Procedure, The Criminal Law (Amendment) Act, 2018

I. INTRODUCTION

The Criminal Law (Amendment) Act, 2018 stands as a pivotal legislative milestone in the realm of Indian criminal law, signifying a concerted effort to address pressing issues and enhance the efficacy of the justice system. Enacted as No. 22 of 2018, this amendment aimed to fortify legal provisions pertaining to sexual offences and related criminal procedures and thus had a profound impact on the Code of Criminal Procedure (hereinafter referred

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'CrPC'), a fundamental legal framework governing criminal proceedings in India. The amendment introduced substantial changes to the CrPC, notably through the insertion of new provisions and the modification of existing ones. This legislative overhaul sought to address the evolving challenges in dealing with sexual offences and ensure a more robust legal response to such heinous crimes. Of particular significance is the introduction of Section 438(4) into the CrPC, a provision that imposes an absolute bar on the grant of anticipatory bail in cases involving specific offences under the Indian Penal Code, 1860. The insertion of this provision reflects a legislative intent to prioritise the prevention and prosecution of serious sexual offences, aiming to create a more stringent legal framework to combat such crimes. As this research paper delves into the constitutional validity of Section 438(4), it does so against the backdrop of the broader legislative changes brought about by the Criminal Law (Amendment) Act, 2018. Understanding the significance of this amendment is essential for contextualising the legal landscape within which the provision in question operates.

The newly introduced provision, as manifested in the constitutional amendment, declares that:

In section 438 of the Code of Criminal Procedure, after sub-section (3), the following sub-section shall be inserted, namely:-

"(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code (45 of 1860).] [1]

This absolute restriction on anticipatory bail has become a focal point of constitutional concern, specifically as it appears to clash with the principles of equality before the law and the right to life and personal liberty.

II. UNDERSTANDING THE CONCEPT OF ANTICIPATORY BAIL

Section 438 of the Code of Criminal Procedure (CrPC) plays a pivotal role in safeguarding the fundamental right to personal liberty by introducing the concept of anticipatory bail. Enacted in 1973 following the recommendations of the 41st Law Commission Report (1969), anticipatory bail provides a legal recourse for individuals who anticipate being accused of non-bailable offences. When there is a genuine apprehension of arrest, an individual can apply to the High Court or the Court of Session for a pre-emptive direction under this section. The provision empowers the court to exercise its discretion, allowing the person to be released on bail even before an arrest is made, thereby averting the need for custodial detention.

Section 438 of the CrPC lays down the provisions on anticipatory Bail:

Sec. 438(1): When any person anticipates that he/she may get arrested on an accusation of having committed a non-bailable offence, he/she may apply to the High Court or the Court of Session for a direction under this Section. The Court may direct (if it thinks fit) that in the event of such arrests, he/she shall be released on Bail even before an arrest is made without subjecting him/her to further restraints.[2]

Black's Law Dictionary (4th edition) describes bail as "procuring release from the legal custody of an individual, undertaking to appear in the designated place and place and present him/herself to the court's jurisdiction and judgement."

The difference between an ordinary bail order and an anticipatory bail order was that while the former would be issued upon arrest and thus would entail freeing from police detention; the latter would be given in anticipation of the arrest and thus would be valid at the time of the arrest. [3] Hence, Anticipatory bail order is not an order of stay of arrest, rather the order is only in case he is arrested, he shall be released on bail provided he furnishes the bail bond.

Anticipatory bail is an injunctive order (injunction against custody) whereas regular bail is a remedial order [4]. It is a remedial order in the sense that the accused is already in custody and as a relief he is

1 the Criminal Law (Amendment) Act, 2018

2 The Code of Criminal Procedure, 1973

3 Sunita Devi v State of Bihar 2005 S.C.C. (Cri) 43

4 Gurbaksh Singh Sibbia v. State of Punjab 1980 AIR 1632, 1980 S.C.R. (3) 383

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released from custody.

The foundational principle behind the inclusion of anticipatory bail was to shield individuals from arbitrary violations of their right to personal liberty. In situations where influential individuals attempt to implicate their rivals in false cases for ulterior motives, anticipatory bail serves as a crucial preventive measure. Additionally, when there are reasonable grounds to believe that the accused is unlikely to abscond or misuse their liberty, anticipatory bail offers a pragmatic solution, eliminating the necessity of first subjecting the person to custody before seeking bail. This provision is particularly relevant in the context of arbitrary arrests, which often result in the harassment and humiliation of citizens. Recognizing the pervasive nature of such arrests, Section 438 stands as a legislative bulwark, acknowledged even by the Parliament as a "crucial underpinning to shield individual's personal liberty in a free and democratic country." Anticipatory bail, therefore, emerges as a procedural mechanism designed to balance the scales of justice, protecting individuals from unwarranted deprivation of liberty and ensuring a fair and just legal process.

III. DECODING THE APPLICABILITY OF SECTION 438(4): ANALYSIS OF THE RELEVANT SECTIONS IN THE INDIAN PENAL CODE

The Criminal Law (Amendment) Act, 2018, introduced a significant change to the Code of Criminal Procedure (CrPC) through the insertion of Section 438(4). This provision creates an absolute bar on the grant of anticipatory bail for offences specified under sub-section (3) of Section 376 and Sections 376AB, 376DA, and 376DB of the Indian Penal Code (IPC). To comprehend the implications of Section 438(4), a detailed examination of the relevant sections in the IPC is imperative.

Section 376 of the IPC deals with the offense of rape, one of the most heinous crimes against an individual. The section defines the elements of rape and prescribes the punishment for the offense. Rape is considered a grave violation of an individual's bodily integrity and autonomy, and Section 376 reflects society's condemnation of such acts. Section 376(3) addresses rape cases involving victims under the age of sixteen years. It provides for a rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, and shall also be liable to fine.

Section 376AB – Punishment for Rape on Woman under Twelve Years of Age:

Enacted through the Criminal Law (Amendment) Act, 2018, Section 376AB specifically addresses rape cases involving victims under the age of twelve. This section recognizes the heightened vulnerability of young children and imposes stringent punishments on those convicted of such offences.

Section 376DA – Punishment for Gang Rape on woman under sixteen years of age:

Section 376DA focuses on the crime of gang rape, acknowledging the aggravated nature of offenses committed by multiple perpetrators. Gang rape not only inflicts severe physical and psychological trauma on the victim but also highlights the need for specialized legal provisions to address such atrocities. It provides that *"Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine*.

Section 376DB – Punishment for Gang Rape on Woman under Twelve Years of Age:

Section 376DB targets the particularly heinous crime of gang rape committed against minors under the age of twelve. It provides that accused shall be punished with imprisonment for life or with death. This provision underscores the legislature's intent to protect the most vulnerable members of society from egregious acts of sexual violence.

Hence, the insertion of Section 438(4) in the CrPC, as a response to the 2018 Amendment, reflects a legislative decision to restrict the grant of anticipatory bail for offences under Sections 376, 376AB, 376DA, and 376DB. The rationale behind this

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restriction lies in the heinous nature of these offences and the imperative to ensure the safety and security of potential victims. By disallowing anticipatory bail, the legislature seeks to prevent the misuse of the legal process and to prioritise the protection of society, especially vulnerable individuals.

However, the Critics argue that the provision may lead to unintended consequences, depriving individuals of a fair chance to establish their innocence based on the merits of each case. The lack of discretion in treating distinct cases uniformly raises concerns about potential arbitrariness and a departure from principles of equal protection. This analysis sets the stage for a comprehensive understanding of the complex legal landscape shaped by the interplay between these statutory provisions.

IV. CONSTITUTIONAL IMPERATIVE: UPHOLDING ARTICLE 14 AND ARTICLE 21

A central argument posited in this research contends that Section 438(4) of the CrPC violates the constitutional mandates articulated in Articles 14 and 21. Article 14 of the Constitution guarantees the right to equality before the law and equal protection of the law to all individuals. It prohibits arbitrary and unreasonable classifications, ensuring that similar cases are treated similarly and different cases are treated differently based on rational and justifiable reasons. Section 438(4) treats all cases involving the specified offences uniformly, disregarding the unique circumstances, individual facts, and merit of each case. This blanket classification leads to an unreasonable and arbitrary differentiation between cases that may have distinct factual and evidentiary contexts. This lack of discretion contradicts the principles of equal protection and fairness by depriving individuals of the opportunity to establish their innocence based on the prima facie strength of their case. It was held in the landmark case of *Ajay Hasia vs Khalid Mujib Sehravardi & Ors* [5] that " If the classification is not reasonable and does not satisfy the two conditions, namely, (1) that the classification is founded on an intelligible differentia and (2) that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action, the impugned legislative or executive action, would plainly be arbitrary and the guarantee of equality under Article 14 would be breached. Wherever, therefore, there is arbitrariness in State action whether it be the Legislature or of the executive or of an "authority under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution"

Also, the constitutional imperative enshrined in Article 21, guaranteeing the right to life and personal liberty, stands compromised by the categorical prohibition on anticipatory bail outlined in Section 438(4) of the Code of Criminal Procedure (Cr.P.C) Article 21 is an embodiment of dignity, fair trial, and protection against arbitrary deprivation of liberty and underscores the importance of the principle ***"innocent until proven guilty."*** The pronouncement by the Hon'ble Supreme Court in *Suresh Thipmppa Shetty v. The State of Maharashtra* [6] reinforced the constitutional roots of the presumption of innocence, affirming its origin in Articles 21 and 14. The historic ruling of the United States Supreme Court in *Coffin v. United States*[7] echoed similar sentiments, emphasising the presumption of innocence as foundational to the administration of criminal law. Moreover, international instruments such as Article 11(1) of the Universal Declaration of Human Rights (1948) and comparable provisions in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the International Covenant on Civil and Political Rights (1966) uphold the right to be presumed innocent until proven guilty. Therefore, the absolute bar on anticipatory bail imposed by Section 438(4) not only contravenes these constitutional principles but also results in the prejudiced assumption of guilt solely based on the

5 Ajay Hasia Etc vs Khalid Mujib Sehravardi & Ors., (1981) 1 SCC 722

6 Suresh Thipmppa Shetty Versus The State Of Maharashtra., 2023 SCC OnLine SC 1038

7 Coffin Versus United States., 156 US 432 (1895)

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nature of the alleged offence, leading to arbitrary arrests and unwarranted deprivation of personal liberty, thereby inflicting trauma, humiliation, and hardship upon the accused.

V. ABUSE OF SECTION 438(4): POTENTIAL FOR MISUSE AND VENGEANCE

The well-intentioned 2018 Amendment to Section 438(4) of the Code of Criminal Procedure, while aiming to address heinous offences, introduces a structure that is inconsistent with foundational principles of liberty and accountability. This section, although created with the noble objective of protecting victims, presents a risk of being weaponized for malicious purposes. False allegations, driven by personal vendettas or extraneous motives, could trigger arrests or prosecutions with severe consequences on an individual's right to liberty. This restriction, which can lead to the wrongful arrest of individuals, challenges the bedrock principle that an accused is presumed innocent until proven guilty. Legal precedents, such as the case of *Dr. Rini Johar & Anr. vs State Of M.P. & Ors* [8] emphasise the significance of Article 21 in safeguarding against wrongful arrests and affirm the entitlement of victims to compensation in cases of such violations. It was held that Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case.

The observations from *Joginder Kumar vs. State of U.P* [9] underscores the expanding horizon of human rights and caution against indiscriminate arrests. The law of arrest is balancing individual rights, liberties and privileges, duties, obligations and responsibilities. The Court in this case noted the 3rd Report of the National Police Commission to the effect that 60% of arrests were unnecessary or unjustified. This Court observed that no arrest can be made merely because it is lawful to do so. In *Arnesh Kumar versus State of Bihar* [10] The Supreme Court observed that arrest brings humiliation, curtails freedom and casts scars forever. It is considered a tool for harassment and oppression. The drastic power is to be exercised with caution.

The courts considering the Anticipatory Bail application should try to maintain fine balance between the societal interest vis-à-vis personal liberty while adhering to the fundamental principle of criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the competent court. Exclusion of anticipatory bail has been justified only to protect victims of perpetrators of crime. It cannot be read as being applicable to those who are falsely implicated for extraneous reasons and have not committed the offence on prima facie independent scrutiny. Access to justice being a fundamental right, grain has to be separated from the chaff, by an independent mechanism. Liberty of one citizen cannot be placed at the whim of another. Law has to protect the innocent and punish the guilty.

According to Blackstone's formulation in criminal law- It is better that ten guilty persons escape than one innocent suffer. Thus considered, exclusion has to be applied to genuine cases and not to false ones. This will help in achieving the object of the law.

VI. FURTHER RESTRICTIONS ON REGULAR BAIL IN CASES OF OFFENCES MENTIONED

The 2018 Amendment introduces additional complexities for individuals accused under Section 376(3), Section 376AB, Section 376DA or Section 376DB of the Indian Penal Code (IPC), particularly concerning their right to seek regular bail under section 439 of the CrPC.

The relevant abstract of the constitutional amendment is produced herein under-

In section 439 of the Code of Criminal Procedure,

(a) in sub-section (1), after the first proviso, the following proviso shall be inserted, namely:

"Provided further that the High Court or the Court

8 Dr. Rini Johar & Anr. vs State Of M.P. & Ors., 2015 SCC OnLine SC 1694

9 Joginder Kumar versus State of U.P., (1994) 4 SCC 260

10 Arnesh Kumar versus State of Bihar., (2014) 8 SCC 273

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of Session shall, before granting bail to a person who is accused of an offence triable under sub-section (3) of section 376 or section 376AB or section 376DA or section 376DB of the Indian Penal Code, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application." [11]

This new provision significantly exacerbates the difficulties faced by the accused, further encroaching upon their fundamental rights and rendering the process of securing regular bail even more arduous and protracted. The newly inserted Proviso to section 439(1) of the CrPC introduces a mandatory requirement for the court to give notice of the bail application to the Public Prosecutor within a specific timeframe as the word 'shall' has been used. Such mandatory notification requirement to the Public Prosecutor within a specific time frame adds layers of difficulty for the accused.

While the intention behind such a provision might be to ensure informed decision-making and give the parties an opportunity to present their views, the actual ramifications of this amendment are deeply problematic. This new obligation, specifically applicable to cases involving offences under section 376 and its derivatives, places an undue burden on the accused. Not only does this extend the timeline for the court to consider the bail application, but it also allows for a further delay, often resulting in prolonged pretrial detention, which amounts to a clear violation of the accused's right to liberty as enshrined in Article 21 of the Constitution.

By imposing this notification requirement on the court, the amendment fails to consider the various circumstances that might necessitate the grant of bail, such as the prima facie innocence of the accused, lack of evidence, or other mitigating factors. This mechanistic approach disregards the principle that bail should not be withheld as a punitive measure, but should instead be granted unless there are compelling reasons to the contrary. Furthermore, the timeframe of fifteen days within which the Public Prosecutor must be notified further adds to the existing delays in the criminal justice system. This is especially concerning in cases of heinous offences, where the accused might face prolonged detention even before their guilt is proven beyond reasonable doubt. This not only infringes upon the presumption of innocence, but also perpetuates a system where personal liberty is compromised for extended periods without proper justification. The cumulative effect of these factors exacerbates the suffering of the accused, denying them the speedy and fair trial that is their constitutional right.

VII. JUDICIAL DISCRETION TO BE EXERCISED IN GRANTING ANTICIPATORY BAIL

The research delves into the nuanced factors and parameters elucidated by the Hon'ble Supreme Court in *Siddharam Satlingappa Mhetre v. State of Maharashtra* [12] and *Gurcharan Singh v. State (Delhi Admn.)* [13] in granting bail.

Emphasising that no universal formula exists for granting anticipatory bail, the Hon'ble Court in Siddharam Satlingappa Mhetre case held that: "The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:

(i) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;

(ii) The possibility of the applicant to flee from justice;

(iii) The possibility of the accused's likelihood to repeat similar or other offences;

(iv) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(v) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vi) While considering the prayer for grant of anticipatory bail, a balance has to be struck be-

11 Sec 439,The Code of Criminal Procedure, 1973

12 Siddharam Satlingappa Mhetre v State of Maharashtra., 8 (2011) 1 SCC 694

13 Gurcharan Singh v. State (Delhi Admn.).,(1978) 1 SCC 118

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tween two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(vii) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail." These are some of the factors which should be taken into consideration while deciding the anticipatory bail applications. These factors are by no means exhaustive but they are only illustrative in nature because it is difficult to clearly visualise all situations and circumstances in which a person may pray for anticipatory bail.

In Gurcharan Singh v. State (Delhi Admn.) [14] It was observed by HMJ Goswami, who spoke for the Court, that "there cannot be an inexorable formula in the matter of granting bail. The facts and circumstances of each case will govern the exercise of judicial discretion in granting or cancelling bail." The High Court and the Court of Session to whom the application for anticipatory bail is made ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit to do so on the particular facts and circumstances of the case and on such conditions as the case may warrant. Similarly, they must be left free to refuse bail if the circumstances of the case so warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code. The judicial discretion granted under Section 438 should not be read down by reading into the statute conditions that are not to be found therein. The courts have to be allowed a little freeplay in the joints if the conferment of discretionary power is to be meaningful. There is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly these are higher courts manned by experienced persons, secondly their order are not final but are open to appellate scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges.

Hence, it underscores the importance of judicial discretion in granting or refusing bail, allowing for a case-specific evaluation rather than rigid adherence to predetermined conditions.

VIII. OTHER FACTORS TO BE TAKEN INTO CONSIDERATION BY THE COURT

It is a well known principle of law that instead of literal interpretation, the court must prefer purposive interpretation to achieve the object of law. There has been a jurisprudential shift elucidated in *Hema Mishra v. State of U.P* [15], challenging statutory bars against anticipatory bail. In this case, it has been expressly laid down that in spite of the statutory bar against grant of anticipatory bail, a Constitutional Court is not debarred from exercising its jurisdiction to grant relief. This Court considered the issue of anticipatory bail where such provision does not apply. Reference was made to the view in *Lal Kamlendra Pratap Singh versus State of Uttar Pradesh and Ors*[16] . to the effect that interim bail can be granted even in such cases without the accused being actually arrested. It is well settled that a statute is to be read in the context of the background and its object. Instead of literal interpretation, the court may prefer purposive interpretation to achieve the object of law. It is a well known principle of law that Procedure is the handmaid of justice and not its mistress which means the procedural law must be interpreted in such a manner so that it does not defeat the ends of justice. Procedure cannot control justice rather justice controls

14 Ibid

15 Hema Mishra versus State of U.P., (2014) 4 SCC 453

16 Lal Kamlendra Pratap Singh versus State of Uttar Pradesh and Ors. (2009) 4 SCC 437

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the procedure. This Doctrine of proportionality is well known for advancing the object of Articles 14 and 21. A procedural penal provision affecting liberty of citizens must be read consistent with the concept of fairness and reasonableness. Wisdom of the legislature in creating an offence cannot be questioned but individual justice is a judicial function depending on facts. As a policy, anticipatory bail may be excluded but exclusion cannot be intended to apply where a patently malafide version is put forward. Courts have inherent jurisdiction to do justice and this jurisdiction cannot be intended to be excluded. Thus, exclusion of Court's jurisdiction is not to be read as absolute. There can be no dispute with the proposition that mere unilateral allegation by any individual, when such allegation is clearly motivated and false, cannot be treated as enough to deprive a person of his liberty without an independent scrutiny. Thus, exclusion of provision for anticipatory bail cannot possibly, by any reasonable interpretation, be treated as applicable when no case is made out or allegations are patently false or motivated. They can be black mailed with the threat of a false case being registered, without any protection of law. This cannot be the scenario in a civilised society. This is not the intention of law and such laws cannot stand judicial scrutiny. It will fall foul of guaranteed fundamental rights of fair and reasonable procedure being followed if a person is deprived of life and liberty. Thus, literal interpretation cannot be preferred in the present situation.

It is pertinent to mention here that despite the seemingly absolute bar on anticipatory bail under Section 18 and 18A(2) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, judicial precedent in *Prathvi Raj Chauhan v. Union of India* [17] highlights the nuanced approach courts may take. The court held that there is no absolute bar against grant of anticipatory bail in cases where the complaint does not make out a prima facie case for applicability of the provisions of act of 1989. In cases where no prima facie materials exist warranting arrest in a complaint, the court has the inherent power to direct a pre-arrest bail. However, the power is to be used sparingly and under exceptional circumstances where no prima facie offence is made out as shown in the FIR, and further also that if such orders are not made in those classes of cases, the result would inevitably be a miscarriage of justice or abuse of process of law. It cannot be used in a liberal or regular manner for that would defeat the intention of the Parliament with respect to the Act. This precedent reinforces the notion that even when a statutory provision excludes the possibility of anticipatory bail in certain cases, the courts still retain the inherent power to grant such bail if the circumstances warrant it.

Drawing a parallel, the Prathvi Raj Chauhan case showcases that courts are empowered to evaluate the merit of each individual case and determine whether an application for anticipatory bail should be granted, even when faced with seemingly absolute restrictions. This aligns with our argument in the writ petition that Section 438(4) should not impose an across-the-board bar on anticipatory bail for certain offences as it contradicts the core principles of fairness, justice, and individualised consideration in the legal process.

IX. CONCLUSION

In concluding the examination of the constitutional validity of Section 438(4) of the Code of Criminal Procedure, inserted by The Criminal Law (Amendment) Act, 2018, it is imperative to underscore the foundational principles enshrined in the Constitution of India. As the supreme law of the land, the Constitution establishes three distinct organs of the State, each assigned with unique functions that collectively uphold the pillars of the State. While Parliament and State Legislatures enact laws, and the Executive Government implements them, the judiciary assumes the pivotal role of sitting in judgement on both the implementation of laws by the Executive and the validity of legislation.

The judicial review power vested in the superior judiciary of India is unparalleled, encompassing the examination of legislative competence and consistency with Fundamental Rights. This expansive scope of judicial review extends even to constitutional amendments, as reiterated in landmark cases such as *Kesavananda Bharati Sripadagalayaru v. State of*

17 Prathvi Raj Chauhan v Union of India .,(2020) 4 SCC 727

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Kerala [18], *Smt. Indira Nehru. Gandhi v. Raj Narain* [19], *Minerva Mills Ltd. v. Union of India* [20], and *S. P. Sampath Kumar v. Union of India* [21]. The doctrine of basic structure affirms that no constitutional amendment can endure if it violates the fundamental framework of the Constitution.

The constitutional amendment in question, which imposes an absolute bar on anticipatory bail for specific offences under Section 376 of the Indian Penal Code, has been analysed in the preceding sections of this research paper. The arguments put forth highlight the potential infringement on the right to equality and equal protection under Article 14, as well as the right to life and personal liberty under Article 21. The indiscriminate classification imposed by Section 438(4), treating all cases uniformly without regard to individual facts and circumstances, raises constitutional concerns.

Drawing inspiration from the principles laid down in Kesavananda Bharati and other seminal cases, the judiciary must employ a purposive interpretation to uphold the objectives of justice and fairness. The Court, as the custodian of the Constitution, should not be shackled by literal interpretations but rather should have the flexibility to address evolving societal needs and challenges.

18 Kesavananda Bharati Sripadagalayaru v. State of Kerala.,AIR 1973 SC 1461
19 Smt. Indira Nehru. Gandhi v. Raj Narain.,(1976) 2 SCR 347
20 Minerva Mills Ltd. v. Union of India.,(1981) 1 SCR 206
21 S. P. Sampath Kumar v. Union of India.,(1987) 1 SCC 124

FEDERALISM IN INDIA: EVOLVING DYNAMICS AND ONGOING TRANSFORMATIONS

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Introduction

Federalism in India has garnered significant attention, particularly in its role within the country's political landscape. Recent shifts in the relationship between the nation-state and the cases brought before the Supreme Court highlight the continuous transformation of Indian federalism. It is clear that the current form of Indian federalism is transitory, reflecting the dynamism of our society. The ongoing engagements between the central government and the states undeniably contribute to the evolving trends in Indian federalism.

Historical Foundations of Indian Federalism

The concept of federalism, as a means of incorporating the conflicting elements in the Indian polity, was initially explored in the 1930s. During the Round Table Conference (1930-1932), convened by the British government to deliberate on India's future constitution, delegates favoured the idea of an All India federation. This vision materialized in the Government of India Act 1935. Federalism was extensively debated in the Constituent Assembly, evident in the discussions held during its sessions. When drafting the constitution of India, the makers of the constitution embraced the doctrine of federalism, adopting the Government of India Act 1935 as a guiding model.

Shifting Views on Federalism Post-Partition

However, the aftermath of partition, marked by bloodshed and emotional trauma, prompted a reconsideration of federalist perspectives. The socio political development compelled the makers of the Indian constitution to modify the doctrine of federalism to suit the needs of an emerging new India. Therefore, the framers of the constitution diverged from conventional federalism and embraced a practical and realistic approach to the concept.

While the term "federalism" is not expressly used or defined in the Indian constitution, the principles of federal governance are manifested in the envisioned relations between the Centre and the States. The concept of federalism in the Indian constitution is effectively illustrated in various rulings of the Supreme Court when interpreting constitutional provisions.

Constitutional Illustration of Federalism

The most predominant characteristic of Indian federalism lies in the concentration of power at the Union level. An examination of the 7th Schedule of our constitution distinctly reveals a significant bias in favour of the central government.

Several articles in the Indian Constitution, including Article 249, Article 254, Article 257, and Article 356, unequivocally highlight the presence of a strong central authority

Article 249 outlines Parliament's authority to enact legislation concerning matters in the State list, specifically in the context of national interest.

Article 254 states that in cases of inconsistency between laws enacted by Parliament and those by State legislatures, the laws made by Parliament take precedence.

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Article 257 shows the Union's control over states in specific situations, allowing the President of India to issue directives to a state in the interest of the sovereignty and integrity of the nation.

Article 356 addresses the provision in cases of the failure of constitutional machinery in states.

Supreme Court Interpretations on Federalism

Despite constitutional provisions that seemingly favour the central government, the prevailing belief among the people of our nation is that we operate under a system of cooperative federalism. This conviction is deeply rooted in the citizenry, with various Supreme Court judgments highlighting this aspect. For instance, in the case of (State of Rajasthan vs Union of India & Ors 1977 3 SCC 592), the Supreme Court delved into the concept of federalism in India. The Court emphasized that the satisfaction under Article 356 is subjective and cannot be evaluated using objective or judicially discoverable standards.

Contrastingly, in (Kuldip Nayar vs Union of India 2077 7 SCC), the Supreme Court observed that India does not conform to the traditional sense of a federal state. Meanwhile, in (S.R.Bommai & Ors vs Union of India & Ors 1994 3 SCC), a majority of nine judges held that the exercise of power under Article 356(1) is subject to judicial review. The Court also addressed the justiciability of the President's order under Article 356, asserting that administrative law principles might not entirely apply when considering the exercise of a constitutional power.

In (State of West Bengal vs Keshoram Industries Ltd & Ors MANU/SC/0038/2004), the constitutional bench acknowledged India's federal structure. However, it emphasized that our constitution exhibits a federal structure where the centre holds more power compared to the states. The Indian Constitution is fundamentally federal, featuring a clear distribution of powers, inter-governmental relations through regular meetings, financial cooperation, and the establishment of a dual polity with an independent judiciary to resolve disputes between states and the centre.

Political Landscape Shift

Following the second UPA government, there was a significant shift in India's political landscape. The Congress party, which had long been in power, began losing influence both in the parliament and various state assemblies. A new political paradigm emerged, with the BJP gaining dominance at the central level, while regional parties secured power in several states.

The present political landscape in India unmistakably indicates the rise of a formidable central government and comparatively diminished influence of state governments. This phenomenon is not unprecedented; historically, whenever a single political party commands a substantial majority at the centre, such a trend tends to manifest. At the core of the matter lies the question- does this align with our constitution, and is it in the best interest of the Indian public, who bestowed sovereign power upon the party leading the nation?

Fiscal Crisis and COVID-19

Certain issues, particularly those related to financial matters and the implementation of Goods and Services Taxes (GST), along with its impact on state revenues and the role of governors, clearly illustrate the evolving trends in India's cooperative federalism. The question at hand is whether these trends align with the spirit of our constitution.

Any argument in favour of combating federalism should be rooted in our constitution. The Indian constitution embraces the federal principle, delineating sovereign functions between two entities—the Union and the States. Unless the constitution explicitly allows, neither entity can encroach on the operational domain of the other. The framers of our constitution envisioned strict adherence to the federal principle for the future stability of this vast country. As rightly emphasized by the Supreme Court in (State of West Bengal vs Keshoram Industries Ltd & Ors MANU/SC/0038/2004), the Court has the constitutional power and the corresponding duty to prevent encroachment by either the Union or State overtly or covertly, ensuring a balanced federation.

The onset of COVID-19 and the subsequent

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lockdown created a severe financial crisis for state governments. Populist schemes, such as farm loan waivers and free ration provisions by state governments, increased their financial burden. The Centre contributed to this fiscal stress by delaying GST compensation cess and reducing the divisible pool amount through cesses and surcharges.

Evolution of Cooperative Federalism

In a vast and diverse country like India, it is highly likely that states may be governed by different political parties, contributing to potential political disparities between the Union and the States. The critical question arises: does this political diversity impact the financial provisions to the states? Regrettably, what transpired was not a consistent and uniform distribution of finances. The enactment of the Goods and Services Tax (GST) Law on March 29, 2017, through the One Hundred and First Amendment to the Constitution of India, significantly influenced the relations between the central and state governments. This amendment, introducing GST, marked a pivotal moment in the evolution of cooperative federalism, a concept enshrined in the Indian constitution. GST came into force on July 1, 2017.

The Standing Committee report on Goods and Services Tax (GST) assured the safeguarding of states' financial autonomy. To ensure this protection, the committee sought guidance from the Attorney General. The guidance asserted that ultimate legislative power lies with both the parliament and the state legislature, emphasizing a commitment to cooperative federalism.

Deviation from Stated Objectives: Analyzing the Mohit Minerals Case

The (Mohit Mineral vs Union of India 2022 SCC OnLine SC 657) serves as a striking illustration of the central government's departure from the intended objectives and principles of the Goods and Services Tax (GST). This legal dispute cantered around the imposition of a reverse charge on ocean freight within a Cost-Insurance-Freight (CIF) contract, revealing significant discrepancies in the interpretation of GST norms.

In the intricate landscape of the CIF Contract, involving agreements between the foreign exporter, Indian importer, and the shipping line, the central issue emerged during the levy of Integrated Goods and Service Tax (IGST) for the delivery of goods and shipping services. The crux of the matter lies in the Centre's insistence on separate IGST payments for shipping services, treating them as discrete elements rather than acknowledging their composite nature within the GST framework (para 1-2).

This departure from the fundamental goals of GST, aimed at establishing a uniform taxation system and preventing cascading taxes, is evident. In a CIF contract, goods and shipping services are inherently intertwined, constituting a composite supply. The central government's demand for separate GST on shipping services contradicts the foundational principles of GST and raises questions about the consistency of its application.

The legal saga unfolded with the Gujarat High Court (HC) rejecting the reverse charge, leading to an appeal to the Supreme Court (SC) (para 9). Instead of conceding potential policy flaws, the Centre introduced two contentious arguments. Firstly, it justified levying IGST on foreign shipping lines as a means to support Indian shipping lines. Secondly, a perplexing contention emerged concerning the nature of the GST Council, introduced at the Supreme Court stage and irrelevant to the determination of the reverse charge's validity. This argument posited the GST Council, a sui generis body, as a convergence point transforming recommendations into legislation (para 10).

In its ruling, the Supreme Court emphatically rejected the reverse charge, underscoring that the Centre cannot exploit arguments of convenience to bypass the composite supply clause. The judgment emphasized the interdependent nature of democracy and federalism, highlighting the principles of cooperative federalism. Recognizing the unequal powers granted to the Centre and states, the Court affirmed the right of states, even those comparatively weaker, to employ various forms of contestation within the constitutional framework to safeguard their rights.

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The Mohit Minerals case, therefore, serves not only as a legal precedent but also as a critical reminder of the importance of upholding the core principles of GST and maintaining the delicate balance between the Centre and states in a federal structure.

Understanding Constitutional Rationale through Constituent Assembly Debates

Delving into the Constituent Assembly debates sheds light on the Supreme Court's judgment. T.T. Krishnamachari asserted in these debates that our constitution empowers units substantially in both legislative and executive spheres. Dr B.R. Ambedkar clarified the basic principle of federalism: legislative and executive authority partitioned between the centre and states, not by a centre-made law, but by the constitution itself. This marks federalism's core – coequal sharing of legislative and executive powers between the centre and units.

However, in reality, states lack funds, compelling them to seek survival assistance from the centre, contradicting constitutional ideals. To counter, the centre portrays fiscal struggles, emphasizing unitary elements. This trend, relying on Articles 1 and 3 of the Indian Constitution, portrays India as a union of states, emphasizing non-negotiable unity. Article 3 provides the Union power to alter state boundaries.

Erosion in Centre-State Relations

The erosion in centre-state relations demands serious consideration by policymakers and the Indian public. Tensions arising from controversial moves like GST and the Citizenship Amendment Act (CAA) signify an infringement on state autonomy, fostering resentment among state governments. Federalism, foundational to our constitution, is vital for a democratic and pluralistic society like India.

Governors' roles, particularly in delaying bills, add complexities to the federal concept. While the governor's formal powers, as exemplified in the (Shamsher Singh & Ors vs State of Punjab 1974 AIR2192), are constitutionally defined, their discretionary powers have sparked debates. Conflicts, as seen in the S (S.R.Chaudhari vs State of Punjab 2001 7 SCC 126) and (Naham Rabia And Etc vs Deputy Speaker & Ors 2017 13 SCC 332), highlight the need for governors to act impartially within constitutional frameworks.

Governors' discretionary powers, exemplified in the Arunachal Pradesh case, have been subject to criticism. The Supreme Court, in landmark judgments, emphasized the need for governors to act impartially and within constitutional bounds. Instances of biased actions and recommendations for state assembly dissolution underscore the delicate balance required in governorship. The judiciary, exemplified in the Bommai case, plays a crucial role in upholding federalism. While acknowledging the Union's power, the judgment reinforced that the centre cannot arbitrarily interfere with state powers. This precedent has significantly reduced the imposition of president's rule, promoting cooperative federalism.

While considering the revocation of special status of J&K one of the questions 9 that was raised was that whether Article 370 could have been abrogated when that state was under presidents rule sine 2018. The Supreme court while relying on the Bommai judgement held that the president's action of revoking the special status of J&K was constitutionally valid.

Recommendations for Harmonious Relations

Commissions like the Administrative Reforms Commission and the Sarkaria Commission proposed solutions for harmonious centre-state relations. Recommendations included forming inter-governmental councils and using Article 356 sparingly. However, despite these efforts, conflicts persist, particularly when the ruling party at the centre holds a brutal majority. A continuous dialogue and commitment to constitutional principles are imperative for fostering a balanced federal structure in India.

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India's Shift from Cooperative to Combative Federalism

The prevailing trajectory in India reflects a shift from cooperative federalism to combative federalism. This term denotes a situation marked by conflict or tension between different levels of government within a federal system. In federal structures, power is distributed between a central government and state governments. Combative federalism emerges when disagreements arise, leading to conflicts over powers, responsibilities, or policies.

This conflict can manifest in various forms, including legal battles, political disputes, or clashes in policy. It often revolves around determining the appropriate distribution of power between the central and regional governments and their respective involvement in governance areas. Combative federalism is characterized by active resistance or opposition from regional or state governments against central policies, creating a confrontational dynamic.

States in India consistently grapple with financial constraints. Recently, the central government increased state borrowing limits but imposed conditions, violating Article 293 of the constitution. Such administrative control is unwarranted, considering the vast responsibilities and limited financial resources of state governments.

Proposed amendments to the I.A.S (Cadre) Rules signal an attempt by the central government to exert more control over the deputation of I.A.S officials. By relieving officers without state consent, these changes undermine state autonomy, making states more dependent on the central government. This move challenges the foundational principles of federalism.

Recent judicial responses, such as the Supreme Court's message in the Union-Delhi government case, emphasize the importance of not wresting control from state governments. However, the central government's reaction, like the (Government of National Capital Territory of Delhi vs Union of India Civil Appeal No 1239 /2023) Ordinance, reveals a combative trend. The ordinance, challenged and replaced by an Act of Parliament, granted more power to the Lieutenant Governor, perpetuating the conflict.

Federalism and the Constitution: A Balancing Act

As the centre grows more powerful, adopting a tough stance with states, the Madras High Court's observations in M. Karunanidhi v Union of India become relevant. The constitution establishes a government for the entire country, defining powers and relations between the centre and states. The present approach, relying on a unified but cooperative structure, conflicts with states' demands for more financial freedom and less unnecessary intervention.

Recent Supreme Court verdicts reinforce the importance of the Governor's role and the need for adherence to constitutional integrity. The Court's emphasis on the Governor's obligation to communicate and not indefinitely withhold assent to bills underscores the role of Governors in safeguarding federalism.

Presently, the central government's approach hinges on a particular dimension. While states are expected to maintain their existing status, their requests and struggles do not revolve around secession from the Union. Instead, they seek increased autonomy in financial matters and the freedom to administer their affairs without undue interference from Governors who, at times, neglect constitutional principles.

The trend of dismissing governments, which began with the ousting of the first communist government led by EMS Namboodiripad in Kerala in 1959, persists. Governors continue to function more as agents of the central government, prioritizing loyalty over upholding constitutional integrity, exemplified by instances such as Mr. Surjit Singh Barnala's actions as the governor of Tamil Nadu in 1990-91.

In a recent ruling addressing the concerns raised by the governments of (The State of Punjab vs Principal Secretary to the Governor of Punjab And Another WP (C) No 1244/2023), (The State of Kerala And Another vs Hon'ble Governor for State of Kerala

And Ors WP(C) No 1264/2023) and Tamil Nadu, the Supreme Court emphasized that Governors cannot indefinitely withhold bills to obstruct the legislative process. The Court stressed the pivotal role of the Governor as a symbolic head of state in safeguarding federalism, a fundamental aspect of the Constitution. It warned against the unchecked exercise of discretion, which could undermine the functioning of democratically elected state governments.

Regarding the powers outlined in Article 200, the three-judge bench, led by the Chief Justice of India, clarified that while the Governor can withhold assent, they must promptly communicate a message to the state legislature, necessitating a reconsideration of the bill. The bench highlighted the advisory role of the Governor, allowing recommendations for amendments but ultimately leaving the decision to the legislature.

In conclusion, the coexistence of states with a robust Union government is imperative for India. Fostering a harmonious relationship between the center and state governments is crucial. The Union government should ensure financial stability for states, while Governors must align with the spirit of the constitution, functioning as facilitators in an efficient federal setup.

Towards Harmonious Relations: The Way Forward

In conclusion, India must balance a strong Union government with harmonious relations between the centre and states. Adequate financial stability for states, respectful adherence to the constitution's spirit by Governors, and a commitment to an efficient federal setup are essential for the coexistence of a strong Union and empowered state governments. Combative federalism, while reflecting current challenges, should prompt a re-evaluation of power dynamics for a more balanced and cooperative future.

NON- STATE JUDICIAL SYSTEM BANGLADESH: SHALISH SYSTEM

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ABSTRACT

Non-state justice systems (NSJS) are community-level organizations or procedures that use customary laws to resolve disputes on behalf of religious, ethnic, or indigenous groups inside a state or territory. [1] The majority of disputes are resolved through various non-state, traditional, customary, religious, and informal institutions, as well as alternative dispute resolution systems, in many different nations. According to estimates, in many poor nations, these techniques are used to resolve about 80% of cases. [2] Over the past few decades, there has been a need to research the balance between state and non-state legal systems. Due to the perceived shortcomings or inaction of the state justice delivery systems, non-state justice systems—such as jirgas, shuras, shalish, panchayat, etc.—have become sought-after methods of dispute resolution. In order to remove impunity and advance long-term peace and stability, it is important to cooperate with both formal and non-state justice systems while developing the legal and judicial sector in post-conflict environments. In developing justice responses, it is crucial to consider and address the expressed needs of survivors. In some cases, survivors may want to access non-formal justice structures, but it is crucial that these structures are made in a way that minimizes the risk of stigmatization and/or harm to survivors.

This paper aims to conduct a brief study of Non-State Justice System, particularly focusing on the Bangladeshi system of Shalish. The objective is to conduct an in dept study about the Shalish system of justice and its relevance in today's time.

Keywords: Non state judicial system, Bangladesh, Shalish, Justice structure.

1 Non -State Justice System Programming, USAID, June 2019, Guide-to-NSJS-Jun-19.pdf (usaid.gov)

2 Non-state justice system, UN Women, July 3, 2013, https://www.endvawnow.org/en/articles/1585-non-state- justice-systems.html

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NON- STATE JUSTICE SYSTEMS

Non-state justice systems (NSJS) are community-level organisations or procedures that use customary laws to resolve disputes on behalf of religious, ethnic, or indigenous groups inside a state or territory. [3]

Many non-state, traditional, customary, religious, and informal procedures, as well as alternative dispute resolution processes, are used to settle conflicts in many different countries. According to estimates [4], these methods are used to settle almost 80% of cases in many developing nations. In order to remove impunity and advance long-term peace and stability, it is important to cooperate with both formal and non-state justice systems while developing the legal and judicial sector in post-conflict environments. There are many ways that NSJS systems and the state are related.

Systems can be established by the state outside of the formal justice system for a specific purpose, by non-governmental organizations (NGOs), or by communities that are relatively cut off from the state. In developing justice responses, it is crucial to consider and address the expressed needs of survivors. In some cases, survivors may want to access non-formal justice structures, but it is crucial that these structures are made in a way that minimizes the risk of stigmatization and/or harm to survivors. These non-state justice systems frequently take place at the local level and are governed by local institutions and social organizations. They apply whenever a wrong of any kind that disturbs the community's social order is committed, and they are not always specific to criminal or civil wrongs. Decisions are made by leaders who are constrained by religious, cultural, and/or tribal customs.

Non-State Justice Systems (NSJS) are widely used for several compelling reasons. Some of the reasons for their extensive use include that they are economical, practical, easily accessible, culturally relevant, and sensitive to the needs of underprivileged communities. Fast resolution procedures are made possible by the NSJS's simplified design, which does away with the bureaucratic bottlenecks that are sometimes present in formal legal systems. For those who would find the cost burden of regular justice procedures to be too great, this makes it a financially feasible alternative.

It is crucial to recognize that non-state judicial systems do have certain inherent disadvantages. The integrity of these systems may be compromised by problems with corruption and the misuse of power, among other noteworthy difficulties. Events of misconduct inside NSJS have the potential to undermine the same values they purport to defend, undermining faith in their ability to do their jobs well.

Moreover, concerns arise regarding the adherence to international human rights norms within the ambit of non-state justice. Without the protections offered by well-established legal frameworks, instances of discrimination or cruel and inhumane treatment may occur, raising concerns about the moral basis of these institutions.

The lack of accountability measures in the NSJS landscape is a key gap. Unchecked power dynamics run the risk of exacerbating the lack of institutional control, which could result in injustices. The absence of accountability is a significant obstacle to guaranteeing the impartiality, openness, and compliance of non-state justice systems with internationally accepted legal norms.

In the field of National Security and Justice Systems (NSJS), decision-makers must make a wide range of strategic decisions to successfully negotiate the intricate terrain. The best course of action depends on a careful assessment of the system's intrinsic qualities and a precise knowledge of the objectives that are meant to be achieved.

A wise course of action always includes encouraging positive cooperation with the NSJS. Such a path of action makes sense since it acknowledges that complex and multidimensional problems require collaborative and synergistic efforts. Through the use of a collaborative framework, stakeholders can use one another's perspectives, resources, and expertise, strengthening the NSJS as a whole.

This collaborative mentality emphasizes the

3 Non -State Justice System Programming, USAID, June 2019, Guide-to-NSJS-Jun-19.pdf (usaid.gov)

4 UN Rule of Law website and Governance and Social Development Resource Centre (GSDRC) "Non-state justice and security systems"

value of building partnerships that cross conventional boundaries and constructive discussion, going beyond simple cooperation. By adopting a cooperative perspective, decision-makers can proactively tackle systemic problems, strengthen the NSJS's resilience, and promote a shared responsibility environment.

Furthermore, this collaborative paradigm makes it possible to respond dynamically and adaptively to changing problems and threats. Understanding that the security environment is ever-changing, collaboration allows for the prompt sharing of knowledge, intelligence, and best practices, which helps the NSJS adapt to new challenges.

Choosing the best approach for NSJS requires careful analysis of the unique goals being pursued as well as the features of the system. Policymakers may effectively utilize the combined strength of stakeholders by placing a high priority on constructive collaboration. This will enable the National Security and Justice System to be flexible, responsive, and robust, enabling it to effectively tackle modern-day issues.

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The Family Court Ordinance of 1985's Sections 10(3) and 13(1), which provide for compromise or reconciliation even before the entry of judgement, are where the notion of ADR was first introduced in Bangladesh. There is no formal procedure that governs the informal justice delivery system in Bangladesh. As huge populations and groups within the village structure in the area where Bangladesh is located were progressively crammed into small spaces and obliged to share scarce resources, the incidence of localized disagreements and altercations continued to rise. As a result, on the one hand, the village identity solidified and, on the other, there were more neighborhoods. The village-based shalish also or alternatively replaced the neighborhood-based shalish. Inter-village shalish was also done during this time. Shalish is intended to serve as a forum for the out-of-court resolution of minor disputes or disagreements in rural life.

A long-standing democratic process that is ingrained in rural Bangladeshi culture, shashish is a kind of informal social governance that was created to settle small legal and criminal problems. This system depends on the knowledge and power of respected community members, such as shalishkars (adjudicators) or matbars (leaders), who are essential to the adjudicatory procedure.

Rural Bangladesh has experienced two different types of adjudication over the course of history: the traditional shalish and the progressive incursion of the state's judicial system into these hinterlands through the enactment of special legislation. The way these systems are compared highlights how conflict resolution has evolved in a sophisticated way within the socio-legal context of the area.

As a pillar of communal harmony, Shalish is a prime example of a collaborative and community-focused strategy to resolving disputes. In this paradigm, adjudicators are usually those who have a thorough awareness of the customs and norms of the area, such as matbars or shalishkars. Their well-known status in the community lends the procedure a feeling of comfort and confidence, creating an atmosphere that is favorable to the peaceful resolution of both civil and criminal cases.

In contrast, the state's judicial branch's extension into rural areas as a result of legislative interventions highlights a divergent trend in the development of conflict resolution. Certain statutes, designed to tackle the difficulties faced by rural communities, define the authority and processes by which state-approved courts handle cases that are customarily settled through shalish.

By bringing traditional customs and formal legal systems into harmony, this legal assimilation aims to provide a dual-track system that can help negotiate the challenges of delivering justice in rural areas.

In rural Bangladesh, the cohabitation of shalish and the state's judicial growth reflects a dynamic interaction between formal legal frameworks, community-based resolution, and tradition and modernity. Policymakers and legal scholars alike must comprehend this complex web to strike a balance between upholding the rule of law and protecting cultural heritage in the dynamic field of dispute resolution.

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I. PROCEDURE

Shalish is a comprehensive conflict resolution system that handles a wide range of civil cases, many of which have subtleties related to criminal activity. With a strong focus on gender and family-related issues, this comprehensive framework excels at resolving complex challenges. These include but are not restricted to inheritance issues, dowry disputes, polygamy cases, divorce cases, and cases of abuse against women.

The Shalish system's effectiveness stems from its capacity to handle these intricate issues from an all-encompassing perspective, acknowledging the interdependence of many legal and social aspects. When it comes to inheritance, Shalish is an important channel for ensuring that assets are distributed fairly while maintaining the values of justice and family unity. The Shalish system takes great care to settle disputes involving dowers, which are a common cause of conflict, in a way that upholds the dignity of all parties concerned.

Another level of complication arises in polygamous situations, as Shalish tries to balance the legal issues with the interpersonal factors involved. The system takes a sophisticated approach to divorce proceedings, acknowledging the delicate nature of these cases and working to promote cooperative solutions that put the interests of all parties first.

The parties' agreement to follow the board's decision is a need for conducting the Shalish. The village chief will occasionally request Shalish when a conflict arises out of a desire to reduce social tension. The public also asks questions during Shalish. Here, the audience serves as an impartial yet powerful advocate. To reveal the truth, they pose several inquiries. The key point is that the Shalish board members truly attempt to assess the primary circumstance. The board has delivered its final decision.

There are typically two sides involved in a conflict. Shalish's location is filled with presentations from both sides. The board members first carefully heard the complainant's full list of grievances. The accused then can make a defense. If both sides make the same kind of statement, such as if the accused admits to the allegations and concurs with the Shalish board members' judgments, the board members will request formal approval from each side. Finally, a decision was reached and recorded in writing.

In that written document of judgement, all the audiences in attendance also provide judgmental indicators. In general, the Shalish board chairman should keep the paper safe. The paper may be presented to the court or Thana if necessary. If anybody files a lawsuit, there have initially been some attempts to resolve the issue without litigation. Throughout this process, the Shalish is performed by both parties. And following the Shalish, the paperwork to withdraw the case is given to the police station's official in charge.

II. HISTORY

This traditional kind of mediation has a long history in Bangladesh's humanities, culture, and history. It depends on either shalish panel arbitration or mediation, where the shalishkars assist the parties in reaching an understanding.

The village Shalish, which is historically a local committee of officials that is exclusively made in the traditional form and provides dispute resolution apart from the state, is most frequently included in the legal structure of Bangladesh. The village Shalish is traditionally a local committee of officials that is exclusively made in the traditional form. Active NGOs have all established their Shalishs as the fairer alternative for local Shalish in order to improve access to justice. It's interesting to observe that different institutions are consulted by citizens. Sessions take place in the captain's home or a temporary office with community members frequently present, and Shalish frequently creates physical access to these spaces.

People have historically turned to the Shalish in Bangladesh to seek justice since it is believed that the formal judicial system is plagued by corruption, delays, difficult processes, high costs, class bias, and gender bias that favors males over women. cases can aggravate the already challenging circumstances faced by female plaintiffs. Here, Shalish appears as a different arena for resolving disputes. However, the

village Shalish is customarily a male-only committee or official body. More hybrid Shalish forms led by local elected leaders have replaced the classic Shalish. Additional NGO interventions have assisted in the establishment of alternate Shalish in an effort to divert people's attention to new structures made to be more inclusive of women. Despite the concision effect to include women in the interventions to provide justice, people continue to go to traditional Shalish as the community and religious sanctions are strong. [5]

Despite major advancements, the Shalish frequently subjected the women to the same social pressures and gender biases as the formal courts, demonstrating that the Shalish was more detrimental to the female party than beneficial. [6] According to the same report, donor-funded NGOs connect bar associations to make it simpler for people to access the legal system, particularly in cases of violence against women.

Another initiative (Banchte Shekha) started an all-female paralegal programme to train village women in Muslim family law, teaching them about topics like dowry, marriage, divorce, and inheritance so they may help villagers without having to hire a lawyer. The status of women in Shalish, who were previously unable to have any representation even in high-risk scenarios, has significantly improved because to these volunteer paralegals who assist in the Shalish process.

III. TYPES OF SHALISH

Three types of shalish exist: traditional shalish, shalish facilitated by the government, and shalish facilitated by non-governmental organisations.

a. Traditional Shalish

It entails the assembly of male village elders and concerned individuals to resolve local conflicts. Even though some of the decisions are unfair and unjust, they still have a lot of value because they are made by reputable and recognized members of the society. Women, however, are vulnerable to severe punishments through the issuance of fatwas, or legal judgements, made by recognized religious authority of Islam, given that they are only governed by high-level males. In order to keep control over these judicial systems and uphold cultural norms and biases, corruption is frequently used.

b. Government Facilitated Shalish

The Union Parishad (UP), the lowest level of local elected government, participates in it by serving as session chairmen and moderators and by considering the rules intended to control the penalties imposed out. However, it is widely reported that the dynamics and organisational structure of this type of shalish are very similar to the traditional form in that local patronage systems have a significant impact on the selection of candidates and the rights of women and vulnerable groups are largely disregarded. However, there is an increasing tendency toward women joining Union Parishad.

c. NGO Facilitated Shalish

It offers shalish and community members training and instruction in gender and social justice, supports session planning, and introduces record-keeping procedures. The Madaripur Legal Aid Association (MLAA), which has also taught numerous other NGOs in the subject, has been the most major actor in spreading this framework and lobbying for the modification of gender and class prejudices in these proceedings.

IV. CURRENT STATUS

Legal processes are cumbersome and expensive in Bangladesh, as they are in many other nations. The legal system is out of reach for the majority of people. People look for local remedies like the traditional alternative dispute settlement method, generally known as shalish, to avoid expensive and drawn-out court proceedings.

In Bangladesh, shalish sessions are frequently used to address matters such as marital conflict, desertion, oral divorce, etc. Shalish is currently mired

5 Lugo and Searing (2014)
6 Goresh (2009)

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in a complex web of issues in Bangladesh. Huq [7] cited research on rural informal shalish led by the Union Parishad as a method of pervasive corruption of its administrators. In informal shalish incidents, there is a propensity to ignore or give the institutional laws and accepted justice principles an improper amount of respect. The outcome of the majority of shalish procedures is frequently influenced by orthodox religious beliefs, wealth, nepotism, political dominance, and the social position of persons from the upper class.

There is evidence that some of the splashes were used in various regions of the country to carry out perverted "fatwas" [8] against women. It was actually a quiet revolution that altered the social climate of rural Bangladesh. In earlier times, this would have been unimaginable. As a result, the Mahajan class and the clergy retaliated by systematically abusing women through fatwas and attacks on NGOs, NGOs' employees, etc. Fatwas against women have almost always been issued, condemning them to inhumane, brutal, and degrading treatment in the name of Islam through a Shalish.

Therefore, in addition to being "anti-women," the fatwabaj are also "anti-development." Due to her judgement protecting a fatwa victim who was pregnant and ordering the authorities to take necessary action against the concerned fatwabaz, even the Supreme Court's first lady judge has not been immune to these fatwas. As a result, the fatwas have been consistently employed as a means of oppression and violence against women.

It is also clear that the rural power structure is undergoing periodic adjustments. All aspects of rural life are affected by these developments, which weakens the Gram Panchayet system's historical appeal. Bangladesh's Gram Panchayet is now a severely dysfunctional and ineffective mechanism for resolving local conflicts. The panchayets' original emergence was a spontaneous phenomenon created to address social demands, and they exhibited a high degree of autonomy in their operations. Almost all disputes that arose in the village community fell under the purview of the panchayet. The existing village panchayet was essentially preserved despite the Muslim rulers later creating their own judicial system that was at odds with the established structure.

Intense factional rivalries and infighting in the villages, according to recent studies, have caused the village-based shalish to experience serious functional difficulties. Localized minor disputes are increasingly being referred to the union parishad (UP) chairmen/ members for mediation instead of the formal village courts. These findings also point to rampant corruption in the informal shalish carried out by local officials or UP employees, including erroneous consideration of pertinent legal requirements or accepted standards of justice. Inequality in Shalish is mostly caused by pressure from the wealthy, the influence of money or special favors, fear of local terrorists, and dominance of traditional religious beliefs. When a minor disagreement is settled through shalish, money is frequently exchanged. Family and land disputes, which are more amenable to peaceful remedies, are the root of many crimes. Although it is preferable to avoid being vengeful and seek a solution to the conflict in minor criminal cases, litigation is generally the preferred course of action. However, litigation ultimately does not lead to a resolution and instead simply fosters further hostility and division among the disputants specifically as well as within the community as a whole. Anyone interested in the continuation of shalish in Bangladesh today will find it extremely difficult to bring the traditional shalish back and shape it in a way that reflects the people's spirit and aspirations. But it appears to be exceedingly challenging to reach an equitable agreement between the disputing parties because of enduring structural- functional issues and the absence of peace and amity within the rural social structure. The fact that certain Non-Governmental Organizations (NGOs) have recently stepped forward to reform the conventional shalish system, however, appears to be a beneficial trend. They are aware that the main goals of the mediation process should be to achieve neutrality, non-imposition, and a "win-win situation."

7 1998

8 Religious verdict

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IMPERICAL DETAILS ABOUT SHALISH

1. Number of Cases

Village Court paves the way for accessing to justice for the huge amount of vulnerable communities. One report (LGD, 2013) shows that over 90,000 people, especially those from vulnerable communities have extended direct access to localized justice through shalish. In 2013 a total of 18,348 cases were reported of which 15,276 were resolved and13,174 of these decisions of resolved cases have been implemented in the 350 shalish. Since the formal court is overburden with huge number of cases, these activities of shalish reduce the loads of court. From July 2017 to February 2018, District Courts has transferred of 2210 cases to the shalish.

2. Gender

Women have always been excluded from taking part in community conflict resolution in rural Bangladesh. Women seldom ever even show up for their own hearings in traditional community justice systems in rural Bangladesh (shalish), much less serve as mediators.

The government, NGOs, and women leaders have really been striving to improve the situation. NGOs have used historic concepts to construct their own community dispute forums that give women's voices a platform. The village courts, a quasi-state justice venue, now have at least one woman on each case involving women and kids in development areas.

Women's participation in and influence over these forums is still limited. The ability to advance is constrained by the domination of elite (mostly male) interests in decisions affecting politics, society, and the economy in both public and private settings. Women's participation in communal conflict resolution, for instance, is typically limited to "women's matters," which excludes disputes over land and property.

Women are now having more opportunity to engage in public decision-making due to institutional and legal reform. Quotas for women's participation in direct elections were part of the 1997 reforms to local government, ensuring their numerical (though not substantive) involvement in local politics. The Village Court Act was amended in 2013 to require the presence of a woman in matters involving women and kids. Due to procedural requirements, these same politicians frequently serve as judges in village courts, which increases their level of involvement in the community.

Mahbuba, a woman leader who was mentioned in focus groups held in the neighborhood, said: *"My father-in-law had been the chair of this union for a long 25 years and the people would abide by his words like the blind […] After his judgement nobody needed to go to the village court."* [9]

The majority of the women participating in conflict resolution that we spoke with made it apparent that women's participation in these forums – as both disputants and mediators – had traditionally been and frequently still is limited.

A few years ago, a woman who had recently come into the community after getting married said, "If we want to talk in the community-level shalish, then older members of the community say: "You are women, you are young, we have more experience, and you only came from your parent's village only a couple of years ago – how can you talk about the community? We know more about the community than you, so you stop it" [10]

A larger body of research shows how shalish have become more open to women, yet they rarely take part as shalishkars. Instead, they occasionally attend sessions as witnesses or observers.

CRITICAL ANALYSIS

Despite the fact that everyone in Bangladesh has equal access to the legal system under the country's constitution, the reality differs greatly from the ideal. The citizens of Bangladesh, particularly those from rural areas and indigenous tribes, rarely

9 Craig Valters and Ferdous Jahan, Women and Power: Mediating community justice in rural Bangladesh, February 2016, http://cdn-odi-production.s3-website-eu-west-1.amazonaws.com/media/documents/10291.pdf

10 *Id*

experience the full potential of their rights due to prices, case backlogs, and shortages of resources and expertise. As a result, informal and regional dispute resolution processes like the Shalish are still applicable in Bangladeshi society. Due to the informal nature of these mechanisms, disputants are able to address their issues more quickly, for little to no money, and in a fashion that allows them to express themselves freely. Additionally, this forum for resolving neighborhood problems can successfully stop the increase of aggression in these regions. [11]

Although, shalish proves to be a good system, it comes with a lot of drawbacks. Shalish's biggest problem or hindrance is politics. Shalish system aristocracy is destroyed by party-centered politics. The main challenge in this situation is politics. There is a good possibility that the victim won't receive justice if they don't have family members who support the government or if they have relatives who support the opposition. Conflicts of a minor kind are promptly brought before Shalish. However, significant and delicate issues are first brought up in court, but if they are not resolved or are pending for an extended period of time, they resort to Shalish . One restriction, though, is that the Shalish board is only permitted to issue monetary fines and cannot make any major judgments or punishments.

The Shalish board cannot enforce the decision if someone disobeys it. One of the primary difficulties facing the Shalish system is animosity between various influential members of society. Some powerful individuals outside of the Shalish board, who have strained relationships with its members, attempt to persuade one of the parties to violate the agreement or reject the Shalish board. Conflicts can occasionally suit someone's interests. They might not want the conflict to be resolved. That is why they make various attempts to obstruct the reconciliation process. But there is no problem with security in the village.

It can happen that one of the parties is unwilling to participate in a Shalish for a specific individual. Shalish's lack of power is the key issue. The board has no authority to take action if one or more parties violate the rules. The conventional Shalish system is currently on the verge of extinction. They are not armed in any way. Another reason for the disaster of Shalish is that sometimes the members themselves may be involved in favoritism, which may turn out very injurious for the procedure. They occasionally receive bribes from the parties.

CONCLUSION AND RECOMMENDATION

The Shalish system is an essential institution that is deeply ingrained in Bangladeshi rural culture and is still relied upon by most villagers. Two main processes—the top-down and bottom-up approaches—define this social structure. Each provides a different viewpoint on how Shalish proceedings are initiated and carried out.

According to the top-down theory, Shalish discussions could have started with the village chiefs, indicating a hierarchical framework in which commands and decisions trickle down from greater authority to the lowest tier of the organisation. On the other hand, the bottom-up approach highlights the possibility of initiating Shalish procedures from the recipient's end, highlighting the community members' agency and involvement in igniting the conflict resolution process.

Amazingly, there are no strict rules or guidelines attached to the position of a Shalish board member—a characteristic that reflects the system's organic structure. The fact that there are no set requirements for board participation highlights how inclusive the Shalish structure is, enabling people with a variety of experiences and backgrounds to actively engage in the settlement of conflicts within the community.

To put it simply, the Shalish system continues to function as a dynamic and flexible organisation in which the interaction between top-down and bottom-up procedures promotes a collective strategy for resolving disputes. The adaptable character of Shalish board membership serves as an additional illustration of the democratic spirit ingrained in this age-old system, underscoring its durability and applicability in the dynamic context of rural Bangladeshi culture.

11 Akram S. A Critical Analysis of Access to Justice in Bangladesh. International Journal of Humanities and Social Science Invention. 2017

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However, family conflicts, land disputes, acts of violence like arson, theft or robbery, etc. are the disputes that Shalish is most frequently called upon to settle. The system has faced numerous difficulties, including political influence, a lack of documentation, and a lack of legal support. The local Shalish system, however, is extremely helpful in resolving disputes and supporting the broader judicial system. Through all available means, the entire system should be promoted and preserved as a piece of cultural heritage and a powerful tool for resolving disputes.

The following suggestions can be considered for good shalish implementation:

- Politics should be less intrusive in the shalish system. Building societal awareness is necessary in this situation.
- The shalish session's proper paperwork should be kept up to date. In this situation, management should at the very least oversee the documenting of the problem.
- To assess the actual shalish system scenario, more research should be done. It is essential for the system to be well promoted.
- Funding should be set aside in a certain amount for the procedure.

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CRIMINAL LIABILITY FRAMEWORK OF CORPORATE FINANCING

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ABSTRACT

"Corporate crime is the conduct of a corporation or of its employees acting on behalf of the corporation, which is prescribed and punished by law."- J. Braithwaite

Corporations have their own legal entity and are treated as such in the eyes of the law. As a result, corporations can be held distinct from any criminal liability that may be imposed on individual members for any crime. The primary concept of criminal responsibility is based on the 'actus non facit reum nisi mens sit rea'(latin maxim) means which effectively means that an act is not incorrect unless it is done with a wrongful state of mind. Only those offences that occur during the course of business operations and for which the corporation bears responsibility are legally accountable. A firm might be involved in omission offences including failing to secure safety mechanisms and other omission offences. Because intent does not play a part in judging claims against corporations, they can be held accountable for crimes that do not require intent.

INTRODUCTION

A company is regarded as a different legal entity from its shareholders. It can be regarded as a group of people working together to achieve a common goal, and it has no legal or technical significance. It is well established that where there is a violation of criminal law, criminal liability is connected. The Actus non facit reum mens sit rea(Latin maxim) states that in order to hold a person or entity accountable, it must be demonstrated that there was an act or omission that was prohibited by law, along with mens rea, which is legally defined as having a guilty mind. It is classified as a type of white-collar crime.

Corporate criminal liability is defined as a crime committed by an individual or group of individuals who, for the purpose of pursuing a common goal or making a profit in the course of their occupation, commit acts or omissions that are prohibited by law and are done with a guilty mind for the benefit of the corporation or any individual within the group.Earlier in many situations when the concept of holding a corporation liable was not introduced there was not any corporation held liable for any criminal act as the it is an artificial legal person, so it could not be imprisoned, and corporation not being natural person there was absence of mens rea.

When a corporation is hold criminally liable it not only affects the business of corporation but also the individuals in the corporation who are engaged in criminal conduct it may make them suffer criminally and financially. However, it has been suggested in case of punishment to be imposed on corporation it has been suggested that fine should be imposed rather than imprisonment.

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CORPORATION'S LIABILITY FOR CRIMINAL ACTS

A company can be held accountable for its workers' criminal acts as long as the employees are acting within the limits of their job and their actions benefit the company. A company cannot be imprisoned or punished in the same way that an individual may. However, there are various ways to penalise a corporation, including:

- Strict penalties
- Business license(s) being revoked
- Government authorities enforcing regulations

CRIMINAL PENALTIES FOR A CORPORATION HELD LIABLE

A corporation that is held legally accountable for the unlawful activity of its workers may suffer both financially and criminally. Officers, directors, and the corporation itself could all be held accountable for the criminal action. The following sanctions may be imposed:

- State authorities may revoke the corporation's charter.
- Shareholder lawsuits
- Permanent or temporary loss of deposit insurance, conservatorship, and receivership

INDIAN DEVELOPMENT OF CONCEPT OF CORPORATE CRIMINAL LIABILITY-

Corporate crimes are those perpetrated by corporations or members of corporations for which they are held liable for any conduct or omissions that are punishable under the law.

In Zee Telefilms Ltd. v. Sahara India Co. Corp. Ltd. , a firm was released from liability for defamation because there was no evidence of mens rea, which is an implied condition under the law.

The State of Maharashtra v. Syndicate held that a company could not be prosecuted for offences that entailed corporeal punishment or imprisonment because prosecuting a company for such offences would result in a trial with a guilty verdict but no effective order could be implemented.

In Iridium v. Motorola , the Supreme Court took a different stance than in the previous case, holding that a firm might be held accountable for both statute and common law offences, including those requiring mens rea.

INDIA'S LEGAL STATUS

The Indian Penal Code contains offences that specify significant offences for which a corporate organisation may be found guilty, and the punishment imposed is a mandatory jail sentence.

Saradha 'Chit Fund' Ponzi Scheme

Saradha Group, which collected money from investors by issuing redeemable bonds and secured debentures and promised ridiculously large profits on moderate investments, was exposed as a Ponzi fraud in 2013. Local agents were hired across West Bengal, and they were offered large cash rewards from investor deposits to help them expand swiftly, eventually establishing a conglomerate of over 200 companies. This syndicate was set up to launder money and deceive regulators such as the SEBI. The scheme crashed altogether in April 2013, resulting in a loss of around $5 billion and bankrupting many of the plan's low-income investors. The CBI has questioned over a dozen TMC MLAs and MPs, including ministers, in connection with the scandal. Many of these leaders were active in the group's operations on a daily basis.

Quasi-Judicial Powers of SEBI

SEBI has the authority to deliver judgements related to fraud and other unethical practices in terms of the securities market. This helps to ensure fairness, transparency, and accountability in the securities market.

Organisational Positioning Functions under S. 11(1) of the SEBI ACT

- Protect the interests of investors in securities.
- Regulate the securities markets.
- Promote the development of securities markets.

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Statutes dealing with Legal Framework of SEBI

- SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018
- SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015
- SEBI (Share Based Employee Benefits) Regulations, 2014
- SEBI (Issue of Sweat Equity) Regulations, 2002
- SEBI (Buy Back of Securities) Regulations, 2018
- SEBI (Prohibition of Insider Trading) Regulations, 2015
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- SEBI (Delisting of Equity Shares) Regulations, 2021
- SEBI (Issue and Listing of Debt Securities) Regulations, 2008
- SEBI (Foreign Portfolio Investors) Regulations, 2019
- SEBI (Ombudsman) Regulations, 2003
- SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003
- SEBI (Collective Investment Schemes) Regulations, 1999
- SEBI (Depositories and Participants) Regulations, 2018

Other important powers of SEBI

- Power to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities (Sec. 11A).
- Power to Regulate Collective Investment Schemes (Sec. 11AA).
- Power to issue directions (Sec. 11B).
- Power to levy penalty (Sec. 11B).
- Powers to initiate “Cease and Desist” Proceedings (Sec. 11D).
- Power of adjudication (Sec. 15-I).
- Power to make regulations (Sec. 30).

STATUTORY REGULATION OF SECURITY DEALINGS: LEGAL INSTITUTIONS

- Securities and Exchange Board of India Act, 1992.
- Securities Contracts (Regulation) Act, 1956.
- Depositories Act, 1996.
- Companies Act, 2013.

In Standard Chartered Bank vs. Directorate of Enforcement , it was decided that the corporation is subject to criminal prosecution and punishment. The Supreme Court dismissed the idea that the firm could avoid criminal prosecution if a prison sentence was required. Because the company cannot be condemned to imprisonment, the court cannot impose that punishment; but, if both imprisonment and a fine are authorised as punishments, the court can impose a fine against the firm.

In Aneeta Hada vs. Godfather Travels and Tours Pvt. Ltd , the issue in this case was determining the culpability of a corporation in the event of a cheque being dishonoured. The Supreme Court debated the scope of vicarious responsibility in corporate cases. As a legal entity, the corporation is responsible for the actions of others.

In the case Iridium India Telecom Ltd vs. Motorola Inc., , the Supreme Court held that in all jurisdictions across the world which are governed by the rule of law companies and corporate houses can no longer claim immunity from criminal prosecution on the ground that they are not capable of possessing mens rea.

CONCEPT OF CORPORATE CRIMINAL LIABILITY IN INDIA

Courts in India did not punish corporations until the notion of corporate criminal culpability was developed because they believed that vital factor was missing.i.e. Mens rea is absent in corporation it being a fictitious legal entity having no physical existence so also could not be brought physically for the proceedings. However, many legal difficulties

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arose as a result of such a concept, as noted by the Law Commission of India in its 41st Report, where amendments were suggested in the landmark case of Standard Chartered Bank and Ors. v. Directorate of Enforcement , in which the bank was prosecuted for violating provisions of the Foreign Exchange Regulation Act, 1973, where the Supreme Court did not follow the strict penal provisions and held that a corporation can be held liable.

When a company is judged criminally accountable, employees may face criminal and financial consequences as a result of their unlawful behaviour. Officers, directors, and even the corporation are all held accountable, with consequences including civil and criminal penalties, loss of government contracts, permanent or temporary loss of deposit insurance, conservatorship, and more.

In Assistant Commissioner v. Velliappa Textiles Ltd , It was decided that companies could not be imprisoned since they could not be punished or prosecuted under the IPC, which prohibits them from doing so. Under the Companies Act, the notion of corporate criminal culpability was introduced. The Companies Act 2013, which superseded the Companies Act 1956, has raised the responsibility of directors. Under Companies Act 2013, not only the directors are liable, but also the officers in default, which includes in a broad sense a full-time director, key managerial personnel, and such other officers in the absence of KMP who have been specified by the Board of directors, as well as every other director who has information about it or has participated in the act without raising an objection under the concept of corporate criminal liability in India.

The concept of Corporate Criminal Liability under the Companies Act 2013-

- Section 53-Prohibition of shares at a discount.
- Section 118(12)-Minutes of proceedings of General Meeting, Meeting of Board of Directors and other meetings and resolutions passed by Postal Ballot.
- Section 128(6)-Books of Account, etc, to be kept by Company.
- Section 129(7)- Financial Statement.
- Section 134- Financial Statement, Boards report, etc.
- Section 188(5)- Related Party transactions.
- Section 57-Punishment for personation of Shareholder.
- Section 58(6)- Refusal for registration and appeal against refusal.
- Section 182(4)- Prohibitions and restrictions regarding Political Contributions.
- Section 184(4)- Disclosure of Interest by Director.
- Section 187(4)- Investments of the Company to be held in own name.
- Section 447- Punishment for fraud.

Section 21 in Transplantation of Human Organs Act 1994 about Offences by Companies for the purposes of this section.

As per Section 66 of the Food and Safety Standard Act 2006 offences by Companies:

(I) Where an offence under this Act which has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that where a company has different establishments or branches or different units in any establishment or branch, the concerned Head or the person in-charge of such establishment, branch, unit nominated by the company as responsible for food safety shall be liable for contravention in respect of such establishment, branch or unit.

Provided further that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. (2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of, any director,

manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(a) "company" means anybody corporate and includes a firm or other association of individuals

As per section 305 of the Code of Criminal Procedure mentions Procedure when corporation or registered society is an accused.-

(1) In this section, Corporation means an incorporated company or other body corporate, and includes a society registered under the Societies Registration Act, 1860 (21 of 1860).

(2) Where a corporation is the accused person or one of the accused persons in an inquiry or trial, it may appoint a representative for the purpose of the inquiry or trial and such appointment need not be under the seal of the corporation.

(3) Where a representative of a corporation appears, any requirement of this Code that anything shall be done in the presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that that thing shall be done in the presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representative shall be examined.

(4) Where a representative of a corporation does not appear, any such requirement as is referred to in subsection (3) shall not apply.

(5) Where a statement in writing purporting to be signed by the managing director of the corporation or by any person (by whatever name called) having, or being one of the persons having the management of the affairs of the corporation to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section, is filed, the Court shall, unless the contrary is proved, presume that such person has been so appointed.

(6) If a question arises as to whether any person, appearing as the representative of a corporation in an inquiry or trial before a Court is or is not such representative, the question shall be determined by the Court.

As per the Section 38 of the NDPS Act, 1985 mentions Offences by Companies-

(1) Where an offence under Chapter V has been committed by a company, every Person, who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to Prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under Chapter IV has been committed by a company and it is Proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the Part of, any director, manager/ secretary, or other officer of the company, such director, manager, secretary of other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation- for the purpose of this section, -

(a) "Company" means anybody corporate and includes a firm or other association of individuals.

The corporation can be held criminally responsible for a variety of Crimes namely-

a. Conspiracy.
b. Maintaining public nuisance.
c. Violations of Consumer Protection laws.
d. The illegal practice of Medicine.
e. Antitrust laws Violations.

As per the PC Amendment Act Bill 2013, Section 9(1)- A commercial organisation shall be guilty of an offence and shall be punishable with fine, if any person associated with the commercial organisation offers, promises or gives a financial or other advantage to a public servant intending- (a) to obtain or retain business for such commercial

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organisation; and (b) to obtain or retain an advantage in the conduct of business for such commercial organisation: Provided that it shall be a defence for the commercial organisation to prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking such conduct.

(2) For the purposes of this section, a person offers, promises or gives a financial or other advantage to a public servant if, and only if, such person is, or would be, guilty of an offence under section 8, whether or not the person has been prosecuted for such an offence. (3) For the purposes of section 8 and this section-

(a) "commercial organisation" means-

(i) a body which is incorporated in India and which carries on a business, whether in India or outside India;

(ii) any other body which is incorporated outside India and which carries on a business, or part of a business, in any part of India;

(iii) a partnership firm or any association of persons formed in India and which carries on a business (whether in India or outside India); or

(iv) any other partnership or association of persons which is formed outside India and which carries on a business, or part of a business, in any part of India;

(b) "business" includes a trade or profession or providing service including charitable service;

(c) a person is said to be associated with the commercial organisation if, disregarding any offer, promise or giving a financial or other advantage which constitutes offence under sub-section (1), such person is a person who performs services for or on behalf of the commercial organisation.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the offence under section 8 and this section shall be cognizable.

Section 10 (1)- Where a commercial organisation has been guilty of an offence under section 9, every person who at the time the offence was committed was in charge of, and was responsible to, the commercial organisation for the conduct of the business of the commercial organisation shall be deemed to be guilty of the offence and shall be punishable with imprisonment which shall not be less than three years but which may extend to seven years and shall also be liable to fine Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he has exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under section 9 has been committed by a commercial organisation and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the commercial organisation, such director, manager, secretary or other officer shall also be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly under this section.

Explanation-

For the purposes of this section, "director", in relation to a firm, means a partner in the firm.

Corporate Culture is the one which comprises of corporate ethics and rules relating to behaviour in a Company. The corporate culture is the one wherein the Culture of the Company depends from organization to organization. It is the beliefs and attitudes which guides the practices of the Company. It can also be termed as the organizational culture.

There are six components of a great corporate culture which can be explained as follows-

1. Vision- One of the components of the great corporate culture is to have a good vision and have a vision or mission statement. It is simple and is considered as foundation element.

2. Values- It is one such element which provides guidelines on the pattern of behaviour to achieve the vision or mission set by the Corporation. Originality of values are to be considered less important than authenticity.

3. Practice– The values which are set by the corporation need to be practised and the company needs to practice what it professes.

4. People– One of the most important elements

is people wherein if people follow the culture which has been set by the organization it adds to the value structure of that organization. Stringent policies are been followed by the recruiting firms.

5. Narrative- It has been considered as the core element of the Culture Creation wherein every organisation has a unique story and a unique history.

6. Place -Place has been considered as the one which shapes the culture. Place in terms of architecture or Aesthetic design determines the Behaviour and mindset of the people at workplace and the workplace as a whole.

These six components provide for a foundation for shaping the culture of a new organization. When a Company is looking for a change the first step is to identify and understand them carefully when in the existing organization.

CONCEPT OF CORPORATE CRIMINAL LIABILITY IN OTHER COUNTRIES

a) United States of America (USA)-

Earlier in the USA the corporations were considered as a fictitious legal entity and the Mens Rea required to commit a crime was absent in corporations so they weren't held criminally liable but this notion was changed and however in the present scenario although the federal statues may apply but they cannot overrule the state laws in case where it overlaps with state laws and hence a Corporation can be prosecuted for both Federal and State laws. The punishment given under the laws of this country is that there is punishment by fine or confiscate Property which can be levied by the orders of the Court. Generally, when there is violation of a Statue the punishment is either fine or imprisonment or both as per the Courts order but it does it applies to corporation as well and the rule applies that if fine is not paid then punishment of imprisonment can be given.

b) Switzerland-

The concept of Corporate Criminal liability in Switzerland was introduced in the late of 2003 where it was based on the subsidiary liability which stated that corporations can be held liable when fault cannot be attributed to a specific individual due to lack of organisation within the enterprise and also the Criminal fines range upto five Swiss francs.

c) France-

The concept of Corporate Criminal liability in French law under Article 121(2) of the new French Penal code. According to the law in this country there are three requirements which need to be fulfilled in order to impose a liability on a legal entity. The first requirement is that French legislature must have enacted a substantive criminal offence which the corporation must have contravened, the second requirement being that the actual criminal liability must lie with the agents or representatives of that corporation on which liability of corporate criminal liability will be imposed. The third requirement is that the acts which are criminal in nature and criminal liability can be imposed must be for the benefit of the Corporation. It provides a list Statutory Criminal Liability.

d) Germany-

In present situation in Germany companies cannot be held liable as per the German Law but those individuals who commit crime can be held accountable for their actions even if those actions are for Company's benefit however fines can be imposed on companies under the Administrative offences Act. In order to make a company to hold liable the individuals who commit the criminal or administrative offence must belong to the person mentioned in the group of persons under section 30 para 1.

e) Japan-

In Japan there is a provision of known as dual criminal liability provision wherein the Company as well as the business operator and the perpetrator can be held liable and this provision was introduced in the Act which is the Prevention of Capital Outflow in the year 1932.A company will be held liable when the crime is committed not only by the Senior Executives but also any of the employees of the Company however the company will not be held liable in case the crime has been committed by the Act of Third parties.

f) Russia-

In Russia the liability of a Company is either Civil or Administrative in case it commits illegal conduct as there is no concept of criminal liability for companies which exists in case of individuals. In this country under their administrative legislation Company is considered as a separate legal entity and may commit acts known as the administrative offences.

g) UK-

The EU General Data Protection Regulation along with the UK Legislation is set to introduce new criminal offences for corporates which will not be relied on the basis of identification principle where prosecutions will be in instances of cybercrime and misuse/manipulation of personal data.

CONCLUSION

It is a well-established legal premise in criminal law doctrine that companies are subject to criminal culpability. A company can commit a crime and be held criminally accountable. However, Indian legislation does not keep up with these changes, and corporations are not held legally accountable. Even if they do, the statutes and court interpretations impose no penalties other than a fine. Even the Supreme Court has stated that a separate law is needed to provide for the imposition of criminal liability on corporations. The 47th Law Commission Report recommended various solutions to deal with corporate criminal liability namely that the judges should have the discretionary powers to impose penalties as it deems fit to them. In case of a corporation, it would be competent enough if it is a corporation to sentence the offender with fine only rather than imprisonment and fine or only imprisonment. Note that corporate criminal liability can arise from various circumstances.

However, with the growth and developments which take place in India the corporations are not made criminally liable and if punishments are given then no other than except fines are to be imposed. There is a need to attach the significance of Corporate Culture in both formal and informal polices, in rules and practices wherein the corporation is considered as a conduct element of offence which has been committed by it when their cause was encouraged by culture of Corporation. It becomes possible through this concept for a corporation in cases where there is no involvement of individual in committing an offence.

The existing standards in terms of assessing the Corporate Criminal liability has often been criticized and has also been termed unrealistic, inconsistent with the fundamentals of the criminal laws. In terms of corporate context in order to deter crimes the state should induce the firms to take policing measures. In case of professional assessment of the corporation, the court should have the power to appoint suitable person or persons to prepare report on corporation. When a corporation is sentenced in addition to imposing a fine or instead of imposing a fine it should make one or more orders in such a way that it considers that it will achieve the objectives of sentencing. Stricter punishments need to be imposed like corporate dissolution wherein the courts will be able to see whether any reincorporation can happen in cases where there is penalized corporate. The concept of Sustainable Development professed by the Government has substantially failed in its efforts to control such crimes affecting largely the society.

CRIMINAL LIABILITY FRAMEWORK OF CORPORATE FINANCING

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A STUDY OF VICTIM COMPENSATION IN INDIA WITH EMPHASIS ON JUDICIAL ACTIVISM

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ABSTRACT

The victim compensation scenario in India reflects a complex landscape shaped by legal frameworks, judicial interventions, and systemic challenges. The legal framework, primarily under the Victim Compensation Scheme (VCS) and related statutes, outlines the principles and mechanisms for compensating victims of crimes. However, implementing these provisions faces challenges such as bureaucratic hurdles, delays, and variations in compensation amounts across states.

Judicial activism in this context has been instrumental in broadening the interpretation of victim rights and compensation eligibility. Courts have often intervened to ensure a more inclusive approach, addressing the diverse needs of victims beyond mere financial restitution. Noteworthy cases have set precedents, influencing the evolution of compensation laws and prompting a re-evaluation of existing schemes.

INTRODUCTION

The compensation to the victim of crime is a significant matter of concern; all over the world, the condition of the victims of crime is not better. For quite a long time, the victims were not the major concern for criminology. The function of compensation is simple. Compensation serves the victim's right to what would be unlawful injuries to persons or their property. The advancement of victim compensation played a significant issue in the victim support movement. Part of the dilemma, in my opinion, might be traced to the fact that a lot has been written through these years about the arrangement and function of victim compensation.[1] Victim compensation is a form of victim support that meets the physical, emotional, and society-related needs of the victim and has played a crucial role in victim recovery. Not much attention is given to the role of victim compensation in future victim support efforts. Victims of crime often endure physical, emotional, and financial suffering, and their path to recovery can be arduous. In recognition of this, India has implemented a system of victim compensation to provide financial assistance and support to those who have been victimized.

The role of the victim of a crime in the present criminal justice system is limited to that of a witness for the prosecution, even though he or she is a person who has suffered harm such as physical, mental, emotional, economic or impairment of his/her fundamental rights. The primary attention of the State is on the offender, to protect his rights, his fundamental rights, human rights, fair trial, the protection from custodial harassment, etc., faced by them. All the problems of the accused are taken care of by the State ignoring the plight of the victim. The State spends the resources to take care of the accused. Of course, the accused will have to be

1 Robert E. Goodin, Theories of Compensation, Oxford J. Legal Stud., 9, 56 (1989).

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treated with dignity as he is deemed to be innocent till he is convicted, but understanding the fact that the victim, against whom the crime was committed, was put to irreplaceable pain and suffering and punishment alone was not subserving the needs of the victim. It is necessary to give due attention to the victims of crime, as otherwise, the victim will remain discontented and may develop a tendency to take the law into his own hands in order to seek revenge and pose a threat to the maintenance of the Rule of Law, essential for sustaining democracy.

Victim compensation in India is a significant step forward in recognizing the rights and needs of crime victims. It serves as a critical support mechanism for those who have suffered at the hands of offenders. While challenges exist, continued efforts to raise awareness, streamline processes, and ensure adequate funding will contribute to a more effective and victim-centric compensation system, thereby upholding the principles of justice, equality, and human rights in India. [2]

SIGNIFICANCE OF VICTIM COMPENSATION

1. **Restoring Dignity and Confidence:** Victim compensation in India plays a crucial role in restoring the dignity and confidence of those who have suffered from crime. Providing financial support helps victims recover from their losses, rebuild their lives, and regain their trust in the justice system.
2. **Promoting Access to Justice:** Victim compensation schemes ensure that individuals from vulnerable and marginalized backgrounds have access to justice. This is particularly important in a country as diverse as India, where socio-economic disparities can impede access to legal remedies.
3. **Encouraging Reporting of Crimes:** Compensation schemes incentivize victims to report crimes and cooperate with law enforcement. By alleviating financial burdens and providing support, victims are more likely to come forward, which aids in investigating and prosecuting offenders.
4. **Reducing the Burden on the State:** In cases where the offender is unable to pay compensation, the state steps in to provide the required funds. This reduces the burden on the state by sharing the responsibility for victim support.

HISTORICAL RECORD OF VICTIM COMPENSATION IN MODERN INDIAN HISTORY

The ancient Indian history attests to the notion that victims of crimes are entitled to adequate restitution in the form of recompense for their injuries.

If the King could not restore the stolen things or reclaim the price for the owner by apprehending the thief, it was deemed his obligation to pay the price from his treasury, which he might then recover from the village officers who were responsible for the thief's escape due to their carelessness. Since ancient times, reparation or compensation as a form of punishment has been documented in India. In ancient Hindu law, compensation was recognized as a royal right throughout the Sutra period. [3]

The law of Manu mandates the offender to compensate the victim and pay for medical expenses if the victim is injured, as well as satisfaction to the owner if assets are harmed. The assailant must pay the costs of a perfect cure or, if he fails, both total damages and a fine in all situations of cutting a limb, injuring, or obtaining blood. It demonstrates that victim compensation was never an alien concept in the country's justice delivery institutions. [4]

A story is often told how Emperor Jehangir was faced with a problem in one of his daily "darbars" and how he solved it. One day, the Empress, in a fit of anger, hit her launderer, whose work was not satisfactory, and the washer man fell down dead. On being persuaded, the widow attended Jehangir's "darbar" the following day, and on being asked by Jahangir as to who killed her husband, she trembled and replied, "The Empress" Jehangir was stunned;

2 Ibid

3 Aryan Mohanty, Detailed Analysis of Victim Compensation in India, Law Insider (Jan. 29, 2023, 9:30 AM), https://www.lawinsider.in/columns/detailed-analysis-of-victim-compensation-in-india

4 Ibid

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he drew his sword and said, "The Empress killed your husband. Now, with that sword, you kill the Empress's husband. I command you to do it." The Laundress was nonplussed. She fell at the Emperor's feet, recovered her equanimity soon enough and said, "Sire, I have suffered, but I do not want either the Empress or the country to suffer by my obeying Your Majesty's command. I am prepared to take any punishment for this disobedience." The story goes that the words of the washerwoman touched Jehangir so much that he made her a baroness and showered her with riches beyond measure.

NATURE & SCOPE - VICTIM COMPENSATION

Any person who has suffered damage or his dependants are entitled to compensation. In the medieval era, a criminal or his kin used to give compensation for any wrongful act. If the accused is not capable of paying the compensation, then the state is duty-bound to pay the compensation.

"Ubi jus ibi remedium" is a principle in the of torts that states that there is no wrong without a remedy and that the rule of law demands that one should not be disturbed by wrongdoing. [5]

The term "Compensation" in the current scenario means repayment for the loss suffered. Anything that is given to make things equal is called compensation, a thing that is given to make reparation for the loss, repay, recompense or pay. It can be seen as a liability to society, which is civil. Compensation, which is different from damages, is used for any unlawful act which causes damage or loss to any person. Compensation means that the money is given to compensate for any damage or loss. The main objective behind the compensation is to make the loss bearable to the victim, whether the person has suffered financial loss. The crux of providing compensation is to provide some help to the victim who has suffered the damage, whether it be physical, psychological or emotional. It supports the victim to recover from the trauma as soon as possible and works as a helping hand. The idea underlying compensatory justice is not merely to rehabilitate the victim but also leads to a regime where societal values see such crimes as aberrations, entitling the victim to some form of compensation due to the stark intensity of the crime. [6]

The word 'victim' lacks descriptive precision. The word Victim objectively implies more than the mere existence of an injured party in that innocence or virtuousness is suggested as well as a moral claim to a compassionate response from others.

The United Nations General Assembly in 1985 adopted a 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' which defines "Victims" as persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

The right of compensation to the victim was finally crystallised in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, which recognises four types of rights and entitlements of victims of crime: (a) Access to justice and fair treatment, (b) Right to restitution, (c) Personal assistance and support services, and (d) Compensation.

The right to compensation is recognised in UDHR, 19485 and the International Covenant on Civil and Political Rights. [7] Considering the victims as the key players in the criminal justice process, the UN General Assembly passed The UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985. The Declaration lays down basic standards for the fair treatment of victims, consideration of their views in the criminal justice process, restitution and compensation. The Declaration reconceptualised victimhood as a notion inclusive of those who had been victimised by the

5 MARLENE A. YOUNG, THE ROLE OF VICTIM COMPENSATION IN REBUILDING VICTIMS' LIVES, 1

6 Ibid

7 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Dec. 11, 1985).

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state and by private individuals.

The term 'victim' has been defined in The Code of Criminal Procedure, 1973 under **Section 2 (wa) of The Code of Criminal Procedure (Amendment) Act, 2008** also defines "Victim" means a person who has suffered any loss or injury caused because of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir. The literal meaning of the word "victim" is a person to whom any harm or injury is caused or a person killed as a result of an accident, crime or other event or action and also includes his guardian and legal heirs.

When a victim gets compensation for any crime he has suffered, it becomes essential to the person because it symbolizes justice towards the victim, and it can be seen as financial help for the victim.

- In society, when compensation is awarded, it shows that there is something wrong that the victim does.
- The compensation would work as a step towards helping the victim to overcome the trauma and the damages that are suffered by the victim at the individual level.
- The compensation helps victims transform their lives.

Suresh v. State of Haryana (2015) -

"It is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show the commission of a crime, whether the victim is identifiable and whether the victim of crime needs immediate financial... relief. On being satisfied with an application or on its own motion, the court ought to directly grant interim compensation, subject to final compensation being determined later. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from other factors that may be found relevant in the facts and circumstances of an individual case."[8]

Nipun Saxena v. Union of India -

Pursuant to Supreme Court directions, NALSA drafted the Grant of Compensation to Women Victims/ Survivors of Sexual Assault/Other Crimes-2018.

Essential features of the Scheme:

(i) Woman victim eligible for compensation from multiple schemes

(ii) Online application for compensation.

(iii) The enquiry to be completed within 60 days &

(iv) In the Acid Attack case, and in all other deserving cases, the Secretary DLSA will grant interim compensation.

Subsequently, the Supreme Court laid down that NALSA's Compensation Scheme for Women/ Victims should function as a guideline to the Special Courts for the award of compensation to victims of child sexual abuse under Rule 7 until the Central Government finalizes the Rules. [9]

LEGAL FRAMEWORKS FOR VICTIM COMPENSATION IN INDIA

CONSTITUTIONAL PROVISIONS

Constitution of India also provides for certain safeguards to the victim of crime. It has several provisions which endorse the principle of victim compensation.8 The guarantee against unjustified deprivation of life and liberty has elements obligating the state to compensate victims of criminal violence. The Supreme Court of India has interpreted the right to compensation as an integral part of Article 21 of the Constitution.[10]

COMPENSATORY PROVISIONS UNDER CR.P.C.

The CR.P.C 1973 has authorized the courts in which criminal matters are tried in India for ordering compensation to the person who has suffered loss or damage. Section 357 deals with compensatory provisions.

Under Section 357(1) it is given : [11]

"Whenever under any law in force for the time

8 Suresh v. State of Haryana (2015) 2 SCC 227

9 Nipun Saxena v. Union of India (2019) 2 SCC 703

10 INDIA CONST. art. 21

11 S.N MISHRA, THE CODE OF CRIMINAL PROCEDURE, 1973 (Central Law Publications 2001)

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being a criminal court puts fine... or a sentence (including a sentence to death) of which fine forms a part, the court may, when imposing judgment, order the whole or any part of the fine recovered to be applied:

a) In covering expenses properly incurred in the prosecution;

b) In the payment to any person of reimbursement for any loss or injury caused by the offence when compensation is, in the view of the court, restorable by such person in a civil court;

c) When any person is prosecuted of any offence for having caused the death of another person. Under the Fatal Accident Act, 1855, another person is compelled to pay a person entitled to receive compensation from a person who has been compensated for such a death." - Under Sec. 1A (b) of the Act, husband, wife, parents and children are entitled to compensation.

Section 358 gives power to a magistrate to force or give an order to a person to pay or give compensation of not more than Rs1000 to a person for making police officers arrest that person in the wrong case. Likewise, section 359 of CR.P.C directs the payment of compensation in non-cognizable cases.

It can be seen clearly that only small action is possible under section 357 of the Cr.P.C in case of compensation to a victim of a crime. Moreover, it has been proved through various restrictions and limitations. Some restrictions given in the section are the capacity of the wrongdoer to pay the compensation amount, and its ability to pay acts as an obstacle for the victim to get the compensation.

The state government, on the direction of the Supreme Court, made certain modifications to sec 357 A of CrPC in 2008 for the benefit of V.C.S. The amendment provided for various compensatory measures, and the main objective of the modification in 2008 was to broaden the definition of victim as defined under sec. 2(wa) of crpc. In context to the amendment made in 2008, all the Indian states came up for the benefit of providing a remedy to the victim with the help of a victim compensation scheme. In lieu of the following amendments and the initiative taken by the various states, the Delhi govt and also issued an order giving 200 crores to victims of various types of offences like rape, acid attack. This victim compensation scheme was effectively addressed and implemented, which was seen in various case laws. In one of the cases Delhi Domestic Working Women's Forum v. Union of India and others, Ankush Shivaji Gaikwad v. State of Maharashtra, and other cases. Where the court implementing the order of govts gave the compensatory relief to the victim. Owing to the situation, the 2008 amendment also ratified sec 372 of CRPC and added certain rights to be given to the victims of such kinds of offences. Some of the rights include

1. Acquittal of criminated,
2. Condemnation for a trivial offence or little legal in nature, and;
3. Not satisfied with the amount of compensation given before."

Implementation of victim compensation scheme in relation to CRPC -

The victim compensation scheme, which various states have started under the direction of the Supreme Court for the protection of the victims against mental harm and dependents of the victims against the offences under sec. 357A of crpc. Further the sec 357A providing for compensation to the victims has been categorised into various parts which are as follows:-

- Sec 357A(1) provides for compensation to be given to either the victim or his legal heirs who have suffered misfortunes or faced any dis-crimination by society and should be given an opportunity to recover under the formation of a victim compensation scheme as implemented by the states.

The compensation criteria for victims laid down in sec 357A (2) is based upon sub sec (1) itself. The District Legal Service Authority, which is referred to as DALSA, when ordered by any court under its judgement, has The power to decide on the amount of compensation to be paid to the victim. This power has been granted to the District legal authority as expertise in understanding the nature and effect on the victim for granting the proper quantum of compensation.

- After the insertion of sec 357A the District or the Trial courts are also allowed to compensate

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the victims as earlier they were not authorised. Under sub-sec (30 of sec 357A, it has been provided that the District legal authority, on the direction of the District court, has the power to grant compensation under those circumstances where the victim is released or requires any rehabilitation to recover from the event as it might hamper in his life ahead. Also, the compensation provided by the D.AL.S.A. should be sufficient enough that the individual can recover from the event.

- Further, the rights of the victim and the legal heir or representative have been dealt with under sub-sec (4) of sec 357A. These rights include the right to compensation for any damages suffered by the victim before the identification of the culprit and before the court proceedings start. This sec. talks in favour of the victim as they can ask for compensation even before the start of any court proceeding from the District legal authority. This sub-section is significant for providing quick remedies to the victim.

- Recently, SECTION 375(A) was added in CR.P.C through the amendment act 2008 Section 357 (A) states that:

  (1) Central government, with the help of state governments, should prepare a scheme for victim compensation to provide funds to the victims who have suffered death, loss, damage, or injury to restore their status of life. This provision would work as a helping hand for victim compensation. These regulations would strengthen the provision of victim protocol given in SAARC protocol.

VICTIM COMPENSATION SCHEMES

The provision of a victim compensation scheme is a much desirable relief to the victim of offences; therefore, it is one of the most progressive legislations in recent times. The scheme provides that the state government, in coordination with the central government, shall prepare a scheme for providing funds for compensation to victims.15 In 2009, the central government gave directions to every state to prepare a scheme that had to be in agreement with the Canters scheme for victim compensation. The primary purpose of the scheme is to provide funds for compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and require rehabilitation.

Under the scheme when an application for compensation is made to the court by victim and the court if find that victim is worthy of compensation or any interim compensation during the proceedings as the case may be, it may make recommendation to the District, or State Legal Service Authority, and the quantum of compensation and award of compensation shall be decided and made respectively by the authority under the scheme made by State government in coordination with central government.

JUDICIAL ACTIVISM IN GRANTING VICTIM COMPENSATION AS A CHANGING TREND

Judiciary plays a very crucial role in rectifying the claims of the compensation of the victims. High courts have played a vital role in awarding compensatory justice to the victim suffered from loss or damage. Some landmark judgments ensures compensatory justice to victims and show the concern of the judiciary in that field.

Guidelines for Victim Assistance in **Bodhisattwa Gautam v. Subhra Chakraborty**[12] , the Supreme Court held that if the court trying an offence of rape has jurisdiction to award compensation at the final stage, the Court also has the right to award interim compensation. Having satisfied the prima facie culpability of the accused, the court ordered him to pay a sum of Rs.1000 every month to the victim as interim compensation along with arrears of compensation from the date of the complaint. It is a landmark case in which the Supreme Court issued a set of guidelines to help indigenous rape victims who cannot afford legal, medical and psychological

12 Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1996 SC 922

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services in accordance with the Principles of UN Declaration of Justice for Victims of Crime and Abuse of Power, 1985: The Supreme Court of India has played the most commendable role in evolving compensatory jurisprudence for the victims. Some of the landmark cases in which the Supreme Court provided compensation to the victim are as follows:- **Chairman, Railway Board and Others v. Mrs. Chandrima Das,**[13] **Nilabati Behara v. State of Orissa**, [14]

The first landmark judgment where compensation to the victim was ordered by the Madras High Court and upheld with some modifications by the Supreme Court of India was **Palaniappa Gounder v. State of Tamil Nadu**.[15] In this case, the High Court after commuting the sentence of death on the accused to one of life imprisonment, imposed a fine of Rs.20,000 on the appellant and directed that out of the fine, a sum of Rs.15,000 should be paid to the son and daughters of the deceased under Section 357 (1) (c) of the Code of Criminal Procedure, 1973. The Supreme Court while examining the special leave petition of the appellant, observed that there can be no doubt that for the offence of murder, courts have the power to impose a sentence of fi ne under Section 302 of the IPC but the High Court has put the "cart before the horse" in leaving the propriety of fi ne to depend upon the amount of compensation. In the case of **Sarwan Singh v. State of Punjab**[16] , the Supreme Court not only reiterated its previous standpoint but also laid down, in an exhaustive manner, points to be taken into account while imposing fine or compensation. The Honourable Court observed that while awarding compensation, the court must decide whether the case is fit enough to award compensation. If the case is found fit for compensation, then the capacity of the accused to pay the fixed amount has to be determined.

The Supreme Court of India had pronounced upon the need by the government to set up a Criminal Injuries Compensation Board for rape victims within 6 months. The Supreme Court had suggested that this board should give compensation whether or not a conviction takes place. The Supreme Court explained the justification for this proposal as follows: "It is necessary, having regard to the Directive Principles contained under Article 38(I) of the Constitution of India, to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example are too traumatized to continue in employment. Compensation for victims should be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction takes place. The board will take into account pain suffering, and shocks as well as loss of earnings due to pregnancy and the expenses of the child, but if it occurred as a result of rape..."

The court adopted the paradigm shift towards enhancing the compensation to provide solace to the victim and to serve social justice in the society. Thus, in **Ankush Shiwaji Gaikwad v. The State of Maharashtra**,[17] it was held that, the legislative intent of the provisions relating to victim compensation was to reassure the victim that he is not a forgotten party in the criminal justice system. Further, a landmark decision of the Court in the case of **Suresh v. State of Haryana**[18] awarded the victim with an interim compensation, and the State was directed to pay an amount of Rs.10 lakhs to the family of the victims who had been abducted and murdered.

Increasing the area of awarding the compensation to the person suffered under Section 358 of Cr.P.C., in **Rudal Shah v. State of Bihar**[19] , observed that the person is compensated for the loss or injury caused by the crime, and this includes the deceased's wife, husband, parents and children.

The Apex Court in **Sarwan Singh v. State of Punjab**[20] , there are several factors that should be taken into consideration before giving order of compensation to the crime victim is the court should keep in mind the ability of paying the compensatory

13 Chairman, Railway Board and Others v. Mrs. Chandrima Das, (2000)2 SCC 465
14 Nilabati Behara v. State of Orissa, (1993) 2 SCC 746
15 Palaniappa Gounder v. State of Tamil Nadu, AIR 1977 SC 1323
16 Sarwan Singh v. State of Punjab, AIR 1957 637
17 Ankush Shiwaji Gaikwad v. The State of Maharashtra , (2013) 6 SCC 770
18 Suresh v. State of Haryana, (2015) 2 SCC 227
19 Rudal Shah v. State of Bihar, AIR 1983 SC 1086
20 Sarwan Singh v. State of Punjab, AIR 2000 SC 362

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amount by the offender , the type of offence and the amount of damage and injury suffered and should keep in mind the effect of offence on the life of victim and its family the amount of bodily, psychological and emotional lass suffered by the victim and its relatives and family member. Before awarding compensation, the court should keep in mind that the amount should depend on facts, logic, and the circumstances. A reasonable time period should be provided for the accused to pay the compensation, and the offender should be allowed to pay the compensation in instalments.

As given in the case **SAHELI [21] (a organization of women's activist group)** the Apex Court of Delhi gave the order to the Delhi Administration to pay the sum of Rs. 75,000/- as exemplary compensation to nine-year-old child's mother as the boy died because of getting beaten by a police officer while extracting evidence from him.

CONCLUSION

The victim compensation in India is still the vanishing point of our criminal law. The remedies currently available under the law are limited, fragmented, uncoordinated and reactive. This is the lacunae in the system, which must be remedied by Comprehensive Law by the legislature. Nevertheless, the criminal justice system has changed its ambit, and the legislatures and judges have been playing a significant role in the expansion of the rights of victims of crime in the criminal justice administration of the country, yet the victims have not received their due concern and their rights have not been given their due weightage. Victims have few legal rights to be informed, present and heard within the criminal justice system. However, regrettably, victims do not have to be notified of court proceedings or of the arrest or release of the defendant, they have no right to attend the trial or other proceedings, and they have no right to make a statement to the court at sentencing or at other hearings. Further, the coordination between the various limbs of justice, i.e. the courts, the police, the DLSA and the State Legal Services Authority, must be streamlined. Each instrument must inform and assist the victim in realizing compensation. Judicial activism in victim compensation matters in India has seen a notable increase in recent years. Courts have taken a proactive role in interpreting and expanding the scope of victim compensation laws to ensure justice. This trend involves awarding compensation and addressing systemic issues related to delays and gaps in compensation schemes. The judiciary's focus on protecting victims' rights has led to landmark decisions, influencing policy changes for more effective victim redressal mechanisms.

21 SAHELI V. police commissioner, Delhi, AIR 1990 SC 513

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ANALYSIS OF ORGANISED CRIME: FAMOUS INCIDENTS & RECENT FINDINGS

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ABSTRACT

This paper talks about all phenomena of organized crime in national trends. It first examines the basic ideology of organized crime, outlining the magnitude and different instances when criminals commit organized crime and various reasons why Indian agencies cannot secure their society from such illegal acts. Then, the paper passes on legal, sociological, economic, and demographical profiles that lead to some suggestions that, when adopted, must solve the issues of organized crimes.

Specific crimes that lead to severe threats are abuse of power, monopolization, terrorism, extortion, tax evasion, trafficking, etc., which even pose a threat to the integrity of the people and destabilizing effect on the national economy. With the increase in digitalization, such criminal activities negatively impact lawful conduct. At last, this paper indulges landmark cases to give a proper understanding of all legal and illegal aspects of organised crime, talks about certain laws which provide rights to the victims, and legal bodies that stop the continuation of such crime; even new principles were discussed which are given under Bharatiya Nyaya Sanhita Act, 2023.

Keywords- Organised crime, Law, Criminal, Group, Illegal, Case.

INTRODUCTION

Crime that is carried out by a group of two or more criminals[1] in an organized manner is called organized crime. It is a category of transnational[2] , national, or local groupings of highly centralized enterprises run by criminals which is performed by, or on behalf of members of an organized crime syndicate[3] . Its primary purpose is to gain pecuniary benefits, gain undue economic or other advantage for himself or a person, or promote insurgency surviving on fear-corruption.

Criminals under Organized crime corrupt the public to join their organization and public officials to avert governmental interference. By corrupting public officials, they monopolize organized crime so that they aim to secure their power, which gives rise to money laundering, extortion, tax evasion, monopolization, terrorism, etc. This leads to the gain of illegal profit, which removes lawful ownership and leadership from the public. This is how the vicious circle of organised crime functions. Every gang performs its own act, but sometimes, there can be interconnection among gangs to perform any organised crime. E.g., in Clubs,

1 Organized crime - Wikipedia

2 Extending or operating across national boundaries. Farlex, Transnational - definition of transnational by The Free Dictionary

3 A syndicate is a self-organizing group of individuals, companies, corporations or entities formed to transact some specific business to pursue or promote a shared interest

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there are illegal activities like liquor trade, drugs, gambling, and prostitution; if all criminal gangs work separately, then disputes may arise in case of conflict of interest, whereas if they all are united, then no dispute arise they will work harmoniously, and holds much strong power.

Dr. Walter Reckless[4] Disorganised crime is defined as an unlawful misadventure [wrongful act] carried on by the boss, his lieutenants and operators who form a hierarchical structure for a specified period. It can be interpreted as a step-by-step pyramid in which one is the head, lieutenants below them and the operators which coordinate with each other to accomplish such crime successfully.

CERTAIN FEATURE SHOWS THAT AN ACT DONE ARE ORGANISED CRIME

Powers in organised crime vest as centralised power. The criminal group operates beyond the lifetime of individual members; therefore, it does not matter whether the member/leader dies, the way crime is committed will continue. For example - if there are 100 members in an organization and one leader, then the doctrine of subordination hierarchy subordinate will be imposed, i.e. if a leader dies, then whoever is subordinate is considered to be the second leader.

Proper planning in lieu of structure is made to give rise to valid disposal of crime because adequate structuration leads to proper functioning. Also, every member performs the work that is allotted to them. E.g., in any organised crime, all those criminals involved in such crime are allotted different natures of the acts they have to perform. In the case of kidnapping, A talks to a girl, B gives poison, C is ready with the car, D is guarding everything, and E maintains the main venue where such a kidnap girl will be kept. So, every work is divided among A to E. Therefore, to be a potential member of such a group, they must prove their worth by undergoing much scrutiny and loyalty.

To secure proper discipline and economic interest, violence for/ by organised criminal group members can be used to gain political or other power. They work as a team and hold complete unity and cooperation for effective delivery. In such groups, secrecy is the key; they have to keep it confidential; otherwise, punishment can be imposed. For example, if police catch any team member, they will not speak during interrogation to protect others and make a successful escape. Otherwise, such criminals are killed by their own group.

Therefore, the functioning of the mafia is linked with public officials, corporations and substantial business houses. There is a division of labour, and delegation of duties and responsibilities. Like all modern businesses, organized crimes also involve careful planning, risk insurance, and expansive and monopolistic tendencies. Such criminal organizations adopt measures to protect the group and to guard against the prevention of their activities.

TYPES OF ORGANISED CRIME[5]

A. Organised predatory crime

In this type of crime, the criminal has greater skill than the occasional criminals. They are masters of committing such crimes that if caught and detained, they also have a great plan to escape successfully. In this crime, the complete benefit is in the hands of the criminal where the victim loses everything. E.g., theft, Dacoity, extortion, robbery, kidnapping, Bank robbery, hijacking, murder, kidnapping, automobile and jewel thefts are some of the common examples. Uttar Pradesh and Bihar are the two major states where such a crime is committed.

B. Crime Syndicate

A single group of gangsters is formed to promote common interest. Criminals provide illegal services to the customers because people cannot directly demand such services from the market and are willing to pay any amount in exchange for

4 An American Criminologist known for his containment theory.
Criminologist is an expert in the scientific study of crime and criminal behaviour.

5 Thomas J. Bernard, Edwin Sutherland 115, Encyclopedia Britannica October 07, 2020; Edwin Sutherland | American criminologist | Britannica.

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such services. E.g., drug and intoxicated services, smuggling, bootlegging, gambling, prostitution and foreign exchange violations etc. Sometimes, criminals attract customers so that they get high demand and can earn more. This generated money is further invested in legitimate business enterprises, and this is how black money becomes white.[6] Moreover, it floats in the country's economy.

C. Criminal Rackets

Those crimes are where service is given to members normally engaged in legitimate business activities to improve gangsters' bargain-gaining. Such as gambling racketeers, labour unions that get salary without coming to work because the racketeers mark their attendance[7] , business organizers get the assurity from the labour union that there is no strike or labour unrest.

D. Political Graft

People of high status believe they have connections with high criminals to obtain political powers; they engage people to commit crimes. By committing violence and threats to others, they ensure the work must be completed for which they are contacted. E.g.[8] hiring professional offenders who resort to violence and threaten to make the voter caste their candidate for whom they are working. Vote buying is also a political graft.

SOME IDENTIFIED BRANCHES OF ORGANISED CRIMES

A. Drug abuse and drug trafficking

This crime starts only on public demand w, which not only harms volunteer consumers but also forces consumers into parties where someone mixes drugs. Such acts happen only because there is an illegal supply. It is seen that the successful implementation of drug trafficking.[9] Is due to accurate systematic planning of crime. The revenue generated from the traffic is used to fund their expenses and operational costs. That's how this crime continues. Police attempt to surveillance on the normal financial routes, but still, the terror organizations are regularly trying to find resources to fund their activities. In a recent matter[10] , around 5/10kg of drug in truck was identified by the police at the border of Haryana and Delhi.

B. Smuggling

Smuggling[11] is the direct result of the country's government's import and export policy (Fiscal policy). In smuggling, local products and industries are traded to conserve maximum exchange. India features a large border area alongside neighbouring countries like- Gujarat, Maharashtra, and the Eastern region. Therefore, smuggling is completed because criminals have a strong network, making it difficult for administrative machinery to catch them. The most items[12] smuggled into the country are synthetic fabrics, watches, electronic goods, narcotic drugs and gold.

C. Money laundering & Hawala

Money laundering[13] means conversion of illegal money into legal money for easy flow in the economy, e.g. drugs. An offender freely utilizes such money. That's why the intricate steps of placement, layering and integration[14] are being taken by criminals. Money laundering poses a significant threat over the world,

6 Money laundering
7 Samantha Henman, What Is Racketeering? A Surprisingly Complex Crime (factinate.com), Racketeering - Wikipedia
8 Another example- Newsdesk, CBI arrests postal officer in a graft case in Bengal, English Telugu stop, 12'2020 (telugustop.com)
9 YASH SONI, Drug Trafficking in India: Legal Perspective, latest laws, student of Btech.LLB at University of Petroleum & Energy Studies, Dehradun, Uttarakhand, 20 Sep 2018.; Drug Trafficking in India: Legal Perspective By Yash Soni (latestlaws.com)
10 News Desk, Drug Bust: Bengaluru Cab Driver Caught Hiding Heroin & MDMA in a Teddy Bear, Arrested, msn news, 07-12- 20.Drug Bust: Bengaluru Cab Driver Caught Hiding Heroin & MDMA in a Teddy Bear, Arrested (msn.com)
11 PUJA MONDAL, Smuggling in India: Concept, Magnitude and Measures to Control Smuggling, (yourarticlelibrary.com)
12 Financial Express, Smuggling in India: From cigarettes, gold to smartphones, here is all you need to know at a glance, 21-oct- 2017, The Financial Express
13 HEMANT SINGH, What is Money Laundering and how is it done? (jagranjosh.com), 22nd Aug, 2019
14 FAHAD TAUSIF, Money Laundering 101: How It Is Done In India – The Second Angle, 23RD NOV. 2020

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not only to the countries' criminal justice systems but also to global sovereignty.

D. Light Arms Proliferation & Trafficking Light

Arms proliferation[15] have taken a significant toll from human life and socio economic development of entire regions, costs of which may never be adequately computed. Such rising of crime are directly linked to the worldwide proliferation[16] and movement of weapons[17] . Human trafficking is considered as profitable business where underworlds involve in doing flesh trade[18] , which flourishes in India in several places and forms. The underworld is closely connected with brothels and prostitute rackets. To minimize the danger of being rescued, they provide young girls to brothels in several parts of the country. Generally, criminals are in groups, and each has a separate activities to try and do; some are brokers, some misguide innocent girls or boys, and some do dealing. This is how, by division of work, such activities are conducted.

E. Contract Killings

Contract killing means when one person hires another person to kill a third person where the actual doer's name won't come in highlighted, but the criminal who did such an act on 'supari[19] ' be punished, because the strategy adopted in contract killings is by engaging an expert gang for monetary consideration. Such criminals also get monetary benefits for not disclosing the real wrongdoer's name. In return for this, such criminals sometimes also get political support, that is why the possibility of detection in contract killings is low. E.g., the Dawood Ibrahim gang committed various offences under contracts, like the killing of several rich business people, industrialists and politicians.

F. Illegal Immigration[20]

A large number of Indians are willing to move to foreign countries for lucrative jobs because it is difficult for the aspirants to get valid travel documents and jobs abroad; they fall under the trap of unscrupulous travel agents and employment agencies who promise that in exchange for considerable amount give them valid travel documents and employment. Generally, such documents are illegal and dumped without giving victims promised jobs.

G. Kidnapping is an unchanging threat which keeps on increasing with duration of time. Several locals, such as inter-state gangs, are involved because the financial rewards are immense. With new technology, virtual kidnapping is also emerging. Even in theft[21] Leaders make plans, give direction to all or any, and then mutually commit to it. In fraud, many criminals target innocent people, take those persons in their confidence, then mislead or do fraudulent activity. E.g., Spam or Fake calls. Cybercrime is where criminals attempt to hack the accounts of persons to achieve monetary benefit. It is an oversized network because an individual sitting in Dubai can hack the account of a person in India[22] and also include white-collar criminals.

H. Terrorism is related to organised crime but per se different because of certain differences between them[23] - organized crime aims to make a parallel government, while terrorism aims to overthrow the present government by altering the status quo. Organized crime prefers to be non-violent until necessary, while terrorism primarily uses violent means. Economic objectives are the operational determinants of organized crime, while terrorism

15 The Proliferation of Small Arms and Light Weapons | SpringerLink

16 IANS, Impact of the proliferation of small arms and light weapons in South Asia: Medicine, Conflict and Survival: Vol 22, No 3 (tandfonline.com), and OCT 2020

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20 Earth eclipse, Causes and Effects of Illegal Immigration | Earth Eclipse 2020

21 100003973.pdf (amu.ac.in)

22 ANIRUDH TYAGI, An Analysis of Cyber Crimes in India - Libertatem Magazine, 27TH NOV. 2020

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is driven purely by political objectives despite the exploitation of regional, national and religious sentiments to attain their ends.

Relationship[24] - Terrorists resort to organized crime to seek financial help for their organization, like - counterfeit notes, contractual murder, extortion, etc. Organized criminals give smuggled weapons to terrorist parties in exchange for monetary benefit. Terrorists take help from organised criminals through networking25 to send their members to different countries on the planet.

Government funds reach the militants indirectly because of misgovernance. Administration either threatened or bribed to award contracts to individuals of militant groups. Essential commodities like rice and kerosene reach the militant groups directly and are sold to the general public at much higher prices. .[25]

ORGANISED CRIME: THREAT FOR INDIA

1. There are always differences between different classes in India. Criminals always try to capitalize on these differences for their benefit and take certain actions that are a threat to more internal differences.[26] . E.g. Inter-caste religious harm to other communities, which causes riots.
2. Such syndicates deepen the relation with associations of movements like separatist movements, etc., which have connections with criminal organizations. Such activities indulge youth in such crimes because India has a large number of educated unemployed people, and they want more success, muscle and monetary power. Such youth can be trained and qualified for organized crime, which is a significant threat.
3. Due to most corruption in political-administrative life, alliances between criminal organizations and political parties across the border can be developed.

SOME LEADING/ FAMOUS INCIDENTS OF ORGANISED CRIME

1. To keep with the spirit of the Directive Principles of State Policy, various legislation were enacted to get rid of social inequalities and evils and to scale back economic disparities, but it gave rise to organised crime, such as restrictions imposed on the consumption of alcohol, which gave rise to bootlegging activities in several States. From there, bootlegging or trading illicit liquor became a lucrative business for criminal gangs. They made considerable money out of it. this is how the system of illegal trading continues.
2. Indian govt. to push the country at international level by legalizing L.P.G.[27] Allowed a free flow of foreign goods and capital into the country; this created a dramatic growth in computerization and e-business that resulted in the emergence of 'cyber-crime'. All schemes introduced to spice up the country's exchange reserves are receptive to manipulation.
3. Haji Mastan and Yusuf Patel began as small-scale criminals and later continued in 'smuggling' gold and silver.[28] They made tons of cash and invested it in legitimate business ventures, primarily construction and land.
4. Harshad S. Mehta vs. Union of India 29th July 1992 [29]

   This scam was one of the biggest white-collar crimes ever witnessed by the Bombay stock exchange, where Harshad Mehta, a broker, misappropriated public money and, before refunding that money to the public, invested in the stock exchange and earned great profit. This also raises the stock market to new heights.

24 BARTLEBY, Similarities Between Terrorism and Organized Crime: | Bartleby

25 HM commanders channelised drug smuggling money in J&K to support terror activities: NIA | Business Insider India

26 Such differences are economic, social, regional, ethnic, caste, and communal

27 DEVELOPMENT PLANNING, Liberalization, Privatization, Globalization (LPG Model) in India (planningtank.com), 2015

28 SANJIV KUMAR UPADHYAY, CONTENTS (unafei.or.jp) P.g.- 197

29 Harshad S. Mehta vs Union Of India, And Another on 29 July, 1992 (indiankanoon.org)

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This was an organised crime because various bankers, politicians, and middlemen indulged in it. Their main aim for doing this crime was to earn significant profits and good reputation in society. Later, charges of embezzlement were imposed as the committee found Harshad Mehta directly responsible, causing a scam leading to the loss of wealth approx. of Rs. 3542 crores ($7 billion).

5. Abdul Latif [30], the Mafia don of Ahmedabad began as a little time bootlegger and later monopolised the whole illicit liquor business within the State. Later, he aligned with the Pathan gangster and received a consignment of 57 AK-56 rifles and 15,000 rounds of ammunition ('Arms Proliferation42') from Dawood Ibrahim that had to be used during the post-Ayodhya riots. He turned out to be a dangerous gangster-cum-terrorist-cum-politician; he also became a severe headache for the Gujarat Police. In Oct 1995, he was nabbed at Daryaganj, New Delhi, and was killed during a police encounter.
6. Within the recent 2019 Pulwama Bomb attack[31] , CRPF paramilitary troopers were killed when they were going back to security borders. It is seen that Jaish-e-Mohammed (Islamic terrorist) was the one who planned this terror because they wanting to merge Kashmir in Pakistan & this incident might create a terror within the mind of the govt. this is often the type of 'terrorism'.
7. In the very recent case of Sushant Singh Rajput[32] , the case is still going on, but during the investigation, it's seen that there's involvement of drugs angle, which also identified that there is a large chain between drug peddlers and buyers. In the most recent case, NCB is dedicated to inspecting and identifying the wrongdoers directly or indirectly involved in such illegal activities. Various celebrities, politicians etc. are connected with this matter. India incorporates a national law on drug i.e. NDPS act which punishes wrongdoers. When the official legally entertain the duty, an accurate charge sheet has been framed. But if we see the case from a deep level, it's seen that to try and do 'drug peddling', there's involvement of the many criminals who organised in a way to execute the plan. At one place drugs are made and at other places it travels to. The younger generation is coming in close contact with such dangerous substances, which can damage their health.

So each activity which we discussed above is one or other way connected as a section of organised crime. Since earlier times, organised crime has been committed in India. However, in today's modern India, the way such criminal activities are growing because of progressions in technology and connections is extremely dangerous.

REASONS: WHY INDIA IS UNABLE TO CURE ORGANISED CRIME?

Major problem is organised crimes dealt under general conspiracy law and relevant unique Acts but need to be defined in centralised acts. Also it penalize for individual act and not for group crimes.

1. Difficulties in Obtaining Proof: Organised criminal groups are structured hierarchically, and one of the highest authority of such gangs is generally law officials. If any criminal got detained it may be possible to have the actual perpetrators of crime convicted, but it is difficult to prove their guilt because it should be prove beyond reasonable doubt. In mannier times, the highest officials in such groups were legal officials. As a result, it became difficult to collect evidence against them as they already had huge connections and were aware of loopholes in law.
2. No legal backing for witnesses: It is life threatening for any witnesses who will give statements against such criminals, that's why witnesses won't come in the frontline as there is just Section 357A Cr.P.C to supply protection to

30 Abdul Latif & Ors. Vs. State and Anr. on 12 October, 2017 (indiankanoon.org)

31 HARDIK JAIN ETC., Case study- Pulwama attack (slideshare.net), 17TH March 2017

32 First Post Staff, NCB arrests absconding accused in drugs case linked to Sushant Singh Rajput's death - India News, Firstpost, 09TH Dec, 2020

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the witnesses, but it won't suffer great protection as a result victim still get harassed.

3. Lack of Resources & Training: In our Constitutional framework, police are the State's subject, which means investigating cases, their prosecution, and setting up criminal courts is the responsibility of the concerned State Government. Most state governments face financial shortages, that's why they are not in a position to spare training for the criminal justice system. The ratio of police personnel is lesser as compared to the crime rate.
4. Lack of Coordination: India needs a national agency to coordinate between state and central enforcement agencies to combat organised crime. There needs to be an adequate function on central exchange of information relating to international and inter-state gangs operating in India and abroad.
5. Bureaucratic Nexus with criminals: There has been a rapid growth of criminals, mafias, gangs, drug peddlers, economic lobbyists, etc., in the country, which over the years developed an extensive network of contacts with the bureaucrats, etc.
6. Slow Pace of Trials & Low Conviction Rate: 'The pace of trials in India is languid. 'Justice delayed is justice denied' which says if a person within reasonable time cannot get justice, it is considered that his justice is delayed.

IMPORTANT DIMENSIONS

It is seen that the person belongs to lower strata hold more punishment comparatively to higher strata of society, i.e. who stole huge money attract lesser charges than the one who just stole little money. Upon trial, Judges sometimes believe that the allegations imposed on high-strata accused are false because the accused is educated and won't do such acts. But the reality is those accused dispose of evidence. As a result, proofs won't be shown; therefore, lighter or no punishment is imposed, which is visible in judgment[33]

. Membership in such crime is increasing constantly because of Sociological reasons. Firstly, individuals involved in such activity may not commit it from free will, but are forced by poor income circumstances, which become a problem for their basic survival [Strain Theory of Crime]. Secondly, the behavioral nature of a person will determine what drove him into the commission of criminal activity. So, the need and desire for survival can force him to do such an act, although it is unacceptable by law [Crime pattern theory].

Morality decides any act is right or wrong, but as per utilitarian theory, any act is valid for basic living, and criminals work upon this theory; this is where the commission of crime begins, though it's illegal as per society. We must always work on the greater good per the general approach. That is why the offender's utilitarian[34] needs precede the moral character. To prevent the commission of such crimes, effective implementation of government policies is required to solve major social and economic problems; a committee by govt. shall be appointed, which will work as per the current situation. Once the government can set up a commission and enhance its operations through treasury financing, the public would feel safe and confident.

LEGAL POSITION OF ORGANISED CRIME IN INDIA

In India, there are certain laws which deal with organised crime[35] The President gave assent to three criminal bills on 25th December 2023, and now Bharatiya Nyaya Sanhita will replace IPC from the date of enforcement -

1. Some of IPC section dealing with organised crime are-
   a) If there are two or more persons who conspire and commit any act can come under the purview of Sec 120 A [36] and Sec 120

33 Studycorgi.com, Crime Commission: Legal and Social Perspectives | Free Essay Example (studycorgi.com), 8th Jan 2020

34 Major Ethical Perspectives (saylordotorg.github.io)

35 FORUMIAS, Organized crimes in India: an overview | | ForumIAS Blog, 19th December 2017

36 When two or more persons agree to do or cause to be done-

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B[37] of Indian Penal Code.

b) There are some offences related to Dacoity which can be punishable, such as Section 364-A[38], sec 391[39] , sec 395[40], sec 399 [41], sec 402 [42], and sec 400 [43] of the Penal Code.

2. Sec 41 Cr.P.C. empowers a police officer to arrest on the basis of a Red Corner Notice. 'Interpol generally executes the Red Corner Notice' to arrest fugitive criminals. The role of Interpol has serviced law enforcers worldwide in their fight against crime. Sometimes difficulty arises when the requested Interpol does not have enabling provisions in the domestic laws for effecting arrests.

3. Gangsters

There is no central legislation to suppress 'gang activity'. Crime administrations are also state subject. Such as Uttar Pradesh Gangsters and Anti-Social Activities (Prevention) Act, 1986 it has been brought to check and curb acts of mafia and organised crimes [44]. Sec 3 of the act says gangsters are punishable with minimum imprisonment extendable of two years. The act is wide and covers a large area, but if we see its application, a study reveals that so far, not even a single person has been convicted. Although many persons were booked in 80% of the cases, even a charge could not be framed in the court. Where the charges were framed, the acquittal rate has been 100%. We can say there is a threat to witnesses and officials from such criminals; therefore, it becomes difficult to act against them. In my view, it is the need of the hour that we must have more trained police officers, an unbiased/ strong judiciary, and proper legal execution of laws; once all are united, then only such criminal activity might come at a low pace. Even states like Maharashtra and Karnataka also have state domestic laws, i.e. Maharashtra Control of Organised Crime[45] and Karnataka Control of Organized Crime Act[46] resp.

4. Laws at National Level

The National Security Act 1980[47] : This act talks of preventive detention by the Central/ state Government. The detention order is issued for one year to prevent a person from acting in any manner prejudicial to the security of India, like defenses of India, friendly relations with foreign powers etc. The detention has to be approved by an Advisory Board headed by a serving High Court judge and does not go to the court for trial. This act is used against anti-national elements and brutal core gangsters.

5. Other Laws

a. The Customs Act, 1962[48]

b. The Immoral Traffic (Prevention) Act, 1956[49]

c. The Foreign Exchange Regulation Act, 1973[50]

d. The Public Gambling Act, 1867[51]

e. Unlawful Activities Prevention Act [52]

(a) An illegal act, or (b) An Act which is not illegal by illegal means. Such an agreement is designated as criminal conspiracy

37 Punishment for criminal conspiracy
38 Kidnapping for ransom
39 When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of Persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt amount to five or more, every person so committing, attempting or aiding is said to commit 'dacoity'
40 Dacoity is punishable with imprisonment for life or rigorous imprisonment up to 10 years and five months
41 Criminalists preparation to commit Dacoity
42 Assembly to commit Dacoity
43 Criminalizes belonging to a 'gang' of persons associated with habitually committing Dacoity
44 Such as -land grabs, illegal mining, sale of illegal medicine and illicit liquor, wildlife smuggling, extortion, abduction syndicates, white-collared criminals etc
45 Maharashtra Control Of Organised Crime Act, 1999 (latestlaws.com)
46 THE KARNATAKA CONTROL OF ORGANISED CRIME ACT ,2000
47 National Security Act 1980 - Complete Bare Act - B&B Associates LLP (bnblegal.com)
48 the Customs Act, 1962 (indiankanoon.org)
49 Immoral Traffic (Prevention) Act, 1956 (bareactslive.com)
50 The Foreign Exchange Regulation Act, 1973 (indiankanoon.org)
51 The Public Gambling Act, 1867 (indiankanoon.org)
52 A1967-37_0.pdf (mha.gov.in)

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6. Multi-lateral Agreement

   India is a signatory to the South Asia Association for Regional Cooperation, 1993 (SAARC)[53] & Convention for Suppression of Terrorism[54] .

7. The National Investigation Agency Act, 2008

   It deals with offences of terrorism, counterfeit currency, human trafficking, narcotics, and organized crime The Prevention of Money Laundering Act also targets money laundering activities in a focused manner to counter the Hawala transactions. The national and state investigating agencies engaged in tackling organized crimes such as NATGRID [55] etc.

8. Sections 109 and 110 of the Bharatiya Nyaya Sanhita Act deal specifically with Organised Crime

MY FINDINGS

1. If we broadly see the youth of India, they are more involved in these organised crimes. At the age of young, everyone wants to achieve good earnings for their family and fulfil their dreams, but due to various irregularities by govt., people cannot get adequate jobs; therefore, because of their big goals, some youth are involved in such activities.

2. When a govt. declares the use of any commodity as illegal, the person who is addicted to such commodity still wants to hold it even though it becomes illegal. If still produced, such commodities come under the purview of illegal activity because the one who was still producing from escaping the govt. officials because this was their earnings, while the ones who were addicted[56] to it also purchase that because this was their addiction. And those who trade/link these individuals for supply and demand all consider themselves accused and liable to punishment. Because of this conduct, crime is increasing. Therefore, we can say that when the government imposes a new ban, a new level of crime increases. For e.g. - liquor is prohibited in Punjab but various people still have liquor through indirect means because it is an addiction to one person while need of survival to another (seller). There must be rehabilitation centres82 and job opportunities to cure such issues in those places.

3. Suppression of Organised Crime, draft is on the anvil but it is not known when it will be passed into law. There is a close link between organised crime and money laundering, which warrants immediate legislative intervention. It is observed that because of lack of action taken by the government. Even the laws enacted were different from in the draft of SOCA.

4. The illicit trafficking in narcotic drugs and psychotropic substances poses a serious threat to the health and welfare of the people, and the activities of persons engaged in such illicit traffic have a destabilizing effect on the national economy because it will lead to black marketing/ money.

CONCLUSION

After analyzing the report[57] and all the above approaches, we found this problem of organised crime is increasing with the advancement of technology. There is not only the mistake of officials involved in corrupt practices, which is why the crime rate needs to be controlled. But many times some public servants want to investigate the matter truthfully but due to no accommodation and traveling facilities given to officials while doing such investigation at different places outside home state, they needed more. The govt. argued that they don't have adequate funds, but in reality some govt. officials take money for illegal activities from criminals in the discharge of providing them support, and

53 SAARC Secretariat (saarc-sec.org)
54 UNITED NATION,1999; treaty3 (un.org)
55 TIMES NOW DIGITAL, NATGRID: EXPLAINED: What is the National Intelligence Grid? | India News (timesnownews.com), 14TH SEPT. 2019
56 Nawab Malik | Addicts should be sent to rehab, not jail; NCB protects drug traffickers: NCP's Nawab Malik | Mumbai News Updates (timesnownews.com), 22ND NOV. 2020
57 (ncrb.gov.in) - (Go through every Performa which specifically shows crime statistics of all nature of crime in India.)

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such received money goes to the official's personal accounts, which means criminals take money from the general public, and such money goes to private accounts of criminals and officials; this also reduces the flow of money from the economy due to which there is lack of funding for countries growth(the reason why India is lacking to stop organised crime). If we see a broader perspective, we can say such practises are also because of a loophole in the criminal justice system. It is concluded that officials must also be patriotic and work hard to save the integrity of the country and its people, because it not only harms the country's growth but also involves the youth who are the country's future under such crime. Therefore, it is the need of the hour that we need to discuss this problem separately, and implementation and enactment of stringent laws or codes should be there.

SUGGESTIONS-

1. There should be capital punishment given to harsh criminals instead of life imprisonment so that it brings fear in the minds of criminals.
2. Provide wide powers to administrative authorities so that instant actions against criminals could be taken. Under section 167(2) Cr.P.C[58] . As the investigation requires time, therefore, instead of 15 days, more police remand should be provided. Archaic provisions of evidentiary value must be reviewed.
3. The honest officers who have taken the initiative to fight organised crime must be defended; practically, what happens is such officers are transferred, leads to their demoralization.
4. Need to develop specialised infrastructure for investigating and prosecuting such crimes, like hi-tech software and machinery to keep track of the high alert areas.
5. Stricter control on possession of illegal firearms and explosives and implementing ARC[59] recommendations on organized crime.
6. Most importantly, no politician should give the criminals power instead of money or power. Combating corruption at every stage.
7. In Penal laws, suitable amendments should be there, and severe types of punishments for criminals should be given, as strict implementation of existing laws.
8. Unemployment should be reduced by giving priority to job creation and skill development. I.e., priority should be given to national importance.
9. Witness Protection Program: In cases of crime, the witnesses are reluctant to depose in the open court having fear of life at the hands of criminal syndicates/ terrorists. The cases of threat or criminal intimidation to potential witnesses are too many to be recounted.
10. There must be a mechanism or institutional arrangement to collect data regarding organised crime gangs at the central or state levels. This hampers investigative efforts and planning. It is suggested that a common database be built up and stored in a computer accessible to all enforcement agencies through the networking of computers. The National Crime Records Bureau could take up this job as it has the technical availability.
11. Nowadays, people are very much connected to mass media. Such mass media successfully develop the opinion of the large public. If a country has to make its people aware of crimes, then such media themselves have a program where they can tell people how crimes are committed, can also expose the criminal acts and what people should do if such above-discussed crimes are committed. I.e. start by an awareness program against organised crime. Media, if they work genuinely, then effectively portray an accurate picture of the phenomenon, which attempts to build trust between the police and citizenry. Organised crime can be curbed in the city when the citizenry is involved in its prevention and that public opinion is built up against such crimes. In such a process, the media can

58 Section 167(2) in The Code Of Criminal Procedure, 1973 (indiankanoon.org)

59 Administrative reforms commission, About ARC | Department of Administrative Reforms & Public Grievances | MoPP&P | India (darpg.gov.in), JAN 1996

act as a catalyst because it has the strength and influence to reach out to people and to create mass awareness.

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CONSTITUTIONAL CONTOURS – A CROSS NATIONAL ANALYSIS OF ABORTION RIGHTS

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ABSTRACT

This article provides a comprehensive comparative analysis of medical termination of Pregnancy (MTP) laws from an international constitutional standpoint. With a focus on various jurisdictions, including Zimbabwe, China, the United Kingdom, India, and others, the study explores the legal frameworks, constitutional principles, and socio-political factors shaping MTP regulations. The article highlights similarities, differences, and evolving trends in MTP legislation by examining key aspects such as the right to privacy, bodily autonomy, health considerations, and the role of government intervention. Through this comparative lens, the aim is to foster a deeper understanding of the complex interplay between legal, ethical, and medical dimensions in shaping policies related to reproductive rights and women's healthcare globally.

I. INTRODUCTION

In exploring the termination of Pregnancy within the realm of comparative constitutional law, one must delve into the intricate web of legal frameworks governing reproductive rights across different jurisdictions. The essay seeks to analyses and compare the constitutional perspectives that shape the discourse surrounding abortion, shedding light on the diverse approaches taken by various nations in addressing this complex and sensitive issue.

II. DEFINITION

According to WHO, abortion means "the expulsion or extraction from its mother of a foetus or embryo weighing less than 500 grams."

According to section 2(e) of the Medical Termination of Pregnancy Act 1971, termination of Pregnancy means "a procedure to terminate a pregnancy by using medical or surgical methods"[1] .

III. HISTORICAL REASONS FOR WHY ABORTIONS ARE RESTRICTED

- Abortion is a dangerous thing which results to the death of a pregnant woman.
- In many religions, Abortion is considered a Sin.
- Abortions are restricted to protect the life of a fetus.

IV. REASONS WHY NATIONS NEED TO DECRIMINALIZE ABORTION

1. Countries with highly restrictive abortion laws

1 Medical Termination of Pregnancy Act, 1971

do not get a result of lower abortion rates. For example, in Western Europe, abortion is legal in certain circumstances. Contrary it is illegal to abort a foetus in Africa and Latin America. However, the percentage of abortion in Western Europe is 12%, and in Africa and Latin America, it is 29%. This shows that the criminalization of abortion does not lower the percentage but results in Clandestine and Unsafe abortions.

2. It is discriminatory to prohibit equal access to safe and dignified health services for women experiencing undesired Pregnancy. Because it violates the rights of women and also it is against the article 1 and 2 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

   According to WHO, nearly 50% of abortions worldwide are unsafe abortions. Because the persons who perform the abortions do not have adequate knowledge or skills to perform that. There is a correlation between unsafe abortions and restrictive laws. Where abortion laws restrict the death rate to 34 per 1,00,000 deaths in accordance with an abortion. Moreover, where liberalized laws exist, the death rate is 1 per 1,00,000 deaths in accordance with an abortion. Therefore, criminalization of abortion not only results in fewer abortions but also in unsafe abortions.

3. Those restrictive abortion laws disproportionately impact poor and young women. Because middle- and higher-class women have access to adequate and safe health care. So they do not face any post-abortion complications. That fixes high mortality rates for abortion—and lamentable reflection of discrimination against women from poor backgrounds.[2]

V. ABORTION IN INDIAN LAW PERSPECTIVE

Before Medical Termination of Pregnancy Act of 1971, medical termination of Pregnancy is governed by Indian Penal Code 1860 [3]. Both sections are aimed to criminalize abortion. However, it failed to distinct between wanted and unwanted pregnancies.

In 1971, the Medical Termination of Pregnancy Act was enacted by parliament as a "health" measure, a "humanitarian" measure and a "eugenic" measure to decriminalize abortion in certain defined circumstances.

According to 1971 Act, abortion was permitted for the gestation which does not exceed 20 weeks[4]. Within 12 weeks of Pregnancy, the abortion must be performed by one doctor. Moreover, for 12-to-20-week Pregnancy, the abortion must be performed by 2 doctors. [5]

In 2021, the MTP Act was amended. New grounds were added to the Act.

Rule 3B of the MTP (Amendment) rules 2021

Rule 3B lays down the categories of women eligible for termination of Pregnancy up to 24 weeks.

The following categories are eligible [6]

a. Survivors of sexual assault or rape or incest b. Minors c. Changing of marital status during the ongoing Pregnancy (widowhood or divorce) d. Women with physical disabilities (criteria laid down by the Rights of Persons with Disability Act, 2016) e. Mentally ill women f. The foetal malformation that has a substantial risk of being incompatible with life or if the child born, it may suffer from physical or mental abnormalities to be seriously handicapped g. women with Pregnancy in humanitarian settings or disaster or emergencies as may be declared by the government. [7]

2 Guttmacher Institute – November 2015, The WHO, Safe Abortion: technical and Policy guidance for Healthy Systems, 2012

3 Section 312 to 318 of IPC, 1860

4 Section 3(2) of MTP Act, 1971

5 https://www.hindustan.com/india-news/explained-abortion-laws-in-india

6 Section 3(2) (b) of MTP Act,1971

7 Parliament Library and Reference, Research, Documentation and Information Service (LARRDIS) No.22/RN/Ref/December 2022

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Twenty-five years unmarried women become pregnant as a result of consensual relationship. Her partner refused to marry her. So, she sought permission to terminate her 22-week pregnancy under section 3(2)(b) of MTP Act, 1971. The high court held that terminating a pregnancy that arises out of a consensual relationship is not covered by MTP rules 2003. Therefore, section 3(2)(b) of this Act not applicable to the case. However, in the Supreme Court, Justice D.Y. Chandrachud, Justice A.S. Bopanna, and Justice J.B. Pardiawala held that irrespective of their marital status, all women are entitled to a safe and legal abortion up to 24 weeks of Pregnancy. The phrase "married women" was replaced by "any women", and the word "husband" was replaced by "partner".[8]

VI. CONSENT FOR MEDICAL TERMINATION OF PREGNANCY

a) Consent of a minor for Medical Termination of her Pregnancy

MTP Act mandates that consent of the guardian of the minor girl or mentally ill woman or girl before termination of her Pregnancy[9] . There is no need for guardians' consent if the minor wishes to keep their Pregnancy when there is no foetal impairment.[10] On the other hand, the Madhya Pradesh High Court stated that it is not necessary to obtain a rape survivor's willingness to terminate her Pregnancy when she is a minor and her guardian consent to such termination. [11]

b) Spousal consent for medical termination of Pregnancy

MTP Act only requires the woman's consent to terminate her Pregnancy does not require her husband's consent for terminate the Pregnancy of a major women [12].

In Anil kumar Malhotra v. Ajay Pasricha[13] the Supreme Court dismissed the appeal against the Punjab and Haryana High Court's decision in Dr. Mangala Dogra v. Anil Kumar Malhotra[1415] rejecting a suit for damages filed by the husband against his wife and doctors for terminating the Pregnancy without his consent. Because the MTP Act does not require the consent of the husband.

In Nirav Anupambhai Tarkas v. State of Gujarat15, the husband filed a criminal complaint on his wife and her family for terminating the Pregnancy without his consent. However, the complaint was dismissed by the Gujarat High Court on the reasoning that the MTP Act does not require the husband's consent.

Abortion Laws in Great Britain, Scotland, Wales.

According to section 1(1) of the Abortion Act 1967 (Amended by the Human

Fertilization and Embryology Act, 1990) States that abortion is legal if it is performed by a registered medical practitioner, authorized by two doctors and acting in good faith on one of the following grounds.

a. Gestation, which is to exceed 24 weeks, and the continuation of the gestation cause any injury to the mental and physical health of a pregnant woman.

b. If the abortion is necessary to prevent the foetus from the grave permanent injury.

c. The continuance of Pregnancy will be the risk to the life of the pregnant woman.

d. If the child is born, it will suffer from physical or mental abnormalities.

Is abortion permitted for the condition where there is a lack of economic resources?

Section 1(2)(b) of the abortion Act states that, Doctors may take account the pregnant woman's actual or reasonably foreseeable environment to determine that whether the abortion necessary or

8 X Vs. The Principal Secretary, Health and Family Welfare Department, Govt of NCT of Delhi & Anr
9 Section 3(4)(a) of MTP Act, 1971
10 V. Krishnan Vs. G. Rajan (1994) 2 MWN (Cri)333
11 Sundarlal Vs. State of Madhya Pradesh AIR 2018 (NOC 589) 205
12 Section 3(4)(2)(b) of MTP Act, 1971
13 Civil Appeal No. 4704 of 2013 (Order dated OCT 27. 2017) (Supreme Court)
14 ILR (2012) 2 P&H 446
15 2011 SCC Online Guj 5577

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not. [16]

Royal college of nursing Vs. Department of Health and Social Security (1981) [17]

Facts:

Abortions are illegal under the offence against Persons Act, 1861. However, if the Abortion is done by a registered medical practitioner under section 1(1) of the Abortion Act, 1967, it is not an offence. In 1967, when this act was established, abortions were done only by surgery by doctors. After the development of medical Science, registered nurses can do abortions by drugs. Department of Health and Social Security issued a circular that nurses can have an abortion with drugs under the supervision of doctors. The Royal College of Nursing challenged this circular as wrong and illegal.

Held:

The House of Lords held that it is lawful when a nurse carries out an abortion under the supervision of doctors. The first part of the procedure done by doctors and the second part performed by nurses in the absence of the doctor's presence is not illegal.

Under section 1(1) of the Abortion Act, 1967, the two medical practitioners must complete, sign and date the form HSA1 before performing an abortion. This HSA1 form must be kept 3 years from the date of termination.

The HSA2 form must completed by the relatives of the pregnant woman at the time of abortion in an emergency under section 1(4) of the Abortion Act, 1967. Abortion Law in China

The law of the People's Republic of China on Maternal and Infant Health Care lays down the abortion provisions.

- Article 18 states that the physician shall advise the married couple about the termination of Pregnancy on the following grounds.
  1. The foetus is suffering with a genetic disease
  2. If the child is born it will get a defect of a serious nature
  3. Continued gestation may jeopardize the safety of life of the pregnant woman or seriously impair her health due to the severe disease she suffers from.
- Article 19 states that the signature of the pregnant woman is essential to perform the abortion. If she cannot give consent due to her civil condition, then the guardian will give the signature for consent. If the abortion is done with the provision of this law, they can get free medical services.
- Article 36 states that persons who have not obtained a relevant qualification certificate issued by the state operating for termination of Pregnancy or other means of causing death, disability, loss, or basic loss of working ability are investigated and punishable. [18]

The practice of pre-natal sex determination and sex-selective abortions is illegal.

Abortion Law in Zimbabwe

Circumstances in which Pregnancy may be terminated laid down by the Termination of Pregnancy Act, 1977

Section 4(a) states that gestation endangers the life of a pregnant woman or creates a severe threat to physical health.

Section 4(b) if the child to be born suffer physical or mental defect or he will permanently be seriously handicapped

Section 4(c) foetus conceived by unlawful intercourse such as rape or intercourse with mentally ill women.

Abortions not done per the above section are punishable under section 60 of the Criminal Law and Codification Reforms Act. It is up to 5 years in prison or a fine of $5,000 or both.[19]

16 https://www.Bpas.org/our-cause/compaigns/briefings/abortion-law-in-great-britain/#.~:textThe%201967%20Abortion%20Act%20Renders.to%20help%20her%20do%20so

17 RCN Vs. DHSS [1981] 2 WLR 279

18 Article 134 and 135 of Criminal Law

19 https:// cyber.harvard.edu/population/abortion/Zimbabwe.abo.html

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VII. HUMAN RIGHTS COMMITTEE AND ABORTION

In two cases[20] Before the human rights committee, two women are compelled to go neighboring country from their own country to terminate their Pregnancy. Because in their home country, abortion is completely prohibited. In these cases, the committee found that the women

are subject to the condition of intense physical and mental suffering that constituted inhuman, cruel or degrading treatment. The committee also noted that the criminalization of abortion created shame and constituted "a separate source of severe emotional pain".

In a particular case before the committee, a minor woman was illegally denied access to an abortion by the hospital director even though abortion is legal in that country. The case marked the first time an international human rights body has held a government accountable for failing to ensure access to legal abortion service. [21]

In another case, the court interfered with a minor girl's decision to abort, even though the law permitted abortion for a pregnancy which is raised due to rape. So, the girl illegally aborted her gestation. This violated Article 2, Article 3 (right to equality and non-discrimination), Article 7 (right to be free from torture or cruel, inhuman or disregarding treatment) and Article 17 (right to privacy). So, the human rights committee pointed out the Article 2 of the Optional protocol of the

ICCPR creates an obligation for the country to provide Compensation as a remedy.[22]

20 Mellet Vs. Ireland and Whelon Vs. Ireland - Information Services on Sexual and Reproductive Health and Rights (Updated 2020)

21 K.L. Vs. Peru Human Rights Committee Communication No. 22/2009 U.N. DOC. CCPR/C/85/D/1153/2003

22 L.M.R. Vs. Argentina Human Rights Committee Communication No. 1608/2007 U.N.DOC. CCPR/C/101/D/1608/2007

VIII. ABORTION LAWS WORLDWIDE

Countries do not permit abortion under any circumstances including women's health and life at risk. (26 Countries)	Countries which permit abortion only when the woman's life at risk. (39 Countries)	Countries which permit abortion only when to preserve the woman's mental and physical health. (56 Countries)	Countries which permit abortion under a broad range of circumstances (14 countries)	Countries which permit abortion only on request (Gestational limit vary) (66 countries)
Egypt, Iraq, Jamaica, Philippines, Tonga,	Afghanistan, Bangladesh, Bhutan, Brazil, Iran, Mexico, Myanmar, Nigeria, Oman, Somalia, Sri Lanka, Uganda	Argentina, Colombia, Israel, Kenya, Malaysia, Mauritius, New Zealand, Pakistan, Peru, Poland, Zimbabwe	India, Ethiopia, Finland, Great Britain, Hongkong, Japan, Taiwan	Australia, Belgium, Cambodia, Canada, China, Denmark, Germany, Greece, Hungary, Mongolia, Nepal, Norway, Portugal, Romania, Serbia

(source: Center for Reproductive Rights)23

Note: - Only a few countries are listed

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IX. SUGGESTIONS

- Some Countries have prohibited abortions in all circumstances, including women's lives at risk. So, international organisations and treaties must raise awareness about the need to de-criminalize abortion in those countries.
- In India, many of the rural areas are not aware of the abortion laws. So, women from those reserved areas give birth from unwanted pregnancies. After the child's birth, they face many health as well as socio-economic inabilities.
- Some of the abortions are done illegally only with the intention to abort the foetus. In these abortions, there is no threats to the life or physical or mental health of the pregnant woman. They conceived the foetus with unwanted intercourse. So only they do these abortions due to their inability to face society. We must develop our law to address this issue.
- Some people leave their children homeless. Because they do not have sufficient means for the maintenance of the child. So, no. of orphans is gradually increasing. To eradicate this problem, strong abortion laws are needed, and awareness about the abortion laws is critical.

X. CONCLUSION

In conclusion, the comparative constitutional exploration of medical termination of Pregnancy underscores the dynamic interplay between legal frameworks, cultural values, and human rights across diverse jurisdictions. From the intricacies of individual autonomy and the responsibilities vested in the state, our analysis has unveiled a spectrum of approaches that shape the discourse on Abortion. As we navigate this complex landscape, it becomes evident that the convergence and divergence of constitutional perspectives reflect legal considerations and societal attitudes. The nuanced understanding gained through this examination underscores the ongoing dialogue necessary to strike a delicate balance between each nation's individual reproductive rights and broader constitutional fabric. In the ongoing discourse, the constitutional area remains a vital stage for shaping the future contours of medical termination of Pregnancy, calling for continued reflection, adaptability, and respect for the multifaceted dimensions inherent in this crucial aspect of reproductive justice.

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"LEGAL EQUALITY OR RELIGIOUS SANCTITY?": CRITIQUE OF THE FEMINIST JUDGEMENT IN THE SABARIMALA CASE 2019

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Abstract

This paper focuses on the dissenting aspect of the Supreme Court's judgement in the Indian Young Lawyers' Association v. State of Kerala. The central concern of this paper concerning the case was the constitutional validity of a long-enforced prohibition on women from entering the Hindu temple at Sabarimala, Kerala. The paper further draws reasoning towards using History as a rational and legitimate factor in judicial pronouncements. The course of discussion of the paper revolves around the majority judgment that conforms to the transformative vision of the Constitution, which, on the contrary, the public sentiment has made it impractical to enforce. The paper attempts to criticise the pseudo-feministic approach to the Sabarimala controversy, which has played a significant in the Court's judgement formulation.

Keywords: Sabarimala, History, Religious Sentiments, Pseudo Feminism, Science

Introduction

In Indian Young Lawyers Association and Others[1] V. State of Kerala and Others, often referred to as the Sabarimala Case, the Supreme Court of India addressed the Sabarimala temple's exclusionary practice as violative of the Constitution's founding and fundamental principles. The Court, in its feminist judgement in the year 2018, limited its interpretation of religion, equality and freedom, and held the prohibition of women's entry into the Sabarimala temple as an act in contravention to the Indian Constitution and purported the same to be a discriminatory practice against women. In a culture-rich country like India, Religion and Law predominantly exist nearby and cannot exist independently. Thus, there prevails a scope for both to come into conflict, which results in either of the two being the trade-off for the other. Upon the delivery of this judgement, it is considered impliedly that external factors have moved the Apex Court and has disregarded the internal religious structure belief of the people. This judgement passed by the Court was subjected to the two-fold effect of small-scale progressive appreciation and widespread dissent and unacceptance, respectively.

1 Citation- (2019) 11 SCC 1; 2018 (8) SCJ 609

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The Historical Heritage:

The Sabarimala Temple is an ancient Sastha temple in the thick forest of the Pathanamthitta district of God's own country – Kerala. The Temple's geographical location is near the dense forest and tiger reserve, and also, due to its hill topography, it is characterised by a rough terrain to travel by foot. This Hindu shrine is known to be the place of worship of Lord Ayyappa, a Brahmachari in his celibate form. The Temple is a part of the six temples, i.e., the Sasth Chakra Temples (i.e., the temples the that correspond to the six chakras) of Sastha. Sastha, referred to herein is the deity whose incarnation is Lord Ayyappa. The Sabarimala temple, amongst the six chakras, represents the sixth chakra.

The Dialectic Argument of the Practice:

There is reasonable and sufficient scientific evidence behind the customary prohibition practice on women's entry into the Sabarimala temple. There is a significant impact on women who enter the temple, not only during their menstruating period but also during the time duration of their respective reproductive ages.

The pilgrimage visit to Sabarimala by women of reproductive age, adversely alters the women's menstrual cycle. The result of the same is not only attributable to the stoppage of the period but also to the subsequent problems associated with the period cycle, which severely affects the women's health and well-being. The phenomenon of menstruation and the menstrual cycle is at the absolute core of a woman's health. If this is disrupted, her mental health, bodily disorders such as PCOD and Endometriosis and painful conditions can occur.

As mentioned in the previous paragraph, the six chakras are aligned along the spinal column and correspond to our endocrine glands. For the purpose of explaining the effect of, the reference of primely three chakras is necessary, and they are - the chakra between the eyebrows, which refers to the pituitary gland and the lower two chakras, which correspond to the reproductive and excretory organs, respectively.

Entry into the Sabarimala Temple causes rigorous activation of the pituitary gland, which begins to secrete testosterone (a male hormone) at a higher rate, which the ovaries, on the contrary, cannot convert into the female hormone as there is excessive production. The same secretion, which occurs in men upon entering the temple, positively impacts the male body by increasing any deficiency and balancing the hormones, respectively. However, the excess energising of the pituitary gland in women causes unpleasant changes. This is the widescale development of masculine features, such as the growth of excessive hair, a manly voice, and so on.

The Pseudo Feministic Mentality:

Before understating this segment, there is a need to raise this question – "Why are women trying to fix something that has not been broken yet?". It is to be taken into account, the level of misconception of the term 'discrimination' by women and their negligent claim. Lack of knowledge of native sciences has resulted in women overlooking the aspect of how this particular religious place of worship can impact and change the course of a woman's life and the considerate amount of negligence shown towards the consequent bodily harms.

This is highly attributable to the contribution of those pseudo feminists, who have misrepresented the ideology of feminism. It is upsetting to notice, how these women miscomprehended a sensitive traditional guideline proposed to be followed by them in the best of their interests as a discriminatory practice that is violative of their fundamental rights. It is such misrepresentation and distortion of facts that have significantly contributed towards the downfall of certain Hindu beliefs and the undermining of its worth.

It is ironic to note that several temples prohibit men from entering the holy premises due to religious sentiment, and where for the same, the men respected, valued and chose to preserve that belief. For instance, the Attukal Bhagwati temple prohibits the entry of men, which is upon Goddess Parvati's wish. In these cases, the men preferred to uphold the sanctity of the holy place and not infiltrate it with their right to equality of sexes.

"LEGAL EQUALITY OR RELIGIOUS SANCTITY?": CRITIQUE OF THE FEMINIST JUDGEMENT IN THE SABARIMALA CASE 2019

The Constitutional Interpretation:

The writer herein opines that the Court approached and addressed this issue as "Women's Right to Worship" but was utterly ignorant to the Temple, its tradition and religious sensitivity aimed at protecting "Women's Right to Health". Women's right to health should have been given precedence over the aspects of discussion herein in this case. In this segment, the prime issue of focus that needs to be addressed is the "Constitutional authority of the Court to comment on religious matters. This is because, if any practice is considered harmful for the women, the same must be treated with due respect and further intervention or interpretation of the same must not be encouraged. Lastly, the writer poses the following questions to imbibe the sense of critical analysis of the Judiciary's power: Are public sentiments and enforcement practicability to be considered while exercising the judicial process? Moreover, "Should judges ignore the disaffection caused by their decisions?

CONCLUSION:

In conclusion, it is necessary for the reasonable limitation on liberal interpretation performed by the Court in religious matters. The sacred practices of a religion and the corresponding sentiments of the people who are its followers must be given due respect and shall be upheld. Though the nature of such a judgement may be progressive, the people's reaction to the same may, in instances as that discussed in the paper, tend to be revolutionary. The Court's interference and interpretation have subsequently hurt certain deep-rooted cultural aspects of the country and developed a fear of the people. This is attributable to the rapid adoption of Western culture in our Indian society. Wherein the people fear that with further such "so-called progressive judgements", the Indian nation's varied ethnicity and cultural heritage is gradually depleting, and its significance is undermined. Hence, limited intervention with reference to such matters helps in restoring trust in the Judiciary in the minds of the people, which in turn will ensure that their age-old culture, in its broader sense and in its narrow sense, the religious practices will not be the trade-off, for upholding miscomprehended equality and in abolishing the non-existent discrimination.

ANALYZING THE ROLE OF LAW ENFORCEMENT IN RESPONDING TO DOMESTIC ABUSE

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Introduction

Domestic refers to being in one's own country. Domestic abuse is mainly caused by abuse that a female experiences at the hands of her spouse or his family. Abuse within the four walls is often considered violence between spouses. However, it also comprises partnerships where family members cohabit and interact. The Court determined that "A relationship like marriage" is not defined by the Act. In D. Velusamy v. D. Patchaiamal A one-night stand or a weekend spent together would not qualify as a "domestic relationship." No "live-in relationship" can compare to a marriage in the truest sense. Domestic violence comprises a wide range of violent incidents in which females are subjected to physical harm, assault, bodily injury, mental stress, misery, humiliation, harassment, abuse, danger, and fear of retaliation. In Indra Sarma v. V.K.V. Sarma , the Court determined that domestic abuse encompasses all types of violence, including but not limited to physical beatings that occur within a household, including emotional, mental, sexual, and financial abuse. Domestic violence refers to any type of abuse that occurs within a household, including financial, emotional, mental, sexual, and other forms of brutality in addition to physical beatings. Women's lives are inextricably linked to abuse and harassment. She encounters violence of various forms almost everywhere she goes: at home, at work, or elsewhere; from strangers or close friends; in public or private spaces.

This demonstrates how violence against women still exists in many spheres of society. For a long time, there has been a severe gap in our judicial system, and there is no mechanism in place to handle allegations of domestic abuse against women. Because our current laws are inadequate to offer victims of violence in the private domain legal help and protection, it has been difficult for victims of domestic abuse to obtain legal redress. However, the Act currently establishes guidelines to close the gap and end the issue of domestic abuse. The Preamble of the Act states unequivocally that the aim is to eradicate and eradicate evil. It says that the primary focus will be on giving the victims immediate relief and that reasonable efforts will be made to aid in the aggrieved parties' rehabilitation. One of its goals also includes the provision for compensation. Stated differently, the primary objective is to shield female sufferers from abuse being done within four walls. Protection also paves the way for rehabilitation and compensation to the victim.

Historical Perspective

The Act was passed, and it offers support to tortured females. Although the Indian Penal Code of 1862 had provisions like Section 304B and 498A, they were insufficient to end the exploitation and harassment of women. If we ignore the past, it is pertinent to note that Indian law has, for the most part, concentrated on the dowry issue whenever we want a solution for domestic abuse. In fact, police have frequently refused to file cases under the rules unless the case relates to a demand for dowry. Eventually, the Bill was passed in 2005, and its commencement was in 2006.

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Scope and Incidents Covered under the Act

All women in household relationships, whether they are mothers, wives, sisters, widows, or otherwise, are to be protected by this Act. Therefore, under this Act, a wife has rights against her husband's family members and is protected from female relatives, regardless of the fact that they are her sister-in-law, mother-in-law, daughter-in-law, etc. In order for someone to be held accountable under this Act, they must be in a domestic relationship. According to Section 2 f, a domestic relationship is defined as a relationship between two individuals who live together or have lived together in the past and are related by birth, a relationship based on adoption, or there is a matrimonial relationship, or they are cohabiting as one single family. It includes a significant provision for women's right to residence. A woman is entitled to live in the marital dwelling no matter whether she owns the house or not. Under Section 19, residence orders can be passed by the Court. These residency orders, however, cannot be applied to a woman. There are provisions for refuge homes in this Act as well. The service providers are responsible for ensuring that those who have been wronged are given a place to stay if necessary. This Act also provides for the employment of Protection Officers. According to Section 8 of the Act, a State Government may designate as many protection officers as it deems appropriate in each district and designate the region in which these officers would carry out their duties by publishing a notification in the official gazette.

This Section further stipulates that female protection officers must be there and must have the training and experience specified by the Central Government through regulations. Under Section 4, a victim of domestic abuse has the authority to report the incident to the Protection Officer. It further states that reporting domestic abuse without any malafide intention will not subject one to legal or criminal consequences. A sufferer of injustice, a protection officer, or someone acting on their behalf may ask the Magistrate, as per Section 12, for one or more reliefs. Before making a decision on such an application, the Magistrate must consider any domestic abuse event report submitted by the protection officer. It also empowers the Magistrate to schedule the initial hearing date, which can be scheduled up to three days after the Court receives the application. Additionally, it states that the Magistrate must try to decide on each application filed under this provision within sixty days after the first hearing.

According to Section 14, a magistrate may order any of the parties, individually or together, to seek counselling from any service provider with the necessary counselling training and expertise during the proceedings. In line with Section 15, the Magistrate may ask a suitable individual (preferably a woman) for support to take care of the Court's responsibilities, including someone who works in women's welfare. In addition, According to Section 16, the Magistrate may conduct the proceedings behind closed doors if he thinks the case's circumstances justify it and if any party requests it. Various orders, including protection orders, residency orders, financial reliefs, custody orders, and compensatory reliefs, may be granted under Sections 18–22.

Protective Provisions Provided to Woman

1. It is the right of any woman who has experienced domestic abuse to report the incident to a protection officer, police officer, Magistrate, or service provider.
2. The police officer, service provider, protection officer, or Magistrate must inform the victim of their legal rights to remedies as soon as they receive the complaint.
3. With the help of DLSA, 1987, the offended woman is having a right to free legal services, which the concerned officers shall inform her of.
4. The woman who feels mistreated has the right to file a complaint in accordance with IPC section 498A.
6. The aggrieved person is allowed to stay in a refuge house.
7. The angry woman receives medical attention. The person overseeing the facility is required to provide her with medical attention.
8. The person who feels wronged should receive professional counseling.

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9. Everything will happen behind closed doors.
10. Financial assistance must be given—maintenance for the children and the resentful party. Any awarded monetary relief must be sufficient, rational, consistent, and equitable.

Judicial Concern

A few court rulings indicate the Court's stance about the Act's implementation. In the case of Dr Vinod Parashar v. State of U.P ., it was decided that the Judicial Magistrate has the authority to enforce rights under the Cr.PC., and the reliefs are primarily civil in nature with the only goal of reducing procedural delays. The Apex Court in Delhi Domestic Women's Forum v. Union of India acknowledged the seriousness of women's condition and the harm that sexual assault does to them. In this instance, the Court established guidelines for helping the victim of rape. A qualified attorney will give the victim of sexual assault with legal assistance. Besides representing the victim, the attorney will advise her about other different options that she can utilize, like mental health therapy and medical assistance.

The Apex Court in Lalita Toppo v. State of Jharkhand & Another stated, "a claimant is also eligible for maintenance if she has been living as a live-in partner or is not a legally wedded wife". The Apex Court in Krishna Bhattacharjee v. Sarathi Choudhary It held that the 2005 Act is comprehensive and includes every kind of abuse and violence. It also provides a broad definition of terms such as aggrieved and domestic abuse as per the Indian Constitution. Every such right, which is necessary for fundamental human existence and dignity, is guaranteed to women by this Act. The goal of protecting victims of domestic abuse is articulated in the Act's Preamble. This ruling was re-examined, leading to a different conclusion from Satish Chander Ahuja v. Sneha Ahuja. , it was ruled that females have separate housing rights from other family members, and the trial court, not the Family Court, was instructed to decide this matter further. The reason for this decision is that the fundamental goal in the eyes of the judiciary is to protect women from violence. This interpretation is urgently needed, given the limitations of the reliefs mentioned in the 2005 Act.

Apex Court established many rules and principles in Amarendu Jyoti v. State of Chhattisgarh , which serve as a basis for determining compensation amounts, particularly in matrimonial situations. In M. Palani v. Meenakshi , it was concluded that the length of time together as partners is irrelevant and not required to evaluate the maintenance claim, and the woman has the authority to ask for maintenance if she and the opposing party cohabitated in " a close relationship". Upon examining all of these rulings and decisions, it is evident that the judiciary is enthusiastically assuming the position of protector for victims of domestic abuse. Even if numerous obstacles remain in the victim's way of receiving justice, these gaps will eventually be closed.

How to Apply for Orders of Relief

Step 1: Informing the Protection Officer

A protection officer designated under Section 8(1) can be contacted by anybody who has cause to suspect that she has been the sufferer of domestic abuse. It is even better if the protection officer in question is a woman. A legally recognized volunteer organization whose mission is to defend women's rights and interests), or a magistrate who had received the complaint or was present when the offence took place would all inform such women of their rights. These entitlements consist of:

1. These women have the right to apply for relief by getting a residency order, compensation order, guardianship order, financial relief, or protection order.
2. They also possess the entitlement to utilize the services offered that are accessible.
3. Right to utilize the protection officers' services.
4. The Legal Assistance Authority Act of 1987 makes them entitled to receive free legal assistance.
5. Under IPC Section 498-A, they can also initiate a criminal case.

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6. It should be mentioned that the authorized protection officer who neglects to fulfil their appointed duties could spend up to a year in jail and pay a fine.

Step 2: Making a Domestic Incident Report by the Protection Officer

The protection officer is required to report domestic incidents to the Magistrate after receiving complaints about domestic abuse. If the individual who was wronged wants one, this report should include ask for relief like a protection order. The report is addressed to a Magistrate or a metropolitan magistrate or the first class magistrate, with jurisdiction:

- The respondent's residence;
- The temporary residence of the injured party; or
- The location of the alleged domestic violence.

Copies of the report should be sent to the local police officer in charge of the police station where the alleged domestic abuse occurred. In addition, the protection officers' responsibilities include keeping track of local service providers, refuge houses, and medical facilities and ensuring the abuse victim receives all advantages specified in her rights.

Step 3: Procedure Regarding Application

The Magistrate will set the date of the first hearing after receiving an application from the harmed party, someone acting on their behalf, or a protection officer. Typically, this date is at most three days after the Magistrate receives the application. In addition, the Magistrate will try to decide on the application within sixty days following the initial hearing.

Step 4: Notice to the Respondent

The protection officer will receive notice of the first hearing date after the Magistrate has scheduled it, and they will then notify the informant and any other individuals the magistrate designates. Unless the Magistrate grants an extension, the protection officer must complete this within two days of receipt.

Step 5: Other options that the Magistrate can make use

Section 14 permits the Magistrate to propose, either singly or in conjunction with the aggrieved party, that the respondent undergo counselling from a service provider member. Such a person needs to have prior counselling experience. Section 15 of the Act allows the Magistrate to ask someone, preferably a woman, for help in performing his duties. For someone like this, a career in family welfare would be great.

Step 6: Giving Orders

- Protection Orders

The Court may issue a protection order and forbid the respondent from doing any of the following after providing the victim and respondent with an opportunity to be heard:

- Attempting any act of domestic abuse; or
- assisting in the commission of any domestic abuse.
- Getting into the offended party's workplace or, if the victim is a youngster, going to their educational institution or the place they frequently go.
- It is making an effort to get in touch with the individual who feels wronged in any way possible, whether it be through personal, writing, oral, electronic, or telephone communication.
- Inflicting violence on dependents, other family members, or anybody else who provides support to the victim of domestic abuse
- Performing any further acts that the protective order specifies.

The protection officer's testimony, which claimed that the complainant was being denied basic necessities and that the respondents were abusing her at home, was deemed by the Court in the Yadwinder Singh v. Manjeet Kaur case to be a significant and objective piece of evidence. Respondents are prohibited from participating in any domestic abuse, providing assistance or incitement to commit domestic violence, entering the injured person's place of employment, and engaging in any connected activity by a protective order issued by the

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Magistrate under Section 18. Section 26(1) of the Act states that since Sections 18 to 22 of the Act are civil in character and unconnected to a criminal conviction, relief under them may be obtained in the Civil Court, Family Court, or Criminal Court. The Parijat Vinod Kanetkar v. Malika Parijat Kanetkar case established that any legal process before the Civil, Family, or Criminal courts may seek relief under section 26, which lays down the provisions accessible under sections 18, 19, 20, 21, and 22. These are supplemental reliefs; they do not take away from other reliefs afforded by other statutes.

- In case of contempt of Protection Order

As per Section 31, a provision has been laid of penalties for the respondent's violation of Protection Order

1. if the respondent violated a protection order or an interim protection order. He will be liable for the maximum term for this offence, which is one year in jail, a fine of up to twenty thousand rupees, or both.
2. The Magistrate who issued the order, whose violation the accused is said to have caused, will be tried for the offence under sub-section (1).
3. The magistrates may also file charges under sub-section (1) while doing so if the evidence indicates that an offence under Section 498A of the Indian Penal Code, any other provision of that Code, or the Dowry Prohibition Act, 1961, as applicable, may have been committed.

Cognizance and Proof

Only individuals who violate a protection order granted under Section 18 or a temporary protection order imposed under Section 23 of the Act are subject to penalties as per Section 3. As a result, domestic abuse is not considered an infraction under the Act, and breaking a magistrate's order in accordance with Sections 18 or 23 is punishable under Section 31. Consequently, it is now unlawful for anybody to carry out acts of domestic abuse against a woman or to refuse her entry to the shared residence in violation of orders issued under Sections 18 and 23 of the Act.

- **Residence Orders**

The subject property should be a shared household if a woman who feels mistreated obtains protection orders or orders allowing her to remain in a shared household. Under Section 19(1)(f) of the Act, the resentful woman may seek alternative lodging as a remedy if she finds the idea of a shared home unappealing. The term "shared household" is used only to allow a woman who feels aggrieved to search for alternative housing that is comparable to the shared home she previously enjoyed under Section 19(1)(f) of the Act. In the case of Chhangur Ram Nishad v. State of UP , it was determined that when a wife complies with the specified procedure and has the legal right to dwell in the shared household, section 17 must be applied.

It was resolved to read Sections 12 and 19 of the Act, 2005, concurrently in the case of M. Nirmala v. Dr. Gandla Balakotaiah . Section 19 addresses orders of residence. It is a well-known fact that a learned magistrate must receive an application under Section 12 and independently ascertain that domestic abuse has occurred prior to granting an order under Section 19 of the Act. The case of Samir Vidhyasagar Bhardwaj v. Nandita Samir Bhardwaj established that, based on the prima facie evidence supporting the wife's domestic abuse accusation, the Court could compel the husband to vacate the married house in order to prevent any interference.

- **Monetary Relief**

The Court may grant a monetary award under Section 20 of the Act if the abuse caused the lady to incur financial loss. This might pay for a woman's lost income, medical bills, repairs to her property, and other expenses. The abused woman may also request upkeep from her male companion. The paragraph further states that any monetary award must be reasonable, fair, and adequate in order to be commensurate with the quality of living of the injured party. The Court may order the respondent to place a percentage of their earnings, salaries, and cred-

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it-related debt with them to be used as a down payment for any financial aid they may need to provide. If the respondent does not make payment in accordance with the monetary order, the Magistrate may order the respondent's employer or a debtor to reimburse the person who was directly harmed.

Approach to financial support. The petitioner in Ramu Singh v. Smt. Bhuri Bai objected to receiving the maintenance money in one lump sum, even though the Court ordered it to be given in monthly installments. Financial support should be reasonable, equitable, and sufficient. Since the petitioner's spouse in Abhishek Dubey v. Archana Tiwari Makes between 50,000 and 1,000,000 rupees a month, the respondent is considered the petitioner's lawful wife and is obligated to support her in line with his status. The spouse maintained his standard of living. Thus, the High Court decided to raise support from Rs. 10,000 to Rs. 20,000. The Act's Section 2(k) specifies a monetary remedy in Kanchan v. Vikramjeet Setiya . For the monetary order made under Section 12 to be executed, the petitioner must apply under Section 20 of the Act. However, only those who may have accrued credit or who are salaried are covered by this rule. In the event that the petitioner works for themselves, this condition will not help. When an order of monetary relief is not obeyed, Section 31 will not be enforceable; Section 125 must be utilized. The DV Act's monetary relief orders are to be implemented in line with section 125 Cr.P.C., except that no formal application is required.

Custody Orders

The Magistrate may grant the mother who is angry or whoever applies on her behalf temporary custody of the children. This prevents a woman from experiencing the perilous situation of being violently torn from her children. According to Section 21, at any point during the hearing of the application for a protection order or for any other relief under this Act, the person who feels abused or the person applying on her behalf may ask the Magistrate for temporary custody of any child or children. The Magistrate may further specify how the respondent will see the child or children if necessary. If the Magistrate believes the respondent's visitation with the child or children will be detrimental, she may reject the contract. When the mother and father are fighting their claims without considering the child's welfare, the Court has a significant responsibility to apply its discretion judiciously and prioritize the child's needs. This was determined in the case of Gayatri Bajaj v. Jiten Bhalla .

- **Ex- Parte Orders**

The Magistrate may grant temporary directions under Section 23 if he determines they are just and suitable. In addition, if the Magistrate determines from the application that there is a reasonable chance the respondent will use domestic violence or that the respondent has already done so, he may issue an ex-parte order based on the aggrieved party's prescribed format affidavit. Upon the aggrieved party's application, the Magistrate may issue an order requiring the respondent to pay damages to the injured party as well as compensation for the mental and emotional suffering caused by the respondent's domestic violence acts.

Step 7: Steps to take in case of violation of the order given

The respondent will be held accountable under this Act if he violates the Magistrate's protection order. A fine of up to 20,000 Rupees may be levied on him, or imprisonment for one year.

Conclusion

The primary motivation for the Act's enactment was to give females of our country the much-needed protection against the harassment they endure. Ending the scourge of domestic violence against women has been the primary goal of the Act from its establishment. The only goal under the Act is to provide equality before the law for all genders, although frequently it seems that the monetary relief

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provided to women is insufficient. Nonetheless, male children are not covered under it. Thus, it is humbly proposed that this Act should add all male children. Undoubtedly, there are some hurdles standing while implementing the Act's goal. For example, it is next to impossible to consider a family's reconciliation if everyone in the family was jailed following the filing of a complaint. It would undoubtedly result in the irreversible dissolution of the marriage, which will ultimately undermine the goal of giving women happiness and dignity.

The family courts must hear the matter to confirm that the women's marriage rights and obligations are met. Furthermore, passing laws alone will not be adequate until we are all attentive enough to the problem. Now, the correct time has arrived for the women who have endured harassment and oppression in silence for the most significant period to rise above the injustice and suppression. Domestic abuse is among the most heinous forms of abuse that women endure in our culture. As per the report, over 85% sufferers of domestic abuse are women. No one is immune from the ill effects of domestic abuse, regardless of their color, faith, religion, or social standing. Domestic abuse incidents will undoubtedly continue to climb across all societal segments if the problem is continuously ignored. Thus, in order to remove this crime from our society, we must all work as a team and make all feasible efforts. It is time to come together, stand as a group, and enact more stringent legislation that will assist victims of abuse in escaping this kind of heinous crime. Marx's statement, "Equal Laws cannot be applied to Unequal people," encapsulates it.

HOMOSEXUALITY AND SAME-SEX MARRIAGE: THE INDIAN CONTEXT

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Abstract

Discussions over homosexuality and same-sex marriage have always been complicated in India due to deep-rooted cultural norms and differing legal viewpoints. By closely examining the historical development, the legal system, and the societal views that influence the experiences of the LGBTQ+ (LGBTQ is an acronym that stands for “lesbian, gay, bisexual, transgender and queer) population in India, this study aims to clarify these difficulties.

The article seeks to advance knowledge of the changing dynamics around same-sex marriage and homosexuality by examining significant case laws. This study explores the complex relationship between same-sex marriage and homosexuality in India. The study intends to provide a thorough understanding of the difficulties experienced by the LGBTQ+ community in India by exploring the historical, legal, and sociocultural aspects. It also examines pertinent case laws and the changing narrative towards greater tolerance and acceptance.

Objective of the study:

This research aims to provide an in-depth and detailed analysis of all aspects related to homosexuality and same-sex marriage in the context of India’s distinct sociocultural and legal environment. The research aims to examine how society currently perceives homosexuality, understand what impacts public opinion, and examine how history, religion, and culture connect to shape these viewpoints. The study also aims to give a comprehensive analysis of the legal framework that governs homosexuality and same-sex unions in India, looking at how laws have changed over time, their possible effects on the LGBTQ+ population, and their evolution. Additionally, the study will look into the psychological effects of societal perceptions and legal restrictions on people who identify as homosexual, with a particular emphasis on issues like stigma, discrimination, and mental health. By addressing these dimensions, the study aspires to contribute valuable insights to the ongoing discourse on LGBTQ+ rights in India and foster a more informed and inclusive societal dialogue. Through this article, we tried to answer some questions relating to homosexuality and same-sex marriage. The following aspects have been dealt with in the article:

- Historical Perspectives on Homosexuality and Same-Sex Marriage in India

HOMOSEXUALITY AND SAME-SEX MARRIAGE: THE INDIAN CONTEXT

- Sociocultural Challenges in the Indian Context of Homosexuality and Same-Sex Marriage
- Changing Perspectives on Homosexuality and Same-Sex Marriage: The Indian Context
- Legal Reforms
- Viewpoint of SC as to homosexuality in Navtej Singh Johar v. Union of India (2018)
- Judgment of Supreme Court on same-sex marriage in Supriyo v. Union of India (SC 2023)
- Future Directions and Challenges

Keywords: Homosexuality, same-sex marriage, LGBTQI community

Historical Perspectives on Homosexuality and Same-Sex Marriage in India

Interpreting the current discussion requires an understanding of the historical viewpoints in India toward homosexuality and same-sex marriage. Although there is a wide variety of views regarding sexuality in India's rich cultural substance, historical perspectives on same-sex relationships are complicated and multidimensional.

1. Ancient Texts and Art:

a. The Kama Sutra: Old Indian writings, most notably the Kama Sutra, reveal a complex conception of sexuality that cuts beyond heteronormative limits. Although these scriptures recognize a range of sexual orientations, societal perspectives have changed over time, and interpretations differ.

b. Temples and Artwork: The idea that same-sex partnerships were completely prohibited in ancient Indian civilization is challenged by temples like Khajuraho, which feature sensuality depicting same-sex relationships. These creative interpretations point to a broader conception of human sexuality.

2. British Colonial Era:

India's views on homosexuality were greatly influenced by British colonialism. Same-sex relationships became illegal in 1860 when Section 377 of the Indian Penal Code was introduced, outlawing "carnal intercourse against the order of nature. The stigmatization of non-heteronormative partnerships was largely a result of Victorian morality's strong influence on colonial views on sexuality. Long after independence, the effects of these colonial-era views remained.

Section 377 of the Indian Penal Code,1860 provides that – "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

3. Post-Independence Era:

Following India's 1947 independence, Section 377 was kept in place, which aided in the continuous criminalization and stigmatization of homosexuality. LGBTQ+ identities were suppressed at this time due to social and legal constraints. The British colonial era significantly impacted India's stance on homosexuality. The introduction of Section 377 in the Indian Penal Code in 1860 criminalized "carnal intercourse against the order of nature," laying the foundation for the criminalization of same-sex relationships.

The Right to Privacy: The recognition of the right to privacy as a fundamental right by the Supreme Court has far-reaching consequences for LGBTQ+

rights, including the right to choose one's life partner. This section will analyze the legal implications of the right to privacy in the context of same-sex marriages.

Despite the legal challenges, the post-independence era saw the emergence of early LGBTQ+ activism, laying the groundwork for future movements advocating for the rights and acceptance of the community.

Sociocultural Challenges in the Indian Context of Homosexuality and Same-Sex Marriage

Social and cultural obstacles are a major factor in determining how members of the LGBTQ+ community in India experience themselves. Views toward homosexuality and same-sex marriage are greatly influenced by the complex environment that is created by the interaction of cultural norms, societal expectations, and historical viewpoints.

1. Stigmatization and Discrimination:

In India, there are several deeply rooted customs that continue to stigmatize and discriminate against those who identify as non-heteronormative. People who fall outside the traditional mould of heterosexual partnerships may find themselves rejected as a result of the expectation of conformity.

2. Family and Community Dynamics:

Marriage-related expectations from family and culture, which are often rooted in tradition, can provide serious difficulties for LGBTQ+ people. Internal conflicts can arise from the expectation to uphold heterosexual norms for the sake of family honour. LGBTQ+ people may face severe consequences from pressure to fit in with traditional family structures and expectations, such as isolation, rejection, and even forced marriages. The fear of social rejection continues to be a major obstacle for people to express their sexual orientation publicly.

3. Media Representation:

Although there have been improvements in how LGBTQ+ characters are portrayed in the media, their visibility is still restricted. A broader level of societal acceptance may be impeded by the absence of authentic and diverse representations.

4. The Difficulties of Coming Out:

Fears of social rejection and familial rejection make coming out a difficult endeavour. People's unwillingness to publicly accept their sexual identities is partly due to the powerful impact of India's extended family and community systems.

5. Stereotyping:

The way LGBTQ+ people are portrayed in the media in India frequently encourages stereotypes, which in turn creates a limited perspective that could fail to represent the variety of the community adequately. This may encourage additional stigmatization and misconceptions.

6. LGBTQ+ Activism:

In India, LGBTQ+ community activism has experienced both setbacks and victories. Conservative groups have opposed the movement for acceptance and equal rights, but it has also sparked improvements that have improved awareness and led to legislative amendments. In an effort to challenge social conventions and promote a feeling of community, LGBTQ+ pride events and visibility initiatives have gained traction. Nonetheless, conservative social groups frequently oppose and criticize these measures.

Changing Perspectives on Homosexuality and Same-Sex Marriage: The Indian Context

The changing perspectives on homosexuality and same-sex marriage in India reflect a dynamic societal landscape. Shaped by evolving cultural attitudes, legal reforms, and advocacy efforts, this shift signifies a broader transformation in the understanding of LGBTQ+ rights and the acceptance of diverse sexual orientations.

1. Empowerment of the Community: The LGBTQ+ movement has given people the confidence to

tell their stories, which has strengthened their sense of belonging and fortitude. Together, advocacy groups, social media campaigns, and grassroots movements combat discriminatory practices and advance inclusivity.

2. Educational Efforts: Integrating All Students: More and more educational establishments are realizing the value of inclusive curricula covering various sexual orientations. A shift in perceptions among the younger generation can be attributed to initiatives that foster awareness and sensitivity.
3. Legal Literacy Programs: In order to debunk myths and prejudices, legal literacy programs that educate the public about LGBTQ+ rights and legal reforms are essential. Communities with more knowledge are better able to confront discriminatory practices.
4. Intersectionality and Inclusivity: Understanding the intersections of identities—such as those based on gender, caste, and religion—helps us comprehend LGBTQ+ experiences from a wider perspective. This nuanced approach promotes diversity and challenges preconceptions.
5. Inclusive Policies: The creation of inclusive policies in a number of industries, including healthcare and the workplace, is indicative of a larger cultural movement in favour of accepting and recognizing a range of sexual orientations. These laws help to make places safer for people who identify as LGBTQ+.

Legal Reforms

Naz Foundation Vs Government of NCT of Delhi (Delhi HC 2009)

The main issue in this case was that Sec 377 IPC does not specify whether the consenting adults would also be liable. The language suggests that even with consent, they will be liable. The court held that sec 377, to the extent that it makes consenting adults liable, is unconstitutional as

a) It violates the right to privacy under article 21.
b) It is an unreasonable classification under Article 14, i.e. treating homosexually differently.
c) It is a violation of freedom of speech and expression also, as a person should have the right to express his sexual preferences.
d) Article 15(1) prohibits not only discrimination on the grounds of sex but also discrimination on the grounds of sex orientation.

However, later on, in Suresh Kumar Kaushal vs Naz Foundation (2013 SC), the Supreme Court, speaking through Singhvi J., held that sec 377 is constitutional as it is a matter of legislative policy and the court shall not interfere in it. Also, the Naz Foundation judgment is based upon foreign judgments, and hence, it is overruled.

Decriminalization of Homosexuality: The decriminalization of consensual same-sex relationships in India, following the historic judgment in Navtej Singh Johar v. Union of India (2018), marked a significant legal milestone. This decision, overturning Section 377, contributed to altering societal perceptions by acknowledging the fundamental rights of LGBTQ+ individuals. The Supreme Court has laid down the following major points as follows -

The Supreme Court tested the constitutionality of Section 377 against the principles of equality, liberty, and dignity under Articles 14, 19 and 21.

Right to Equality and Non-Discrimination: The Court observed that those who have same-sex relationships are arbitrarily punished by Section 377. In support of this, the Court pointed out that in order to safeguard women and children, Section 377 categorizes and punishes those who participate in carnal intercourse as being against the natural order. However, as unnatural offences are also punished separately under Section 375 and the POCSO Act, this goal has no legitimate connection to the classification. Consequently, the Court decided that it is against Article 14 to treat LGBT people differently. Furthermore, the Court determined that because Section 377 does not distinguish between adult consensual and non-consensual sexual conduct, it is arbitrary. It discriminated against those who

HOMOSEXUALITY AND SAME-SEX MARRIAGE: THE INDIAN CONTEXT

made specific decisions, treating them as "less than humans," and it promoted stereotypes and biases along with debilitating social effects. This violates Article 14, which is the very basis of non-discrimination.

Freedom of Expression: The Court recognized that everyone, including members of the LGBTQI community, had the freedom to express their preferences without fear. It acknowledged same-sex relationships as a typical form of human sexuality. The Court specifically pointed out that transgender people are considered inferior and subjected to discrimination under Section 377. The Court then considered whether Article 19(1)(a) permits reasonable restrictions on the right to manifest one's sexual orientation in accordance with public order, decency, and morality. It was mentioned that private, consenting acts that do not violate public decency or morals or disturb public order are illegal under Section 377. It is impossible to see sexual behaviours only through the prism of morality, which limits them to being done for the purpose of procreation. Unreasonably restricting someone's ability to operate in their personal space will hurt freedom of choice. For these reasons, the Court held that Section 377 is disproportionate and violates the fundamental right to freedom of expression.

Right to Life and Personal Liberty: The Court held that Section 377 violates human dignity, decisional autonomy and the fundamental right to privacy. Every individual has the liberty to choose their sexual orientation, seek companionship and exercise it within their private space. As Section 377 inhibits the exercise of personal liberty to engage in voluntary sexual acts, it violates Article 21. It socially ostracizes LGBT persons and does not permit the full realization of their personhood. Denying the right to determine one's sexual orientation curtails the right to privacy of an individual. Therefore, the Court held that the scope of the right to privacy must be widened to incorporate and protect 'sexual privacy'.

Recognition of Transgender Rights: Judicial recognition of transgender rights in cases like the National Legal Services Authority (NALSA) v. Union of India (2014). The Court had to decide whether persons who fall outside the male/female gender binary can be legally recognized as "third gender" persons. It deliberated on whether disregarding non-binary gender identities is a breach of fundamental rights guaranteed by the Constitution of India. It referred to an "Expert Committee on Issues Relating to Transgender" constituted under the Ministry of Social Justice and Empowerment to develop its judgment.

The Court upheld the right of all persons to self-identify their gender. Further, it declared that hijras and eunuchs can legally identify as "third gender". The Court clarified that gender identity did not refer to biological characteristics but rather referred to it as "an innate perception of one's gender". Thus, it held that no third-gender persons should be subjected to any medical examination or biological test which would invade their right to privacy.

This was a landmark decision where the apex court legally recognized "third gender"/transgender persons for the first time and discussed "gender identity" at length. The Court recognized that third-gender persons were entitled to fundamental rights under the Constitution and international law. Further, it directed state governments to develop mechanisms to realize the rights of "third gender"/transgender persons.

In conclusion, a transformative path highlighted by legal reforms, developing media depictions, LGBTQ+ activism, educational initiatives, and a dedication to inclusivity has resulted in changing perceptions of homosexuality and same-sex marriage in the Indian setting. Even if there are still obstacles to overcome, these shifting viewpoints point to a positive trend for India's LGBTQ+ community toward a more fair and accepting society. Continued efforts in advocacy, education, and policy reforms are crucial for sustaining and accelerating this positive shift.

Supriyo v. Union of India (SC 2023) is a case involving same-sex marriage and marital equality. The five judges on the historic Constitution bench, led by Dr. DJ Chandranand, CJI, and Sanjay Kishan Kaul, S. Ravindra Bhat, Hima Kohli, and P.S. Narasimha, JJ., provided four distinct opinions in this case. In a 336-page ruling, the Honorable Judges came to the unanimous conclusion that there is no constitutional right to marriage and that the Supreme Court cannot

judicially amend the Special Marriage Act of 1952 to make it more gender-neutral. However, the court assigned this procedure to Parliament to manage. The lengthy ruling addressed a wide range of issues related to the LGBT community's constitutional rights. However, the primary arguments made in support of or opposition to these claims are as follows:

1. Fundamental Right to Marry: The Judges unanimously agreed that there are no constitutional foundations for the fundamental right to marry. CJI Chandrachud extensively discussed the issue in his verdict of 247 pages, where he said there is no explicitly declared fundamental right to marry, as the constitution states. However, the content given to the institution by law cannot be used to elevate the institution to the level of a fundamental right. Nonetheless, various aspects of the conjugal relationship constitute manifestations of Constitutional values, such as the right to human dignity and the right to life and personal liberty. Justice Bhat further wrote along with Justice Kohli, saying, —There cannot be a per se assertion that an unqualified right to marry requires treatment as a fundamental freedom.
2. Gender Neutral Interpretation of Special Marriage Act: The petitioners demanded that if the Court found such a provision to be inconsistent with part III of the Constitution, then
    a) The court should pronounce that article as unconstitutional or alternatively.
    b) The court must read down some of its provisions and add or substitute.

According to CJI Chandrachud, if Section 377 is struck down for discriminating against same-sex couples, it will be a return to colonial times when marriage was prohibited between populations who practised different religions. This type of judicial ruling will return the nation to a period when discrimination and religious differences were founded on class division, leading to prejudice and inequity. In this instance, the Court chooses to take the second approach and insert new language into the Special Marriage Act of 1952 and other relevant laws, including the Hindu Succession Act of 1956 and the Indian Succession Act of 1925. This will obstruct the legislative process. Therefore, Justice Bhat concluded that gender-neutral interpretations of the Special Marriage Act can put women in disadvantageous situations when efforts are made to counteract the societal order that has historically favoured heterosexual men.

Future Directions and Challenges

As India grapples with evolving perspectives on homosexuality and same-sex marriage, the future presents a canvas of possibilities and challenges. This note explores potential directions for the LGBTQ+ rights movement and outlines the persistent challenges for a more inclusive and accepting society.

Legislative Reforms:

The prospect of legalizing same-sex marriages in India remains a crucial avenue for future progress. Advocacy efforts and legal reforms are essential to create a framework that recognizes and protects the rights of individuals irrespective of their sexual orientation.

While strides have been made, the absence of comprehensive anti-discrimination laws remains a challenge. Future directions should focus on enacting legislation that explicitly prohibits discrimination based on sexual orientation and gender identity in various spheres, including employment, education, and healthcare.

Cultural Sensitization:

Future efforts should prioritize the incorporation of LGBTQ+ perspectives into educational curricula. Inclusive education programs can challenge stereotypes, promote understanding, and foster acceptance from an early age. Supporting cultural initiatives that highlight LGBTQ+ experiences and contributions can play a pivotal role in shaping societal attitudes. Literature, art, and media can contribute to creating a more empathetic and inclusive cultural landscape.

Mental Health Support:

Addressing the mental health challenges faced

by LGBTQ+ individuals requires accessible and culturally sensitive mental health services. Future directions should focus on destigmatizing seeking mental health support and creating safe spaces for counselling. Building strong community support networks is essential for the mental well-being of LGBTQ+ individuals. Future initiatives should prioritize creating community spaces and support groups that offer understanding and solidarity.

Public Awareness and Sensitization:

Ongoing media campaigns should continue challenging stereotypes and promoting positive representations of LGBTQ+ individuals. These campaigns can contribute significantly to changing public perceptions and fostering acceptance. Future directions should involve fostering dialogue and engagement with religious communities to build bridges and challenge prejudices. Encouraging open conversations can lead to greater understanding and acceptance.

International Collaboration:

The LGBTQ+ rights movement in India can benefit from international collaborations and shared best practices. Engaging with global organizations and learning from the experiences of other nations can propel the movement forward.

Advocating within the broader human rights framework can strengthen the LGBTQ+ rights movement. Framing LGBTQ+ rights as intrinsic human rights reinforces the urgency and necessity of legal and societal acceptance.

Conclusion:

Summarizing the findings, the conclusion underscores the complexities of the Indian context regarding homosexuality and same-sex marriage. While legal strides have been made, societal attitudes continue to be influenced by cultural norms. The evolving narrative reflects a delicate balance between cultural heritage and the pursuit of individual freedoms, laying the groundwork for continued research and advocacy in pursuing LGBTQ+ rights and equality in India. The future of homosexuality and same-sex marriage in the Indian context lies in a collective commitment to inclusivity, legal reforms, cultural sensitization, and ongoing advocacy. While progress has been made, persistent challenges demand sustained efforts from activists, policymakers, and society. Future directions should be guided by a vision of India that embraces diversity and upholds the rights and dignity of all its citizens, regardless of their sexual orientation or gender identity.

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GEOGRAPHICAL INDICATION

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Abstract

Intellectual property is the property of the creation of the mind. Geographical indication is not the creation of the mind or any other person. Then why does Geographical Indication come under intellectual property? It is based only on a particular place's territory or unique character. To protect the culture, heritors of the place. The first geographical indication was included in the trade mark later; after the TRIPs agreement, it had a separate Act, and separate characters of the product came under the GI Act in 1999. This article is about the GI in India and also in Tamil Nadu. Tamil Nadu has one of the highest registrations of GI tags in India, with 58 products, and next is UttraPardesh. In India, the first GI was given to the Darjeeling tea in West Bengal in 2003-2004.

Keywords : Geographical indication, benefits of Registration, protection of product, unique character, statistics

INTRODUCTION

Intellectual property is an idea, a design, an invention, a manuscript, etc.; it gives rise to a new useful product. In simple terms, intellectual property means the creation of the human mind. Like other types of property, the intellectual property owners can also give for rent, sell and mortgage to other people. This type of intangible property was established for the creator or owner to earn recognition or financial benefit by using their creation or invention. The intellectual property was first recognized in the Paris convention for the protection of Industrial Property (1883) and the Berne Convention for the protection of literary and Artistic Works (1886). World Intellectual Property Organization (WIPO) established both this treaty. Copyright, patents, trade mark, etc., are significant parts of intellectual property. This article is about one of this intellectual property "geographical indication".

GEOGRAPHICAL INDICATION

It is originating from a definite geographical territory and it is used to identify agricultural, natural, or manufactural goods. The manufactured goods should be produced pr,ocessed, or prepared in the territory. It should have a reputation or special quality or other characteristics. Geographical indication is a sign used on goods that have a specific geographical origin and often possess qualities or a reputation of that place of origin. Example of geographical indications Textile and handicraft: Solapuri Chaddar, Mysore silk, Fruits and nuts, Hapus (Alpanso) Mango, Animal and meat products, Kadaknath, Osmanadadi goat etc. But the registration of a geographical indication is not compulsory.

DEFINITION

GEOGRAPHICAL INDICATIONS ACT,1999

"Geographical indication, in relation to goods , mean an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristics of such goods is essentially attributable to its geographical origin and in a case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place

GEOGRAPHICAL INDICATION

such territory, region or locality, as the case may be."

TRIPS AGREEMENT DEFINES GI

"Geographical indications are, for the purpose of this agreement, indications which identify a good as originating in the territory of a member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

HISTORICAL BACKGROUND

In the world:

The geographical indication was first used in Egyptian Civilization. The brick-makers indicated the origin of bricks using GI marks. In ancient Greece, Thasian Wine was given a GI mark.

In the past centuries, the European countries were the first to identify and protect their intellectual properties. The first intellectual property laws appeared in Venice in the 15th century, in England in the 17th century and other industrialized countries in the 18th century. Thus, the GI are of European origin.

GIs historically served as indicators of the commercial quality of the goods. They were used primarily to identify agricultural products with their place of production. Afterwards, GI was used for products with "unique qualities" due to special materials and labour associated with the place of manufacture. For e.g. 'Swiss' watches etc. GI first gained importance in 1800, since territories were defined for production of special products. However, the term 'geographical indication' was first used only in the trade Related Aspects of intellectual property Rights agreement.

At present, the most famous and lucrative GIs exist with their origins in developed countries, watches, and Australian wines etc.. Thus, most GIs pertain to items like drinks, meat, cheese, fruits, vegetables, clothing and crafts. The famous protected GIs in Europe belong to wines and spirits, and the trade values of these GIs run into billions of dollars. The well-known GIs in Asia relate to items like Basmati rice, Himalayan waters, Alphonso and sindhri mangoes, Hunza apricots, Bhutanese red rice, Pakistani Shaul Sumatra, Mandheling coffee, Shaoxing alcohol, Ceylon and Darjeeling teas etc.,

In India

Geographical indication of the Goods Registration and Protection) Act,1999 and Rule of 2002. It came after the signing of the TRIPS Agreement of 1955; This was mainly done to protect local producers' original use of the GI and the consumer from the product.

Geographical Indications registration in India is governed by the Geographical Indications of Goods (Registration and Protection) Act, 1999 It was enacted on 15th September 2003. This Act aims to improve the protection and registration of geographical indications relating to goods in India. The product has the traditional knowledge master and power generation units of cultivation practices used to protect the respective unique characteristics of the product.

GEOGRAPHICAL INDICATION VS TRADEMARK

The geographical indication is one of the branches of the trademark. However, it is different from the trademark.

- The geographical indication is to identify a good originality from a specific place.

The trademark identifies a product or goods from a particular company by its originality.

- The geographical indication is used by all individuals in the particular area and by every person who has produced the goods in that area.

Trade marks can be used only by a particular person who owns the produce he registered.

- The geographical indication has to be registered within the territory, and no rights to any person to register other than the territory of the place of origin.

The trademark is registered worldwide.

- The geographical indication does not belong to an individual and is considered to belong to the entire community.

GEOGRAPHICAL INDICATION

Trademarks belong to individual persons or individual communities.

VI. LEGAL PATHWAY OF GIs

Paris Convention (1883)

The protection against False indication.

Madrid Agreement (1891).

False and deceptive indication.

Lisbon Agreement (1958)

Provided protection of appellation of origin and their international registration Geographical indications

TRIPS Agreement (1994)

The first international treaty is bound to protect GIs and enforce their application.

GEOGRAPHICAL INDICATIONS ACT (1999)

In India in 1999, the Geographical Indication Act was enacted. This Act seeks to provide for the registration for better protection of geographical indications relating to goods in India. This Act would be administered by the Controller General of Patents, Desing and Trade Marks, who is the Registrar of Geographical indications. The Geographical Indications Registry is located in Chennai .

VII. PRODUCT OF GI

The Geographical indications are given to products of

- agricultural products
- foodstuffs
- wine and spirit drinks
- handicrafts and
- industrial products

VIII. REGISTRATION OF GI

The Register of Geographical Indication is divided into two parts. Part 'A' consists of particulars relating to registered geographical indications, and part 'B' consists of particulars of the registered authorized users. The registration process is similar to both for registration of geographical indication and an authorized user, which is illustrated below:

1. Filling an application.
2. Examination.
   a) Objection.
   b) Opportunity for hearing.
   c) Refused.
3. Acceptance.
4. Advertisement of Application in GI Journal.
   a. Opposition, if any
   b. Allowed or refused.
      - Application allowed.
   c. Appeal to IPAB
5. Enter in GI Register (If application is allowed)
   a) Particulars of Registered GI entered in Part A of the register
   b) Particulars of Registered AU GI are entered in part B of the Register.
6. Registration certificate issued.

IX. WHO AND WHICH CAN FILL OUT THE APPLICATION

- Eligible products

The product should have the reputation and qualities of the place of origin. GI is usually registered on products produced for generations by rural, marginal, and indigenous communities, which have gained a reputation mainly at the international and national levels due to some of their unique qualities.

- Who can apply

Any Person or Any Association of Persons or Producers or any organization or Authority established under law representing the interest of producers of the goods concerned.

The application has to be in a prescribed form

and manner.

Prescribed fees have to be paid.

The application under sub-section (1) shall contain—

(a) a statement as to how the geographical indication serves to designate the goods as originating from the concerned territory of the country or region or locality in the country, as the case may be, in respect of specific quality, reputation or other characteristics of which are due exclusively or essentially to the geographical environment, with its inherent natural and human factors, and the production, processing or preparation of which takes place in such territory, region or locality, as the case may be;

(b) the class of goods to which the geographical indication shall apply

(c) the geographical map of the territory of the country or region or locality in the country in which the goods originate or are being manufactured;

(d) the particulars regarding the appearance of the geographical indication as to whether it is comprised of words ,figurative elements, or both;

(e) a statement containing such particulars of the producers of the concerned goods, if any, proposed to be initially registered with the registration of the geographical indication as may be prescribed; and

(f) such other particulars as may be prescribed.

 Prohibition of registration of certain geographical indications

(a) The use of which would be likely to deceive or cause confusion or

(b) The use of which would be contrary to any law for the time being in force; or

(c) which comprises or contains scandalous or obscene matter or

(d) which comprises or contains any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India or

(e) which would otherwise be disentitled to protection in a court or

(f) which are determined to be generic names or indications of goods and are, therefore, not or ceased to be protected in their country of origin, or which have fallen into disuse in that country; or

(g) which, although literally true as to the territory, region or locality in which the goods originate, but falsely represent to the persons that the goods originate in another territory, region or locality, as the case may be, shall not be registered as a geographical indication.

 Where to apply

The central government of India has established the geographical indications Registry with all India jurisdiction in Chennai. Every application shall be filled in the office of the GI Registry.

 Renewal

A registered GI shall be valid for ten years and can be renewed can also payment-free . If GI registration is not renewed, the protection of the product under the GI Act 1999 is.

 Authorized user

An authorized user is any person claiming to be the producer of the goods in respect of which a geographical indication has been registered. To become an authorized user, the person has to apply in writing to the registrar in a prescribed manner and by paying the requisite fee.

X. BENEFIT

Why register the geographical indication? Because it protects the unique character of the territory product. The protection against infringement is granted if the geographical indication product.

Protect of Infringement

Element of infringement: If the signs are attached to goods, goods packaging, service means or transaction receipt: demonstration, means of advertisement and other means of business.

Remedies of infringement

Geographical indication identifies goods such

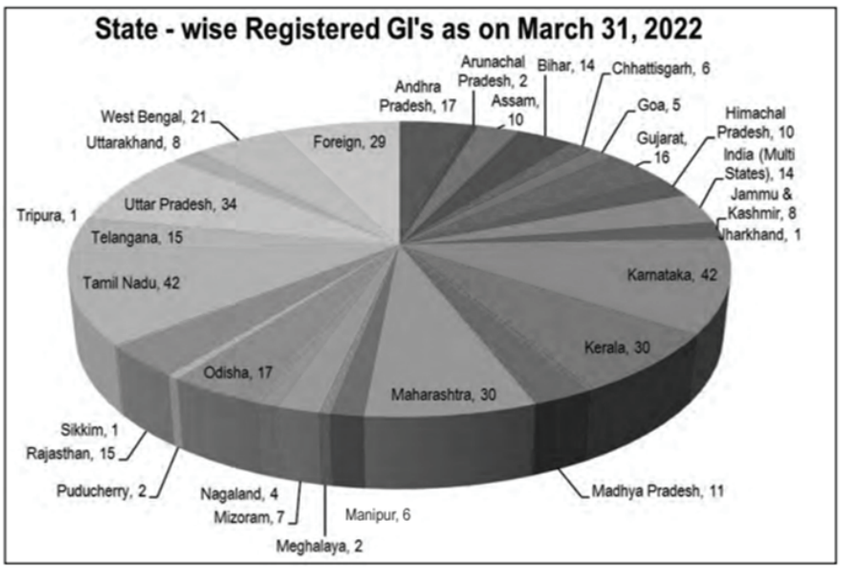
as agricultural goods, natural goods or manufactured goods originating or manufactured in the territory of a country, region, or locality.

If an unauthorized user uses a registered GI, proceedings can be instituted to prevent or recover damages for the infringement of a registered GI.

XI. STATISTICS

In India, on March 31, 2022, GI tag registration

Goods as per sec. 2(f) GI Act, 1999	No. GI Applications received	No. GI application Registered
Handicrafts (including Textile)	389	232
Agricultural	252	125
foodstuff	149	36
Natural	10	2
TOTAL	861	420



GEOGRAPHICAL INDICATION IN TAMIL NADU

Salem Fabric

Kancheepuram Silk

Kancheepuram Silk

Madurai Sungudi

Coimbatore Wet Grinder

Thanjavur Paintings

Temple Jewellery of Nagercoil

Thanjavur Art Plate

East India Leather

Salem Silk, known as Salem Venpattu

Kovai Kora Cotton Sarees
Arani Silk
Swamimalai Bronze Icons
Eathamozhi Tall Coconut
Thanjavur Doll
Nilgiri (Orthodox)
Virupakshi Hill Banana
Sirumalai Hill Banana
Madurai Malli
Pattamadai Pai (“Pattamadai Mat”)
Nachiarkoil Kuthuvilakku (“Nachiarkoil Lamp”)
Chettinad Kottan
Toda Embroidery
Thanjavur Veenai
Thanjavur Art Plate (Logo)
Swamimalai Bronze Icons (Logo)
Temple Jewellery of Nagercoil (Logo)
Mahabalipuram Stone Sculpture
Erode Manjal (Erode Turmeric)
Thirubuvanam Silk Sarees
Kodaikanal Malai Poondu
Palani Panchamirtham
Dindigul Locks
Kandangi Saree
Srivilliputtur Palkova
Kovilpatti Kadalai Mittai
Thanjavur Pith Works
Arumbavur Wood Carvings

CONCLUSION

GI tag has established itself as an essential intangible asset that has a lasting impact on consumers’ views of product quality regarding the nation, region or location of origin. It provides the advantage of such legal protection for the product, preventing it from being used illegally, providing a high-quality, standardized product, and increasing its economic stability in domestic and foreign markets.

GEOGRAPHICAL INDICATION

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PRISONERS' RIGHTS IN INDIA: A COMPARATIVE ANALYSIS IN THE CONTEXT OF THE INTERNATIONAL CONVENTION ON PRISONER RIGHTS

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Abstract

This research article delves into the intricate web of prisoners' rights in India, with a focus on a comparative analysis concerning the International Convention on Prisoner Rights. The study aims to shed light on the extent to which India aligns with international standards in safeguarding the rights and dignity of prisoners. By examining key legal frameworks, policies, and practices, this research seeks to identify areas of conformity and divergence between India's domestic legislation and the international standards outlined in the relevant conventions.

Objective of the study

The aim of this research is to provide a comprehensive analysis of the Indian legal framework concerning prisoners' rights, with a focus on comparing it to international conventions and treaties relevant to the rights of the accused and prisoners. The following aspects have been dealt in the article:

- To critically Examining the Legal Provisions in India Pertaining to the Rights of an Accused Person
- To analyses the key International Conventions and Treaties Relevant to the Rights of the Accused
- To evaluate Policy Guidelines and Reforms
- To analysis the comparison of the Indian legal framework on prisoners' rights with international standards
- To propose recommendations for reforms

By fulfilling these objectives, the study seeks to contribute to a better understanding of the legal framework governing prisoners' rights in India and provide insights into potential areas for reform to enhance the protection of these rights in line with international norms and principles.

Keywords: Accused, Prisoner's rights, International conventions

PRISONERS' RIGHTS IN INDIA: A COMPARATIVE ANALYSIS IN THE CONTEXT OF THE INTERNATIONAL CONVENTION ON PRISONER RIGHTS

Introduction

The Indian legal system, with its diverse and complex nature, addresses prisoners' rights through a myriad of statutes, court decisions, and policy frameworks. The research begins by providing an overview of the historical and legal context of prisoners' rights in India, emphasizing the constitutional guarantees and international obligations that form the foundation of these rights.

Ensuring the protection of individual rights within the context of criminal justice is the cornerstone of any democratic legal system. This ideology is based on the notion of protecting the rights of the accused and ensuring that everyone involved in judicial procedures receives a fair and just trial. Given that India has a lengthy history of constitutional law and a complex legal system, understanding the rights accorded to the accused necessitates serious research and thought.

The Indian legal system is dedicated to fair trials. Pleading innocent unless and until proven guilty is always an accused party's first line of defense in a court of law. This study's objective is to investigate and assess each right granted to an individual in India who is facing charges. The rights of the person being charged during the proceedings of a pending trial are thoroughly investigated in this work. Determining the extent to which specific rights are required is the primary goal of the research.

Everyone has the right to basic human rights, particularly those who have been convicted of a crime or are under suspicion of one. According to the blog Equality and Human Rights Commission, human rights are the fundamental freedoms and rights to which every person in the world is entitled, starting at birth and ending at death. These basic rights are based on shared ideals such as independence, justice, equality, respect, and dignity. These principles are defined and protected by legislation.

An accused is a person who has been charged with a crime, is on trial for one, but has not been found guilty. Given that India is a democratic country, the constitution mandates the concept of a fair trial. In Indian courts, one cannot be found guilty unless there is clear evidence of their guilt.

This paper undertakes a critical examination of "The Rights of an Accused Person in India," placing particular emphasis on an analytical examination that draws connections to international accords. The realization that human rights are global in nature and that a complete understanding of justice requires an evaluation of India's legal system in the context of global standards is what inspired the inquiry.

Legal Provisions in India Pertaining to the Rights of an Accused Person:

The Indian legal framework concerning prisoners' rights is multifaceted, encompassing constitutional provisions, statutory laws, judicial decisions, and policy guidelines. These components collectively aim to safeguard the fundamental rights and dignity of individuals in custody. Below is an overview of the key aspects of the Indian legal framework on prisoners' rights:

1. **Constitutional Safeguards:**

   India's Constitution provides several fundamental rights that are applicable to accused persons. The right to a fair trial, right to legal representation, right against self-incrimination, and the presumption of innocence until proven guilty are fundamental principles embedded in Articles 14, 20, and 21. While these constitutional provisions lay a robust foundation, challenges arise in their consistent implementation.

2. **Right to Legal Representation:**

   The right to legal representation is one of the major requirements of effective criminal justice system. While the Constitution guarantees this right, the practical accessibility to legal aid remains a challenge. The overburdened legal aid system and inadequate representation for marginalized or economically disadvantaged accused persons often compromise the effectiveness of this crucial safeguard.

3. **Right against Self-Incrimination:**

   Article 20(3) of the Constitution protects individuals from being compelled to be a witness against themselves. However, loopholes in investigative practices, such as custodial torture

PRISONERS' RIGHTS IN INDIA: A COMPARATIVE ANALYSIS IN THE CONTEXT OF THE INTERNATIONAL CONVENTION ON PRISONER RIGHTS

and coercive interrogations, raise concerns about the actual enforcement of this right. The need for stringent measures to curb custodial abuse and protect the accused during interrogations is evident.

4. **Presumption of Innocence:**

While the presumption of innocence until proven guilty is a fundamental principle, pre-trial publicity and societal prejudices can undermine this right. Media trials and public opinion often influence investigations and trials, compromising the accused person's right to a fair and impartial proceeding. Legal mechanisms to address and mitigate the impact of media sensationalism on accused persons are imperative.

5. **Delay in Justice:**

The right to a speedy trial is inherent in the right to life and personal liberty under Article 21. However, the Indian legal system grapples with prolonged trials, resulting in extended periods of pre-trial detention. This issue not only infringes upon the accused person's liberty but also challenges the effectiveness of the justice delivery system.

6. **Right against double jeopardy:**

No one may face charges or punishment for the same offense more than once, according to Article 20(2). Another provision of the Code of Criminal Procedure, Section 300, prohibits retrials for the same offense by anyone who has already been found guilty or not guilty.

7. **Right to fair and speedy trial:**

This legal dictum, "Justice postponed is justice denied," holds true for everyone, regardless of whether they are charged with a crime or not. Hence, everyone has a right to prompt, unbiased, and fair justice, even those who are accused.

8. **Right to consult a legal practitioner:**

Article 22 (1) of the Indian Constitution states that it is an accused person's fundamental right to have a lawyer of his or her choosing represent them and to advise them. A person has the right to consult with an advocate of his choosing while being questioned by police, according to Section 41(d) of the Code of Criminal Procedure. Also, according to Section 303 of the Code of Criminal Procedure a person facing charges also has the right to have their preferred pleader represent them.

9. **Right to bail:**

Section 50(2) of CrPC states that a police officer must notify the person being detained that he is eligible to bail when they arrest someone without a warrant for a charge that can be brought against him.

10. **Evidence and Witness Protection:**

Effective protection of evidence and witnesses is crucial for a fair trial. The absence of comprehensive witness protection laws and challenges in preserving evidence can compromise the reliability of the judicial process. Strengthening witness protection mechanisms and addressing challenges related to evidence preservation is essential.

11. **Juvenile Justice (Care and Protection of Children) Act, 2015:**

This Act deals with the rights and rehabilitation of juvenile offenders. It mandates special provisions for the care and protection of children in conflict with the law, emphasizing their rehabilitation and reintegration into society.

12. **The Prisons Act, 1894:**

This is the primary legislation governing the management and administration of prisons in India. It provides for the classification, treatment, and discipline of prisoners. The Act also lays down provisions related to the rights of prisoners, including access to food, clothing, medical facilities, and legal assistance.

13. **Model Prison Manual:**

Each state in India has its own prison manual based on the Model Prison Manual provided by the Government of India. These manuals detail procedures and guidelines for the management of prisons, including provisions for the welfare and rights of prisoners.

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Judicial Decisions:

The Indian judiciary has played a significant role in interpreting and expanding the scope of prisoners' rights. Several landmark judgments have affirmed the fundamental rights of prisoners, including the right to humane treatment, right to healthcare, right to legal aid, and right to speedy trial.

Notable judgments such as Sunil Batra v. Delhi Administration (1978), Hussainara Khatoon v. Home Secretary, Bihar (1980), and R.D. Upadhyay v. State of Andhra Pradesh (2006) have laid down important precedents in this regard.

Key International Conventions and Treaties Relevant to the Rights of the Accused:

This section explores the core principles outlined in international conventions relevant to prisoners' rights, such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMRs) and the International Covenant on Civil and Political Rights (ICCPR). By dissecting these conventions, the study aims to establish a benchmark against which India's legal provisions can be evaluated.

1. **Universal Declaration of Human Rights (UDHR):**

   The UDHR, which was ratified by the UN General Assembly in 1948, is a key piece of legislation pertaining to human rights. The presumption of innocence is affirmed in Article 11 of the UDHR, which states that "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence." The presumption of innocence and the right to a fair trial are highlighted in this clause since they are essential to the rights of the accused in any judicial system.

2. **International Covenant on Civil and Political Rights (ICCPR):**

   Adopted by the United Nations General Assembly in 1966, the ICCPR is a key international human rights treaty that outlines civil and political rights. Article 14 of the ICCPR enumerates specific rights of the accused in criminal proceedings, including the right to a fair and public hearing, the presumption of innocence, the right to be informed promptly and in detail of the charges, the right to legal assistance, and the right to examine witnesses. States parties to the ICCPR are obligated to ensure that these rights are respected and protected within their legal systems.

3. **European Convention on Human Rights (ECHR):**

   Adopted by the Council of Europe in 1950, the ECHR is a regional human rights treaty that protects fundamental rights and freedoms in Europe. Article 6 of the ECHR guarantees the right to a fair trial, which encompasses various rights relevant to the accused, such as the presumption of innocence, the right to legal assistance, the right to be informed of the nature and cause of the accusation, and the right to examine witnesses.

   The European Court of Human Rights (ECtHR) has issued numerous judgments interpreting and applying these provisions in cases concerning the rights of the accused.

4. **American Convention on Human Rights:**

   Adopted by the Organization of American States in 1969, the American Convention on Human Rights is a regional human rights treaty that protects fundamental rights and freedoms in the Americas. Article 8 of the American Convention guarantees the right to a fair trial, including specific rights relevant to the accused, such as the presumption of innocence, the right to be informed of the charges, the right to legal assistance, and the right to examine witnesses. The Inter-American Court of Human Rights has addressed issues related to the rights of the accused in several of its judgments.

These international conventions and treaties constitute a comprehensive framework for the protection of the rights of the accused at the global level. They articulate fundamental principles such as the presumption of innocence, the right to a fair trial, and the right to legal assistance, which are

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essential safeguards against arbitrary detention and prosecution.

Moreover, these treaties establish mechanisms for monitoring compliance and providing remedies for violations of the rights of the accused. International bodies such as the Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights play a crucial role in interpreting and enforcing these provisions, thereby contributing to the development of international human rights jurisprudence.

However, challenges remain in ensuring the effective implementation of these international standards in domestic legal systems. Variations in legal traditions, resource constraints, and political considerations can impede efforts to fully realize the rights of the accused in practice. Therefore, ongoing efforts are needed to raise awareness, strengthen legal frameworks, and enhance accountability mechanisms to ensure the protection of the rights of the accused worldwide.

Evaluation of Policy Guidelines and Reforms:

The National Human Rights Commission (NHRC) and various state human rights commissions oversee the implementation of prisoners' rights and investigate complaints of human rights violations in prisons.

The Government of India periodically issues guidelines and reforms aimed at improving prison conditions and ensuring the rights of prisoners. For example, the Ministry of Home Affairs has issued advisories on issues such as overcrowding, healthcare, and rehabilitation of prisoners.

Comparative Analysis of Indian legal framework on prisoners' rights with international standards

The heart of the research lies in the comparative analysis, where a side-by-side examination of India's domestic laws and international standards is conducted. The study assesses the alignment of Indian legal provisions with the SMRs and ICCPR, identifying areas where India either meets or falls short of international benchmarks.

A comparative analysis of the Indian legal framework on prisoners' rights with international standards, particularly those outlined in relevant conventions and treaties, reveals both areas of alignment and divergence. Below is a comparative analysis focusing on key aspects:

1. **Presumption of Innocence:**

   Indian Legal Framework: The Indian Constitution guarantees the right to presumption of innocence until proven guilty, similar to international standards.

   International Standards: International conventions such as the ICCPR and ECHR explicitly affirm the presumption of innocence as a fundamental right of the accused.

   Comparison: There is alignment between Indian law and international standards regarding the presumption of innocence. Both emphasize the importance of this principle in ensuring a fair trial.

2. **Right to Legal Representation:**

   Indian Legal Framework: The Indian legal framework provides for the right to legal representation, including free legal aid for indigent accused persons.

   International Standards: Conventions such as the ICCPR and ECHR guarantee the right to legal assistance and representation as essential components of the right to a fair trial.

   Comparison: While India recognizes the right to legal representation, challenges such as limited access to legal aid and quality representation persist, which may impact the effective realization of this right.

3. **Conditions of Detention:**

   Indian Legal Framework: The Prisons Act and Model Prison Manual lay down provisions for the classification, treatment, and discipline of prisoners.

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International Standards: International conventions such as the SMRs and ECHR provide detailed guidelines on the humane treatment of prisoners, including standards for living conditions, healthcare, and access to basic amenities.

Comparison: While the Indian legal framework addresses some aspects of the conditions of detention, there are concerns regarding issues such as overcrowding, inadequate healthcare facilities, and substandard living conditions, which may contravene international standards.

4. **Right to Speedy Trial:**

Indian Legal Framework: The Code of Criminal Procedure provides for the right to a speedy trial, although delays in the judicial process remain a challenge.

International Standards: International conventions such as the ICCPR and ECHR recognize the right to a fair trial within a reasonable time as an essential aspect of the right to due process.

Comparison: While both Indian law and international standards recognize the right to a speedy trial, there is a gap between the legal provision and its implementation in practice, leading to prolonged delays in the disposal of cases.

5. **Protection Against Torture and Ill-Treatment:**

Indian Legal Framework: The Constitution prohibits the use of torture and cruel, inhuman, or degrading treatment or punishment.

International Standards: International conventions such as the ICCPR, CAT (Convention against Torture), and ECHR prohibit torture and ill-treatment, emphasizing the obligation of states to prevent and investigate such acts.

Comparison: While the Indian Constitution prohibits torture and ill-treatment, reports of custodial abuse and torture indicate challenges in ensuring effective implementation and enforcement of this prohibition.

In conclusion, while the Indian legal framework on prisoners' rights shares commonalities with international standards, there are significant gaps and challenges in its implementation. Addressing these gaps requires concerted efforts to strengthen legal safeguards, improve prison conditions, enhance access to justice, and ensure accountability for human rights violations. Additionally, greater awareness and compliance with international standards can contribute to advancing the protection of prisoners' rights in India.

Recommendations for Reform:

Based on the comparative analysis of the Indian legal framework on prisoners' rights with international standards, as well as identified challenges and concerns, the following recommendations for reform can be proposed:

1. **Strengthen Legal Aid Services:**
   a) Enhance funding and resources for legal aid programs to ensure effective representation for indigent accused persons.
   b) Expand the reach of legal aid services to cover a wider range of legal issues and ensure accessibility to legal assistance for all prisoners.
2. **Improve Conditions of Detention:**
   a) Undertake measures to address issues of overcrowding, inadequate healthcare facilities, and substandard living conditions in prisons.
   b) Invest in infrastructure development, healthcare services, sanitation facilities, and access to clean water to improve the overall conditions of detention.
3. **Promote Alternatives to Incarceration:**
   a) Explore alternatives to incarceration, such as community service, probation, diversion programs, and restorative justice initiatives, particularly for non-violent offenders and juveniles.
   b) Implement sentencing reforms to prioritize rehabilitation and reintegration over punitive measures, in line with international best practices.

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4. **Ensure Speedy Disposal of Cases:**
   a) Strengthen the judicial system by increasing judicial capacity, enhancing court infrastructure, and implementing procedural reforms to expedite the trial process.
   b) Provide training and capacity-building programs for judicial officers and legal professionals to improve case management and reduce delays in the disposal of cases.
5. **Prevent and Combat Torture and Ill-Treatment:**
   a) Enact comprehensive legislation specifically criminalizing torture and ill-treatment in line with international standards, such as the Convention against Torture (CAT).
   b) Establish independent oversight mechanisms, including regular inspections of detention facilities and effective complaint mechanisms, to prevent and address instances of custodial abuse.
6. **Raise Awareness and Sensitize Stakeholders:**
   a) Conduct awareness campaigns and training programs for law enforcement officials, prison staff, judicial officers, legal professionals, and civil society organizations on prisoners' rights and international standards.
   b) Foster a culture of respect for human rights and dignity among all stakeholders involved in the criminal justice system through education and sensitization efforts.
7. **Enhance Monitoring and Accountability:**
   a) Strengthen the role and mandate of human rights commissions, ombudsman institutions, and independent monitoring bodies to oversee compliance with prisoners' rights and investigate complaints of human rights violations.
   b) Ensure accountability for perpetrators of human rights abuses through prompt and impartial investigations, prosecution, and appropriate disciplinary measures.
8. **Engage in International Cooperation and Collaboration:**
   a) Foster partnerships with international organizations, human rights bodies, and foreign governments to exchange best practices, technical assistance, and capacity-building support in advancing prisoners' rights reforms.
   b) Ratify and implement relevant international conventions and treaties, such as the Optional Protocol to the Convention against Torture (OPCAT), to strengthen the legal framework and enhance protection mechanisms.

In conclusion, these recommendations aim to address the identified challenges and gaps in the Indian legal framework on prisoners' rights and bring it closer to international standards. Implementation of these reforms requires a comprehensive and coordinated approach involving legislative measures, policy interventions, institutional reforms, and stakeholder engagement to ensure the protection and promotion of prisoners' rights in India.

Conclusion:

The research article concludes by summarizing key findings and emphasizing the importance of aligning India's prisoners' rights framework with international standards. It calls for a holistic approach to ensure the protection and promotion of the rights and dignity of prisoners, contributing to a more humane and just criminal justice system in India.

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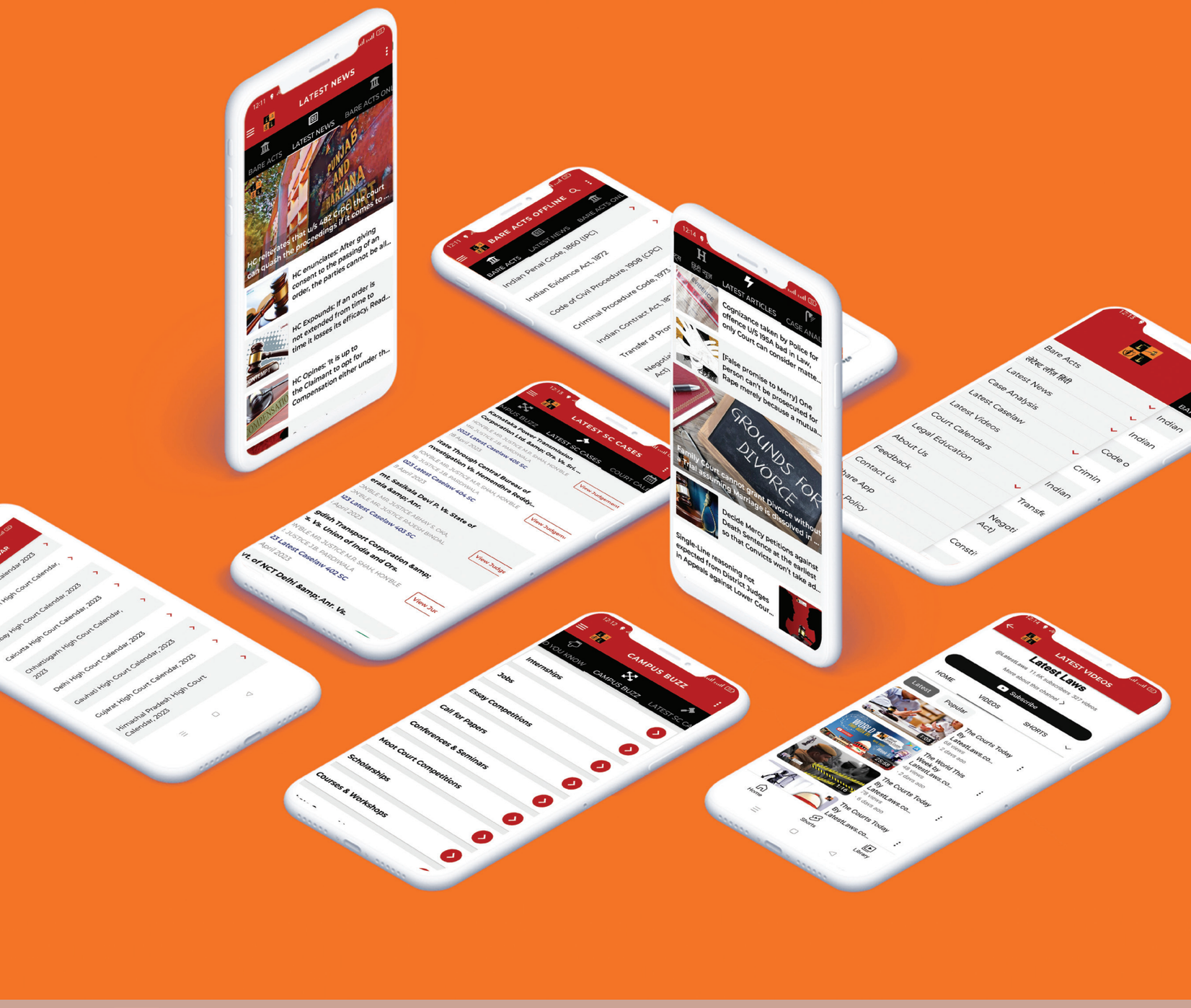

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