MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI
CENTRE FOR RESEARCH IN CRIMINAL JUSTICE

REPORT OF RESEARCH PROJECT ON CRIMINAL LAW REFORMS PROPOSED BY THE GOVERNMENT OF INDIA

'SUGGESTIVE AMENDMENTS IN CRIMINAL LAW'
VOLUME - I

PROF. (DR.) DILIP UKEY
VICE-CHANCELLOR

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[Volume 1]

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'SUGGESTIVE AMENDMENTS IN CRIMINAL LAW'

[Volume 1]

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MAHARAHTRA NATIONAL LAW UNIVERSITY MUMBAI

Maharashtra National Law University Mumbai, established under the Maharashtra National Law University Act 2014 is one of the premier National Law Universities in India. The Act envisaged establishing National Law University in Maharashtra to impart advanced legal education and promote society-oriented research in legal studies for the advancement of the social life of the people in the country. The prime goal of the University is to disseminate advance legal knowledge and processes of law amongst the students and impart in them the skills of advocacy, legal services, law reforms and make them aware and capable to utilize these instruments for social transformation and development. To attain this goal, it has started its first academic endeavour on 1st August 2015. Hon'ble Mr. Justice S. A. Bobde, Chief Justice of India is the Chancellor of the University who not only guides but also inspires the institution with his novel ideas and rich experience in the law field. Prof. (Dr.) Dilip Ukey a renowned academician in law has varied experience in teaching and research is the Vice-Chancellor of Maharashtra National Law University Mumbai and is guiding and leading the University to achieve newer heights.

The University offers BA., LL.B.(Hons.) five years integrated program, One-year LL.M. program in Constitutional Law, Corporate and Commercial Laws, Criminal Law, Maritime Law and an M.A (Executive) in Mediation and PhD Programme. Since its inception in 2015, the University has made serious and sincere efforts to excel in the field of legal research and education. Within five years the University has been able to traverse an arduous yet, promising path filled with lots of possibilities for the future. Prof. (Dr.) Anil G. Variath is serving as the Registrar of the University. With his dynamic vision coupled with excellent administrative and academic skills, he is enabling the university to make newer strides in the field of legal education. In recent years the University has taken long strides in the areas of research and has established multiple Research Centers. The University is steered by distinguished judges, senior advocates, eminent academicians, seasoned and senior bureaucrats as members of governing bodies and they guide our students with their rich and valuable experience. Cognizant of this changing paradigm of learning MNLU Mumbai has signed MoUs with some leading Universities and premier Institutions in India and abroad for a more sustained and engaged exchanges of ideas related to law and allied subjects and society in modern times.

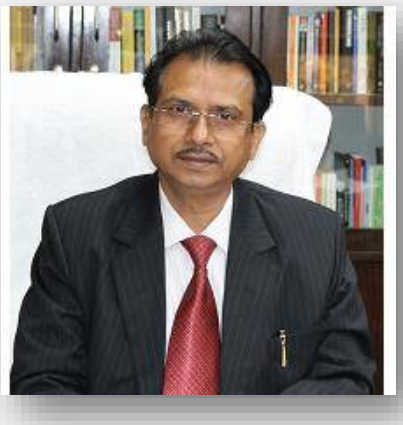
CENTRE FOR RESEARCH IN CRIMINAL JUSTICE

The Centre for Research in Criminal Justice (CRCJ) was established to promote and advance national and comparative research and scholarship in the area of Criminal Law and Criminal Justice, Criminology, Victimology, and Human Rights. The Centre was inaugurated by Hon'ble Justice Naresh Patil (Judge, Bombay High Court) and Hon'ble Justice A. S. Oka (Judge, Bombay High Court) in the presence of Shri. Ashutosh Kumbhakoni (Advocate General, State of Maharashtra), Dr. Milind Sathe (Advocate and President, Bombay Bar Association), and other legal luminaries from Bar and academia on 13th January 2018. Following are the key objectives of the Centre:

- To carry out co-ordinated research into the efficacy and adequacy of the Criminal Justice System in India and communicate the findings and recommendations to the agencies of Government concerned with the same.
- To research, analyze, and critically examine the laws, policies, and programs related to criminal laws and disseminate the findings through publications, workshops, seminars, and other means. Further, the Centre also undertakes specific research programs in many areas.
- To organize various training programs, webinars, seminars, for stakeholders in these fields like students, academicians, researchers, etc.
- To organize a student-centric initiative in the form of an outreach program.
- To provide an interactive platform for exchanging thoughts about current events and interesting topics in the field of criminal law and human rights.

With many more objectives in the core, CRCJ has started Criminal Justice Talks on YouTube to have a discourse on the legal issues of contemporary relevance, CRCJ Quizzical, a quiz competition for the young minds and Advance research work in areas such as 'Amendments in criminal laws', 'Revisiting the law and policy of Prison Administration in India', etc. by involving the experts in the field of law. To realise these aims and objectives, CRCJ has introduced two P.G Diploma courses, 1) Crime Investigation, Medical Jurisprudence and Forensic Science and 2) Litigation Lawyering and Law Firm Management to bridge the gap between the theoretical and practical aspects of Legal Profession.

MESSAGE FROM VICE CHANCELLOR



Criminal Laws in India have colonial roots as many of them, including the Indian Penal Code and the Evidence Act were enacted by the Imperial regime. The Indian Penal Code in 1860 at the time of its enactment has focused on crimes against state and crimes against property. Though there was a chapter on crimes against the human body, there was no emphasis given to crimes against women as it were days when women were considered as property. The Constitution of India gives us the right to equality and also provides for substantive equality under Articles 14 and 15. It provided for the right to freedom under Article 19 and right to life and liberty under Article 21. Unfortunately, till date, there have been no wide-scale changes made to the criminal laws to reflect the changing social, cultural and political values of the country.

There had been suggestions and recommendations from different corners including the Law Commission of India for revamping the criminal justice administration. However, for long there had been no serious efforts in that direction. At the same time, we have an accused centric adversarial criminal justice dispensation system, where very little concern is shown to the rights of the victims. The nature and magnitude of the crimes have increased to such an extent so as to render the existing provisions of law insufficient or inefficient to address the issues. On the one hand there are complaints about highhandedness and misuse of law, on the other we can see many criminals go scot-free through the loopholes of the system. This itself points towards the need for bringing systemic changes in our criminal justice administration. Now the Government of India has taken up the task of bringing large scale reforms in the criminal justice system, which is indeed a great initiative.

The Hon'ble Union Home Minister Shri. Amitji Shah has vide his Office letter dated 06.01.2020 sought suggestions regarding the amendments to the criminal laws. On receipt of the letter, I had requested the Centre for Research in Criminal Justice (CRCJ) to conduct a study on this issue and submit a report thereto. The CRCJ team undertook the research project as early as in the month of February 2020. However, the project was unfortunately hampered

by the COVID 19 pandemic. But I am happy to say that the team of student researchers rose to the occasion and reactivated themselves in to the project along with the process of unlocking.

They have undertaken a serious academic review of select legislations and suggested some changes, which they would like to bring in respective areas of criminal law. The entire research project was driven by our students under the supervision of the CRCJ. I take this opportunity to congratulate each one of them and the Director of the Centre Dr. Anil G. Variath for their sincere and dedicated works. This is the first major research project undertaken by the Centre. I am sure that more such projects will be taken up by the centre in the coming days. I take the privilege of submitting this Research Project Report to the Hon'ble Union Home Minister for consideration by Government with an assurance that we would be conducting further studies in this direction and submitting supplementary reports.

Prof. (Dr.) Dilip Ukey

Vice Chancellor

अमित शाह
AMIT SHAH

गृह मंत्री
भारत
HOME MINISTER
INDIA

06 JAN 2020

Prof. (Dr.) Dilip ji,

This year we are celebrating 70th anniversary of the adoption of our Constitution. The Preamble of the Constitution bestows upon us the responsibility to make justice accessible to all. The Government of India, under the leadership of Prime Minister Shri Narendra Modi, with its mantra of '***Sabka Saath - Sabka Vikas***', is committed to ensure speedy justice to all the citizens of India, especially to the weaker and backward sections.

In conformity with these constitutional and democratic aspirations, the Government of India has resolved to make fundamental changes in criminal law framework of India to provide accessible, affordable and speedy justice to all. The experience of seven decades of Indian Democracy suggests the need to review our criminal laws, especially Indian Penal Code (IPC), The Code of Criminal Procedure (CrPC), Indian Evidence Act, Narcotic Drugs and Psychotropic Substances Act (NDPS act) and adapt them in accordance with contemporary needs and aspirations of our people. The Government of India intends to create a legal structure which is citizen-centric and prioritizes to secure life and to preserve human rights.

National Law Schools and Judicial Academies have played an important role in the field of law education for the youth of the country. The Law schools not only produced skilled jurists to the democratic society, but they also create a class which is sensitive towards the judicial system which is effective in maintaining the social and constitutional values. These institutions work as a fertile land for law-related brainstorming, creating innovative thoughts along with legal acumen and knowledge.

Contd.....on page 2/-

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This endeavor of paradigm shift in the criminal justice system by Government of India will actually be an enormous exercise of public participation which can be successful only with the participation of the leading law institutions and all other stakeholders. In this regard, I have requested Chief Ministers of States and Administrators of UTs to send their suggestions. The Ministry of Home Affairs has also constituted a committee of experts to prepare draft of a new law, which will discuss various issues with all the stakeholders.

In this exercise of public participation, yours as well as law teachers' and law students' contribution will be important. The prestigious law institutes can provide a platform for comprehensive discussion on the initiative of the Government of India for providing quick justice to each citizen. Your thoughts and deliberations will be invaluable for us for bringing above fundamental changes in the criminal laws. Therefore, I earnestly request you to send your valuable suggestions to the Home Secretary, Government of India at the earliest.

With regards,

Yours sincerely,

(Amit Shah)

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"Truth does not pay homage to any society ancient or modern. But society has to pay homage to truth or perish"

- Swami Vivekananda.

INTRODUCTION

The increasing number of crimes and types of crimes in India is currently one of the most significant challenges. Evolving crimes not only make citizens feel insecure but may also erode the reputation of legal institutions, government, and even democracy. It further raises the concerns of overcrowding prisons due to the increasing rate of crime, compromising with individual rights, indefinite period of trial, etc. Criminal law is traditionally described as directing its injunctions exclusively to actual or potential criminals. Under this description, criminal law norms are aimed at influencing the behaviour of criminals or potential criminals, but not that of a victim or potential victim of crime. Looking at the inner picture of criminal court, and gathering from the experience of people working for the criminal justice system, it is an ardent truth that existing conditions of criminal practice are enfeebled due to developments in the society.

To deal with these issues the laws and legislations on combating crime need to be developed with the developing regime of society. Our criminal procedure should be remoulded in a way which can work towards the greater good. Reforms in criminal law not only means making the system more efficient and transparent but also taking care of individual rights whether defendant or prosecutor. Keeping the above proposition in view this report examines what are some of the required amendments in Indian Penal Code 1860, Code of Criminal Procedure 1973, Prevention of Corruption Act 1988, and Armed Forces Special Power Act, 1958. Many other legislation will be taken as a subject of research in the upcoming volumes of this project.

Criminal Law reforms is a very vast research subject in itself and cannot be treated exhaustively within a given scope. However, this research project is an attempt to highlight some of the important aspects of criminal laws that need immediate improvement.

ACKNOWLEDGEMENTS

Today we are passing through a period of great transition in every walk of life. The developments in the field of science and technology have brought in revolutionary changes in society. These changes are reflected in all our institutional and individual life. Naturally, it has its own bearing on crimes and criminals with the emergence of new types of crimes and new modus operandi by criminals which in turn challenges the criminal justice administration from different angles. Is our aged old criminal justice administration system equipped to deal with the new challenges? For a sizeable section of the stakeholders the answer is in the negative. There had been suggestions and recommendations from responsible centres for revamping the criminal laws and the criminal justice dispensation system in tune with the need of time. But still, the laws and the administration of justice continued for a long time without any significant systemic changes. It is encouraging to know that the Government of India has decided to bring far-reaching amendments to our criminal laws and also decided to get the opinion of the professional and academic bodies in this endeavour. The letter from the Hon'ble Home Minister dated 06.01.2020 addressed to our Hon'ble Vice-Chancellor is an eloquent example of the commitment and seriousness the Government has in this issue.

I am happy to note that this initiative by the Government is the inspiration for us to conduct serious research on this topic. We, as a team are extremely thankful to our Vice-Chancellor Prof. (Dr.) Dilip Ukey for providing us with the opportunity to undertake this research project. The trust he reposed on us and the confidence we had in his leadership are the backbones of this entire project. The Director, Centre for Research in Criminal Justice (CRCJ) Prof. (Dr.) Anil G Variath, who is also the Principal Investigator has taken the lead in doing this project and monitored every stage of progress by providing necessary guidance as and when required. At a certain point of time, we literally lost to wilderness due to the pandemic situation and it had brought the project activities to a standstill. It was the efforts of the Co-Investigator, Ms. Gauri Rane; which placed the research project back on track. She worked in close association with me in encouraging and motivating the team members. Every member of the research team did work with total dedication for which I am thankful to each one of them. I take this opportunity to thank the student head coordinators, Mr. Nishchay Raut and Mr. Hardik Nain who helped extensively in creating the database for Research and co-ordinating with progress on each and every step with the head of each Research group. Four Research teams were

formed with their help each of which focused on suggestive amendments related to Indian Penal Code, 1860, Code of Criminal Procedure, 1973, Prevention of Corruption Act, 1988, Armed Forces Special Power Act, 1958 respectively.

Further, I would like to thank the heads of above-mentioned research groups, Mr. Yashaswi Pande, Mr. Shubham Dhamnaskar, Ms. Isha Akat, Mr. Utsav Saxena, Mr. Preetraj Dhok who proactively took part in identifying the scope of improvements in criminal laws and legislations. They worked closely with the team members and regularly communicated the updates to student head coordinates. I heartily thank Ms. Anushka Rungta who gave design to this report and for her valuable suggestions during the project.

We will be failing in our responsibility if we do not acknowledge our deep sense of gratitude to the Union Home Minister, Shri Amitji. Shah for providing us with an opportunity to do this research. We look forward to many such opportunities in future.

This being the first major research project undertaken by the CRCJ, it is bound to have shortcomings and deficiencies, which we undertake to remedy at the subsequent stages. We propose to keep this project ongoing for some more time so that we can have a better study with respect to other legislations as well. We shall be submitting further reports based on such studies. While expressing our deep sense of gratitude to our Hon'ble Vice-Chancellor, we look forward to him for necessary support and guidance in our all-future endeavours.

Ms. Manisha Katyal
Co-Investigator &
Research Coordinator

RESEARCH TEAM

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Compilation and Designing: Anushka Rungta, Yashaswi Pande

A: Indian Penal Code, 1860..... A1 - A80

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- Isha Akat (Head)
- Ramsha Reyaz
- Janhavi Deshmukh
- Aditya Mundra
- Sulekha Punyani

B: Code of Criminal Procedure, 1973..... B1 - B38

- Preetraj Dhok (Head)
- Utsav Saxena
- Simran Dhinoji
- Rhea Khandke
- Yashaswi Pande

C: Prevention of Corruption Act, 1988..... C1 - C34

- Utsav Saxena(Head)
- Shubham Dhamnaskar
- Rhea Khandke
- Simran Dhinoji
- Aditya Mundra
- Janhavi Deshmukh

D: Armed Forces Special Powers Act, 1958.....D1 - D30

- Yashaswi Pande (Head)
- Preetraj Dhok
- Ramsha Reyaz
- Sulekha Punyani
- Isha Akat

A: INDIAN PENAL CODE, 1860

CONTENTS

PART – I

INTRODUCTION

The Indian Penal Code, 1860[1] (hereinafter referred to as 'IPC') is a general penal code for India. In this section, the researchers have identified four broad laws and have analysed the same. They have also suggested amendments as and when necessary. Following are the four areas of law:

A. Offences against the State

Chapter VI of the Indian Penal Code, 1860 deals with the offences against the State. The sections under this chapter are sections 121 to 130, dealing with the offences of waging war against the State, assaulting Head of State or Governor, sedition, waging war against an Asiatic Power or any territory of power at peace with India, the offence of allowing a prisoner to escape committed by public servants, harbouring prisoners etc. These offences are classified as the offences against the security of the State.[2] Because of the serious nature of these offences, the punishments prescribed for such offences are also quite grave, i.e., death, imprisonment for life or long-term imprisonment lesser than imprisonment for life. Out of the offences against the State, the offence of sedition has been the most contentious. This is because sedition is often considered to be an unjustified and excessive limit to the freedom of speech and expression and it is also prone to a wide interpretation and possible misuse.[3]

B. Offences against Property

Chapter XVII of the IPC deals with the 'Offences against Property' and contains 85 sections from Section 378 to Section 462. There are 10 sub-heads under 'Of Offences against Property' which include Theft, Extortion, Robbery and Dacoity, Criminal Misappropriation of Property,

[1] Indian Penal Code, 1860.
[2] Law Commission of India, *Report on offences against the National Security*, Report No. 43 (Aug 1971).
[3] Law Commission of India, *Consultation Paper on "SEDITION"* (Aug 2018).

Criminal Breach of Trust to Receiving of Stolen Property, Cheating, Fraudulent Deeds and Disposition of Property, Mischief and Criminal Trespass.

The common element to all these offences is 'Dishonesty'[4] which the act defines as 'the intention of causing wrongful gain to one person or wrongful loss to another'[5]. This is the key to the element of *mens rea* for offences under the header of 'offences against property'. The manner in which this dishonesty is employed is different under different sub-heads.

The researchers have identified lacunas under each of the ten headers as under the chapter of 'Offences against Property' and will elaborate on the same in this report.

C. Sexual Offences

Chapter XVI of the Indian Penal Code, 1860 deals with the offences affecting the human body. This chapter includes offences which are classified under the head 'Criminal Force and Assault' which are covered from section 349 to section 358 and Section 375. These offences cover outraging the modesty of woman, sexual harassment, voyeurism, stalking, assault or criminal force with intent to dishonour person on grave provocation etc. Among these offences, the offence of outraging the modesty and Section 375 which covers Rape with intent is the most contentious.

Modesty is not defined under Section 354 of the IPC which makes it open to wide interpretation, inconsistencies and increases subjectivity which in turn gives rise to a need for an amendment which will define modesty. Thus, there is a need for an amendment which clearly limits the scope of this section.

Further, the chapter also includes sexual offences which deal primarily with the offence of rape, its different forms and punishments; these offences are enshrined in section 375 and 376. Due to the serious nature of these offences, the punishments prescribed for such offences are also quite grave, i.e., death, imprisonment for life or long-term imprisonment lesser than imprisonment for life. Amongst these offences, the exception 2 of section 376 which allows marital rape and the gendered definition of rape are the most contentious.

[4] Law Commission of India, *Report on Indian Penal Code*, Report No. 42 (Jun 1971).
[5] Indian Penal Code, 1860, § 24.

The requirement to remove exception 2 emerges due to the societal needs. Rape should be looked at as an offence and should not be calculated on the basis of the relationship between the perpetrator and the victim. Further, the offence of rape should be reframed as gender-neutral looking into the increasing numbers of other genders who are being raped.

Sexual offences are offences against the basic human rights of an individual which violate their dignity. Sexual offences aptly take the form of sexual violence, which sometimes cause severe and irreparable damage to the physical and mental health of the victims. Physical injury includes an increased risk of a range of sexual and reproductive health problems. It entirely disturbs the social well-being of the victims because of stigmatization and the consequential loss of status in their families and the neighbourhood.

D. Defamation

Defamation essentially means tarnishing someone's reputation by a publication which is essentially false. It connotes to lowering the reputation of the person in society through false publication. Publication here can be both oral (slander) or written (libel). Generally, to constitute defamation, the publication must be false and done without the concerned person's consent. Furthermore, the words and actions are to be construed reasonably and not considering any prejudice for the person.

There are 2 subcategories of defamation: 1. Libel and 2. Slander. Libel means defamation which is in permanent form such as statements made in writing or published in a public forum. Slander refers to defamation through actions or gestures; something which is not permanent. Nonetheless, both of them are actionable. Both of these types are a part of 'Civil Defamation'. Defamation is of 2 types: 1. Civil Defamation and 2. Criminal Defamation

The IPC deals only with 'criminal defamation'. Defamation is a criminal offence under Section 499-502 of IPC, which protects an individual's/person's reputation. Section 499 of the IPC defines 'defamation' and Section 500 prescribes punishment for the same.

Section 499 defines Defamation as:

a. (i) words (spoken or intended to be read), (ii) signs, or (iii) visible representations;

b. which are published or spoken, making an imputation concerning any person;

c. and if the imputation is spoken or published with: (i) the intention of causing harm to the reputation of the person to whom it pertains, or (ii) with knowledge or reason to believe that the imputation will harm the reputation of the person to whom it pertains will be harmed,

d. then it is defamation.

The researchers have identified lacunas under this section and will elaborate on the same in this section.

METHODOLOGY AND APPROACH FOR RESEARCH

The present report is fundamentally based upon a critical analysis of the chapters of 'Offences against Property', 'Section 124A under Offences against the State', 'Sexual Offences' and 'Defamation' of the IPC. There was a detailed study based upon both primary and secondary sources of information. The research team has relied on existing academic and research work on the given legislation, as well as judicial precedents and various Law Commission Reports. To analyze the core of the issue, the team relied on: i) Indian Penal Code, 1860; ii) Constitution of India, 1949; iii) Law Commission Reports; iii) Judicial precedents, especially Supreme Court judgements; iv) Constitutional Assembly and Parliamentary debates; v) International Legislations and other sources of law, etc.; vi) Sedition laws of various countries; vii) National Crime Records Bureau data, viii) News Articles, ix) Committee Reports - Malimath and Verma Committee Reports and x) Reports by International Organizations.

PART – II

ABOUT THE ACT

The Preamble of the IPC states that the object of this statute is to provide a 'general penal code for India'. The word 'penal' emphasizes the concept of punishing those who transgress the law and commit offences. The substantive law of crimes in India is contained in the IPC. It consolidates the whole of the law on the subject and is exhaustive on the matters in respect of which it declares the law. The Code extends to the whole of India 'except the State of Jammu and Kashmir'. The territorial waters of India also form a part of India. Hence, any offence committed within territorial waters of India is deemed to be within India. The Code applies to all persons irrespective of their sex, race, sect or religion. IPC is thus territorial in nature.

The provisions of the IPC are divided under two broad heads:

1. General principles of criminal law: Sections 1 to 120B; and

2. Specific Offences: Section 121 to 511; for instance, offences against State; Offences against the human body; offences against the property; offences against public tranquillity; offences against public justice; offences relating to marriage, defamation, etc.

LACUNAS

A. Offences against State

1. Ambiguity in the Judicial Interpretation of Sedition

- *Pre-Independent Interpretation*

In the pre-independence era case of ***Queen Empress v. Jogendra Chander Bose***,[6] the Calcutta Hign Court clearly stated that Section 124A of the IPC did not punish disapprobation. *"A person may freely say what he pleases about any Government measure or any public man as long as it is consistent with a disposition to render obedience to thy lawful authority of Government. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the*

[6]*Queen Empress v. Jogendra Chander Bose*, (1892) ILR 19 Cal 35.

Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them."

In ***Queen Empress v. Bal Gangadhar Tilak***,[7] Justice Strachey placed the following before the jury for interpreting the word 'disaffection':

"It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. Disloyalty is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite: he must not make or try to make others feel enmity of any kind towards the Government. .....the amount or intensity of the disaffection is absolutely immaterial ..... it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question."[8]

This interpretation shows that the offence of sedition would include even minor expressions that have the potential of causing any 'ill-will' or disaffection towards the government. Relying on this interpretation would mean that the law could be used to crack down on all expressions of dissent against the government.

In ***Queen Empress v. Ramchandra Narayan***,[9] the Court observed that sedition under Section 124A of the IPC means:

"It is a positive feeling of aversion which is akin to disloyalty, a defiant insubordination of authority or when it is not defiant, it secretly seeks to alienate the people, and weaken the bond of allegiance, and prepossesses the minds of the people with avowed or secret animosity to Government, a feeling which tends to bring the Government into hatred or contempt by imputing base or corrupt motive to it, makes men indisposed to obey or support the laws of the realm and promote discontent and public disorder."

[7] *Queen Empress v. Bal Gangadhar Tilak*, ILR (1898) 22 Bom 112.
[8] *Id.*
[9] *Queen Empress v. Ramchandra Narayan*, ILR (1898) 22 Bom 152.

As can be seen, such an interpretation broadens the scope of sedition, and even brings under the ambit of sedition imputations of corruption. Such an interpretation if carried forward can be quite dangerous for a democracy, which is established on the basis of transparency, accountability, answerability and criticism of the actions of the government by the citizens of the nation.

In ***Niharendu Dutt Majumdar v. the King Emperor***,[10] the Court held that *"(sedition) is not made an offence in order to minister to the wounded vanity of Governments but because where Government and the law ceases to be obeyed because no respect is felt any longer for them, only anarchy can follow. Public disorder, or the reasonable anticipation or likelihood of public disorder, is thus the gist of the offence. The acts or words complained of must, either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency."*

Through this judgment, the scope of Section 124A was restricted. However, this interpretation was overruled in ***King-Emperor v. Sadashiv Narayan Bhalerao***,[11] where the Court relied on the interpretation of Section 124A of the IPC expressed by Justice Strachey in ***Queen Empress v. Bal Gangadhar Tilak***.[12]

"The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles, is absolutely immaterial."

Thus, in the pre-independence era, the interpretation of sedition was constantly broadened to include criticism against the Government and expressions that even had a slight potential to incite people against the government and disrupt public order.

- *Post-Independent India Interpretation*

In ***Tara Singh Gopi Chand v. State,***[13] the Punjab and Haryana High Court held that Section 124A of the IPC was unconstitutional, as it violates freedom of speech and expression,

[10] *Niharendu Dutt Majumdar v. the King Emperor,* AIR 1942 FC 22.
[11] *King-Emperor v. Sadashiv Narayan Bhalerao*, ILR 1947 Bom 110.
[12] *Queen Empress v. Bal Gangadhar Tilak*, ILR (1898) 22 Bom 112.
[13] *Tara Singh Gopi Chand v. State,* 1951 CriLJ 449.

guaranteed by Art. 19 of the Constitution. The Court stated that there was no doubt in the fact that Section 124A acts as a restriction to freedom of speech and expression, and further, that it was not saved by clause 2 of Art. 19.

"India is now a sovereign democratic State. Governments may go and be caused to go without the foundations of the State being impaired. A law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has come about."[14]

In a 1953 judgement of the Patna High Court, it was held that Clause (2) of Article 19, as it now stands after the inclusion of the words "in the interests of public order", saves the provisions of Sections 124A.[15]

In ***Brij Bhushan v. State of Delhi***,[16] while discussing the scope of the offence of sedition, Fazl Ali, J. observed that sedition is an offence against public tranquillity. Further, it was opined that there are two classes of offences against public tranquillity: *"(a) those accompanied by violence including disorders which affect tranquillity of a considerable number of persons or an extensive local area, and (b) those not accompanied by violence but tending to cause it, such as seditious utterances, seditious conspiracies, etc. Both these classes of offences are such as will undermine the security of the State or tend to overthrow it if left unchecked…"*

In the case of ***Ram Nandan v. State of Uttar Pradesh***,[17] the Supreme Court held that the provisions of Section 124A of IPC had become void as a consequence of the enforcement of the Constitution. The Court noted that Section 124A of IPC, by virtue of its exceptions, permits no criticism of the Government as such. Although the Section allows disapprobation, *"it has been recognized that even disapprobation of Government measures and action could be carried too far".* Thus, the Court was of the opinion that this section was not in line with the Indian Constitution.

In this very case, the Court referred to the speech made by Pandit Jawahar Lal Nehru, while addressing the Parliament on the Bill relating to the First Constitution of India Amendment in

[14] *Id.*
[15] *Debi Soren v. State*, AIR 1954 Pat 254.
[16] *Brij Bhushan v. State of Delhi*, 1950 SCR 605.
[17] AIR 1959 All 101.

1951. While referring to the offence of sedition, as contemplated by Section 124A of the IPC, he stated:

"Now so far as I am concerned, that particular Section (Sec. 124A of IPC) is highly objectionable and obnoxious and it should have no place both for practical and historical reasons, if you like, in anv body of laws that we might pass. The sooner we get rid of it the better. We might deal with that matter in other ways, in more limited ways, as every other country does but that particular thing, as it is, should have no place, because all of us have had enough experience of it in a variety of ways and apart from the logic of the situation, our urges are against it." (emphasis supplied)

Finally, in ***Kedar Nath Singh v. State of Bihar***,[18] the Supreme Court held Sec 124A of the IPC as constitutionally valid. As per the decision of the Court, Sec 124A was aimed *"at rendering penal only such activities as would be intended, or have a tendency, to create disorder or disturbance of public peace by resort to violence."*

The Court further observed that *"...the security of the State, which depends upon the maintenance of law and order is the very basic consideration upon which legislation, with a view to punishing offences against the State, is undertaken. Such a legislation has, on the one hand, fully to protect and guarantee the freedom of speech and expression, which is the sine quo non of a democratic form of Government that our Constitution has established. This Court, as the custodian and guarantor of the fundamental rights of the citizens, has the duty cast upon it of striking down any law which unduly restricts the freedom of speech and expression with which we are concerned in this case. But the freedom has to be guarded again becoming a license for vilification and condemnation of the Government established by law, in words which incite violence or have the tendency to create public disorder. A citizen has a right to say or write whatever he likes about the Government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder."*

In ***Nazir Khan v. State of Delhi***,[19] the Supreme Court further established the principle laid down in the ***Kedar Nath*** case.[20] As per the Court, sedition would include all the practices, by

[18] *Kedar Nath Singh v. State of Bihar*, 1962 AIR 955.
[19] *Nazir Khan v. State of Delhi*, (2003) 8 SCC 461.
[20] *Kedar Nath Singh v. State of Bihar*, 1962 AIR 955.

word, actions or writing, *"which are calculated to disturb the tranquillity of the State, and lead ignorant persons to endeavour to subvert the Government and laws of the country".*

"The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion. Sedition has been described as disloyalty in action, and the law considers as sedition all those practices which have for their object to excite discontent or dissatisfaction, to create public disturbance, or to lead to civil war; to bring into hatred or contempt the Sovereign or the Government, the laws or constitutions of the realm, and generally all endeavours to promote public disorder."[21]

The history of judicial interpretation of Sec 124A of the IPC points to how contentious the issue has been. This is mainly because the way the section is worded leaves a lot of scope for various interpretations of the offence of sedition. Although the Courts have clearly interpreted the law in a constricted manner and stated that at its core, sedition would include actions that incite and disturb public order, tranquillity, the security of the State and incite people towards an insurrection or rebellion against the State, Section 124A still mentions ambiguous terms like 'contempt' of government. Thus, this can lead to the curbing of dissent and criticism of the government, in the name of preventing 'contempt' of the government.

2. The Impact of the Law of Sedition on the Fundamental Right of Freedom of Speech and Expression

The freedom of speech and expression is considered as the cornerstone of democracies. It is a natural and basic right guaranteed to all citizens of the country. The freedom of speech and expression, guaranteed by Art 19(1) of the Indian Constitution, is of great importance to ensure that the citizens have the right to voice their opinions, and although this right is subject to certain restrictions mentioned in clause 2 of Art 19., these restrictions must be reasonable.

The Supreme Court has opined: *"Freedom of speech and expression is a natural right which a human being acquires on birth. It is, therefore, a basic human right. Everyone has the right to*

[21] *Id.*

freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers."[22]

In ***Romesh Thappar v. State of Madras***,[23] Sastri CJ., observed: *"...freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible."*

In the same case, the Court held that the offence of sedition, as contained in Sec 124A of the IPC, would only be attracted in certain grave situations which actually have the tendency of affecting public order or disturbing public tranquility. *"...a line to be drawn in the field of public order or tranquility marking off, may be, roughly, the boundary between those serious and aggravated forms of public disorder which are calculated to endanger the security of the State and the relatively minor breaches of the peace of a purely local significance, treating for this purpose differences in degree as if they were differences in kind."*

Over the years, the judiciary has placed increased importance on the significance of free speech through various judgements. In ***Maneka Gandhi v. Union of India***,[24] Bhagwati J., emphasized the importance of the freedom of speech and expression and stated: *"Democracy is based essentially on free debate and open discussion, for that is the only corrective of Governmental action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential." (emphasis supplied)*

In ***Rangarajan v. P. Jagjivan Ram***,[25] the Court held that fundamental freedoms under Art 19(1) can only be restricted reasonably and must be justified *"on the anvil of necessity and not the quicks and of convenience or expediency."* It was further held that open criticism of the government and its policies would not qualify as a ground for restricting freedom of expression.

[22] *Union of India v. Naveen Jindal*, (2004) 2 SCC 510.
[23] *Romesh Thappar v. State of Madras*, AIR 1950 SC 124.
[24] *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.
[25] *Rangarajan v. P. Jagjivan Ram*, (1989) 2 SCC 574.

The Supreme Court, while emphasizing the importance of freedom of speech and expression, stated: *"In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social, economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries."*[26]

The Court has, over the years, reiterated the importance of freedom of expression in a democracy, by terming it as a 'cardinal value' which is of paramount importance[27] and the Apex Court has held that the law should not be allowed to function in a way that has *"chilling effects"* on the freedom of speech and expression.[28]

An important aspect of the impact of sedition on freedom of speech and expression is that though the Courts of the country now have comprehensively interpreted the wide language of Sec 124A., it is still misused to curb dissent. In ***Chintaman Rao v. State of Madhya Pradesh***[29] the Supreme Court, although dealing with the freedom of profession guaranteed under Art 19(g), observed that if the language employed in a statute is wide enough to cover restrictions that would be both *"within and without the limits of constitutionally permissible legislative action affecting the right"*, and there exists a possibility for this restriction to be applied for purposes not sanctioned by the Constitution, the whole statute must be held to be void.

3. The Criticism of the Law of Sedition in the Constituent Assembly Debates

The sedition law received severe criticism and opposition during the Constituent Assembly debates, especially because of the broad powers given to the Government to crush dissent, as was seen in the colonial times. The inclusion of 'sedition' as a restriction to the freedom of speech and expression, under draft Art. 13, was outrightly rejected by several members of the Constituent Assembly and it was eventually not included as a restriction to the freedom of speech and expression.

[26] *In Re Harijai Singh*, AIR 1997 SC 73
[27] *Shreya Singhal v. Union of India*, (2015) 5 SCC 1.
[28] *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600.
[29] *Chintaman Rao v. State of Madhya Pradesh*, 1951 AIR 118.

K.M. Munshi referred to the interpretation of sedition made in ***Niharendu Dutt***[30] and stated that a distinction had to be made between what 'sedition' meant when the Indian Penal Code was enacted and as it was understood in 1942. *"…a line must be drawn between criticism of Government which should be welcome and incitement which would undermine the security or order on which civilized life is based, or which is calculated to overthrow the State. Therefore, the word 'sedition' has been omitted. As a matter of fact, the essence of democracy is Criticism of Government."*[31]

Very strong opposition to the inclusion of 'sedition' as a restriction to the freedom of speech and expression was voiced by M. Ananthasayanam Ayyangar. *"If we find that the government for the time being has a knack of entrenching itself, however, bad its administration might be it must be the fundamental right of every citizen in the country to overthrow that government without violence, by persuading the people, by exposing its faults in the administration, its method of working and so on. The word 'sedition' has become obnoxious in the previous regime. We had therefore approved of the amendment that the word 'sedition' ought to be removed, except in cases where the entire state itself is sought to be overthrown or undermined by force or otherwise, leading to public disorder; but any attack on the government itself ought not to be made an offence under the law. We have gained that freedom and we have ensured that no government could possibly entrench itself, unless the speeches lead to an overthrow of the State altogether."*[32]

The discussion of the Constituent Assembly clearly demonstrates that the makers of the Constitution felt that establishing sedition as a reasonable restriction on freedom of speech and expression, under Art 19, would be detrimental and would leave the term open to a broad interpretation. Instead, the specific terms like 'public order', 'security of State', 'incitement of violence' have been used. The use of the word 'sedition' would have left the saving clause open to a much broader interpretation to the restrictions on Art. 19 (1), which was not acceptable to the makers of the Constitution. India experienced the abuse of such powers under the British, and the continuation of such abuse in a democratic India was unacceptable to the Constituent Assembly. However, Section 124A of the IPC continues to act as a restriction on the freedom of speech and expression, because the Courts have held that Sec 124A of the IPC would come under the ambit of reasonable restrictions to Art. 19(1). Further, although the

[30] *Niharendu Dutt Majumdar v. the King Emperor*, AIR 1942 FC 22.
[31] Constituent Assembly of India, *Constituent Assembly Debates Official Report*, Vol.VII, 2nd December 1948.
[32] *Id.*

Courts have now interpreted sedition to mean acts grave enough to disturb public tranquillity or public order etc., the law is considered to be prone to misuse.

4. Misuse of Sedition Law

The sedition law is highly criticized for the fact that Sec 124A, on account of being so broadly worded, is often misused to curb dissent. On September 16, 2020, Mr. Santanu Sen put forward the issue of misuse of sedition law on the floor of the Rajya Sabha. The questions raised were whether the instances of misuse of sedition law were increasing in the country and the law being used to muzzle dissent and if there were considerations towards scrapping the law. The government's answer was that the National Crime Records Bureau (NCRB) data did not present a clear trend in this regard and that "amendment of laws was an ongoing process".[33]

However, the NCRB data does show that the instances of cases recorded under sedition law have increased over the last few years. The incidence of sedition across the country, as recorded by the NCRB in 2019 was 93, in 2018 it was 70, 51 in 2017,[34] 35 cases in 2016 and 30 cases in 2015.[35] Although this data does not prove that the increase in the number of cases is due to misuse of the law, the NCRB data for 2019 shows that in that year, 2 cases of sedition were ended as the final report was false, 6 were ended on account of 'mistake of fact or law', 21 cases ended because of insufficient evidence and the total number of cases disposed of in that year were 70. In the year 2019, only 1 case of sedition reached conviction, and 29 persons were acquitted. Further, in the same year, the total number of persons arrested under sedition was 95, but the charge-sheet was filed only in 76 cases.[36] Similarly, in 2018, 2 cases were ended as 'final report was false', only 38 cases were charge-sheeted and 21 persons were acquitted.[37] The data from the previous years show a similar trend, where most cases don't reach the stage of filing of charge-sheet or are acquitted.

[33]Rajya Sabha, *Unstarred Question No. 377: Misuse of Sedition Law*. September 16, 2020, Government of India.
[34]National Crime Records Bureau, *Crime in India 2019*, Ministry of Home Affairs, Government of India, September 2020.
[35]National Crime Records Bureau, *Crime in India 2017*, Ministry of Home Affairs, Government of India, October 2019.
[36]National Crime Records Bureau, *Crime in India 2019*, Ministry of Home Affairs, Government of India, September 2020.
[37]National Crime Records Bureau, *Crime in India 2018*, Ministry of Home Affairs, Government of India, December 2019.

The trend, although not conclusive, does show that the number of persons arrested under the sedition law is increasing but all the cases don't reach the point of filing of charge-sheet or conviction due to the lack of merit in the cases. This is a cause for concern, especially since sedition is a non-bailable offence and its misuse can have very serious implications on the freedom and liberties of the citizens. Some examples of the sedition law being frivolously used are the arrest of cartoonist Aseem Trivedi, for allegedly mocking the constitution and the national emblem through his cartoon and the arrest of 60 Kashmiri students in Uttar Pradesh in 2014, for cheering for Pakistan in a cricket match.[38] All of this happened despite the Apex Court's clear interpretation of the sedition law, by stating that for an action to qualify as a seditious act, it must be against public order and tranquillity and it must include the element of incitement.[39] Such incidents, too, point to the misuse of the law of sedition.

B. Offences against Property

Under 'Offences against Property', there are ten sub-heads namely: Theft, Extortion, Robbery and Dacoity, Criminal Misappropriation of Property, Criminal Breach of Trust to Receiving of Stolen Property, Cheating, Fraudulent Deeds and Disposition of Property, Mischief and Criminal Trespass. The researchers have identified lacunas under each of these headers and suggested amendments to cure those lacunas.

1. Theft

i. In Section 380 of the IPC, only dwelling house as a place where theft can be committed is mentioned. However, this severely narrows down the scope of the offence. There are other places except for a dwelling house where theft can be committed.

ii. There is no provision in the law which can punish for the offence of theft committed in cases of accidents or natural disasters like floods, earthquakes, etc.

[38] Soutik Biswas, *Why India needs to get rid of its sedition law*, BBC News (Aug 28, 2016) https://www.bbc.com/news/world-asia-india-37182206
[39] Nazir Khan v. State of Delhi, (2003) 8 SCC 461.

iii. Section 381, under 'theft', punishes acts done by 'clerks' and servants'. However, this limits the scope and other types of employees like an 'agent', etc. cannot be included under these sections.

2. **Extortion**

i. Under the sub-header of 'extortion', blackmail hasn't been included as an offence. However, there are umpteen cases of extortion due to blackmail in India. Foreign jurisdictions like the UK[40] have a comprehensive portion on the offence of Blackmail.

ii. Section 388 and 389, one of the types of punishment is according to the punishment laud down under Section 377 of the IPC. However, Section 377 was read down in the case of *Navtej Sigh Johar v. Union of India*[41], with bestiality being retained. So, people cannot thus be punished according to Section 377.

3. **Robbery and Dacoity**

i. Section 397 punishes robbery and dacoity with attempt to cause grievous hurt or death, where the words 'with the use of deadly weapon' have been used. Further, there have been cases where people carrying deadly weapons were charged under Section 397 even though there was no actual use of the same. Furthermore, there is a separate section, Section 398 on the punishment of the use of deadly weapons. In light of this, Section 397 should be examined.

4. **Criminal Misappropriation of Property**

i. Under Section 404, there has been confusion whether dishonest misappropriation of property is applicable to both movable and immovable property and this section should be examined in this light.

[40] Theft Act, 1968, § 21(1).
[41] *Navtej Sigh Johar v. Union of India*, AIR 2018 SC 4321.

5. **Criminal Breach of Trust**

i. As discussed earlier, keeping the scope of punishment applicable to 'clerks' and 'servant' limits the scope and other types of employees like an 'agent', etc. cannot be included under these sections.

6. **Receiving Stolen Property**

i. In thes sections under this sub-head, there is no separate provision for punishment against receiving stolen property which belongs to the Government or local authority. However, such a provision is needed as there is an added importance to Government property which should be safeguarded against any offences that can be committed against it.

7. **Cheating**

i. According to the bare text of Section 415, only the person who has been cheated can seek relief for the offence. However, this completely ignores the people who have been affected due to the offence committed but against whom the offence wasn't directly committed. It is this regard, that Section 415 should be analysed.

ii. The number of instances where builders purchase land or enter into development agreements with owners of land and then enter into agreements of sale with multiple buyers for the same flat is on a rise and that there is no safeguard in law to protect the same. This offence of cheating should be punished by the IPC.

iii. There is no provision in the law which ensures that a purchaser will be informed by the seller about the pendency of any litigation in Court. Due to this, often unwary purchasers pay huge amounts of consideration and or are even put in possession whether under an agreement or a sale deed and they are never informed if there is any claim with regard to the same property pending in a court of law. This is also an offence of cheating which should be penalised.

8. **Mischief**

i. Section 433 penalises destruction of sea-marks, however, does not take into account the destruction of air-marks.

ii. Section 437 penalises mischief with intent to destroy or make unsafe a decked vessel. Similar to Section 433, it completely omits aircraft, something which should be taken into consideration.

9. **Criminal Trespass**

i. Section 441 describes 'criminal trespass' in two parts: Whoever

a. enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

b. *or having lawfully entered into or upon such property, unlawfully remains there* with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

The Courts, in some cases, have interpreted the second part in such a way that if the initial entry is unlawful though not accompanied by any of the intentions mentioned in the section, then the second part of the definition becomes inapplicable. This renders any offences under the second part unpunishable. This should be looked into, in the case of Section 441.

C. Sexual Offences

1. Post-Penetrative Withdrawal of Consent

Consent is an integral part of any sexual activity. There have been several debates on the concept of consent and certain acts that imply consent. The absence of the consent in a sexual activity means that there has been an infringement on the bodily integrity and dignity of a person and that an offence of rape or sexual assault has been committed.[42] For this purpose, the concept of consent should be defined substantively by law. In general parlance, consent flows from the agency of a person which is based on the well-established principle of autonomy,

[42] *In re John Z,* 29 Cal.4th 756.

according to which the person has the complete right to determine the course of their own lives and to be free from interference by others so to maintain one's bodily integrity.[43]

According to the current system, consent is defined under IPC as:

"an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act"[44]

However, there is no explicit or implicit view on consent when the penetration has taken place. When there is a withdrawal of consent during or after the sexual intercourse involving penetration, it is called the post-penetrative withdrawal of consent.[45] Post-penetrative withdrawal of consent as amounting to rape was first recognized by the state of Illinois in USA by stating in its laws that, "*A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct.*"[46]

Various foreign judgements deal with the interpretation of consent. One such interpretation of consent defines the scope of the consent to sexual activity as "a conscious, operating mind, capable of granting, revoking or withholding consent to each and every sexual act".[47] Under the Law of England and Wales, lack of consent is also proven if there is the presence of inducement with the intent to deceive a person so as to the nature of sexual intercourse.[48] The element of inducement with the intent to deceive is also true in the case wherein, the other sexual participant is made to believe that the penile penetration will involve the use of protection, whereas the actual penetration is done without the use of the same.[49]

[43] Kusa Shah, et. al., *Review Article The Importance of Informed Consent in Medicine*, 1 SCHOLARS JOURNAL OF APPLIED MEDICAL SCIENCES, 455-463 (2013).
[44] Indian Penal Code, 1860, § 375.
[45] Amy McClellan, *Post-Penetration Rape-Increasing the Penalty*, 31 SANTA CLARA LAW REVIEW, 780 (1991).
[46] 720 ILL. COMP. STAT. 5/12-17 (2002).
[47] *R. v. J. A.*, 2011 SCC 28.
[48] Sexual Offences Act, 2003, § 75, §76.
[49] Tom O'Malley & Elisa Hoven, *Consent in the Law Relating to Sexual Offences*, 1 CORE CONCEPTS IN CRIMINAL LAW AND CRIMINAL JUSTICE 135–171 (Kai Ambos et al. eds., 2020).

As of now there is no legal recognition to post-penetrative withdrawal of consent amounting sexual assault or rape under Indian legal system. The 84th Report very well pointed out the importance of consent in sexual intercourse stating that: -

"*Consent is the anti-thesis of rape. Even if some may find any discussion on consent, it is too complicated. The matter cannot consistently with the needs of the subject be put in simple one phrase formulation. When circumstances in life present an infinite variety, the law must be well equipped to deal with them, nuances of consent are therefore unavoidable…… A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or conception; or if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gave his consent; or unless the contrary appears from the context if consent is given by a person who is under 12 years of age."*

The court in the case of ***State v. Robinson***[50], further substantiated on this view by explaining the nuances associated with post-penetration withdrawal of sex by stating that, "*there is an element of compulsion that the victim has to bear to continue the sexual intercourse against their will*". Furthermore, in the case of ***People v. Vela***[51], the court further added on to this particular nuance as:

"*the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the non-consensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outraged because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial non-consensual violation of her womanhood.*"

While these interpretations of consent may deal with a particular aspect in which consent can be withdrawn during intercourse, it fails to recognise the withdrawal of consent where the

[50] *State v. Robinson*, (1985) 496 A.2d 1067.
[51] People v. Vela, (1985) 172 Cal.App.3d 237.

element of misconception is missing. Moreover, while trying to penalize rape, the law and lawmakers deal with sex itself, which brings them in confrontation with sex roles, differentiated perceptions and ideas of masculinity, femininity and of sexuality; all of which may present themselves differently to men and women. Rape hinges on attacking and attenuating a person's sexual worth and sexual esteem. The right to sexual freedom, sexual integrity, autonomy and safety, emotional and sexual equity is of utmost importance.[52]

There is often an argument against the post-penetrative withdrawal of consent amounting to rape on the basis that the establishment of withdrawal of consent is impractical and the mere reliance on the statement of the prosecutrix would lead to misuse of such criminalisation.

This can be countered by the observation made by the Supreme Court in the case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat***[53], wherein the Court held that:

"*In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyse the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opiniated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the Western World which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western World. It is wholly unnecessary to import the said concept on a turn-key basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian Society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the Western Society that a female may level false accusation as regards sexual molestation against a male for several reasons such as*:

[52] Karuna Maaraj, *Evaluating Issues Regarding Post Penetrative Rape From A Women's Perspective*, 11 NALSAR Student Law Review 97-124 (2019).
[53] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217.

(1) The female may be a 'gold digger' and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.
(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by fantasizing or imagining a situation where she is desired, wanted and chased by males.
(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.
(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed."

Further substantiating on this point the **JS Verma Committee Report** very well pointed out that the misuse of this provision is in very exceptional cases due to the societal sanctions and victimization that a woman may face due to the societal moral and the notions flowing from it that sex is a taboo and the honour of women is associated with their vagina.[54] "*Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity. The court must not be oblivious of the emotional turmoil and the psychological injury that a prosecutrix suffers on being molested or raped. She suffers a tremendous sense of shame and the fear of being shunned by society and her near relatives, including her husband. Instead of treating her with compassion and understanding as one who is an injured victim of a crime, she is, more often then not, treated as a sinner and shunned. It must, therefore, be realised that a woman who is subjected to sex*

[54] Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law*, 66 (January 23, 2013).

violence would always be slow and hesitant about disclosing her plight. The court must, therefore, evaluate her evidence in the above background."[55]

In addition to this, the Supreme Court has also observed that, "*Hardly a sensitised Judge who sees the conspectus of circumstances in its totality and rejects the testimony of a rape victim unless there are very strong circumstances militating against is veracity. None we see in his case, and confirmation of the conviction by the courts below must, therefore, be a matter of course. Judicial response to human rights cannot be blunted by legal bigotry.*"[56]

In furtherance to this, there is a presumption raised in favour of the prosecutrix that there was absence of consent, when proved and established that sexual intercourse with the accused has taken place.[57] Furthering this point the court recognised the lower convictions rate and subsequently the victim being put on trial rather than the accused.[58]

"*It is only in the rarest of rare cases if the court finds that the testimony of the prosecutrix is so trustworthy, truthful and reliable that other corroboration may not be necessary.*" The report elaborated on the point stating that the law should be vice-versa, wherein, it is only in the rarest of rare cases if the court finds that the prosecutrix is not trustworthy and the truth value and reliability of their testimony needs to be corroborated.[59]

There exists many infrastructural lacking in the law after having a strong presumption working in favour of it, the accused in various cases walk free and the victim's position is even more compromised. Therefore, the misuse of a provision that deals with post-penetrative withdrawal of consent should not be the hindrance in protecting the rights of people against unwanted sexual activities.

2. Non-Recognition of Female Genital Mutilation as an offence

Female Genital Mutilation or Female Circumcision (hereinafter, "FGM") is a practice that involves all procedures involving partial or total removal of the external female genitalia or other injuries to the female genital organs for a non-medical reason. It is carried out in four

[55] *State of Maharashtra v. Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550.
[56] *Rafiq Ahmad* v. *State of U.P.*, (2011) 8 SCC 300.
[57] Indian Evidence Act, § 114-A.
[58] *Bodhisattwa Gautam v. Shubhra Chakraborty*, (1996) 1 SCC 490.
[59] Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law, 66 (January 23, 2013).

types. Type I pertains to the partial or total removal of the clitoris and/or the prepuce (clitoridectomy), Type II involves partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision), Type III includes narrowing of the vaginal orifice with creation of a covering seal by cutting and a positioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulation) and Type IV deals with all other harmful procedures to the female genitalia for non-medical purposes, for example pricking, piercing, incising, scraping and cauterization.[60]

The practice has been carried on for nearly 2500 years, even before the emergence of two major religions in the world, i.e., Islam and Christianity. In addition to this, the practice does not exist in any of the teachings of these religions.[61] It is very pertinent to note that the practice has no specific religious mandates and not performed by all the Muslim communities. The practice is only a part of a cultural tradition.[62] Even the Grand Mufti of Egypt, i.e., a religious head with Islamic authority emphasised on the fact that Islam has never been in support of FGM and this practise should be abolished.[63]

The tradition of FGM is to mark the "rite of passage" for the introduction of young women to womanhood.[64] There are various beliefs and reasons for the continuation of this practice. One of the reasons is that the clitoris of a woman is an impure genital part that represents the male sex organ and therefore it needs to be cut in order to restore the purity of women.[65] The major underlying issue with FGM is that it has its roots at discrimination against women and serves as a tool to reduce women's sexual urges and control their sexuality until they are married so that they maintain the purity and sanctity attached with womanhood.[66]

FGM results in many health complications, resulting in chronic pelvic, infection, haemorrhage, inflammatory diseases, shock, sexual dysfunctionality, infertility, obstructed labour and

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[60] OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO, *Eliminating Female genital mutilation An interagency statement* (2008). https://apps.who.int/iris/bitstream/handle/10665/43839/9789241596442_eng.pdf.
[61] Blaine Harden, *Female Circumcision: A Norm in Africa*, 4 INTERNATIONAL HERALD TRIBUNE (1985).
[62] Kola Odeku, et. al., *Female Genital Mutilation: A Human Rights Perspective*, 19 JOURNAL OF PSYCHOLOGY IN AFRICA, 55-61 (2009).
[63] Maggie Michael, *Egypt outlaws circumcision after girl dies*, THE GUARDIAN (Jul 1, 2007) https://www.theguardian.com/world/2007/jul/01/egypt.theobserver.
[64] A. A. Frances, *Female Circumcision: Rite of Passage Or Violation of Rights?*, 23 A SPECIAL REPORT (1997).
[65] Nayra Atiya, *Khul-Khaal: Five Egyptian Women Tell Their Stories*, 11 SYRACUSE UNIVERSITY PRESS (1982); See also, Harinder Baweja, *India's Dark Secret*, Hindustan Times, http://www.hindustantimes.com/static/fgmindias-dark-secret.
[66] K Norman, *FGM is Always With Us: Experiences, Perceptions and Beliefs of Women Affected by FGM in London*, CENTRE FOR DEVELOPMENT STUDIES (2009).

possibly even death.[67] Some studies have pointed out that practising FGM decreases the life expectancy of women.[68] In addition to this many women and young girls suffer from PTSD and other forms of psychological disturbances induced by this practice.[69]

In India, FGM is prevalent in the Dawoodi Bohra community. The religious leader in the Bohra community holds supreme authority in all of their religious matters. Various families have faced social boycott for not abiding by the religious practices of the communities. The women in the community are highly educated and the community has progressed economically over the years. Even then, out of the fear of social boycott and ex-communication from the community the Bohra women are forced to abide by the practice of FGM. [70] The women from the community admitted that religious requirements, traditions and customs and the wish to curb the girls' sexuality were the main reasons for the flourishing practice.[71] The Dawoodi Bohra community urged that it is an integral part of their community.[72] They raised the defence of cultural self-determination embodied under Article 26 of the Constitution[73] and the right to choose to follow a religion.[74] However, no traditions or religions enjoy complete immunity under the freedom of religion.

Indian courts, in order to limit the freedom of religion and cultural practices introduced the test of "essential religious practices"[75] and considered it a reformative approach towards religion.[76] This test was further transformed by adding the qualification of the importance that the practices hold to the religious beliefs.[77] The courts have at times upheld the principle that religious freedom can be tolerated only to the extent of permitting pursuit of spiritual life.[78]

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[67] UN High Commissioner for Human Rights, 1999.
[68] R. Berg, et al., *Effects of female genital cutting on physical health outcomes: A systematic review and meta-analysis*, 4 *BMJ OPEN* (2014).
[69] Blaine Harden, *Female Circumcision: A Norm in Africa*, 4 INTERNATIONAL HERALD TRIBUNE (1985).
[70] *Female Genital Mutilation: Guide to Eliminating the FGM Practice In India*, Lawyers Collective (2012).
[71] R. Ghadially, *All for 'Izzat': The Practice of Female Circumcision among Bohra Muslims*, 66 Manushi, (1991).
[72] *Sunita Tiwari v. Union of India, 2018 SCC OnLine SC 2667.*
[73] The Constitution of India, 1950, Art. 26.
[74] The Constitution of India, 1950, Art. 25.
[75] Gautam Bhatia, *Individual, Community, and State: Mapping the terrain of religious freedom under the Indian Constitution*, Indian Constitution Law & Philosophy (Feb. 7, 2016), https://indconlawphil.wordpress.com/2016/02/07/individual-community-and-state-mapping-the-terrainof-religious-freedom-under-the-indian-constitution/.
[76] *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005.
[77] *Ram Prasad Seth v. State of UP and Others*, AIR 1957 All 411.
[78] *S.R. Bommai v. Union of India*, AIR 1994 SC 1918.

Following FGM instils a sense of cultural violence against women, burdened by the notion of purity of womanhood and can only result in traumatic life experiences.

The courts even distinguished, superstition from the actual religious practices as superstitious practices is not essential for following one's religion.[79] Practices like not allowing women of menstruating age to enter places of worship[80] or FGM are in turn related with the patriarchal nature of religions which puts a moral definition to women's modesty according to regressive societal norms and values. Following their norms would have the same effect that superstitious religious practices have. Therefore, by drawing an analogy between superstitious practices and the practices attached to the modesty of a woman, practices like FGM, that discriminate against women should be considered as violative of human rights of women and should not garner any immunity from right to religious and cultural self-determination as they are not covered under "essential religious practices".

Since FGM results in undermining the natural bodily appearance of a woman and results in denial of sexual pleasure, the practice, in turn, infringes upon the individual liberty and bodily integrity of women,[81] denying them the dignity that they deserve as a person. It reinforces the cultural and societal ideals of modesty that are associated with femininity.[82]

Further, in a community, wherein practising FGM signifies a worth associated with woman, her purity and sanctity that comes with being a virgin; not carrying out such a practice results in various societal sanctions. People often refuse to marry a woman who has not undergone FGM. Some communities that function on the basis of bride price, which highly depends on the virginity of the bride, bring in the societal aspect where FGM would be carried out to gain economic benefits.[83] Assuming that women practices FGM out of their free will and personal choice, the position of women in the community will be prejudiced for not practising FGM as the practice has a moral and ethical value attached with it. Kymlicka states that the collective right of cultural self-determination should be limited if a tradition results in the violation of individual liberty.[84] Therefore, FGM should not be covered under cultural tolerance and self-

[79] *Durgah Committee, Ajmer And Another v. Syed Hussain Ali And Others*, AIR 1961 SC 1402.
[80] *Indian Young Lawyers Assn. (Sabarimala Temple-5 J.) v. State of Kerala*, (2019) 11 SCC 1.
[81] Nawal M. Nour, *Female Genital Cutting: A persisting practice*, 1 REV. OBSTET GYNECOL. (2008).
[82] Blaine Harden, *Female Circumcision: A Norm in Africa*, 4 INTERNATIONAL HERALD TRIBUNE, (1985).
[83] G. Richardson, *Ending female genital mutilation? Rights, medicalization, and the state of ongoing struggles to eliminate the FGM in Kenya* (2005), http://www. dominionpaper.ca/accounts/2005/02/11/ending_fem.html.
[84] W. KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (Oxford University Press, 1995).

determination and "*cannot become a cloak for oppression and injustice*" within the communities. [85]

3. Shortcomings in Section 354 of the IPC

Section 354 provides for an offence which is committed against a woman by using assault or criminal force to outrage her modesty. This section has certain loopholes such as the absence of a definition of modesty in IPC which makes the section vague and unclear since the term subjective. The interpretation of the term modesty is gathered through case laws wherein various courts have interpreted it differently resulting in further ambiguity.[86]

Addiionally, the words used in the Section provide a wide ambit to interpret what constitutes the threshold of intention or knowledge required for outraging modesty. What might be an act of outraging the modesty of woman according to one judge might not be the same according to others. The difference in interpretation will exist until there is a prescribed guideline as to what amounts to outraging the modesty of a woman.

When a case comes to court against a man under Section 354, it is the court's discretion to decide whether the act by man has amounted to outraging the modesty of a woman. This gives a high probability that the judge will have a soft corner towards a woman and might end up punishing an innocent man. Thus, this section clearly gives an edge to a woman who wants to settle her personal scores. A woman can abuse this section under the pretext of outraging her modesty even on simple grounds of unintentional touching, pulling in a crowded place etc.[87]

Interpretation of the term "modesty" is subject to the personal bias of the judges hearing a particular case. According to Flavia Agnes, a certain bench may consider the act of pulling a woman as *outraging her modesty* under S. 354, but another bench might not deem it

[85] S. POULTER, ENGLISH CRIMINAL LAW AND ETHNIC MINORITY CUSTOMS (Butterworths. 1986)
[86] R.A. NELSON, *PENAL CODE, 1860*, 3495 (S.K. Sarvaria ed., 10th ed., 2008).
[87] Adhish Anilkumar Kulkarni, *Analysis of Section 354 of IPC with special reference to Criminal (Amendment) Act 2013*, EX GRATIA LAW JOURNAL, (Aug. 20, 2020), https://exgratialawjournal.in/blawg/criminal-law/analysis-of-section-354-of-ipc-with-special-reference-to-criminal-amendment-act-2013/.

so.[88] Consequently, this leads to inconsistency in what may actually be classified as *outraging the modesty of a woman*.

Therefore, there is a need for amendment for a better, fair and perfect implementation of the law.

4. Shortcomings in Section 375 of the IPC

Section 375 of IPC criminalizes the offence of rape. It is an expansive definition which includes both sexual intercourse and other sexual penetration such as oral sex within the definition of 'rape'.[89] However, in Exception 2, it excludes the application of this section on sexual intercourse or sexual acts between a husband and wife and thus renders married women vulnerable to sexual violence and abuse within marriage. This exception clause does not state any reason for the exclusion of sexual intercourse or sexual acts between a man and his wife from the purview of rape.[90]

Black's Law Dictionary defines "marital rape" as "*a husband's sexual intercourse with his wife by force or without her consent*".[91] In *Independent Thought v. Union of India*,[92] the Indian Supreme Court in 2017 held that the part of Exception 2 to section 375 which excused marital rape of minors between the ages of 15-18, was unconstitutional. However, there are no criminal penalties for marital rape when a wife is over 18 years of age. The Court categorically refrained from making any observations with regard to the issue of marital rape of a woman aged 18 years or above.

Rape should be called rape regardless of one's marital status with regard to the rapist. It is not only the rape of a woman's body but the rape of her love and trust as well. Being subject to sexual violence by her own husband envelopes her in a sense of insecurity and fear. Her human

[88] Flavia Agnes, *Violence against women: Review of recent enactments, in the Name of Justice: Women and Law in Society* 81-116 (Swapna Mukhopadhyay ed., 1998).
[89] The Indian Penal Code, 1860, §375.
[90] The exemption excludes rape committed in a marriage, if the age of the wife is more than fifteen years. Recently, the Supreme Court struck down this part of the exception clause in *Independent Thought* v. *Union of India*, (2017) 10 SCC 800.
[91] Marital Rape, Black Law Dictionary, (5th ed. 1979).
[92] *Independent Thought v. Union of India*, (2017) 10 SCC 800.

rights are sacrificed at the altar of marriage.[93] The importance of consent for every individual decision cannot be overemphasized.

The sad truth is that the victim of these marital rapes stay in marriage for various reasons. These reasons include fear of more violence, low sense of self-worth, financial dependency, hope that partner will change, safeguarding the future of children, lack of stringent laws and a stigma that they will be a burden on their own parents.[94] Marital rape is complicated because of the personal nature of relationships and therefore in some cases the women do not even see themselves as victims.

Marital relationship is considered to be sacrosanct where the husband is considered to be an incarnation of God. Sex has long been viewed as an obligation in a marriage. Considering marriage as a bond of trust and affection, a husband exercises sexual supremacy through any means possible. It is argued that criminalising marital rape has the potential of destroying the institution of marriage. This argument assumes that marriage as an institution is not based on mutual consent and equality of rights. The fundamental right of a person over one's body, male or female, is ignored in this assumption. In practice, this results in the wife's body being considered the property of her spouse, regardless of her consent.

It is an extremely reprehensible and hated crime which defiles and degrades a victim physically as well as mentally and shakes very core of life and dignity. Marital rape is not about sex, but about violence; it is not about marriage, but about lack of consent. Rape is rape and it should be penalized whenever and wherever it occurs.'[95] Ironically this violence is hidden behind the iron curtain of marriage.

Since the 1980s, several other common law countries such as South Africa, Ireland, Canada, the United States, New Zealand, Malaysia, Ghana, Israel and other have removed the immunity

[93] YLLÖ & TORRES, *MARITAL RAPE*, OXFORD UNIVERSITY PRESS (2016).
[94] Anderson, *Marital Rape Laws Globally*, 177-186 (2016).
[95] Shashi Tharoor, *The Citizen about the private member's bill 'The Women's Sexual, Reproductive and Menstrual Rights Bill, 2018*', https://www.thecitizen.in/index.php/en/NewsDetail/index/7/15986/Marital-Rape-Is-Not-About-Marriage-But-About-Lack-Of-Consent-Shashi-Tharoor.

given to husbands in case of having forced sex with wife, i.e., without her consent.[96].Only 36 countries across the world don't recognise marital rape as a crime.[97] India is one among them.

The problem with this exception is that it presumes consent between husband and wife but a rapist should be rapist regardless of the relationship between perpetrator and victim. The husband treats his wife as a chattel[98] and thus subservient to him[99] and thus he believes he has privileges[100] over her – this thinking is the root of marital rape.

D. Defamation

1. Fails to constitute a reasonable restriction

Section 499-500 of the IPC fail to constitute "reasonable restriction" on free speech, and even truth is not a defense in such cases. Even if a person speaks the truth, he can still be prosecuted. Under exception 1 of section 499, the truth can be a valid defense only if the statement was made in the public good, and this question needs to be assessed by the Court. This rule is arbitrary and deters people from making statements against anyone because of the risk of prosecution.

2. Can even be detained solely on allegations

Second, a person can be prosecuted under Section 499 of the IPC even if he/she has not made any verbal or written statement. A magistrate may issue a criminal trial against the person on the mere allegation that the defendant was conspiring with the person who allegedly made the defamatory statements.

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[96] Meghan Casserly, *UN Women Report 2011:Good News, Bad News by the Numbers*, FORBES (July 6, 2011) https://www.forbes.com/sites/meghancasserly/2011/07/06/un-women-report-2011-good-news-bad-news/#65e68e3e5667

[97] *Do you think Marital Rape isn't a Crime?*, DAILY O (2019) https://www.dailyo.in/variety/marital-rape-shashi-tharoor-countries-where-marital-rape-is-legal-consent-sexual-assault/story/1/29347.html.

[98] *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) HARVARD LAW REVIEW, 1256 (1986).

[99] Rebecca M. Ryan, *The Sex Right: A Legal History of Marital Rape Exemption*, 20 LAW AND SOCIAL ENQUIRY, 944 (1995).

[100] *Id.*

3. Can be prosecuted even for making statements against dead people

Third, a person can even be prosecuted for statements made about the dead. Article 19(2)[101] permits restrictions on speech in the public interest and protects private reputation but restricting speech to protect the deceased's reputation is excessive and overboard.

4. Allows "allegedly" defamed people to sue

It confers certain arbitrary powers that enable "allegedly" defamed persons to drag anyone to the Court. This power is overboard and allows individual to sue anyone who has not even defamed them thereby taking undue benefit of this power.

AMENDMENTS SUGGESTED (SUMMARY)

A. Offences against the State

After analysing the history, interpretation and cases of sedition law, it is the suggestion of the research team that Section 124A of the IPC be omitted.

On August 5, 2011, a bill was introduced in the Rajya Sabha, proposing the omission of Section 124A of the IPC.[102] The reasons for the same were stated to be: the sedition law was used by the colonial government *"to oppress any opinion, criticism, argument on any matter related to the rule of British in India"* and was used against the freedom fighters. Further, it was stated that the law was in force even after 60 years of independence and was being widely misused and applied on individuals and organizations, despite the existence of specialized laws, *"merely for democratic expression of dissatisfaction towards the Government". "Such criticisms are essential for India to grow as a nation and bring in rule of law and equality among its citizens. Such existence of Section 124A will be an affront to the fundamental rights and especially to freedom of speech under Article 19 enjoined under the Constitution of India. In view of the adverse effect of the section on individuals and organizations that work for the unity, integrity,*

[101] The Constitution of India, 1950, Art. 19(2).
[102] The Indian Penal Code Amendment Bill, 2011, Bill No. II of 2011, Introduced in the Rajya Sabha on 5th August, 2011.

equitable development of India and the citizens of the nation, it is felt necessary to delete section 124A from the Indian Penal Code, 1860."

B. Offences against Property

Following are the amendments suggested for 'offences against property' under each of the ten subheaders:

1. **Theft**

i. Addition of an explanation under Section 378 of the IPC

Proposed Explanation:

Explanation 6 - A person's appropriation of property belonging to another is not to be regarded as dishonest if he appropriates the property in the belief that he has, in law, the right to deprive the other of it, on behalf of himself or of a third person.

ii. Addition of different places where theft can occur other than just a dwelling house under Section 380 of the IPC

Current Section:

"*Section 380 – Theft in a dwelling house, etc.—Whoever commits a theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

Proposed Amendment:

"Section 380 – *Theft in a building, vehicle, temple, etc* – Whoever commits theft –

(a)in a building or tent used as a human dwelling or for custody of property, or

(b) in, or in respect of any vehicle, vessel or aircraft used for the transport of goods or passengers or

(c) in a temple, mosque, church, gurdwara or any other place of worship open to the public, in respect of any property which belongs to, or is a part place of, such place of worship.

(d)in respect of any property of the Government or of a local authority,

shall be punished with imprisonment or either description for a term which may extend to seven years, and shall be liable to fine."

iii. Addition of different situations when theft can occur. (Section 380A)

Current Section: None

Proposed Amendment:

"Section 380A: *Theft of property affected by accident, fire, flood, etc*. —Whoever. taking advantage of the occurrence of an accident in a public place or of a fire, flood, riot, earthquake or similar calamity, commits a theft in respect of any property affected by such accident or calamity, shall be punished with imprisonment of either description for a term which may extend to seven years and shall be liable to fine.

iv. Substituting the words 'clerk' and 'servant' with 'employee' to widen the scope of 'employees'.

Current Section:

"*Section 381 – Theft by clerk or servant of property in possession of master —Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits a theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."*

Proposed Section:

Section 381- *Theft by employee* – Whoever being employed in any capacity by another person commits theft in respect of any property in the possession of that person, shall be punished with

imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

2. Extortion

i. Addition of a new section for the offence of 'Blackmail'.

Proposed Section:

Section 385A – Blackmail – Whoever dishonestly threatens any person with the making or publication of any imputation which is likely to harm his reputation or the reputation of any other person, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation – Where the threat is to accuse a person of the commission of an offence, it is immaterial whether the accusation is true or false.

ii. Deleting of the part related to section 377 in Section 388 and 389

Current Sections:

"Section 388 – Extortion by threat of accusation of an offence punishable with death or imprisonment for life, etc. – Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with imprisonment for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and, ***if the offence be one punishable under section 377 of this Code, may be punished with imprisonment for life.****"*

"Section 389 – Putting person in fear or accusation of offence, in order to commit extortion. – Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation, against that person or any other, of having committed, or attempted to commit, an offence punishable with death or with imprisonment for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description

*for a term which may extend to ten years, and shall also be liable to fine; and**, if the offence be punishable under section 377 of this Code, may be punished with imprisonment for life.**"*

Proposed Sections:

The line '*if the offence be punishable under section 377 of this Code, may be punished with imprisonment for life*' should be deleted from both the sections.

3. Robbery and Dacoity

i. Addition of 'Robbery' to Section 396.

Current Section:

"Section 396 – Dacoity with murder – If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

Proposed Section:

Section 396 – ***Robbery or*** *Dacoity with murder –* ***If any one of two or more persons, who are conjointly committing robbery commits murder in so committing robbery***, or if any one of five or more persons, who are conjointly committing dacoity commits murder in so committing dacoity every one of those persons shall be punished with death, or imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

ii. The omission of the words 'uses any deadly weapon' from Section 397.

Current Section:

"Section 397 – Robbery, or dacoity, with attempt to cause death or grievous hurt. – If, at the time of committing robbery or dacoity, the offender ***uses any deadly weapon****, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years."*

Proposed Section:

Section 397 – *Robbery, or dacoity, with attempt to cause death or grievous hurt*. – If, at the time of committing robbery or dacoity, the offender causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

iii. Omission of the line 'at any time after the passing of this Act' from Section 400.

Current Section:

"Section 400 – Punishment for belonging to gang of dacoits. – Whoever, ***at any time after the passing of this Act****, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."*

Proposed Section:

Section 400 – *Punishment for belonging to gang of dacoits*. – Whoever belongs to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

iv. Addition of the word 'robbers' alongside 'thieves' and omission of the word 'thugs' and omission of the line 'at any time after the passing of this Act'.

Current Section:

Section 401 – Punishment for belonging to gang of thieves. – Whoever, ***at any time after the passing of this Act****, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.*

Proposed Section:

Section 401 – *Punishment for belonging to gang of thieves* ***or robbers***. – Whoever belongs to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a ***gang of dacoits***, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

v. Addition of the word 'robbery' and its ingredients in Section 402.

Current Section:

Section 402 – Assembling for purpose of committing dacoity. – Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Proposed Section:

Section 402 – Assembling for purpose of ***committing robbery*** or dacoity. – Whoever:

(a) ***is one of three of four persons, assembled for the purpose of committing robbery***, or

(b) is one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

4. Criminal Misappropriation of Property

i. Reframing Explanation 2 under Section 403.

Current Explanation:

Explanation 2 – A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of

discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Proposed Explanation:

Explanation 2 – It is not dishonest misappropriation for a person who finds property not in the possession of any other person, to take it for the purpose of protecting it for, or of restoring it to the owner, but it is such misappropriation if he appropriates it to his own use, –

(a) when he knows, or has the means of discovering the owner or

(b) when he does not in good faith believe that the owner cannot be discovered, or

(c) before he has used reasonable means to discover and give notice to the owner, and allowed a reasonable time for the owner to claim the property.

ii. Adding the word 'any' under Section 404.

Current Section:

"Section 404 – Dishonest misappropriation of property possessed by deceased person at the time of his death. – Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years."

Proposed Section:

Section 404 – *Dishonest misappropriation of property possessed by deceased person at the time of his death*. – Whoever dishonestly misappropriates or converts to his own use ***any*** property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

5. Criminal Breach of Trust

i. *Amending the words 'clerk' and 'servant' to 'employee' to widen the scope of 'employees' under Section 408.*

Current Section:

"Section 408 – Criminal breach of trust by clerk or servant. – Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Proposed Section:

Section 408 – *Criminal breach of trust by* ***employee***. – Whoever, being ***an employee*** or employed as ***an employee***, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

6. Receiving Stolen Property

i. Addition of the term 'cheating' with 'theft, extortion, robbery' under Section 410.

Current Section:

"Section 410 – Stolen property. – Property, the possession whereof has been transferred ***by theft, or by extortion, or by robbery,*** *and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property."*

Proposed Section:

Section 410 – *Stolen property*. – Property, the possession whereof has been transferred by theft, by extortion, by robbery **or by cheating**, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as "stolen property", whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

ii. Addition of an explanation and an illustration under Section 410 exempting offences qualifying under Section 82 and 84 of the Act.

Proposed Explanation and Illustration:

Explanation: Property the possession whereof has been transferred by an act which would otherwise constitute theft, robbery or criminal misappropriation, but is not that offence by virtue of section 82 or section 84, shall be deemed to be stolen property.

Illustration A, a child nine years of age, snatches away a necklace from another child, voluntarily causing hurt to that child. Z, knowing this fact, dishonestly receives the necklace

from A. Though A's act is not by virtue of section 82, the necklace is stolen property, and Z has committed the offence defined in section 411.

iii. Additional increased term of imprisonment under Section 411 if the property stolen belongs to the Government or local authority.

Current Section:

"Section 411 – Dishonestly receiving stolen property. – Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

Proposed Section:

Section 411 – *Dishonestly receiving stolen property*. – Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ***and if the stolen property is the property of the Government or of a local authority shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.***

iv. Additional increased term of imprisonment under Section 414 if the property stolen belongs to the Government or local authority.

Current Section:

"Section 414 – Assisting in concealment of stolen property. – Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

Proposed Section:

Section 414 – *Assisting in concealment of stolen property*. – Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both and ***if the stolen property is the property of the Government or of a local authority, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.***

7. Cheating

i. Substitute the words from 'harm to that person' to 'harm to any person' under Section 415.

Current Section:

"Section 415 – Cheating. – Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or ***harm to that person*** *in body, mind, reputation or property, is said to "cheat"."*

Proposed Section:

Section 415 – *Cheating*. – Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or ***harm to any person*** in body, mind, reputation or property, is said to "cheat".

ii. Modify the Explanation under Section 415.

Current Explanation:

"Explanation. – A dishonest concealment of facts is a deception within the meaning of this section."

Proposed Explanation:

Explanation. – A dishonest concealment of facts, or, where there is a legal duty to disclose particular facts, a dishonest omission to disclose those facts, is a deception within the meaning of this section.

iii. Addition of a new section related to 'disclosure of prior transactions and encumbrance' and its explanation. (Section 420A)

Proposed Section:

Section 420A – Whoever, having entered into any prior transaction or having created any prior encumbrance in relation to immovable property or having knowledge of the existence of such prior transaction or encumbrance, enters into a subsequent transaction or creates a subsequent encumbrance in favour of another person in relation to or affecting the whole or any part of such property and -

(a) knowingly fails to bring the existence of such prior transaction or prior encumbrance to the notice of such other person; or

(b) knowingly fails to include a recital in regard to the existence of such prior transaction or prior encumbrance in any subsequent instrument executed in relation to the whole or part of such property with such other person,

shall be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine.

Proposed Explanation:

Explanation: - sale, agreement of sale, exchange, mortgage, lease, charge, or right to possession in relation to land or land with buildings or flats already in existence or buildings or flats proposed to be constructed shall be a "transaction" or "encumbrance" within the meaning of this section."

iv. Addition of a new section 'punishing prior knowledge and not dishonest intention'. (Section 420B)

Proposed Section:

Section 420B – Whoever knowingly executes any instrument-

(a) which is or purports to be a transfer of immovable property or any interest therein; or

(b) which is or purports to be an agreement to transfer any immovable property or any interest therein; or

(c) which creates or purports to create a charge over immovable property, and

(i) fails to refer to the pendency of any suit or proceeding, in which any right to such property is in question, in the said instrument; and

(ii) executes such instrument without the authority of the court in which any suit or proceeding in relation to or affecting the whole or any part of such property is pending,

shall be punished with imprisonment for a term which shall not be less than one year but which may extend to three years and shall also be liable to fine.

v. Addition of a new section and its explanation to cover the offence of cheating public authorities. (Section 420C)

Proposed Section:

Section 420C – *Cheating public authorities in the performance of certain contracts*. — Whoever, in performance of any contract with the Government or other public authority for the supply of any goods, the construction of any building or the execution of any other work –

(a) in the case of a contract for the supply of goods, dishonestly supplies goods which are less in quantity than, or inferior in quality to, those he contracted to supply, or which are, in any manner whatever, not in accordance with the contract; or

(b) in the case of a contract for the construction of a building or execution of other work, dishonestly uses materials which are less in quantity than, or inferior in quality to, those he contracted to use, or which are, in any manner, whatever not in accordance with the contract, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall be also liable to fine.

Proposed Explanation:

Explanation. – ln this section "public authority" means –

(a) a corporation established by or under a Central, Provincial or State Act;

(b) a Government company as defined in section 617 of the Companies Act, 1956; and

(c) a local authority

8. Fraudulent Deeds and Disposition of Property

No amendments are proposed under this sub-section.

9. Mischief

i. Addition of a new section specifically punishing mischief towards public or government property. (Section 425A)

Proposed Section:

Section 425 A – *Mischief causing damage to public property or machinery to the amount of one hundred rupees*. – Whoever commits mischief in respect of any ***property of the Government or of a local authority or in respect of any machinery***, and thereby causes loss or damage to the amount of one hundred rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

ii. Increasing the amount of 'any other animal' under Section 429.

Current Section:

"Section 429 – Mischief by killing or maiming cattle, etc., of any value or any animal of the value of fifty rupees. – Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or ***any other animal of the value of fifty rupees or upwards****, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both."*

Proposed Section:

Section 429 – *Mischief by killing or maiming cattle, etc., of any value or any animal of the value of five hundred rupees*. – Whoever commits mischief by killing, poisoning, maiming or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow or ox, whatever may be the value thereof, or ***any other animal of the value of five hundred rupees or upwards***, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

iii. Simplifying Section 430 and expanding its scope.

Current Section:

"*Section 430 – Mischief by injury to works of irrigation or by wrongfully diverting water. – Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause, a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both."*

Proposed Section:

Section 430 – *Mischief by causing diminution of supply of water or inundation or obstruction in public drainage.* – Whoever commits mischief by doing any act which causes, or which he knows to be likely to cause. –

(a) a diminution of the supply of water to the public or to any person for any purpose, or

(b) an inundation of, or obstruction to any public drainage,

shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

iv. Addition of a section covering air route as Section 433 is only with respect to the sea (Section 433A)

Proposed Section:

Section 433A – *Mischief by destroying, moving or rendering less useful air-route, beacon etc.* – Whoever commits mischief by destroying or moving or rendering less useful any air-route beacon or aerodrome light, or any light at or in the neighbourhood of an air-route or aerodrome provided in compliance with the law, or any other thing exhibited or used for the guidance of aircraft, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine. or with both.

v. Omitting the line 'or (in case of agricultural produce) ten rupees' under Section 435 to widen the scope of the section.

Current Section:

"Section 435 - Mischief by fire or explosive substance with intent to cause damage to amount of one hundred ***or (in case of agricultural produce) ten rupees****.—Whoever commits mischief by fire or any explosive substance intending to cause, or knowing it to be likely that he will thereby cause, damage to any property to the amount of one hundred rupees or upwards* ***[or (where the property is agricultural produce) ten rupees or upwards]****, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine".*

Proposed Section:

Section 435 – Mischief by fire or explosive substance with intent to cause **damage to the amount of one hundred**. —Whoever commits mischief by fire or any explosive substance intending to cause, or knowing it to be likely that he will thereby cause, **damage to any property to the amount of one hundred rupees or upwards,** shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

vi. Modifying Section 437 to include aircraft along with sea vessels.

Current Section:

"Section 437 – Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden. – Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Proposed Section:

Section 437 – *Mischief with intent to destroy or make unsafe a decked vessel or one of twenty tons burden*. – Whoever commits mischief to *any decked vessel or any vessel of a burden of*

twenty tons or upwards or ***any aircraft****,* intending to destroy or render unsafe, or knowing it to be likely that he will thereby destroy or render unsafe, that vessel, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

vii. Omission of Section 439.

10. Criminal Trespass

i. Omission of the word 'lawfully' from the second part of Section 441.

Current Section:

"Section 441 – Criminal trespass. – Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

or ***having lawfully entered into or upon such property****, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass"."*

Proposed Section:

Section 441 – *Criminal trespass.* – Whoever –

(a) enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or

(b) ***having entered into or upon such property*** without such intent, unlawfully remains there with such intent, is said to commit criminal trespass".

C. Sexual Offences

i. Post-Penetrative Withdrawal of Consent

The definition of "consent of" should also deal with revocation of consent, therefore, the following amendment is required.

Current Provision:

"375. Rape –

Explanation 2 –

Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates a willingness to participate in the specific sexual act."

Proposed Provision:

375. Rape –

Explanation 2 –

Consent means an unequivocal voluntary agreement when the woman, **capable of granting, revoking or withholding consent to each and every sexual act**, by words, gestures or any form of verbal or non-verbal communication, communicates a willingness to participate in the specific sexual act.

ii. Non-Recognition of Female Genital Mutilation as an offence

At present there is no specific provision dealing with the criminalisation FGM, therefore, it is important to consider the UK FGM Act, 2003 and POCSO Act, 2012 to bring in the said amendment in IPC.

iii. Shortcomings in Section 354 of the IPC

After section 354 of the Penal Code, the following explanation shall be inserted, namely:

''*Modesty is an attribute which attaches to the personality with regard to commonly held belief of morality, decency and integrity of speech and behaviour in any woman. It is the*

attribute of the womanhood. All women irrespective of their age, possess modesty in varying levels that is capable of being outraged."

iv. Shortcomings in Section 375 of the IPC

The exception 2 of Section 375 of IPC can be amended as –

The exception for marital rape be removed.

After the Proviso clause of Explanation 2, Explanation 3 shall be inserted namely: -

(a) A marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation.

v. Defamation

It is recommended that Section 499 and Section 500 of the IPC be repealed.

PART – III

EXPLANATION OF THE AMENDMENTS AND RECOMMENDATIONS

A. Offences against the State

The sedition law has been so highly contentious for the reason that Section 124A can have a very broad interpretation, unlike the decision of the Supreme Court, and this Section is thus open to misuse by the government for curbing dissent. Suggestions have been made in the past for the amendment of the Section to include those actions that directly result in the use of violence or incitement to violence, like the Bill introduced by Mr. Shashi Tharoor in the Lok Sabha in 2015.[103] The rationale behind the Bill was that despite the narrowed interpretation of the Section given by the Apex Court in ***Kedar Nath***[104] and affirmed in ***Nazir Khan* case**,[105] the interpretation is still not followed by the lower courts and the investigative authorities.

As per the Apex Court's judgement's in ***Kedar Nath*** and ***Nazir Khan***, the offence of sedition essentially includes actions that incite and disturb public order, tranquillity, security of the State and incite people towards an insurrection against the State. In ***Ram Manohar Lohia v. State of Bihar***,[106] while enunciating the difference between 'public order', 'security of State' and 'law and order', the Court stated: *"...public order in the rulings of this Court (earlier cited) was said to comprehend disorders of less gravity than those affecting security of State, law and order also comprehends disorders of less gravity than those affecting public order. One has to imagine three concentric circles. Law and order represent the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may affect law and order but not public order just as an act may affect public order but not security of the State."*

Since Section 124A of the IPC is so ambiguous in the way it has been phrased and controversial because of the possibility of misuse, it can just be done away with, because there are other laws that already exist and deal with the offences of incitement of offences against public order,

[103]The Indian Penal Code Amendment Bill, 2015, Bill No. 234 of 2015, Introduced in the Lok Sabha on July 23, 2015.
[104]*Kedar Nath Singh v. State of Bihar,* 1962 AIR 955.
[105]*Nazir Khan v. State of Delhi,* (2003) 8 SCC 461.
[106]*Ram Manohar Lohia v. State of Bihar,* (1966) 1 SCR 709.

public tranquillity and security of the State. Chapter VI of the IPC deals with offences against the State, of which Sec 124A is a part. Under this chapter, the offences of insurrection and waging war against the State have already been defined under Section 121. Further, Chapter VIII of the IPC deals with offences against public tranquillity. Under this Section, the following acts have been classified as offences: Unlawful assembly, rioting, promoting enmity between different groups, imputations prejudicial to national integration etc. These sections adequately deal with the offences which may cause public disorder and impact the security of the State and, therefore, the ambiguous Section 124A should be omitted from the IPC.

B. Offences against Property

1. Theft

i. Addition of an explanation under Section 378 of the IPC

The following explanation was recommended with the view that a bona fide claim of right to property is a good defence to a charge of theft. This principle has been widely held in many judicial decisions like ***Suvvari Sanyasi Apparao & Anr v. Boddepalli Lakshminarayana & Anr***[107]***, Kumar v. Abandidhar***[108], etc.

ii. Addition of different places where theft can occur other than just a dwelling house under Section 380 of the IPC

The Law Commission[109] strongly recommended additional places where there could be theft like vehicles, places of public worship, Government properties, etc. thus expanding the scope of punishment under the offence of 'theft' in light of the real-life incidences and cases before Courts. The researchers agree with this rationale.

[107] *Suvvari Sanyasi Apparao & Anr v. Boddepalli Lakshminarayana & Anr,* A.I.R.1962 S.C. 586.
[108] *Kumar v. Abandidhar,* A.I.R. 1965 S.C. 585.
[109] Law Commission of India, *Indian Penal Code,* Report No. 42 (June, 1971).

iii. Addition of different situations when theft can occur. (Section 380A)

The Law Commission[110] found it to be plausible for there to be cases of thefts in case of accidents, fires and natural disasters like floods, etc. and recommended insertion of this section to safeguard the public in such cases.

iv. Amending the words 'clerk' and 'servant' to 'employee' to widen the scope of 'employees' under Section 381.

Both the terms 'clerk' and 'servant' come into the ambit of 'employees' and it would widen the scope. Also, the terms 'clerk' and 'servant' generally denote to persons close to a 'private employer'. However, the Law Commission[111] clarified that this wasn't the intention of the Legislature and continuing with the narrow terms of 'clerk' and 'servant' is completely arbitrary.

2. Extortion

i. Addition of a new section for the offence of 'Blackmail'. (Section 385A)

The Law Commission[112] had noted that the header of extortion does not cover blackmail in the aspect of tarnishing one's reputation. The question of whether *"a person actually offended by some wrongful act of X can demand money from X with the threat that otherwise he will expose the conduct of X.*" was examined by the Commission. It was observed that harm to reputation is a valid factor and should be added as a separate section.

[110] *Id.*
[111] *Id.*
[112] *Id.*

ii. Deleting of the part related to section 377 in Section 388 and 389.

In the punishment prescribed under Section 388 and 389, the last line prescribes the punishment of imprisonment to life if the offence is punishable under Section 377 of the Act. Now, although the bare text reads as '*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*', the 2018 judgement of ***Navtej Sigh Johar v. Union of India***[113] read down Section 377 decriminalizing consensual sexual acts between two adults, irrespective of their gender. However, the offence of bestiality was retained.

As the offence of extortion can be committed by the human being, the last line prescribing the punishment of imprisonment to life if the offence is punishable under Section 377 of the Act is invalid and should be deleted.

3. Robbery and Dacoity

i. Addition of 'Robbery' to Section 396.

The Law Commission[114] has strongly suggested that vicarious liability should exist in case one of the dacoits commits murder and that same vicarious liability should be applied to robbers in case of murder. The researchers agree with this recommendation.

ii. Omission of the words 'uses any deadly weapon' from Section 397.

The phrase 'uses any deadly weapon' has a significant punishment upto seven years. According to Section 397, '*if the offender uses any deadly weapon,* or causes grievous hurt to any person or attempts to cause death then the punishment for the same is seven years.' Also, there have been express judgments of the Indian Courts, punishing people carrying deadly weapons wherein it was held that the actual use is not necessary.[115]

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[113] *Navtej Sigh Johar v. Union of India,* AIR 2018 SC 4321.
[114] Law Commission of India, *Indian Penal Code*, Report No. 42 (June, 1971).
[115] *P.P. v. Varappau,* A.I.R. 1941 Mad. 718; See also: *Goyind Dipaji. v. The State of Maharashtra*, A.I.R. 1956 Bom. 353; *Nagar Singh v. Emp*eror, A.I.R. 1933 Lah. 35: *In Re: Thevur Servai and Ors.*, A.I.R. 1938 Mad. 477.

The Law Commission[116] does not agree with the Indian Courts for the simple reason that just the use of deadly weapon should not be punished on the same level as causing grievous hurt or attempting to cause death. Also, the Law Commission[117] strongly disagrees with the holding of the Court that just carrying a deadly weapon should be punished with seven years. It has thus recommended that the phrase 'uses any deadly weapon' should be omitted and the researchers agree with this suggestion.

iii. Omission of the line 'at any time after the passing of this Act' from Section 400.

This amendment suggested is a formal amendment, the IPC was passed in 1860. The following section was meant to apply immediately after the passing of the Act. As the IPC hasn't yet been amended, this line should be omitted.

iv. Addition of the word 'robbers' alongside 'thieves' and omission of the word 'thugs' and omission of the line 'at any time after the passing of this Act' from Section 401.

The Law Commission[118] strongly suggested adding the word 'robbers' alongside 'thieves' and omitting the word 'thugs' as it was only robbers which were not covered under this sub-section, as dacoits were covered by Section 400. Also, they were of the opinion that the punishment prescribed under Section 401 is enough for the class of 'robbers'. The latter was recommended as the word 'thugs' did not come under the class of either 'robbers' or 'dacoits' or 'thieves'.

The line 'at any time after the passing of this Act' was omitted according to the reasoning given above in 3(iii).

v. Addition of the word 'robbery' and its ingredients in Section 402.

The Law Commission[119] observed that 'dacoity' was covered under assembly by 'robbery' wasn't and hence recommended the same.

[116] Law Commission of India, *Indian Penal Code*, Report No. 42 (June, 1971).
[117] *Id.*
[118] *Id.*
[119] *Id.*

4. Criminal Misappropriation of Property

i. Reframing Explanation 2 under Section 403.

The Law Commission[120] observed that the current 'Explanation 2' under Section 403 was correct but lengthy and confusing. Therefore, a reframing of the explanation has been suggested. The researchers agree with that observation.

ii. Adding the word 'any' under Section 404.

In contrast to Section 403 which specifically refers to 'movable' property, Section 404 doesn't have the word 'movable'. The Supreme Court has clarified in the case of ***R.K. Dalmia v. Delhi Administration***[121] categorically stated that the omission of the word 'movable' from Section 404 is deliberate and thus, adding the word 'any' between 'to his use' & 'property'.

5. Criminal Breach of Trust

i. Amending the words 'clerk' and 'servant' to 'employee' to widen the scope of 'employees' under Section 408.

Refer to 1(iv), Page A55.

[120] *Id.*
[121] *R.K. Dalmia v. Delhi Administration*, AIR 1962 S.C. 1821.

6. Receiving Stolen Property

i. Addition of the term 'cheating' with 'theft, extortion, robbery' under Section 410.

The Law Commission[122] observed that property which has been misappropriated/obtained by cheating is also stolen property which wasn't included under Section 410 and thus recommended the offence of cheating to be added with theft, extortion and robbery.

ii. Addition of an explanation and an illustration under Section 410 exempting offences qualifying under Section 82 and 84 of the Act.

The Law Commission[123] observed that while adding 'theft' to the definition of stolen property under Section 410, there is no provision to cover a situation where if a child below the minimum age of criminal responsibility[124], or an insane[125] person commits theft, it is not theft.

iii. Additional increased term of imprisonment under Section 411 if the property stolen belongs to the Government or local authority.

The Law Commission[126] observed the importance of Government or local property and hence recommended that if such property is stolen, there should be an increase in term of imprisonment. The researchers agree with the recommendation.

iv. Additional increased term of imprisonment under Section 414 if the property stolen belongs to the Government or local authority.

Refer to 6(iii), Page A 58.

[122] Law Commission of India, *Indian Penal Code*, Report No. 42 (June, 1971).
[123] Law Commission of India, *Indian Penal Code*, Report No. 42 (June, 1971).
[124] Indian Penal Code, 1860, § 82.
[125] Indian Penal Code, 1860, § 84.
[126] Law Commission of India, *Indian Penal Code*, Report No. 42 (June, 1971).

7. Cheating

i. Substitute the words from 'harm to that person' to 'harm to any person' under Section 415.

Section 415 defines cheating. Cheating has been defined in two parts:

a. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or
b. intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause *damage or harm to that person in body, mind, reputation or property*, is said to "*cheat*".

According to the bare text of the section, only the person who has been cheated can seek relief for the offence, which has some loopholes. In the case of ***Baboo Khan v. State of Uttar Pradesh***[127], where an eye specialist induced the father of a 12-year child to operate upon the child, the Court held that although there was physical harm to the child, it was the father who had been cheated and had suffered mental agony or 'harm in mind', due to which the offence of cheating was upheld. However, this happened because of Court's liberal interpretation of Section 415. There have been express judgments[128] that observe that 'harm' should be caused to the persons deceived.

Hence, it has been suggested that the word 'that' be replaced with the word 'any' to widen the scope of the offence but so that it is contained to the harm suffered by the person who has been cheated.

ii. Modify the Explanation under Section 415.

Section 415 contains an explanation that "a dishonest concealment of facts is a deception within the meaning of this section". However, since "concealment" conveys the idea of something

[127] *Baboo Khan v. State of Uttar Pradesh*, A.I.R. 1961 All. 639.
[128] *S. Rama Rao vs Dasarathy Rao*, AIR 1955 Kant 43; *Baboo Khan v. State of Uttar Pradesh*, A.I.R. 1961 All. 639.

active, the question has often arisen whether 'mere non-disclosure of facts is deception' when there is no legal obligation to disclose them. The view generally taken by the courts is that *such non-disclosure is not concealment and there is no deception*.

Hence, it has been recommended that the explanation be modified to expressly mention 'when there is a legal duty to disclose particular facts, the dishonest omission of the same would-be deception'.

iii. Addition of a new section related to 'disclosure of prior transactions and encumbrance' and its explanation. (Section 420A)

The 178th Law Commission Report[129] specifically recommended the addition of this section keeping in mind that the instances of 'builders purchasing land or enter into development agreements with owners of land and *then entering into agreements of sale with prospective buyers in respect of the land or in respect of buildings or flats already constructed or proposed to be constructed*' is on a rise and that there is no safeguard in law to protect the same.

The case of ***Delhi Development Authority V. Skipper Construction Co (P) Ltd and Others***[130] focused on the exact issue wherein it was observed that "*hundreds of purchasers had to suffer and the litigation regarding the refund of amounts paid by them or in regard to specific performance was still pending*."

The Law Commission[131] was of the view that in such cases, *civil remedies alone were not sufficient* and that a specific provision in the Indian Penal Code in regard to such transactions is necessary. In that light, the following amendment has been recommended. The researchers agree with this recommendation.

[129] Law Commission of India, *Recommendations for Amending Various Enactments, Both Civil and Criminal*, Report No. 178 (Dec, 2001).
[130] *Delhi Development Authority V. Skipper Construction Co (P) Ltd and Others*, (2000) 10 SC 130.
[131] Law Commission of India, *Recommendations for Amending Various Enactments, Both Civil and Criminal*, Report No. 178 (Dec, 2001).

iv. Addition of a new section 'punishing prior knowledge and not dishonest intention'. (Section 420B)

The Law Commission[132] observed that there was no provision in law which ensures that 'a purchaser will be informed by the seller about the pendency of any litigation in Court'. Due to this, often unwary purchasers pay huge amounts of consideration and or are even put in possession whether under an agreement or a sale deed and they are never informed if there was any claim with regard to the same property pending in a court of law.

Further, it was also observed that in regard to such transactions during litigations, the plea of the transferee being a 'bona fide purchaser without notice of the pendency of litigation' is not available in view of the provision of Section 52.

Hence, the Law Commission[133] was of a view that buyers should be protected against such type of cases and recommended the following amendment in light of the same. In the proposed section, *it is sufficient if it is done knowingly and not necessarily with a dishonest or fraudulent intention*. The researchers agree with this recommendation.

v. Addition of a new section and its explanation to cover the offence of cheating public authorities. (Section 420C)

The Law Commission[134] observed that the problem of cheating of Government on a large scale by dishonest contractors, while supplying goods or executing works, was on a rise and thus it recommended a specific provision penalising it as an aggravated offence of cheating. The researchers agree with this suggestion.

8. Fraudulent Deeds and Disposition of Property

No amendments are proposed under this sub-section.

[132] *Id.*
[133] *Id.*
[134] Law Commission of India, *Indian Penal Code*, Report No. 42 (June, 1971).

9. Mischief

i. Addition of a new section specifically punishing mischief towards public or government property. (Section 425A)

The Law Commission[135] observed the importance of Government or local property and hence recommended and addition of a new section specifically punishing mischief towards public or government property. The researchers would like to propose the same amendment.

ii. Increasing the amount of 'any other animal' under Section 429.

The IPC has not been amended since its inception in 1860. Under Section 429, mischief against animal of the value of 'ten rupees or upwards' is punished. However, in today's day and age, the cost of animals has increased over the years, Hence, the recommendation of increasing the amount of 'any other animal' has been made.

iii. Simplifying Section 430 and expanding its scope.

The bare text of Section 430 is quite detailed about the various sources of 'supply of water' and its use. However, by listing down the sources, it has become self-limiting and any other source of water cannot be included. To prevent the same, it has been suggested that the 'supply of water for any purpose' be included in the section.

iv. Addition of a section covering air route as Section 433 is only with respect to the sea (Section 433A)

Section 433 punishes 'mischief by destroying, moving or rendering less useful a light-house or sea-mark'. However, in doing so, it has totally excluded mischief against 'air marks'. The researchers' suggestion rectifies the same.

[135] *Ibid.*

v. Omitting the line 'or (in case of agricultural produce) ten rupees' under Section 435 to widen the scope of the section.

The following amendment has been suggested on the basis of practical thinking that agricultural produce will be more than Rs. 10. However, to circumvent that logic and to make it full-proof, the Law Commission[136] recommended that the following line be omitted to widen the scope.

vi. Modifying Section 437 to include aircrafts along with sea vessels.

Similar to the amendment suggested for Section 433A, the Law Commission[137] observed that if Section 437 includes aircraft with sea-vessels, the scope will be rightfully extended to aircrafts. The researchers agree with this suggestion.

vii. Omission of Section 439.

The Law Commission observed that 'running a vessel ashore' to commit theft of that vehicle is impractical and there were no instances of the same in the past years. It was also observed that there were other provisions to punish people in the case such an act is committed. The researchers agree with this suggestion.

10. Criminal Trespass

i. Omission of the word 'lawfully' from the second part of Section 441.

Criminal trespass has been defined under Section 441 in two parts: Whoever

a. enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property,

[136] *Ibid.*
[137] *Ibid.*

b. *or having lawfully entered into or upon such property, unlawfully remains there* with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence,

is said to commit "criminal trespass".

The second part is what has been causing problems. What the second part seems to cover is the case of a person who enters '*another's property without any intention of annoying him or committing any offence there, but later changes his mind and insists on staying on the property in order to annoy the person in possession'*.

Some courts[138] have interpreted the second part in such a way that if the initial entry is unlawful though not accompanied by any of the intentions mentioned in the section, then the second part of the definition becomes inapplicable, and if such a wrongdoer continues to stay on the property expressly for annoying the person in possession, he commits no offence.

The omission of the word 'lawfully' cures this defect, hence the recommendation.

C. Sexual Offences

i. Post-penetration withdrawal of consent

According to the classical liberal perspective, the term "consent" means the 'expression of autonomy and free will by competent and rational individuals who are free from coercion and pressure.'[139] The Indian legal system by considering the viewpoint of post-modern feminists[140] realised that due to existing power equation to the gender stereotypes stemming from a patriarchal society, the capacity of a woman to give free consent gets diluted. It is important to note that consent does not create any right for the other person as against the body of the person giving consent. There is no submission of bodily autonomy whatsoever and therefore, a post-penetration withdrawal of consent should be treated as a revocation of consent during the act and from that point onwards the act should be constituted as rape.

[138] *Sunil Kumar Pal vs Sadan Chatterjee And Ors,* AIR 1951 Cal 297.
[139] Rosemary Hunter & Sharon Cowan, *Introduction in Choice and Consent: Feminist Engagements with Law and Subjectivity,* 1-9 (eds. Rosemary Hunter & Sharon Cowan, Routledge-Cavendish, 2007) (discussing the ideological tensions between scholars tackling agency in rape law).
[140] Carole Pateman, *Women and Consent*, 8 Political Theory 149 (1980); Diana Coole, *ReReading Political Theory from a Woman's Perspective,* 34 Political Studies 129 (1986).

The Indian legal system should consider that rape or sexual offences against women "*is not just a crime of violence, but predominantly an assertion of male power and male dominance*"[141] and therefore, recognize the continuation of sexual intercourse even after revocation of consent as violative of a person's autonomy and bodily integrity. For this purpose, the definition of consent in Explanation II of S. 375 of IPC should be re-defined in order to include post-penetration withdrawal of consent.

ii. Non-Recognition of Female Genital Mutilation as an offense

FGM may qualify as a form of "hurt or grievous hurt" and "sexual offences" under the IPC and a crime under Section 3 of the POCSO Act being carried out with an instrument used for cutting and may be addressed under the existing laws of sexual assault, child sexual abuse and domestic violence. However, to address such a deeply ingrained and complex traditional practice a more holistic approach is required. Such an approach needs to address the various other aspects of FGM including abetting or aiding the practice, propagating the practice, prevention of FGM, regulations on medical/health professionals who carry out this practice, the duty to report, support and rehabilitative provisions and awareness generation.

The Guide to Eliminating the FGM Practice in India[142] described that the offence of FGM should be well-defined and the definition of victim should include girls and women of all age. This definition should exclude any medical necessity or post-partum procedure as carried out by a registered medical practitioner.[143] The legal framework on FGM should primarily focus on prevention of the practice and therefore, a provision is required in order to secure the rights and interests of informants and such informants should not be held liable by law in any manner. The offenders involved in this practice are mostly the family of the girl or women and therefore, it is important to recognise the offenders in a proper manner including those who propagate this practice.[144] Along with this comes the duty to inform or report and the responsibility to

[141] Anupriya Dhonchak, Standard of Consent in Rape Law in India: Towards an Affirmative Standard, 34 BERKELEY JOURNAL OF GENDER, LAW & JUSTICE (2019).
[142] *Female Genital Mutilation: Guide to Eliminating the FGM Practice in India,* LAWYERS COLLECTIVE (2012).
[143] United Kingdom Female Genital Mutilation Act, 2003 § 1.
[144] United Kingdom Female Genital Mutilation Act, 2003 § 2, § 3.

protect and those who fail to do the same should face penal consequences.[145] For this purpose, it is important that a regular medical examination as provided in the POCSO Act[146] be done.

It is pertinent to note the view highlighted by the Guide regarding the role that **National Policy for Children, 2013** (hereinafter, NPC) could be used for dealing with the issue of FGM. NPC affirms that: "*the State is committed to taking affirmative measures - legislative, policy or otherwise - to promote and safeguard the right of all children to live and grow with equity, dignity, security and freedom, especially those marginalised or disadvantaged; to ensure that all children have equal opportunities; and that no custom, tradition, cultural or religious practice is allowed to violate or restrict or prevent children from enjoying their rights*." The NPC seeks to recognize and prioritise the right to health, survival, development and protection as inalienable rights of children, further, realising that "*a safe, secure and protective environment is a precondition for the realisation of all other rights of children*." The main objective of NPC is to create "*a caring, protective and safe environment for all children, to reduce their vulnerability in all situations and to keep them safe at all places, especially public spaces*", and protect them from all forms of violence, abuse, exploitation and discrimination, or any activity that harms their personhood or impedes their development. Furthermore, the NPC establishes the State's obligation to take special protection measures to secure the rights of children in need of special protection, as characterised by "*their specific social, economic and geopolitical situations, including their need for rehabilitation and reintegration*". The Policy also states that the State must "*enact progressive legislation, build a preventive and responsive child protection system, including emergency outreach services, and promote effective enforcement of punitive legislative and administrative measures against all forms of child abuse and neglect to comprehensively address issues related to child protection.*"

By virtue of this, the State is under the obligation to take a paternalistic approach for the survivors of FGM and appoint a legal guardian in case a minor is left without a family. The State needs to create a rehabilitation mechanism for women and young girls.

In a study conducted by the United Nations called the "***Indepth Study on All Forms of Violence Against Women***"[147], it was observed that non-implementation or ineffective

[145] United Kingdom Female Genital Mutilation Act, 2003 § 3A, § 5B.
[146] Protection of Children from Sexual Offences, 2012, § 27.
[147] *Indepth Study on All Forms of Violence Against Women — Report of the Secretary General*, July 2006, UN General Assembly Document A/61/122/Add.
www.un.org/womenwatch/daw/vaw/SGstudyvaw.htm.

implementation of existing domestic laws in most countries was the single most important reason for continued immunity to perpetrators of violence against women, particularly in intimate relationships. Therefore, identifying the present lacunae in the existing provisions of sexual offences it is pertinent to incorporate all these changes. The manner in which the rights of women can be recognised can only be manifested when they have full access to justice and when the rule of law can be upheld in their favour. The proposed Criminal Law Amendment Act, 2012, should be modified as suggested, and to secure public confidence, be promulgated forthwith. Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality, the provisions have to be cognizant of the same.[148]

iii. Shortcomings in Section 354 of IPC

Interpretation of "modesty" is highly subjective and stands on inconclusive grounds. It depends on factors like morality and the prevalent customs of society. In fact, according to Ratanlal and Dhirajlal's commentary on the Penal Code, 1860:

"*No particular yardstick of universal application can be made for measuring the amplitude of modesty of women; it may vary from country to country and society to society".*[149]

The dictionary meaning of the modesty is 'a state of being free from undue familiarities outrage'[150], which means an act which is of extreme violence and cruelty. It can be observed through a catena of cases that modesty of a woman is defined by virtue of her sex.

In ***Rupam Deol Bajaj* v. *Kanwar Pal Sigh Gill***,[151] the Supreme Court had defined "modesty" as "*an attribute which is peculiar to a woman as a virtue that attaches to a female on account of her sex*".

The Supreme Court in the case of ***Tarkeshwar Sahu* vs *State of Bihar***[152], in the context of Section 354 of the IPC had defined modesty of a woman by stating that the essence of a woman's modesty is her sex. By this standard, any act against a woman that interferes with her

[148] Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law, 66 (January 23, 2013).
[149] RATANLAL AND DHIRAJLAL, INDIAN PENAL CODE 1913 (33rd ed. 2012).
[150] Modesty, Oxford English Dictionary (2nd Ed. 1989) 1933 Edn.).
[151] *Rupam Deol Bajaj* v. *Kanwar Pal Sigh Gill,* (1995) 6 SCC 194.
[152] *Tarkeshwar Sahu* vs *State of Bihar* ,(2006) 8 SCC 560.

bodily integrity solely because of her sex would amount to an offence under Section 354. It would have been appropriate if the same standard which is absolute in interpretation be followed.

In one case the Supreme Court has defined the word 'modesty' as follows - 'the essence of women's modesty is her sex'[153]. The word 'Modesty' is not to be interpreted with reference to a particular victim of an act, but as an attribute associated with a female human being which reflects a particular class[154]. It is a virtue which is attached to a female on account of her sex. The ultimate test for whether the modesty of a woman has been outraged or assaulted is that the action of the offender should be such that it may be perceived as one which causes annoyance or insult to women's sense of decency and modesty or an affront to her dignity

In the famous case of ***Major Singh Lachhman Singh v. State of Punjab***[155] the word "modest" with regard to a woman was considered. It was held that modesty is 'Decorous in manner and conduct; not forward or lewd; shame fast, which means when used for men, it means the quality of being modest, and in relation to woman, 'womanly propriety of behaviour, scrupulous chastity of thought, speech and conduct'.

The court observed that "*the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty, capable of being outraged. A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. Even if the victim is a baby, has not yet developed a sense of shame and has no awareness of sex. Nevertheless, from her very birth, she possesses the modesty which is the attribute of her sex. Thus, it can be concluded that modesty is the attribute of the sex of women*."

[153] *Dhananjoy Chaterjee vs. State of W.B*. 1994 (1) SCR 37.
[154] *Bachan Singh v. State of Punjab*, 980 SCC (Cri) 580.
[155] *Major Singh Lachhman Singh v. State of Punjab*, 1967 AIR 63.

iv. Shortcomings in Section 375 of IPC

a. Violative of Article 14

Article 14 embodies the principle of equality and acts as a shield against discrimination and prohibits discriminatory laws.[156] The exception of marital rape is violative of art 14 as the exception has created class legislation by conferring privilege upon a class of persons arbitrarily selected i.e., husband. This classification is per se arbitrary and any legitimate purpose is not served by this classification. The state has to justify its discriminatory conduct against married women. Further, the classification of a rape victim as married and unmarried women is unreasonable and thus unconstitutional as it lacks *intelligible differentia*.

b. Violative of Article 21

Marital rape is a stab on a woman's dignity. Sexual coercion with an unwilling partner constitutes the grossest form of violation of individual's right to privacy and offends the integrity of such person, hence calling for the violation of Article 21 of the Constitution of India.[157] It undoubtedly qualifies as being not only against the right to life, but also against personal liberty which has a wide ambit and going with its literal interpretation, every married woman has a right to make her choice. She has *personal liberty* to decide whether to indulge in sexual intercourse with her husband or not. Her husband by no means can coerce her to indulge in sexual intercourse.[158]

In ***State of Maharashtra* v. *Madhukar Narayan Mardikar***[159] the court held that a woman is entitled to protect herself against an unwilling sexual assault, even of so-called easy virtue. Thus, having such an exception which does not let women protect themselves is unwarranted.

In the case of ***T. Sareetha* v. *T. Venkata Subbaiah***[160] , the court emphasised on the importance of sexual autonomy for a woman.[161] It is also here that the Court agrees that "*no positive act of sex can be forced upon the unwilling persons because nothing can conceivably be more*

[156] Constitution of India, 1950, Art. 14.
[157] Constitution of India, 1950, Art. 21.
[158] Anvesha Kumar & Ipsita Mazumdar, *'Bride' and Prejudice — Marital Rape and the Indian Legal Dilemma*, 2 NSLJ 15 (2013).
[159] *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57.
[160] *T. Sareetha v. T. Venkata Subbaiah*, AIR 1983 AP 356.
[161] *Id.*

degrading to human dignity and monstrous to the human spirit than to subject a person by the long arm of the law to a positive sex Act".

By not criminalising forced sex in marriage, the legislature is not accepting the autonomy of female to control over intimacies of personal identity and have transferred the choice to have or not to have marital intercourse to the husband only which is again detrimental to the right of women to choose.

c. Husband liable for other sexual offences but not rape

According to IPC, the husband is liable for other sexual offences such as assault or use of criminal force against a woman with intent to outrage her modesty; sexual harassment and punishment for sexual harassment; assault or use of criminal force to woman with intent to disrobe; voyeurism; and stalking but not rape.

The Law Commission was directly faced with the validity of the exception clause in the ***172nd Law Commission Report***.[162] It was argued that when other instances of violence by a husband toward wife were criminalised, there was no reason for rape alone to be shielded from the operation of law.[163] The recommendation made by ***J S Verma Committee*** was simply that the exception clause must be deleted. It gave a four-prong suggestion to effectively criminalise marital rape.[164]

Thus, the marital rape exception should be deleted as it is violative of Article 14 and 21 and the husband should not be given a shield of marriage to protect himself by raping his wife. It should be recognized by the Legislature as an offence under the Penal Code, 1860 and the punishment for it should be the same as the one prescribed for rape under Section 376 of the Penal Code, 1860. The mere fact that the parties are married should not make the punishment trivial.

[162] Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000).
[163] *Id.*
[164] Justice J.S. Verma Committee, *Report of Committee on Amendments to Criminal Law* (January 23, 2013).

D. Defamation

The researchers recommend that the sections of 'Criminal Defamation', i.e., Section 499 and Section 500 should be omitted from the IPC due to the reasons given below.

Article 19(2)[165] contains nine grounds in the interests of which a law may reasonably restrict the right to free speech. Defamation is one of the nine grounds, but the provision is silent as to which type of defamation, civil or criminal. However, B.R. Ambedkar's comments in the Constituent Assembly arguably indicate that criminal defamation was intended to be a ground to restrict free speech.[166]

The answer to the question that whether sections 499 and 500 of IPC lie under reasonable restrictions lies in measuring the reasonableness of the restriction criminal defamation places on free speech. If the restriction is proportionate to the social harm caused by defamation, then it is reasonable. However, restating an earlier point, criminalising defamation serves no legitimate public purpose because society is unconcerned with the reputations of a few individuals. Even if society is concerned with private reputations, the private civil action of defamation is more than sufficient to protect private interests. Further, the danger that current criminal defamation law poses to India's free speech environment is considerable.[167]

Many countries, including neighbouring Sri Lanka and Maldives have decriminalized defamation. In a landmark move to promote freedom of expression and media rights, Sri Lanka's Parliament also abolished the offence of criminal defamation.[168] The house adopted by voice vote a bill to repeal the provisions for criminal defamation in their penal statute book. The Maldives parliament has passed an amendment to the Penal Code abolishing five articles providing for criminal defamation.

The United Kingdom has abolished criminal defamation altogether. Recently, the Constitutional Court of Zimbabwe struck 'criminal defamation' down as an unconstitutional restriction upon the freedom of speech.[169] In 2011, the Human Rights Committee of the International Covenant on Civil and Political Rights called upon signatory states to abolish

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[165] Constitution of India, 1950, Art. 19(2).
[166] *Criminal Defamation and the Supreme Court's Loss of Reputation*, THE WIRE (December 01, 2020), https://thewire.in/law/criminal-defamation-and-the-supreme-courts-loss-of-reputation.
[167] Law Commission of India, *The Indian Penal Code*, 42nd Report (June 1971).
[168] *A kingdom rich in criminal defamation laws*, INTERNATIONAL PRESS INSTITUTE (10 Oct., 2013) https://ipi.media/a-kingdom-rich-in-criminal-defamation-laws/
[169] Gautam Bhatia, *A blow against free speech*, THE HINDU (July, 2018) https://www.thehindu.com/opinion/lead/a-blow-against-free-speech/article14321176.ece1 .

criminal defamation, noting that it intimidates citizens and makes them shy away from exposing wrongdoings.

Section 499-500 of the IPC fail to constitute 'reasonable restriction' on free speech, and even truth is not a defense in such cases. Even if a person speaks the truth, he can still be prosecuted. Under exception 1 of section 499, the truth can be a valid defense only if the statement was made in the public good, and this question needs to be assessed by the Court. This rule is arbitrary and overboard, deters people from making statements against anyone because of the risk of prosecution.

Since it doesn't constitute reasonable restrictions, it violates Article 19[170] of the Constitution and therefore, it is recommended that Section 499 and Section 500 of the IPC be repealed.

II. Comparison with international conventions and laws

A. Offences against the State

i. United Kingdom

The law of sedition in India was introduced by the British colonial government itself. In ***Queen Empress v. Jogendra Chander Bose***,[171] it was observed that the sedition law in India under 124A of IPC was milder as compared to the laws governing the offence of sedition in England. Fitzgerald J. in ***R. v. Sullivan***,[172] defined sedition as:

"Sedition in itself is a comprehensive term and it embraces all those practices, whether by word, deed or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the Empire. The objects of sedition generally are to induce discontent and insurrection and to stir up opposition to the Government, and bring the administration of justice into contempt; and the very tendency of sedition is to incite the people to insurrection and rebellion."

[170] Constitution of India, 1950, Art. 19.
[171] *Queen Empress v. Jogendra Chander Bose*, (1892) ILR 19 Cal 35.
[172] *R. v. Sullivan*, (1868) 11 Cox C.C. 44.

In 1977, the **Law Commission of UK** released a paper[173] and made the following important observations about the law of sedition:

"Apart from the consideration that there is likely to be a sufficient range of other offences covering conduct amounting to sedition, we think that it is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is "political". Our provisional view, therefore, is that there is no need for an offence of sedition in the criminal code." (emphasis supplied)

Finally, sedition was abolished as an offence in 2009. The then Parliamentary Under-Secretary of State at the Ministry of Justice stated:[174]

"Sedition and seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right, it is today… The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom… Abolishing these offences will allow the UK to take a lead in challenging similar laws in other countries, where they are used to suppress free speech." (emphasis supplied)

Thus, the country that introduced the law of sedition in India itself abolished sedition as an offence about a decade ago.

ii. Australia

Sedition was made a permanent offence in Australia by the War Precautions Act Repeal Act 1920, which inserted the sections 24A-24E into the Crimes Act 1914. When the Bill was introduced, there were several debates about the provision, as some believed that the provision was unnecessary and would be used by the Government against political opponents.[175]

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[173] The Law Commission, Working Paper No. 72, *Codification of the Criminal Law: Treason, Sedition and Allied Offences*.
[174] Law Commission of India, *Report on offences against the National Security*, Report No. 43 (Aug 1971).
Law Commission of India, *Consultation Paper on "SEDITION"*, (Aug 2018).
[175] *In Good Faith: Sedition Law in Australia*, August, 2010, Parliament of Australia, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/sedition

In 1991, the fifth report of the Review of Commonwealth Criminal Law recommended that sections 24-28 of the Crimes Act 1914 be repealed and be replaced by 3 offences: "*incitement to overthrow the Constitution or the government; incitement to interfere by force or violence with Parliamentary elections; and inciting violence against national, racial or religious groups*".[176]

Subsequently, in 2005, amendments were made in the Anti-Terrorism Act (No 2) 2005, including sedition as an offence. The Australian Law Reform Commission subsequently reviewed the relevance of the use of the term sedition to define the offences mentioned under the 2005 amendment. After deliberations, the Law Commission, in its report, suggested that the word sedition be removed from federal criminal law. The recommendation was implemented by the National Security Legislation Amendment Act 2010, by the replacement of the word sedition with 'urging violence offences.'[177]

iii. United States of America

The First Amendment of the US Constitution, i.e., the right to expression, holds immense importance and therefore, the law of sedition was opposed on the grounds that it is contrary to the right given by the First Amendment. This view has not been accepted and a sedition law does exist in the USA, but it has a very constricted interpretation.

In ***Schenck v. United States***,[178] the court laid down the test of clear and present danger for the purpose of restricting the freedom enshrined under the First Amendment. In ***Abrams v. United States,***[179] it was held that distribution of flyers for holding a strike in factories to stop manufacturing machineries to be used against Russian revolutionaries would fall under sedition, and it wasn't protected by the freedom of expression. However, over the years, the interpretation of sedition has become quite limited and the freedom of expression is given utmost importance.

[176] *Id*.
[177] Law Commission of India, *Consultation Paper on "SEDITION"* (Aug 2018).
[178] *Schenck v. United States,* 249 U.S. 47 (1919).
[179] *Abrams v. United States,* 250 U.S. 616 (1919).

In ***Brandenburg v. Ohio***,[180] the Supreme Court held that *"freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".*

Thus, any State action restricting the First Amendment rights is subject to scrutiny and thought, because the freedom of expression is given utmost importance. Certain doctrines are used to prevent hate speech, but the freedom of expression enjoys a lot of respect and importance in the USA.[181]

Thus, democracies have taken a stand towards respecting the freedom of speech and expression extensively and many have done away with the law of sedition.

India also has a duty to protect the freedom of speech and expression, enshrined in its Constitution as well as the International Covenant on Civil and Political Rights, article 19 of which guarantees the freedom of expression. The UN Human Rights Committee has stated:[182]

"Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3, i.e., 'freedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information."

B. Offences against Property

This part was not considered for comparison for the research in this Volume of Report.

[180] *Brandenburg v. Ohio***,** 395 U.S. 444 (1969).
[181] Law Commission of India, *Consultation Paper on "SEDITION"* (Aug 2018).
[182] Human Rights Committee, General Comment No. 34, 102nd Session, United Nations International Covenant on Civil and Political Rights (Sept. 2011).

C. Sexual Offences

Universal Declaration of Human Rights, 1948 (hereinafter UDHR), the foundation of International Human Rights, defines the fundamental freedoms of a person. The preamble of UDHR states,

"*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,*

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."[183]

Article 16 of the same document mentions that men and women have equal rights "*as to marriage, during marriage and at its dissolution*"[184], "*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*"[185].

"*(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

UDHR was followed by **International Covenant on Civil and Political Rights**, 1966 (hereinafter, ICCPR) and **International Covenant on Economic, Social and Cultural Rights**, 1966 (hereinafter, ICESR).

[183] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), 1948.
[184] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), 1948, Article 16 (1).
[185] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), 1948, Article 16 (3).

The main objective of ICCPR is to create an environment wherein, "*the ideal of free human beings"* enjoy *"civil and political freedom*". In addition to this, it bestows individual with the duty to "*to strive for the promotion and observance of the rights*".[186] Article 3 establishes the duty to ensure gender justice[187] and Article 23 states gender equality of both the spouses in a family.[188] On similar lines, ICESR seeks to create an environment that ensures "*the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights,*"[189] Article 7 creates an obligation on states to "*recognise the right of everyone to the enjoyment of just and favourable conditions of work*" and "*Safe and healthy working conditions*".[190]

Under the **Beijing Principles of the Independence of the Judiciary,** the judiciary has a duty to ensure that all persons are able to live securely under the Rule of Law. This is particularly important to women. The judiciary also has a duty to promote the observance and the attainment of human rights of women and "*to administer the law impartially among persons and between persons and the State".*

The Declaration on Elimination of Violence against Women 1993 states that violence against women deprives them of equal access to civil and political rights and social and economic rights and there should be no invocation of any custom that may lead to violence against women.[191] Further, it states that "*State should pursue by all appropriate means and without delay a policy of eliminating violence against women*"[192]. This document specifies violence against women that result from traditional practices as "*physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and*

[186] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999.
[187] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 3.
[188] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 23.
[189] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.
[190] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, Article 7.
[191] UN General Assembly, *United Nations Declaration on Elimination of Violence Against Women*, 20 December 1993.
[192] UN General Assembly, *United Nations Declaration on Elimination of Violence Against Women*, 20 December 1993, Article 14

other traditional practices harmful to women, non-spousal violence and violence related to exploitation…".[193]

Convention on Elimination of all forms of Discrimination against Women recognizes that role of cultural factor in determining gender relations resulting in restrictions on women's enjoyment of rights to a greater extent.[194] **Convention for Rights of Children** again emphasizes the harmonious development of a child's personality in a familial environment.[195]

It is pertinent to note the observation in the case of ***CR* v. *United Kingdom***[196] that a rapist remains a rapist regardless of his relationship with the victim. So, by protecting a cover to husband because of the virtue of him being husband is not correct as he is still the rapist. In 1993, the United Nation's Declaration on the Elimination of Violence against Women, recognised marital rape as a violation of human rights.[197] Additionally, marital rape is a crime under international law according to the UN General Assembly.[198] Even the CEDAW committee recommended to broaden the definition of rape so that it covers sexual abuse and remove the exception.

D. Defamation

This part was not considered for comparison for the research in this Volume of Report.

[193] UN General Assembly, *United Nations Declaration on Elimination of Violence Against Women*, 20 December 1993, Article 1.
[194] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249.
[195] UN General Assembly, Convention of Rights of Children, 7 March 1990.
[196] *CR* v. *United Kingdom*, ECHR, Ser. A. No. 335-C (1995).
[197] United Nation's Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104, at Art. 2, (20-12-1993).
[198] United Nations General Assembly, 23rd Special Session, 26-11-2000.

CONCLUDING REMARK

Historically, Section 124A of the IPC has been used to subjugate the voice of the freedom struggle and curb dissent against the British government. Although after independence, the Courts of the country have comprehensively interpreted and constricted the scope of the Section, the applicability of such an interpretation has been questioned. The Section is prone to being misused by the authorities to curb dissent and criticism and there have been multiple demands for the repeal of this section.

The Law Commission, in its 42nd report,[199] recommended expanding the scope of Section 124A. However, over the years, this opinion has changed and the Law Commission, in its consultation paper released in 2018, recommended that the country needs to rethink the existence and need of the law of sedition. Eminent personalities from the legal field, such as Retired **Justice Madan Lokur**[200] and **Justice Deepak Gupta**[201] have voiced their displeasure at the misuse of sedition and the need to rethink the sedition laws of the country. Several countries, including the UK, have repealed the sedition law, while others have reduced its scope and ambit.

The IPC already has several sections under Chapters VI and VIII to comprehensively deal with the offences covered under Section 124A, and therefore, there is a need to omit Section 124A from the IPC as this section is prone to misuse and can be extremely detrimental to the fundamental right to freedom of speech and expression.

Chapter XVII of the IPC covers 'Offences against Property' which contains 85 sections from Section 378 to Section 462, under 10 sub-headers. It is to be noted that the IPC hasn't been amended since its inception. Therefore, the researchers analysed all the 85 sections and have suggested *31 Amendments*. Some of these amendments are just a necessity to keep up with the times like increase of monetary amount, increased punishment for offences against

[199] Law Commission of India, *The Indian Penal Code*, Report No. 42 (June 1971).
[200] *Govt using sedition law to curb free speech, says former SC judge Lokur*, NATIONAL HERALD (14 Sept, 2020), https://www.nationalheraldindia.com/india/govt-using-sedition-law-to-curb-free-speech-says-former-sc-judge-lokur
[201] Debayan Roy, *Supreme Court judge Deepak Gupta slams 'misused' sedition law, says it's time for re-look*, THE PRINT (8 Sept, 2020), https://theprint.in/judiciary/supreme-court-judge-deepak-gupta-slams-misused-sedition-law-says-its-time-for-re-look/288401/

Government property, addition of the criteria of aircrafts along with sea-vessels, omission of the word ‘thugs’, etc.

However, most of these amendments are focused on the major lacunas present in the provisions for ‘Offences against Property’. The abovementioned amendments are focused on either curing the defects arising out of the present section or on adding provisions for protection against specific offences which are not safeguarded by law. Lacunas like theft being restricted only to a dwelling house, restricted scope due to the words ‘clerks’ and ‘servants’, no mention of the offence of ‘blackmail’ as a mode of ‘extortion’, use of the words ‘uses any deadly weapons’ and its negative implication, no safeguard against cheating by developers, negative interpretation of the second part of ‘criminal trespass’, etc. were focused upon by the researchers and analysed in length. Amendments for the same have been suggested by the researchers. With these amendments, the sections related to ‘Offences against Property’ under the IPC would be significantly improved due to the addition of safeguards which have been included in the amendments.

The law must be implemented in a manner that satisfies the criteria of impartial administration of justice, which is the fundamental cornerstone of the rule of law. While physical violence is an offence, it also constitutes a deprivation of human rights and liberty and is a form of sex discrimination. Thus, violence against women has a dual character as it is not only an offence under the principles of penology but, more importantly, it is a direct constitutional violation. The number of constitutional violations in India assumes great importance as they have a bearing upon the true meaning of democracy, the true meaning of republic, and the true meaning of social justice.

Section 499 and 500 of Indian Penal Code,1860 deals with criminal defamation. It is argued that criminal defamation violates Article 19 of the Constitution of India. Sections 499-500 of the IPC fail to constitute “reasonable restriction” on free speech, and even truth is not a defense in such cases. Even if a person speaks the truth, he can still be prosecuted.

Hence, this report submits that Sections 499 and 500 of Indian Penal Code, 1860 which deal with criminal defamation should be repealed. All the lacunas have been pointed out in the report of having criminal defamation as an offence. It is thus recommended by the researchers that the sections of criminal defamation be repealed.

The following has been a detailed report by the researchers on the topics of 'Offences against Property', 'Offences against the State', 'Sexual Offences' and 'Defamation' of the IPC, which have been analysed in-depth and subsequent amendments have been suggested for the same.

B: CODE OF CRIMINAL PROCEDURE, 1973

CONTENTS

PART – I

INTRODUCTION

Criminal Procedure provides a procedure to determine right or liability. It basically addresses the procedures involved in the investigation, detection, and prosecution of criminal offences. Therefore, it looks after the process of administration and enforcement of substantive criminal law. The object behind the introduction of these procedural laws was to consolidate and amend the laws relating to courts of criminal judicature, that is, collection of all the laws relating to criminal procedure and making timely amendments. The Code of Criminal Procedure, 1973 ("Cr.P.C") is exhaustive in terms of matter which are specifically dealt by it as under Section 482 of the Code wherein the High Courts have been given inherent powers to give effect to such orders under the Code in relation to such circumstances which are not dealt by it, to prevent abuse of any process of the Court and to secure the ends of justice.

The Code of Criminal Procedure was extensively discussed by the First Law Commission wherein it examined the various subjects of organization of criminal courts, police investigation, prosecuting agencies, delays in criminal trials, committal proceedings, criminal appeals, revisions and inherent powers, the procedure for trial of perjury cases, etc. Consequently, the Code of Criminal Procedure, 1898 was amended in order to include some of the recommendations given by the Committee.

The present report examines the provisions dealing with First Information Report (FIR), Search and Seizure, Bail, Compounding and Plea bargaining. It provides an overview of the existing system of law and critically analyses the abovementioned aspects of the Code of Criminal Procedure. Furthermore, this report aims to provide suggestions and recommendations upon the laws with a goal to enhance the procedural aspect of the criminal justice system.

1. First Information Report

First Information Report or FIR as provided under Section 154 of the Cr.P.C is the first step towards the initiation of an investigation of any cognizable offence. When police receive

information about the commission of an offence, they are mandated to register an FIR to establish a record of the commission of an offence. An FIR can be filed by anyone who has witnessed the commission of a cognizable crime or by the Station House Officer ("SHO") on his own knowledge or information. It is the right of the person filing an FIR to claim a copy of the same.[202]

Generally, an FIR is filed at the police station which has jurisdiction over the place where an offence was committed, however, a Zero FIR or an E-FIR can also be filed. The former refers to the kind of FIR which can be filed at any police station irrespective of the jurisdiction. However, after investigating and filing it with the magistrate, it is transferred to the police station which has competent jurisdiction. An E-FIR refers to Electronic FIR. Such an FIR can be filed in cases of cognizable offences like rape, murder, dowry deaths etc. Its main agenda is to protect the identity of such victims who may not be able to file an FIR at the nearby police station for reasons such as social pressure, inability to face the society, etc.

2. Search and Seizure

Search and seizure are a crucial stage in the process of effective investigation. Chapter VII of the Cr.P.C., i.e., Sections 91 to 100 deal with the provisions relating to the summons to produce things, provisions related to search-warrants and other general laws relating to searches. The suspected individual will be summoned by the Court or a warrant can be issued by the judge or magistrate authorizing a police officer to make an arrest, search, seize property or take action relating to the administration of the justice system. This is issued whenever any court or an officer in charge of a police station considers that the production of any document or other thing is essential or desirable for the purposes of investigation inquiry, trial or other proceedings under this code, such court or officer may issue a summons or order to the person in whose possession or power such document or thing is believed to be in possession. This is done before the search and seizure procedure takes place.

There are two methods in which police can affect search and seizure. One under a warrant which is issued under any of the provisions of Sections 93, 94, 95, and 97 and the other is without a warrant under any of the provisions of Sections 103, 165 and 166 of Cr.P.C. the basic

[202] The Code of Criminal Procedure, 1973, § 154(2)

provisions as to search and seizure are laid down in Section 100 of Cr.P.C. It was observed that the procedure laid down under Cr.P.C had certain difficulties whilst the procedure is being conducted. During the search and seizure procedure, there is a possibility that a common man can become an easy target for harassment by the police officials while conducting the procedure. The power of the police officials is more over the individual. Thus, there is a need to confine or bring out more rules and regulations in order to curtails such harassments.

3. Bail Laws

Bail is one of the vital concepts of the criminal justice system as it seeks to safeguard the right to liberty of an individual who has been accused of a crime. Bail essentially means the judicial interim release of a person suspected of a crime held in custody, on entering into a recognizance. The provisions related to bail are present under Chapter XXXIII of the Code of Criminal Procedure, 1973.

Although 'bail' has not been defined in the Cr.P.C, Wharton's Lexicon defines it as "*setting at liberty a person arrested – on security being taken for his appearance.*" Further, as to the principle behind the grant of bail, Halsbury's Laws of England[203] provides that "*the effect of granting bail is not to set the defendant (accused) free, but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place.*"

According to the National Crime Records Bureau, the Indian prisons are overcrowded with the number of prisoners at 118.5% of the prison capacity.[204] What is even more worrying is the fact that out of the total prison population 70% of the prisoners are undertrials.[205] This simply means that the majority of the inmates in Indian prisons are individuals who have not been convicted of a crime but have been detained in prison during the period of investigation or trial. Since any accused is presumed to be innocent until proven guilty, the arrest of an accused as a rule is in stark contravention of the 'right to personal liberty' guaranteed by Article 21 of the Indian Constitution. It is in this background that the provisions relating to bail are required to be examined and amended.

[203] Halsbury's Laws of England, Vol II para 166 (4th Ed. 1998).
[204] *Prison Statistics India*, National Crime Records Bureau (2019).
[205] *Id.*

4. Compounding of Offences

Compounding of offences means forbearance from the prosecution as a result of an amicable settlement between the parties[206]. The rationale for the compounding of offences is that the chastened attitude of the accused and the praiseworthy attitude of the complainant in order to restore peace and harmony in society must be given effect to in the composition of offences[207]. Indian procedural law had various provisions relating to compounding of offences at a different point in time and it still exists. The policy of the legislature adopted in Section 320 is that in the case of certain minor offences, where the interest of the public is not vitally affected, the complainant should be permitted to come to terms with the party against whom he complains in respect of offences specified in the section[208].

The purpose behind allowing compounding of offences in India is that certain offences primarily concern the individual person and not people at large. Therefore, if the parties are agreeable to settle those cases themselves, the law should recognize such desire of the parties.

Section 320 of the Code of Criminal Procedure permits compounding of offences. Clause (1) provides that the offences which are mentioned in the first column can be compounded by the parties referred in the last column of the list. Clause (2) deals with other offences in the list that can be compounded with the permission of the court by the parties referred to in the list. Further, according to clause (3) when the offences under the law are compoundable the abetment to such offence are also compoundable. The law further permits the compounding of offence by a legal guardian if the offences are committed against children or lunatic etc. under clause (4) of Section 320.

In particular, situations where the accused has been committed for trial or when he has been convicted and an appeal is pending, Section 320 clause (5) provides that no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard. Clause (6) allows the High Court as well as the Court of Session to compound the offence while exercising their revisional power. The Act has created a limitation in respect of habitual offender under clause (7). It provides that no offence shall be compounded if the accused is, by reason of a previous conviction, liable either

[206] Law Commission of India, *Report on Compounding of (IPC) Offences*, Report no. 237 (Dec. 2011).
[207] Law Commission of India, *Report on The Code of Criminal Procedure 1973*, Report no. 154 (Aug. 1996).
[208] *Biswabahan v. Gopen*, AIR 1967 SC 895.

to enhanced punishment or to a punishment of a different kind for such offence. By way of clause (8) the Act provides that the effect of compounding shall amount to the acquittal of the accused. Lastly under clause (9) of the provision, only the offences which are permissible under Cr.P.C. can be compounded.

5. Plea Bargaining

Plea Bargaining refers to the pre-trial negotiations between the accused and the prosecution wherein the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. It is governed by the provisions mentioned under Chapter XXIA of the Cr.P.C. The Criminal Justice System in India is plagued with the problem of pendency of cases and it, therefore, becomes imperative to examine the implementation of plea bargaining in India for swifter disposal of cases in the country.

METHODOLOGY AND APPROACH FOR RESEARCH

The present report is fundamentally based upon critical analysis of the Code of Criminal Procedure, 1973 in the area of 'First Information Report', 'Search and Seizure', 'Bail', 'Compounding of offences' and 'Plea bargaining', which is substantially understood from previous judicial committee reports along with a detailed study based upon adequate primary and secondary resources. The research team relied on existing academic and research work on the given legislation, as well as judicial precedents. To analyze the core of the issue, the team relied on: i) the Constitution of India; ii) Constitutional Assembly and Parliamentary debates; iii) National Crime Records Bureau reports; iv) Judicial precedents, especially Supreme Court judgements on the scope of the provisions of Cr.P.C.

PART – II

ABOUT THE ACT

The Code of Criminal Procedure, 1973 was enacted to amend and consolidate law regarding the criminal procedure in India. Cr.P.C. is a procedural law which provides the machinery required to punish the offenders under substantive criminal law. The history of the Act can be traced back to the British era after the rebellion of 1857. Post rebellion the crown took over the administration in India and enacted the Criminal Procedure Code, 1861. Thus, the Code of Criminal procedure came into existence in the year 1882 and was amended for the first time in 1898 and subsequently in 1973 in accordance with the 41st law commission report.
The code comprised of 484 sections, 2 schedules, and 56 forms. The 484 sections are structured and divided into 37 chapters. The code provides a detailed understanding of the procedure which is required to be followed in every investigation, inquiry, and trial. The Code also deals with the classification of courts and their jurisdiction and the procedure mandated to be followed in addition to the general provisions of procedure such as holding trials etc. The objective of the code is to ensure that the substantive law is adjudicated effectively and efficiently.

However, the Code, in its character, is not limited to being a procedural law but also includes certain sections of substantive law i.e., defining rights and duties. For example, Section 125 of the Code provides for the right of maintenance, Section 436,437,438, and 439 provides for granting of bails, Section 145 provides for the right of immovable property etcetera. The Supreme Court in *Iqbal v. State of Maharashtra*[209] held that it is the procedure that spells much of the difference between the rule of law and the rule of whim and caprice. Thus, the code is deemed to be an exhaustive list.

[209] *Iqbal v. State of Maharashtra*, (1975) 3 SCC 140.

LACUNAS

A. FIRST INFORMATION REPORT

1. FIR: Code of Criminal Procedure, 1973

Cr.P.C., under Chapter XII provides for the provisions related to the information to the police and their power to investigate. The chapter ranges from Section 154 to Section 176 of the Cr.P.C. Section 154 of the Cr.P.C. mandates a police officer to file an FIR for cognizable cases[210].

The Hon'ble Supreme Court ("SC") in *Lalita Kumar v. Government of Uttar Pradesh*[211] established guidelines for the interpretation and scope of FIR under Cr.P.C., 1973 and all other legislations were the Cr.P.C. is applicable. The Court held that under Section 154 of the Cr.P.C. it is mandatory for the police to register an FIR if the information discloses commission of a cognizable offence and no preliminary inquiry is required in such a situation.

A preliminary inquiry may be conducted only to ascertain whether a cognizable offence is disclosed or not and not to verify the veracity of the information received. No police officer can avoid his duty of registering offence if a cognizable offence has been committed and is hence disclosed.

Section 155 of the Cr.P.C. discusses the procedure of filing of non-cognizable cases according to Schedule 1 of the Cr.P.C. The provision establishes that if an act constitutes a non-cognizable offence then the police officer must enter the information provided by such an informant in a book which must be kept in person by such officer and refer such informant to the magistrate. Section 155 of Cr.P.C. bars a police officer from initiating an investigation in non-cognizable offences without prior order of a magistrate. Moreover, if in any case there are two or more offences then if a single offence falls under the category of cognizable offence then the case shall be deemed a cognizable case and filing of an FIR becomes mandatory.

[210] Cognizable offence refers to an offence in which the police can arrest the accused without an arrest warrant. The police in cognizable offences can start an investigation on their own and there is no need for attaining court's order.
[211] *Lalita Kumar v. Government of Uttar Pradesh*, (2014) 2 SCC 1.

2. FIR: Prevention of Money Laundering Act

Section 65 of the Prevention of Money Laundering Act (hereinafter referred to as "PMLA") states that provision of Cr.P.C shall be applicable unless they are inconsistent with the provisions of PMLA. Thus, according to this section, the procedure related to FIR as provided under Cr.P.C will be applicable to PMLA. Hence, the provisions of Cr.P.C would apply insofar as they are not inconsistent with provisions of PMLA.[212] In the case of *Union of India v. Varinder Singh*[213], the honourable court observed that registration of an FIR is not necessary for exercising the powers given to the empowered officers under PMLA.

Enforcement Case Information Report ("ECIR"), refers to a complaint filed by the Enforcement Directorate ("ED") equivalent to an FIR to establish an offence under PMLA. The police can take cognizance of Scheduled Offences[214] but to establish that such scheduled offences are an offence of money laundering is the duty of the authorities.[215]

In the case of *P Chidambaram v. Directorate of Enforcement*[216], the court held that the offences specified under Part C of the Schedule (scheduled offences), is a sine qua non for the offence of money-laundering which would generate the money that is being laundered. Schedule offences are to be tried by special courts.

In the case of *Arun Kumar Mishra v. Directorate of Enforcement*[217], the Hon'ble court quashed an ECIR registered by the ED on the grounds that Regular Case (RC) (FIR in the prevention of corruption case) filed by CBI on which this ECIR is filed has already been quashed by the High Court. Thus, establishing that schedule offence is significant in establishing an offence under PMLA.

In the case of *Janta Jha v. AD, Directorate of Enforcement*[218], the court held that PMLA is a special statute and therefore it has an overriding effect on the state which deals with Schedule

[212] *P. Chidambaram v. Directorate of Enforcement*, (2019) 9 SCC 24.
[213] *Union of India v. Varinder Singh*, 2017 (3) RCR(Criminal) 576.
[214] Scheduled Offence as defined under Section 2(1)(y) of PMLA means offences specified under Part A of the Schedule; or offences specified under Part B of the schedule when the total value in the offence is thirty lakhs or more; or the offences under Part C of the schedule.
[215] *Vakamulla Chandrashekhar v. Union of India*, 2017 (356) ELT 395(Del.).
[216] *P. Chidambaram v. Directorate of Enforcement*, (2019) 9 SCC 24.
[217] *Arun Kumar Mishra v. Directorate of Enforcement*, CRL. M.C. 5508/2014.
[218] *Janta Jha v. AD, Directorate of Enforcement*, CRLMC No. 114 OF 2011.

offence. Thus, even if an individual is acquitted from the scheduled offence, proceedings under PMLA can still stand valid.

In the case of *Rajiv Chanana v. Dy. Director of Enforcement*[219], the court held that if an individual is acquitted of a scheduled offence, then his trial for an offence under Section 3 of PMLA would not survive. The court established steps for an offence to be tried under PMLA. The fundamental basis for a trial under PMLA is the commission of a Scheduled offence. Furthermore, after acquittal from the scheduled offence, the attachment of the property under section 5 of PMLA would also come to an end.

Section 45 of PMLA states that notwithstanding anything contained in Cr.P.C, offences under the Act will be cognizable and non-bailable. In *Gurucharan Singh v. Union of India*[220], the Hon'ble Delhi High Court took a holistic approach while stating that if the offences are to be treated as non-cognizable then it is mandatory to comply with provisions of Section 155, 177(1), and 172 of Cr.P.C. Whereas, if the offences are cognizable, then Section 154 and 157 of Cr.P.C must be complied with mandatorily.

In the case of *Vakamulla Chandrashekhar v. Union of India*[221], the court held that the Indian Penal Code, 1860 creates a host of offences some of which are cognizable and others are non-cognizable, in accordance with the first schedule. It is for this reason that in respect of certain offences, the police are empowered and duty-bound to take cognizance on its own, (i.e. register the case; carry out the investigation; if necessary, arrest the accused, and; file a final report before the concerned Magistrate). However, the PMLA deals with the sole offence of money laundering. The information received by the authorities under the Act in respect of such offence is actionable by the authorities (ED) under the PMLA, i.e., it is the duty of the authorities to take notice of the offence, and not the police. However, the offence is still actionable by the authorities under PMLA.

Whereas the PMLA is substantive law, Cr.P.C, is merely a procedural law. Insofar as the PMLA creates and sets down the statutory scheme, *inter alia*, for the opening/registration of the case, its investigation; the officers by whom the case would be investigated; the powers of investigation, the manner of filing a complaint before the Special Court, the said statutory

[219] *Rajiv Chanana v. Dy. Director of Enforcement*, W.P.(C) 6293/2014.
[220] *Gurucharan Singh v. Union of India,* 2017 (355) ELT 95 (Del.).
[221] *Vakamulla Chandrashekhar v. Union of India*, 2017 (356) ELT 395(Del.).

scheme would prevail over the general procedural law in respect of criminal matters to which Cr.P.C applies.

3. FIR: Income Tax Act, 1961

Section 112(2) of the Income Tax Act, 1961 ("IT Act") states that offence mentioned under Section 112(1) of the IT Act shall be non-cognizable. Section 279A of the IT Act states that notwithstanding anything contained in the Cr.P.C, an offence punishable under sections 276B, 276C, 276CC, 277 or 278 shall be deemed to be non-cognizable within the meaning of the Cr.P.C.

Section 280B states that a special court may, upon a complaint made by an authority authorized in this behalf under the IT Act take cognizance of the offence for which the accused is committed for trial. Section 292, cognizance of offence, states that no court inferior to that of a presidency magistrate or a magistrate of the first class shall try any offence under this Act.

Section 280D states that the provisions of the Code of Criminal Procedure (including the provisions as to bails or bonds), shall apply to the proceedings before a Special Court.

According to section 279A, offences under sections 276B, 276C, 276CC, 277 or 278 shall be deemed to be non-Cognizable. All these offences are punishable with imprisonment up to 7 years. Most other offences are punishable with imprisonment up to 3 years except for those provided under sections 276BB and 278A. Thus, according to the first schedule of Cr.P.C, except sections 276BB & 278A, all other offences are non-cognizable.

With regards to IT act offences, a complaint can be filed under section 280B of the act read with the section of the Cr.P.C. Section 280B states that all the offences mentioned under the Income Tax Act shall be tried by the Special court when a complaint is filed.[222]

4. Kinds of FIR:

(a) Zero FIR

FIR known as First-Hand Report is an initial report in form of a written document prepared by police officers when they receive information about the commission of an offense which is

[222] Amit Khemka, *Offences under the Income Tax Act, 1961: Some Salient Issues*, available at https://www.wirc-icai.org/images/material/Offences-The-Income-Tax-Act-1961-ppt.pdf (accessed on 21st July, 2020)

cognizable in nature. This means the police officer can suo moto take an action on an offense without prior approval from the court. This report has a serial number, date/time/place of occurrence, contents etc. of the offense that has been committed. The information under FIR may be given orally or in writing but it needs to be recorded as per Section 154 of the Code of Criminal Procedure.[223]

The jurisdictional aspect is of great importance when filling an FIR report as every police station has specific jurisdiction under them for which they can take up the investigation after the filling of the report. In a case, the Supreme Court was of the view that if a police officer evades his duty of registering an FIR upon receiving information about a cognizable offence, then disciplinary action can be taken against him. Now, it is only after the registration of FIR that the police will take up the action of investigation of the case. Hence it sets the process of criminal justice in motion. Any person can register FIR after the commission of the cognizable offence be it: the victim, a family member, witness of offence, police officer, a person who committed the offence or any person who knew about the offence, and through the order of the magistrate.

The arrangement of Zero FIR came up as a proposal in the Justice Verma Committee Report in the new Criminal Law (Amendment) Act, 2013 after the shocking Nirbhaya instance of December 2012. The provision says that a ZERO FIR can be recorded in any Police station, regardless of any sort of jurisdictional zone. The fundamental examination will happen on the jurisdictional police station. The case will be enlisted with the sequential number zero then the case will be transferred to the particular police station. It's beneficial for a serious and heinous crime. This provision is for everyone. The sanctity of the legal process under zero FIR remains the same as that of the original FIR. The zero F.I.R. will be later exchanged to the proper Police Station.

Filling of Zero FIR is just like filling a regular FIR, just that there is no jurisdictional touch to it. Like all regular FIRs, a Zero FIR can be filed in accordance with the below-mentioned checklist.

- Recording of statements by the police officer in writing.
- All details, without any speculation or assumption, should be provided to the police during the statement.

[223] *Zero FIR*, B&B ASSOCIATES LLP (Feb 15, 2019) available at https://bnblegal.com/article/zero-fir/.

- Make the statement official by signing the register.
- Get a duplicate of your complaint and request for the identification number or Roll if not provided.

Lacunas:

The Lacunas for this section have been discussed along with the recommendations in Part-III of the Report.

B. Search and Seizure

1. Prevention of Money Laundering Act, 2002

The search and seizure procedure as seen under Section 17 of the Prevention of Money Laundering Act ("PMLA"), can be conducted only when the necessary conditions are satisfied:

i. the Director or any other officer authorized by him is in possession of some information,
ii. that on the basis of such information he has reason to believe
iii. the reason for such belief has to be recorded in writing, and
iv. that there are reasons to believe that any person
v. has committed any act which constitutes money-laundering, or
vi. is in possession of any proceeds of crime involved in money laundering, or
vii. is in possession of any records relating to money laundering, or
viii. is in possession of any property related to crime.

The Director, or any other officer authorized by him on his behalf, shall strictly satisfy the aforementioned conditions, enumerated under Section 17 of PMLA, before the Director could direct search and seizure to be conducted in the premises of the accused. On the basis of the information received, the Director must have adequate 'reasons to believe' that an offence has been committed under the PMLA before invoking Section 17 of the PMLA.[224]

[224] Vijay Pal Dalmia, *Search & Seizure Of Property Under AML Of India (Prevention Of Money Laundering Act, 2002 [PMLA])*, MONDAQ (17 Aug, 2017) URL: https://www.mondaq.com/india/money-laundering/618936/search-seizure-of-property-under-aml-of-india-prevention-of-money-laundering-act-2002-pmla

The reason for conducting the search and seizure should be provided by the Director, and this needs to be communicated to the aggrieved party, and if this is not communicated, the procedure conducted would be considered bad for the want of natural justice.[225]

In the case of *CIT & Ors v. Rubber Works*[226], while considering the powers of retention of seized documents under section 132 of the Income Tax Act, 1962, wherein the reasons for retention were required to be recorded in writing, but as in the case of section 17 of PMLA, there was no express requirement for communicating the reasons so recorded, the Hon'ble Supreme Court held that irrespective of there being no such requirement in the statute, the concerned officer is bound to communicate the said reasons, as the failure to communicate shall materially prejudice the person so searched under the provisions of section 132:

> *"...On a plain reading of the aforesaid provisions it will be clear that ordinarily the books of account or other documents that may be seized under an authorization issued under Sub-sections (1) of Section 132 can be retained by the authorized officer or the concerned Income-fax Officer for a period of one hundred and eighty days from the date of seizure, where after the person from whose custody such books or documents have been seized or the person to whom such books or documents belong becomes entitled to the return of the same unless the reasons for any extended retention are recorded in writing by the authorized officer/the concerned Income Tax Officer and approval of the Commissioner for such retention is obtained. In other words two conditions must be fulfilled before such extended retention becomes permissible in law:' (a) reasons in writing must be recorded by the authorized officer or the concerned Income-fax Officer seeking the Commissioner's approval and (b) obtaining of the Commissioner's approval for such extended retention and if either of these conditions is not fulfilled such extended retention will become unlawful and the concerned person (i.e. the person from whose custody such books or documents have been seized or the person to whom these belong) acquires a right to the return of the same forthwith. It is true that Sub-section (8) does not in terms provide that the Commissioner's approval or the recorded reasons on which it might be based should be communicated to the concerned person but in our view since the person concerned is bound to be materially prejudiced in the enforcement of his right to have such books and documents returned to him by being kept ignorant about the factum of fulfillment of either of the conditions it is obligatory upon the Revenue to communicate the Commissioner's approval as also the recorded reasons to the person concerned. In the absence of such communication the Commissioner's decision according to his approval will not become effective"*

[225] *Id.*
[226] *CIT & Ors v. Rubber Works*, 1984 1 SCC 700.

The Delhi High Court in the case of *Abdullah Ali Balsharaf v. Directorate of Enforcement*[227] dealt with the inconsistency between S. 109 of Cr.P.C and S. 17(1A) of PMLA where the ED seized the assets of the petitioner u/s 102 of Cr.P.C. Section 65 of PMLA states that:

> *"The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, insofar as they are not* ***inconsistent*** *with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act."*

The Supreme Court in the case of *Innovative Industries Ltd. v. ICICI Bank*[228] had laid down a test for determining if there is repugnancy between two statutes by finding out whether one of the statutes has adopted a plan or a scheme, which will be hindered or obstructed by giving effect to the other statute. Inconsistency was cited on two grounds by the court while explaining how the provisions of Cr.P.C were inapplicable for seizing the property for the offence of money laundering:

a. The power u/s 17(1) of PMLA to provisionally attach or seize or freeze a property can be exercised only (a) if the specified officer has material in his possession, which provides him a reason to believe that the property sought to be attached or seized is proceeds of crime or related to a crime; and (b) after recording the reasons in writing. Whereas the power under S. 102 of Cr.P.C can be exercised without meeting any preliminary requirements.
b. U/s 20 of PMLA the orders of provisional attachment and/or seizure and/or freezing cannot extend beyond the period of 180 days. Whereas the property can be seized u/s 102 of Cr.P.C for an indefinite period.

Significant Sections

- Section 165 of Cr.P.C

*"**Search by police officer.***

1. Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorized to investigate may be found in any place with the limits of the police station of which he is in charge, or to which he is attached,

[227] *Abdullah Ali Balsharaf and Ors. v. Directorate of Enforcement*, MANU/DE/0051/2019.
[228] *Innoventive Industries Ltd. v. ICICI Bank and Anr*, (2018) 1 SCC 407.

and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause a search to be made, for such thing in any place within the limits of such station.

2. *A police officer proceeding under sub-section (1), shall if practicable, conduct the search in person.*
3. *If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.*
4. *The provisions of this Code as to search- warrants and the general provisions as to searches contained in section 100 shall, so far as may be, apply to a search made under this section.*
5. *Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on the application, be furnished, free of cost, with a copy of the same by the Magistrate.*"

2. Section 17 PMLA

"*Search and seizure. —*

1. *Where [the Director or any other officer not below the rank of Deputy Director authorized by him for the purposes of this section,] on the basis of information in his possession, has reason to believe (the reason for such belief to be recorded in writing) that any person—*
   - *i. has committed any act which constitutes money-laundering, or*
   - *ii. is in possession of any proceeds of crime involved in money-laundering, or*
   - *iii. is in possession of any records relating to money-laundering, then, subject to the rules made in this behalf, he may authorize any officer subordinate to him to—*
     - *a. enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such records or proceeds of crime are kept;*
     - *b. break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (a) where the keys thereof are not available;*
     - *c. seize any record or property found as a result of such search;*

d. place marks of identification on such record or make or cause to be made extracts or copies therefrom;

e. make a note or an inventory of such record or property;

f. examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act:

[Provided that no search shall be conducted unless, in relation to the scheduled offence, a report has been forwarded to a Magistrate under section 157 of the Code of Criminal Procedure, 1973 (2 of 1974), or a complaint has been filed by a person, authorized to investigate the offence mentioned in the Schedule, before a Magistrate or court for taking cognizance of the scheduled offence, as the case may be.]

2. The authority, who has been authorized under sub-section (1) shall, immediately after search and seizure, forward a copy of the reasons so recorded along with material in his possession, referred to in that sub-section, to the Adjudicating Authority in a sealed envelope, in the manner, as may be prescribed and such Adjudicating Authority shall keep such reasons and material for such period, as may be prescribed.

3. Where an authority, upon information obtained during survey under section 16, is satisfied that any evidence shall be or is likely to be concealed or tampered with, he may, for reasons to be recorded in writing, enter and search the building or place where such evidence is located and seize that evidence: Provided that no authorisation referred to in sub-section (1) shall be required for search under this sub-section.

4. The authority, seizing any record or property under this section shall, within a period of thirty days from such seizure, file an application, requesting for retention of such record or property, before the Adjudicating Authority.

a) Paragraph 1 of Part A and Part B of the Schedule, a report has been forwarded to a Magistrate under section 173 of the Code of Criminal Procedure, 1973 (2 of 1974); or

b) *Paragraph 2 of Part A of the Schedule, a police report or a complaint has been filed for taking cognizance of an offence by the Special Court constituted under sub-section (1) of section 36 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985)*".

C. BAIL LAWS

1. The Right to Personal Liberty and the Need for Bail Laws

The right to personal liberty has been recognized as one of the most important human rights as it affects the vital elements of an individual's physical freedom. It has been recognized as a fundamental human right available to each individual by the Universal Declaration of Human Rights[229] (hereinafter, 'UDHR') as well as the Constitution of India.[230] The right to personal liberty and rule of law are also protected under Article 22 of the Indian Constitution which stands as a safeguard against arbitrary and indefinite detention.

Bail has been recognized as an important concept, in various international conventions and instruments, in safeguarding the freedom of an individual. Article 9 (1) of the International Covenant on Civil and Political Rights (hereinafter, ICCPR) too recognizes the right to liberty and security of a person as a basic human right. ICCPR further provides that the detention of persons awaiting trial should not be the general rule and they may be released subject to guarantees to appear for a trial or any other stage of judicial proceedings.[231]

The presumption of innocence of an accused is one the most important principles of criminal law jurisprudence according to which every individual charged with an offence has a right to be presumed innocent until proven guilty.[232] The detention of an individual before or during the trial, for a period which extends beyond the necessary limits, threatens this presumption of innocence. It is for this reason that bail becomes an important tool to safeguard the right of liberty of an individual who has not been held guilty of committing a crime.

- **Types of Bail**

The law on bail is broadly established on the following norms:[233]

(i) In bailable offences, bail is a matter of right.

(ii) In non-bailable offences, bail is discretionary.

[229] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 3.
[230] Constitution of India, 1950, Article 21.
[231] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 9(3).
[232] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 11; *Golbar Hussain v State of Assam*, (2015) 11 SCC 242.
[233] Law Commission of India, *Report on Congestion of Under-Trial Prisoners in Jails*, Report No. 78 (Feb, 1979).

(iii) If the alleged offence is punishable by death or imprisonment for life, the bail shall not be granted by the Magistrate.

(iv) The Court of Sessions and High Courts have a wider discretion in granting bail even when the alleged offence is punishable by death or imprisonment for life.

- **Bail in Bailable Offences**

Bailable offence means "*an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force*"[234] In the cases of bailable offences, the grant of bail is governed by Section 436 of the Cr.P.C which provides that bail in such offences is mandatory. Any individual accused of a bailable offence must be released if s/he is willing to provide bail and the only discretion available with the police officer in charge of a police station or the Magistrate is to release the accused either on a personal bond or with sureties.[235] The right to bail for bailable offences is an absolute and in-defeasible right and no discretion can be exercised as the words of Section 436 Cr.P.C are imperative and the person accused of an offence is bound to be released as soon as the bail is furnished.[236]

- **Bail in Non-Bailable Offences**

For a person accused of a non bailable offence[237], bail is not a matter of right and is subject to certain restrictions as mentioned under Section 437 of the Cr.P.C. It provides the Magistrates with the discretion to release such persons on bail. Further, in cases where the nature of the crime committed is grave and significant, pre-trial detention of the accused has been held to not offend the principles of natural justice.[238] However in denying the bail to an accused in a non-bailable offence the Court must exercise the discretion judicially.[239] In deciding whether the bail should be granted or not multiple factors such as nature and seriousness of the offence, character of evidence, reasonable possibility that the presence of the accused person cannot be

[234] The Code of Criminal Procedure, 1973, § 2(a).
[235] Law Commission of India, *Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail*, Report No. 268 (May, 2017).
[236] *Rasiklal v. Kishore*, AIR 2009 SC 1341.
[237] The Code of Criminal Procedure, 1973, § 2(a).
[238] *United States v. Salerno*, 481 U.S. 739 (1987).
[239] *Rao Harnarain Singh Sheoji Singh v. The State*, 1958 CriLJ 563.

secured at trial, reasonable apprehension of witness tampering and the larger interests of the public or State must be considered.[240]

- **Default Bail**

Default (or Statutory) Bail is governed by Section 167 of Cr.P.C. Persons who are detained for committing an offence and undergoing investigation are statutory eligible for bail under Section 167(2) of Cr.P.C after ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for not less than ten years if the investigating authorities fail to complete their investigation and file a charge sheet. Where the investigation relates to any other offence, the investigating authorities are required to complete the investigation within sixty days.

A person accused of an offence acquires an indefeasible right to be granted bail, if the investigation is not completed within the periods mentioned u/s 167(2) and the bail conditions are met.[241] If such a situation arises, any detention beyond the prescribed period is illegal and the Magistrate is therefore required to release the accused. The Hon'ble Supreme Court has further held that the right to statutory bail available under Section 167(2) is part of the '*procedure established by law*' under Article 21 of the Constitution and is therefore a fundamental right available to the accused to be released on bail once the conditions stipulated under Section 167(2) of Cr.P.C are fulfilled.[242]

- **Anticipatory Bail**

Under Section 438 of Cr.P.C, any individual who has a reason to believe that s/he may be arrested on accusation of having committed a non-bailable offence may file an application to the High Court or the Sessions Court for a direction that in the event of such an arrest s/he shall be released on bail.[243] However, the term 'anticipatory bail' is a misnomer as the bail is not granted by the Courts in anticipation of an arrest.[244] The grant of an anticipatory bail simply means that in the event of an arrest a person shall be released on bail.[245]

[240] *State v. Captain Jagjit Singh*, AIR 1962 SC 253.
[241] *Suresh Jain v. State of Maharashtra*, (2013) 3 SCC 77.
[242] *Bikramjit Singh v. State of Punjab*, 2020 SCC OnLine SC 824.
[243] The Code of Criminal Procedure, 1973, Section 438.
[244] *Balchand Jain v State of Madhya Pradesh*, 1977 AIR 366.
[245] *Id.*

It has been held in the case of *Gurbaksh Singh Sibba v State of Punjab*[246] that Section 438 Cr.P.C was enacted to protect those individuals who are implicated by their rivals in false cases for the purpose of disgracing them or detaining them for other reasons. However, while this provision was enacted to safeguard the personal liberty of an individual and the principle of presumption of innocence, it has been misused rampantly.[247]

Lacunas in the Current Bail Laws:

(a) Arbitrary Arrests by the Police

Section 41 of the Cr.P.C authorizes the police to arrest any person who is connected to any 'cognizable offence' or against whom a reasonable complaint has been made, or credible information has been received or a reasonable suspicion that s/he has committed a cognizable offence exists. It is the most frequently used provision for making arrests.[248] According to the reports made by the Law Commission of India, a major number of arrests in India are connected with minor prosecutions and are not necessary for crime prevention.[249] While section 41 A of the Cr.P.C was enacted to reduce the number of arrests by providing the police officer with the power to require the attendance of a person when his/her arrest was not necessary under 41(1), the same has failed to curb the problem of arbitrary arrests.

The main reason for arbitrary arrests made by the police is the wide discretion given to them under the provisions of the Cr.P.C. Section 41(1) of the Cr.P.C provides that a police officer 'may' effectuate an arrest, giving him full discretion to determine whether a particular case falls within the ambit of Section 41 or 41A. Further, the terms 'reasonable compliant', 'credible information' and 'reasonable suspicion' are not defined and remain subjective, providing enormous discretion to a police officer for making an arrest.

(b) Classification of Offences under the First Schedule of the Code of Criminal Procedure, 1973

Schedule 1 of the Cr.P.C categorizes the criminal offences based on two criteria (i) whether it is cognizable or non-cognizable and (ii) whether it is bailable or non-bailable. This classification of offences is important for the simple reason that the powers of arrest are

[246] *Gurbaksh Singh Sibba v State of Punjab*, 1980 AIR 1632.
[247] Law Commission of India, *Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail*, Report No. 268 (May, 2017).
[248] *Id*.
[249] Law Commission of India, *Report on The Code of Criminal Procedure, 1973*, Report No. 78 (1996).

severely curtailed in non-cognizable offences where police require a warrant from the Magistrate and the rights of an individual to bail are severely limited in non-bailable offences due to the stricter standards that are required to be fulfilled under S. 437 Cr.P.C. However, the Cr.P.C does not provide for a rationale with respect to this classification. While the Courts have held that the distinction between cognizable and non-cognizable offences is based on the gravity of offences,[250] the same has been contradicted by the Law Commission of India in its 177th Report. According to the report the classification of cognizable and non-cognizable offences is not based upon the quantum of punishment or the gravity of the crime but upon the need to arrest the person immediately for a relevant purpose.[251]

Schedule 1 classifies a large number of IPC offences as non-bailable offences thereby requiring the accused individual to fulfill the strict requirements under Section 437 of Cr.P.C. The distinction between bailable and non-bailable offences is largely based on the quantum of punishment prescribed for an offence.[252] However, this correlation for classification of an offence as bailable or non-bailable does not hold true for all classifications. For example, an offence under section 494 of the IPC i.e. 'Marrying again during lifetime of husband or wife' is punishable with up to seven years of imprisonment and is a bailable offence. However, an offence under section 498-A of the IPC i.e. 'Husband or relative of husband of a woman subjecting her to cruelty' is punishable with imprisonment up to three years but is a non-bailable offence.

(c) Arrest made upon the denial of an application for Anticipatory Bail

The proviso to Section 438 of Cr.P.C provides that

> "*where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this Sub-Section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.*"

This proviso which provides for permitting the arrest of the applicant, where the Court has not passed an interim order or has rejected the application for the grant of the anticipatory bail can result in an unwarranted restrain of a person, thus violating his right to personal liberty. An

[250] *Subbalakshmi v. State*, 1993 1 MWN (Cri) 268.
[251] Law Commission of India, *Report on law Relating to Arrest*, Report No. 177 (Dec, 2001).
[252] *Id.*

individual mainly approaches the Court for the grant of anticipatory bail to safeguard himself from the malafide motives of a complainant, who may seek to implicate him falsely in a criminal charge.[253] However by permitting arrest, merely on the ground that an interim bail is denied the application for anticipatory bail is rendered infructuous exposing the applicants to the possibility of getting apprehended. While there may exist a possibility of a real offender making false allegations of malafide to obtain the relief u/s 438 Cr.P.C, the proviso fails to make a distinction in this regard and strike the right balance.[254]

D. COMPOUNDING OF OFFENCES

- **Previous committee reports on the compounding of offences**

The Law Commission India discussed the topic of compounding of offences in Chapter 24 of the 41st report. According to the Commission, *"…The broad principle that forms the basis of the present scheme is that where the offence is essentially of a private nature and relatively not serious, it is compoundable".* The Committee was not much inclusive about the idea of forming a general rule that all offences which are punishable with the maximum imprisonment of three years or so shall be compoundable. *Inter alia*, the Committee recommended to make sections 354, 411, 414 of Indian Penal Code ("IPC") compoundable, provided that under Section 411 and 414 value of the property was not more than Rs.250. Moreover, the Committee was of the opinion that Section 374 (unlawful compulsory labor) should not be compoundable and this omission was duly observed in Cr.P.C., 1973 thus making the count of compoundable offences to 57, i.e., 21 in the first table and 36 in the second table.

In 1996, the 154th Law Commission Report opined that Section 324 IPC should be made compoundable upon the Court's permission and thereby shifted to sub-section (1). Further, this section was completely omitted from the list of compoundable offences in the amended act of 2005 without paying any heed to the recommendations given in the 177th Law Commission Report wherein the Committee had recommended its retention under sub-section (2). In the next decade, several changes were brought in the tables under Section 320 of Cr.P.C. as Section

[253] Law Commission of India, *Report on Section 438 of the Code of Criminal Procedure, 1973*, Report No. 203 (Dec, 2007).
[254] Law Commission of India, *Report on Section 438 of the Code of Criminal Procedure, 1973*, Report No. 203 (Dec, 2007).

354 IPC was omitted in the amended act of 2008. Further, Section 312 IPC was included under sub-section (2) of Section 320 Cr.P.C.

The Malimath Committee in 2003, strongly recommended for inclusion of other offences within the purview of compoundable offence. The committee observed that in addition to the offences prescribed in the Code as compoundable with or without the order of the court there are many other offences which deserve to be included in the list of compoundable offences. According to the Committee, the offences which are not of a serious nature and where the effect is mainly on the victim and not on societal standards of conduct, it is desirable to encourage amicable settlements without trial. The Committee felt that many offences should be added to the table in 320(1) of the Code of Criminal Procedure. The Committee further recommended that offences which are compoundable with the leave of the court, may be made compoundable without the leave of the court.

In 2011, the Law Commission of India in its 237th report dealt with the subject of compounding of offences wherein it mentioned that the idea behind compounding of offences is primarily to reduce the burden in the courts and move towards restorative justice. In achieving this, the idea of making as many offences compoundable as possible was duly followed paying respect to the constraints of providing justice to the victim.

Thus, the legislative discourse, judicial interpretation as well as different committees have continuously recommended the use of compounding mechanism within the Criminal Justice System. However, it becomes important to note that while these Law Commission reports have recommended either omission or addition of certain offences under Section 320, i.e., either making them compoundable or non-compoundable, they have failed to provide a stringent procedure of compounding or non-compounding an offence. Several questions in this regard remain unanswered, such as whether there is a need of an absolute procedure, whether such procedure be tested on the footholds of principles/opinions laid down in different judgments, and so on.

- **Scope of Victim Offender Mediation in Criminal Cases**

Introduction of Section 89 into the Code of Civil Procedure, the Arbitration and Conciliation Act, 1996 and the guidelines under *Salem Advocate Bar Association v. Union of India*[255] are some of the crucial instances in which the the importance of restorative justice has been highlighted. One of the leading initiatives taken in introducing mediation in criminal justice in various jurisdictions is of victim-offender mediation (also known as victim-offender dialogue) wherein the victim and the offender get an opportunity to discuss about the offender's crime, which is facilitated by a mediator in order to create a restorative agreement amongst the two parties. In India, there is no separate law which enables the victim to have their say in the criminal justice system and the two primary reasons for this can arguably be that *firstly*, the Code of Criminal Procedure has no scope for these kinds of practices. For, example, in relation to compensation, the procedural delays create impediments in providing timely justice to the victims. *Secondly*, the criminal justice system in India is not victim-oriented[256] and the victim's interests are not focused upon as compared to that of the state's.

Therefore, Victim Offender Mediation process brings up the interests of the victim by providing them with an opportunity to converse. This process is primarily considered in offences relating to property and petty crimes. Under this process, the victims are able to let the offenders know how the crime affected them and therefore create a situation wherein the offender can be held financially accountable for the loses they caused. The goal of this procedure is to provide speedy justice by creating a diversion from prosecution, assuming the mediation agreement is agreed upon. Since, in this process, generally, a party has clearly committed a criminal offence and has admitted doing so, the issue of deciding innocence and guilt does not come into the picture.

The existing research provides some underlying principles of Victim Offender Mediation which are below:

1. *"Presence of a neutral third party, like a mediator, helps to facilitate the discussion and can neutralize differences in status and power and provide an environment conducive to meaningful dialogue, especially in an emotionally intense situation.*

[255] *Salem Advocate Bar Association v. Union of India*, (2005) 6 SCC 344.
[256] G.S. BAJPAI, VICTIM IN THE CRIMINAL JUSTICE PROCESS: PERSPECTIVE ON POLICE AND JUDICIARY (Uppal Pub. House, 1997).

2. *The mediator's presence plays an important role in facilitating an open dialogue in which the parties are actively engaged and doing most of the talking. This "presence" is established through the mediator's verbal and non-verbal communication, tone of voice, expression of empathy, etc.*
3. *Providing choices to the parties whenever possible maximizes opportunities for them to feel empowered by the process.*
4. *The mediator's role is critical in a successful mediation. It is important for mediator to encourage conversation between the victim and the offender so that the parties can depict their situations directly and thus mediators should be cautious about intervening too frequently.*
5. *Discovering underlying needs and interests can enhance a collaborative effort and provide more satisfying results."*[257]

E. PLEA BARGAINING

The issue of pendency of cases in India is not a newfound discovery, but the figures that came to the surface in 2015 during the tenure of Chief Justice H L Dutta avidly revealed the pathetic conditions related to the pendency of cases in Indian courts. A number of high profile criminal cases in India were delayed to such an extent that the phrase, '*Justice delayed is justice denied'* seemed true. The pendency of cases in India is thus a grave concern and is of primary importance. To reduce delay in disposing of criminal cases the Law Commission of India in its reports has recommended the introduction of 'plea bargaining' as an alternative method to deal with huge arrears of criminal cases. The said reports [258] set out in extenso the rationale behind the concept of plea bargaining, its successful function in the USA and the manner in which it should be given a statutory shape in India. The Law Commission Reports recommended that the said concept be made applicable as an experimental measure to offences which are punishable with imprisonment of less than seven years and/or fine including the offences covered by sections 320 of the Indian Penal Code. It was also recommended that plea

[257] Mark S. Umbreit & Jean Greenwood, *Guidelines for Victim-Sensitive Victim-Offender Mediation: Restorative Justice Through Dialogue*, Center for Restorative Justice & Peacemaking, University of Minnesota. (April 2000).
[258] Law Commission of India, *Report on Concessional Treatment for Offenders who on their own initiative choose to plead guilty without any Bargaining*, Report no. 142 (Aug. 1991). See also, Law Commission of India Report no. 154 and Report no. 177.

bargaining can also be in respect of the nature and the gravity of the offences and the quantum of punishment. It was observed that the said facility should not be available to habitual offenders and to those who are accused of socio-economic offences of a grave nature and those accused of offences against women and children.

Accordingly, the draft Criminal Law (Amendment) Bill, 2003 was introduced in the parliament which became enforceable from July 5, 2006. It sought to amend the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1892 to improve upon the existing Criminal Justice System in the country, which is inundated with a plethora of criminal cases and overabundant delay in their disposal on the one hand and very low rate of conviction in cases involving serious crimes on the other. It introduced Chapter XXIA Section 265A to 265L and brought the concept of plea bargaining in India.

Plea bargaining has since been introduced to the Indian Legal System. The application for plea bargaining has to be filed by the accused in the court in which the offence is pending for trial.[259] However, offences affecting the socio-economic condition of the country and those offences committed against a woman or a child (a person below the age of 14 years) are excluded.[260] Furthermore, the law makes it mandatory to pronounce the judgement in open court.[261]

The Malimath Committee too has made recommendations for the plea-bargaining system in India. The committee said that it would facilitate the expedite disposal of criminal cases and reduce the burden of the courts. Moreover, the Malimath Committee pointed out the success of the plea-bargaining system in the USA to show the importance of Plea Bargaining.

The Law Commission in its 154th report specifically defines Plea Bargaining as,

> *"Plea bargaining in its most traditional and general sense refers to pre-trial negotiations between the accused, usually conducted by the counsel and the prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. It has two facets. One is "charge bargaining" which refers to a promise by the persecutor to reduce or dismiss some of the charges brought against the accused in exchange for guilty plea. The second one is "sentence bargaining" which refers to a promise by the*

[259] Code of Criminal Procedure, 1973 § 265B (1).
[260] Code of Criminal Procedure, 1973 § 265A(1)(b).
[261] Code of Criminal Procedure, 1973 § 265F.

prosecutor to recommend a specific sentence or to refrain from making any sentence recommendation in exchange for a guilty plea."[262]

Plea bargaining was first introduced in India by the Law Commission in its 142nd, [263] 154th [264] and 177th [265] Reports, and has now been present in the Indian legal system for a considerable amount of time. The traditional view on plea bargaining was the subversion of justice. Plea Bargaining in India has always been a controversial front due to a mixed reaction by the judiciary. Plea bargaining was not recognized by the court as it was considered to be against the public policy.[266] On one occasion, the Superme Court even stated that "(*plea bargains) please everyone except the distant victim, the silent society*"[267] On another occasion, the Court has challenged the morality of plea bargaining, on the ground that it pollutes the pure front of justice. [268]

In *Kirpal Singh v. State of Haryana*[269], a case involving S. 392 and 397 I.P.C. (minimum punishment of seven years of rigorous imprisonment by the law) it was held by the Supreme Court that the concept of plea bargaining can't be adopted to circumvent the minimum punishment prescribed by law. No court can by-pass the minimum limit of the sentence prescribed by law on the pretext that a pre-bargain was clinched by the accused on the assumption of a lesser sentence. This goes to show that the Indian Judiciary still hasn't accepted the practice of Plea Bargaining in its entirety. But the acceptance is underway in some ways — to avoid all the problems the Supreme Court observed that streamlined procedures should be devised if the state was to administer justice by recourse to Plea bargaining.

(a) Why Plea Bargaining was considered to be implemented

The Law Commission of India, in its 142nd Report, initially mooted the implementation of Plea Bargaining for those who plead guilty on their own volition but was careful to underscore that it would not involve any plea bargaining or "haggling" with the prosecution. Plea Bargaining

[262] Law Commission of India, *The Code of Criminal Procedure, 1973*, 154th Report (1996).
[263] Law Commission of India, *Concessional Treatment for Offenders who on their own initiative choose to plead guilty without Bargaining*, 142nd Report (1991).
[264] Law Commission of India, *The Code of Criminal Procedure, 1973*, 154th Report (1996).
[265] Law Commission of India, 177th Report on Law relating to arrest of law (2001).
[266] *Kasambhai Abdul Rehman Bhai Sheikh v. State of Gujarat*, (1980) 3 SCC 120.
[267] *State of Uttar Pradesh v. Chandrika*, AIR 2000 SC 164.
[268] Code of Criminal Procedure, 1973 § 265A(1)(b).
[269] *Kirpal Singh v. State of Haryana*, 1999 Cri LJ 5031 (SC).

was initially recommended in the 142nd, 154th and 177th reports of the Law Commission to address the grievances of people and the justice system when it came to disposal of criminal trials in the courts taking considerable time and that in many cases trials do not commence for as long as a period as three to four years after the accused was remitted to judicial custody. A large number of individuals accused of criminal offences have not been able to secure bail for one reason or another and have to languish in jails as under trial prisoners for years. It is also a matter of common knowledge that the majority of the cases ultimately end in acquittal. The accused have to undergo mental torture and also have to spend a considerable amount by way of legal expenses and the public exchequer has to bear the resulting economic burden. During the course of detention as under-trial prisoners, the accused persons are exposed to the influence of hardened criminals. Additionally, he accused have to remain in a state of uncertainty and are unable to settle down in life for a number of years awaiting the completion of the trial. Thus, the Law Commission felt that some remedial legislative measures should be introduced to reduce the delays in the disposal of criminal trials and appeals and also to alleviate the suffering of under-trial prisoners.[270]

(b) Benefits of plea bargaining listed by Law Commission of India[271]

1. *"It is not just and fair that an accused who feels contrite and wishes to make amends or an accused who is truthful and candid enough to plead guilty in the expectation that the society will encourage him to pay the punishment with a degree of sympathy and empathy for the crime should be punished at the same amount as an accused that claims to be prosecuted to the community at a greater time cost and financial cost.*
2. *In the reformatory provisions contained in section 360 of the Criminal Procedure Code and in the Probation of Prisoners Act, which remain virtually unused as of now it is desirable to infuse life.*
3. *It will assist the accused who has to remain as under-trial prisoners pending trial as well as other accused on whom the sword of an imminent trial stays hanging for years to receive speedy trial with attendant benefits such as—*
   a. *end of uncertainty,*
   b. *saving in litigation-cost,*

[270] Law Commission of India, *Report on The Code of Criminal Procedure 1973*, Report no. 154 (Aug, 1996).
[271] Law Commission of India, *Report on The Code of Criminal Procedure 1973*, Report no. 154 (Aug, 1996).

c. *saving in anxiety-cost,*
d. *being able to know his or her fate and to start of fresh life without fear of having to undergo a possible prison sentence at a future date disrupting his life or career,*
e. *saving avoidable visits to lawyer's office and to court on every date or adjournment.*

4. *It would reduce the back-breaking pressure of court proceedings which have already reached menacing proportions, without prejudice to the public interest.*
5. *In prisons, it would reduce congestion.*
6. *In the USA nearly 75% of the total convictions are secured as a result of plea-bargaining and implementing plea bargaining in India, could result in an ease in the burden on the cases pending in the courts.*
7. *Under the present system 75% to 90% of the criminal cases if not more, result in acquittals.*"

PART – III

RECOMMENDATIONS

A. FIRST INFORMATION REPORT

The main issue that arises with respect to Zero FIR is that the general public is not well aware of it and the police officials often refuse to register the same. They tell the victim and his/her family to approach the police station that has a jurisdiction over the particular case. Section 166A of the Indian Penal Code states that a police officer who refuses to register FIR (related to offences against women) can be punished with imprisonment up to 1 year or fine or both.

Section 460 of the Cr.P.C lays down a list of irregularities which do not vitiate legal proceedings. Clause (e) states that if a Magistrate takes cognizance of an offence under Section 190 (a) or (b), even though he may not be empowered by law to do so, it would not prove to be frivolous. These sections essentially constitute the legal basis of a Zero FIR as of today, since no explicit provisions have been added to the Cr.P.C.

The First Information Report has a pivotal role in the Indian Criminal Justice System. Though certain amendments are required to be made. The concept such as Zero FIR needs proper implementation and specific provisions under the Code of Criminal Procedure. The States must implement rules on the central law for the implementation of the same and the penalization on the police officer who rejects filing such FIR must be stringent. The FIR must also be made mandatory in offence under the Prevention of Money-laundering Act not only in relation to schedule offences but also in relation to money laundering offences.

B. SEARCH AND SEIZURE

- ***Powers of the police***

It the responsibility of the Police to maintain law and order and to follow all the directions prescribed in the warrant, for the search and seizure procedure. However, there have been cases where the Police have crossed their boundaries and violated the rights of the people. Section 102 of the Cr.P.C. provides the police officers with the power to seize certain property.[272] According to Cr.P.C., there are certain procedures that the Police officer has to follow while

[272] The Code of Criminal Procedure, § 102.

searching and seizing any property if the said property raises any kind of suspicions. This has to be reported to the senior officer who is in charge of the police station. Every police officer shall immediately report the seizure to the Magistrate with jurisdiction. If the confiscated property cannot be transferred to the Court, the police officer may give its custody to any person on his execution of a bond undertaking to deliver the property before the Court as and when appropriate and to give effect to the Court's further orders as to the disposition of the property.

Since the power to perform a search and seizure procedure is an essential power, the officer and the senior officials should use such powers responsibly and should not act in an arbitrary manner. However, the police officers to conduct inquiries, arrest people, conduct searches and conduct seizures of persons and their property, use appropriate force in the line of duty. Yet the powers given to them must be exerted within the limits of the law as there might be a chance of jeopardizing the admissibility of the evidence collected.

- ***ED***

The powers of the Enforcement Directorate can be used arbitrarily and are therefore required to be restricted in their scope. The Enforcement Directorate is obliged to establish that defence is not prejudiced in any way. Any discrepancies, contradictions and vagueness apart from non-adherence to principles of natural justice has not affected the due process of fair investigation and trial. Sufficient evidence and a reason to believe must exist before sending a show-cause notice. The power to provisionally attach, seize or freeze a property can only be exercised if the officer has enough material in his possession with a reason to believe and only after recording the reason in writing that such property is 'proceeds of crime' or related to crime.[273] The parliament did not bestow upon the ED any powers to attach or freeze assets on mere suspicion. The authorities should abide by the legal provisions provided and should not be arbitrary. After the inquiry and investigation, if no charges are found against the suspect, the ED is liable to return the confiscated money and property back to him.

[273] *Abdullah Ali Balsharaf and Ors. v. Directorate of Enforcement*, MANU/DE/0051/2019.

C. Bail Laws

- **Bail should be available as a matter of Rule**

The Supreme Court in the case of *State of Rajasthan v. Balchand alias Baliya*[274] laid down the principle that bail is the rule and jail is the exception. However, for a non-bailable offence the bail is not granted as a matter of right and consideration is given to factors such as the nature and seriousness of the offence; the character of the evidence; position and the status of the accused person with reference to the victim and witnesses; the likelihood of the person accused of an offence to flee from justice; the likelihood of accused repeating the offence and the likelihood of the accused to jeopardize his own life or tamper with the witness among others.[275]

It is recommended that reliance should not be placed on these factors merely for the reason that an individual is accused of a 'non-bailable offence'. Instead, the Courts must examine the facts of each case and bail should be denied only if 1) the crime committed is of the category of rarest of rare cases and directly affects the collective conscience and moral fabric of the society or 2) if there is a reasonable apprehension that the accused can abscond from justice or thwart the course of the same – through tampering with evidence or intimidating the witnesses, etc.

Further, Section 437(4) provides that:

> *"An officer or a Court releasing any person on bail under sub- section (1) or sub- section (2), shall record in writing his or its [1] reasons or special seasons] for so doing."*

The provision does not require that the reasons be recorded if a bail application is denied. It is therefore recommended that the provision should be amended to require that specific reasons be recorded upon the grant OR the denial of bail by a police officer or the Court.

- **Classification under the First Schedule of the Code of Criminal Procedure, 1973**

While the classification of offences under the First Schedule makes a distinction between bailable and non-bailable offences largely on the grounds of the quantum of punishment, the criteria are not followed consistently. Notwithstanding anything in the suggestions made under the previous heading, it is therefore recommended that the classification of the offences as bailable or non-bailable should follow a more consistent correlation with the term of imprisonment for the same.

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[274] *State of Rajasthan v. Balchand alias Baliya,* (1997) 4 SCC 308.
[275] *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179.

- **Arrests**

The arrest of an individual results in the curtailment of his/her liberty and therefore the power of arrest must be exercised by the police rationally and reasonably. The Hon'ble Supreme Court has held that the power of arrest should not be exercised in a routine manner and that no arrests should be made without conducting an investigation as to the *bona fides* of a complaint. [276] Furthermore, the ICCPR too provides that pre-trial detention of an individual must be an exception[277] and any individual who is so deprived of his liberty must be brought before a court, without delay, so that the lawfulness of his detention may be determined.[278]

In order to safeguard the individuals against the arbitrary exercise of power under Section 41 Cr.P.C, an addition should be made to the provision making it mandatory for the Investigating Officer to record the reasons prior to making the arrest in the Case Diary as well as the Daily Diary Register. Further, any arrest made by the Investigating Officer should also require the written approval of the Officer in Charge of the Police Station.[279] Additionally, the scope of the terms '*reasonable compliant*', '*credible information*' and '*reasonable suspicion*' should be defined under this section so as to curtail the discretionary power available with the police and in turn, curb the problem of arbitrary arrests.

Under Section 50 Cr.P.C, an arrested individual is required to be informed of the grounds of arrest and the right of bail. In order to ensure that such communication is made to the arrested individual and the person understands the same, Section 50 should be amended to require that where possible, the arrestee is informed of the grounds of arrest and the right of bail in writing, in a language that s/he understands.

Section 170(1) of the Cr.P.C provides that:

> *"If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take*

[276] *Joginder Kumar v State of Uttar Pradesh*, AIR 1994 SC 1349.
[277] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 9(3).
[278] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 9(4).
[279] Law Commission of India, *Report on* Amendments *to Criminal Procedure Code, 1973 – Provisions Relating to Bail*, Report No. 268 (May, 2017).

cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed."

The language of this section connotes that where the offence is non-bailable in nature an arrest is required to be made mandatorily. The section is therefore required to be amended so as to remove this connotation.

- **Section 436 A of the Code of Criminal Procedure, 1973**

Section 436 of the Cr.P.C provides:

"Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with

or without sureties;

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties."

In light of the fact that a majority of the prisoners in India are undertrials, it is recommended that the mandatory period of detention that is to be served before an inmate is released under Section 436 of Cr.P.C be reduced to one-third of the maximum period of imprisonment specified for the offence.

It is also recommended that the mere fact that an individual is charged with an offence which has 'punishment of death' specified as one of the punishments should not bar the individual from claiming the relief present under this provision. The grant of bail after the exhaustion of the pre-decided term of imprisonment should be determined on a case-to-case basis depending on the facts of each case and the behavior of the accused. Furthermore, the Court should only order the continued detention of an accused under the first proviso in rarest of rare cases.

- **Anticipatory Bail**

The proviso to Section 438 Cr.P.C should be repealed and the mere rejection of an application for anticipatory bail should not directly permit the officer in-charge to arrest the applicant. An arrest after the rejection of the application should be governed by Section 157(1) Cr.P.C. Therefore. an arrest should be made only if the officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under Section 156 Cr.P.C to investigate.

The Law Commission had recommended that the anticipatory bail must be granted only in very exceptional cases. This view also has been upheld by the Apex Court.[280] However, given the rampant misuse of the provision, it is recommended that certain safeguards be added to prevent the same. Any initial order made under Section 438 should be made an interim order. The final order should only be made after a notice has been served to the Public Prosecutor (as provided for u/s 438 1(A) of Cr.P.C).

E. COMPOUNDING OF OFFENCES

Over the decades, the effect of compounding of offences has proved to give the authority to the parties in disputes to decide their course of action. The ultimate purpose of every law is to do justice between parties. The current penological trend and thought are to impress upon parties to settle their disputes amicably and the underlying purpose behind this approach has not only been to reduce arrears of cases but also to restore peace in society. There are certain offences which affect the crucial interests of society, and therefore, compromise in such cases cannot be allowed. However, there are many offences which can be allowed to be compounded with the permission of the court but such offences do not find a mention in the present list under section 320.

Moreover, compounding of offences in itself will not serve the purpose until the victims are informed about such provisions in the procedural laws. Therefore, it is recommended that state pieces of machinery like state legal services authority, victim's legal advisor and judges should make victims of an offence, aware of such provisions in the law. Judge's role in making the ultimate decision and adopting a restorative option in deciding a particular case bestows on

[280] *Balchand Jain v State of Madhya Pradesh*, 1977 AIR 366; *Gurbaksh Singh Sibba v State of Punjab,* 1980 AIR 1632

him/her certain powers so that they can remove any legal discrepancies in the settlement reached by the parties. Additionally, in certain jurisdictions where the model of Victim Offender Mediation is adopted, a similar kind of responsibility falls upon the mediator to be neutral and to adopt an approach of restorative justice. Thus, compounding of offences can also be instrumental for providing restorative justice to the victims where they themselves settle their cases. Moreover, the introduction of dispute resolution model (such as Victim-Offender Mediation) in criminal cases (to the case of certain offences) can prove effective in saving ample amount of time in litigation and also providing justice to the victim by making the criminal justice system more victim-centric.

E. Plea Bargaining

- **Power of public prosecutor to initiate plea bargain**

In America, the prosecutor has the power to initiate plea bargaining proceedings as opposed to India where the accused has the same power. According to some studies[281], victim's participation in plea bargain negotiations has been shown to contain their vengeful instincts, decrease their assessment of the system being too lenient on criminals and inculcate of the feeling of fairness in the whole process. Increased victim satisfaction will, in effect, enhance the efficiency of the Criminal Justice System by ensuring his future support to the system.

It is suggested that the power of initiating plea bargaining for accused should be given to the prosecutor instead. The prosecutor being aware of the law can analyse whether it would be beneficial to initiate plea bargaining proceedings for the accused or not. There are times that, though an offense is technically a crime, the prosecutor may feel that under the particular circumstances it is not appropriate to subject the defendant to the harsh punishment that is spelt out for the offense. The prosecutor may then charge the defendant with a less serious offense to avoid the harsh penalty. Furthermore, to bring the accused to an equal footing, regardless of the the opinion of the prosecutor, the accused should be empowered to request the initiation of plea bargain proceedings.

[281] Justice Malimath Committee, *Report of the Committee on Reforms of Criminal Justice System* (2003).

- **Mandate plea bargain before court proceedings**

  French law classifies criminal offences into three categories: contraventions (minor offenses), dilits (intermediate offenses), and crimes (serious offenses)[282]. Corresponding to the three types of offenses, there are three first-instance trial courts. Contraventions are tried in the Police Court; dilits are tried in the Correctional Court; and crimes are tried in the Assize Court. The pretrial screening process differs depending on the type of offense involved and the court in which the prosecution is to be instituted. The law mandates a stringent pretrial screening for cases to be tried as crimes in the Assize Court. Once a decision is made that a case is to be tried in the Assize Court, the prosecutor must send the case to the examining magistrate for a judicial investigation.

  It is suggested that India too should adopt the method of pretrial screening for cases to segregate the grave crimes from the trivial ones before going to trial. Given the fact that all cases go to trial results in a backlog in the courts and the accused have to wait for years for their trial. If there is segregation, it would ease the burden on the Courts and streamline the cases that actually go for trial. Furthermore, this would enable Courts to determine in which cases plea bargaining proceedings can be initiated as a matter of procedure.

- **Proper definition for heinous crimes under Plea Bargaining**

- There is no set definition given under heinous crimes and crimes against women and children that are exceptions to plea bargaining which then makes it a vague aspect. Although it is ultimately the court's decision as to whether a crime can be considered for plea bargaining or not, it burdens the court and the judges to evaluate each and every case and its eligibility for plea bargaining. It is therefore recommend that such crimes whoich do not allow the accused avail plea bargaining should be properly defined.

- **Public prosecution**

  It suggested that a new post, Director of Prosecution, be created in every State to facilitate effective coordination between the investigating and prosecuting officers under the guidance

[282] Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany and Italy: A comparative perspective*, 12, INTERNATIONAL CRIMINAL JUSTICE REVIEW (2002).

of the Advocate General. Furthermore, the appointment of Assistant Public Prosecutors and Prosecutors, it should be made through competitive examination.

- **Courts and Judges**

  Since under Cr.P.C, Section 256B the court is responsible for determining whether the application has been filed by the accused voluntarily, the court and the judges need to be impartial and just. The National Judicial Commission must have clear guidelines on precise qualifications, experience, qualities and attributes that are needed in a good judge and also the prescription of objective criteria to apply to the overall background of the candidate. The higher courts, including the Supreme Court, should have a separate criminal division consisting of judges who have specialized in criminal law. Further, the Malimath Committee has suggested that every court should keep a record of the timestamps such as date of conclusion of arguments, date of pronouncement of judgment, and so on, which may be prominently displayed.

CONCLUDING REMARK

The recommendations of the provisions of the Code of Criminal Procedure seek to achieve the end goal of ensuring exercise of rights of individual to promote social justice in the community.

In light of the same, it is important to identify several inalienable rights like that of Right to Liberty, which each individual is granted. It therefore becomes imperative for the State to protect the same. While a number of provisions have been introduced by the Legislation of our country to safeguard this right, the statistics in India paint a very grim picture when it come to the liberty of the accused. While the State is certainly required to balance the right of freedom of an individual with the Society's interests, the same should not come at the cost of imprisoning the accused as a rule. The Police Officers and the Courts should uphold the principle of 'Bail is rule and jail is the exception'.

Moreover, the powers of the police and ED under both Cr.P.C and PMLA are required to be confined or more rules and regulations need to be enacted so as to protect the innocent civilians

from any harassment during the search and seizure procedure conducted by the state officials. Additionally, in cases of compounding of offence, a proper procedure is necessary in order to qualify certain offences under IPC as compoundable or non-compoundable. It for these reasons that the above-mentioned recommendations to the provisions of Cr.P.C become relevant.

C: Prevention of Corruption Act, 1988

CONTENTS

PART – I

INTRODUCTION

The contemporary history of civil society is tainted with the shame of corruption. The Latin word '*Corruptus'* signifies '*to break or devastate*'. Black's law dictionary defines corruption as an act, done with the intent to give some advantage inconsistent with official duty and the rights of others. Without a widespread or a nonexclusive definition, a well-known verbalization has clarified it as maltreatment of public power for private increases.

Corruption is additionally (and particularly) a moral issue. The ruler, government worker, director or representative who, by acting against the obligations of his position, enters a circumstance, such as those portrayed above, is acting unjustifiably to his head and isn't satisfying the obligations that relate to his position. It is basic for this shamefulness to likewise influence others or organizations.

Amongst other legislations like the Indian Penal Code, 1860, the Prevention of Money Laundering Act, 2002, the Benami Transactions (Prohibition) Act, 1988, the Prevention of Corruption Act, 1988 penalizes public servants in India for corruption. The Prevention of Corruption Act, 1988 ("PCA") broadens the scope of 'public servant' from the definition given under the Indian Penal Code, 1860.

The PCA punishes public servants for taking gratification other than his/her legal remuneration in respect of an official act, for taking gratification to influence the public by illegal means and for exercising his/her personal influence with a public servant, for accepting a valuable thing without paying for it or paying inadequately from a person with whom he/she is involved in a business transaction in his official capacity. Notably, it is necessary to obtain prior sanction from the central or state government in order to prosecute a public servant. India is also a signatory to the UN Convention against Corruption since 2005 (hereinafter referred as the "UNCAC"). UNCAC[283] covers a wide range of acts of corruption and also proposes certain

[283] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422.

preventive policies. There are four elements which are found to be missing in the Prevention of Corruption Act, 1988 and the Prevention of Corruption (Amendment) Act, 2018. The following report deals with the four elements which are missing in the Prevention of Corruption Act, 1988 and its subsequent amendment. They are:

1. Illegal Gratification of Private Entities,
2. Preventive Anti-Corruption Policies,
3. Witness Protection,
4. Habitual Offenders.

A. Illegal Gratification of Private Entities

An international cooperative initiative is the United Nations Convention against Corruption[284], marked in 2003, which came into force in December 2005. This is the first principal worldwide instrument to prevent and battle corruption on an expansive global accord.

The Prevention of Corruption Act, 1988 as well as the Prevention of Corruption (Amendment) Act, 2018 do not provide for prosecution of corrupt practices amongst private entities such as payments made beyond a contract, or payments made to fraudulently secure contracts in the private sector which could have a far-reaching impact on public interest. The UNCAC and most matured jurisdictions have legislated for the prosecution of private parties for illegal gratification such as making or accepting payments beyond a contract or fraudulent payments made to secure contracts. Further, contrary to more matured jurisdictions like the US and UK dealing with bribery of foreign public officials, the PCA does not recognize illegal gratification paid to foreign government officials or officials of a public international organization. This has been an obvious departure from the UNCAC which specifically prohibits giving undue advantage to any foreign public official or official of a public international organization.

B. Preventive Anti-Corruption Policies

Corruption is widely considered as one of the biggest challenges to socioeconomic development and political economies globally, as it disturbs competitive markets and contributes to the misallocation of assets and also violates the rule of law, public trust in

[284] *Id.*

politicians, public servants and business leaders. There can be no question that corruption has a destructive and debilitating impact in the global business sector and trade.[285]

Thus, it becomes highly important to implement policies that keep corruption in control and help eradicate it. Preventative Anti-Corruption Policies aid in doing so. It sets the expected basic behavioural conduct of all employees and board members, public officials, along with the role of the company and the government on taking advantage of and managing conflicts of interest. Currently, the Prevention of Corruption Act, 1988 or the Prevention of Corruption (Amendment) Act, 2018 do not contain any Anti-Corruption Policy, and it is greatly needed to aid and prevent corruption in India.

C. Witness Protection

Time and again, in its judgments, the Supreme Court has been persistent on the importance of 'witness protection'. In the case of *National Human Rights Commission v. State of Gujarat and Ors* [286], the Hon'ble Apex Court duly acknowledged the importance of witness protection and highlighted the role to be played by the State in this regard. In the case of *Rajubhai Dhamirbhai Baria and Ors. v. The State of Gujarat and Ors*[287], the Bombay High Court stressed on the State's role to evolve a machinery for the purpose of giving protection to the witnesses in sensitive matters.

In the case of *Mahender Chawla & Ors. Vs. Union of India & Ors*[288], the Supreme Court approved the first Witness Protection Scheme drafted by the union government, namely the Witness Protection Scheme, 2018[289] and directed the Centre, States and Union Territories to enforce it in letter and spirit. Considering the absence of a statutory regime, the Supreme Court duly adopted the Scheme and declared it to be the law, under Article 141 of the Constitution[290], until a suitable law in this regard was framed. However, legislation has not yet been brought

[285] *Combating Corruption*, THE WORLD BANK (Oct 4, 2018) https://www.worldbank.org/en/topic/governance/brief/anti-corruption.
[286] *National Human Rights Commission v. State Of Gujarat & Ors*, Writ Petition (Crl.) No. 109/2003.
[287] *Rajubhai Dhamirbhai Baria and Ors. v. The State of Gujarat and Ors*, 2012 (114) BomLR 3549.
[288] *Mahender Chawla & Ors. Vs. Union of India & Ors*, (2016) SCC OnLine SC 1778.
[289] Witness Protection Scheme, 2018, https://www.mha.gov.in/sites/default/files/Documents_PolNGuide_finalWPS_08072019.pdf.
[290] Constitution of India, 1950.

about in this regard. There is no mention of 'witness protection' under the 1998 Act[291] and the 2018 Amendment Act.[292] The 2018 Amendment is sought to be in line with the 'United Nations Convention against Corruption', which was ratified by India in 2011.

Although one section of the 1998 Act did come close to providing 'protection to witnesses' in certain conditions where the witnesses don't come forward in fear of getting indicted themselves, it was removed by the 2018 Amendment. Section 24 of the 1988 Act provided protection to the 'offeror of the bribe' from prosecution if they come forward during the trial and make a statement against a public servant in any ongoing proceedings.[293] However, as this section has been deleted from the 1988 Act by the Amendment, currently there is no provision of 'witness protection' under the Act.

The Whistle Blowers Protection Act, 2014 enables any person (i.e., a whistle-blower) to report an act of corruption, wilful misuse of power or discretion, or criminal offence by a public servant. However, as the Centre wants the 2015 Amendment[294] to be passed, the 2014 Act[295] is not in force right now[296]. Borrowing these provisions to the PCA would be helpful for 'witness protection' until the Amendment is passed, or the Centre allows the 2014 Act to be in force.

D. Habitual Offenders

According to Prevention of Corruption Act, 1988, a habitual offender is someone who habitually takes rewards to either influence a public servant or abets in the taking of a bribe, along with the guilt of the accused which would be presumed for the following 3 offences: i) taking a bribe, ii) being a habitual offender and iii) for abetting an offence. Further, such a presumption of guilt would not apply if the reward obtained is considered 'trivial' by the

[291] The Prevention of Corruption Act, 1988.
[292] Prevention of Corruption (Amendment) Act, 2018.
[293] The Prevention of Corruption Act, 1988, §24.
[294] The Whistle Blowers Protection (Amendment) Bill, 2015.
[295] The Whistle Blowers Protection Act, 2014.
[296] K Giriprakash, *Why India's whistleblower protection programme is not as effective as that in the US*, BUSINESS LINE (Oct 25, 2019), https://www.thehindubusinessline.com/companies/why-indias-whistleblower-protection-programme-is-not-as-effective-as-that-in-the-us/article29794564.ece; Rupinder Malik, *Anti-corruption & Bribery in India*, LEXOLOGY JSA, (Jan 9, 2019), https://www.lexology.com/library/detail.aspx?g=17185ebc-cfd3-4f76-a504-edf12b3361a3.

court.[297] Under this Act, the persons who have committed offences mentioned under Section 14, i.e. habitual committing offences under Sections 8, 9 and 12, are liable to be punished with an imprisonment of five years which may be extended up to ten years of imprisonment. Additionally, the offender shall also be liable to pay a fine as directed by the court in this regard. Here only a minimal term of punishment was provided, which was insufficient in effectively controlling the evil of corruption.

Section 14 of the Prevention of Corruption (Amendment) Act 2018, talks of committing any offence under the Act by a person who has previously been convicted. However it does not specify whether the individual is a habitual offender or not. The guilt of the accused would be presumed only for the offence of taking a bribe, as the Act amends this provision only to cover the offence of taking a bribe or accepting an undue advantage. The burden of proof is shifted to the prosecution for persons accused of being habitual offenders and abetting an offence.[298]

[297] The Prevention of Corruption Act (Amendment) Bill, 2013.
[298] Anshul Prakash et.al., *Prevention of Corruption (Amendment) Act 2018- Booster for the Honest or the Corrupt*?, MONDAQ (Aug 2, 2018). https://www.mondaq.com/india/white-collar-crime-anti-corruption-fraud/724856/prevention-of-corruption-amendment-act-2018-booster-for-the-honest-or-the-corrupt

METHODOLOGY AND APPROACH FOR RESEARCH

For conducting this research, the researchers have used the secondary method of research including books, articles, economic reports, websites, and newspaper reports. Secondary research or desk research is a research method that involves using already existing data. Existing data is summarized and collated to increase the overall effectiveness of research. Secondary research includes research material published in research reports and similar documents. These documents can be made available by public libraries, websites, data obtained from already filled in surveys etc. Some government and non-government agencies also store data that can be used for research purposes and can be retrieved from them. Various law reports and reviews have been used for the researhcers for a better and deep understanding of the study.

PART – II

ABOUT THE ACT

The Prevention of Corruption Act, 1988 was constructed for the more effective prevention of bribery and corruption. It was aimed at making anti-corruption laws more effective by widening their coverage and by strengthening the provisions to make the overall statute more effective.

LACUNAS

A. Illegal Gratification of Private Entities

i. The Prevention of Corruption Act, 1988 or the Prevention of Corruption (Amendment) Act, 2018 do not provide for prosecution of corrupt practices amongst private entities such as payments made beyond a contract, or payments made to fraudulently secure contracts in the private sector which could have far-reaching impact on public interest, i.e. illegal gratification of private entities.

ii. Further, the Acts do not recognize illegal gratification paid to foreign government officials or officials of a public international organization.

B. Preventive Anti-Corruption Policies

i. The Prevention of Corruption Act, 1988 and its Amendment do not contain Preventive Anti- Corruption Policies.

ii. Compliance programmes are not mandated for companies.

C. Witness Protection

i. There exists no provision for Witness Protection under the Prevention of Corruption Act, 1988 or its Amendment as the 2018 Amendment omitted Section 24 of the 1998 Act which gave protection to bribe offerors from persecution. Such provisions have to be added in this Act.

ii. The currently existing **'Witness Protection Scheme, 2018'** and the **'The Whistle Blowers Protection Act, 2014'**, which have dealt with 'Witness Protection' have a number of lacunas and thus adopting the provisions as they are would prove to be counter-productive.

- **Witness Protection Scheme, 2018[299]**
  - The scheme mainly focuses on the protection of the witness, concealment of the identity of the witness and other measures for protection. It does not dwell into public interest disclosures against acts of corruption or wilful misuse of power by public servants.
  - There is a drawback with respect to the time frame of protection provided. The scheme has limited the scope of protection for three months at a time.[300] This renders it redundant as the possibility of threat from the accused cannot be eliminated once protection is terminated. Witness protection should be provided until the threat has ceased to exist.
  - Though the scheme is committed to protecting the identity of witnesses by maintaining the confidentiality of personal information, it does not penalize any violation of the said provision, as is done partly by Section 16 of the Whistle Blowers Act, 2014. The said section penalizes 'the person who reveals the identity of the complainant' and not the witness. An effective deterrent must be put in place to prevent the disclosure of such sensitive information

[299] Witness Protection Scheme, 2018. https://www.mha.gov.in/sites/default/files/Documents_PolNGuide_finalWPS_08072019.pdf.
[300] Bhawna Gera & Kashish Makkar, *Due to major loopholes, the witness protection scheme does not instil confidence*, The Telegraph, (Sept 14, 2020, 11:07 AM), https://www.telegraphindia.com/opinion/due-to-major-loopholes-the-witness-protection-scheme-does-not-instil-confidence/cid/1685139.

- Also, under the Scheme, after the threat categorization has been done, the Competent Authority directs the Witness Protection Cell (WPC) to take steps for protection of the witness. However, there is always a possibility of corruption in case of the Police Officers involved in the WPC especially in high-profile cases.
- The Witness Protection Scheme does not prohibit and protect against victimization by way of malicious prosecution against the witness.

- **The Whistle Blowers Protection Act, 2014**
  - The Whistle Blowers Protection Act, 2014, although sufficient against acts of corruption and wilful misuse of power by public servants, does not really focus on 'witness protection' in detail.
  - While Section 11, 12 and 13 of the Act[301] contain provisions for 'protection of witnesses', it just states that 'the Competent Authority will issue appropriate directions to the concerned Government authorities (including police) which shall take necessary steps. There is no elaboration as to what this will entail.

D. Habitual Offenders

i. The word 'habitual offender' is not mentioned under the Prevention of Corruption (Amendment) Act, 2018, instead it has been substituted under Section 14, which was previously mentioned under Section 14 of the 1998 Act.

ii. There is no mention as the type of bribe that has been given or taken by the offenders.

[301] The Whistle Blowers Protection Act, 2014.

SUMMARY AND RECOMMENDATIONS

A. Illegal Gratification of Private Entities

While the Prevention of Corruption (Amendment), Act, 2018 under Section 9(1) does enable the Central Government to prescribe guidelines to be put in place for compliance by such an organization, the absence of guidelines at present could lead to considerable uncertainty in order to determine what would be seen as "*adequate procedures*" and considerable subjectivity in the enforcement of the statute.

Original Section 9(1) of the Amended Act:

"9. ***Offence relating to bribing a public servant by a commercial organisation***. - *(1) Where an offence under this Act has been committed by a commercial organisation, such organisation shall be punishable with fine if any person associated with such commercial organisations gives or promises to give any undue advantage to a public servant intending -*

a) to obtain or retain business for such commercial organisation; or

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"*** *in compliance of such guidelines as may be prescribed to prevent persons associated with it from undertaking such conduct.*"

Suggested Amendment:

The term ***"adequate procedures"*** should be defined in compliance with the provisions of the UK Bribery Act, 2010.

B. Habitual Offenders

Original Section 14 of the Amended Act:

"14. Punishment for habitual offender - *Whoever convicted of an offence under this Act subsequently commits an offence punishable under this Act, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to ten years and shall also be liable to fine."*

Suggested Amendment:

14. Punishment for habitual offender - Whoever convicted of an offence under this Act ***"who is a habitual offender"***, shall be punishable with imprisonment for a term which shall be not less than five years but which may extend to ten years and shall also be liable to fine.

PART – III

AMENDMENTS

Explanation related to every suggested amendment.

A. Illegal Gratification of Private Entities

1. While Section 9 of the Amended Act does enable the Central Government to prescribe guidelines to be put in place for compliance by such an organization, absence of guidelines at present could lead to considerable uncertainty to determine what would be seen as ***"adequate procedures"*** and considerable subjectivity in the enforcement of the statute.

2. The UK Bribery Act's Six Principles provides an outline for an anti-corruption compliance system that establishes 'adequate procedures' to prevent a person from bribing on the company's behalf including *proportionality, tone at the top, risk assessment, due diligence, communication, monitoring and review,* used as a valid defence.[302] India needs to follow the same without any further delay and publish guidelines to determine the ***"adequacy of procedures"***.

B. Habitual Offenders

There has to be a specific term in order to distinguish whether the person convicted is a ***"one-time bribe taker"*** or a ***"habitual offender"***. The term ***"habitual offender"*** should also be defined in Section 2 of the Act.

[302] Bribery Act, 2010.

Comparison with international conventions and laws

A. Witness Protection

- **United Nations Convention against Corruption, 2004**

i. **Article 32** of the UNCAC[303] contains provisions for the protection of witnesses, experts and victims and **Article 33** contains provisions for reporting persons.

ii. Under **Article 32**, each State Party has been directed to take appropriate measures (including entering into agreements or arrangements with other States) within the ambit of the domestic legal system to provide effective protection from potential retaliation or intimidation for witnesses, experts and victims (**Article 32.1**). The Witness Protection Scheme, 2018 covers these provisions.

iii. Under **Article 32.2(a)** and **Article 32.2(b**), Member States should a) Establish procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons and b) Provide evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means. The Witness Protection Scheme, 2018 covers these provisions.

iv. Under **Article 33**, each Member State shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention. This is quite similar to Section 24 of the Prevention of Corruption Act, 1988 which was omitted in the 2014 Amendment.

- **Foreign Corrupt Practices Act, 1977**

[303] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422.

The Foreign Corrupt Practices Act, 1977, which is the equivalent of the Prevention of Corruption Act, 1988 in the USA does not have a provision for 'witness protection'. However, there are separate legislations for 'Witness Protection' in the USA.

Two legislations namely the 'Witness Security Reform Act, 1984' and 'Section 3251 of the United States Code, 2006' [304] contain provisions of 'Witness Protection' in the USA.

- **Witness Security Reform Act, 1984**

i. The Witness Security Reform Act, 1984, sets forth the procedures by which a government attorney may apply for the services of the Program in order to protect a witness against dangers that may be related to the witness's testimony.

ii. The criteria for a witness to be placed in the Witness Protection Programme are provided under Title 9 in Section 9-21.100 of the Act[305].

iii. The Act entails collection of information of the witness to the suitability of a witness for inclusion in the Program, information like the threats against the witness, the witness's criminal history, and a psychological evaluation of the witness, subsequent to which the Attorney General is required to make a written assessment of the risk faced by the witness.

iv. The US Department of Justice is obligated to provide for the safety and welfare of a protected witness and family members long after the witness has testified. It is imperative, therefore, that the request for entry of a witness into the Program be made only after the sponsoring attorney has determined that the witness's testimony is significant and essential to the success of the prosecution.

v. The provision for the relocation of Witnesses is given under Section 9-21.220 and 9-21.400.

vi. Requests for the appearance of a relocated witness for trial or pre-trial conferences and interviews in the case for which the witness entered the Witness Security Program should be made by the prosecutor to the Witness Security Inspector of the US Marshals

[304] The United States Code, 2006, Title 18, Part II, Chapter 224, Section 3251, (18 U.S.C. 3521).
[305] Witness Security Reform Act, 1984.

Service (USMS) in the prosecutor's area at least ten working days in advance of the appearance date.

vii. According to Section 9-21.950 of the Act, the area of relocation should be known only to the USMS, and must not be made known to the case attorney or agent, or their staffs.

viii. Section 9-21.990 of the Act provides for continued protection to the witnesses in case the witnesses are no longer a part of the program, they still receive protection in the courtroom for testimony in the case or cases for which the witness entered the Program. Also, if there is clear evidence that a witness who has had their participation in the Program terminated is in immediate jeopardy arising out of the former cooperation, through no fault of the witness, the need for further protective services will be evaluated, and provided, if appropriate.

- **United States Code, 2006 (Section 3251)**

i. Section 3251 of the United States Code, 2006 [306] contain provisions of 'Witness Protection'.

ii. Under this section, the Attorney General (AG) has the power to provide for relocation and protection of a witness if the AG determines that that an offense involving a crime of violence has been directed at the witness with respect to that proceeding. This provision is covered by Part V of the Witness Protection Scheme, 2018.

iii. The AG can also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.

iv. To protect the witness and family/close associates of the witness, the AG can undertake steps like provide them with documents establishing a new identity, housing, expenses to meet the basic living requirement, assist the person in obtaining employment, protect the confidentiality of the identity and location of persons, etc.

[306] The United States Code, 2006, Title 18, Part II, Chapter 224, Section 3251, (18 U.S.C. 3521).

v. Before providing these facilities to the witnesses and close associates/family of the witness, the AG undertakes an MoU with each concerned person that the witness will testify, persons receiving such facilities will not commit any crimes, take active steps in avoiding detection, co-operate with the concerned officers, etc.

vi. If there is an imminent danger to the witness, the AG can provide immediate protection till the assessment of the witness is done.

vii. The AG can terminate the protection provided if the MoU is breached and the decision is not subject to a judicial review.

- **The Bribery Act, 2010**

The Bribery Act, 2010, which is the equivalent of the Prevention of Corruption Act, 1988 in the UK does not have any provisions on 'witness protection'.

There is no separate legislation with regards to 'Witness Protection' in the UK however the Serious Organised Crime and Police Act, 2005[307] deals with 'witness protection'. The objective of the Act itself was to make provision about investigations, prosecutions, offenders and witnesses in criminal proceedings and the protection of persons involved in investigations or proceedings.

1. Serious Organised Crime and Police Act, 2005

i. **Chapter 4 of the Act[308]** has provisions for the 'protection of witnesses'. The said act led to the establishment of the UK Protected Persons Service (UKPPS), a nationwide network of regional police units, led by the National Crime Agency (NIA). It provides protection to people judged to be at risk of serious harm where the protection arrangements required by the individual are not available to the local police force or referring agency.[309]

[307] Serious Organised Crime and Police Act, 2005.
[308] *Id.*
[309] *Protected Persons*, NATIONAL CRIME AGENCY. https://www.nationalcrimeagency.gov.uk/what-we-do/how-we-work/providing-specialist-capabilities-for-law-enforcement/protected-persons#:~:text=The%20UK%20Protected%20Persons%20Service,police%20force%20or%20referring%20agency.

ii. **Section 82.4 of the Act**[310] provides for the criteria which should be considered for providing protection to a person which include the nature and extent of the risk to the person's safety, cost of the arrangements, the likelihood that the person and any person associated with him, will be able to adjust to any change in their circumstances which may arise from the making of the arrangements, the nature of the proceedings and the importance of the witness in those proceedings.

iii. Interestingly, this legislation prescribes for a penalty **under Section 86** if any person involved in the system discloses information about the protection arrangements and **under Section 88** if the witness or any other person involved in the system discloses information related to the persons assuming a new identity.

iv. **Section 94 of the Act**[311] lists down criteria of when a person is considered as a protected person, when a person assumes a new identity, of who is a witness in legal proceedings and who is not.

Provisions we can adopt from

A. UNCAC

- **Illegal Gratification**

i. **Article 15** talks about 'Bribery of National Public Officials':

ii. This is a mandatory article requiring the criminalization of the domestic bribery of public officials, an act which is already criminalized in most national laws. The offense is defined in a way that is less broad than many existing national laws (the "*promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties*"), but is in essence consistent with other conventions that include this type of offense.

[310] Serious Organised Crime and Police Act, 2005.
[311] Serious Organised Crime and Police Act, 2005.

iii. A key issue for the application of this provision is the scope of the definition of "public official" in Article 2(a). The UN Convention contains a semi-autonomous definition that establishes certain categories of persons as officials without regard to local law, but also extends the definition to any other person defined as a public official by local law.

iv. The autonomous component of the definition covers officials of all branches of government, specifically mentioning - legislative, executive (which the travaux preparators indicate will include the military), administrative and judicial, persons who perform a public function, and officials of public agencies or enterprises. Regrettably, there is no definition of the term "public enterprise."[312]

v. **Under Article 21**, the UNCAC has legislated for the prosecution of private parties for illegal gratification such as making or accepting payments beyond a contract or fraudulent payments made to secure contracts.

vi. This article is framed in non-mandatory ("shall consider") terms. It is applicable to economic, financial or commercial activities, and is therefore of direct relevance to businesses to the extent implemented by countries. The offense is crafted in a parallel fashion to the official bribery offense.

vii. On the supply side, it requires a promise, offer or giving of an "undue advantage" to a private person of any capacity in order that the concerned individual should act or refrain from acting in breach of his or her duties. There is a mirror image demand side provision.[313]

viii. **Under Article 16(1)**, the UNCAC specifically prohibits giving undue advantage to any foreign public official or official of a public international organization.

ix. **Under Article 12 (4)**, the UNCAC provides that every Party shall take measures to disallow deductions in respect of illegal gratifications paid under the domestic taxation statute.

[312] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Art. 15.
[313] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Art. 21.

- **Preventive Anti- Corruption Policies**

i. The UNCAC Act commences its preventative anti-corruption provisions from one of the steering principles which is to encourage research on corruption. **Article 5** elaborates on the importance to establish and promote effective practices aimed at the prevention of corruption.[314] It encourages revaluation of relevant legal instruments and administrative measures to fight corruption, along with consulting experts to analyse trends with corruption and frame strategies and action plans to combat corruption.

ii. Under the UNCAC, it is obligatory for each state party to guarantee that there is an existence of a body or bodies that prevent corruption by executing preventive policies and administering and coordinating their implementation, and *"increasing and disseminating knowledge about the prevention of corruption".* The body or bodies shall be granted the necessary independence to enable it/them "*to carry out its or their functions effectively and free from any undue influence".* Material resources, specialized staff as well as training thereof should also be provided. [315]

iii. UNCAC also recommends the dissemination of information, which can be provided by annual reports on the threats of corruption in public administration, in combination with initiatives to encourage transparency and accountability in public financial management as suggested in **Article 10**. Likely to the analysis, the risk evaluation of corruption allows anti-corruption practitioners to concentrate their attention on different procedures and functions. Corruption risk management is part of an accepted methodology or common protocol in most countries where structural anti-corruption / integrity programmes are used. [316]

iv. Effective prevention of corruption relies on the expertise and capacity of public officials in a variety of public agencies, who are specifically responsible for the efforts to counter corruption and are largely responsible

[314] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Art. 5.
[315] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Art. 6.
[316] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 10.

for primary tasks in other areas. **Paragraph 2, Article 6** [317] of the UNCAC talks about the training of specialized staff of preventive anti-corruption bodies.

v. In terms of the public sector more generally, Article 7 of the UNCAC mandates that the State Parties undertake to adopt, maintain and strengthen systems for recruitment, retention, promotion and retirement structures of civil servants where appropriate, and of other public officers that are not elected, where necessary, retain a corruption less environment.[318] It also talks about augmenting transparency when funding candidatures, or political donations towards political parties for public officials. [319]

vi. The long-term effectiveness of the anti-corruption initiatives is also related to improvements in the general public's perceptions as a prerequisite. Such awareness and skills can be promoted with the help of both awareness-raising activities for the general public, public campaigns, social advertising and educational programs for schools, use of booklets, buttons and other souvenirs for handing out, open lectures, TV discussions, public hearings, etc. UNCAC envisages raising public awareness and promoting ethical behaviour in connection with the prevention of corruption. **Article 13** [320] of the UNCAC addresses the education of the general public.[321]

vii. The UNCAC addresses the conflict of interest from various points of view, starting with a contractual obligation to *"endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest"* [322] and the need to disclose their private interests for public officials [323] predominantly in the context of the public obtaining.[324]

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[317] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 6 (¶2).
[318] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 7 (¶1).
[319] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 7 (¶ 3).
[320] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 13.
[321] OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia,* The Organization for Economic Cooperation and Development (Date accessed [August 28th, 2020]), http://www.oecd.org/corruption/acn/ACN-Prevention-Corruption-Report.pdf
[322] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 7 (¶ 4).
[323] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 8 (¶ 5).
[324] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 9.

viii. The war against corruption calls for a broad number of players from the State, municipalities and civil society to work together. The coordination of law enforcement, judiciary, public administration and other bodies is important solely for every specific sector which is vulnerable to corruption to achieve lasting improvements. In specific, Article 38 involves coordination between national authorities and what is expected of each state party.[325]

ix. According to **Paragraph 2, Article 9** of the UNCAC state parties shall *"take appropriate measures to promote transparency and accountability in the management of public finances"*. The convention further lists such measures as:

- Procedures for the adoption of the national budget;
- Timely reporting on revenue and expenditure;
- A system of accounting and auditing standards and related oversight;
- Effective and efficient systems of risk management and internal control; and
- Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph. [326]

State Parties shall also take the civil and administrative steps needed to safeguard and avoid falsification of public spending and tax accounts, reports, financial statements or other documents.

x. **Article 12** [327] discusses private sector collaboration and talks about encouraging accountability and providing adequate internal audit controls to aid in preventing and identifying acts of wrongdoing between law enforcement authorities and other private institutions. It further addresses

[325] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 38.
[326] OECD Anti-Corruption Network for Eastern Europe and Central Asia, *Prevention of Corruption in the Public Sector in Eastern Europe and Central Asia*, The Organization for Economic Cooperation and Development, (Date accessed [August 28th, 2020]), http://www.oecd.org/corruption/acn/ACN-Prevention-Corruption-Report.pdf
[327] United Nations Convention Against Corruption, Dec. 14, 2005, A/58/422, Article 12, (¶1, (¶2).

the issue of conflict of interest by restricting the employment of public officials after resignations or retirements by the private sector.

B. Foreign Corrupt Practices Act (USA)

- **Illegal Gratification of Private Entities**

  i. The FCPA contains anti-bribery and accounting provisions. The anti-bribery provisions, broadly speaking, prohibit giving things of value to foreign government officials in order to obtain or retain business. The accounting provisions, broadly speaking, require publicly traded U.S. companies ("issuers") to maintain reasonably effective internal controls and accurate books and records.

  ii. Under the FCPA, there are three categories i.e., an issuer and a domestic concern. An "issuer" is any company that has securities registered in the United States or is otherwise required to file periodic reports with the SEC. A "domestic concern" is a broader category, which encompasses any individual who is a citizen, national, or resident of the United States. This category also includes any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, etc.

  iii. The third category applies to "*persons other than an issuer or domestic concern*" which refers to foreign nationals or entities that directly, or through an agent, use the mail or any means of interstate commerce to engage in an act in furtherance of a corrupt payment while in the United States.

- **Preventive Anti- Corruption Policies**

  i. Within the Department of Justice, the Fraud Section of the Criminal Division has primary responsibility for all FCPA matters. FCPA matters are handled primarily by the FCPA Unit within the Fraud Section, regularly working jointly with U.S. Attorneys' Offices around the country.[328] Similarly, having a specialised unit enacted by PCA will be efficient so it becomes easier for the state and local prosecutors to bring criminal charges for violators of state anti-corruption laws faster and more efficiently.

[328] U.S. Dept. of Justice, U.S. Attorneys' Manual § 9-47.110 (2008) [hereinafter USAM], *available at* http://www.justice.gov/usao/ eousa/foia_reading_room/usam/.

ii. Under FCPA, there are stringent repercussions or penalties to bribery that help set a rigorous example and reduce the spread of corruption. Implementing more stringent policies and penalties under PCA will also do the same.

C. The Bribery Act, 2010 (UK)

- **Illegal Gratification of Private Entities**

i. General bribery offences

- Sections 1 to 5 of the Act cover "general bribery offences". The crime of bribery is described in Section 1 as occurring when a person offers, gives or promises to give a "financial or other advantage" to another individual in exchange for "improperly" performing a "relevant function or activity".

- Section 2 covers the offence of being bribed, which is defined as requesting, accepting or agreeing to accept such an advantage, in exchange for improperly performing such a function or activity. The "relevant function or activity" element is explained in Section 3 - it covers "*any function of a public nature; any activity connected with a business, trade or profession; any activity performed in the course of a person's employment; or any activity performed by or on behalf of a body of persons whether corporate or unincorporated*".

- This applies to both private and public industry, and encompasses activities performed outside the UK, even activities with no link to the country. The conditions attached are that the person performing the function could be expected to be perform it in good faith or with impartiality, or that an element of trust attaches to that person's role.

- Under Section 4, the activity will be considered to be "improperly" performed when the expectation of good faith or impartiality has been breached, or when the function has been performed in a way not expected of a person in a position of trust. Section 5 provides that the standard in deciding what would be expected is what a reasonable person in the UK might expect of a person in such a position.

- Where the breach has occurred in a jurisdiction outside the UK, local practices or customs should be disregarded when deciding this, unless they form part of the "written law" of the jurisdiction. "Written law" is given to mean any constitution, statute or judicial opinion set down in writing. The general offences also cover situations where the mere acceptance of such an advantage would constitute improperly performing relevant functions or activities.

ii. Bribery of foreign officials

- Bribery of foreign public officials is a distinct crime under Section 6, in line with the OECD Anti-Bribery Convention. A person will be guilty of this offence if they promise, offer or give a financial or other advantage to a foreign public official, either directly or through a third party, where such an advantage is not legitimately due.

- A foreign public official is defined, under Section 6(4), as "an individual holding legislative, administrative or judicial posts or anyone carrying out a public function for a foreign country or the country's public agencies or an official or agent of a public international organization". The inclusion of "through a third party" is intended to prevent the use of go-betweens to avoid committing a crime, although if the written law of the country of the foreign public official allows or requires the official to accept the advantage offered, no crime will be committed.

- Unlike with general bribery offences, there is no requirement to show that the public official acted improperly as a result; this is a distinction between the Act and the Anti-Bribery Convention. The offence under Section 6 only applies to the briber, and not to the official who receives or agrees to receive such a bribe.

iii. Failure of commercial organizations to prevent bribery

- Section 7 creates the "broad and innovatory offence" of the failure of commercial organizations to prevent bribery on their behalf. This applies

to all commercial organizations which have a business in the UK. Unlike corporate manslaughter, this does not only apply to the organization itself; individuals and employees may also be found guilty.

- The offence is one of strict liability, with no need to prove any kind of intention or positive action. It is also one of vicarious liability; a commercial organization can be guilty of the offence if the bribery is carried out by an employee, an agent, a subsidiary, or another third-party, as found in Section 8.
- Under Section 7(2), the commercial organization has a defence if it can show that, while bribery did take place, the commercial organization had in place "adequate procedures designed to prevent persons associated with the organization from undertaking such conduct". Under the Act's explanatory notes, the burden of proof in this situation is on the organization, with the standard of proof being 'on the balance of probabilities'.

iv. Prosecution and penalties

- Section 10 requires the authorization of any prosecution by the director of the appropriate prosecution agency before a case can go ahead; this is a shift from the old regime, which required the consent of the Attorney General for England and Wales.
- Section 11 explains the penalties for individuals and companies found guilty of committing a crime. If an individual is found guilty of a bribery offence, tried as a summary offence, he or she may be imprisoned for up to 12 months and fined up to £5,000. Someone found guilty on indictment, however, faces up to 10 years' imprisonment and an unlimited fine.
- The crime of a commercial organization failing to prevent bribery is punishable by an unlimited fine. In addition, a convicted individual or organization may be subject to a confiscation order under the Proceeds of Crime Act 2002, while a company director who is convicted may be disqualified under the Company Directors Disqualification Act 1986.

- **Preventive Anti-Corruption Policies**

  i. The Bribery Act allows the company policies against corruption to be stringent, and also make them well communicated to the officials in the form of official training to prevent bribery. Under the Act, there are provisions for strict liability for corporations that have failed to implement adequate procedures to prevent bribery.[329]

  ii. There is regular risk assessment performed by corporations as an organization should consider the nature and extent of its exposure to potential risks of bribery on its behalf by persons associated with it. Its assessment ought to be "periodic, informed and documented". Thus, this can be incorporated in the Prevention of Corruption Act as well.

  iii. Corporations also establish committees that create guidelines for compulsory compliance training programmes at the company, and this would be a strong addition to the Prevention of Corruption Act.

General Recommendations

A. Preventive Anti-Corruption Policies

i. An important part of the prevention of corruption is the elimination of rules and practices that create favourable conditions for corruption or preventing the adoption of such rules. In practical terms, this requires the elaboration of methodology as to what provisions facilitate corruption and the application of the methodology to concrete existing or draft regulations.

ii. Political contributions are not prohibited under certain legislation *per se*. Such contributions, are to an extent protected by the constitutions and are generally permissible so long as they are made in conformity with the federal and states campaign, finance laws and regulations applicable to political donations. Payments made as *quid pro quo* for an official act would still be illegal, despite being made as a campaign contribution. Thus, the implementation of restriction on "political contributions" or "donations" in

[329] Bribery Act, 2010, §7, 9

conformity with the finance laws, or any legislation that best suits, is a strong provision suggestion for anti-corruption provisions.

iii. Mandatory compliance programs can be incorporated into Prevention of Corruption Act as an anti-corruption provision in corporations so that the employees are thoroughly aware of the corporation anti-corruption policies and are also trained under its policies as "adequate procedures" in place to prevent persons associated with it from engaging in bribery.

B. Witness Protection

In case of Witness Protection, 6 documents were examined in this report: a) The Witness Protection Scheme, 2018, 2) The Whistle Blowers Protection Act, 2014, c) United Nations Convention against Corruption, 2005, d) Witness Security Reform Act, 1984 & e) Section 3251 of the United States Code, 2006 (In relation to the Foreign Corrupt Practices Act, 1977), f) Serious Organised Crime and Police Act, 2005 (In relation to the Bribery Act, 2010).

All of these documents have their own merits and demerits, and on the basis of the same, the researchers have suggested recommendations in the form of amendments and addition of a Chapter in the Prevention of Corruption Act, thus having concrete and full - proof provisions about 'Witness Protection' in the Act.

The recommendations are based on the Witness Protection Scheme, 2018 (WPS) rather than the Whistle Blowers Protection Act, 2014 (WPA) as the former is more detailed and the latter is not currently not in force due to a pending amendment.

i. There should be a separate chapter on the matter of 'Witness Protection' in the Prevention of Corruption Act (PCA) as witness protection is a serious matter where the lives of the witnesses are at stake.

ii. The newly added provisions should be a mix of the 'Witness Protection Scheme' and the 'Whistle Blowers Protection Act, 2014', along with the addition of useful provisions of other international legislations.

iii. The detailed provisions of the Witness Protection Scheme, 2018 should be adopted. However, the time frame of 3 months should be omitted and, in its place, the provision of continued protection to the witnesses as provided by Section 9-21.990 of the Witness Security Reform Act, 1984 should be substituted - wherein the witness is given protection in the courtroom for testimony in the case or cases, till the end of the case. Also, if there is clear evidence that a witness who had cooperated earlier is in immediate jeopardy arising out of the former cooperation, through no fault of the witness, the need for further protective services should be evaluated by the Competent Authority, and provided, if necessary.

iv. The drawback of the Scheme not penalising for revealing the identity of the witness can be corrected by borrowing the provisions of Section 86 and 88 of the Serious Organised Crime and Police Act, 2005 (UK) which penalize persons involved in the process and witnesses for disclosing information about the protection arrangements and for disclosing information related to the persons assuming new identity. According to Section 3521(d)(1) of the United States Code, 2006, an MoU is signed with the Witness, one of the clauses of which is to take active steps in avoiding detection, and a breach of any of the clauses of the MoU leads to termination of the protection being provided (Section 3521(f)). Such a provision can be adopted by the WPS and the Competent Authority that disclosing of information by the witness itself will lead to termination in the protection being provided and disclosing of information by any other person in the system will lead to that person being penalized by law.

v. To prevent victimization of the witnesses, the provisions of Section 11 of the Whistle Blowers Protection Act, 2014 can be borrowed which provide for ‘safeguards against victimization’, with more elaborate safeguards for prevention of victimisation.

vi. There are no criteria on how one is accepted as a ‘witness’ under the Witness Protection Scheme. However, Section 9-21.100 of the Witness Security Reform Act, 1984 (USA) lays down the criteria for a witness to be placed in the Witness Protection Programme. One of the important factors considered while determining to provide witness protection is that the witness’s testimony is significant and essential to the success of the prosecution, as well as credible. Such a method can be followed to classify the witnesses and provide protection for them under WPS and PCA, 2018.

vii. The application under the WPS, 2018 does not analyse information of the witness like witness's criminal history, if any, and a psychological evaluation for the witness as is laid down in Section 9-21.100 of the Witness Security Reform Act, 1984 (USA) to check the eligibility of the witness. Such a two-tier method can be useful to sort out the witnesses who have a genuine claim from those who have a malafide intention.

viii. As under Section 9-21.100 of the Witness Security Reform Act, 1984 (USA), the Department of Justice is obligated to provide for the safety and welfare of a protected witness and even **family members** long after the witness has testified. Section 3521(a)(1) of the United States Code, 2006, **provides for the relocation and other protection of the immediate family or a person otherwise closely associated with the witness if they are in danger.** Such a provision of providing security and relocation and other benefits not only to the witnesses but close associates/family members of the witnesses should be made available by the amended PCA and WPS, 2018, which currently provides security and other benefits only to the witness and no one else.

ix. As under Section 9-21.700 of the Witness Security Reform Act, 1984 (USA), Witness Security Inspector should be made aware of the requests for the appearance of a relocated witness for trial or pre-trial conferences and interviews in the case by the prosecutor at least ten working days in advance of the appearance date. Such a provision should be adopted to have a transport plan in advance, ensuring the maximum safety of the witness.

x. According to Section 9-21.950 of the Witness Security Reform Act, 1984 (USA), the area of relocation should be known only to the USMS (concerned police officials), and must not be made known to the case attorney or agent, or their staffs. Such a provision can be adopted by the Witness Protection Cell and the amended PCA.

xi. According to Section 3521(b)(1) of the United States Code, 2006, the Attorney General (concerned authority) can undertake steps like providing the witness with documents establishing a new identity, housing, expenses to meet the basic living requirement, assist the person in obtaining employment, protect the confidentiality of the identity and location of persons, etc. Such a provision should be undertaken by the WPS,2018 where the Competent Authority provides all of these to the witness and close associates/family members, in case of a continuous, persistent threat on the said people. This will ensure that there is normalcy in the lives of the witness and other associated people.

xii. According to Section 3521(e) of the United States Code, 2006, if there is an imminent danger to the witness, the AG (concerned authority) can provide immediate protection till the assessment of the witness is done. This can be adopted by the WPS and done by the Competent Authority until they complete the 'threat analysis'.

xiii. According to Section 82.4 of the Serious Organised Crime and Police Act, 2005 (UK), there is a detailed criterion which should be considered for providing protection to a person which include the nature and extent of the risk to the person's safety, cost of the arrangements, the likelihood that the person, and any person associated with him, will be able to adjust to any change in their circumstances which may arise from the making of the arrangements, the nature of the proceedings and the importance of the witness in those proceedings. This is quite similar to the Threat Analysis Report as done by the WPS, 2018 however it is much more detailed factoring in the cost, adjustability of the witness, etc. Such a provision should be adopted by the WPS and subsequently the PCA so that a detailed report along with the threat analysis report is ready for future reference, expediting the process.

CONCLUDING REMARK

Illegal Gratification of Private Entities

The 2018 Amendment makes significant changes to a law that has been in place for over three decades and has seen uneven enforcement. The investigative and prosecutorial burden required to successfully enforce the provisions of the PCA against errant public servants appears to have increased as a result of the 2018 Amendment. However, the new law also brings with it a promise of more speedy trials in bribery cases. Under the amended PCA, trials are required to be completed within two years from the date on which the case is filed. While this amendment does not address delays that generally plague the investigative process, it is expected to expedite cases once filed.

The key features which should be implemented in the amended Act to prevent illegal gratification of private entities are the implementation of a methodology as to what provisions facilitate corruption and what can be done to prevent it. For commercial organizations doing business in India, the 2018 Amendment is an opportunity to revisit their anti-bribery policies, compliance programmes, and processes, especially for frameworks that have been focused on ensuring compliance with legislation like the FCPA or the UKBA. With commercial organizations and managerial personnel now directly under scrutiny for violations of the PCA, multinational organizations need to ensure that their India operations rise up to the heightened compliance standards ushered in by the 2018 Amendment.

Preventative Anti-Corruption Policies

Corruption has always had a destructive and debilitating impact in the global business sector and trade despite historic occurrences of unethical practises and modern theories of control of economic activity. Thus, it becomes highly important to implement policies that keep corruption in control and help eradicate it. Preventative Anti-Corruption Policies aid in doing so. The Prevention of Corruption Act, 1988 fails to include any preventative anti-corruption policies, an important aspect in the fight towards eradicating corruption.

A new specific chapter dedicated to the provisions of "Preventative Anti- Corruption Policies" needs to be added. UNCAC, can be used as a strong foundation for these anti-corruption policies, amongst other acts. Provisions such stringent anti-corruption policies, compliance training for all employees, implementing more stringent penalties for corruptive acts, the existence of bodies that prevent corruption by executing preventive policies and administering and coordinating their implementation between the state and the government, having a specialised unit enacted by PCA for ease of prosecution for corruptive acts, strengthening systems for recruitment, retention, promotion and retirement structures of civil servants, and of other public officers that are not elected to retain a corruption less environment, encourage research on corruption to come up for anti-corruption policies best suited for the country, and most of all improvements in the general public's perceptions as a prerequisite.

Such provisions should be added to the Prevention of Corruption Act, 1988 they would inspire confidence amongst the citizens of the country and the public officials to take a stand against people involved in corruption, would encourage a better system to tackle corruption with preventative policies and majorly aid in eradicating or reducing corruption to a great extent.

Witness Protection

The Prevention of Corruption Act, 1988 or the Prevention of Corruption (Amendment) Act, 2018 do not include any provisions on 'witness protection'. However, it is the need of the hour. Many jurisdictions have legislation and programs on 'witness protection'. Currently, in India, the Witness Protection Scheme, 2018 is in place as a mechanism for 'witness protection' however it isn't enough as it doesn't cater to the specific needs of witnesses requiring protection in regards to the Prevention of Corruption Act, 1988.

There needs to be an addition of a specific chapter dedicated to the provisions of 'witness protection' in the Prevention of Corruption Act, 1988. Some key features like the provision of continued protection to witnesses (even after the end of the case in apprehension of imminent danger to the witness rather than the 3 months duration stipulated by the WPS), penalizing the authority for revealing the identity of witnesses, redaction of services provided in case of revealing of information by the witness themself, classification of witnesses based on the relevance of their testimony and not the level of danger faced by them, strong system for evaluation of 'witnesses', provisions for relocation and protection of family members and close

associates of witnesses, protection to witnesses to be provided on some sort of analysis (like the threat analysis report) are features which aren't a part of Witness Protection Scheme, 2018. These should be made a part of the new chapter on 'witness protection' in the Prevention of Corruption Act, 1988 as such robust provisions would inspire confidence amongst witnesses to give testimonies against the rich and the powerful people involved in corruption, who could range from being a common man to some of the most important people in the country like Judges, Senior Bureaucrats, Leaders, etc.

Such provisions in the amended Prevention of Corruption Act would be essential to get testimonies which form the most important part of corruption cases as direct evidence of corrupt activity in form of documents is rarely found. With these provisions, the amended Prevention of Corruption Act would serve as a strong legislation for 'witness protection'.

Habitual Offenders

The Prevention of Corruption Act, 1988 and the Prevention of Corruption (Amendment) Act, 2018 do not explain much about what or who a habitual offender is. However, it does give a detailed explanation of the offences and the punishments which a public servant might commit. The payment of a bribe to public officials has been included as a distinct offence which further opens up the scope for direct prosecution of bribe-givers. The Amended Act is also considered to be a positive development in respect of anti-graft regime as it includes various provisions relating to commercial organisations and persons who give an undue advantage.

According to the Amended Act, there has to be a need of a proper definition or explanation as to who can be considered as a bribe-taker and a habitual offender as these two terms have a different meaning which can make it difficult to distinguish whether the individual who has a committed the offense is just a one-time bribe-taker or habitual offender. Furthermore, there has to be a defined amount of fine or an aggregate amount which should be provided for in the Act in addition to the punishment served, for committing such offenses. The clause should also include the types of bribes that could be taken from individuals, which can be beneficial for granting the fines and the punishment accordingly. A separate clause which can deal with habitual bribe givers can also be considered as this is also considered to be an offense. These provisions would provide useful in order to punish both the bribe taker and giver.

D: Armed Forces Special Powers Act, 1958

CONTENTS

PART – I

INTRODUCTION

The Armed Forces Special Powers Act (AFSPA) has been in force in the Northeast since 1958 and in Jammu and Kashmir (J&K) since 1990. The Act has been criticized as draconian and has acquired a central place in India's counter-insurgency and anti-terrorism strategy. This includes its impact on fundamental rights of the citizens, the implications for centre-state relations and the political message sent to areas which are singled out for the application of such laws.[330]

AFSPA is based on the colonial-era law enacted by the British to suppress the Quit India movement in 1942. It was promulgated in the year 1958 to control Naga Insurgency that had broken out in the States of Assam and Manipur. However, the scope of the Act was then extended to the states of Meghalaya, Nagaland, Tripura, Arunachal Pradesh and Mizoram. The act confers extraordinary power on the police and military personnel for maintaining law and order and is on non-conformity with various international conventions and protocols which India is a signatory to.

There have been multiple reports of human right violations by the armed forces serving in the 'disturbed areas' under these Acts. These incidents are in blatant disregard to the fundamental rights guaranteed to the citizens by Part III of the Constitution of India. The act, therefore, requires to undergo amendments to ensure that the acts of the forces don't violate fundamental rights and that cases of deaths and torture are properly investigated.

Previous Committee Reports on AFSPA

A. Justice Jeevan Reddy Commission (2005)

The Central government appointed a five-member commission headed by Justice BP Jeevan Reddy to review the provisions of the Act. This commission submitted its report in 2005, which included various recommendations. The commission was of the opinion[331] that the AFSPA was

[330] Ali Ahmed, *Reconciling AFSPA with the Legal Spheres*, 5 JOURNAL OF DEFENCE STUDIES (2011).
[331]Abhimanyu Rao &Dr.MwirigiK. Charles, *Critical evaluation of armed forces (special powers) act, 1958: Sovereignty first*, RRIJM, (Vol. 4, Issue2, February-2019),

"*a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness*." This commission recommended that AFSPA should be repealed and appropriate provisions should be included in Unlawful Activities (Prevention) Act, 1967 in a way that clearly enumerates the powers of both, armed forces and paramilitary forces. Moreover, the committee recommended the introduction of a grievance cell in every district where the armed forces are deployed.

B. Justice N. Santosh Hegde Commission (2013)

A three-member commission, comprising of Justice N. Santosh Hegde, retd. Judge of the SC; JM Lyngdoh, former Chief Election Commissioner; and Ajay Kumar Singh, former DGP of Karnataka, was appointed by the SC in 2013. This commission was requested to make a thorough enquiry into six cases of alleged extra-judicial killings and record their findings regarding the antecedents of the victims and the circumstances in which they were killed. Various agencies, including the State government, were directed to hand over all the relevant records to the commission. The commission had the autonomy to formulate its own procedure and also address the larger question of the role of the State police and security forces in the State of Manipur. The commission was supposed to submit its recommendation in a report within 12 weeks. In March 2013, the commission submitted its report[332] and found that all the six cases were not true encounters. Subsequently, the case was taken up on April 4, 2013, wherein the Supreme Court noted a brief conclusion of the six cases.

Case 1: Md. Azad Khan

The commission was of the opinion that the incident in which the deceased was killed was neither an encounter nor was he killed in the exercise of the right to self-defence. There was no evidence to come to the conclusion that the deceased was involved in any sort of criminal or unlawful activities.

Case 2: Khumbongmayum Orsonjit

https://rrjournals.com/wp-content/uploads/2019/02/125-129_RRIJM190402029.pdf.

[332] Justice Hegde Commission - Report of the Supreme Court Appointed Commission (2013). https://humanrightsmanipur.files.wordpress.com/2013/07/ejevfam.pdf.

The commission was of the opinion that the incident in which the deceased died was neither an encounter nor did the security forces plead for it to be an exercise of their right to private defence. Furthermore, the committee found that the deceased did not have any adverse criminal antecedents.

Case 3: Nameirakpam Gobind Meitei & Nameirakpam Nobo Meitei

In the commission's opinion, the incident in question was not an encounter but an operation by the security forces wherein death of the victim was caused knowingly. Further, the two deceased did not have any criminal antecedents.

Case 4: Elangbam Kiranjit Singh

The commission was of the opinion that the incident of killing the victim could not be justified on grounds of private defence as the security forces exceeded their right of private defence. Moreover, the deceased had no adverse antecedents and thus a notice was served to the Government of Manipur to provide monetary benefits.

Case 5: Chongtham Umakanta

The Court stated that the incident in which the victim died had compelled them to conclude that the manner in which he was picked up, as stated by the complainant, could not be accepted. The manner of his death indicated that it could not have been an encounter and thus on the same reasons, the court was of the opinion that the case put forth on behalf of the security forces - that the incident was an encounter and that the victim was killed in an encounter or in self-defence, could not be accepted. Even though there were allegations against the deceased, the veracity of those allegations was not established.

Case 6. Akoijam Priyobrata alias Bochou Singh

The court, based on the report of the commission, was of the opinion that the deceased did not die in an encounter and further stated that there is no evidence to come to the conclusion that the deceased had any adverse antecedents.

Overall, the opinion was that all six encounters were not genuine and the force used was excessive. Furthermore, the commission made several recommendations. It proposed that all cases of encounters resulting in death should be reviewed once in three months by a committee

chaired by the Head of the State Human Rights Commission. It also proposed that the cases of encounters resulting in death should be tried by a Special Court constituted for this purpose and the number of such courts can be decided depending upon the number of pending cases in a state, to ensure quick disposal of cases.

C. The Justice Verma Committee on Amendments to Criminal Law

The Justice Verma Committee Report on Amendments to Criminal Law recommended that serious consideration be given to the removal of AFSPA. The committee heard testimonies from women in 'conflict zones' and recognized that the impunity for sexual violence in the discharge of security duties was being legitimized by the AFSPA. The committee further suggested that the cases of sexual violence against women by members of armed forces should be tried by ordinary criminal law; special commissioners should be appointed for women's safety in conflict areas and such commissioners should be vested with the powers to initiate redressal of cases of sexual violence, general law related to the detention of women during specified hours should be followed, etc.[333]

METHODOLOGY AND APPROACH FOR RESEARCH

The present report is fundamentally based upon critical analysis of the Act substantially understood from previous judicial committee reports along with a detailed study based upon adequate primary and secondary resources. The research team relied on existing academic and research work on the given legislation, as well as judicial precedents. To analyse the core of the issue, the team relied on: i) the Constitution of India; ii) Constitutional Assembly and Parliamentary debates; iii) Judicial precedents, especially Supreme Court judgements on the validity and scope of the provisions of AFSPA; iv) Judicial Committee reports on the actions of the armed forces and the impunity granted to the actions of the persons acting under the Act; v) Reports by International Organizations and other sources of law, like the United Nations Organization, International Covenant on Civil and Political Rights (ICCPR), Universal Declaration of Human Rights (UDHR) and other human rights groups like Amnesty

[333] Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* (Jan. 23, 2013).

International; vi) Right to Information (RTI) requests and National Human Rights Commission (NHRC) data vii) News reports.

PART – II

ABOUT THE ACT

The Armed Forces Special Powers Act, 1958 and the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 confer powers on the armed forces in the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Tripura and Jammu and Kashmir respectively. The Act was removed completely from Meghalaya and from some parts of Arunachal Pradesh in 2018.[334]

The Acts confer wide-ranging powers on the armed forces, including the power to fire or use force against any person for maintenance of public order,[335] arrest any person without a warrant based on reasonable suspicion or actual commission of a cognizable offence and the powers to use force in furtherance of this provision,[336] enter and search premises without a warrant and use force[337] and the power to stop, search and seize vehicles suspected to be carrying offenders of non-cognizable offences or persons suspected to commit such an offence and the use of force in pursuance of such powers.[338] The Acts further provide protection to armed forces against prosecution for acts committed in the exercise of the powers conferred by the Acts, unless sanctioned by the Central Government.[339]

LACUNAS

A) Section 3 of Armed Forces (Special Powers) Act, 1958

Section 3 of the Armed Forces (Special Powers) Act, 1958 provides for the power of the Governor of a State or the Administrator of a Union Territory to declare an area as a disturbed area. It reads as follows:

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[334] *Home Ministry Revokes AFSPA in Meghalaya, Dilutes the Act in Arunachal*, THE WIRE (April 23, 2018), https://thewire.in/government/afspa-revoked-meghalaya-restricted-arunachal

[335] Armed Forces Special Powers Act, 1958, §4(a) and Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, §4(a).

[336] Armed Forces Special Powers Act, 1958, §4(c) and Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, §4(c).

[337] Armed Forces Special Powers Act, 1958, §4(d) and Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, §4(d).

[338] Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, §4(e).

[339] Armed Forces Special Powers Act, 1958, §6 and Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, §7.

"3. Power to declare areas to be disturbed areas.—If, in relation to any State or Union territory to which this Act extends, the Governor of that State or the Administrator of that Union territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area."[340]

The section fails to define what activities or 'dangerous condition' in a state or union territory can allow the Governor or Administrator to declare an area as a disturbed area. The definition of the same should be expanded in accordance with Section 3 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990. The said provision provides that an area can be declared as disturbed if the Governor or the Central Government is of the '*opinion that the whole or any part of the State is in such a disturbed and dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent—*

(a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;

(b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India'.[341]

The expanded section in the 1990 Act reduces the discretion available with the authorities to declare an area as 'disturbed area' thereby decreasing the ambiguity of the same.

B) Preventive detention and Section 5

Any kind of rights enjoyed by the people come with a responsibility or duty to exercise these rights so that one may promote inclusivity of public order in the society. This creates a regime in which rights are administered in such a manner that there is the adjudication of rights and

[340] Armed Forces Special Powers Act, 1958, §3.
[341] Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, §3.

public interest. Following this logic, enjoyment of every right comes with limitations to achieve objectives in the interest of larger public policy such as health, maintenance of peace and public order, the welfare of the downtrodden, national security, etc.[342]

There are some basic rights such as the right to life including fair trial, freedom of expression, freedom from arbitrary imprisonment - that are integral to the democratic setup of a country. The limitations to be imposed on the enjoyment of these rights calls for important measures that could provide protection from the arbitrary and unreasonable limitations on these rights.

There are different ways in which the scope of the rights and limitations to it are interpreted in furtherance of larger and more important social objectives.[343] One of the ways is a derogation clause that allows the states to breach or suspend rights during formal states of emergency or war.[344] On the other hand, there is a limitation or clawback clause that "constrains and empowers legislatures and the courts by (a) allowing specific limitations on rights; and (b) placing limits on such limitations, thereby protecting the right against excessive restrictions".[345]

It is important to further understand the difference between the two and apply the same to preventive detention.

There were many strong criticisms from the Constituent Assembly to the unchecked constitutional power to make preventive detention laws and called it "*a blot upon the Constitution*"[346], "*a cloak for denying the liberty of the individual…Charter to the Provincial Legislature to go on enacting legislation under which persons can be arrested without trial and detained for such period as they think fit*"[347] and "*a short-term Constitution….which will last perhaps just as long as some of us hope to be in power*"[348].

As per Dr. Ambedkar, "*in the present circumstances of the country exigency of liberty of the individual should [not] be placed above the interests of the State*".[349] He further argued that

[342]Michael Freeman, *Univeralism, Particularism, and Cosmopolitan Justice*, in INTERNATIONAL JUSTICE (Tony Coates, ed., Routledge 1st ed. 2000).
[343]Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRITISH YEARBOOK OF INTERNATIONAL LAW (1976)
[344]*Id.*
[345]Dawood Ahmed and Elliot Bulmer, *Limitation Clauses, International IDEA Constitution-Building Primer*, INTERNATIONAL IDEA (2017) https://www.idea.int/sites/default/files/publications/limitation-clauses-primer.pdf.
[346]Speech by Pandit Thakur Das Bhargava, Constituent Assembly Debates, Vol. IX, 1506 (Sept. 15, 1949).
[347]Speech by Bakshi Tek Chand, Constituent Assembly Debates, Vol. IX, 1506 (Sept. 15, 1949).
[348]Speech by H.V. Kamath Constituent Assembly Debates, Vol. IX, 1521 (Sept. 15, 1949).
[349]Speech by Dr. B.R. Ambedkar, Constituent Assembly Debates, Vol. IX, 1500 (Sept. 15, 1949).

the following clauses to Article 22, in fact, controlled the preventive detention laws by providing safeguards.[350] The safeguard that Dr. Ambedkar refers to gives very few safeguards, wherein, there is no right to legal representation and public hearing as it was a matter of national security which was required to be kept confidential.[351]

This was the time when the Constituent Assembly preferred using 'procedure established by law' over 'due process of law' to limit the role of the judiciary in scrutinizing the laws passed by the legislature. Therefore, there was no proper judicial review and there existed only an Advisory Board, which in its composition looked like a judiciary but was not a judiciary in essence. This leads an unbalanced and unchecked enjoyment of power and a humiliation of the federal structure of the government.

The preventive detention laws hold the sanctity of the Constitution. Mere inclusion of preventive detention in the Fundamental Rights Chapter of the Constitution highlights the importance and necessity of such a law. Under Article 22 of the Constitution of India, the legislature is empowered to pass preventive detention laws resulting in suspension of rights integral to the principle of due process and provides some safeguards against preventive detention. The rights suspended are as follows:

1. Right to be informed about the grounds of the arrest,[352]
2. Right to be produced before a magistrate within 24 hours of arrest,[353]
3. Right to legal representation by a counsel,[354]
4. Right to freedom against arbitrary detention.[355]

Safeguards provided are as follows:

1. Communication of grounds of detention "as soon as may be" to the detainee,[356]

[350]Speech by Dr. B.R. Ambedkar, Constituent Assembly Debates, Vol. IX, 1500 (Sept. 15, 1949).
[351]Preventive Detention Act, 1950, § 10, §14.
[352]The Constitution of India, 1950, Arts. 22(3), 22(6).
[353]The Constitution of India, 1950, Art. 22(3).
[354]The Constitution of India, 1950, Art. 22(3).
[355]The Constitution of India, 1950, Arts. 22(4), 22(7).
[356]The Constitution of India, 1950, Art. 22(5).

2. "Earliest opportunity of making a representation" against the detention,[357]

3. Establishment of Advisory Body to review the detention in order to allow it for more than 3 months.[358]

AFSPA, under Section 4(c) allows the arrest of a person without a warrant which again violates the due process of law to be followed. This law is backed by the Constitution by virtue of Article 22(5), which gives discretion of revealing the grounds of arrest to the person arrested. Moreover, there is no Advisory Board or any other body to check this power and review whether the arrest made is in pursuance of preventive detention.

Section 5[359]

"Arrested persons to be made over to the police: -

Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest."

Section 6 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, confers similar powers to the armed personnel and police forces acting under the Act in the state of Jammu and Kashmir.

This section of the Act deals with the preventive detention law that gets its validity from Article 22(3) of the Constitution. In order to understand the scheme of this provision, it is important to study this section with respect to Article 22. The major loophole in this section is due to the mention of "least possible delay". This provision introduces an angle of arbitrary and prolonged detention.

[357]The Constitution of India, 1950, Art. 22(5).
[358]The Constitution of India, 1950, Art. 22(7).
[359]Armed Forces Special Powers Act, 1958, §5.

Article 22[360]

"*Protection against arrest and detention in certain cases: -*

1. *No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice*

2. *Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.*

3. *Nothing in clauses (1) and (2) shall apply*

   (a) to any person who for the time being is an enemy alien; or

   (b) to any person who is arrested or detained under any law providing for preventive detention.

4. *No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless*

   (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

   Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

[360]The Constitution of India, 1950, Art. 22.

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

5. *When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.*

6. *Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.*

7. *Parliament may by law prescribe*

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) *the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4).*"

The legislations that are backed by Article 22(3) lose the essence of due process of law and therefore, there is no procedure followed to safeguard the rights of the detainee, including, the right to representation and right to be presented before the magistrate. Further, the Advisory Board under Clause 4 enjoys discretionary power to extend the detention beyond three months. Even the communication of grounds for arrest is made to be discretionary and arbitrary due to the provision of "as soon as may be" under Clause 5. Furthermore, Clause 6 strengthens this discretion by bringing in the angle of public interest. The Advisory Board, in essence, provides no judicial scrutiny of such detention. The Advisory Board then loses importance once the law falls under the purview of sub-clause (a) of Clause 7.

By virtue of Section 5 of AFSPA, the maximum period to review such detention is defined as "least possible delay". The time period of "least possible days" gives scope to a number of

interpretations in order to justify any length of the delay.[361] This provision has given unchecked and indefinite power to the security forces to detain people on their whims and fancies. There is a lot of discretion exercised by the executive body to detain a person thus giving more room for arbitrary detention.

The framers of the Constitution, while debating Article 22(2), established that usage of "least possible delay" would in fact result in the person being detained for an indefinite time period whereas using a definite time period of "twenty-four hours" would result in maximum detention of twenty-four hours. The inclusion of a definite time period helps to avoid the scope of torture in custody and checks the executive power by bringing in an angle of judicial scrutiny at an appropriate time.[362] Therefore, a definite time period of "twenty-four hours" serves as an actual safeguard as against "least possible days" that only serves as a namesake safeguard.

Moreover, while the Parliament has the power to define the maximum period for preventive detention, it has no obligation to do so.[363] The framers of the Constitution sought that Parliament should have the obligation to specify the maximum limit if it has the power to make such a law.[364] Even the courts have interpreted the provision of "least possible days" to mean twenty-four hours.[365]

Habeas Corpus

The term least possible delay has been used to detain people for several days, months and even years. In a number of habeas corpus petitions- recognised as the undeniable right of all individuals and one of the most effective remedies against challenging arbitrary detention,[366] these excessive delays have been recorded.[367] In Jammu and Kashmir, patterns and factors for delay range from blatant denial of arrest, claims that the arrested person has either been

[361]Speech by Jaspat Roy Kapoor, Constituent Assembly Debates, Vol. IX, (Sept. 16, 1949).
[362]Preventing Torture: An Operational Guide for National Human Rights Institutions is a joint publication of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the Association for the Prevention of Torture (APT) and the Asia Pacific Forum of National Human Rights Institutions (APF).
[363]The Constitution of India, 1950, Art. 22(7)(b).
[364]Speech by Brajeshwar Prasad, Constituent Assembly Debates, Vol. IX, (Sept. 16, 1949); Speech by Jaspat Roy Kapoor, Constituent Assembly Debates, Vol. IX, (Sept. 16, 1949).
[365]*Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109.
[366] The Constitution of India, 1950, Art. 32.
[367]Ashok Agrwaal, *In Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990-2004*, SAFHR (2008).

subsequently released or has escaped from custody to refusal by the armed forces to produce records and documents regarding arrests and detention.

In a report on the AFSPA to the UN Human Rights Committee in 1991, Nandita Haksar, a lawyer who has often petitioned the Guwahati High Court in cases related to the AFSPA, explained how in practice this leaves the military's victims without a remedy. Firstly, there has not been a single case of anyone seeking such permission to file a case in the North East. Given that the armed forces personnel conduct themselves as being above the law and the people are alienated from the state government, it is hardly surprising that no one would approach Delhi for such permission. Secondly, when the armed forces are tried in army courts, the public is not informed of the proceedings and the court-martial judgments are not published.

The armed forces carry out abuses in the name of counterinsurgency operations and are shielded from accountability by the AFSPA. One of the starkest abuses under the AFSPA in Assam has been the imprisonment of young children. Children between the ages of 4 and 12 have languished in different jails across the state. The unarmed children and their mothers were first detained by Bhutanese soldiers in a 2003 counterinsurgency operation against militant bases in Bhutan. They were then handed over to Indian authorities and jailed. The children have grown up behind bars with their only crime being that they are children of suspected separatists.

C) Section 6 & 7

Section 6 of the Armed Forces Special Powers Act, 1958 (hereinafter the Act of 1958), states:

Protection to persons acting under Act- No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (hereinafter the Act of 1990), states:

Protection of persons acting in good faith under this Act- No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government,

against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

In ***Naga People's Movement of Human Rights v. Union of India***[368] the validity of Section 6 of the Act of 1958 was questioned because it is believed to provide limitless immunity to the persons exercising the powers conferred under Section 4 of the Act of 1958, as it states that the protection extends to *"anything done or purported to be done in exercise of the powers conferred by this Act"*. The immunity provided by Section 6 of the Act of 1958 was compared to Sections 45 and 197 of the Code of Criminal Procedure, 1973, (Cr.P.C.) and the petitioners contended that these sections already provide immunity to members of the armed forces and Sections 76 and 79 of the Indian Penal Code, 1860, (IPC) could further be invoked as a statutory defense in criminal proceedings. The petitioners, therefore, believed that immunity provided by Section 6 of the Act of 1958 was "uncalled for" as it gave further protection to the armed personnel.

The relevant provisions of the Cr.P.C. and IPC are:

Section 45 of Cr.P.C- *"(1) Notwithstanding anything contained in Sections 41 to 44 (both inclusive), no member of the Armed Forces of the Union shall be arrested for anything done or purported to be done by him in the discharge of his official duties except after obtaining the consent of the Central Government. (2)The State Government may, by notification, direct that the provisions of sub-section (1) shall apply to such class or category of the members of the Force charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section shall apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted."*

Section 197 of Cr.P.C- *"(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.*

(3)The State Government may, by notification, direct that the provisions of sub-section (2)shall apply to such class or category of the members of the Forces charged with the maintenance of

[368]*Naga People's Movement of Human Rights v. Union of India*, (1998) 2 SCC 109.

public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted."

Section 76 of the IPC- *"Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it."*

Section 79 of the IPC- *"Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law, in doing it."*

In ***Naga People's Movement***, the Court was of the opinion that Section 6 of the Act of 1958 did not give immunity to persons exercising the powers conferred by the Act, but only provides certain protection in the form of the previous sanction of the Central Government before the institution of criminal prosecution of a suit or other civil proceedings.

The Supreme Court relied on its judgement in ***Matajog Dobey v. H.C. Bhari***[369], and reiterated that although Section 197(1) of the Cr.P.C. confers similar protection to public servants in respect of acts committed *"while acting or purported to act in the discharge of his official duty"*, the Section was found to be constitutionally sound.

"It has to be borne in mind that a discretionary power is not necessarily a discriminatory power and that abuse of power is not to be easily assumed where discretion is vested in the government and not in a minor official."[370]

However, the Apex Court further emphasized that *"since the order of the Central Government refusing or granting a sanction under Section 6 is subject to judicial review, the Central Government shall pass an order giving reasons"*.[371]

In ***General Officer Commanding v. CBI***[372], the Supreme Court dealt with the Pathribal encounter case, in which 5 persons were killed by the army in the year 2000. In 2006, a CBI enquiry revealed that the encounter was indeed a fake encounter. However, the Central

[369]*Matajog Dobey v. H.C. Bhari,* 1956 AIR 44.
[370]*Id.*
[371]*Id.*
[372]*General Officer Commanding v. CBI,* (2012) 6 SCC 228.

Government never issued a sanction for prosecution, due to which the J&K High Court and the Supreme Court could not go ahead with the prosecution. The Supreme Court ordered the army to decide as to whether the trial should be carried out by a criminal court or by a court-martial. In case the former was selected, the CBI was to make an application to the Central Government for grant of sanction. The army went ahead with the option of court-martial, but the matter was eventually dismissed after the summary of evidence and the trial never reached the court-martial stage.[373]

In ***General Officer Commanding***, the Apex Court made the following observations:

i) In case of acts committed in the exercise of powers conferred by the Act, prior sanction by the Central Government is required before taking cognizance of the acts. However, prior sanction is not required while filing, presenting or initiating proceedings, and it is only required for taking cognizance as per the provisions contained in the Cr.P.C. This implies that a prior sanction is not required during the stage of investigation or enquiry.

ii) For an act to be protected under Section 7 of the Act of 1990 and Section 6 of the Act of 1958, it must be reasonably connected with the discharge of duty and the performance of duty cannot be *"camouflaged to commit a crime"*. The Court further stated that the events of the action need to be looked into to determine whether the act was dutiful and in good faith or if the intentions behind the act were malicious.

iii) Sanction can be obtained during the course of a trial, depending on the facts of the case and the stage of the proceedings at which the need for the sanction has come up.

iv) The Army can choose to try a case by a court-martial or by the criminal court, as per Section 125 of the Army Act. In case an offence is to be tried by the army court, no prior sanction is required. However, the decision of the military authorities that a case be tried in a military court is not final, as per Section 126 of the Army Act. The criminal court having jurisdiction to try the offender may require the competent military officer to deliver the offender to the Magistrate concerned, to be proceeded according to law, or to postpone the proceedings pending reference to the Central Government, if that

[373]SurangyaKour, *Pathribal: A Timeline of 18 Years of Injustice*, NEWSCLICK (March 26, 2018), https://www.newsclick.in/pathribal-timeline-18-years-injustice

criminal court is of the opinion that proceedings should be instituted before itself in respect of that particular offence.

In ***Extra Judicial Execution Victim Families Association v. Union of India***[374], the petitioners alleged that they had made several complaints in respect to extra-judicial executions by the armed forces in Manipur but the FIRs were not registered against the alleged perpetrators. The case dealt with 1528 cases of alleged extra-judicial execution and the Court appointed a commission, headed by Justice Santosh Hegde, to look into six identified cases out of the ones brought before the court. The Commission found that in all six cases, the encounters were not genuine and the use of force by the armed personnel was excessive. The Court further took a firm stand against the Attorney General's view that the procedure laid down in the Cr.P.C was adequate to deal with any inaction on the part of the authorities.

"This is not an ordinary case of a police complaint or a simple case of an FIR not being registered. This case involves allegations that the law enforcement authorities, that is, the Manipur Police along with the armed forces acting in aid of the civil power are themselves perpetrators of gross human rights violations. This is also not a case where the ordinary criminal law remedy provides an adequate answer. A particular situation of internal disturbance has prevailed for decades and the ordinary citizens of Manipur have had little access and recourse to law in the situation that they find themselves placed in. To make matters worse, FIRs have been registered against the victims by the local police thereby leaving the next of kin of the deceased with virtually no remedy under the Cr.P.C."

The Attorney General further submitted that all allegations of human rights violations were investigated by the Human Rights Division of the Army and the Ministry of Defence. However, when the investigation conducted by the Army and the Hegde Commission was compared, the Court observed that the persons were indeed killed in fake encounters. The Court further stated: *"Under these circumstances, we do not wish to comment on the nature of the internal enquiry conducted by the respondents but only record that these cases apparently never reached the Human Rights Division of the Army or the Ministry of Defence."*

[374] *Extra Judicial Execution Victim Families Association v. Union of India,* (2016) 14 SCC 536.

An important point iterated by the Supreme Court in this case was that if the army uses excessive force against the 'enemy', it would not come under the scope of the immunity given by AFSPA.

"...even while dealing with the 'enemy' the rule of law would apply and if there have been excesses beyond the call of duty, those members of the Manipur Police or the armed forces who have committed the excesses which do not have a reasonable connection with the performance of their official duty would be liable to be proceeded against."

Thus, section 6 provides virtual blanket immunity to the armed forces for the reason of their protection from false allegations. These unrestrained powers given to the army officers encourage crimes and criminals as there is no fear of punishment and prosecution. Under this veil of legal impunity, armed forces personnel commit gross violation of human rights. Some of these acts are extra judicial killings, rape, sexual assault, inhuman treatment, enforced disappearances. It is pertinent to note that this impunity provision snatches away the human rights of the people and primarily the fundamental rights.

History of sanctions:

There has always been uncertainty in determining the number of sanctions requested because of the lack of transparency in the process. In an RTI reply in 2013, the Ministry of Defence revealed that it had received 44 applications for sanctions to prosecute human rights violations in J&K, and did not reveal any further details.[375] However, this data is inconsistent with the data released by the J&K State Home Department. The Jammu Kashmir Coalition of Civil Society obtained, through the RTI Act in 2012, a list of 46 cases sent to the Ministry of Defence for sanctions from the J&K State Home Department. The Ministry of Defence stated in an affidavit to the Jammu and Kashmir High Court in 2008 that it had not received 27 of the 46 cases that the Jammu and Kashmir State Home Department listed as sent to the Ministry. The whereabouts and status of these 27 sanction applications remain unknown.[376]

[375] *Denied: Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*, AMNESTY INTERNATIONAL (2015). https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF

[376] *Denied: Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir*, AMNESTY INTERNATIONAL (2015). https://www.amnesty.org/download/Documents/ASA2018742015ENGLISH.PDF

As per the Ministry of Defence's reply to a request raised on this issue by Hussain Dalwai in the Rajya Sabha, in the 30 years that AFSPA has been in force in J&K, not a single sanction has been issued by the Central Government for prosecuting armed personnel in criminal courts. As per the reply, the Union Government has received 50 cases for sanction of prosecution against armed forces under the Act of 1990, out of which 47 were denied and 3 were pending.[377] The allegations included offences of death of civilians, rape, the beating of civilians, the disappearance of civilians, torture, fake encounter etc. In 2018, an RTI application was filed for access to the Standard Operating Procedures (SOPs) and other standards for measuring evidence on the basis of which the sanctions were rejected. The reply from the Ministry of Defence stated that the relevant data was not available. The Central Information Commission (CIC), in June 2020, allowed access to the orders issued by the Ministry of Defence refusing the sanctions, but access to case files was denied.[378] As per Amnesty International's report, there are no public records of the number of sanctions sought for prosecution from northeast India.[379] Further, the reports of human rights bodies and the judicial committees set up by the Supreme Court clearly suggest that the armed forces have committed grave human rights violations under the powers given by AFSPA.

The process of the grant of sanction for prosecution under the Act in its present form lacks transparency and accountability, as indicated by the CIC's response. As per Amnesty International's interviews, the family members of the victims have not been directly informed by the authorities of the status or outcome of a sanction request in relation to their case.[380]The lack of transparency in the sanction process, and the failure of the authorities to inform families of the status of the decision of the central government regarding sanction accounts for the low number of legal challenges to the denial of sanction to prosecute. Further, Amnesty International has claimed that the review process of cases, where denial of sanction is challenged by families, is too slow and the cases are not given priority and take many years to

[377]Rajya Sabha, *Unstarred Question No. 1463: Prosecution of Armed Forces under AFSPA*, Government of India. https://www.humanrightsinitiative.org/download/RS-J&KAFSPA-Q&A-Jan18.pdf
[378]Venkatesh Nayak, *CIC Rejects Access to Information on Sanction Denial for Prosecution Under J&K AFSPA*, THE WIRE (June 12, 2020), https://thewire.in/rights/cic-jammu-and-kashmir-afspa
[379]*Briefing: The Armed Forces Special Powers Act: A Renewed Debate in India on Human Rights and National Security*, AMNESTY INTERNATIONAL INDIA (2013). https://www.amnestyusa.org/wp-content/uploads/2017/04/asa200422013en.pdf
[380]Office of the United Nations High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (June 14, 2018) https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf

actually be considered in the courts.[381] The Ministry of Defence has dismissed human rights violations and given vague justifications for denying sanction, like "the allegation was motivated by vested interests"[382] and the process lacks transparency.

In *Extra Judicial Execution*, the Supreme Court stated:

"The law is, therefore, very clear that if an offence is committed even by Army personnel, there is no concept of absolute immunity from trial by the criminal court constituted under the Cr.P.C. To contend that this would have a deleterious and demoralizing impact on the security forces is certainly one way of looking at it, but from the point of view of a citizen, living under the shadow of a gun that can be wielded with impunity, outright acceptance of the proposition advanced is equally unsettling and demoralizing, particularly in a constitutional democracy like ours."

Although the Supreme Court has stated that the grant or rejection of sanction by the Central Government is subject to judicial review, history shows that these cases hardly make it to the court. The victim's families are unaware of the laws and the State governments, too, do not request judicial reviews of such cases. The reasons for rejection of grant are vague, lack transparency and the data on such cases is inconsistent. The reasons for rejection of sanction, therefore, should be reviewed by an authority to ensure that rights of the citizens are not infringed.

Constitutional violation and federal conflict of AFSPA pertinent to section 6

Section 6 and 7 of the aforementioned Acts, by preventing people from filing a lawsuit, take away the right to constitutional remedy given under article 32(1) of the Indian Constitution. It denies the prevention against arbitrary arrests on the grounds of habeas corpus and the access to justice; thus, limiting the role of the judiciary.

Article 32(1) of the Constitution states that "*the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed*."

[381] *Id.*
[382] *Id.*

It is pertinent to note that this particular provision of AFSPA is more than an emergency provision because the suspension of Article 32 is allowed only in the state of emergency.

Considering India being a democratic country formed by the people, for the people and of the people and where ideally people's voices should be heard, this provision of legal impunity needs to be reviewed and amended as it is a mockery on people's rights. The concept of human dignity and fraternity, promoted by our Preamble, is now nothing but a farce due to this provision.

Section 6 of the Act of 1958 and Section 7 of the Act of 1990 reinforce and perpetuate a differential treatment between the central and state forces. While both the State police force and the armed forces of the Union work in the same area, the former do not get the powers and protection that AFSPA provides to the central forces. The central forces work under impunity whereas the civil forces of the State do not enjoy any such protection irrespective of the fact that they work under the same conditions and threat (if any). This causes widespread disenchantment among the personnel of civil forces of the State while also leading to centre-state conflicts.

AMENDMENTS SUGGESTED (SUMMARY)

- **Amendment to Section 3 -**

In the Armed Forces (Special Powers) Act, 1958, Section 3 be amended as

If, in relation to any State or Union territory to which this Act extends, the Governor of that State or the Administrator of that Union territory or the Central Government, in either case, is of the opinion that the whole or any part of such State or Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary to prevent -

(a) activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;

(b) activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about the cession of a part of the territory of India or

secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution of India,

the Governor of that State or the Administrator of that Union territory or the Central Government, as the case may be, may, by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area.

- **Amendments to Section 5 of the Act of 1958 and Section 6 of the Act of 1990–**

In the Armed Forces Special Powers Act, 1958, Section 5 be amended as:

Arrested persons to be made over to the police—Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station within 24-hours, together with a report of the circumstances occasioning the arrest.

In the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Section 6 be amended as:

Arrested persons and seized property to be made over to the police—Any person arrested and taken into custody under this Act and every property, arms, ammunition or explosive substance or any vehicle or vessel seized under this Act, shall be made over to the officer-in-charge of the nearest police station within 24-hours, together with a report of the circumstances occasioning the arrest, or as the case may be, occasioning the seizure of such property, arms, ammunition or explosive substance or any vehicle or vessel, as the case may be.

The rationale behind interpreting "least possible delay" as "within 24-hours" has been sufficiently discussed under relevant cases[383] and International reports.[384]

[383] *Naga People's Movement of Human Rights v. Union of India,* (1998) 2 SCC 109.
[384] India: Briefing on the Armed Forces (Special Powers) Act, 1958, AMNESTY INTERNATIONAL (2005). https://www.amnesty.org/download/Documents/84000/asa200252005en.pdf

- **Amendments to Section 6 of the Act of 1958 & Section 7 of the Act of 1990 –**

In the Armed Forces Special Powers Act, 1958, Section 6 and in the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990, Section 7 be replaced by the following provision:

"Protection to persons acting under Act- No prosecution, suit or other legal proceedings shall be instituted against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act where the Central Government provides reasons inwriting and the competent court upholds the legal validity of these reasons."

Such an amendment would introduce the mandatory review of all sanction rejections from the Central Government, which would ensure that the process is transparent and fair. Further, this amendment should comply with the Constitutional framework, International laws and the guidelines laid down in the Code of Criminal Procedure.

Mechanism to ensure organic functioning of the Centre and the States (viz., co-operative federalism) should be worked out so that the concerns of populace are placed at the highest pedestal and are not eclipsed by federal conflicts and tensions.

PART – III

RECOMMENDATIONS

A. Explanation related to every suggested amendment.

On 5th August 2011, an amendment bill titled 'The Armed Forces (Special Powers) Amendment Bill, 2011' was introduced by Mahendra Mohan in the Rajya Sabha.[385]

The Bill suggested for the substitution of Section 6 of the Act of 1958 and Section 7 of the Act of 1990 by the following provision:

"No prosecution, suit or other legal proceedings shall be instituted against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act where the Central Government provides reasons inwriting and the competent court upholds the legal validity of these reasons."

The statement of objects of the bill states that Section 6 of the Act of 1958 and Section 7 of the Act of 1990 confer *de facto* impunity on the armed forces violating the Act.

"The logic behind this simple section, as in many other Indian laws, is to protect public servants from frivolous or vexatious lawsuits. The Apex Court of the country has often declared that the object of such protection is not to set an official above the common law. If he commits an offence not connected with his official duty, he has no such protection. A Government which has faith in the actions of its officers and the fairness of its judicial system should not shy away from allowing the courts to step in when doubts arise. And yet, in case after case, legal proceedings could not take place against erring officials for want of permission. It is, therefore, long over that this provision should be amended by providing that while denying the permission for prosecution, the Central Government must give reasons inwriting and the competent court upholds the legal validity of these reasons."

Therefore, same stands the reason for the recommended amendments.

[385] *The Armed Forces (Special Powers) Amendment Bill, 2011*, Bill No. XI of 2011, Introduced in the Rajya Sabha on 5th August, 2011.

a. New sections to add –

i. Amendments to the Acts of 1958 and 1990 is recommended to include the commission of an independent body to review all cases of alleged torture, fake encounters, excessive force, harassment, etc. by the armed forces. This independent body shall review cases within a stipulated time period which shall be fixed in advance. Moreover, the same body should be entrusted with ensuring that cases of judicial deaths be investigated and brought before the Magistrate in a timely manner. The reasons for the same has been submitted below.

Firstly, in part IV of the Hegde Commission report, the commission discussed the issue in ***Naga Peoples Movement for Human Rights v. Union of India***[386] that under the direction of HC of Guwahati a judicial enquiry was conducted in two of the alleged encounters. The decision of the judicial enquiry was that the alleged encounters were fake. Although, the commission was not informed whether in the two judicial enquiry cases, at least departmental proceedings have been initiated against the personnel involved or not. However, the report indicates that though Section 176 Cr.P.C contemplates Magisterial Enquiry into all cases of death in police custody or police action, in the cases before this commission, "Magisterial Enquiries were ordered after a lapse of a couple of years and the same was true regarding the judicial enquiries in the two cases".

Secondly, in the landmark judgment of ***Extra Judicial Victim Families Association (EEVFAM) & Anr. v. Union of India & Anr.***[387], the Hon'ble Supreme Court dealt with the extrajudicial killings in Manipur. In this case a PIL was filed by EEVFAM alleging 1,528 fake encounter deaths in various places in Manipur and demanded a probe by a special investigation team. A bench consisting of Justice Madan B. Lokur and Justice UU Lalit held that the killings in Manipur in the guise of self-defence were unacceptable. In a subsequent discussion, the court also dealt with the issue of inquiry or investigations of the allegations made, apart from the armed forces at their own level. It reiterated the fact that in ***Naga Peoples Movement for Human Rights v. Union of India***[388], Supreme Court had already set out detailed guidelines within which the security forces should operate under AFSPA. Moreover, NHRC (National Human Rights Commission) has also issued circulars prescribing operational limits for the

[386] *Naga Peoples Movement for Human Rights v. Union of India,* (1998) 2 SCC 109.
[387] *Extra Judicial Victim Families Association (EEVFAM) & Anr. v. Union of India & Anr,* (2016) 14 SCC 536.
[388] *Naga Peoples Movement for Human Rights v. Union of India*, (1998) 2 SCC 109.

State police and security forces. However, the court (while considering the issue of magisterial enquiry) observed that the guidelines were not obeyed. Moreover, NHRC has complained that the State government invariably takes more time to submit documents like magisterial enquiry report, post-mortem report, etc. Therefore, the Court observed that the magisterial enquiry is "not given much credence". Additionally, NHRC has also complained about the poor quality of magisterial enquiry report, as it stated that *"…in some instances, the family of the deceased is neither examined nor is any independent witness examined by the Magistrate*".

Therefore, the court held that even if the State government decides to hold a magisterial enquiry, there can be no substitute for judicial enquiry and thus, would not preclude any other enquiry or investigation of the allegations.

As far as the guidelines of the operation of armed forces are concerned, it is predicted that the NHRC rules and guidelines, if not obeyed, will just remain bound to existence on paper itself. Thus, it is recommended that Section 19 of Protection of Human Rights Act, 1993 should be amended so that both the National and State Human Rights Commission can independently investigate the allegations of human rights violations by the security forces.

The Hegde Commission has also recommended and stressed upon the evidence gathering procedure. It categorically mentioned in its report that the post-mortem in encounter cases should be video-graphed. At various instances, the post-mortem is conducted after several days of the actual incident which can result in loss of vital evidence owing to the physiological changes in the dead body. Therefore, the report recommended that the post-mortem should be conducted as quickly as possible.

The importance of electronic evidence has been acknowledged by various criminal justice systems[389]. In India, Section 65-A and 65-B of Evidence Act, 1872 deals with the special provisions as to evidence relating to the electronic record. In this the electronic records are admissible in both, primary and secondary form of evidence, subject to the fact that they are not tampered with, related to the case, are under appropriate custody, etc[390]. Moreover, Section 65-B (4) deals with the requirement of a certificate for admissibility of such electronic evidence. On the similar lines, it is recommended that an amendment should be made to introduce similar provisions for recording evidence, including photographic evidence, etc. This

[389]*See* Digital Evidence and the US Criminal Justice System;*See also* The Supreme Court of India re-defines admissibility of electronic evidence in India.
[390]*Anvar P.V. v. P.K. Basheer & Ors.*, (2014) 10 SCC 473.

amendment will be very crucial to ensure that no kind of torture or excessive force is applied to the person in custody. Additionally, to maintain its credence, such evidence must be sent to the independent body for review and maintenance of record.

B. Position in International Law

Human rights and International law

Customary International Law

As per international law, States have the obligation to investigate and prosecute violations of international human rights law and serious violations of international humanitarian law, which include prompt and impartial investigations. This has been demonstrated by the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Reparation Principles).[391]

AFSPA is in violation of the *UN Code of Conduct for Law Enforcement Officials*, and the *UN Body of Principles for Protection of All Persons Under any form of Detention* which were passed by UN General Assembly Resolutions and form a part of the International Customary Law. Article 2 of the *UN Code of Conduct for Law Enforcement Officials* requires the law enforcement officials to respect and protect human dignity and safeguard the human rights of all individuals.[392] Further, the *UN Body of Principles for Protection of All Persons Under any form of Detention* provides for the just and humane treatment of any individual under any form of detention for the protection of the 'inherent dignity of the human person'.[393]

International Covenant on Civil and Political Rights (ICCPR)

India is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the ICCPR provides that all humans have an inherent right to life, encapsulated in the provision that *"No one shall be arbitrarily deprived of his life"*. Further, Article 7 of ICCPR prohibits torture under any circumstances. This means that India is obligated to ensure that no

[391]Office of the United Nations High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (June 14, 2018) https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf
[392] G.A. Res. 34/169, *Code of Conduct for Law Enforcement Officials* (Dec. 17, 1979).
[393] G.A. Res. 43/173, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Dec. 9, 1988).

person is subjected to torture or to cruel and inhumane treatment. There have been several claims of torture from the areas under AFSPA.[394] In its statement on AFSPA, the Human Rights Committee has stated that this right *"should not be interpreted narrowly"*. Further, the Committee stated: *"The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."*[395]

Section 6 of the Act of 1958 and Section 7 of the Act of 1990 are considered in violation to Article 2(3) of the ICCPR, which states:

"(State parties must) ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."

The sanction for prosecution is not only rejected by the Central Government, the rejection is not transparent as the files are never released to the public. This provision, certainly, hampers the process of justice and denies the victims their rights.

[394] *Id.*
[395] Second Administrative Reforms Commission, Fifth Report, Public Order, Government of India (June 2007).

CONCLUDING REMARK

The provision of "least possible delay" in Section 5 legitimizes arbitrary arrests. This provision not only detains a person arbitrarily but also denies dignity and liberty to the detainee, which is in violation of principles of Human Rights and International Law. Further, it goes against the spirit of due process of law by virtue of Article 21 and Article 22 of the Constitution. Due to these reasons, the SC established law by interpreting "least possible delay" as "within 24 hours" to uphold the principle of natural justice embedded in Article 22. Therefore, such interpretation should hold true to application and the provision of "least possible delay" should be replaced by "within 24 hours".

Section 6 of the Act of 1958 and Section 7 of the Act of 1990 have practically given absolute impunity to armed forces acting under the Acts. Sanctions for prosecution are almost always rejected by the Central Government and the Supreme Court, as well as Judicial Committees, have observed that human rights have been violated under the garb of AFSPA and duty. There is a need to introduce transparency in the process of rejection of sanctions because the people from these 'disturbed areas' should not be denied justice based on the fact that such areas have had persistent security concerns. The Supreme Court has further stated that even the enemies of the state cannot be denied their human rights and actions against such persons must not possess the elements of excessive force.[396] Protection of human rights has been an aspect of utmost importance to the Indian Constitution and the judiciary, and the introduction of transparency in the sanction rejection process will ensure that the rule of law and justice prevail.

[396] *Extra Judicial Execution Victim Families Association v. Union of India*, (2016) 14 SCC 536.

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